

North Carolina State Board of Dental Examiners v. FTC: Aligning Antitrust Law with Commerce Clause Jurisprudence Through a Natural Shift of State-Federal Balance of Power

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The Supreme Court's holding in *North Carolina State Board of Dental Examiners v. FTC (NC Dental)*¹ in February 2015 demonstrates a natural shift in the balance of power from the states to the national government. As the country's interstate and international economy has become more integrated, federal authority has likewise expanded.² And although the federalism dichotomy has undergone periodic back-and-forth "swings" since the nation's founding, the end result has been a net increase in federal power. *NC Dental* exemplifies this trend toward increasing national authority through the organic development of interstate commerce.

At the time the Supreme Court handed down its first holdings, commerce in the nascent United States was primarily intrastate.³ The local nature of the economy logically suggested that its regulation should also be local. Consequently, when regulation and licensure of professions spawned from the medical discipline, Chief Justice Marshall acknowledged that these health regulations stood squarely in the states' purview. In *Gibbons v. Ogden*,⁴ he heralded the national government's exclusive power to regulate interstate commerce, but also maintained that "health laws of every description" are component parts of "that immense mass of legislation . . . not surrendered to the general government: all which can be most advantageously exercised by the States themselves."⁵

But improved communication and cheaper transportation have created an interstate market that dwarfs the one that existed at the time of *Gibbons*.⁶ While Chief Justice Marshall was likely correct in averring that professional regulation to promote health was best suited to state control at a time when interstate commerce was far more limited, the massive growth of the economy casts doubt on the current

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1. 135 S. Ct. 1101 (2015).

2. Frank H. Easterbrook, *Federalism and Commerce*, 36 HARV. J.L. & PUB. POL'Y 935, 936 (2013).

3. See, e.g., *Kidd v. Pearson*, 128 U.S. 1, 17–18 (1888) (upholding as constitutional a state statute prohibiting manufacture and sale of intoxicating liquors, and recognizing that laws of state legislatures having a remote and considerable influence on commerce "are considered as flowing from the acknowledged power of a State to provide for the safety and welfare of its people, and form a part of that legislation which embraces everything within the territory of a State not surrendered to the general government").

4. 22 U.S. 1, 203 (1824).

5. *Gibbons*, 22 U.S. at 203.

6. See Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1335 (1994).

validity of that assertion.⁷ The Court has permitted the growth of Congress's commerce power as the interstate economy has expanded,⁸ and *NC Dental's* extension of federal antitrust law—with its accompanying limitation on state sovereignty—rests soundly on the same grounds of economic reasoning and principles of democratic governance.⁹

In *NC Dental*, the Court held that in order to receive *Parker* state action immunity¹⁰ from federal antitrust liability,¹¹ state regulatory boards that are predominantly composed of market participants must meet both requirements of the *Midcal* test:¹² (1) the challenged restraint on trade must be “one clearly articulated and affirmatively expressed as state policy”; and (2) the board's conduct must be “actively supervised by the State itself.”¹³ When the Court decided *NC Dental*, many states believed the holding would undermine and substantially intrude on states' sovereign authority and self-governance¹⁴ because the Court's decision limits the types of

7. See *id.*; see also Easterbrook, *supra* note 2, at 937 (“Today the national government is to commerce what states were 230 years ago, and cities are to commerce what states were in the long past.”).

8. See, e.g., *Perez v. United States*, 402 U.S. 146, 156–57 (1971) (holding that the Consumer Credit Protection Act prohibiting “loan-sharking” activities is within Congress's power under the Commerce Clause to control activities affecting interstate commerce); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257–58 (1964) (holding that “overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse” renders the Civil Rights Act of 1964 a proper exercise of Congress's authority under the Commerce Clause); *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942) (finding that amendments to the Agricultural Adjustment Act of 1938 penalizing a famer farmer for growing wheat for his own use in excess of a federally established quota did not exceed Congress's power under the Commerce Clause); *United States v. Darby*, 312 U.S. 100, 122 (1941) (finding that Congress has the power to prohibit the shipment in interstate commerce of goods produced for interstate commerce by employees whose wages and hours of employment do not conform to the requirements of the Fair Labor Standards Act); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 10 (1937) (holding that Congress possessed authority under the Commerce Clause to enact the National Labor Relations Act and enforce federal law establishing standards under which employees could organize and collectively bargain); *Houston, E. & W. Tex. Ry. Co. v. United States*, 234 U.S. 342, 353–55 (1914) (holding that Congress may control the intrastate rates maintained by a railroad carrier under state authority to the extent necessary to remove unjust discrimination against interstate commerce); *Champion v. Ames (Lottery Case)*, 188 U.S. 321, 363 (1903) (“[L]ottery tickets are subjects of traffic . . . [.] carriage of such tickets by independent carriers from one State to another is therefore interstate commerce . . . [and Congress] has plenary authority over such commerce . . .”).

9. See Easterbrook, *supra* note 6, at 1335–36 (arguing that the decreased communication and transportation costs generates more cohesive factions, about which James Madison cautioned in the *Federalist Papers*).

10. See *infra* Part II.C.

11. E.g., *Sherman Act*, 15 U.S.C. §§ 1–2 (2012); *Federal Trade Commission Act*, 15 U.S.C. § 45(a) (2012).

12. *N.C. State Bd. of Dental Exam'rs v. FTC (NC Dental)*, 135 S. Ct. 1101, 1114 (2015).

13. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc. (Midcal)*, 445 U.S. 97, 105 (1980) (quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978)).

14. Twenty-two states joined an amicus brief asserting that the Fourth Circuit holding “violates state sovereignty because it undermines the States' right to staff their agencies in the

regulatory schemes a state may use to monitor occupational practices and promote welfare in the state.¹⁵

This Note argues that the *NC Dental* decision appropriately accompanies the augmented federal authority that has followed the expansion of interstate commerce. Part I traces the development of professional regulation and licensure in America from their origins to the enactment of the Sherman Act in 1890. Part II examines the Court's interpretation of the Sherman Act and treatment of state regulatory authority from 1890 to modern times, while also tracking the course of congressional Commerce Clause authority as it has been construed by the Court. Part III analyzes the *NC Dental* decision and opinion in light of progressions in Commerce Clause and antitrust jurisprudence. It concludes that *NC Dental*'s holding (1) falls in line with the Court's preceding commerce and antitrust decisions and (2) is not an ultimately detrimental assault on state authority. The Court's decision encourages states to more fully exercise their authorities to regulate professional practices in the best interest of their citizens and to quell cartel-like conduct that threatens the states' economies and citizens' prosperity. Part III also anticipates the impact *NC Dental* will have on states and their regulatory boards.

I. THE ORIGIN & GROWTH OF PROFESSIONAL LICENSING & REGULATION IN THE UNITED STATES

A. Health Regulations at the Birth of the Nation

Since its inception, the regulation of professions has been predominantly a state function—an exercise of traditional police powers.¹⁶ Regulation of professional occupations began with the medical discipline during the colonial era,¹⁷ but formal regulation and licensing did not fully take root until after the Civil War.¹⁸ A 1649

manner they have deemed most desirable” and “[s]ubjecting the States’ supervisory choices to [the ‘active supervision requirement’] . . . plainly trenches upon the States’ authority to determine which of their agencies ‘exercise which of their governmental powers.’” Brief of Amici Curiae State of West Virginia and 22 Other States in Support of Petitioner at 11, 14, *NC Dental*, 135 S. Ct. 1101 (No. 13-534).

