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*Sherman Act — State-Action Immunity —*  
North Carolina State Board of Dental Examiners v. FTC

The state-action antitrust immunity doctrine is premised on the idea that Congress, in passing the Sherman Act, could not have intended to prohibit all state economic regulation that displaces competition. First laid out by the Supreme Court in *Parker v. Brown*,<sup>1</sup> the doctrine immunizes the decisions of states as sovereigns from antitrust scrutiny.<sup>2</sup> In *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*,<sup>3</sup> the Court held that private entities can be protected by state-action immunity, but only if their conduct is (1) taken pursuant to a “clearly articulated and affirmatively expressed . . . state policy” and (2) “‘actively supervised’ by the State itself.”<sup>4</sup> After *Midcal*, however, it remained open whether the actions of state agencies like professional licensing boards — which are typically composed of active practitioners in the market they regulate<sup>5</sup> — were subject to the doctrine’s requirement of active state supervision for private entities claiming state-action immunity.

Last Term, in *North Carolina State Board of Dental Examiners v. FTC*,<sup>6</sup> the Supreme Court held that in order to obtain antitrust immunity, a state agency must be actively supervised by the state if “a controlling number of [its] decisionmakers are active market participants in the occupation the board regulates.”<sup>7</sup> The majority’s test leaves open important questions regarding the scope of the active supervision requirement, including the very definition of active market participation.<sup>8</sup> Future courts may be tempted to interpret the majority’s test narrowly and apply the active supervision requirement only to boards with a majority of active participants in the precise market being regulated. But that interpretation would be at odds with the balance between competition and federalism struck by the majority opinion and with the Court’s functionalist approach taken in other antitrust contexts.

The North Carolina State Board of Dental Examiners is a state-created agency tasked chiefly with licensing dentists and dental hy-

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<sup>1</sup> 317 U.S. 341 (1943).

<sup>2</sup> See *id.* at 350–52.

<sup>3</sup> 445 U.S. 97 (1980).

<sup>4</sup> *Id.* at 105 (quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978) (plurality opinion)).

<sup>5</sup> See Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1103 (2014).

<sup>6</sup> 135 S. Ct. 1101 (2015).

<sup>7</sup> *Id.* at 1114.

<sup>8</sup> See *id.* at 1123 (Alito, J., dissenting).

gienists.<sup>9</sup> Six of its eight members must be practicing dentists and are elected by other dentists.<sup>10</sup> In addition to its licensing authority, the Board can bring actions in state court against people suspected of practicing dentistry without a license.<sup>11</sup> In 2003, the Board became aware of a growing trend in the market for teeth-whitening services: nondentists were performing whitening procedures, mostly at salons and shopping mall kiosks, at a significantly lower price than dentists.<sup>12</sup> After an initial investigation, the Board sent cease-and-desist letters to twenty-nine nondentist providers.<sup>13</sup> The campaign was effective. Nondentists left the teeth-whitening market, and sellers of the nondentist providers' whitening products shut down their operations in North Carolina.<sup>14</sup>

In 2010, the Federal Trade Commission (FTC) brought an administrative action against the Board alleging that it engaged in “[u]nfair methods of competition” in violation of the Federal Trade Commission Act<sup>15</sup> (FTC Act).<sup>16</sup> The Board moved to dismiss, claiming that, as a state agency, it was protected by state-action antitrust immunity.<sup>17</sup> The FTC denied the motion.<sup>18</sup> The case then proceeded to an adjudication on the merits in front of an administrative law judge, who found that the Board had violated the FTC Act.<sup>19</sup> The FTC affirmed and, in its Final Order, enjoined the Board from continuing to send cease-and-desist letters to nondentists or otherwise “discouraging the provision” of teeth-whitening goods or services.<sup>20</sup>

The Fourth Circuit denied the Board's petition for review of the FTC order.<sup>21</sup> Writing for the court, Judge Shedd<sup>22</sup> endorsed the FTC's view that state agencies will be considered “private” actors —

<sup>9</sup> N.C. State Bd. of Dental Exam'rs v. FTC, 717 F.3d 359, 364 (4th Cir. 2013); *see also* North Carolina Dental Practice Act, N.C. GEN. STAT. § 90-22 (2015) (establishing the Board).

