COMMENT

The Antitrust State Action Doctrine and State Licensing Boards

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INTRODUCTION

Imagine that a state board of dentistry claims that consumers could be harmed when a popular procedure such as teeth whitening is performed incorrectly. The board issues a rule prohibiting anyone other than a state-licensed dentist from offering teeth-whitening services in the state. This rule ensures that only those with the most training and experience treating teeth in the state—dentists—may perform the service.

But whatever increased safety is generated by this rule comes at two costs. First, dental hygienists, nondentist doctors, and other groups can no longer earn money from teeth whitening. Second, because the rule shrinks the number of suppliers, consumers may have to pay more for the service.

When such a rule is promulgated by a state legislature and enforced by bureaucrats, consumers and nondentist competitors often accept the state's judgment that the benefits to public safety justify the anticompetitive effects. But because the hypothetical board of dentistry is composed of practicing dentists, there is a greater fear that the professed threat to public safety is an excuse to allow dentists to enrich themselves by monopolizing the market for teeth whitening.

To continue this hypothetical, based on *In the Matter of the North Carolina State Board of Dental Examiners*,[1] imagine further that the Federal Trade Commission (FTC) and aggrieved competitors seek to defeat the board's rule by alleging that it represents a conspiracy in restraint of trade in violation of the

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1 FTC, *Opinion of the Commission*, Docket Number 9343, 2011 WL 549449.

Sherman Antitrust Act.[2] In response, the board claims that its actions are immune from antitrust liability under what is known as the state action doctrine. This doctrine, announced in *Parker v Brown*,[3] immunizes anticompetitive acts authorized by the states from federal antitrust liability.[4]

The Supreme Court has yet to determine how the state action doctrine applies to state licensing boards, but it has settled the doctrine's application to other bodies. State legislatures and state supreme courts receive automatic state action immunity for the anticompetitive actions they authorize.[5] Municipalities receive state action immunity only if the anticompetitive conduct they authorize is pursuant to a clearly articulated state policy to displace competition.[6] Private parties receive state action immunity only if their anticompetitive actions are pursuant to a clearly articulated state policy *and* are actively supervised by the state.[7]

The combination of public function and private composition in state licensing boards frustrates any easy application of the state action doctrine to their commands. Licensing boards are established by states in the form of state bars and boards of medicine, dentistry, accounting, and other professions. States authorize these agencies to regulate their respective professions by determining qualifications for licensure, implementing rules related to scope of practice, and issuing other regulations. Licensing boards are typically composed entirely or primarily of licensed professionals who continue to practice while serving on the board.[8] As units of government, boards are analogous to both state legislatures and municipalities. This suggests that their actions should either receive automatic state action immunity or be subject only to the clear articulation requirement. On the other hand, their private composition suggests that they should be treated like private parties and be subject to active supervision in addition to the clear articulation requirement.

Resolving the application of the state action doctrine to state licensing boards is especially important given the ubiquity of

2 26 Stat 209, codified at 15 USC § 1 et seq.

3 317 US 341 (1943).

4 See id at 352.

5 See id; *Hoover v Ronwin*, 466 US 558, 568 (1984) (plurality).

6 See *City of Lafayette v Louisiana Power & Light Co*, 435 US 389, 413 (1978) (plurality).

7 See *Southern Motor Carriers Rate Conference v United States*, 471 US 48, 56–57 (1985).

8 See, for example, New York Office of the Professions, *State Board for the Professions: Statutory Composition and Current Membership* (New York State Education Department Nov 4, 2011), online at http://www.op.nysed.gov/boards/bdcomp.htm (visited Dec 27, 2011).

licensing regimes. According to a study based on the 2000 census, the number of licensed occupations in states ranges from 47 to 178, with 17 states licensing over 100 occupations.[9] In California, more than 30 percent of the employed workforce is covered by licensing.[10]

Considering the enormous influence that state licensing boards collectively wield over the national economy,[11] it is not surprising that lower federal courts and the FTC have applied the state action doctrine in ways that they believe will discourage board members from issuing self-interested regulations. Although the circuit courts and the FTC are split several ways on this issue, all approaches subject licensing boards to the clear articulation requirement, and all but one subject them to active supervision as well, at least in some circumstances. Commentators have also advocated for stronger constraints on licensing board regulations, urging courts to subject boards to active supervision.[12]

This Comment argues that these approaches undermine the benefits of licensing boards, obstruct state regulation, and in some cases exacerbate the threat of self-interested behavior. The approach offered here (1) exempts licensing boards from active supervision, (2) allows them to automatically pass the clear articulation test when they act pursuant to a statutory authorization to make rules within a state, and (3) subjects them to a strict version of the clear articulation test when they implement rules specified by a legislature or state supreme court.

The first two lenient components of this approach are based on three considerations. First, the state action doctrine originates in a

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9 Morris M. Kleiner, *Licensing Occupations: Ensuring Quality or Restricting Competition?* 99–101 (W.E. Upjohn 2006).

10 Id at 102–03.

11 See J.F. Barron, *Business and Professional Licensing—California, A Representative Example*, 18 Stan L Rev 640, 643–44 (1966).

12 See Jarod M. Bona, *The Antitrust Implications of Licensed Occupations Choosing Their Own Exclusive Jurisdiction*, 5 U St Thomas J L & Pub Pol 28, 45 (2011) (urging courts to recognize that state licensing boards have "the structural incentive to expand their own monopoly" and that boards seeking to expand their jurisdiction should be subject to both the clear articulation and active supervision requirements); William S. Brewbaker III, *Learning to Love the State Action Doctrine*, 31 J Health Polit Pol & L 609, 611 (2006) ("[S]tate legislation conferring unsupervised regulatory authority on incumbent market providers should be viewed as facially preempted by federal antitrust law and hence invalid."), citing *Joint FTC/Department of Justice Hearing on Health Care and Competition Law and Policy* *38 (2003) (testimony of Clark Havighurst, Professor of Law, Duke University School of Law), online at http:// www.ftc.gov/ogc/healthcarehearings/030611ftctrans.pdf (visited Dec 27, 2011); Jared Ben Bobrow, Note, *Antitrust Immunity for State Agencies: A Proposed Standard*, 85 Colum L Rev 1484, 1498 (1985) ("[W]here there is a palpable danger that the agency will pursue private rather than public interests, antitrust immunity should be granted only if the agency [ ] establishes that its challenged conduct is actively supervised by the state.").

concern for federalism, not efficiency. The doctrine allows a state to displace the federal procompetitive norm in order to achieve a policy objective that the state believes is more important. Second, regulation through professional licensing boards offers states at least two features that commonly cited alternatives lack. Compared to regulation through public employees, licensing board regulation is cheaper for states. Compared to an optional licensing regime (also known as certification), in which unlicensed providers are allowed to operate, mandatory licensing (the type discussed in this Comment) denies consumers the ability to select services the state believes are inferior. Although paternalistic and at times inefficient, licensing represents a state policy choice. The state action doctrine was designed to protect this judgment. Finally, even if the benefits of licensing boards do not exceed their cost to the public in terms of service price, availability, and innovation, licensing remains the dominant means by which states regulate medical, dental, legal, and many other markets for professional services. Real dangers to consumers can arise in these markets. Obstructing the ability of licensing boards to regulate services when no alternative regulatory regime is in place invites harm.

The third component of this approach, subjecting board implementations of state rules to a strict clear articulation test that requires evidence of authorization for the specific type of action taken, seeks to restrain board action when the state legislature or supreme court has indicated some specifics of the regulation that it is seeking. This component acknowledges the potential harm to competition when private parties are vested with public authority. This Comment's approach aims to facilitate state regulation through licensing boards while minimizing opportunities for board members to issue self-interested anticompetitive rules.

Part I reviews the Supreme Court's state action decisions. Part II examines how the circuit courts and the FTC apply the doctrine to state licensing boards. Part III explains the theoretical advantages and disadvantages of licensing boards, reviews an analysis of empirical studies on the impact of licensing on service quality and price, and explains why it is understandable for consumers to favor licensing over other forms of regulation, despite the possibility that the aggregate economic costs of licensing may exceed its benefits.

Part IV argues that courts should apply the clear articulation test strictly when a board implements rules specified by the legislature or state supreme court, but that a board should automatically pass the test when it makes a rule pursuant to a

statutory authorization to regulate generally within a state. For example, if a statute defines the specific actions that constitute the practice of an occupation, a strict application of the clear articulation test should permit a board to take only those types of actions explicitly authorized by the statute. If, however, a statute authorizes a board to adopt all regulations it deems necessary to regulate its profession, any rules made pursuant to that authority should automatically satisfy the clear articulation test.

This Part seeks to use state licensing boards to advance the larger, normative debate over the clear articulation test. Commentators have long criticized the Supreme Court's clear articulation requirement and offered proposals for reform. For example, the FTC advocates for a stricter application of the test that would require more evidence of legislative intent before granting state action immunity.[13] In contrast, one scholar has argued that a lenient application of the test promotes the federalism principle underlying the state action doctrine by facilitating state regulation.[14]

This Comment acknowledges that the clear articulation test should be applied so as to facilitate state regulation, but it argues that both strict and lenient applications of the test can accomplish this goal. Lenient applications can facilitate regulation by relieving a legislature of the burden of specifying each area in which it wants licensed professionals to issue regulations. Strict applications can facilitate regulation by assuring a legislature that courts will not expand narrow delegations of authority to licensing boards beyond what the legislature intended. In applying the clear articulation test, courts should first determine which obstacle to delegation is greater with respect to the delegated entity. Professional members of state licensing boards have a strong incentive to expand their jurisdiction. Courts can therefore facilitate state regulation through licensing boards by adopting a strict application of the clear articulation test that requires statutory authorization of the specific type of anticompetitive act in question. An entity with less incentive to issue anticompetitive rules, such as a bureaucratic agency, may receive a more lenient application, though these bodies are not considered here.