15. At oral argument, Hashim Mooppan, on behalf of the Board, began by asserting that “respect for federalism requires deference to a State’s sovereign choices concerning how to structure and manage its own regulatory agencies.” Transcript of Oral Argument at 3, *NC Dental*, 135 S. Ct. 1101 (2015) (No. 13-534); *see also, e.g.*, David J. Owsiany, *Federalism & Separation of Powers: North Carolina Board of Dental Examiners v. Federal Trade Commission*, 15 *ENGAGE* 27, 28 (2014); James R. Saywell, *The Six Sides of Federalism in North Carolina Board of Dental Examiners v. FTC*, 76 *OHIO ST. L.J. FURTHERMORE* 1 (2015).

16. Edward P. Richards, *The Police Power and the Regulation of Medical Practice: A Historical Review and Guide for Medical Licensing Board Regulation of Physicians in ERISA-Qualified Managed Care Organizations*, 8 *ANNALS HEALTH L.* 201, 202 (1999).

17. Owsiany, *supra* note 15, at 28; *see also* DAVID A. JOHNSON & HUMAYUN J. CHAUDHRY, *MEDICAL LICENSING AND DISCIPLINE IN AMERICA* 3–6 (2012); Richards, *supra* note 16, at 202–06 (discussing disease control and nuisance abatement as catalyzing exercise of state police power to abate threats to public health).

18. Richards, *supra* note 16, at 206 (characterizing formal regulation of the professions

regulation passed by the Massachusetts Bay Colony was among the first to acknowledge that unscrupulous and unqualified health practitioners endanger citizens, and New York adopted a similar provision in 1665.¹⁹

Following ratification of the Constitution, state legislatures continued to institute health care regulations and penalize unlicensed practice of medicine.²⁰ While the newly formed central government gathered modest authority through interstate commerce, banking, and a burgeoning infrastructure,²¹ the Court under Chief Justice Marshall explained that “[t]he acts of Congress, passed in 1796 and 1799, empowering and directing the officers of the general government to conform to, and assist in the execution of the quarantine and health laws of a State, . . . are considered as flowing from the acknowledged power of a State, to provide for the health of its citizens.”²² The central government served the states in promoting the welfare of their citizens, but this subservient relationship would arguably be reversed come the Court’s decision in *NC Dental* in the twenty-first century.

B. Jacksonian De-Regulation, the Civil War, and the Progressive Era

Nearly all states repealed their health care laws during the Jacksonian era (1828–1840).²³ An antiregulatory climate swept across the country, and economic development was, on the whole, left to the states.²⁴ However, the Civil War—which generated unprecedented numbers of casualties attributable to medical illness and unsanitary practices—along with advancements in medical science led to both greater scrutiny of physicians and higher regard for public hygiene and sanitation.²⁵ Not surprisingly, “physicians and dentists were among the earliest occupations to be regulated [with] licensing laws,”²⁶ but the Progressive Era’s advances in knowledge and science saw the birth of modern-day professions in a variety of disciplines. Accompanying this growth in professions was the adoption of voluminous occupational licensing regulation by state legislation.²⁷

Whereas the first regulations of professional practices emerged from health

as a post-Civil War phenomenon, particularly because earlier regulations passed by state legislatures were repealed from the early 1800s to the Civil War as a result of “poor organization of the professions” and “Jacksonian democratic notions of ‘every man his own doctor’”).

19. See JOHNSON & CHAUDHRY, *supra* note 17, at 4.

20. Owsiany, *supra* note 15, at 28–29.

21. See, e.g., *Gibbons v. Ogden*, 22 U.S. 1, 205 (1824); *McCulloch v. Maryland*, 17 U.S. 316 (1819); William N. Eskridge, Jr. & John Ferejohn, *The Elastic Commerce Clause: A Political Theory of American Federalism*, 47 VAND. L. REV. 1355, 1369–72 (1994). See generally BERNARD SCHWARTZ, *THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS* 160–86 (1977).

22. *Gibbons*, 22 U.S. at 205.

23. Owsiany, *supra* note 15, at 28–29; Richards, *supra* note 16, at 206; see also Eskridge & Ferejohn, *supra* note 21, at 1373 (“Jackson vetoed bills seeking to renew the U.S. Bank and to spend money to create interstate transportation networks.”).

24. See Richards, *supra* note 16, at 206.

25. See JOHNSON & CHAUDHRY, *supra* note 17, at 21; Owsiany, *supra* note 15, at 29.

26. Marc T. Law & Sukkoo Kim, *Specialization and Regulation: The Rise of Professionals and the Emergence of Occupational Licensing Regulation*, 65 J. ECON. HIST. 723, 731 (2005).

27. See *id.* at 723.

concerns, the subsequent wave of regulatory laws served a consumer protection function.²⁸ As the knowledge base in various disciplines expanded, it became “increasingly difficult for consumers to judge the quality of professional services,” and competition between technically trained experts and long-standing practitioners generated greater heterogeneity of professional quality, ultimately generating consumer uncertainty about services.²⁹ Because sellers of specialized services were better informed about product quality than were buyers, lower-quality goods, sold at lower rates, attracted underinformed consumers and drove higher-quality goods out of the market.³⁰ Adding to this “lemon problem”³¹ were collusive agreements that threatened business, property, and trade.³²

II. STATE REGULATORY ENFORCEMENT & THE SHERMAN ANTITRUST ACT

A. States’ Response to the “Lemon” Market

To combat the problems of decreased quality in marketed goods and services, professionals may self-regulate, or professionals and consumers may seek government regulation.³³ In the late 1800s and early 1900s, state governments enacted large quantities of legislation that regulated a variety of occupations, from barbers and beauticians to architects and engineers.³⁴ Enforcement of these laws was generally delegated to independent or state licensing boards composed largely of individuals drawn from the occupational group being regulated.³⁵ Limited government resources encouraged the enlistment of part-time officials, and the expertise needed to design appropriate regulatory measures resided with these practitioners.³⁶

In 1889, one year before enactment of the Sherman Act, the Court in *Dent v. West Virginia* endorsed state regulatory laws that required occupational certification by state-developed boards.³⁷ In that case, the Court upheld West Virginia’s law

28. *Id.*

29. *Id.* at 723, 729.

30. See MILTON FRIEDMAN, CAPITALISM AND FREEDOM 152–53 (40th Anniversary ed. 2002) (remarking that preservation of quality provides one rationale for limiting the number of physicians).

31. See George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 4 Q. J. ECON. 488, 488 (1970) (explaining that the incentive for sellers to market poor-quality merchandise tends to reduce the average quality of goods and the size of the market, and governmental intervention or private institutional regulation may respond to these problems); see also Law & Kim, *supra* note 26, at 723–29 (asserting that the problem of asymmetric information is a likely explanation for the emergence of occupational-licensing regulation).

32. See 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman, explaining his bill to the Senate as “arm[ing] the Federal courts within the limits of their constitutional power that they may co-operate with the State courts in checking, curbing, and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States”).

