

VIRGINIA LAW REVIEW

VOLUME 102

OCTOBER 2016

NUMBER 6

ARTICLES

THE NEW ANTITRUST FEDERALISM

*Rebecca Haw Allensworth**

“Antitrust federalism,” or the rule that state regulation is not subject to federal antitrust law, does as much as—and perhaps more than—its constitutional cousin to insulate state regulation from wholesale invalidation by the federal government. For most of the last century, the Court quietly tinkered away with the contours of this federalism, struggling to draw a formal boundary between state action (immune from antitrust suits) and private cartels (not). But with the Court’s last three antitrust cases, the tinkering has given way to reformation. What used to be a doctrine with deep roots in constitutional federalism is now a doctrine with close ties to the federal administrative state where courts sit in judgment of an agency’s decision-making procedure.

The new antitrust federalism conditions antitrust immunity not on the fact of state regulation but on the process of that regulation. Now, only regulation created by a politically accountable process is beyond the reach of federal antitrust suits, exposing vast areas of state regulation to new antitrust scrutiny. This Article argues that the new antitrust federalism is an improvement on the old, both because the old boundary model was unworkable and because the new regime addresses the “inherent capture” problems at the heart of modern state regulation. But this Article also warns that if the Court does not give accountability review real bite, it may have to abandon the new antitrust federalism and opt for a

* Associate Professor of Law, Vanderbilt Law School; J.D., Harvard Law School; M.Phil, University of Cambridge; B.A., Yale University. Thank you to Edward Cheng, Einer Elhauge, Rob Mikos, and Jim Rossi for helpful comments on previous drafts. Thank you to Demetrios Festa for excellent research assistance.

nuclear option that could portend the end of antitrust federalism altogether.

INTRODUCTION.....	1389
I. THE OLD ANTITRUST FEDERALISM	1392
A. <i>The Old Antitrust Federalism: Drawing Boundaries, Giving Deference</i>	1393
1. <i>Parker: Origins of State Action Immunity</i>	1394
2. <i>Formalist Attempts to Define the State</i>	1397
3. <i>Cracks in the Formalist Foundation: Midcal’s Two-Step</i>	1398
B. <i>The Old Model: Formal Boundaries and Constitutional Federalism</i>	1401
II. THE NEW ANTITRUST FEDERALISM.....	1404
A. <i>The New Antitrust Federalism: From Ticor to NC Dental</i>	1404
1. <i>Ticor Title: Assigning Political Responsibility</i>	1405
2. <i>Phoebe Putney: Raising the Bar for Clear Articulation</i> ..	1406
3. <i>NC Dental: The New Antitrust Federalism Has Arrived</i>	1407
B. <i>The New Model: Federal Administrative Law</i>	1410
1. <i>Process Review in Administrative Law</i>	1410
2. <i>Process Review in the New Antitrust Federalism</i>	1413
III. THE NEW REGIME: A BETTER FIT FOR THE REALITIES OF STATE REGULATION.....	1414
A. <i>The Old Model Falters</i>	1414
B. <i>The New Model Responds: Fighting Capture, Preserving Deference</i>	1417
1. <i>Fighting Capture</i>	1417
2. <i>Giving Deference</i>	1426
C. <i>Does the Model Go Far Enough?: The Uncertain Future of Deference</i>	1429
1. <i>The Subtext of Substantive Review in the Old Antitrust Federalism</i>	1430
2. <i>Is the New Antitrust Federalism a Step Towards Substantive Review?</i>	1432
IV. THE FUTURE OF ANTITRUST FEDERALISM: ACTIVE SUPERVISION .	1433
A. <i>“Active Supervision” So Far</i>	1434
B. <i>Supervision: Next Steps</i>	1435
1. <i>Who Can Provide “Active Supervision”?</i>	1435
2. <i>May Judicial Review Serve as “Active Supervision”?</i>	1438

3. <i>What is the “Substance” of Substantive Review?</i>	1439
CONCLUSION	1444

INTRODUCTION

IN just three relatively obscure antitrust cases,¹ the U.S. Supreme Court has quietly revolutionized how states and the federal government share power. These cases addressed a doctrine—unfamiliar to those outside of the field of antitrust law—that grants “state action” immunity from federal antitrust liability² and thus marks the thin line that insulates state regulation from wholesale invalidation through federal antitrust lawsuits.³ For decades, the Court conceived of this line, and the “antitrust federalism” it effected, as a formal question about where the state ended and antitrust liability began. This was the old antitrust federalism: a boundary-drawing exercise that gave strong deference to state regulation. The Court’s state action revolution ushers in a new antitrust federalism, one that all but dispenses with the notion of separate spheres in favor of something less deferential to the states—procedural review of state regulation.

Antitrust federalism may be less familiar than its constitutional cousin, but it is just as important—if not more so—to the state-federal balance of power. The Sherman Act forbids anticompetitive restraints of trade and monopolization of markets, and it does not seem to limit these prohibitions to private citizens and corporations.⁴ Because regulation often tinkers with the free market economy and tends to create competitive winners and losers, Sherman Act liability for state conduct would severely restrict a state’s ability to regulate within its borders.⁵ So when

¹ *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101 (2015) [hereinafter *NC Dental*]; *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992).

² See *Parker v. Brown*, 317 U.S. 341, 350–51 (1943) (holding that the Sherman Act does not apply to state activity). *Parker* has been credited with creating the “state-action antitrust immunity” doctrine. See *NC Dental*, 135 S. Ct. at 1107.

³ See *Cnty. Commc’ns Co. v. City of Boulder*, 455 U.S. 40, 64 (1982) (Rehnquist, J., dissenting).

⁴ See 15 U.S.C. §§ 1, 2 (2012).

⁵ See *Cnty. Commc’ns Co.*, 455 U.S. at 64 (Rehnquist, J., dissenting) (explaining that “if an adverse effect upon competition were enough to render a statute invalid under the Sherman Act,” states would essentially be unable to regulate in the economic sphere (citing *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 111 (1978))); *New Motor Vehicle Bd.*, 439 U.S. at 109–11; Richard Squire, *Antitrust and the Supremacy Clause*, 59 *Stan.*

the Court extended the reach of the Sherman Act—along with all federal regulation passed under the Commerce Clause—during the New Deal,⁶ it became necessary to define an exemption for “state action” or risk the demise of state regulatory autonomy altogether. And state action immunity from the Sherman Act was born.⁷

For the remainder of the twentieth century, the Court struggled to define the boundaries of state activity immune from antitrust suit. In conceiving of the task as a perimeter-drawing exercise with a binary result—“inside” gets immunity, “outside” does not—it borrowed from constitutional federalism’s theory that the Constitution gives states the right to regulate autonomously where the feds do not or cannot. This boundary theory of antitrust federalism placed an emphasis on formalism in defining the state, and largely left up to the states themselves the question of what “the state” is for purposes of antitrust immunity. But the boundary method faltered, both because formal lines around state activity turned out to be unworkable, and because such deference to states hobbled the Sherman Act and permitted extremely anticompetitive state regulation.⁸ Cracks in the formalist foundation began to show in the 1980s, but the Court still struggled to preserve the paradigm of separate federal and state turf.

Today, the Court has broken with the boundary model and crafted a new antitrust federalism for the twenty-first century. The Court’s last three antitrust federalism cases have virtually abandoned formal definitions of “the state” and have adopted an accountability-based test for whether state regulation enjoys immunity from federal antitrust law.⁹ The model for power sharing no longer comes from constitutional federalism, but from administrative law where courts use procedural review to control agency decision making. As in administrative law, power sharing means some deference; a federal court hearing an antitrust case

L. Rev. 77, 106 (2006) (explaining that “[s]tate laws that transfer wealth from consumers to producers are . . . extremely common”).

⁶ See *Wickard v. Filburn*, 317 U.S. 111, 124 (1942) (extending the reach of the Commerce Clause to intrastate activities that “affect” interstate commerce).

⁷ See *Parker*, 317 U.S. at 350–51.

⁸ See, e.g., *Bates v. State Bar of Ariz.*, 433 U.S. 350, 361 (1977) (allowing a state bar association to ban price advertising for all lawyers, despite obvious anticompetitive effect, because the bar rules were technically approved by the state supreme court and so constituted “state action”).

⁹ *NC Dental*, 135 S. Ct. at 1111; *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992).

will defer to a state's regulatory choices, but only where states adhere to certain decision-making procedures. I call this mode of review "accountability review" because the procedures imposed by the Court are designed to maximize states' exposure to political heat for the regulation's adverse effects on competition.

This Article argues that the Court's new antitrust federalism is an improvement upon the old. First, it is superior to the boundary model because boundaries proved unworkable and because the constitutional federalism model was an imperfect theoretical fit in the antitrust context. Second, process review aimed at political accountability is a better tool for curbing anticompetitive regulation without abrogating state autonomy. It promises to reduce states' reliance on the most competitively risky kind of regulation—industry self-regulation—without second-guessing the regulation for which states take transparent political responsibility.

Its success, however, is not guaranteed. If accountability review fails, the Court has intimated that it may be willing to face the specter of *Lochner v. New York*¹⁰ and directly review the substance of anticompetitive state regulation. Much depends on how the Court fills in the most important piece still missing from the antitrust federalism puzzle. The Court's recent cases have held that regulation delegated to the industry itself must be "actively supervised" by the State¹¹ to enjoy immunity from the Sherman Act,¹² but the Court has not provided a concrete definition of active supervision. If the Court defines "active supervision" to give accountability review real bite, then the new antitrust federalism has a chance of survival. If not, the Court may find itself in the unenviable position of having to choose between accusations of *Lochnerism* and letting the states trample federal antitrust policy at their discretion.

This Article proceeds in four parts. Part I identifies the old antitrust federalism, from its inception in *Parker v. Brown*¹³ to its crisis in *Cal-*

¹⁰ 198 U.S. 45 (1905).

¹¹ *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (establishing a two-part test for state action immunity, the second prong requiring that the challenged activity be "actively supervised" by the State itself" (quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978) (opinion of Brennan, J.))).

¹² See *NC Dental*, 135 S. Ct. at 1114 ("The Court holds today 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.").

¹³ *Parker*, 317 U.S. 341.

*fornia Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*¹⁴ arguing that in this era the Court—inspired by constitutional federalism—attempted to draw formal boundaries around state activity. Part II presents the new antitrust federalism, as established in the Court’s last three state action immunity cases. Here I show that the cases’ emphasis on procedure and political accountability point towards new theoretical underpinnings for antitrust federalism, borrowed from federal administrative law. Part III defends the new antitrust federalism normatively, explaining that the old paradigm was flawed both practically and theoretically, and that the new regime’s focus on accountability and process addresses the capture problems that lead to extremely anticompetitive state regulation. Part III also addresses the possibility that the new antitrust federalism is a step towards substantive federal review of state regulation. Part IV pushes the analysis into the future, by providing the most complete scholarly account to date of what “active supervision” should mean.¹⁵ It argues for a definition of “active supervision” that helps accountability review deliver on its promise to balance state power with federal competition policy. A short conclusion follows.

I. THE OLD ANTITRUST FEDERALISM

From its inception in 1943, antitrust federalism labored under a false formalism that conceived of “the state” as having a discernable boundary. The old focus on boundaries was modeled on constitutional federal-

¹⁴ Following *Midcal*, the Court decided nine cases in ten years attempting to define the two-part test established in that case. See *Ticor*, 504 U.S. at 633; *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 378 (1991); *Patrick v. Burget*, 486 U.S. 94, 100–01 (1988); *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 343–45 (1987); *Fisher v. City of Berkeley*, 475 U.S. 260, 267–69 (1986); *S. Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 59–60 (1985); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 43–44 (1985); *Hoover v. Ronwin*, 466 U.S. 558, 568–69 (1984); *Cnty. Commc’ns Co. v. City of Boulder*, 455 U.S. 40, 51 (1982).

¹⁵ The question of what “active supervision” means has received little scholarly attention. Joshua Rosenstein treats the question in his Comment, *Active Supervision of Health Care Cooperative Ventures Seeking State Action Antitrust Immunity*, 18 *Seattle U. L. Rev.* 329 (1995), but the analysis is specific to the health care context and predates the recent changes in antitrust federalism jurisprudence. Michal Dlouhy makes an important contribution in a student note, see Michal Dlouhy, Note, *Judicial Review as Midcal Active Supervision: Immunizing Private Parties from Antitrust Liability*, 57 *Fordham L. Rev.* 403 (1988), but the piece only deals with one possible mode of supervision and is also out-of-date. To be sure, the question is discussed in many antitrust federalism articles, but none with the depth of treatment or specificity offered by this Article.

ism, where states were seen as centers of decision making separate from the federal government.

A. The Old Antitrust Federalism: Drawing Boundaries, Giving Deference

It has been observed that the Sherman Act, the main federal statute governing competition law,¹⁶ “cannot mean what it says.”¹⁷ It makes all “restraint[s] of trade” unlawful¹⁸ and prohibits monopolization in any form, without regard to who is restraining trade or conferring monopoly power.¹⁹ State regulation routinely restrains trade in ways that would run afoul of the Sherman Act if performed by private parties.²⁰ States fix prices,²¹ restrict competitive entry,²² and even prohibit categories of transactions.²³ And states regularly make monopolists out of market actors and otherwise insulate industries from competition.²⁴ If the Sherman Act and the decades of case law interpreting it were applied against these regulatory activities, they could obliterate state autonomy as we know it. To avoid this backdoor to plenary federal power, the Court, in 1943, read into the statute an exception for “state action”: States are immune from antitrust suits challenging their regulatory activity as anti-competitive.²⁵ From its inception, and through most of the twentieth cen-

¹⁶ See Richard A. Posner, *Antitrust Law* 33 (2d ed. 2001) (calling the Sherman Act “[t]he basic federal antitrust law”).

¹⁷ See *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 687 (1978) (observing that the Sherman Act cannot actually mean that “‘every’ contract that restrains trade is unlawful”).

¹⁸ 15 U.S.C. § 1 (2012).

¹⁹ See *id.* §§ 1, 2.

²⁰ See sources cited *supra* note 5.

²¹ States typically fix prices when they regulate utilities. See, e.g., *Trigen-Okla. City Energy Corp. v. Okla. Gas & Elec. Co.*, 244 F.3d 1220, 1223 (10th Cir. 2001) (finding state action immunity for a state-regulated utility).

²² States control entry into many professions. See Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. Pa. L. Rev. 1093, 1112 (2014) (observing that “professional licensing can act as a barrier to entry into the profession”).

²³ Arizona, for example, prohibits surrogacy contracts. See *Ariz. Rev. Stat. Ann.* § 25-218 (2015).

²⁴ For example, in *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 45–46 (1982), the city of Boulder had prohibited a cable television provider from expanding its business within the city and competing with existing providers.

²⁵ See *Parker*, 317 U.S. at 351 (finding that because there was “no hint that [the Sherman Act] was intended to restrain state action or official action directed by a state,” state action is immune from federal antitrust suit).

ture, state action immunity doctrine used formalism and deference to delineate federal from state regulatory power.

I. Parker: Origins of State Action Immunity

Although the Sherman Act was passed in 1890, it was not until the New Deal era that any conflict between the statute and state regulation arose. Until the Court interpreted the Commerce Clause to give Congress sweeping regulatory authority, it was unthinkable that a federal statute such as the Sherman Act could apply to state regulation, which was, by definition, formally intrastate.²⁶ But in 1942, the Court established the “affectation” doctrine in *Wickard v. Filburn*, vastly expanding the reach of Congress’s Commerce Clause power to include all commerce that had an effect (however small and indirect) on interstate trade.²⁷ Overnight, the boundaries of the Sherman Act grew to reach any state regulation that had even a small effect on interstate trade.²⁸

The following year, the Court decided *Parker*, creating immunity from the Sherman Act for state regulatory activity.²⁹ The case presented a Sherman Act challenge against a state-run output restriction on California’s raisin producers. The program had the same effect on the market as a cartel agreement and if created privately by the raisin farmers themselves, certainly would have run afoul of federal antitrust laws.³⁰ The Court assumed that under *Wickard* the raisin program “affected” inter-

²⁶ See *NC Dental*, 135 S. Ct. at 1118 (Alito, J., dissenting) (noting that until *Wickard v. Filburn*, 317 U.S. 111 (1942), “the [Sherman] Act did not pose a threat to traditional state regulatory activity”); Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 *J.L. & Econ.* 23, 40–41 (1983) (noting that “few if any members [of Congress in 1890] reasonably could have thought that the [Sherman Act] applied to any actions wholly within the borders of a single state,” and that “[t]he need for accommodation between state and federal law arises only because the Sherman Act has grown with the growth of the commerce power”).

