

Public-Private Divide in *Parker* State-Action Immunity

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ABSTRACT

The U.S. Supreme Court's jurisprudence on *Parker* state-action immunity from federal antitrust laws has remained largely muddled since its inception. The Court recently attempted to bring clarity to the doctrine in *North Carolina Board of Dental Examiners v. FTC*, holding that state occupational licensing boards with a controlling number of active market participants are subject to the same active supervision requirement as private actors performing state governmental functions. Given that most state licensing boards are comprised of active market participants in the industry they are charged with regulating, state licensing boards can no longer assume they are immune from antitrust suits.

In response, states have been scrambling to reassess the composition and oversight of their regulatory bodies in order to reduce antitrust liability for board members. In addition, litigants are bringing more claims against these boards for alleged antitrust violations. Lower courts are left with the task of determining whether these boards are closer to private actors or to prototypical state agencies. For those boards classified as private, lower courts are left with the task of determining whether the regulatory regimes overseeing the boards' anticompetitive conduct satisfy the active supervision requirement.

In light of these rapid developments, however, doctrinal confusion about *Parker* immunity persists. This confusion largely stems from the Court's failure to formally adopt a rule of decision incorporating the two bedrock principles that have explained *Parker* immunity doctrine since its inception: financial disinterest and political accountability. In pursuit of bringing much-needed clarity to the doctrine, this Comment makes a descriptive case, inspired by Professor Einer Elhauge's seminal article on *Parker* immunity, that *Parker* immunity jurisprudence has been shaped by inquiring into the functional purposes the public-private distinction serves in the context of delegating state power to municipalities, prototypical state agencies, and private entities. This Comment will argue that the U.S. Supreme Court should formally adopt a rule of decision inspired by the principles of financial disinterest and political accountability to govern *Parker* immunity doctrine. The Comment will lastly incorporate this rule of decision and square it directly with the Court's recent opinion in *North Carolina Board of Dental Examiners v. FTC*.

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INTRODUCTION

The public-private distinction has caused much uncertainty in the field of *Parker* immunity from federal antitrust laws.¹ Due to federalism concerns, the U.S. Supreme Court held in *Parker v. Brown* that states as sovereigns are exempt from federal antitrust law.² The question of when other entities acting under the auspices of state power are similarly exempt, however, remains largely unanswered. At which point does an entity gain sufficient “publicness” to obtain *Parker* immunity?³ In *North Carolina Board of Dental Examiners v. FTC*, the Supreme Court recently attempted to bring clarity to this question in the context of a state occupational licensing board, labeled a state agency under state law.⁴ The Court held that the board, a decisive coalition of whose members were active members of the industry they were charged with regulating, was a private entity for purposes of *Parker* immunity.⁵

In 1950, about 5 percent of the American workforce occupied a job that required a state license.⁶ Today, that figure has skyrocketed to about one-third of the American workforce.⁷ Current market participants have incentives to lobby state legislatures to create these highly specialized licensing boards.⁸ The vast

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1. See, e.g., Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL’Y 931, 987 (2014).
 2. See *Parker v. Brown*, 317 U.S. 341, 350–51 (1943).
 3. See IA PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 226b (3d ed. 2006) (“[D]etermining whether an actor is sufficiently ‘public’ so as not to require supervision has often proven difficult.”).
 4. N.C. Bd. of Dental Exam’rs v. FTC, 135 S. Ct. 1101 (2015).
 5. *Id.* 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.”).
 6. See MORRIS M. KLEINER, *LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION?* 1 (2006). About fifty occupations are licensed in all states. *Id.* at 5. Among the licensed professions are “florists, interior designers, private detectives, hearing-aid fitters, conveyor-belt operators and retailers of frozen desserts.” See Stephanie Simon, WALL STREET J., *A License to Shampoo: Jobs Needing State Approval Rise* (Feb. 7, 2011, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748703445904576118030935929752> [<http://perma.cc/HZX9-YP3Y>].
 7. See Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. LAB. ECON. S173, S198 (2013).
 8. See KLEINER, *supra* note 6, at 45 (“[L]icensing is a response by professionals who seek to protect themselves from competition.”); see also Jarod M. Bona, *The Antitrust Implications of Licensed Occupations Choosing Their Own Exclusive Jurisdiction*, 5 U. ST. THOMAS J.L. & PUB. POL’Y 28, 35 (2011) (“While many anticompetitive harms involve entry or regulation of the licensed occupation

majority of state occupational boards consist of financially interested market participants.⁹ That anticompetitive policies have been on the rise can hardly be a surprise given the makeup of these boards.¹⁰

The role of *Parker* immunity for state occupational licensing boards therefore becomes a pivotal question. Are such entities exempt from federal antitrust law? To arrive at an answer, two threshold questions must be asked. First, does a particular state occupational licensing board fall under the “private” or “quasi-public” category in *Parker* immunity analysis? Second, if a board falls under the “private” category, what type of showing will suffice to satisfy the active state supervision requirement?

The Court’s decision in *North Carolina Board of Dental Examiners* has reinvigorated antitrust suits against state licensing boards. For example, Teladoc, a company within the telehealth industry that is committed to using telecommunication technologies to provide health care services, has brought claims against the Texas Medical Board, asserting that it had committed a violation of antitrust law for its formal rulemaking that required face-to-face visitation before a physician could issue a prescription to a patient.¹¹ The parties stipulated that because the board was “largely composed of market participants,” the Texas Medical Board was a private entity, subject to the active state supervision requirement.¹² In addition, state bar associations are now under attack from businesses like LegalZoom that offer legal document-preparation services and present a threat to licensed attorneys.¹³ In light of the *North Carolina Board of Dental Examiners* decision, the North Carolina Bar, controlled by active market participants, was forced to settle

itself, a board made up of a particular occupation has incentives to expand its own territory at the expense of other occupations, and of consumers.”) (footnote omitted).

9. See Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1103 (2014) (“[B]oards are typically dominated by active members of the very profession that they are tasked with regulating . . .”).
10. The Department of Treasury, Council of Economic Advisers, and the Department of Labor have recently explored the rise of occupational licensing boards and warned states about the trend’s negative effect on the labor market. See generally DEPT OF THE TREASURY OFFICE OF ECON. POLICY ET AL., OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS (2015).
11. *Teladoc, Inc. v. Texas Medical Board*, No. 1-15-CV-343 RP, 2015 WL 8773509, at *1–3 (W.D. Tex. Dec. 14, 2015).
12. *Id.* at *7. Notably, the district court applied the factors outlined in *North Carolina Board of Dental Examiners v. FTC* to hold that judicial review by the courts of Texas, the State Office of Administrative Hearings, and review by the Texas Legislature did not satisfy the active supervision requirement. *Id.* at *7–10.
13. See, e.g., Complaint at 7, *LegalZoom.com, Inc. v. N.C. State Bar*, No. 1:15-CV-439 (M.D.N.C. June 3, 2015) (bringing lawsuit to recover more than \$10,500,000 in actual and treble damages under the Sherman Act and seeking permanent injunctive relief against North Carolina State Bar).

an antitrust suit brought by LegalZoom, permitting the online provider of legal services to continue operating in the state.¹⁴

States have scrambled to make recommendations and issue administrative rules and executive orders to adjust to this new antitrust reality. Oklahoma's Governor issued an executive order concluding that sufficient statutory safeguards were in place for boards' rulemaking powers but that procedural safeguards were insufficient to show active supervision for licensure or prohibition actions.¹⁵ Accordingly, the Governor ordered all non-rulemaking actions proposed by any state board controlled by active market participants to submit licensure or prohibition actions to the Office of the Attorney General for review.¹⁶ The Alabama State Board of Medical Examiners has issued an emergency rule suspending enforcement of telehealth rules immediately and seeking passage of a telehealth statute in light of the litigation brought against the Texas Medical Board.¹⁷ The Office of the Attorney General in California has issued an opinion examining the active state supervision requirement and identifying measures the legislature should take to reduce the risk of antitrust claims.¹⁸

