

Freedom of Competition and the Rhetoric of Federalism: *North Carolina Board of Dental Examiners v. FTC*

by Timothy Sandefur*

The novice might imagine that the antitrust laws that forbid “every” restraint of trade¹ would bar the government from prohibiting competition for the benefit of established businesses. After all, legal barriers to trade are the most obvious tool for those seeking to establish a cartel. Without such barriers, a cartel is inherently unstable because whenever it tries to raise prices above market levels, it will face either the threat of new firms entering the trade and offering products or services at lower prices, or the threat that members of the cartel will defect and do the same. Legal barriers to entry can therefore shore up the structural weaknesses that doom cartels in a free market. Empowered to punish defectors and block new entrants, the cartel need not satisfy consumers to survive and may raise prices and relax efforts at innovation. Legal barriers to entry such as licensing laws raise the cost of living and deprive entrepreneurs of economic opportunity and their constitutionally protected right to pursue the lawful vocation of their choice.²

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¹ Sherman Antitrust Act, 15 U.S.C. § 1.

² Though much neglected in the literature, this right was recognized as far back as seventeenth century common law. See generally Timothy Sandefur, *The Right to Earn a Living: Economic Freedom and the Law* 17–25 (2010).

But the reality is that today's antitrust laws do not bar government from creating cartels.³ On the contrary, thanks to the doctrine of *Parker* antitrust immunity, the one entity that can most effectively engage in anti-competitive conduct—the government—may do so with impunity, and states may effectively nullify federal antitrust laws on behalf of private monopolists. *Parker* immunity has led to the bizarre result that private parties who collude among themselves are liable to prosecution and punishment, even though market forces typically render such efforts futile—whereas if their efforts are backed by state regulatory agencies, they are immune from prosecution and yet are much more likely to inflict the harms that the antitrust laws are supposed to prevent.

This is the dilemma at the heart of *North Carolina Board of Dental Examiners v. Federal Trade Commission*.⁴ In this case, the FTC sued a state board charged with regulating the dental profession after the board used licensing laws to bar non-dentists from offering teeth-whitening services, not to protect the general public, but to prevent competition against licensed dental practitioners. To what degree will federal laws against monopolist activities apply to state regulators who wield the state's power to block competition to benefit industry members?

I. The *Parker* Immunity Doctrine

A. Origins of *Parker* Immunity

The shield allowing states—and private parties deputized by states—to indulge in anti-competitive activities that federal law otherwise punishes as a crime is called the *Parker* immunity doctrine, named for the 1943 case of *Parker v. Brown*.⁵ That case involved the California Agricultural Prorate Act, one of the many Depression-era

³ Courts are divided as to whether the Constitution does so. The Fifth, Sixth, and Ninth Circuits have held that states may not use licensing laws simply to protect established firms against competition. See *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222-23 (5th Cir.), cert. denied, 134 S. Ct. 423 (2013); *Craigsmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002); *Merrifield v. Lockyer*, 547 F.3d 978, 991 n. 15 (9th Cir. 2008). The Tenth Circuit has held that they may. *Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004).

⁴ 135 S. Ct. 1101 (2015).

⁵ 317 U.S. 341 (1943).

laws that restricted competition in the agriculture industry to keep food prices up.

The act allowed raisin producers to establish “prorate marketing plans” which—subject to alteration by a government commission and approval by a certain number of raisin producers—would govern raisin production in California’s central valley, where perhaps half of all raisins are produced. The 1940 plan required producers to divide their crop into categories, handing over a large portion to the commission to sell “in such manner as to obtain stability in the market.”⁶ Producers were free to sell 30 percent of their standard-grade raisins but were forced to pay the commission a fee for each ton sold. (Basically the same regulatory apparatus remains in place today, and the Supreme Court addressed some of its constitutional implications this term.⁷)

This was the very model of a modern major cartel, and raisin packer Porter Brown sued to challenge its legality.⁸ Although the Court acknowledged that the Sherman Antitrust Act prohibits “every contract . . . in restraint of trade,” and that the raisin program would likely have been illegal if it had been “organized and made effective solely by virtue of a contract, combination or conspiracy of private persons,” it nevertheless found that the Sherman Act could not apply because the program “derived its authority and its efficacy from the legislative command of the state.”⁹ The justices saw no reason to believe that the act was intended to apply to state governments, and to “nullify a state’s control over its own officers and agents” would unduly interfere with the federalist system.¹⁰ Thus neither the state,

⁶ *Id.* at 348.

⁷ See Michael W. McConnell, *The Raisin Case*, 2014–2015 *Cato Sup. Ct. Rev.* 313 (2015); *Horne v. Dep’t of Agric.* 135 S. Ct. 2419 (2015). The Court addressed a procedural aspect of this case in *Horne v. Dep’t of Agric.*, 133 S. Ct. 2053 (2013). During the oral argument, Justice Elena Kagan called the California raisin marketing statute “the world’s most outdated law” and Justice Antonin Scalia agreed, calling it “a crazy statute.” Transcript of Oral Arg. at 40, 49, *Horne v. Dep’t of Agric.*, 133 S.Ct. 2053 (No. 12-123).

⁸ Brown also argued that it violated the Commerce Clause and was preempted by the Federal Agricultural Marketing Agreement Act. *Parker*, 317 U.S. at 348-49. Brown did not initially make a Sherman Act claim; that question was raised by the Supreme Court on its own motion. See *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 585-89 (1976).

⁹ *Parker*, 317 U.S. at 350 (quoting Sherman Act, 15 U.S.C. § 1) (emphasis added).

¹⁰ *Id.* at 351.

nor private parties acting under state law, could be prosecuted for antitrust violations.

This conclusion is not as obvious as it may seem. The theory behind the antitrust laws is that restraints on free competition harm consumers by raising prices and harm businesses by limiting the opportunity to engage in a trade. But such restraints can be accomplished either by private collusion or by the government, which legislates against low prices, or restricts entry into a trade, or otherwise bars competition. There is no difference in the consequences between these two—except that private collusion is less likely to succeed than government-created schemes, given the incentives that free competition gives for defection or new entry. This factor suggests that antitrust prosecutors should, if anything, monitor the behavior of government more skeptically than they do private entities.

In fact, one of the first Supreme Court decisions applying the Sherman Act, *United States v. Trans-Missouri Freight Association*,¹¹ seemed to say just that. There, the Court rejected the argument that railroads were exempt from the Sherman Act because, being subject to heavy government regulation and vested with special government privileges, such as the use of eminent domain, they were not the sort of private entities at which the act was aimed. The railroads had even submitted their price schedules to the Interstate Commerce Commission for approval. How, then, could their price-setting be an illegal restraint of trade?

Yet the Court refused to exempt them from the Sherman Act's reach because the act's plain language applies to *all* restraints of trade, and the Court refused to infer an exemption where none was expressed in the statute. The Court acknowledged that railroads are "of a public nature"¹² and are not ordinary private businesses, but it found that this was actually reason for *more* stringent enforcement of the antitrust laws. Purely private contracts "must be unreasonable in their nature to be held void," but "different considerations" would probably apply "in the case of public corporations." In the latter case, *any* restriction on competition "must . . . be prejudicial to the

¹¹ 166 U.S. 290 (1897).

¹² *Id.* at 321–22.

public interests.”¹³ At the very least, the harm to be anticipated from anti-competitive acts “is substantially of the same nature”¹⁴ whether done by public or private entities, and “the evil to be remedied is similar.”¹⁵ There was thus no basis for exempting the anti-competitive conduct of public entities from the antitrust laws.