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13 Federal Trade Commission Office of Policy Planning, *Report of the State Action Task Force* 34–36 (2003), online at http://www.ftc.gov/os/2003/09/stateactionreport.pdf (visited Dec 27, 2011).

14 Hillary Greene, *Articulating Trade-Offs: The Political Economy of State Action Immunity*, 2006 Utah L Rev 827, 830–32.

If, however, a legislature has made clear its intent to permit a licensing board more flexibility in issuing rules by granting it general rule-making authority, courts should allow an anticompetitive rule issued pursuant to that authority to automatically satisfy the test, provided that no other statute limits the board's authority with respect to the challenged conduct. This facilitates state regulation by allowing legislatures to enlist the expertise and experience of practicing professionals in formulating regulation so long as the legislatures make that intention clear.

Part V contends that licensing boards should never be subject to active supervision. Imposing this requirement unnecessarily interferes with board regulation and in some cases may discourage regulation of emerging threats. The argument in this Part is directed against an approach to antitrust immunity that has persisted in the state action literature and recently emerged in an FTC opinion subjecting a state licensing board to active supervision.[15] Several prominent scholars have contended that protection from antitrust laws should depend, at least in some circumstances, on whether the individuals who generated the challenged restraint stand to benefit financially from the restraint. Professors Phillip Areeda and Herbert Hovenkamp have recommended that courts classify as private "any organization in which a decisive coalition (usually a majority) is made up of participants in the regulated market."[16] Professor John Wiley has argued that courts should apply substantive antitrust analysis to state regulation that does not respond directly to market inefficiency if the regulation is the "product of capture in the sense that it originated from the decisive political efforts of producers who stand to profit from its competitive restraint."[17]

Similarly, Professor Einer Elhauge has asserted that "restraints on competition must be subject to antitrust review whenever the persons controlling the terms of the restraints stand to profit financially from the restraints they impose."[18]

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15 *North Carolina State Board of Dental Examiners*, 2011 WL 549449 at *10.

16 Phillip E. Areeda and Herbert Hovenkamp, IA *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 227b at 209 (Aspen 3d ed 2006).

17 John Shepard Wiley Jr, *A Capture Theory of Antitrust Federalism*, 99 Harv L Rev 713, 743 (1986). See also William H. Page, *Capture, Clear Articulation, and Legitimacy: A Reply to Professor Wiley*, 61 S Cal L Rev 1343, 1345–47, 1350–51 (1988); Matthew L. Spitzer, *Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory*, 61 S Cal L Rev 1293, 1315–18 (1988); John Shepard Wiley Jr, *A Capture Theory of Antitrust Federalism: Reply to Professors Page and Spitzer*, 61 S Cal L Rev 1327, 1337–40 (1988).

18 Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 Harv L Rev 667, 671 (1991).

In *North Carolina State Board of Dental Examiners*, the FTC drew on this literature to argue that a board of dentistry should be subject to active supervision because the board's members, a majority of whom were practicing dentists, stood to benefit financially from the anticompetitive regulations that they issued.[19] This Part demonstrates that using financial interest as a central criterion for determining state action immunity contradicts Supreme Court doctrine. To the extent that it supports subjecting state licensing boards to active supervision, it also represents a flawed policy.

The Comment concludes with an application of the proposed approach to the facts of *North Carolina State Board of Dental Examiners*. For simplicity, the term "state licensing board" refers here to licensing boards composed entirely or primarily of in-state practicing members of the regulated profession. At times, the Comment will refer to these boards as "privately composed licensing boards" to emphasize the distinction from agencies composed of bureaucrats.

I. THE STATE ACTION DOCTRINE IN THE SUPREME COURT

A. Origins

The Sherman Antitrust Act is a federal prohibition against monopolies and every "contract, combination . . . or conspiracy, in restraint of trade."[20] When private parties engage in prohibited anticompetitive behavior, they expose themselves to liability under the Act. Not all anticompetitive conduct, however, is barred by the Sherman Act. In *Parker*, the Supreme Court held that anticompetitive acts authorized by state legislatures are immune from the Sherman Act's prohibitions.[21] There, plaintiff, a raisin grower, sought to enjoin California officials from enforcing a state raisin marketing program that aimed to fix prices under the auspices of the state's Agricultural Prorate Act.[22] Although the program was anticompetitive, the Court held that the program was immune from Sherman Act challenges because the program "derived its authority . . . from the legislative command of the state."[23]

19 *North Carolina State Board of Dental Examiners*, 2011 WL 549449 at *10.

20 15 USC §§ 1–2.

21 *Parker*, 317 US at 351–52.

22 Id at 344, 346–48.

23 Id at 350.

The Court based its holding on an implied exemption from the Sherman Act.[24] Because the Act contains no language suggesting that its purpose was to restrain a state from activities directed by its legislature and the Act's legislative history, the Court declined to extend the Act to the anticompetitive conduct of states.[25] The Court reasoned that although Congress has the power to prevent states from displacing the federal procompetitive norm, respect for federalism required that Congress express such a prohibition explicitly.[26] The effect of the Court's decision was to permit a state to sacrifice competition in a market in order to achieve an alternative goal.

B. State Legislatures and State Supreme Courts

Subsequent decisions by the Supreme Court clarified how the doctrine applies to various entities. Only acts of the state as sovereign receive state action immunity.[27] State legislatures are considered sovereign.[28] State supreme courts are also considered sovereign when they act in a "legislative capacity," such as by promulgating rules governing the legal profession.[29] State legislatures and state supreme courts thus receive automatic state action immunity for any anticompetitive behavior that they authorize. For example, in *Parker*, the Supreme Court immunized the state of California from federal antitrust liability because the price-fixing scheme was an act of the state legislature.[30] In *Hoover v Ronwin*,[31] the Court also immunized the decision of the Arizona Supreme Court to deny an applicant admission to the state bar.[32]

C. Municipalities

Municipalities receive state action immunity only if their anticompetitive conduct is pursuant to a "clearly articulated and affirmatively expressed" state policy that authorizes them to displace competition.[33] The clear articulation requirement, first announced in

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24 Id at 350–51 ("[N]othing in the language of the Sherman Act or in its history [ ] suggests that its purpose was to restrain a state.").

25 *Parker*, 317 US at 350–51.

26 Id at 351.

27 See *Hoover v Ronwin*, 466 US 558, 574 (1984) (plurality).

28 See *Parker*, 317 US at 352.

29 See *Hoover*, 466 US at 568.

30 *Parker*, 317 US at 352.

31 466 US 558 (1984).

32 Id at 573 (plurality).

33 See *City of Lafayette v Louisiana Power & Light Co*, 435 US 389, 410–13 (1978) (plurality).

City of Lafayette v Louisiana Power & Light Company,[34] ensures that nonsovereign bodies claiming to act for the state as sovereign do in fact act for it.[35]

In *Lafayette*, petitioner cities, which owned and operated electrical utilities, moved to dismiss a counterclaim by a competitor private utility, Louisiana Power & Light (LP&L), alleging various antitrust offenses against the cities.[36] LP&L alleged that the cities displaced LP&L in certain locales by requiring LP&L customers to purchase electricity from the cities as a condition of continued water and gas service.[37] A plurality of the Court refused to grant the cities the same automatic state action immunity accorded to state legislatures because it held that cities are not sovereign.[38] Instead, the Court applied what is now known as the clear articulation test.[39] Finding that no state statute or other authority permitted the cities to act as they did and that the policy of the state was at best "neutral" toward such activity, the Court denied state action immunity to the cities.[40]

D. The Standard for Satisfying the Clear Articulation Requirement

The Supreme Court has struggled to define the standard for determining that a state has clearly articulated a policy to displace competition. One early state action case, decided before *Lafayette*, suggested that the challenged conduct must be compelled by the state in order to receive state action immunity.[41] *Lafayette* muddied the waters by holding that a municipality could receive immunity as long as the challenged activity was "clearly within the legislative intent."[42]

Town of Hallie v City of Eau Claire[43] and *Southern Motor Carriers Rate Conference v United States*,[44] decided on the same day, helped clarify the standard. The Court rejected the suggestion that the challenged conduct must be *compelled* by the state in order for

34 435 US 389 (1978).

35 See id at 412–13 (plurality).

36 Id at 391–92 (majority).

37 Id at 392 n 6.

38 *Lafayette*, 435 US at 411–12 (plurality).

39 Id at 410–13.

40 Id at 414–15.

41 See *Goldfarb v Virginia State Bar*, 421 US 773, 790 (1975) ("The threshold inquiry . . . is whether the activity is required by the State acting as sovereign.").

42 *Lafayette*, 435 US at 393–94 (quotation marks omitted).

43 471 US 34 (1985).

44 471 US 48 (1985).

the policy to be clearly articulated[45] and instead adopted a foreseeability standard.[46] In other words, an entity acts pursuant to a clearly articulated state policy for the purposes of receiving state action immunity as long as its anticompetitive conduct would foreseeably result from the legislature's authorization to regulate.[47]

In *Hallie*, a city had acquired a monopoly over sewage treatment services in an area and refused to extend those services to adjacent townships unless the townships agreed to be annexed by the city and to use the city's sewage collection services.[48] The Court held that statutes authorizing the city to provide sewage services and to determine the areas to be served were sufficient to satisfy the clear articulation test for the city's conduct because it was "foreseeable" that "anticompetitive effects logically would result from this broad authority to regulate."[49]

The Court applied the foreseeability standard again in *Southern Motor*. There, rate bureaus composed of motor common carriers operating in four states submitted joint rate proposals to the public service commissions in each state for either approval or rejection.[50] In three of the states, statutes explicitly permitted collective rate making by common carriers.[51] These statutes easily satisfied the clear articulation requirement. The Court then considered whether a statute in the fourth state, which did not explicitly permit collective rate making, could still satisfy the requirement.[52] In this state, a statute authorized the public service commission to regulate common carriers and to prescribe "just and reasonable" rates for those carriers to charge for the intrastate transportation of general commodities.[53] The Court held that this statute articulated an anticompetitive policy with sufficient clarity to grant state action immunity to the Commission's decision to permit collective rate making among motor common carriers because the state intended to displace price competition with a regulatory structure.[54]

Only one Supreme Court case has indicated the limit of the foreseeability standard. In *Community Communications Co v City of*

45 See *Southern Motor*, 471 US at 60–61.
46 See *Hallie*, 471 US at 42.
47 See id.
48 Id at 36–38.
49 Id at 42.
50 *Southern Motor*, 471 US at 50–51.
51 Id at 63.
52 Id.
53 *Southern Motor*, 471 US at 63, citing Miss Code § 77-7-221 et seq.
54 See *Southern Motor*, 471 US at 63–66.