<sup>10</sup> N.C. GEN. STAT. § 90-22(b). One of the remaining two members is a dental hygienist elected by other hygienists, and the other member is a consumer appointed by the Governor. *Id.*

<sup>11</sup> *Id.* § 90-40.1. Suits may also be brought by the state Attorney General's office, a district attorney, or any North Carolina-residing citizen. *Id.*

<sup>12</sup> *Dental Exam'rs*, 717 F.3d at 364–65.

<sup>13</sup> *Id.* at 365. The letters ordered the targets to stop “all activity constituting the practice of dentistry,” and some letters warned that failure to comply was a misdemeanor. *Id.* (quoting Joint Appendix, Volume I at 159, *Dental Exam'rs*, 717 F.3d 359 (No. 12-1172)).

<sup>14</sup> *Id.*

<sup>15</sup> 15 U.S.C. §§ 41–58 (2012).

<sup>16</sup> *Id.* § 45(a)(1); *see* N.C. Bd. of Dental Exam'rs, 151 F.T.C. 607, 608 (2011) (interlocutory order).

<sup>17</sup> *See* N.C. Bd., 151 F.T.C. at 617.

<sup>18</sup> *Id.* at 633. The Board attempted unsuccessfully to have a federal district court enjoin the proceedings. *See* N.C. State Bd. of Dental Exam'rs v. FTC, 768 F. Supp. 2d 818, 824 (E.D.N.C. 2011). The district court dismissed the action as improperly “seek[ing] to subvert the established administrative review process . . . , which vests the circuit courts with exclusive jurisdiction to hear the sorts of [administrative] challenges made [by the Board].” *Id.*

<sup>19</sup> *Dental Exam'rs*, 717 F.3d at 366.

<sup>20</sup> *In re* N.C. Bd. of Dental Exam'rs, 152 F.T.C. 640, 697 (2011) (final order).

<sup>21</sup> *Dental Exam'rs*, 717 F.3d at 375.

<sup>22</sup> Judge Shedd was joined by Judge Wynn.

and thus are subject to *Midcal*'s active-supervision requirement — when they are “operated by market participants who are elected by other market participants.”<sup>23</sup> Because the Board could not show that it was actively supervised by North Carolina,<sup>24</sup> the court turned to the merits of the underlying antitrust claim and held that the Board had violated the FTC Act.<sup>25</sup> Judge Keenan concurred separately to “emphasize the narrow scope” of the court’s holding.<sup>26</sup> She saw the Board’s *election* by market participants as critical to its holding and suggested that, had the active dentists “been appointed or elected by state government officials pursuant to state statute,” the argument for requiring active supervision would have been weaker.<sup>27</sup>

The Supreme Court affirmed. Writing for the Court, Justice Kennedy<sup>28</sup> began by acknowledging the importance of state-action immunity in striking a necessary balance between protecting competition and respecting state sovereignty.<sup>29</sup> Unlike purely private actors, Justice Kennedy explained, “[t]he States . . . need not adhere in all contexts to a model of unfettered competition.”<sup>30</sup> And this preservation of state sovereignty was not solely a judicial endeavor: Justice Kennedy cited *Parker* as recognizing that Congress, in passing the Sherman Act, aimed “to respect the federal balance and to ‘embody . . . the federalism principle that the States possess a significant measure of sovereignty under our Constitution.’”<sup>31</sup>

Justice Kennedy continued, however, to note the Court’s general “disfavor[]” of state-action immunity<sup>32</sup> and the doctrine’s limitation

<sup>23</sup> *Dental Exam’rs*, 717 F.3d at 370.

<sup>24</sup> *Id.* The Board’s decision to send cease-and-desist letters “without state oversight and without . . . judicial authorization” was subject to “far less ‘supervision’” than the supervisory scheme that was condemned in *Midcal*. *Id.*

<sup>25</sup> *See id.* at 375. Courts have interpreted the FTC Act’s broad proscription of “unfair competition” as including any conduct that would violate section 1 of the Sherman Act, 15 U.S.C. § 1 (2012), which courts have construed to prohibit any “contract, combination, or conspiracy . . . that impose[s] an unreasonable restraint of trade,” *Dickson v. Microsoft Corp.*, 309 F.3d 193, 202 (4th Cir. 2002). *See, e.g., Dental Exam’rs*, 717 F.3d at 370–71. And “because the FTC limited its review to whether the Board’s conduct violated § 1” of the Sherman Act, the Fourth Circuit “d[id] the same.” *Id.* at 371.