Forty-six years later, the *Parker* Court reasoned differently. It found that the Sherman Act’s silence regarding government-sponsored cartels—which to the *Trans-Missouri* Court was proof that no exception was available—was sufficient reason to infer an exemption for government-sponsored cartels. *Parker* made no reference to the theory of antitrust laws or to the fact that consumers suffer the same, or worse, harm when public entities block competition. Instead, it focused on the preservation of state autonomy. “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,” the Court wrote, “an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress.”¹⁶

This formulation begged the question. The Sherman Act purports to be an exercise of Congress’s authority to regulate interstate commerce, which of its own force preempts state laws to the contrary, and therefore it cannot be said to unduly interfere with the “dual system of government.”¹⁷ And the act forbids “every” restraint of trade without exceptions. Interpreting that expansive term to bar restraints imposed under color of state law would not be “lightly” attributing anything to Congress but simply giving the statute its literal meaning. At best, *Parker*’s invocation of the clear statement rule is unavailing, since courts also should not “lightly” infer exemptions in a statute phrased so broadly.¹⁸

¹³ *Id.* at 334. See further Alan J. Meese, *Liberty and Antitrust in the Formative Era*, 79 B.U. L. Rev. 1, 45–47 (1999).

¹⁴ *Trans-Missouri Freight*, 166 U.S. at 322.

¹⁵ *Id.* at 324–25.

¹⁶ *Parker*, 317 U.S. at 351.

¹⁷ See Ronald E. Kennedy, *Of Lawyers, Lightbulbs, and Raisins: An Analysis of the State Action Doctrine under the Antitrust Laws*, 74 Nw. U. L. Rev. 31, 72 (1979) (“State sovereignty is not injured when the federal government validly acts in the sphere to which it is delimited.”).

¹⁸ The Court has frequently said that antitrust immunity should not be lightly inferred. *FTC v. Titor Title Ins. Co.*, 504 U.S. 621, 636 (1992); *Nat’l Gerimedical Hosp. &*

Finally, the *Parker* Court's examination of history left out important details. The anti-monopoly tradition that gave rise to the Sherman Act was—beginning with the 17th-century Whig campaign against legal monopolies and culminating in the 1623 Statute of Monopolies—focused largely on the evils of government-imposed restraints on trade.¹⁹ There is no basis in the text or history of the Sherman Act to presume that its authors meant to categorically immunize state-imposed cartels.²⁰

B. Federalism and Rent-Seeking

Parker's motivating concern was state autonomy, but it serves that interest clumsily, creating a unique form of “reverse preemption,” which allows states to block the operation of federal statutes, in apparent conflict with the Supremacy Clause.²¹ In no other circumstance may a state shield citizens from the operation of federal law in quite that way. *Parker* immunity thus justifies one critic's claim that “the ideology of federalism has displaced a national model of competition for one favoring state-based resolutions.”²² Yet “federalism” is an imprecise word here, because genuine federalism balances state autonomy and federal oversight for the purpose of protecting individual freedom.²³ The *Parker* Court was not motivated by this

Gerontology Ctr. v. Blue Cross of Kansas City, 452 U.S. 378, 388–89 (1981); Cantor, 428 U.S. at 596–98; United States v. Nat'l Ass'n of Sec. Dealers, Inc., 422 U.S. 694, 719 (1975); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 348 (1963). See also Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1056 (9th Cir. 1983).

¹⁹ See generally Steven G. Calabresi & Larissa C. Leibowitz, Monopolies and the Constitution: A History of Crony Capitalism, 36 Harv. J.L. & Pub. Pol'y 983 (2013); William Letwin, Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act 18–52 (1965).

²⁰ See, e.g., Paul E. Slater, Antitrust And Government Action: A Formula for Narrowing *Parker v. Brown*, 69 Nw. U. L. Rev. 71, 83 (1974) (“In truth, a full reading of the legislative history of the Sherman Act is not likely to help answer the *Parker* question one way or the other [I]f the legislative history reveals anything, it is that the purpose of the act is to strike down arrangements which have anti-competitive effects . . . regardless of whether the state is a participant.”).

²¹ Einer Richard Elhauge, The Scope of Antitrust Process, 104 Harv. L. Rev. 667, 669–70 (1991).

²² E. Thomas Sullivan, Antitrust Regulation of Land Use: Federalism's Triumph Over Competition, the Last Fifty Years, 3 Wash. U. J.L. & Pol'y 473, 511 (2000).

²³ See The Federalist No. 51 (James Madison) at 351 (Jacob Cooke ed. 1961) (“In the compound republic of America, the power surrendered by the people, is divided

carefully balanced conception of federalism, but by a cruder desire to protect state power, even though the antitrust laws manifest no such concern.

Not only is *Parker's* conception of federalism incorrect, but the decision has had unfortunate consequences for the marketplace thanks to regulatory capture—the tendency of regulatory bodies to be dominated by the private entities they purport to regulate. As public choice scholars have emphasized, private parties who stand to gain or lose from the actions of regulatory agencies will devote time and effort to persuading those agencies to act in ways that will benefit them.²⁴ Thus businesses will frequently lobby regulators to adopt licensing rules or other barriers to entry so that they can haul up the ladder behind them—pretending public benefit, intending private, as Sir Edward Coke put it.²⁵ Such regulations cast a cloak of officialdom over policies that protect the private actors from competition with only a flimsy connection to the public welfare.

Parker itself is a prime example. The California raisin law prohibited competition in agriculture for the express purpose of raising food prices, not just in California, but nationwide—at a time of national economic depression, no less. To declare it immune from the antitrust laws is, as Richard Epstein has observed, “quite perverse from every angle.”²⁶ Or consider *Southern Motor Carriers Rate Conference, Inc. v. United States*, in which a group of private shipping companies adopted a price-fixing schedule that was approved by the regulatory agencies of several states.²⁷ Such price-fixing would certainly have violated the antitrust laws if done privately, but the Court gave it a pass because it had received the blessing of state governments. *Parker* immunity thus rewards and encourages what the Founders called the “mischiefs of faction.”²⁸ By putting the power to

between two distinct governments . . . Hence, a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controuled by itself.”); *Id.* No. 45, at 309 (“as far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, let the former be sacrificed to the latter.”).

²⁴ See generally James Buchanan & Gordon Tullock, *The Calculus of Consent* (1962).

²⁵ Ronald Coase, *The Firm, the Market, and the Law* 196 (1990).

²⁶ Richard A. Epstein, *How Progressives Rewrote the Constitution* 84 (2006).

²⁷ 471 U.S. 48 (1985).

²⁸ *The Federalist* No. 10 (Madison), *supra* note 23, at 61.

nullify the antitrust laws into the hands of the same bureaucracies that establish all the other rules for an industry—the bureaucracies existing firms are already most likely to lobby and influence—the *Parker* doctrine ensures that the industry groups that gain sway over regulators and acquire the power to impose restraints on their competitors also become exempt from the anti-monopoly laws. The game of regulatory capture is therefore “winner-takes-all.”

These concerns are particularly acute in the realm of occupational licensing. Although licensing laws are supposed to prevent dishonest or unqualified practitioners from entering a trade and endangering consumers, such laws have been exploited for centuries by established firms seeking to block new competition.²⁹ Business owners therefore often invest time and effort to obtain this power. Consider the efforts of the American Society of Interior Designers, a trade organization that has lobbied state legislatures to adopt stringent licensing requirements for the practice of interior design.³⁰ If there is any such thing as a harmless business, it is interior decorating. Yet the ASID has sought, successfully in some cases, to persuade states to allow only college graduates with special certification to practice that trade. Worse, state officials often delegate their licensing and regulatory powers to long-established businesses, often by deputizing them as regulators, thus ignoring the obvious conflict of interest inherent in empowering established firms to bar their own competition. This should warrant more antitrust scrutiny, not less. As Professors Aaron Edlin and Rebecca Haw observe, “[t]hat the consortium of competitors is called a state board and given power by the state to regulate its profession does not make it more trustworthy. The grant simply makes the board more powerful and therefore more dangerous.”³¹

C. Other Anomalous Immunities

In the years since *Parker*, immunity doctrines have carved antitrust law into two spheres, where what’s law for thee is not law for me. In

²⁹ See Sandefur, Right to Earn a Living, *supra* note 2, at 145-63.

