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State Occupational Licensing Reform and the Federal Antitrust Laws: Making Sense of the Post-*Dental Examiners* Landscape

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OVERVIEW

During the 2016 presidential election, employment was a significant issue for U.S. voters. A year later, there remains strong bipartisan interest in lowering barriers to job growth. Many view state occupational licensing reform, which would ease the burdens placed on millions of Americans who require a state license to perform work, as part of the solution to this problem.

The federal antitrust laws have emerged as an important factor in the national licensing reform discussion. In *North Carolina Board of Dental Examiners v. Federal Trade Commission* ("*Dental Examiners*"),[1] the U.S. Supreme Court was asked to decide whether unsupervised state licensing and regulatory boards controlled by private market participants are immune from federal antitrust scrutiny under the Court's state-action doctrine. It answered in the negative, opening the door to future federal antitrust challenges to anticompetitive conduct by state boards. State and federal policymakers have since proposed legislative responses to *Dental Examiners*, some of which would grant federal antitrust immunity to state boards in exchange for substantive occupational licensing reform by state legislatures.

With the *Dental Examiners* decision now more than two years old and legislative proposals garnering increased attention, the AAI believes it is an appropriate time to examine the implications of the Court's opinion and the merits of various reform proposals in light of the history and policy underlying the state-action doctrine.

This white paper is divided into five parts. Parts I-III examine the legal and political fallout from *Dental Examiners* and contrast the legislative goals of state officials and licensing reform proponents. Part IV traces the legal history of the state-action doctrine and identifies key policy considerations underlying the Supreme Court's jurisprudence in this area. Part V discusses the implications of these policy considerations for the ongoing occupational licensing reform debate.

The white paper's principal observation is that the policies underlying the state-action doctrine can help guide policymakers in resolving key disputes likely to arise and persist during the political battle over licensing reform. Specifically, the paper concludes as follows:

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[1] 135 S.Ct. 1101 (2015).

- Calls to soften or eliminate the state-action doctrine's active-supervision requirement should be rejected. Active state supervision is essential if the federal antitrust laws are to be displaced.

- Calls to immunize state boards dominated by private market participants from antitrust treble damages are based on unsubstantiated fear. Case law developments provide no evidence that boards will be wrongfully exposed to excessive litigation costs or treble damages liability under *Dental Examiners*. States that remain concerned have ample self-help measures available to avoid potential chilling effects on legitimate board activity.

- The fact-driven nature of the active-supervision requirement creates uncertainty for states and poses an unresolved policy problem. For different reasons, legislative solutions that rely on bureaucratic restructuring or state judicial review are each imperfect. Policymakers should aspire to a balanced approach that decreases uncertainty.

- Legislative proposals that grant federal antitrust immunity in exchange for substantive changes to occupational licensing regulation ignore a basic tenet of state-action case law. Namely, the merits of state regulation are irrelevant in determining whether immunity is warranted. If states value immunity assurances over regulatory flexibility, however, the opportunity for effective legislative compromise is clear.[2]

BACKGROUND

I. *Dental Examiners* Denied Immunity to Unsupervised State Boards Controlled by Private Market Participants

The *Dental Examiners* case arose after North Carolina's state dental board received complaints about the provision of teeth whitening services by "nondentists" operating in mall kiosks, salons and elsewhere. Nearly all of the complaints came from fellow dentists rather than consumers, and suspiciously, they tended to focus disproportionately on the low prices being charged by nondentist teeth whiteners rather than any public health or safety concerns.

Notwithstanding that North Carolina law had never formally classified teeth whitening as the practice of dentistry, the dental board took up the cause. It sent at least 47 cease-and-desist letters threatening nondentist teeth whiteners with criminal liability for practicing dentistry without a license, thereby eliminating significant competition in the teeth-whitening market. The Federal Trade Commission (FTC) investigated the board's conduct as an unreasonable restraint of trade and brought a complaint alleging a violation of Section 5 of the FTC Act. The dental board asserted state-action immunity, which the FTC, and subsequently the Fourth Circuit, rejected. The dental board then appealed the immunity determination to the U.S. Supreme Court.

In a 6-3 opinion written by Justice Kennedy, the Court sided with the FTC. It held that a state licensing board on which a controlling number of decision makers are active market participants in the occupation the board regulates must be actively supervised by the state in order to invoke state-action protection from the federal antitrust laws. The dental board, which had not been actively

[2] This white paper does not endorse or oppose any specific legislative reform proposals.

supervised by a disinterested state official, therefore had to answer the FTC's complaint, notwithstanding that the FTC assumed the board acted pursuant to a clearly articulated state policy to displace competition.

II. *Dental Examiners* Was an Unexceptional Holding with Exceptional Consequences

Although *Dental Examiners* quickly caused a legal and political uproar, it amounted to a modest and predictable doctrinal development. Prior to the decision, categories of eligibility for state-action immunity had already been firmly established for decades. The Court distinguished between (1) acts of "the state itself," which include the state legislature and state supreme court[3]; (2) acts of inferior municipal or "sub-state" entities, which include state and local governmental or regulatory bodies possessed of authority delegated by the "state itself"[4]; and (3) acts of private parties, which may be enlisted by the state or a municipal or sub-state entity in carrying out governmental mandates.[5]

Each of these three categories of potential antitrust defendants has to overcome qualitatively different hurdles to successfully claim immunity. Acts of the "state itself" are automatically immune, *ipso facto*.[6] Acts of inferior municipal and "sub-state" entities are immune if they are undertaken pursuant to a clearly articulated state policy to displace competition.[7] And acts of private parties are immune if they are pursuant to a clearly articulated state policy to displace competition and are actively supervised by the state.[8]

At most, the doctrinal impact of *Dental Examiners* was to marginally alter the dividing line between the second and third categories. In one view, the Court extended the active-supervision requirement to a subset of agencies controlled by private market participants, thereby expanding the category of entities treated like private parties and contracting the category of entities treated like sub-state entities. In another, it did no more than sharpen the dividing line between "public" and "private" actors that was already in place, if perhaps thinly drawn.[9]

The minor change, or clarification even, nonetheless ignited a firestorm because of its potential impact on a very large swath of state boards. In Florida and Tennessee, for example, 90% and 93% of occupational boards, respectively, were under the majority control of private professionals.[10]

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[3] Hoover v. Ronwin, 466 U.S. 558, 567-68 (1984). Acts of the Governor's office likely also constitute "the state itself." *See* IA Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 227, at 104-05 (4th ed. 2013).

[4] City of Lafayette, La. v. Louisiana Power & Light Co., 435 U.S 389, 413 (1978); Town of Hallie v. City of Eau Claire, 471 U.S. 34, 39 & n.10 (1985); *see also* FTC v. Phoebe Putney Health System, Inc., 568 U.S. 216, 225 (2013).

[5] California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105-06 (1980); *see* Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 56 (1985).

[6] *Hoover*, 466 U.S. at 567-68.

[7] *Town of Hallie*, 471 U.S. at 39. Although it squarely addressed municipal entities in *Town of Hallie*, the Supreme Court has never explicitcly held that publicly controlled "sub-state" entities are exempt from *Midcal*'s active-supervision requirement. But it has suggested as much in dicta. *Id.* at 39, n.10; *see also City of Lafayette*, 435 U.S. at 413; *Phoebe Putney*, 568 U.S. at 225. Lower courts also have consistently held that such entities need not be supervised. *See* Areeda & Hovenkamp, *supra* note 3, ¶ 227a, at 222 (citing cases).

[8] *Midcal*, 445 U.S. at 105.

[9] *Cf.* I Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 227b, at 501 (2d ed. 2000) (suggesting, 17 years prior to *Dental Examiners*, that "[w]e would presumably classify as 'private' any organization in which a decisive coalition (usually majority) is made up of participants in the regulated market").

