Antitrust, Capture, Federalism and the *North Carolina Dental* Case

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In *North Carolina Dental* a divided Supreme Court agreed with the Fourth Circuit and the Federal Trade Commission that a state dental board's restriction on the performance of teeth whitening services violated the antitrust laws because it was not adequately supervised by a sufficiently independent state decision maker.[1] The regulatory board in question was controlled by a majority actively engaged in the practice of dentistry.[2] A state statute provided that this Board was "the agency of the State for the regulation of the practice of dentistry,"[3] and it had authority over licensing as well as power to discipline the unlawful practice of dentistry.[4] Nothing in the statute, however, identified teeth whitening as part of the practice of dentistry.[5] Under the Act, six of the Board's eight members must be actively practicing dentists, and these members were elected by other licensed dentists practicing in North Carolina. A seventh member was required to be a dental hygienist, and a eighth "consumer" member was appointed by the Governor.[6]

Dentists in North Carolina began whitening teeth in the 1990s, earning substantial fees. In the early 2000s, however, nondentists entered into competition with them and charged lower fees. The Board received numerous complaints from dentist members. Most of these complaints were about the lower fees, although some also complained of possible harm to consumers.[7] The Board began an investigation conducted by several dentist members of the Board, but not the hygienist or consumer members. Beginning in 2005 the Board sent out numerous cease-and-desist letters to nondentists performing teeth whitening services.[8] At that point the FTC filed its complaint, challenging the rule limiting teeth whitening to licensed dentists and the use of the cease and desist letters. It concluded that the Board's conduct was a trade restraint prohibited by Section 5 of the FTC Act and was not immunized by the "state action" doctrine.[9] The Fourth Circuit agreed.[10]

The Supreme Court rejected the Board's argument that because its members "were invested by North Carolina with the power of the State," its actions required neither authorization

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[1] *N. C. State Board of Dental Examiners v. FTC*, 135 S.Ct. ___, 2015 WL 773331 (Feb. 25, 2015) (per Justice Kennedy, joined by C.J. Roberts and Justices, Ginsburg, Breyer, Sotomayor, and Kagan). Justice Alito dissented, joined by Justices Scalia and Thomas.

[2] Id. at ___.

[3] Id. at ___, quoting N. C. Gen. Stat. Ann. §90–22(b) (2013).

[4] *N. C. Dental*, 135 S.Ct. at ___, citing Id., §90–40.1..

[5] Id. at ___.

[6] Id. at ___.

[7] Id. at ___.

[8] Id. at __.

[9] 152 F.T.C. 75 (2011).

[10] *N.C. State Bd. of Dental Examiners v. F.T.C.*, 717 F.3d 359 (4th Cir. 2013).

nor supervision in order to be free of antitrust scrutiny. "Here, the Board did not receive active supervision by the State when it interpreted the Act as addressing teeth whitening and when it enforced that policy by issuing cease-and-desist letters to nondentist teeth whiteners."[11] A grant of "state action" immunity applies only to "exercise[s] of the State's sovereign power.[12] That status "requires more than a mere facade of state involvement, for it is necessary in light of *Parker's* rationale to ensure the States accept political accountability for anticompetitive conduct they permit and control."[13] The Court then observed:

> Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability..... So it follows that, under *Parker* and the Supremacy Clause, the States' greater power to attain an end does not include the lesser power to negate the congressional judgment embodied in the Sherman Act through unsupervised delegations to active market participants.
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> ... *Parker* immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own.[14]

Speaking then of the immunity requirements of clear articulation (authorization) and active supervision,[15] the Court observed:

> The first requirement—clear articulation—*rarely* will achieve that goal by itself, for a policy may satisfy this test yet still be defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated.... Entities purporting to act under state authority might diverge from the State's considered definition of the public good. The resulting asymmetry between a state policy and its implementation can invite private self-dealing. The second *Midcal* requirement—active

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[11] Id. at __.
[12] Id. at __, citing *Columbia v. Omni Outdoor Advertising, Inc*., 499 U.S. 365, 374 (1991).
[13] 135 S.Ct. at __, citing *FTC v. Ticor Title Ins. Co*., 504 U.S. 621, 636 (1992); and referring *Parker v. Brown*, 317 U.S. 341 (1943).
[14] Id. at ___, citing ¶226; Einer Elhauge, The Scope of Antitrust Process, 104 Harv. L. Rev. 667, 672 (1991); and Merrick B. Garland, Antitrust and State Action: Economic Efficiency and the Political Process, 96 Yale L. J. 486, 500 (1986).
[15] From *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980). See 1A Antitrust Law ¶¶224-227 (4th ed. 2013).

