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EXEMPTIONS

State Action

North Carolina State Board of Dental Examiners v. FTC — What Hath the Supreme Court Wrought?

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The federalism debate has continued to serve as a point of controversy and division in American politics and jurisprudence.[1] The balance of power between the states and the federal government has shifted over time reflecting the realities of this debate. Historically, the states were thought to possess the exclusive power to regulate ''their purely internal affairs'' through the exercise of their police powers.[2] However, in the wake of the New Deal,[3] the second Reconstruction of the 1960s, and the advent of the Warren Court, a new era, which favored the primacy of the federal government, arose.[4] In this era, both Congress and the Courts significantly expanded the scope and reach of federal power into arenas traditionally reserved to the states in part by leveraging Congress's authority to regulate interstate commerce.[5] However, the tides turned against federal power in the 1970s and the primacy of states' rights was championed under the Rehnquist Court. [6] Today, a sharp divide has emerged in the

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[1] *See* Geoffrey R. Stone, et al., CONSTITUTIONAL LAW 147-48 (3rd ed. 1996).

[2] *Leisy v. Hardin*, 135 U.S. 100, 122 (1890).

[3] *See generally* Akhil Reed Amar, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998).

[4] *See, e.g., National League of Cities v. Usery*, 426 U.S. 833 (1976), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

[5] *See* Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 5-20, at 378 (2d ed. 1988).

[6] *See, e.g.,* Marie L. Garibaldi, *The Rehnquist Court and State Constitutional Law*, 34 TULSA L. J. 67, 69-70 (1998).

current Supreme Court between those justices who favor enhanced states' rights and those justices who favor the primacy of federal power.

The United States Supreme Court in *North Carolina State Board of Dental Examiners v. Federal Trade Commission* (''*NC Dental*'')[7] was recently given the opportunity to revisit the federalism debate in deciding whether the protections of the state action immunity doctrine shielded a state agency from antitrust liability. Directly at issue in *NC Dental* was a quintessential question of federalism: Could a state agency's conduct in regulating its internal affairs be subject to the federal government's commerce power as embodied in the Sherman Act, 26 Stat. 209, as amended 15 U.S.C. § 1 *et seq.*? A majority of Supreme Court Justices answered this question in the affirmative and in a manner that appears calculated to broaden the scope of the federal government's power.[8] Not surprisingly, and emblematic of the current divide, Justices Alito, Scalia and Thomas filed a vigorous dissent championing a states' rights approach to the question and concluding that a state agency will always be immune from federal antitrust law.[9]

This article will examine in detail the Supreme Court's decision in *NC Dental* including both the practical and theoretical implications of the decision. In particular, the article will consider whether the majority's decision heralds a break from prior precedent regarding the state action immunity doctrine or is merely an organic outgrowth of that precedent, including whether the Supreme Court moved the proverbial needle in determining what constitutes immune state action. To understand these issues and the import of the *NC Dental* decision, the article will also provide a background surveying the development of the state action immunity doctrine. Lastly, the article will consider whether the majority's decision portends the recognition of a market participant exception to the state action immunity.

I. The Development of the State Action Immunity Doctrine

The state action immunity doctrine provides states and entities that act under the state's authority with immunity in certain situations where their conduct would otherwise be actionable under federal antitrust laws. The doctrine was first recognized in the case of *Parker v. Brown*.[10] In *Parker*, a raisin producer challenged under the Sherman Act the California Agricultural Prorate Act which authorized the creation of an Agricultural Prorate Advisory Commission (''Commission'') to develop and establish marketing plans for certain agricultural products. [11] The Prorate Act established a multifaceted and complex process for the creation and implementation of these marketing plans in which the Commission coordinated development of the plans with the input and approval of qualified market producers. [12] The *Parker* court assumed that the program would have violated the Sherman Act if carried out by private individuals but nonetheless found no violation for the reason that the Sherman Act was not ''intended to restrain state action or official action directed by a state.''[13] Because, in the court's view, the Prorate Act was an exercise of California's regulatory power, it was immune from attack under the Sherman Act.

The next major decision to consider the state action immunity doctrine was the Supreme Court's decision in *Goldfarb v. Virginia State Bar*.[14] In *Goldfarb*, the Supreme Court applied *Parker's* analysis to conclude that attorney fee schedules enforced by the Virginia State Bar were not immune from antitrust liability despite the fact that the State Bar was a state agency by law.[15] The court reasoned that because the fee schedules were not mandated by ethical standards established by the State Supreme Court or by other law the State Bar association was not immune from antitrust liability.[16] According to *Goldfarb*, immunity is warranted only where state anticompetitive conduct is ''compelled by direction of the State acting as a sovereign'' as opposed to conduct merely '' 'prompted' by state action.''[17] Thus, the court found that ''[t]he fact that the State Bar is a state agency for some limited purpose does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members. The State Bar, by providing that deviation from County Bar minimum fees may lead to disciplinary action, has voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act.''[18]

Similar to its decision in *Goldfarb*, the Supreme Court in *Cantor v. Detroit Edison Co.*[19] found that no antitrust immunity was conferred on a state agency that merely passively accepted a public utility's tariff. Then in *Bates v. State Bar of Arizona*[20] the Supreme Court found that antitrust immunity was warranted in connection with lawyer advertising rules because those rules reflected a ''clear articulation of the State's policy'' and were re-examined by the policy maker (the state supreme court) in enforcement proceedings.[21]

