Has the Supreme Court Thrown Health Care Regulation into Disarray?
A Comment on the Court's Reworking of the State Action Doctrine

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PROTECTING THE HEALTH, SAFETY, AND welfare of the populace is the quintessential responsibility of the states. They carry out this responsibility largely through extensive health care regulatory regimes, and, when regulation fails, they often step in to perform what the market cannot. But antitrust issues abound. When a state anoints itself the market champion, or otherwise picks winners and losers, it is no longer a fair fight, causing foreclosed competitors to seek redress from the federal courts. But are these state actions illegal? That is a tougher question.

States "need not adhere in all contexts to a model of unfettered competition."[1] Because "nothing in the language of the Sherman Act . . . suggested that Congress intended to restrict the sovereign capacity of States to regulate their economies,"[2] states may "impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives" without the need to "conform" to the Sherman Act.[3] A contrary rule, the Supreme Court noted, would "impose an impermissible burden on the States' power to regulate."[4] Since the Supreme Court's 1943 decision in *Parker v. Brown*, that principle has never been seriously disputed.[5]

But determining when a state is acting in its sovereign capacity to regulate, and when it is not, often involves shades of gray. Nowhere are these lines murkier than in the health care arena, which often feature the kind of public-private intersections that give rise both to claims of economic protectionism and the defense that the conduct is the state's own and, thus, immune. It is no coincidence then that the Supreme Court's two most recent state action cases involved health care. In *Phoebe*, the Court considered whether a municipal hospital merger was immune from antitrust scrutiny.[6] In *NC Dental*, the Court analyzed the enforcement actions of a state board of dentistry.[7]

In each case the Court declined to immunize the health sector defendant and narrowed the state action doctrine, but also claimed to give a wide berth to its future invocation, asserting that states must be given "their freedom . . . to use their municipalities [and agencies] to administer state regulatory policies free of the inhibitions of the federal antitrust laws."[8] But they may not abuse that freedom by "permitting purely parochial interests to disrupt the Nation's free market goals."[9] Balancing these interests in future cases may be challenging, however, as the Court's rulings in the two cases blurred the already murky line between conduct that is protected by the state action doctrine and that which is not.

To see why, consider the following hypothetical.

The Hypothetical

The election is over, and having just won her inaugural term campaigning on health care reform, the governor appoints Dr. Miles, her longtime friend and supporter, as head of the state's University Medical System. The system is a multihospital group with inpatient hospitals and community clinics located throughout the state. Upon taking the reins, Miles concludes that the best way to improve care and reduce costs is to expand the system's outpatient surgery capabilities by acquiring various ambulatory surgery centers (ASCs).

Miles asks the governor to introduce legislation expressly recognizing the inability of a competitive market to provide for the well-being of the citizenry and authorizing the system to acquire additional facilities without being subjected to antitrust review. The governor likes the idea, especially the part about keeping the federal government out of her backyard, but is concerned about financing these acquisitions out of the state budget. "No worries," Miles assures her. A savvy businessperson, he proposes adding a provision to the health

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code requiring ASCs *unaffiliated* with a hospital to obtain the approval of the State Board of Medicine before performing outpatient surgery in the future. "We can deny licenses to any ASC we have our sights on," Miles explains, noting that "this will force the ASC to sell out at fire-sale prices."

"Genius!" the governor exclaims. "But how do we get this through the legislature?" Miles reassuringly tells the governor, "We will hold a series of legislative hearings where hand-picked community doctors can express concern about ASCs' lack of resources to handle complex surgeries. Board review will ensure that ASC patients receive the highest-quality care at state-of-the-art facilities. And for good measure, the law will empower the attorney general to review and, in her discretion, veto the board's decisions."