> supervision—seeks to avoid this harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity."[16]

Turning to the active supervision requirement, the Court noted that municipalities were exempted from the requirement[17] because "there is little or no danger" that they might be involved "in a private price fixing arrangement."[18] Rather, the principal danger from municipal regulation was that the municipality might "seek to further purely parochial public interests at the expense of more overriding state goals."[19] In addition, municipalities are "electorally accountable" entities, and they exercise regulatory power "across different economic spheres, substantially reducing the risk that they would pursue private interests while regulating any single field."[20] In the case of municipalities, the *Omni* case had gone one step further, rejecting subjective tests for "corruption" that would have forced a "deconstruction of the governmental process" by engaging in "ad hoc and ex post questions of their motives for making particular decisions."[21]

After examining its earlier decisions, the Court drew a "clear" lesson that "*Midcal*'s active supervision test is an essential prerequisite of *Parker* immunity for any nonsovereign entity—public or private—controlled by active market participants."[22] As a result, the need for active supervision by the state itself turns "not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in retraining trade."[23] Further, "State agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing *Midcal*'s supervision requirement was created to address."[24]

The court then suggested that the Court's statement in *Hallie* "that active state supervision would also not be required" of state agencies was dicta, given that the defendant in that case was "an electorally accountable municipality with general regulatory powers and no private price fixing agenda." As a result, the municipality resembled a traditional state agency rather than "specialized boards dominated by active market participants."[25] As a result,

> The similarities between agencies controlled by active market participants and private trade associations are not eliminated simply because the former are given a formal

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[16] *N.C. Dental*, 135 S.Ct. at __(emphasis added), referring to *Midcal*, *supra*.
[17] See 1A Antitrust Law ¶223 (4th ed. 2013).
[18] *N.C. Dental*, 135 S.Ct. at ___.
[19] Id. at ___, quoting *Hallie v. Eau Claire*, 471 U.S. 34, 47 (1985).
[20] 135 S.Ct. at ___.
[21] Id. at __, citing *Columbia v. Omni Outdoor Advertising, Inc*., 499 U.S. 365, 374 (1991).
[22] Id. at __, referring *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980). See 1A Antitrust Law ¶221f (4th ed. 2013).
[23] Id. at ___.
[24] Id. at ___, citing 1A Antitrust Law ¶227 (4th ed. 2013).
[25] Id. at ___. Further, "[t]here is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm." Id. at ___, quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S.492, 500 (1988).

> designation by the State, vested with a measure of government power, and required to follow some procedural rules.[26] *Parker* immunity does not derive from nomenclature alone. When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. The Court holds today that a state board on which a controlling number of decision makers are active market participants in the occupation the board regulates must satisfy *Midcal*'s active supervision requirement in order to invoke state-action antitrust immunity.[27]

Then Court then discussed and rejected the Board's argument that the prospect of treble damages would discourage citizens from public participation on such boards. It noted, first, that this particular case brought by the FTC was not such a situation, and provided no occasion to address the separate question of citizen members' liability for damages. Further, the state could always provide for defense and indemnification of such members.[28] The Court also rejected the argument that the Board's decision in this case should be treated as a type of "peer review," which is "essential to the provision of quality medical care," and that the spectre of antitrust damages would act as a deterrent to such review. The Court concluded that this argument is more properly addressed to the "legislative branch," apparently referring to either Congress or the relevant state legislature.[29]

Finally, the Court observed that active supervision was lacking in this case. Teeth whitening was not covered by the statutory provisions creating the Board and stating its duties and powers. Further, in this case the Board had acted against putative offenders by means of unilaterally sent "cease-and-desist letters threatening criminal liability, rather than any of the powers ... that would invoke oversight by a politically accountable official."[30] It probably did not mean to suggest that a more judicially-involved process, such as a request for a preliminary injunction, would have qualified as supervision unless judicial review in that context actually reached the competitive merits of the requested action. Nevertheless, the Court also stated:

> Active supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision. Rather, the question is 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."[31]

The Court then provided a list of requirements for qualifying active supervision. *First*, the state supervisor "must review the substance of the anticompetitive decision, not merely the procedures followed to produce it."[32] Further, the relevant superivisor "must have the power to veto or modify particular decisions to ensure they accord with state policy," and the "mere

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[26] Citing *Hallie*, 471 U.S. at 39, as "rejecting 'purely formalistic' analysis."
[27] *N.C. Dental*, 135 S.Ct. at ___, citing 1A Antitrust Law ¶227 (4th ed. 2013).
[28] 135 S.Ct. at ___.
[29] Id. at __, citing Aaron Edlin and Rebecca Haw, Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?, 162 Univ. Pa. L. Rev. 1093 (2014).
[30] 135 S.Ct. at ____.
[31] Id. at ___.
[32] Id. at __, citing *Patrick v. Burget*, 486 U.S. 94, 102-103 (1988).

potential" for such supervision is inadequate.[33] Finally, "the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case."[34]

Dissent

Justice Alito's dissent found the majority's reasoning to be "based on a serious misunderstanding" of the antitrust state action doctrine.[35] For him, the Court took " the unprecedented step of holding that *Parker* does not apply to the North Carolina Board because the Board is not structured in a way that merits a good-government seal of approval."[36]

Justice Alito then stated categorically that "Under *Parker*, the Sherman Act... and the Federal Trade Commission Act... do not apply to state agencies; the North Carolina Board of Dental Examiners is a state agency; and that is the end of the matter."[37] Returning to this issue later, he concluded that the state of North Carolina had had an "agency" in mind when it passed the legislation creating the dental board.[38] "As this regulatory regime demonstrates, North Carolina's Board of Dental Examiners is unmistakably a state agency created by the state legislature to serve a prescribed regulatory purpose and to do so using the State's power in cooperation with other arms of state government."[39]

Justice Alito observed that self-regulation of dentistry long antedated the Sherman Act.[40] Further, when the antitrust laws were originally passed the scope of the Commerce Power was much narrower than it is today. "As a result, the Act did not pose a threat to traditional state regulatory activity," which generally applied only within its own borders.[41] Further, "In 1890, the regulation of the practice of medicine and dentistry was regarded as falling squarely within the States' sovereign police power." Like the majority, he also parsed earlier decisions, finding instances such as *Parker* itself that found immunity for purely private, self-interested conduct.[42] While *Midcal* had required active state supervision, the party claiming immunity in that case was a private trade association, not a state agency.[43] Justice Alito preferred to liken the dental agency in the present case to the municipality in *Hallie.* He found it "puzzling" that the majority treated the dental Board "less favorably than a municipality."[44] Municipalities, he noted, are not sovereign, while agencies can and do exercise sovereign state functions.

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[33] 135 S.Ct. at ___, citing *Patrick*, id; *FTC v. Ticor Title Ins. Co*., 504 U.S. 621, 638 (1992).
[34] 135 S.Ct. at ___.
[35] Id. at ___ (Alito, J., dissenting, joined by Justice Scalia and Thomas).
[36] Id. at ___.
[37] Id. at ___.
[38] Id. at ___.
[39] Id. at ___.
[40] Id. at ___.
[41] Id. at ___. For development and confirmation of this, see Herbert Hovenkamp, The Opening of American Law: Neoclassical Legal Thought, 1870-1970 at 296-298 (2015).
[42] 135 S.Ct. at ___, discussing *Parker v. Brown*, 317 U.S. 341, 347-351 (1943)
[43] 135 S.Ct. at ___.
[44] Id. at ___.

Analysis

Both the Court's majority and the three dissenters agreed with the conclusion in the lower tribunals that active supervision was not present. The legal conclusions they drew were starkly different. The majority believed that state authorization was "rarely" sufficient standing alone and most of the time must be accompanied by supervision.[45] The notable exceptions are municipalities and agencies in which a controlling number of decisions makers are either disinterested public officials or else persons other than active market participants. By contrast, the dissenters believed that authorization was sufficient any time the relevant actor had been designated by the state as an agency, without regard to the interested and active market participation of the agency's decision makers.