Boulder,[55] the city issued an emergency ordinance prohibiting the plaintiff—assignee of a permit to conduct a cable television business—from expanding into new areas of the city for three months while the city drafted a model cable television ordinance and invited competitors to enter the market.[56] The city contended that a "home rule" amendment to the Colorado Constitution, granting the city broad powers of self-government, satisfied the clear articulation requirement for its ordinance. The Court rejected this argument, holding that a statute that expresses mere "neutrality" with respect to the challenged conduct cannot constitute clear articulation.[57]

E. Private Parties

Private parties are also eligible to receive state action immunity. If the doctrine did not protect private parties that undertake anticompetitive acts in accordance with state policy, plaintiffs could easily frustrate a state's regulatory scheme by suing the complying entities.[58] For example, if private parties were ineligible for state action immunity, the plaintiff in *Parker* could have defeated the state's marketing initiative by suing the raisin growers complying with the state's marketing program instead of the state itself.

Private parties must satisfy a two-prong test in order to receive state action immunity. Private parties who engage in anticompetitive activity receive state action immunity only if (1) they act pursuant to a clearly articulated state policy, and (2) the state actively supervises their anticompetitive conduct.[59] This test was first set forth in *California Retail Liquor Dealers Association v Midcal Aluminum*.[60] In this case, a California statute required all wine producers and wholesalers to file fair trade contracts or price schedules with the state and prohibited wholesalers from selling wine to a retailer for a price other than the one stated in the contract or schedule. When California's Department of Alcoholic Beverage Control charged Midcal Aluminum, a wholesale wine distributor, with selling below a scheduled price, Midcal filed for an injunction against California's wine pricing system, alleging a restraint of trade in violation of the Sherman Act.[61] In announcing and applying the two-prong test, the

55 455 US 40 (1982).

56 Id at 44–46.

57 Id at 54–55.

58 See *Southern Motor*, 471 US at 56–57.

59 See id; *California Retail Liquor Dealers Association v Midcal Aluminum*, 445 US 97, 105 (1980).

60 445 US 97 (1980).

61 See id at 99–100.

Court held that while the California statute satisfied the clear articulation requirement, it failed to actively supervise the trade contracts and price schedules filed by the producers and wholesalers. The state neither reviewed the reasonableness of the price schedules nor regulated the terms of the fair trade contracts.[62]

The active supervision requirement ensures that a private party's anticompetitive conduct promotes state policy and not merely the private party's interests.[63] To accomplish this purpose, the state must have and exercise the power to review the particular acts of private parties and disapprove of the acts that it does not believe are in accord with state policy.[64]

The Supreme Court has focused on three differences between private parties and municipalities to explain why the former, and not the latter, are subject to active supervision. First, the Court has emphasized that, unlike private parties, municipalities are subject to public scrutiny.[65] Municipal officers "are checked to some degree through the electoral process," and cities in some states are subject to mandatory disclosure requirements.[66] According to the court, "[s]uch a position in the public eye may provide some greater protection against antitrust abuses than exists for private parties."[67] Second, the Court focused on the fact that municipalities, as arms of the state, have authority to act on behalf of the state. Private parties have no such authority.[68] Finally, private parties, unlike municipalities, can be presumed to act for their own interests and not for those of the public.[69]

The Court's most recent state action case provided some guidance on how actively the state must supervise the anticompetitive conduct of private parties in order for those parties to receive state action immunity. In *FTC v Ticor Title Insurance Co*,[70] statutes in four states authorized private rating bureaus composed of title insurance companies to establish uniform rates for their members.[71] The FTC conceded that these statutes satisfied the clear articulation requirement, but argued that the state did not actively

62 Id at 105–06.

63 See *Patrick v Burget*, 486 US 94, 100–01 (1988) (quotation marks omitted).

64 See id at 101.

65 See *Hallie*, 471 US at 45 n 9.

66 Id.

67 Id (explaining that public disclosure requirements and electoral constraints raise a presumption that municipalities act in the public interest).

68 Id at 45, 47.

69 *Hallie*, 471 US at 45, 47.

70 504 US 621 (1992).

71 Id at 629.

supervise the companies' anticompetitive activity (joint rate setting).[72] The bureaus recommended their rates to state agencies and the rates became effective automatically if the agencies did not reject them.[73] The Court agreed with the FTC and denied state action immunity to the companies in two of the states, holding that the agencies insufficiently supervised the anticompetitive conduct.[74] In some cases, states failed to check the recommended rates for mathematical accuracy.[75] In one state, a rate came into effect despite the bureau's failure to provide data demanded by the agency. Without more robust state review, the rate setting constituted private action and was therefore ineligible for state action immunity.[76]

F. State Agencies

State agencies are not exempt from the antitrust laws simply because of their status as such.[77] The Supreme Court has not decided, however, when and how the clear articulation and active supervision requirements apply to state agencies. Although the Court has held the clear articulation requirement applicable in all of its state action cases involving agency action, it has yet to determine if all agency types must satisfy the test. Consequently, there remains a circuit split over whether at least some types of agencies are exempt from the clear articulation requirement.[78]

The Supreme Court has also not decided whether state agencies are exempt from active supervision. A footnote in *Hallie* suggested that they are, though the Court declined to decide the issue.[79] Nevertheless, the Court's case law before and after *Hallie* has never inquired into the supervision of bureaucratic state agencies.[80]

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72 Id at 631.

73 Id at 629.

74 *Ticor*, 504 US at 639–40.

75 Id at 630.

76 Id at 638.

77 *Lafayette*, 435 US at 408 ("Plainly petitioners are in error in arguing that *Parker* held that all governmental entities, whether state agencies or subdivisions of a State, are, simply by reason of their status as such, exempt from the antitrust laws.").

78 Compare *Neo Gen Screening, Inc v New England Newborn Screening Program*, 187 F3d 24, 28–29 (1st Cir 1999), with *Automated Salvage Transport, Inc v Wheelabrator Environmental Systems, Inc*, 155 F3d 59, 71 (2d Cir 1998); *Hybud Equipment Corporation v City of Akron*, 742 F2d 949, 957 (6th Cir 1984).

79 *Hallie*, 471 US at 46 n 10.

80 See, for example, *New Motor Vehicle Board of California v Orrin W Fox Co*, 439 US 96, 111 (1978); *Southern Motor*, 471 US at 50–52; *Ticor*, 504 US at 621.

The Supreme Court's application of the active supervision requirement to privately composed agencies, such as state licensing boards and state bars, is more muddled. One reading of the Court's early state action cases suggests that licensing boards are subject to active supervision. In *Goldfarb v Virginia State Bar*,[81] the Supreme Court denied state action immunity to minimum-fee schedules promulgated by local bars and enforced by the Virginia State Bar.[82] In explaining that no state statutes or state supreme court rules authorized minimum-fee schedules, the Court wrote that "anticompetitive activities must be *compelled* by direction of the State acting as a sovereign."[83] By contrast, in *Bates v State Bar of Arizona*,[84] the Supreme Court upheld restrictions on lawyer advertising because the Arizona Supreme Court itself had prescribed the restrictions and oversaw their enforcement by the state bar.[85] In upholding the restrictions, the Supreme Court held that it deemed "it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is *so active*."[86]

The significance of these cases is difficult to discern, however, because they were decided before the Court announced the active supervision test in *Midcal*.[87] Part V suggests an interpretation.

II. CIRCUIT COURT AND FTC APPROACHES TO THE STATE ACTION DOCTRINE AND STATE LICENSING BOARDS

A. The Clear Articulation Requirement

Circuit courts and the FTC always apply the clear articulation requirement to rules issued by state licensing boards. There is some disagreement, however, on how strictly courts should apply the Supreme Court's foreseeability standard for determining legislative intent.[88]

Circuit courts apply the standard more leniently than the FTC. For example, in *Earles v State Board of Certified Public Accountants*

81 421 US 773 (1975).

82 Id at 788–92.

83 Id at 791 (emphasis added).

84 433 US 350 (1977).

85 Id at 359–63.

86 Id at 362 (emphasis added).

87 *Midcal*, 445 US at 105.