The enabling legislation passes, and the governor appoints Miles's brother, a non-practicing physician, to chair the State Board of Medicine. That board is staffed with a cross-section of officers from the private and public sectors, but Miles's brother is the swing vote. As ASC applications flow in, Miles's brother generally defers to board member consensus. But when the application of Maverick Associates, located across from the system's flagship hospital, is up for review, Miles's brother demands a more searching inquiry. The board determines that Maverick lacks adequate facilities and, therefore, must affiliate with a hospital or cease operations. The attorney general denies Maverick's petition to overturn the board's conclusion.

Seeing no other choice, Maverick sells out to the system, creating a local monopoly in surgery services. As the ink dries on the asset purchase agreement, Maverick sues the system, the state, the board, and the governor under Section 1 of the Sherman Act, and the FTC files its own complaint seeking an injunction to prevent the pending sale. The defendants file a motion to dismiss, claiming that the antitrust laws do not preempt the newly enacted licensing regime or the State University's acquisition of Maverick Associates.

Phoebe Weakens the Right of Substate Governmental Entities to Create a "Public Health Care Option"

The key question in determining whether state actors, or private actors engaged in conduct under color of state law, are subject to federal antitrust claims, is whether their actions are "undertaken pursuant to a regulatory scheme that *is the State's own*."[10] In the hypothetical, the State University System acquired a competing ASC and the State Board of Medicine denied Maverick's ASC license. There were no "private" actors to speak of.

Before *Phoebe*, this fact alone might have obviated any potential antitrust claims. In *Fisher*, the City of Berkeley passed a rent control ordinance that eliminated price competition among private landlords.[11] Rejecting the notion that the Sherman Act preempts the ordinance because the city was not sovereign, the Supreme Court held that the Sherman Act does not reach the *unilateral* activity of *any* substate governmental entity. As Justice Rehnquist explained,

> Recognizing that the function of government may often be to tamper with free markets, correcting their failures and aiding their victims, this Court [has held] that a state statute is not preempted by the federal antitrust laws simply because the state scheme may have an anticompetitive effect. . . . [A] state statute should be struck down on preemption grounds only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. . . .
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> [This] rule . . . does not distinguish between [state statutes and municipal ordinances]. Only where legislation is found to conflict "irreconcilably" with the antitrust laws . . . does the level of government responsible for its enactment become important, [since legislation] that would otherwise be preempted . . . may nonetheless survive if it is found to be state action immune . . . under *Parker*.[12]

Because the Berkeley rent control ordinance involved only unilateral conduct of the City, the Court ruled that the ordinance was not preempted by the Sherman Act, and that resort to the state action doctrine was unnecessary.[13] That is, the ordinance did not need to be "saved" under the state action doctrine by a "clearly articulated state policy" or "active supervision" of the City.[14]

In his dissent, Justice Brennan lamented the Court's expansive holding that "a municipality's authority [cannot] be constrained by the Sherman Act," because it would immunize "a broad range of local government anticompetitive activities from the reach of the antitrust laws."[15] While Justice Brennan lost the vote in *Fisher*, the Supreme Court in *Phoebe* embraced his view without mentioning *Fisher*. The Georgia law at issue in *Phoebe* allowed municipal "hospital authorities" to own, operate, and acquire health care facilities. The FTC sued when the county hospital authority that owned one local hospital (Phoebe Putney Memorial) tried to buy the only competing hospital in the area.

The Court conceded that municipal hospital authorities were "akin to a political subdivision" and not private actors.[16] But the Court stated that "immunity will only attach to the activities of local governments if they are undertaken pursuant to a 'clearly articulated and affirmatively expressed' state policy to displace competition."[17] The mere authorization to acquire health care facilities, the Court held, does not "foreseeably entail permission to roughhouse in that market unlawfully."[18] Nor does the grant of "unique powers and responsibilities to fulfill the State's objective of providing all residents with access to adequate and affordable health care" suffice, since the desire to create a public option "does not logically suggest that the State intended . . . hospital authorities pursue that end through mergers that create monopolies."[19]

The inconsistency between *Fisher* and *Phoebe* is clear. In *Fisher*, the Court never reached the state action doctrine and its "clear articulation" test because the municipality engaged only in unilateral actions and, therefore, its conduct was not

"irreconcilable" with federal antitrust laws. In *Phoebe*, the municipality's conduct was just as unilateral, but it was struck down because the municipality lacked specific state authorization to act anticompetitively.