[10] Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust*

State officials were immediately concerned that denying federal antitrust immunity to unsupervised state boards would lead plaintiffs' lawyers to declare open season on the state treasury. The boards and individual board members, meanwhile, feared increased costs and aggravation from an onslaught of nuisance suits, or worse, personal liability for massive treble damages awards. Collectively, states and boards also worried that the threat of liability and reputational exposure would deter qualified volunteer experts from serving in essential regulatory positions critical to protecting citizens' health and safety.[11] And even if state boards could be adequately staffed with practicing volunteers, they might be chilled in implementing their core missions, foregoing necessary and appropriate regulatory actions for fear of being sued for antitrust violations.

III. *Dental Examiners* Has Activated Two Constituencies with Contrasting Legislative Reform Goals

A. The States Have Sought a Clear Pathway to Antitrust Immunity for Privately Controlled Boards

Bracing for a threatened wave of attacks, one of the states' first steps after *Dental Examiners* was to seek advice from the FTC on how to protect their boards from antitrust liability. The staff of the FTC's Bureau of Competition issued guidance explaining that states have a variety of options. First, they can create regulatory boards that serve only in an advisory capacity, or they can staff regulatory boards exclusively with persons who have no financial interest in the regulated occupation. Second, they can simply satisfy the state-action test by clearly articulating their anticompetitive policies and actively supervising their privately controlled boards. Third, if they do not wish to restructure or actively supervise their boards, the FTC suggested that "[a] state legislature may, and generally should, prefer that a regulatory board be subject to the requirements of the federal antitrust laws."[12]

Attorneys' general also promptly began issuing formal or informal advisory opinions and other guidance in response to the decision. The Governor of Oklahoma, Mary Fallin, was one of the first to take definitive action. She issued an Executive Order in July 2015 requiring all privately controlled boards to submit "all non-rulemaking actions" to the Office of the Attorney General for review.[13] The same month, the Connecticut legislature passed a bill giving widespread supervisory authority over certain boards to the Department of Public Health.[14] In congressional testimony in 2016, however, the Solicitor General of Wisconsin warned that "it may take years for many States to decide what steps they will take."[15]

Scrutiny?, 162 U. Pa. L. Rev. 1093, 1103, app. 1157-64 (2014).

[11] *See, e.g.*, David L. Dennis, Chair, Fl. Bd. of Accountancy, Letter to The Honorable Rick Scott (Mar. 1, 2016) (on file with the author) (expressing worry over litigation costs and treble damages and warning that a majority of board members would reconsider serving if it "exposed their personal net worth to catastrophic financial risk").

[12] Fed. Trade Comm'n, Bur. of Comp., FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants 2-3 (Oct. 2015), https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf [hereinafter "FTC Staff Guidance"].

[13] *See License to Compete: Occupational Licensing and the State Action Doctrine: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Judiciary Comm.*, 114th Cong. 11 (Feb. 2, 2016) (testimony of Misha Tseytlin, Solicitor General of Wisconsin) [hereinafter "Tseytlin Testimony"] (quoting Okla. Gov. Mary Fallin, Exec. Order 2015-33 (July 17, 2015)).

[14] *Id.* at 12 (citing S.B. 1502, 2015 Conn. Leg., June Sp. Sess., Pub. Act 15-5 (eff. July 1, 2015)).

[15] *Id.* at 10.

In more recent legislative sessions, bills in response to *Dental Examiners* have been enacted in Maryland, Mississippi, Ohio, Montana and Tennessee.[16] Bills have also been introduced in Alabama, Florida, Illinois, Nebraska, New Jersey, North Dakota, and Texas.[17] The proposed and enacted measures vary in scope and take a variety of approaches, including to create new supervisory entities as part of comprehensive occupational licensing reform; to task different publicly controlled boards, attorneys general offices, or other state officials with performing supervisory functions using designated procedures; and in some instances to indemnify board members against damages liability.[18]

B. Occupational Licensing Reform Proponents Have Sought Substantive Changes to State Law

Beyond the walls of state legislatures and attorneys general offices, however, public discourse has shifted. Many policymakers have focused less on the narrow doctrinal and liability questions presented by *Dental Examiners* and more on a broad critique of the patchwork national system of state occupational licensing laws. The groundwork for the shift was laid in part in a provocative 2014 law review article by Professors Aaron Edlin and Rebecca Haw Allensworth, which the Court had cited in its *Dental Examiners* opinion. Edlin and Allensworth, drawing heavily on prior empirical work by economists Morris Kleiner and Alan Krueger, documented how state occupational licensing boards had "eclipsed unionization as the dominant organizing force of the U.S. labor market."[19] Licensing boards, which they dubbed "cartels by another name," had governed only 5% of American workers in the 1950s, but by 2013 they lorded over nearly a third of the American workforce.[20]

In December 2016, the Obama Administration's Treasury Department, Council of Economic Advisors, and Labor Department released a report advocating for the lessening of occupational licensing burdens on workers, with an exhaustive review and supplementation of the empirical economics literature. Although the report concluded that occupational licensing plays an important role in protecting consumers and ensuring quality in many fields, it highlighted studies suggesting that occupational licensing does not improve quality or public health and safety; leads to higher prices for consumers; diminishes market entry; leads to higher wages for licensed incumbents; and may depress interstate worker mobility.[21]

The Obama White House team also reviewed and supplemented the Kleiner & Krueger data using information from the Census Bureau, including to look narrowly at individual professions. They found that two-thirds of the fivefold growth in licensing from the 1960s to 2008 came from an

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[16] *See* Emily Myers, Litigation, Legislation and Policy – Two Years of Reaction to NC Dental, 2 NAGTRI J. 23, 24-25 (Sept. 6, 2017), http://www.naag.org/publications/nagtri-journal/volume-2-issue-3/litigation-legislation-and-policy-two-years-of-reaction-to-nc-dental.php.

[17] *See 2017 Update: Counseling Professional Licensing Boards After NC Dental*, NAAG (Mar. 23, 2017), http://www.naag.org/nagtri/nagtri-courses/webinars/webinar-library/state-action-immunity-part-2.php (last visited Sept. 15, 2017) (providing primer, video webinar, powerpoint, and extra materials, including links to bills).

[18] *See generally* Myers, *supra* note 16; NAAG, *supra* note 17.

[19] Edlin & Haw, *supra* note 10, at 1102.

[20] *Id.* at 1096 (citing Morris M. Kleiner & Alan Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. Lab. Econ. S173, S198 (2013)).

[21] U.S. Dep't of Treasury, Off. of Econ. Pol'y et al., Occupational Licensing: A Framework for Policymakers 13-16 (July 2015) [hereinafter "White House Report"].

increase in the number of licensed professions rather than the changing composition of the workforce during that time. This suggests that licensing has expanded considerably into new sectors. They also found that states impose licensing requirements at drastically different rates, ranging from a low of 12 percent of workers in South Carolina to a high of 33 percent in Iowa. This suggests states are not treating the same occupations equivalently.[22]

Unprecedented attention to occupational licensing's hazards, coupled with the Supreme Court's skeptical attitude toward federal antitrust immunity, gave rise to political opportunity that has drawn bipartisan interest. A variety of federal legislative proposals have been put forward, including several that have been introduced as bills in Congress. An important first step was the ALLOW Act, which was introduced in the Senate in July 2016 and the House in November 2016. The bill proposes to create a comprehensive occupational licensing scheme for the District of Columbia.[23] It requires the establishment of an "Office of Supervision of Occupational Boards" and prescribes the office's structure, duties, responsibilities, staffing requirements, and review procedures. It also prescribes rights, responsibilities, procedures, review mechanisms, review standards, burdens of proof, and reporting requirements to facilitate licensee and other challenges to board actions and other aspects of occupational licensing laws.[24]

