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## Antitrust and the Politics of State Action

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## ANTITRUST AND THE POLITICS OF STATE ACTION

THOMAS B. NACHBAR\*

### ABSTRACT

*In North Carolina State Board of Dental Examiners, the Court refused to exempt the board from the second element of Parker immunity—active supervision by the state—because the Board was made up largely of “active market participants.” This Article argues that the “active market participant” rule laid out in North Carolina State Board, while intuitively appealing, ignores important political values represented by antitrust law, values most evident in the context of state action immunity. By focusing on the potential market harm from self-interested regulators, the Court ignored a series of political harms inherent in the structure of the North Carolina State Board of Dental Examiners, harms having little to do with whether the members of the board were market participants. The result in North Carolina State Board is misguided, but should not be surprising. It is the natural result of the Court’s reliance on an economically oriented test—the Midcal/Hallie framework—for what is a political rather than an economic problem. Thus, North Carolina State Board is not so much a misapplication of the modern antitrust law of state action as it is a demonstration of how state action law has gone awry and how the Court can return it to its political roots.*

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## INTRODUCTION

In *North Carolina State Board of Dental Examiners v. FTC*,<sup>1</sup> the Supreme Court considered whether attempts by North Carolina's dental regulatory board (the Board) to prevent nondentists from engaging in teeth whitening should be immune from antitrust scrutiny by virtue of the doctrine of "state action immunity" first developed in *Parker v. Brown*.<sup>2</sup> As established by North Carolina law, an overwhelming majority of the Board (six of eight seats) must be dentists who are elected by the state's licensed dentists.<sup>3</sup> The Board is charged with the regulation of dentistry in the state, which includes the prohibition of unlicensed dentistry.<sup>4</sup> Consequently, the state's dentists are effectively in control not only of the practice of dentistry but also of defining what constitutes dentistry.<sup>5</sup> This means that their regulations can have considerable effects on nondentists, including both patients (who purchase the dental services regulated by the Board) and nondentist practitioners of similar services (who might be excluded by them).<sup>6</sup> That is exactly what happened in the case of teeth whitening, which the Board determined to be "the practice of dentistry" and therefore required a license from the Board to perform.<sup>7</sup>

When one considers the kind of regulatory power the Board wields, and its effects on nondentists,<sup>8</sup> it might seem a little strange to vest control of the Board exclusively in the state's dentists. Don't we all have a stake in the question of how dentistry is performed? Why should we nondentists be effectively excluded from regulating such a substantial part of our economy?

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1. 135 S. Ct. 1101, 1107-08 (2015).

2. 317 U.S. 341 (1943). I will alternatively refer to the doctrine as "state action immunity" and "*Parker* immunity," as the Court itself has done over time.

3. *N.C. State Bd.*, 135 S. Ct. at 1108. A dental hygienist, who is elected by the state's licensed hygienists, occupies one seat, and a "consumer" representative, who is appointed by the Governor, occupies the final seat. *Id.*

4. *Id.* at 1107.

5. *See id.* at 1107-08.

6. *See id.*

7. *See id.* at 1108.

8. *See id.* at 1107-08.

The Court in *North Carolina State Board* analyzed the problem from the standpoint of self-dealing; it was problematic that the Board was made up largely of practicing dentists.<sup>9</sup> But that misses the point. The problem is not that the dentists are self-interested; the problem is that in a republican government it is the people, not its dentists, who set regulatory policy.<sup>10</sup> Imagine, if you will, that the State of North Carolina had vested exclusive regulatory authority over dentistry in the state's *lawyers*. That would solve the problem of self-interest, but it would still be completely illegitimate, not as a matter of competition regulation but rather as a matter of political control in a democratic society.<sup>11</sup>

The Court's error in *North Carolina State Board* was not a singular event; it was the natural consequence of how the state action doctrine has developed over time, and particularly how it has come to be dominated by the two-prong test the Court announced in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*<sup>12</sup> Over time, the Court has become increasingly concerned about the competitive harms that flow from state regulations that, by virtue of the state action doctrine, are immune from review under the federal antitrust laws.<sup>13</sup> Although antitrust law is generally consumed with the problem of protecting competition,<sup>14</sup> that concern is misplaced when it comes to the state action doctrine.

The state action doctrine is not merely unconcerned with competition; the destruction of competition is a fundamental assumption of the state action doctrine. Rather than being concerned about the likely effects on competition or allocative efficiency (as are most aspects of modern antitrust doctrine), state action is concerned about the nature of governmental action. The motives of the relevant actors, self-interested or otherwise, are irrelevant. *North*

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9. *See id.* at 1114.

10. *See* Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749 (1994).

11. *See id.*

12. *See* 445 U.S. 97, 105 (1980).

13. *See N.C. State Bd.*, 135 S. Ct. at 1113.

14. *See Bd. of Trade of City of Chi. v. United States*, 246 U.S. 231, 238 (1918) ("The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.").

*Carolina State Board's* mistaken introduction of those motives into its state action analysis, while possibly saving us from avaricious regulators and lobbyists, will only further cloud the application of the doctrine. The state action doctrine has become increasingly muddled as the Court has allowed concerns over the competitive effects of state regulation to push it toward a competition-focused analysis—the same analysis that led to the confused, self-interest approach in *North Carolina State Board*. Recognizing that state action is a doctrine that represents political rather than economic values will allow the Court to return to its original conception of state action, one that fits within a broader, political understanding of the federal constitutional structure. Resituating state action within its political dimensions demonstrates the connections between state action and other politically salient aspects of not only antitrust law but also constitutional law more generally. Doing so will not only rationalize state action within antitrust law, but it will also do so in a way that makes sense in the larger constitutional order.

This Article proceeds by reviewing the development of the state action doctrine from its origins in *Parker* as a doctrine about deference to state regulation through the Court's adoption of the modern test for state action in *Midcal*, tracing the shift away from a political model of state action that focused on state power toward an economic one that could be more generally applied. After explaining how state action operates differently for governmental and non-governmental entities, this Article returns to *North Carolina State Board* to consider it as a matter of first principles. Armed with the lessons of *Parker*, this Article considers how a political understanding of state action can work and can connect antitrust to other areas of law concerned with state power, especially constitutional law. This Article then considers the implications of this new understanding, followed by a brief conclusion.

### I. FROM *PARKER* TO *NORTH CAROLINA STATE BOARD*

If the structure of the Board is indeed so odd from the perspective of political control, then why did the Court rule on the self-interest

rationale,<sup>15</sup> rather than on the infinitely more intuitive rationale of the Board's lack of political legitimacy? When one considers the origins of the modern state action doctrine, it becomes easier to see how and why the Court veered far enough off course to adopt the rule it did in *North Carolina State Board*. As originally understood, state action was fundamentally a doctrine about precisely what it says: the action of states.<sup>16</sup> Later, when the Court attempted to extend the doctrine to private firms, it adopted a test—the two-element combination of (1) a clearly articulated state policy to displace competition, and (2) active supervision by the state that has become closely identified with *Midcal*.<sup>17</sup> That test, which focused on the economic policy underlying the regulation while requiring active state supervision in order to avoid the problems of regulatory capture, effectively hid the political origins of the test and caused the Court to focus on the economic rather than political consequences of regulation.<sup>18</sup> The Court then modified the *Midcal* test in order to reapply it to political rather than private actors in *Town of Hallie v. City of Eau Claire*,<sup>19</sup> effectively incorporating the concerns over the economic harms of regulatory capture into state action writ large, forgetting the political origins of the doctrine in the process. By the time the Court applied the doctrine in *North Carolina State Board*, the *Midcal/Hallie* framework had completely subsumed the original political understanding of state action, causing the Court to worry about problems of regulatory capture instead of democratic legitimacy.<sup>20</sup>

#### A. Putting the State Back in State Action

##### 1. The Parker Era: A State Actor?

Although state action has its canonical origins in *Parker v. Brown*,<sup>21</sup> that case was originally decided not as an antitrust case

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15. *N.C. State Bd.*, 135 S. Ct. at 1114.

16. See *Parker v. Brown*, 317 U.S. 341, 352 (1943).

17. 445 U.S. at 105.

18. See *id.* at 105-06.

19. 471 U.S. 34, 46-47 (1985).

20. See *N.C. State Bd.*, 135 S. Ct. at 1112-14.

21. See, e.g., *Hoover v. Ronwin*, 466 U.S. 558, 567 (1984) (“The starting point in any

but rather as a *constitutional* challenge to the California raisin program<sup>22</sup> and was accordingly tried before a three-judge district court.<sup>23</sup> The Supreme Court did not even consider the antitrust question until the second time *Parker* was argued.<sup>24</sup>

The California scheme was complicated, but the statute was designed to limit the number of raisins on the market through a system of marketing rations combined with a “surplus pool” of reserves.<sup>25</sup> The statute authorized the creation of a state Agricultural Prorate Advisory Commission, which consisted of eight governor-appointed members who were confirmed by the state senate along with the state Director of Agriculture serving as an *ex officio* member.<sup>26</sup> On petition of ten relevant producers, the Commission would hold a hearing and, after making relevant findings, would form a “program committee” from “among nominees chosen by the qualified producers within the zone.”<sup>27</sup> That program committee, in turn, would formulate a “proration marketing program” that, after approval by both the Commission and 65 percent of the relevant producers, would then come into force and be administered by the relevant program committee.<sup>28</sup> Brown, aggrieved by the program, decided to sell raisins in excess of his ration, prompting state authorities to threaten prosecution.<sup>29</sup> He then sued to enjoin the program’s operation.<sup>30</sup>

Consequently, although *Parker* gave birth to the modern doctrine of state action immunity, the question in *Parker* was not whether the State of California, the Agricultural Prorate Advisory Commission, the relevant “program committee,” the raisin farmers, or Parker (the Director of Agriculture) were liable for violating the Sherman Act.<sup>31</sup> Indeed, the Act went completely unmentioned in the

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analysis involving the state-action doctrine is the reasoning of *Parker v. Brown*.”).

22. See *Brown v. Parker*, 39 F. Supp. 895, 896 (S.D. Cal. 1941).

23. See *Parker v. Brown*, 317 U.S. 341, 344-45 (1943).

24. See *id.* at 344.

25. *Id.* at 346-48.

26. *Id.* at 346.