Following its decisions in *Goldfarb*, *Cantor* and *Bates*, the Supreme Court next considered whether the state action immunity doctrine applied to protect private party wine merchants who had been delegated price-fixing authority under California law. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc.*[22] Based on its decisions in *Goldfarb*, *Cantor* and *Bates*, the Supreme Court in *Midcal* articulated a two-prong test for antitrust immunity: First, the challenged restraint must be the ''clearly articulated and affirmatively expressed goal of the state policy''; and second, the ''policy must be actively supervised by the State itself.''[23] The *Midcal* court found that although the California system for wine pricing satisfied the first requirement, it did not meet the second requirement of active supervision because the State ''simply authorize[d]

[7] *N. Carolina State Bd. of Dental Examiners v. F.T.C.*, 135 S. Ct. 1101, 191 L. Ed. 2d 35 (2015) .
[8] *Id.* at 1107-17.
[9] *Id.* at 1117-23.
[10] *Parker*, 317 U.S. 341 (1943).
[11] *Id.* at 344.
[12] *Id.* at 344-48.

[13] *Id.* at 351.
[14] *Goldfarb*, 421 U.S. 773 (1975).
[15] *Id.* at 791.
[16] *Id.* at 792.
[17] *Id.* at 791.
[18] *Id.* at 791-92 (citations omitted).
[19] *Cantor*, 428 U.S. 579, 594 (1976).
[20] *Bates*, 433 U.S. 350 (1977).
[21] *Id.* at 362.
[22] *Midcal*, 445 U.S. 97 (1980).
[23] *Id.* at 105 (internal quotation marks and citations omitted).

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price setting and enforce[d] the prices established by private parties."[24] Because California did not establish the prices nor reviewed the reasonableness of the price schedules set by the wine merchants, it did not regulate "the terms of fair trade contracts" and thus was not immune from antitrust liability.[25] The *Midcal* court emphasized 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."[26]

Just five years after *Midcal* was decided, the Supreme Court was confronted with another challenge to state action immunity doctrine involving the conduct of a municipality. In *Town of Hallie v. City of Eau Claire*,[27] the Supreme Court considered whether a municipality could be held liable under the Sherman Act for its allegedly anticompetitive policies involving the collection and transportation of sewage. As a starting point, the *Hallie* court pointed out that municipalities are not beyond the reach of the antitrust laws because "they are not themselves sovereign."[28] The court then considered the appropriateness of applying the two prong test articulated in *Midcal* to an entity like a municipality. The court held that only the first prong of the *Midcal* test was applicable to an actor like a municipality. To be immune, municipalities only had to "demonstrate that their anticompetitive activities were authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service" . . . without necessarily pointing to "specific, detailed legislative authorization."[29]

The *Hallie* court then explained that *Midcal*'s second prong—active state supervision—was unnecessary but it was really aimed at routing out inappropriate regulation by private parties. The "requirement of active state supervision serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy . . . Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State."[30] Thus, "active supervision" was not a prerequisite for immunity because there was "little or no danger" that an actor like a municipality was "involved in a *private* price-fixing arrangement."[31] This was because municipalities were electorally accountable and thus subject to public scrutiny which "may provide greater protection against antitrust abuses."[32] The *Hallie* court found that the municipal conduct in question was protected under the immunity doctrine because the statutory regime relating to the construction and maintenance of sewage systems clearly contemplated that a city may engage in anticompetitive conduct.[33]

Shortly after *Hallie* was decided, the Supreme Court attempted once again to clarify the contours of the state action immunity doctrine. In *Patrick v. Burget*,[34] Oregon physicians claimed antitrust immunity for their conduct as part of a hospital peer-review proceeding that terminated a competing physician's hospital privileges. The physicians argued that their conduct fell within the ambit of immune state action because Oregon's Health Division has general supervisory powers over matters relating to healthcare, including the licensing of hospitals, and that hospitals in Oregon are statutorily required to establish peer-review procedures.[35] The *Patrick* court held that both prongs of the *Midcal* test were applicable because, much like the wine merchants in *Midcal*, the Oregon physicians were private parties claiming state-action antitrust immunity.[36] However, the court found it unnecessary to consider the "clear articulation" prong because it was clear that the "active supervision" requirement was not met.[37] The *Patrick* court explained that "active supervision requirement stems from the recognition that '[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.' "[38] Thus to satisfy the "active supervision" requirement, the State must exercise "ultimate control over the challenged anticompetitive conduct" through, for example, the exercise of the "power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy."[39] In *Patrick*, there was no evidence that the State of Oregon had the authority to review and overturn private decisions regarding hospital privileges that are made through the peer-review process and thus the physicians' private conduct could not be considered state action for purposes of the state action immunity doctrine.[40]

