



## PROTECTING ECONOMIC LIBERTY BY OTHER MEANS

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Occupational licensing continues to burden businesses and entrepreneurs to no discernible benefit to consumers. While licensing requirements alone are economic barriers enough, regulators have proven savvy at using such regimes to frustrate the free operation of labor and capital markets, often as a means of rewarding or protecting politically-connected interests. Deputized by state governments—sometimes not even staffed by state employees—private practitioners acting as licensing boards can use their government-granted authority to bar entry, deter competition, and engage in price-fixing. Such self-interested and monopolistic behavior would be a clear violation of federal antitrust law were it not for the judicial invention of an immunity doctrine that shields state actors—even market participants—from such liability.

Thanks to the 1943 Supreme Court ruling in *Parker v. Brown*, state-government entities and private parties who act on state orders

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are typically immune from prosecution under federal antitrust laws.<sup>1</sup> To avail themselves of *Parker* immunity, regulators must prove that the alleged anti-competitive behavior is in pursuance of a “clearly articulated” official policy, and that it is “actively supervised by the State itself.”<sup>2</sup> In practice, both of these requirements have proven exceptionally low bars, and thanks to *Parker* and its progeny, state governments can institutionalize the same anti-competitive behavior for which businessmen and companies routinely face severe penalties. This impunity is legally unique. Pacific Legal Foundation (“PLF”) attorney Timothy Sandefur, also a Cato Institute adjunct scholar, has explained that exempting cartels protected by state law from federal law was “an extreme innovation in both antitrust law and federalism jurisprudence . . . . In virtually no other context can states exempt their citizens from the operation of federal statutes.”<sup>3</sup>

The Supreme Court had the opportunity to reevaluate the need for and scope of *Parker* immunity this past term in the case of *North Carolina Board of Dental Examiners v. Federal Trade Commission*.<sup>4</sup> The Court ultimately ruled that to enjoy state-action immunity, there really does have to be active state supervision over the occupational-licensing board — you can’t just give a blank regulatory check to a private cartel. But it declined to question why this sort of immunity exists in the first place. Neither the six-justice majority nor the three dissenters saw fit to place meaningful limitations on *Parker* immunity or to contemplate relevant and too-often neglected constitutional principles, such as the right to earn a living.

Still, even if it’s unfortunately par for the minimalist course for the Roberts/Kennedy Court, *Dental Examiners* is instructive as a po-

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<sup>1</sup> 317 U.S. 341 (1943).

<sup>2</sup> *Cal. Retail Liquor Dealers Ass’n. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

<sup>3</sup> Timothy Sandefur, *Reining in Antitrust Immunity*, REGULATION 17–18 (Fall 2014).

<sup>4</sup> 135 S. Ct. 1101 (2015).

tential way to attack the abuses of occupational licensing – representing the flip-side of the sorts of economic-liberty claims litigated by organizations like PLF and the Institute for Justice.

#### THE RISE OF A TEETH-WHITENING CARTEL

Beginning in 2003, the North Carolina Board of Dental Examiners issued cease-and-desist orders to beauticians and others who were offering teeth-whitening services (in which a plastic strip treated with peroxide is applied to the teeth to brighten them).<sup>5</sup> Although teeth-whitening is perfectly safe – people can even do it at home with an over-the-counter kit – the state’s licensed dentists sought to limit competition in this lucrative area. The Board is made up entirely of dentists and hygienists, with no input from the general public, so it’s not surprising that evidence later showed the Board’s orders on this subject responded to complaints from dentists, not consumers.<sup>6</sup>

The Federal Trade Commission charged the Board with engaging in anti-competitive conduct. Although the Board argued it should enjoy *Parker* immunity, the FTC, and later the U.S. Court of Appeals for the Fourth Circuit, rejected that argument, holding that the Board was not “actively supervised” by the state, but was instead a group of private business owners exploiting government power.<sup>7</sup>

Whatever one’s opinion of antitrust law – mine isn’t too favorable, because the law is too slow-acting to befit a dynamic marketplace, and in any event is typically hijacked to punish capitalists rather than promote competition<sup>8</sup> – existing immunity doctrines are dangerous because they allow private entities cloaked in government

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<sup>5</sup> *Id.* at 1108.

