

# THE ANTITRUST IMPLICATIONS OF LICENSED OCCUPATIONS CHOOSING THEIR OWN EXCLUSIVE JURISDICTION

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Academic journals, legal briefs, judicial opinion, and expert reports scrutinize the pro-competitive benefits and anticompetitive harm of nearly every private restraint imaginable.<sup>2</sup> The resources—both financial and brain-power—that pour over every angle of these restraints are staggering, but not surprising. The Supreme Court has remarked that “[t]he heart of our national economy has long been faith in the value of competition.”<sup>3</sup> The decision whether to permit a particular restraint or action may affect substantial commerce, so antitrust players tirelessly debate the optimal policy.

With a few exceptions,<sup>4</sup> there are certain obvious and significant anticompetitive activities receive little to no attention—state and local government restraints.<sup>5</sup> Antitrust regulation of these restraints is limited by

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2. Jarod M. Bona, *Loyalty Discounts And The FTC’s Lawsuit Against Intel*, 19 COMPETITION: THE J. OF THE ANTITRUST AND UNFAIR COMPETITION LAW SECTION OF THE STATE BAR OF CAL. 6, 8 (Spring 2010) (“[L]awyers and economists fill lots of space in both economic and law journals debating the precompetitive and anticompetitive effects of various agreements and actions.”).

3. Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 695 (1978).

4. The Federal Trade Commission, for example, has played a very active role in trying to regulate and eliminate these public restraints.

5. Timothy J. Muris, *State Intervention/State Action—A U.S. Perspective* (Fordham Annual Conference on International Law & Policy), 1–2, (October 24, 2003), [http://ssrn.com/abstract\\_id=545163](http://ssrn.com/abstract_id=545163) (“Although private restraints have received the most attention in antitrust, focusing exclusively on these restraints leaves a gaping hole in the antitrust enforcement net.”). (The former Federal Trade Commission Chairman explained that “[a]ttempting to protect competition by focusing solely on private restraints is like trying to stop the flow of water at a fork in a stream by blocking only of the channels. Unless you block both channels, you are not likely to even slow, much less stop, the flow. Eventually, all the water will flow toward the unblocked channel.”) *Id.* at 2.

the “state action immunity” doctrine,<sup>6</sup> which struggles to accommodate both federal competition policy and the state’s sovereign status within our federal system.<sup>7</sup> These public restraints take many forms, from limiting the number of taxicab licenses in a city to professional advertising restrictions to actual price or output restrictions. This article, however, focuses on state and local licensing restrictions. In doing so, it examines two instances where state boards that are predominantly made up of licensed occupations enact policies that expand the sphere of commerce that is reserved by law to these occupations.<sup>8</sup> These examples present compelling circumstances for antitrust regulation because the deciding board is dominated by members with private incentives to expand the scope of the occupation to the detriment of consumers and competitors from other occupations.

Part I of this article examines licensing and its impact on competition. Licensing, and activities by licensing boards, have both stated benefits and anticompetitive harms. Part II analyzes the antitrust regulation of licensing boards, including whether their actions violate the antitrust laws, and more interestingly, whether the antitrust laws even apply to licensing boards. To answer this question, this article provides a detailed discussion of the state action immunity doctrine, and how it applies to various entities. Part III argues that state licensing boards that take actions expanding their own jurisdiction should face antitrust scrutiny. The argument is that the state action immunity doctrine should not apply in these instances, unless the state board can satisfy a heightened test. To demonstrate that this is not merely a hypothetical problem, but a recurrent one, Part III discusses two specific and recent situations where a state licensing board enacted an anticompetitive policy to protect its members from competition.

## I. LICENSING AND ITS IMPACT ON COMPETITION

Governments have restricted entry to many occupations by requiring individuals who want to practice in that area to fulfill certain requirements—including an initial and yearly fee—to obtain a license.<sup>9</sup> While the stated rationale for such a restraint typically focuses on the health and safety of citizens, or assuring quality, the capture theory recognizes the

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6. See *Parker v. Brown*, 317 U.S. 341, 352 (1943).

7. F.T.C. Office of Policy Planning, *Report of the State Action Task Force*, p. 5 (2003); Fed. Trade Comm’n v. Ticor Title Ins. Co., 504 U.S. 621, 633 (1992) (concluding that the *Parker v. Brown* decision “was grounded in principles of federalism”). But see Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 669 (1991) (arguing that these interests cannot be accommodated because they are truly conflicting interests).

8. See generally Op. of the Comm’n, *N.C. Bd. of Dental Exam’rs*, F.T.C. Docket No. 9343 (Feb. 9, 2011); *Mitz v. Tex. State Bd. of Veterinary Med. Exam’rs*, 278 S.W.3d 17 (Tex. App. 2008).

9. See generally MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? (2006).

financial benefits of the restraint to individuals already within the licensed occupation.<sup>10</sup> Indeed, Milton Friedman argued in *Capitalism & Freedom* that “[t]he pressure [for the imposition of occupational licensing standards] invariably comes from members of the occupation itself,” rather than an aggrieved public.<sup>11</sup> Ultimately, however, licensing regimes incorporate a combination of both benefits and anticompetitive harm.<sup>12</sup>

#### A. The Basics of Licensing

Licensing occupations is not a new idea. Scholars, for example, cite the Babylonian Code of Hammurabi, back in 1780 BCE, and the medieval guilds of Europe as illustrations of early rules governing occupations.<sup>13</sup> The Hammurabi Code regulated both medical fees and practitioner punishment for negligent treatment, while the medieval guilds maintained tough restrictions for those entering a craft or occupation.<sup>14</sup> Adam Smith himself, in *The Wealth of Nations*, recognized the economic impact of licensing when he discussed how crafts increased their earnings by lengthening apprenticeship programs and limiting the number of apprentices per master.<sup>15</sup> He explained that the purpose of these policies is to “restrain the competition to a much smaller number than might otherwise be disposed to enter the trade.”<sup>16</sup> More specifically, the “limitation of the number of apprentices restrains it directly,” while the “long term of apprenticeship restrains it more indirectly, but as effectually, by increasing the expense of education.”<sup>17</sup>

Systematic licensing developed in the United States at the state level in the late nineteenth century following the regulation of professions such as

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10. KLEINER, *supra* note 9, at 34–35; Carolyn Cox & Susan Foster, Federal Trade Commission Bureau of Economics, *Economic Issues: The Costs and Benefits of Occupational Regulation* 18–19 (October 1990) (explaining that the “capture theory of occupational regulation argues that regulation is a response to professionals who seek to protect themselves from competition and thereby increase their incomes”); see also Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23, 23 (1983) (“Although state and local legislatures may say that their schemes are better than the markets they replace, many scholars believe, and the evidence shows, that regulatory laws owe more to interest group politics than to legislators’ concern for the welfare of society at large.”). Cox & Foster note that “[r]egulation designed to limit entry will decrease supply and increase prices.” *Supra* note 10, at 19.

11. MILTON FRIEDMAN, *CAPITALISM & FREEDOM* 140 (1962) quoted in John T. Delacourt & Todd J. Zywicki, *The FTC and State Action: Evolving Views on the Property Role of Government*, 72 ANTITRUST L.J. 1075, 1080 (2005).

12. See generally, Cox & Foster, *supra* note 10; KLEINER (2006), *supra* note 9.

13. KLEINER (2006), *supra* note 9, at xiii & 19; Cox & Foster, *supra* note 10, at 2.

14. KLEINER (2006), *supra* note 9, at xiii & 19. The merchant guilds from the Middle Ages and “Enlightenment” served as models for the professional associations that exist today. *Id.* at 19.

15. ADAM SMITH, *THE WEALTH OF NATIONS*, Book I, Chapter 10, Part II (1776) cited in KLEINER, *supra* note 9, at 3.

16. *Id.*

17. *Id.*

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doctors and lawyers.<sup>18</sup> But it is in the last 50 years, as jobs have become more complex, that licensing has really taken off “as one of the fastest-growing labor market institutions in the United States and other industrialized nations.”<sup>19</sup> Licensing is now pervasive, as about 50 occupations are licensed in all states and over 800 of them are licensed in at least one state.<sup>20</sup>

Under a licensing regime, it is illegal for a person to practice the licensed occupation without meeting the regime’s promulgated standards.<sup>21</sup> A typical licensing regime is governed by a state-sanctioned board that is predominately controlled by members of the regulated profession.<sup>22</sup> These boards set entry requirements, enact conduct rules, and even discipline individuals that violate the board rules.<sup>23</sup> Although the entry requirements vary from state-to-state and occupation-to-occupation, they typically include some combination of the following: (1) specific formal education; (2) experience or apprenticeship; (3) an examination; (4) good moral character; and (5) citizenship or residency of a particular state.<sup>24</sup> Not surprisingly, there is great variation in the extent to which the licensing regime increases barriers to entry. For example, medical school and law schools (and the accompanying examinations to practice) create higher barriers to entry than an occupation that may, for example, only require attendance in short courses with an exam that covers the relevant material.