<sup>26</sup> *Dental Exam’rs*, 717 F.3d at 376 (Keenan, J., concurring).

<sup>27</sup> *Id.* Judge Keenan pointed to the Supreme Court’s decision in *FTC v. Phoebe Putney Health System, Inc.*, 133 S. Ct. 1003 (2013), as supporting antitrust immunity for “certain ‘substate’ entities . . . without regard to whether their activities are actively supervised by the state.” *Dental Exam’rs*, 717 F.3d at 376 (Keenan, J., concurring) (quoting *Phoebe Putney*, 133 S. Ct. at 1010).

<sup>28</sup> Justice Kennedy was joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan.

<sup>29</sup> *See Dental Exam’rs*, 135 S. Ct. at 1109–10.

<sup>30</sup> *Id.* at 1109.

<sup>31</sup> *Id.* at 1110 (quoting *Cnty. Commc’ns Co. v. Boulder*, 455 U.S. 40, 53 (1982), *superseded by statute*, Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. 2750).

<sup>32</sup> *Id.* (quoting *Phoebe Putney*, 133 S. Ct. at 1010).

solely to “exercise[s] of the State’s sovereign power.”<sup>33</sup> He declined to apply the doctrine’s protection to the Board’s cease-and-desist campaign.<sup>34</sup> Rather, the Court held that, notwithstanding the Board’s formal designation as a state agency, it must be treated like a private actor and thus subjected to *Midcal*’s active supervision requirement if “a controlling number of decisionmakers are active market participants in the occupation the board regulates.”<sup>35</sup> Justice Kennedy distinguished the Board from a municipality — which, after *Town of Hallie v. City of Eau Claire*,<sup>36</sup> is exempted from the supervision requirement<sup>37</sup> — because the latter did not pose the same risk of pursuing private economic gain as did market participants.<sup>38</sup>

On the merits, while the Court assumed (as did both parties) that *Midcal*’s “clear articulation requirement [was] satisfied,”<sup>39</sup> the Board did not argue that its cease-and-desist campaign was actively supervised by the State.<sup>40</sup> Thus, because the supervision requirement was concededly not satisfied, the Court affirmed the lower court’s condemnation of the Board’s action under the FTC Act.<sup>41</sup> Finally, the Court recognized that the sufficiency of state supervision would be a “flexible and context-dependent” inquiry for future courts to decide on a case-by-case basis.<sup>42</sup> Notwithstanding the details of the supervisory scheme, the Court described the key issue in any given case as “whether the State’s review mechanisms provide ‘realistic assurance’ that a nonsovereign actor’s anticompetitive conduct ‘promotes state policy, rather than merely the party’s individual interests.’”<sup>43</sup>

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<sup>33</sup> *Id.* Justice Kennedy categorized state legislation and legislative decisions of a state supreme court (like bar admissions) as clearly protected by state-action immunity. *Id.* (citing *Hoover v. Ronwin*, 466 U.S. 558, 567–68 (1984)).

<sup>34</sup> *See id.*

<sup>35</sup> *Id.* at 1114.

<sup>36</sup> 471 U.S. 34 (1985).

<sup>37</sup> *See id.* at 47.

<sup>38</sup> *Dental Exam’rs*, 135 S. Ct. at 1112–13. Likewise, the Board could not seek shelter behind *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), where the Court refused to peel back state-action immunity for a municipality where its ordinance benefited a private actor, even where there were allegations of conspiracy between the city and the company. *See id.* at 367–68; *Dental Exam’rs*, 135 S. Ct. at 1113.

<sup>39</sup> *Dental Exam’rs*, 135 S. Ct. at 1110.

<sup>40</sup> *Id.* at 1116.