Earlier this year, the Restoring Board Immunity Act of 2017 ("RBI Act") was introduced in both houses. This bill, which is the first to explicitly trade federal antitrust immunity for state occupational licensing reform, proposes to adopt a federal scheme for states that is substantially similar to what the ALLOW Act proposes to adopt for the District of Columbia.[25] Rather than foist federal policy on sovereign states unwillingly, however, the RBI Act offers states a pathway to immunity from Sherman Act prosecution in exchange for their voluntary adoption of the federal scheme. The RBI Act also offers states a second pathway to immunity, which is to adopt a system of state judicial review that allows complainants to challenge the basis for an occupational licensing regulation or to seek injunctive relief against the enforcement of an occupational licensing law. To qualify for immunity using either pathway, the state board's action must be "authorized by a non-frivolous interpretation of the occupational licensing laws" and the state must adopt a legislative policy to "displace competition through occupational licensing laws only if less restrictive alternatives to occupational licensing will not suffice to protect consumers."[26]

IV. The Supreme Court's State-Action Doctrine Is a Compromise Between Federalism and Antitrust Principles

The state-action doctrine is the Supreme Court's traditional mechanism for determining whether federal antitrust immunity is warranted in the occupational licensing board context. It represents the

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[22] *See id.* at 20-21, 23; *id.* at 4 ("Estimates suggest that over 1,100 occupations are regulated in at least one State, but fewer than 60 are regulated in all 50 States.").

[23] Alternatives to Licensing that Lower Obstacles to Work Act ("ALLOW Act"), S. 3158, 114th Cong. (2016); H.R. 6312, 114th Cong. (2016).

[24] ALLOW Act S. 3158 §§ 205-208 (2016).

[25] Restoring Board Immunity Act ("RBI Act"), S. 1649, 115th Cong. §§ 4-6 (2017); H.R. 3446, 115th Cong. §§ 4-6 (2017); *compare* RBI Act S. 1649 § 5 *with* ALLOW Act S. 3158 §§ 205-208.

[26] RBI Act S. 1649 §§ 5(a)(1)-(2). A less restrictive alternative to occupational licensing is defined to include options ranging from market competition to private certification, provision of a civil cause of action, enforcement of deceptive trade practices acts, inspections, bonding or insurance, registration, and government certification, among other things. *Id.* §§ 3(4)(A)-(C).

Court's compromise between two competing goals: the desire to protect states' sovereign democratic political processes and the desire to protect the national policy favoring competition embodied in the federal antitrust laws.

A. Private Actors Must Sometimes Be Immunized for States to Regulate Effectively

The state-action doctrine originated in *Parker v. Brown* in 1943. A raisin grower had challenged a Depression-era California statute that restricted competition and fixed prices in agricultural commodities produced in the state. The Court refused to apply the Sherman Act, holding that "nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."[27] The Court explained that "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."[28] In this case, the state "as sovereign" had "imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit."[29]

In the aftermath of *Parker*, the Court came to realize that state-action immunity must sometimes extend beyond public officials to include private actors involved in anticompetitive activity pursuant to a state regulatory scheme. Otherwise, plaintiffs could thwart state policy simply by suing the private actors, and *Parker*'s holding would be "reduce[d] . . . to a formalism." [30] In *Midcal* in 1980, the Court articulated the modern two-prong test whereby private actors are immune under the state-action doctrine if the challenged restraint is "clearly articulated and affirmatively expressed as state policy" and the challenged conduct is "actively supervised by the State itself."[31] The Court has since explained that the two elements of the *Midcal* test have a "close relation" in that "[b]oth are directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy."[32]

The active-supervision requirement in particular "stems from the recognition 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.'"[33] The requirement thus "prevents the State from frustrating the national policy in favor of competition by casting a 'gauzy cloak of state involvement' over what is essentially private anticompetitive conduct."[34] It is "designed to ensure that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies."[35]

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[27] Parker v. Brown, 317 U.S. 341, 350-51 (1943).

[28] *Id.* at 351.

[29] *Id.* at 352.

[30] *Southern Motor Carriers*, 471 U.S. at 57.

[31] Calif. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) (internal quotation omitted).

[32] *Id.* at 636.

[33] Patrick v. Burget, 486 U.S. 94, 100 (1988) (quoting *Town of Hallie*, 471 U.S. at 47) (brackets in original).

[34] *Southern Motor Carriers*, 471 U.S. at 57 (quoting *Midcal*, 445 U.S. at 106).

[35] *Patrick*, 486 U.S. at 100-101.

B. The Federal Antitrust Laws Are Not to Be Set Aside Lightly

Although the Court's state-action cases recognize that preserving state sovereignty in regulatory decisionmaking is essential to our federalist system of government, they also recognize that federal antitrust law is "a central safeguard for the Nation's free market structures" and "'as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.'"[36] The Court has therefore held that "state-action immunity is disfavored."[37]

In addition, the Court has refused to presume that the application of the federal antitrust laws necessarily interferes with state sovereignty. Rather, it reasons that "[c]ontinued enforcement of the national antitrust policy grants the States more freedom, not less, in deciding whether to subject discrete parts of the economy to additional regulations and controls."[38] The Court therefore insists that "no conflict between state and federal law be inferred unless it is clear that an exemption is necessary to make the state's regulatory program work."[39]

C. States Are Allowed to Substitute Regulation for Market Competition But Are Not Allowed to Abandon Markets to Private Parties

Because the state-action doctrine seeks to promote the national policy favoring competition, and also promote states' rights to set aside that policy, it brings into "potential conflict . . . policies of signal importance."[40] Courts must not give states too much leeway in displacing the antitrust laws, or they risk undermining the national policy favoring competition. But they must not be too restrictive of states' freedom of action, or they risk undermining federalism principles.

The state-action doctrine represents "the Court's effort to thread this needle."[41] Its fundamental compromise is to allow accountable public officials to make the political value judgment to substitute anticompetitive state regulation for market competition, but not to allow states merely to abandon markets to the unsupervised discretion of politically unaccountable private actors.[42] Thus, "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."[43] It "may not confer antitrust immunity on private persons by fiat."[44] But "it may displace competition with active state supervision if the displacement is both intended by the State and implemented in its specific details."[45]

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[36] *Dental examiners*, 135 S. Ct. at 1109 (quoting United States v. Topco Associates, Inc., 405 U.S. 596, 610 (1972)).

[37] F.T.C. v. Ticor Title Ins. Co., 504 U.S. 621, 636 (1992).

[38] *Id.* at 632.

[39] Areeda & Hovenkamp, *supra* note 3, ¶ 221d2, at 59; *see* Cantor v. Detroit Edison Co., 428 U.S. 579, 597 (1976) (regulation does not give rise to an implied exemption unless "exemption [is] necessary in order to make the regulatory Act work, 'and even then only to the minimum extent necessary'").

[40] *City of Lafayette*, 435 U.S at 400.

[41] Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 Yale L.J. 486, 500-01 (1987).

[42] Areeda & Hovenkamp, *supra* note 3, ¶ 226, at 180.

[43] *Parker*, 317 U.S. at 351.

[44] *Ticor*, 504 U.S. at 633.

[45] *Id.*

At first blush, it may seem counterintuitive that the state-action doctrine gives states the greater power to ensure anticompetitive outcomes through regulation but not the lesser power to merely risk anticompetitive outcomes by setting aside the federal antitrust laws.[46] But this is actually "a relatively sensible compromise between the judiciary's obligation to respect the results of the democratic process at the state level and its obligation to respect that same process at the national level."[47] *Midcal* "seeks to immunize action taken by the state *qua* state, but to bar delegation to private parties of the power to restrain competition."[48]

ANALYSIS

V. The State-Action Doctrine Offers Valuable Lessons for the Ongoing Occupational Licensing Reform Debate

The policies underlying the state-action doctrine, including its respect for federalism, its respect for the national policy favoring competition, and its basic compromise allowing states to replace but not merely annul the antitrust laws, have important implications for the ongoing occupational licensing debate. They can be useful to policymakers in resolving key issues likely to arise and persist during the political battle over legislative reform. Four such issues, and the relevant lessons from the Court's state-action cases, are discussed below.