The last major decision by the Supreme Court on the state action immunity doctrine before *NC Dental* examined whether an otherwise immune entity could lose its immunity for conspiring with private parties. In *City of Columbia v. Omni Outdoor Adver. Inc.*,[41] a billboard merchant argued that a city in South Carolina had violated the Sherman Act by conspiring with a local billboard company to pass an ordinance restricting new billboard construction. [42] The Supreme Court declined the invitation to create a "conspiracy" exception to *Parker* immunity because such an exception would "swallow up the *Parker* rule" if conspiracy means nothing more than agreement to "impose the regulation in question. Since it is both inevitable and desirable that public officials agree to do what one or another group of private citizens urges upon them."[43] The Supreme Court further reasoned that to permit such an exception would result in the " 'deconstruction of the governmental process and probing of the official 'intent' that we have consistently sought to avoid."[44] Thus, where the preconditions of *Parker* immunity are met *ex ante*, a

[24] *Id.*
[25] *Id.* at 105-06.
[26] *Id.* at 106.
[27] *Hallie*, 471 U.S. 34 (1985).
[28] *Id.* at 38.
[29] *Id.* at 39.
[30] *Id.* at 46.
[31] *Id.* at 47 (emphasis in the original).
[32] *Id.* at 45, n. 9.
[33] *Id.* at 47.
[34] *Patrick*, 486 U.S. 94 (1988).
[35] *Id.* at 101.
[36] *Id.* at 100.
[37] *Id.*
[38] *Id.* at 101 (quoting *Hallie*, 471 U.S. at 47).
[39] *Id.* at 101.
[40] *Id.* at 102-04.
[41] *Omni*, 499 U.S. 365 (1991).
[42] *Id.* at 367-68.
[43] *Id.* at 375.
[44] *Id.* at 377.

state actor will not lose immunity ''on the basis of ad hoc and *ex post* questioning of their motives for making particular decisions.''[45]

II. The *NC Dental Decision*

This past term, the Supreme Court once again heard a challenge involving the state action immunity doctrine. This time the Federal Trade Commission (''FTC'') had charged the North Carolina State Board of Dental Examiners (the ''Board'') with violating the Sherman Act when it issued 47 official cease-and-desist letters accusing nondentists offering teeth whitening services of the unlicensed practice of dentistry despite the fact that North Carolina's Dental Practice Act did not specify that the practice of dentistry included teeth whitening. [46] The Board contended that it was entitled to antitrust immunity under *Parker* and its progeny because it had acted pursuant to a clearly articulated state policy to displace competition and, much like a municipality in *Hallie,* it was exempt from *Midcal*'s second requirement of ''active state supervision.''[47] The Supreme Court disagreed concluding that because the Board was controlled by active market participants it was a ''nonsovereign actor'' more like a private trade association vested with regulatory authority and thus must satisfy both prongs of the *Midcal* test to be entitled to immunity. [48] In applying the *Midcal* Test, the Supreme Court assumed that *Midcal*'s clear articulation prong was met but nonetheless found that the Board's conduct was not entitled to immunity on the basis that the State did not actively supervise the Board's practice at issue—the distribution of cease-and-desist letters to nondentists.[49]

To understand the Supreme Court's decision, it is important to understand the framework of North Carolina's Dental Practice Act (the ''Act''). The Act provides that the Board is ''the agency of the state for the regulation of the practice of dentistry.''[50] Under the Act, the Board's principle duty is to ''create, administer, and enforce a licensing system for dentists'' and thus the Board has ''broad authority'' over its licensees.[51] With respect to unlicensed persons, the Board's authority is limited to filing suit to ''perpetually enjoin any person from . . . unlawfully practicing dentistry.''[52] The Act further provides that six of the Board's eight members must be licensed dentists engaged in the active practice of dentistry who are elected by other licensed dentists in elections conducted by the Board.[53] The seventh member is an active licensed dental hygienist elected by other licensed hygienists.[54] The last member is a ''consumer'' who is appointed by the Governor.[55] All members serve three year terms and no person may serve more than two consecutive terms. There is no procedure for removal of an elected member of the Board by a public official.[56] The Board may promulgate rules and regulations governing the practice of dentistry in the state provided those mandates are not inconsistent with the Act and approved by the North Carolina Rules Review Commissions whose members are appointed by the state legislature.[57]

The holding in *NC Dental* also appears to have been influenced by the factual background leading up to the Board's decision to target nondentists performing teeth whitening services. The Supreme Court emphasized that since the 1990's North Carolina dentists earned substantial fees from teeth whitening.[58] But by 2003, nondentists began offering those services at lower prices.[59] Dentists then began complaining to the Board principally regarding the lower prices charged by nondentists.[60] The Board then opened an investigation and proceeded to issue 47 cease-and-desist letters that either strongly implied or expressly stated that teeth whitening constituted the practice of dentistry and warning that the unlicensed practice of dentistry was a crime.[61] The Supreme Court emphasized that the Board could have but did not promulgate a formal rule or regulation regarding teeth whitening.[62]