<sup>41</sup> *Id.* at 1117. In response to the Board’s argument that the threat of damages would discourage professionals from serving on boards, the Court noted that whether board members might in some circumstances be immune from damages liability remained an open question and that nothing prevented states from defending and indemnifying their agency members in litigation. *Id.* at 1115.

<sup>42</sup> *Id.* at 1116. The Court pointed to prior holdings that clarified both what active supervision requires (at a minimum, “[t]he supervisor must review the substance of the anticompetitive decision[s]” and “have the power to veto or modify” them, *id.*) and what would be insufficient (the mere potential for supervision, or a state supervisor that itself was an active market participant, *id.* at 1116–17).

<sup>43</sup> *Id.* at 1116 (quoting *Patrick v. Burget*, 486 U.S. 94, 101 (1988)).

Justice Alito dissented.<sup>44</sup> He criticized the majority for its “serious misunderstanding” of state-action immunity, divorced from the doctrine’s roots in *Parker*.<sup>45</sup> For Justice Alito, the case could be decided simply on the grounds that the Board was validly established as a state agency under state law, and thus was categorically immunized.<sup>46</sup> He canvassed the early history of the doctrine to show that *Parker* demanded his view: The Sherman Act was enacted against a “constitutional landscape . . . [with] an understanding of the scope of federal and state power that is very different from our understanding today.”<sup>47</sup> By the time *Parker* was decided in 1943, the Court understood that — even though the reach of federal antitrust regulation had expanded along with the federal commerce power<sup>48</sup> — the Sherman Act could not be read to bar “States from exercising their traditional regulatory authority.”<sup>49</sup> In this way, it would thwart the reasoning of *Parker* to ignore the Board’s obvious status as a traditional state licensing agency and treat it as a private entity based on the identities of its members alone.<sup>50</sup> Justice Alito also found it odd that the majority treated a state agency less favorably than a municipality — the latter of which does not have to satisfy *Midcal*’s active supervision requirement.<sup>51</sup> Finally, he criticized the majority’s test for leaving open too many complex questions: “What is a ‘controlling number’?”; “Who is an ‘active market participant’?”; “What is the scope of the market in which a member may not participate while serving on the board?”<sup>52</sup>

Past state-action immunity decisions, and especially *Parker*, could help answer the difficult questions posed by Justice Alito in dissent — in particular, the question of how courts should decide which board members are “active market participants.” But if *Parker* guides future courts’ interpretations of *Dental Examiners*, the majority’s test might be construed quite narrowly — perhaps requiring active supervision

<sup>44</sup> Justice Alito was joined by Justices Scalia and Thomas.

<sup>45</sup> *Dental Exam’rs*, 135 S. Ct. at 1117 (Alito, J., dissenting).

<sup>46</sup> *Id.* at 1119–20 (“[T]he only question in this case is whether the North Carolina Board of Dental Examiners is really a state agency, and the answer to that question is clearly yes.”).

<sup>47</sup> *Id.* at 1118.

<sup>48</sup> The Sherman Act’s regulatory power stems from the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3 (allowing Congress “to regulate Commerce . . . among the several States”); see also Sherman Act, 15 U.S.C. § 1 (2012) (limiting its scope to “restraint[s] of trade or commerce among the several States”), which Justice Alito recognized had a much more limited scope when the Sherman Act was enacted in 1890, see *Dental Exam’rs*, 135 S. Ct. at 1118 (Alito, J., dissenting) (pointing to *Wickard v. Filburn*, 317 U.S. 111 (1942), as permitting the federal regulation of local affairs so long as those affairs “exert[] a substantial economic effect on interstate commerce,” *id.* at 125).

<sup>49</sup> *Dental Exam’rs*, 135 S. Ct. at 1119 (Alito, J., dissenting).

<sup>50</sup> *Id.* at 1121. Justice Alito explained the Board’s organic legislation and governance rules to prove that it “is really a state agency.” *Id.* at 1120.

<sup>51</sup> *Id.* at 1122.

<sup>52</sup> *Id.* at 1123.

only for agencies with a majority of current participants in the precise market being regulated. This narrow construction would be at odds with the functionalist reasoning of the majority opinion and the flexible ethos of other antitrust doctrines.