³⁰ See generally Dick M. Carpenter, II, Designing Cartels: How Industry Insiders Cut Out Competition (Institute for Justice 2007), available at http://www.ij.org/images/pdf_folder/economic_liberty/Interior-Design-Study.pdf.

³¹ Aaron Edlin & Rebecca Haw, Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?, 162 U. Pa. L. Rev. 1093, 1143 (2014).

City of Lafayette v. Louisiana Power & Light,³² the Court held that city governments were subject to the antitrust laws. The source of *Parker* immunity, the Court explained, was a concern with *state* autonomy, which was not present in cases involving cities.³³ Nor would the Court adopt a naïve presumption that city governments represent the public interest. Municipalities were just as prone to pursuing “their own parochial interests” as were private parties.³⁴ A blanket exemption for all government entities would create “a serious chink in the armor of antitrust protection . . . at odds with the comprehensive national policy” of antitrust.³⁵ Chief Justice Warren Burger emphasized this point in a concurring opinion: if the antitrust laws were “meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade,” it would be “wholly arbitrary” to treat government-imposed restraints of trade as categorically “beyond the purview of federal law.”³⁶ But when *Louisiana Power & Light* inspired successful lawsuits challenging cities’ anti-competitive conduct, Congress rushed to pass the Local Government Antitrust Immunity Act.³⁷

More problematic is the question of immunity in cases in which government acts as a “market participant.” *Parker* focused on immunizing the government when it acted as a sovereign implementing official policies, not when it simply operated a business. But subsequent rulings have expanded immunity even into cases where the government is just another business owner. Thus in *Sea-Land Services v. Alaska Railroad*, the D.C. Circuit held that a government-run railroad was immune simply because it was government-run, without considering the conduct at issue or the fact that the government was acting solely as a market participant.³⁸ More recently, in *U.S. Postal Service v. Flamingo Industries*, the Court held that the Postal Service was immune from suit even for matters *not* involving its mail delivery operations, because, notwithstanding the Postal Reorganization

³² 435 U.S. 389 (1978).

³³ *Id.* at 412.

³⁴ *Id.* at 408.

³⁵ *Id.*

³⁶ *Id.* at 419 (Burger, C.J., concurring) (quoting *Atlantic Cleaner & Dyers, Inc. v. United States*, 286 U.S. 427, 435 (1932)).

³⁷ 15 U.S.C. §§ 34–36.

³⁸ 659 F.2d 243 (D.C. Cir. 1981).

Act, it “remains part of the Government.”³⁹ Chief Justice Burger’s warning that focusing on the character of the defendant instead of the nature of its conduct proved prescient: antitrust immunity now revolves almost entirely around the formalistic question of whether courts regard the defendant as a government entity or a private one, instead of the substantive questions of consumer welfare that courts have said is the focus of antitrust law.

Not only are private entities shielded from antitrust scrutiny when they receive state approval, they are also exempt when they endeavor to persuade the government to grant them such monopoly status. Under the *Noerr-Pennington* doctrine,⁴⁰ the First Amendment trumps the antitrust laws in cases where private entities lobby the government to block competition against them. *Noerr-Pennington*’s concern for the security of First Amendment rights is understandable, but speech as part of a conspiracy to violate the law has never been protected in any other context. As one critic notes, “when a group of competitors or a single firm influence governmental process for the purpose of restraining trade or monopolizing the market, the statutory objectives of the Sherman Act are placed in serious jeopardy . . . [Failure to] regulate this form of predatory ‘petitioning of government’ . . . threatens federal competition policy . . . by allowing competitors to use governmental process as a ‘loophole.’”⁴¹

These anomalies reinforce the overall theme: antitrust immunity doctrines have created a body of law under which government—which enjoys exclusive power to illegalize competition—is not only exempt from laws that purport to forbid *every* restriction on free competition, but it can even grant waivers to private parties who engage in the most obvious example of monopolistic conduct: using coercion to block their competitors. Meanwhile, private parties who conspire between themselves to set prices or to bar new firms from entering their industry face massive damages and even criminal

³⁹ *U.S. Postal Serv. v. Flamingo Indus.*, 540 U.S. 736, 746 (2004) (citing 39 U.S.C. § 401). This act dissolved the U.S. Post Office and replaced it with the Postal Service as “an independent establishment of the executive branch of the Government.”

⁴⁰ Named for two cases, *E. R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).

⁴¹ Gary Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine*, 41 *Hastings L.J.* 905, 908–09 (1990).

liability, even though their cartelizing efforts are inherently unlikely to succeed because they lack power to fine or jail potential competitors. What's national economic policy for the goose is a series of judicially created immunities for the gander.

II. The Limits of *Parker* Immunity

The *Parker* Court seemed to detect these problems when it declared that a state "does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."⁴² Later decisions have insisted that *Parker* immunity must not be expanded to allow organized business to thwart the "national policy in favor of competition . . . by casting . . . a gauzy cloak of state involvement over what is essentially a private [anti-competitive] arrangement."⁴³ Yet the Court has not explained the precise limits on the power states enjoy to give away "get out of antitrust free" cards.

Instead, the Court has fashioned two standards which a state must satisfy before *Parker* immunity may apply: first, the anti-competitive policy must be "clearly articulated" by the state, and, second, the parties engaging in the anti-competitive conduct must be "actively supervised" by state officials. These requirements have often proven to be little more than formalities.

The "clear articulation" rule began as a stringent requirement that the anti-competitive conduct at issue be actually compelled by state law before immunity would be granted. Thus in *Goldfarb v. Virginia State Bar*, the Court denied immunity to state bar officials who established a price-fixing scheme for lawyers.⁴⁴ The first question to ask when deciding whether immunity applied, said the Court, "is whether the activity is required by the State acting as sovereign."⁴⁵ But Virginia statutes were silent on the matter, so that "it cannot fairly be said that the State . . . required the anti-competitive activities."⁴⁶ Although this silence might be interpreted as allowing the bar to

⁴² *Parker*, 317 U.S. at 351.

⁴³ *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980).

⁴⁴ 421 U.S. 773 (1975).

⁴⁵ *Id.* at 790.

⁴⁶ *Id.*

decide whether or not to set prices for lawyers, the Court found that it was “not enough” that the anti-competitive conduct was merely “‘prompted’ by state action; rather, anti-competitive activities must be compelled by direction of the State acting as a sovereign” for immunity to apply.⁴⁷ Two years later, in *Cantor v. Detroit Edison Co.*, the Court was again tight-fisted, refusing to grant a blanket exemption for all private conduct required by state law, and noting that “state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity.”⁴⁸ Even where the state participates in the anti-competitive conduct of private parties, those parties can still be liable if they exercise “sufficient freedom of choice” that they “should be held responsible for the consequences.”⁴⁹ And the next year, in *Bates v. State Bar of Arizona*, it granted immunity to the state bar because it “act[ed] as the agent of,” and “its role [was] completely defined by,” the state government—unlike in previous cases, where the anti-competitive conduct had been engaged in “with only the acquiescence of the state.”⁵⁰

But later cases have watered down the “clear articulation” requirement. In *Southern Motor Carriers*, the Court declared that anti-competitive conduct need not be actually *compelled* by state law to qualify for immunity; it was enough that state law simply allowed bureaucrats to decide whether or not to impose an anti-competitive policy. That case involved “collective rate-making”—in other words, price-fixing—by groups of shipping companies in several states. The shippers submitted their rate agreements for review and approval by government regulators in their states, but these agreements were only allowed, not required, by state law. Still, the Supreme Court held that immunity applied, saying that “a state policy that expressly *permits*, but does not compel, anti-competitive conduct” is enough to invoke *Parker* immunity.⁵¹ Thus states may empower private parties to engage in price-fixing and other illegal activities with impunity, so long as the state “intends to adopt a *permissive policy*” allowing

⁴⁷ *Id.* at 791.

⁴⁸ *Cantor*, 428 U.S. at 592–93.

⁴⁹ *Id.* at 593.