27. *Id.*

28. *Id.* at 347.

29. See *id.* at 349.

30. *Id.* at 344.

31. Cf. *id.*

district court opinion<sup>32</sup> and unargued in the original merits briefs.<sup>33</sup> Rather, the question originally before the Court was whether the California act was unconstitutional.<sup>34</sup> On reargument, the Court added the questions of whether the California act was preempted by either the Sherman Act or the Agricultural Marketing Agreement Act of 1937.<sup>35</sup> But even in the final case, there was never any question that any of the defendants might be liable under the Sherman Act, and thus no question of their immunity under the state action doctrine.<sup>36</sup>

Because *Parker* was a case about state power as opposed to anti-trust liability, the Court naturally focused on the interests of the state. As the Court described the Sherman Act's effect—or lack thereof—*on the state*:

We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.<sup>37</sup>

The Court did address the possibility of immunity for private entities, albeit in the course of explaining that all of the relevant acts were those of the state.<sup>38</sup> The treatment of private immunity

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32. See *Brown v. Parker*, 39 F. Supp. 895 (S.D. Cal. 1941); see also 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, 1105 (1981) (“[T]he *Parker* Court did not base its construction of the Sherman Act on legislative history, but instead derived a presumption of congressional intent from the concept of federalism.”).

33. See generally Brief of Appellee, *Parker v. Brown*, 317 U.S. 341 (1943) (No. 46), 1942 WL 53736; Brief on Behalf of Appellants, *Parker v. Brown*, 317 U.S. 341 (1943) (No. 46), 1942 WL 53737.

34. See *Brown*, 39 F. Supp. at 896.

35. *Parker*, 317 U.S. at 344.

36. See *id.*

37. *Id.* at 350-51.

38. See *id.* at 351-52 (“[W]e have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade.”). The Court compared the case to *Union Pacific Railroad Co. v. United States*, 313 U.S. 450, 451-53 (1941), in which the city of Kansas City, Kansas was alleged to have violated the Elkins Act

based on the state program was short and stark: There was none. “[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.”<sup>39</sup>

That might initially seem in tension with the state action doctrine as we currently understand it. It would be a pretty narrow doctrine if it only applied to the states themselves. The whole point of the state action doctrine is to allow private actors to avoid liability for conduct that would otherwise violate the Sherman Act, isn’t it?

The answer to that question seems to be “no,” although the Court has admittedly struggled to articulate it in such simple terms.

During the early development of the *Parker* doctrine, the Court drew distinctions specifically based on the identity of the party engaged in the challenged conduct. *Parker* itself, with the Court’s emphasis on the state’s singular role in the restraint, was such a case.<sup>40</sup> But there were others. In *Cantor v. Detroit Edison Co.*, a plurality of the Court refused to extend *Parker* immunity to an electric utility on the singular theory that *Parker* is limited to state actors:

Unquestionably the term “state action” may be used broadly to encompass individual action supported to some extent by state law or custom. Such a broad use of the term, which is familiar in civil rights litigation, is not, however, what Mr. Chief Justice Stone described in his *Parker* opinion. He carefully selected language which plainly limited the Court’s holding to official action taken by state officials.<sup>41</sup>

Conversely, the next year in *Bates v. State Bar of Arizona*, the Court distinguished *Cantor* and identified the supervisory role the Arizona

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by effectively providing rebates to railroad customers in exchange for moving their livestock market to the city. See *Parker*, 317 U.S. at 351-52.

39. *Id.* at 351.

40. See *id.* at 352.

41. 428 U.S. 579, 590-91 (1976) (plurality opinion) (footnote omitted). Indeed, the Court’s emphasis on the private character of the utility prompted Justice Stewart to declare that *Parker* immunity would essentially become a nullity, “circumvented by the simple expedient of suing the private party against whom the State’s ‘anticompetitive’ command runs.” *Id.* at 616-17 n.4 (Stewart, J., dissenting).

Supreme Court wielded over the Arizona State Bar to render the bar an “agent” of the Supreme Court.<sup>42</sup> That agency relationship made not the bar—but rather the state—the “real party in interest,” effectively making the claims “against the State” and therefore immune under *Parker*.<sup>43</sup>

The distinction between state and private actors with regard to a doctrine called “state action” certainly has intuitive appeal, and, as the Court frequently pointed out, it cannot possibly be the case that states can immunize private firms from federal antitrust liability simply by declaring that it is a state policy to do so.<sup>44</sup> That theory would allow the states to confer immunity on state corporations against any number of federal laws, a nonsensical result.<sup>45</sup>

Another way to look at state action is through the lens of conduct—the conduct ostensibly protected by the state action. In *Schwegmann Bros. v. Calvert Distillers Corp.*, a Louisiana statute allowed for enforcement of resale price maintenance agreements against both signatories and nonsigning distributors so long as the manufacturer had an agreement with one distributor.<sup>46</sup> The Court held that the state’s enabling of a private vertical price restraint (which at that time constituted a per se violation, albeit with an exception for state regulation as to signatories from the Miller-Tydings Act) essentially “demands private conduct which the Sherman Act forbids.”<sup>47</sup> Similarly, in *Rice v. Norman Williams Co.*, in which a state statute permitted the enforcement of vertical non-price restraints against nonsigners, the Court held that the statute was not preempted but still would not receive state action immunity, as “[t]he manner in which a distiller utilizes the designation statute and the arrangements a distiller makes with its wholesalers will be subject to Sherman Act analysis under the rule of reason.”<sup>48</sup>

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42. 433 U.S. 350, 359-61 (1977).

43. *Id.* at 361-63.

44. See *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980) (“The 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.”).

45. See *N. Sec. Co. v. United States*, 193 U.S. 197, 346 (1904) (“It cannot be said that any State may give a corporation, created under its laws, authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress.”).

46. 341 U.S. 384, 386-87 (1951).

47. *Id.* at 388-89.

48. 458 U.S. 654, 661-62 (1982).

Thus, in cases where the Court considered the state action to be the enforcement of discretion exercised by private actors, there was no state action immunity. But that is simply another way of saying that the relevant act—the act of discretion—is located in private rather than public hands. Discussing *Schwegmann* in *Fisher v. City of Berkeley*, Justice Marshall described the discretion retained by the distributors in *Schwegmann* as making “it impossible to characterize the regulation as unilateral action by the State of Louisiana.”<sup>49</sup> Even if looked at from the perspective of conduct, the focus was on the identity of the relevant actor engaging in that conduct. If the body exercising discretion was the state, then state action immunity applied; if not, then it didn’t.

## 2. Midcal’s *Turn*

In 1980, the Court reconsidered the question of when state action immunity might apply to private actors. In *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, the Court considered a California law requiring producers to post a “fair trade contract” specifying a wholesale resale price and then required all wholesalers in the region to charge no less than that price.<sup>50</sup> Essentially, the statute required minimum resale price maintenance, which was at the time a per se violation of Section 1 of the Sherman Act.<sup>51</sup> The scheme did not set resale prices—it left the price setting to the individual producer and then required all to comply with that resale price.<sup>52</sup> The case arose when the State of California brought an action against Midcal for violating the program by selling twenty-seven cases of Gallo wine at a price below the Gallo Winery’s posted prices.<sup>53</sup> Midcal responded by filing a writ of mandate in the California Court of Appeals seeking to enjoin operation of the state’s resale price maintenance program as conflicting with the Sherman Act.<sup>54</sup>

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49. 475 U.S. 260, 268 (1986).

50. 445 U.S. 97, 99-100 (1980).

51. *Id.* at 99-100.

52. *Id.* at 100.

53. *Id.*

54. *Id.*; see also *Midcal Aluminum, Inc. v. Rice*, 153 Cal. Rptr. 757, 758-59 (Ct. App. 1979) (“[P]etitioner is placed in the untenable position of having to choose to obey possibly

For the California Court of Appeals, the case was a straightforward one. The California Supreme Court had recently invalidated the California program as violating the Sherman Act with regard to wholesale price maintenance of distilled spirits.<sup>55</sup> The only real question was whether to extend the California Supreme Court's ruling from wholesale price maintenance for distilled spirits to retail price maintenance for wine, which the California Court of Appeals did, finding the two cases indistinguishable.<sup>56</sup> The State was happy to let that decision stand, but the California Retail Liquor Dealers Association was not. The Association intervened and brought the question to the U.S. Supreme Court.

In its survey of the state action case law, Justice Powell's opinion discerned "two standards for antitrust immunity under *Parker v. Brown*. First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself."<sup>57</sup> This two-pronged test has become the standard inquiry for state action cases.<sup>58</sup> The Court found the first prong satisfied because the California statute so clearly required resale price maintenance; the second prong was not satisfied because state regulators did not oversee the setting of prices—that was left entirely in private hands.<sup>59</sup>

That *Midcal* has become the standard for whether private entities can receive *Parker* immunity is quizzical given the nature of the case. As in *Parker* (and unlike in *North Carolina State Board*), the only action implicating the Sherman Act was an injunction against the operation of the State regime, not civil or criminal liability for private entities participating in it.<sup>60</sup> *Midcal* was not an action against a private entity, nor did any private entity seek *Parker* immunity in the case.<sup>61</sup> It was an action brought by a private entity

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conflicting federal and state laws and face a penalty under the one it chooses to disobey.”).

55. *Rice v. Alcoholic Beverage Control Appeals Bd.*, 579 P.2d 476, 494-95 (Cal. 1978).

56. *Midcal*, 153 Cal. Rptr. at 760-61.

57. *Midcal*, 445 U.S. at 105 (internal quotation marks omitted).

58. *See, e.g.*, *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1111-12 (2015).

59. *Midcal*, 445 U.S. at 105-06.

60. *Compare id.* at 100, *and Parker v. Brown*, 317 U.S. 341, 348-49 (1943), *with N.C. State Bd.*, 135 S. Ct. at 1108-09.