The numerous amicus briefs supporting the FTC, as well as the Commission's own brief, differed in their formulations of the level of market-participant control that triggers the active supervision requirement.<sup>53</sup> These differences suggest that what constitutes active market participation is neither predetermined by prior case law nor clear as a normative matter. The decision in *Parker* could be seen as providing some guidance, and may lead courts to adopt a narrow reading of *Dental Examiners*. In *Parker*, a California raisin grower challenged the enforcement of a state marketing program that had the avowed purpose of insulating state producers from competition.<sup>54</sup> The California law authorized the creation of an Agricultural Prorate Advisory Commission, with six of nine members appointed by the governor to represent various agricultural commodities.<sup>55</sup> Producers would petition the Commission to impose a marketing plan for a given agricultural product, and the Commission could then appoint a program committee to design and enforce such a plan.<sup>56</sup>

In upholding the program as it applied to raisin producers, the *Parker* Court did not scrutinize the Commission's membership.<sup>57</sup> In fact, most of the Commission members were market actors; the petitioners in *Dental Examiners* (and the dissent) argued as much in claiming that the Dental Board was analogous to the Commission approved of in *Parker*.<sup>58</sup> But the Prorate Commission differed from the

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<sup>53</sup> Compare Brief for the Respondent at 22, *Dental Exam'rs*, 135 S. Ct. 1011 (No. 13-534) ("dominated by private participants in the regulated market"), and Brief of Amicus Curiae Public Citizen, Inc., in Support of Respondent at 4, *Dental Exam'rs*, 135 S. Ct. 1011 (No. 13-534) ("made up of or dominated by industry members"), with Brief for the American Antitrust Institute as Amicus Curiae in Support of Respondent at 5, *Dental Exam'rs*, 135 S. Ct. 1011 (No. 13-534) ("financially self-interested state boards"; "boards dominated by market participants"), and Brief of Antitrust Scholars as Amici Curiae in Support of Respondent at 10, *Dental Exam'rs*, 135 S. Ct. 1101 (No. 13-534) [hereinafter Scholars' Brief] ("'decisive coalition' consisting of financially-interested market participants" (quoting PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 227b, at 226 (4th ed. 2013))).

<sup>54</sup> See *Parker v. Brown*, 317 U.S. 341, 346 (1943) ("The California Agricultural Prorate Act authorizes . . . programs for the marketing of agricultural commodities produced in the state, so as to restrict competition among the growers . . .").

<sup>55</sup> See Scholars' Brief, *supra* note 53, at 13-14, 14 n.9 (citing *Liberal Prorate Board Named*, RURAL OBSERVER (Apr. 10, 1940), [http://content.cdlib.org/view?docId=hb5k4006p6&chunk.id=div00369&brand=calisphere&doc.view=entire\\_text](http://content.cdlib.org/view?docId=hb5k4006p6&chunk.id=div00369&brand=calisphere&doc.view=entire_text) [<http://perma.cc/RC3C-9TVD>] (describing the makeup of the Commission)).

<sup>56</sup> *Parker*, 317 U.S. at 346-47.

<sup>57</sup> See *id.*

<sup>58</sup> See *Dental Exam'rs*, 135 S. Ct. at 1121 (Alito, J., dissenting); Brief for Petitioner at 21, *Dental Exam'rs*, 135 S. Ct. 1101 (No. 13-534).

Dental Board in a key way: its members came from across the agricultural sector and only one represented the raisin industry, to which the challenged regulation specifically applied.<sup>59</sup> Thus, the Court's approval of the state regime in *Parker* could be understood to support an approach of "counting" a board member as a market participant for purposes of control only if that member participates in the precise market being regulated.<sup>60</sup>

