

# Antitrust Immunity, State Administrative Law, and the Nature of the State

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## ABSTRACT

North Carolina State Board of Dental Examiners v. FTC (N.C. Dental) *has worked a potential revolution in antitrust law. A revolution because it makes clear that state regulatory agencies dominated by active market participants are not entitled to immunity from federal antitrust liability unless they are actively supervised by the State. But still only a potential revolution, because much depends on what counts as “active state supervision.”*

*The story of N.C. Dental is, in large part, the story of how federal courts have tried to define “the State” (for purposes of state-action immunity). N.C. Dental has rejected a labeling approach, a balancing approach, and a sovereignty approach in favor of a financial disinterestedness approach. I argue that this approach isn’t obvious from an abstract political-philosophy standpoint but is actually quite sensible as a limited, antitrust-specific definition.*

*Whether state administrative-law judicial review counts as active state supervision has been a topic of recent litigation. I argue that judicial review that is deferential—which is usually the case—can’t count. De novo, merits-based judicial review can count, but it’s rare. Moreover, the presence of other accountability-enhancing features shouldn’t be considered relevant unless those features are directly related to whether a disinterested official has approved the agency’s action on the merits.*

*Finally, I conclude that, in general, the mere availability of judicial review shouldn’t be considered active state supervision: it’s merely potential, it’s*

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*costly, and it often must wait until harm is suffered—which discourages its exercise. However, if state judicial review is actually invoked and upholds state regulation on the merits, such judicial review should be considered active state supervision and should confer state-action antitrust immunity.*

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## I. INTRODUCTION

*North Carolina State Board of Dental Examiners v. FTC (N.C. Dental)*<sup>1</sup> is potentially revolutionary.<sup>2</sup>

Federal antitrust law's doctrine of "state-action immunity" has been around for a long time: it was in 1943, in *Parker v. Brown*, that the Supreme Court declared that the Sherman Act didn't reach the anticompetitive policies of the states themselves.<sup>3</sup> California had established a blatantly anticompetitive scheme to keep raisin prices up by restricting how much could be sold.<sup>4</sup> If an identical scheme had been organized by the raisin growers themselves, that would have been a per se violation of the Sherman Act.<sup>5</sup> Does it make a difference that the political power of the raisin growers was funneled through California's political process and was enforced by government coercion?<sup>6</sup>

Yes, that makes all the difference, said the Supreme Court: the Sherman Act—as a matter of statutory interpretation, influenced by a federalism vibe—was never meant to reach state policy.<sup>7</sup> (Maybe the fact that these anticompetitive schemes are backed by state coercion makes them even worse than ordinary private monopolies—but that's precisely what makes them immune from antitrust law.)<sup>8</sup>

But it wasn't until 1980, in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, that the Supreme Court explained what to do about private actors whose anticompetitive acts were authorized by state law.<sup>9</sup> California was the culprit again: state law required wine producers and wholesalers to file "fair trade contracts or price schedules" with the state, and

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1. *N.C. State Bd. of Dental Exam'rs v. FTC (N.C. Dental)*, 574 U.S. 494 (2015).

2. See Rebecca Haw Allensworth, *The New Antitrust Federalism*, 102 VA. L. REV. 1387, 1389 (2016) (contending that, with *N.C. Dental* and two other cases, "the U.S. Supreme Court has quietly revolutionized how states and the federal government share power").

3. *Parker v. Brown*, 317 U.S. 341, 351 (1943); see also Allensworth, *supra* note 2, at 1393–96. State-action immunity under federal antitrust law has no relation to the similarly titled state-action doctrine of federal constitutional law. See, e.g., *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *United States v. Stanley (The Civil Rights Cases)*, 109 U.S. 3 (1883).

4. *Brown*, 317 U.S. at 347–48.

5. *Id.* at 350.

6. See generally Alexander Volokh, *Are the Worst Kinds of Monopolies Immune from Antitrust Law?: FTC v. North Carolina Board of Dental Examiners and the State-Action Exemption*, 9 N.Y.U. J.L. & LIBERTY 119 (2015).

7. *Brown*, 317 U.S. at 350–51.

8. See Volokh, *supra* note 6.

9. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

prohibited them from selling to retailers at any price other than the one set in their fair trade contract or price schedule.<sup>10</sup>

Again, if the wine producers and wholesalers had agreed on their own to not deviate from their previously announced price schedules, this would have been a per se Sherman Act violation. Did California's authorization change the result? No: here, this remained essentially private action. Unlike in *Parker*, the anticompetitive acts weren't those of the State. For the private parties to get antitrust immunity, the Court held, they would have to show that their acts both (1) stemmed from a policy that was "clearly articulated" in the statute and (2) were "actively supervised" by the State.<sup>11</sup> Federalism is all well and good, but there's also supremacy:<sup>12</sup> one does not simply authorize violations of the Sherman Act by throwing a "gauzy cloak of state involvement" over private activity.<sup>13</sup>

The *Midcal* test, with its sharp distinction between the State itself on the one hand (complete Sherman Act immunity), and mere private parties on the other hand (no immunity without the two elements of clear authorization and active supervision), has been around for forty years now.

The doctrine acquired a significant curlicue in 1985, when, in *Town of Hallie v. City of Eau Claire*, the Court announced that municipalities, and probably (traditional) state agencies, could get immunity merely on a showing of clear authorization, without having to show the second element of active supervision.<sup>14</sup> The theory relied in significant part on the municipalities being disinterested political actors, so there was a reduced risk that their anticompetitive policies would be merely a "gauzy cloak" for self-interested private price-fixing.<sup>15</sup>

But one major issue remained outstanding in the three decades after *Midcal* and *Hallie*: what about state regulatory agencies controlled by active market participants—the sort of industry self-regulatory agency that is now common in occupational licensing?<sup>16</sup> Would the "self-interested market participant" angle dominate, so that these agencies would be treated no better than private price fixers?<sup>17</sup> Or would the "state agency" labeling dominate, so that these agencies could get immunity merely by showing clear

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10. *Id.* at 99.

11. *Id.* at 105.

12. See U.S. CONST. art. VI, cl. 2; Volokh, *supra* note 6, at 129–30.

13. *Midcal*, 445 U.S. at 105–06; see also Allensworth, *supra* note 2, at 1398–99.

14. 471 U.S. 34, 46 (1985).

15. *Id.* at 46–47; see also Allensworth, *supra* note 2, at 1399.

16. See Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1102–10 (2014).

17. See, e.g., *N.C. State Bd. of Dental Exam'rs v. FTC*, 717 F.3d 359, 368 (4th Cir. 2013), *aff'd*, 574 U.S. 494 (2015); *N.C. Bd. of Dental Exam'rs*, 151 F.T.C. 607, 620–26 (2011).

authorization?<sup>18</sup> Or did the result depend on somehow balancing all the public factors against all the private ones?<sup>19</sup> The federal courts split on this question, and the Supreme Court provided no answer.<sup>20</sup>

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Until *N.C. Dental*. This is what makes the case potentially revolutionary—for the first time, the Supreme Court has made it clear that “a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*’s active supervision requirement in order to invoke state-action antitrust immunity.”<sup>21</sup>

In other words, regulatory boards dominated by active market participants are treated no better than mere private parties for purposes of federal antitrust law; their actions aren’t automatically attributable to the State.

Is this right? Self-interested bias may be bad for all sorts of reasons, but does it really make someone not the State? What if the Governor himself, and the legislators, were compensated directly from the profits of the industries they regulated? Surely this would alter their incentives, perhaps for the worse—but surely we would still say that their decisions were those of the State. (Wouldn’t we?) Perhaps it’s incorrect to confuse the question “Who is the State?” with “Do these state officials have good incentives?”

Perhaps. But perhaps not. Is there any better line to draw? As I’ve noted above, the federal circuits divided on whether the labeling of a board as a “state agency” should be determinative, or whether some other factors should matter. Unexpectedly, with its emphasis on *Who is the State?*,<sup>22</sup> the *Parker/Midcal* doctrine has dragged us into one of the oldest problems of political philosophy.

And, though *N.C. Dental*’s resolution of this problem for purposes of federal antitrust law is hardly self-evident, I conclude, in Part II, that it’s actually the correct approach.

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18. See, e.g., *Earles v. State Bd. of Certified Pub. Accountants of La.*, 139 F.3d 1033, 1041 (5th Cir. 1998); *Porter Testing Lab. v. Bd. of Regents for the Okla. Agric. & Mech. Colls.*, 993 F.2d 768, 772 (10th Cir. 1993); *Cine 42nd St. Theater Corp. v. Nederlander Org., Inc.*, 790 F.2d 1032, 1047 (2d Cir. 1986).

19. See, e.g., *Bankers Ins. Co. v. Fla. Residential Prop. & Cas. Joint Underwriting Ass’n*, 137 F.3d 1293, 1296–97 (11th Cir. 1998); *Hass v. Or. State Bar*, 883 F.2d 1453, 1460 (9th Cir. 1989); *Fuchs v. Rural Elec. Convenience Coop. Inc.*, 858 F.2d 1210, 1217–18 (7th Cir. 1988); *FTC v. Monahan*, 832 F.2d 688, 690 (1st Cir. 1987).

20. See Volokh, *supra* note 6, at 125–28; Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL’Y 931, 987–92 (2014).

21. *N.C. Dental*, 574 U.S. 494, 511 (2015).

22. “L’État, c’est moi,” as Louis XIV tells us.

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But *N.C. Dental* is still only *potentially* revolutionary. As with any revolution, whether it makes a difference depends on how the courts apply it going forward; Justice Alito already pointed out some ambiguities in his *N.C. Dental* dissent.<sup>23</sup>

In particular, the lower courts are now dealing with the crucial question of what constitutes “active supervision.”<sup>24</sup> For instance, is it enough that one can challenge an agency’s action in state court under state administrative-law principles?

Back in the 1980s, *Patrick v. Burget* already gave a partial answer: even if judicial review can count as active supervision, merely procedural judicial review is insufficient.<sup>25</sup> But what if state-court review is more than just procedural—what if the state court reviews the agency for substantive rationality? Could substantive state judicial review be a sort of active supervision?<sup>26</sup>

Recently, the State of Texas argued exactly that. Texas law requires that medicine be practiced “in an acceptable professional manner consistent with public health and welfare.”<sup>27</sup> These words are clearly not self-defining, so the Texas Medical Board, as part of its regulation of the medical profession, fleshes them out by regulation. Regulations have long required that drug prescriptions require a “proper professional relationship”; and in 2010, the Board adopted a new rule providing that such a “proper” relationship can’t exist without a physical examination of a patient.<sup>28</sup> Teladoc, a telehealth provider, sued the Board under federal antitrust law, arguing that the rule

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23. *N.C. Dental*, 574 U.S. at 526 (Alito, J., dissenting).

24. See Allensworth, *supra* note 2, at 1391, 1435–44. Another issue involving active state supervision is what procedures the state executive branch must follow in supervising a market-participant-dominated agency. See *SmileDirectClub, LLC v. Ga. Bd. of Dentistry*, No. 1:18-cv-02328-WMR, 2019 WL 3557892 (N.D. Ga. May 8, 2019), at \*4–\*5; *La. Real Estate Appraisers Bd., F.T.C. Docket No. 9374*, 2018 WL 1836646 (Apr. 10, 2018) (demanding that the state oversight actors exercise meaningful review of the merits); see also FED. TRADE COMM’N, FTC STAFF GUIDANCE ON ACTIVE SUPERVISION OF STATE REGULATORY BOARDS CONTROLLED BY MARKET PARTICIPANTS (2015). Other issues include whether there is a market participant exception to state-action immunity. See *AmeriCare MedServices, Inc. v. City of Anaheim*, 735 F. App’x 473, 474 n.1 (9th Cir. 2018).

25. 486 U.S. 94, 102–05 (1988); see also Allensworth, *supra* note 2, at 1434.

26. See Allensworth, *supra* note 2, at 1435, 1438–39.

27. TEX. OCC. CODE ANN. § 164.051(a)(6) (West 2019).

28. *Teladoc, Inc. v. Tex. Med. Bd.*, No. 1-15-CV-343 RP, 2015 WL 8773509 (W.D. Tex. Dec. 14, 2015), at \*2; see also TEX. ADMIN. CODE § 190.8(1)(L); *id.* § 174.8.

anticompetitively ruled out their innovative business model—essentially relying on video consultation.<sup>29</sup>

Because the Texas Medical Board is dominated by private practitioners, both sides agreed that antitrust immunity was unavailable unless there was “active state supervision.” But the State of Texas pointed out that you can always take a state agency to court and argue that the agency is acting contrary to the statute, or arbitrarily and capriciously. Then, the court exercises substantive review, applying state administrative-law doctrines similar to the familiar *State Farm*<sup>30</sup> and *Chevron*<sup>31</sup> doctrines of federal administrative law. And this substantive review, Texas argued, meant that the Board—concededly dominated by market participants—was indeed actively supervised by the State.

If this were so, the Texas Medical Board’s anticompetitive decisions—and the decisions of any similar state agency—would be essentially insulated from federal antitrust scrutiny. (And what would then be left of *N.C. Dental*?) The State also argued that because Texas law has mechanisms to limit Board members’ self-dealing and promote accountability, the active-supervision requirement should be enforced even less strictly than it would otherwise be. In effect, Texas endorsed a “sliding scale” approach to assessing state supervision.

A federal district judge rejected Texas’s arguments in *Teladoc, Inc. v. Texas Medical Board*.<sup>32</sup> The Board appealed to the Fifth Circuit but then

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29. *Teladoc*, 2015 WL 8773509, at \*3. On telehealth and telemedicine generally, see Alexander R. Kalyniuk, *More Than Just a Toothache? N.C. Dental Leaves Medical Boards Vulnerable: A Look at Telemedicine Companies and Antitrust Challenges to State Prescription Drug Rules*, 8 WM. & MARY BUS. L. REV. 175, 182–89 (2016); Caroline M. Poma, *Telemedicine: A Therapeutic Prescription for Our Healthcare System Contaminated by Old Economy Rules and Regulations*, N.C. J.L. & TECH. 76–82, 98–105 (Jan. 2016), [http://ncjolt.org/wp-content/uploads/2016/01/Poma\\_Final.pdf](http://ncjolt.org/wp-content/uploads/2016/01/Poma_Final.pdf) [<https://perma.cc/7HXQ-7XY9>]; Wynter K. Miller, Note, *Trust and Antitrust: State-Based Restrictions in Telemedicine*, 50 U.C. DAVIS L. REV. 1807, 1813–21, 1829–31 (2017).

30. *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

31. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

32. No. 1-15-CV-343 RP, 2015 WL 8773509 (W.D. Tex. Dec. 14, 2015). On the various stages of the district court litigation, see Mary Delsener, *Telemedicine & the Courts: Teladoc v. Texas Medical Board as a Case Study*, 2015 B.C. INTELL. PROP. & TECH. F. 1, 4–8 (2015); Hon. Craig T. Enoch & John J. Vay, *North Carolina Board of Dental Examiners v. FTC: The High Court Increases Scrutiny of Professional Licensing Boards*, 28 APP. ADVOC. 235, 241–44 (2016); Kalyniuk, *supra* note 29, at 202–12; Miller, *supra* note 29, at 1833–43; Poma, *supra* note 29, at 82–87; Sina Safvati, *Public-Private Divide in Parker State Action Immunity*, 63 UCLA L. REV. 1110, 1113 (2016); William M. Sage, *Competitive Harm from State Licensing Boards: First North Carolina Dentists, Now Texas Physicians?*, HEALTH AFF. BLOG (May 27, 2015), <https://www.healthaffairs.org/doi/10.1377/hblog20150527.048019/full/> [<https://perma.cc/X6KB-BRZH>].

withdrew its appeal—so this issue hasn’t been resolved at the circuit court level.