A. Should the Active-Supervision Requirement Be Softened or Eliminated?

1. Active Supervision Burdens States' Federalism Interests

One potential challenge for occupational licensing reform involves a tension that arises in state-action cases involving delegations of sovereign authority to private parties. As discussed above, the state-action doctrine allows states to enlist private parties in carrying out anticompetitive state regulatory initiatives, but it requires that state officials make themselves politically accountable for doing so. It also resolves doubts or ambiguities about political accountability in favor of the continuing application of the antitrust laws. When this accountability is achieved by requiring active state supervision, however, each act of regulatory delegation to private parties requires a corresponding increase in devotion of the state's public resources, so it can monitor the delegees.

Commentators have noted that this aspect of the active-supervision requirement limits states' choices in how to structure their regulatory affairs and "makes the process of state and local government less efficient"[49] by "encourag[ing] states to adopt duplicative regulatory structures."[50] Accordingly, the Solicitor General of Wisconsin has argued that Congress should eliminate the active-supervision requirement statutorily, or at a minimum give each state "the sovereign right to choose for itself the type and level of supervision for its own State boards," in the interests of both efficiency and "sovereign dignity."[51]

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[46] *Dental Examiners*, 135 S. Ct. at 1111.

[47] Garland, *supra* note 41, at 501.

[48] *Id.*

[49] John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 Harv. L. Rev. 713, 733–34 (1986).

[50] Tseytlin Testimony, *supra* note 13, at 13 (citing Frank Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. L. & Econ. 23, 30 (1983)).

[51] *Id.*

2. Robust Active Supervision Is Essential If the Antitrust Laws Are to Be Displaced

The argument that federalism principles should allow states to forego supervision of privately controlled boards, or to forego an active form of supervision, is badly mistaken. First, it is wrong to suggest there is anything problematic in allowing states to displace the federal antitrust laws, on the one hand, but requiring them to assume political responsibility for doing so, on the other. Federalism requires deference to anticompetitive market decisions made by governments, not by private individuals. Perhaps states "might wish simply to yield discretion to private [parties] to break the antitrust laws when and how they please, but that is the place where federal antitrust policy draws the line."[52] To the extent states have any federalism interest at all in structuring their regulatory affairs in a way that abandons the market to private parties, it is not a cognizable one under the Court's state-action cases.

Second, and relatedly, "under our principles of federalism, as moderated by the Supremacy Clause of the Constitution, the state has significant power to displace the federal antitrust laws and substitute *its own* regulatory judgments," but not those of private parties.[53] In our "*dual* system of government . . .[,] [a]ll sovereign authority within the geographical limits of the United States resides either with the Government of the United States, or with the States of the Union. *There exist within the broad domain of sovereignty but these two.*"[54] In other words, the Constitution does not recognize any sovereign interest in protecting private regulation of commercial conduct. On the contrary, it has been treated suspiciously under the Sherman Act since 1890.

Third, the state-action doctrine recognizes an important difference between a burden and a conflict. In the exacting *Midcal* criteria it employs, in according state-action immunity "disfavored" status, and in presuming that states ordinarily prefer to regulate "against the backdrop of the federal antitrust laws,"[55] the Court has repeatedly demonstrated a willingness to inconvenience sovereign states' immunity interests out of respect for the national policy favoring competition. The antitrust laws only yield to state-action immunity when their enforcement would mean that "effectuation of state policy would have been thwarted."[56] Requiring active state supervision may burden, but it does not thwart, the effectuation of any state policy.

Proposals to soften or eliminate the active-supervision requirement are contrary to the federalism bargain that the Court has struck by allowing states to replace, but not merely set aside, the federal antitrust laws.[57] The burden of state supervision is not only appropriate but necessary. The premise for allowing immunity is that "state supervision prevents the injury the antitrust laws ordinarily prevent."[58]

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[52] Areeda & Hovenkamp, *supra* note 3, ¶ 226a, at 80.

[53] *Id.* (emphasis in original).

[54] Cmty. Comm'ns Co., Inc. v. City of Boulder, 455 U.S. 40, 53 (1982) (emphasis in original; internal quotation and alterations omitted) (citing *United States v. Kagama*, 118 U.S. 375, 379 (1886)).

[55] *Phoebe Putney*, 568 U.S. at 231; *see supra* Section IV.A., B.

[56] Areeda & Hovenkamp, *supra* note 3, ¶ 221c, at 53.

[57] *See supra* Section IV.C.

[58] Areeda & Hovenkamp, *supra* note 3, ¶ 224c, at 115.

3. The New Status Quo After *Dental Examiners* Has Ancillary Benefits

The burden of robust active state supervision is not only necessary to justify immunity, but it can also have salutary effects that should serve the interests of licensing-reform proponents without unreasonably encroaching on state sovereignty. Theoretically, the resource demands engendered by the active-supervision requirement should serve as a natural check on expansive, unnecessary, and overburdensome licensing regimes, forcing states to prioritize the use of more restrictive (and expensive to administer) regimes for professions where licensing is deemed essential to promoting public health and safety. Such states may consider less restrictive (and less resource intensive) alternatives, such as certification, for other occupations.

Of course, this theory may not always hold true, because the results of the political process in a given state can lead to a variety of suboptimal outcomes that prioritize the expansion or retrenchment of occupational licensing on a basis other than public health and safety. If states are required to adopt robust active-supervision regimes, however, citizens unsatisfied with outcomes of the political process can hold identifiable state officials politically accountable and vote them out of office to effectuate change.

While calls to soften or eliminate the active-supervision requirement are easily rejected in principle, they also ignore these benefits of the new status quo after *Dental Examiners*. Absent even more effective solutions via legislative reform, *Dental Examiners* can be expected to yield higher quality supervision, better political accountability, and acceptable, natural limits on unnecessary state occupational licensing schemes.

B. Does *Dental Examiners* Require New Rules to Immunize Privately Controlled Boards and Board Members from Treble Damages Liability?

1. Treble Damages Pose the Risk of Chilling Beneficial Regulatory Conduct or Depleting the Public Fisc

The stakes are raised in state-action cases because the costs of both false negatives and false positives are high. Wrongly denying an antitrust claim to victims of exclusionary or collusive board conduct can harm competition, consumers, and workers, and it allows private actors to commandeer the power of the state to injure its citizens. Wrongly allowing an antitrust challenge can chill the state's right to regulate in our federalist system, chill potentially beneficial regulatory behavior, and threaten the state treasury.

These dynamics pose unique challenges for antitrust enforcement in the state-action context, particularly with regard to the Clayton Act's treble damages remedy. Unlike in traditional antitrust cases, the source of funding for treble damages matters. Most policymakers agree, for example, that courts should not require states to transfer taxpayer-funded treble damages awards from the state treasury to private businesses when government economic policies go awry.[59] The antitrust laws are famously "a consumer welfare prescription"[60]; it would be perverse to use them to extract wealth from consumer taxpayers because of misdeeds by their elected officials or governmental agents.[61]

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[59] *Id.* ¶ 228c, at 234.

[60] Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979).

[61] *See City of Lafayette*, 435 U.S at 441 (Stewart, J., dissenting).