²⁷ 317 U.S. at 124.

²⁸ See *NC Dental*, 135 S. Ct. at 1118 (Alito, J., dissenting) (“The new interpretation of the commerce power brought about an expansion of the reach of the Sherman Act.”); Herbert Hovenkamp, *Federalism and Antitrust Reform*, 40 *U.S.F. L. Rev.* 627, 629 (2006) (observing that with *Wickard*, “significant conflict between federal antitrust and state regulation became possible”).

²⁹ 317 U.S. at 350–51.

³⁰ *Id.* at 350 (“We may assume for present purposes that the California prorate program would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate.”).

state commerce and so was within the ambit of the Sherman Act,³¹ but it explained that the Act could not be used to “restrain state action or official action directed by a state.”³² The Court grounded this new “state action immunity” in the text—or lack thereof—of the Sherman Act, which “makes no mention of the state as such.”³³

This appeal to the text of the Sherman Act has made it common for scholars and courts to justify state action immunity—sometimes called *Parker* immunity—as giving effect to the original intent of the drafters of the Sherman Act.³⁴ But it is too much to say that the Congress that passed the Sherman Act affirmatively intended to exempt state regulation from federal antitrust liability; the most that can be said is that Congress never considered the possibility at all.³⁵ *Parker*, therefore, is better understood as being more about the affectation doctrine than about the intent behind or text of the Sherman Act. Federal antitrust liability for state laws and regulations would so disrupt the state-federal balance of power as it stood in the 1940s as to render the affectation doctrine ques-

³¹ *Id.* (assuming “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”).

³² *Id.* at 351.

³³ *Id.*

³⁴ For cases grounding state action immunity in congressional intent, see *Patrick v. Burget*, 486 U.S. 94, 99 (1988) (explaining that *Parker* held that the Sherman Act was not “intended” to restrain states); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38 (1985) (explaining that the *Parker* Court “refused to infer [a congressional] intent” to apply Sherman Act liability to the states); *Parker*, 317 U.S. at 351. For scholarship grounding *Parker* immunity in congressional intent, see, e.g., Phillip Areeda, Antitrust Immunity for “State Action” After *Lafayette*, 95 Harv. L. Rev. 435, 437 (1981) (explaining that in *Parker* “[t]he Supreme Court found no Sherman Act language or legislative history to indicate a congressional intent to control [the] behavior of a sovereign state”); Merrick B. Garland, Antitrust and State Action: Economic Efficiency and the Political Process, 96 Yale L.J. 486, 488 (1987) (explaining that *Parker* immunity is based on the fact that “Congress had not intended the Sherman Act to bar states from imposing restraints on competition”); Milton Handler, The Current Attack on the *Parker v. Brown* State Action Doctrine, 76 Colum. L. Rev. 1, 9 (1976) (explaining that “*Parker* specifically held [that] the Congress that passed the Sherman Act never intended it to apply at all to state action”). But see *NC Dental*, 135 S. Ct. at 1119 (Alito, J., dissenting) (“The Court’s holding in *Parker* was not based on either the language of the Sherman Act or anything in the legislative history affirmatively showing that the Act was not meant to apply to the States.”).

³⁵ *NC Dental*, 135 S. Ct. at 1119 (Alito, J., dissenting) (explaining that “[f]or the Congress that enacted the Sherman Act in 1890, it would have been a truly radical and almost certainly futile step to attempt to prevent the States from exercising their traditional regulatory authority” through Sherman Act liability).

tionable under the federalist principles enshrined in the Constitution.³⁶ Thus, to preserve the viability of *Wickard*, the Court created a compromise that would leave states a relatively free hand to regulate without federal oversight, and *Parker* immunity was born.

Even from its inception, state action immunity was not complete. The *Parker* Court held that states could not selectively repeal the Sherman Act by sanctioning private cartels and other antitrust violations. The Court explained that “a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.”³⁷ This caveat in *Parker* implied a difference between genuine state regulation and mere rent dealing to private actors, a distinction that would prove both essential to the Court’s antitrust federalism doctrine and resistant to easy application. The *Parker* Court observed that because the raisin program was directed, not merely authorized, by the state, the raisin farmers and the members of the agricultural commission responsible for the price fixing were immune.³⁸ But *Parker*, otherwise, provided no guidance on the line between directed and authorized Sherman Act violations.³⁹

Parker’s creation of state action immunity and its caveat that states may not merely sanction private antitrust violations made it crucial to distinguish state regulation from private anticompetitive conduct. Thus, *Parker* gave rise to a question that would plague the Court for over seventy years in defining the contours of state action immunity and the balance between state and federal power to control competition: What is “the state” for antitrust immunity purposes?

³⁶ The *Parker* Court acknowledged the threat that *Wickard*’s affectation doctrine posed to state sovereignty. *Parker*, 317 U.S. at 359–60 (“The governments of the states are sovereign within their territory This Court has repeatedly held that the grant of power to Congress by the Commerce Clause did not wholly withdraw from the states the authority to regulate the commerce with respect to matters of local concern.”); cf. Easterbrook, *supra* note 26, at 24 (noting that if the Sherman Act were interpreted to preempt state laws inconsistent with the Act’s procompetitive principles, it would “doom all state regulation”).

³⁷ *Parker*, 317 U.S. at 351.

³⁸ *Id.* at 351–52.

³⁹ Nor did the Court provide any guidance on this question in its next state action immunity case, *Schwegmann Bros. v. Calvert Distillers Corp.*, which merely reiterated *Parker*’s holding that a state cannot immunize Sherman Act violations merely by authorizing them. 341 U.S. 384, 386 (1951) (“The fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, absent approval by Congress.”).

2. Formalist Attempts to Define the State

The Court's initial attempts to define "the state" were formalist, and for some cases formal boundaries worked well. When, in *Cantor v. Detroit Edison Co.*, a hardware store challenged a regulated electric utility's policy of including free light bulbs with electric service, the Court resolved the state action question by examining the caption of the suit.⁴⁰ The named plaintiff was the private utility itself, not a state governmental body or official, and so, the Court held that *Parker* immunity did not apply.⁴¹ Similarly, in *City of Lafayette v. Louisiana Power & Light Co.*, the Court permitted a suit against a municipality, holding that a city is not "the state" for immunity purposes.⁴²

In other cases, formalism seemed to work less well to define the state. In *Goldfarb v. Virginia State Bar*, the Court confronted a Sherman Act suit against a state bar association challenging its rule of ethics encouraging compliance with fee schedules as anticompetitive.⁴³ The case turned on whether the Bar was a private professional organization or an arm of the state, as the body responsible for licensing attorneys. The Bar was a hybrid entity, comprised of private attorneys but endowed with some governmental-like powers and responsibilities.⁴⁴ Without the possibility of resorting to formalist boundaries of "the state," the Court decided the Bar's status based on a kind of *respondeat superior* test: It found that because the Supreme Court of Virginia had expressed skepticism towards fee schedules,⁴⁵ the Bar was acting in a private capacity in encouraging adherence to the schedules.⁴⁶ Two years later, in *Bates v.*

⁴⁰ *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 581–82, 591 (1976).

⁴¹ *Id.* at 591–92 ("In this case, unlike *Parker*, the only defendant is a private utility. . . . Since the case now before us does not call into question the legality of any act of the State of Michigan or any of its officials or agents, it is not controlled by the *Parker* decision."). The Court did consider whether the light bulb program was compelled by the state. The Court answered this question in the negative, observing that because the light bulb program was initiated by the utility, "the option to have, or not to have, such a program [was] primarily respondent's, not the Commission's." *Id.* at 594.

⁴² *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 408 (1978). The Court explained, after citing language from *Parker*, that "[c]ities are not themselves sovereign; they do not receive all the federal deference of the States that create them." *Id.* at 412.

⁴³ *Goldfarb v. Va. State Bar*, 421 U.S. 773, 775 (1975).

⁴⁴ *Id.* at 790–91.

⁴⁵ The Virginia Supreme Court had "explicitly directed lawyers not 'to be controlled' by fee schedules." *Id.* at 789.

⁴⁶ The Court explained that while "the State Bar is a state agency for some limited purposes," when it promulgated the ethics rule it was acting as a co-conspirator in "what is essen-

State Bar of Arizona, the Court implied that when a State Bar acts *within* the scope of its authority under the state, it does enjoy state action immunity.⁴⁷

3. Cracks in the Formalist Foundation: Midcal's Two-Step

By the 1980s, it was clear that the *Parker* doctrine needed to evolve to address the fact that much state regulation is conducted by hybrid entities like the Virginia State Bar, and not by sovereign branches of state government. The Court attempted to provide clarity for hybrid entities in *Midcal*, a case challenging a California statute obligating all wine wholesalers to sell at prices set by wine producers.⁴⁸ The California statute required wine producers to file price schedules with the state, but the state had “no direct control over wine prices, and it [did] not review the reasonableness of the prices set by wine dealers.”⁴⁹ The resale price scheme would have violated the Sherman Act if all the parties involved were private,⁵⁰ but the wine producers defended the scheme by claiming *Parker* immunity.

Rather than asking whether the defendant was an arm of the state, or whether the state directed the challenged conduct, the Court created a two-step test for antitrust immunity. The Court held that a restraint enjoys state action immunity if it is “clearly articulated and affirmatively expressed as state policy” and “‘actively supervised’ by the State itself.”⁵¹ The Court found no state action immunity in *Midcal* because, while the pricing scheme satisfied the first prong of the new test, the state did not adequately supervise the program.⁵²

tially a private anticompetitive activity,” and so could be sued under the Sherman Act. *Id.* at 791–92.

⁴⁷ The Court in *Bates* did not explicitly decide the case on the *respondeat superior* theory advanced in *Goldfarb*, but rather held that the “real party in interest” was the Arizona Supreme Court, because while the Bar had proposed the restriction in question (an ethics rule banning lawyer advertising), the Arizona Supreme Court had approved it. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 361 (1977). But, one can square *Bates* (where the Court looked past the Bar to the state supreme court) with *Goldfarb* (where the Court did not) by applying *Goldfarb*'s *respondeat superior* theory: Where a Bar acts under its authority, evidenced in *Bates* by the supreme court's approval of the ethics rule, it enjoys state action immunity.

⁴⁸ 445 U.S. at 99.

⁴⁹ *Id.* at 100.

⁵⁰ *Id.* at 102–03.

⁵¹ *Id.* at 105 (internal quotation marks omitted) (quoting *La. Power & Light Co.*, 435 U.S. at 410).

⁵² *Id.* at 105–06.

One of the benefits of *Midcal*'s two-step test over the early formalist attempts to identify the state was that it provided a way to categorize restraints created by sub-state entities like bar associations and municipalities. By the time of *Midcal*, it was relatively uncontroversial that restraints on trade created by the state "acting as sovereign,"⁵³ such as laws passed by a state legislature and rules promulgated by a state supreme court, were per se immune.⁵⁴ But a significant amount of regulation was and is created by nonsovereign entities, and *Midcal* provided a way to categorize these restraints as either private, and so subject to antitrust liability, or sufficiently tied to the state as to enjoy immunity.

In theory, *Midcal* could be seen as a move towards the procedural review that defines the new antitrust federalism. It essentially asked two questions about how the challenged restraint was created: whether the state had articulated a regulatory intent to abrogate competition and whether the state supervised the restraint's creation and implementation.⁵⁵ But subsequent cases interpreting *Midcal* failed to realize its potential to create meaningful procedural review. By returning to formalism in defining "clear articulation," and failing to define "active supervision" at all, the Court largely retained the old boundary model even after *Midcal*.

In *Town of Hallie v. City of Eau Claire*, decided four years after *Midcal*, the Court defined "clear articulation" broadly to include any state mandate to regulate a particular area of economic activity.⁵⁶ A state statute authorizing cities to "provide sewage services and also to determine the areas to be served" contemplated anticompetitive conduct, which was sufficient "clear articulation" of a state's intent to displace competition with regulation.⁵⁷ Similarly, in *Southern Motor Carriers Rate Conference, Inc. v. United States*, the Court found "clear articulation" when a state "authorized, but [did] not compel[]," collective rate

⁵³ *Goldfarb*, 421 U.S. at 790.

⁵⁴ See *Hoover v. Ronwin*, 466 U.S. 558, 567–68 (1984) ("[W]hen a state legislature adopts legislation, its actions constitute those of the State and *ipso facto* are exempt from the operation of the antitrust laws." (citation omitted)); Office of Policy Planning, FTC, Report of the State Action Task Force 6 (2003) (noting that "actions of a state legislature and of a state supreme court acting in a legislative fashion are those of the state acting as sovereign" (footnotes omitted)). Cf. *Goldfarb*, 421 U.S. at 790–91 (explaining that if a Virginia statute or the Virginia Supreme Court Rules "required the anticompetitive activities of either respondent," their actions would be immune).

⁵⁵ *Midcal*, 445 U.S. at 105.

⁵⁶ 471 U.S. 34, 45–46 (1985).

⁵⁷ *Id.* at 42.

making among competitors.⁵⁸ These cases evinced extreme deference to states; only one case of this era found articulation lacking, and there the statute that defendants claimed provided “clear articulation” said nothing specific about regulation or competition.⁵⁹

As for the other *Midcal* prong, the Court also failed to actualize its potential to create meaningful procedural review. The “active supervision” cases following *Midcal* provided little guidance about what steps states must take in supervising regulation, instead merely highlighting what is *not* active supervision. In *Patrick v. Burget*, the Court held that a state-ordered peer review program of physicians was not actively supervised because the state could only overturn peer-review decisions for procedural defects.⁶⁰ And even *FTC v. Ticor Title Insurance Co.*, which can be seen as the first case of the new era, defined active supervision in the negative.⁶¹

Perhaps part of why the Court did not feel the need to precisely define “active supervision” is that it created, just five years after *Midcal*, a shortcut for some sub-state entities that allowed immunity even in the absence of supervision. In *Hallie*, the Court held that municipalities need not be supervised to enjoy immunity; “clear articulation” from the state was enough.⁶² The Court justified the shortcut for municipalities by reasoning that when a city restricts competition, “there is little or no danger that it is involved in a *private* price-fixing arrangement.”⁶³ It hinted that other regulatory entities, perhaps “state agenc[ies],” would also be allowed to take the shortcut, but it expressly declined to extend its holding beyond municipalities.⁶⁴ The creation of this shortcut, together with a liberal interpretation of “clear articulation,” marked a return to formalism and sweeping state deference, despite *Midcal*’s apparent focus on the process of state decision making.

⁵⁸ 471 U.S. 48, 50 (1985).

⁵⁹ See *Cnty. Commc’ns Co. v. City of Boulder*, 455 U.S. 40, 43, 55 (1982) (holding that a state’s constitutional “home rule” amendment, granting cities “the full right of self-government in both local and municipal matters,” did not provide clear articulation of the state’s intent to displace competition (quoting Colo. Const. art. XX, § 6(h)) (internal quotation marks omitted)).

⁶⁰ 486 U.S. 94, 102–03 (1988).

⁶¹ 504 U.S. 621, 638 (1992) (finding active supervision lacking because while the state had the power to review the anticompetitive restriction in question, it did not exercise that power).

⁶² *Hallie*, 471 U.S. at 46–47.

⁶³ *Id.* at 47.

⁶⁴ *Id.* at 46 n.10.

B. The Old Model: Formal Boundaries and Constitutional Federalism

The theory behind this turf model—deferential and formalist—was borrowed from constitutional federalism, where state regulatory autonomy is prized, even if the mechanisms defining and policing its boundaries are fraught. The connection between constitutional and antitrust federalism seems natural enough, since *Parker* itself was born out of a fear that the affectation doctrine of *Wickard* would all but obliterate state sovereignty if state regulation were placed within the reach of the Sherman Act. But it is not inevitable that antitrust and constitutional federalisms should rest on the same model of power sharing.