Applying this reasoning to *Dental Examiners* could allow agencies with diverse, cross-market membership to evade state supervision despite their ability to reach anticompetitive outcomes with similar ease as boards with a majority of active market participants. To take a simple hypothetical, say a board consisting of three dentists, three orthodontists, and a consumer member appointed by the governor is considering a monthly maximum-hour limit on all licensed dentists. The limit is ostensibly designed to reduce dentists' fatigue and improve patient safety.<sup>61</sup> This output-limiting regulation, while likely good for dentists to the extent it increases the price of dental services, will harm consumers for that same reason. Although the regulation will have little to no effect on the orthodontists, given that the demand for braces and the like is weakly correlated to the price of dental services, orthodontists have little incentive to vote against the regulation.<sup>62</sup> So long as there is an understanding that the dentists will protect the orthodontists' finan-

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<sup>59</sup> See Scholars' Brief, *supra* note 53, at 13–14 & nn.8–9 (describing the composition of the board and noting that only the raisin-marketing program was at issue, not the entire statute authorizing the Commission). Most of the Commission members at the time of the challenged action came from different produce subsectors — prunes and apricots, peaches, citrus fruit, and vegetables — while the other two represented consumers and commercial handlers. *See id.* at 14 n.9 (citing *Liberal Prorate Board Named*, *supra* note 55).

<sup>60</sup> Professors Phillip Areeda and Herbert Hovenkamp describe the Commission in *Parker* as unambiguously meeting the supervision requirement. *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 221e, Wolters Kluwer (last updated May 2015) ("In *Parker*, supply and price were set under the active supervision of the state even though initially they were suggested by private parties."). But the presence of state supervision in *Parker* is of questionable value in evaluating its relationship with *Dental Examiners* because, at the time of the former case, the Court had not yet articulated the active-supervision requirement. *See* Herbert Hovenkamp, *Rediscovering Capture: Antitrust Federalism and the North Carolina Dental Case*, CPI ANTITRUST CHRON., Apr. 2015 (2), at 12–13, <https://www.competitionpolicyinternational.com/file/view/7367> [<https://perma.cc/2XBZ-ZZU6>].

<sup>61</sup> The dentists' ability to impose this regulation depends on obtaining state-action immunity. A group of private actors generally cannot self-regulate, even if its stated goal is safety or another facially benign public interest goal. *See, e.g.,* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 424 (1990) (rejecting lawyers' public interest justification for group boycott); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692–93 (1978) (rejecting engineers' safety justification for agreement not to bid competitively).

<sup>62</sup> This is not to mention the noneconomic, interpersonal incentives a board member may have to agree with anticompetitive self-regulation even where it does not benefit her own market directly. *Cf. Zapata Corp. v. Maldonado*, 430 A.2d 779, 787 (Del. 1981) (suggesting that "empathy" may affect the soundness of a corporate board's decisionmaking).

cial interests in the future,<sup>63</sup> there may be no functional difference between the regulations produced by a half-dentist, half-orthodontist board and those passed by a board dominated by dentists.<sup>64</sup>

Furthermore, a narrow understanding of active market participation would conflict with the Court's shift in modern antitrust doctrine toward functional standards. To take one example, the Sherman Act's condemnation of "combination[s] . . . or conspirac[ies] in restraint of trade"<sup>65</sup> requires that the alleged conspirators be "separate economic actors pursuing separate economic interests."<sup>66</sup> The Court has held that a parent company cannot conspire with its wholly owned subsidiary,<sup>67</sup> but it explicitly left open the question of whether agreements between parents and partially owned subsidiaries were immune from antitrust scrutiny.<sup>68</sup> The Court also took a decidedly functionalist approach in successively overruling cases that had categorically condemned vertical intrabrand restraints (agreements between firms at different levels of a market) as per se violations of the Sherman Act.<sup>69</sup> It evaluated the typical competitive effects of three common vertical agreements and held that the more flexible "rule of reason" review should be applied in suits challenging each.<sup>70</sup>

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<sup>63</sup> When it comes to this sort of mutual understanding, it should be remembered that the immunity-related question of whether a board must be actively supervised is separate from the substantive antitrust question of whether the members of the board have actually agreed to take a certain anticompetitive action. In other words, the relevant question is one of *motivation* (are the board's decisions driven by the private financial incentives of active market participants?), not one of coordination.

<sup>64</sup> This logic can be extended to hypotheticals involving even more fragmented boards: nine doctors, each representing a different surgical specialty, have little incentive to restrain each other's proposed anticompetitive regulations.