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The State’s aggressive position can’t possibly be right—as I argue in Part III.

First, state judicial review, as usually practiced—i.e., with deference regimes similar to the federal *State Farm/Chevron* regimes—can’t constitute “active state supervision” within the meaning of *Midcal*.

Agencies virtually always administer statutes that are ambiguous to some extent. Most of what they do is gap-filling, which means that they’re making their own decisions within those gaps: their actions are neither commanded nor forbidden by the statute. With traditional state agencies, we can presume that their decisions are those of the State as long as they’re within the statute.<sup>33</sup> But if there’s one thing *N.C. Dental* makes clear, it’s that when we’re talking about agencies dominated by active market participants—self-interested, and thus with dual loyalties—we can no longer attribute their actions to the State.

Occasionally courts strike down agency action that is forbidden, or mandate agency action that is commanded, but this is the exception. When the governing statute is ambiguous, it authorizes many possible agency actions, and the agency uses its discretion to choose which action to take. Courts could substitute their discretion for that of the agency, but the virtually universal view of courts is that this would be an improper assertion of judicial power<sup>34</sup> and that agencies are more expert and have more democratic credentials than courts.<sup>35</sup> Instead, courts look to whether the agency’s decision is adequately reasoned and within the broad bounds of its authority. It’s a question of separation-of-powers, where state courts (like their federal counterparts) have largely sided with granting power to the state’s executive branch.

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33. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 n.10 (1985). *Hallie*’s footnote 10 treats state agencies casually, as though they were all similar to municipalities. *But see* Edlin & Haw, *supra* note 16, at 1142 (“The flaw of *Hallie*’s footnote ten is its failure to articulate why state agencies and municipalities are so similar that ‘there is little or no danger’ or self-dealing in both. There is a diversity of state agencies . . . .” (footnotes omitted) (quoting *Hallie*, 471 U.S. at 47)).

34. *See, e.g., Chevron*, 467 U.S. at 844 (“[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”); *State Farm*, 463 U.S. at 43 (“The scope of review under the ‘arbitrary and capricious’ standard is narrow and a court is not to substitute its judgment for that of the agency.”).

35. *See Chevron*, 467 U.S. at 865–66.



This is all fine in the usual case (though the assertion that agencies have better democratic credentials than courts may not hold in states with elected judiciaries).<sup>36</sup> But whatever its merits as a matter of administrative law, this posture of deference can't confer immunity as a matter of federal antitrust law: courts' refusal to substitute their own judgment for that of the agency is precisely the opposite of "active state supervision."

For state administrative-law review to confer federal antitrust immunity, state courts would have to revolutionize their own administrative law when private-dominated agencies are at issue—actively substituting their own judgment for that of the agencies. Review would have to be *de novo* and reach the actual merits (not just the permissibility) of the specific anticompetitive decisions.<sup>37</sup>

This sort of *de novo* review is plausible for statutory interpretation—not all states have *Chevron*-like doctrines, and even the federal *Chevron* doctrine has recently come under fundamental criticism at high levels.<sup>38</sup>

It's also conceivable for ordinary exercises of policymaking discretion—state courts could just exercise a free-floating common-law policymaking power, as they do for torts and contracts, instead of using something like *State Farm* deference. But in practice, this is quite hard to imagine.

And non-deferential review is extremely hard to imagine for heavily fact-intensive inquiries like the disciplining of particular doctors for having exceeded the bounds of the legitimate practice of medicine.<sup>39</sup>

Second, the presence of accountability-enhancing mechanisms—like political appointment and removal, legislative oversight, and the like—are praiseworthy as a matter of administrative policy, but they fall short of establishing that the State (i.e., disinterested officials) has approved the policy. Thus, these mechanisms, while nice, don't make for active state supervision.

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36. See Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1279–80 (2012).

37. See *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 515 (2015) ("The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; and the 'mere potential for state supervision is not an adequate substitute for a decision by the State.'" (citations omitted) (quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 638 (1992))).

38. See, e.g., *Pereira v. Sessions*, 138 S.Ct. 2105, 2121 (2018) (Kennedy, J., concurring) ("[I]t seems necessary and appropriate to reconsider . . . the premises that underlie *Chevron* and how courts have implemented that decision.").

39. See, e.g., *Petrie v. Va. Bd. of Med.*, 648 F. App'x 352, 354 (4th Cir. 2016). I was an expert witness on the plaintiff's side in this litigation.

But some antitrust scholars go a bit further and argue that state judicial review should never count, or that the only acceptable forms of active state supervision are those that occur before any antitrust harm has occurred (which would exclude any judicial review other than review that is entirely pre-enforcement).<sup>40</sup>

I'm sympathetic to this view: judicial review doesn't happen unless an injured party invokes it. And an injured party may rationally choose not to invoke judicial review because it's costly: not only is the judicial review process itself costly, but because judicial review usually occurs *ex post*, it requires the party to actually suffer injury before (and often while) suing.

Still, I wouldn't go quite so far. I argue in Part IV that, under some (perhaps rare) circumstances—if state judicial review is actually invoked, and if it upholds State action on the policy merits—even *ex post* judicial review should be deemed to be active state supervision.

## II. DEFINING THE STATE

### A. *The Emphasis on “the State’s Own”*

The basic idea behind *Parker* is that, roughly speaking, antitrust immunity is automatic for the State's own anticompetitive acts but is hard to get for the acts of those that are not the State. The *N.C. Dental* Court states repeatedly that, for immunity to apply, the choice to act anticompetitively must be that of the State and stem from the State's judgment.<sup>41</sup>

Fair enough: If *all* anticompetitive activity (or *no* anticompetitive activity) were equally subject to federal antitrust law, we wouldn't need to care so much whose it was. But as soon as we accept both the *Parker* premise that state government programs are exempt, and the premise of supremacy that

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40. See, e.g., Allensworth, *supra* note 2, at 1438–39; Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 716–17 (1991).

41. *N.C. Dental*, 574 U.S. at 504 (“An entity may not invoke *Parker* immunity unless the actions in question are an exercise of the State's sovereign power.”); *id.* at 505 (“[I]t is necessary in light of *Parker*'s rationale to ensure the States accept political accountability for anticompetitive conduct they permit and control.”); *id.* at 506 (“*Parker* immunity requires that the anticompetitive conduct of nonsovereign actors . . . result from procedures that suffice to make it the State's own.”); *id.* at 507 (“Entities purporting to act under state authority might diverge from the State's considered definition of the public good. . . . The second *Midcal* requirement—active supervision—seeks to avoid this harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity.”).

State approval can't immunize *everything* (no “gauzy cloak[s],” please),<sup>42</sup> we have to draw the State/non-State distinction somehow.

The Supreme Court has been consistent on that point and has long insisted that the challenged acts be *the State's own* before immunity can apply. In *FTC v. Ticor Title Insurance Co.*, the Court wrote: “The question is not how well state regulation works but whether the anticompetitive scheme is the State's own.”<sup>43</sup> And in *N.C. Dental*, the Court wrote: “*Parker* immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own.”<sup>44</sup> Justice Alito, dissenting in *N.C. Dental*, agreed on the need to find acts *of the State*;<sup>45</sup> the only disagreement between the majority and the dissent was whether the acts of the North Carolina Board of Dental Examiners, a state agency, were those of the State.

This concept of *the State itself* shows up in two separate places:

- First, there's the State as the anticompetitive actor. When the legislature acts, as it did in *Parker*, that's clearly the act of the State itself: state constitutions define legislatures as the source of state law. The same goes for state supreme courts (at least when acting in their legislative capacity),<sup>46</sup> the Governor himself (at least when acting within his delegated power,<sup>47</sup> and perhaps also within his inherent power under the state constitution), and so on.
- Second, there's the State as active supervisor. If the State itself isn't the anticompetitive actor and you have to satisfy the second prong of *Midcal*—as in *Midcal* itself, where the actors were clearly private profit-makers—you can achieve *Parker* immunity if you're subject to active supervision *by the State*.

So if you want to be immune, either *you* need to be the State or *your active supervisor* needs to be the State. Either way, the decision to allow an anticompetitive act needs to be *the State's own*.

42. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105–06 (1980).

43. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992).

44. *N.C. Dental*, 574 U.S. at 506 (citing *Goldfarb v. Va. State Bar*, 421 U.S. 773, 790 (1975); 1A PHILIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 226, at 180 (4th ed. 2013)).

45. *N.C. Dental*, 574 U.S. at 520 (Alito, J., dissenting) (“[T]he only question in this case is whether the Board is really a state agency, and the answer to that question is clearly yes.”).

46. *See Bates v. State Bar of Ariz.*, 433 U.S. 350, 359–60 (1977); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 790 (1975). As to state courts in their judicial capacity, the Supreme Court has reserved judgment. *See Patrick v. Burget*, 486 U.S. 94, 103–04 (1988).

47. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 n.10 (1985).

B. *The Ambiguities Behind “the State’s Own”*

Unfortunately, the concept of *the State’s own* turns out to be less clear than one would hope.

We could define “the State” as only including lawmakers—the legislature, plus the state supreme court when acting in a legislative capacity.<sup>48</sup> Then, all we’d need to do would be to check whether the anticompetitive intent is clear on the face of the statute (or supreme court enactment): not too hard.

But this doesn’t work when it comes to who’s the State for purposes of “active state supervision”: it’s unrealistic to think that the legislature itself would be supervising every potentially anticompetitive decision by a state agency.

Moreover, even if the case of direct State action, the Court has rejected the idea that immunity attaches only if the anticompetitive conduct is *mandated* by statute: the first step of the *Midcal* inquiry is whether the anticompetitive conduct stems from a policy “clearly articulated” by statute, which really means only that the conduct be “a foreseeable result” of the statutory design.<sup>49</sup>

In other words, the *Parker* doctrine allows the state legislature to authorize at least some of its *agents* to, in their discretion, engage in acts (and supervise others who engage in acts) that would otherwise violate federal antitrust law. But it can’t authorize just *anyone*, or else federal supremacy would go out the window. So who’s in and who’s out?

We could draw some other lines that would reach into the state’s Executive Branch. A narrow line would protect only those who are elected by the people (i.e., the Governor and various others, like perhaps cabinet officials). A broader line would protect anyone who is appointed (or perhaps who is removable) by an elected official, or even anyone who can ultimately trace their appointment (or removability) to an elected official.<sup>50</sup> Maybe the *Ticor* majority is pointing in this direction when it says that “States must undertake political responsibility for actions they intend to undertake” and that the State must (by compliance with the *Midcal* test) be “responsible for the price fixing it has sanctioned and undertaken to control”;<sup>51</sup> and the *N.C.*

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48. See *Bates*, 433 U.S. at 359–60; *Goldfarb*, 421 U.S. at 790; see also *Patrick*, 486 U.S. at 103–04.

49. See *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 226–27 (2013); *Hallie*, 471 U.S. at 41–46. For a recent (post-*Phoebe Putney*) application of the clear articulation requirement, see *Diverse Power, Inc. v. City of Lagrange*, 934 F.3d 1270, 1275–76 (11th Cir. 2019).

50. Cf. FTC OFFICE OF POLICY PLANNING, REPORT OF THE STATE ACTION TASK FORCE (2003) (calling for supervision by elected politicians); Allensworth, *supra* note 2, at 1436–37 (suggesting that “the state,” for purposes of supervision, should consist of elected officials or executive branch officials).

51. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992); see also Allensworth, *supra* note 2, at 1405–06.

*Dental* majority is pointing in the same direction when it says that “it is necessary in light of *Parker*’s rationale to ensure the States accept political accountability for anticompetitive conduct they permit and control.”<sup>52</sup>

Such a line would probably protect most “traditional” state agencies, though it would exclude non-traditional agencies like the North Carolina Board of Dental Examiners, whose members are elected only by market participants and whose removal isn’t provided for at all in the statute.<sup>53</sup> Perhaps that’s a good line. But the courts haven’t embraced that inquiry either.

In what follows, I’ll discuss a number of other lines that have been common in the caselaw. The first connects “state-ness” to the absence of financial self-interest. The second defines it by a balancing of various pro-public and pro-private factors. The third defines it by how the relevant entity is labeled under state law. The fourth defines it by the presence of sovereignty.

None of these lines is self-evidently the best. And indeed, *Who is the State?* is an old problem of political theory—we shouldn’t expect that courts deciding Sherman Act cases will resolve it. I conclude here that there is no line that is best for all purposes; the best we can hope for is a definition of what the State is *for purposes of federal antitrust law*. And by that standard, the first criterion—depending on the absence of financial self-interest—is the best fit for antitrust purposes.

### 1. Self-Interest, Self-Dealing, and the Public Good

The *Hallie* Court, in its holding that municipalities didn’t need active state supervision, emphasized financial incentives. The trouble with private profit-makers like the wine producers and wholesalers in *Midcal* is precisely that they’re profit-makers—self-interested actors. “Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.”<sup>54</sup>

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52. *N.C. State Bd. of Dental Exam’rs v. FTC*, 574 U.S. 494, 505 (2015) (citing *Ticor*, 504 U.S. at 636); *see also* Allensworth, *supra* note 2, at 1409; Edlin & Haw, *supra* note 16, at 1136–39. This would give the threshold inquiry for the antitrust state-action doctrine a bit of the flavor of the federal separation-of-powers doctrines about appointment and removal of “officers of the United States.” *See, e.g.*, U.S. CONST. art. II, § 2, cl. 2; *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 495–98 (2010); *Morrison v. Olson*, 487 U.S. 654, 670–78 (1988); *Buckley v. Valeo*, 424 U.S. 1, 120–32 (1976) (per curiam).

53. *See N.C. Bd. of Dental Exam’rs*, 151 F.T.C. 607, 626 (2011).

54. *Hallie*, 471 U.S. at 47.

Municipalities, on the other hand, aren't as subject to financial incentives and are electorally accountable, so this danger is muted; that's why they can get immunity on a mere showing of "clear authorization" (prong one of *Midcal*) and don't have to show "active state supervision" (prong two), as private actors like the wine producers and wholesalers would have to.

But wait a minute: if state-action immunity is about whether you're the State, and if municipalities are the State because of the absence of profit-making incentives and the presence of electoral accountability, then why not grant them the same immunity that legislatures get? Why still subject them to the first prong of *Midcal*—the "clearly articulated" prong? The *Hallie* Court's view was that this prong "serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy."<sup>55</sup> Essentially, requiring the first prong of *Midcal* imports a bit of state administrative law—making sure that the municipality (or state agency)<sup>56</sup> isn't acting beyond its delegated power—into the federal antitrust inquiry.<sup>57</sup>

The *N.C. Dental* Court hit these same themes, in holding that state agencies dominated by active market participants need to satisfy *Midcal*'s second prong and show active state supervision: self-interested entities "purporting to act under state authority might diverge from the State's considered definition of the public good."<sup>58</sup> The conclusion that agencies controlled by active market participants pose the risk of self-dealing "does not question the good faith of state officers but rather is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals."<sup>59</sup>

This formulation seems to deviate somewhat from the question of whether the actor *is the State*. Rather, what seems to matter here is whether they can be counted on to carry out state policy, which can be established by showing that they're acting within their lawful powers and showing that they lack a

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55. *Id.* at 46.

56. *Id.* at 46 n.10.