88 This disagreement extends to how the standard applies to bodies other than state licensing boards. For a discussion of circuit court and commentator approaches to the question, see C. Douglas Floyd, *Plain Ambiguities in the Clear Articulation Requirement for State Action Antitrust Immunity: The Case of State Agencies*, 41 BC L Rev 1059, 1061–65 (2000).

of Louisiana,[89] the Louisiana legislature delegated to the Board of Public Accountants the power to "[a]dopt and enforce all rules and regulations, bylaws, and rules of professional conduct as the board may deem necessary and proper to regulate the practice of public accounting in the state of Louisiana."[90] The Fifth Circuit held that this delegation of general rule-making authority satisfied the clear articulation test for a Board rule that prohibited the practice of so-called "incompatible professions."[91]

The FTC criticized this decision for its application of a lenient foreseeability standard, arguing that courts should not interpret the "presence of a general regulatory regime in an industry" as synonymous with a clear articulation of an intent to displace all competition in the industry.[92]

In re South Carolina State Board of Dentistry[93] illustrates the FTC's preferred approach. In this case, the South Carolina legislature, seeking to increase children's access to preventive dental care, amended its state dental law to permit dental hygienists to provide such care to children in schools without those children having to be examined by a dentist within forty-five days prior to the hygienists' treatment, as the law previously required. In its place, the legislature included a "general supervision" provision requiring that a dentist merely authorize the treatment before a hygienist examines a child.[94] In response, the South Carolina Board of Dentistry issued an emergency regulation reinstating the forty-five-day rule.[95]

In applying the clear articulation test to the amended state statute, the FTC adopted a comparatively strict foreseeability standard that asked whether the challenged restraint would "ordinarily or routinely" result from the authorizing legislation.[96] The FTC found that the forty-five-day requirement would not ordinarily result from the general supervision provision and denied the Board state action immunity.[97] Admittedly, by having removed the requirement, the legislature's intent not to have it reinstated was

89 139 F3d 1033 (5th Cir 1998).

90 Id at 1042, citing La Rev Stat Ann § 37:75(B)(2).

91 *Earles*, 139 F3d at 1042–44.

92 Federal Trade Commission Office of Policy Planning, *Report of the State Action Task Force* at *34–35 (cited in note 13).

93 138 FTC 229 (2004).

94 Id at 252–54.

95 Id at 231.

96 Id at 251–53 (quotation marks omitted).

97 *In re South Carolina State Board of Dentistry*, 138 FTC at 252–53.

already clear. But this case is significant for illustrating the FTC's approach to the foreseeability standard.

B. The Active Supervision Requirement

The principal division is over the application of the active supervision requirement. Before the Supreme Court's 1985 ruling in *Hallie*, which exempted municipalities from active supervision, courts did not even consider subjecting licensing boards to active supervision. Instead, courts looked to whether the licensing board supervised the state's anticompetitive policy, though courts struggled with how to define supervision.[98] After *Hallie*, this approach was abandoned. In explaining why municipalities were exempt from supervision, the *Hallie* Court wrote that it could "presume, absent a showing to the contrary, that [a] municipality acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf."[99]

Circuit court and FTC decisions have interpreted this language to mean that because members of licensing boards have a financial interest in the regulations they promulgate and enforce, they should be treated, at least in some circumstances, like private parties. Accordingly, when state licensing boards invoke the state action defense, courts and the FTC now consider whether licensing boards are sufficiently similar to collections of private individuals to require active state supervision, though the courts and the FTC are split three ways over when the supervision requirement applies.

1. Majority approach.

The majority approach, adopted by the Ninth and First Circuits, subjects state licensing boards to supervision depending on the characteristics of the board in question. Courts look to whether there is a danger that the agency authorizing anticompetitive activity is pursuing interests other than those of the state. To decide this question, courts examine various characteristics of the agency to determine whether it is more like a private party or more like a state entity.

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[98] See, for example, *Gambrel v Kentucky Board of Dentistry*, 689 F2d 612, 618 (6th Cir 1982) (granting state action immunity to a board's refusal to give denture work orders directly to patients); *Benson v Arizona State Board of Dental Examiners*, 673 F2d 272, 275 (9th Cir 1982) (granting state action immunity to a board's refusal to allow dentists licensed in other states, but not licensed in Arizona, to practice dentistry outside a restricted permit scheme).

[99] *Hallie*, 471 US at 45.

In *Hass v Oregon State Bar*,[100] for example, plaintiff sued the state bar for requiring that all state attorneys purchase malpractice insurance from the bar.[101] The Ninth Circuit ruled that the state bar was exempt from supervision because it was an agency of the state organized to regulate the legal profession, produced records and held meetings open to the public, and was composed of members required to conform to the state's code of ethics.[102] The Ninth Circuit was careful to note that its holding was "based on the characteristics of the Oregon State Bar" and that it did "not hold that all state bars are protected under the state action exemption to the federal antitrust laws."[103] This case-by-case, characteristic-based approach to active supervision may be viewed as the majority approach.[104]

2. Minority approach.

The second approach, adopted only by the Fifth Circuit, automatically exempts boards from the active supervision requirement. In *Earles*, public accountants brought antitrust claims against the Board of Certified Public Accountants and others after the accountants, who also earned money by selling securities, were sanctioned under Board rules that prohibited the practice of "incompatible occupations."[105]

In justifying its decision to exempt the Board from supervision, the Fifth Circuit illustrated the influence of *Hallie*'s concern for self-interested behavior. "Despite the fact that the Board is composed entirely of CPAs who compete in the profession they regulate, the public nature of the Board's actions means that there is little danger of a cozy arrangement to restrict competition."[106]

Admittedly, the difference between the majority and minority approaches is not distinctly cut. The majority approach moves through a checklist of specific features commonly associated with public bodies, while the minority approach grants boards a de facto

100 883 F2d 1453 (9th Cir 1989).

101 Id at 1455.

102 Id at 1460.

103 Id at 1461 n 4.

104 See *FTC v Monahan*, 832 F2d 688, 690 (1st Cir 1987) ("Whether any 'anticompetitive' Board activities are 'essentially' those of private parties depends upon how the Board functions in practice, and perhaps upon the role played by its members who are private pharmacists."). See also *Washington State Electrical Contractors Association, Inc v Forrest*, 930 F2d 736, 737 (9th Cir 1991) (suggesting that the Washington Apprenticeship Council might be subject to active supervision because its private members have their own agenda which may not be in line with state policy).

105 *Earles*, 139 F3d at 1041.

106 Id.

automatic exemption from active supervision because of the unspecified "public nature" of board action. It is difficult to further distinguish these approaches because no circuit court post-*Hallie* has ever subjected a licensing board or state bar to active supervision. Nevertheless, the Fifth Circuit's approach is unique in granting licensing boards an automatic exemption from active supervision.

3. FTC approach.

The third approach represents almost a mirror image of *Earles*. The FTC holds that when the interests of the members of state licensing boards are insufficiently independent from the interests of the parties that the board regulates, the board's actions are subject to active supervision.[107] Because a majority of licensing board members are virtually always members of the regulated profession, in practice, the FTC will always require that the state actively supervise licensing boards before according state action immunity to the anticompetitive rules that boards promulgate.

In *North Carolina State Board of Dental Examiners*, for example, the Board sent letters to nondentists ordering them to stop providing teeth-whitening services because this constituted the unauthorized practice of dentistry.[108] The FTC subjected the Board to the active supervision requirement, construing the Supreme Court's state action jurisprudence to hold that whether an entity must be actively supervised depends on the "degree of confidence that the entity's decision-making process is sufficiently independent from the interests of those being regulated."[109] Finding that no state body actively supervised the Board, the FTC denied state action immunity.[110]

Although in some respects this could be viewed as a variant of the majority circuit approach in that the application of the active supervision requirement depends on specific characteristics of the agency, it is much different. Where *Hass* looked to a variety of factors, the FTC looked to only one: the composition of the agency.

107 *North Carolina State Board of Dental Examiners*, 2011 WL 549449 at *7–9.

108 Id at *4–5.

109 Id at *9.

110 Id at *14–17.

III. THE PROMISE AND PERIL OF PROFESSIONAL LICENSING BOARDS

The economic rationale for professional licensing boards is grounded in the threat to public safety that arises when there are no effective remedies for injuries that consumers cannot easily avoid.[111] No legal remedy can restore a life taken by the hand of an unskilled surgeon. Professional licensing is designed to ensure that consumers make choices only among sellers who possess some minimum level of competence.[112]

Once a state decides to subject a profession to licensing, it is logical to entrust the power to license and regulate the profession to members of that profession.[113] State legislators are no more capable of assessing the qualifications of professionals than are ordinary consumers.[114] Current members of the profession have the expertise to determine qualifications and assess competence.[115] In addition, practicing professionals are likely to spot emerging threats to public welfare in their respective fields faster than state legislators or bureaucrats.

On the other hand, groups may lobby to have their profession licensed in order to extract monopoly rents. Once empowered by the legislature, they might issue regulations that, while justified as protecting the public welfare, serve primarily to enrich the licensed profession.[116]

For example, in *Goldfarb*, the Virginia State Bar defended its enforcement of minimum-fee schedules for lawyers by arguing that competition was inconsistent with the practice of law because earning profit was not the goal of the profession.[117] The Supreme Court questioned the bar's altruism, noting that the first sentence of the bar's own report on minimum-fee schedules stated that "lawyers have slowly, but surely, been committing economic suicide as a profession."[118]

More often, however, anticompetitive rules with dubious public interest justification may simply be a function of the board members' narrow focus and institutional environment. As practitioners, board

111 See Barron, 18 Stan L Rev at 642 (cited in note 11).
112 See id.
113 See id at 649.
114 See id.
115 See Barron, 18 Stan L Rev at 649 (cited in note 11).
116 See Kleiner, *Licensing Occupations* at 44 (cited in note 9).
117 *Goldfarb*, 421 US at 786.
118 Id at 786 n 16 (quotation marks omitted).

members cannot help but be conscious of how their regulations will affect themselves and their colleagues.[119] Moreover, private professional associations are likely to have a licensing board's ear in ways that other groups will not. Additionally, state licensing boards may hear little about the effects of their rules on consumer prices or other service providers.

Empirical studies on licensing boards offer mixed conclusions but overall tend to paint an unflattering picture. One analysis of major academic studies on licensed occupations concluded that the impact of licensed regulation on the quality of service received by consumers is "murky," with most studies showing no effect on average consumer well-being relative to little or no regulation.[120] However, some evidence suggests that licensed regulation leads to higher quality service for higher-income consumers.[121] Estimates on the price impact of licensing are much clearer, with most studies finding that licensing policies increase service prices.[122] Altogether, the evidence suggests that "higher-price effects dominate potential modest impacts on quality."[123]

Scholars have proposed alternatives to licensing that they indicate can provide at least as much quality assurance with fewer restrictions on competition.[124] One commonly cited alternative is optional licensing or certification.[125] Under this regime, individuals who meet predetermined standards receive a title testifying to their qualifications. Consumers seeking quality assurance can purchase services from certified providers, but they remain free to purchase from non-certified providers who may be cheaper.