On the exemption from the active supervision requirement given to municipalities, the majority emphasized one set of points -- namely, that municipal decision making is most frequently made by disinterested public officials, that municipalities are "multi-sector," with regulatory obligations in many areas, and that most of the state action issues pertain to furtherance of excessively parochial issues rather than blatant trade restraints such as price fixing or market exclusion.[46] For the dissenters, the main significance was that municipalities were non-sovereign institutions of local government, while agencies were created in order to carry out state policy.[47] On the nature of the likely restraints, the majority's observation that municipalities rarely engage in naked price fixing or exclusion but are more likely to regulate for parochial or territorial reasons is well justified by the case law. The typical municipally imposed restraints are things like tying of electric service to waste pick-up, use of land use provisions to limit providers, or limitations on ambulance or airport taxi access.[48] By contrast, *Parker*, *Midcal*, *Goldfarb*, and *N.C. Dental* all involved participant-created price or output control that would have been per se unlawful at the time of those decisions. Further, while Justice Alito found it puzzling that the majority should treat agencies less favorably than municipalities, in fact the test that the majority created applied to both. Municipalities are entitled to regulate without independent state supervision because they act largely through elected government officials accountable through the political process.

Both sides agreed that the dental Board's actions in this case were an instance of special interest agency "capture." They drew different conclusions from that premise as well. The majority embraced and the dissent rejected a link between the state action doctrine and special interest capture. Indeed, the dissent noted that in *Parker v. Brown*, the grandparent of state action cases, the relevant decision makers were all market producers.[49]

The dissent drew strong conclusions from the fact that regulation of dentistry was traditionally an intrastate activity that the Sherman Act very likely could not have reached at the time it was passed. That changed with the Supreme Court's *Wickard* case in 1942, which brought such markets within the reach of federal law provided that they had a sufficient effect on

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[45] Id. at ___.
[46] Id. at ___.
[47] Id. at ___.
[48] For analysis of the decisions, see 1A Antitrust Law ¶223 (4th ed. 2013).
[49] 135 S.Ct. at ___.

interstate commerce.[50] What the dissent did not note is that the present case was brought under §5 of the Federal Trade Commission Act, because the FTC has no direct authority to enforce the Sherman Act. At the time of *Wickard* and *Parker,* the FTC Act reached only activities "in commerce," but thirty years later it was amended to embrace all matters "in or affecting commerce," thus tracking the *Wickard* language.[51] It is worth noting that the "business of insurance" was very tightly regulated by state law at the time of *Wickard*, but that only a year after *Parker* the Supreme Court applied the antitrust laws to insurance regulation.[52]

One portion of the dissent's argument seems anachronistic. The dissenters dwelt at some length on *Parker*, which immunized what amounted to a state-sanctioned raisin cartel without assessing any kind of supervision by a disinterested state actor.[53] For decades the Court struggled with the meaning of this decision, at one time suggesting that it required "compulsion."[54] It did not develop the modern two-prong test requiring "clear articulation" and "active supervision" (but not compulsion) until *Midcal* in 1980.[55] Already in *Goldfarb*, however, the Court held that minimum price schedules promulgated by the Virginia Bar Association were not immune, in part because no independent agency -- referring in this case to the Virginia Supreme Court -- supervised them.[56] On this point *Goldfarb* and the dissent seem quite inconsistent, and the dissent did not attempt to resolve the conflict.

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[50] Id. at __, citing *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

[51] 88 Stat. 2193, 15 U.S.C.A. §45. See H.R. Rep. No. 1107, 93 Cong., 2d Sess., 29-31 (1974).

[52] *United States v. S. E. Underwriters Ass'n,* 322 U.S. 533 (1944). See 1A Antitrust Law ¶219 (4th ed. 2013).

[53] See *N.C.Dental*, 135 S.Ct. at ___.

[54] See, e.g., *Cantor v. Detroit Edison*, 428 U.S. 579, 637 (1976) ("*Goldfarb* clarified *Parker* by holding that private conduct, if it is to come within the state-action exemption, must be not merely "prompted" but "compelled" by state action); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 791 (1975) ("It is not enough that, as the County Bar puts it, anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign."). See 1A Antitrust Law ¶217a (4th ed. 2013).

[55] *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-106 (1980).