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14. See Daniel Fisher, *LegalZoom Settles Fight with North Carolina Bar Over Online Law*, FORBES (Oct. 22, 2015, 2:16 PM), <http://www.forbes.com/sites/danielfisher/2015/10/22/legalzoom-settles-fight-with-north-carolina-bar-over-online-law> [perma.cc/F4VF-D5Z3] (depicting that LegalZoom and North Carolina State Bar have "settled a long-running dispute over whether the online provider of legal documents was serving up unauthorized legal advice . . ."); see also Consent Judgment, *LegalZoom.com v. N.C. State Bar*, No. 11 CVS 15111, at 1 (N.C. Oct. 22, 2015) ("The parties agree that the definition of the 'practice of law' . . . does not encompass LegalZoom's operation of a website that offers consumers access to interactive software that generates a legal document based on the consumer's [sic] answers to questions presented by the software . . .").
 15. Okla. Exec. Order No. 2015-33 (July 17, 2015), <https://www.sos.ok.gov/documents/executive/993.pdf> [https://perma.cc/RAH5-8L64].
 16. *Id.* at 2 ("Therefore, I hereby order that all non-rulemaking actions proposed by any state board on which, a majority of its members are participants in the same market that the board regulates: 1. All proposed licensure or prohibition actions shall be submitted to the Office of the Attorney General for review and written analysis of possible violation of law; 2. Upon receipt of the written analysis provided by the Office of the Attorney General, the board shall defer to any recommended modification, including rescinding the proposed action; and 3. Failure to follow the written analysis provided by the Office of the Attorney General shall constitute misconduct and shall subject such board member(s) to removal for cause by the appointing authority.") (emphasis in original).
 17. Ala. State Bd. of Med. Exam'rs, Rule No. Chapter 540-X-15 (Aug. 25, 2015), <http://www.albme.org/Documents/Rules/Temp/540-X-15ER%20repealed.pdf> [perma.cc/5M82-8D48] ("In light of the United States Supreme Court decision in *North Carolina Board of Dental Examiners v. FTC*, the Board of Medical Examiners voted on Aug. 19, 2015, to immediately suspend enforcement of the telehealth rules and to seek passage of a statute specific to telehealth.").
 18. 98 Op. Cal. Att'y Gen. 12 (No. 15-402) (Sept. 10, 2015), <http://src.bna.com/EH/perma.cc/LQ3D-V8JL>] ("Measures that might be taken to guard against antitrust liability for

Amid these developments, however, confusion in *Parker* immunity doctrine persists. The uncertainty stems from the Court's failure to formally adopt the two principles that have shaped *Parker* immunity jurisprudence since its inception: financial disinterest and political accountability. In pursuit of much-needed doctrinal clarity, this Comment makes a descriptive case, inspired by Professor Einer Elhauge's seminal article on *Parker* immunity,¹⁹ that *Parker* immunity jurisprudence has been shaped by inquiring into the functional purposes the public-private distinction serves in the context of delegating state power to municipalities, prototypical state agencies, and private entities. Two principles have shaped *Parker* immunity jurisprudence: (1) delegation of state power compromises political accountability, and (2) delegation of regulatory authority sacrifices the essential attribute of states as disinterested government agencies looking to the public good, rather than private gain.²⁰

This Comment proceeds in four Parts. Part I provides a brief history of *Parker* immunity jurisprudence. Part II surveys case law to show that financial disinterest and political accountability have been the bedrock principles that have shaped *Parker* immunity doctrine. Part III argues that the Supreme Court should formally adopt a rule of decision inspired by the principles of financial disinterest and political accountability to govern *Parker* immunity doctrine. Part IV evaluates the Court's most recent *Parker* immunity case, *North Carolina Board of Dental Examiners v. FTC*, in light of the rule of decision proposed in this Comment.

I. BRIEF HISTORY OF *PARKER* IMMUNITY DOCTRINE

In *Parker v. Brown*, the Supreme Court interpreted the Sherman Act as applying only to private actors and not to states as sovereigns.²¹ The Court reasoned that absent an explicit purpose to “nullify a state's control over its officers and

board members include changing the composition of boards [and] adding lines of supervision by state officials . . .”).

19. Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667 (1991).

20. The exact language of these principles is drawn from the D.C. Circuit's *Amtrak* decision in the context of the non-delegation doctrine. See *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 675 (D.C. Cir. 2013), *rev'd on other grounds*, *U.S. Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225 (2015) (“First, delegating the government's powers to private parties saps our political system of democratic accountability. . . . Second, fundamental to the public-private distinction in the delegation of regulatory authority is the belief that disinterested government agencies ostensibly look to the public good, not private gain.”).

21. *Parker v. Brown*, 317 U.S. 341, 350–51 (1943).

agents,” the Sherman Act could not be construed to restrain state action.²² This concept of state immunity from the Sherman Act was an act of statutory interpretation in light of the “dual system of government” undergirding the U.S. Constitution. But the Court proceeded to qualify the state-action exemption from federal antitrust law. The Court feared that states would abuse the state-action exemption to authorize non-state actors to violate federal antitrust law, compromising Congress’s purpose of promoting competition in the marketplace through the passage of the Sherman Act.²³

Based in part on the fear that States might “confer antitrust immunity on private persons by fiat,”²⁴ the Supreme Court clarified in later decisions that the automatic exemption from federal antitrust law applies only when the state is acting as a sovereign—when the anticompetitive decision is expressly made by a state legislature or state supreme court.²⁵ In the case of political subdivisions and private entities, the *Parker* immunity exemption applies only if the entity makes a sufficient showing that the anticompetitive decision was in fact one of the sovereign.²⁶ Through its subsequent jurisprudence, the Court defined three distinct categories in the *Parker* immunity inquiry.

The first category is reserved for cases in which the sovereign directly and expressly made the anticompetitive action, limited to actions of the state legislature or state supreme court.²⁷ *Parker* immunity automatically applies in such cases.²⁸ The second category (“quasi-public”)²⁹ is reserved for cases in which a municipality or a “prototypical state agency”³⁰ has engaged in anticompetitive

22. *Id.* at 351.

23. *Id.* (“[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 . . .”).

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

25. *E.g.*, *Bates v. State Bar of Ariz.*, 433 U.S. 350, 363 (holding that the State Bar of Arizona automatically received *Parker* immunity because the anticompetitive conduct was pursuant to the affirmative command of the Arizona Supreme Court).

26. *See, e.g.*, *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101, 1111 (2015) (“*Parker* immunity requires that the anticompetitive conduct of nonsovereign actors . . . result from procedures that suffice to make it the State’s own.”).

27. *E.g.*, *Bates*, 433 U.S. at 363.

28. *See, e.g.*, *Hoover v. Ronwin*, 466 U.S. 558, 567–68 (1984) (“Thus, under the Court’s rationale in *Parker*, 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)).

29. Quasi-public is a term adopted here, not otherwise used in the case law, to describe the intermediate category in the first stage of the *Parker* immunity inquiry.

30. The so-called “prototypical state agency” term was first adopted by the Court in *North Carolina Board of Dental Examiners v. FTC*. 135 S. Ct. 1101, 1114 (2015).

conduct.³¹ When municipalities seek *Parker* immunity, the anticompetitive conduct must have been pursuant to a clearly articulated state policy to displace competition.³² The third category is reserved for instances in which private entities have engaged in anticompetitive conduct. When private entities seek *Parker* state-action immunity, they must show both that the challenged conduct was pursuant to a clearly articulated state policy and that it was actively supervised by the state itself.³³ In the 2014–2015 term, the Supreme Court held in *North Carolina Board of Dental Examiners v. FTC* that a state occupational licensing board comprised of a “controlling number” of “active market participants” was private and subject to the active supervision requirement.³⁴

The clear-articulation requirement inquires whether the anticompetitive conduct is pursuant to a state’s authorization of such a policy.³⁵ Due to the flexibility essential to the administration of state government, the Court has held that a state need not compel an entity to engage in anticompetitive conduct in order to satisfy the clear-articulation prong.³⁶ Rather, so long as a policy of anticompetitiveness is reasonably foreseeable from the state’s delegation of authority, the clear-articulation standard is satisfied.³⁷

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31. *E.g.*, *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 413 (holding that municipalities can obtain *Parker* immunity by showing that the anticompetitive conduct was pursuant to a state policy to displace competition with regulation).
 32. *See, e.g.*, *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38–39 (1985). The Court further held that the active state supervision requirement should not be imposed in cases in which the actor is a municipality. *Id.* at 47. In dicta, the Court mentioned that this single-element analysis would also likely apply to state agencies. *Id.* at 46 n.10.
 33. *E.g.*, *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105–06 (1980) (holding that the private wine price-setting scheme could not benefit from *Parker* immunity because although the scheme was pursuant to a clearly articulated state policy, the state did not engage in any “pointed reexamination” of the program and thus did not satisfy the active state supervision prong); *see also* *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56–57 (1985).
 34. *N.C. Bd. of Dental Exam’rs*, 135 S. Ct. at 1114.
 35. *See, e.g.*, *Hoover v. Ronwin*, 466 U.S. 558, 568–69 (1984) (“[I]n cases involving the anticompetitive conduct of a nonsovereign state representative the Court has required a showing that the conduct is pursuant to a ‘clearly articulated and affirmatively expressed state policy’ to replace competition with regulation.” (quoting *Cnty. Commc’ns Co. v. City of Boulder*, 455 U.S. 40, 54 (1982))).
 36. *Town of Hallie*, 471 U.S. at 43 (rejecting the town’s argument that a legislature must expressly state that it intends the delegated action to have anticompetitive effects because the contention “embodies an unrealistic view of how legislatures work and of how statutes are written”).
 37. *Id.* at 44 (holding that the Wisconsin statutes at issue satisfied the clear-articulation prong because the legislature had contemplated the kind of challenge complained of). This foreseeability standard has had more bite than it did at its inception. *See, e.g.*, *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1012 (2013) (holding that the Hospital Authority, as a local governmental entity, did not satisfy the clear-articulation requirement because “while the Law [did] allow the Authority to acquire hospitals, it [did] not clearly articulate and affirmatively express a state policy