Registration is a variation in which all service providers are required to register their name, address, and qualifications with the state. The registrant displays her certificate listing her information and prospective buyers select the provider that offers the desired combination of cost and qualification.

While a thorough comparison of certification and licensing is beyond the scope of this Comment, it is sufficient to point out that a preference for licensing is understandable. First, consumers have

119 See Barron, 18 Stan L Rev at 650 (cited in note 11).

120 Kleiner, *Licensing Occupations* at 52–58, 63 (cited in note 9).

121 See id at 63.

122 See id at 59.

123 Id at 63.

124 See Kleiner, *Licensing Occupations* at 152–57 (cited in note 9).

125 See id at 152–53. See also Barron, 18 Stan L Rev at 663–64 (cited in note 11).

limited knowledge, capacity, and time to make decisions.[126] It may be rational for consumers to prefer that another body, such as a licensing board, undertake the difficult task of weeding out providers who fail to meet a certain standard. Second, licensing standardizes the knowledge and skills within an occupation, providing some protection against quackery at the cost of higher prices and less innovation. Research has shown people's tendency to strongly prefer avoiding losses to acquiring gains.[127] Known as "loss aversion," this tendency would lead consumers to prefer avoiding harm from an unskilled dental treatment to receiving the benefits of cheaper or more innovative dental procedures. In other words, even if the improvement in service quality from licensing is small compared to the costs, loss aversion may lead voters to prefer licensing to other regulatory regimes.[128]

Whatever one's opinion of licensing, the fact remains that it is the dominant regime for regulating service quality in medicine, dentistry, law, and many other fields. It may be that this dominance can be attributed to cognitive biases, along with a general ignorance of the true costs of licensing, and that with more knowledge voters would prefer certification or other regimes. For the moment, however, one may infer from the dominance of licensing that voters receive more assurance from licensing than from alternative regulatory schemes. Thus, a key objective in crafting the law that governs licensing boards is to enable boards to regulate threats to consumer welfare, while curbing self-interested behavior.

IV. TAILORING THE CLEAR ARTICULATION TEST

This Section argues that when state licensing boards act pursuant to a statutory authorization to make rules within a state, their actions should automatically satisfy the clear articulation test. When, however, boards implement a rule specified by a state legislature or state supreme court, their actions should satisfy the test only if there is evidence that the legislature or court authorized the particular type of conduct challenged. This approach facilitates state delegation while minimizing opportunities for self-interested behavior.

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126 See generally Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q J Econ 99 (1955).

127 See Daniel Kahneman, Jack L. Knetsch, and Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J Econ Perspectives 193, 199–203 (1991).

128 See Kleiner, *Licensing Occupations* at 142–43 (cited in note 9).

The above use of the terms "rule making" and "rule implementation" may not be synonymous with how those terms are used in other fields, such as administrative law. When a board creates rules pursuant to a general power to adopt rules the board deems necessary to regulate within its area of authority, I consider this rule making. If, however, a board interprets a rule set forth in a statute or state supreme court guideline and creates a more specific rule, I consider this rule implementation. For example, imagine that a statute permits only in-state licensed accountants to practice accounting and that the statute defines accounting as, among other things, reviewing accounting records. A board will be considered to have implemented the state's prohibition against the unlicensed practice of accounting when, for instance, it specifically prohibits out-of-state accountants from offering to review over the Internet the accounting records of the state's citizens.

A. Understanding the Supreme Court's Foreseeability Standard

In *Southern Motor* and *Hallie*, the Supreme Court adopted a foreseeability standard for satisfying the clear articulation requirement. A state statute need not compel a specific anticompetitive action for the conduct to satisfy the requirement.[129] Instead, the anticompetitive conduct must only be a foreseeable result of the statute's authorization to act.[130]

The Court introduced this foreseeability standard in order to facilitate state law making and delegation. "Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature. Requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness."[131] *Hallie* supported this justification. Requiring the legislature to expressly state its intention for "delegated action to have anticompetitive effects . . . embodies an unrealistic view of how legislatures work and of how statutes are written."[132]

Professor Hillary Greene argues that, in adopting the foreseeability standard, the Supreme Court prioritized protecting against false negatives (denials of immunity when a state legislature intended to authorize the act in question) over protecting against false positives (grants of immunity when a state legislature did not

129 See *Southern Motor*, 471 US at 59–60, 64.

130 See *Hallie*, 471 US at 43.

131 *Southern Motor*, 471 US at 64.

132 *Hallie*, 471 US at 43.

intend to authorize the act).[133] She further argues that requiring less clarity in statutory authorizations facilitates state regulation by freeing states to delegate authority without having to anticipate the many factual circumstances a delegated entity will face.[134]

But Greene overlooks the fact that the foreseeability standard's corresponding vulnerability to false positives inhibits state policy making from a different direction. By disclaiming a requirement that statutes compel anticompetitive action, the foreseeability standard increases the likelihood of false positives. In turn, this may discourage legislatures from delegating authority out of fear that the standard will permit delegated bodies to authorize anticompetitive activity not intended by the legislature.

The Supreme Court recognized this problem in the context of the active supervision requirement. In *Ticor*, the Court announced a stricter standard for satisfying the requirement because it said it was persuaded by amici curiae submitted by thirty-six state governments that a "broad immunity rule would [not] serve the States' best interests . . . [for if] the States must act in the shadow of state action immunity whenever they enter the realm of economic regulation, then [the state action] doctrine will impede their freedom of action, not advance it."[135]

The Supreme Court's foreseeability standard will always vacillate between permitting more false negatives and permitting more false positives, depending on how strictly courts define foreseeability. *Martin v Memorial Hospital at Gulfport*[136] provides an illustration. In this case, the Fifth Circuit followed its lenient foreseeability standard to hold that a municipal hospital's exclusive contract with a doctor to supervise a kidney disease center was a foreseeable consequence of a state statute authorizing municipal hospitals to contract for services, even though the statute did not state that the contracts could be exclusive.[137] If the legislature intended for its grant of contracting authority to include exclusive contracts, the lenient standard avoided a false negative and facilitated state delegation. If, however, the legislature did not intend this, the Fifth Circuit undermined the state's goals and discouraged the legislature from delegating authority to the hospitals.

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133 Greene, 2006 Utah L Rev at 830–31 (cited in note 14).

134 See id at 830–31, 839.

135 *Ticor*, 504 US at 635–36.

136 86 F3d 1391 (5th Cir 1996).

137 Id at 1398–1401. See Herbert Hovenkamp, *Federalism and Antitrust Reform*, 40 USF L Rev 627, 640–42 (2006).

Thus, by itself, the foreseeability standard adopted by the Supreme Court does not necessarily achieve the Court's goal of enabling state lawmaking and delegation because depending on how strictly courts apply the standard, they risk producing either more false negatives or more false positives, each of which inhibits state action in different ways. Instead, the virtue of the standard lies in the freedom it affords courts to exercise judgment as to when they should protect against one type of erroneous decision over another.

B. Adjusting the Foreseeability Standard Based on the Type of Stautory Authorization and the Incentives of the Delegated Body

Applying the foreseeability standard therefore requires an understanding of the particular purposes and risks underlying a delegation of authority. State licensing boards present two considerations. On the one hand, legislatures want boards to issue regulations regarding specific threats to public welfare in their respective industries because practicing professionals understand their industries better than legislators. On the other hand, the fact that board members have an economic interest in their regulations means that they have a stronger incentive than comparatively disinterested bureaucrats to try to issue anticompetitive regulations outside what the legislature intended.

Distinguishing between rule making and rule implementation enables states to reap the benefits of privately composed licensing boards while limiting opportunities for boards to issue self-interested anticompetitive rules. Recall that the clear articulation requirement ensures that when nonsovereign entities engage in anticompetitive conduct they act on behalf of the state. When state legislatures delegate rule-making authority to licensing boards, these boards, by definition, become bodies authorized to make rules for the state as sovereign within their field of authority. Any regulations issued pursuant to this authority should therefore automatically satisfy the clear articulation test, provided that no other statutes limit the boards' authority with respect to the challenged conduct. If courts were to search for evidence that the legislature authorized particular anticompetitive conduct in a statute granting general rule-making authority, the board would always fail the clear articulation test because, by definition, such a broad delegation of regulatory authority will never reveal what specific rules, if any, the legislature intended.

For example, in *Earles*, the Louisiana legislature granted the Board of Certified Public Accountants the power to adopt all rules the Board deemed necessary to regulate public accounting in the state. There is no evidence that the legislature ever considered the Board's particular rule prohibiting the practice of incompatible professions. While it is possible that the Louisiana legislature did not intend for the Board to use its authority to issue such an anticompetitive rule, absent other evidence to the contrary, the presumption should favor the Board. The legislature delegated regulatory authority to the Board in part because the legislature determined that practicing accountants were better able to identify and regulate threats to consumer welfare than legislators. Had the court looked for specific authorization, as the FTC advocated, the Board would have failed the clear articulation test and the state's purpose in delegating power to practicing professionals would have been thwarted.

Permitting licensing boards that act pursuant to their delegated rule-making authority to automatically satisfy the clear articulation test accords with Supreme Court doctrine. The Court has stated that "[a]s long as the State clearly articulates its intent to adopt a *permissive* policy," the clear articulation requirement is satisfied.[138] Although the Supreme Court has declared that state agencies are not exempt from the antitrust laws simply because of their status as such, by delegating broad rule-making authority, such as the Louisiana legislature did in *Earles*, the state demonstrates its intent to adopt a permissive policy. Accordingly, board regulations issued pursuant to such authority should automatically satisfy the clear articulation test.