The Supreme Court ultimately rejected a formalistic approach to *Parker* immunity in *NC Dental* that the Board urged the Court to adopt and which the Dissent champions. The Board argued that because its members were invested by North Carolina with the power of a State, the Board's action were necessarily ''cloaked with *Parker* immunity'' and therefore exempt from *Midcal*'s second requirement.[63] In rejecting this argument, the Supreme Court reasoned that a formalistic approach ''cannot be reconciled with the Court's repeated conclusion that the need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade.''[64] The Supreme Court's analysis hinged on its conclusion that a state agency may not always act in a ''sovereign'' capacity entitling it to immunity particularly where that agency is dominated and controlled by private interests who could in effect hijack the agency's power in pursuit of their private interests. Thus, the Court concluded that where there is a risk that a state agency is pursuing private interests and not the public good (as in the case where the agency is controlled by active market participants) that agency must meet both prongs of the *Midcal* test to be entitled to immunity.[65]

The Supreme Court's decision also weighed in on the federalism debate finding that application of both prongs of the *Midcal* test struck the appropriate balance between respecting the state's authority to regulate its internal affairs with the federal government's interest in prohibiting anticompetitive conduct. In delivering the opinion of the Supreme Court, Justice Kennedy wrote, ''[a]lthough state-action immunity exists to avoid con-

[45] *NC Dental*, 135 S. Ct. at 1113 (citing *Omni*).
[46] *Id.* at 1109.
[47] *Id.* at 1113-14.
[48] *Id.* at 1114.
[49] *Id.* at 1116-17.
[50] N.C. Gen. Stat. Ann. § 90-22(a) (2013).
[51] *Id.* at § § 90-29 to 90-41.
[52] *Id.* at § 90-40.1.
[53] *Id.* at § 90-22.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *See* N.C. Gen. Stat. Ann. § § 90–48, 143B–30.1, 150B–21.9(a).
[58] *NC Dental*, 135 S. Ct. at 1108.
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.* at 1110.
[64] *Id.* at 1114.
[65] *Id.* at 1110.

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flicts between state sovereignty and the Nation's commitment to a policy of robust competition, *Parker* immunity is not unbounded.''[66] Accordingly, ''[a]n entity may not invoke Parker immunity unless the actions in question are an exercise of the State's sovereign power . . . . But while the Sherman Act confers immunity on the States' own anticompetitive policies out of respect for federalism, it does not always confer immunity where, as here, a State delegates control over a market to a nonsovereign actor.''[67] The Supreme Court then defined a ''nonsovereign actor'' for purposes of *Parker* immunity as ''one whose conduct does not automatically qualify as that of a sovereign State itself'' and concluded that ''State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity.''[68] Therefore, ''[l]imits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants''[69] who may pursue their own private anticompetitive motives. These limits are important because ''under *Parker* and the Supremacy Clause, the States' greater power to attain an end does not include the lesser power to negate the congressional judgment embodied in the Sherman Act through unsupervised delegations to active market participants.''[70]

In coming to this conclusion, the Supreme Court relied on its decisions in *Goldfarb* and *Patrick* and distinguished its holding in *Hallie*. The Supreme Court emphasized that it had already determined in *Goldfarb* that a state agency was not entitled to *Parker* immunity based solely on its governmental character and where it is controlled by active market participants who had '' 'joined in what is essentially private anticompetitive activity' for the 'benefit of its members.' ''[71] The Supreme Court then distinguished its holding in *Hallie* on the basis that the active supervision requirement was not a necessary check for an entity like a municipality principally because municipalities were not controlled by active market participants, were electorally accountable to the public, and ''exercised a wide range of governmental powers across different economic spheres.''[72] Thus, there was a substantially reduced ''risk that [a municipality] would pursue private interests while regulating any single field.''[73] The active supervision requirement was therefore unnecessary in *Hallie* because there was little or no danger of private interests hijacking a municipality unlike a state agency controlled by active market participants.

The Court also relied on its holding in *Patrick* to support its conclusion that ''nonsovereign actors'' are only entitled to immunity where they can meet both prongs of the *Midcal* test.[74] Although the *Patrick* Court only dealt with the state-action immunity doctrine in the context of private parties, the Supreme Court in *NC Dental* summarily equated ''nonsovereign actors'' with *Patrick*'s private parties and purposefully extended the holding in *Patrick* to a state agency. [75] According to the Supreme Court, the fact that active market participants controlled the Board rendered it more like a private trade association. Thus, the Board, although not private party, is classified as a nonsovereign actor by the Supreme Court and treated like a private party claiming state action immunity under *Patrick*.

After concluding that the Board must meet both prongs of the *Midcal* test to be entitled to immunity, the Supreme Court considered whether the State exercised active supervision over the Board's conduct.[76] Explaining that ''[a]ctive supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decisions'' and is ''context-dependent,'' the Supreme Court concluded that North Carolina failed to actively supervise the Board by ensuring that the Board's conduct promoted state policy as opposed to merely the board member's private interests.[77] The Supreme Court found that the typical hallmarks of active supervision—substantive not procedural review of anticompetitive decisions; veto or power to modify particular decisions by a state supervisor; and a state supervisor that is not also an active market participant—were not present in the instant case.[78]

In the concluding paragraph of its decision, the Supreme Court emphasized that its decision was largely driven by its suspicion and distrust of active market participants blindly vested with regulatory authority by the State and its concern that States could abuse their powers to regulate their internal affairs through the unbridled delegation of power to market participants:

> The Sherman Act protects competition while also respecting federalism. It does not authorize the States to abandon markets to the unsupervised control of active market participants, whether trade associations or hybrid agencies. If a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity under *Parker* is to be invoked.[79]

Thus, the Supreme Court concluded that the active supervision requirement was necessary to ensure that active market participants controlling an ostensible state agency are not inappropriately shielded from the antitrust liability.