The threshold inquiry into active state supervision is “whether the State has played a substantial role in determining the specifics of the economic policy.”³⁸ In *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, the Court held that California’s passive role in delegating governmental power to fix prices for wine failed to satisfy the active supervision prong.³⁹ In so holding, the Court reasoned that the state did not “engage in any ‘pointed reexamination’ of the program.”⁴⁰ The Court explained further that the rationale behind requiring “pointed reexamination” by the state was so that “[t]he national policy in favor of competition [could not] be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.”⁴¹ To ensure against this “gauzy cloak of state involvement,” the Court has required a showing that state officials have undertaken actual steps to determine the specifics of the anticompetitive scheme.⁴² The mere potential for state supervision is insufficient to satisfy the active supervision requirement.⁴³

II. FOUNDATIONAL PRINCIPLES OF *PARKER* IMMUNITY: FINANCIAL DISINTEREST AND POLITICAL ACCOUNTABILITY

The principles of financial disinterest and political accountability have shaped *Parker* immunity doctrine since its inception. These principles account for the initial classification of states as sovereigns, municipalities, and private actors as public, quasi-public, and private respectively. These principles further explain the Court’s application of the active supervision test for private actors. A comprehensive survey of *Parker* immunity case law illustrates that any descriptive rule must account for these two principles. Such an understanding would provide clarity and guidance for lower courts tasked with adjudicating future *Parker* immunity cases.

empowering the Authority to make acquisitions of existing hospitals that [would] substantially lessen competition”); *City of Boulder*, 455 U.S. at 55–56 (1982) (holding that a Colorado law granting municipalities the power to enact ordinances governing local affairs did not satisfy the clear-articulation requirement because the state had not necessarily “contemplated” those anticompetitive actions).

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

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

40. *Id.* at 106 (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 362 (1977)).

41. *Id.*

42. *See Tigor Title Ins. Co.*, 504 U.S. at 633.

43. *Id.* at 638.

A. States as Sovereigns Versus Municipalities

Intuitively, it makes sense to treat municipalities as “public” entities. Local public officials are directly responsible to their electorate.⁴⁴ Local officials are government employees and there is an understanding that these officials, as part of the government, seek to promote the public good.⁴⁵ Under *Parker* state-action immunity, however, municipalities are categorized differently from the sovereign state itself. The Court has emphatically held that not all governmental entities are per se exempt from federal antitrust law.⁴⁶ *Parker* doctrine exempts only subdivisions’ anticompetitive conduct when the conduct is “pursuant to state policy to displace competition with regulation or monopoly public service.”⁴⁷ In concluding that *Parker* immunity does not automatically extend to political subdivisions of the state, the Court ushered the sentiment that an entity is not merely part of the “state” by virtue of its political and legal authorization to act or the fact that it is comprised of government officials.

One explanation for this position is that municipalities are not financially disinterested in the anticompetitive policies they adopt. Delegating state power to municipalities necessarily involves delegating power to officials with interests more narrow than advancing the general public welfare of the state. Local officials, directly responsible to the narrower local electorate, are susceptible to advancing these “parochial” interests over the interests of the state as a whole.⁴⁸

44. See BARRY C. BURDEN ET AL., *COMPARING ELECTED AND APPOINTED ELECTION OFFICIALS: THE IMPACT OF SELECTION METHOD ON POLICY PREFERENCES AND ADMINISTRATIVE OUTCOMES* 1 (2010), <https://apw.polisci.wisc.edu/archives/burden%20et%20al%20032010.pdf> [perma.cc/32L7-7PUD] (“[E]lected officials are more likely to express attitudes and generate outcomes that reflects their direct exposure to the policy preferences of voters, in contrast to the more insulated position of appointed officials.”).

45. See WILLIAM BARNES & BONNIE MANN, *NAT’L LEAGUE OF CITIES, MAKING LOCAL DEMOCRACY WORK: MUNICIPAL OFFICIALS’ VIEWS ABOUT PUBLIC ENGAGEMENT* iii (2010) (“[Local public officials] see important benefits such as developing a stronger sense of community, building trust between the public and city hall and finding better solutions to local problems.”).

46. See, e.g., *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 408 (1978) (“Plainly petitioners are in error in arguing that *Parker* held that all governmental entities, whether state agencies or subdivisions of a State, are, simply by reason of their status as such, exempt from the antitrust laws.”).

47. *Id.* at 413.

48. See *id.* at 414 (“But, the fact that the governmental bodies sued are cities, with substantially less than statewide jurisdiction, has significance. When cities, each of the same status under state law, are equally free to approach a policy decision in their own way, the anticompetitive restraints adopted as policy by any one of them, may express its own preference, rather than that of the State.”).

Therefore, courts impose the clear-articulation requirement on municipalities to ensure that the local officials are acting pursuant to a clearly articulated state policy to displace competition.⁴⁹

That alone, however, cannot explain the distinction between states and municipalities. Both state and local governments have a “collective financial interest” in restraining national competition in furtherance of their own policies.⁵⁰ But only states as sovereigns are automatically immune. For Professor Elhauge, one major factor that explains the doctrine’s differential treatment of municipalities as compared to sovereign state actors is that the Dormant Commerce Clause serves as a sufficient restraint on state action that sanctions grossly anticompetitive measures against the public interest.⁵¹ An extra check on local governments is necessary for antitrust law to ensure that a municipality’s anticompetitive measure furthers the public interest.⁵²

Notwithstanding the Dormant Commerce Clause, and independent of federal antitrust law, both local and state governments pass intrastate protectionist policies, even when those policies are contrary to the public interest.⁵³ But, as mentioned above, antitrust law treats states as automatically immune from anti-trust law, whereas municipalities are subject to a showing of clear-articulation. This distinction partly lies in the principle of political accountability. If a state

49. *Id.* at 415–16 (“The *Parker* doctrine, so understood, preserves to the States their freedom under our dual system of federalism to use their municipalities to administer state regulatory policies free of the inhibitions of the federal antitrust laws without at the same time permitting purely parochial interests to disrupt the Nation’s free-market goals.”).

50. See Elhauge, *supra* note 19, at 672 (“[G]overnmental units may have collective financial interests in restraints whose anticompetitive effects are extraterritorial.”).

51. *Id.* at 732 (“[U]nder a gamut of constitutional doctrines, most notably the dormant commerce clause, the Court already polices state efforts to exploit market power against out-of-staters.”) (footnote omitted). The Dormant Commerce Clause restrains both local and state governments from interstate economically discriminatory policies. *E.g.*, *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 356 (1951) (holding that a municipal ordinance requiring all milk sold to be pasteurized at an approved plant within five miles of the city unconstitutionally discriminated against interstate commerce).

52. See Elhauge, *supra* note 19, at 732 (“[W]hen a municipality inflicts market injuries outside municipal boundaries but inside state boundaries, dormant commerce clause review does not apply. The point is not that municipalities are more likely than states to exploit market power against outsiders, but rather that, because of the contours of the dormant commerce clause, only municipal action presents a problem of unpoliced exploitation.”).

53. *E.g.*, *Powers v. Harris*, 379 F.3d 1208, 1220 (10th Cir. 2004) (upholding a state statute protecting licensed funeral directors by requiring a license to sell caskets intrastate against a substantive due process challenge because the “Supreme Court has consistently held that protecting or favoring one particular intrastate industry, absent a specific federal constitutional or statutory violation, is a legitimate state interest.”).

were to favor one intrastate group over another, voters could respond by either rewarding or punishing governmental officials through the electoral process.⁵⁴ If a local government were to favor one intrastate group over another, however, the fear would be that the disfavored intrastate group would have no voice in the electoral process.⁵⁵ Because states acting in a legislative capacity are politically accountable as far as intrastate anticompetitiveness is concerned, courts can presume that states act in the public interest.

Of course, the distinction between municipalities and states could be independent of the question of which entity is more trusted in promoting the public interest. That is, federalism as a principle in itself can justify the distinction apart from any other consideration.⁵⁶ *Parker* was largely decided based on an understanding that Congress could not have intended to dramatically disturb states' regulatory regimes through federal antitrust law without expressly stating the intent to do so.⁵⁷ This explanation of *Parker* immunity, however, simply advances the notion that political accountability has mattered in the Court's jurisprudence. Whether political accountability matters in itself or is simply a necessary byproduct of federalism, the bottom line is unequivocally clear: political accountability matters.

54. See Christopher R. Berry & William G. Howell, *Accountability and Local Elections: Rethinking Retrospective Voting*, 69 J. POL. 844, 845 (2007) ("On the whole . . . the ability of at least some citizens, some of the time, to evaluate the performance of incumbents and vote accordingly appears well established.").