This does not mean, however, that board rules should always be subject to a lenient foreseeability standard. States rarely authorize licensing boards to formulate all the rules governing a profession. Instead, legislatures enact many regulations themselves and delegate to boards the power to implement these regulations. Any matters related to the industry not addressed by state statutes may be left to the discretion of the board. For example, in North Carolina, statutes define the activities that constitute the practice of dentistry,[139] but the Board of Dental Examiners is also empowered with general rule-making authority to "make necessary bylaws and regulations, not

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138 *Southern Motor*, 471 US at 60 (emphasis added) (noting that "federal antitrust laws do not forbid the States to adopt policies that permit, but do not compel, anticompetitive conduct by *regulated* private parties").

139 NC Gen Stat § 90-29.

inconsistent with the provisions of [the enabling article], regarding any matter referred to in [the article]."[140]

Board implementations of state policy should be subject to a strict foreseeability standard that searches for authorization of the specific type of conduct challenged. If a legislature does not want a board to formulate a policy on a particular question, it enacts a statute articulating its own policy. When legislatures enact their own policies with respect to licensed professions, courts should presume that the legislatures did not intend for the regulating boards to engage in anticompetitive acts outside the scope specifically authorized in the statute.

Consider a scope-of-practice hypothetical. Imagine that coloring one's teeth with dye becomes fashionable. The North Carolina Board of Dental Examiners issues a rule stating that only licensed dentists can dye teeth—perhaps to monopolize the market, perhaps to protect consumers from what the Board sincerely believes is pervasive unsafe coloring.

Although the Board possesses general rule-making authority,[141] the legislature has defined the particular acts that constitute the practice of dentistry in a statute.[142] In other words, the legislature has apportioned to itself, not the Board, the authority to define the practice of dentistry. Thus, the Board's hypothetical dye rule represents an implementation of state rules.

The closest the statute defining the practice of dentistry comes to encompassing teeth dyeing is its language on the "treat[ment]" of a "physical condition of the human teeth."[143] Following the Fifth Circuit's standard applied in *Martin*, such a general authorization to displace competition in the treatment of teeth would be sufficient to satisfy clear articulation for the specific dye regulation. While that presumption might be appropriate for bureaucratic agencies, it is inappropriate for privately composed boards given their strong incentive to adopt anticompetitive regulations.

Instead, courts should apply a stricter foreseeability standard that searches for authorization of the particular type of conduct at issue. Since there are no statutes or legislative history suggesting the legislature intended to authorize the Board's regulation of teeth coloring, the Board's rule would fail the clear articulation test.

140 NC Gen Stat § 90-28(a).
141 NC Gen Stat § 90-28(a).
142 NC Gen Stat § 90-29(b)–(c).
143 NC Gen Stat § 90-29(b)(1).

In sum, in cases such as *Earles*, where a board promulgates a rule related to an issue that the legislature did not contemplate (practicing dual professions), courts should not deny the board state action immunity simply because the legislature did not contemplate the specific rule in question. Where, however, the legislature enacts rules related to the issue that the board seeks to regulate (such as scope-of-practice questions), the board's action should be regarded as an implementation of those rules. For the purposes of deciding the clear articulation test, courts should interpret those provisions narrowly, excluding any type of anticompetitive conduct not specifically authorized. Although there is a possibility that this standard produces a false negative, that risk is tolerable considering the board members' economic interest in the regulation. The burden is placed on the legislature to correct any erroneous denials of immunity.

One could argue that applying a strict foreseeability standard might encourage rent-seeking.[144] Inhibited from implementing state statutes to create self-interested anticompetitive rules, boards might lobby the legislature for more authority. For example, in the above hypothetical, the Board or a private dental association might lobby the legislature to expand the definition of dentistry to encompass teeth dying.

While lobbying is always a possibility, two obstacles impede the profession's lobbying efforts. First, other organized groups, such as nondentist teeth dyers, can lobby against the profession. These groups will have a voice before the legislature that they will not have before the Board. Second, consumers of teeth-dying services can punish legislators who limit their teeth-dying options. Accordingly, legislators will be cautious in granting more authority to the Board.

In other words, forcing the licensed profession to lobby the legislature for more authority increases the likelihood that disadvantaged groups will prevent the passage of anticompetitive rules. While applying a strict foreseeability standard to board implementations of state policy will not prevent rent-seeking, it can reduce it, at least compared to the more lenient standard adopted by some courts.

Applying a strict foreseeability standard to board implementations of state policy may at first appear to contradict *Hallie* and *Southern Motor*, but it accords with the Supreme Court's rationale

144 Rent-seeking refers to attempts to capture economic benefits by manipulating the regulatory environment rather than by adding value. See generally Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 Am Econ Rev 291 (1974).

for adopting the foreseeability standard. In those cases, the Court held that when municipalities and bureaucratic state agencies implement state statutes, the statutes need only to indicate a legislative intent to displace competition in order to satisfy the clear articulation requirement.[145]

The purpose of this lenient foreseeability standard was to facilitate state regulation by making it easier for legislatures to delegate authority. When privately composed licensing boards implement state rules, this same goal is furthered by applying a stricter foreseeability standard. Legislatures will be more likely to delegate authority to licensing boards (and reap the benefits of professional expertise) if they are assured that courts will prohibit interested board members from engaging in anticompetitive conduct outside the scope that the legislature specifically authorized.

Just how strictly courts should apply the foreseeability standard is a much more difficult question.[146] As a general matter, the presumption of intent should vary with such factors as the magnitude of the restraint's anticompetitive effects and the alleged purpose for which the restraint was imposed.

For example, in *Hass*, the Ninth Circuit held that statutes authorizing the Oregon State Bar to compel Oregon attorneys to carry malpractice insurance, to "own, organize and sponsor any insurance organization," and "to establish a lawyer's professional liability fund" clearly articulated a policy sufficient to immunize a Board rule requiring all Oregon attorneys to purchase their insurance from the bar.[147] The court adopted the same lenient foreseeability standard used by the Fifth Circuit, holding that statutes that evince "a legislative policy to supplant free market competition with regulation in the field of primary legal malpractice coverage" authorized the particular conduct at issue.[148]

Although the foreseeability standard advocated here would demand evidence that the legislature authorized the particular type of restraint challenged (monopolization of the state's primary legal malpractice insurance market), this would still be a close case. Taking into account the anticompetitive effects of the rule and the extent to which it advances the bar's stated purpose, the Ninth

145 See *Hallie*, 471 US at 45–46; *Southern Motor*, 471 US at 57.

146 Many scholars have offered proposals. See, for example, John F. Hart, *"Sovereign" State Policy and State Action Antitrust Immunity*, 56 Fordham L Rev 535, 541, 593 (1988) (arguing for a standard based on whether the state expressed a policy to displace competition in the "pertinent field in the form and magnitude presented by the challenged restraint").

147 *Hass*, 883 F2d at 1458–59, quoting Or Rev Stat § 9.080(2)(a).

148 *Hass*, 883 F2d at 1458–59.

Circuit reached the correct result. The burden of the rule's anticompetitive effects falls primarily on Oregon attorneys. Moreover, mandatory participation significantly facilitates the organization of the bar's state authorized professional liability fund.

This approach will not eliminate uncertainty by providing an easy answer in every circumstance. Rather, it defers to board judgments in those areas where the legislature has indicated its decision to defer and demands more precise state authorization for board actions in areas where the legislature has offered a clearer indication of the policy it wants. By acknowledging the distinction between rule formulation and rule implementation, and applying a lenient foreseeability standard to the former and a strict standard to the latter, the state action doctrine can enable states to reap the benefits of privately composed licensing boards, while limiting opportunities for self-interested behavior.

V. STATE LICENSING BOARDS SHOULD NEVER BE SUBJECT TO ACTIVE SUPERVISION IN ORDER TO RECEIVE STATE ACTION IMMUNITY

A. Active Supervision Does Not Apply to State Bodies Authorized to Either Formulate or Implement State Rules

The Supreme Court has always applied active supervision to private parties but never to state bodies such as bureaucratic state agencies and municipalities. To understand this distinction, recall that the purpose of the active supervision requirement is to ensure that the anticompetitive conduct of private parties promotes state policy.

When authorized state bodies formulate rules or implement rules formulated elsewhere, these rules are, by definition, authorized by the state.[149] By contrast, when private parties claim to act according to a state-authorized anticompetitive scheme by recommending prices or engaging in other anticompetitive activity, those parties are not authorized by the state to either formulate or implement policy. Private parties are merely the instruments through which the state effectuates its anticompetitive policy. Accordingly, the state must supervise the anticompetitive conduct of these parties to ensure that their actions further state policy.

Where municipalities approve particular tariffs or anticompetitive activities, they are not subject to active supervision because, as state

[149] See Floyd, 41 BC L Rev at 1111–12 (cited in note 88).

subdivisions, they are already authorized to implement state policy. Likewise, when an agency is authorized to formulate policy for the state, it should not be subject to active supervision because it speaks for the state by virtue of its delegated authority.[150] Because the active supervision requirement is designed to ensure that nonauthorized entities (such as private parties) act on behalf of the state, applying it to agencies that are already authorized to act for the state is redundant. To the extent that state licensing boards are granted authority to formulate or implement state policy, they too are exempt from active supervision.

B. Members of State Licensing Boards Are Not "Private Parties" As That Term Is Used in *Hallie*

The private composition of state licensing boards does not require that they be subject to active supervision. *Hallie* justified exempting municipalities from active supervision by pointing to several differences between municipalities and private parties. First, private parties are not subject to public scrutiny.[151] Second, the *Hallie* Court stated that municipalities are exempt from active supervision in part because they possess official authority to act for the state. In contrast, private parties lack such authority.[152] Third, private parties can be presumed to act for their own interests instead of those of the state.[153] The first two reasons do not apply to state licensing boards. The third reason is misinterpreted as holding that the economic interest of a decision maker is relevant to the state action doctrine. Instead, *Hallie*'s language on private interest is better read as an illustration of the Court's earlier suggestion that state action immunity requires official authority.