III. The *NC Dental* Dissent

Justices Alito, Scalia and Thomas filed a dissenting opinion arguing that the Court's decision ''is based on a serious misunderstanding of the doctrine of state-action antitrust immunity'' and entirely inconsistent with *Parker*.[80] Taking an historical perspective, the Dissent emphasized that when the Sherman Act was enacted in 1890, the ''understanding of the scope of federal and state power'' was very different as Congress's commerce power was much more limited.[81] Although by the time *Parker* was decided, the scope of Congress' commerce power had increased to permit federal regulation of even local activity through the dormant commerce clause, the Dissent points out that the Supreme Court in

[66] *Id.*
[67] *Id.* at 1110.
[68] *Id.* at 1111.
[69] *Id.*
[70] *Id.*
[71] *Id.* at 1114 (quoting *Goldfarb*, 421 U.S. at 792).
[72] *Id.* at 1112-13.
[73] *Id.* at 1113.
[74] *Id.* at 1111-12.
[75] *Id.* at 1114.
[76] *Id.* at 1116-17.
[77] *Id.* at 1116.
[78] *Id.* at 1117.
[79] *Id.*
[80] *Id.*
[81] *Id.* at 1118.

Parker still found that the Sherman Act could not ''circumscribe state regulatory power.''[82] The Dissent argues that the holding in *Parker* properly acknowledged that it could not possibly have been Congress's intent in enacting the Sherman Act to prevent the States from exercising their traditional regulatory authority.

Thus, the Dissent eschews the *Midcal* test, in favor of a bright line test that confers absolute immunity on all arms of the state. For the dissent, the only relevant question is whether North Carolina's Board is ''really a state agency,'' to which the answer is a resounding ''yes''.[83] The Dissent principally attacks the Court's conclusion that the delegation of regulatory power to active market participants transformed the Board into a ''nonsovereign actor'' or private actor undeserving of immunity. Justice Alito writing for the Dissent argues that the *Midcal* test is only appropriate where a private party is claiming state action immunity and thus the active supervision requirement is simply unnecessary where the ''conduct in question is the conduct of a state agency.''[84] For the Dissent, respect for federalism and state sovereignty requires absolute immunity for all state agencies regardless of whether those agencies are controlled by active market participants.

The Dissent also highlights that although active market participants played a significant role in facilitating the anticompetitive conduct at issue in *Parker*, the *Parker* Court nonetheless held that the California prorate program was entitled to immunity because California was acting as a sovereign when it adopted and enforced the prorate program.[85] The Dissent argues that if *Parker* were decided today, it would likely fail under the *Midcal* test due to the influence of active market participants in the anticompetitive scheme at issue. Thus, the Dissent felt that the Majority went ''astray because it for[got] the origin of the *Parker* doctrine and [wa]s misdirected by subsequent cases that extended the doctrine (in certain circumstances) to private entities.''[86]

For the Dissent, ''[n]ot only is the Court's decision inconsistent with the underlying theory of Parker; it will create practical problems and is likely to have far-reaching effects on the States' regulation of professions.''[87] The Dissent points out that the Court's decision likely requires many States to change the composition of their medical, dental, and other professional boards and worries that requiring someone other than an active market participant to regulate a profession would ''compromise the State's interest in sensibly regulating a technical profession in which lay people have little expertise.''[88] Lastly, the Dissent faults the majority with failing to give proper guidance as to what types of changes will insulate a Board from liability under the current framework and condemns the *Midcal* test as a ''rather crude test'' that is ''not true to the *Parker* doctrine.''[89]

[82] *Id.* at 1118-19 (citation omitted).
[83] *Id.* at 1119-20.
[84] *Id.* at 1120.
[85] *Id.* at 1120-21.
[86] *Id.* at 1121.
[87] *Id.* at 1122.
[88] *Id.*
[89] *Id.* at 1123.

IV. Implications of the *NC Dental* Decision

a. Why Bypass Clear Articulation?

The Supreme Court's decision in *NC Dental* in effect bypassed the clear articulation requirement of *Midcal* by summarily assuming it was met. However, there is a colorable argument that the Court could have limited its decision by finding that the Board's conduct was not the ''clear articulation'' of North Carolina policy. In *Hallie*, the Supreme Court clarified that clear articulation does not require a showing that the state compelled the anticompetitive restraint although ''compulsion affirmatively expressed may be the best evidence of state policy.''[90] Rather, clear articulation is satisfied ''where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals.''[91]

Perhaps the parties and the Court assumed clear articulation was met because North Carolina's Dental Practices Act permitted the Board to file suit to enjoin the unlawful practice of dentistry.[92] Thus, in one sense, the anticompetitive conduct at issue may be said to be the express result of the Board's exercise of its authority to enjoin unlicensed individuals from the unlawful practice of dentistry. However, this line of reasoning presumes that the practice of dentistry includes teeth whitening under North Carolina's Act where the Act is notably silent. As the Supreme Court emphasized, it is not clear whether the practice of dentistry in North Carolina includes teeth whitening.[93] Thus, there is a colorable argument that it is also not clear that the regulation of teeth whitening by the Board reflected the policy of North Carolina. The displacement of competition by the Board as to conduct that was outside the bounds of ''dentistry'' cannot be said to be the inherent, logical, or ordinary result of the Board's authority to regulate ''dentistry.'' On the basis of this reasoning, the Supreme Court could have concluded that the clear articulation requirement was not met and then declined to decide whether the second prong of *Midcal* even applied to the Board.