61. *See Midcal*, 445 U.S. at 99.

against the state, and, as in *Parker*, it was the state, not a private party, that sought the benefits of the immunity.<sup>62</sup>

What has generally come to be called the “*Midcal*” formulation was not itself a product of *Midcal*. *Midcal* cited Justice Brennan’s plurality opinion in *City of Lafayette v. Louisiana Power & Light Co.*, a case dealing with state action immunity for a city.<sup>63</sup> *City of Lafayette*, in turn, cited *Bates v. State Bar of Arizona* for the standard,<sup>64</sup> even though the Court decided *Bates* not based on clear articulation plus active supervision, but rather on the more categorical basis that the acts ostensibly of the State Bar were in actuality the acts of the State of Arizona,<sup>65</sup> albeit by virtue of the Arizona Supreme Court’s supervision of those acts.<sup>66</sup>

Thus, what has become the standard for private state action immunity from antitrust liability had its origins in a case about whether a public actor’s enforcement of a state regulatory scheme was preempted by the Sherman Act. Moreover, *Midcal* announced the new rule, the full dimensions of which were hypothetical because the rule had not been satisfied in *Midcal* itself, without any apparent recognition or intent that it would apply to private rather than public actors.<sup>67</sup> The Court recognized the state statute would allow conduct by private parties that would otherwise violate the Sherman Act,<sup>68</sup> but it never considered the possibility that those private parties might be liable for violating the Sherman Act. The question in the case was whether they had violated the California liquor distribution statute, not the Sherman Act.<sup>69</sup>

### 3. Cities and the Lost Public/Private Distinction

Given their somewhat ambiguous position on the state-private continuum, cities present a particular problem of classification.

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62. See *id.* at 102-03; *Parker*, 317 U.S. at 348-51.

63. See *Midcal*, 445 U.S. at 105 (citing *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978) (plurality opinion)); *City of Lafayette*, 435 U.S. at 391.

64. *City of Lafayette*, 435 U.S. at 410 (citing *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977)).

65. See *supra* notes 42-43 and accompanying text.

66. See *Bates*, 433 U.S. at 361.

67. See *Midcal*, 445 U.S. at 105-06.

68. *Id.* at 103.

69. See *id.* at 100.

Cities are neither “private” nor the “state,” forcing the Court to consider the grey area between those binary extremes. In *City of Lafayette*, a plurality of the Court relied on its general understanding of the city versus state distinction to conclude that cities do not necessarily get *Parker* immunity the way states do.<sup>70</sup> When the Court decided *Community Communications Co. v. City of Boulder* in 1982, the *Midcal* formulation was extant, and the Court considered the question by applying *Midcal* to conclude that a general home-rule grant of authority did not satisfy the clear articulation element of the inquiry.<sup>71</sup>

By the time of *Town of Hallie v. City of Eau Claire*, the *Midcal* test had become a given, and the only question was how *Midcal* would apply to a city.<sup>72</sup> The Court decided that only the first *Midcal* factor—clear articulation—applied to cities, removing the active supervision requirement.<sup>73</sup> Thus in *Hallie*, the development came full circle. A rule the Court developed to apply only to public entities had been advanced to apply to private ones (except it didn’t), and then the Court modified the rule in order to make sense in the context of a politically accountable entity such as a city. By this point, though, the underlying inquiry—whether the act could fairly be attributed to the state—had been lost entirely and had been replaced with the *Midcal* test, albeit modified for cities.<sup>74</sup> What was also lost was any real attempt to ask the question the Court asked in *Parker*, or for that matter, that the California Supreme Court asked in its own cases striking down the California liquor resale price maintenance regime: whether the resale price maintenance regime was “a sovereign act of the state so as to exempt it from the Sherman Act.”<sup>75</sup>

In addition to finding the active supervision requirement inapplicable to cities, *Hallie* adopted what can only be described as

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70. See *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 411-13 (1978) (plurality opinion).

71. See *Cmty. Commc’ns Co. v. City of Boulder*, 455 U.S. 40, 54-56 (1982).

72. 471 U.S. 34, 39-40 (1985).

73. *Id.* at 47.

74. See *id.*

75. *Rice v. Alcoholic Beverage Control Appeals Bd.*, 579 P.2d 476, 485 (Cal. 1978); see also *Parker v. Brown*, 317 U.S. 341, 352 (1943) (finding the California liquor board laws valid because the Sherman Act works only as “a prohibition of individual and not state action”).

a generous interpretation of “clearly articulat[ed]” as “foreseeable.”<sup>76</sup> By the time of *FTC v. Phoebe Putney Health System, Inc.*, which dealt with a different kind of nonstate public entity with its own corporate existence distinct from the state (a hospital authority, which could be organized under Georgia law by a city or by a combination of them<sup>77</sup>), the state action doctrine had become “disfavored, much as are repeals by implication.”<sup>78</sup> The Court dialed back the generosity of its “foreseeability” interpretation of clear articulation while assuming the hospital authorities to be “akin” to political subdivisions and therefore also free of the active supervision requirement.<sup>79</sup>

Of course, state action immunity is nothing like a “repeal[] by implication”;<sup>80</sup> it reflects a decision that regulatory acts of states are different in kind than acts by private market participants.<sup>81</sup> One might conceive of the immunity as a repeal by implication by absolving private firms of antitrust liability (as *FTC v. Ticor Title Insurance Co.*, the case the Court quoted in *Phoebe Putney*, did),<sup>82</sup> but not when applying the doctrine to allow the enforcement of state regulation by public entities. Saying that state action is “disfavored” even when the act in question is clearly public regulation is a little like saying that “federalism is disfavored.”

*Phoebe Putney*’s failure to recognize the fundamentally different effects of state action on public as opposed to private entities is a direct consequence of *Midcal*’s unwitting conflation of the treatment of private and public entities. The result has been the loss of any real connection between “state action immunity” and actual state action.<sup>83</sup>

Between *Parker* and *North Carolina State Board*, there was only one case in which the Court extended immunity to an act involving agreement by private firms and not otherwise expressly authorized

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76. See 471 U.S. at 42-43.

77. See 568 U.S. 216, 220 (2013).

78. *Id.* at 225 (quoting *FTC v. Ticor Title Ins.*, 504 U.S. 621, 636 (1992)).

79. *Id.* at 226 n.5, 226-28.

80. *Id.* at 225.

81. See *Parker v. Brown*, 317 U.S. 341, 352 (1943).

82. See *Ticor Title*, 504 U.S. at 638-40.

83. *Phoebe Putney*, 568 U.S. at 225 (citing *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980)).

by federal statute.<sup>84</sup> the collective ratemaking at the heart of *Southern Motor Carriers Rate Conference, Inc. v. United States*.<sup>85</sup> *Southern Motor Carriers* pertained to the setting of rates for intrastate truck transportation in a number of states.<sup>86</sup> The carriers used joint rate bureaus in order to collectively propose uniform rates, which state public utility commissions then approved.<sup>87</sup> In the context of rejecting an “inflexible ‘compulsion requirement’” in favor of the *Midcal* two-pronged test,<sup>88</sup> the Court held that the carriers were immune from antitrust scrutiny.<sup>89</sup> But it is important to note not only that the Court’s ruling was limited to the compulsion requirement<sup>90</sup> but also that the government conceded the active supervision element in *Southern Motor Carriers*.<sup>91</sup> Seven years later, in *Ticor Title*, the approval of rates by state commissions without meaningful review was itself rejected for failing to satisfy the active supervision requirement<sup>92</sup> conceded in *Southern Motor Carriers*,<sup>93</sup> leaving considerable doubt whether the rule of *Southern Motor Carriers* has any practical applicability at all.

In the end, the only real work that *Parker* immunity seems to do is for *public* entities—albeit ones that do not rise to the status of the state itself—including the cities in *City of Lafayette*, *Community Communications*, and *Hallie*, and the hospital authority in *Phoebe Putney*.<sup>94</sup> But the one thing that most completely determines

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84. *E.g.*, McCarran-Ferguson Act, ch. 20, 59 Stat. 33 (1945) (current version at 15 U.S.C. §§ 1011-1015 (2012)); Reed-Bulwinkle Act, ch. 491, 62 Stat. 472 (1948) (current version at 49 U.S.C. § 10706 (2012)); Miller-Tydings Act, ch. 690, 50 Stat. 693 (1937) (codified as amended at 15 U.S.C. § 1 (1940)) (repealed 1975).

85. 471 U.S. 48, 66 (1985).

86. *Id.* at 50.

87. *Id.* at 52. The carriers were free to deviate from the joint rates and submit an independent rate proposal to the relevant state commission. *Id.*

88. *Id.* at 62.

89. *Id.* at 65.

90. *Id.* at 62. *But see id.* at 61 (“[W]e hold *Midcal*’s two-pronged test applicable to private parties’ claims of state action immunity.”).

91. *Id.* at 62.

92. *FTC v. Ticor Title Ins.*, 504 U.S. 621, 638 (1992).

93. *Id.* at 639 (citing *Southern Motor Carriers*, 471 U.S. at 62, 66) (noting that supervision had been conceded in *Southern Motor Carriers* and that the Court had undertaken “no real examination of the active supervision aspect of the case”).

94. *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225 (2013); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38 (1985); *Comty. Commc’ns Co. v. City of Boulder*, 455 U.S. 40, 50-51 (1982) (quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 412-13

whether (and the degree to which) an entity benefits from *Parker* immunity is its degree of identity with the state.<sup>95</sup> Thus, when Justice Scalia had to describe the state action doctrine in *City of Columbia v. Omni Outdoor Advertising, Inc.*, he correctly distinguished private action, and described *Parker* exclusively as an immunity of the state.<sup>96</sup>

*Midcal* represented a break in the development of state action immunity, even if it was, as I would argue, a somewhat inadvertent one. Decided at a time when antitrust scholars and judges were developing a more sophisticated understanding about the economics of regulation,<sup>97</sup> *Midcal* focused on the potential problems inherent in regulation, such as regulatory capture, and problems of agency between states and private parties when the state had adopted anticompetitive policies for one reason, but the private actors would use those anticompetitive policies for their own financial gain.<sup>98</sup> In so doing, the Court shifted the inquiry away from the previous focus on whether an act could rightly be attributed to the state<sup>99</sup> and replaced it with an artificial inquiry that came to dominate state action cases, even as the Court discovered that one half of it (the active supervision requirement) should not apply to any entity actually covered by the doctrine.<sup>100</sup>

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(1978) (plurality opinion); *City of Lafayette*, 435 U.S. at 416.

95. See *Phoebe Putney*, 568 U.S. at 228.

96. *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 379 (1991) (“While *Parker* recognized the States’ freedom to engage in anticompetitive regulation, it did not purport to immunize from antitrust liability the private parties who urge them to engage in anticompetitive regulation.”).