Moreover, "Nothing in the legislative history of the antitrust laws indicates congressional intent to subject state or local government to damages actions or perhaps even criminal liability for regulatory regimes subsequently found to be inconsistent with antitrust policy."[62]

However, privately controlled board and board-member payments that do not come out of the state treasury are a very different proposition. The legislative history of the Sherman Act is quite clear that Congress was very concerned about privately caused antitrust injury.[63] And as the Court explained in *Dental Examiners*, "[A]ctive market participants . . . possess singularly strong private interests" and "pose the very risk of self-dealing *Midcal*'s supervision requirement was created to address."[64] Moreover, "[t]he similarities between agencies controlled by active market participants and private trade associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules."[65]

2. There is No Evidence to Suggest Privately Controlled Boards or Board Members Are Being Wrongfully Exposed to Excessive Antitrust Risk

States, boards, and board members affected by *Dental Examiners* have cautioned that subjecting privately controlled boards to the threat of treble damages liability "will discourage dedicated citizens from serving on state agencies that regulate their own occupation."[66] Moreover, such entities and individuals arguably are at risk of being "intimidated from carrying out their regulatory obligations by threats of costly litigation, even if they might ultimately win."[67] However, both recent and past history suggests these concerns may be overblown.

In the *Ticor* case in 1992, Justice Scalia's concurrence predicted that imposing the active-supervision requirement on private firms would be "a fertile source of uncertainty and (hence) litigation" and thereby "produce total abandonment of some state programs because private individuals will not take the chance of participating."[68] Dissenting Justices Rehnquist, O'Connor, and Thomas made similar predictions.[69] But "the flood of litigation that Justice Scalia and the dissenters feared has not materialized. Overall, the post-*Ticor* case law suggests that state agencies are doing a better job of supervising regulated firms. Many of the decisions have found supervision adequate."[70]

Early indications suggest there may be similar overreaction here, too. A very large proportion of rulings issued since *Dental Examiners* have resulted in dismissal on a Rule 12(b)(6) motion, voluntary dismissal, or dismissal on summary judgment.[71] No state, board, or board member has been ordered

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[62] Areeda & Hovenkamp, *supra* note 3, ¶ 223b, at 87.

[63] *Id.* ¶ 223a, at 85.

[64] *Dental Examiners*, 135 S.Ct. at 1114.

[65] *Id.*

[66] *Id.* at 1115; *see* Dennis, Letter to the Honorable Rick Scott, *supra* note 11.

[67] Areeda & Hovenkamp, *supra* note 3, ¶ 222b, at 82.

[68] *Ticor*, 504 U.S. at 640-41 (Scalia, J., concurring).

[69] *Id.* at 641-46 (Rehnquist, C.J., dissenting); *id.* at 646-47 (O'Connor, J., dissenting).

[70] Areeda & Hovenkamp, *supra* note 3, ¶ 226c2, at 199; s*ee also id.* ¶ 227, at 34 (4th ed. Supp.).

[71] *See* Nathan E. Standley, Slide Presentation at National Council of State Boards of Nursing Discipline Case Management Conference: Antitrust and Regulatory Boards: Where Do We Go From Here? 4 (June 13, 2017), https://www.ncsbn.org/2017DCM_NStandley.pdf (reviewing 17 antitrust cases with rulings issued post-*Dental Examiners* and showing that seven were dismissed on a Rule 12(b)(6) motion, six were voluntarily dismissed, and one of the remaining four was dismissed on summary judgment).

to pay damages, and in the one "successful" case where preliminary equitable relief was granted, the plaintiffs dropped their damages claims.[72]

Many courts have held that boards and other state entities are exempt from the active-supervision requirement, either because they are not controlled by private market participants,[73] or they are only at risk of pursuing parochial public interests rather than private interests.[74] Other courts have held that the active-supervision requirement applied but was satisfied.[75] We are aware of only two cases even to survive a motion to dismiss for want of active supervision, and in one of them the district court promptly reversed itself on the defendant's motion for reconsideration.[76]

As empirical reality begins to inform states' and boards' worst fears, it is also important to remember that denial of immunity is not "tantamount to a holding that the antitrust laws have been violated."[77] In the board context in particular, "actions tend to fall into several specific categories," and "the liability concerns occasioned by *NC Dental*'s new application of the 'active supervision' requirement are not presented in most of them."[78] Ministerial acts, for example, involve "no discretionary intervention or interpretation by the active market participants sitting on the board."[79] Quasi-judicial actions, which are "the bread and butter of professional boards—on which they spend the bulk of their time—" typically affect only one professional in a market of many and therefore are unlikely to cause antitrust injury.[80] Several courts post-*Dental Examiners* have thus dismissed challenges to

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[72] *See infra* note 76.

[73] Rivera-Nazario v. Corp. del Fondo del Seguro del Estado, No. 14-1533 (JAG), 2015 WL 9484490, at *7 (D.P.R. Dec. 29, 2015); Century Alum. of S.C., Inc. v. S.C. Pub. Svc. Auth., No. 2:17-274-RMG, 2017 WL 4443456, at *6 (D.S.C. Oct. 4, 2017); Chicago Studio Rental Inc. v. Illinois Dep't of Comm. and Econ. Opp., No. 15 C 4099, 2016 WL 7213055, at *3 (N.D. Ill. Mar. 29, 2016); Campbell v. Othoff, No. 4:15-cv-00143, 2016 WL 1066287, at *3 (D.N.D. Feb. 17, 2016).

[74] Edinboro College Park Apartments v. Edinboro University Foundation, 850 F.3d 567, 578 (3d Cir. 2017); In re Processed Egg Products Antitrust Litig., No. 08-md-2002, 2016 WL 4771865, at *8 (E.D. Pa. Sept. 12, 2016). *See Town of Hallie*, 471 U.S. at 39 (municipalities are exempt from active-supervision requirement where they are only at risk of pursuing parochial public interests and not private interests).

[75] Prime Healthcare Services-Monroe, LLC v. Indiana Univ. Health Bloomington, Inc., No. 1:16-cv-00003-RLY-DKL, 2016 WL 6818956, at *8 (S.D. Ind. Sept. 30, 2016).

[76] Teladoc, Inc. v. Texas Medical Board, No. 1-15-CV-343 RP, 2015 WL 8773509, at *10 (W.D. Tex. Dec. 14, 2015) (denying motion to dismiss and refusing to confer immunity due to lack of active supervision); Veritext Corp. v. Bonin, No. 16-13903, 2017 WL 1317609, *1 (E.D. La. Apr. 10, 2017) (same), *invalidated by* No. 16-13903, 2017 WL 3279464 (E.D. La. Aug. 2, 2017) (dismissing upon reconsideration). In *Teladoc*, the plaintiffs obtained a temporary restraining order and preliminary injunction prior to defeating defendants' motion to dismiss. 112 F. Supp.3d 529, 544 (W.D. Tex. 2015). It is the only antitrust case to date in which plaintiffs successfully obtained preliminary relief. In May, the Texas legislature passed responsive telemedicine legislation with the parties' input, and the case is currently stayed pending forthcoming revisions to the Texas Medical Board's telemedicine rules. The parties plan to submit a joint voluntary dismissal motion once the rules are formally adopted. Second & Final Joint Motion to Extend Stay, Teladoc, Inc. v. Texas Medical Board, No. 1:15-cv-00343-RP (W.D. Tx. filed Aug. 29, 2017). A different judge in a different case in the Western District of Texas recently held that the Texas Medical Board was entitled to both Eleventh Amendment and state-action immunity. Allibone v. Texas Medical Board, No. 1:17-cv-00064-SS (W.D. Tex. Oct. 20, 2017).

[77] *City of Boulder*, 455 U.S. at 58 (Stevens, J., concurring).

[78] Kathleen Foote, *Immune No Longer: State Professional Boards Consider Their Options*, 30 Antitrust 55, 55 (Fall 2015).