Indeed, if the North Carolina Act had defined dentistry to include teeth whitening the outcome of the *NC Dental* decision would have probably been different under either a clear articulation or active supervision analysis. If the State had expressed its desire to regulate teeth whitening as the act of dentistry, then the Board's conduct in attempting to enjoin that practice by unlicensed individuals would have likely passed muster under the clear articulation test for the reasons discussed above. With respect to the active supervision prong, the Supreme Court in *NC Dental* was focused on whether the Board was actively supervised by the State ''when it interpreted the Act as addressing teeth whitening and when it enforced that policy by issuing cease-and-desist letters to nondentist teeth whiteners.''[94] The Supreme Court was concerned that North Carolina officials ''may well have been unaware that the Board had decided

[90] *Hallie*, 471 U.S. at 45-46.
[91] *NC Dental*, 135 S. Ct. at 1112 (citation omitted).
[92] N.C. Gen. Stat. Ann. § 90-40.1.
[93] *NC Dental*, 135 S. Ct. at 1110.
[94] *Id.*

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teeth whitening constitutes 'the practice of dentistry' and sought to prohibit those who competed against dentists from participating in the teeth whitening market.''[95] However, these concerns would have been entirely resolved if the Act had simply been amended to provide that teeth whitening constituted the practice of dentistry.

If the Supreme Court had a credible basis for limiting its decision in *NC Dental* to the clear articulation prong, why didn't it choose to do so? One possibility was that the Court saw an opportunity to actively broaden the scope and reach of the federal government's power by concluding that both prongs of the *Midcal* test applied to North Carolina's Board. If the Court had limited its decision to the clear articulation prong, it would not have had the chance to air its concerns regarding the unbridled delegation of regulatory authority by States to active market participants. It is clear that the Supreme Court was concerned that States could effectively abuse federalism and thwart national interests by casting a ''gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.''[96] By limiting its holding to clear articulation, the Court would not have had the opportunity to hold that state actors controlled by active market participants are not entitled to state action immunity unless actively supervised. Thus, the Court may have been incentivized to reach *Midcal*'s second prong as a means to provide a check against what they perceived to be the improper influence of active market participants in a state agency.

b. Is the Dissent Correct?

Is the *NC Dental* Dissent correct? Did the Supreme Court arguably move the proverbial needle in terms of what constitutes immune state action? On a common sense level, the Dissent's rationale makes perfect sense. The whole purpose of the state action immunity doctrine is to insulate states from antitrust liability. If North Carolina's Board is truly a state agency, then shouldn't it be entitled to immunity? The Dissent also makes a valid point regarding the historical perspective of the Sherman Act. It is unlikely that Congress intended the Sherman Act to abrogate a State's right to govern its internal affairs through its police powers.

Moreover, the Dissent makes a strong argument that the Court's decision runs afoul of *Parker*. If the facts of *Parker* came before the current Supreme Court, it is questionable whether immunity would be extended to California's prorate program under *NC Dental*. In *Parker*, active market participants were actively involved in creating and approving the allegedly anticompetitive marketing plans.[97] In particular, the marketing plans were initiated upon the petition of ten producers, the Prorate Commission then established a committee to formulate the plan from among nominees chosen by producers, and the plan was only implemented upon the consent of at least 65% of producers.[98] Upon these facts, one could argue that California's prorate program was controlled by active market participants and thus must satisfy both the clear articulation and active supervision requirements of *Midcal*. Considering the Court's skepticism and suspicion regarding the unchecked delegation of regulatory authority to active market participants, there is a possibility the current Supreme Court would decline to find immunity under the facts of *Parker* today.

Lastly, did the Court misuse its decision in *Patrick* as the Dissent suggests? Didn't the Court stretch its holding in *Patrick* to fold its creation of ''nonsovereign actor'' into *Patrick*'s private party?[99] In fact, the Supreme Court in *NC Dental* extends *Patrick*'s holding somewhat unceremoniously by merely switching out the words ''private party'' for ''nonsovereign actor'' without any discussion.[100] Moreover, the conduct at issue in *Patrick*—the decision of a private hospital's peer review committee to terminate a competing physician's hospital privileges—is a far cry from the conduct at issue in *NC Dental*. In *Patrick*, the connection to the state was at most tangential and thus the Court applied both prongs of the *Midcal* test to determine state action immunity. In *NC Dental*, the actor was not tangentially related to the state but an expressly authorized arm of the state. As the Dissent points out, if the Board is truly an arm of the state, isn't it necessarily a sovereign actor? [101] On a common sense level, it defies logic to suggest that the state may not be sovereign. According to the Dissent's rationale, there can be no question that *NC Dental* moved the proverbial needle in terms of what constitutes immune state action.