1. Members of state licensing boards possess official authority and are subject to public scrutiny.

Hallie exempted municipalities from active supervision in part because they possess official authority. "Once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function."[154] Boards of dentistry, accounting, medicine, and

150 See id at 1112.
151 *Hallie*, 471 US at 45 n 9.
152 Id at 47.
153 Id at 45.
154 Id at 47.

others are likewise agencies of the state. They are granted constitutional or statutory authority either to apply state policy articulated elsewhere or to formulate policy for the state in a given area.

On account of being official arms of the state, these agencies are also "likely to be exposed to public scrutiny."[155] Boards typically submit annual reports of their activities to state legislatures.[156] They must comply with state public records laws, give public notice of their meetings, and open those meetings to the public.[157] Moreover, many boards contain members from related, but competing, professions as well as members who do not practice a profession at all. For example, New York requires that its State Board of Dentistry include thirteen practicing dentists, three dental hygienists, one certified dental assistant, and one nonpracticing public member.[158]

Members of licensing boards are also accountable to the general public in a variety of ways.[159] State governors often appoint board members from a list of names recommended by licensed professionals.[160] Statutes set forth members' terms of office.[161] Individuals or organizations that object to a member's behavior can pressure the government to deny reappointment.

In those cases where members of boards are not formally approved by the state, members are typically subject to some kind of ethics or financial disclosure rules. For example, in North Carolina, members of the Board of Dental Examiners must submit annual financial disclosures to the state Ethics Commission.[162] While these regulations do not provide as direct a means for removal as appointment proceedings, they ensure access to information about a board's activities. This information in turn can be used to lobby for more (or fewer) restraints on a board. The formal delegated authority of state licensing boards, and their corresponding public exposure, distinguishes them from the purely private professional

155 *Hallie*, 471 US at 45 n 9.

156 See, for example, *North Carolina State Board of Dental Examiners*, 2011 WL 549449 at *4.

157 See, for example, *Hass*, 883 F2d at 1460, citing Or Rev Stat § 9.010(1).

158 New York State Office of the Professions, *State Board for the Professions* (cited in note 8).

159 See Floyd, 41 BC L Rev at 1090 (cited in note 88) (discussing evidence that bureaucratic state agencies may be no less politically accountable than legislatures).

160 See, for example, *Gambrel v Kentucky Board of Dentistry*, 689 F2d 612, 614 (1982).

161 Id.

162 See *North Carolina State Board of Dental Examiners*, 2011 WL 549449 at *4.

associations or standard-setting institutions to which the Supreme Court has applied antitrust scrutiny.[163]

2. *Hallie*'s distinction between acting in the public interest versus acting in the private interest should be read as an illustration of the requirement of official authority, not as a demand for disinterestedness.

Circuit courts, the FTC, and proponents of subjecting licensing boards to active supervision read *Hallie* as supportive of their position. In exempting municipalities from active supervision, the Court wrote that it could presume "absent a showing to the contrary, that [a] municipality acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf."[164] Relying on this language, courts and commentators have assumed that because the majority of members of state licensing boards are practicing professionals who financially benefit from the regulations they issue, these boards, at least in some circumstances, should be subject to active supervision before receiving state action immunity.[165]

Several Supreme Court rulings foreclose this reading of *Hallie*. State action immunity does not turn on the propriety of the decision-makers' motivations. In *Lafayette*, the Court discussed an argument by petitioners that the Virginia State Bar in *Goldfarb* was not a state agency because its actions financially benefitted the bar's practicing officers.[166] The Court rejected this reasoning, declaring that the financial interest of the lawyers in issuing minimum-price schedules did not transform the bar into a private organization. "We think it obvious that the fact that the ancillary effect of the State Bar's policy, or even the conscious desire on its part, may have been to benefit the lawyers it regulated cannot transmute the State Bar's official actions into those of a private organization."[167]

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163 See, for example, *California Dental Association v FTC*, 526 US 756, 756 (1999) (calling for a truncated rule-of-reason analysis to be applied to advertising restrictions promulgated by a private dental association). See also *Allied Tube & Conduit Corporation v Indian Head, Inc*, 486 US 492, 499–501 (1988) (denying *Noerr-Pennington* immunity—an alternative antitrust exemption accorded to entities that strive to restrain trade by petitioning government officials—to a private standard-setting organization because "no official authority" was conferred on the organization).

164 *Hallie*, 471 US at 45.

165 See, for example, *North Carolina State Board of Dental Examiners*, 2011 WL 549449 at *8–9.

166 *Lafayette*, 435 US at 411–12 n 41.

167 Id.

City of Columbia v Omni Outdoor Advertising[168] reaffirmed the irrelevance of a decision maker's motivation. Under pressure from a start-up billboard company, an established billboard company with 95 percent of the local market and personal ties to members of the city council successfully lobbied for a zoning ordinance preventing the construction of new billboards.[169]

The Court refused to scrutinize the motivations of the councilors. Nearly all government action is vulnerable to the charge of being "not in the public interest."[170] It is simply too difficult to distinguish between "municipal-action-not-entirely-independent-because-based-partly-on-agreement-with-private-parties that is *lawful* and municipal-action-not-entirely-independent-because-based-partly-on-agreement-with-private-parties that is *unlawful*."[171]

A better reading of *Hallie*'s language on private interests regards it as an illustration of the Court's chief concern for state authorization.[172] The first difference the Court noted between municipalities and privates parties is that the former possess official authority.[173] Municipalities are exempt from active supervision, not because they can be trusted to act in the public interest, but because they are authorized to determine the specifics of state-authorized policies.[174] Private parties, by contrast, are not authorized to speak for the state. They speak only for themselves. The language on private parties merely echoes *Hallie*'s earlier emphasis on the fact that municipalities have official authority, which private parties lack.

This reading of *Hallie* accords with the Court's other antitrust rulings. In rejecting a conspiracy exception to the *Noerr-Pennington* doctrine, which immunizes private parties from federal antitrust liability for attempting to influence the passage or enforcement of laws with anticompetitive effects,[175] *Omni* confirmed a bright-line separation between public and private action. When states act in a regulatory capacity, their actions cannot be deemed private for the purposes of antitrust law:[176]

168 499 US 365 (1991).

169 Id at 367–68.

170 Id at 377 (quotation marks omitted).

171 Id at 375 n 5.

172 See generally Floyd, 41 BC L Rev 1059 (cited in note 88) (arguing that the Supreme Court's state action decisions can be explained by the Court's concern for identifying the locus of state authority).

173 *Hallie*, 471 US at 47.

174 See Floyd, 41 BC L Rev at 1082–83 (cited in note 88).

175 See *Omni*, 499 US at 379–80.

176 See id at 379.

> The rationale of *Parker* was that, in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators. . . . [T]his immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market.[177]

Omni's distinction between a state acting in a regulatory capacity and a state owning and operating a business, and the deference accorded to the former, recalls language quoted by *Lafayette*: "Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it."[178] These cases demonstrate that members of licensing boards are not private parties for the purposes of state action immunity. They are public officials acting in a state regulatory capacity and should be exempt from active supervision.

C. *Goldfarb* and *Bates* Support Exempting Licensing Boards from Active Supervision

On the one hand, *Goldfarb* and *Bates* can be interpreted to support subjecting state bars and licensing boards to active supervision.[179] In *Goldfarb*, the Court denied state action immunity to a minimum-fee schedule promulgated by a state bar, holding that "anticompetitive activities must be *compelled* by direction of the State acting as a sovereign."[180] In *Bates*, the Court upheld restrictions on lawyer advertising in part because the Arizona Supreme Court oversaw the state bar's enforcement of the restrictions.[181] The majority wrote that it deemed "it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is *so active*."[182] Because the active supervision test announced in *Midcal* was in part derived from *Goldfarb*,[183] these cases can be read to

177 Id at 374–75.

178 *Lafayette*, 435 US at 411–12 n 41, quoting *Indian Towing Co v United States*, 350 US 61, 67–68 (1955) (rejecting the dissent's view that *Goldfarb* turned on the economic interest the members of the Virginia State Bar had in the regulations they issued).

179 See *North Carolina State Board of Dentistry*, 2011 WL 549449 at *12–13.

180 *Goldfarb*, 421 US at 791 (emphasis added).

181 *Bates*, 433 US at 359–63 (noting that the state policy was very clearly and affirmatively expressed and the state actively supervised the activity).

182 Id at 362 (emphasis added).

183 *Midcal*, 445 US at 104–05 (referring to *Goldfarb*, *Cantor v Detroit Edison Co*, 428 US 579 (1976), and *New Vehicle Motor Board of California v Orrin W. Fox Co*, 439 US 96 (1978), in

support applying active supervision to state bars and other licensing boards.

Goldfarb and *Bates* are better read, however, as demonstrating a concern for state authorization. In *Goldfarb*, the Virginia State Bar did not receive state action immunity in part because the Virginia Supreme Court had explicitly directed lawyers "not to be controlled" by fee schedules.[184] In contrast, the advertising restrictions in *Bates* received immunity because a sovereign body, the state supreme court, made the final determination to approve the restrictions.[185] The Arizona State Bar did not exceed its authority in recommending the enforcement to the court. This reading of *Bates* is reinforced by *Hoover* where the Court again granted state action immunity to the Arizona State Bar because the Court found that the challenged conduct (denial of admission to the bar) "was in reality that of the Arizona Supreme Court," a sovereign body.[186]

Moreover, no language in *Goldfarb*, *Bates*, or *Hoover* suggests that the private composition of the state bars played any role in the Court's application of the state action doctrine. The one possible exception is *Goldfarb*'s pronouncement that "[t]he fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members."[187] However, this too is more accurately read as illustrating a concern for authorization. The State Bar did not receive automatic state action immunity because it was neither sovereign nor authorized to make policy. It was a state agency for only a "limited purpose," and that purpose expressly excluded the enforcement of minimum-fee schedules.[188]

D. Exempting Licensing Boards from Active Supervision Accords with the State Action Doctrine's Goal of Facilitating State Regulation

In a dissenting opinion in *Ticor*, Chief Justice William Rehnquist observed that a robust active supervision requirement was problematic. Private parties have no way of knowing whether their

declaring that "[t]hese decisions establish two standards for antitrust immunity under *Parker v Brown*").