33. Law & Kim, *supra* note 26, at 725; see also Akerlof, *supra* note 31, at 488.

34. Law & Kim, *supra* note 26, at 731 n.23.

35. *Id.*

36. See *id.* at 729.

37. 129 U.S. 114, 122 (1889) (“The power of the State to provide for the general welfare

requiring all physicians to obtain a certificate from the state board of health attesting to the physician's qualifications.³⁸

B. The Sherman Act

Amidst these state regulations, Congress instituted the "general statutory framework for governmental intervention in the market" through the Sherman Act of 1890.³⁹ Congress adopted broad, Constitution-like language that invited refinement through judicial interpretation in tandem with the Commerce Clause.⁴⁰ The Act makes unlawful every "contract, combination . . . or conspiracy, in restraint of trade or commerce"⁴¹ and conduct directed to "monopolize, or attempt to monopolize . . . any part of . . . trade or commerce . . ."⁴²

Prior to the Act's enactment, Senator Sherman explained that he "d[id] not wish to single out any particular trust or combination. It is not a particular trust, but the system [he aimed] at."⁴³ Representative Stewart further clarified that "[t]he provisions of this trust bill are just as broad, sweeping, and explicit as the English language can make them to express the power of Congress over this subject under the Constitution of the United States."⁴⁴ And Senator George⁴⁵ plainly expressed Congress's intent that the Sherman Act's reach mirror that of the Commerce Clause, saying, "The bill has been very ingeniously and properly drawn to cover every case which comes within what is called the commercial power of Congress."⁴⁶

of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the practice of different States, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely; their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity.").

38. *Id.* at 128.

39. William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 662 (1982); Albert M. Kales, *The Sherman Act*, 31 HARV. L. REV. 412, 412–14 (1918).

40. Baxter, *supra* note 39, at 662–63; *see also* United States v. S.-E. Underwriters Ass'n (*Underwriters Ass'n*), 322 U.S. 533, 558 (1944) ("That Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements . . . admits of little, if any, doubt.").

41. 15 U.S.C. § 1 (2012).

42. 15 U.S.C. § 2 (2012).

43. 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman).

44. 21 CONG. REC. 6314 (1890) (statement of Rep. Stewart during the last speech preceding the unanimous adoption of the Sherman Act); *see also Underwriters Ass'n*, 322 U.S. at 558 n.46.

45. Senator George was a member of the Senate Judiciary Committee that redrafted the Sherman Act before its final passage. *See Underwriters Ass'n*, 322 U.S. at 558 n.46.

46. 21 CONG. REC. 3147 (1890) (statement of Sen. George).

The Sherman Act immediately prompted questions about which contracts, combinations, and conspiracies in restraint of trade are prohibited,⁴⁷ and the expansive, open-ended statutory provisions enlisted judicial reasoning as the primary vehicle for determining the Act's scope.⁴⁸ One scholar analyzing the Sherman Act's implementation shortly after its enactment concluded that the conduct prohibited was to be determined in accordance with the "standard of reason which had been applied at common law."⁴⁹ Theoretically, the uncertainty that would arise from this judicial function would be "no greater than that which attends any new course of decision by common-law courts,"⁵⁰ but the Act's broad language certainly made the new federal law unique. Another contemporary commentator explained that "[t]he Act is necessarily vague, because, in men's minds, the evil dreaded is vague, and like words, therefore, have been used to express it."⁵¹

But as broad as the Act purported to be, the Court readily acknowledged that regulation of professional licensing remained an entrenched function of the states, outside of the Act's reach. For example, in *Hawker v. New York* in 1898, the Court reiterated its pre-Sherman Act assertion that a law defining qualifications of one who attempts to practice medicine is a proper exercise of state police power: "Care for the public health is something confessedly belonging to the domain of that power."⁵² Twenty-five years later in *Douglas v. Noble*, the Court determined that the Federal Constitution does not prohibit a state legislature from delegating to an administrative board nonarbitrary discretion to determine (1) the required standards of fitness for licensure, and (2) whether an applicant meets those standards.⁵³

Despite the Court's resolve that states' police power includes regulatory authority to monitor professional practices, the Court wrestled with the extent of Congress's commerce power and the reach of the Sherman Act. In *United States v. Trans-Missouri Freight Ass'n*, the Court asserted that the Sherman Act is "not limited to that kind of contract alone which is [a]n unreasonable restraint of trade"⁵⁴ but rather "renders illegal all agreements which are in restraint of trade or commerce."⁵⁵ That

47. See Kales, *supra* note 39, at 413 ("The most important question regarding the construction of the Sherman Act is this: Does the prohibition of the act apply to every contract, combination, and conspiracy which is (however slightly) in restraint of trade, according to the literal significance of those words; or does it apply only to every *illegal* contract, combination, or conspiracy in restraint of trade—the determination of what contracts, combinations, and conspiracies are illegal because in restraint of trade being left to a standard outside of the act?" (emphasis in original)); see also Baxter, *supra* note 39, at 662–73 (tracing the Court's evaluation of the Sherman Act's scope).

48. See, e.g., Baxter, *supra* note 39, at 687; Kales, *supra* note 39, at 413–14.

49. Kales, *supra* note 39, at 414.

50. *Id.*

51. William F. Dana, "Monopoly" Under the National Anti-Trust Act, 7 HARV. L. REV. 338, 355 (1894).

52. 170 U.S. 189, 193–94 (1898).

53. 261 U.S. 165, 169–70 (1923). In *Douglas*, "the legislature of Washington [had] provided that only licensed persons should practice dentistry" and "vested the authority to license in a board of examiners, consisting of five practicing dentists." *Id.* at 166, cited in NC Dental, 135 S. Ct. 1101, 1119 n.5 (2015).

54. 166 U.S. 290, 345 (1897).

55. *Id.* at 341.

same year, in *Allgeyer v. Louisiana*⁵⁶—a case that would launch the beginning of the *Lochner* era—the Court struck down a state constitutional provision prohibiting foreign corporations from doing business in the state.⁵⁷

The *Lochner* Court—characterized by judicial activism in promotion of a laissez-faire economic policy—engaged in a series of holdings striking down regulation of activity that affected the commercial landscape.⁵⁸ Accordingly, the Court restricted congressional commerce power by asserting both a substantive due process liberty right of contract and a narrow definition of interstate commerce.⁵⁹ For example, the Court held in *Hammer v. Dagenhart* that a federal child labor law could not be sustained on the theory that Congress possessed power to regulate interstate commerce in the shipment of child-made goods, because regulation of child labor hours was “a purely local matter to which the federal authority does not extend.”⁶⁰ Likewise, in *Carter v. Carter Coal Co.*, the labor provisions of a conservation act, which dictated hours and wages, were unconstitutional as regulations outside of Congress’s Commerce Clause authority.⁶¹

The Court’s restriction of Commerce Clause authority, coupled with its assertion of a substantive free market liberty right, complicated application of the Sherman Act: the Act’s scope was designed to mirror that of Congress’s commerce power, but its content promoted a laissez-faire economy by permitting the invisible hand of competition to regulate the market. Furthermore, when the Court excluded from congressional commerce power control of commercial matters “purely local in [their] character,”⁶² the Court diminished federal authority, which weakened the Sherman Act’s forcefulness as a federal vehicle to promote freedom of contract.