[56] *Goldfarb v. Va. State Bar*, 421 U.S. 773, 791 (1975). The Court spoke in terms of "compulsion" as much as "supervision":

> Here we need not inquire further into the state-action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent. Respondents have pointed to no Virginia statute requiring their activities; state law simply does not refer to fees, leaving regulation of the profession to the Virginia Supreme Court; although the Supreme Court's ethical codes mention advisory fee schedules they do not direct either respondent to supply them, or require the type of price floor which arose from respondents' ctivities. Although the State Bar apparently has been granted the power to issue ethical opinions, there is no indication in this record that the Virginia Supreme Court approves the opinions. Respondents' arguments, at most, constitute the contention that their activities complemented the objective of the ethical codes. In our view that is not state action for Sherman Act purposes. It is not enough that, as the County Bar puts it, anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.

The dissenters position that once a state-created "agency" is found, state action immunity for authorized conduct is automatic is hardly a foregone conclusion from the case law. The State Bar Association in *Goldfarb* had been designated "a state agency by law" in a 1938 statute creating an integrated state bar.[57] The *Ticor* decision, which also involved state regulatory agencies, is somewhat different. There the "rating bureaus" were simply private cartels of title insurers, and the relevant state agencies rubber stamped their rate requests with little or no review.[58] It is unclear, however, why rubber stamping by the insurance agency is insufficient, given that it is an agency with the authority to make its own unsupervised decisions in this market. If it exercises by rubber stamping, that would be all the law requires under the dissenters' view.[59] In *Cantor* a state agency, the Michigan Public Service Commission, had approved a privately owned electric utility's practice of providing "free" light bulbs to utility customers. In sum, the majority's approach was hardly "unprecedented," as Justice Alito suggested.[60] Rather, it was more responsive to the Court's long list of admittedly fumbling and confusing precedents, while the dissent dwelt at length on *Parker*.

Fundamentally, the dispute between the majority and the dissent centers on the questions of "how much federalism" vs. "how much national competition policy." For the dissenters all the state need do is declare that a group of private actors is an "agency" and that is the end of the matter. Apparently, the state could simply create an agency of taxicab drivers, authorize them to select several among their members as decision makers, and then give them the authority to fix taxicab prices. This fact did not appear to trouble the dissenters because, after all, deciding to permit a taxicab cartel injures primarily the state's own citizens. The state as sovereign is competent to deal with the matter itself.

Indeed, on this score the raisin cartel in *Parker* makes a better case for non-immunity than the dentists' cartel in *North Carolina Dental*. In *Parker* nearly all of the raisins were shipped outside of the state of California, making the state's raisin growers an enormous beneficiary of the cartel while visiting the consumer harm elsewhere.[61] In *North Carolina Dental*, by contrast, one can assume that most of those purchasing teeth whitening services in North Carolina are also residents of that state. Indeed, to the extent that the cartel makes teeth cleaning more expensive there, one would expect the consumer migration to be outward rather than inward. Finally, although unstated, is the fact that states have their own regulatory provisions as well as their own antitrust laws. These can also be deployed against the anticompetitive acts of state professional associations (whether or not they are denominated "agencies") if the state legislatures or courts so choose.[62]

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[57] *Goldfarb*, 421 U.S. at 790

[58] *FTC v. Ticor title Ins. Co.*, 504 U.S. 621 (1992).

[59] Justice Scalia concurred with the Court's finding of nonimmunity in *Ticor*, but warned that the holding would produce "uncertainty and (hence) litigation." *Ticor*, 504 U.S. at 641. He gave the example of private physicians invited to particpate in a hospital peer review system and who might not find out until too late that the State's supervision was not "active" enough. Ibid.

[60] *N.C. Dental*, 135 S.Ct. at ___.

[61] See Herbert Hovenkamp, The Opening of American Law: Neoclassical Legal Thought, 1870-1970 at 297-298 (2015)

[62] See Ch. 24 of *Antitrust Law*, which details these state law provisions.

For the majority, the national policy favoring competition permits states to intervene in markets to a considerable extent, and even anticompetitively, but provided that the final decision rests with a sufficiently "public" official. It was not sufficient that the state merely designate the professional association as an "agency," leaving it to police its own conduct. Nevertheless, the state could actually permit the hypothetical taxicab companies to cartelize their market, provided that the resulting agreement was subject to public review by a disinterested decision maker. Thus the concern of the majority is to use federal antitrust law to provide a layer of transparency and more immediate political control to the process. For the dissenters even this was too much federal intervention. On this point, the majority's view seems more realistic about legislative processes. For the dissenters all that was required was the formality that the state designate the association as an agency, perhaps decades prior to the challenged action, as was so in this case.[63] By contrast, the majority insisted on public supervision of important decisions (although not day-by-day management) at the time they took effect.