55. See Robert Eisig Bienstock, *Municipal Antitrust Liability: Beyond Immunity*, 73 CALIF. L. REV. 1829, 1833 (1985) ("Although local governments play a beneficial role in providing public services to their constituents, their interests are necessarily parochial. They act to benefit their constituencies. Since municipalities are independent economic actors, they pose the same threats to the national economy that private corporations do. An unqualified exemption for local government would allow the sort of anticompetitive activities the Sherman Act was enacted to prohibit.").

56. See, e.g., Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23, 45 (1983) (arguing for a revisionist approach to *Parker* immunity that maximizes the "autonomy of the states in maintaining their traditional regulatory roles.").

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

B. Municipalities Versus Private Entities

In distinguishing municipalities from private entities, the Court has reserved the more rigorous test for private actors.⁵⁸ In determining if an entity is private for purposes of *Parker* immunity, the Court has focused on the interests of the entity's decisionmakers.⁵⁹ As explained above, municipalities have "collective financial interests" in passing anticompetitive measures because there is significant risk that they will advance parochial interests at the expense of the state's interests as a whole. Unlike private entities, however, municipalities do not need to prove active state supervision to obtain *Parker* immunity.⁶⁰

The Court has addressed this quandary by evaluating the relative risk that municipalities pose to promoting their own interests compared with private actors.⁶¹ The Court has opined that the danger of parochial interests to federal antitrust law is minimal.⁶² The clear-articulation standard sufficiently ensures that the anticompetitive conduct of displacing competition is in the public interest.⁶³ There is a presumption that a "municipality acts in the public interest."⁶⁴ In contrast, "[a] private party . . . may be presumed to be acting primarily on his or its own behalf."⁶⁵

On the surface, however, it is unclear why private price-fixing arrangements necessarily carry a greater risk of interrupting the national policy of competition. While private actors might have more of a financial stake to engage in anticompetitive conduct,⁶⁶ municipalities have incentives to promote parochial

58. See, e.g., *Patrick v. Burget*, 486 U.S. 94, 105 (1988) (holding that partners in a private medical clinic were not protected from *Parker* immunity because there was no active state supervision over their activities on hospital peer-review committees).

59. In holding that the active state supervision requirement is necessary for private entities to obtain *Parker* immunity, the Court reasoned that "there is a real danger that [the private entity] is acting to further his own interests, rather than the governmental interests of the State." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985).

60. *Id.*

61. See *id.*

62. *Id.* ("This danger is *minimal*, however, because of the requirement that the municipality act pursuant to a clearly articulated state policy. Once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function.") (emphasis added).

63. *Id.*

64. *Id.* at 45.

65. *Id.*

66. See, e.g., *N.C. Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1114 (2015) ("State agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing *Midcal's* supervision requirement was created to address.").

interests. Most notably, local officials have a political incentive to promote parochial interests in order to ensure reelection.⁶⁷

There are two explanations for these flipped presumptions. The first explanation can be found in the Court's emphasis on the public interest.⁶⁸ While there are perverse incentives for municipalities to act contrary to the state's public interest, the risk would be substituting the promotion of one public interest with another public interest. While the risk accompanying governmental anticompetitive conduct could be mitigated with a clear-articulation principle, something inherent in private entities makes the risk particularly dangerous, such that a clear-articulation standard does not suffice.⁶⁹ Municipal officers are less likely to act against the public interest⁷⁰ compared with private actors who have ancillary private interests such as profit maximization.⁷¹

Second, the Court has used the principle of political accountability to justify the distinction. In particular, the Court has noted that municipalities are different from private entities because there is some form of public scrutiny with the former that is absent with the latter.⁷² Municipalities are subject to "sunshine"

67. See ALAIN DE JANVRY ET AL., LOCAL ELECTORAL ACCOUNTABILITY AND DECENTRALIZED PROGRAM PERFORMANCE 5 (2008), <http://are.berkeley.edu/~esadoulet/papers/Bolsa7-08.pdf> [perma.cc/H9ZC-794B] ("The basic insight from [the standard political agency model] is that in a political context in which elections reward competent or able politicians, incumbents with reelection possibilities have the incentive to exert more effort in the implementation of the program in order to increase their re-election chances.")

68. See *Town of Hallie*, 471 U.S. at 45 (distinguishing a municipality from a private entity by pointing to the fact that "a municipality is an arm of the State.").

69. For private entities, clear-articulation rarely will suffice to ensure that the anticompetitive policy is the state's. See *N.C. Bd. of Dental Exam'rs*, 135 S. Ct. at 1112 (2015) ("[A] policy may satisfy [the clear articulation] test yet still be defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated.").

70. A key difference between municipalities and private entities is that the former deals with "the same range of [multi-sector] regulatory issues that state government controls" and therefore "the interests of one entrepreneurial group are more likely to be offset by those of a different group." Herbert Hovenkamp, *Rediscovering Capture: Antitrust Federalism and the North Carolina Dental Case*, CPI ANTITRUST CHRON. 1, 12 (2015).

71. Publicly held corporations owe their shareholders a fiduciary duty to maximize wealth through corporate returns. See, e.g., *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) ("[N]o one will contend that, if the avowed purpose of the defendant directors was to sacrifice the interests of shareholders, it would not be the duty of the courts to interfere."). It is important to note, however, that while one interest is profit-maximization, "[t]he key is not the profit or nonprofit status of the organization, but the identity of its decision-making personnel." See AREEDA & HOVENKAMP, *supra* note 3, at ¶ 227a.

72. *Town of Hallie*, 471 U.S. at 45 n.9.

laws⁷³ and mandatory disclosure requirements.⁷⁴ In addition, the electoral process serves as a check against municipal officers.⁷⁵ While municipalities are not accountable to the state as a whole, there is usually at least some form of electoral body that scrutinizes the decisions of local officials.⁷⁶ Moreover, the presence of these other state-imposed measures on municipalities provides some degree of public scrutiny such that there is a reduced risk of arbitrary and unchecked anti-competitive conduct.⁷⁷ That is, there is some form of preexisting active supervision already in place. In contrast, private entities lack any form of a public check.⁷⁸ Thus, the active state supervision requirement is necessary to protect against the “gauzy cloak of state involvement over what is essentially a *private* price-fixing arrangement.”⁷⁹

C. Active State Supervision

The first two sections of Part II demonstrate that the principles of financial disinterest and political accountability have shaped the Court’s inquiry as to the category into which a particular entity falls. These two principles similarly shape the Court’s inquiry as to whether a particular regulatory oversight regime satisfies the active supervision prong.

73. These sunshine laws are in effect in all fifty states and the federal government. Benita S. Baird, Note, *The Government in the Sunshine Act: An Overview*, 1977 DUKE L.J. 565, 565 (1977). Sunshine laws, like the federal Sunshine Act of 1976, require meetings of public agencies to be open to the public. RONALD A. CASS ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 959 (6th ed. 2011).

74. See *Town of Hallie*, 471 U.S. at 45 n.9.

75. See *id.*

76. See generally Melissa Marschall et al., *The Study of Local Elections: Editors’ Introduction: A Looking Glass Into the Future*, 44 POL. SCI. & POL. 97 (2011) (noting the prevalence of elected positions at the local and municipal levels).

77. See *Town of Hallie*, 471 U.S. at 45 n.9 (noting that these structural mechanisms for municipalities “may provide some greater protection against antitrust abuses than exist[] for private parties”).

78. Scholars have proposed various solutions to bring about greater private sector transparency because of the inherent absence of a public check against private actors performing governmental functions. See, e.g., Jon D. Michaels, *Privatization’s Pretensions*, 77 U. CHI. L. REV. 717, 723 n.21 (2010) (noting that amid the age of “excessive delegations of government sovereignty to contractors and the government’s inability to manage those delegations, scholars have sought to ensure contractor accountability by, among other things, extending public laws and public norms into the private sector.”). Even assuming these proposals come to fruition, however, principles of political accountability would still warrant a more rigorous *Parker* immunity analysis for private actors relative to municipalities when those actors’ memberships would lack a nexus to the initial selection of an elected official. See *infra* Part III.B.

79. *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980) (emphasis added).

First, the active supervision requirement serves to mitigate the risk of financially interested anticompetitive conduct. The purpose of the active state supervision requirement is to ensure that the state has in fact approved the anticompetitive conduct; otherwise, there is fear that the conduct is not actually promoting a state regulatory policy.⁸⁰ The Court has reasoned that the active supervision requirement serves as a “realistic assurance that a private party’s anticompetitive conduct promotes state policy, rather than merely the party’s individual interests.”⁸¹ By requiring active supervision, there is sufficient assurance that financially disinterested government officials seeking to advance the state’s regulatory policy have adequately checked private conduct.⁸² Absent such a supervision, there is heightened risk that private entities are acting under the auspices of state power to promote private interests, disrupting the national scheme of competition the Sherman Act created.⁸³

Moreover, the Court’s robust active supervision test ensures that the Court will apply *Parker* immunity only when impartial and financially disinterested state officials have adequately checked the risk of financial interest motivating the anticompetitive conduct. The Court has required two showings for a regulatory regime to satisfy active state supervision: (1) that the disinterested government officials have ultimate authority over the anticompetitive conduct, and (2) that the state affirmatively exercise control over the specifics of the economic policy.⁸⁴ Mere passive supervision does not sufficiently remove the taint of financial interest to ensure that the anticompetitive conduct furthers state regulatory policy.⁸⁵ This stringent standard ensures that a private actor obtains *Parker* immunity only when there is substantial assurance that the anticompetitive conduct is promoting the *public* interest.