There appear to be only three ways to explain this inconsistency.

First, *Phoebe* may have overruled *Fisher sub silentio*. If so, the Court would be returning to the liberal side of a long-running philosophical debate over "states' rights" concerning the treatment of municipalities, state agencies, and other state actors. Under the view championed by Justice Rehnquist, the relevant question is "not whether state and local governments are *exempt* from the Sherman Act, but whether statutes, ordinances, and regulations enacted as an act of government are *preempted*."[20] Under this view, anticompetitive regulations fall into two camps: those that mandate or authorize per se illegal conduct *by private parties*, and those that do not. The latter are beyond challenge, while the former require a clearly articulated state policy to pass muster. Under Justice Brennan's competing view, substate governmental entities are persons subject to the Sherman Act, and therefore *all* protectionist regulations or exclusionary activities can be challenged unless clearly authorized by the state. In *Phoebe*, the Court expressly aligned itself with Justice Brennan, explaining that his decision in *Boulder* espousing this view over Justice Rehnquist's dissent "controls this case."[21]

Second, *Fisher* may be distinguished from *Phoebe* based on the nature of the underlying claim. In *Fisher*, the plaintiff sued under Section 1 of Sherman Act; in *Phoebe*, the FTC sued under Section 7 of the Clayton Act. Why would this matter? Since the rent control regulation in Fisher did not authorize or compel price fixing by landlords, there was no agreement that facially violated Section 1 of the Sherman Act. In contrast, the county's anticompetitive acquisition in *Phoebe* arguably violated Section 7 on its face. Thus, under either the Rehnquist or Brennan view, resort to the state action doctrine would be necessary in *Phoebe*. But while this may technically reconcile *Fisher* and *Phoebe*, it would seem to be a narrow basis on which to distinguish them, and one that is unlikely to satisfy either those who believe that local regulation should be free from federal interference or those who believe substate governmental entities should be treated just as private parties.

Third, the Court may have implicitly distinguished between governmental entities acting as regulators and those acting as market participants. In *Fisher*, the city exercised its zoning authority—a quintessential government activity—while the hospital authority in *Phoebe* directly competed with private entities in the health care market. From a policy perspective, the Court may have wanted to give more deference to the former than the latter.[22]

Moreover, a market participant exception also would reconcile *Phoebe* with the Court's post-*Fisher*, pre-*Phoebe* decision in *Omni*.[23] There, a city enacted a moratorium on newly erected billboards, conferring a monopoly on the incumbent billboard purveyor. As in *Phoebe*, the state's enabling statute authorized the city to enact such zoning rules, but did not expressly confer the power to do so anticompetitively. Unlike in *Phoebe*, however, the conduct was immune because the mere authorization to act satisfied the clear articulation test. A different result surely would obtain by applying the rule in *Phoebe*, i.e., whether the enabling statute "logically suggest[s] that the State intended" that the conferred authority be exercised anticompetitively. The market participant exception reconciles this conflict once it is recognized—as the majority did in *Omni*—that regulations *necessarily* displace competition within the zone of interest, while mere authorizations to compete in the private market do not.[24] For this reason, as Justice Scalia noted, immunity may apply to substate governmental entities when acting "in their governmental capacities as sovereign regulators" even if such immunity does "not necessarily obtain where the State acts . . . as a commercial participant in a given market."[25]

How the Supreme Court reconciles *Fisher* and *Phoebe* will critically impact how health care regulations will be analyzed in the future. If *Phoebe* overrules *Fisher*, any protectionist regulation unsupported by a clearly articulated state policy to displace competition could be challenged.[26] But if *Phoebe* merely creates a market participant exception to *Fisher*, government regulations would remain protected activity.[27]