Licensure, which governs the right to practice, is the most common regulatory framework for occupations, but less competitively-harmful alternatives exist.<sup>25</sup> For example, certification differs from licensure in that any person may perform the relevant tasks, but a government or non-profit

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18. AMY HUMPHRIES, MORRIS M. KLEINER & MARIA KOUMENTA, *How Does Government Regulate Occupations in the UK and US? Issues and Policy Implications*, LABOUR MARKET POLICY FOR THE 21ST CENTURY 7.1 (David Marsden ed.), Oxford University Press (forthcoming 2011); KLEINER , *supra* note 9, at xiii & 20. In 1889, the U.S. Supreme Court established in *Dent v. West Virginia* that states could grant licenses under their police power. 129 U.S. 114, 128 (1889).

19. KLEINER , *supra* note 9, at xiii.

20. *Id.* at 5; Cox & Foster, *supra* note 10, at 3. And this number could increase, as a February 2011 Wall Street Journal article about the proliferation of licensing explains that cat groomers have formed a professional organization that hopes to one day convince Ohio and other states to license cat groomers. Stephanie Simon, *A License to Shampoo: Jobs Needing State Approval Rise*, WALL ST. J., Feb. 7, 2011.

21. KLEINER (2006), *supra* note 9, at 18.

22. Cox & Foster, *supra* note 10, at 3; Clark C. Havighurst, *Contesting Anticompetitive Actions Taken in the Name of the State: State Action Immunity and Health Care Markets*, 31 J. HEALTH POL. POL’Y & L. 587, 596 (June 2006) (“Although practices vary, many states appoint the members of such boards from lists of nominees provided by the professional or occupational group being regulated. A public member or two is usually appointed as well, but such boards are rarely less than friendly to and supportive of the licensed group.”).

23. Cox & Foster, *supra* note 10, at 3.

24. *Id.* at 3–4.

25. KLEINER , *supra* note 9, at 18; Cox & Foster, *supra* note 10, at 3.

entity anoints those who have passed the level of skill and knowledge required—typically through an examination—as “certified.”<sup>26</sup> Travel agents and car mechanics, for example, are typically certified, but not licensed.<sup>27</sup> By attaching a badge of skill and knowledge to certain individuals, certification can provide many of the informational benefits of licensing, but without the barriers to entry.<sup>28</sup> The least onerous form of regulation is registration, which merely requires individuals that want to practice an occupation to file their name, addresses, and perhaps other qualifications with a government agency.<sup>29</sup> While registration may not signal quality to consumers like licensure and certification, state officials may use the threat of registration revocation to incent individuals to provide high-quality service.<sup>30</sup>

### B. *The Benefits of Licensing*

When establishing a licensing regime—regardless of the actual motives—the government entity and the sponsoring occupation will describe several benefits to the regulation. Most prominently, regulators point out that licensing is necessary to protect the health and safety of citizens by assuring higher quality services.<sup>31</sup> The mandatory entry requirements are supposed to increase the quality of the occupations’ services by controlling the quality of inputs (education, experience, etc.) into the production of these services.<sup>32</sup> Licensing can, for example, screen out individuals whose skill or character is likely to undermine quality.<sup>33</sup>

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26. HUMPHRIS, KLEINER & KOUMENTA, *supra* note 18, at 7.2; Cox & Foster, *supra* note 10, at 43–46.

27. HUMPHRIS, KLEINER & KOUMENTA, *supra* note 18, at 7.2.

28. See Cox & Foster, *supra* note 10, at 44 (explaining that certification allows “consumers greater freedom of choice” because an “individual could choose either a lower priced, noncertified professional or a higher priced, certified one”). Cox & Foster also explain that “one potential source of market failure in professional markets is asymmetric information on quality.” *Id.* at 5; see also HUMPHRIES, KLEINER & KOUMENTA, *supra* note 18, at 7.7 (“[L]icensing signals to consumers that the service they are receiving meets certain standards and therefore consumer uncertainty is minimized and demand for the service increases.”).

29. KLEINER (2006), *supra* note 9, at 18; Cox & Foster, *supra* note 10, at 49; Humphries, Kleiner & Koumenta, *supra* note 18, at 7.1.

30. Cox & Foster, *supra* note 10, at 49–50.

31. Morris M. Kleiner & Charles Wheelen, *Occupational Licensing Matters: Wages, Quality and Social Costs*, CESIFO DICE REPORT 4 (March 2010); Cox & Foster, *supra* note 10, at 21 (“Regardless of whether consumers or professionals demand regulation, the rationale for occupational regulation has typically been to protect the public’s health and safety by guaranteeing a mandatory quality standard.”).

32. Cox & Foster, *supra* note 10, at 21. There is some doubt, however, whether these input restrictions actually increase the quality of the output. *Id.* at 22; see also Kleiner & Wheelen, *supra* note 31, at 4 (“Licensure can potentially improve the quality of service in cases where consumers are unable to make an informed decision and society has some stake in their wellbeing.”).

33. HUMPHRIES, KLEINER & KOUMENTA, *supra* note 18, at 7.6.

Moreover, licensing boards can monitor performance standards and punish those that deviate from them.<sup>34</sup> Some regulators and professional associations may also argue their business-practice regulations will increase the quality of the services.<sup>35</sup> These types of regulations might include, for example, restrictions on advertising, branch offices, and trade names.<sup>36</sup>

A full evaluation of these proposed benefits is beyond the scope of this article, but economic studies have been mixed at best, putting many of these benefits into doubt.<sup>37</sup> Morris M. Kleiner, in his 2006 book, *Licensing Occupations: Ensuring Quality or Restricting Competition?*, analyzed major academic studies on the quality and demand effects of licensing in the United States.<sup>38</sup> He concluded that “few of these studies of demand and quality show significant benefits of occupational regulation.”<sup>39</sup> According to Kleiner, the results show only modest effects on the demand for and quality of services, as a result of licensing.<sup>40</sup> Moreover, a 1990 report by the Bureau of Competition at the Federal Trade Commission (FTC) explained that the theoretical literature indicates that entry restrictions from licensing will not necessarily increase quality because many factors that are not controlled by licensing also affect quality.<sup>41</sup> The professional is free to adjust downward the level of inputs not controlled by licensing, and may do so to compensate for the mandates from licensing.<sup>42</sup> For example, individuals that must pass a written contractor’s test to receive their license may spend extra time preparing for the exam and less time with actual hands-on training.<sup>43</sup>

### C. The Anticompetitive Effects of Licensing

While the benefits of licensing schemes are questionable,<sup>44</sup> the anticompetitive effects are more apparent.<sup>45</sup> Indeed, anticompetitive effects

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34. *Id.*

35. Cox & Foster, *supra* note 10, at 25. Cox & Foster explain, however, that while a few studies indicate that such licensing restrictions may increase quality, the majority of work (as of 1990) finds quality to be unaffected by these business practice restrictions. *Id.*

36. *Id.*

37. See, e.g., KLEINER, *supra* note 9, at 43-64.

38. *Id.* at 52-56.

39. *Id.* at 56.

40. *Id.* In contrast, most studies show that licensing increases the prices of the services. *Id.* at 59.

41. Cox & Foster, *supra* note 10, at 22.

42. *Id.*

43. *Id.* at 22-23.

44. Some evidence suggests that licensing may initially have positive effects through the standardization of the quality of service that is expected, but that these benefits diminish with time and the occupation eventually focuses on restriction of supply. KLEINER, *supra* note 9, at 39-40.