Second, the principle of political accountability has shaped the Court’s determination of whether a particular regulatory regime satisfies the active state

80. See, e.g., OFFICE OF POLICY PLANNING, REPORT OF THE STATE ACTION TASK FORCE 13 (2003) (“The active supervision test operates by according state action protection only when the challenged conduct can be said to be that of the state rather than private actors.”).

81. *Patrick v. Burget*, 486 U.S. 94, 100–01 (1988) (“The [active supervision] requirement is designed to ensure that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies.”).

82. See, e.g., *FTC v. Tico Title Ins. Co.*, 504 U.S. 621, 634 (1992) (explaining that the purpose of the active state supervision inquiry is to “determine whether the State has exercised sufficient independent judgment and control” over the anticompetitive conduct).

83. Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1–7 (2012).

84. See *Patrick*, 486 U.S. at 101 (“[T]he active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct.”).

85. See, e.g., *Tico Title Ins. Co.*, 504 U.S. at 638.

supervision requirement. In one of the Court's decisions on the issue of active state supervision, the Court held that a "negative option" system of approving rate filings by title insurance rating bureaus was insufficient to satisfy the active state supervision prong.⁸⁶ Under this system, the rating bureau, comprised of private title insurance companies, filed rates for title searches and title examinations with the state's insurance offices.⁸⁷ While the disinterested governmental officials had the authority to veto any anticompetitive decision by the bureaus, the officials were not compelled to do so, nor did they exercise any affirmative steps toward approving or rejecting the bureaus' decisions.⁸⁸ Under the negative option, the policies adopted by the bureaus automatically went into effect a period of time after the states' insurance officers had not acted. In rejecting the negative option, the Court held the key inquiry was "whether the [s]tate ha[d] played a substantial role in determining the specifics of the economic policy."⁸⁹

The Court reasoned that an alternative standard, in which the mere potential for state control over private anticompetitive conduct was sufficient, would compromise the principles of federalism and political accountability.⁹⁰ By requiring states as sovereigns to exercise formal control over anticompetitive conduct, the electorate could either reward or punish state officials for attempting to displace the national scheme of competition. If there were a broad immunity principle, as would exist under the negative option system, states would be wholly immune from public scrutiny.⁹¹ Therefore, for a private entity to obtain *Parker* immunity, states must have particular regulatory regimes in place that serve the principle of political accountability.

III. PROFESSOR EINER ELHAUGE'S APPROACH REVISITED

Part II surveyed Supreme Court case law to make a descriptive case that two principles have shaped the determination of whether an actor will obtain *Parker* immunity. *Parker* immunity involves two steps: first, classifying an entity as public, quasi-public, or private; and second, determining whether the entity has satisfied the extra showing necessary to obtain *Parker* immunity. As this

86. *Ticor Title Ins. Co.*, 504 U.S. at 640.

87. *Id.* at 629.

88. *Id.*

89. *Id.* at 635.

90. *Id.* at 636 ("Federalism serves to assign political responsibility, not to obscure it. Neither federalism nor political responsibility is well served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends.")

91. *See id.*

Comment has demonstrated, the principles of financial disinterest and political accountability govern the inquiries. A key question remains, however: How does this descriptive case bring clarity for future courts looking to resolve the uncertainties undergirding the *Parker* immunity inquiry? Is one principle more important than the other? Must an entity show that it is *both* financially disinterested and politically accountable to obtain *Parker* immunity?

A. An Overview of *The Scope of Antitrust Process*

To answer these questions, this Comment starts with a brief overview of Professor Einer Elhauge's seminal article, *The Scope of Antitrust Process*.⁹² In the article, Professor Elhauge responds to what he sees as the Court's failed attempt at using formalistic definitions of "state action" to adjudicate *Parker* immunity questions.⁹³ In contrast to others who propose substituting substantive accommodations in place of the Court's formalistic approach,⁹⁴ Elhauge adopts a functional approach that explains why particular entities are entitled to *Parker* immunity while others are not.⁹⁵ He opines that the Court has limited *Parker* immunity to the types of decisionmaking processes that provide "sufficient assurance that restraints resulting from the process will serve the public interest."⁹⁶ He concludes that antitrust principles support the proposition that those who have an interest in profiting financially cannot not be trusted in determining which restraints are in the public interest.⁹⁷

From this process view, Elhauge adopts a rule of decision that has proven to have great predictive force:

[A]ntitrust case law adjudicating the distinction between state and private action embodies the process view that restraints on competition must be subject to antitrust review whenever the persons controlling the terms of the restraints stand to profit financially from the restraints they impose. Conversely, restraints are immune from antitrust review whenever financially disinterested and politically accountable persons

92. Elhauge, *supra* note 19.

93. *Id.* at 670 ("This effort to avoid the judicial embarrassment of open-ended choice through formalistic definitions of 'state action' has . . . been a failure.")

94. *See, e.g.*, Easterbrook, *supra* note 56, at 25–27.

95. Elhauge, *supra* note 19, at 671.

96. *Id.*

97. *Id.* at 672.

control and make a substantive decision in favor of the terms of the challenged restraint before it is imposed on the market.⁹⁸

Elhauge makes a normative case stemming from this view. According to him, in lieu of the inquiries relating to whether an actor is public, quasi-public, or private, and whether the entity satisfies the clear-articulation or active supervision requirements, the Court should adopt the rule of decision above.⁹⁹

Elhauge reserves the bulk of his analysis to the principle of financial interest. In his view, *Parker* immunity stands for the limited proposition that antitrust law does not trust financially interested actors to promote the public interest.¹⁰⁰ The concern is not to reduce inefficiencies in anticompetitive conduct or even to curb anticompetitive processes as contrary to public policy.¹⁰¹ *Parker* immunity doctrine merely ensures that only actors trusted to promote the public interest receive immunity.¹⁰² That trust is rooted in the principle of financial disinterest.¹⁰³ Not only does the case law support this process view, but so too does the Sherman Act's rich legislative history.¹⁰⁴

B. A Rule of Decision

As surveyed in Part II, Elhauge's focus on financially interested decisionmaking seems to predict the Court's decisions very accurately. The rule of decision needs to be slightly tweaked, however, in order to encompass the Court's focus on the principle of political accountability. Before proceeding with the rule of decision, it is important to define what political accountability would mean if incorporated in any rule of decision. For this purpose, Elhauge's definition is convincing and consistent with both accounts of civic republicanism¹⁰⁵ and the Court's case law in *Parker* immunity.

98. *Id.* at 671.

99. *Id.* at 696 (asserting "a rule of decision for the Supreme Court's state action doctrine . . . that has more predictive force than . . . the clear authorization/active supervision test").

100. *Id.* at 685 ("This is the true dispositive feature of each statute the Court invalidated—each delegated the power to set the terms of vertical price restraints to suppliers financially interested in the resale prices of their products. These statutes were not denied immunity because they did not constitute 'state action' but because they set up a decisionmaking process that antitrust law views as suspect.") (footnote omitted).

101. *Id.* at 677.

102. *Id.* at 671.

103. *See id.*

104. *See id.* at 697–708.

105. *See* THE FEDERALIST NO. 39, at 214 (James Madison) (Am. Bar Ass'n ed., 2009) ("It is sufficient . . . that the persons administering [the government] be appointed, either directly or

For Elhauge, an actor is politically accountable if her power stems from the electorate at large.¹⁰⁶ This can involve either an appointment by elected officials or any chain of appointments starting with elected officials.¹⁰⁷ So long as the political process could influence the initial selection of personnel to exclude those with disfavored policy preferences, an actor is politically accountable.

First, let us suppose that a governor in her first term appoints an unpopular state judge with life tenure. In this scenario, the state judge is a politically accountable actor because her appointment was tied to the initial selection of an elected official (the governor). In addition, principles of political accountability are served because voters could oust the governor in her bid for reelection for an unpopular appointment.¹⁰⁸ Next, suppose that a governor in her final term appoints a state judge with life tenure. Would the state judge be a politically accountable actor? Common sense might suggest not—if the state judge acts against the public interest, the electorate would have no recourse in the polls to oust either the judge or the governor. But at the very least, the public interest is somewhat served through the initial selection of the elected governor. And if that state judge were unpopular, future candidates for governor could pledge not to appoint a judge with similar values to the bench.