97. See Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23, 27 (1983); John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 723-28 (1986).

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

99. See *Parker v. Brown*, 317 U.S. 341, 350-51 (1943).

100. See *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985).

*B. The Antitrust Ecosystem of Political Immunities**1. Protections for Private Parties*

If the core of *Parker* immunity is the public nature of the recipient of the immunity, what then of private actors subject to state anticompetitive regulation? After all, it seems unfair (as posed by the California Court of Appeals in *Midcal*) to hold private parties liable under the federal antitrust laws if they are compelled to violate those laws by inconsistent state regulation.<sup>101</sup> There is an answer for those private parties, but it does not come from *Parker*.

The first way private parties might avoid antitrust liability by virtue of compliance with conflicting state law is substantive—by failing to enter into an agreement to restrain competition. *Fisher v. City of Berkeley* involved a rent-control ordinance adopted by the city council of Berkeley, California.<sup>102</sup> A group of landlords, recognizing that the ordinance was necessarily restraining rents below competitive levels, sued, arguing (among other things) that the ordinance was preempted by Section 1 of the Sherman Act.<sup>103</sup>

Justice Marshall, writing for the Court, did not see how the ordinance could be preempted because he did not see any conflict between the ordinance and Section 1.<sup>104</sup> Of course, the ordinance affected competition—indeed, its restraint on prices would constitute a *per se* violation if implemented by the landlords themselves.<sup>105</sup> But more than an anticompetitive effect is necessary for a Section 1 violation; that effect must be the product of a “contract, combination ..., or conspiracy.”<sup>106</sup> As understood by the Court, regulatory mandates of the state are unilaterally imposed, and as such they lack the element of agreement necessary for a Section 1 violation.<sup>107</sup>

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101. See *Midcal Aluminum, Inc. v. Rice*, 153 Cal. Rptr. 757, 760-61 (Ct. App. 1979).

102. 475 U.S. 260, 261-62 (1986).

103. See *id.* at 264.

104. *Id.* at 270.

105. *Id.* at 266.

106. See Sherman Antitrust Act of 1890, 15 U.S.C. § 1 (2012); *Fisher*, 475 U.S. at 266 (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984)).

107. *Fisher*, 475 U.S. at 267; see *United States v. Colgate & Co.*, 250 U.S. 300, 306 (1919).

For private parties simply complying with mandatory state regulation, there is no potential for Section 1 liability because there is no agreement.<sup>108</sup> Many of the early cases approached the state action doctrine from just this angle, looking for state compulsion as an essential ingredient of a state action defense.<sup>109</sup> But from the perspective of private defendants, the better approach is Justice Marshall's.

But what of parties who do agree—who might even seek out and either band together to obtain anticompetitive state regulation or conspire with the government to obtain it? They cannot benefit from *Fisher* because they agreed.<sup>110</sup> For those private parties, antitrust provides a different but related immunity, one the Court developed in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*<sup>111</sup> and *United Mine Workers of America v. Pennington*.<sup>112</sup> The *Noerr/Pennington* doctrine protects action, even concerted action, directed at government officials to obtain regulation that produces anticompetitive advantages, and it stems from the recognition that virtually all lobbying efforts seek regulation that will harm competition in some way.<sup>113</sup> As Justice Scalia explained in *City of Columbia v. Omni Outdoor Advertising, Inc.*, the *Noerr/Pennington* doctrine recognizes that “the antitrust laws, ‘tailored as they are for the business world, are not at all appropriate for application in the political arena.’”<sup>114</sup>

*Omni Outdoor* demonstrates just how broad *Noerr/Pennington* immunity is, and how it works with *Parker* immunity. *Omni*, a billboard company seeking to enter the billboard market in Columbia, South Carolina, alleged a conspiracy between a dominant market incumbent (Columbia Outdoor) and members of the Columbia city council.<sup>115</sup> The scheme allegedly involved meetings between the incumbent and city council members covered over by a series

108. See *Fisher*, 475 U.S. at 267.

109. See *id.*; *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 414 (1978) (plurality opinion).

110. See *supra* notes 106-07 and accompanying text.

111. 365 U.S. 127, 144-45 (1961).

112. 381 U.S. 657, 671 (1965).

113. See *id.*; *Noerr*, 365 U.S. at 144-45; Easterbrook, *supra* note 97, at 23 (“Regulation displaces competition. Displacement is the purpose, indeed the definition, of regulation.”).

114. 499 U.S. 365, 380 (1991) (quoting *Noerr*, 365 U.S. at 141).

115. *Id.* at 368.

of public hearings held in bad faith, leading the city to adopt zoning ordinances and other billboard regulations designed to prevent Omni from entering the market and to protect the monopoly position of the market incumbent.<sup>116</sup> The Court found that the firm's conduct was protected under *Noerr/Pennington* and posited it would be protected even if the firm had obtained the regulation through an act of conspiracy—an antitrust favorite—or some other wrongful or illegal act.<sup>117</sup>

The Court drew the connection to *Parker* explicitly, highlighting the different application of the two doctrines: “As we have described, *Parker* and *Noerr* are complementary expressions of the principle that the antitrust laws regulate business, not politics; the former decision protects the States’ acts of governing, and the latter the citizen’s participation in government.”<sup>118</sup> Just as public entities can avail themselves of state action immunity for their regulatory acts, private entities are protected either by their lack of agreement under *Fisher*,<sup>119</sup> or more generally, by the intervening regulatory act under *Noerr/Pennington*.<sup>120</sup> The doctrines fit together just that closely, one respecting the state’s role in government and the other respecting the citizen’s.

## 2. *Fitting the Pieces Together*

How do these sets of immunities and protections work together? It depends on who the relevant actor is. If the relevant actor is a governmental entity but not the state itself (such as a municipality), then there is limited state action immunity based on the connection between the regulation and the state, either under *Midcal/Hallie*<sup>121</sup> or by application of the earlier state action cases seeking to connect the regulation to the state, such as *Bates*.<sup>122</sup> If the relevant actor is

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116. *See id.*

117. *See id.* at 383-84.

118. *Id.* at 383.

119. *Fisher v. City of Berkeley*, 475 U.S. 260, 267 (1986).

120. *Omni Outdoor*, 499 U.S. at 383-84; *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 671 (1965); *see E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144-45 (1961).

121. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46-47 (1985); *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-06 (1980).

122. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 362-63 (1977).

not a governmental entity, then state action immunity is not available, but two other approaches are available: either the lack of agreement defense under *Fisher*<sup>123</sup> or, if there is agreement, the defense under *Noerr/Pennington*.<sup>124</sup>

Private parties do have a role in state action cases, but it's not by receiving immunity from antitrust liability. In true state action cases such as *Parker*, the private party doesn't have antitrust liability because its act is not a violation of the Sherman Act but rather is a violation of the state regime.<sup>125</sup> The private party's violation is by virtue of their insistence on hewing toward competitive markets, such as when Brown sold his raisins in defiance of the ration program—conduct that cannot possibly violate the Sherman Act.<sup>126</sup> Rather, the private party has likely violated the relevant state law, and it is not seeking immunity; instead, it is seeking an injunction against the state law's enforcement, which is a form of preemption.<sup>127</sup> In order for state action *immunity* to be on the table, the relevant actor has to be a governmental actor, which brings us back to the real question at issue in *North Carolina State Board*.<sup>128</sup>

### C. Applying *Parker* (and the Lessons of *Midcal*) to North Carolina State Board

With this fresh perspective, we can approach *North Carolina State Board* from the first principles of state action rather than by attempting to apply the narrow *Midcal* test of clearly articulated policy and active state supervision.

What can we draw from this?

As between the majority and dissent in *North Carolina State Board*, it seems the dissent came closer to asking the right question: Is the Board the state?<sup>129</sup> As the cases demonstrate, the availability

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123. 475 U.S. at 267.

124. *Omnipoint Outdoor*, 499 U.S. at 383-84; see *Pennington*, 381 U.S. at 671; *Noerr*, 365 U.S. at 144-45.

125. See *Parker v. Brown*, 317 U.S. 341, 352 (1943).

126. See *id.* at 349, 352.

127. See *id.* at 352.

128. See *supra* notes 1-2 and accompanying text.

129. *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1117-18 (2015) (Alito, J., dissenting).

of *Parker* immunity depends largely on where the actor falls on the private-state continuum, which ranges from purely private actors getting essentially no immunity to states themselves having broad immunity.<sup>130</sup>

That is not to say that Justice Alito took the right approach to answering that question. According to him, North Carolina's definition of the agency as a state agency, combined with finding the regulation of dentistry to be a matter of public health and granting the Board the power to make regulations and to sue in the name of North Carolina, should have been adequate to make it a state actor for immunity purposes.<sup>131</sup> Although he was careful to cite *Parker's* own limits on state conferrals of immunity and *Northern Securities*<sup>132</sup> to distinguish the North Carolina law from a simple grant of immunity to a private company, it is not clear how successfully he did so, unless it is the case that the State of North Carolina can designate anyone it wants to promulgate regulations and sue in its name. It cannot possibly be up to the government of North Carolina to decide, unilaterally and on its own terms, whether an agent's acts are its own for the purposes of state action immunity. If it were, then North Carolina could effectively bestow federal antitrust immunity on any private corporation by proclamation, the precise result rejected by both *Parker*<sup>133</sup> and *Northern Securities*.<sup>134</sup>

The majority rejected Justice Alito's approach by pointing to the potential for conflicts of interest caused by the board members participating in the industry they are regulating.<sup>135</sup> That argument is essentially the converse of a justification advanced in *Hallie* for *not* applying the active supervision requirement to cities.<sup>136</sup> The Court justified allowing cities to avoid the active supervision requirement because "[w]e may presume, absent a showing to the contrary, that the municipality acts in the public interest. A private

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130. See *supra* Part I.B.2.

131. *N.C. State Bd.*, 135 S. Ct. at 1119-20 (Alito, J., dissenting).

132. See *id.* at 1120.

133. See *supra* text accompanying note 41.

134. See *N. Sec. Co. v. United States*, 193 U.S. 197, 346 (1904).

135. *N.C. State Bd.*, 135 S. Ct. at 1113-14 (majority opinion).