<sup>6</sup> *Id.* at 1116.

<sup>7</sup> *In re* N.C. Bd. of Dental Exam’rs, 152 F.T.C. 640 (2011); N.C. Bd. of Dental Exam’rs v. FTC, 717 F.3d 359, 365 (4th Cir. 2013).

<sup>8</sup> See generally EDWIN S. ROCKEFELLER, *THE ANTITRUST RELIGION* (2007).

authority to raise prices and restrict choice.<sup>9</sup> Worse, state-established cartels frequently harm constitutional rights, such as the right to earn an honest living, by barring new businesses from opening. The North Carolina case is a prime example of private actors abusing government power to arbitrarily block entrepreneurs from entering an industry and providing for themselves and their families. The Supreme Court may well agree with this assessment in the abstract, but it's not about to abandon decades of crony-capitalist-condoning case law to the contrary.

#### THE MAJORITY'S NARROW RULING

Justice Anthony Kennedy's majority opinion in *Dental Examiners*, joined by Chief Justice John Roberts and the four liberal justices, is a fine example of judicial minimalism, which has been the Court's overwhelmingly preferred jurisprudence when confronted with cases or controversies implicating economic liberties.

Kennedy explained that the issue was "not whether the [Board's] challenged conduct is efficient, well-functioning, or wise," but rather, "whether anticompetitive conduct engaged in by [non-sovereign actors] should be deemed state action and thus shielded from the anti-trust laws" whenever the state declares them to be the official licensing agency.<sup>10</sup> He then recited the two-part doctrinal test first set forth in the 1980 case of *California Retail Liquor Dealers v. Midcal Aluminum* for resolving this issue: "A state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear policy to allow the anticompetitive conduct, and second, the

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<sup>9</sup> See, e.g., *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985).

<sup>10</sup> 135 S. Ct. at 1111 (quoting *Patrick v. Burget*, 486 U.S. 94, 100 (1988)).

State provides active supervision of [the] anticompetitive conduct.”<sup>11</sup> Since both the parties and the Court had “assumed that the clear articulation requirement is satisfied,”<sup>12</sup> the case would turn entirely on *Midcal*’s “active supervision requirement [demanding], *inter alia*, ‘that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.’”<sup>13</sup>

Further discussing the active-supervision requirement, Justice Kennedy noted that “[c]oncern about the private incentives of active market participants animates *Midcal*’s supervision mandate, which demands ‘realistic assurance that a private party’s anticompetitive conduct promotes state policy, rather than merely the party’s individual interests.’”<sup>14</sup>

The Board contended that it should be exempt from the active-supervision requirement due to its formal designation as a state agency, but the Court disagreed, invoking the “repeated conclusion that the need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade.” State agencies like the North Carolina Board, that are “controlled by active market participants” who have “singularly strong private interests” that might distract them from their public duties, “pose the very risk of self-dealing *Midcal*’s supervision requirement was created to address.”<sup>15</sup> Accordingly, the Court held that a state board “on which a controlling number of decisionmakers are active market participants

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<sup>11</sup> 135 S. Ct. at 1111–12 (quoting *FTC v. Ticor Ins. Co.*, 504 U.S. 621, 635 (1992) (citing *Midcal*, 445 U.S. at 105)).

<sup>12</sup> *Id.* at 1110.

<sup>13</sup> *Id.* at 1112 (quoting *Patrick*, 486 U.S. at 100).

<sup>14</sup> *Id.* (quoting *Patrick*, 486 U.S. at 101).