Regardless of how deeply *Phoebe* wounds *Fisher*, one point is now clear: A substate entity acting as a market participant must have clear state authorization to act anticompetitively. In the hypothetical above, for example, the state system acquired the competing ASC after the ASC lost its license. While the board's denial of the license might be beyond challenge if *Fisher* remains good law, the subsequent acquisition would be subject to federal antitrust claims absent a clearly articulated state policy to displace competition. Neither the university's status as a "state actor," nor its statutory mandate to establish a public option would suffice. Under *Phoebe*, there must be express *statutory* authorization to pursue anticompetitive acquisitions.

In the hypothetical, this authorization was little more than an announcement that any acquisition should be exempt from antitrust scrutiny. Is that enough? It may seem odd that a state can preempt federal law simply by announcing that it does not apply within its borders. Such a "reverse Supremacy clause" does not find purchase in the Constitution. But, as *Phoebe* explained, the Court has "approached the clear-articulation inquiry . . . practically."[28] As long as "the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature," there is no reason why "federal antitrust law [should] undermine [the] arrangement" or take "completely off the table the policy option that the state clearly intended" to provide.[29] This rule suffices for the hypothetical. By exempting the system's acquisitions from antitrust scrutiny, the state made its view crystal clear: a public option is more important than a competitive market. The federal antitrust laws will respect that choice.[30]

NC Dental Weakens a Substate Governmental Entity's Ability to Regulate Health Care Markets

But while the acquisition is immune under this analysis, it does not entirely resolve the hypothetical. We are still left with the Board of Medicine's denial of Maverick's operating license. Are such basic governmental *regulatory* activities subject to federal antitrust claims, including the adoption of health care licensing requirements, enforcement of unauthorized practice of medicine statutes, and decisions on certificate of need applications? That is where *NC Dental* comes into play.

In *NC Dental*, the North Carolina Board of Dentistry sent letters to cosmetologists who offered teeth whitening services, accusing them of engaging in the unauthorized practice of dentistry and threatening them with civil and criminal penalties. The Board of Dentistry, however, was made up of a majority of practicing dentists who competed with the cosmetologists and who allegedly were motivated by financial gain, not patient welfare. The Supreme Court rejected the board's defense that, as a state agency, its activities were those of the state, not of the private dentists who controlled the board. Analogizing to private trade associations, the Court noted that the "similarities between [state agencies] controlled by active market participants and private trade associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules."[31] Accordingly, the Court held that "a state board on which a controlling number of decision-makers are active market participants in the occupation the board regulates must satisfy [the] active supervision requirement in order to invoke state-action antitrust immunity."[32]

NC Dental, like *Phoebe*, fundamentally alters the landscape of how much control the Sherman Act exerts over state actors. Prior to *NC Dental*, the key case was *Omni*. There, Justice Scalia (who dissented in *NC Dental*) held that courts cannot "look behind" a city ordinance to determine whether it was the product of a "conspiracy with private parties," "corruption," or simply an "abandonment of public responsibilities to private interests."[33] *Omni* follows in the steps of prior precedent, clarifying that regulatory capture is not a Sherman Act concern and that active supervision is not required for municipalities, state agencies, or state actors acting under color of state law.[34] *Omni*'s rule was simple: Conduct by a state actor acting pursuant to clearly articulated state policy is immune.