45. According to Morris M. Kleiner, “[e]conomists generally accept that licensing is a way of limiting competition since they argue that licenses limit labor supply, often quite explicitly through varying the pass rates and statutory regulations on residency requirements.” KLEINER

may arise not only out of the licensing scheme itself, but from the subsequent actions of boards that govern the licensed occupations.<sup>46</sup> One theory even suggests that occupations lobby to become regulated through licensure so their members can receive the rents that accompany anticompetitive conduct.<sup>47</sup>

The most obvious anticompetitive effect of licensing is restricted entry. By mandating certain educational requirements, exams, or experiences, licensing schemes increase the barriers to entry for a particular occupation, and thereby reduce the number of individuals that enter that occupation.<sup>48</sup> Other restrictions could include limited interstate mobility by lack of reciprocity for licenses from state-to-state, or straight restrictions on advertising and other commercial practices.<sup>49</sup> An FTC study concluded, for example, that fees for certain routine legal services were higher in cities that had time, place, and manner restrictions on advertising.<sup>50</sup>

As he did for claims about quality,<sup>51</sup> Kleiner in 2006 analyzed the major academic studies on the price impact of licensing policies and concluded that they increased prices between 4 and 35 percent, depending upon the type of commercial practice and location.<sup>52</sup> While these price increases could be the result of rent-capture by occupations that limit entry or restrict price information, there are less pernicious alternative explanations that focus on reduced uncertainty in the service, higher quality, a higher perception of quality, or greater complexity in licensed fields that require more education or training.<sup>53</sup> A more recent paper by Kleiner and Charles Wheelan concluded that estimates show that occupational licensing raises the wages of licensed practitioners in the United States by about 15 percent.<sup>54</sup>

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(2006), *supra* note 9, at 11–12.

46. HUMPHRIES, KLEINER & KOUMENTA, *supra* note 18, at 7.8 (“[O]nce an occupation becomes licensed, the corresponding occupational association has the power further to limit supply through various ways. For example, it can upgrade the educational and general requirements for entry, control examination pass rates and residency requirements before one can apply for a license.”).

47. KLEINER, *supra* note 9, at 45 (“The capture theory of occupational regulation argues that licensing is a response by professionals who seek to protect themselves from competition.”).

48. See Havighurst, *supra* note 22, at 596 (“True to their origins and cartel-like character, licensing boards constituted principally by representatives of the regulated group not only adopt licensing standards that raise entry costs and limit the number of competitors in the field but also frequently adopt regulations that directly restrain trade.”); see also HUMPHRIES, KLEINER & KOUMENTA, *supra* note 18, at 7.8 (explaining that there is indeed evidence that the supply of practitioners in regulated occupations is indeed restricted by licensing).

49. KLEINER, *supra* note 9, at 59; see also Cox & Foster, *supra* note 10, at 29–36.

50. Staff Report by the F.T.C.’s Bureau of Economics and Cleveland Regional Office, *Improving Consumer Access to Legal Services* (1984) cited in Cox & Foster, *supra* note 10, at 33.

51. KLEINER, *supra* note 9, at 52–56.

52. *Id.* at 59.

53. *Id.* at 59–62.

54. Kleiner & Wheelan, *supra* note 31, at 31.

While many anticompetitive harms involve entry or regulation of the licensed occupation itself, a board made up of a particular occupation<sup>55</sup> has incentives to expand its own territory at the expense of other occupations, and of consumers.<sup>56</sup> Thus, it is the edges between professions or occupations that may provide the most systematically-concerning anticompetitive conduct. For instance, a board of dentists may decree that only licensed dentists within a state may provide teeth-whitening services.<sup>57</sup> Or a board of veterinarians may decide that only licensed veterinarians within a state may practice horse teeth floating, which is the practice of filing down the outer contours of an animal's teeth.<sup>58</sup> Both of these are real-world examples of licensing board actions that seek to eliminate competition for their respective professions. One of these actions was challenged by the FTC for its anticompetitive effects,<sup>59</sup> while the other was challenged on other grounds, but could also likely form the basis of a private or governmental antitrust action.<sup>60</sup> These examples of anticompetitive board actions and their relationship to the antitrust laws are examined in-depth in Part III.

A state board or occupation may be able to defend its decision on some basis to impose or expand licensing restrictions or create business practice restrictions. But these restrictions—even if implemented for benevolent reasons—may still result in anticompetitive effects on a particular market and harm consumers through higher prices or reduced output.

## II. THE ANTITRUST REGULATION OF LICENSING BOARDS

It is only natural to ask whether state or local licensing boards that take actions resulting in anticompetitive harm are violating the antitrust laws. After all, the antitrust laws exist to protect competition and, as described above, licensing and actions by licensing boards may, in many instances, harm competition.

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55. Moreover, the anticompetitive harm of licensing itself may increase when the regulatory board is controlled by the profession, as professionals have an incentive to limit entry by setting entry requirements that are too high. Cox & Foster, *supra* note 10, at 37.

56. KLEINER, *supra* note 9, at 25 (“Recent issues involve the attempts by the professions to capture work from other occupations or to restrict the ability of licensed or unlicensed occupations, such as alternative health care providers, to do work within the occupations’ ‘span of control.’”); see also Havighurst, *supra* note 22, at 596 (“State boards also tend to be protective of the domains of the professionals they regulate, fighting incursions by unauthorized practitioners and assisting their licensees in dividing markets with other occupations.”).

57. See Complaint, *N.C. Bd. of Dental Exam'rs*, F.T.C. Docket No. 9343 (June 17, 2000).

58. See Mitz, 278 S.W.3d at 20.

59. See Complaint, *N.C. Bd. of Dental Exam'rs*, F.T.C. Docket No. 9343 (June 17, 2000).

60. See Mitz, 278 S.W.3d at 20.

#### A. Does the Action Violate the Antitrust Laws?

Not all actions that result in some anticompetitive harm are violations of the antitrust laws. Depending upon the type of restraint at issue, a court will apply a *per se* rule,<sup>61</sup> the rule of reason,<sup>62</sup> or something in between like the quick-look review.<sup>63</sup> Unless the restraint is a *per se* violation of the antitrust laws, a reviewing court will also examine the pro-competitive benefits or business justifications for the challenged activity. *Per se* violations include specific types of agreements that “would always or almost always tend to restrict competition and decrease output.”<sup>64</sup> These include, for example, price fixing, market allocation, bid rigging, limited types of tying, and certain horizontal group boycotts—typically anticompetitive agreements among horizontal competitors. Other potentially anticompetitive conduct requires courts to compare the benefits or justifications for the activity with the anticompetitive harm. Conduct involving licensing boards that are made up of members of the relevant occupation could fall into the *per se* category because it involves agreements among horizontal competitors to restrain trade in some manner. But each situation must be analyzed separately.

#### B. Is the Licensing Board’s Action Excluded From Antitrust Review Under the State Action Immunity Doctrine?

The U.S. Supreme Court established in its *Parker v. Brown* decision in 1943 that the federal antitrust laws do not apply to certain state conduct.<sup>65</sup> The Court emphasized federalism and state sovereignty when it interpreted the Sherman Act to not apply to the activities of a state.<sup>66</sup> This decision spawned what is now called the “state immunity” doctrine.<sup>67</sup> Eventually,

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61. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (“The *per se* rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work.”); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

62. *Leegin*, 551 U.S. at 885 (“The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1.”).

63. *Cal. Dental Ass’n v. Fed. Trade Comm’n*, 526 U.S. 756, 770 (1999) (explaining that under the quick-look analysis, “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets”).

64. *Bus. Elecs. Corp. v. Sharp*, 485 U.S. 717, 723 (1988) (quoting *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1979)).

65. 317 U.S. 341, 351 (1943).

66. *Id.* “The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.” *Id.* Heather K. Gerken, in her 2010 forward to the Harvard Law Review, explained that with regard to federalism, “while the Court continues to make much of sovereignty, most of the field has rejected a notion that it determines federalism’s metes and bounds.” 124 HARV. L. REV. 4, 12 (2010).

67. Note, however, that despite its name, this doctrine did not really create an “immunity,” but is instead recognizes that the Sherman Act does not cover conduct by certain actors. See S.C.

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however, the doctrine evolved in such a way that the federalism and state sovereignty rationales have displaced the statutory interpretation of the Sherman Act as the driving force behind what is excluded from antitrust scrutiny.<sup>68</sup> For example, the Supreme Court affirmatively stated about *Parker* in *Federal Trade Commission v. Ticor Title Insurance Company* that “[o]ur decision was grounded in principles of federalism.”<sup>69</sup> The Court elaborated that the “principle of freedom of action for the States, adopted to foster and preserve the federal system, explains the later evolution and application of the *Parker* doctrine in our [subsequent decisions].”<sup>70</sup> These federalism principles, however, do not always lead to an easy answer to the question of whether particular conduct can legally evade antitrust review. As explained in more detail below, this is particularly the case for state regulatory bodies, like state licensing boards.