57. See Allensworth, *supra* note 2, at 1413.

58. N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 507 (2015).

59. *Id.* at 510; see also Patrick v. Burget, 486 U.S. 94, 100–01 (1988) ("The [active supervision] requirement is designed to ensure that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies."); *id.* at 101 ("Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests."); Allensworth, *supra* note 2, at 1423 (noting that "the test devised in *NC Dental* is based on capture"—i.e., the "inherent capture" of agencies dominated by self-interested actors).

self-interest that would make them pursue some other, possibly inconsistent goal.

That's one possible critique of this approach: the shift from "Are you actually the State?" to "Can you be counted on to pursue the State's goals?"—or perhaps not really a shift, but rather the simultaneous invocation of both ideas, which on their face don't seem identical.

Second—and related—what about the notion of political accountability? The *N.C. Dental* Court writes, "Immunity for state agencies, therefore, requires more than a mere facade of state involvement, for it is necessary in light of *Parker*'s rationale to ensure the States accept political accountability for anticompetitive conduct they permit and control."<sup>60</sup> And it twice contrasts industry self-regulatory boards with the electorally accountable municipalities at issue in *Hallie*.<sup>61</sup>

Political accountability is praiseworthy, but how does it connect with the financial self-interest point? As I've noted above, the Governor is politically (and even electorally) accountable, but what if he were compensated in a way that made him financially biased—would he no longer be the State? And we can imagine the same critique in reverse: what if the financially self-interested board members were subject to appointment and removal by high-level political officers, legislative oversight, and had other accountability-promoting institutional features? Couldn't one be both politically accountable and financially self-interested?

This ends up being important, because these features don't always cut in the same direction. The North Carolina Board of Dental Examiners lacked meaningful political accountability (in the conventional sense), since its members were solely elected by the community of active market participants—and the Fourth Circuit and the FTC found this feature important in denying the Board state-action immunity.<sup>62</sup> On the other hand, the members of the Texas Board of Medicine are appointed and removable by the Governor and Senate, and the Board has other accountability-promoting features—which seems to make them as politically accountable as, say, the Secretary of State.<sup>63</sup> But this sort of political accountability doesn't seem significant for the bottom-line *N.C. Dental* test, which rides solely on self-interestedness—despite the Court's invocations of political accountability.

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60. *N.C. Dental*, 574 U.S. at 505 (citing *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992)).

61. *Id.* at 508, 511.

62. *N.C. Dental*, 717 F.3d 359, 368 (4th Cir. 2013), *aff'd*, 574 U.S. 494 (2015).

63. *See infra* Part III.C.

In fact, the *N.C. Dental* Court seems to throw the term “political accountability” around as though it’s essentially a synonym for financial disinterestedness—which seems like an oddly antitrust-specific way of talking about a big concept of political theory. (We’ll see this again later, with the term “sovereignty”<sup>64</sup>—and perhaps adopting antitrust-specific definitions is the best approach after all! Still, the Court doesn’t seem very conscious about what it’s doing.)

Third, one might also critique this approach’s single-minded focus on *profit-making* incentives. Are traditional state officials—ones that earn flat salaries—immune from incentives? Clearly everyone has incentives, even ideological ones. Even if we ignore ideological incentives (because there’s no principled line to be drawn between “the public good” and ideology, and because in any event, ideological bias isn’t the focus of antitrust law), there remains the problem of agency capture. Nominally disinterested public officials interact with the profit-maximizing community all the time, and these profit-maximizers mobilize political support (including by contributing to these officials reelection campaigns), hold out the prospect of future private-sector career opportunities, and do all the other things that are typical of capture.<sup>65</sup>

And yet, the caselaw has rejected that the possibility of capture has a role to play in the state-action immunity inquiry. Justice Alito, in his *N.C. Dental* inquiry, critiques the majority’s analysis as being apparently “predicated on an assessment of the varying degrees to which a municipality and a state agency like the North Carolina Board are likely to be captured by private interests.”<sup>66</sup> Not exactly: the majority’s analysis is about direct profit-making incentives, not the possibility of regulatory capture. Still, if direct profit-making incentives vitiate immunity, why not indirect influence by profit-makers? Justice Alito points to *Columbia v. Omni Outdoor Advertising*,<sup>67</sup> where the Court “refused to recognize an exception to *Parker* for cases in which it was shown that the defendants had engaged in a conspiracy or corruption or had acted in a way that was not in the public interest. The Sherman Act, we said, is not an anticorruption or good-government statute.”<sup>68</sup>

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64. See *infra* text accompanying notes 123–31.

65. On capture, see MAXWELL L. STEARNS ET AL., LAW AND ECONOMICS: PRIVATE AND PUBLIC 759–62 (2018); Allensworth, *supra* note 2, at 1417–26; Elhauge, *supra* note 40, at 717–29; Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039 (1997).

66. *N.C. Dental*, 574 U.S. at 525 (Alito, J., dissenting).

67. 499 U.S. 365 (1991).

68. *N.C. Dental*, 574 U.S. at 525 (Alito, J., dissenting) (citations omitted) (citing *Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 374, 398 (1991)).



This critique can be answered, and in fact the *N.C. Dental* majority does answer it: focusing on capture is simply “vague and unworkable” and requires “subjective tests” and “ad hoc and *ex post* questioning of [officials’] motives”;<sup>69</sup> at least limiting oneself to direct profit-making incentives is more administrable and objective.

Still, the critique is out there, as well as the concern that, by asking “Do you have profit-making motives?”, we’ve seemed to move away from the general concern with “Are you the State?” Does being the State really depend on the details of your compensation arrangements? We’ll come back to this question later.<sup>70</sup> Perhaps this is the best approach—but deciding that might also depend on whether any other lines look better.

A final critique of this approach is that it’s in some tension with *Parker* itself, where the approval of the state’s Agricultural Prorate Advisory Commission was necessary to make the raisin program effective. The Commission had no state supervision, and “six of the nine Commission members were required to be engaged ‘in the production of agricultural commodities as their principal occupation.’”<sup>71</sup> Moreover, even after the Commission approved the program, it took a vote of (presumably self-interested) raisin producers to finally enact the program.<sup>72</sup>

## 2. Does It Look Like the State?

Another approach—which at least looks more tied to “Are you the State?”—would be to look at indicia of State-ness. *Hallie* had already suggested, in dictum, that state agencies would be treated like municipalities and would only have to satisfy the first prong of *Midcal*. If we buy this—but if we’re also worried that States will label essentially private organizations as state agencies to avoid the operation of antitrust law—perhaps we might look at whether the challenged agencies “look like” traditional state agencies.

This, indeed, was the approach taken by some circuits before *N.C. Dental*. The First, Seventh, Ninth, and Eleventh Circuits adopted a somewhat laundry-list approach. Everything that *usually* characterizes government

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69. *Id.* at 509 (majority opinion).

70. *See infra* Part II.C.

71. Brief for Petitioner, *N.C. Dental*, 574 U.S. 494 (2015) (No. 13-534), 2014 WL 2212529, at \*21–\*22 (citing *Parker v. Brown*, 317 U.S. 341, 346 (1943) (citing 1939 CAL. STAT. ch. 894, § 3, at 2488)); John Lopatka, *The State of “State Action” Antitrust Immunity: A Progress Report*, 46 LA. L. REV. 941, 948 & n.21 (1986).

72. *N.C. Dental*, 574 U.S. at 522 (Alito, J., dissenting) (citing *Parker*, 317 U.S. at 346–47). *But see generally* Elhauge, *supra* note 40 (arguing that the self-interestedness approach has in fact always implicitly characterized state-action caselaw).

agencies is relevant: the more such characteristics an entity has, the more likely it will be considered “the State” for purposes of *Parker* immunity.<sup>73</sup>

Here’s one example: Illinois regulated its electric utility monopolies and allowed them to jointly divide geographic markets.<sup>74</sup> The Rural Electric Convenience Cooperative (RECC, an electric cooperative owned by its customer-members) entered into such an agreement with another utility, and was eventually sued by some of its customer-members on the grounds that this market division was a per se violation of the Sherman Act.<sup>75</sup> Whether some form of state-action immunity applied depended on whether RECC was more similar to a municipality or to a purely private party.<sup>76</sup> The Seventh Circuit found that RECC didn’t “fit easily into any clear category on the continuum from private to public.”<sup>77</sup> It was a nonprofit corporation that had the power of eminent domain but wasn’t “subject to public scrutiny through sunshine laws or the political process.”<sup>78</sup> It was “a hybrid entity with sufficient non-private attributes that its activities require[d] some lower level of supervision to ensure that it is acting pursuant to state policy” (i.e., merited the same state-action treatment as a municipality).<sup>79</sup>

This decision was somewhat confused—treating Illinois Commerce Commission oversight as sufficiently establishing that RECC was acting within the scope of its delegated power (*Midcal* prong one), whereas that determination is usually made by the reviewing federal court, and ICC oversight could have been used instead to establish active state supervision (*Midcal* prong two). Moreover, it’s not clear why nonprofit status cuts in favor of state-action immunity: yes, nonprofit corporations have muted profit-making incentives, but, on the other hand, nonprofits are also subject to antitrust law.<sup>80</sup> Still, this case shows how a balancing approach that considers public-looking and private-looking factors can work.

Then-Judge Stephen Breyer followed a similar approach in the First Circuit, in a case involving the Massachusetts Board of Registration in Pharmacy. The Board had taken steps to limit pharmacist advertising,

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73. See, e.g., *Bankers Ins. Co. v. Fla. Residential Prop. & Cas. Joint Underwriting Ass’n*, 137 F.3d 1293, 1296–97 (11th Cir. 1998); *Hass v. Or. State Bar*, 883 F.2d 1453, 1460 (9th Cir. 1989); *Fuchs v. Rural Elec. Convenience Coop. Inc.*, 858 F.2d 1210, 1217–18 (7th Cir. 1988); *FTC v. Monahan*, 832 F.2d 688, 690 (1st Cir. 1987).

74. *Fuchs*, 858 F.2d at 1211–12.

75. *Id.*

76. *Id.* at 1217.

77. *Id.*

78. *Id.*

79. *Id.*

80. See, e.g., *Arizona v. Maricopa Cty. Med. Soc’y*, 457 U.S. 332, 348–49 (1982); *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 696 (1978); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 788 (1975).

mail-order pharmacies, and “branch offices” or “pick-up stations.”<sup>81</sup> Factors relevant to state-action immunity included “how the Board functions in practice, and perhaps upon the role played by its members who are private pharmacists.”<sup>82</sup> Judge Breyer used a similar approach in a case involving the Massachusetts Port Authority; whether the Authority was governed by municipality-like rules depended on whether it possessed “such typical governmental attributes as the power of eminent domain, rulemaking authority, bonding authority, and tax exempt status.”<sup>83</sup>

The Eleventh Circuit was very candid about the enterprise: “*The more public the entity looks*, the less we worry that it represents purely private competitive interests, and the less need there is for active state supervision to ensure that the entity’s anticompetitive actions are indeed State actions and not those of an alliance of interests that properly should be competing.”<sup>84</sup> The focus on “purely private competitive interests” sounds like *Hallie*’s self-dealing inquiry (and, indeed, the court immediately cited *Hallie*),<sup>85</sup> but the court tied it to whether these actions were “indeed state actions,” and admitted that it comes down to an impressionistic analysis of how public the entity looks. This was the Eleventh Circuit’s laundry list of “government-like attributes”.<sup>86</sup>

Factors favoring political-subdivision treatment include open records, tax exemption, exercise of governmental functions, lack of possibility of private profit, and the composition of the entity’s decision-making structure. The presence or absence of attributes such as these tells us whether the nexus between the State and the entity is sufficiently strong that there is little real danger that the entity is involved in a *private* anticompetitive arrangement.<sup>87</sup>

The Ninth Circuit did a similar analysis: The Oregon State Bar adopted a rule making itself the sole provider of legal malpractice insurance within the state.<sup>88</sup> The Ninth Circuit granted immunity without requiring active

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81. *FTC v. Monahan*, 832 F.2d 688, 688 (1st Cir. 1987).

82. *Id.* at 690.

83. *Interface Grp., Inc. v. Mass. Port Auth.*, 816 F.2d 9, 13 (1st Cir. 1987).

84. *Bankers Ins. Co. v. Fla. Residential Prop. & Cas. Joint Underwriting Ass’n*, 137 F.3d 1293, 1297 (11th Cir. 1998) (emphasis added).

85. *Id.* (citing *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 45 (1985)).

86. *Id.* at 1296.

87. *Id.* at 1296–97 (footnote omitted) (citation omitted) (citing *Crosby v. Hosp. Auth. of Valdosta & Lowndes Cty.*, 93 F.3d 1515, 1525 (11th Cir. 1996); *Commuter Transp. Sys., Inc. v. Hillsborough Cty. Aviation Auth.*, 801 F.2d 1286, 1290 (11th Cir. 1986); and various cases from outside the Eleventh Circuit, as well as the then-current edition of the Areeda-Hovenkamp treatise, *supra* note 44).

88. *Hass v. Or. State Bar*, 883 F.2d 1453, 1455–56 (9th Cir. 1989).

supervision based on (1) the Bar’s formal labeling as “a public corporation and an instrumentality of the judicial department of the State of Oregon,” (2) how many of its members “must be nonlawyer members of the public,” (3) open-records, account-auditing, and open-meeting requirements, and (4) the fact that its members are defined as “public officials who must comply with the Code of Ethics.”<sup>89</sup> “These requirements,” the court said, “leave no doubt that the Bar is a public body, akin to a municipality for the purposes of the state action exemption.”<sup>90</sup>

Perhaps I’ve given away the problem here by characterizing the approach as being “laundry-list.” The presence of “private profit” is familiar from the previous subsection. What about the other factors? Many entities have tax exemptions: how about churches? Many entities exercise (traditionally) “governmental functions,” like coercively controlling entry into an industry through licensing. But isn’t it problematic to use the presence of such coercion as a factor *supporting* immunity, when one is precisely trying to smoke out cases where governments seek to immunize such coercive groups by labeling them agencies?<sup>91</sup> Why does the presence of open-records requirements make an entity “the State,” when the State is also capable of regulating private companies by imposing open-records requirements on them?<sup>92</sup>

In short, the problem with considering *everything* relevant is that many factors are only tenuously connected to the theoretical question of what makes something “the State,” and in any event we have no non-impressionistic way of weighing all these factors.<sup>93</sup>

### 3. Labeling

If weighing factors—or even identifying relevant factors—is too much of a burden, how about just trusting the legislature itself to define the State?

Let’s not forget the origins of the *Parker* doctrine—and its (quasi-) constitutional foundations. The Sherman Act was passed decades before the 1937 New Deal constitutional revolution, in an era when the Commerce Clause was interpreted far more narrowly. In those days, state professional

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89. *Id.* at 1460.

90. *Id.*

91. See Edlin & Haw, *supra* note 16, at 1143.

92. See, e.g., Nicole B. Casarez, *Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 U. MICH. J.L. REFORM 249, 251 (1995) (advocating that Congress pass legislation subjecting private federal prisons to the Freedom of Information Act).

93. See Edlin & Haw, *supra* note 16, at 1141.

regulation—and, more generally, most state economic regulation—wouldn't even have been thought of as falling within the Commerce Clause. Not only would the regulation of in-state raisin producers or tooth whiteners have been considered beyond Congress's powers—it wouldn't even have been subject to the statute in the first place because it wouldn't have been “in restraint of trade or commerce among the several States.”<sup>94</sup>

With the expansion of the Commerce Clause,<sup>95</sup> the reach of the Sherman Act has likewise expanded (though not necessarily to the utmost extent of Congress's commerce power).<sup>96</sup> But should this expansion mean that even traditional state regulation is now subject to federal antitrust law?