As the survey of *Parker* immunity case law has indicated, the principles of financial disinterest and political accountability matter in classifying an entity as public, quasi-public, or private, and in making the necessary showing to satisfy the active supervision requirement.¹⁰⁹ Taking Elhauge's rule of decision and modifying it to include the value of political accountability yields the following rule:

General Rule: Restraints on competition must be subject to antitrust review when the persons controlling the terms of the restraints either stand to profit financially from the restraints they impose or are politically unaccountable actors. Conversely, restraints are immune from antitrust review *only when* financially disinterested and politically

indirectly, by the people According to the constitution of every State in the Union, some or other of the officers of government are appointed indirectly only by the people.”) (emphasis in original).

106. See Elhauge, *supra* note 19, at 671 n.10.

107. *Id.*

108. This fear of lack of political accountability also underlies the Court's “commandeering” cases. See, e.g., *New York v. United States*, 505 U.S. 144, 169 (1992) (“[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.”).

109. See *supra* Part II.

accountable persons control and make a substantive decision in favor of the terms of the challenged restraint before it is imposed.¹¹⁰

Subsidiary Rule 1: A sovereign actor (either a state legislature or judiciary) acting in a legislative capacity is automatically entitled to *Parker* immunity.

Subsidiary Rule 2: If a nonsovereign actor is politically accountable and financially disinterested, the entity is “quasi-public” and need only satisfy the clear-articulation requirement.¹¹¹

Subsidiary Rule 3: If a nonsovereign actor is politically unaccountable or financially interested, the entity is “private” and must satisfy both the clear-articulation and active supervision requirements.

Unlike Elhauge’s rule, in this rule of decision, political accountability is a *necessary* showing before an entity can receive *Parker* immunity.¹¹²

There is little doubt that *Parker* immunity case law values political accountability, whether as a matter of antitrust policy or on federalism grounds.¹¹³ Scholarship supports this view as well. For one theorist, John Shepard Wiley, Jr., *Parker* immunity attaches only when the anticompetitive policy is not a product of “producer” capture.¹¹⁴ Professor Thomas M. Jorde argues that the active supervision requirement “promotes the citizen participation value of federalism.”¹¹⁵ Merrick Garland argues that the Court’s deference to states was part of a compromise toward respecting the political process at both the state and federal levels.¹¹⁶ Lastly, William H. Page posits

110. See Elhauge, *supra* note 19, at 671.

111. This framework abstracts away the fact that both municipalities and state agencies, like states as sovereigns, may have “collective financial interests.” See *id.* at 672.

112. Elhauge notes that political accountability is not “strictly necessary” to his proposal. *Id.* at 738–39 (“Whether or not disinterested but unaccountable restraints are or should be policed by antitrust courts, my prior conclusions still hold that antitrust review does and should apply to financially interested restraints but not disinterested accountable ones.”).

113. See, e.g., *FTC v. Tico Title Insurance Co.*, 504 U.S. 621, 636 (1992) (“States must accept political responsibility for actions they intend to undertake [by active supervision].”).

114. John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 741 (1986). One criterion in Wiley’s standard for *Parker* immunity is whether “the regulation is the product of capture in the sense that it originated from the decisive political efforts of producers who stand to profit from its competitive restraint.” *Id.* at 743.

115. Thomas M. Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 CALIF. L. REV. 227, 249 (1987) (“The citizen participation value of economic federalism supports deference to state decisions that are the product of meaningful public participation in the decision to supplant competition with regulation.”).

116. See Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L.J. 486, 487 (1987) (arguing that the Court’s deference to states in *Parker* immunity

that the Madisonian model of representative democracy helps explain *Parker* immunity doctrine.¹¹⁷

A few clarifying points about the rule of decision are in order. Elhauge makes a normative judgment to replace the clear-articulation and active supervision framework with his more straightforward approach: If the actor in the position of controlling the terms of the anticompetitive measure is financially interested, immunity does not apply; if the actor in the position of controlling the terms of the anticompetitive measure is politically accountable and financially disinterested, *Parker* immunity applies. This in a sense incorporates the active supervision requirement into the rule of decision by stressing that the actor in question is the actor in the “position of controlling the terms,” not necessarily the actor making the original anticompetitive decision.

This leap is unnecessary, however. The dual framework of asking which category a particular entity falls into, and then inquiring whether the clear-articulation and active supervision requirements are satisfied, is more in line with the way the Court has decided *Parker* immunity cases. While the clear-articulation and active supervision standards are subject to much judicial uncertainty and scholarly dispute,¹¹⁸ a straightforward approach that eliminates the need for those inquiries makes matters even more uncertain.

For example, a showing of clear-articulation is always required if the initial actor is not the sovereign state itself.¹¹⁹ The clear-articulation standard ensures that the nonsovereign entity is acting pursuant to the sovereign’s affirmative

“represents the judiciary’s effort to respect the results of the political process, tempered only by the compromises needed to accommodate respect for that process at both the state and federal levels.”)

117. 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, 1107 (1981) (“[The Court’s] approach draws doctrinal support from the Madisonian model of representative government, and dictates judicial restraint as long as the ‘process of representation’ affords interested parties an opportunity to influence the formulation of policy. . . . State regulation often deviates from the Madisonian model when legislative bodies delegate substantial responsibility for central policy development to administrative agencies. This phenomenon alters the process basis of the *Parker* doctrine, and thus affects the legal standard for antitrust exemption.”) (footnote omitted). For more scholarship supporting the view that political accountability matters in *Parker* immunity, see Edlin & Haw, *supra* note 9, at 1138 n.273.

118. See OFFICE OF POLICY PLANNING, *supra* note 80, at 25–40; see also C. Douglas Floyd, *Plain Ambiguities in the Clear Articulation Requirement for State Action Antitrust Immunity: The Case of State Agencies*, 41 B.C. L. REV. 1059, 1061–65 (2000) (noting the different approaches that courts employ when applying the clear-articulation requirement).

119. *E.g.*, *Hoover v. Ronwin*, 466 U.S. 558, 568–69 (1984) (“[I]n cases involving the anticompetitive conduct of a nonsovereign state representative the Court has required a showing that the conduct is pursuant to a ‘clearly articulated and affirmatively expressed state policy’ to replace competition with regulation.” (quoting *Comty. Comm’ns Co. v. City of Boulder*, 455 U.S. 40, 54 (1982))).

decision to authorize the anticompetitive conduct.¹²⁰ Elhauge's straightforward rule does not address how the clear-articulation inquiry would figure in the analysis, making it even more unnecessary to wholly drop the traditional two-step inquiry.

Lastly, it is necessary to clarify how political accountability and financial disinterest would operate at the second stage of the *Parker* immunity inquiry under the rule of decision proposed here. Under the framework of the rule, an entity could be labeled private either because it is politically unaccountable or because it is financially interested. Assuming an entity is financially interested but politically accountable, the active supervision requirement applies. As Part II indicated, principles of political accountability govern the active supervision inquiry. Yet if an actor is "politically accountable" in the first stage inquiry, it seems superfluous to attach a second stage inquiry that involves the principle of political accountability. But the role political accountability plays at the second stage is different from the "politically accountable" actor as defined here.

Instead, principles of political accountability in a general sense govern the analysis. The end goal of the active supervision inquiry is to ensure that the anticompetitive decision is that of the state.¹²¹ The multi-factor analysis ensures that the state supervisor has made an affirmative and substantive choice to approve the anticompetitive conduct, enabling voters to punish or reward government officials for anticompetitive decisions. Likewise, principles of financial disinterest govern the active supervision analysis. Through a financially disinterested state supervisor, the active supervision prong significantly mitigates the taint of financial interest from the original anticompetitive decision.¹²²

Thus, the second stage inquiry does not ask whether the state supervisor is politically accountable in the limited sense as in the first stage inquiry. Rather, the principle of political accountability plays a role through the multi-factor analysis the Court has employed in its previous decisions including in *FTC v. Ticor Title Insurance Co.*¹²³ and most recently in *North Carolina Board of Dental Examiners v. FTC.*¹²⁴

120. See *supra* Part I.

121. See OFFICE OF POLICY PLANNING, *supra* note 80, at 13 ("The active supervision test operates by according state action protection only when the challenged conduct can be said to be that of the state rather than private actors.").

122. See *supra* Part II.C.

123. 504 U.S. 621, 638–40 (1992).

124. 135 S. Ct. 1101, 1116–17 (2015).

IV. *NORTH CAROLINA BOARD OF DENTAL EXAMINERS V. FTC*

The Court's opinion in *North Carolina Board of Dental Examiners v. FTC* and an amicus brief filed by an influential group of antitrust scholars lend support to the rule of decision adopted here. The case illustrates how the rule would operate in the concrete scenario of a specific state occupational licensing board.