It is not accurate to conclude that the state action doctrine accommodates principles of federalism and state sovereignty on the one hand, and the federal policies embodied in the antitrust laws favoring competitive markets on the other hand.<sup>71</sup> Instead, as presently constituted, the doctrine simply chooses state sovereign interests over the federal antitrust laws.<sup>72</sup> The real battle is to determine whether a particular challenged action actually flows from the state acting as sovereign or from some other basis.<sup>73</sup> If the action is that of the “State acting as a sovereign,”

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State Bd. of Dentistry v. Fed. Trade Comm’n, 455 F.3d 436, 444 (4th Cir. 2006) (rejecting state board’s argument that the doctrine creates immunity from suit such that it can immediately appeal the F.T.C.’s determination that it is not entitled to protection under *Parker*).

68. See William J. Martin, *State Action Antitrust Immunity for Municipally Supervised Parties*, 72 U. CHI. L. REV. 1079, 1082 (2005). Martin also notes that since the *Parker* decision, scholars have argued that the Court’s statutory interpretation based upon legislative history was incorrect. *Id.* See, e.g., Paul E. Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 NW. U. L. REV. 71, 83 (1974) (“In truth, a full reading of the legislative history of the Sherman Act is not likely to help answer the *Parker* question one way or another.”).

69. 504 U.S. 621, 633 (1992).

70. *Id.*

71. See Elhauge, *supra* note 7, at 670 (explaining that there “is no principled way for courts to reconcile [these] truly conflicting interests”).

72. See *id.* (“Specifically, the Court treats ‘state action’ as immune from antitrust scrutiny, and then endeavors to adjudicate cases based on some formal understanding of which actions can and cannot be attributed to ‘the state as sovereign.’”). Elhauge, back in 1991, accurately stated that the issue is whether a particular action can be attributed to the sovereign state. He also developed the thesis that the dividing line between state and private action is functional, even if the Court adjudicates the issues on formal grounds. *Id.* at 671. This position has developed support with the F.T.C., in particular, which recently applied a functional approach to conclude that a state-licensing board made up of members of the regulated profession is treated like a private entity because its members are financially-interested in the challenged regulation. Op. of the Comm’n, *supra* note 8.

73. See *Hoover v. Ronwin*, 466 U.S. 558, 569 (1984) (“When the conduct is that of the sovereign itself . . . the danger of an unauthorized restraint of trade does not arise.”). The Supreme Court has made it clear that a municipality is not considered a sovereign, and is therefore not *ipso facto* exempt from application of the antitrust laws. *City of Lafayette, La. v. La. Power & Light*

the antitrust restrictions, under current law, do not apply.<sup>74</sup>

But what *is* the state acting as a sovereign? Courts are still struggling to answer that question, particularly for state regulatory boards. There is no bright line test that applies to all circumstances. Instead, the nature of the test depends upon the source of the alleged anticompetitive act. Courts consider direct actions by the state legislature<sup>75</sup> and state supreme court (acting in a legislative manner)<sup>76</sup> as the sovereign state itself, and therefore free from federal antitrust scrutiny.<sup>77</sup> For all other state-related actions, courts will apply some form of the test that the U.S. Supreme Court described in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*<sup>78</sup> This *Midcal* test has two requirements for antitrust immunity: First, the challenged restraint must be “one clearly articulated and affirmatively expressed as state policy,” and second, the policy must be “actively supervised” by the State itself.<sup>79</sup> Courts apply this *Midcal* test to determine whether the challenged practice ultimately flows from the

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Co., 435 U.S. 389, 393 (1978); *see also* Delacourt & Zywicki, *supra* note 11, at 1082–83 (“Breaking with the *Parker* opinion, the *City of Lafayette* opinion places a significantly stronger emphasis on the federalism rationale for the decision. Rather than leaving the door open to a broader exemption, available to ‘public’ and ‘governmental’ entities generally, the Court makes it clear that a federal system recognizes only two sovereigns—federal and state.”).

74. A major weakness of the state-sovereignty and federalism approach to antitrust exclusions is that it does not account for state activity with interstate effects. That is, it ignores the fact that, within federalism, state sovereignty itself is limited when it interferes with our national economy or has effects beyond the state’s borders. Indeed, aggrieved parties may challenge such actions under our federal Constitution by bringing a dormant commerce clause challenge. *See, e.g.*, Am. Trucking Ass’ns v. Whitman, 437 F.3d 313, 318 (3d Cir. 2006) (quoting W.Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 193 (1994)). (“The dormant Commerce Clause ‘prohibits the states from imposing restrictions that benefit in-state economic interests at out-of-state interests’ expense, thus reinforcing the principle of the unitary national market.’”). Not allowing antitrust challenges to sovereign state actions that have anticompetitive interstate effects credits state sovereignty with greater power with regard to the antitrust laws than it has in our federal system. In other words, the doctrine loses its federalism character in exchange for a state power approach. The F.T.C., in its 2003 Report of the State Action Task Force, decried courts’ lack of attention to these interstate spillovers of anticompetitive state action. *See* F.T.C. Office of Policy Planning, *Report of the State Action Task Force*, September 2003, pp. 40–44. The F.T.C. expressed concern that “out-of-state citizens adversely affected by spillovers typically have no participation rights and effectively are disenfranchised on the issue.” *Id.* at 41–42; *see also* Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23, 39–40 (1983) (“Since *Parker* the Court has not even hinted that antitrust scrutiny of a state’s program might depend upon whether the effects of that program are broadcast outside the state’s borders. It has left all scrutiny of interstate effects to the jurisprudence of the Commerce Clause.”).

75. *Parker*, 317 U.S. at 350–52; S. Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 63 (1985) (citing *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978)).

76. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 362–63 (1977).

77. *Hoover*, 466 U.S. at 569 (explaining that where the challenged conduct is that of the state legislature or supreme court, no further inquiry is necessary).

78. 445 U.S. 97, 105 (1980).

79. *Id.* (quoting *City of Lafayette*, 435 U.S. at 410).

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sovereign state.<sup>80</sup>

*1. Private entities*

Private-entity activities are subject to both prongs of the *Midcal* test.<sup>81</sup> In *Midcal* itself, the Court invalidated a California statute that forbade wholesalers in the wine trade to sell below prices set by the wine producer.<sup>82</sup> The Court held that the California system for wine pricing satisfied the first part of the test—the legislation was “forthrightly stated and clear in its purpose to permit resale price maintenance.”<sup>83</sup> But it failed the second requirement for immunity—active state supervision—because the “State simply authorizes price setting and enforces the prices established by private parties.”<sup>84</sup> The Court explained what the State did not do: “The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any ‘pointed reexamination’ of the program.”<sup>85</sup> The Court, applying the test that would eventually bear the name of its decision, concluded that the “national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.”<sup>86</sup>

In *Southern Motor Carriers Rate Conference, Inc. v. United States*, the Supreme Court weakened the first prong of the *Midcal* test—clearly articulated and affirmatively expressed state policy—by holding that it does not require a state statute to explicitly authorize the specific restraint at issue.<sup>87</sup> Instead, it is enough that the “sovereign clearly intends to displace competition in a particular field with a regulatory structure.”<sup>88</sup> The Court

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80. Hoover, 466 U.S. at 568. The F.T.C. recently explained that “[b]ecause the balance between competition policy and federalism embodied in the state action doctrine exempts only sovereign policy choices from federal antitrust scrutiny, non-sovereign defendants invoking the state action defense must clear additional hurdles to ensure that their challenged conduct truly comports with a state decision to forego the benefits of competition to pursue alternative goals.” Op. of the Comm’r, *supra* note 8, at 1.

81. *Ticor Title*, 504 U.S. at 633; *Patrick v. Burget*, 486 U.S. 94, 100 (1988); *S. Motor Carriers*, 471 U.S. at 57.

82. *Midcal*, 445 U.S. at 105. When *Midcal* was decided, resale price maintenance practices were *per se* illegal. See *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 407 (1911). But in *Leegin*, the Supreme Court overruled *Dr. Miles* and held that these types of vertical agreements would instead be analyzed under the rule of reason. *Leegin*, 551 U.S. at 882.

83. *Midcal*, 445 U.S. at 105.

84. *Id.*

85. *Id.* at 105–06.

86. *Id.* at 106; see also *Parker*, 317 U.S. at 351 (explaining that “a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful”).

87. 471 U.S. at 64.