<sup>15</sup> *Id.*

in the occupation the board regulates must satisfy *Midcal*'s active supervision requirement in order to invoke state-action antitrust immunity."<sup>16</sup>

Justice Kennedy did note "the risks licensing boards dominated by market participants may pose to the free market," and admitted that he had "identified only a few constant requirements of active supervision." Still, that was enough because "the adequacy of supervision will depend on all the circumstances of a case."<sup>17</sup>

That holding's squishy narrowness is evidenced by its specific tailoring to the structure of the Board of Dental Examiners: It gives no guidance for future cases involving differently organized state agencies. Indeed, why should the outcome of this case change if a state's assistant deputy under-secretary of commerce had merely attended the Board's meetings and rubber-stamped its cease-and-desist orders?

#### EVEN MINIMALIST HOLDING TOO MUCH FOR DEFERRING DISSENTERS

The dissent saw the case through the lens of federalism, arguing simply that "[u]nder *Parker*, the Sherman Act and the Federal Trade Commission Act . . . do not apply to state agencies" —so the Board should enjoy *Parker* immunity because it's officially a state agency.<sup>18</sup> In effect, Justice Samuel Alito's argument is that the federal judiciary shouldn't interfere with the power of states to pick winners and losers via deputized cartels.<sup>19</sup> While acknowledging the risk of cronyism that licensing boards create, he, along with Justices Scalia and

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<sup>16</sup> *Id.* at 1114.

<sup>17</sup> *Id.* at 1116–17.

<sup>18</sup> *Id.* at 1117–18 (Alito, J., dissenting).

<sup>19</sup> *Id.* at 1118 ("Determining whether a state agency is structured in a way that militates against regulatory capture is no easy task . . . . The Court has veered off course.").

Thomas, believe that we can trust the political process to resolve this problem.

Alito also calls into question the Court's use of the terms "controlling number" and "active market participant" in its holding.<sup>20</sup> This argument, that the difficulty inherent in "determining when regulatory capture has occurred . . . does not explain why it is appropriate for the Court to adopt [this] rather crude test for capture,"<sup>21</sup> is convincing as far as it goes. But it forgets that it was the Supreme Court that created *Parker* immunity in the first place, rendering the Court the most appropriate actor to work out any difficulties in the doctrine.

The dissent ends by concluding that the Court's "[creation of] a new standard for distinguishing between private and state actor for purposes of federal antitrust immunity . . . diminishes our traditional respect for federalism and state sovereignty."<sup>22</sup> But the almost blind deference defended by Alito in these matters is naïve; if the states were so trustworthy, there'd be no need for "active supervision" or "clear articulation" requirements in the first place. Alito would have the Court abdicate its constitutional responsibilities rather than engage in deciding hard cases involving the quagmire that is the modern administrative state.

Meanwhile, as George Will put it in his recent column on the case, occupational licensing laws and the monopoly power they grant "are growth-inhibiting and job-limiting, injuring the economy while corrupting politics. They are residues of the mercantilist mentality, which was a residue of the feudal guild system, which was

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<sup>20</sup> *Id.* at 1123

<sup>21</sup> *Id.* at 1123

<sup>22</sup> *Id.*

crony capitalism before there was capitalism. Then as now, commercial interests collaborated with governments that protected them against competition.”<sup>23</sup>

#### BUT WHAT DOES IT MEAN FOR ECONOMIC LIBERTY?

Cato and PLF had filed an *amicus* brief supporting the FTC—the first time Cato has ever filed a brief supporting the federal government!—arguing that courts should only rarely immunize private parties who act on the government’s behalf.<sup>24</sup> The Fourth Circuit was not only correct in applying the “active supervision” requirement, but existing immunity doctrines are too lax. Instead, courts should grant antitrust immunity to private entities acting under state law only where state law commands their restraint on competition, and where that restraint substantially advances an important state interest. This test would help protect the constitutional right to economic liberty against the only entity that can normally create monopolies and yet which today enjoys immunity from antimonopoly laws: the government.