I use “constitutional federalism” to refer to the most common meaning of “federalism” outside of the antitrust context. It is the federalism the Founders debated in the Federalist Papers and the theory of federal-state power balance that underlies many constitutional crises confronted by the Supreme Court, beginning with *McCulloch v. Maryland*.⁶⁵ Constitutional federalism refers to the principle that the United States is a “they” and not an “it,” a coalition of otherwise autonomous, self-governing states that have given their consent to be governed—in limited, enumerated ways—by a central government of their election.⁶⁶

Constitutional federalism relies on the idea that separations of decision-making power—among the states and between the federal government and the states—will optimize law and policy in the United States. The way that power is divided among the sovereigns, and the means of maintaining those divisions, has changed dramatically in the last century, but all theories of federalism describe state and federal lawmaking power as occupying some separate turf, even if much of it is overlapping. This division of governance describes even modern federalism doctrine, which does not recognize a judicially-enforceable boundary between federal and state regulatory prerogatives. Whether as a matter of politics, pragmatism, or path-dependence, the federal government has not legislated to the fullest extent of its power, leaving many areas of policy dominated by state regulation.

⁶⁵ 17 U.S. (4 Wheat.) 316 (1819).

⁶⁶ Although there is no single federalism provision, amendment, or clause in the Constitution, concerns about how the central federal government and states should share governing responsibility over the nation animate many parts of the Constitution’s text. The constitutional provisions most directly relevant to federalism include the Supremacy Clause, U.S. Const. art. VI, cl. 2; the Necessary and Proper Clause, id. art. I, § 8, cl. 18; the Commerce Clause, id. art. I, § 8, cl. 3; and the Tenth Amendment, id. amend. X.

Boundary work in constitutional federalism has taken several different forms as federalism itself has evolved. Early conceptions of federalism envisioned separate spheres of state and federal regulatory authority. The Constitution was seen as protecting states' rights by granting the federal government only limited, enumerated powers.⁶⁷ This limitation on the federal government was underscored by the Tenth Amendment, which said that "[t]he powers not delegated to the United States by the Constitution . . . are reserved to the States."⁶⁸ But when, after the New Deal, the Court reinterpreted the Commerce Clause to give the federal government authority to regulate almost any commercial activity, boundaries dependent on a federal government of limited enumerated powers seemed doomed.⁶⁹

After three decades of intense federal legislative activity under the expanded Commerce Clause power, the Court experimented with a new theory of the federal-state boundary. In *National League of Cities v. Usery*, decided in 1976, the Court carved out an area of state sovereignty that operated free from federal interference and invalidated a federal statute that crossed that boundary.⁷⁰ According to the Court, the Tenth Amendment prohibited federal regulation of "States as States" that "operate[d] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions."⁷¹ But when defining "traditional governmental functions" proved unworkable, the Court once again reinvented the federal-state boundary. In *Garcia v. San Antonio Metropolitan Transit Authority*, which overruled *National League of Cities*, the Court identified the political process as the primary—and most effective—protector of states' regulatory autonomy.⁷² That theory's contemporary heir, "process federalism," adds other pro-

⁶⁷ See Larry Kramer, Understanding Federalism, 47 Vand. L. Rev. 1485, 1495–96 (1994).

⁶⁸ U.S. Const. amend. X.

⁶⁹ See Kramer, *supra* note 67, at 1496 (noting that "enumeration ceased to do any real work long ago").

⁷⁰ 426 U.S. 833, 852 (1976).

⁷¹ *Id.* at 842, 852.

⁷² Thus, the *Garcia* Court endorsed the "political safeguards of federalism" over judicially-enforceable boundaries. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985). See Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543 (1954) (arguing that because the states are well represented in federal government, they will block any federal legislation that takes too much sovereign power from the states).

cedural and political mechanisms—but not judicially-enforceable rules—to the list of forces that maintain federal-state boundaries.⁷³

From the beginning, the Court's antitrust federalism jurisprudence re-sounded in constitutional federalism and its focus on bounded divisions of decision-making power. *Parker* invoked the image of “a dual system of government”⁷⁴ and explained that the Commerce Clause power “did not wholly withdraw from the states the authority to regulate the commerce with respect to matters of local concern.”⁷⁵ Later cases, including *Midcal* and its progeny, relied on less formalistic tests for the boundary between state and federal power, but they still conceived of the immunity question as a boundary-drawing exercise. *Midcal* established a two-part test for that boundary, which was categorized in *Hallie* as serving an “evidentiary function” of “ensuring that the actor is engaging in the challenged conduct pursuant to state policy.”⁷⁶ *Hallie* emphasized that genuine “governmental interests of the State” are within the state boundary and outside of federal reach.⁷⁷ Similarly, *Patrick* placed beyond federal reach “conduct [that] promotes state policy.”⁷⁸ These cases at least appeared to be agnostic as to the substance of that policy, relying on the constitutional federalist principle that benefits accrue when each sovereign has some freedom to set and execute its own regulatory agenda within the bounds of its power.

Scholarship analyzing the case law of this era similarly identified antitrust federalism with constitutional federalism and its focus on boundary work. Writing in 1987, Professor Thomas M. Jorde identified the constitutional federalism principles at the heart of antitrust federalism, arguing that the Court's state action immunity doctrine permitted “states wide latitude to select their own mix of competition and regulation,”⁷⁹ and that such legal diversity among the states promoted federalist principles, especially citizen participation.⁸⁰ Professor Milton Handler described the boundary affected by antitrust federalism as the inverse of

⁷³ See Ernest A. Young, Two Cheers for Process Federalism, 46 *Vill. L. Rev.* 1349, 1352–66 (2001); Kramer, *supra* note 67, at 1486–87.

⁷⁴ *Parker*, 317 U.S. at 351.

⁷⁵ *Id.* at 360.

⁷⁶ *Hallie*, 471 U.S. at 46.

⁷⁷ *Id.* at 47.

⁷⁸ 486 U.S. at 101.

⁷⁹ Thomas M. Jorde, Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism, 75 *Calif. L. Rev.* 227, 230 (1987).

⁸⁰ *Id.* at 249–50.

federal preemption, a doctrine typically associated with constitutional federalism.⁸¹ Several scholars criticized *Midcal*'s supervision requirement as too much of a departure from constitutional federalism, arguing that both kinds of federalism should respect decisions made by a state within the bounds of its autonomy—no matter what processes the state used to make them.⁸²

Perhaps the strongest case for a close connection between constitutional and antitrust federalism can be found in an article by Professors James F. Blumstein and Terry Calvani that argues that *Parker* immunity has deep ties to the Court's Tenth Amendment jurisprudence, and that state action immunity protects states when they are performing the "traditional [state] governmental functions" discussed in *National League of Cities*.⁸³ These articles all emphasized what the Court had made plain: Antitrust federalism and constitutional federalism were close relatives, and both required a separation between federal and state regulatory activity.

II. THE NEW ANTITRUST FEDERALISM

In its last three antitrust federalism cases, the Court has broken with the boundary theory of state-federal power sharing it once borrowed from constitutional federalism. Power sharing in the new antitrust federalism is modeled on administrative law, where federal courts scrutinize the process of agency decision making in order to ensure agencies' political accountability.

A. *The New Antitrust Federalism: From Ticor to NC Dental*

The new antitrust federalism can be stated as three principles. First, under the new antitrust federalism, what constitutes "the state" is a mat-

⁸¹ See Milton Handler, *Antitrust—1978*, 78 Colum. L. Rev. 1363, 1374–88 (1978).

⁸² See generally John E. Lopatka, *The State of "State Action" Antitrust Immunity: A Progress Report*, 46 La. L. Rev. 941 (1986) (arguing that the state action immunity doctrine should be clarified as allowing total deference to states' regulatory intent); William H. Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After Midcal Aluminum*, 61 B.U. L. Rev. 1099 (1981) (arguing that *Parker* stands for total deference to considered state decision making, and that *Midcal*'s supervision requirement goes too far in dictating how states may regulate).

⁸³ James F. Blumstein & Terry Calvani, *State Action as a Shield and a Sword in a Medical Services Antitrust Context: Parker v. Brown in Constitutional Perspective*, 1978 Duke L.J. 389, 419–24, 422 n.193 (quoting *Nat'l League of Cities*, 426 U.S. at 852) (internal quotation marks omitted).

ter of federal, not state law. Second, according to that federal law—an interpretation of the Sherman Act—federal antitrust enforcement must forbear only when the state has followed certain procedures in creating anticompetitive regulation. Third, those procedures are designed to force states to take political accountability—that is, to take transparent credit or blame—for the challenged anticompetitive activity.

1. Ticor Title: Assigning Political Responsibility

It is tempting to think of the new antitrust federalism as comprising only the Court's last two antitrust federalism cases—2013's *FTC v. Phoebe Putney Health System, Inc.*⁸⁴ and 2015's *NC Dental*⁸⁵—because two decades of Supreme Court inactivity separate *Phoebe Putney* from the previous case decided by the Court, 1992's *FTC v. Ticor Title Insurance Co.*⁸⁶ But in fact, *Ticor* sounds more in the new antitrust federalism than the old, even if it does not contain *NC Dental*'s full-throated rejection of the boundary model. Whether *Ticor* is seen as presaging the new antitrust federalism, or straddling the new and the old, it is properly discussed in conjunction with the two more recent cases, although separated from them by time.

In *Ticor*, the Court introduced the notion of political accountability as a condition of state action immunity, a theme that would mature in its more recent cases. The plaintiffs in *Ticor* challenged several states' rate-setting programs for title searches, arguing that the state did not supervise the rate setting and so did not meet *Midcal*'s second prong. The Court agreed, rejecting the states' argument that they supervised the programs because they had—but did not exercise—the power to review the rate schedules.⁸⁷ Explaining that potential supervision was insufficient under *Midcal*, the Court introduced a new way to understand *Midcal*'s two-step: not only as a signal that the regulation was “the State's own,”⁸⁸ but as evidence that the state had taken political accountability for it in the eyes of its voters. The opinion explained, “States must accept political responsibility for actions they intend to under-

⁸⁴ 133 S. Ct. 1003 (2013).

⁸⁵ 135 S. Ct. 1101.

⁸⁶ 504 U.S. 621 (1992).

⁸⁷ *Id.* at 638.

⁸⁸ *Id.* at 635.

take. . . . Federalism serves to assign political responsibility, not to obscure it.”⁸⁹

2. Phoebe Putney: *Raising the Bar for Clear Articulation*

Phoebe Putney built on this emphasis on credit-and-blame accountability by setting a new, higher bar for “clear articulation” under the first prong of the *Midcal* test.⁹⁰ The case involved the purchase of a private hospital by a Georgia hospital authority that would “substantially lessen competition or tend to create, if not create, a monopoly.”⁹¹ The hospital authority argued that it was entitled to state action immunity because it met *Midcal*’s first requirement that it acted pursuant to a “clearly articulated . . . state policy to displace competition.”⁹² It based this claim on a state statute that authorized cities and counties to create hospital authorities, which had the power to acquire hospitals.⁹³ The authority argued that the market for healthcare was so concentrated in Georgia that most hospital purchases would run afoul of the Sherman Act’s standards, and thus the state reasonably anticipated anticompetitive conduct when it gave hospital authorities the ability to acquire hospitals.⁹⁴

The Court rejected the authority’s arguments, requiring more to show clear articulation than it had in previous cases. It rejected the lower court’s holding that anticompetitive effects need only be “reasonably anticipated” by a state statute,⁹⁵ a holding that seemed consistent with the Court’s previous rule that state authorizing language needed merely to “contemplate[]” anticompetitive regulation.⁹⁶ The *Phoebe Putney* Court articulated a higher standard, explaining that the authorized conduct needed to be “inherently anticompetitive” to entail clear articulation.⁹⁷

⁸⁹ Id. at 636.

⁹⁰ 133 S. Ct. at 1101.

⁹¹ *FTC v. Phoebe Putney Health Sys., Inc.*, 663 F.3d 1369, 1375 (11th Cir. 2011). The merged hospital would “account for 86 percent of the market for acute-care hospital services . . . in the six counties surrounding Albany[, Georgia].” *Phoebe Putney*, 133 S. Ct. at 1008.

⁹² See *Phoebe Putney*, 133 S. Ct. at 1009. In dicta, the Court explained that “local governmental entities,” such as the hospital authority, are not subject to the supervision requirement. Id. at 1011.

⁹³ Id. at 1007–08.

⁹⁴ Id. at 1014.

⁹⁵ Id. at 1009 (internal quotation marks omitted).

⁹⁶ See *Cnty. Comm’ns Co. v. City of Boulder*, 455 U.S. 40, 55 (1982) (internal quotation marks omitted); *La. Power & Light Co.*, 435 U.S. at 394.

⁹⁷ *Phoebe Putney*, 133 S. Ct. at 1012–13.

Although the opinion did not mention political accountability as such, the holding was consistent with *Ticor*'s emphasis on states taking credit and blame for anticompetitive regulation. A stricter test for clear articulation leads to sharper lines of accountability: The stronger the statement from the state, the easier it is for voters to blame or credit the state for its regulations and policies. The higher the bar for immunity, the more heat the state must take for unpopular anticompetitive regulation that it has placed outside the reach of federal antitrust enforcement. And reading between the lines of the opinion, the *Phoebe Putney* Court did seem concerned about the possibility that the state, the hospital authority, and the merging private hospital had used a complex shell game to diffuse blame for the effective merger-to-monopoly that they created.⁹⁸

3. NC Dental: *The New Antitrust Federalism Has Arrived*

The latent themes of accountability in *Ticor* and *Phoebe Putney* became explicit in the Court's 2015 decision in *NC Dental*.⁹⁹ The case alleged that North Carolina's Board of Dental Examiners violated the Sherman Act by sending cease-and-desist letters to nondentist providers of teeth whitening.¹⁰⁰ The letters averred that teeth whitening was "the practice of dentistry," and therefore, teeth whitening by nondentists (which had become popular in mall kiosks and beauty salons) constituted the unlicensed practice of dentistry in violation of North Carolina law.¹⁰¹ The Federal Trade Commission sued the Board, and the Board defended by arguing that it was entitled to state action immunity because

⁹⁸ The opinion details the complex web of subsidiaries—some connected by one-dollar-lease agreements—that the authority created, implying that it had attempted to disguise the true parties to the transaction. *Id.* at 1008. The transaction was complex: As authorized by the state statute, the city of Albany and Dougherty County created a hospital authority, which purchased Phoebe Putney Memorial Hospital. The Authority then created Phoebe Putney Health System, Inc. ("PPHS"), and a subsidiary known as Phoebe Putney Memorial Hospital, Inc. ("PPMH"). The Authority leased the hospital to PPMH for one dollar a year. PPHS then entered an agreement, with approval from the Authority, to purchase the competing hospital, Palmyra Medical Center, with PPHS funds. The deal contemplated that PPHS would create yet another subsidiary to manage the hospital, to which PPHS would lease Palmyra for "\$1 per year under the Memorial lease agreement." *Id.*

⁹⁹ *NC Dental*, 135 S. Ct. 1101.

¹⁰⁰ *Id.* at 1108–09.

¹⁰¹ *NC Dental*, 135 S. Ct. at 1108 (internal quotation marks omitted) (quoting Appendix To Petition for Writ of Certiorari at 103a, *NC Dental*, 135 S. Ct. 1101 (No. 13-534)).

it acted according to a clearly articulated state policy and as a “state agency,” it did not need supervision to enjoy immunity.¹⁰²

Because *Town of Hallie v. City of Eau Claire* suggested that the shortcut—skipping supervision—was available not only to cities but to other sub-state entities not involving “a private party,”¹⁰³ the battleground of *NC Dental* was what under the old antitrust federalism was a formal question: Was the Board private or public? The Board argued in this formalist vein, claiming that as a “state agency,” it was part of the state and so entitled to take the shortcut.¹⁰⁴ The Board cited several facts as supporting its status as a state agency, including the requirement that its members “swear an oath of allegiance to the State,” the Board’s duty to “comply with the State’s administrative procedure act,” and the power of the Board to promulgate rules and regulations with the force of law.¹⁰⁵ But the Board’s strongest argument was that the State of North Carolina itself considered the Board to be a “state agency,”¹⁰⁶ and joined as *amicus curiae* on its behalf.¹⁰⁷

If the question of what is “the state” or “a state agency” for immunity purposes were a question of state law, then North Carolina’s litigation position on behalf of the Board should have been the end of the story.¹⁰⁸ And under the old antitrust federalism, that may have been the case. But the new emphasis on full state accountability for immune regulation in *Ticor* and *Phoebe Putney* pointed towards a new rule: Acts of the state, for immunity purposes, are defined as a matter of federal antitrust law to include only those acts for which the state takes full and transparent political accountability. Allowing entities like the Board of Dental Exam-

¹⁰² N.C. State Bd. of Dental Exam’rs v. FTC, 717 F.3d 359, 368 (4th Cir. 2013); see also *NC Dental*, 135 S. Ct. at 1108–09 (“The Board moved to dismiss, alleging state-action immunity.”).