⁵⁰ 433 U.S. 350, 361–62 (1977).

⁵¹ 471 U.S. at 61 (emphasis original).

such conduct.⁵² Since then, write Edlin and Haw, “the Court has made clear that virtually any colorable claim to state authority can be all the articulation necessary.”⁵³

The second requirement for *Parker* immunity, “active supervision,” has also been diluted. This requirement is meant to provide “realistic assurance that a private party’s anti-competitive conduct promotes state policy, rather than merely the party’s individual interests.”⁵⁴ Yet the Supreme Court does not demand this showing from a category of entities that it considers sufficiently accountable to the public. In *Town of Hallie v. City of Eau Claire*, decided the same day as *Southern Motor Carriers*, the Court suggested that lower courts could give *Parker* immunity to city governments and state agencies without first ensuring that they were actively supervised by state officials, because such entities could be presumed to act in the public interest.⁵⁵

Since then, courts have granted immunity to state regulatory agencies on the theory that they automatically operate in the public interest—disregarding the risk that businesses will gain sway over the regulatory agency and use its powers to prevent free competition. In *Earles v. State Board of Certified Public Accountants of Louisiana*, the Fifth Circuit held that the active supervision requirement did not apply to a group of CPAs deputized by the state to regulate the practice of accountants.⁵⁶ “Despite the fact that the Board is composed entirely of CPAs who compete in the profession they regulate,” the court was satisfied that “the public nature of the Board’s actions means that there is little danger of a cozy arrangement to restrict competition.”⁵⁷ And in *Hass v. Oregon State Bar*, the Ninth Circuit held that state agencies are exempt from the antitrust laws because their acts are sufficiently public as to assuage any concern that they are exploiting public power for private benefit.⁵⁸

These decisions have largely transformed the limits on *Parker* immunity into empty gestures. The “clear articulation” requirement

⁵² *Id.* at 62 (emphasis added).

⁵³ Edlin & Haw, *supra* note 31, at 1120.

⁵⁴ *Patrick v. Burget*, 486 U.S. 94, 101 (1988).

⁵⁵ 471 U.S. 34, 45 (1985).

⁵⁶ 139 F.3d 1033 (5th Cir. 1998).

⁵⁷ *Id.* at 1041.

⁵⁸ 883 F.2d 1453, 1460 (9th Cir. 1989).

can be met by a flimsy “permissive policy,” and the “active supervision” requirement was rendered inapplicable to state entities by the presumption that they act in the public interest. This did indeed allow private trade organizations to cast a “gauzy cloak of state involvement” over their efforts to bar free competition.⁵⁹

III. The North Carolina Dental Board Case

A. Proceedings in the FTC and the Fourth Circuit

The North Carolina Board of Dental Examiners is a group of practicing dental professionals deputized by the state to regulate the practice of dentistry. Crucially, they are elected to their positions by other practicing dentists, not by the general public or by government officials.⁶⁰ About a decade ago, the board began receiving complaints from dentists about the growing practice of “teeth-whitening,” a cosmetic procedure in which a plastic strip treated with peroxide is placed on the teeth for a few minutes in order to make them brighter.

This practice is safe and can even be done at home with a kit available over the counter at the grocery store. There is no evidence that it is dangerous; even the Food and Drug Administration refused to regulate teeth-whitening as a risk to consumer health.⁶¹ Many people choose to have it done while visiting a nail salon or shopping at the mall. But licensed dentists have labored to exclude anyone but themselves from offering this service, and it is now against the law in at least 14 states to apply a whitening strip to someone else’s teeth without having a dental or dental hygienist license. Such a license cannot be obtained without meeting expensive and time-consuming education and testing requirements.⁶²

⁵⁹ *Midcal Aluminum*, 445 U.S. at 106.

⁶⁰ *In the Matter of the N.C. Bd. of Dental Examiners*, 152 F.T.C. 640, 2011 WL 11798463 at *3 (Dec. 2, 2011).

⁶¹ See Letter from Janet Woodcock to Charles Norman, et al., Apr. 22, 2014 (FDA Docket No. FDA-2009-P-0566), available at <http://www.regulations.gov/contentStreamer?objectId=09000064816c224b&disposition=attachment&contentType=pdf>.

⁶² See Angela C. Erickson, *White Out: How Dental Industry Insiders Thwart Competition from Teeth-Whitening Entrepreneurs* (Institute for Justice 2013), available at <http://www.ij.org/white-out>.

Responding to complaints by licensed dental workers—not consumers⁶³—the board issued 47 cease-and-desist orders to small business owners who offered “teeth-whitening” in stores and malls throughout North Carolina, and urged the state’s Board of Cosmetic Art Examiners to bar cosmetologists from offering teeth-whitening services.⁶⁴ The Dental Board contended that teeth-whitening qualified as the practice of dentistry and therefore required a license.

When the FTC learned of the board’s efforts to block competition for teeth-whitening, it initiated an unlawful competition proceeding, alleging that the board was exploiting its licensing powers to restrict competition. The board responded by asserting immunity under *Parker*. The FTC rejected the immunity argument, and the U.S. Court of Appeals for the Fourth Circuit agreed. *Parker* immunity, the judges held, was unavailable because the board was not adequately supervised by accountable state officers.

The board contended that the active supervision requirement should not apply, because, being a state agency, courts should presume that its acts were in the public interest. The court of appeals rejected this argument. Such a presumption could apply only to entities that answer to voters or to government officials, but the board was accountable only to licensed dentists with a strong private interest in protecting their collective turf.⁶⁵ The active supervision requirement therefore did apply, and the board could not pass that test. It sent its cease and desist orders without oversight from any state agency, and although the board was required to file regular public reports of its operations, this was merely “generic oversight” which could not qualify as active state supervision.⁶⁶

Having dispensed with the board’s assertion of *Parker* immunity, the court went on to affirm the FTC’s finding that the board had violated the antitrust laws. Judge Barbara Milano Keenan wrote a concurring opinion to emphasize the narrowness of the holding: were

⁶³ In the Matter of the N.C. Bd. of Dental Examiners, 152 F.T.C. 640 (2011), 2011 WL 11798463 at *4. The FTC found evidence of only four instances of possible harm to consumers. The Dental Board failed to investigate two of them. The other two appeared to have resulted from unrelated conditions. In the Matter of the N.C. Bd. of Dental Examiners, 2011 WL 11798463, at *28.

⁶⁴ N.C. Bd. of Dental Examiners v. F.T.C., 717 F.3d 359, 365 (4th Cir. 2013).

⁶⁵ *Id.* at 369.

⁶⁶ *Id.* at 370.

the board appointed by elected officials, she wrote, it would have a stronger argument for immunity. But “the fact that the Board is comprised of private dentists elected by other private dentists, along with North Carolina’s lack of active supervision of the Board’s activities, leaves us with little confidence that the state itself, rather than a private consortium of dentists, chose to regulate dental health in this manner at the expense of robust competition.”⁶⁷

B. *The Supreme Court’s Holding*

The Supreme Court granted certiorari to address just the *Parker* immunity question, and in a 6–3 decision written by Justice Anthony Kennedy, it ruled that *Parker* immunity did not apply, because the state agency was not sufficiently supervised by elected officials. Private parties “cannot be allowed to regulate their own markets free from antitrust accountability.”⁶⁸ Thus, when considering whether to grant or withhold immunity, a court’s primary concern is “political accountability for anti-competitive conduct” that the entity “permit[s] and control[s].”⁶⁹

The Court therefore refused to give the board the blanket exemption that municipalities enjoy. The latter are “electorally accountable” and pursue a broader range of goals than private market actors do, which diminishes the likelihood that they will use regulatory power for private enrichment.⁷⁰ Because the private market participants serving on the Dental Board—elected by other private market participants—operated free of these checks and balances, they would have to satisfy the “active supervision” test to qualify for *Parker* immunity.