<sup>65</sup> 15 U.S.C. § 1 (2012).

<sup>66</sup> *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2212 (2010) (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 769 (1984)).

<sup>67</sup> See *Copperweld*, 467 U.S. at 771 ("A parent and its wholly owned subsidiary have a complete unity of interest.")

<sup>68</sup> See *id.* at 767. Lower courts are split on the issue of partially owned subsidiaries. Compare, e.g., *Direct Media Corp. v. Camden Tel. & Tel. Co.*, 989 F. Supp. 1211, 1217 (S.D. Ga. 1997) (holding parent could not conspire with 51%-owned subsidiary), with *Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc.*, 677 F. Supp. 1477, 1486 (D. Or. 1987) (restricting *Copperweld's* ruling to 100%-owned subsidiaries). In the context of corporate control, Delaware courts take a similarly functionalist approach in determining whether a controlling shareholder exists. See *In re Crimson Expl. Inc. Stockholder Litig.*, No. 8541-VCP, 2014 WL 5449419, at \*10 (Del. Ch. Oct. 24, 2014) ("[T]he cases do not reveal any sort of linear, sliding-scale approach whereby a larger share percentage makes it substantially more likely that the court will find the stockholder was a controlling stockholder.")

<sup>69</sup> See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007). Because antitrust law is primarily concerned with protecting *interbrand* competition among horizontal competitors, law and economics scholars have long pushed for courts to take a more flexible approach with — if not per se *legalize* — vertical intrabrand restraints. See Einer Elhauge, *Harvard, Not Chicago: Which Antitrust School Drives Recent U.S. Supreme Court Decisions?*, COMPETITION POL'Y INT'L, Autumn 2007, at 59, 60, 66.

<sup>70</sup> See *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58–59 (1977) (holding vertical nonprice restraints subject to rule of reason); *State Oil Co. v. Khan*, 522 U.S. 3, 7 (1997) (same for

If future courts should not interpret *Dental Examiners* to require a majority of active market participants in the precise market being regulated, then how should they interpret it? An ideal approach would require state supervision of the hypothetical dentist-orthodontist board — where there is a risk of “back-scratching” — but would not call for supervision of boards that are unmotivated by private gain.<sup>71</sup> One option is to treat active market participation as an open-ended factual question to be litigated at the outset of any antitrust suit against a regulatory board. To be sure, significant difficulty and administrative cost can inhere in applying flexible standards rather than rigid rules; the former approach is not always preferable.<sup>72</sup> While the costs of a flexible, fact-dependent standard do not necessarily suggest that courts should adopt some sort of alternate *rule*,<sup>73</sup> there may be some middle ground that mitigates the risks of an open-ended standard while maintaining flexibility. For example, courts could develop a rebuttable evidentiary presumption for cases against boards that are not made up of a majority of active participants in the market affected by the challenged regulation. The plaintiff could be required to show that the board members who actively participate in a market within the board’s jurisdiction — but outside the market covered by the challenged regulation — have some incentive to go along with the active market participants’ decisions notwithstanding those decisions’ anti-competitive consequences.<sup>74</sup>

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vertical maximum price fixing); *Leegin*, 551 U.S. at 882 (same for vertical minimum price fixing). For restraints that are not illegal per se (that is, condemned without an inquiry into their actual effects on competition), courts apply the rule of reason: the court will weigh the pro- and anti-competitive effects of a restraint and will condemn it only if, on net, it harms competition. *See, e.g., Leegin*, 551 U.S. at 886.

<sup>71</sup> That is, a purely open-ended approach could be overinclusive to a degree that undermines the federalism concerns embodied in the state-action immunity doctrine. In the same way that the dentists and orthodontists may vote for each other’s anticompetitive regulations, non-market-participant regulators likely make decisions that favor their campaign donors and lobbyists, who may themselves be market participants. But as Justice Alito argued in dissent, peeling back state-action immunity may not be the soundest method of addressing that latter sort of regulatory capture. *See Dental Exam’rs*, 135 S. Ct. at 1123 (Alito, J., dissenting).