88. *S. Motor Carriers*, 471 U.S. at 64.

explained that if “more detail than a clear intent to displace competition were required of the legislature, States would find it difficult to implement through regulatory agencies their anticompetitive policies.”<sup>89</sup> *Southern Motor Carriers* involved a price-fixing challenge by the United States Department of Justice to joint freight rates prepared for motor carriers by private rate-setting bureaus that were set up by state law.<sup>90</sup> As private activity, both prongs of the *Midcal* test applied in *Southern Motor Carriers*.<sup>91</sup> But, as discussed below, by weakening the first part of the test, *Southern Motor Carriers* raised the stakes for the question of whether an entity is private or public because public entities need not fulfill the second part of the *Midcal* test.<sup>92</sup>

The Supreme Court applied this second prong of the *Midcal* test—active state supervision—in *Patrick v. Burget* to hold that activities of a private hospital peer-review committee were subject to the antitrust laws.<sup>93</sup> In contrast to the holding in *Southern Motor Carriers* that the first prong of the *Midcal* test only requires that a state intend to *generally* displace competition in a particular field through a regulatory structure,<sup>94</sup> the active state supervision prong requires that a state supervise the *particular* anticompetitive conduct.<sup>95</sup> The *Patrick* court explained that the “active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.”<sup>96</sup> This requirement fulfills the state sovereign approach to state antitrust immunity because “[a]bsent such a program of supervision, there is no realistic assurance that a private party’s anticompetitive conduct promotes state policy, rather than merely the party’s individual interests.”<sup>97</sup>

In *Ticor Title*, the Supreme Court reiterated that the “active supervision” requirement is not a rubber stamp when it held that a state’s “negative option” system of oversight is not sufficient supervision to avoid antitrust review.<sup>98</sup> Under the “negative option” review, rates filed by private

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89. *Id.* Delving into the principles of administrative law, the Court explained that “[a]gencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature. Requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness.” *Id.*

90. *Id.* at 50.

91. *Id.* at 65–66. The government conceded active supervision in this case. *Id.* at 66.

92. See *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985).

93. 486 U.S. at 100.

94. *S. Motor Carriers*, 471 U.S. at 64.

95. *Patrick*, 486 U.S. at 100–01.

96. *Id.* at 101.

97. *Id.* at 100–01.

98. 504 U.S. at 638. Delacourt and Zywicki argue that this decision is further evidence that the Court is moving further away from the public interest approach developed in *Parker* and toward a public choice approach that is much more skeptical about state oversight. Delacourt & Zywicki, *supra* note 11, at 1084–85 (“While the *Parker* Court seemed content to defer to most—

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parties become effective unless they are rejected by the state within a set time.<sup>99</sup> Reiterating the “active” part of the “active state supervision” requirement, the Court held that the “mere potential for state supervision is not an adequate substitute for a decision by the State.”<sup>100</sup>

## 2. Municipalities

If the entity with the alleged anticompetitive activity is considered “public,” however, it need only satisfy the clear articulation part of the *Midcal* test to avoid antitrust scrutiny.<sup>101</sup> In *Town of Hallie v. City of Eau Claire*, for example, the Court concluded that “the active state supervision requirement should not be imposed in cases in which the actor is a municipality.”<sup>102</sup> The Court reasoned that “[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.”<sup>103</sup> In contrast, “[w]here the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement.”<sup>104</sup>

In addition to clarifying that municipalities do not have to prove active state supervision to avoid antitrust liability, the Court added further content to *Midcal*’s “clear articulation” requirement by holding that an entity can satisfy it by showing that their anticompetitive conduct is a “foreseeable” result of state legislation.<sup>105</sup> The legislature does not need to explicitly state

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indeed, almost all—state oversight efforts, the *Ticor [Title]* Court was substantially more skeptical.”).

99. *Ticor Title*, 504 U.S. at 638.

100. *Id.* The Court elaborated further on the policy behind the state immunity doctrine and the second prong of the *Midcal* test: “[T]he purpose of the active supervision inquiry is not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices. Its purpose is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties.” *Id.* at 634–35.

101. *See Report of the State Action Task Force*, *supra* note 7, at 15. (“[T]he need for active supervision turns on whether the relevant actor is public or private. It is well settled that purely private actors claiming to act pursuant to state policy are subject to the active supervision test, while municipalities are not subject to that requirement.”).

102. 471 U.S. 34, 46 (1985). In a footnote, the Court also stated that in “cases in which the actor is a state agency, it is likely that active supervision would also not be required, although we do not here decide that issue.” *Id.* at 46 n.10. This, of course, is an open question right now that depends, in part, upon the composition of the state agency. *See, e.g.*, Op. of the Comm’n, *supra* note 8, at 8–14.

103. *Town of Hallie*, 471 U.S. at 47.

104. *Id.* The Court also explained that municipal conduct is more likely to be exposed to public scrutiny than private conduct. *Id.* at 45 n.9. For example, “[m]unicipalities in some States are subject to ‘sunshine’ laws or other mandatory disclosure regulations, and municipal officers, unlike corporate heads, are checked to some degree through the electoral process.” *Id.*

105. *Town of Hallie*, 471 U.S. at 41–42; *see also* *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 372–73 (1991) (“It is enough, we have held, if suppression of competition is the ‘foreseeable result’ of what the statute authorizes [citation omitted]. That condition is amply met here.”).

that it expects the City to engage in anticompetitive activity; it is enough that “it is clear that anticompetitive effects logically would result” from broad authority to regulate in a particular area.<sup>106</sup> Once again, by further weakening the “clear articulation” requirement, the Court increased the emphasis on the decision whether an entity is public or private because the “clear articulation” requirement is the only part of the *Midcal* test that applies to “public” entities.

### 3. State Agencies

It is still an open question whether certain state executive branch agencies like licensing boards are subject to the “public” or “private” *Midcal* test.<sup>107</sup> Formally, state agencies are clearly “public,” but there is increasing support to apply both prongs of the *Midcal* test to state agencies that have a public/private hybrid character. That support follows a move away from the formal approach of determining whether an agency is public to a more functional approach that looks at the incentives of the particular individuals that are part of the agency.<sup>108</sup>

The Supreme Court has not officially addressed the issue of whether a hybrid state agency should face the active supervision requirement to avoid antitrust scrutiny. But, in *Goldfarb v. Virginia State Bar*—a case preceding *Midcal*—the court held that a bar association, which “is a state agency for some limited purposes,” is subject to the antitrust laws when it provides that deviation from county bar minimum fees may lead to disciplinary action.<sup>109</sup> Thus, the state bar association in *Goldfarb* is an example of a hybrid public-private entity that was “a state agency by law.”<sup>110</sup> Even though it is a state agency, it does not possess an “antitrust shield that allows it to foster

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106. *Town of Hallie*, 471 U.S. at 42. In an earlier decision, however, the Court held in *Cnty. Commc'nns Co. v. City of Boulder* that a broad state-constitutional home-rule provision for a municipality is enough to clearly articulate the intent to displace competition. 455 U.S. 40, 56 (1982). Thus, for a municipality to take advantage of state action immunity, broad powers to manage its own affairs are not enough to survive the *Midcal* test.

107. F.T.C. Office of Policy Planning, *Report of the State Action Task Force*, p. 37 (2003) (“[T]here is a gray area consisting of hybrid state or local entities with a combination of some governmental characteristics and the active participation of private actors, such as regulatory boards and special purpose authorities (e.g. hospital and airport authorities.”).

108. See, e.g., Elhauge, *supra* note 7, at 671 (arguing that the state action immunity case law “adjudicating the distinction between state and private action embodies the process view that restraints on competition must be subject to antitrust review whenever the persons controlling the terms of the restraints stand to profit financially from the restraints they impose”). In criticizing the formal approach, the FTC explains that “[t]he government attributes of a hybrid entity—such as its establishment to serve a governmental purpose, bond authority, power of eminent domain, or tax status—are not necessarily probative of whether there is danger that private actors/members will pursue their own economic interests rather than the state’s policies.” F.T.C. Office of Policy Planning, *Report of the State Action Task Force*, p. 38 (September 2003).

109. 421 U.S. 773, 791 (1975).

110. *Id.* at 789–90.