¹⁰³ 471 U.S. 34, 46 n.10 (1985).

¹⁰⁴ Here the Board had help from the Court’s dicta in *Hallie* that suggested “[i]n cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue.” *Id.*

¹⁰⁵ Brief for Petitioner at 6, *NC Dental*, 135 S. Ct. 1101 (No. 13-534), 2014 WL 2212529, at *6.

¹⁰⁶ As the dissent in *NC Dental* observed, the state statute creating the board called it an “agency of the state.” See *NC Dental*, 135 S. Ct. at 1120 (Alito, J., dissenting) (citation omitted) (quoting N.C. Gen. Stat. Ann. § 90-22(b) (2013)) (internal quotation marks omitted).

¹⁰⁷ See Brief of *Amici Curiae* State of West Virginia and 22 Other States in Support of Petitioner at 1, *NC Dental*, 135 S. Ct. 1101 (No. 13-534), 2014 WL 2506625, at *1 [hereinafter West Virginia Brief].

¹⁰⁸ This was the *NC Dental* dissent’s position, and has the benefits of simplicity and clarity. See *NC Dental*, 135 S. Ct. at 1117–18 (Alito, J., dissenting).

iners—which operate outside of the political limelight—to take the *Hal-lie* shortcut would allow North Carolina to avoid taking the political heat for higher priced, less convenient teeth whitening for its citizens.

The *NC Dental* Court therefore adopted an accountability-based test for whether the Board was sufficiently governmental to take the shortcut. It held 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.”¹⁰⁹ The high risk of self-interest, coupled with an almost total lack of accountability to the voters, made the Board “private” and so immune only after passing the strictest version of the *Midcal* test.¹¹⁰ The Court explained, “Immunity for state agencies . . . 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.”¹¹¹

Thus *NC Dental* completed the Court’s revolution away from the old paradigm where the state’s intent marked a bright line defining its immunity. The difference between *NC Dental* and the old regime is evident from the dissent in the case, which would have found immunity based on the principle laid out in old antitrust federalism cases like *Bates v. State Bar of Arizona*¹¹² and *Hoover v. Ronwin*¹¹³: State regulation, however the state designs it, is exempt from the Sherman Act. The dissent invoked the old formalism when it said that “[u]nder *Parker*, the Sherman Act . . . [does] not apply to state agencies; the North Carolina Board of Dental Examiners is a state agency; and that is the end of the matter.”¹¹⁴ According to the dissent, the fact that the state statute creating the Board referred to it as an “agency of the State” was dispositive of the immunity question.¹¹⁵ That the majority took a different view shows that the Court had once and for all rejected the false formalism of boundary drawing.

¹⁰⁹ Id. at 1114 (majority opinion).

¹¹⁰ Id.

¹¹¹ Id. at 1111.

¹¹² 433 U.S. 350, 359 (1977).

¹¹³ 466 U.S. 558, 568–69 (1984).

¹¹⁴ *NC Dental*, 135 S. Ct. at 1117–18 (Alito, J., dissenting).

¹¹⁵ Id. at 1120–21 (quoting N.C. Gen. Stat. Ann. § 90-22(b) (2013)) (internal quotation marks omitted).

B. The New Model: Federal Administrative Law

The Court's new antitrust federalism finds its theoretical roots in administrative law, where procedural review dominates. Whereas constitutional federalism requires power sharing in parallel—even if the boundary between federal and state regulatory authorities is not judicially enforceable after *Garcia v. San Antonio Metropolitan Transit Authority*¹¹⁶—administrative law envisions hierarchical power sharing between agencies and courts sitting in review of their decisions. In administrative law, therefore, questions about turf and boundaries between the decision-making bodies are less important than questions about the depth of judicial review and the criteria courts can use in overturning agency decisions.¹¹⁷ For the most part, administrative law asks courts to focus on the processes used by an agency in making a decision, with an eye toward holding agencies accountable for their choices.¹¹⁸ So too in the new antitrust federalism, where the Court now focuses on reviewing state decision-making procedures in order to enhance states' political accountability for anticompetitive regulation.

1. Process Review in Administrative Law

In part, the judicial focus on process in the administrative context is doctrinally inevitable; most cases challenging agency action are brought under the Administrative Procedure Act¹¹⁹ (“APA”) or a similarly procedurally-focused statute. Under the APA, courts consider allegations that an agency failed to adhere to a statute's often demanding directions for how to make decisions. Rules made according to notice-and-comment rulemaking (informal rulemaking under Section 553 of the APA¹²⁰) can be challenged on a variety of procedural grounds, including

¹¹⁶ 469 U.S. 529 (1985).

¹¹⁷ Cf. Jim Rossi, *Antitrust Process and Vertical Deference: Judicial Review of State Regulatory Inaction*, 93 Iowa L. Rev. 185, 188 (2007) (referring to judicial deference to agency regulation as “traditional[] issues of administrative law”).

¹¹⁸ See Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2269 (2001) (explaining that courts today avoid substantive review and “incline instead toward enforcing structures and methods of decision making designed to enable or assist other actors [including Congress, the president, and interest groups] to influence administrative actions and policies”).

¹¹⁹ Administrative Procedure Act, 5 U.S.C. §§ 551 et seq. (2012).

¹²⁰ *Id.* § 553.

as being inadequately responsive to comments,¹²¹ based in faulty or non-existent reasoning (such as failing to consider an obvious alternative),¹²² or tainted by ex parte communications.¹²³ Agency adjudications can be challenged for failure to adhere to the APA's requirements that include notice, hearing, development of a record, and an explanation of reasoning.¹²⁴ Further, procedures used in individualized decision making can be challenged as violating the Due Process Clause of the Constitution, which under some circumstances can require process beyond that specified in the APA or the statute establishing the agency's authority.¹²⁵

The judicial focus on procedure in reviewing agency decision making, however, can be justified as more than a doctrinal feature made inevitable by the APA. Agencies have been seen—to varying degrees throughout the history of the administrative state—as more technically expert¹²⁶ and more democratically legitimate¹²⁷ than the federal courts. Yet there has also been anxiety within the judiciary, Congress, and academia about agency capture and the possibility of systematic regulatory drift from Congress's interests towards those of industry and other powerful

¹²¹ See 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 7.4, at 443 (4th ed. 2002) (observing that a statement of basis and purpose that does not adequately respond to comments made during the notice-and-comment period is likely to result in a court concluding that the rule is “arbitrary and capricious”).

¹²² See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46–49 (1983) (setting aside a vehicle safety rule as arbitrary and capricious because the agency failed to consider requiring airbags only).

¹²³ See, e.g., *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 55 (D.C. Cir. 1977) (per curiam).

¹²⁴ See Pierce, *supra* note 121, § 8.2, at 531 (describing the APA's requirements for formal adjudication).

¹²⁵ See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970) (imposing trial-like procedural requirements—such as a live evidentiary hearing where the claimant can be present, submit evidence, and confront adverse witnesses—on administrative termination of government benefits).

¹²⁶ See Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 *Chi.-Kent L. Rev.* 1039, 1049 (1997) (noting that during the early years of the APA, agencies were seen as having “the specialized information and systematic knowledge—in other words, the expertise—to comprehend complex problems and to fashion rational solutions to them”).

¹²⁷ See Bradley George Hubbard, *Comment, Deference to Agency Statutory Interpretations First Advanced in Litigation? The Chevron Two-Step and the Skidmore Shuffle*, 80 *U. Chi. L. Rev.* 447, 456–57 (2013) (noting that “concerns about the ‘judicial activism [of] the 1960s and 1970s,’ prompted the Court to conclude that agency interpretations are more democratically legitimate and provide greater safeguards against errant interpretations than those of the judiciary” (alteration in original) (footnote omitted)).

lobbying groups.¹²⁸ Procedural review emerged as a way for courts to harness the benefits of agency decision making while minimizing the risks associated with capture. Procedural review has operated as a kind of middle ground, where courts (at least appear to) avoid substantive second-guessing of agency choices, while retaining some tools to hold agencies accountable for their decisions.¹²⁹

Consequently, the intensity of procedural review has expanded and contracted as faith in agency decision making ebbed and flowed throughout the last century. Professor Thomas Merrill argues that during what he calls the “capture theory era”—running from 1967 to 1983—faith in the technocratic expertise of agencies had given way to deep anxieties about industry capture and biased agency decision making.¹³⁰ This era saw the rise of the most intense standards of procedural review. For example, in 1971, the Supreme Court created “hard look review” in *Citizens to Preserve Overton Park, Inc. v. Volpe*,¹³¹ which allowed courts to vacate agency decisions that lacked a full explanatory basis.¹³² During this era, courts also experimented with imposing additional procedural requirements on a case-by-case basis beyond those required by the APA,¹³³ and expanded the due process requirement for agency decision making.

But although courts have demonstrated an appetite for second-guessing the process of agency decision making—especially during the “capture theory era”—courts have also largely deferred to the substance of agency decisions. The *Overton Park* Court went so far as to approve of judicial inquiry into the “mental processes” of the decisionmakers,¹³⁴ but did not—at least formally—condone courts reversing agency decisions as substantively undesirable or incongruent with congressional in-

¹²⁸ See Merrill, *supra* note 126, at 1059–67 (summarizing the judicial and academic attitudes towards agency capture during what Professor Merrill calls the “capture theory era” of administrative law).

¹²⁹ See Ganesh Sitaraman, *Foreign Hard Look Review*, 66 *Admin. L. Rev.* 489, 497 (2014) (calling intensive procedural review of agency decision making “an intermediate standard between judicial abdication and judicial entanglement”).

¹³⁰ See Merrill, *supra* note 126, at 1060 (observing that “the idea that effective government means management by a politically neutral technocratic elite fell into deep disfavor” in part because of the belief that the regulators were captured).

¹³¹ 401 U.S. 402 (1971).

¹³² See Sitaraman, *supra* note 129, at 500.

¹³³ This practice was ultimately shut down by the Supreme Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 523–25 (1978).

¹³⁴ *Overton Park*, 401 U.S. at 420.

tent.¹³⁵ The result has been that agencies enjoy some substantive regulatory autonomy, even if their hands are tied as to procedure.

2. *Process Review in the New Antitrust Federalism*

The Court's new antitrust federalism likewise defers to substance while enforcing procedural requirements on states. In the new antitrust federalism, the "clear articulation" requirement—reinvigorated in *Phoebe Putney*—asks a procedural question when it requires assurance that the state has actually delegated regulatory authority to the decisionmaker. At the same time, the "clear articulation" requirement asks courts to remain agnostic about whether the state's regulatory agenda is substantively pro- or anti-competitive,¹³⁶ or wise or efficient.¹³⁷

The "active supervision" requirement under the new regime, tightened up by the holding in *Ticor* and more recently by dicta in *NC Dental*, is likewise procedural. It requires states to use one of four methods of regulation.¹³⁸ First, states may regulate directly though their sovereign branches and enjoy immunity as a matter of course. Second, a state may use a governmental board or council made up of disinterested bureaucrats, and the state need not supervise it to confer immunity. Third, it may delegate regulation to industry itself, provided that the state also actively supervises that regulation. The fourth and probably least attractive¹³⁹ procedural option is to use industry self-regulation, not supervise it, and face the threat of antitrust liability for anticompetitive rules.

In both contexts—in administrative law and in the new antitrust federalism—the aim of procedural review may be to curb substantively undesirable regulation, whether that is defined as regulation out of line with congressional intent or regulation that is excessively anticompeti-

¹³⁵ See Kagan, *supra* note 118, at 2269 (observing that courts "usually shy away from . . . substantive review of agency outcomes").

¹³⁶ In fact, as the Court has interpreted it, the *Midcal* test assumes that the regulatory intent is anticompetitive by requiring a clearly articulated "state policy to displace competition with regulation." *Hallie*, 471 U.S. at 44.

¹³⁷ Cf. *NC Dental*, 135 S. Ct. at 1111 (explaining that in deciding whether activity is immune from the antitrust laws, "[t]he question is not whether the challenged conduct is efficient, well-functioning, or wise").

¹³⁸ Cf. Edlin & Haw, *supra* note 22, at 1154–56 (explaining that antitrust liability for self-regulatory boards presents states with three regulatory options, and implying a fourth: accepting antitrust liability for boards).

¹³⁹ See West Virginia Brief, *supra* note 107, at 11 (explaining that liability for practitioner-dominated boards will force states into other regulatory schemes).

tive. But in both contexts the path to better regulation is indirect: It uses review of procedure, with an eye towards accountability, to get there.

III. THE NEW REGIME: A BETTER FIT FOR THE REALITIES OF STATE REGULATION

The new antitrust federalism is an improvement on the old. The old model was designed for a world where states primarily regulated using entities that were recognizably governmental, such as their own sovereign branches or commissions made up of disinterested bureaucrats. In this world, linedrawing between state and private activity was possible. As it became clear that much state regulation was done by delegation to entities that had only a nominal connection to the sovereign branches of the state, such as professional licensing boards made up of license holders actively working in the profession,¹⁴⁰ the boundary model faltered. The new antitrust federalism is a response to the modern realities of state regulation where industry self-regulation—or what I call “inherent capture”—is ubiquitous. It is reasonably tailored to strike a compromise between state autonomy and federal competition policy because it imposes additional procedures on states when they use the most competitively risky means of regulation: regulation by industry itself.

A. *The Old Model Falters*

From its inception in *Parker*, state action immunity demanded a stable definition of the state. When decisions were made by sovereign branches of a state’s government, such as the legislature or the Supreme Court, it was easy for courts to declare such regulation “state action” and so entitled to immunity.¹⁴¹ But *Parker*’s seemingly off-hand observation that states may not merely authorize private violations of the Sherman

¹⁴⁰ See Edlin & Haw, *supra* note 22, at 1119–20 (explaining that “states rarely regulate economic activity directly through a legislative act. . . . [More often] states delegate rulemaking and rate-setting to agencies, councils, or boards dominated by private citizens”).

¹⁴¹ See, e.g., *Hoover v. Ronwin*, 466 U.S. 558, 567–68 (1984) (explaining that “when a state legislature adopts legislation, its actions constitute those of the State and *ipso facto* are exempt from the operation of the antitrust laws” (citation omitted)); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 360 (1977) (finding “the affirmative command of the Arizona Supreme Court” immune).

Act¹⁴² became critical in the 1980s when the Court confronted the realities of state regulation. A substantial portion of regulatory activity had been delegated to commissions, councils, and boards dominated by industry members.¹⁴³ The question in these cases was whether, in *Parker*'s terms, such an entity's activity was "private" or "public"; a question that *Parker* failed to answer.

The model behind antitrust federalism—constitutional federalism—provided little guidance. Constitutional federalism was itself standing on shaky ground during antitrust federalism's crisis moment. In the decade after *Midcal*, when the Court decided an antitrust federalism case every year in an effort to accommodate the old boundary model to the new state regulation realities, the Court decided *Garcia v. San Antonio Metropolitan Transit Authority*.¹⁴⁴ The Court's announcement in that case that it would no longer police the constitutional federalist boundary between the federal government and the states prompted scholars to declare the death of (constitutional) federalism.¹⁴⁵

But there was more than its "death" that made constitutional federalism a problematic model for its antitrust counterpart. Although both federalisms are ultimately concerned with how the states and federal government share power, they ask fundamentally different questions. In the constitutional context, the question is: How far may federal regulatory power go in intruding on states' regulatory autonomy? Constitutional federalism, therefore, draws the state-federal line with reference to limits on federal power, reserving the remaining authority to the states.¹⁴⁶ Anti-

¹⁴² See *Parker*, 317 U.S. at 351 (explaining that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful").

¹⁴³ These sub-state entities were at issue in *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621 (1992) (rate bureaus); *Patrick v. Burget*, 486 U.S. 94 (1988) (medical peer-review committee); *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985) (rate bureaus); *Hoover*, 466 U.S. 558 (bar association); *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978) (automobile board); *Bates*, 433 U.S. 350 (bar association); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) (electric utility); and *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (bar association).

¹⁴⁴ 469 U.S. 528 (1985).

¹⁴⁵ See, e.g., Kramer, *supra* note 67, at 1494 (paraphrasing the argument that "federalism is 'dead'"); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 Iowa L. Rev. 243, 246 (2005) ("Dual federalism is dead.").