As a result, in the year following *Allgeyer*, the Court refined its interpretation of the Sherman Act to “appl[y] only to those contracts whose *direct and immediate*

56. 165 U.S. 578 (1897).

57. The Louisiana state provision read: “No foreign corporation shall do any business in this state without having one or more known places of business and an authorized agent or agents in the state upon whom process may be served.” *Id.* at 583. The Court determined that Louisiana had violated liberty of contract by regulating insurance contracts made between its citizens and out-of-state companies. *Id.* at 588–89. Although the focal issue of *Allgeyer* was the jurisdictional reach of Louisiana’s legislation beyond its state boundaries, the lengthy substantive due process dicta has led scholars to view the case as “the pivotal case” of the *Lochner* Era, R. STRONG, SUBSTANTIVE DUE PROCESS OF LAW: A DICHOTOMY OF SENSE AND NONSENSE 90 (1986), with a “landmark holding” that opened “the floodgates of substantive due process review,” FRANK LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 567 (2d ed. 1988).

58. *See, e.g.*, *Adair v. United States*, 208 U.S. 161, 180 (1908) (striking down federal legislation prohibiting “yellow-dog contracts”); *Lochner v. New York*, 198 U.S. 45, 58 (1905) (striking down New York’s laws limiting the maximum hours of employment in bakeries as an invalid exercise of police power to protect the public health, safety, morals, or general welfare).

59. *See, e.g.*, Matthew J. Lindsay, *In Search of ‘Laissez-Faire Constitutionalism,’* 123 HARV. L. REV. FORUM 55, 56 (2010); Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 877 (1987) (observing the Court’s several-step analysis involving the right of contract as a liberty protected by the due process clause and a “sharp limitation of the category of permissible government ends”).

60. 247 U.S. 251, 276 (1918).

61. 298 U.S. 238, 316–17 (1936).

62. *Hammer*, 247 U.S. at 276.

effect is a restraint upon interstate commerce.”⁶³ The Court also asserted that “to treat the act as condemning all agreements . . . would enlarge the application of the act far beyond the fair meaning of the language used.”⁶⁴

Considering that “the language used” was decidedly intertwined with the Commerce Clause,⁶⁵ it is not surprising that the Court’s reining-in of the Sherman Act coincided with a cap on congressional commerce power, using the same direct-indirect test. In *A.L.A. Schechter Poultry Corp. v. United States*, the Court plainly stated that the direct-indirect test that applied in the context of the Sherman Act also determines the scope of the Commerce Clause.⁶⁶ The Court consequently determined that the National Industrial Recovery Act (NIRA), under which defendants were convicted for violating wage and hour requirements, exceeded Congress’s commerce authority because the NIRA’s attempt to control intrastate activity only indirectly affected interstate commerce.⁶⁷ Similarly, in *Carter Coal*, the Court reasoned that because the production and distribution of coal that the federal law sought to regulate occurred before interstate commerce begins, those processes affected interstate commerce only “indirectly,” which placed them outside of Congress’s power under the Commerce Clause.⁶⁸

C. State Action Parker Immunity

In 1937, the Court abandoned its effective ban on governmental regulation and intervention in the market.⁶⁹ As the post-*Lochner* Court loosened its grip on congressional commerce authority to enable federal regulation, it likewise curtailed the Sherman Act’s interference with state regulation. As a result, state and government regulations abounded.⁷⁰

By the mid-twentieth century, over 1200 state occupational-licensing statutes

63. *United States v. Joint Traffic Ass’n*, 171 U.S. 505, 568 (1898) (emphasis added). The Court clarified the direct-indirect restraint test in *Anderson v. United States*, 171 U.S. 604 (1898), and its companion case, *Hopkins v. United States*, 171 U.S. 578 (1898), explaining that the test distinguished between “agreements whose primary purpose and effect was the suppression of competition in the general market and those whose purpose was something else but which would, just as any economic behavior would, inevitably have some side effect upon the market.” Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 *YALE L.J.* 775, 796 (1965).

64. *Joint Traffic Ass’n*, 171 U.S. at 568.

65. *See supra* notes 44–46 and accompanying text.

66. 295 U.S. 495, 547–48 (1935) (“The distinction between direct and indirect effects has been clearly recognized in the application of the Anti-Trust Act.”).

67. *Id.* at 543, 545–46, 548, 550–51.

68. *Carter v. Carter Coal Co.*, 298 U.S. 238, 308, 310 (1936).

69. *See* WILLIAM E. LEUCHTENBERG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 216, 220 (1995) (remarking that in 1937, the Court “began to execute an astonishing about-face” by “uph[olding] every New Deal statute that came before it”); *see also* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392, 399–400 (1937) (holding that a Washington minimum wage law for women was a valid restriction on the “freedom of contract”).

70. *See supra* note 8 and accompanying text.

governed at least seventy-five occupations.⁷¹ Requiring every state law to conform to the mandates of the Sherman Act, however, would have retrograded the Court's newfound judicial restraint and dismissed the values states had recently codified into regulatory statutes. So the Supreme Court in *Parker v. Brown* interpreted the antitrust laws to confer immunity on states in their sovereign capacity.⁷²

In *Parker*, a California statute authorized the establishment of a committee to formulate a marketing program for agricultural commodities produced in the state.⁷³ One program restricted competition among raisin growers and maintained prices in the raisin market, and a producer and packer of raisins brought suit, challenging the program as invalid under the Sherman Act.⁷⁴ The Court, however, determined that the program "derived its authority and its efficacy from the legislative command of the state."⁷⁵ It reasoned:

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

The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.⁷⁶

This language, voiced by a post-*Lochner* Court averse to obstructing government programs, is regulation enabling. It is not a distinctly anti-federal government, pro-state sovereignty holding. Rather, what removal of *Lochner* constraint on commerce power did for federal regulation, *Parker* immunity did for state regulation. But the Court would, decades later, characterize *Parker* immunity as a reflection of "Congress'[s] intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution."⁷⁷ This assertion, stemming from a Reagan-era Court⁷⁸ characterized by "New

71. Law & Kim, *supra* note 26, at 725–26.

72. 317 U.S. 341 (1943).

73. *Id.* at 346–47.

74. *Id.* at 344–49.

75. *Id.* at 350.

76. *Id.* at 350–51.

77. *Cnty. Commc'ns Co. v. City of Boulder*, 455 U.S. 40, 53 (1982); *see also* *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 632–33 (1992) (asserting that the *Parker* decision "was grounded in principles of federalism," and "[t]he principle of freedom of action for the States, adopted to foster and preserve the federal system, explains the later evolution and application of the *Parker* doctrine").

78. The Reagan administration has generally been known for its antigovernment intervention disposition regarding business. *See* William E. Kovacic, *Reagan's Judicial Appointees and Antitrust in the 1990s*, 60 *FORDHAM L. REV.* 49, 49–50 (1991) (noting the Reagan Administration's deregulation foundations, "success in redirecting federal antitrust enforcement," and the "antitrust reform movement in the 1980s").