Justice Kennedy rejected the board’s argument that it should be automatically deemed exempt because the state had designated it as the official regulator. Immunity must turn “not on the formal designation” or on legal “nomenclature,” but “on the risk that active market participants will pursue private interests in restraining trade.”⁷¹ Given “the risks licensing boards dominated by market participants may pose to the free market,” it was important to ensure that such

⁶⁷ *Id.* at 377 (Kennan, J., concurring).

⁶⁸ N.C. Bd. of Dental Exam’rs, 135 S. Ct. at 1111.

⁶⁹ *Id.*

⁷⁰ *Id.* at 1112.

⁷¹ *Id.* at 1114.

boards are accountable to the public, by being answerable either to voters or elected officials on one hand, or to antitrust laws on the other.⁷² The active supervision requirement is not a matter of the regulators' good or bad faith, but of the "structural risk" that they will "confus[e]" their private interest with the public good⁷³—a particularly realistic concern in a profession like medicine, where regulators can find the two hard to separate.⁷⁴

The Court emphasized that this focus on structural incentives was required by the fact that, once immunized from antitrust law, even a regulator's bad-faith decisions are shielded from antitrust scrutiny. In *Columbia v. Omni Outdoor Advertising*, the Court granted exemption to a municipality even though it had conspired with a private corporation to engage in anti-competitive conduct that benefited the corporation.⁷⁵ The justices ruled that there was "no such conspiracy exception" that might deprive officials of immunity. *Parker* immunity is justified by "our national commitment to federalism" and judicial deference, and a bad-faith exception to the immunity doctrine would "shift . . . judgment from elected officials to judges and juries."⁷⁶ The only recourse for citizens harmed by officials who abuse their antitrust immunity is to vote the offenders out of office. This, Kennedy wrote in *Dental Examiners*, makes it "all the more necessary to ensure the conditions for granting immunity are met in the first place."⁷⁷

The Dental Board made no effort to argue that it could satisfy the "active supervision" requirement, and the Court spent little time on that question. State law did not expressly define teeth-whitening as the practice of dentistry, and it was therefore unclear whether the board had acted within its ambit when it issued the cease-and-desist

⁷² *Id.* at 1116.

⁷³ *Id.* at 1114.

⁷⁴ For example, the American Medical Association was successfully sued for antitrust violations for taking steps to discourage patients from visiting chiropractors, even though those efforts were scientifically well grounded and arguably required by the doctors' Hippocratic Oaths. See *Wilk v. Am. Med. Ass'n*, 671 F. Supp. 1465 (N.D. Ill. 1987), *aff'd*, 895 F.2d 352 (7th Cir. 1990).

⁷⁵ 499 U.S. 365 (1991).

⁷⁶ *Id.* at 374–77.

⁷⁷ N.C. Bd. of Dental Exam'rs, 135 S. Ct. at 1113.

orders.⁷⁸ The Court provided few details as to how a state might satisfy the active supervision requirement for antitrust immunity in the future—since whether the supervision is adequate “will depend on all the circumstances of a case.”⁷⁹ But at a minimum, an accountable state actor must review the anti-competitive act to ensure that it complies with state policy, and “the state supervisor may not itself be an active market participant.”⁸⁰

C. *The Dissent: State Autonomy Trumps*

Justices Samuel Alito, Antonin Scalia, and Clarence Thomas dissented. They objected to withholding antitrust immunity simply because the Dental Board was “not structured in a way that merits a good-government seal of approval.”⁸¹ In their view, the danger that regulatory entities may “be captured by private interests”⁸² was beside the point: antitrust laws simply do not apply to state agencies, and since the Dental Board is a state agency, “that is the end of the matter.”⁸³

According to the dissenters, *Parker* immunity was fashioned in response to the expansion of federal Commerce Clause authority during the New Deal. In 1890, when the Sherman Act was passed, federal power over interstate commerce was understood as limited in such a way that none of the act’s supporters would have imagined that the act might someday be used to interfere with a state’s regulatory conduct, regardless of whether such conduct was anti-competitive or not. But by the time *Parker* was decided, the Court had broadened the Commerce Clause so much that state and federal regulatory powers were brought into conflict. The *Parker* Court could only resolve that conflict by devising an immunity doctrine that would shield state regulation from federal oversight. *Parker*, the dissenters acknowledged, “was not based on either the language of the Sherman Act or anything in the legislative history,” but on the assumptions of the act’s authors about the limits on federal power, which, in light of the

⁷⁸ *Id.* at 1116.

⁷⁹ *Id.* at 1117.

⁸⁰ *Id.*

⁸¹ *Id.* (Alito, J., dissenting).

⁸² *Id.* at 1112.

⁸³ *Id.* at 1118.

New Deal's erosion of those limits, required the creation of an immunity doctrine to give states discretion to regulate without federal oversight, the way they had been allowed to do in 1890.⁸⁴

As for *Parker's* acknowledgement that immunity would not apply on the state's mere say-so, the dissenters viewed that as referring only to cases in which the state tried to authorize *private* entities to engage in illegal conduct, which was not occurring here. The Dental Board is not a private trade association but "a full-fledged state agency"⁸⁵ to which the state gave "the power to regulate."⁸⁶ This was just like the raisin cartel at issue in *Parker* itself—and the city's behavior in *Omni Outdoor*—in both of which the anti-competitive conduct was declared immune because the entity involved was a government entity.⁸⁷ In the dissent's view, these cases demonstrated that *Parker* immunity does not hinge on the acts of the regulator, whether anti-competitive or even corrupt, but solely on considerations of state autonomy.⁸⁸ That autonomy would be compromised by aggressively applying antitrust laws against regulatory boards. The risk of liability could undermine the states' ability to employ the expertise of chosen professionals to help "regulat[e] a technical profession in which lay people have little expertise."⁸⁹

Finally, the dissenters observed, it makes little sense to stop the inquiry at whether the regulatory agency is staffed by practitioners in the regulated trade. If one took the majority's approach of focusing on the national policy against anti-competitive conduct instead of state independence, then there was no reason not to make the inquiry broader and determine "whether this regulatory body has been captured by the entities that it is supposed to regulate," regardless of who serves on the board.⁹⁰ The reason the majority did not go so far, wrote Justice Alito, was because it is "no simple task" to determine "when regulatory capture has occurred." But this is just why courts should be "reliev[ed] . . . from the obligation to make

⁸⁴ *Id.* at 1119.

⁸⁵ *Id.* at 1122.

⁸⁶ *Id.* at 1120.

⁸⁷ *Id.* at 1122.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 1123.

such determinations at all,⁹¹ and should simply immunize all state entities, regardless of their behavior.

D. Summary

It is no surprise that the dissent was signed by the Court's most steadfast proponents of state autonomy and judicial deference. Justices Alito, Scalia, and Thomas are hardly ignorant of the danger that regulatory entities may abuse their powers to benefit the politically influential, but, in their view, that is simply not a matter for the courts—and efforts by judges to combat such abuses are only judicial meddling. Courts ought therefore to leave it to the political process to police the conduct of regulatory bodies.

This argument is unpersuasive. Given that *Parker* immunity, like so much else in antitrust law, is a wholly judge-made doctrine to begin with, it seems a little late to sound the alarm about judicial “activism” or interference with state authority. In fact, although the dissent phrases its concerns as somehow more fundamental or objective than the majority's considerations of regulatory policy, the dissent is no less rooted in policy considerations. The dissenters argue that “[t]he Sherman Act . . . is not an anticorruption or good-government statute,”⁹² but by that logic, state entities should be accorded *no immunity at all*, since the antitrust laws are also not state-autonomy statutes. On the contrary, the Court has often said that the primary concerns of the antitrust laws are “the protection of competition,”⁹³ the promotion of “fundamental national values of free enterprise and economic competition,”⁹⁴ and the preservation of a “national policy in favor of competition.”⁹⁵ These laws make no reference to state immunity.⁹⁶ As the dissent admits, the immunity doctrine itself is based solely on the Court's vision of what makes for “good government”—namely, the “dual system” which gives states a degree of independence never mentioned in the words of the antitrust statutes. State autonomy in antitrust is therefore just a

⁹¹ *Id.*

⁹² *Id.* at 1122.