¹⁴⁶ See U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). Of course this line between state and federal regulatory activity is not crisp, as the Court's anti-commandeering cases—cases striking down federal statutes that conscripted

trust federalism draws the line between federal and state power with reference to the public-private divide, with public (state) activity receiving immunity and private cartelization receiving federal antitrust scrutiny.¹⁴⁷ The key question in antitrust federalism is: Is this conduct public or private?

The public-private distinction is notoriously fraught.¹⁴⁸ Importing the Court's jurisprudence from *constitutional* "state action" cases—an area of law with a similar name but quite a different approach—is unhelpful. The Constitution's requirement that "state actors" are bound by its proscriptions means that courts must distinguish private from governmental conduct, a particularly vexing question in an era of privatization of services traditionally provided by government.¹⁴⁹ The criteria developed by the Court to distinguish public from private conduct in constitutional state action cases afford little guidance to antitrust federalism's public-private question. Constitutional state action doctrine is concerned with protecting individuals' rights by not allowing states to offload their constitutional responsibilities. This concern cuts against a narrow definition of "the state" in favor of a functional standard that prevents states from strategically outsourcing constitutionally sensitive governmental tasks.¹⁵⁰ In antitrust federalism, the interests and incentives of states are the opposite. States want as free a hand to regulate as possible, and that typically includes the right to delegate regulation to private regulators with the assurance that the regulation will be immune to antitrust chal-

state lawmaking and enforcement mechanisms to achieve federal ends—made clear. See *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992). The rise of cooperative federalism likewise illustrates that the boundary between federal and state regulatory activity is hardly a bright line.

¹⁴⁷ See Garland, *supra* note 34, at 501 (describing the state action doctrine as an attempt to distinguish private from public activity).

¹⁴⁸ See, e.g., Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. Rev. 543, 548–49 (2000); Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 Harv. J.L. & Pub. Pol'y 931, 940 (2014) (calling the public-private distinction "fuzzy" and providing examples).

¹⁴⁹ See Gillian E. Metzger, *Privatization as Delegation*, 103 Colum. L. Rev. 1367, 1369–70 (2003) (describing the difficulties the rise of privatization has created for constitutional state action doctrine).

¹⁵⁰ See, e.g., *Terry v. Adams*, 345 U.S. 461, 473 (1953) (broadly defining state action to include any "[s]tate responsibility—that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme by which colored citizens are denied voting rights merely because they are colored").

lenge.¹⁵¹ Here, broad definitions of “the state” enable the gamesmanship *Midcal* warned against: the possibility that states would sanction private antitrust violations through only nominal governmental involvement.¹⁵²

With self-regulation making it difficult to formally distinguish private from state activity, and without a useful theory of power sharing to resolve the hard cases, it is unsurprising that the old antitrust federalism faltered. The Court’s period of fumbles and false starts—from 1975’s *Goldfarb v. Virginia State Bar*¹⁵³ to 1992’s *FTC v. Ticor Title Insurance Co.*¹⁵⁴—eventually led it to a new theory, one that was grounded in administrative law’s focus on accountability review.

B. The New Model Responds: Fighting Capture, Preserving Deference

Accountability review of state decision making is a better model for power sharing between federal antitrust enforcement and state regulation. First, it can help curb anticompetitive rent seeking made inevitable by industry self-regulation. Self-regulation is a kind of capture—it is inherent capture. It seems reasonable, therefore, to import accountability review from administrative law, where concerns about capture are paramount.¹⁵⁵ Second, in both antitrust federalism and administrative law some deference is due, and accountability review leaves the primary decisionmaker some autonomy. It is an intermediate standard that may be able to hinder excessively anticompetitive state regulation while preserving the federalism envisioned in *Parker*.

1. Fighting Capture

When it comes to the new antitrust federalism, the story shares many features of the “capture theory era” of administrative law from 1967–1983.¹⁵⁶ Both follow a period of relative sanguinity about regulation

¹⁵¹ Cf. West Virginia Brief, *supra* note 107, at 7 (calling the supervision requirement as a condition of immunity for self-regulatory boards, a “direct attack on the States’ ability to use a method of governance that they have found desirable and beneficial”).

¹⁵² See *Midcal*, 445 U.S. at 106 (warning that “[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement”).

¹⁵³ 421 U.S. 773 (1975).

¹⁵⁴ 504 U.S. 621 (1992).

¹⁵⁵ See Kagan, *supra* note 118, at 2264–65 (observing that “[t]he view that firms subject to regulation had ‘captured’ the agencies gained wide currency beginning in the 1960s” and influenced the development of administrative law).

¹⁵⁶ See Merrill, *supra* note 126, at 1059–67.

where the two decisionmakers—federal courts and agencies in the administrative law context, and federal courts and states in the antitrust context—were content to divide power without intrusive judicial second-guessing. And in both instances, the federal courts' mistrust of captured regulation led them to increase the intensity of judicial review of the regulatory process.

(a) *Capture in the Administrative State.* The capture theory of administrative decision making is by now familiar. A federal agency's decisions tend to offer diffuse benefits to large numbers of people: A cleaner environment, safer cars, and more effective drugs make almost everyone better off. But the costs of regulation are typically concentrated on a smaller number of actors, such as oil companies, automobile manufacturers, and pharmaceutical companies. This asymmetry means that the beneficiaries of regulation who may want to lobby for harsher standards face a larger collective action problem than their adversaries.¹⁵⁷ As the more effective lobbyists, industry will tend to exert an outsized influence, and regulations will be more lenient and industry-friendly than Congress intended.¹⁵⁸

Adding to this effect is the “revolving door” problem.¹⁵⁹ One of the benefits of agency over judicial or legislative decision making is that agencies tend to involve experts more directly in making decisions. But expertise has a cost: Knowledge of an industry typically comes from working within it, and so experts that agencies consult, employ, or even use as leaders are often former industry members,¹⁶⁰ leading to pro-industry bias. And because government work is in turn valuable in the labor market, many of these experts return to industry after their service in an agency. This bias, whether simply a disposition or a product of implicit quid pro quo arrangements between the regulators and their once

¹⁵⁷ This is a version of the “‘exploitation’ of the great by the small” that can occur because of collective action problems. See Mancur Olson, Jr., *The Logic of Collective Action: Public Goods and the Theory of Groups* 29 (1965) (emphasis omitted) (footnote omitted).

¹⁵⁸ For an account of how capture theory developed and became highly influential in the administrative context, see John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 *Harv. L. Rev.* 713, 724–26 (1986), and sources cited therein.

¹⁵⁹ For an overview of the “revolving door” problem in agency regulation, see Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 *Tex. L. Rev.* 15, 45–49 (2010).

¹⁶⁰ See *id.* at 23 (noting that “the heads of agencies often anticipate entering or returning to employment with the regulated industry once their government service terminates”).

and future employers, adds to the risk of antiregulatory drift from Congress's intent.

Congress thus faces a principal-agent problem in delegating to agencies, one that it has attempted to solve by writing increasingly specific instructions when giving agencies regulatory authority. Modern statutes are a far cry from the three-paragraph Sherman Antitrust Act; the Affordable Care Act, for example, takes up almost a thousand pages of the Federal Code.¹⁶¹ This level of statutory specificity can serve as a check on capture since only “reasonable” interpretations of the statute will survive judicial scrutiny. The specificity often extends to procedural requirements designed to limit the power of special interests adverse to Congress's intent.¹⁶² Process requirements—such as notice-and-comment in rulemakings and due process in adjudications—theoretically raise the costs of naked rent dealing by giving nonindustry interests a seat at the table and building a record that exposes an agency's conduct to political sunshine and judicial review.¹⁶³ Of course, process review has not been seen as an unqualified success in combatting capture.¹⁶⁴ But it is often justified, at least theoretically, as increasing accountability and therefore alleviating capture,¹⁶⁵ and it seems at least plausible that capture is less of a problem with procedural review than without it.

(b) *“Inherent Capture” in Antitrust Federalism.* Capture has been a theme in antitrust federalism since its inception in *Parker*. One way of understanding the Court's admonition that “a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful,”¹⁶⁶ is as a prohibition on an extreme form of capture, in which an anticompetitive actor, such as a

¹⁶¹ *NFIB v. Sebelius*, 132 S. Ct. 2566, 2675 (2012) (Scalia, J., dissenting) (“The ACA is over 900 pages long.”).

¹⁶² See *Pierce*, supra note 121, § 7.7, at 485–92 (discussing examples of additional requirements some statutes impose on rulemaking).

¹⁶³ See Kagan, supra note 118, at 2265–67 (observing that a response to capture fears was to increase participation in agency decision making); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 *Stan. L. Rev.* 29, 63 (1985) (explaining that hard-look review serves to prevent the subversion of “governing values . . . through the domination of powerful private groups”).

¹⁶⁴ See Kagan, supra note 118, at 2267–68.

¹⁶⁵ See Merrill, supra note 126, at 1093 (describing the rise of procedural review as a response to capture problems).

¹⁶⁶ *Parker*, 317 U.S. at 351.

cartel, is able to extract official sanction from the state.¹⁶⁷ *Goldfarb*'s holding—that the Virginia State Bar was operating outside of its authority, and thus outside of the state's bounds when it encouraged compliance with fee schedules¹⁶⁸—can also be cast in terms of capture. As a professional organization comprised of all licensed lawyers in the state, the Bar was a per se captured agency and thus was not entitled to immunity.¹⁶⁹ Likewise, the holding in *Cantor v. Detroit Edison Co.* was perhaps motivated by suspicion that the utility's "participation" in the state commission's regulation led to favorable treatment.¹⁷⁰

Antitrust scholars have noted the role that capture theory played during the development of state action immunity in the 1970s and 1980s. Perhaps the most prominent example is then-Professor John Shepard Wiley's article in the *Harvard Law Review* providing "A Capture Theory of Antitrust Federalism," in which he argued that the Court has allowed the Sherman Act to trample state autonomy because of a lack of faith in the public interest theory of state regulation.¹⁷¹ He argued against the *Midcal* test in favor of either full deference to states, which he equated with the holding in *Parker*,¹⁷² or a substantive review of state regulation that would look at a restriction's anticompetitive impact and the likelihood that it arose because of capture.¹⁷³ Although he did not endorse Wiley's capture test, Professor Einer Elhauge did invoke a kind of capture—the inherent capture of *Goldfarb*—when he advocated for antitrust liability for any set of actors, even nominally governmental ones, that were dominated by financial self-interest.¹⁷⁴

¹⁶⁷ Yet by drawing a deferential boundary between a state and the Sherman Act, *Parker* exhibited a relatively optimistic perspective on state regulation. See Wiley, *supra* note 158, at 715 (describing the *Parker* Court as embracing "the dominant view of the time that regulation was both economically necessary to combat market failures and politically legitimated by the mandate of broad political majorities").

¹⁶⁸ *Goldfarb*, 421 U.S. at 790–92.

¹⁶⁹ The *Goldfarb* Court emphasized the self-interest inherent in regulation of lawyers by a bar association when it described the bar's stance on fee schedules as "foster[ing] anticompetitive practices for the benefit of its members." *Id.* at 791.

¹⁷⁰ 428 U.S. 579, 594 (1976).

¹⁷¹ Wiley, *supra* note 158, at 714.

¹⁷² *Id.* at 739–40 (suggesting that a return to "*Parker*'s premise of deference to state sovereignty" is preferable to the Court's awkward compromise in *Midcal*, but also noting that such a move would be "doctrinally traumatic").

¹⁷³ *Id.* at 741–76 (proposing a test for whether state regulation is a product of capture and thus, in Professor Wiley's view, not entitled to immunity).

¹⁷⁴ Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 *Harv. L. Rev.* 667, 696–704 (1991).

Today, it is clear that “capture” understates the problem in state regulation. A significant portion of state regulation is left to inherently captured boards, commissions, and councils comprised of industry members themselves.¹⁷⁵ Inherent capture has all the problems of ordinary capture, but to an even greater degree. Industry self-regulation puts regulators in the pocket of industry because the regulators *are* industry. Where the federal administrative state has a revolving door problem, state regulation has something even worse, because board members are not asked to don even a pretense of civil service. Many statutes creating boards and commissions endowed with the power to create state regulations actually *require* current industry membership for service.

A prominent example is professional licensing, the context for the *NC Dental* case.¹⁷⁶ Most state statutes establishing professional licensing bodies delegate rulemaking and enforcement to a board that must be comprised of a majority of currently-licensed professionals,¹⁷⁷ putting the reins of competition into the hands of those who stand to gain the most from anticompetitive restrictions. This authority to make professional entry and practice rules—powerful tools to deal rents to incumbent practitioners and to raise prices to consumers—has been abused. Empirical work shows that heavy-handed professional licensing tends to raise prices for professional services without measurable gain in service quality.¹⁷⁸ Similar industry self-regulation appears in other areas of state law, such as utility rate-setting and liquor regulation.¹⁷⁹

The reasons why states acquiesce to this self-dealing, even though it injures its citizens, are supplied by more capture theory. Professionals, utilities, and other industry groups, in contrast to consumers, are well-organized and motivated, and so have political power to encourage a

¹⁷⁵ See Edlin & Haw, *supra* note 22, at 1141 (arguing that because most professional licensing boards must be comprised of a majority of professionals, they “are literally and explicitly captured . . . [They] are born captured”).

¹⁷⁶ It is no coincidence that a substantial portion of the Court’s antitrust federalism cases have involved professional regulation. See *NC Dental*, 135 S. Ct. 1101 (dentists); *Patrick v. Burget*, 486 U.S. 94 (1988) (doctors); *Hoover v. Ronwin*, 466 U.S. 558 (1984) (lawyers); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (lawyers); *Goldfarb*, 421 U.S. 773 (lawyers).

¹⁷⁷ See Edlin & Haw, *supra* note 22, at 1103 & app.

¹⁷⁸ See *id.* at 1114 and sources cited therein.

¹⁷⁹ See, e.g., *Ticor*, 504 U.S. 621 (rate setting); *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987) (liquor); *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985) (rate setting); *Midcal*, 445 U.S. 97 (liquor).

hands-off attitude from the state.¹⁸⁰ States face relatively little electoral discipline for their delegations because these boards are too numerous and small, and the activities of any single board are too obscure to raise public outrage. States engage in a cost-benefit analysis, where the political cost of displeased consumers is smaller than the benefit of the enthusiastic support of organized professions and other industries. Finally, self-regulation with antitrust immunity is cheap. To the extent these industries demand rents, and states face incentives to supply them, suspending antitrust liability can be an efficient way to deal those rents. It allows the industry to write its own check with minimal effort or involvement of the state bureaucracy. And self-regulation can even be remunerative for the state; in the case of professional licensing and alcohol regulation, anticompetitive regulation can line the state coffers with revenue from taxes, licensing fees, and tariffs.¹⁸¹

There is ample evidence that in designing the new antitrust federalism the Court was reacting to capture, especially inherent capture. In *FTC v. Phoebe Putney Health System, Inc.*, the issue is apparent from the facts section, which highlights the disturbingly cozy relationship between the state and private actors involved in the hospital merger.¹⁸² In the *NC Dental* opinion, capture fears take center stage. The Court was aware of the incentives that states have to acquiesce to self-dealing self-regulation, having received multiple amicus briefs on the excesses of professional licensing boards.¹⁸³ So while the Court seemed to note with approval the long tradition of self-regulation in medicine and dentis-

¹⁸⁰ See Morris M. Kleiner, *Licensing Occupations: Ensuring Quality or Restricting Competition?* 44–46 (2006) (discussing the political economy of professional licensing).

¹⁸¹ See Morris M. Kleiner, *Guild-Ridden Labor Markets: The Curious Case of Occupational Licensing* 14–15 (2015) (observing that “fees from licensed members of the occupation are greater than the cost of monitoring the licensing provisions of the occupation, [so] the government entity doing the licensing is more likely to gain revenue as a consequence of this form of regulation” and saying that this revenue “provides an incentive for . . . government to pass and sign licensing legislation,” such as legislation creating self-regulatory licensing boards).

¹⁸² 133 S. Ct. 1003, 1008 (2013) (describing the self-interested machinations of the parties to the *Phoebe Putney* deal).