136. See *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 45-46 (1985).

party, on the other hand, may be presumed to be acting primarily on his or its own behalf.”<sup>137</sup>

That statement is false, or at least comically naïve, given not only the extensive scholarship on the political economics of regulation,<sup>138</sup> but also the Court’s own precedent. In *City of Lafayette*, the Court took a somewhat more realistic view of the incentives of cities:

Every business enterprise, public or private, operates its business in furtherance of its own goals. In the case of a municipally owned utility, that goal is likely to be, broadly speaking, the benefit of its citizens. But the economic choices made by public corporations in the conduct of their business affairs, designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders.<sup>139</sup>

Whether cities (or other political subdivisions of states) have incentives to serve the public interest varies by circumstance. Some cities use profits from money-making activities to subsidize others, creating an incentive to charge profit-maximizing prices identical to those of private firms.<sup>140</sup> The incentives might even depend on the particular restraint at issue. The restraints in both *City of Lafayette* and *Hallie* involved the potential to leverage the city’s monopoly power within its own jurisdiction into markets where the city was not politically accountable.<sup>141</sup> In cases such as those, where fiscal incentives match poorly with political accountability, there is little

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137. *Id.* at 45 (footnote omitted).

138. *E.g.*, George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971).

139. *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 403 (1978) (plurality opinion); *see also id.* at 418-19 (Burger, C.J., concurring) (“This case turns, or ought to, on the District Court’s explicit conclusion, unchallenged here, that ‘[t]hese plaintiff cities are engaging in what is clearly a business activity; activity in which a profit is realized’.... There is nothing in this record to support any assumption other than that this is an ordinary dispute among competitors in the same market.” (footnote omitted)).

140. *See, e.g., Hallie*, 471 U.S. at 37.

141. In *City of Lafayette*, it was competition among customers outside the relevant cities’ boundaries, 435 U.S. at 391-92; in *Hallie*, it was an attempt to tie sewage collection and transportation services to sewerage treatment services for residents outside the city limits, 471 U.S. at 37.

reason to believe that the city's "public-service" orientation is likely to do much work.<sup>142</sup> Indeed, strong forces will push the other way: toward shifting financial burdens onto parties to whom the cities are not politically accountable.<sup>143</sup> Since the city's political currency is denominated in votes rather than in dollars, it has every incentive to financially benefit its voters at the expense of nonconstituents in the hope that protecting its constituents' pocketbooks will result in increased political support.<sup>144</sup> In that regard, cities are considerably more dangerous than private firms, which cannot similarly arbitrage financial gains into political capital.

What is even more troubling is that the majority appeared to determine that the Board was not the state *because* the members of the Board were self-interested.<sup>145</sup> In so doing, the Court effectively took a justification for not applying the active supervision requirement and stood it on its head to make it the *sine qua non* of state action immunity.<sup>146</sup> In this way, the Court worked backwards from the harm it perceived antitrust laws seek to prevent to formulate a rule for when a particular entity is, for purposes of antitrust law, a state actor.<sup>147</sup> By focusing too much on the possibility of an economic harm stemming from self-dealing, the Court ignored the real question presented by the case: whether (or to what degree) the Board was the state.<sup>148</sup> That is a question that has to be answered with reference to political, not competitive, values.

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142. See *City of Lafayette*, 435 U.S. at 403 ("[T]he economic choices made by public corporations in the conduct of their business affairs, designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders.").

143. Such "representation reinforcement" concerns are the justification for much of the constitutional law of both vertical, *e.g.*, *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 433 (1819), and horizontal federalism, *see* *S.C. State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 184-85 n.2 (1938).

144. See *City of Lafayette*, 435 U.S. at 403-04.

145. See *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1113-14 (2015).

146. See *id.* at 1114, 1117.

147. See *id.* at 1114, 1116-17.

148. See *id.* at 1111, 1117; *see also id.* at 1117 (Alito, J., dissenting).

## II. THE POLITICS OF STATE ACTION

So, if Justice Alito asked the right question but answered it incorrectly, and the majority asked the wrong question altogether, then what should the Court have done? As suggested above, the right answer does not come from the likely harm to competition, since enabling harm to competition is the objective of the state action immunity.<sup>149</sup> The answers come from political constitutional values, ones whose distinctions are notoriously difficult to identify at the margins. While I will explore some of those margins, *North Carolina State Board* itself does not come close to any of them—it is a constitutional, if not an antitrust, no-brainer.

### A. Taking off Antitrust Blinders

Were it not for the *Midcal/Hallie* combination of cases,<sup>150</sup> it would be hard to imagine anyone approaching the question of whether the Board was a state actor the way the Court did,<sup>151</sup> the structure of the antitrust state action inquiry is at least slightly odd. Singularly focused on competition (a specific field of regulation) and immunity (rather than power or liability), the state action doctrine does not generalize well to other areas. For example, if the state had a policy of encouraging self-help and implemented it by giving all applicants police badges without training or supervision, I think we would all still attribute those new officers' acts to the state, the likely self-interest of the new officers notwithstanding. The doctrine is even more specific after *North Carolina State Board*, with its additional dimension of self-interest. Conflicts of interest are important—their presence can invalidate state action by violating rights of due process<sup>152</sup>—but they do not generally alter the identity of the conflicted actor. A judge with a conflict of interest is a judge, even if her

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149. See *supra* Part I.C.

150. See *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40 (1985); *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 103-04 (1980).

151. See *N.C. State Bd.*, 135 S. Ct. 1101, 1111-12 (2015).

152. See *Tumey v. Ohio*, 273 U.S. 510, 531 (1927).

rulings might be deficient—even constitutionally deficient—because of the presence of a conflict.<sup>153</sup>

Rather, we generally identify state actors because they occupy a constitutional or statutory office.<sup>154</sup> In the end, all state actors in the United States are politically accountable to the electorate.<sup>155</sup> This is true even of federal judges, who, although they have life tenure, are appointed, confirmed, and potentially removed by elected officials.<sup>156</sup> This is not true of the Board, which, even if it occupies a statutory office, is not accountable to the people of North Carolina.<sup>157</sup> Rather, six of the eight members of the Board are accountable only to the *dentists* (and one to the dental hygienists) of North Carolina.<sup>158</sup> The “consumer” member of the Board is appointed by the governor and so is at least ultimately accountable to the electorate.<sup>159</sup> The lack of any real political accountability to the electorate—not just that it is made up largely of dentists—is the real problem with the Board,<sup>160</sup> and it is a problem not limited to antitrust.<sup>161</sup> When one considers the restrictions on the dental franchise, the professional requirements for *membership* on the Board seem comparatively unproblematic. Imagine, for instance, a requirement that anyone being appointed or elected to a judgeship be a licensed attorney.<sup>162</sup> So long as the office remains politically accountable, such an occupational limitation seems to be not just acceptable but maybe even a good idea.

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153. *Cf. id.*

154. *See* *Am. Mfrs. Mut. Ins. v. Sullivan*, 526 U.S. 40, 50 (1999) (noting that the inquiry to determine if someone is a state actor is “whether the ... conduct is fairly attributable to the State”).

155. *See* Amar, *supra* note 10, at 749.

156. *See* U.S. CONST. art. II, §§ 2, 4, art. III, § 1.

157. *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1108 (2015).

158. *Id.*

159. *Id.*

160. *See* Page, *supra* note 32, at 1103 (“[S]tate action that adversely affects individuals who do not have access to ordinary modes of political redress merits a lesser degree of deference.”).

161. *See* *Gibson v. Berryhill*, 411 U.S. 564, 571-72 (1973) (invalidating administrative action of state licensing based on conflict of interest as a matter of due process).

162. *See* Matt Ford, *When Your Judge Isn't a Lawyer*, ATLANTIC (Feb. 5, 2017), <https://www.theatlantic.com/politics/archive/2017/02/when-your-judge-isnt-a-lawyer/515568/> [<https://perma.cc/AN3F-DFUP>] (pointing out that twenty-eight states require all criminal judges to be lawyers and considering states that allow *any* nonlawyer judges to be “troubling”).

It does not take much imagination to see the real problem here. As suggested above, it seems problematic to limit the electorate for the Board to the self-interested dentists, but it would be equally (if not more)<sup>163</sup> problematic to limit the right to vote for dental regulators to any professional group, including one without a conflict of interest, such as the state's licensed attorneys. Professional limits on the franchise are essentially unheard of in the United States. The history of voting in the United States is hardly one of universal suffrage, with the franchise gradually expanding as to race,<sup>164</sup> then as to sex,<sup>165</sup> and finally as to wealth,<sup>166</sup> but there is no apparent history of limiting it on the basis of one's profession.<sup>167</sup> One has to travel back to the mercantilist economic order of England and control of the economy by the various livery companies to find meaningful voting limits based on profession.<sup>168</sup>

The converse, of course, is also true. If North Carolina had an open, statewide election for the Board, and the people of North Carolina elected a board consisting entirely of practicing dentists, then it would be hard to see any objection. In the U.S. constitutional order, democracy generally provides its own justification for regulation, subject to only the mildest form of substantive review so long as there is no reason to think political processes have been systemically subverted or higher order constitutional rights are implicated.<sup>169</sup> Indeed, the imposition of a federal statutory scheme to control the exercise of such electoral power by North Carolina

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163. At least there is a rational basis for believing that dentists are well-suited to governing the practice of dentistry. The same cannot be said for lawyers. The lawyers' lack of a conflict of interest seems somewhat outweighed by their lack of an understanding of dentistry.

164. U.S. CONST. amend. XV, § 1.

165. U.S. CONST. amend. XIX.

166. See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966).

167. Cf. *Carrington v. Rash*, 380 U.S. 89, 96-97 (1965) (striking down as unconstitutional a prohibition on voting by members of the U.S. military who moved to Texas). The Court later identified the standard applied in *Carrington* for limiting the franchise on the basis of membership in the military as requiring a "compelling state interest." See *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969) (citing *Carrington*, 380 U.S. at 96).

168. See Thomas B. Nachbar, *Monopoly, Mercantilism, and the Politics of Regulation*, 91 VA. L. REV. 1313, 1320-21 (2005).