NC Dental cannot be reconciled with *Omni*. In *NC Dental*, the board was a duly constituted state agency that acted pursuant to its statutory authority to enforce the state's unauthorized practice of dentistry statute.[35] Active supervision was required there but not in *Omni*. Why? Rather than overruling *Omni*, Justice Kennedy drew a distinction between the conditions needed to confer immunity on a governmental agency and those required to strip it of immunity once conferred. There is a difference, the Court said, between an "*ex ante* inquiry in nonsovereign actors' structure and incentives" and an "ad hoc and *ex post* questioning of their motives for making particular decisions."[36]

The distinction does not hold up to scrutiny. In *Omni*, even corruption of the city council could not strip it of its immunity, because active supervision was not required. But in *NC Dental*, the mere *possibility* of a conflict of interest triggered the need for active supervision. Certainly, actual corruption is at least as likely as the mere appearance of impropriety to deviate in an anticompetitive way from legitimate state policy. Consider again the hypothetical above. If the governor had appointed Miles, instead of his brother, to the State Board of Medicine, a majority of the members would have participated "in the occupation the board regulates" and the active supervision requirement would have been triggered. But because Miles's brother was appointed, active supervision is no longer needed. Nor could the board's decision be challenged, since doing so would require an impermissible "ad hoc and *ex post*" analysis of the motives of Miles's brother and the other board members.

NC Dental appears to open up an entirely new and potentially broad avenue for attacking state agency actions. While the Court's actual holding is limited to state boards where "a controlling number of decision-makers are active market participants in the occupation [being] regulated," nothing in the decision limits its holding to this particular structural flaw.[37] Is this really the only form of regulatory capture that can trigger the active supervision requirement? For example, what if the board is a fractious entity, such that controlling a small minority of members usually suffices to get any resolution passed? What if the governor accepts political favors in exchange for appointing board members sympathetic to the industry? *Omni* would suggest that policing such conduct is reserved for the political arena. After all, the Sherman Act is a consumer protection statute, not a political corruption statute. But such conduct could be attacked under *NC Dental* because it only requires a *permissible* "*ex ante* inquiry into non-sovereign actors' structure and incentives," not an "ad hoc and *ex post* questioning of their motives."

The tension between *Omni* and *NC Dental* has not yet been answered by the lower courts, and may remain more hypothetical than real given Justice Kennedy's effort to provide a road map to states wishing to "ensure immunity" for their agencies.[38]

First, the state could "adopt clear policies to displace competition," so that any anticompetitive effect flows from the statute, not from any discretionary act of a conflicted state agency.[39] The problem in *NC Dental* was that North Carolina (supposedly) failed to define "the practice of dentistry" to include teeth whitening.[40] Had it done so, the cosmetologists would have lacked the legal right to participate in the market, and the board's enforcement activities would not have restrained any lawful competition.[41] Unfortunately, this solution may not work as well as Justice Kennedy believes. By "requir[ing] state legislatures to explicitly authorize specific

anticompetitive effects before state-action immunity could apply," this supposed solution, as the Court has elsewhere observed, may "embody an unrealistic view of how legislatures work and of how statutes are written."[42]

Second, Justice Kennedy noted that, if agencies must be provided with a measure of regulatory discretion, the state still could ensure immunity by "provid[ing] for active supervision."[43] By creating a "super board" with supervisory powers over conflicted boards—in effect, a babysitter for the babysitter—a state can solve the conflict-of-interest problem at the heart of *NC Dental*. Such an approach has precedent. In the legal field, state bar associations play a critical role in defining and policing the unauthorized practice of law. Yet their actions are immune because final authority lies with the State Supreme Courts, which are sovereign entities.[44]

Following *NC Dental*, a number of states appear to be walking down this path. In California, for example, the State Attorney General issued a legal opinion to the California State Senate concluding that "active state supervision requires a state official to review the substance of a regulatory decision made by a state licensing board," that the "official reviewing the decision must not be an active member of the market being regulated," and that the official "must have and exercise the power to approve, modify, or disapprove the decision."[45] Likewise, New York's new Certificate of Public Advantage Law requires the State Health Department to consult with the State Attorney General before issuing an order exempting private parties from the antitrust laws.[46]