If one wants to immunize traditional state regulation, one could just rest one's argument solely on the basis of the original understanding that the Sherman Act didn't encompass state regulation. But that isn't likely to be a good argument: as to private activity, it's clear that previously excluded intrastate activity may now fall within the Sherman Act's element of “interstate commerce”;<sup>97</sup> why should previously excluded state regulatory activity be any different?

If one wants to argue that such an expansion of the Sherman Act is more problematic when state regulation is concerned, one will have to bring in federalism- and state sovereignty-based concerns.

But resting one's argument on federalism and state sovereignty as such likewise seems excessive: after *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>98</sup> if Congress amended the Sherman Act to explicitly encompass State anticompetitive activity on the same basis as private anticompetitive activity, that would clearly be constitutionally permissible. (And even back in 1937, *Parker* had assumed as much.)<sup>99</sup> And *Parker* only ever presented itself as a statutory interpretation case: “In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a State's control over its officers and agents is not lightly to be attributed to Congress.”<sup>100</sup>

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94. 15 U.S.C. § 1 (2018).

95. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942).

96. See *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 242 (1980); Jeffrey M. Thompson, Note, *Jurisdiction Under the Sherman Act: A Close Look at the Affects Test*, 60 NOTRE DAME L. REV. 603, 606–08, 607 n.16 (1985).

97. See Thompson, *supra* note 96, at 608–13.

98. 469 U.S. 528 (1985).

99. *Parker v. Brown*, 317 U.S. 341, 350 (1943) (“We may assume . . . , without deciding, that Congress could, in the exercise of its commerce power, prohibit a state from maintaining a stabilization program like the present because of its effect on interstate commerce.”).

100. *Id.* at 351.

What motivates *Parker* is thus a subconstitutional notion of respect for federalism—now familiar to us as a version of the federalism-based substantive canon of *Gregory v. Ashcroft*,<sup>101</sup> *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*,<sup>102</sup> and other cases.

If we're going to respect federalism (even if only as an optional matter of statutory interpretation), then presumably we should give *some* amount of respect to how states choose to organize themselves. I've already discussed some formalistic strategies above—only including the legislature, only including elected officials, or only including officials who can trace their appointment (or possibly removal) back to elected officials—but the courts haven't gone for those.<sup>103</sup>

How about, then, letting the states label themselves? The apex of such formalism is illustrated by the Second Circuit's reasoning in *Cine 42nd Street Theater Corp. v. Nederlander Organization*,<sup>104</sup> discussing the immunity of New York's Urban Development Corporation:

[T]he UDC need not satisfy the active state supervision prong of the *Midcal* test. When the actor is a municipality, the active state supervision requirement is abandoned because a municipality has no incentive to act in any other than the public interest. The UDC, like a municipality, is by statute a political subdivision of the state. Therefore its interests must be defined as public rather than private, and consequently, the active state supervision requirement is unnecessary. Such a holding was presaged by *Hallie*, where the Supreme Court indicated that it was "likely" that state agencies would not have to demonstrate active state supervision.<sup>105</sup>

Some other circuits do essentially the same, though with even less analysis. For instance, the Fifth Circuit granted immunity to Louisiana's state board of CPAs with a cursory statement that the board was "functionally similar to a municipality" and a cursory reference to the "public nature of the Board's actions."<sup>106</sup> And the Tenth Circuit did the same for a public university, "[g]iven the nature of these defendants, a constitutionally created

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101. 501 U.S. 452 (1991).

102. 531 U.S. 159 (2001).

103. See *supra* text accompanying notes 42–47.

104. 790 F.2d 1032 (2d Cir. 1986).

105. *Id.* at 1047 (citations omitted) (citing *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 n.10 (1985); and N.Y. UNCONSOL. LAW § 6254 (McKinney 2019)).

106. *Earles v. State Bd. of CPAs of La.*, 139 F.3d 1033, 1041 (5th Cir. 1998).

state board, its executive secretary, and a state created and funded university.”<sup>107</sup>

This extreme formalism seems clearly inconsistent with current caselaw: what about *Goldfarb v. Virginia State Bar*,<sup>108</sup> where the Supreme Court denied immunity to the Virginia State Bar, though it was labeled a state administrative agency by statute?<sup>109</sup> As the *N.C. Dental* majority reasserted, immunity doesn’t “derive from nomenclature alone.”<sup>110</sup> Moreover, it would seem to allow states to exempt their favored in-state anticompetitive activity from federal antitrust law without limit. Because this is just a matter of statutory interpretation, it wouldn’t violate the Supremacy Clause; but it does seem to open up a big loophole.<sup>111</sup>

#### 4. Sovereignty

A twist on the formalist approach might be to ask whether the actor is *sovereign*: the federalism aspect of *Parker* is all about dual sovereignty,<sup>112</sup> and the *Parker* Court stated explicitly that the State was acting “as sovereign” in imposing the challenged restraint “as an act of government.”<sup>113</sup> So perhaps the key to whether *the State* is acting in any given case is whether the challenged entity is *sovereign*.

Justice Alito’s *N.C. Dental* dissent pushed sovereignty strongly. Medical and dental regulation, Justice Alito wrote, was seen in 1890 as “falling squarely within the States’ sovereign police power.”<sup>114</sup> The Board is a sovereign entity, a state agency created by statute to follow State-established

107. *Porter Testing Lab. v. Bd. of Regents for Okla. Agric. & Mech. Colls.*, 993 F.2d 768, 772 (10th Cir. 1993).

108. 421 U.S. 773 (1975).

109. *Id.* at 776, 789–90; *Hallie*, 471 U.S. at 45; Allensworth, *supra* note 2, at 1397 (discussing *Goldfarb*). Compare Elhauge, *supra* note 40, at 670–71 (noting heavy use of formalism in earlier cases), with Allensworth, *supra* note 2, at 1390 (noting that the Court has abandoned formalism). *Goldfarb* preceded *Midcal*, so it couldn’t discuss *Midcal*’s precise two-part test. But *Hallie* distinguished municipalities from the Virginia State Bar, stating that the latter was private for *Midcal* purposes.

110. *N.C. State Bd. of Dental Exam’rs v. FTC*, 574 U.S. 494, 511 (2015).

111. The labeling approach is reminiscent of what Allensworth calls the old-style “boundary theory” of distinguishing the state from the private sector. See Allensworth, *supra* note 2, at 1392–1404. Under the new approach, by contrast, “what constitutes ‘the state’ is a matter of federal, not state law.” *Id.* at 1404–05.

112. *Parker v. Brown*, 317 U.S. 341, 351 (1943) (“In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress.”).

113. *Id.* at 352.

114. *N.C. Dental*, 574 U.S. at 519 (Alito, J., dissenting).

standards in pursuing traditional state regulatory goals,<sup>115</sup> able to sue in the State’s name,<sup>116</sup> “a full-fledged state agency,”<sup>117</sup> “really a state agency,”<sup>118</sup> “unmistakably a state agency created by the state legislature to serve a prescribed regulatory purpose and to do so using the State’s power in cooperation with other arms of state government.”<sup>119</sup> In short, it’s “part of the government of the sovereign State of North Carolina.”<sup>120</sup>

These state agencies are unlike the corporations chartered by the State that sought to immunize their anticompetitive activities: “North Carolina did not authorize a private entity to enter into an anticompetitive arrangement.”<sup>121</sup> They’re likewise unlike the *nonsovereign* municipalities denied automatic immunity in *Town of Hallie v. City of Eau Claire*.<sup>122</sup> If these agencies are more sovereign than municipalities, surely they should also be more immune—but perversely, Alito argues, the rule of *N.C. Dental* treats them less favorably, since the Board has to satisfy both prongs of *Midcal*, not just the first.<sup>123</sup>

According to the Alito approach, then, we should just look to sovereignty. But what does sovereignty mean? Looking at the factors that Alito relies on, it turns out that his view of “sovereignty” is partly labeling, partly the laundry list of factors, and partly a reliance on traditional areas of state regulation. The critiques of those approaches seem to apply here too.

The *N.C. Dental* majority apparently agreed on the importance of sovereignty, writing that “[a] nonsovereign actor controlled by active market participants . . . enjoys *Parker* immunity” only if it satisfies both prongs of *Midcal*,<sup>124</sup> and that “[a]n entity may not invoke *Parker* immunity unless the actions in question are an exercise of the State’s sovereign power”<sup>125</sup>—though disagreeing with Alito on whether the Board was in fact sovereign.

One might initially observe that the majority’s statement about sovereignty and immunity isn’t right as a matter of doctrine. As mentioned above, municipalities are non-sovereign, though arms of the State.<sup>126</sup> And yet, as Alito pointed out, even they can qualify for *Parker* immunity if they satisfy

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115. *Id.* at 520–21.

116. *Id.* at 521.

117. *Id.* at 524.

118. *Id.* at 520.

119. *Id.* at 521.

120. *Id.* at 524.

121. *Id.* at 522 (citing *N. Secs. Co. v. United States*, 193 U.S. 197 (1904)).

122. *Id.* at 524.

123. *Id.* at 524.

124. *Id.* at 503–04 (majority opinion).

125. *Id.* at 504 (citing *Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 374 (1991)).

126. *See id.* at 524 (Alito, J., dissenting); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38, 45 (1985).



the first prong of *Midcal*, which just means that their anticompetitive policies must have been “contemplated”<sup>127</sup> by the legislature, which comes down to whether their conduct is “a foreseeable result” of the legislative act.<sup>128</sup>

Second, one might wonder how the *N.C. Dental* majority and dissent can have disagreed on such a fundamental issue as whether a state agency is sovereign.

But it turns out that, when the Court repeatedly categorizes the Board as “nonsovereign,”<sup>129</sup> it has an antitrust-specific concept of sovereignty in mind—its statements about sovereignty are hedged about with “[f]or purposes of *Parker*” and “for purposes of state-action immunity.”<sup>130</sup> The concept starts out looking circular—“a nonsovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself”—but it soon becomes clear that *Parker*-sovereignty is a matter of the degree of State involvement (more than a “facade”) and the extent of “political accountability.”<sup>131</sup> (Recall that “political accountability” also seems to be used as just as synonym for disinterestedness.)<sup>132</sup>

How do we know that the Board isn’t politically accountable and thus that the degree of State involvement is insufficient? Because of the presence of “private anticompetitive motives,” which may “blend” with “established ethical standards . . . in a way difficult even for market participants to discern.”<sup>133</sup> In light of this failure of accountability, the only procedures sufficient to make the Board’s decisions “the State’s own”<sup>134</sup> are those that stem from both parts of the *Midcal* test. So the majority’s view of sovereignty just comes back to the self-interestedness approach.

### C. *The Incoherence of Prevailing Approaches*

As we’ve seen by now, none of these approaches are perfect if what we’re looking for is a reliable way of determining what “the State” is. I’ve suggested a couple of bright-line rules—legislator, elected official, or

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127. *Hallie*, 471 U.S. at 42, 44.

128. *Id.* at 42.

129. *N.C. Dental*, 574 U.S. at 503–10.

130. *Id.* at 505.

131. *Id.*

132. See text accompanying *supra* notes 60–64; see also Elhauge, *supra* note 40, at 738–46 (discussing political accountability but concluding that financial disinterestedness is more important); Allensworth, *supra* note 2, at 1436–37 (advocating that the antitrust notion of “political accountability” be transformed in later caselaw to require actual electoral accountability, public participation rights, or the like).

133. *N.C. Dental*, 574 U.S. at 505.

134. *Id.* at 506.

someone who can trace their appointment (or removal) to an elected official<sup>135</sup>—but these haven’t been embraced by the courts. Or rather, I suspect they *have* been embraced by the courts, but as a criterion of inclusion rather than exclusion. The question, then, is how much more broadly than this the State might extend.

The laundry list of factors is no good, because surely—especially under our federal structure—it’s an optional matter whether any particular state body has open-records acts, tax exemptions for state bodies, or the power of eminent domain. Labeling has got to be no good, because even though it seems to respect the flexibility that our federal structure accords to the State, it would seem to allow the State to contravene federal antitrust law entirely by labeling everyone a state actor. Relying on traditional areas of state regulation doesn’t seem good, because why bind the State to historical, traditional areas—surely the State can do more than it has previously done?<sup>136</sup>

And surely it doesn’t seem right at all to look to the presence or absence of self-interest. As I’ve asked above, what if high-level elected officials were compensated based on the fines they collected? What if all state government officials, including the Governor himself, were compensated that way? I’m sure it would be a bad idea, and it would surely result in a lot of Due Process violations<sup>137</sup>—but would that really be *not the State*? The idea that state officials should be professionalized and insulated as far as possible from financial incentives is fairly recent.<sup>138</sup> In fact, looking historically or internationally, self-dealing by badly motivated government actors with perverse financial incentives is probably the norm—and yet these bad State actors are still *State actors*. King John was notorious (though far from unique) for selling justice<sup>139</sup>—and, under duress, he promised in Magna Carta not to do so anymore.<sup>140</sup> But even while King John was selling justice, he was still *King John*.

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135. See text accompanying *supra* notes 48–53.

136. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 543–44 (1985); cf. Allensworth, *supra* note 2, at 1414–17 (critiquing formalistic boundary drawing); Elhauge, *supra* note 40, at 703.

137. See Volokh, *supra* note 20, at 953–55; see also *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *Ward v. Vill. of Monroeville*, 409 U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927).

138. See generally NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–940* (2013); see also *id.* at 1 (“In America today, the lawful income of a public official consists of a salary. However, in the eighteenth century and often far into the nineteenth and early twentieth centuries, American law authorized a wider variety of ways for officials to make money.”).

139. See generally J.C. HOLT, *MAGNA CARTA* 172–73 (3d ed. 2015).

140. “Nulli vendemus, nulli negabimus aut differemus rectum aut justiciam.” (“To no one will we sell, to no one will we deny or delay right or justice.”) *Id.* app. 6 at 388–89.

These particular criteria for dividing the State from not-the-State, which are common in the caselaw, are definitely flawed. Probably *all* criteria for distinguishing between State and non-State actors are ultimately flawed, though going that far is beyond the scope of this Article.<sup>141</sup> Fortunately, this is just statutory interpretation—in an area where the federal courts have long been recognized to have a quasi-common-law-making authority.<sup>142</sup> Perhaps we should be tied to the original meaning of the text that Congress passed—but it’s probably safe to say that the antitrust framers had no intent, and expressed no meaning, on this question that would have seemed nonsensical in 1890. Federal antitrust law *could* govern all state regulatory activity; the only question is whether it *should*.

Thus, we don’t have to be bound by the abstract question *Who is the State?*, which is bound to be unsatisfying when one considers the whole range of modern-day arguably governmental bodies. Instead, we can just ask about the proper purposes of antitrust law, and what sorts of rules will strike the proper balance between promoting competitive activity and protecting state regulatory power.

Seen this way, the self-interest theory of immunity, which apparently has little to do with the nature of the State, actually seems like the best option. The self-interest theory actually comports with the goals of antitrust law, because self-interested regulators—whose regulatory activity we can expect to protect their own market position—pose precisely the sorts of anticompetitive harms that antitrust law is designed to remedy.<sup>143</sup>

Moreover, while antitrust law is often (rightly or wrongly) criticized for targeting harms that would have resolved on their own through market processes, market regulation that has the force of government coercion behind it is precisely the sort of anticompetitive behavior that is resistant to market correction.<sup>144</sup>

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141. I develop part of the argument in Alexander Volokh, *Privatization and the Elusive Employee-Contractor Distinction*, 46 U.C. DAVIS L. REV. 133 (2012).