169. Cf. Page, *supra* note 32, at 1103 ("The popular consent which authorizes state regulation enacted through the democratic process justifies the Court's deferential approach, and, so long as this process is available, a wide range of regulatory legislation is permissible." (footnote omitted)).

would raise substantial constitutional concerns. The States, not the federal government, are constitutionally assigned the responsibility and power to regulate their elections,<sup>170</sup> and federal interference with that power is “far from ordinary.”<sup>171</sup> Federalism was the lynchpin of Justice Alito’s dissent—and even if one disagrees with his approach to resolving this dispute between the Federal Trade Commission (FTC) and North Carolina, he did recognize the case for what it is: an attempt by federal authorities to control how the people of North Carolina delegate regulatory authority within the State.<sup>172</sup> The first part of *Midcal* requires that the state’s anti-competitive policy is clearly expressed<sup>173</sup> (which was conceded in this case<sup>174</sup>), and if the people of North Carolina want their dental services run by dentists, then who is the FTC, or the Sherman Act, to say otherwise?

When viewed as a matter of political legitimacy, the economic interests of the Board, which served as the lynchpin of the Court’s decision in *North Carolina State Board*,<sup>175</sup> are not relevant to any part of this analysis. This irrelevance works both ways. The lack of a financial interest would not make the dentists (or our notional lawyers) the state for purposes of the state action doctrine (or, for that matter, for any purpose whatsoever).<sup>176</sup> Conversely, if the Board is the state, then the financial interests of its members would not be relevant to the antitrust analysis, just as the potentially illicit interests of the city council members were rendered legally irrelevant by the decision in *Omni Outdoor*.<sup>177</sup> Regulators frequently benefit from regulation, and even in the context of state action

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170. *Carrington*, 380 U.S. at 91.

171. *Shelby County v. Holder*, 133 S. Ct. 2612, 2630 (2013).

172. *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101, 1117 (2015) (Alito, J., dissenting) (“Today, however, the Court takes the unprecedented step of holding that *Parker* does not apply to the North Carolina Board because the Board is not structured in a way that merits a good-government seal of approval.”); see also Easterbrook, *supra* note 97, at 28 (describing the shift in *Midcal* toward federal prescription of state regulatory processes in order to avoid capture); Paul R. Verkuil, *State Action, Due Process and Antitrust: Reflections on Parker v. Brown*, 75 COLUM. L. REV. 328, 335 (1975) (describing the close relationship between narrow state action immunity and aggressive substantive due process review).

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

174. *N.C. State Bd.*, 135 S. Ct. at 1110.

175. See *id.* at 1114.

176. See *supra* notes 151-53 and accompanying text.

177. *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 383-84 (1991).

immunity, the Court has refused to re-label state action as nonstate action by virtue of that self-interest.<sup>178</sup> As a plurality of the Court said in *City of Lafayette* when describing the incentives of the Virginia State Bar in *Goldfarb v. Virginia State Bar*,<sup>179</sup> “[w]e think it obvious that the fact that the ancillary effect of the State Bar’s policy, or even the conscious desire on its part, may have been to benefit the lawyers it regulated cannot transmute the State Bar’s official actions into those of a private organization.”<sup>180</sup> It seems unobjectionable for North Carolina Governor Roy Cooper, a licensed attorney,<sup>181</sup> to participate in actions that affect competition in legal markets, although Justice Kennedy seemed to suggest the contrary at the end of *North Carolina State Board* when he asserted (without citation or analysis) that “the state supervisor may not itself be an active market participant.”<sup>182</sup> Taken seriously, Justice Kennedy’s assertion would require a census of the professions and real estate holdings of any legislature that engaged in regulation that limited competition (which is to say virtually all regulation), exactly the kind of inquiry the Court rejected in *City of Lafayette*<sup>183</sup> and *Omni Outdoor*.<sup>184</sup>

The question in *North Carolina State Board* was whether the Board was the state,<sup>185</sup> which is a question of political, not competitive, or even economic, import. Justice Alito criticized the majority approach for “complicating” the question by introducing the question of conflicts of interest,<sup>186</sup> but the real problem with the majority approach was not its complexity, but rather its replacement of political concerns with financial ones. What makes the Board problematic is not that its members are financially interested; the problem

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178. *See id.*

179. 421 U.S. 773 (1975).

180. *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 411 n.41 (1978) (plurality opinion); *see also id.* at 412 n.41 (“Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it.” (internal quotation marks omitted)).

181. *Roy Cooper*, N.C. OFFICE OF THE GOVERNOR, <https://governor.nc.gov/about-first-family/roy-cooper> [<https://perma.cc/8HPW-BUVF>].

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

183. 435 U.S. at 411-12 n.41 (plurality opinion).

184. *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 383-84 (1991).

185. *N.C. State Bd.*, 135 S. Ct. at 1111.

186. *See id.* at 1117-18 (Alito, J., dissenting).

is that (contrary to North Carolina's assertion<sup>187</sup>) they are not, by any reasonable measure, "the state." It is the limitation on accountability, not the conflict of interest, that renders the office problematic, and that limitation on accountability is a political, not a competitive or an economic, harm. The narrow, competition-focused approach of *Midcal/Hallie*<sup>188</sup> focused the Court on the potential for competitive or economic harm, causing it to miss a much more general, and obvious, political one.

### B. A Constitutional State Action Doctrine

If the state action doctrine truly is grounded in federalism—a commonplace for the majority and dissent in *North Carolina State Board*<sup>189</sup>—one would think that the primary answers regarding the Board's power would be determined as a matter of constitutional, not antitrust, law. By regulating, the Board seeks to control the property and liberty of others.<sup>190</sup> The Board makes rules—rules that apply not only to its dentist members (who, if they agreed to it, would be members of a conspiracy) but also to nondentists, including both the dentists' patients and other people seeking to perform dental-related services, such as the teeth whitening at issue in *North Carolina State Board*.<sup>191</sup> Normally, only governments are allowed to engage in regulation.<sup>192</sup> The question, then, is whether the North Carolina State Board qualifies as a governmental entity under the constitutional structure for which the Court designed *Parker* immunity. There are at least two different ways to ask that question, neither of which calls upon the *Midcal/Hallie* structure

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187. See *id.* at 1109 (majority opinion).

188. See *supra* note 149.

189. Compare *N.C. State Bd.*, 135 S. Ct. at 1110 (“[*Parker v. Brown*] recognized Congress’[s] purpose to respect the federal balance and to ‘embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution.” (quoting *Cnty. Commc’ns Co. v. City of Boulder*, 455 U.S. 40, 53 (1982))), with *id.* at 1119 (Alito, J., dissenting) (“Instead, the Court reasoned that ‘[i]n 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.” (quoting *Parker v. Brown*, 317 U.S. 341, 351 (1943) (alteration in original))).

190. See *id.* at 1107-08 (majority opinion).

191. See *id.*

192. Thomas B. Nachbar, *The Antitrust Constitution*, 99 IOWA L. REV. 57, 69 (2013).

that has come to dominate the law of antitrust state action immunity.

### 1. *State Action and Nondelegation*

As suggested above, the most straightforward response to Justice Alito's claim that the Board is the State of North Carolina is that it is not. The question then, is what are the consequences of that conclusion? Under antitrust law, the consequence is that the active supervision requirement applies, per *Hallie*,<sup>193</sup> and the Board becomes potentially liable for violating the antitrust laws.<sup>194</sup> Under constitutional law, the consequence is that the Board's regulation is invalid.

The rule that private entities may not regulate is an unfailing, if infrequently invoked (if only because it is so widely accepted), rule of constitutional law.<sup>195</sup> In a series of cases prompted by New Deal legislation that pushed the regulation of the economy toward industry participants in order to garner stability (and generally higher prices), the Court uniformly rejected congressional delegations of regulatory authority to private groups.<sup>196</sup> In the famous *A. L. A. Schechter Poultry Corp. v. United States* case, the Court avoided confronting the question by asserting its improbability:

[W]ould it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? ... Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress.<sup>197</sup>

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193. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40 (1985).

194. *See N.C. State Bd.*, 135 S. Ct. at 1114.

195. *See Nachbar*, *supra* note 168, at 1368-69.

196. *See Nachbar*, *supra* note 192, at 82-88 (discussing cases).

197. 295 U.S. 495, 537 (1935); *see also id.* at 529 ("[T]he statutory plan is not simply one for voluntary effort. It does not seek merely to endow voluntary trade or industrial associations or groups with privileges or immunities. It involves the coercive exercise of the

When the Court was forced to confront the question a few years later in *Carter v. Carter Coal Co.*, which dealt with a similar industry-code regime, it confirmed what it suggested in *Schechter Poultry*:

The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.... And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question.<sup>198</sup>

What eventually saved these schemes was, as was the case in *Parker*,<sup>199</sup> the interposition of a government actor between the private body and the promulgation of regulations. In *Currin v. Wallace*, the Court dealt with a scheme that allowed the Secretary of Commerce to designate particular markets and set tobacco inspection and grading rules for those specific markets, but required a two-thirds majority of the tobacco growers in the market to support the designation.<sup>200</sup> The Court allowed the regulation, casting it as regulation by Congress (through the Secretary), albeit conditional on some future private action (the growers' approval).<sup>201</sup>

In *Parker*, the Court applied an identical analysis to the raisin growers' ratification, citing *Currin* for the rule.<sup>202</sup> It should be of little surprise that antitrust's state action doctrine, originating as it did in a case challenging the constitutionality of a state statute,

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law-making power. The codes of fair competition which the statute attempts to authorize are codes of laws.").

198. 298 U.S. 238, 311-12 (1936) (citing *Schechter*, 295 U.S. at 537).

199. See *Parker v. Brown*, 317 U.S. 341, 352 (1943).

200. 306 U.S. 1, 6-7 (1939).