It is unclear, however, whether Justice Kennedy's "super board" solution will really be the panacea it may first appear to be. While conferring supervisory powers on a nonconflicted state official may now be necessary, active supervision may require more. The supervising official actually must exercise its given authority by reviewing the actions of the conflicted agency and determining whether the conduct is consistent with the state's clearly articulated policy to displace competition. In *Ticor*, the Supreme Court rejected immunity where the market participant's conduct was "subject only to a veto if the State chooses to exercise it."[47] Because the "mere potential for state supervision is not [itself] adequate," a case-by-case analysis, akin to "causation inquiries," is required to determine if the "State has played a substantial role in determining the specifics of the economic policy."[48] The FTC, in recently issued guidance, appears to echo this.[49]

We can now return to our hypothetical. Recall that the Attorney General was given oversight of the medical board's denial of any license. Unfortunately, the required case-by-case analysis now means that questions still linger, leaving the validity of the regulatory regime uncertain. Did the Attorney General actually review the petition, or did she rubber-stamp the board's decision? Does it matter whether and how she has dealt with similar petitions from other ASCs? Was she provided with sufficient information to determine whether the board acted out of anticompetitive animus or pursuant to state policy? The licensing requirement was passed for patient-protection reasons. Was there sufficient evidence to allow the board to deny Maverick's license, but not other similarly situated ASCs? If there wasn't "substantial evidence" to support the board's decision, is the Attorney General's decision the final say in the matter or is it subject to judicial review? If the latter, has the Sherman Act now become a mini-federal Administrative Procedure Act for the review the actions of (potentially) conflicted state boards?

These are questions for which there are no clear answers as yet, but the questions make clear that *Phoebe* and *North Carolina Dental* have substantially complicated the state action immunity analysis, injecting a great deal of uncertainty into the regulation of health care markets. ■

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1 N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1109 (2015).

2 FTC v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003, 1010 (2010). *See also* Parker v. Brown, 317 U.S. 341, 350 (1943).

3 *NC Dental*, 135 S. Ct. at 1109.

4 *Parker*, 317 U.S. at 350.

5 *Id.*

6 *Phoebe*, 133 S. Ct. 1003.

7 *NC Dental*, 135 S. Ct. 1101.

8 *Phoebe*, 133 S. Ct. at 1011.

9 *Id.*

10 *Id.* at 1010.

11 Fisher v. City of Berkeley, 475 U.S. 260 (1986).

12 *Id.* at 264–65.

13 *Id.* at 270 (Municipal ordinance not preempted because it is not "facially inconsistent with the federal antitrust laws," and as such there is no need to address whether it "would be exempt under the state-action doctrine."). While the *Fisher* majority chose to frame the issue as a "preemption" case, and not a "state action immunity" case, the concurring and dissenting judges would have decided the case on state action grounds. The case also arose through the appellate ranks as a state action case.

14 *See* Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 106 (1980) (establishing two-pronged test).

15 *Fisher*, 475 U.S. at 278–79 (Brennan, J., dissenting).

16 *Phoebe*, 133 S. Ct. at 1010–11 n.4.

17 *Id.* at 1011–15.

18 *Id.*

19 *Id.*

20 Cmty. Commc'ns, Inc. v. Boulder, 455 U.S. 40, 60 (1982) (Rehnquist, J., dissenting).

21 *Phoebe*, 133 S. Ct. at 1010–12. The different approaches are best illustrated by *Boulder* and *Fisher*, in which Justices Rehnquist and Brennan swapped roles as lead and dissenting justices. In *Boulder*, Justice Brennan held that a city's moratorium on cable franchise expansions could be challenged because the state had not clearly articulated a policy to displace competition. Justice Rehnquist dissented because, in his view, the majority improperly treated "a political subdivision of a State as an entity indistinguishable from any privately owned business" and, therefore, erred in "holding that a municipality's ordinances can be 'exempt' from antitrust scrutiny only if the enactment furthers or implements a clearly articulated and affirmatively expressed state policy." *Boulder*, 455 U.S. at 60. In *Fisher*, the roles were reversed. Justice Rehnquist held that a municipality's rent control ordinance constituted unilateral government activity and could not be challenged. Justice Brennan dissented, accusing the majority of "discard[ing] 40 years of carefully considered precedent." *Fisher*, 475 U.S. at