c. Is the *NC Dental* Opinion in Line with *Goldfarb?*

Stepping back from the Dissent's perspective, can the Court's decision in *NC Dental* be seen as the logical outgrowth of its prior holding in *Goldfarb*? As the *NC Dental* court points out, the Court in *Goldfarb* acknowledged that a state agency may not always be entitled to *Parker* immunity just because it is a state agency. Indeed, the *Goldfarb* Court held that the state is only entitled to immunity when it is acting in a sovereign capacity: ''[t]he threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign.''[102] Thus, the idea of a state acting as a ''nonsovereign'' was not a novel creation by the Court in *NC Dental* but really a reflection of the Court's prior holding in *Goldfarb*. Not only did the Court in *Goldfarb* acknowledge that a state could act as a ''nonsovereign,'' it acknowledged that the state could engage in essentially private anticompetitive activity. Thus perhaps that Court in *NC Dental* did not misuse its holding in *Patrick* after all as the Supreme Court had already equated nonsovereign conduct with private conduct in *Goldfarb*.

Moreover, the Court's decision in *NC Dental* may not be inconsistent with *Parker* upon closer examination. Indeed, an argument can also be made that the facts of *Parker* would pass muster under the *Midcal* analysis articulated in *NC Dental*. Although California's prorate program was influenced by and relied on the input of

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[95] *Id.* at 1116.
[96] *Id.* at 1111 (quoting *Midcal*, 445 U.S. at 937).
[97] *Parker*, 317 U.S. at 347-48.
[98] *Id.*

[99] We would like to acknowledge Richard M. Steuer, a partner at Mayer Brown LLP, for bringing to our attention the Supreme Court's potential misciting of *Patrick*.
[100] *NC Dental*, 135 S. Ct. at 1111 (quoting *Patrick*, 486 U.S. at 100).
[101] *Id.* at 1120.
[102] *Goldfarb*, 421 U.S. at 790.

active market participants, there was a significant amount of active state supervision that potentially cleansed the program from the taint of market participants.[103] First, the Prorate Commission itself was not controlled by active market participants as it members were appointed by the Governor and required to take an oath of office. In addition, the state Director of Agriculture was a member of the Commission.[104] Although, active market participants petitioned for the initiation of a marketing plan, the Commission was required to make findings after a public hearing that the plan was consistent with the state policy of preventing agricultural waste and the conservation of the agricultural wealth of the state. [105] In addition, the Commission was only authorized to approve a marketing plan if after a public hearing it found that the plan carried out the objectives of California's Prorate Act.[106] The Commission also had the ability to modify a proposed marketing plan to ensure it achieved those objectives.[107] So although the plan was only implemented upon the vote of 65% of active producers, the procedures of the Act ensured that the plan that was subject to the vote reflected the policy of the state.[108] In light of these facts, it is plausible that the current Supreme Court would find that immunity was appropriate in light of the active supervision of the state in overseeing and approving the marketing plans at issue. Thus, the Court's decision in *NC Dental* may not in fact be based upon a ''serious misunderstanding of the state-action'' doctrine as the Dissent contends and instead may actually reflect a more nuanced and sophisticated understanding of the doctrine.[109]

d. Practical implications of the *NC Dental* Decision?

As the Dissent pointed out, the Court's decision in *NC Dental* will necessarily impact the regulation of professions by states. Indeed, the Court's decision requires that a non-market participant official of the state meaningfully oversee the activities of occupational licensing boards if the state wants to ensure that a board controlled by active market participants is insulated from liability. In the alternative, states could also amend their acts to ensure that non-marking participants also serve on licensing boards such that those boards cannot be said to be controlled by active market participants. Although the *NC Dental* decision mandates change, it is unclear from the decision what type of supervising official would be appropriate, what level of supervision would be adequate and what is the ideal composition of licensing boards for state action immunity purposes. It would not be surprising in most, if not all cases, new legislation by states to define the adjudicatory functions of occupational licensing boards will be a necessary response to the *NC Dental* decision. As the Dissent rightly points out, the ''answers to these questions are not obvious'' and will most likely be ''worked out by the lower courts and the Federal Trade Commission.''[110]

[103] *Parker*, 317 U.S. at 347-48.
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *NC Dental*, 135 S. Ct. at 1117.
[110] *Id.* at 1123.

Another implication of the Court's decision is that qualified individuals may be discouraged by the prospect of antitrust liability from serving on state agencies that regulate their own occupations. As the Dissent points out this may ''compromise the State's interest in ''sensibly regulating a technical profession.''[111] The Supreme Court's answer to this problem is to encourage states to provide for the ''defense and indemnification of agency members in the event of litigation.''[112] The Supreme Court also suggests that this problem can be eliminated by states adopting clear policies to displace competition and further providing adequate active supervision of such agencies such that the *Midcal* test would be met. [113] While this solution may sound good in theory, it may be more difficult to implement in practice.