201. See *id.* at 15-18.

202. See *Parker*, 317 U.S. at 352 (citing *Currin*, 306 U.S. at 16).

contains such strong parallels to the constitutional law of private regulation. The only real difference between the doctrines is one of consequence. In the constitutional domain, the consequence is the invalidity of the regulation;<sup>203</sup> in antitrust, the consequence is immunity from liability under the Sherman Act.<sup>204</sup>

But either doctrine could be used to produce both consequences. That is clear from the state action cases themselves, many of which sound not in immunity but rather in preemption. In addition to *Parker*, there are *Rice v. Norman Williams Co.*,<sup>205</sup> *Fisher v. City of Berkeley*,<sup>206</sup> and even the origin of the modern state action test, *Midcal* itself, in which parties sought an injunction to prevent the operation of the resale price maintenance system.<sup>207</sup> Indeed, it is inherent in many state action cases that the outcome will be one of two extremes: either (1) the state regulatory regime receives state action immunity, in which case not only is the regime immune from antitrust liability, but it also can be enforced against the opposing party; or (2) the defense fails, and not only does the ostensible beneficiary of the state regime lose the benefit of the regime, but its participation in it also potentially becomes an antitrust violation. The dentists of North Carolina (perhaps all of them, but, at the very least, the Board members) have not only lost the ability to exclude nondentists from offering teeth whitening, but they also are antitrust violators for having conspired to do so (or so the FTC alleged).<sup>208</sup> When you play the game of state action, you win<sup>209</sup> or you expose yourself to treble damages.<sup>210</sup> There is no middle ground.<sup>211</sup>

Recognizing the connection between state action and the private delegation cases does not, unfortunately, end our inquiry but rather begins it. The margins of private nondelegation (to whom may the state delegate?) have not been explored, which is unsurprising given

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203. See, e.g., *Carter*, 298 U.S. at 311.

204. See, e.g., *Parker*, 317 U.S. at 350.

205. 458 U.S. 654, 661-62 (1982).

206. See *supra* notes 102-07 and accompanying text.

207. See *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 99-100 (1980).

208. See *N.C. Bd. of Dental Exam'rs*, 152 F.T.C. 75, 222, 226, 228-29 (2011).

209. See, e.g., *Parker v. Brown*, 317 U.S. 341, 352 (1943).

210. See 15 U.S.C. § 15 (2012).

211. Cf. GEORGE R. R. MARTIN, *A GAME OF THRONES* 408 (1996) (with apologies).

the paucity of the cases. It is not an easy inquiry.<sup>212</sup> Notably, the Court has failed to come up with a singular test for who is and is not a state actor in the *Parker* context. Instead the Court developed the *Midcal* test and otherwise relied on either conclusory statements (as in *North Carolina State Board*<sup>213</sup>) or confusing ones,<sup>214</sup> despite having had many opportunities to devise a test.

## 2. State Action and “State Action”

Another approach to antitrust’s state action problem comes from the appropriately named *constitutional* “state action” doctrine: that most constitutional limitations apply only to governmental acts.<sup>215</sup> That doctrine asks a similar question—when is an act that of the state—albeit for purposes of imposing liability rather than for immunizing it.<sup>216</sup> Like the antitrust state action doctrine, the constitutional state action doctrine presents a similar dichotomy of liability: state action is frequently a defense to state law claims,<sup>217</sup> but it subjects one to federal constitutional scrutiny.<sup>218</sup>

The constitutional state action doctrine is unlikely to bring instant clarity to the antitrust state action doctrine. Offering the

212. See, e.g., *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 469-70 (Tex. 1997).

213. The Court’s examination of whether the Board qualified as a state actor consisted of the following three circular sentences:

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 non-sovereign actor.... For purposes of *Parker*, a nonsovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself.... State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity.

*N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101, 1110-11 (2015) (internal citations omitted). The Court then entered into the conflict of interest analysis that produced the rule of *North Carolina State Board*. See *id.* at 1111-12.

214. See, e.g., *Goldfarb v. Va. State Bar*, 421 U.S. 773, 791 (1975) (describing the Virginia State Bar as a “state agency for some limited purposes” without identifying either the limits or the purposes).

215. See *The Civil Rights Cases*, 109 U.S. 3, 18 (1883).

216. See *id.*

217. For instance, it is because police officers are state actors that they are immune from prosecution for assault when they subdue suspects. See, e.g., *Smith v. City of Wyoming*, 821 F.3d 697, 708 (6th Cir. 2016).

218. See *Civil Rights Cases*, 109 U.S. at 10-11.

constitutional law of state action as an aid to the antitrust state action doctrine is a bit like throwing an anvil to a struggling swimmer. Practically no area of constitutional law is more vexing than the state action doctrine; it is a field pockmarked with imponderables and circular reasoning, from *Shelley v. Kraemer*, which held that judicial enforcement of a land covenant was sufficient to constitute state action<sup>219</sup> (a position that, if applied generally, would render every contract state action), to *Marsh v. Alabama*, which held that the First Amendment could be enforced on privately owned land because it was being operated as a “town,”<sup>220</sup> which is about as helpful as Justice Stewart’s definition of obscenity in *Jacobellis v. Ohio*.<sup>221</sup> The point is not that constitutional state action has the answers; instead, the doctrine—like the private nondelegation doctrine—is asking the same question and for similar purposes: When should we consider a particular act to be one of the state, and why?

### 3. A Federal Standard

Although incorporating considerations of private nondelegation and constitutional state action law may not lead to instant clarity in the antitrust state action cases, it does make it clear that whatever standard is adopted for determining whether a particular act is attributable to the state must be a federal, not a state, standard.<sup>222</sup> That was not a matter of much dispute prior to *North Carolina State Board*,<sup>223</sup> but Justice Alito’s assertion of federalism as a justification for accepting North Carolina’s characterization of the Board at least makes it a point of contention.<sup>224</sup> Just as in the

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219. 334 U.S. 1, 18-19 (1948).

220. 326 U.S. 501, 507 (1946). Notably, Justice Vinson, who authored *Shelley*, see 344 U.S. at 4, dissented from *Marsh* two years later, see 326 U.S. at 517 (Vinson, C. J., dissenting), suggesting some discontinuity as to the reasoning between the two cases.

221. See 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.”).

222. See *N. Sec. Co. v. United States*, 193 U.S. 197, 346 (1904).

223. See *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 39 (1985) (“[T]he State may not validate a municipality’s anticompetitive conduct simply by declaring it to be lawful.”).

224. See *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101, 1119-20, 1123 (2015) (Alito, J., dissenting).

constitutional cases, the values at issue in antitrust state action are federal values, and they require a federal standard to determine whether they are being served. While that standard might provide deference to state determinations, it cannot plausibly delegate the whole determination to the states while still serving those values. Just as the test for whether a state adjudicator has an impermissible conflict of interest that renders its decision a violation of federal due process protections is federal,<sup>225</sup> so must be the test for when a state acts in a way that abrogates application of the federal antitrust laws.

#### *4. Problems of an Economic Solution to a Political Problem*

Taking the constitutional dimensions of *Parker* immunity seriously also highlights problems with the economic approach offered by the Court in *North Carolina State Board*. As the Court has modified the state action doctrine over the years to incorporate more economic thinking, it has taken the doctrine further from its political roots.<sup>226</sup> That shift has consequences. What if the dentists (or our notional lawyers) could prove that they had actually landed on optimal regulation? What if, for instance, only *retired* dentists could sit on and vote for the Board, thereby decreasing the likelihood of self-interested regulation? If the Board remained controlled by the state's dentists but we could show that they have consistently produced economically optimal regulation, then should we all be happy? That would effectively make state action cases matters of presumption, with self-interested boards eligible for immunity if they could show that they have been producing economically optimal regulation. That approach seems problematic from both sides. Such a detailed showing hardly deserves the name "immunity," and I doubt the FTC would be satisfied with conditioning state action immunity on such a case-by-case, regulation-by-regulation analysis. If there really is a problem with the Board's

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225. See *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) ("It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes."); *Tumey v. Ohio*, 273 U.S. 510, 514-15 (1927).

226. See *supra* Part II.A.

makeup, then the likelihood that it will produce optimal regulation should be irrelevant.

Even if the Court and the FTC, each with its own conception of what qualifies as optimal regulation, may be comfortable to move in that direction, we should be hesitant to do so. If the purpose of regulation is to displace competition,<sup>227</sup> evaluating whether something qualifies as regulation by measuring its likelihood to produce outcomes that mirror competitive ones is likely to miss the point. The Court has been explicit on this point, readily acknowledging the tension between the competitive harms wrought by state regulation and the competitive designs of the Sherman Act, relying instead on state sovereignty as the justification for state action immunity. As the Court explained in *Ticor Title*, “Immunity is conferred out of respect for ongoing regulation by the State, not out of respect for the economics of price restraint.”<sup>228</sup>

### III. THE WAY FORWARD

Having condemned the Court’s approach in *North Carolina State Board*, it behooves me to at least briefly explore the implications of adopting a different approach. There are at least four approaches—two obvious and two perhaps less so.

#### A. *Toward Antitrust Accountability*

The most obvious implication of my analysis (at least I hope), is that the *Midcal/Hallie* framework is a poor fit for the principles underlying the state action doctrine. State action is designed to allow republican principles of democratic government operating at one level of the federal system to override economic principles of competitive markets operating at another.<sup>229</sup> The necessary attributes of an entity receiving state action immunity should reflect those same democratic considerations, and the test for state action immunity should therefore include them as well.

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227. Easterbrook, *supra* note 97, at 27.

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

229. *See Parker v. Brown*, 317 U.S. 341, 352 (1943).

There is, unfortunately, no ready-made candidate for such a standard. Other areas of the law dealing with these questions, such as private nondelegation and constitutional state action, are poor candidates as sources for clear rules to apply in antitrust, and they may not be perfectly adapted for doing so.<sup>230</sup> Determining state action for the purpose of constitutional review may call upon different considerations than determining it for the purpose of antitrust immunity.<sup>231</sup> But one can draw parallels and some of them are highlighted by *North Carolina State Board* itself.<sup>232</sup>

Any approach to applying state action in antitrust must have at its core the political accountability that defines republican government.<sup>233</sup> *Hallie* has its problems, but its attention to the importance of political accountability<sup>234</sup> is both intuitively appealing and consistent with broader approaches to the American constitutional order, such as the representation reinforcement concerns that operate in constitutional law.<sup>235</sup> The relationship between the active supervision requirement and political accountability is no accident, and although the active supervision requirement itself makes little sense as currently applied,<sup>236</sup> the accountability it seeks to provide is perhaps the quintessential feature of republican government and worthy of recognition as part of the state action doctrine. I would go a step further to say that if the political structure of a regulator comports with republican government generally (as in the case of a legislature), the professional composition of the regulator is irrelevant, contra the Court's approach in *North Carolina State Board*.<sup>237</sup>

What is needed instead of emphasis on the financial incentives of regulators is a conception of "antitrust accountability" to accompany the "antitrust state action" doctrine. That accountability might look exactly like democratic accountability, or it might vary in some ways. But having political accountability as the goal is likely to take

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230. See *supra* Parts II.B.1-2.