274–79. In his view, our "dual system of government . . . has no place for sovereign cities." *Id.*

[22] In *Phoebe*, the Supreme Court declined to address whether a "market participant exception to state action immunity" exists because the argument was procedurally waived. *Phoebe*, 133 S. Ct. at 1010–11 n.4. But this does not mean that Phoebe's role as a market participant was irrelevant to the implicit denial of Fisher preemption, an issue that precedes the state action analysis. As discussed below, in *NC Dental*, the Supreme Court held that anticompetitive conduct by market-participant state actors requires satisfaction of the state action doctrine, but anticompetitive conduct by state actors who are not market participants does not. This implies a "market participant" exception to *Fisher* preemption that, absent state action immunity, expands the Sherman Act's reach to substate governmental entities when acting as, or controlled by, market participants.

[23] Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365 (1991).

[24] Justice Scalia, speaking for the Court, found clear articulation because the "very purpose of a zoning regulation is to displace unfettered business freedom [and] necessarily protects existing billboards against some competition from newcomers." *Omni*, 499 U.S. at 373. Justice Stevens dissented, speaking for three Justices, because "[a]cceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that our precedents require." *Id.* at 391–93 (Stevens, J., dissenting) (quoting Justice Brennan's decision in *Boulder*, 455 U.S. at 56). Foreshadowing *Phoebe*, the dissenting Justices would have denied immunity because there was "not even an arguable basis for concluding that the State authorized the city . . . to use [its] zoning power to protect favored citizens from competition." *Id.*

[25] *Id.* at 374–75.

[26] Presumably, even if a protectionist regulatory regime had unjustified anticompetitive effects, it would only violate the Sherman Act if its enactment was the product of a conspiracy, because Section 1 requires an "agreement" and Section 2 of the Sherman Act only reaches the conduct of a monopolist and its conspirators. *See* 15 U.S.C. §§ 1, 2. That said, the Justices in the *Boulder* line of cases (unlike those in the *Fisher* line of cases) have not focused on the "agreement" element of the Sherman Act. In any event, as discussed below, *NC Dental* partially reopens the door to an argument that a conspiracy could be based on private-party involvement in the regulatory process.

[27] The difference between a "market participant" exception to *Fisher* and a "merger" exception, while not relevant to the hypothetical above, also may be relevant in other health care contexts. For example, a municipal hospital may be accused of entering into exclusive contracts or engaging in other exclusionary unilateral conduct. A market participant exception to Fisher would allow such conduct to be subjected to antitrust scrutiny, but a "merger exception" to Fisher would not.

[28] *Phoebe*, 133 S. Ct. 1012–13.

[29] *Id.*

[30] It should be noted that even if the conduct is not entitled to immunity, the Local Government Antitrust Act of 1984 bars antitrust damages actions against any political subdivisions and state actors. 15 U.S.C. §§ 34–36.

[31] *NC Dental*, 135 S. Ct. at 1113–14.

[32] *Id.*

[33] *Omni*, 499 U.S. at 375–79.

[34] Hallie v. Eau Claire, 471 U.S. 34, 46–47 (1985); *see also Phoebe*, 133 S. Ct. at 1011 (municipalities "are not subject to the active state supervision requirement").

[35] In addition to *Omni*, *NC Dental* is also inconsistent with *Parker*. There, the California legislature enacted the Agricultural Prorate Act, creating a committee for specific commodities (e.g., raisins), which were formed with majority membership of persons nominated by producers of the commodity. Competing producers would propose "prorate zones" that imposed restrictions on all producers covered by it. These zones were then approved by the committee and by a "referendum of [all] producers." *Parker*, 317 U.S. at 351–52. The Court upheld this regime because it was "the state, acting through the Commission, which adopts the program and enforces it." *Id.* Had the *NC Dental* rule applied in *Parker*, state action immunity would only be available if there had been active supervision of the committee by the state sovereign. But in *Parker*, the committee's acts only had to be approved by majority vote of all competitors in the market. Thus, private parties actually supervised the state agency, not vice versa as *NC Dental* requires.