[79] *Id.*

[80] *Id.* at 56.

boards and other state entities on the merits,[81] including because the court simply deemed the merits easier to resolve than the immunity question.[82]

Another consideration is that boards and board members may be immune on other grounds. Eleventh Amendment sovereign immunity, for example, "is the privilege of the sovereign not to be sued without its consent."[83] Immunity attaches not only to the state itself, but to sub-state entities and instrumentalities that act as an "arm of the state."[84] Some courts have held post-*Dental Examiners* that boards and board members are entitled to this immunity.[85] Indeed, in one recent post-*Dental Examiners* case, a district court granted a board and its members Eleventh Amendment immunity in a suit for injunctive relief, which is historically more difficult to obtain than Eleventh Amendment immunity in suits for damages.[86]

Certain state regulators acting in an official capacity may also enjoy "qualified immunity" from suit if their action "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[87] This common law rule typically arises in claims under 42 U.S.C. § 1983, but it has been applied to other statutes, including the Sherman Act.[88]

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[81] Conrad v. Beshear, No. 3:17-cv-00056-GFVT, 2017 WL 3470917, at *8 (E.D. Ky. Aug. 11, 2017) (no harm to competition in action against individual licensee); Turner v. Va. Dep't of Med. Assistance Svcs., 230 F. Supp.3d 498, 507, 513 (W.D.Va. 2017) (failure to plausibly plead agreement and antitrust injury); Robb v. Connecticut Board of Veterinary Medicine, 157 F.Supp.3d 130, 147 (D. Conn. 2016) (failure to plausibly plead agreement); *see also* Petrie v. Virginia Bd. of Medicine, 648 Fed. Appx. 352, 356 (4th Cir. 2016) (affirming unpublished dismissal on the merits); *Campbell*, No. 4:15-cv-00143, 2016 WL 1066287, at *3 (defendant immune but plaintiff also failed to state a plausible claim for relief).

[82] *Robb*, 157 F.Supp.3d at 147 ("With such a clear and adequate ground for dismissal based upon Defendants' substantive antitrust defense, the Court need not address Defendants' other arguments (as to immunity, abstention, or exhaustion) . . . ."); *Turner*, 230 F. Supp.3d at 513 (noting that defendant likely exempt from active-supervision requirement but dismissing on the merits). The leading antitrust treatise actually encourages courts to consider whether disposing of the antitrust merits may be easier and more expedient than resolving the immunity question, which helps illustrate the *ex ante* uncertainty problem discussed *infra*. Areeda & Hovenkamp, *supra* note 3, ¶ 228a, 227; *see infra* Section V.C.

[83] Va. Off. for Protection and Advocacy v. Stewart, 563 U.S. 247, 253 (2011).

[84] *See, e.g.*, Versiglio v. B'd. of Dental Examiners of Alabama, 686 F.3d 1290, 1291 (11th Cir. 2012) (en banc) (Board of Dental Examiners of Alabama was an "arm of the state" entitled to Eleventh Amendment immunity where Alabama state supreme court had so held).

[85] Rodgers v. Louisiana Board of Nursing, 665 Fed. Appx. 326, 330 (5th Cir. 2016) (no need to perform state-action analysis where board was immune on Eleventh Amendment sovereign immunity grounds); Allibone v. Texas Medical Board, No. 1:17-cv-00064-SS (W.D. Tex. Oct. 20, 2017) (both board and individual board members entitled to Eleventh Amendment immunity to the extent claims seek non-injunctive and non-declaratory relief); Jemsek v. North Carolina Medical Board, No. 5:16-CV-59-D, 2017 WL 696721, at *6 (E.D.N.C. Feb. 21, 2017) (Eleventh Amendment immunity bars all claims against both board and individual board members for completed violations).

[86] *Jemsek*, No. 5:16-CV-59-D, 2017 WL 696721 at *6; *see* Ex Parte Young, 209 U.S. 123 (1908) (although state officials acting in official capacity are protected from damages, they may be subject to suit for prospective declaratory and injunctive relief).

[87] Pearson v. Callahan, 555 U.S. 223, 231 (2009).

[88] *See, e.g.*, Affiliated Capital Corp. v. City of Houston, 735 F.2d 1555, 1569-70 (5th Cir. 1984) (mayor of Houston enjoyed qualified immunity from Sherman Act claims); *but see Veritext,* No. 16-13903, 2017 WL 1317609, at *1 (refusing to grant qualified immunity in suit against board members acting in official capacities), *invalidated on other grounds,* No. 16-13903, 2017 WL 3279464 (E.D. La. Aug. 2, 2017).

Finally, as the Court noted in *Dental Examiners*, "the States may provide for the defense and indemnification of agency members in the event of litigation."[89] Indeed, some states have proposed legislation to do so,[90] although other states' constitutions may prevent effective indemnification.[91]

Of course, indemnification does not solve the problem of taxpayers being financially responsible for antitrust violations committed by financially interested board members.[92] Moreover, broad indemnification provisions may create moral hazard by giving board members freedom to use the power of the state to adopt self-interested anticompetitive programs. On the other hand, with the state on the hook, it may be motivated to rigorously supervise indemnified board members to prevent them from adopting anticompetitive programs that do not serve the public interest. And indemnification is often structured to mitigate moral hazard by denying coverage when violations are found to be intentional.[93]

3. Damages Immunity for Boards is Unwarranted at This Time

All of the preceding analysis suggests that no special rules are needed to immunize privately controlled boards from treble damages at this time. Only two cases have survived a motion to dismiss for lack of active supervision. One was immediately reversed and the other is being resolved through legislative reform. Even of the remaining post-*Dental Examiners* challenges to boards, which were not affected by *Dental Examiners* insofar as they were not decided on active-supervision grounds, the vast majority have been dismissed at early stages of litigation, with no indications of excessive costs. No court post-*Dental Examiners* has awarded damages or permanent injunctive relief against a privately controlled board or its members. Only one court has awarded preliminary injunctive relief.

Eleventh Amendment and qualified immunity not only may afford multiple layers of added protection, but they create additional litigation questions that should serve to deter specious claims (by raising their cost). And while states and boards nonetheless incur costs when they successfully defeat non-meritorious claims, the Supreme Court's federalism-antitrust compromise arguably does not prevent states from being burdened in this way.[94] Moreover, those states and boards concerned about non-trivial litigation costs or deterring volunteer experts from serving on boards have ample self-help measures available, including to restructure boards or to have them serve in an advisory capacity. They may also indemnify board members.

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[89] *Dental Examiners*, 135 S. Ct. at 1115. Boards also may obtain private liability insurance. *See, e.g.*, NC Gen. Stat § 93B-16(a).

[90] *See, e.g.*, S. 582, 2017 Sess. (Fla. 2017); S. 271, 2016 Reg. Sess. (W. Va. 2016) (enacted).

[91] *Occupational Licensing: Competition and Regulation: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the House Judiciary Comm.*, 115th Cong. 10 (Sept. 12, 2017) (testimony of Sarah Oxenham Allen, Sen. Ass't Att'y Gen, Off. of the Va. Att'y Gen.) [hereinafter "Allen Testimony"].

[92] *See supra* notes 59-61 and accompanying text. The Supreme Court recently clarified that indemnification provisions "do not alter the real-party-in-interest analysis for purposes of sovereign immunity," and the "analysis turn[s] on where the potential *legal* liability [lies], not from whence the money to pay the damages award ultimately [comes]." Lewis v. Clarke, 137 S.Ct. 1285, 1292-94 (2017) ("The critical inquiry is who may be legally bound by the courts adverse judgment, not who will ultimately pick up the tab."); *see also id.* at 1293 n.4 (distinguishing scenario where a judgment "*must* be paid out of the state treasury" from the (voluntary) indemnification at issue) (emphasis in original)).

[93] *See, e.g.*, W. Va. SB 271 § 30-9-3(h) (good faith required); NC Gen. Stat. §§ 143-300.3, 300.6 (defense and indemnification not provided in the case of "actual fraud, corruption, or actual malice"). Liability insurance also raises moral hazard problems, but they are similarly ameliorated to some extent by good faith requirements.

[94] *See supra* Section V.A.2.