Yet the narrow ruling in *Dental Examiners* provides little legal guidance on whether *Parker* immunity would be appropriate in cases involving regulatory agencies with a different structure than the North Carolina Board of Dental Examiners. The facts of *Dental Examiners* were unique in that the dental practitioners were relatively insulated from electoral accountability; thus, the Court could easily

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<sup>23</sup> George Will, *Supreme Court Has a Chance to Bring Liberty to Teeth Whitening*, WASH. POST (Oct. 10, 2014), available at [http://www.washingtonpost.com/opinions/george-will-supreme-court-has-a-chance-to-promote-cleaner-competition/2014/10/10/13a3a2c0-4fd8-11e4-babe-e91da079cb8a\\_story.html](http://www.washingtonpost.com/opinions/george-will-supreme-court-has-a-chance-to-promote-cleaner-competition/2014/10/10/13a3a2c0-4fd8-11e4-babe-e91da079cb8a_story.html).

<sup>24</sup> See Brief Amicus Curiae of Pacific Legal Foundation and Cato Institute in Support of Respondent, *N.C. Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101 (2015) (No. 13-534), available at <http://object.cato.org/sites/cato.org/files/pubs/pdf/nc-dental-merits-brief.pdf>.

find that the Board, composed of private actors who are elected by other private actors, failed the “active supervision” test.

The case-by-case, minimalist approach advocated by Justice Kennedy for dealing with future *Parker* immunity cases—as opposed to espousing a clear guiding principle—only allows government to assert more and more control over economic freedoms. Some executive officials take seriously their charge to act in the public interest and not interfere with normal market operations—particularly in states where the citizenry is suspicious of state involvement in economic affairs.<sup>25</sup> But most simply don’t act this way.

Moreover, neither the majority nor the dissent in *Dental Examiners* appears to notice the inconsistency of advocating judicial minimalism to resolve complications that result from a doctrine that the Court—not Congress, let alone the Constitution—created in the first place. Especially in such cases implicating purely judge-made doctrinal inventions, judges shouldn’t hide behind the usual tools of restraint, such as “settled” precedent, vague standards, and near-blind deference to state legislators and regulators. The Court could have at least drawn a brighter line with regard to either of the underdeveloped *Midcal* standards on which *Parker* immunity hinges.

The biggest problem with the dissent is the way in which the Justices trot out federalism concerns in order to stylize the case as an issue of federal versus state power. This dichotomy distracts from the real tension here, that between the economic interests of government vis-à-vis those of private citizens. Justice Alito characterizes the

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<sup>25</sup> See, e.g., Oklahoma’s experience since the Supreme Court’s *Dental Exam’rs* ruling. Randy Ellis, *Court Decision Sparks Request to Review Make-Up of Oklahoma Boards*, OKLAHOMAN (May 17, 2015), available at <http://newsok.com/article/5419799>; Randy Ellis, *State Panels Are Vulnerable to Antitrust Lawsuits, AG Says*, OKLAHOMAN (July 7, 2015), available at <http://newsok.com/article/5432314> (discussing Letter from Attorney General Scott Pruitt to Governor Mary Fallin, July 6, 2015, available at [http://object.cato.org/sites/cato.org/files/gov\\_fallin\\_letter\\_state\\_licensing\\_boards.pdf](http://object.cato.org/sites/cato.org/files/gov_fallin_letter_state_licensing_boards.pdf)).

North Carolina Board as “a state agency, created and empowered by the State to regulate an industry affecting public health,” as opposed to a “private trade association.”<sup>26</sup> But while the Board may technically be a state agency, its behavior—at least the behavior that precipitated the intervention of the FTC—is far more attributable to private than to public interest, and previous *Parker* cases have emphasized that immunity should not depend on such formalistic questions as whether the state simply declares a private trade association to be a government entity.<sup>27</sup> To paraphrase Justice Field, the law deals with substance, not shadows—with things, not names.<sup>28</sup>

#### A LACK OF JUDICIAL ENGAGEMENT

More broadly, *Dental Examiners* is just the latest instance of an entrenched unwillingness on the part of the Supreme Court to subject regulatory regimes to meaningful judicial review. While there’s good case law on the books that would allow for a more stringent review via the Fourteenth Amendment’s protection for the implicit right to earn a living,<sup>29</sup> as things stand now, the default rational-basis review given to economic regulations effectively gives state governments carte blanche to infringe ever more the economic liberties of private citizens. The biggest problem with such a permissive standard of review is its tacit endorsement of limitless executive-branch action.