Federalism,”⁷⁹ improperly conflates the *Parker* Court’s decision and dicta with Congress’s intentions in enacting the Sherman Act a half century before.

Of course, when states regulate occupational practices by granting professionals authority to limit entry into their own professions, there exists potential for misuse of the state’s authority for private gain. The ultimate dilemma inherent in professional regulation, therefore, is that it can improve market quality and efficiency, as well as working conditions, but it can also limit beneficial competition.

In response to this reality, the Court in *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.* crafted a two-part test for instances in which private parties participate in a price-fixing regime: “First, the challenged restraint must be ‘one clearly articulated and affirmatively expressed as state policy’; second, the policy must be ‘actively supervised’ by the State itself.”⁸⁰

Elaborating on this test in *Town of Hallie v. City of Eau Claire*, the Court explained that the active supervision requirement stems from a recognition that “[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.”⁸¹ But where the actor is a municipality, the Court asserted, “there is little or no danger that it is involved in a *private* price-fixing arrangement.”⁸² Consequently, municipalities need only meet the first, clear-articulation prong of the *Midcal* test in order to receive *Parker* immunity.⁸³

The *Hallie* Court also remarked in a footnote that in cases in which the actor is a state agency, active state supervision would likely not be required.⁸⁴ It is an iteration of this contemplated scenario that brought *NC Dental* before the Court in 2014.

III. A LOOK AT THE *NC DENTAL* DECISION, DISSENT, & IMPACT

As has been common practice among the states, the North Carolina legislature

79. The “New Federalism” refers to the late twentieth-century Court’s “radical restructuring of federal-state relations” that included revitalization of the Tenth Amendment and assertion of a “categorical anticommmandeering principle.” See Susan Bandes, *Erie and the History of the One True Federalism*, 110 YALE L.J. 829, 832 (2001) (reviewing EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* (2000)); see also *United States v. Morrison*, 529 U.S. 598 (2000); *Printz v. United States*, 521 U.S. 898 (1997) (invalidating provisions of the Brady Act); *United States v. Lopez*, 514 U.S. 549 (1995).

80. 445 U.S. 97, 105 (1980) (quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978)). The Court invalidated a California statute forbidding licensees in the wine trade from selling below prices set by the producer. Although the intent to restrain prices was expressed with sufficient precision to meet the first prong of the test, the absence of state participation in the mechanics of the price posting caused the statute not to meet the requirement of active supervision. *Id.*

81. 471 U.S. 34, 47 (1985).

82. *Id.* at 47 (emphasis in original).

83. *Id.* at 46–47.

84. *Id.* at 46 n.10 (“In cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue. Where state or municipal regulation by a private party is involved, however, active state supervision must be shown, even where a clearly articulated state policy exists.”).

created a state licensing board (“the Board”) to regulate the practice of dentistry in the state.⁸⁵ That Board consisted of six voting members, who were all licensed dentists elected by other licensed dentists in the state, and two nonvoting members: a dental hygienist and nondentist consumer.⁸⁶ A North Carolina statute also provides that “[n]o person shall engage in the practice of dentistry in this State, or offer or attempt to do so, unless such person is the holder of a valid license . . . issued by the North Carolina State Board of Dental Examiners,”⁸⁷ and a person is deemed to be “practicing dentistry” if that person “[r]emoves stains, accretions or deposits from the human teeth.”⁸⁸

In the early 1990s, dentists in North Carolina began offering teeth whitening services, and around 2003, nondentists began offering similar services.⁸⁹ Dentists soon complained to the Board about these nondentists’ provision of teeth whitening, and in response, the Board began issuing cease-and-desist letters to nondentist teeth whitening providers.⁹⁰

A. Administrative Proceedings

In 2010, the Federal Trade Commission (“Commission”) issued a single-count administrative complaint against the Board, alleging that “[t]he North Carolina dental statute does not expressly address whether, or under what circumstances, a nondentist may engage in teeth whitening.”⁹¹ The Commission also claimed that the Board classified teeth whitening as a practice of dentistry and violated Section 5 of the Federal Trade Commission Act (FTCA)⁹² by (1) “engag[ing] in extra-judicial activities aimed at preventing non-dentists from providing teeth whitening services,” (2) in the absence of authorization by statute, and (3) in circumvention of “any review or oversight by the State.”⁹³

In its response, the Board admitted that “[n]o kiosk, spa or other provider of teeth whitening services by a non-dentist could actually be forced to stop operations unless the Board obtained either a court order or the cooperation of a district attorney in a

85. N.C. GEN. STAT. ANN. § 90-22(a)–(b) (West 2008).

86. *Id.*

87. N.C. GEN. STAT. ANN. § 90-29(a) (West 2008 & Supp. 2016).

88. N.C. GEN. STAT. ANN. § 90-29(b) (West 2008 & Supp. 2016).

89. N.C. Bd. of Dental Exam’rs, 152 F.T.C. 640 (F.T.C. 2011), 2011 WL 11798463, at *2 (Final Commission Opinion and Order).

90. *Id.*

91. Complaint at 3, N.C. Bd. Of Dental Exam’rs, 152 F.T.C. 640 (F.T.C. 2011) (No. 9343), <http://www.ftc.gov/sites/default/files/documents/cases/2010/06/100617dentalexamcmpt.pdf> [<https://perma.cc/JL5S-U7N4>].

92. *Id.* at 3, 5. Section 5 of the Federal Trade Commission Act provides, in relevant part, that “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.” 15 U.S.C. § 45(a)(1) (2012). Federal authority under the FTCA is broader than that under the Sherman Act, but the FTCA “was designed to supplement and bolster the Sherman Act,” and a violation of the Sherman Act is considered an “unfair method of competition” within the meaning of section 5 of the FTCA. *FTC v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 394–95 (1953).

93. Complaint, *supra* note 91, at 4.

criminal conviction and a court judgment.”⁹⁴ The Board then asserted the affirmative defense that the Board was immune from suit under *Parker* and possessed sovereign immunity under the Eleventh Amendment.⁹⁵

At trial, the Administrative Law Judge (ALJ) found that “the Board’s concerted action to exclude non-dentists from the market for teeth whitening services” constituted “an unreasonable restraint of trade and an unfair method of competition in violation of Section 5 of the FTC Act.”⁹⁶ The ALJ also rejected the Board’s *Parker* immunity argument.⁹⁷

On appeal, the Commission rejected the Board’s defense, which was premised on principles of federalism.⁹⁸ The Commission asserted that the *Parker* “state action defense, for state or private actors acting pursuant to a state regulatory program . . . requires a showing of both ‘clear articulation’ and ‘active supervision’ for state boards controlled by financially interested members.”⁹⁹ Bluntly asserting that “[t]he Board is not a sovereign”¹⁰⁰ and had failed to show sufficient active supervision to meet both prongs of the *Midcal* test, the Commission issued a final order sustaining the ALJ’s decision.¹⁰¹

The Commission recognized that “the [Supreme] Court has never ruled directly on the question of whether state agencies must be supervised,” and acknowledged the aforementioned footnote in *Hallie*,¹⁰² as well as lower court cases in accord with that footnote’s suggestion.¹⁰³ Nevertheless, the Commission determined that “[t]he Court’s jurisprudence in this area leads us to conclude that when determining whether the state’s active supervision is required, the operative factor is a tribunal’s degree of confidence that the entity’s decision-making process is sufficiently independent from the interests of those being regulated.”¹⁰⁴

B. The Fourth Circuit

The Board petitioned the Fourth Circuit for review of the Commission’s order, and the Fourth Circuit denied the petition, holding that in order to receive *Parker* immunity, the Board must demonstrate active supervision by the state, which the

94. *N.C. Bd. of Dental Exam’rs*, 152 F.T.C. 640, 2011 WL 11798463, at *6 (citation omitted) (Final Commission Opinion and Order).