C. Is It Possible to Have Active Supervision of Boards While Preserving Meaningful Immunity for States?

1. States Do Not Know in Advance Whether Their Supervision is Sufficiently Active

A legitimate policy problem is that the active-supervision requirement creates uncertainty for states. "The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; and the mere potential for state supervision is not an adequate substitute for a decision by the State. Further, the state supervisor may not itself be an active market participant." [95]

"In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case."[96] State officials are required to "have *and exercise* power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy."[97] And government review "extends not only to the general regulatory scheme, but to the particular details."[98] If challenged, a private actor can "claim the *Parker* exemption only by showing that the practice at issue was brought to the attention of the regulatory agency, that the agency considered the practice with the requisite degree of attention, and that the agency then approved it."[99]

Because the active-supervision inquiry is contingent and fact-driven in this way, states cannot be sure *ex ante* whether immunity will ultimately apply and protect state actors from a future federal antitrust challenge.[100] Insofar as the federalism interest protected by the state-action doctrine is preserving sovereign states' freedom of action, the *post hoc* nature of the immunity determination arguably provides cold comfort. It also requires states to account for the risk of federal antitrust prosecution at the operative moment of regulatory decisionmaking.

Under the Court's federalism bargain, states arguably should have a reliable *means* of displacing the federal antitrust laws when doing so is necessary to effectuate state policy. Otherwise they may be "prevented by the antitrust laws alone from supplanting those laws."[101] At the same time, however, there is no substitute for political accountability. Courts cannot solve the *ex ante* uncertainty problem by relying exclusively on a procedural checklist to confer immunity, or there would be no "realistic assurance" that the state-action doctrine shelters "only the particular anticompetitive acts of private parties that, in the judgment of the State, *actually* further state regulatory policies."[102]

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[95] *Dental Examiners*, 135 S.Ct. at 1116-17.

[96] *Id.* at 117.

[97] *Patrick*, 486 U.S. at 101 (emphasis added).

[98] Areeda & Hovenkamp, *supra* note 3, ¶ 226c2, at 198.

[99] *Id.*

[100] *See, e.g.*, In the Matter of Kentucky Household Goods Carriers Assn., Inc., 2005-1 Trade Cases ¶ 74,833, Fed. Trade Comm'n. No. 9309 (June 21, 2005), *aff'd* 199 Fed. Appx. 410 (6th Cir. 2006) (no active supervision where state imposed duty on ratemaking association to ensure "just and reasonable" and not "excessive" rates, but "the record shows that, in practice, the [association's] review . . . has been exceedingly limited"); *see also Ticor*, 504 U.S. at 646-47 (O'Connor, J., dissenting).

[101] Areeda & Hovenkamp, *supra* note 3, ¶ 221d8, at 67.

[102] *Patrick*, 486 U.S. at 101 (emphasis added).

2. There Are No Perfect Solutions to the *Ex Ante* Uncertainty Problem

(a). *Bureaucratic Restructuring Has Benefits but Does Not Solve the Basic Problem*

Policymakers have struggled in vain to thread this needle. In response to *Dental Examiners*, several states have given umbrella agencies, the state office of the attorney general, or specific state officials responsibility for supervising boards. The RBI Act also delineates a detailed, prescriptive supervisory scheme for all states. To the extent such bureaucratic restructuring makes it harder for privately controlled boards to regulate in their private self-interest indiscriminately, it is a substantial improvement and vindication of the Court's reasoning in *Dental Examiners*. These measures also can undoubtedly benefit consumers and workers by making state officials politically accountable for the actions of privately controlled boards.

However, the bureaucratic-restructuring approach fails to resolve the *ex ante* uncertainty problem for states. Putting strong supervisory processes in place perhaps improves the odds that a state will satisfy the active-supervision requirement, but if the state does not re-populate the board to give control to financially disinterested members, or limit the board to serving in an advisory capacity, the process may break down. On any given set of facts, the bureaucracy may fail to actually deliver the supervision that the Court requires. Indeed, to the extent the RBI Act's congressional supervision standard asks states to do more than the Court's judicial supervision standard requires, without resolving the *ex ante* uncertainty issue, it is hard to see why states would avail themselves of the RBI Act's immunity offer rather than the Court's.[103]

Another shortcoming of the bureaucratic restructuring approach is that it could lead to low quality review. Particularly if the state officials tasked with supervising a given board lack subject matter familiarity in the board's regulatory domain, there is a risk that state officials may defer to a privately controlled board's decisions in practice, despite nominally reviewing actions in accordance with prescribed review mechanisms. This could amount to an end run around the Court's prohibition on "rubber stamp" review as basis for conferring immunity,[104] although it is arguably tolerable so long as a politically accountable state actor affords the requisite level of attention.

(b). *Relying on State Judicial Review Solves the Problem but Creates a Host of New Questions*

One question to arise in the aftermath of *Dental Examiners* is whether state judicial review of a board decision can satisfy the active-supervision requirement. In *Teladoc, Inc. v. Texas Medical Board*, which involved a Sherman Act challenge to a Texas Medical Board regulation limiting competition, the board argued that it was actively supervised because its rulemakings and disciplinary actions were

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[103] *See supra* notes 23-26 and accompanying text (explaining how RBI Act conditions immunity on implementing prescriptive regulatory regime or judicial review mechanism). The RBI Act is not entirely clear on whether it envisions states continuing to have the choice to satisfy the Supreme Court's judicially crafted active-supervision standard, or if instead the bill contemplates a singular new congressional active-supervision standard that would become states' only pathway to satisfying the *Midcal* supervision requirement. If the latter, this seems objectionable and would nullify decades of Supreme Court law.

[104] *See Ticor*, 504 U.S. at 638-39.

subject to state judicial review.[105] The court disagreed, siding with plaintiffs who sought to provide telehealth services in competition with Texas doctors. The court held that the nature of the available judicial review was insufficient under the circumstances, because it was limited in scope, did not entail consideration of whether the action was in accord with state policy, and did not provide for modifications of the board's rulemakings or actions (as opposed to wholesale rejection or acceptance). Other courts have also refused to find active supervision where state judicial review was similarly limited in nature.[106]

Nevertheless, the Supreme Court has remained open to the possibility that state judicial review could satisfy the active-supervision requirement.[107] This prospect holds at least limited promise. If, on a different set of facts, a more robust form of state judicial review could meet the active-supervision standard, it would enable states to provide "realistic assurance" *ex ante* that a policy is the "state's own." States could put a procedural mechanism in place at the time they enact legislation which would assure consumers and workers that a *substantive* review of board conduct will occur. And if states can know in advance that supervision will later prove qualitatively sufficient, they can know in advance that their immunity assertions will later pass muster accordingly.

In an amicus brief in *Teladoc*, the AAI acknowledged that a well-established right to invoke judicial review should theoretically be capable of satisfying the active-supervision standard, but with several caveats.[108] First, the substance of judicial review must be sufficiently rigorous, without "*Chevron*" deference or other presumptions favoring the board, and it must be attuned to the conflicting economic interests of private regulators. Second, judicial review would have to be available before a board's ruling has any anticompetitive effect, or it would scarcely amount to "supervision."[109]

Even if these conditions are met, prospective state judicial review still may be inadequate in certain circumstances. For example, the Justice Department or FTC may not have standing to seek state judicial review on certain facts, and consumers often cannot reasonably be expected to take it upon themselves to do so. This can render state judicial review ineffectual. On the other hand, motivated victims like the telehealth providers in *Teladoc* are well positioned to take advantage of judicial review to ensure that a board's acts accord with state policy.[110]

One of the novel aspects of the RBI Act is that it attempts to delineate a rigorous form of judicial review to satisfy the active-supervision standard in the board context. Among other things, the Act affords immunity to states that put state judicial review procedures in place only if the procedures

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[105] Teladoc, Inc. v. Texas Medical Board, No. 1-15-CV-343 RP, 2015 WL 8773509, at *10 (W.D. Tex. Dec. 14, 2015).