<sup>72</sup> And vice-versa. For a classic examination of the tradeoffs, see Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985). Justice Alito’s pro-rule dissent drew on a criticism often leveled at standards: parties will be unsure whether their conduct is subject to liability. *See Dental Exam’rs*, 135 S. Ct. at 1122–23 (Alito, J., dissenting).

<sup>73</sup> An alternate rule would interpret “controlling number” as setting some proportion of market participants (say, one-third) or dictate the scope of the relevant market for their participation (say, by using traditional principles of market definition) as necessary for the application of the active-supervision requirement.

<sup>74</sup> Although used to answer a wholly different question, courts’ approach in evaluating — absent direct evidence of communication — whether competitors *agreed* in restraint of trade (thereby violating the Sherman Act) may serve as a helpful analog for an evidentiary presumption in the immunity context. When courts confront anticompetitive conduct undertaken in parallel by several competitors that (i) would be profitable only if taken collectively and (ii) would be implau-

And to the extent that state-action immunity seeks to balance the stringent protection of competition with federalism values, the ability of the state to immunize a board's actions by providing active supervision assuages the dissent's concerns.<sup>75</sup> Further, notwithstanding the more challenging issues courts will face, some boundaries of the majority's test are already established. *Dental Examiners* implies, for example, that a board regulating multiple markets in a situation in which, by law, only participants in the market being regulated may vote on relevant decisions, will be subject to the active-supervision requirement.<sup>76</sup>

In the end, few courts may have the chance to define the bounds of the majority's test. *Dental Examiners* will likely encourage current professional boards to ensure any potentially anticompetitive actions are directly supervised by the state. Even in the cases that do arise, courts may rarely face the most difficult questions regarding the composition of boards — most are in fact controlled by a majority of active market participants in direct competition with each other.<sup>77</sup> But the courts that do face the issue should keep in mind the functionalist nature of antitrust law and not unduly narrow the Court's holding.

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sible to coordinate without an agreement, courts will infer a hidden agreement between the competitors. See, e.g., *Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 409–12 (1921). With parallel conduct that would be profitable *regardless* of whether the competitors were acting interdependently, courts generally do not infer an agreement. See, e.g., *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596–97 (1986). Courts could plausibly draw on these principles in formulating a presumption against market-participant control: for example, by holding that plaintiffs can rebut the presumption only by showing that the boards' decisions are inexplicable without a back-scratching story.

<sup>75</sup> See *N.C. State Bd. of Dental Exam'rs v. FTC*, 717 F.3d 359, 376–77 (4th Cir. 2013) (Keenan, J., concurring) (holding that active supervision “does not impose an onerous burden on either the Board or the state,” *id.* at 376). To be sure, providing active supervision itself may not be as simple as it sounds, particularly given the judicial indeterminacy on what constitutes adequate supervision. See STATE ACTION TASK FORCE, FED. TRADE COMM'N, REPORT OF THE STATE ACTION TASK FORCE 36–37 (2003) (describing the Court's “tests for active supervision” as “lacking in specific guidance on how states should conduct their supervision”). But even assuming that the supervision requirement is not onerous for states, there remains a troubling question: will the state supervisors merely rubber-stamp the actions of the market-participant board members? Such reflexive approvals would be particularly concerning in complex fields like surgery where regulations and licensing decisions are too arcane for lay lawmakers to evaluate. Thankfully, even for the most arcane boards, nonexpert state supervisors would probably be able to catch the most anticompetitive actions and, if that is the case, requiring supervision should improve on a situation where such decisions would be otherwise entirely unreviewed.

<sup>76</sup> This implication follows from the majority's rule that immunity does not apply where the *decisionmakers*, as opposed to merely the “members,” are active market participants. See *Dental Exam'rs*, 135 S. Ct. at 1114; see also Scholars' Brief, *supra* note 53, at 10–11 (noting that only dentists could vote on dentist-licensing decisions and that the two nondentist board members were not involved in the cease-and-desist campaign).

<sup>77</sup> See Edlin & Haw, *supra* note 5, at 1103 (“Our study of the composition and powers of all occupational licensing boards in Florida and Tennessee revealed that license-holders active in the profession have a majority on 90% of boards in Florida and 93% of boards in Tennessee.”).