142. I explain and justify this judicial authority in Alexander Volokh, *Judicial Non-Delegation, the Inherent-Powers Corollary, and Federal Common Law*, 66 EMORY L.J. 1391, 1453–56 (2017).

143. See Edlin & Haw, *supra* note 16, at 1132 (“Without the veneer of ‘professional licensing,’ some board restrictions epitomize the evil at which modern antitrust policy is aimed.”); Elhauge, *supra* note 40, at 697–708.

144. As Aaron Edlin and Rebecca Haw write:

[L]icensing schemes can be similar to cartel agreements in substance, which alone may justify antitrust liability. But making matters even worse for consumers, licensing schemes come in a particularly durable form. Licensing boards, by their very nature, face few of the cartel problems that naturally erode price and output agreements between competitors. By centralizing

The fact that these regulatory bodies deal with health and safety—traditional areas of state regulation—isn’t dispositive. Antitrust law has said repeatedly that there is no free-floating antitrust exemption for health and safety concerns.<sup>145</sup>

And, in fact, economists have documented that occupational licensing can give rise to serious anticompetitive harms, reliably increasing prices while not being guaranteed to improve health and safety.<sup>146</sup>

Rather than a laundry list of items with little theoretical connection to “the state,” a focus on traditional regulatory fields, or allowing the State to make its choice of agencies exempt through labeling, the focus on self-interested vs. disinterested behavior is thus a good match for the goals of antitrust law.<sup>147</sup>

### III. ACTIVE SUPERVISION VS. DEFERENCE

The question in *Teladoc v. Texas Medical Board* was “What is active state supervision?”<sup>148</sup> In Part II, we wondered, “What is the ‘State’?” Now that we’ve dealt with that question, let’s move on to “What is ‘active . . . supervision’?”

Clearly supervision can fall on a spectrum, from nominal supervision that merely rubber-stamps all decisions to intrusive supervision that reanalyzes all decisions de novo. States seeking to insulate their private regulatory regimes from antitrust scrutiny would like immunity to be granted even when

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decisionmaking in a board and endowing it with rulemaking authority through majority voting, professional competitors overcome the hurdle of agreement that ordinarily inhibits cartel formation. Cheating is prevented by imposing legal and often criminal sanctions—backed by the police power of the state—on professionals who break the rules. Finally, most cartels must fend off new market entrants from outside the cartel that hope to steal a portion of its monopoly rents. For licensed professionals, licensing deters entry and ensures that all professionals (at least those practicing legally) are held to its restrictions.

Edlin & Haw, *supra* note 16, at 1133 (footnote omitted); *see also* Elhauge, *supra* note 40, at 675.

145. *See, e.g.*, *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 464 (1986); *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 695 (1978); *Va. Acad. of Clinical Psychologists v. Blue Shield of Va.*, 624 F.2d 476, 485 (4th Cir. 1980); *see also* Edlin & Haw, *supra* note 16, at 1145–47 (advocating a “modified rule of reason that would allow licensing boards to cite public safety and quality enhancement justifications even when those alleged benefits flow directly from eliminating or limiting competition,” and counting such justifications “on the procompetitive side of the scale”).

146. *See* Edlin & Haw, *supra* note 16, at 1111–18 (collecting sources critiquing occupational licensing, particularly in the health and safety areas).

147. *Id.* at 1132–34 (noting the “close fit between the Sherman Act’s intended target and the economic harm of excessive licensing”).

148. *See supra* text accompanying notes 27–32.

the supervisor is fairly passive—for instance, when the supervision is done by state administrative-law judges who apply deferential judicial review. But this goes against the teaching of the Supreme Court’s state-action immunity cases; in fact, accepting deferential judicial review as a reason to grant immunity would amount to a substantial rollback of *N.C. Dental*.

This Part makes three main points. First, deferential judicial review is in fact *the opposite* of active supervision. Second, one can imagine regimes of non-deferential judicial review. Standard administrative-law review usually doesn’t fit that bill—but if such a regime existed, it could constitute active supervision. Third, state administrative law has many tools at its disposal to keep agencies in line and promote transparency. These tools may be praiseworthy, but they’re not the same as active supervision.

### A. *The Necessity of Substantive Review*

*N.C. Dental* increases the number of cases where courts will get to the second prong of *Midcal*, so the question of whether there is active state supervision will arise more often. And because states generally have administrative-law regimes allowing for judicial review of agency action in state courts, they will obviously want to argue that such judicial review counts as active state supervision.<sup>149</sup> If that argument generally succeeds, *N.C. Dental*’s promise of antitrust review for regulatory boards could turn to be hollow.

#### 1. What Adequate Judicial Review Must Look Like

Before *N.C. Dental*, we knew a few things (but only a few) about the role of judicial review in an antitrust immunity inquiry. In *Patrick v. Burget*, the Supreme Court said that it had “not previously considered whether state courts, acting in their judicial capacity, can adequately supervise private conduct for purposes of the state-action doctrine.”<sup>150</sup> (Note the phrase “acting in their judicial capacity,” and recall that state supreme courts can count as active supervisors when they act in their legislative capacity.)<sup>151</sup>

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149. Thus, in *Teladoc, Inc. v. Texas Medical Board*, the state of Texas conceded that it needed to show active state supervision but argued that state administrative-law review counted. No. 1-15-CV-343, 2015 WL 8773509, at \*10 (W.D. Tex. Dec. 14, 2015); *see also* Brief for Appellants at 36, 45, *Teladoc, Inc. v. Tex. Med. Bd.*, No. 16-50017 (5th Cir. Oct. 17, 2016), 2016 WL 3383026 (calling such review “sufficient”).

150. *Patrick v. Burget*, 486 U.S. 94, 103 (1988).

151. *See supra* note 48 and accompanying text.

The *Patrick* Court didn't need to resolve that issue, since, regardless, the judicial review present in that case was insufficient.<sup>152</sup> It wasn't always clear whether review was available; and in any event, any available review was "of a very limited nature."<sup>153</sup> When hospital peer-review committees terminated a doctor's hospital privileges, reviewing courts didn't reach the merits of the committees' decisions. In fact, their review was limited to checking whether "some sort of reasonable procedure was afforded and that there was evidence from which it could be found that plaintiff's conduct posed a threat to patient care."<sup>154</sup> This sort of review was too "constricted" to "convert the action of a private party . . . into the action of the State for purposes of the state-action doctrine."<sup>155</sup>

So at least *Patrick* tells us that merely procedural review is insufficient, and that—if judicial review can even count as active supervision at all—it must be substantive and engage with the merits. (But the review present in *Patrick* did include an element of sufficiency of the evidence, which is substantive—so even some substantive review is insufficient.) More specifically, *Patrick* teaches (and *N.C. Dental* reaffirms<sup>156</sup>), "[t]he active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy."<sup>157</sup> *FTC v. Ticor Title Insurance Co.* is even more specific: "while a State may not confer antitrust immunity on private persons by fiat, it may displace competition with active state supervision if the displacement is both intended by the State and implemented in its specific details."<sup>158</sup>

Checking for consistency with state policy is key: otherwise, "there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests."<sup>159</sup>

This is familiar by now: as we've already seen, the very notion of whether one is "the State" for purposes of the state-action doctrine is tightly bound up with whether one can be counted on to carry out the policy that disinterested

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152. *Patrick*, 486 U.S. at 104.

153. *Id.*

154. *Id.* at 105 (internal quotation marks omitted) (quoting *Straube v. Emanuel Lutheran Charity Bd.*, 600 P.2d 381, 386 (Or. 1979)).

155. *Id.*

156. *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 515 (2015) (citing *Patrick*, 486 U.S. at 102–03).

157. *Patrick*, 486 U.S. at 101.

158. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992) (emphasis added); see also *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 595 (1976); *AREEDA & HOVENKAMP*, *supra* note 44, at 204–05; Allensworth, *supra* note 2, at 1441.

159. *Ticor Title Ins. Co.*, 504 U.S. at 634.

state officials have determined is good.<sup>160</sup> It stands to reason that “state supervision” can’t be “active”—that is, can’t convert private action into that of the State—unless it consists of disinterested state officials’ actual policy judgment.

## 2. The Status of Federal-Style Deference Regimes

With this in mind, let’s consider what would happen if a state had a system of administrative-law judicial review equivalent to the federal *State Farm*<sup>161</sup> and *Chevron*<sup>162</sup> regimes.

Under *State Farm*:

[A] reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute. . . . The scope of review under the “arbitrary and capricious” standard is narrow and *a court is not to substitute its judgment for that of the agency*. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.<sup>163</sup>

It’s clear that the “arbitrary and capricious” standard,<sup>164</sup> as explicated in *State Farm*, falls far short of checking the merits of an agency decision to see whether it comports with the State’s view of sound policy: “*a court is not to substitute its judgment for that of the agency*.”<sup>165</sup> Federal courts generally have no view on sound policy. If they encountered a self-interested agency and wanted to make its behavior comport with sound policy as determined by some disinterested government official, they wouldn’t even know how to determine that—unless, I suppose, a relevant disinterested official intervened in the case, or unless a particular policy were mandated by the Constitution or a statute.

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160. *See supra* Part II.B.1.

161. *Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

162. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

163. *State Farm*, 463 U.S. at 42–43 (emphasis added) (footnote omitted) (citations omitted) (internal quotation marks omitted) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962); *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)).

164. 5 U.S.C. § 706(2)(A) (2018).

165. *State Farm*, 463 U.S. at 43 (emphasis added).

The reference to “rational[ity]” likewise makes clear that the agency has wide discretion to choose among many policies when the statute is ambiguous. The concept of rationality is reminiscent of the “rational basis” standard of federal constitutional law, under which courts defer almost completely to the government’s action—unless there is literally no rational connection between the action and a permissible government goal.<sup>166</sup> The “arbitrary and capricious” standard isn’t quite as deferential as that—though it was probably meant to be that way when the Administrative Procedure Act (APA) was enacted in 1946<sup>167</sup>—but it is still understood to be deferential. The case reports are full of statements to the effect that the court disagrees with an agency action but feels constrained to uphold it as being non-arbitrary.

*State Farm* applies generally to any kind of agency action;<sup>168</sup> now let’s look at *Chevron*, which applies specifically to judicial review of agency interpretations of statutes they administer.<sup>169</sup>

The *Chevron* Court explicitly equated an agency’s interpretation of an ambiguous statute with gap-filling: “The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”<sup>170</sup>

And immediately afterward, the Court equated gap-filling with the exercise of delegated power:

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather

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166. See, e.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) (“It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”); *id.* at 491 (“We cannot say that the regulation has no rational relation to that objective and therefore is beyond constitutional bounds.”).

167. See GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 727–28 (7th ed. 2015); see also *Wickard v. Filburn*, 317 U.S. 111, 129–30 (1942) (identifying the phrase “arbitrary and capricious” with the standard for striking down legislation under the Due Process Clause).

168. *State Farm* itself was a review of a notice-and-comment rulemaking, but it’s the same standard that was applied in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (informal adjudication) and in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) (formal adjudication). In any event, the “arbitrary and capricious” standard derives from the APA, 5 U.S.C. § 706(2)(A), which applies to all agency action.

169. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) (“When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions.”).

170. *Id.* at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).



than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.<sup>171</sup>

In other words, when an agency interprets an ambiguous statute that it administers, it is engaged in *legislatively delegated “lawmaking.”* I put “lawmaking” in quotes because, under the nondelegation doctrine, Congress is prohibited from delegating its own legislative power. For a delegation to be constitutional, we must be able to characterize what the delegate is doing as merely the *execution* of a statute—and the caselaw has made it clear that usually Congress only needs to provide an “intelligible principle” for the delegation to be valid.<sup>172</sup>

So the agency isn’t technically *legislating* when it interprets an ambiguous statute that it administers; but it is making its own, independent policy choices, and thus engaging in a form of “lawmaking.”<sup>173</sup> And where the *Chevron* doctrine applies,<sup>174</sup> courts are prohibited from second-guessing the agency as long as its policy choice is “reasonable.” This sort of “*Chevron* Step 2” deference is reminiscent of *State Farm* deference, and indeed, it’s often recognized that *Chevron* Step 2 is essentially the same as the *State Farm* inquiry.<sup>175</sup> This makes sense, since unreasonably interpreting a statute is surely a way of being “arbitrary and capricious” within the meaning of the APA.<sup>176</sup>

If there were any doubts as to who’s the lawmaker in a *Chevron* context, they were resolved by *National Cable & Telecommunications Ass’n v. Brand X Internet Services*.<sup>177</sup>

Suppose an agency interprets an ambiguous statute that it administers in a context that would normally call for a court to apply the *Chevron* framework.

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171. *Id.* at 843–44 (footnotes omitted).

172. See Volokh, *supra* note 20, at 956–57; Volokh, *supra* note 142, at 1393; Alexander “Sasha” Volokh, *The Shadow Debate over Private Nondelegation in DOT v. Association of American Railroads*, 2014-2015 CATO SUP. CT. REV. 359, 359–62 (2015).

173. See *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) (“The whole theory of *lawful* congressional ‘delegation’ is not that Congress is sometimes too busy or too divided and can therefore assign its responsibility of making law to someone else; but rather that a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action . . .”).

174. See *United States v. Mead Corp.*, 533 U.S. 218 (2001); *Christensen v. Harris Cty.*, 529 U.S. 576 (2000); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

175. See JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION: CASES AND MATERIALS* 972 (3d ed. 2017) (citing articles taking this view); GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 727–28, 845–48 (8th ed. 2018) (discussing the debate about the relationship between *Chevron* Step 2 and *State Farm*).

176. See 5 U.S.C. §§ 706(2)(A), (C) (2018).

177. 545 U.S. 967 (2005).

But suppose the court has previously interpreted the statute—before the agency had gotten around to its interpretation. Normally—in a non-agency context—a court interpretation of an ambiguous statute fixes the meaning of the statute, and this interpretation is binding unless Congress changes the statute (or a later court overrules the previous interpretation<sup>178</sup>). But here, said the *Brand X* Court, it is the agency’s new interpretation that controls, almost as though the agency were overriding the court (unless the court’s previous interpretation had held that the statute was unambiguous).<sup>179</sup> “*Chevron*’s premise is that it is for agencies, not courts, to fill statutory gaps.”<sup>180</sup>

This makes sense from a delegation perspective: if the agency is the lawmaker because Congress has made it so, then of course the court should bow to changed law. “[W]hether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur.”<sup>181</sup>

The *Brand X* Court analogized this to the situation where a federal court interprets state law—say in a diversity case, under *Erie*<sup>182</sup>—and the state court later adopts a different interpretation of state law.<sup>183</sup> The state court is authoritative as to the meaning of state law, and the federal court (though allowed to interpret state law) isn’t; and if this analogy holds, courts are likewise authorized to interpret ambiguous agency-administered statutes, but it’s the administering agencies that are truly in charge.

Let’s step back from this tour through administrative law and return to antitrust immunity.

If we have a regulatory board dominated by market participants, their self-interest implies, according to *N.C. Dental*, that they aren’t the State. So *Midcal* tells us that they can’t get immunity from federal antitrust law unless they’re actively supervised by the State. And *Patrick* says that if state judicial review can count as active supervision at all, it has to be not only substantive but reach the merits of the agency decisions—implementing the specific

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178. Courts are, however, more unwilling to revisit statutory precedents than they are to revisit other sorts of precedents. See, e.g., Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317 (2005).

179. *Brand X*, 545 U.S. at 982.

180. *Id.*

181. *Id.* at 983.

182. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); see also Doris DelTosto Brogan, *Less Mischief, Not None: Respecting Federalism, Respecting States and Respecting Judges in Diversity Jurisdiction Cases*, 51 TULSA L. REV. 39 (2015).

183. *Brand X*, 545 U.S. at 983–84.

details of the state's anticompetitive regime to ensure that agency action truly comports with the state's view of sound policy.<sup>184</sup>

But if state administrative-law judicial review resembles the federal *State Farm/Chevron* regime, then it cannot constitute active state supervision.<sup>185</sup> Courts applying this regime disclaim any pretense of second-guessing the agency's judgment, as long as the agency isn't so irrational as to be "arbitrary and capricious"; in fact, if the agency's action is based on its statutory interpretation, the agency (as long as it passes the minimal hurdle of reasonableness, i.e., a sort of means-ends rationality) is the ultimate lawmaker.

This kind of deference isn't active state supervision; in fact, I would call it *the opposite of active state supervision*. "Actual State involvement, not deference to private pricefixing arrangements under the general auspices of state law, is the precondition for immunity from federal law."<sup>186</sup> For a regime of judicial review to be active supervision, it would have to address the merits *de novo*.<sup>187</sup> That the review is labeled "substantive" rather than "procedural" isn't enough: the review also needs to ask the right question, which is whether the Board's decision "accord[s] with state policy" as determined by disinterested officials—and, in particular, whether state officials endorse the specific anticompetitive aspects challenged in the specific case.<sup>188</sup>

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184. See Allensworth, *supra* note 2, at 1441–44 (also suggesting that the state should do a sort of (non-deferential) competitive impact analysis, roughly similar to environmental impact statements).

185. See also *Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024, 1030 (9th Cir. 1989); *Shahawy v. Harrison*, 875 F.2d 1529, 1536 (11th Cir. 1989); *AREEDA & HOVENKAMP*, *supra* note 44, ¶ 226c1, at 187; Allensworth, *supra* note 2, at 1442.

186. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992).

187. See *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 515 (2015); Elhauge, *supra* note 40, at 716–17.

188. See *Patrick v. Burget*, 486 U.S. 94, 102–05 (1988); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 595–98 (1976); *Health Care Equalization Comm. v. Iowa Med. Soc'y*, 851 F.2d 1020, 1026–27 (8th Cir. 1988) (describing a regulatory scheme in which the Commissioner had to approve every contract); *Tambone v. Mem'l Hosp. for McHenry Cty., Inc.*, 825 F.2d 1132, 1134 (7th Cir. 1987); *AREEDA & HOVENKAMP*, *supra* note 44, ¶ 226c1, at 185–87; *id.* at 87 ("Of course, the active supervision must extend to the anticompetitive aspects of challenged conduct."); *id.* ¶ 226c2, at 205; *id.* at 198–99 ("One implication of *Ticor* seems relatively clear: the 'supervision' requirement extends not only to the general regulatory scheme, but to particular details, at least when the challenged activity is price fixing. Thus, if a particular practice by a regulated firm is challenged, the regulated firm can claim the *Parker* exemption only by showing that the practice at issue was brought to the attention of the regulatory agency, that the agency considered the practice with the requisite degree of attention, and that the agency then approved it." (footnote omitted)).

### 3. The Texas Case

How similar are state administrative-law judicial review regimes to their federal counterpart? I won't do a fifty-state survey here, but let's take, as an example, Texas law—which was at issue in *Teladoc, Inc. v. Texas Medical Board*.<sup>189</sup>

Texas administrative law has deference regimes similar to the federal ones. (Not every state tracks the federal regime very closely, but most states allow for some amount of deference.<sup>190</sup>) The leading Texas deference case is *Railroad Commission of Texas v. Texas Citizens for a Safe Future and Clean Water*.<sup>191</sup> The Texas Railroad Commission (which, despite its name, regulates various things, including oil and gas, but *not* railroads<sup>192</sup>) is required to consider “the ‘public interest’ in the permitting of proposed oil and gas waste injection wells.”<sup>193</sup> The Commission decided that this “public interest” inquiry shouldn't include the consideration of traffic-safety factors; the question was whether that interpretation of the Texas Water Code was entitled to deference.<sup>194</sup>

The Texas Supreme Court explained that it had “long held that an agency's interpretation of a statute it is charged with enforcing is entitled to ‘serious consideration,’ so long as the construction is reasonable and does not conflict with the statute's language.”<sup>195</sup> It reaffirmed, in this case, that “serious consideration” meant that it would “generally uphold an agency's interpretation of a statute it is charged by the Legislature with enforcing, ‘so long as the construction is reasonable and does not contradict the plain language of the statute.’”<sup>196</sup>

This sounds a lot like *Chevron*—and, indeed, the Court stated that while it had “never expressly adopted the *Chevron* or *Skidmore* doctrines for [its] consideration of a state agency's construction of a statute,” its framework was

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189. 1-15-CV-343 RP, 2015 WL 8773509 (W.D. Tex. Dec. 14, 2015); *see also supra* text accompanying notes 25–30.

190. *See* Bernard W. Bell, *The Model APA and the Scope of Judicial Review: Importing Chevron into State Administrative Law*, 20 WIDENER L.J. 801, 818–22 (2011) (noting that “at least eleven states and the District of Columbia have explicitly embraced *Chevron*”); Michael Pappas, *No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the Chevron Doctrine*, 39 MCGEORGE L. REV. 977, 1010–24 (2008).

191. 336 S.W.3d 619 (Tex. 2011).

192. *See Oil & Gas*, RAILROAD COMMISSION TEX., <https://www.rrc.state.tx.us/oil-gas/> [<https://perma.cc/83LF-4QDA>]; *Railroads*, RAILROAD COMMISSION TEX., <https://www.rrc.texas.gov/about-us/railroads/> [<https://perma.cc/XD5E-NBVQ>].

193. *Tex. Citizens*, 336 S.W.3d at 621.

194. *Id.*

195. *Id.* at 624 (quoting *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 632 (Tex. 2008)).

196. *Id.* at 625 (quoting *First Am. Title Ins. Co.*, 258 S.W.3d at 632).

“similar.”<sup>197</sup> Even some of the exceptions to this deference regime track some of the exceptions to *Chevron*—for instance, the limitation of deference to agency statements that have some level of formality and the denial of deference to “isolated comments during a hearing or opinions [in a court brief],”<sup>198</sup> which roughly tracks the federal *Mead* (“*Chevron* Step Zero”) doctrine.<sup>199</sup>

Texas deference to agency interpretations isn’t precisely identical to its federal counterpart; “[t]he Texas Supreme Court has given itself multiple outs to reject agency deference even if the federal *Chevron* inquiry would require deference.”<sup>200</sup> Still, for our purposes, what’s important is that Texas courts routinely decline to simply substitute their interpretive judgment for that of administrative agencies.

What about ordinary agency action that doesn’t fall in the statutory interpretation pigeonhole? Here, *Gulf Coast Coalition of Cities v. Public Utility Commission*<sup>201</sup> provides a guide. The Public Utility Commission had amended an existing rule to remove a conflict-of-interest provision.<sup>202</sup> The challengers contended that the amendment was invalid because it “contravene[d] the plain language of the statute”<sup>203</sup> (this sort of challenge was governed by the *Chevron*-style rules described above<sup>204</sup>)—but they also challenged the amendment for lacking a “reasoned justification” as required by Texas’s Administrative Procedure Act.<sup>205</sup> The Texas Court of Appeals used “an ‘arbitrary and capricious’ standard,”<sup>206</sup> which it described as follows:

An agency’s action is arbitrary if in making a decision it commits any of the following errors: (1) does not consider a factor that the Legislature intended the agency to consider in the circumstances;

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197. *Id.*; see also Scott A. Keller, *Texas Versus Chevron: Texas Administrative Law on Agency Deference After Railroad Commission v. Texas Citizens*, 74 TEX. B.J. 984, 986 (2011) (“In sum, *Texas Citizens*’ statements on agency deference suggest a series of decision rules that relate to the federal *Chevron* inquiry.”); *id.* at 988 (“[T]he Texas Supreme Court has made clear that the federal cases engage in an inquiry that is analogous to Texas law.”).

198. *Tex. Citizens*, 336 S.W.3d at 625 (alteration in original) (quoting *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 747–48 (Tex. 2006)).

199. See *United States v. Mead Corp.*, 533 U.S. 218 (2001); *Christensen v. Harris Cty.*, 529 U.S. 576 (2000); Sunstein, *supra* note 174, at 187.

200. Keller, *supra* note 197, at 986.

201. 161 S.W.3d 706 (Tex. App. 2005).

202. *Id.* at 709.

203. *Id.*

204. See *supra* text accompanying notes 187–199.

205. *Gulf Coast Coal. of Cities*, 161 S.W.3d at 709.

206. *Id.* at 713 (quoting *Reliant Energy, Inc. v. Pub. Util. Comm’n of Tex.*, 62 S.W.3d 833, 841 (Tex. App. 2001)).

(2) considers an irrelevant factor; or (3) reaches a completely unreasonable result after weighing only relevant factors.<sup>207</sup>

This sounds a lot like the *State Farm* language, quoted above, about “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”<sup>208</sup> Moreover, Texas courts have repeatedly stressed that “[r]eview under the ‘arbitrary and capricious’ standard is limited and deferential.”<sup>209</sup>

In sum—whatever the precise differences between Texas and federal administrative law—courts generally disclaim any intent to second-guess the policy judgment of agencies. They do reverse agency action when it’s substantively irrational (“arbitrary and capricious”) or—in the case of a statutory interpretation—when it violates the plain terms of a statute or adopts an unreasonable interpretation of an ambiguous statute. But, when they uphold agency action, they *don’t* do so on the grounds that the agency action was substantively correct. Permissible or non-irrational, yes; good policy, no.

And as I’ve argued above, this sort of deferential state judicial review can’t constitute “active state supervision” under *Midcal*.<sup>210</sup> This is admittedly substantive, not procedural, judicial review—a good sign, since *Patrick* tells us that purely procedural review is inadequate for state-action immunity.<sup>211</sup> But not all substantive review can be sufficient; this substantive review answers the wrong substantive question: Is the policy both adequately reasoned and somewhere within the large set of authorized policies? I’d hope that agency action would be both of these things; but because many policies are both authorized and capable of being rationally justified, passing this test isn’t the same as being actually approved on the merits by disinterested officials.

Many statutes—including the ones at issue in *Teladoc*—are ambiguous. A statute may have more than one reasonable interpretation—in which case an agency can choose either one meaning of the statute, or its opposite. Or a statute may grant discretion within a broad range—in which case an agency can take either one action, or its opposite.

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207. *Id.* (quoting *Reliant*, 62 S.W.3d at 841 (internal quotation marks omitted)).

208. See *supra* text accompanying note 163.

209. *Outdoor Sys., Inc. v. Tex. Dep’t of Transp.*, No. 03-99-00748-CV, 2000 WL 1028498, at \*2 (Tex. App. July 27, 2000); see *City of Abilene v. Pub. Util. Comm’n of Tex.*, No. 03-02-00569-CV, 2003 WL 549297, at \*3 (Tex. App. Feb. 27, 2003); *Pedernales Elec. Coop., Inc. v. Pub. Util. Comm’n of Tex.*, 809 S.W.2d 332, 338 (Tex. App. 1991).

210. See *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); see also *AREEDA & HOVENKAMP*, *supra* note 44, ¶ 226c1, at 187.

211. *Patrick v. Burget*, 486 U.S. 94, 102–15 (1988); see also *Miller v. Ind. Hosp.*, 930 F.2d 334, 338–39 (3d Cir. 1991) (then-Judge Samuel Alito authored this opinion while on the Third Circuit); *Shahawy v. Harrison*, 875 F.2d 1529, 1535 (11th Cir. 1989).

One of the Texas statutes interpreted by the Texas Medical Board requires that physicians “practice medicine in an acceptable professional manner consistent with public health and welfare,” and authorizes disciplinary action against physicians who violate this requirement.<sup>212</sup> Are video consultations allowed, or not? Must examinations be at an “established medical site”? Can prescribing drugs as a result of an “online or telephonic evaluation by questionnaire” lead to disciplinary action?

Texas courts may well strike down many agency actions as being inconsistent with the statute—what we’d call a “*Chevron* Step 1” issue in federal administrative law.<sup>213</sup> So they will tell us sometimes that agency action is flatly *inconsistent* with state policy. Same goes for actions that are upheld because they are outright *commanded* by the plain text of a statute; the agency’s decision is that of the State, so antitrust immunity would properly apply. But in the interesting cases—where courts uphold agency action as a permissible use of agency discretion under an ambiguous statute—we don’t actually know what the State’s view on the matter is. (Indeed, as under federal law, Texas law even allows agencies to reverse their interpretations as long as their new position is reasonable and their change of heart is adequately explained.<sup>214</sup>)

Of course, if the agency were dominated by disinterested actors, the agency’s decision would actually be that of the State for antitrust purposes, and we wouldn’t need to deal with the question of active state supervision. But in the case of the Texas Medical Board, the dominance of self-interest means that the Board is not the State.<sup>215</sup> And the nature of deference then means that a permissible decision by the Board within the broad outlines of a vague grant tells us *the Board’s* view, not the State’s.<sup>216</sup>

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212. TEX. OCC. CODE ANN. § 164.051(a)(6) (West 2019).

213. *See, e.g.*, *Tex. Bd. of Chiropractic Exam’rs v. Tex. Med. Ass’n*, 375 S.W.3d 464, 475–88 (Tex. App. 2012); *Tex. Orthopaedic Ass’n v. Tex. State Bd. of Podiatric Med. Exam’rs*, 254 S.W.3d 714, 722 (Tex. App. 2008).

214. *See, e.g.*, *R.R. Comm’n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 632 n.18 (Tex. 2011); *Stanford v. Butler*, 181 S.W.2d 269, 273 (Tex. 1944); *see also* *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 645 & n.28 (Tex. 2008) (Hecht, J., dissenting) (citing Texas cases, as well as federal cases like *Rust v. Sullivan*, 500 U.S. 173 (1991), where an administrative reversal of policy was upheld).

215. *See supra* Part II.C.

216. Note that my attack on deference here is an attack on a limited type of deference: deference to (self-interested) state agencies *by state courts*, as a way of insulating these agencies from federal antitrust review. By contrast, *federal courts* do defer to state processes (as long as the *Midcal* factors are satisfied) rather than striking them down as anticompetitive on the same basis as private action. My critique here does not apply to such deference. *See* Allensworth, *supra* note 2, at 1426–29; Elhauge, *supra* note 40, at 707–08.

*B. The Road Seldom Taken: Fully De Novo Review*

One can imagine some state judicial review that might theoretically count as active supervision, but it is precisely the opposite of the sort of judicial review found in the administrative law of Texas and of other states that follow the federal (*State Farm/Chevron*) model.

Under this standard model of judicial review, courts can reject agency action that is so far from being grounded in the statute that it is arbitrary and capricious—but this protects only against extreme cases.<sup>217</sup> When agencies are dominated by financially disinterested officials, this is all well and good, because we can then identify their views with that of the State. But when the opposite is the case, this approach leaves untouched the vast set of instances where the statute allows self-interested officials to (self-interestedly) choose among a wide variety of options. Only in the rare case where the statute allows for a single correct interpretation (i.e., when it commands a particular result) will we be able to say that a self-interested board's action is that of the State and thus entitled to state-action immunity.

But what if we had a much more activist form of judicial review? Imagine a hypothetical state system of judicial review in which (disinterested) state judges (whether elected or appointed) *explicitly* made policy. Instead of deferring to the agency in the equivalent of “*Chevron Step 2*”/*State Farm* cases, they would routinely substitute their own judgment for that of agencies, striking down agency action they disliked and upholding agency action they liked. In essence, judges would be exercising a sort of legislative or executive power.