¹⁸³ See Brief of Antitrust Scholars as *Amici Curiae* in Support of Respondent at 2, *NC Dental*, 135 S. Ct. 1101 (No. 13-534), 2014 WL 3908427, at *2; Brief Amicus Curiae of Pacific Legal Foundation and Cato Institute in Support of Respondent at 4–6, *NC Dental*, 135 S. Ct. 1101 (No. 13-534), 2014 WL 3895927, at *4–6.

try,¹⁸⁴ it also highlighted the need for states to supervise self-regulation, “particularly in light of the risks licensing boards dominated by market participants may pose to the free market.”¹⁸⁵

Further, the test devised in *NC Dental* is based on capture.¹⁸⁶ When the Court held 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,”¹⁸⁷ it essentially premised the need for supervision on whether the board was captured—in the per se or inherent sense—by its own members. Thus, in drawing the line between public and private—made essential by *Town of Hallie v. City of Eau Claire*’s holding that governmental entities do not need to meet both *Midcal* prongs¹⁸⁸—the Court used capture as the touchstone.

Because both administrative law and antitrust federalism are concerned with capture, it seems reasonable for the Court to use a similar power sharing model in both contexts, especially if that model could be tailored to address inherent capture in state regulation. In *NC Dental*, the Court has done just that. It has imposed an additional procedural requirement—active supervision by the state itself—where the nominally governmental regulator is actually a collection of industry members currently competing in the regulated field.

(c) *Battling Inherent Capture: The New Regime Imposes Credit-Blame Accountability.* The way process review works in antitrust federalism—and the particular processes required—differs in significant ways from administrative law. In the administrative law context, agencies are made accountable by being required to adhere to sometimes quite numerous and specific procedures. They range from small details such as keeping a transcript of agency adjudications¹⁸⁹ to onerous obligations like responding adequately to objections raised during the no-

¹⁸⁴ *NC Dental*, 135 S. Ct. at 1115 (acknowledging “a long tradition of citizens esteemed by their professional colleagues devoting time, energy, and talent to enhancing the dignity of their calling” and “a strong tradition of professional self-regulation”).

¹⁸⁵ *Id.* at 1116 (citing Edlin & Haw, *supra* note 22).

¹⁸⁶ The dissent criticizes the majority on this very point. See *id.* at 1123 (Alito, J., dissenting) (arguing that the majority’s “capture” test is “crude” and ill-advised).

¹⁸⁷ *Id.* at 1114 (majority opinion).

¹⁸⁸ 471 U.S. 34 (1985).

¹⁸⁹ See, e.g., 5 U.S.C. § 556(e) (2012) (entitling parties to a transcript of evidence that formed the basis of a decision).

tice-and-comment period of a rulemaking.¹⁹⁰ These procedures are designed to align agency decision making with congressional intent;¹⁹¹ in administrative law, the agency is the agent, and Congress is the principal.¹⁹²

Process review in the new antitrust federalism, in contrast, imposes few and general requirements that are designed to make states accountable to their own voters for the anticompetitive self-regulation they permit. The procedural requirements imposed by the latest cases create a menu of regulatory options for states: regulate through their sovereign branches, use disinterested boards, actively supervise self-regulation, or delegate to self-regulatory groups and accept antitrust scrutiny of their choices.¹⁹³ The first three options expose state regulation to voter scrutiny by more clearly assigning the state credit and blame for the competitive effects of regulation. These are the carrots, and the last option is the stick: Where a state fails to make itself accountable for its anticompetitive regulation, federal antitrust law may intervene. This menu encourages accountability of the state to its voters; on this view, the state is the agent, and the electorate is the principal.

Forcing a state to take more political credit and blame for the anticompetitive regulation it sanctions or tolerates has the potential to mitigate the risks of inherent capture. In theory, if voters represent the diffuse interests of consumers in lower prices, better products and services, and more innovation, then exposing regulation to electoral discipline may improve the competitive environment of state-regulated industries. It may seem naïve to argue that exposing anticompetitive self-dealing to the sunshine of electoral politics will actually affect regulatory outcomes, and indeed, it is likely not a perfect solution. Yet there is anecdotal evidence—from the *NC Dental* case itself—that forcing states to take credit and blame may result in less anticompetitive regulation than would occur in a regime of immune, unsupervised industry self-regulation.

¹⁹⁰ See Pierce, *supra* note 121, § 7.4, at 443.

¹⁹¹ See Lisa Schultz Bressman, *Chevron's Mistake*, 58 Duke L.J. 549, 580 (2009) (observing that “[a]dministrative procedures are a mechanism that facilitates legislative monitoring”).

¹⁹² *Id.* at 569–70 (describing the principal-agent relationship between Congress and the administrative state).

¹⁹³ See *supra* notes 138–39 and accompanying text.

The North Carolina dental board had the option of making a rule about nondentist teeth whitening,¹⁹⁴ which could have been even more effective than the cease-and-desist letters in terms of either stopping dangerous teeth whitening or suppressing competition. But making such a rule, under North Carolina law, would have required review by the state's Rules Review Commission,¹⁹⁵ which would have resulted in more transparent state involvement in the anticompetitive regulation.¹⁹⁶ The dental board chose the less effective, but more opaque, route to suppressing nondentist teeth whitening probably because they believed the state, through the Rules Review Commission, would have blocked their efforts to, in their own words, “do battle” with the teeth whiteners.¹⁹⁷ That the state seemed willing to allow the dentists themselves to do what it was likely unwilling to do in a transparent, accountable manner suggests that credit-blame accountability can help counter the perverse incentives that prompt states to cast the “gauzy cloak” that *Midcal* warned against.¹⁹⁸

As an added benefit, process review—by making essential the means of regulation—operates in the spirit of the Sherman Act. It matters a great deal for liability under Section One of the Sherman Act *how* a restraint of trade is created. A restraint created unilaterally, or by parallel but uncoordinated conduct,¹⁹⁹ is typically legal under Section One, while the same restraint created by agreement among competitors can be per

¹⁹⁴ See *NC Dental*, 135 S. Ct. at 1108.

¹⁹⁵ *Id.*

¹⁹⁶ The North Carolina Rules Commission is comprised of ten members, appointed by the State's General Assembly upon recommendation by the President Pro Tempore of the Senate and Speaker of the House. N.C. Gen. Stat. Ann. § 143B-30.1 (West 2015). The purpose of the Commission is to review administrative rules in accordance with the state's Administrative Procedure Act. *Id.* § 143B-30.2. Because there are no statutory requirements for who may serve and because this ten-person Commission reviews all administrative rules for the state, it is virtually impossible that for any given rule it reviews it can be said to be inherently captured. Moreover, the Commission has open meetings and publishes minutes, decisions, and membership online. See Rules Review Commission – Commission Meetings, N.C. Off. of Admin. Hearings, <http://www.ncoah.com/rules/rrc/meetings/index.html>. [<https://perm.a.cc/UP9X-9R8R>].

¹⁹⁷ *NC Dental*, 135 S. Ct. at 1108 (quoting Appendix To Petition for Writ of Certiorari at 103a, *NC Dental*, 135 S. Ct. 1101 (No. 13-534)) (internal quotation marks omitted).

¹⁹⁸ *Midcal*, 445 U.S. at 106.

¹⁹⁹ See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (“A statement of parallel conduct . . . needs some setting suggesting the agreement necessary to make out a § 1 claim . . .”).

se unlawful.²⁰⁰ Through its emphasis on credit-blame accountability, the new antitrust federalism makes essential how regulation is created and by whom. Like other Sherman Act doctrines, it makes the who and how crucial to liability.

2. Giving Deference

Cabining the effects of capture is an important goal of the Court in designing state action immunity. But so too is its interest in deferring to states' regulatory expertise and idiosyncratic regulatory preferences; the Court has not yet gone so far as to read federalism out of antitrust federalism. The process review model allows this deference and affords states some freedom to pursue diverse regulatory approaches. Interestingly, the reasons for deference in administrative law and antitrust federalism are different, but the effects—regulatory autonomy for the primary decisionmaker—are similar.

(a) *Deference in the Administrative State.* When a federal court reviews an agency decision, some deference is due. *Chevron* deference, for example, requires courts to defer to an agency's reasonable interpretation of an ambiguous statute.²⁰¹ Similarly, procedural review of agency decision making, even hard-look review, provides agencies with deference.²⁰²

Courts justify deference to administrative regulation with two categories of arguments. First, agencies have relatively more expertise than courts; the administrative state concerns itself with highly technical, often scientific areas of regulation, and employs highly expert technocrats to aid in decision making.²⁰³ A lay court second-guessing the product of such expertise would result in less rational, less effective regulation. Second, courts review agencies deferentially because courts are per-

²⁰⁰ See *Theater Enters. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540–41 (1954) (explaining that the same conduct the case finds lawful, if a product of agreement by multiple competitors, would run afoul of the Sherman Act).

²⁰¹ See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (holding that agencies must clear two hurdles in defending an interpretation of a statute in court: First, the agency must show the statute is ambiguous, and second, the agency must show its interpretation is reasonable).

²⁰² See *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) (describing the deference due under what would become known as hard-look review).

²⁰³ See *Chevron*, 467 U.S. at 865 (explaining that Congress may choose to delegate interpretive authority to an agency because of its expertise, and since “[j]udges are not experts in the field,” it would be inappropriate to second-guess an agency’s reasonable interpretation).

ceived as being less democratically legitimate than agencies, which are accountable to the electorate, albeit indirectly through the President.²⁰⁴

(b) *Deference in Antitrust Federalism.* The reasons for deference, however, are different in antitrust federalism. At a glance, it may seem possible to map the justifications for deference in administrative law—expertise and democratic legitimacy—on to the deference afforded by the new antitrust federalism. But this confuses federalism for its consequences.

It is plausible to say that expertise justifies deference in antitrust federalism because states know more about their particular regulatory challenges and preferences than a federal court. But this justification can find no support in the case law, and indeed, the Court has always avoided pointing to practical reasons to defer to state decision making in antitrust federalism cases.²⁰⁵ Democratic legitimacy would seem to fit too because unelected judges second-guessing state regulatory choices sounds undemocratic. But in antitrust federalism, the democratic legitimacy problem has an additional layer: Searching review by an antitrust court elevates not only unelected judges but unelected *federal* judges over (theoretically) democratically legitimate state choices. And whereas in the administrative context legitimacy is a reason for deference,²⁰⁶ in antitrust federalism it is a condition of deference.²⁰⁷

The reason for deference in the new antitrust federalism is simpler and more powerful: The federal courts defer because the state is a state. This is the “federalism” of the new antitrust federalism. Whether federalism can be justified by appeal to the text of or intent behind the Consti-

²⁰⁴ See *id.* at 865–66 (explaining that deference at *Chevron*’s second step is due because “federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do”); see also Kagan, *supra* note 118, at 2331–33 (explaining the democratic legitimacy of agencies running through the President).

²⁰⁵ The dissent in *NC Dental* underscored this fact when it observed that “[t]he question before us is not whether such programs serve the public interest.” *NC Dental*, 135 S. Ct. at 1117 (Alito, J., dissenting).

²⁰⁶ Likewise, political illegitimacy is a reason *not* to defer. See Lisa Schultz Bressman, *Deference and Democracy*, 75 *Geo. Wash. L. Rev.* 761, 762–64 (2007) (arguing that although *Chevron* seems to make deference a matter of course, courts tend to defer only to agency decisions they view as democratically legitimate). Thus the exceptions—where courts have failed to defer to an agency’s interpretation of the law—prove the rule: Courts defer to agencies because (and therefore only when) they are democratically legitimate.

²⁰⁷ Cf. *Ticor*, 504 U.S. at 636 (“States must accept political responsibility for actions they intend to undertake. . . . Federalism serves to assign political responsibility, not to obscure it.”).

tution²⁰⁸ or to the practical benefits that attend decentralized decision making,²⁰⁹ or even if it cannot be justified at all,²¹⁰ it is the system we have. Some deference to state decision making—probably even anti-competitive regulation—is required, or at least so the argument goes, for its preservation.²¹¹

Process review preserves the federalism of the new antitrust federalism. It forces a democratic process at the state level, and then accepts the result without questioning its competitive effects. If exposing inherently captured regulators to political sunshine does not result in more competition that may mean that a state's voters prefer or are willing to tolerate the downsides of self-regulation. The federalist approach—one the Court has not (yet) abandoned—suggests that if voters of a state genuinely prefer one regulatory mode over another, then federalism (and the benefits it offers to regulatory experimentation,²¹² welfare optimization,²¹³ and political engagement²¹⁴) is served by a regime that respects such a choice. On this view, the superior expertise states may bring to their own regulation and the legitimacy of their regulatory choices are consequences of—not reasons for—deference by federal antitrust courts.

Deference in the new antitrust federalism has the added benefit of avoiding charges of Lochnerism,²¹⁵ even while it puts courts in a strong-

²⁰⁸ See, e.g., *Printz v. United States*, 521 U.S. 898, 918–21 (1997) (finding federalist principles in the text of the Constitution and in other contemporary writings by the Founders).

²⁰⁹ See Easterbrook, *supra* note 26, at 34–35 (describing the efficiencies of decentralized decision making and jurisdictional diversity).

²¹⁰ See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 *UCLA L. Rev.* 903, 907–09 (1994) (providing a sustained critique of federalism).

²¹¹ See Handler, *supra* note 34, at 17–20 (describing the problems that would ensue with federal scrutiny of anticompetitive state regulation and concluding “that *Parker* is integral to our federalism . . . I would not substitute preemption for substantive due process to achieve a federal censorship of state legislation”).

²¹² See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”); see also Easterbrook, *supra* note 26, at 34–35 (describing the value of competition among diverse jurisdictions).

²¹³ See Michael W. McConnell, *Federalism: Evaluating the Founders’* Design*, 54 *U. Chi. L. Rev.* 1484, 1493–94 (1987) (explaining that governmental decentralization optimizes citizen choice).

²¹⁴ See Rubin & Feeley, *supra* note 210, at 915–17 (summarizing the argument that federalism encourages political engagement).

²¹⁵ See *Lochner v. New York*, 198 U.S. 45 (1905).

er supervisory role over state regulation.²¹⁶ In the same way that limiting judicial review of agency decision making to procedure allows federal courts to avoid accusations of grabbing power from a rival branch,²¹⁷ limiting antitrust review of state decision making to whether the state took political accountability allows federal courts to avoid accusations of lightly invalidating state regulation based on a political preference for free markets. Tying state voter preferences to the question of invalidation is the opposite of *Lochner*—it puts regulatory authority firmly in the hands of the state, if “the state” is defined as its voters.

C. Does the Model Go Far Enough?: The Uncertain Future of Deference

The Court’s new antitrust federalism strikes a balance that allows some deference to state regulatory policy, but that choice is not necessarily inevitable or permanent. Whereas in administrative law, courts face constitutional barriers to direct substantive review of agency decision making, in antitrust federalism there may be no equivalently strong barrier to invalidating a state regulation based on its anticompetitive effect because the *Parker* doctrine rests on statutory interpretation grounds.²¹⁸ Although the Court has never taken this path, the careful reader will find intonations of substantive review in the Court’s antitrust federalism jurisprudence, and it is a theme that scholars have invoked in advocating more heavy-handed federal intervention. It may be that if the

²¹⁶ Antitrust federalism has always operated in the shadow of *Lochner*. For example, dissenting from a state action immunity case exposing liquor regulation to Sherman Act liability, Justice O’Connor accused the majority of a return to “the long-repudiated *Lochner v. New York*.” 324 Liquor Corp. v. Duffy, 479 U.S. 335, 359–60 (1987) (O’Connor, J., dissenting). Furthermore, scholarly comparisons between denials of state action immunity and *Lochnerism* abound. See, e.g., John Cirace, An Economic Analysis of the “State-Municipal Action” Antitrust Cases, 61 Tex. L. Rev. 481, 484 (1982) (noting that “[a]lthough substantive due process was supposedly consigned to oblivion in *Ferguson v. Skrupa*, it is alive, well, and traveling incognito in the narrow [antitrust] state action area” (footnote omitted)); Easterbrook, *supra* note 26, at 24; Garland, *supra* note 34, at 488; Stephen C. Sherrill, Note, *Parker v. Brown* Revisited: The State Action Doctrine After *Goldfarb*, *Cantor*, and *Bates*, 77 Colum. L. Rev. 898, 931–32 (1977).

²¹⁷ See Pierce, *supra* note 121, § 2.1, at 35 (noting that “[s]eparation of powers has . . . been invoked to support . . . the contention that courts cannot review agency policy decisions”).

²¹⁸ Although the *Parker* Court seemed to invoke constitutional principles of federalism by appealing to a “dual system of government,” *Parker*, 317 U.S. at 351, it is clear that the holding of *Parker* was based on a textual interpretation of the Sherman Act. *Id.*

new antitrust federalism does not succeed in reining in state rent dealing, substantive review is next.