⁹³ *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

⁹⁴ *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013).

⁹⁵ *Midcal Aluminum*, 445 U.S. at 106.

⁹⁶ *N.C. Bd. of Dental Exam'rs*, 135 S. Ct. at 1114.

policy consideration like any other. As with Eleventh Amendment immunity, the dissent's arguments for judicial deference in antitrust have taken on an "activist" life of their own, which throws the statutory text overboard in the service of policy considerations about the proper federal-state balance.

Because *Parker* immunity is a creation of judicial grace, it is up to the courts to decide the conditions on which they will grant that immunity. Good economics teaches us to regard state immunity with suspicion, as it is likely to encourage factionalism and rent-seeking. Good federalism teaches that state autonomy should be sacrificed when necessary to protect individual rights. Thus both wise policy and fidelity to the text of the statutes counsels for narrowing, not expanding, state antitrust immunity.

IV. A Path for the Future

A. The Constitutional Dimension

Although the Court was right to deny blanket immunity to the agency, the decision appears to have little applicability beyond the facts of this case. The structure of the North Carolina Board of Dental Examiners was unusual in that members were chosen not by elected officials or the general public, but by other practicing members of the profession, thus blurring what the Court might otherwise consider a clear line between a public entity and a private trade association.

Justice Kennedy's closing statement—that courts must assess "all the circumstances of a case"⁹⁷ when deciding questions of antitrust immunity—makes it hard to predict how future courts will use the decision. Yet it seems that states should find it easy to structure agencies in ways that will satisfy the courts that regulators are being adequately supervised. Moreover, of the two factors that determine whether *Parker* immunity applies, it is the other one—the "clear articulation" requirement—that is more troubling. Under the current rule of *Southern Motor Carriers*, states can satisfy this requirement with a vague "permissive policy," which undermines democratic accountability much more than the "active supervision" requirement does. But the Court did not address this issue. Thus the *Dental Examiners* case seems unlikely to cause much change. It is at

⁹⁷ *Id.* at 1117.

least gratifying to see the FTC taking steps to protect entrepreneurs against some of the worst abuses.

A better solution would be to narrow the antitrust immunities drastically, not only through a rigid “active supervision” requirement and a reinvigorated “clear articulation” rule, but also by adopting a third restriction on *Parker* immunity, rooted in a concern that went largely unaddressed in the North Carolina litigation: the constitutional right to earn a living without unreasonable government interference.

The Constitution guarantees to every person the right to pursue the vocation of his or her choice.⁹⁸ This right was well recognized by common law courts as far back as the 17th century, when English courts and Parliament took steps to block the government from creating monopolies that denied people the right to take up trades or enter into professions.⁹⁹ Although much neglected today,¹⁰⁰ this right is nevertheless firmly rooted in the nation’s history and tradition, and courts have held, even recently, that the government may not arbitrarily deprive people of the right to earn a living—a right Justice William Douglas called “the most precious liberty that man possesses.”¹⁰¹

This right is very often the victim of licensing regimes that exclude entrepreneurs from the marketplace for the benefit of existing industries. Some licensing requirements impose unnecessary and burdensome education or training requirements on people wishing

⁹⁸ See, e.g., *Greene v. McElroy*, 360 U.S. 474, 492 (1959).

⁹⁹ See, e.g., *The Case of Monopolies*, 11 Co. Rep. 84b, 77 Eng. Rep. 1260 (Q.B. 1603); *City of London’s Case*, 8 Co. Rep. 121b, 77 Eng. Rep. 658 (K.B. 1610); *Dr. Bonham’s Case*, 8 Co. Rep. 107a, 77 Eng. Rep. 638 (C.P. 1610). See also Bernard Siegan, *Economic Liberties and the Constitution* 36 (1980).

¹⁰⁰ To cite just one example, Justice Scalia has asserted that “the ‘liberties’ protected by Substantive Due Process do not include economic liberties.” *Stop the Beach Renourishment, Inc. v. Florida Dep’t of Env’tl. Prot.*, 560 U.S. 702, 721 (2010). This is simply not true. No court has ever categorically excluded economic liberty from the protections of the Due Process Clause. While economic liberty today receives low-yield “rational basis” review, that review is still *some* degree of protection, and in practice courts have protected that right under the Due Process Clause even in recent years. See, e.g., *Merrifield*, 547 F.3d at 991; *Bruner v. Zawacki*, 997 F. Supp. 2d 691 (E.D. Ky. 2014).

¹⁰¹ *Barsky v. Bd. of Regents of Univ.*, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting).

to practice a business.¹⁰² Others impose no requirements relating to skill or honesty, but simply bar people from entering trades if the government believes no more competition is “necessary.”¹⁰³ Such exploitation of government’s regulatory power is a danger not only to wise policy-making and to consumer welfare, but also to constitutionally protected economic liberty.

B. A New Way

This constitutional dimension suggests that antitrust immunity should be only rarely accorded to private entities that are deputized by the government to enforce rules restricting entry into trades. Future decisions should impose a three-part test to determine whether to immunize private entities who wield state power to block competition.

First, the “active supervision” requirement should be consistently applied in the manner promised in *North Carolina Board of Dental Examiners*. The Court’s refusal to waive this consideration simply because the board wears a state badge is gratifying, but it is only a first step, and, as the dissent notes, important questions remain unanswered. The Court says that “active supervision” requires state officials to “‘have and exercise power to review particular anti-competitive acts of private parties and disapprove those that fail to accord with state policy,’”¹⁰⁴ and that “the ‘mere potential for state supervision is not an adequate substitute for a decision by the State.’”¹⁰⁵ It also says that the state agent doing the supervising “may not itself be an active market participant.”¹⁰⁶ But beyond that, adequacy “will

¹⁰² See, e.g., *Craigsmiles*, 312 F.3d at 222 (law required two years of training as an undertaker before selling coffins); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999) (law required 1,600 hours of training in unrelated subjects to obtain a license to braid hair).

¹⁰³ See Timothy Sandefur, *A Public Convenience and Necessity and Other Conspiracies Against Trade: A Case Study from the Missouri Moving Industry*, 24 *Geo. Mason U. Civ. Rts. L.J.* 159 (2014); Timothy Sandefur, *State “Competitor’s Veto” Laws and the Right to Earn a Living: Some Paths to Federal Reform*, 38 *Harv. J. L. & Pub. Pol’y* 1009 (2015).

¹⁰⁴ *N. C. Bd. of Dental Exam’rs*, 135 S. Ct. at 1112 (quoting *Patrick*, 486 U.S. at 101)

¹⁰⁵ *Id.* at 1116 (quoting *Ticor*, 504 U.S. at 638).

¹⁰⁶ *Id.* at 1117.

depend on all the circumstances of a case.”¹⁰⁷ This leaves unanswered such questions as whether a regulator qualifies as an “active market participant” if he simply takes a year off to work for the regulatory board, or if he limits his practice in part, but continues to operate on the side.¹⁰⁸ If a dentist serving on the board chooses not to offer teeth-whitening services, but otherwise maintains his practice, is he an “active market participant” vis-à-vis the teeth-whitening trade? Such issues can only be resolved by further litigation, but the courts should err on the side of protecting competition, not state autonomy.