[36] *NC Dental*, 135 S. Ct. at 1113–14.

[37] *Id.*

[38] *Id.* at 1115.

[39] *Id.*

[40] *See NC Dental*, 135 S. Ct. at 1108; *see also id.* at 1116 ("The Act . . . says nothing about teeth whitening services."). Although this "fact"—mentioned twice in the opinion—is the linchpin of Justice Kennedy's opinion, it is not clear that he was correct. As the Fourth Circuit noted, "Under the Dental Practice Act, a person 'shall be deemed to be practicing dentistry' if that person, inter alia, '[r]emoves stains, accretions or deposits from the human teeth.'" *NC Dental*, 717 F.3d 359, 364 (4th Cir. 2013) (quoting N.C. GEN. STAT. § 90-29(b)(2)). Justice Kennedy did not cite this provision. Assuming he was aware of it, he might have thought that "stain removal" and "teeth whitening" are different. But the American Dental Association notes that teeth whitening products work by "remov[ing] deep (intrinsic) [or] surface stains." *See* http://www.ada.org/en/about-the-ada/ada-positions-policies-and-statements/tooth-whitening-safety-and-effectiveness. It would be unfortunate if the Court upset the balance of federal and state power to regulate based on a misunderstanding of how teeth whitening works.

[41] *See* Bates v. State Bd. of Ariz., 433 U.S. 350, 359 (1977) (immunity applied because rule banning attorney advertising was "the affirmative command" of the State Supreme Court, rendering it irrelevant that the challenged enforcement proceeding was "initiated by the president of the State Bar.").

[42] *Phoebe*, 133 S. Ct. at 1012 (quoting *Hallie*, 471 U.S. at 43).

[43] *NC Dental*, 135 S. Ct. at 1115.

[44] For example, in Hoover v. Ronwin, 466 U.S. 558 (1984), the state bar established eligibility standards for the practice of law. After the plaintiff was denied a license, he sued the Committee, claiming the standards were purposely designed to limit the supply of practicing attorneys. Rejecting the challenge, the Court noted that "although the Arizona Supreme Court necessarily delegated the administration of the admissions process to the Committee, the court itself approved the particular grading formula and retained the sole authority to determine who should be admitted to the practice of law in Arizona," such that the conduct challenged "was in reality" that of the state. *Id.* at 573.

[45] Op. Att'y Gen. Cal. No. 15-402, at 1 (Harris) (Sept. 10, 2015).

[46] 10 N.Y. COMP. CODES R. & REGS., tit. 10 § 83-2 (2014).

[47] FTC v. Ticor Title Ins. Co., 504 U.S. 621, 637 (1992).

[48] *Id.*

[49] Staff, Fed. Trade Comm'n Bureau of Competition, FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants (Oct. 14, 2015), https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf. The FTC Guidance notes that active market participants need not constitute a numerical majority of the members to trigger the requirement of active supervision, and that decisions that are controlled, "either as a matter of law, procedure, or fact, by active participants in the regulated market (e.g., through veto power, tradition, or practice) must be actively supervised to be eligible for the state action defense." If active supervision is required, the FTC will look at whether the supervisor obtained the information necessary for a proper evaluation of the action recommended by the regulatory board, including through public hearings, public comment, investigation and study of the market conditions, and documentary evidence; and whether the supervisor "evaluated the substantive merits of the recommended action and assessed whether the recommended action comports with the standards established by the state legislature." The FTC will also consider whether the supervisor has provided a written decision that explains its underlying rationale.