Lastly, the Supreme Court's commitment to active state supervisions fails to acknowledge a potential unfairness falling on active market participants. If active market participants, serving on a professional board, are not pursuing their private interests, they may be unfairly subject to liability because through no fault of their own if the state fails to provide supervision.[114] Is it fair to subject active market participants to liability just because the state statutory framework either provides no mechanism for supervision or the state fails to provide the supervision that was due? [115]

e.Are we moving towards the recognition of a market participant exception to state action immunity?

The Supreme Court's decision in *NC Dental* with its suspicion of active market participants suggests that the Court is coming closer to officially recognizing a market participant exception to the state action immunity doctrine.[116] The routes of such an exception can be found in the Court's landmark decision in *Parker* and its progeny. In *Parker*, the Court stated that ''True, 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 . . . and we have no question of the state or its municipality becoming a participant in a private agreement or combination by oth-

[111] *Id.* at 1122.
[112] *Id.* at 1115.
[113] *Id.*
[114] A good example of this scenario involved the FTC's action to invalidate negative option tariff filings. *See Federal Trade Commission v. Ticor Title Insurance Co.*, 504 U.S. 621 (1992).
[115] The FTC has been on the forefront of the efforts to challenge and develop the state action immunity doctrine. *See, e.g., Asheville Tobacco Board of Trade Inc. v. F.T.C.*, 263 F.2d 502 (4th Cir. 1959); *In re Massachusetts Board of Registration in Optometry*, 110 FTC 549 (1988); *Federal Trade Commission v. Ticor Title Insurance Co.*, 504 U.S. 621 (1992); *F.T.C. v. Phoebe Putney Health System Inc.*, 133 S. Ct. 1003, 2013 BL 41069 (2013).
[116] *See* Robert M. Langer & Peter A. Barile III, *Can the King's Physician (Also) Do No Wrong? Health Care Providers And a Market Participation Exception to the State Action Immunity Doctrine,* Mathew Bender's Antitrust Report, October 1, 1999, for an examination on the impact of Supreme Court and federal precedent upon the possibility of a market participation exception to the state action immunity doctrine, found at: http://www.wiggin.com/files/langer21.pdf.

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ers for restraint in trade.''[117] In *City of Lafayette v. Louisiana Power & Light Co.*, the Court again suggested that *Parker* immunity would not apply to a ''proprietary enterprise with the inherent capacity for economically disruptive anticompetitive effects . . . because it is organized under state law as a municipality.''[118] Then in *City of Columbia v. Omni Outdoor Advertising, Inc.*, the Court opined that ''with the possible market participant exception, any action that qualifies as state action is *ipso facto* exempt from the operation of antitrust laws.''[119]

The holding in *NC Dental* that even those active market participants chosen by a Governor cannot be trusted to regulate their own markets suggests that the Supreme Court is one step closer to officially recognizing a market participant exception to state action immunity.[120] Indeed, the Supreme Court, in describing the hallmarks of sufficient state supervision, noted that an adequate state supervisor for purposes of the doctrine ''may not itself be an active market participant.''[121] It logically follows that if the state cannot actively supervise itself if it is acting as a market participant, it cannot also be entitled to immunity when it restrains trades in its capacity as a market participant.

In fact, the rational of *NC Dental* may result in the de facto recognition of a market participant exception to immunity. Under the rationale of *NC Dental* when the state acts as a market participant it would be doing so in a nonsovereign capacity. To be entitled to immunity as a nonsovereign, the state would have to satisfy both of *Midcal*'s prongs. However, it is hard to imagine a scenario in which the state would be able to satisfy *Midcal*'s active supervision requirement particularly where the Court has held that an adequate state supervisor may not also be an active market participant. Because the state could not supervise itself in this scenario, it would likely never be entitled to immunity under the rationale of *NC Dental*.

V. Conclusion

The Court's decision creates significant uncertainty from both a legal and practical perspective. It remains to be seen how long it will take for subsequent litigation to clarify what the Court has intentionally left for another day. As has famously been said so many times before, whatever is good for lawyers is often bad for everyone else. Verbum sat sapienti est.[122]

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[117] *Parker*, 317 U.S. at 351-52.

[118] *City of Lafayette*, 435 U.S. 389, 418 (1978) (Burger, C.J., concurring).

[119] *Omni*, 499 U.S. at 379.

[120] To understand the need for a market participant exception to the state action immunity doctrine, it is important to remember that the Supreme Court has already carved out a market participant exception to the dormant Commerce Clause. As discussed in the Langer and Barile article, *supra* note 118 at 10, there are two ways a state can violate the dormant Commerce Clause: by (1) discriminating against other states; or by (2) placing an excessive burden upon interstate commerce. The market participant doctrine provides to states a limited exception to the prohibitions of the dormant Commerce Clause. The exception provides that ''[w]here a state acts not as a market regulator, but as a market participant, its activities will not violate the dormant Commerce Clause,'' *supra*, note 118 at 11. If there were no market participant exception to *Parker* immunity, then a state, acting as a market participant, would essentially have a free pass to engage in anticompetitive conduct. If a state can act to either discriminate against other states or place an excessive burden on interstate commerce at the very least the state should be subject to regulation under the Sherman Act.

[121] *NC Dental*, 135 S. Ct. at 1116-17.

[122] ''A word to the wise is sufficient.''