95. *Id.* at 6.

96. *N.C. Bd. of Dental Exam’rs*, 152 F.T.C. 75 (F.T.C. 2011), 2011 WL 11798452, at *11, 94 (Initial Decision and Order).

97. *See N.C. Bd. of Dental Exam’rs*, 152 F.T.C. 640, 2011 WL 11798463, at *7 (Final Commission Opinion and Order).

98. *Id.* at *27; *see also* *N.C. Bd. of Dental Exam’rs*, 151 F.T.C. 607, 615–28 (F.T.C. 2011), 2011 WL 3568990, at *5–15 (Interlocutory Order).

99. *N.C. Bd. of Dental Exam’rs*, 152 F.T.C. 640, 2011 WL 11798463, at *27 (Final Commission Opinion and Order).

100. *Id.* at *38 n.20.

101. Final Order, *N.C. Bd. of Dental Exam’rs*, 152 F.T.C. 640 (F.T.C. 2011) (No. 9343), <http://www.ftc.gov/sites/default/files/documents/cases/2011/12/111207ncdentalorder.pdf>.

102. *See supra* note 84 and accompanying text.

103. *N.C. Bd. Of Dental Exam’rs*, 151 F.T.C. at 619, 2011 WL 3568990, at *8 (Interlocutory Order).

104. *Id.*

Board failed to do.¹⁰⁵ The court reasoned that although the Board is a state agency,¹⁰⁶ it is not the state sovereign, because the Supreme Court has recognized two entities as “the sovereign” under *Parker* that “ipso facto are exempt”¹⁰⁷ from the antitrust laws: the state legislature (in *Hoover v. Ronwin*¹⁰⁸) and the state supreme court (in *Bates v. State Bar of Arizona*¹⁰⁹).

Although the Supreme Court had not determined whether other state entities might also constitute the state sovereign, the Fourth Circuit reasoned that because “[i]t is obvious that a state agency comprised of privately employed dentists is not the ‘sovereign’ equivalent of the state legislature or state supreme court,”¹¹⁰ the Board must meet the requirements applied to private parties seeking to claim *Parker* exemption—that is, both prongs of the *Midcal* test.¹¹¹

The court concluded that its decision “hardly sounds the death knell for federal/state balance” because, given the finding that “the Board is a private actor under the antitrust laws, there is no federalism issue.”¹¹² The court left unexplained this self-affirming conclusion—that the state-federal balance is unaffected *because* the court determined that the Board is not the state. This abrupt dismissal of federalism concerns generated criticism among scholars and the several states.¹¹³

105. *NC Dental*, 717 F.3d 359, 366–70 (4th Cir. 2013).

106. *Id.* at 364 (“The Board is a state agency . . .”).

107. *Hoover v. Ronwin*, 466 U.S. 558, 568 (1984) (emphasis omitted).

108. *Id.* at 567–68 (“[U]nder the Court’s rationale in *Parker*, when a state legislature adopts legislation, its actions constitute those of the State and *ipso facto* are exempt from the operation of the antitrust laws.” (italics in original) (citation omitted)). In *Hoover*, an unsuccessful candidate for admission to the Arizona Bar alleged that the Arizona State Bar, the Committee on Examinations and Admissions, and other entities violated the Sherman Act by artificially reducing the numbers of competing attorneys in the state. *Id.* at 564. The Court held that, because the Arizona Supreme Court retained the sole authority to determine who should be admitted to the practice of law in Arizona, the challenged conduct was that of the Arizona Supreme Court and therefore exempt from Sherman Act liability under *Parker*. *Id.* at 573. However, *Hoover* was a 4-3 decision (with Justice Rehnquist taking no part in the decision and Justice O’Connor taking no part in the consideration or decision), *id.* at 559, and the three-justice dissent authored by Justice Stevens believed the challenged restraint of trade conduct was not that of the Arizona Supreme Court, *id.* at 589 (Stevens, J., dissenting). Justice Stevens asserted that *Parker* immunity requires “that the sovereign must require the restraint,” and “[t]he fact that [the State Bar and Commission] are part of a state agency under the direction of the sovereign is insufficient to cloak them in the sovereign’s immunity.” *Id.* at 590 (Stevens, J., dissenting) (emphasis omitted). The *NC Dental* decision might foreshadow a revisit to the question of how a state supreme court must supervise the state bar association in order for *Parker* immunity to apply to anticompetitive conduct.

109. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 359–60 (1977) (“In the instant case . . . the challenged restraint is the affirmative command of the Arizona Supreme Court . . . That court is the ultimate body wielding the State’s power over the practice of law, and, thus, the restraint is ‘compelled by direction of the State acting as a sovereign.’” (citations omitted) (quoting *Goldfarb v. Va. State Bar*, 421 U.S. 579, 791 (1975)).

110. *NC Dental*, 717 F.3d at 366 n.3.

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

112. *NC Dental*, 717 F.3d at 375.

113. *See, e.g.*, Brief of Amici Curiae State of West Virginia and 22 Other States in Support of Petitioner, *supra* note 14, at 7; Owsiany, *supra* note 15, at 29–30; Saywell, *supra* note 15.

Adding to this dissatisfaction with the Fourth Circuit’s decision was the court’s conclusory note that the “Board is represented by private counsel and the State has never intervened in the proceedings on the Board’s behalf,” suggesting that these factors are significant in determining whether a state agency is a private or state actor.¹¹⁴ Judge Keenan’s concurrence further obscured the court’s holding by suggesting that the election of Board members by other private participants in the market was a dispositive factor.¹¹⁵ This assertion, however, contradicted the Commission’s advocacy for a rule that always requires active supervision of financially interested public officials, no matter the method of selection.¹¹⁶ Ambiguity surrounding which factors subject a regulatory board to both *Midcal* requirements might have encouraged the Supreme Court’s decision to grant certiorari.

The Court consequently bore the task of defining the means by which a state agency receives state status for purposes of *Parker* immunity—a question that quickly raised federalism arguments. One scholar entreated that “[f]ederalism offers at least six distinct ways of thinking about the question,” all of which reject the FTC’s view of “the Board as a private party even though the State treats it as a public entity,”¹¹⁷ and at oral argument, the Board began by asserting its position on federalism grounds.¹¹⁸

C. The Supreme Court’s Decision

In a 6-3 decision, the Court rejected the Board’s arguments and held that the Board was a nonsovereign actor controlled by active market participants. As such, the

114. *NC Dental*, 717 F.3d at 375.