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<sup>26</sup> *Dental Exam’rs*, 135 S. Ct. at 1121 (Alito, J., dissenting).

<sup>27</sup> See, e.g., *Midcal*, 445 U.S. at 106 (“The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.”).

<sup>28</sup> *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1866). Field was, in turn, paraphrasing Justice Story. See *Briscoe v. Bank of Kentucky*, 36 U.S. 257, 331 (1837) (Story, J., dissenting).

<sup>29</sup> See, e.g., *Schwartz v. Bd. of Exam’rs*, 353 U.S. 232 (1957); *St. Joseph Abbey v. Castille*, 712 F. 3d 215 (5th Cir. 2013); *Craigsmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002); cf. *Greene v. McElroy*, 360 U.S. 474, 492 (1959) (asserting similar Fifth Amendment liberty interest against federal government).

And the antitrust-law analog to rational-basis review of economic-liberty claims is the permissive *Parker* doctrine.

Perhaps most regrettably, what got basically no attention in *Dental Examiners* was the first of *Midcal*'s requirements, that "the challenged restraint . . . be one clearly articulated and affirmatively expressed as state policy."<sup>30</sup> The fact that both parties (and the Court) simply "assumed that the clear articulation requirement [was] satisfied"<sup>31</sup> is not unusual, though unfortunate nevertheless. According to antitrust scholars Aaron Edlin and Rebecca Haw, the clear articulation requirement has been so diluted by courts over time that "virtually any colorable claim to state authority can be all the articulation necessary."<sup>32</sup> Essentially, states can fashion just about anything as a "permissive policy,"<sup>33</sup> "[couching] their economic policies in vague terms that give regulators the broadest possible power," all the while maintaining the politically advantageous "greatest degree of plausible deniability."<sup>34</sup> The Court has no incentive to engage in the messy work of actually sorting out the often politically charged issues at the center of these cases. An anything-goes mentality is naturally well-suited to a legal system in which *stare decisis* remains paramount; no self-respecting court of law would risk inviting charges of activism from the court of (elite) opinion. Yet the downside to the hands-off approach favored today is that it most often only empowers the special interests responsible for the expansive administrative state in the first place.

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<sup>30</sup> *Midcal*, 445 U.S. at 105 (1980).

<sup>31</sup> *Dental Exam'rs*, 135 S. Ct. at 1110.

<sup>32</sup> Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1120 (2014).

<sup>33</sup> See, e.g., *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985).

<sup>34</sup> Timothy Sandefur, *Freedom of Competition and the Rhetoric of Federalism: North Carolina Board of Dental Examiners v. FTC*, 2014–2015 CATO SUP. CT. REV. 195, 219 (2015).

Even worse, this deference is self-perpetuating: as the body of case law condoning (or only loosely limiting) the anti-competitive practices of state-sanctioned entities grows, future state-sanctioned entities are given wider berth. Unlike elected officials, federal judges are relatively free of the rent-seeking pressures responsible for such administrative abuses, and thus in the best position to take the long run into consideration. This is what makes it so frustrating that the judiciary, being in the best position to defend and champion economic liberty – and being vested with the constitutional duty of doing so, via the Fourteenth Amendment – has for so long abdicated this responsibility and endorsed a naïve deference to administrative agencies. If the legislative and supposedly “democratic” political processes were as effective as the Court would have us believe, situations like that which gave rise to the *Dental Examiners* case would be far less frequent.

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While the conventional wisdom a year ago was that the Court had taken up *Dental Examiners* to clarify its *Parker* immunity doctrine after decades of neglect, the eventual ruling left the most chronic and troubling issues unresolved. At least the Court recognized the danger of occupational-licensing abuse generally, so we’ll just have to see whether the decision heralds the reinvigoration of judicial policing of self-serving bureaucracies. Ultimately, the case shows what happens when courts – both federal and state – are too deferential to legislatures – both federal and state – regarding economic regulation. All too often, getting the judiciary to enforce constitutional limits on government and protect individual liberty is like pulling teeth.