1. The Subtext of Substantive Review in the Old Antitrust Federalism

In theory, substantive federal review of the competitive effects of state regulation could take one of two forms. First, and most simply, substantive federal review of state regulation would result if the Court abolished state action immunity altogether, because then all state regulation would be subject to Sherman Act suits. Less dramatically, the Court could condition state action immunity on whether the state regulation is intolerably anticompetitive.

For the most part, neither of these models of substantive review has found much traction with the Court. The Court has mostly maintained at least an appearance of agnosticism about substance, even of very anticompetitive state regulation, throughout its state action immunity jurisprudence.²¹⁹ Yet there are moments where the mask has slipped. And, with few exceptions, the Court has managed to find a way to impose Sherman Act liability for the most egregiously anticompetitive schemes,²²⁰ suggesting that substance may not be entirely irrelevant to the Court's state action immunity regime. Finally, the notion of substantive review of state regulation for its competitive effects finds significant academic support, especially in scholarship from the 1970s.²²¹

The holding in *Parker* seemed to draw a bright line around state activity, regardless of its anticompetitive effect. Indeed, the raisin protectorate program challenged in the case was straightforward price fixing with very little economic justification beyond dealing rents to the raisin growers.²²² This notion that even extremely anticompetitive state regulation is outside of the Sherman Act's reach—provided that the state is

²¹⁹ See, e.g., *Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365 (1991); *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 109–10 (1978).

²²⁰ See, e.g., *Ticor*, 504 U.S. 621 (finding no immunity for horizontal minimum price fixing); *Goldfarb*, 421 U.S. 773 (same). One notable exception is the Court's refusal to create a bribery exception to its state action immunity doctrine. See *Omni Outdoor*, 499 U.S. at 374.

²²¹ See S. Paul Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. Rev. 693 (1974); Paul E. Slater, *Antitrust and Government Action: A Formula for Narrowing *Parker v. Brown**, 69 Nw. U. L. Rev. 71 (1974); Sherrill, *supra* note 216.

²²² See Easterbrook, *supra* note 26, at 27 (explaining that the goal of the raisin program in *Parker* was to “remedy . . . the evils of excessive competition” and “to boost [a] sagging industr[y]”).

truly regulating—has been repeated in state action immunity cases since *Parker*. For example, in *Ticor*, the Court explained that the supervision requirement exists “not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices,” but rather to provide assurance that “the anticompetitive scheme is the State’s own.”²²³

On the other hand, Justices have expressed skepticism about this agnosticism from time to time, although typically not in majority opinions. For example, Justice Scalia concurred in the result in *Ticor*, but wrote separately to note his belief that “state-programmed private collusion,” however supervised, may not deserve immunity at all.²²⁴ Justice Stevens dissented in a state action immunity case because he advocated a distinction between state regulation of economic activity and state regulation of “public health, safety, and [the] environment.”²²⁵ On his view, immunity turned on whether the substance of the regulation fell in one category or the other.²²⁶

Some Justices have said that state action immunity is grounded in federal preemption. According to this perspective, denying immunity is equivalent to finding that the state-created restriction is preempted by the Sherman Act.²²⁷ Although the opinions do not always acknowledge it, such a theory of state action immunity implies substantive review of the state regulation in question because a Supremacy Clause analysis requires determining whether the substance of the state law is in conflict with or frustrates the purpose of the federal law.²²⁸ Such an analysis in the Sherman Act context would involve a substantive inquiry into the competitive effects of the state law.

The best illustration of how a preemption theory of antitrust federalism is inherently substantive can be found in Justice Blackmun’s full-throated case for *Parker* immunity as substantive review. In his concurrence in *Cantor*, he argued for a “rule of reason” for immunity, explain-

²²³ *Ticor*, 504 U.S. at 634–35.

²²⁴ *Id.* at 641 (Scalia, J., concurring).

²²⁵ *Omni Outdoor*, 499 U.S. at 387 (Stevens, J., dissenting).

²²⁶ *Id.* at 387, 393–94.

²²⁷ See *Cnty. Commc’ns Co. v. City of Boulder*, 455 U.S. 40, 60 (1982) (Rehnquist, J., dissenting); *Cantor*, 428 U.S. at 605 (Blackmun, J., concurring in the judgment).

²²⁸ See Slater, *supra* note 221, at 78 (noting that “when [a] state act is in direct conflict with the policy of a federal act, it should be null and void because of the operation of the supremacy clause of the Constitution” and arguing that such analysis should be applied to determine antitrust immunity).

ing that “state-sanctioned anticompetitive activity must fall like any other if its potential harms outweigh its benefits.”²²⁹ His proposal, grounded in the notion that state action immunity was justified by federal preemption, envisioned different rules for state regulation and private activity. For example, he imagined per se legality for “certain kinds of state enactments, such as the regulation of the classic natural monopoly.”²³⁰

Picking up on these mixed signals, several scholars have advocated substantive review of state regulation before conferring state action immunity. John Shepard Wiley’s capture theory of antitrust federalism included a substantive component; one prong of his proposed test for immunity was whether the restriction “directly address[ed] a substantial market inefficiency.”²³¹ Then-Professor Frank Easterbrook advocated an immunity test that would inquire into the interstate effects of the restriction and use the Sherman Act to invalidate only those with significant “spillovers.”²³² Professor Paul E. Slater presaged Justice Blackmun’s argument in *Cantor* by advocating state action immunity that turns on whether the state interest in the regulation outweighed the federal interest in competition.²³³ Finally, a student note from 1977 argued that *Goldfarb*, *Cantor*, and *Bates v. State Bar of Arizona*²³⁴ can be read together as vindicating Professor Slater’s and Justice Blackmun’s balancing view.²³⁵

2. *Is the New Antitrust Federalism a Step Towards Substantive Review?*

Can the Court’s new focus on accountability review be read as a step towards substantive review of anticompetitive state decision making? Perhaps, although at most that step is small. The Court is clearly concerned about the substance of state regulation, as evidenced especially by the opinion in *NC Dental*, where it identified the specific problem of overregulation of the professions.²³⁶ And it has found against state action immunity in the only two antitrust federalism cases it has decided this

²²⁹ *Cantor*, 428 U.S. at 610 (Blackmun, J., concurring in the judgment).

²³⁰ *Id.* at 611.

²³¹ Wiley, *supra* note 158, at 713.

²³² See Easterbrook, *supra* note 26, at 35, 45.

²³³ See Slater, *supra* note 221, at 104–05; see also Posner, *supra* note 221, at 714–17 (arguing that immunity should turn on whether the regulation is competitively reasonable in light of the regulatory interest).

²³⁴ 433 U.S. 350 (1977).

²³⁵ Sherrill, *supra* note 216, at 929–30.

²³⁶ 135 S. Ct. at 1116.

century. It would be appropriate to conclude that this Court has a healthy appetite for invalidating anticompetitive state regulation.

But the credit-blame accountability in *Phoebe Putney* and *NC Dental* is a decidedly procedural, nonsubstantive constraint on the states. It may be justified by a belief that accountability will result in substantively better regulation, but ultimately, it defers to a state's (politically accountable) choices. If that justification proves weak—if accountability review cannot restore at least some competition to state-regulated industries—it is possible the Court will abandon its posture of deference and confront the ghost of *Lochner* after all.

This Article does not take a stance on whether the abandonment of deference—and therefore the abandonment of federalism—is inherently a bad thing, in part because defending a federalist system over a centralized government would require a sustained argument beyond the scope of this Article. But perhaps even without appeal to first principles, the Court can be commended for proceeding only incrementally in fashioning the new antitrust federalism. The common law method—by which almost all antitrust law has been created—works best by incremental change.²³⁷ For this reason alone, perhaps, the new antitrust federalism and its deference to state regulatory choices ought to be given a fair shot before resorting to substantive review of state regulation for compliance with federal competition standards. That fair shot turns on the definition of “active supervision.”

IV. THE FUTURE OF ANTITRUST FEDERALISM: ACTIVE SUPERVISION

The new antitrust federalism may be able to curb excessively anti-competitive state regulation while preserving the federalism envisioned in *Parker*. But as always, the devil is in the details, and the recent cases are light on those, especially in defining “active state supervision.” The success of the Court's new path—which reviews state activity more deeply than the boundary-drawing method allowed, yet stops short of substantive federal review of state regulation—depends on developing a set of state regulatory procedures that promote genuine jurisdictional diversity without dealing industry a *carte blanche*. “Active state supervi-

²³⁷ See Rebecca Haw, *Delay and Its Benefits for Judicial Rulemaking Under Scientific Uncertainty*, 55 B.C. L. Rev. 331, 354–59 (2014) (arguing that the common law effects legal change only incrementally, and providing a normative defense of that method).

sion” should be found only where a politically accountable branch of the state, acting as supervisor, has identified and attempted to quantify the competitive effects of the regulatory action.

A. “Active Supervision” So Far

The Supreme Court has not been particularly successful in its attempts to define “active supervision.”²³⁸ Of the post-*Midcal* Supreme Court cases addressing supervision, three treat the issue only passingly, including *Midcal* itself, which decided in a conclusory manner that the state did not “engage in any ‘pointed reexamination’” of the rate-setting program, and so, supervision was lacking.²³⁹ The two Supreme Court cases that have confronted the issue head-on—*FTC v. Ticor Title Insurance Co.*²⁴⁰ and *Patrick v. Burget*²⁴¹—decided that the supervision in each case was *not* adequate, leaving little guidance for what state conduct would be considered adequate supervision to meet the second *Midcal* prong. The most that emerges from *Patrick* and *Ticor* is that supervision must be both substantive (states cannot merely review the procedure used to arrive at anticompetitive regulation)²⁴² and actively exercised (the supervision must be more than the unexercised ability to review).²⁴³

The Court provided more guidance in *NC Dental* than it ever had before about the content of “active supervision,” but because the case did not actually present the issue, the discussion is brief and abstract.²⁴⁴ In

²³⁸ See Rosenstein, *supra* note 15, at 334 (observing that “[d]efining the ‘active supervision’ requirement . . . has proven to be problematic”).

²³⁹ *Midcal*, 445 U.S. at 106. Similarly, the majority opinion in *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344–45 (1987), found supervision lacking, explaining that the regulatory framework in that case was essentially indistinguishable from that in *Midcal*: The state authorized private price fixing and did not undertake any review before giving the prices the force of law. In the only other post-*Midcal* case to apply the active supervision prong, the supervision issue was conceded by both parties. See *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 62 (1985).

²⁴⁰ 504 U.S. 621 (1992).

²⁴¹ 486 U.S. 94 (1988).

²⁴² See *Patrick*, 486 U.S. at 102–03 (finding no supervision because “[t]he Health Division’s statutory authority over peer review relates only to a hospital’s procedures; that authority does not encompass the actual decisions made by hospital peer-review committees” (footnote omitted)).

²⁴³ See *Ticor*, 504 U.S. at 638 (holding that “[t]he mere potential for state supervision is not an adequate substitute for a decision by the State”).

²⁴⁴ 135 S. Ct. at 1116.

dicta, the Court outlined the requirements under its preexisting doctrine—that the review be substantive and not merely at the state’s unexercised option—and introduced two requirements not previously made explicit. First, it established that the supervisor must have the right to “veto or modify particular decisions.”²⁴⁵ Second, the Court explained that the “state supervisor may not itself be an active market participant.”²⁴⁶

B. Supervision: Next Steps

The dicta in *NC Dental*, while not entirely unhelpful, raises more questions than it answers. First, it is clear that a state supervisor cannot be an active participant in the regulated market, but who *can* serve as a supervisor? Second, although *Ticor* made it clear that the unexercised power to review at the state’s discretion is not “active supervision,” what about the power to review at an aggrieved party’s election? This issue is essential to the larger question of whether state judicial review could be considered active supervision. Finally, and perhaps most importantly for the accountability questions at the heart of the new antitrust federalism, if the state’s review must be substantive, what must that substance be? Does the state need to consider only the grounds on which the decision below rests or only those relevant to its articulated state purpose? Or perhaps must the state explicitly consider competitive consequences as a part of its review?

1. Who Can Provide “Active Supervision”?

On the one hand, the *NC Dental* Court’s observation that the state supervisor must not itself be a market participant seems tied to the specific facts of that case—a practitioner-dominated professional licensing board was seeking immunity without supervision—but it can also be read as providing a hint about what kind of state entity may serve as a supervisor. Under the old paradigm, an agency, such as a licensing board, may have been considered “the state itself,” and indeed, in 1982 one lower court held that a state dental board was supervised by the state because it supervised itself.²⁴⁷ Thus, the *NC Dental* Court’s declaration can be read as indicating that an inherently captured board can no longer bootstrap

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 1117.

²⁴⁷ See *Benson v. Ariz. State Bd. of Dental Exam’rs*, 673 F.2d 272, 275 (9th Cir. 1982).

the supervision requirement by reporting to another version of itself: a self-interested sub-state entity. That leaves two possible categories of supervisors: sovereign branches of the state government or sub-state entities that are not so self-interested as to need supervision themselves.

The new antitrust federalism's reliance on accountability review suggests that only politically accountable state entities should be considered adequate supervisors. If the purpose of supervision is to "assign political responsibility,"²⁴⁸ then the supervisor must be in a position to take political responsibility for its approval, modification, or veto of a regulatory decision. A state's elected branches—its legislature, its governor, and in some states its supreme court²⁴⁹—are most likely to feel the political heat for anticompetitive regulation through elections. It seems reasonable, therefore, to read *NC Dental's* requirement that the supervisor not be an unaccountable market participant as a hint that self-regulation is only "actively supervised" when one of these sovereign branches of state government reviews the decisions.

In future "active supervision" cases, the Court should hold that a supervisor must be politically accountable to a state's voters. This requirement is likely to be met when a state uses a committee of its legislature to supervise.²⁵⁰ The legislature, comprised entirely of elected members, is both visible and accountable to the electorate. If the new antitrust federalism's aim is to hold states accountable for anticompetitive regulation, then the legislature is the gold standard of accountability. A committee of the legislature—endowed with the power to review rules and regulations created by self-regulatory entities before they go into effect—would meet the requirements of "supervisor" and would confer antitrust immunity with its approval.

Using a legislature as a supervisor presents some possible state constitutional challenges, but they are not insurmountable. If a self-regulatory board is a "state agency" located under the executive branch, which many are, then review by a legislative committee arguably establishes a legislative veto issue similar to that found unconstitutional in the federal

²⁴⁸ *Ticor*, 504 U.S. at 636.

²⁴⁹ In most states, supreme court justices are at least subject to retention elections. See *Methods of Judicial Selection: Selection of Judges*, Nat'l Ctr. for St. Cts., http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= [<https://perma.cc/Z8PM-KQF2>].

²⁵⁰ On this view, the activity of the state bar in *Hoover v. Ronwin*, 466 U.S. 558, 574 (1984), would be immune not because, as the case held, the rubber stamp of the state's supreme court was a sovereign act, but because the court supervised the conduct.

system in *INS v. Chadha*.²⁵¹ Indeed, with one exception, every state to have considered whether a legislative veto violates its constitution has adopted the Supreme Court's reasoning in *Chadha* that all legislation—including vetoes of agency actions—requires bicameralism and presentment.²⁵² The holding of *Chadha*, as applied to states, may mean that a legislative committee would lack the power to “modify or veto”, which *NC Dental* requires of supervisors. Connecticut surmounted this problem by amending its constitution in 1982²⁵³ to allow its Legislative Regulation Review Committee full pre-enactment veto power.²⁵⁴ Similar state constitutional amendments could be used to replicate Connecticut's system.

Supervision through the executive branch is perhaps more desirable, both because it is constitutionally simpler and because it allows the more efficient use of expertise. There may be trade-offs, however, in terms of accountability because state executive agencies are politically accountable only indirectly through the governor. Supervision by an executive agency should pass muster only if it is performed in the harshest possible public light, and with meaningful public participation, while drawing clear lines of credit and blame back to state governors. As long as such exposure is ensured, states should feel free to realize the benefits—both logistical and substantive—of executive review.

Some already do. Many states have rules review commissions located in their executive branches that may provide starting places for designing “active supervision.” For example, Colorado houses many of its executive agencies, including its occupational licensing boards, under the Department of Regulatory Agencies.²⁵⁵ The Department reviews some of its sub-boards' rules and decisions using cost-benefit analysis before

²⁵¹ 462 U.S. 919, 956–59 (1983).