The North Carolina Board of Dental Examiners consists of six practicing dentists elected by the state's licensed dentists, a practicing hygienist, and one consumer member appointed by the Governor.¹²⁵ Board members, with the exception of the consumer member, are required to maintain an active dentistry practice.¹²⁶ Board members have to take an oath to enforce state law and must adhere to open record laws and the state's administrative procedure act.¹²⁷ In 2003, the Board discovered that non-dentists were providing teeth whitening services.¹²⁸ These non-dentists charged substantially lower prices for their services than practicing, licensed dentists.¹²⁹ In response, the Board enforced the state legislative ban on practicing dentistry without a license against these non-dentist teeth whitening providers by sending them cease-and-desist letters.¹³⁰ Shortly after the Board's enforcement action, the Federal Trade Commission brought a complaint against the Board, alleging that it had violated the Sherman Act by excluding a class of teeth whitening providers from the market.¹³¹

A. Lower Courts

In rejecting the Board's *Parker* immunity defense, the FTC held that "a state regulatory body that is controlled by participants in the very industry it purports to regulate" must satisfy the active supervision requirement.¹³² The Board appealed to the Fourth Circuit, contending that as a state agency, it should only be subject to the clear-articulation requirement.¹³³ The Fourth Circuit held that a state occupational licensing board with a "decisive coalition . . . of participants in

125. N.C. GEN. STAT. § 90-22(b) (2014).

126. N.C. GEN. STAT. § 90-22(b)-(c).

127. N.C. GEN. STAT. §§ 90-41(g), 138A-1, -2, -22(a), -45.

128. N.C. State Bd. of Dental Exam'rs v. FTC, 717 F.3d 359, 365 (4th Cir. 2013).

129. *Id.*

130. *Id.*

131. *Id.*

132. *In re* N.C. Bd. of Dental Exam'rs, 2011-1 F.T.C. 77331, 2011 WL 549449, at *13 (Feb. 8, 2011).

133. *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 366.

the regulated market” and whose members were chosen by and accountable to other market participants was a private entity under *Parker* immunity.¹³⁴

The court reasoned that while the Board was a state agency, it had “attributes of a private actor and [was] taking actions to benefit its own membership.”¹³⁵ The court stressed that the Board members were not appointed by the governor or any other state governmental official, but rather were elected by other licensed dentists.¹³⁶ Thus, the Court reasoned, the Board did not face public scrutiny akin to the public scrutiny faced by municipalities.¹³⁷ Because the Board’s decisionmakers were politically unaccountable and financially interested, the Board was closer to a private actor than a municipality.¹³⁸

After subjecting the Board to a showing of active supervision, the court held that the regulatory regime in place did not satisfy that standard.¹³⁹ The court reasoned that the cease-and-desist letters were sent without state oversight.¹⁴⁰ While the Board had to comply with open record laws and the state’s administrative procedure act, general oversight of the Board did not substitute for the required review and approval of the “particular anticompetitive acts.”¹⁴¹ Adhering to the federalism principles underlying the *Parker* immunity doctrine, the Fourth Circuit reiterated that had North Carolina adequately supervised the Board, the Board would be entitled to the *Parker* exemption: “Today’s opinion simply reinforces the Court’s admonition that federalism ‘serves to assign political responsibility, not to obscure it.’”¹⁴²

The North Carolina Board of Dental Examiners has an uncommon selection scheme, requiring that its market participant members be selected by other market participants in dentistry. The vast majority of state occupational licensing boards are selected through gubernatorial appointment.¹⁴³ One interpretation of the Fourth Circuit’s decision is that the private nature of the Board turned on the fact that active market participants in dental practice selected the market

134. *Id.* at 368 (quoting AREEDA & HOVENKAMP, *supra* note 3, at ¶ 227b).

135. *Id.* at 369.

136. *See id.* (“Of particular relevance [is] the fact that the officers were appointed from the board’s membership and not by the State . . .”).

137. *Id.* at 368–69.

138. *See id.* at 370.

139. *See id.* at 368.

140. *Id.* at 370.

141. *Id.*

142. *Id.* at 375 (quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992)).

143. *See* Edlin & Haw, *supra* note 9, at 1157–64.

participants on the Board.¹⁴⁴ Conversely, there is political accountability in gubernatorially appointed boards because their members' powers stem from the electorate's initial selection of a public official.¹⁴⁵

B. Supreme Court Opinion

The Supreme Court, in an opinion authored by Justice Kennedy, affirmed the Fourth Circuit's opinion against the Board.¹⁴⁶ The Court looked exclusively at the composition of the Board to determine its status under *Parker* immunity.¹⁴⁷ The Court reasoned that because six of the Board members were active market participants in dentistry, there was a risk that they would promote their own private interests over the public interest.¹⁴⁸ Citing Professor Elhauge's piece, the Court emphatically stated: “[P]rohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy.”¹⁴⁹ The Court's conclusion was rooted in the concern that the Board's structure would result in the members “confusing their own interests with the State's policy goals.”¹⁵⁰

The Court rejected the argument that North Carolina's statutory label for the Board as a “state agency” should be dispositive of its status.¹⁵¹ Consistent with prior case law rejecting formal designations,¹⁵² the Court held that for

144. *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 376 (Keenan, J., concurring).

145. *See supra* Part III.B.

146. *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1117 (2015).

147. *Id.* at 1114 (“State agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing *Midcal's* supervision requirement was created to address.”).

148. *Id.* at 1112 (“Entities purporting to act under state authority might diverge from the State's considered definition of the public good. The resulting asymmetry between a state policy and its implementation can invite private self-dealing.”).

149. *Id.* at 1111.

150. *Id.* at 1114.

151. *Id.* at 1113–14 (“The Board argues entities designated by the States as agencies are exempt from *Midcal's* second requirement. That premise, however, cannot be reconciled with the Court's repeated conclusion that the need for supervision turns not on the formal designation given by States . . .”).

152. *See, e.g., Goldfarb v. Va. State Bar*, 421 U.S. 773, 791 (1975) (denying *Parker* immunity to the Virginia State Bar, designated a state agency, because the agency had acted in the capacity of a private trade association for the benefit of its members). In the same term as the Court's decision in *North Carolina Board of Dental Examiners v. FTC*, the Court rejected the notion that Amtrak's status rested on the congressional pronouncement that it was not a governmental entity. *U.S. Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1231 (2015) (“Congressional pronouncements, though instructive as to matters within Congress' authority to address, are not dispositive of Amtrak's status as a governmental entity for purposes of separation of powers analysis”).

purposes of *Parker* immunity, an entity is subject to the active supervision requirement if it is “controlled by active market participants.”¹⁵³ An occupational licensing board’s status turns on the risk that its members would pursue private interests in restraining trade. In other words, the status turned on the fact that a “controlling number” of the members on the Board were financially interested in the industry they were charged with regulating. The Court provided the following rule of decision for *Parker* immunity analysis of state occupational licensing boards: “[When] a controlling number of decisionmakers are active market participants in the occupation the board regulates[, the board] must satisfy *Midcal*’s active-supervision requirement in order to invoke state-action anti-trust immunity.”¹⁵⁴

The above reasoning is entirely consistent with Elhauge’s focus on financial interest. The Court held that if an entity is tainted with financial interest, active supervision is required. The Court did not hinge its decision on the fact that the Board members were politically unaccountable. Even if the Board members were politically accountable, the Board’s risk of private self-dealing was enough for the Court to require a showing of active supervision. This was a firm rejection of the Fourth Circuit’s concurring opinion that concluded that political unaccountability was necessary for a licensing board to be private.

But what about a politically unaccountable yet financially disinterested board? The Court could have decided the case on the basis that the selection of the Board’s active market participants had no nexus to an elected public official. Having determined that the Board was financially interested, the Court simply did not need to address that question. But that is not to say that the principle of political accountability did not govern some of the Court’s analysis.

For example, the Court distinguished municipalities and “prototypical state agencies” from the Board using the concept of “electoral[] accountab[ility]”

under the Constitution.” (citation omitted)). Instead, the Court held that Amtrak was a governmental entity based on the principles of financial disinterest and political accountability. *See id.* at 1232 (“Amtrak is not an autonomous private enterprise . . . [because] its priorities, operations, and decisions are *extensively supervised and substantially funded by the political branches*. A majority of its Board is *appointed* by the President and confirmed by the Senate and is understood by the Executive to be removable by the President at will. Amtrak was created by the Government, is controlled by the Government, and *operates for the Government’s benefit.*”) (emphasis added).

153. *N.C. Bd. of Dental Exam’rs*, 135 S. Ct. at 1114.

154. *Id.* Notably, this decision was consistent with the Court’s holding in *Gibson v. Berryhill*, in which the Court struck down the action of a licensing board on the ground of a conflicting financial interest, as a violation of the Due Process Clause. 411 U.S. 564, 581 (1973). The Court noted that it was “sufficiently clear from [their] cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes.” *Id.* at 579.

emphasized in the Court's previous decision in *Town of Hallie v. City of Eau Claire*.¹⁵⁵ The Court concluded that the "quasi-public" category was a "narrow exception" to the rule that financially interested actors must satisfy the active supervision requirement.¹⁵⁶ But in so doing, the Court reiterated dicta in *Town of Hallie* that prototypical state agencies fall within that narrow exception.¹⁵⁷ That members on the Board of Dental Examiners all took an oath to enforce state law and were subject to open record laws and North Carolina's Administrative Procedure Act¹⁵⁸ was not sufficient to mirror the "electorally accountable" characteristic of municipalities and prototypical state agencies. The Court's conception of "electorally accountable" prototypical state agencies likely followed this Comment's definition of political accountability.¹⁵⁹ This is because unlike municipalities, most state agencies are not comprised of a controlling number of elected officials.¹⁶⁰ It implicitly follows that an entity can be "quasi-public" only when a controlling number of its members have a nexus with the selection of an elected official.