115. *Id.* at 376 (Keenan, J., concurring) (“[O]ur holding that the Board is a private actor for purposes of the state action doctrine turns on the fact that the members of the Board, who are market participants, are elected by other private participants in the market. If the Board members here had been appointed or elected by state government officials pursuant to state statute, a much stronger case would have existed to remove the Board from the reach of *Midcal*’s active supervision prong.” (citation omitted)).

116. *See* Transcript of Oral Argument, *supra* note 15, at 28 (“MR. STEWART: The board members, the majority of them at least, are required to be practicing dentists, they have an evident self-interest in the manner in which the dental profession is regulated and in regulations that might keep other people from competing with dentists. That natural self-interest is reinforced by the method of selection. North Carolina law provides that the members of this dental board will be selected not by the governor or by the public, but by the community of dentists.

JUSTICE KAGAN: You are not suggesting, or are you, that that’s critical to your case?

MR. STEWART: We’re not saying that that’s critical. That’s simply a —

JUSTICE KAGAN: It’s just like an add-on feature.

MR. STEWART: That’s right. And—and that’s the way the commission treated it in its opinion. The commission didn’t suggest that the outcome would have been different if the method of selection had been different.”).

117. Saywell, *supra* note 15, at 4. Those six “sides of federalism” are (1) *Parker*’s federalism roots, (2) federalism and statutory interpretation, (3) structural state sovereignty, (4) states as laboratories of experimentation, (5) the Madison-de Tocqueville Compromise, and (6) the nationalist school of federalism. *Id.* at 4–9.

118. Transcript of Oral Argument, *supra* note 15, at 3; *see supra* note 15.

Board was only entitled to *Parker* immunity if it satisfied both prongs of the *Midcal* test: (1) the Board's action in restraint of trade was clearly articulated and affirmatively expressed as state policy, and (2) the policy was actively supervised by the state.¹¹⁹

The Court rested this holding on "the Nation's commitment to a policy of robust competition," which unquestionably reigned over state sovereignty in this case, because "[g]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state action immunity is disfavored, much as are repeals by implication.'"¹²⁰ This policy-backed assertion is well supported by economic reasoning. Edlin and Haw, whom the Court cited in the majority opinion, observe that increasing numbers of licensing boards unequivocally increases consumer costs of services and decreases the number of jobs in those licensed professions.¹²¹ While some of the resulting quality and safety improvements justify these costs, many licensing rules do not.¹²² As the number of occupations requiring licensure from regulatory boards has increased,¹²³ these policy concerns have become more pronounced.

1. In Line with Expansion of the Commerce Clause

Justice Alito in his dissent claimed that the Court should have (1) preserved the federal-state balance that existed at the time *Parker*¹²⁴ was decided in 1943 and (2) maintained the *Parker* Court's conception of state police power, which included state regulatory boards.¹²⁵ Interestingly, the dissent also commented that when Congress passed the Sherman Act in 1890, Congress sought to exercise its power to regulate interstate commerce to the utmost extent, but "the commerce power was far more limited than it is today."¹²⁶ With the expansion of the commerce power through *Wickard* in 1942,¹²⁷ the Sherman Act's reach correspondingly lengthened. In the year following *Wickard*, however, the Court decided *Parker*, preventing the Sherman Act from circumscribing state regulatory power.¹²⁸ Thus, the dissent argued, the Court should retain *Parker*'s exclusion of state regulatory boards from the reach of federal antitrust law.¹²⁹

119. *NC Dental*, 135 S. Ct. 1101, 1110 (2015).

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

121. Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1098 (2014), cited in *NC Dental*, 135 S. Ct. at 1116.

122. *Id.*

123. *Id.* at 1096 (explaining that "[w]hen only about five percent of American workers were subject to licensing requirements during the 1950s, the anticompetitive effect of these state-sanctioned cartels was relatively small . . . [but] [n]ow, however, nearly a third of American workers need a state license to perform their job legally," and that figure is even higher in the service sector).

124. *Parker v. Brown*, 317 U.S. 341 (1943).

125. *NC Dental*, 135 S. Ct. at 1118–19 (Alito, J., dissenting).

126. *Id.* at 1118 (Alito, J., dissenting).

127. *Wickard v. Filburn*, 317 U.S. 111 (1942).

128. *Parker*, 317 U.S. at 351.

129. *NC Dental*, 135 S. Ct. at 1119 (Alito, J., dissenting).

This reasoning was rightly not adopted by the majority because, as mentioned above,¹³⁰ the *Parker* grant of immunity to state regulatory action matches *Wickard*'s expansion of Congress's commerce power insofar as they both enable, rather than restrict, government regulation in intra- and interstate markets, respectively. Consequently, Justice Alito's description of the *Parker* Court as applying disparate treatment to the Commerce Clause and Sherman Act is a mischaracterization. *Parker* did not halt the Sherman Act's expansion on federalism grounds while permitting expansion of its counterpart Commerce Clause.

Even if the *Parker* Court did establish incongruous scopes for the Commerce Clause and Sherman Act, the dissent assumed two premises without justification: first, that although congressional Commerce Clause authority has continued to stretch since *Parker* was decided in 1943,¹³¹ the Sherman Act's reach should be petrified in its mid-twentieth-century scope; and second, that what qualifies as "the State" for *Parker* immunity should not be qualified according to the characteristics of today's state regulatory boards. Although Justice Alito recognized that "[d]ecisions by this Court have permitted the reach of the Sherman Act to expand along with expanding notions of congressional power,"¹³² he explained *Parker* immunity as being rooted in state sovereignty, ignoring the post-*Lochner*, regulation-enabling mentality with which the *Parker* Court expanded the Commerce Clause and permitted New Deal legislation to take effect.

The dissent also asserted that *Midcal*'s active-supervision prong must not apply because the question before the Court "is whether this case is controlled by *Parker*," not "whether [state regulatory] programs serve the public interest."¹³³ But this argument is both a non sequitur and false dichotomy. *Parker* immunity applies only to programs that serve the public interest—that is, programs of the State acting in the public interest. *Parker* does indeed apply to *NC Dental*, but *Parker* does not mandate that *Midcal*'s active-supervision prong not apply to the Board.

The federal antitrust policy furthered by the *NC Dental* decision bolsters healthy competition and ensures that the regulations with which the public must comply actually promote the interests of the public rather than benefit only a select few competitors. This reasoning is consistent with the *Parker* Court's stance that the government's policies ought to be given effect in commerce. Accordingly, Justice Alito's assertion that "[t]he Court has veered off course" by "distort[ing] *Parker*"¹³⁴ is simply not true. *NC Dental* permits a natural extension of federal economic policy as interstate commerce becomes increasingly integrated. If, as the dissent recognized, the Sherman Act stretched alongside congressional commerce power, it does not make sense for the Court to enable the Commerce Clause to continue stretching¹³⁵

130. See *supra* Part II.C.

131. See, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

132. *NC Dental*, 135 S. Ct. at 1118 (quoting *Hospital Building Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 743 n.2 (1976)).

133. *Id.* at 1117 (Alito, J., dissenting).

134. *Id.* at 1118 (Alito, J., dissenting).

135. See, e.g., *Gonzales*, 545 U.S. 1 (holding that Congress's Commerce Clause authority includes the power to prohibit local cultivation and use of marijuana in compliance with California state law).

without also allowing comparable augmentation of the Sherman Act, which is rooted in commercial policy.