[106] *See* Pinhas v. Summit Health, Ltd., 894 F.2d 1024, 1030 (9th Cir. 1989); Shahawy v. Harrison, 875 F.2d 1529, 1535-36 (11th Cir. 1989); *but see* Allibone v. Texas Medical Board, No. 1:17-cv-00064-SS, slip op. at 6-7 (W.D. Tex. Oct. 20, 2017) (active supervision satisfied where there was review of disciplinary proceedings before administrative law judge, subject to state judicial review, for compliance with state legislative requirements).

[107] *See* Areeda & Hovenkamp, *supra* note 3, ¶ 227a, at 34 (4th ed. Supp. 2017).

[108] Brief of the American Antitrust Institute as Amicus Curiae in Support of Neither Party 16-17, Teladoc, Inc. v. Texas Medical Bd., 112 F.Supp.3d 529 (W.D.Tex. 2015), *available at* https://www.antitrustinstitute.org/sites/default/files/AAI%20Amicus%20Brief%20Teledoc.pdf [hereinafter "AAI Teladoc Brief"].

[109] *Id.* at 17.

[110] The Court has stated that the "mere potential for state supervision" is inadequate. *Dental Examiners*, 135 S. Ct. at 1116; *Ticor*, 504 U.S. at 638. But if the absence of adequate supervision is attributable to the antitrust plaintiff's failure to invoke its right to judicial review, then this failure to exhaust state remedies should not vitiate a state's immunity.

allow for injunctive relief, allocate burdens of proof in a specified way, provide for fee shifting, and adhere to specified evidentiary requirements and standards of review. However, it is not clear whether the RBI Act would accept judicial review as a surrogate for active supervision in suits by the federal antitrust agencies or consumers. If it would, this may not be sufficient to check abuses by privately controlled boards. While judicial review may be *capable* of affording active supervision, it will be ineffectual if it is unlikely to come to fruition when it is needed.

3. Legislative Reform Should Seek Balance, Even if It Is Unattainable

As the preceding analysis illustrates, *ex ante* uncertainty presents a vexing puzzle. Some degree of uncertainty is clearly tolerable under the Court's federalism-antitrust balance, and the current scope of the uncertainty problem is questionable given the very large proportion of board actions that do not implicate any serious antitrust risk.[111] However, *Dental Examiners* clearly increased the level of uncertainty facing states by applying the contingent and fact-driven active-supervision requirement to a large swath of state boards. And states have a legitimate federalism interest in minimizing unnecessary uncertainty.

An ideal solution would capture the benefits of both bureaucratic restructuring and reliance on state judicial review, while eliminating some of the drawbacks. Policymakers should seek a solution that (1) assures consumers, workers, and other putative plaintiffs that a substantively sufficient review for accordance with state policy will timely and meaningfully occur; (2) is administered by disinterested, politically accountable state officials; and (3) facilitates meaningful review by such officials; but that also (4) would allow states to satisfy the active-supervision requirement at the time of a rulemaking or board-related action; (5) assures states that their immunity assertions will later pass muster if challenged; and (6) is commensurate with the burdens traditionally placed on states under the Court's federalism-antitrust balance.

D. Should Federal Antitrust Immunity Be Used to Induce Substantive Changes to State Law?

1. The Immunity Inquiry Is Supposed to Ignore the Merits of State Regulation

Another serious challenge for occupational licensing reform is that the application of state-action immunity is supposed to be completely divorced from the merits of anticompetitive state regulation. This is true even where state regulation may be contrary to the public interest or the product of regulatory capture. As the Court explained in *Ticor*, "the 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."[112] In other words, "The question is not how well state regulation works but whether the anticompetitive scheme is the State's own."[113]

In *Omni*, the Court explained that "*Parker* was not written in ignorance of the reality that determination of 'the public interest' in the manifold areas of government regulation entails not

[111] *See* Foote, *supra* note 78, at 58.
[112] *Ticor*, 504 U.S. at 634.
[113] *Id.* at 635.

merely economic and mathematical analysis but value judgment, and it was not meant to shift that judgment."[114] The Court added that "[f]ew governmental actions are immune from the charge that they are 'not in the public interest' or in some sense 'corrupt.' . . . The fact is that virtually all regulation benefits some segments of the society and harms others; and that it is not universally considered contrary to the public good if the net economic loss to the losers exceeds the net economic gain to the winners."[115] The Court reasoned that, if a state actor's decision to regulate anticompetitively "is made subject to *ex post facto* judicial assessment of the 'public interest,' with personal liability for [public] officials a possible consequence," it "will have gone far to 'compromise the States' ability to regulate their domestic commerce.'"[116]

The case law is thus clear that if politically influential incumbents in a given state can persuade the legislature to create an anticompetitive, inefficient, protectionist, or otherwise harmful licensing scheme, private board members carrying out the state's mandate are nonetheless immune from the federal antitrust laws if the state clearly articulates an intent to displace competition and actively supervises the conduct. Victims are left to seek recourse in state tribunals or through the political process.

2. Effective Legislative Compromise Is Nonetheless Attainable

The RBI Act seems to ignore the tenet of the Court's state-action jurisprudence which holds that the merits of state regulation are irrelevant to assessing state-action immunity. By requiring states to adopt a substantive legislative policy and conditioning immunity on a prescriptive federal supervisory scheme, it arguably makes Congress "the effective regulator of the state's own regulatory mechanism—and this happens whether or not the state itself has provided an adequate policing mechanism."[117] States may well prefer to use more efficient, less bureaucratic, or simply different means of combatting the proliferation of occupational licensing laws, or of actively supervising boards.

This aspect of the RBI Act arguably undermines "one of the great virtues of federalism," which is "the opportunity it affords for experimentation and innovation, with freedom to discard or amend that which proves unsuccessful or detrimental to the public good."[118] The states' federalism interest in crafting their own legislative policies and supervision mechanisms suggests that it would make more sense to determine federal antitrust immunity by reference to the *Midcal* factors, not the content of state legislative policy or compliance with a prescriptive federal supervisory scheme.

At the same time, however, the freedom to experiment in the active-supervision context is a key contributor to the aforementioned *ex ante* uncertainty problem. To the extent states prioritize certainty over regulatory flexibility, they may in fact welcome a federal solution that provides the requisite immunity assurances in exchange for a commitment to provide more robust active supervision.

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[114] *Omni*, 499 U.S. at 377.

[115] *Id.*

[116] *Id.* (quoting *Southern Motor Carriers*, 471 U.S. at 56).

[117] Areeda & Hovenkamp, *supra* note 3, ¶ 224d, at 120.

[118] Bates v. State Bar of Arizona, 433 U.S. 350, 403 (1977) (Powell, J., dissenting).

Early indications suggest that states and boards may be unsatisfied with the federalism-antitrust balance reflected in the RBI Act.[119] If they are likely to opt out of the immunity-for-supervision exchange delineated in the bill (assuming they are permitted to do so[120]), the RBI Act will not have its desired effect. Nevertheless, if Congress is willing to revise its approach, a winning compromise remains possible.

CONCLUSION

All signs continue to suggest that state occupational licensing reform may be an idea whose time has come. But the devil remains in the details. The Supreme Court's state-action jurisprudence, refined over seventy-five years, offers useful guidance in crafting effective legislative solutions:

- Robust active state supervision of privately controlled boards continues to be necessary, and it will not thwart state policies.

- Treble damages immunity for private board members can be left out of the equation for the time being, given case law developments and self-help measures available to states.

- *Eliminating* uncertainty for states is an unattainable goal but a worthy aspiration, and reduced uncertainty should be fairly included in legislative compromise.

- Conferring immunity based on the merits of state regulation would be unprecedented, but it nonetheless has the potential to accommodate the legitimate interests of consumers, workers, and regulators alike.

Pending bills may not yet have struck the right balance. If Congress chooses to continue pursuing effective compromise, it should use a balanced and bipartisan approach.

[119] *See* Allen Testimony, *supra* note 91.

[120] *See supra* note 103.