Moreover, consistent with the rule of decision proposed here, the Court reasoned that the principle of political accountability played a significant role once the Board was classified as private. The Court reasoned that the *Parker* immunity defense was not available to the Board because there was no evidence of active supervision over its anticompetitive conduct toward non-dentist teeth whitening providers.¹⁶¹ Active supervision is necessary for entities with a controlling number of active market participants "to ensure the States accept *political*

155. 135 S. Ct. at 1114.

156. *See id.* at 1113.

157. *Id.* at 1114 ("While *Hallie* stated 'it is likely that active state supervision would also not be required' for agencies, the entity there . . . was an electorally accountable municipality In that and other respects the municipality was more like prototypical state agencies, not specialized boards dominated by active market participants." (citation omitted) (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 n.10 (1985))).

158. *See supra* note 127; N.C. GEN. STAT. §§ 150B-1 to -64 (2013).

159. *See supra* Part III.B ("[A]n actor is politically accountable if her power stems from the electorate at large.").

160. *See, e.g.*, MARGARET R. FERGUSON, RUTGERS CENTER ON THE AM. GOVERNOR, INTRODUCTION TO STATE EXECUTIVES (2014) ("Though most states still elect quite a few statewide offices, legislatures have tended to give governors the power to appoint the heads of new agencies as they are created. As a result, the newer agencies (which also have responsibility for some of the states' most important activities) are headed by governor appointees."), <http://governors.rutgers.edu/on-governors/us-governors/introduction-to-governors/introduction-to-governors-chapter-1/#bureaucracy>.

161. *N.C. Bd. of Dental Exam'rs*, 135 S. Ct. at 1116.

accountability for anticompetitive conduct they permit and control.”¹⁶² The Board had statutory authority to “invoke oversight by a politically accountable official,” but instead relied upon filing cease-and-desist letters.¹⁶³ This in effect prevented North Carolina from substantively controlling the restraint of trade. There was simply no assurance that teeth whitening was a part of the practice of dentistry and within the Board’s prerogative to regulate.

The Court provided a set of factors to help guide the active supervision analysis.¹⁶⁴ First, the supervisor must have reviewed the substance of the anti-competitive decision—a mere review of procedure was insufficient.¹⁶⁵ Second, the supervisor must have the power to make substantive changes to the anticompetitive decision (either by way of veto or modification).¹⁶⁶ The “mere potential for state supervision is not an adequate substitute for [an affirmative] decision by the State.”¹⁶⁷ Lastly, the Court held that the state supervisor could not be an active market participant.¹⁶⁸

Interestingly, the factors the Court adopted incorporate the principles of financial disinterest and political accountability. The first two factors were fleshed out in Part II and are rooted in the principle of political accountability: State supervision requires an affirmative decision by state officials to adopt the anticompetitive measure—tacit approval or mere procedural review is insufficient.¹⁶⁹ The last factor is consistent with the principle of financial disinterest: The supervisor cannot be tainted by the same financial interest that resulted in the entity being subject to active supervision in the first place.

C. Antitrust Scholars’ Amicus Brief

Notably, an amicus brief filed by more than fifty antitrust scholars, with Professor Elhauge as the counsel of record, supported Elhauge’s process view of *Parker* immunity doctrine.¹⁷⁰ Citing to Elhauge’s seminal article, the scholars found that “this Court’s precedents have consistently held that, regardless of state

162. *Id.* at 1111 (emphasis added).

163. *Id.* at 1116.

164. *See id.* at 1116–17.

165. *See id.* at 1116.

166. *Id.*

167. *Id.* (quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 638 (1992)).

168. *Id.* at 1116–17.

169. *See supra* Part II.

170. *See* Brief of Antitrust Scholars as *Amici Curiae* in Support of Respondent, *N.C. Bd. of Dental Exam’rs*, 135 S. Ct. 1101 (No. 13-534).

labels and treatment under state law, financially interested market participants are private actors subject to federal antitrust review.”¹⁷¹ In addition to finding jurisprudential support for their position, the scholars found support in federal antitrust policy that antitrust law does not trust financially interested market participants to “neglect their selfish interests in favor of the public’s” to promote the public interest,¹⁷² just as Elhauge had previously claimed.

The antitrust scholars also argued a point not addressed by the Court. The fact that market participants selected the active market participants on the Board should have sufficed to make the Board private for purposes of *Parker* immunity.¹⁷³ The concern the brief raised was that the Board would “naturally represent the interests of those market participants in restraining trade” as opposed to representing the public interest.¹⁷⁴ According to the antitrust scholars, if the Court’s holding was limited to requiring active supervision when a decisive coalition of active market participants adopted an anticompetitive measure, “then a state could easily authorize private cartels by simply creating state agencies full of salaried employees who are elected by the cartel businesses.”¹⁷⁵

Of course, the risk that the Board would not promote the public interest was particularly high since the electoral regime empowers market participants to have the exclusive say as to what the composition of the Board will be. But that concern would not have dissipated had the statute instead authorized a group of financially disinterested consumers to select the members on the Board. Because the Board’s members would have no connection to the initial selection of an elected official, the Board would be politically unaccountable in either scenario.

As the survey of *Parker* immunity showcased, antitrust law does not trust politically unaccountable officials to pass anticompetitive measures absent state supervision. In addition, federalism principles are compromised to a significant degree when a delegated entity comprised of politically unaccountable officials can pass an anticompetitive measure under the auspices of state power and be immune from federal antitrust law conditioned only upon satisfying the lenient clear-articulation requirement.

The amicus brief’s conclusion ultimately is in accord with the rule of decision proposed here: “State action immunity requires that an actor who is both

171. *Id.* at 10.

172. *Id.* at 12.

173. *See id.* at 29 (“While being elected by market participants is not *necessary* to treat a board as private, it should *suffice* to do so.”) (emphasis in original).

174. *Id.*

175. *Id.*

financially disinterested *and* politically accountable to the general electorate substantively control the terms of the relevant restraint before it is imposed on the market. When either factor is absent, immunity should be denied.”¹⁷⁶ These antitrust scholars reached a milestone consensus that political accountability is *necessary* for the entity imposing the substantive restraint to be immune from federal antitrust law.

The *North Carolina Board of Dental Examiners* case and the influential amicus brief filed by the antitrust scholars in the case lend strong support to Elhauge’s process view that financially interested actors who substantively control the economic restraint before it is imposed on the market are not entitled to *Parker* immunity. They also lend support to the view that political accountability matters in *Parker* immunity. The Court should formally adopt the rule of decision proposed in this Comment to bring clarity to lower courts tasked with adjudicating this still-unsettled area of antitrust law.

CONCLUSION

Parker immunity jurisprudence has primarily been shaped by the principles of financial disinterest and political accountability. These two principles have shaped the Court’s decisionmaking in both stages of the *Parker* immunity inquiry—first, in determining the initial categorization of a particular entity and then subsequently determining whether states’ oversight regimes for private anti-competitive conduct satisfy the active supervision requirement. Using these very principles, the Supreme Court in *North Carolina Board of Dental Examiners v. FTC* held that a state occupational licensing board comprised of a controlling number of practicing dentists was a private entity, subject to the active state supervision requirement.¹⁷⁷

Despite repeatedly relying on these two principles, the Court has not formally adopted them in its *Parker* immunity jurisprudence. The rule of decision asserted in this Comment provides a useful framework for lower courts to employ in future *Parker* immunity cases. This Comment finds this framework to be descriptively powerful, as it merely purports to simplify that which the Court has been doing all along.

The rule asserts that financial disinterest and political accountability are both necessary attributes for an entity acting under the auspices of state power

176. *Id.* at 30 (emphasis in original) (citation omitted).

177. *See* 135 S. Ct. at 1114.

to be classified as quasi-public. The rule, by incorporating the two principles of financial disinterest and political accountability, sheds light on the functional purposes courts should look to in determining whether the oversight regime over a private actor's anticompetitive decision satisfies the active supervision requirement. If adopted, the rule would also bring clarity to state legislatures restructuring the composition of their state licensing boards or adjusting their regulatory oversight regimes to minimize antitrust litigation in the future. With two *Parker* immunity cases decided by the Supreme Court in just the last three years,¹⁷⁸ the time is ripe for the clarity and guidance this rule would bring to the field of antitrust law.

178. *See id.*; *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013).