Second, the “clear articulation” requirement should be reinvigorated, to require something more than mere “permissive policy.” *Southern Motor Carriers* should be overruled, and the stricter requirement of *Goldfarb* reinstated. As Michael E. DeBow notes, *Southern Motor Carriers* “evidenced a complete lack of interest in the public choice explanation” for how regulatory agencies can fall into the hands of politically powerful businesses at the expense of entrepreneurs and consumers.¹⁰⁹ That case premised its enfeeblement of the “clear articulation” requirement on the idea that limiting immunity to situations in which state laws actually *compel* the anti-competitive conduct would “reduce[] the range of regulatory alternatives available to the State.”¹¹⁰ But many federal laws reduce the states’ range of regulatory alternatives, and if “[t]he antitrust laws reflect a basic national policy favoring free markets over regulated markets,”¹¹¹ then any state law contradicting that policy must yield.¹¹² In fact, the Supreme Court has declared that by applying a consistent presumption against immunity from the antitrust laws and “adhering in most cases to fundamental and accepted assumptions about the benefits of competition,” the courts actually “increase the States’ regulatory flexibility.”¹¹³

The lax *Southern Motor Carriers* rule reduces accountability by encouraging states to delegate authority to less-accountable

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1123 (Alito, J., dissenting).

¹⁰⁹ Michael E. DeBow, Understanding (and Misunderstanding) Public Choice: A Response to Farber and Frickey, 66 Tex. L. Rev. 993, 1012 n. 4 (1988).

¹¹⁰ *Southern Motor Carriers*, 471 U.S. at 61.

¹¹¹ *Omni Outdoor*, 499 U.S. at 388.

¹¹² *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942).

¹¹³ *Ticor*, 504 U.S. at 636.

enforcement arms, and to couch their economic policies in vague terms that give regulators the broadest possible power and elected officials the greatest degree of plausible deniability. This encourages regulatory capture. Also, a statute that simply lets regulators decide whether to block competition does not give clear instructions to the private parties who wield dangerous power to impose anti-competitive rules contrary to federal antitrust policy. A non-specific “permissive policy” lets them limit free competition without concern for whether they are targeting precisely the aspect of competition that elected officials meant to curtail.¹¹⁴ Private entities can then exercise “unguided discretion” to choose how much to displace competition—making it “illusory to view the state legislature as the ‘politically accountable’ source of a state policy that in fact has been adopted by the agency itself.”¹¹⁵

The *Southern Motor Carriers* Court tried to answer this concern by requiring “evidence [that] *conclusively shows* that a State intends to adopt a permissive policy,”¹¹⁶ but this does little since vague “permissive policies” are not made less vague by the fact that the law “conclusively shows” that the state has adopted a vague policy! An instruction like “engage in whatever anti-competitive conduct you choose” would *conclusively* delegate broad power, but it would not define the contours of that power. Thus the “permissive policy” rule encourages judges to “use [their] imagination liberally in determining whether particular anti-competitive conduct was a foreseeable or logical result of the regulatory delegation” and to grant immunity when they conclude in the affirmative.¹¹⁷ Yet this conflicts with the Court’s often-asserted reluctance to infer state-action immunity

¹¹⁴ See John F. Hart, “Sovereign” State Policy and State Action Antitrust Immunity, 56 *Fordham L. Rev.* 535, 571 (1988) (“The displacement-of-competition standard, in supporting immunity for a substantial class of restraints instituted by state agencies or local government that cannot plausibly be said to implement state policy, defeats the Court’s objective of confining immunity to those restraints that implement state policy.”).

¹¹⁵ C. Douglas Floyd, *Plain Ambiguities in the Clear Articulation Requirement for State Action Antitrust Immunity: The Case of State Agencies*, 41 *B.C. L. Rev.* 1059, 1106 (2000).

¹¹⁶ *Southern Motor Carriers*, 471 U.S. at 62 (emphasis added).

¹¹⁷ Thomas M. Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 *Cal. L. Rev.* 227, 244 (1987).

lightly.¹¹⁸ To the extent that *Southern Motor Carriers* was motivated by valid federalism concerns, those considerations are sufficiently addressed by a rule that allows immunity to private parties only when their anti-competitive conduct is explicitly compelled by state law. This would respect state autonomy while more effectively ensuring the transparency and accountability that the Court emphasizes in *North Carolina Board of Dental Examiners*.

But these two procedural restrictions on *Parker* immunity would remain inadequate even if they were ratcheted up to a workable degree. Any state-imposed limit on competition should also satisfy some substantive judicial scrutiny as well. That substantive test should accord states sufficient discretion to regulate trades in ways that will protect the public interest in health, safety, and honesty, while preventing states from adopting laws that simply let private parties block legitimate competition.

Several antitrust scholars have called for such a substantive requirement. Edlin and Haw, for example, have proposed that the Court apply a Rule of Reason in such cases.¹¹⁹ Ronald E. Kennedy suggested that courts require a showing, similar to that used in dormant Commerce Clause cases, that the state's interests significantly outweigh federal interests.¹²⁰ Other writers suggested that the Court require some evidence of market failure which the restraint would redress,¹²¹ and the FTC's own State Action Report has suggested a multi-tiered approach under which the "clear articulation" and "active supervision" requirements would be more stringently imposed in proportion to "the seriousness of the alleged anti-competitive conduct."¹²² I suggest that a "substantial advancement" test—requiring that any restriction on competition must substantially advance a significant government interest—would ensure a more workable tradeoff between regulation and the right to economic liberty.

¹¹⁸ See, e.g., *Ticor*, 504 U.S. at 636; *Phoebe Putney*, 133 S. Ct. at 1010.

¹¹⁹ *Supra* note 31, at 40.

¹²⁰ *Supra* note 17, at 46–47, 72–73.

¹²¹ John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 *Harv. L. Rev.* 713, 756 (1986); Peter Hettich, *Mere Refinement of the State Action Doctrine Will Not Work*, 5 *DePaul Bus. & Com. L.J.* 105, 147–50 (2006) (proposing a "reasonableness" inquiry).

¹²² John T. Delacourt & Todd J. Zywicki, *The FTC and State Action: Evolving Views on the Proper Role of Government*, 72 *Antitrust L.J.* 1075, 1089 (2005).

This proposal is bolstered, ironically, by a point made by the dissenters. In arguing that *Parker* immunity must be understood in its historical context, they observe that in 1890, when the Sherman Act was passed, “the regulation of the practice of medicine and dentistry was regarded as falling squarely within the States’ sovereign police power,” and the act’s authors would have thought it unnecessary to carve out explicit protections for state regulatory authority.¹²³ Only in the New Deal era, when changes in Commerce Clause doctrine magnified federal power, was it necessary to read into the act an immunity doctrine that would shield state powers that the act’s authors could not have meant to hinder. But that argument cuts both ways. The Sherman Act was also passed at a time when constitutional protections against abusive licensing requirements were more vigilantly enforced than they are now. Indeed, the dissent cited the case of *Dent v. West Virginia*¹²⁴ to support its assertion that states in the 1890s faced little hindrance when regulating professions. But that case actually stands for the opposite proposition. It was the first Supreme Court decision on the constitutionality of occupational licensing under the Fourteenth Amendment; it set forth a substantive limit on licensing laws under the Due Process Clause, holding that if a state imposed a requirement that was not “appropriate to the calling or profession, [or] attainable by reasonable study or application,” such a law would unconstitutionally “deprive [a person] of his right to pursue a lawful vocation.”¹²⁵ Written at the dawn of the so-called *Lochner* era,¹²⁶ *Dent* asserted federal protections for economic liberty.¹²⁷ The authors of

¹²³ N.C. Bd. of Dental Examiners, 135 S. Ct. at 1119 (Alito, J., dissenting).

¹²⁴ 129 U.S. 114 (1889).

¹²⁵ *Id.* at 122.

¹²⁶ This term, as David E. Bernstein reminds us, is slippery. See David E. Bernstein, *Lochner* Era Revisionism, Revised: *Lochner* and the Origins of Fundamental Rights Constitutionalism, 92 Geo. L.J. 1, 10-11 (2003) (“in practice there was not one *Lochner* era, but three.”). Bernstein dates it from *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), but the principle of freedom of contract and the right to pursue the occupation of one’s choice predates that by centuries. See Sandefur, *Right to Earn a Living*, *supra* note 2, at 17-24. What appears in retrospect to be a “*Lochner* era” is actually an artifact of the advent of the Fourteenth Amendment, which for the first time made state restrictions on economic liberty a matter for federal court review.