In such a hypothetical, perhaps judicial review would count as active supervision. The *Parker* regime does, after all, immunize the activities not only of legislatures but also of state supreme courts acting in a legislative capacity.<sup>218</sup> Agency action confirmed by courts would, in a real sense, count as the State's own action, because disinterested state officials—in this case, state judges—would have approved the action.

But such an explicit system of judicial activism is somewhat fanciful. Certainly, it would be contrary to federal ideas of separation of powers if it were done explicitly at the federal level. (The word “explicitly” is key: the Legal Realist thesis that *implicit* judicial policymaking is ubiquitous has never been endorsed as a formal theory of judicial review.) And it would

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217. Brief for Appellants, *supra* note 149, at 47 (citing some such “Step 1” cases).

218. See *Hoover v. Ronwin*, 466 U.S. 558, 568–74 (1984); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 359–63 (1977).



likewise be contrary to the separation of powers in Texas.<sup>219</sup> Texas courts, like federal courts, generally disclaim policymaking authority in administrative-law cases and recite the prevailing standards of deference—and so do most state courts.

How might we come close to this sort of judicial review?

First, there are state courts that have rejected *Chevron*, like those in Arizona, Delaware, Florida, Michigan, Mississippi, and Wisconsin.<sup>220</sup> Courts in those states can review agency statutory interpretations de novo, with no deference to the agency—and they are financially disinterested.

Perhaps judicial review in those states can constitute active state supervision—provided the issue is one that falls within those states’ no-deference regimes. Rejecting a *Chevron*-type rule for statutory interpretation is different than rejecting a *State Farm*-type “arbitrary and capricious” rule for ordinary exercises of discretion, and we shouldn’t presume that ordinary arbitrary and capricious review is abrogated in those states.<sup>221</sup>

Second, some state courts might have real policymaking power. The Supreme Court encountered such courts in *Burford v. Sun Oil Co.*,<sup>222</sup> in the context (not important here) of whether federal courts should abstain from exercising their jurisdiction. As we’ve seen, oil and gas in Texas are regulated by the Texas Railroad Commission,<sup>223</sup> but—in the view of the Supreme Court—the state courts had de novo policymaking authority and were “working partners with the Railroad Commission in the business of creating a regulatory system for the oil industry.”<sup>224</sup> The degree to which the Texas courts fully participated in policymaking was disputed—the dissenting Justice Frankfurter argued that the role of the Texas courts didn’t differ much

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219. See TEX. CONST. art. II, § 1 (“The powers of the Government . . . shall be divided into three distinct departments . . . : Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no . . . department[] shall exercise any power properly attached to either of the others . . .”).

220. See FLA. CONST. art. V, § 21; ARIZ. REV. STAT. § 12-910(E); *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 383 (Del. 1999); *In re Complaint of Rovas Against SBC Mich.*, 754 N.W.2d 259, 270–71 (Mich. 2008); *King v. Miss. Military Dep’t*, 245 So. 3d 404, 408 (Miss. 2018); *Tetra Tech EC, Inc. v. Wis. Dep’t of Revenue*, 914 N.W.2d 21, 28–29 (Wis. 2018); Bell, *supra* note 190, at 819.

221. See, e.g., *Zayed v. Ariz. Dep’t of Transp.*, No. 1 CA-CV 18-0206, 2019 WL 395595 (Ariz. App. Jan. 31, 2019) (“On judicial review of ADOT’s decision, the superior court must affirm unless the decision ‘is contrary to law, is not supported by substantial evidence, is arbitrary and capricious or is an abuse of discretion.’ . . . We view the facts in the light most favorable to upholding the agency’s decision, and defer to the ALJ’s determinations regarding witness credibility.” (citations omitted)).

222. 319 U.S. 315 (1943).

223. See *supra* text accompanying note 192.

224. *Burford*, 319 U.S. at 326.

from the standard role of federal courts in reviewing the work of administrative agencies,<sup>225</sup> while the concurring Justice Douglas argued that the Texas courts had “a large measure of control over the administrative process” and were in fact sometimes the “senior and dominant” policymakers.<sup>226</sup>

It’s not important for us to resolve who’s right in this controversy (much less who was right under Texas law as it existed when *Burford* was decided in 1943). All that matters here is that it’s not too hard to imagine a regime where state courts exercise de novo review over state administrative agencies and are in fact part of the State’s policymaking apparatus. That’s not the federal regime (except in particular areas like antitrust, where the vague language of the Sherman Act has been interpreted to grant common-law-style policymaking authority to the courts<sup>227</sup>), but we could imagine such a state regime. State courts generally have the dominant policymaking role in common-law areas like contracts, torts, and property—why not in oil and gas regulation, or in medical licensing? If such a state regime existed, it could count as the sort of “active state supervision” that would satisfy the second prong of *Midcal*.

Third, it’s easy to imagine policy-motivated judges. Almost all judges disclaim the notion that their rulings *should generally be* motivated by their own policy views. (As noted above, some areas like antitrust do merge administrative agency activity with federal common law review.) But most people believe that most judges are at least subconsciously driven by their policy views.<sup>228</sup>

The only extra step we need to take is to imagine what would happen if a lot of judges unabashedly embraced their policymaking role. What if half of judges were, on the right, like Richard Posner<sup>229</sup> and the other half were, on the left, like J. Skelly Wright?<sup>230</sup> If state judges embraced “the Posner option”

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225. *Id.* at 347 (Frankfurter, J., dissenting).

226. *Id.* at 355 (Douglas, J., concurring).

227. See Volokh, *supra* note 142, at 1438, 1453–56.

228. See Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769, 777–81 (2008).

229. See, e.g., Amul R. Thapar & Benjamin Beaton, *The Pragmatism of Interpretation: A Review of Richard A. Posner, The Federal Judiciary*, 116 MICH. L. REV. 819, 823 (2018); *id.* at 833 (“Posner [argues that] because [federal judges will] never fully escape their personal priors, let’s drop the pretense and embrace our personal views, heretofore suppressed (ineffectively) beneath a veneer of legal formalism. At least, Posner contends, we might get some better policy out of this transparently consequentialist approach.”).

230. See, e.g., Louis Michael Seidman, *J. Skelly Wright and the Limits of Legal Liberalism*, 61 LOY. L. REV. 69, 76–77 (2015) (“[Judge Wright] told his biographer, Arthur Selwyn Miller, that ‘[i]f I want to do something, I can find a way to do it’ . . . . [This] abstract statement [is]

explicitly—perhaps easier to imagine among state judges, many of whom are, after all, elected—then a later federal antitrust court might be able to observe the common practice within a state and consider it active state supervision.

### C. *The New (Ir-?)Relevance of Political Accountability*

Administrative law is more than just a set of rules for judicial review (whether *State Farm/Chevron*-style or not). It encompasses the whole range of mechanisms of agency governance. In *Teladoc*, the State of Texas pointed to several accountability-enhancing features that, in its view, “minimize the risk that [the Board] will forego its mandate and act with only a private purpose”<sup>231</sup> and that “reinforce[]” or “buttress[]” active supervision.<sup>232</sup>

- appointment and removal of Texas Medical Board members by the Governor and Senate,
- the requirement that Board members be specialists from different medical fields,
- oaths,
- good-government laws,
- reporting requirements, and
- legislative oversight.<sup>233</sup>

Can these features constitute active supervision? Doubtful: *Patrick*,<sup>234</sup> *Ticor*,<sup>235</sup> and *N.C. Dental*<sup>236</sup> have made it clear that active supervision must extend to the specific actions that are challenged in a particular case.<sup>237</sup>

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misleading when read in isolation from Wright’s long, legally sophisticated, and footnote-laden opinions that provided legal justification for his work. . . . Yet, when push came to shove, he did not let craft values interfere with what needed to be done.”)

231. Brief for Appellants, *supra* note 149, at 38–41; *see also id.* at 41–45 (other features “further reduce the risk that the Board will shirk its official duties and pursue only private interests”).

232. *Id.* at 50–52.

233. *Id.* at 38–45, 50–52.

234. *Patrick v. Burget*, 486 U.S. 94, 101–02 (1988).

235. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992).

236. *N.C. State Bd. of Dental Exam’rs v. FTC*, 574 U.S. 494 (2015).

237. *See id.* at 507 (“The second *Midcal* requirement . . . seeks to avoid [the] harm [of private self-dealing] by requiring the State to review and approve interstitial policies made by the entity claiming immunity.”); *id.* at 515 (“The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; and the ‘mere potential for state supervision is not an adequate substitute for a decision by the State.’” (citations omitted) (quoting *Ticor*, 504 U.S. at 638)); *see also AREEDA & HOVENKAMP*, *supra* note 44, ¶ 226c1, at 185–87 (“Of course, the active supervision must extend to the anticompetitive aspects of challenged conduct.”).

But if these features aren't themselves active supervision, one can still argue—as the State of Texas did—that, because they reduce the risk of self-dealing and increase political accountability, they should make the active-supervision requirement apply less strictly than it otherwise would.<sup>238</sup> In effect, this is a “sliding scale” theory of active state supervision.

### 1. Some Initial Problems with the Sliding Scale Theory

At first glance, this theory seems to fit well with state-action theory—with *N.C. Dental*'s insistence that states must “accept political accountability for anticompetitive conduct they permit and control,”<sup>239</sup> echoing *Ticor*.<sup>240</sup> Surely Governor-and-Senate appointment and removal furthers political accountability, and so does legislative oversight.

But this theory runs into a few problems.

First, as we've seen a couple of times already, antitrust is a different world—where words have idiosyncratic meanings. *N.C. Dental* uses both sovereignty<sup>241</sup> and political accountability<sup>242</sup> as rough synonyms for financial disinterestedness. Perhaps “idiosyncratic” is too uncharitable a word: rather, let's say that, because these are broad and disputed terms of art among political theorists, the Court chose—as a matter of statutory interpretation—to use *for-purposes-of-state-action-immunity* versions of these terms, interpreting them in light of the structure and purposes of the Sherman Act.

This doesn't inherently rule out using these accountability-enhancing features as part of a sliding-scale approach to judging whether there is active state supervision. But it does mean that the invocation of “political accountability” can't do the work; the words are just being used in totally different senses.

Second, as we've also seen, active state supervision isn't a general concept that applies to the agency's work as a whole. It's a specific concept that requires the State (i.e., a disinterested official) to sign off on the anticompetitive aspect of the specific challenged action.<sup>243</sup> So the accountability-enhancing features shouldn't be relevant to the stringency of

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238. See Brief for Appellants, *supra* note 149, at 41 (arguing that “the necessary degree of active supervision” depends on the “risk that [the Board's] rulemaking does not pursue state policy,” which is mitigated by “its political accountability and structure”).

239. *N.C. Dental*, 574 U.S. at 505.

240. *Ticor*, 504 U.S. at 636 (stating that states “must accept political responsibility for actions they intend to undertake”).

241. See *supra* notes 129–33 and accompanying text.

242. See *supra* notes 60–64 and accompanying text.

243. See *supra* notes 158, 188 and accompanying text.

the analysis unless they connect somehow to approval of the anticompetitive aspects of the specific decisions.

## 2. The Reinterpretation of *Hallie*

Moreover, these accountability-enhancing features were absent from the Court's reasoning in *N.C. Dental*. The North Carolina Board of Dental Examiners *lacked* a lot of political accountability; if political accountability were relevant to the analysis, maybe it would have shown up in the opinion. But while the Fourth Circuit and the FTC found it significant that the Board members were elected only by other active market participants, the Supreme Court didn't rely on this factor.<sup>244</sup>

Similarly, the North Carolina Board members swore oaths of office and complied with the State APA, Public Records Act, and open-meetings law.<sup>245</sup> Some of the circuits have considered those sorts of factors important<sup>246</sup>—but the Supreme Court didn't: “The similarities between agencies controlled by active market participants and private trade associations are not eliminated simply because [active market participants] are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rule.”<sup>247</sup>

One can get around this problem: the North Carolina Board was so weak on active state supervision that it didn't even contend that supervision was present; the whole litigation merely concerned whether supervision was required.<sup>248</sup> So the *N.C. Dental* Court didn't have any occasion to opine on how strict active state supervision had to be.

The Areeda and Hovenkamp treatise does give some slight support to the sliding scale idea: “the kind of supervision appropriate for a public body . . . could well be far less than for an entirely private party.”<sup>249</sup> But “could well be” isn't “is”: the authors are essentially speculating, based on issues left unresolved in *Hoover v. Ronwin*.<sup>250</sup>

The rhetoric of state-action opinions also gives only mild support to the sliding scale approach—and the degree of this support probably doesn't survive *N.C. Dental*, which reinterpreted some previous cases.

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244. See *supra* notes 62–63 and accompanying text.

245. *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 500 (2015).

246. See *supra* Part II.B.2.

247. *N.C. Dental*, 574 U.S. at 496.

248. *Id.* at 514.

249. See Brief for Appellants, *supra* note 149, at 41 (citing AREEDA & HOVENKAMP, *supra* note 44, ¶ 227a, at 221).

250. See *Hoover v. Ronwin*, 466 U.S. 558 (1984).

*N.C. Dental* talked repeatedly not only about political accountability but also about the probability (“realistic assurance”) that the agency will pursue State policy.<sup>251</sup> This concern wasn’t new: back in *Hallie*, the Court had already—in explaining the more favorable treatment of municipalities—spelled out a similar presumption: “[A] municipality is an arm of the State. We may presume, absent a showing to the contrary, that the 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.”<sup>252</sup>

And how did *Hallie* justify this presumption? Because of actual accountability mechanisms, not financial disinterestedness:

Among other things, municipal conduct is invariably more likely to be exposed to public scrutiny than is private conduct. Municipalities in some States are subject to “sunshine” laws or other mandatory disclosure regulations, and municipal officers, unlike corporate heads, are checked to some degree through the electoral process. Such a position in the public eye may provide some greater protection against antitrust abuses than exists for private parties.<sup>253</sup>

Of course, *Hallie* isn’t about the stringency of the second prong of *Midcal*: quite the opposite, since it’s about how the second prong of *Midcal* doesn’t apply at all. Still, if all those factors are important in making us feel good about municipalities, one might think that these concerns might incline us more favorably to the state agency if we get to prong two.

But that’s not how *N.C. Dental* characterizes *Hallie*. In the words of the *N.C. Dental* Court, *Hallie*’s charitable treatment of municipalities had to do with *electoral* accountability (not political accountability writ large, as in the blockquote above), the municipalities’ broad political portfolio, and the “lack . . . of private incentives.”<sup>254</sup> In fact, *N.C. Dental* takes pains to distinguish

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251. See, e.g., *N.C. Dental*, 574 U.S. at 507 (“Concern about the private incentives of active market participants animates *Midcal*’s supervision mandate, which demands ‘realistic assurance that a private party’s anticompetitive conduct promotes state policy, rather than merely the party’s individual interests.’” (quoting *Patrick v. Burget*, 486 U.S. 94, 101 (1988))); *id.* at 515 (“Active supervision need not entail day-to-day involvement in an agency’s operations or micromanagement of its every decision. Rather, the question is whether the State’s review mechanisms provide ‘realistic assurance’ that a nonsovereign actor’s anticompetitive conduct ‘promotes state policy, rather than merely the party’s individual interests.’” (quoting *Patrick*, 486 U.S. at 101; also citing *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 639–40 (1992))).

252. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 45 (1985) (footnote omitted).