²⁵² See Jim Rossi, Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States, 52 *Vand. L. Rev.* 1167, 1202–03 (1999) (observing that a legislative veto of the sort at issue in *Chadha* has been held unconstitutional in every state to consider this issue, with the exception of Idaho).

²⁵³ See Conn. Gen. Assembly, Legislative Regulation Review Committee, <https://www.cga.ct.gov/rr/> [<https://perma.cc/8ALW-U5CJ>] (“[I]t was a November 24, 1982 amendment to the State's Constitution which provided the authority for the General Assembly to adopt the current structure of the committee.”).

²⁵⁴ See *id.* (explaining that “[i]t is the responsibility of the Legislative Regulation Review Committee to review regulations proposed by state agencies and approve them before regulations are implemented”).

²⁵⁵ See What We Regulate, Colo. Dep't of Reg. Agencies, <https://www.colorado.gov/pacific/dora/node/96181> [<https://perma.cc/FJC4-XF9Z>].

implementation.²⁵⁶ Economists have applauded this procedure as leading to less rent dealing and more efficient regulation.²⁵⁷ Similarly, Arizona uses a Regulatory Review Council located in the governor's office to review regulatory activity using cost-benefit analysis.²⁵⁸ These agencies, if given statutory authorization to review every rule and endowed with the power of pre-enactment modification or veto, would suffice as supervisors.

2. *May Judicial Review Serve as "Active Supervision"?*

Some state courts, such as an elected supreme court, would arguably meet the requirement that the supervisor be politically accountable.²⁵⁹ And because judicial review typically allows for a reversal of the reviewed decision, it likely meets the requirement that the supervisor have the power to "veto or modify" the decision in question.²⁶⁰ But does judicial review satisfy the other requirements—that review be substantive and that review be more than an unexercised option? Although presently most state judicial review of sub-state entities' decision making is limited to procedural review,²⁶¹ there is no reason the judicial standards could not be made substantive by legislation and meet that requirement for supervision. But judicial review probably fails to qualify as "active supervision" because it is by nature an optional process, and so, more like the power to review—potentially unexercised—that failed to qualify as supervision in *Ticor*.²⁶²

It is possible to argue, however, that there is an important difference between the negative option in *Ticor* and judicial review: In *Ticor*, it was the state's option to review or leave alone (and thus give the force of law to) the regulation below, but in the case of judicial review the op-

²⁵⁶ See Colorado's Rulemaking and Cost-Benefit Analysis Process, Colo. Dep't of Reg. Agencies, <https://www.colorado.gov/pacific/dora/node/91146> [<https://perma.cc/HUX5-HXK7>].

²⁵⁷ See Morris M. Kleiner, Reforming Occupational Licensing Policies 17 (The Hamilton Project, Discussion Paper No. 2015-01, Jan. 2015).

²⁵⁸ See Ariz. Rev. Stat. Ann. § 41-1052 (2013).

²⁵⁹ See supra note 249.

²⁶⁰ *NC Dental*, 135 S. Ct. at 1116.

²⁶¹ Sub-state regulators are often subject to the state's APA procedural requirements of transparency and due process, and individuals may bring suit for failure to adhere to those requirements. See, e.g., North Carolina Administrative Procedure Act, N.C. Gen. Stat. Ann. § 150B-43 (West 2015) (providing for judicial review at aggrieved party's election).

²⁶² But see Dlouhy, supra note 15, at 419–21.

tion lies with the aggrieved party. On this view, it is perhaps less problematic to consider a state's unexercised potential for judicial review to be "active supervision" because if an antitrust plaintiff is in a position to argue that the state court did not review the decision, that plaintiff must not have exhausted his state remedies. In such a circumstance, Professors Areeda and Hovenkamp argue, "we would be concerned about the challenger's wish to use the antitrust laws in lieu of a state procedure that seems adequate to the purpose."²⁶³

The new antitrust federalism, however, and its emphasis on clear lines of political responsibility for anticompetitive regulation, suggest that judicial review at the election of an aggrieved party is not "active supervision." If judicial review were sufficient, then the state would only have to take full responsibility for its regulation in those circumstances where an injured party is sufficiently organized, informed, funded, and motivated to bring suit. This leaves clarifying the lines of accountability to the whim of individual plaintiffs, and would likely allow the state, in many circumstances, to circumvent the Sherman Act without taking the heat for doing so. So while the argument that judicial review is a negative option has a plausible rejoinder, the fact that judicial review does little to clarify the lines of political accountability means it is likely not an adequate means of state supervision.²⁶⁴

3. What is the "Substance" of Substantive Review?

When the Court said in *NC Dental* that the review must be "substantive," but failed to elaborate on that substance, it defined adequate supervision only negatively: "substantive," in this context, meant "not pro-

²⁶³ 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 221, at 380 (2d ed. 2000). Areeda and Hovenkamp therefore conclude that "the realistic availability of supervision to anyone requesting it should count as adequate supervision." *Id.* ¶ 221, at 381.

²⁶⁴ A difficult case is raised by whether adjudicative acts—such as denying an individual a professional license—can be supervised by a state's courts through lawsuits. On the one hand, adjudicative decisions can have anticompetitive consequences just like rules and regulations and ought to be subject to a similar supervisory requirement. On the other hand, because the individual involved in the adjudication *does* have the kind of personal stake necessary to bring suit, state court review of adjudicatory decisions will in a practical sense force more accountability than would judicial review of rules. And it seems far-fetched to expect meaningful engagement with every individual licensing decision by a legislative committee or umbrella agency located within the executive. Pragmatism probably dictates 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 for individual adjudications.

cedural.”²⁶⁵ The process behind a decision has a relatively concrete meaning, in part because of the familiarity of administrative law. To a legal audience, inquiring into the “process” behind a decision invokes a specific set of questions: Who was consulted? How were arguments presented? Who made the decision? Was there an appeal process? Was the decision making public? Was it on or off the record? Was it conducted in an adversarial manner? But the substance of a decision is a limitless set; it is all the reasons a decision was or could have been made—all the possible justifications, whether articulated or unarticulated—behind a regulatory choice.

To answer this more difficult question of what the Court meant by substantive review, we can look for hints in the cases addressing active supervision, but doing so requires reading between the lines. *NC Dental* explained that substantive review was necessary to attribute a delegated decision to the state itself. The majority opinion explained that the clear articulation prong alone cannot “resolve the ultimate question whether an anticompetitive policy is indeed the policy of a State. . . . for a policy may . . . be defined at so high a level of generality as to leave open critical questions.”²⁶⁶ Supervision, the Court explained, must address the “interstitial policies made by the entity claiming immunity.”²⁶⁷ And it found supervision necessary when the state used a competitively risky way to regulate, through delegation to active industry members.²⁶⁸ Because the special risk of self-regulation, or inherent capture, is that “interstitial policies” will suppress competition to the advantage of industry, it follows that supervision should directly address the competitive effects of the reviewed regulation.

Likewise, the holding in *Town of Hallie v. City of Eau Claire*—that municipalities need not be supervised to enjoy antitrust immunity²⁶⁹—comports with the notion that supervision exists to ensure competitively reasonable regulation. In that case, the Court justified the shortcut for municipalities by explaining that “[w]here the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement.”²⁷⁰ Later, in *Patrick*, the Court reiterated this rationale be-

²⁶⁵ 135 S. Ct. at 1116–17.

²⁶⁶ *Id.* at 1112.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 1114.

²⁶⁹ 471 U.S. 34, 46 (1985).

²⁷⁰ *Id.* at 47 (emphasis omitted).

hind the supervision requirement, by demanding that the supervision provide “realistic assurance that a private party’s anticompetitive conduct promotes state policy, rather than merely the party’s individual interests.”²⁷¹ The “private price-fixing” and “individual interests” at stake in *Hallie* and *Patrick* are, at bottom, competition problems. The *Hallie* Court seemed to believe that the local political accountability of a city would limit anticompetitive municipal regulation; whereas the Court believed the self-interest among the regulating physicians in *Patrick* required state supervision.

The “substance” of substantive review should include an inquiry into the competitive effects of the restriction. The state, in its supervisory role, must ensure not only that the sub-state entity’s decision comports with state policy, but also that it comports with the state’s policy to *displace competition*. Only when the state openly acknowledges the anticompetitive effects of a regulatory decision it has authorized and claimed as its own will the proper assignment of blame be clear and effective. And this acknowledgement must require more than a statement that anticompetitive results are possible or likely. In order to truly adopt the regulation as its own, the state should attempt to identify and quantify the competitive effects that will result from the sub-state regulation. Of course, hard data on these points is preferable,²⁷² but where it is not available, economic theory can at least estimate the types and seriousness of the effects.

The requirement that states, when supervising industry self-regulation, estimate competitive effects has an analogy in the administrative state. The National Environmental Policy Act requires regulators to prepare environmental impact statements when pursuing projects potentially impacting the environment.²⁷³ These disclosures are not neces-

²⁷¹ *Patrick*, 486 U.S. at 101.

²⁷² Where quantitative data is available, or can be imported from an analogous field of regulation, it should be used to estimate the competitive effects.

²⁷³ 42 U.S.C. § 4332(2)(C) (2006). John Shepard Wiley, Jr. considered—but rejected—adding to his “capture” test for state action immunity a prong requiring such competitive impact statements. See Wiley, *supra* note 158, at 744. His reasons for rejecting the prong—that the statements are easily manipulated and the success of environmental impact statements (“EIS”) in the administrative context has been dubious—are not to be ignored. *Id.* at 744–45 n.147. But this Article argues for competitive impact statements, not as a condition of immunity, but as a condition of supervision, meaning that the state as supervisor, and not the self-regulator, would have the final word on the statements. The state is more visible and accountable than the entity usually trying to claim immunity, and so Wiley’s skepticism is not necessarily on point here.

sarily required to conform to a substantive standard of environmental impact, but serve to make any anticipated effects publically known.²⁷⁴ These disclosures are most effective in reducing environmental harm in contexts where there is a well-organized public interest presence that can be counted on to raise objections.²⁷⁵ State regulation may be just such a context, with organizations, like the Institute for Justice,²⁷⁶ acting as watchdogs against competitively harmful state regulation.

States may demand that the sub-state regulatory entity perform a competitive impact analysis in the first instance, but to qualify as active supervision, the state's review of reports prepared by industry members should not be deferential. *De novo* review of all aspects of the entity's decision, including competitive impact, is required to ensure that supervised regulation is "the state's own."²⁷⁷ If inherently captured regulators pose a high risk of self-dealing, then they cannot be expected to be impartial in estimating economic impact or alignment with state policy. Deference to such regulators is also inappropriate because deference blurs the lines of political accountability that the new antitrust federalism is designed to sharpen. Rather, if a state chooses to regulate by delegating to industry itself, then electorally accountable state actors should be required to explicitly communicate to voters the cost of such regulation to consumers.

Some states already perform a competitive impact analysis, or something similar to it, when reviewing agency regulation. Many executive commissions or legislative committees tasked with reviewing administrative rules include cost-benefit analysis as a part of their review,²⁷⁸

²⁷⁴ The hope, of course, is that disclosure would lead to more competitively reasonable regulations. Some argue that environmental impact statements, by forcing disclosure of negative effects, have improved the environmental effects of government regulation. See Wesley A. Magat & Christopher H. Schroeder, *Administrative Process Reform in a Discretionary Age: The Role of Social Consequences*, 1984 *Duke L.J.* 301, 320.

²⁷⁵ See Wiley, *supra* note 158, at 745 n.148 (implying that whatever success the EIS movement had was due to "legally and scientifically well-endowed environmental interest groups" (quoting Serge Taylor, *Making Bureaucracies Think: The Environmental Impact Statement Strategy of Administrative Reform* 309 (1984)) (internal quotation marks omitted)).

²⁷⁶ The Institute for Justice, currently rebranding itself as the National Law Firm for Liberty, is a law firm dedicated to vindicating economic freedom by challenging, among other things, state-level laws that stifle competition. See About Us, Inst. for Justice, <http://ij.org/about-us/> [<https://perma.cc/A9QT-KSE5>].

²⁷⁷ *Ticor*, 504 U.S. at 634-5.

²⁷⁸ See, e.g., *Ariz. Rev. Stat. Ann.* § 41-1052 (2013); Colorado's Rulemaking and Cost-Benefit Analysis Processes, *supra* note 247.

which should include an appraisal of the regulation's impact on competition. Arizona actually requires agencies to prepare impact statements—which are searchingly reviewed—along with their proposed regulations.²⁷⁹

This requirement may seem to run afoul of language from *Ticor*, which explained that “the purpose of the active supervision inquiry is not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices.”²⁸⁰ But the requirement that a state identify and attempt to quantify competitive effects is not equivalent to requiring that a particular standard be met. The identification of competitive effects would serve to make clear who is to blame for unpopular regulation and who should be credited with efficient regulation. But states would remain free to apply their own standards when trading off competitive effects for regulatory benefits, and substantive Sherman Act standards—such as the rule of reason requirement that competitive benefits outweigh costs—need not play a role in establishing whether supervision was adequate. Nor is such a requirement tantamount to a requirement that the state use good governance in its regulation.²⁸¹ It would merely ensure that the state was clear with its citizens that the estimated anticompetitive effects were intended, or at least tolerated, by the state itself.

To be sure, when the state regulates as sovereign, for example through statutes, there is no requirement—as a matter of antitrust law or constitutional law—that the state consider or even acknowledge the competitive effects of its regulation before receiving antitrust immunity.²⁸² But direct regulation by a state legislature carries a far lesser risk of competitive harm than delegated self-regulation. While states certainly do have the power to regulate as sovereign without reference to competition, they do not have the power to hand the reins of competition

²⁷⁹ See Ariz. Rev. Stat. Ann. § 41-1052.

²⁸⁰ *Ticor*, 504 U.S. at 634–35 (observing that the supervision requirement ought not to “question . . . how well state regulation works but whether the anticompetitive scheme is the State's own”).

²⁸¹ See *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 376–78 (1991).

²⁸² Acts of the sovereign are per se immune from antitrust liability, see *Bates v. State Bar of Ariz.*, 433 U.S. 350, 357 (1977) (citing *In re Bates*, 555 P.2d 640, 643 (Ariz. 1976)), and attempts to invalidate economically inefficient state statutes under the Due Process Clause have, for the most part, failed, see, e.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955) (upholding an anticompetitive law even though it “may exact a needless, wasteful requirement in many cases”).

over to industry itself, and then ignore the obvious risk of competitive harm while immunizing such self-interested regulation from a Sherman Act challenge.²⁸³

CONCLUSION

It is common to observe that since *Garcia v. San Antonio Metro*, there are no judicially-enforced boundaries between federal and state power. Federalism, in other words, is dead.²⁸⁴ But in fact, judicially-enforced federalism—lurking behind an obscure and technical area of law known as state action antitrust immunity—is very much alive. For most of the last century, the Court quietly tinkered away with the contours of this federalism, struggling under the false formalism of a discernable boundary between state regulation and private cartels. But with the Court’s last three antitrust cases, the tinkering has given way to reformation.

What used to be a doctrine with deep roots in constitutional federalism—the sort now declared “dead”—is now a doctrine with close ties to the federal administrative state where courts sit in judgment of an agency’s procedure. The change is a welcome one, both because the old antitrust federalism was unworkable and because the new regime of accountability review addresses the inherent capture at the heart of modern state regulation, while affording some deference to state regulatory choices. Accountability review mitigates the risk of delegated self-regulation while retaining some deference—without which antitrust federalism would not be federalism at all.

The success of the new regime depends on how the Court defines its requirement that states “actively supervise” self-regulation or else expose it to antitrust challenge. The Court should only find “active supervision” where the state’s politically accountable actors have taken transparent responsibility, not only for the regulation in general, but also for its specific anticompetitive effects. Without giving accountability review such bite, states will continue to selectively repeal the Sherman Act in the guise of self-regulation. If the new antitrust federalism fails to rein in the self-dealing epitomized by the current state of professional licensing,

²⁸³ The *NC Dental* Court made a similar point when it observed that the states’ greater power to regulate anticompetitively through their own sovereign branches without federal antitrust liability does not include “the lesser power to negate the congressional judgment embodied in the Sherman Act through unsupervised delegations to active market participants.” 135 S. Ct. at 1111.

²⁸⁴ See sources cited *supra* note 145.

2016]

New Antitrust Federalism

1445

for example, the Court may be forced to take a heavier hand against the states and sacrifice federalism at the altar of competition. But abandoning the federalism of antitrust federalism is strong medicine; better to give the new antitrust federalism a fighting chance and save its obliteration for another day.