¹²⁷ *Dent* was written by Justice Stephen J. Field, one of the godfathers of laissez-faire constitutionalism. See generally John C. Eastman & Timothy Sandefur, Stephen Field: Frontier Justice or Justice on the Natural Rights Frontier?, *Nexus*: J. Opinion 121 (2001).

the Sherman Act could no more have anticipated today's excessively deferential "rational basis" test than they could have anticipated the changes in Commerce Clause doctrine.¹²⁸ If historical context justified the *Parker* Court's choice to read state-action immunity into antitrust law, then it also would justify courts today in reading into the same body of law protections against state restrictions on economic liberty that the Sherman Act's authors would likewise have taken for granted. At the very least, it warrants a sliding scale whereby state antitrust immunity expands only if constitutional protections for economic liberty grow with it. Unless the dissenters are willing to accept the latter, they should not argue for the former.

If state immunity from the antitrust laws is granted "out of respect for . . . the State, not out of respect for the economics of price restraint,"¹²⁹ then the flexibility accorded to states under the antitrust laws should mirror the flexibility accorded to states when they deviate from other federal legal or constitutional baselines. The Court should apply a rule that presumes in favor of antitrust liability, unless limiting competition is necessary to accomplish an important end. Such an intermediate form of means-ends scrutiny would require a state to articulate an important goal to be accomplished by restricting competition, and should require that the exemption serve that end in reality.¹³⁰

Anything more lenient, such as rational basis deference, is unwarranted, because such deference should apply only when the political

A resolute critic of licensing laws and other monopolistic restrictions, Field wrote *Cummings v. Missouri*, 71 U.S. (4 Wall) 277 (1866), dissented in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), and wrote other important decisions pioneering federal protections against state laws that restricted economic liberty under the guise of the police power. He also joined Justice Brewer's dissent in *Budd v. People*, 143 U.S. 517, 550-51 (1892), which explained that "[t]here are two kinds of monopoly—one of law, the other of fact. The one exists when exclusive privileges are granted. Such a monopoly, the law which creates alone can break, and, being the creation of law, justifies legislative control. A monopoly of fact any one can break, and there is no necessity for legislative interference."

¹²⁸ See Sandefur, *Right to Earn a Living*, *supra* note 2, at 123–40.

¹²⁹ *Ticor*, 504 U.S. at 633.

¹³⁰ Cf. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005) ("substantial advancement" test "asks, in essence, whether a regulation of private property is effective in achieving some legitimate public purpose."); *Craig v. Boren*, 429 U.S. 190, 197–98 (1976) (substantial advancement test not satisfied by "administrative ease and convenience" or other weak justifications).

process is thought sufficient safeguard for the individual rights at stake. But the political process is not enough to prevent private parties vested with state authority from engaging in anti-competitive and self-interested behavior.¹³¹ The general public is typically unaware of anti-competitive conduct, and although the public genuinely suffers from it, the rewards for those who benefit from it are great enough to ensure that they can prevent any serious reform efforts by injured consumers and taxpayers.

This substantial advancement proposal finds an analogy in cases involving the Federal Arbitration Act. That law—which, like the antitrust laws, was passed under Congress’s power to regulate commerce—holds that an arbitration agreement is valid as a matter of federal law and must be enforced, except when the agreement is invalid for reasons of state law.¹³² Some states—notably, California—have tried to exploit this exception to invalidate arbitration agreements, in spite of federal policy, and have adopted various strategies to do so.¹³³ The Supreme Court has frequently been forced to reverse the state courts’ efforts to devise common law rules that contradict the federal law.¹³⁴ It has not allowed states to escape the Arbitration Act’s requirements merely because they “articulate” an anti-arbitration policy or “supervise” state officials who contradict it. Instead, it has used a substantive test: arbitration agreements may be held invalid as a matter of state law only where that state law “arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.”¹³⁵ This rule blocks state courts from inventing special rules so as to “effect what . . . the state legislature cannot,” namely, a violation of the federal law that requires enforcement of such contracts.¹³⁶ A similar rule should apply to *Parker* immunity: while states may, for certain limited reasons, act in ways that would otherwise violate federal law, courts should apply a substantive test

¹³¹ Hettich, *supra* note 122, at 143.

¹³² *Perry v. Thomas*, 482 U.S. 483, 492 n. 9 (1987).

¹³³ See generally Stephen A. Broome, An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act, 3 *Hastings Bus. L.J.* 39 (2006).

¹³⁴ See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011); *Preston v. Ferrer*, 552 U.S. 346 (2008).

¹³⁵ *Perry*, 482 U.S. at 492 n.9.

¹³⁶ *Id.*

to determine when such acts are valid, so as to ensure that states do not use procedural devices to evade the federal antitrust law.¹³⁷ And that test should be grounded on protecting the right of entrepreneurs to earn a living free of unjust government-created monopolies.

V. Conclusion: Antitrust, the Government, and Economic Liberty

There is much about antitrust law that is deplorable. Its vagueness and malleability threaten the stability we expect of law; the fact that it penalizes non-coercive, often socially beneficial conduct renders it morally objectionable; and many of its economic assumptions are so flimsy that it is incoherent as social policy.¹³⁸ But whatever its flaws, antitrust doctrine is only worsened by state-action immunities that allow the worst offenders against economic freedom and competition to escape unscathed. As Dominick Armentano concludes, “antitrust has always been irrelevant to the actual monopoly problem in America”¹³⁹—that real problem being the use of government power to prohibit free competition. The fact that the ancestor of today’s antitrust law was a body of legal doctrine devoted to freeing individuals from oppressive licensing restrictions and government-sanctioned cartels makes today’s backwardness all the more distressing.

¹³⁷ The state’s choice to deputize private market participants, of course, should not bar application of a substantive legal test rooted in constitutional safeguards. Where a private actor serves as an instrument of the state, it may be required to comply with such standards. See, e.g., *Evans v. Newton*, 382 U.S. 296, 299 (1966). For example, private parties acting as instruments of the government must obtain a warrant when conducting a search, *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 614 (1989), and a government-created private corporation must comply with the First Amendment in its dealings with citizens, *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 399 (1995).

¹³⁸ Reforms in the vein of the Chicago School, whose motto was that antitrust law should protect competition and not competitors, have remedied some of the worst instances. For example, rules against “predatory pricing,” which once punished businesses that simply lowered their prices, are now sharply limited thanks to decisions such as *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). But while such reforms have taken place at the federal level, many states continue to impose reactionary antitrust laws. For example, the California Court of Appeal has rejected the *Brooke Group* rule, and held that the state’s Cartwright Act is intended to “protect[.]...smaller, independent retailers” against competition. *Bay Guardian Co. v. New Times Media LLC*, 187 Cal. App. 4th 438, 457 (Cal. Ct. App. 2010). Thus businesses can be sued in California simply for cutting prices.

¹³⁹ Dominick T. Armentano, *Antitrust and Monopoly: Anatomy of a Policy Failure* 273 (2d ed. 1990).

Although superficially plausible, the rhetoric of state autonomy that underlies the *Parker* immunity doctrine and the dissent here is simply not compatible with the text of the antitrust laws, the national policy they embody, the historical context typically used to justify that doctrine, or the realities of politics and economics. On the contrary, a rational antitrust policy would not only apply to government agencies, but would target them first and foremost. *North Carolina Board of Dental Examiners* holds out some hope on this front: entrepreneurs wrongly deprived of their constitutional right to economic liberty may find it a useful weapon of self-defense, and the most egregious violations of the right to economic liberty may indeed be subject to some limits. But if antitrust law is to serve what the Court calls “the fundamental national values of free enterprise and economic competition,”¹⁴⁰ then the immunity doctrines the Court has invented must be much more sharply limited.

¹⁴⁰ N.C. Bd. of Dental Exam'rs, 135 S. Ct. at 1110 (quoting *Ticor*, 504 U.S. at 636).