184 *Goldfarb*, 421 US at 789.

185 *Bates*, 433 US at 359–60.

186 *Hoover*, 466 US at 573. See also *Bates*, 433 US at 361 ("The Arizona Supreme Court is the real party in interest; it adopted the rules, and it is the ultimate trier of fact and law in the enforcement process.").

187 *Goldfarb*, 421 US at 791.

188 Id at 791, 789.

conduct is sufficiently supervised for them to receive state action immunity. Consequently, private parties may be reluctant to comply with state policy.[189] Nevertheless, Justice Antonin Scalia opined that this consequence was acceptable because he saw no alternative within the constraints of the active supervision doctrine.[190]

This problem would be exacerbated and unnecessary were state licensing boards subject to active supervision. Private parties may have difficulty knowing if their own actions are sufficiently supervised by the state, but it is significantly more difficult for them to know how well the actions of a state agency are supervised.

The majority approach further exacerbates this uncertainty. It subjects licensing boards to active supervision depending on whether the agency is deemed public or private. Since, as the *Hass* court declared, this determination is made on a case-by-case basis,[191] it will be difficult for private parties to know in advance whether their conduct will receive state action immunity.

In addition to discouraging compliance with state regulatory schemes, the uncertainty created by the application of the active supervision requirement to state licensing boards also discourages regulation of threats to public safety. A primary benefit of delegating regulatory authority to practicing professionals is that members of a profession can identify emerging threats to public safety within their field more quickly than laypersons. The flipside of this assumption is that where professional board members see a regulation with anticompetitive effects as necessary to address an emerging threat, laypersons do not see that threat and therefore view the regulation as a purely self-interested action. If a statute granting rule-making authority or clearly articulating the policy that the board's rule implements were sufficient for the board to receive state action immunity, laypersons that perceive the anticompetitive act as self-interested would be less inclined to litigate because the board's authorization would be clear. When, however, the board is also subject to active supervision, the uncertainty of the outcome of that test offers opponents a greater chance of victory and will encourage litigation.

The possibility that a rule will not receive state action immunity will discourage state licensing boards from addressing emerging threats that laypersons may not yet recognize. This undermines one

189 *Ticor*, 504 US at 644 (Rehnquist dissenting).

190 Id at 641 (Scalia concurring).

191 *Hass*, 883 F2d at 1461 n 4.

of the primary benefits of entrusting practicing professionals with regulatory power.

Exempting state licensing boards from active supervision also reduces the cost of regulation. States choose to delegate regulatory power to privately composed boards in part because they are cheaper than bureaucratic agencies and reduce the attention legislatures must give to creating regulations themselves. Given the large number of licensed professions, states can ill afford to staff and pay bureaucrats to regulate physicians, attorneys, accountants, dentists, and a host of other professions. Requiring active supervision merely reinstates many of the costs states sought to avoid in adopting privately composed licensing boards. Under the FTC's approach, for example, the state can delegate policy-making authority to a state board, but this board would have to be actively supervised by yet another agency. This duplicative approach to regulation is unwieldy and expensive.

E. Doctrinal, Legislative, and Institutional Constraints Limit the Ability of State Licensing Boards to Issue Self-Interested Regulations That Lack Strong Public Interest Justifications.

Commentators who advocate subjecting licensing boards to active supervision worry that without this supervision boards will be able to issue anticompetitive regulations that aggrandize the licensed profession at the public's expense.[192] This fear ignores the many doctrinal, legislative, and institutional constraints that limit the ability of boards to issue self-interested regulations that lack strong public interest justifications.

The state action doctrine itself places at least one important limit on the anticompetitive activity of state licensing boards. First, an authorization of anticompetitive behavior must be pursuant to a state policy. States may not simply "give immunity to those who violate the Sherman Act . . . by declaring that their action is lawful."[193] Instead, they must act to achieve some policy goal. This rule, consistently affirmed in the Court's state action cases,[194] reflects the Court's acknowledgement that private parties could use the state

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[192] See, for example, Brewbaker, 31 J Health Polit Pol & L at 613 (cited in note 12); Bobrow, Note, 85 Colum L Rev at 1498 (cited in note 12). See also *North Carolina State Board of Dental Examiners*, 2011 WL 549449 at *7–9.

[193] *Parker*, 317 US at 351 (finding that a party's acts must be in furtherance of state policy to qualify for state action immunity).

[194] See, for example, *Midcal*, 445 US at 106; *Ticor*, 504 US at 633 (holding that the state may not confer "antitrust immunity on private parties by fiat").

to approve anticompetitive arrangements that are purely for their own benefit and not for the public's.[195]

Licensing boards are also checked by their institutional superiors. State legislatures and other bodies can always limit the authority agencies have to authorize anticompetitive conduct. In *Goldfarb* for example, the Virginia Supreme Court directed lawyers not to be controlled by fee schedules. State legislatures concerned with runaway licensing boards could strictly limit a board's authority to define scope of practice. Under the strict foreseeability standard advocated here, this statutory limit on board activity would be respected.

State legislatures can also change a policy if they do not like a regulatory scheme adopted by a board. For example, in *South Carolina Board of Dentistry*, after the Board tried to reinstate the rule requiring a dentist to examine a child within forty-five days before the child received treatment from a dental hygienist, the state legislature amended the state dental law to expressly declare that the requirement did not apply to dental hygienists' work in public health settings.[196]

One could argue that it is unwise to place the burden of removing anticompetitive restrictions on the public because collective action and free-rider problems inhibit the public from lobbying for change.[197] This overlooks the fact that such problems are far less pronounced for competitors, such as dental hygienists, who experience anticompetitive effects acutely and are already organized as professional associations. Moreover, whatever benefits the board receives before a rule is repealed must be weighed against the cost to the board's reputation and the corresponding possibility that its authority will be restricted.

In short, state licensing boards are unlike purely private cartels because their official status subjects them to a wide range of restraints on their ability to formulate self-interested anticompetitive policies or implement state policies in ways that harm consumers. Accordingly, board members are not private parties for the purposes of the state action doctrine and are not subject to active supervision.

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195 See William H. Page and John E. Lopatka, *State Regulation in the Shadow of Antitrust:* FTC v Ticor Title Insurance Co, 3 S Ct Econ Rev 189, 191–92 (1993) (interpreting the Supreme Court's state action doctrine to require federal antitrust law to defer to state restraints that are ancillary to a positive regulatory program, but not to naked repeals of federal antitrust requirements).

196 *In the Matter of South Carolina State Board of Dentistry*, 138 FTC at 231.

197 See Elhauge, 104 Harv L Rev at 712 (cited in note 18) (noting the cost and difficultness of "petitioning state governmental bodies").

CONCLUSION

This Comment began with a hypothetical based on *North Carolina State Board of Dental Examiners*. It concludes by using the same case to illustrate the operation of the foregoing approach.

Recall that the Board sent letters to nondentists ordering the recipients to stop providing teeth-whitening services in North Carolina. Because the practice of dentistry is defined in a state statute, the Board's action represents an implementation of state policy. Thus the Board should be subject to the clear articulation test using a strict foreseeability standard.

North Carolina General Statute § 90-29(b)(2) states that the practice of dentistry includes removing "stains, accretions or deposits from the human teeth."[198] To the extent that teeth whitening involves the removal of such substances, and not, for example, the application of white dye laid over those substances, the Board's rule should satisfy the clear articulation test. Since the Board is a state agency with properly delegated powers to implement policy it also is exempt from active supervision.[199]

In less doctrinal terms, the North Carolina legislature declared that only licensed dentists are permitted to remove stains from the human teeth. It delegated to practicing dentists the power to implement this and other rules on the theory that state-licensed dentists were best situated to regulate the dental profession. The Board exercised its judgment, as contemplated by the legislature, and implemented the legislature's rule by prohibiting nondentists from removing such stains in the form of teeth whitening. Allowing the FTC to use federal antitrust laws to prevent the enforcement of the Board's rule would interfere with the ability of North Carolina to regulate within its borders, thereby undermining the federalism principle animating *Parker*.

Granting regulatory authority over a licensed profession to practicing members of that profession offers states at least two advantages that alternative regulatory regimes do not. Licensing regulation is cheaper for states than bureaucratic regulation. Compared to certification, licensing permits states to protect consumers from choosing what states believe are substandard services.

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198 NC Gen Stat § 90-29(b)(2). Note that the FTC did not consider the clear articulation test because it determined that the Board failed to satisfy the active supervision requirement. See *North Carolina State Board of Dental Examiners*, 2011 WL 549449 at *7 n 8.

199 *North Carolina State Board of Dental Examiners*, 2011 WL 549449 at *4.

It could be argued, however, that given the financial harm inflicted on competitors and consumers by self-interested board members, states should move away from empowering practicing professionals. Whatever the merits of this transition, the law should not encourage states to adopt one regulatory scheme by hampering the functioning of another. While some board rules may lack strong public interest justification, others seek to prevent real threats to public welfare. As long as states choose to regulate these threats through rules formulated or implemented by privately composed boards, the law should govern these bodies in ways designed to enable and encourage them to discharge their duties effectively. Discouraging the use of such boards by inhibiting their regulation when no alternative regulatory scheme is in place invites harm.