The dissent also objected that the majority's identification of "capture" with control by market participants was "crude," and that determining when capture has occurred is "no simple task."[64] That observation is certainly factually correct, and political history is filled with instances in which even salaried government officials were captured by the entities that they were supposed to be regulating.[65] Perhaps the more pertinent question is whether disciplining the decision making of self interested market participants is a worthwhile activity when other decision makers who are not market participants might act improperly as well. The best answer is that even imperfect law can be better than no law at all. For example, a policy of removing drunk drivers from the road is worthwhile, even though not every accident is caused by a drunk. Self interested market participants are high likely to be compromised in favor of their own industry and may even rationalize that their decisions are best for the public as well. Salaried government officials may or may not be excessively beholden to the industries that they are intended to regulate, but capture cannot simply be presumed.

Finally, the dissent fretted that the rule adopted by the majority would increase the risk of antitrust treble damages exposure to those who serve on state agencies. While that problem seems manageable, it does have to be managed. Damages actions would seem to be almost a foregone conclusion. As the majority pointed out, the very objection launched by most dentists to nondentist teeth whitening, and which provoked the dental association's rule, was that the nondentists were charging a lower price.[66] This evidence not only creates an inference that higher prices resulted but also provides a yardstick for measuring the extent of the overcharge.

The most obvious way for state agency officials to avoid antitrust exposure is to ensure that potentially anticompetitive decision making be supervised by economically disinterested government officials. Another is to ensure that majority control over potentially anticompetitive professional decisions not be vested in market participants. A third is use of the antitrust mechanisms themselves, including the rule of reason for most professional rules that are

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[63] The statutes in question creating the dental association as an agency were passed in 1957, and amended in 1961, 1971, 1973, and 1981. See N.C.G.S.A. § 90-22, NC ST § 90-22.

[64] *N.C. Dental*, 135 S.Ct. at ____.

[65] E.g., James M. Landis, Report on Regulatory Agencies to the President Elect (1960); Herbert Hovenkamp, The Opening of American Law: Neoclassical Legal Thought, 1870-1970 at 308-309 (2015).

[66] See 135 S.Ct. at ___.

reasonably intended to promote socially valuable practices, and the per se rule for the occasional situation where a professional association oversteps, as very likely occurred in this case. It is worth noting that standard setting is ubiquitous in the American economy and is hardly limited to professional organizations. In most cases those setting standards have no immunity, but have simply learned to live within antitrust parameters. The courts, for their part, have learned to appreciate the competitive and other social values of collaborative setting of standards. As a result most, although not all, of such practices survive antitrust scrutiny.[67] Of course, this risk may be acceptable for a market participant but not for a citizen who serves as a public service.

Finally, the majority did not rule out the possibility of simple state court supervision by judges, provided that the review extended to the substance and not merely the procedure.[68] The Court approved a roughly similar process in *Hoover,* concluding that substantive review by the state supreme court acting in a quasi-legislative capacity as manager, eliminated the need for a separate supervision requirement.[69] By contrast, *Goldfarb* denied immunity after finding that the state's supreme court did not supervise the bar's practices.[70] This adjustment may require a modification of state administrative procedure acts or collateral legislation so as to provide for more substantial judicial review when a threat to competition is apparent. The court may then be empowered to appoint one or more special masters to evaluate the proposed rule.

The majority concluded that the states could readily indemnify agency members. Of course, indemnification does not remove treble damages but provides that they must be paid by the state and its taxpayers rather than the designated citizen officials themselves. That in itself, however, might be a good discipline against anticompetitive conduct.

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[67] See 12 Antitrust Law ¶¶ 2230-2235 (3d ed. 2012).
[68] See Id. at ____ ("State legislation and 'decision[s] of a state supreme court, acting legislatively rather than judicially,' will satisfy this standard...").
[69] *Hoover v. Ronwin*, 466 U.S. 558, 569 (1984).
[70] *Goldfarb v. Va. State Bar*, 421 U.S. 773, 791 (1975).