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anticompetitive practices for the benefit of its members.”<sup>111</sup> In analyzing whether state action immunity should apply, the Court explained (in different words) that the anticompetitive activity was neither clearly articulated nor actively supervised by the state.<sup>112</sup> Notably, *Goldfarb* is one of several cases that the Court reviewed in *Midcal* before stating that “[t]hese decisions” establish two standards for antitrust immunity under *Parker v. Brown*.<sup>113</sup>

The Court in *Town of Hallie* stated in dicta that in “cases in which the actor is a state agency, it is likely that active state supervision would not be required, although we do not here decide that issue.”<sup>114</sup> That statement embodies the formal approach to classifying entities. At the same time, however, the Court characterized *Goldfarb* as a “private party” case, even though *Goldfarb* expressly noted that the state bar association is a state agency.<sup>115</sup> Given the apparent contradiction, the best interpretation is to respect the Court’s statement in *Town of Hallie* that it is not deciding the issue of whether the active state supervision requirement applies to state agencies. But if these statements must be reconciled, *Town of Hallie* could stand for the proposition that a hybrid entity that is a state entity by law, like the Virginia State Bar, is considered private if its challenged activity has certain characteristics, like fostering “anticompetitive practices for the benefit of its members.”<sup>116</sup>

Whether a hybrid state entity is subject to the active state supervision requirement is determined on a case-by-case basis, but the FTC has criticized lower courts because that “examination is not always as rigorous as it might be.”<sup>117</sup> Several federal circuit courts, however, have held that certain financially-interested governmental bodies must meet *Midcal*’s active-state-supervision requirement.<sup>118</sup> Other lower court decisions have held that state agencies are not subject to both of *Midcal*’s requirements.<sup>119</sup>

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111. *Id.* at 791.

112. *Id.* at 790–91. More specifically, foreshadowing the clear articulation requirement, the Court stated that “it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities.” *Id.* at 790. And addressing state supervision, the Court noted that “[a]lthough the State Bar apparently has been granted the power to issue ethical opinions, there is no indication in this record that the Virginia Supreme Court approves the opinions.” *Id.* at 791.

113. *Midcal*, 445 U.S. at 104–05.

114. 471 U.S. at 46 n.10.

115. *Id.* at 45 (“Cantor and *Goldfarb* concerned private parties—not municipalities—claiming the state action exemption.”). In *Goldfarb*, the Court directly acknowledged that the Virginia State Bar is “a state agency by law.” 421 U.S. at 789–90.

116. *Goldfarb*, 421 U.S. at 791.

117. F.T.C. Office of Policy Planning, *Report of the State Action Task Force*, p. 37 (2003).

118. See, e.g., Wash. State Elec. Contractors Ass’n, Inc. v. Forest, 930 F.2d 736, 737 (9th Cir. 1991); F.T.C. v. Monahan, 832 F.2d 688, 689–90 (1st Cir. 1987); Norman’s on the Waterfront, Inc. v. Wheatley, 444 F.2d 1011, 1018 (3d Cir. 1971).

119. See, e.g., Earles v. State Bd. of Certified Pub. Accountants of La., 139 F.3d 1033, 1041

This split among the circuit courts makes this issue one that could eventually receive Supreme Court attention if the right case comes along.

The FTC published an order denying a motion to dismiss on state action grounds by a state dental board in *In the Matter of South Carolina State Board of Dentistry*, but did not weigh in on the issue of whether both prongs of the *Midcal* test should apply because the board could not even satisfy the first prong—active supervision.<sup>120</sup> That case involved the FTC’s antitrust challenge to the South Carolina State Board of Dentistry’s regulation that contravened state legislation allowing dental hygienists to provide preventative dental care to children in schools.<sup>121</sup> The dental board’s regulation reinstated a previous requirement that hygienists could only treat such children that had received a supervising dentist exam within the last 45 days.<sup>122</sup> The dental board—which is composed of seven dentists, one hygienist and one public member—issued a regulation that would increase demand for dentist services at the expense of hygienist services (and consumers). The dental board tried to utilize state action immunity as a shield, but the FTC rejected that defense because the regulation was not within clearly articulated and affirmatively expressed state policy, even though South Carolina’s statutory regime gave the board broad authority to regulate the fields of dentistry and dental hygiene.<sup>123</sup> The FTC held that “‘foreseeability’ in this context must be restricted only to those regulatory schemes in which the anticompetitive conduct would ‘ordinarily or routinely result’ from the authorization legislation in order to ensure that there was a deliberate and intended state policy.”<sup>124</sup>

### III. LICENSING BOARDS THAT SEEK TO EXPAND THEIR OWN MONOPOLY SHOULD FACE HEIGHTENED ANTITRUST SCRUTINY

The requirement of a license to perform a service restricts entry into an occupation and creates a government-sanctioned monopoly for those that

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(5th Cir. 1998); *Bankers Ins. Co. v. Fla. Residential Prop. & Cas. Joint Underwriting Ass’n*, 137 F.3d 1293, 1296–97 (11th Cir. 1998); *Haas v. Or. State Bar*, 883 F.2d 1453, 1460 (9th Cir. 1989).

120. Order Denying Motion to Dismiss on State Action Grounds, Holding in Abeyance, *S. C. State Bd. of Dentistry*, F.T.C. Docket No. 9311 (July 28, 2004). See generally Jeffrey W. Brennan, *South Carolina State Board of Dentistry and the Role of Immunities in the Parker Doctrine*, 21-SPG ANTITRUST 41 (Spring 2007). The South Carolina State Board of Dentistry eventually entered a consent decree with the FTC that overturned the board’s regulation and required it notify the FTC of future regulations on the same subject matter. See [www.ftc.gov/opa/2007/06/dentists.shtm](http://www.ftc.gov/opa/2007/06/dentists.shtm).

121. Order Denying Motion to Dismiss on State Action Grounds, Holding in Abeyance, *S. C. State Bd. of Dentistry*, F.T.C. Docket No. 9311 (July 28, 2004).

122. *Id.*

123. *Id. Cf. City of Boulder*, 455 U.S. at 56 (general grant of home rule power to municipality was not sufficient to satisfy clear articulation requirement).

124. Order Denying Motion to Dismiss on State Action Grounds, Holding in Abeyance, *S. C. State Bd. of Dentistry*, F.T.C. Docket No. 9311 (July 28, 2004).

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are granted that license over a market for services equal to the scope of the occupation. While competition would remain among the licensed professionals, the restricted entry from the licensure requirements limits this competition.<sup>125</sup> Thus, the jurisdiction of the licensed occupation is an important issue because it defines the scope of the anticompetitive harm. At the same time, the licensed members of an occupation financially benefit from an expansive definition, which would allow them to avoid competition from other occupations in the expanded territory.<sup>126</sup>

Naturally, licensing boards typically consist primarily of members of the regulated occupation, as these individuals possess the best knowledge and expertise about how to regulate and discipline the licensed members.<sup>127</sup> The obvious problem is that the actual individuals that determine the exclusive jurisdiction of the occupation—and therefore the scope of the anticompetitive harm—have strong incentives (either personally or on behalf of their membership) to expand the reach of their occupation to the detriment of both consumers and other occupations. Therefore, antitrust law should treat these public boards as they would a private entity that seeks to restrain trade—with great skepticism. That is, courts should not only require that licensing boards fulfill both prongs of the *Midcal* test to receive state action immunity, but should also analyze both the clear-articulation and active-state-supervision requirements with the understanding that these licensing boards have the structural incentive to expand their own monopoly.<sup>128</sup>

Thus, a legislature's clear articulation of the right of a state licensing board to regulate an occupation should not be sufficient to permit a board to expand its own monopoly relative to other occupations by expanding the scope of how that occupation is defined.<sup>129</sup> This would violate *Parker*'s admonition that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."<sup>130</sup> In addition, the sovereign state must actively supervise the actual decision by a licensing board to broaden the scope of its

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125. See HUMPHRIES, KLEINER & KOUMENTA, *supra* note 18, at 7.8 (describing the evidence that the supply of practitioners in regulated occupations is restricted by licensure requirements).

126. See Havighurst, *supra* note 22, at 596 (explaining that licensing boards may have little enthusiasm for competition).

127. *Id.* ("Although practices vary, many states appoint the members of such boards from lists of nominees provided by the professional or occupational group being regulated. A public member or two is usually appointed as well, but such boards are rarely less than friendly to and supportive of the licensed group.").

128. See Havighurst, *supra* note 22, at 598–99 ("[I]n deciding how explicit a state legislature must be in authorizing curtailments of competition, they might apply the clear-articulation requirement with special rigor to state boards that appear rooted in the self-regulatory tradition.").