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

232. See *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1110-11 (2015).

233. See Amar, *supra* note 10, at 749.

234. See *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 43 (1985).

235. See *supra* text accompanying notes 141-42.

236. See *infra* Part III.B.

237. See *N.C. State Bd.*, 135 S. Ct. at 1114.

the Court in the right direction, certainly more so than attention to the financial incentives of regulators does.

*B. The Problem(s) with Midcal*

If the Court's exertions in *North Carolina State Board* have done anything, they have demonstrated the problems with the Court's shift in *Midcal* away from *Parker's* political view of state action toward an economically driven one. That shift in *Midcal* was of a piece with the Court's larger reworking of antitrust to take greater account of efficiency in evaluating competitive harms, a movement with its origins in the Chicago and Harvard Schools, and one that has generally led to more rationalized antitrust doctrine. But that focus on efficiency, attractive as it might be for the evaluation of restraints, has no place in the political calculus at the heart of the state action doctrine. It is only because *Midcal* produced such a stylized inquiry into state action that the Court was able to miss the larger political question presented in *North Carolina State Board* for the narrower one of competitive self-interest. Nor has the struggle to apply *Midcal's* active supervision requirement seemed to have been worth the effort—the Court has yet to find a private firm immune for its own anticompetitive acts, and it is unlikely ever to need to do so given the availability of *Fisher* and *Noerr/Pennington*. The number of firms that can actually avail themselves of the active supervision requirement that could not avoid liability either under the no-agreement theory of *Fisher*<sup>238</sup> or under *Noerr/Pennington*<sup>239</sup> is effectively zero.

The Court's state action jurisprudence shows that state action is meaningfully available only for political subdivisions, such as municipalities. Given that, recognition that state action is actually a feature of political rather than private entities will remove the confusion that prompted the active supervision requirement in *Midcal*<sup>240</sup> and its subsequent abrogation in *Hallie* for those exact

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238. See *Fisher v. City of Berkeley*, 475 U.S. 260, 266, 270 (1986).

239. See *supra* notes 111-13 and accompanying text.

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

entities.<sup>241</sup> The *Hallie* distinction between cities' and firms' economic incentives itself, which is premised on politico-regulatory fantasy, is an unworthy feature of federal competition law. If rethinking *Midcal* did no more than eliminate the need for the *Hallie* distinction, it would be worth it. Either way, removing state action immunity as an unattainable goal for private firms can go a long way toward rationalizing the doctrine and setting it on its proper, political footing.

### C. *The Dubious Constitutionality of State Licensing Boards*

Although this Article might be taken as a criticism of the outcome in *North Carolina State Board*, it is far from that. Shifting to a focus on the political composition of state licensing boards shows not that *North Carolina State Board* went too far to restrict them, but rather that it did not go far enough. The *Midcal* framework for state action means that the only change needed for state licensing boards structured such as North Carolina's is active supervision by a state actor.<sup>242</sup> A political view of state action would require much more, such as either the general election of a board or, more likely, appointment by politically responsible state officials, such as the Commission in *Parker*.<sup>243</sup> Although prompted by broader concerns about the competitive effects of professional licensing boards on the economy,<sup>244</sup> the arguments advanced in *North Carolina State Board* provide a narrow basis—self-interest—for challenging those boards. Whether a constitutional fix would require more changes to a particular board than *North Carolina State Board* does will depend on the composition of the board, but, regardless of whether it would condemn or spare more licensing boards, a political theory would seek to make sure licensing boards and other forms of industry-specific

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241. See *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985).

242. *N.C. State Bd.*, 135 S. Ct. at 1117 (“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.”).

243. See *Parker v. Brown*, 317 U.S. 341, 346 (1943) (describing political accountability of the Commission's members).

244. Rebecca Haw Allensworth, *The New Antitrust Federalism*, 102 VA. L. REV. 1387 (2016); Einer Elhague, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667 (1991); Brief of Antitrust Scholars as Amici Curiae in Support of Respondent, *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015) (No. 13-534), 2014 WL 3908427.

regulation serve the political values of state electorates rather than the competitive market values of the FTC.

#### *D. Merging Noerr/Pennington and State Action*

Re-examining the politics of state action reveals an obvious connection between the state action doctrine and the *Noerr/Pennington* doctrine, which Justice Scalia described in *Omni Outdoor* as “a corollary to *Parker*.”<sup>245</sup> Cases such as *Omni Outdoor*, which emphasize the political dimensions of state regulation,<sup>246</sup> provide the clearest connections between the two doctrines. Indeed, the symmetry of *Noerr/Pennington* and *Parker*<sup>247</sup> is only hidden because of the artificial nature of the *Midcal* framework.

*North Carolina State Board* itself provides ample demonstration of the value of bringing the *Noerr/Pennington* and state action doctrines closer together. In *North Carolina State Board*, thinking about the values underlying *Noerr/Pennington*—the need to provide space for self-interested actors to engage the regulatory process<sup>248</sup>—could have helped the Court recognize the unrealistic demands of the self-interest limitation advanced by the FTC. Moreover, *Noerr/Pennington* lends itself to the same, identity-driven analysis as a political approach to state action does: both approaches hinge on whether the Board is the state for regulatory purposes. If the Board is itself the state, then there can be no liability for one of two reasons. Either the agreement of the dentists to use the Board is immunized under *Noerr/Pennington*,<sup>249</sup> or, under *Fisher*, we would view the state’s action as unilateral, again defeating the agreement requirement, albeit as a matter of state action.<sup>250</sup> All of these different approaches are of a piece to the same tenet of antitrust law exemplified equally and consistently by *Parker* and *Noerr/Penning-*

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245. *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 379 (1991).

246. *See id.* at 383-84.

247. *Compare supra* Part I.A.1 (discussing *Parker*), *with supra* Part I.B.1 (discussing cases applying the state action doctrine to private parties, including *Noerr/Pennington*).

248. *See Omni Outdoor*, 449 U.S. at 383-84; *supra* notes 111-14 and accompanying text.

249. *See United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 671 (1965); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144-45 (1961).

250. *See Fisher v. City of Berkeley*, 475 U.S. 260, 266, 270 (1986).

ton: Regulatory acts by states do not lead to liability under Section 1.<sup>251</sup>

Introducing *Noerr/Pennington* into state action analysis would obviate the need for the *Midcal/Hallie* framework. Consider the collective ratemaking at issue in *Southern Motor Carriers*.<sup>252</sup> The Court made it clear that if the states were providing active supervision through tariff review of the rates proposed by the collective, then the rate bureaus could qualify for immunity under state action.<sup>253</sup> *Noerr/Pennington*, by immunizing the collective act of petitioning for the joint rates,<sup>254</sup> could lead to exactly the same outcome through similar means—the establishment and operation of the rate approval authority would substitute for the clearly articulated state policy of displacing competition, and the independent consideration of the rates would substitute for active supervision.

Merging the two doctrines would carry additional benefits, like allowing each to borrow features from the other, such as *Noerr/Pennington*'s sham exception.<sup>255</sup> It would also recognize that state action immunity might be appropriate even if defeating competitive forces is not a clearly articulated goal of state regulation, as all regulation harms competition in some way, even if not as part of a clearly articulated policy.<sup>256</sup> By focusing less on the specifics of particular regulation and more on the structure of the entity at issue, the Court can provide greater predictability in state action cases. For instance, in *Phoebe Putney*, instead of interrogating statutory text to determine whether it might contain an articulated policy of displacing competition,<sup>257</sup> the Court could have asked: "Does the hospital authority have the kind of accountability necessary to deem its acts those of the state for purposes of antitrust immunity?" The hospital authority at issue, which was formed and governed by

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251. See *Pennington*, 381 U.S. at 671; *Noerr*, 365 U.S. at 144-45; *Parker v. Brown*, 317 U.S. 341, 350-51 (1943).

252. *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 50 (1985).

253. See *id.* at 62, 66.

254. See *supra* notes 111-14 and accompanying text.

255. See *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 63, 65 (1993).

256. See *supra* note 113 and accompanying text.

257. See *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 226-27 (2013).

political subdivisions of the state,<sup>258</sup> may very well have had such accountability, at least if the cities that formed it had the requisite accountability.

### CONCLUSION

In *North Carolina State Board*, when confronted with a profoundly undemocratic regulatory system, the Supreme Court responded not by upholding the republican values that form the basis of modern democratic government, but instead by pointing to the likelihood that the residents of North Carolina might have to pay too much for whiter teeth.<sup>259</sup> While the Court may have saved us all from the clutches of rent-seeking dentists and the perils of pricey teeth whitening, it ignored democracy in the process. It would be fair to ask whether the Court was focused on the right problem. When considered against the possibility that North Carolina could randomly pick someone out of the Raleigh phonebook and designate that person the state dental regulator without review, the FTC's concern that person might have a conflict of interest by virtue of a financial interest in dentistry borders on the petty.

Yet antitrust's state action doctrine, as it has developed over time, drove the Court to just such a result. Moreover, the Court's economic focus on the harms of state action has caused the Court to ignore the political value of state action immunity. For instance, the Court described state action as a "disfavored" doctrine,<sup>260</sup> when it is in fact a necessary component of federalism. Anticompetitive state regulation, as distasteful as it might be to economists, is an expression of state political systems in exactly the same way as other forms of regulation are; there is no reason to single out regulation that harms competition—as indeed all regulation harms competition to some degree<sup>261</sup>—for especially unfavorable treatment.

State action presents some very difficult questions—some going to core ideas about republican government that border on the imponderable. But whether the Board is the state for purposes of

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258. *See id.* at 220-21.

259. *See* N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1111-14 (2015).

260. *FTC v. Ticor Title Ins.*, 504 U.S. 621, 636 (1992).

261. *See supra* note 113 and accompanying text.

state action immunity is not one of them. The Court should simplify the state action doctrine and return it to its roots. By doing so, the Court can both clarify the doctrine within antitrust and better situate antitrust within the constellation of laws that protect both the competitive landscape and America's political identity.