253. *Id.* at 45 n.9.

254. *N.C. Dental*, 574 U.S. at 507; see also *id.* at 510 (“While *Hallie* stated, ‘it is likely that active state supervision would also not be required’ for agencies, the entity there . . . was an electorally accountable municipality with general regulatory powers and no private price-fixing agenda.” (citation omitted) (citing *Hallie*, 471 U.S. at 46 n.10)).

self-interested boards from municipalities, based on financial bias considerations:

In important regards, agencies controlled by market participants are more similar to private trade associations vested by States with regulatory authority than to the agencies *Hallie* considered. And as the Court observed three years after *Hallie*, “[t]here is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm.”<sup>255</sup>

The *N.C. Dental* Court even went so far as to quote Justice Stevens’s dissent in *Hoover*:<sup>256</sup> “The risk that private regulation of market entry, prices, or output may be designed to confer monopoly profits on members of an industry at the expense of the consuming public has been the central concern of . . . our antitrust jurisprudence.”<sup>257</sup>

So after *N.C. Dental*, it seems inadvisable to try to redeem a self-interested board by pointing to various accountability-enhancing mechanisms like those present in *Hallie*’s municipal context.

At the time of *Hallie*, we might have observed that “the requirement of active state supervision serves essentially an evidentiary function,” and then argued that regulatory boards with strong accountability mechanisms allow us to likewise dispense with prong two in this new context (or at least apply it in some nominal way). But *N.C. Dental* strongly rejects this view and strongly insists on prong two; self-interest turns out to be determinative.

The risk of self-dealing is relevant to whether a board *needs* supervision, not to whether it *is* supervised. Market participation leads to (possibly unconscious) “[d]ual allegiances” and “private anticompetitive motives.”<sup>258</sup> Once the risk of self-dealing has been deemed important enough to require prong two, the only remaining inquiry is whether disinterested state officials have *in fact* approved, *on the merits*, the anticompetitive aspects of the challenged decisions.

In short, *Hallie* has now been reinterpreted, and the presence of financial self-interest has been recognized as standing at the pinnacle of antitrust nonos. As the Court now puts it: “State agencies controlled by active market participants, who possess singularly strong private interests, pose the very

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255. *Id.* at 510 (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988)).

256. *Hoover v. Ronwin*, 466 U.S. 558, 584 (1984).

257. *N.C. Dental*, 574 U.S. at 510 (quoting *Hoover*, 466 U.S. at 584 (Stevens, J., dissenting)).

258. *Id.* at 505.

risk of self-dealing *Midcal*'s supervision requirement was created to address."<sup>259</sup>

Instead of saying, "These self-regulatory boards are so fundamentally similar to the *Hallie* municipalities that, though prong two is technically required, we should police it lightly," we should instead say, "These self-regulatory boards are so radically different from the *Hallie* municipalities that prong two is strongly required; the presence of self-interest is so important that prong two should be enforced to the hilt."

### 3. Administrability Concerns

We've seen that the active state supervision inquiry is "flexible" and "context-dependent,"<sup>260</sup> but all this means is that there are a lot of different types of active state supervision. There are many ways of ensuring that the regulator's decision is that of the State itself. One way might be to have the Governor of the State review, and approve or veto, agency actions—which is now the law in Georgia.<sup>261</sup> Another way might be to reorganize the Board so that a properly appointed and disinterested government official has to sign off on Board actions.<sup>262</sup> Judicial review, under some circumstances, *might* qualify<sup>263</sup>—though, as explained above,<sup>264</sup> deferential state administrative-law review won't do the trick.

But different types of market-participant-dominated agencies aren't entitled to different strengths of analysis depending on a court's assessment, in an individual case, of the strength of various accountability-promoting features that don't relate to approval of the merits by disinterested officials.

Moreover, this sort of sliding-scale approach would be hard to administer—and would increase uncertainty for state officials, who wouldn't be able to easily determine whether a particular supervisory regime would be sufficient to avoid treble damages.

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259. *Id.* at 510.

260. *Id.* at 514.

261. See GA. CODE ANN. § 43-1C-3 (2016) (enacted Apr. 27, 2016 in response to *N.C. Dental*); see also *Anti-trust and Occupational Licensing: State Approaches*, NAT'L CONF. OF ST. LEGISLATURES (Sept. 18, 2017), <http://www.ncsl.org/research/labor-and-employment/anti-trust-and-occupational-licensing-state-approaches.aspx> [<https://perma.cc/DGT6-GMYA>]. But gubernatorial rubber-stamping might not be sufficient. See, e.g., *SmileDirectClub, LLC v. Ga. Bd. of Dentistry*, No. 1:18-cv-02328-WMR, 2019 WL 3557892 (N.D. Ga. May 8, 2019), at \*4–\*5.

262. See Edlin & Haw, *supra* note 16, at 1154–56 (describing "[p]ossible [s]tate [r]esponses [to a rule like that ultimately adopted in *N.C. Dental*] and [t]heir [l]ikely [e]ffects").

263. See *infra* Part IV.

264. See *supra* Part III.A.



A uniform approach is a boon to practitioners and judges. It means that when a court hands down a decision holding whether a particular type of supervision is sufficient, that decision becomes useful precedent. But if the stringency of the active-supervision inquiry depends on the agency-specific risks of self-dealing, every agency in every state is potentially unique, depending on the details of oaths, appointment and removal provisions, state APAs, and the stringency of judicial review. Every precedent is of limited value, and every case requires sifting through a mass of cases that aren't entirely on point and, to some extent, evaluating every agency's institutional constraints de novo.

Courts aren't particularly good at estimating these fine gradations of risks of self-dealing. The Supreme Court was aware of its limitations along these lines in *City of Columbia v. Omni Outdoor Advertising, Inc.*,<sup>265</sup> when it rejected a "conspiracy" or "corruption" exception to state-action immunity.<sup>266</sup> This is also why antitrust doctrine has carved out areas of per se illegality and of "quick look" review:<sup>267</sup> full-blown Rule of Reason analysis is overwhelming, even if theoretically more accurate.

So there are good administrability reasons to treat the active-supervision requirement as applying equally to all actors subject to the second prong of *Midcal*.

#### IV. SHOULD JUDICIAL REVIEW COUNT AT ALL?

The previous analysis has assumed that judicial review could be active state supervision in the first place—recall that *Patrick v. Burget* left this open.<sup>268</sup> Is this assumption warranted?

One important attribute of judicial review is that it requires costly litigation.<sup>269</sup> State courts won't review a rule that no one challenges—and firms might rationally decide not to challenge anticompetitive regulations for several reasons. One reason is "Firms as Regulatory Victims": an affected firm (for instance, the telehealth providers in *Teladoc*) might decide that litigation is too expensive and that it's better to simply submit to illegal regulations. Another reason is "Firms as Regulatory Colluders": an agency rule might just be a disguised form of cartel enforcement that, for instance,

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265. *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 374–78, 375 n.5 (1991).

266. *See also* N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 508 (2015) (calling such an exception "vague and unworkable").

267. *See, e.g.*, Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999); NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 109–10, 109 n.39 (1984).

268. *Patrick v. Burget*, 486 U.S. 94, 103 (1988).

269. *See* Elhauge, *supra* note 40, at 712–16.

deters entry to increase consumer prices (and helps all incumbent firms). Both of these might even be true simultaneously.

Some firm might challenge the rule, hoping to undercut its competitors' price and steal away a lot of their business. But this depends on how cohesive the industry is, and what options are available for policing cartel cheaters. Consumers are a more diffuse group: they may have standing, but their stake might be too small to justify the litigation costs, and damages class actions might not always be available or effective.

That "the 'mere potential for state supervision is not an adequate substitute for decision by the State'" is one of the "few constants of active supervision."<sup>270</sup> Even if judicial review can be active supervision, it has to be *actually completed* judicial review, not the potential of (uninvoked) judicial review.<sup>271</sup>

A related problem is ripeness: judicial review often (though not always) requires a challenger to have first suffered some sort of harm; perhaps there will be some pre-enforcement review, but perhaps not.<sup>272</sup> Like federal courts, Texas courts recognize the doctrine of ripeness, which "asks whether the facts have developed sufficiently so that an injury has occurred or is likely to occur, rather than being contingent or remote," and thus "serves to avoid premature adjudication."<sup>273</sup>

Having to suffer harm before a challenge compounds the problem of costly litigation: both can discourage firms from challenging anticompetitive rules.<sup>274</sup> Affected firms might simply conform their conduct to the (invalid) rule and never achieve the ripeness necessary for a challenge.

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270. *N.C. Dental*, 574 U.S. at 515 (quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 638 (1992)).

271. Allensworth considers the suggestion that unexercised review at the state's option stands on a different footing than unexercised review at the challenger's option. See AREEDA & HOVENKAMP, *supra* note 43, ¶ 221, at 380–81 (expressing concern about "the challenger's wish to use the antitrust laws in lieu of a state procedure that seems adequate to the purpose" and therefore suggesting that "the realistic availability of supervision to anyone requesting it should count as adequate supervision"). But Allensworth (rightly, in my view) rejects this distinction, essentially for the same reasons I express here: not all challengers are "sufficiently organized, informed, funded, and motivated to bring suit." Allensworth, *supra* note 2, at 1439.

272. States can have their own rules for judicial review, but in the federal administrative law context, the availability of pre-enforcement review (and, conversely, the extent to which challengers must wait until their case is "ripe") is governed by *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) and its progeny.

273. *Patterson v. Planned Parenthood of Hous. & Se. Tex., Inc.*, 971 S.W.2d 439, 442 (Tex. 1998).

274. Elhauge, *supra* note 40, at 714.

Based on these factors, Rebecca Haw Allensworth<sup>275</sup> has argued that state judicial review shouldn't be allowed to count as active state supervision.<sup>276</sup> Einer Elhauge would allow state judicial review to count if it's completely pre-implementation.<sup>277</sup>

I'm sympathetic but would like to push back slightly on the strongest form of this view.

What if the aggrieved party *actually does* challenge the agency's policy? If the state court strikes down the policy as being unauthorized, this is easy enough: the agency's policy isn't the action of the State after all, and so the aggrieved party can proceed with his federal antitrust suit and possibly collect treble damages.

But what if the state court actually endorses the policy—not just rules (deferentially) that the policy was permissible, but either rules that it was required or (Posner-like) endorses it on the merits?

Then, it seems that the policy is indeed that of the State. One can still argue that the policy should be endorsed by the political branches, not by the courts. But in many states, the courts are elected. And in any event, we have no problem with the idea that the courts can be freewheeling policymakers in the areas of contracts and torts. Provided the decisionmakers are disinterested, federalism probably requires that (within the constraints of the Republican Form of Government Clause<sup>278</sup>) federal courts allow states to structure their separation of powers however they like.<sup>279</sup> It's more important—for *antitrust purposes*—to hold to the idea, endorsed by *N.C. Dental*, that “being the State” (here, for purposes of supervision) is essentially synonymous with “being financially disinterested.”<sup>280</sup>

It's still true that requiring costly litigation, either for regulated firms or for affected consumers, can discourage lawsuits, perhaps even in the presence of treble damages. So I wouldn't argue for any sort of state administrative or state judicial exhaustion principle. A regulated firm or affected consumer should be able to go directly to federal court to argue that the relevant rule

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275. Allensworth, *supra* note 2, at 1438–39.

276. See also sources cited in Elhauge, *supra* note 40, at 716 n.232.

277. *Id.* at 714, 716–17. But see generally Michal Dlouhy, *Judicial Review as Miscal Supervision: Immunizing Private Parties from Antitrust Liability*, 57 *FORDHAM L. REV.* 403 (1988) (arguing that judicial review should be allowed to count as active supervision).

278. U.S. CONST. art. IV, § 4, cl. 1.

279. Dlouhy, *supra* note 277, at 417–19.

280. See *supra* Parts II.B.1, II.C.

violates the Sherman Act.<sup>281</sup> The *potential* for judicial review shouldn't overcome such a claim,<sup>282</sup> especially if the judicial review is deferential.<sup>283</sup>

However—in the event that the rule is also challenged on state administrative-law grounds (either by that firm or by someone else), and if a state court decision upholding the anticompetitive regulation on the merits comes down before the federal antitrust case is decided—I see no barrier to considering that sort of completed, de novo state judicial review to be a form of “active state supervision” that would satisfy prong two of *Midcal* and establish state-action immunity.<sup>284</sup>

## V. CONCLUSION

The aftermath of *N.C. Dental*—perhaps unexpectedly—raises deep philosophical issues of what it means to *be* the State, and what it means to *speak in the name of* the State.

The antitrust state-action immunity cases have taken a number of positions on what the State is, from a pure labeling approach to a multi-factor balancing approach to a sovereignty-based approach to a financial disinterestedness approach. With *N.C. Dental*, the disinterestedness approach is now dominant.

On the one hand, it seems unsatisfying to conflate *Who is a State?* with *Do you have good incentives?* But the deep answer is that *Who is a State?* has no unique, objective, satisfying answer. To focus too intently on that specific question is to be controlled by the term “State” rather than to think about the policy of who should and shouldn't be controlled by antitrust law. Rather than being ruled by a contested term of political theory, let's instead think of the optimal balance between the supremacy-focused goal of pursuing a particular vision of competition and the federalism-focused goal of protecting state power.

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281. See Elhauge, *supra* note 40, at 713 (arguing that “the burden of seeking governmental action” shouldn't be placed “on those injured by [the] restraints” of self-interested actors).

282. See *supra* text accompanying note 270.

283. See *supra* Part III.A.

284. In the case of adjudicative acts like denials of individuals' professional licenses, Allensworth does suggest, on pragmatic grounds, that “the availability of state court remedies—provided they are substantive and not, as currently is the case in most states, procedural—should suffice as state supervision.” Allensworth, *supra* note 2, at 1439 n.264. However, while I'm (slightly) more willing than is Allensworth to allow for state judicial review to count as active state supervision, I wouldn't recognize unexercised judicial review to count for license denials—the victims of license denials may indeed have good incentives to sue, but even they might rationally decide that the legal fees of challenging the denial and going up against a powerful and well-funded licensing board are too great.

In light of *Garcia*,<sup>285</sup> the federalism-focused goal isn't about constitutional structure; supremacy may rule the day if that's what Congress wants—so the question is just the subconstitutional one of how far Congress wants to go, augmented by the prevailing understanding that federal antitrust law is essentially a delegation to the judicial branch.<sup>286</sup> *N.C. Dental's* view—that financial disinterestedness is the essential test of whether one should have antitrust immunity—is hardly obvious, but it's a good enough fit with the purposes of the Sherman Act, which is probably the best we can hope for.

Given that self-interested agencies don't count as the State, the next question is *What does it take* (in terms of State supervision) *to make their actions those of the State?* Deferential review is clearly insufficient, since the whole premise of deferential review is that courts voluntarily choose not to review agencies de novo and leave the agencies to exercise their own judgment (subject to broad limits). This is fine in the usual case, but once we've already determined that the agency isn't the State, such review can't immunize the agency from federal antitrust law. Only review by disinterested officials that is completely de novo and policy-based can suffice—which isn't inconceivable, but at the same time isn't characteristic of most judicial review.

At a more general level, I'm sympathetic to the view that judicial review should generally *not* count as active state supervision, because judicial review is mostly potential, is quite costly, and often requires previous injury—all of which deters affected parties from seeking review. However, in the (small?) set of cases where an agency action is actually reviewed and upheld de novo on the merits, state judicial review should count as active state supervision and confer state-action immunity from federal antitrust liability.

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285. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

286. *See Volokh, supra* note 142, at 1453–56.