129. Of course, the issue of whether a particular service is within an existing statutory definition of an occupation may create a difficult question in certain circumstances.

130. 317 U.S. at 351.

monopoly. A rubber-stamp acceptance of a board's anticompetitive activity should not be sufficient to invoke the powerful shield of state action immunity. To fulfill the active-state-supervision requirement, a state body or official outside of and above the licensing board should have to approve any decision by the licensing board to expand the scope of its monopoly. The typical state delegation of authority to a board does not usually permit members of the board to so easily create or expand market power in a way that benefits the members and their occupation. Thus, the deferential approach that courts typically employ for the clear-articulation requirement is not sufficient in these circumstances because the state board has a conflict of interest, and is not merely applying its expertise.<sup>131</sup> A heightened active-state-supervision requirement will avoid *Parker*'s prohibition against state authorization to violate the antitrust laws<sup>132</sup> by making sure that it is the state itself—and not a self-interested board—that is expanding the zone of anticompetitive harm.

The competitive problem of a state board expanding its own monopoly is not a mere hypothetical, but has actually occurred in at least two recent cases. One of the instances led to an antitrust challenge by the FTC,<sup>133</sup> and the other was challenged, but not on antitrust grounds.<sup>134</sup> These two cases are discussed below.

#### A. *In the Matter of The North Carolina State Board of Dental Examiners*

The North Carolina Board of Dental Examiners is an agency of the State of North Carolina that "is charged with regulating the practice of dentistry in the interest of the public health, safety, and welfare of the citizens of North Carolina."<sup>135</sup> The board includes six licensed dentists, one licensed hygienist, and one consumer member that is neither a dentist nor a hygienist.<sup>136</sup> Notably, the dentist members are not appointed by state officials, but are instead elected to the board by licensed dentists in North Carolina.<sup>137</sup> Each elected member serves a three-year term.<sup>138</sup> It is unlawful to practice dentistry in North Carolina without a license issued by this board.<sup>139</sup>

Both dentists and non-dentists in North Carolina offer teeth-whitening

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131. See Havigurst, *supra* note 22, at 599 ("Certainly the foreseeability test employed in the case of municipalities seems inappropriate in such cases, for few things are more foreseeable than that a trade or profession empowered to regulate itself will produce anticompetitive regulations.").

132. 317 U.S. at 314.

133. See Complaint, *N.C. Bd. of Dental Exam'rs*, F.T.C. Docket No. 9343 (June 17, 2000).

134. See *Mitz*, 278 S.W.3d at 20-21.

135. Complaint, *N.C. Bd. of Dental Exam'rs*, F.T.C. Docket No. 9343, para. 1 (June 17, 2000).

136. *Id.* at para. 2.

137. *Id.*

138. *Id.*

139. *Id.* at para. 4.

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services, but dentists charge substantially more for the service.<sup>140</sup> There is a North Carolina dental statute, which, according to the FTC, does not expressly address teeth whitening.<sup>141</sup> The board, however, argues that a state statute that limits the practice of dentistry to dentists and defines dentistry as undertaking, attempting, or claiming the ability to “remove[] stains, accretions, or deposits from the human teeth,” directly addresses teeth whitening.<sup>142</sup> This particular issue highlights the point that it is not always easy to determine whether a state board is, in fact, expanding its own exclusive jurisdiction.

The dental board made the determination that non-dentists that provide teeth-whitening services in North Carolina are committing the unauthorized practice of dentistry.<sup>143</sup> And, according to the FTC, the board has “engaged in extra-judicial activities aimed at preventing non-dentists from providing teeth whitening services in North Carolina.”<sup>144</sup> As a result, the dental board excluded their lower-priced competitors from the market for teeth-whitening services.<sup>145</sup> After a lengthy investigation,<sup>146</sup> the FTC concluded that this action was anticompetitive and brought an administrative action against the board.<sup>147</sup> This is an example of a state licensing board that is using its authority to expand its own monopoly, in this case, to teeth whitening services.

Not surprisingly, the board responded to the FTC’s action by seeking dismissal based upon the state action immunity doctrine.<sup>148</sup> Indeed, the board felt so strongly that it was inappropriate for the FTC to proceed against it as a state entity that (before any FTC decision) it filed its own lawsuit for declaratory judgment and preliminary and permanent injunctions against the FTC.<sup>149</sup> This was unusual, as the typical process is to

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140. Complaint, *N.C. Bd. of Dental Exam’rs*, F.T.C. Docket No. 9343 at paras. 7 & 11 (June 17, 2010). There are also teeth whitening products like certain toothpastes and over-the-counter whitening strips, but the FTC alleged that these products are inadequate substitutes for the services performed by dentists and non-dentists. *Id.* at para. 12.

141. *Id.* at para. 15.

142. Motion to Dismiss by The *N.C. Bd. of Dental Exam’rs*, F.T.C. Docket No. 9343 at 20, (Nov. 3, 2010); N.C. Gen. Stat. § 90-29(b)(3).

143. Complaint, *N.C. Bd. of Dental Exam’rs*, F.T.C. Docket No. 9343 at para. 16 (June 17, 2000).

144. *Id.* at para. 19; N.C. Gen. Stat. § 90-29(b)(2).

145. *Id.* at paras. 11 & 24.

146. Motion to Dismiss, *supra* note 142, at 8; N.C. Gen. Stat. § 90-29(b)(3) (“The Complaint was filed at the end of a two-year investigation.”).

147. See generally Complaint, *N.C. Bd. of Dental Exam’rs*, F.T.C. Docket No. 9343 (June 17, 2000).

148. See Motion to Dismiss, *supra* note 142, at 1.

149. See generally Complaint for Declaratory Judgment and Preliminary and Permanent Injunction, *N.C. Bd. of Dental Exam’rs v. Fed. Trade Comm’n*, Case 5:11-cv-00049-FL (E.D.N.C. Feb. 2, 2011).

appeal unfavorable FTC rulings to a federal court of appeals.<sup>150</sup> The board was not shy about its position: “[T]he purpose of this action is to stop a pointless, baseless, and predetermined federal administrative proceeding that has impaired and continues to impair the ability of the State to protect its public, contravenes federal and state statutes, directly encroaches upon the State’s sovereignty assured under the Tenth Amendment to the United States Constitution . . . and defies very, very well-established Supreme Court holdings.”<sup>151</sup>

The FTC rejected the board’s argument that it is protected by the state action immunity doctrine.<sup>152</sup> Commissioner William Kovacic, writing the opinion for a unanimous Commission,<sup>153</sup> set forth the FTC’s view on the state immunity doctrine:

Because the balance between competition policy and federalism embodied in the state action doctrine exempts only sovereign policy choices from federal antitrust scrutiny, non-sovereign defendants invoking the state action defense must clear additional hurdles to ensure that their challenged conduct truly comports with a state decision to forego the benefits of competition to pursue alternative goals.<sup>154</sup>

The FTC took the position that the requirements to invoke the defense “vary depending on the extent to which a tribunal is concerned that decision-makers are pursuing private rather than sovereign interests.”<sup>155</sup> Thus, the FTC took an incentive-based approach rather than a formal approach in deciding how to apply the *Midcal* test. More specifically, the FTC concluded that the Supreme Court’s jurisprudence required that “when determining whether the state’s active supervision is required, the operative factor is a tribunal’s degree of confidence that the entity’s decision-making process is sufficiently independent from the interests of those being regulated.”<sup>156</sup> The FTC reasoned that

allowing the antitrust laws to apply to the unsupervised decisions of self-interested regulators acts as a check to prevent conduct that is not in the public interest; absent antitrust to police their actions, unsupervised self-interested boards would be subject to neither political nor market discipline to serve consumers’ best interests.<sup>157</sup>

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150. See Fed. R. App. P. 15.

151. Complaint for Declaratory Judgment and Preliminary and Permanent Injunction, *supra* note 149, at 1.

152. See Opinion of the Commission, *supra* note 8.

153. *Id.* at n. 1 (Commissioner Julie Brill did not participate in the matter).

154. *Id.* at 1.

155. *Id.*; see also Elhauge, *supra* note 7, at 695 (advancing the theory that “state action immunity applies only when a financially disinterested state official controls the terms of the challenged restraint”).

156. Opinion of the Commission, *supra* note 8, at 9.

157. *Id.* at 11.

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Applying this principle to state licensing boards, the FTC held that “a state regulatory body that is controlled by participants in the very industry it purports to regulate must satisfy both prongs of *Midcal* to be exempted from antitrust scrutiny under the state action doctrine.”<sup>158</sup>

The FTC did not examine the first prong of *Midcal*—clear articulation—because it concluded that the board’s conduct was not actively supervised. The FTC described this test as guaranteeing that “self-interested parties are restricting competition in a manner consonant with state policy.”<sup>159</sup> The “active supervision converts private conduct, which is subject to antitrust review, into a sovereign policy choice, which is not.”<sup>160</sup> In the case at hand, the FTC ultimately rejected the board’s argument that it was subject to active state supervision, as the only oversight was “generic” and there was no suggestion that “a state actor was even aware of the Board’s policy toward non-dentist teeth-whitening, let alone reviewed or approved it in fulfillment of the active supervision requirement.”<sup>161</sup> This decision, however, is not likely the final word in this case. The board’s vociferous response to this administrative lawsuit suggests that this is a battle that could continue for a while.

*B. Mitz v. Texas State Board of Veterinary Medical Examiners*

The Texas State Board of Veterinary Medical Examiners is an agency of the State of Texas that is charged with developing, adopting, and enforcing laws and rules necessary to carry out the Veterinary Licensing Act.<sup>162</sup> Similar to the North Carolina Board of Dental Examiners, the Texas board is dominated by licensed professionals—six practicing veterinarians and three public members.<sup>163</sup> Members are appointed by the governor and serve six-year terms.<sup>164</sup>

This dispute centered around a service to horse owners and breeders called teeth “floating,” which “involves using a file to make teeth level and ensure proper alignment.”<sup>165</sup> Prior to 2007, horse teeth floating (and teeth extraction) services were performed by non-veterinarians, who competed with veterinarians.<sup>166</sup> Similar to the North Carolina dental case, the board

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158. *Id.* at13.

159. *Id.* at14.

160. *Id.*

161. *Id.* at 16.

162. See Tex. Occ. Code Ann. §§ 801.001–.004, .051–.053; see also Plaintiffs’ First Amended Verified Petition for Declaratory and Injunctive Relief, *Mitz v. Tex. State Bd. of Veterinary Med. Exam’rs*, Cause No. D-1-GN-07-002707 at para. 16 (Tex. Dist. Ct., Travis County October 9, 2007).

163. See Tex. State Bd. of Veterinary Med. Exam’rs, Board Members, [www.tbvme.state.tx.us/agency/php](http://www.tbvme.state.tx.us/agency/php) (last visited March 29, 2011).

164. *See id.*

165. *Mitz*, 278 S.W.3d at 20.

166. *Id.*

eventually made a determination that only licensed veterinarians should be able to provide these services, and it began to send cease-and-desist letters to non-veterinarians who practiced teeth-floating.<sup>167</sup> Thus, as in North Carolina, the state board of professionals sought to exercise its authority to eliminate competition by expanding its own exclusive jurisdiction.<sup>168</sup> The Institute for Justice, on behalf of four non-veterinarian teeth-floaters and two horse breeders that hire such teeth-floaters, sought declaratory judgment and injunctive relief against the board, but not on antitrust grounds.<sup>169</sup>

The FTC, however, eventually weighed into the dispute by sending a letter to the board, urging it not to adopt a rule limiting teeth-floating to licensed veterinarians unless “the benefits to purchasers of teeth floating would be greater than the harm that would result from the elimination of competition.”<sup>170</sup> The FTC explained in its letter that “Texas horse owners likely would pay more for horse floating services if veterinarian supervision of lay horse floaters were required, because the proposal would insulate veterinarians from competition by lay horse teeth floaters.”<sup>171</sup> At the same time, the policy “does not appear to provide any countervailing benefits.”<sup>172</sup>

The plaintiffs eventually prevailed on summary judgment, as the Texas trial court ruled that the board’s rule change failed “to comply with the rulemaking requirements of the Texas Administrative Procedure Act.”<sup>173</sup> An interesting question, however, is whether the FTC or a private plaintiff could have also prevailed on antitrust grounds? And, since the decision was on procedural grounds, if the board tries again to promulgate a similar rule (through the correct procedures this time), could it be subject to antitrust scrutiny?

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167. *Id.* at n. 2.

168. Plaintiff’s complaint in *Mitz* alleged that one member of the board was explicit about the anticompetitive purpose of the change in policy: “Defendant Reveley has publicly urged veterinarians who are the beneficiaries of this monopoly to contact their state legislators because it is ‘clear’ to her that lay-people like the Practitioner-Plaintiffs are ‘chipping-away’ at the work of veterinarians ‘in every jurisdiction.’” Plaintiffs’ First Amended Verified Petition for Declaratory and Injunctive Relief, *Mitz v. Tex. State Bd. of Veterinary Med. Exam’rs*, Cause No. D-1-GN-07-002707 at para. 48 (Tex. Dist. Ct., Travis County), filed October 9, 2007.

169. *Mitz*, 278 S.W.3d at 19. Plaintiffs did, however, include a state claim under the Texas Constitution based upon the Prohibition Against Monopolies, but it does not appear that this claim was actively litigated. TEX. CONST., art. I, § 26; Plaintiffs’ First Amended Verified Petition for Declaratory and Injunctive Relief, *Mitz v. Tex. State Bd. of Veterinary Med. Exam’rs*, Cause No. D-1-GN-07-002707 at paras. 45–48 (Tex. Dist. Ct., Travis County October 9, 2007); *Mitz*, 278 S.W.3d at 20–21 (listing claims, including “monopoly prohibition”).

170. Letter from F.T.C. to Ms. Loris Jones, Texas Board of Veterinary Medical Examiners at 1 (August 20, 2010) (available at <http://www.ftc.gov/os/2010/09/100910texasteethfloating.pdf>).

171. *Id.* at 3.

172. *Id.*

173. Order Granting Plaintiffs’ Motion for Summary Judgment, *Mitz v. Tex. State Bd. of Veterinary Med. Exam’rs*, Cause No. D-1-GN-07-002707 (Tex. Dist. Ct., Travis County Nov. 10, 2010).

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The major issue in any such antitrust challenge, of course, would come down to whether the board could take advantage of state action immunity. As described above, the lower courts are not consistent in how they scrutinize state licensing agencies that seek state action immunity.<sup>174</sup> But, as the FTC recognized in its *North Carolina State Board of Dental Examiners* decision, the Supreme Court's *Goldfarb*<sup>175</sup> analysis, "strongly suggests that . . . active supervision is crucial, even for a state agency, in circumstances where the state agency's decisions are not sufficiently independent from the entities that the agency regulates."<sup>176</sup> Indeed, this case would be very similar in structure to the FTC's case against the dental board in North Carolina. Both state boards, dominated by members of the profession they regulate, sought to expand the monopoly for their licensed members at the expense of competitors and consumers. Thus, as in the North Carolina dental case, to utilize the state action immunity shield, the Texas board would likely have to show that its policy to expand the jurisdiction of veterinarians was "clearly articulated" by the state legislature, and that the state itself "actively supervised" the decision.<sup>177</sup> While the actual result of this inquiry would depend upon the facts uncovered during discovery, the board would have a difficult case because the Texas state court's holding that the board's teeth floating decision violated rulemaking requirements<sup>178</sup> suggests that the anticompetitive decision was probably not clearly articulated by the state sovereign. In any event, it would be an interesting battle.

#### IV. CONCLUSION

Private actors do not have a monopoly over anticompetitive conduct. Public entity actions are often anticompetitive but usually escape antitrust scrutiny because of the state immunity doctrine. State licensing boards are legally part of the state, but have conflicts of interests that incent them to act like private entities that seek to protect themselves and their occupation from competition. For that reason, except in rare instances, these state licensing boards—dominated by members of the regulated occupation—should face antitrust scrutiny when they enact policies or take actions that expand their own exclusive jurisdiction at the expense of consumers and competitors. Although current law grants a state sovereign the right to take anticompetitive actions (at least within its borders), it does not allow states to immunize private actors from the antitrust laws. And that is exactly what occurs when a state licensing board is permitted to expand the monopoly of its members.

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174. See Supra Text Section II(B).

175. 421 U.S. at 790-91.

176. Opinion of the Commission, *supra* note 8, at 9.

177. See *Midcal*, 445 U.S. at 105.

178. Order Granting Plaintiffs' Motion for Summary Judgment, *Mitz v. Tex. State Bd. of Veterinary Med. Exam'rs*, Cause No. D-1-GN-07-002707 (Tex. Dist. Ct., Travis County Nov. 10, 2010).