2. Not a Detrimental Assault on State Authority

The critical feature of the regulations that *Parker* and *Wickard* permitted is that they are governmental in nature as opposed to motivated by private interests. Thus, the Court's active supervision requirement for state-created regulatory boards dominated by privately interested members does not undermine *Parker* by altering a state-federal balance that existed at the time. Rather, it preserves the *Parker* Court's intent to allow governmental policies to reign over private market interests.

It cannot come as a surprise that licensing boards comprising competitors are apt to regulate in ways designed to benefit themselves.¹³⁶ In addressing this risk, the active-supervision requirement encourages states to maintain *more* regulatory control over occupational practices in their respective states. This suggests *increased* state-government authority, not a usurpation of state police power. Nevertheless, because this hands-on form of state governance is mandated through federal antitrust law, *NC Dental* can be said to point toward federal authority in the federalism dichotomy.

But what is the harm to states in requiring that they more closely monitor their regulatory boards? Although the *NC Dental* holding might ostensibly favor federal-government power at the expense of state authority, the case will likely, in fact, benefit the states in promoting the interests of their citizens. The majority opinion predominantly focuses on the policy of ensuring that state government regulations not be thwarted by self-interested market competitors, and the Court contemplated how this policy would be undermined by a contrary Court holding.¹³⁷ The risk that the Board, and others similarly situated as state regulatory bodies, would engage in anti-competitive conduct to promote the party's individual interests at the expense of robust competition was simply too great to not require *Midcal*'s active-supervision requirement.¹³⁸

Contrary to arguments that the Court's holding strips states of sovereign authority, *Midcal*'s two requirements do not limit state policies to those that survive Sherman Act or FTCA scrutiny. A state may—without being subject to liability under federal antitrust law—implement a regulatory scheme that undoubtedly restrains trade or results in unfair competition. Those restraint-of-trade policies simply have to be truly those of the state, not of unmonitored competitors who bear a state-board label and who could easily carry governmental authority away from state interests.

Thus, the *NC Dental* holding ultimately ensures that state authority stays with the state. Far from revoking state authority and bestowing that power on the federal government, it safeguards state authority from depletion and contamination by the market's most powerful competitors. Much like the post-*Lochner* Court endorsed New Deal provisions on the basis of the Commerce Clause to facilitate governmental

136. Edlin & Haw, *supra* note 121, at 1093.

137. *NC Dental*, 135 S. Ct. at 1112 (“[W]here a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.” (quoting *Patrick v. Burget*, 486 U.S. 94, 100 (1988))).

138. *Id.* at 1114.

regulation of detrimental business conduct, the *NC Dental* Court has resolved that state regulations should not be undermined by the market elite.

The Court essentially asserts that a state-authorized, market-participant regulator is not “the State” in its sovereign capacity. It is therefore not entitled to state action *Parker* immunity unless the state supervises that regulator’s actions. However, even if the Court were to deem such a regulator the state sovereign, it would not be imprudent to subject that state to federal antitrust law for the regulator’s noncompetitive activity. If a state believes that it is in the best interest of its citizens to regulate using a fox-guarding-the-henhouse scheme (i.e., statutorily authorizing market competitors to regulate their own market, sans confirmation that those competitors are indeed implementing state policies),¹³⁹ one must question whether the states’ regulatory laws are part of “that immense mass of legislation . . . which can be most advantageously exercised by the State[],”¹⁴⁰ as Chief Justice Marshall claimed in 1824.

3. Impact on States and Their Regulatory Boards

To determine whether a state’s regulatory boards are currently exposed to federal antitrust liability under *NC Dental*, a state must first determine which of its regulatory entities are controlled by market participants. Although the Fourth Circuit suggested that the method used to select the Board could determine whether the Board is subject to antitrust scrutiny, the Supreme Court indicates that the means of appointment are not dispositive.¹⁴¹ Rather, determining whether a body is a private entity turns on one factor: whether a controlling number of Board members are active market participants.¹⁴²

State boards or agencies that are not controlled by active market participants presumably receive the treatment *Hallie* bestowed on municipalities and suggested for state agencies: they must meet the first, “clear-articulation,” prong of *Midcal*, but not the active-supervision prong.¹⁴³ Although the Court did not specify that these entities, which are neither the state legislature nor the state supreme court, possess the state sovereignty that triggers *Parker* immunity, this is implied by the Court’s treatment of market-participant-controlled boards. A body that does not present a risk of active market participants pursuing private interests in restraint of trade is presumably

139. See Brief of Antitrust Scholars as Amici Curiae in Support of Respondent at 3, *NC Dental*, 135 S. Ct. 1101 (2015) (No. 13-534), 2014 WL 3908427.

140. *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824); see *supra* text accompanying note 5.

141. See *supra* notes 115–16 and accompanying text. While the Fourth Circuit concurrence asserts that the selection method is dispositive, Justice Kagan during oral argument characterized selection method as an “add-on feature.” Transcript of Oral Argument at 28, *supra* note 15.

142. *NC Dental*, 135 S. Ct. at 1110–16. Although the Fourth Circuit claimed that the “state sovereign” refers exclusively to the state legislature and state supreme court, the Supreme Court has implicitly negated this restrictive assertion by granting *Parker* immunity to entities that are not the legislature and state supreme court. A regulatory board that meets both *Midcal* requirements is cloaked with the state sovereignty that invokes *Parker* immunity. See *supra* text accompanying note 106.

143. See *supra* notes 79–84 and accompanying text.

entitled to *Parker* immunity so long as it is pursuing a clearly articulated state policy.¹⁴⁴

But for state regulatory boards that *are* controlled by active market participants—that is, those that are not actively supervised by a non-market-participant state actor—states have three options: (1) leave boards and their individual members exposed to potential antitrust liability as private, non-state-sovereign actors, (2) assume antitrust liability for board members in their public official capacity, or (3) assign one or more non-active-market participants to supervise the board’s decisions.

The first of these options could result in a decreased number of market-participant individuals who are willing to serve on the board, since they may be personally liable for restraint-of-trade conduct. The Court contemplated this undesirable consequence as “cause for concern” *if* this were a *necessary* result of the Court’s holding, but it is not.¹⁴⁵ The risk that experienced candidates for board positions will decline public engagements if they do not receive immunity for their work on the regulatory board is offset by states’ second option: a state may provide litigation defense, indemnification, or immunity from damages liability for market-participant board members in the same way it provides immunity to other government employees, such as teachers and law enforcement officers.¹⁴⁶

Furthermore, the disruption to state governments in adopting the third option (actively supervising the state’s regulatory boards) is likely minimal. Many state regulatory boards already operate under a scheme of active supervision by non-active-market-participant state officials.¹⁴⁷ Under these schemes, so long as state legislatures adopt clear competition-displacing policies and the regulatory bodies act pursuant to those policies, both *Midcal* requirements are met, and the board is entitled to *Parker* immunity.¹⁴⁸

One scholar has indeed asserted that “[t]he extent of current liability under federal

144. *NC Dental*, 135 S. Ct. at 1114 (explaining 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”).

145. *Id.* at 1115.

146. *See id.*; Brief for the Respondent at 56, *NC Dental*, 135 S. Ct. 1101 (No. 13-354); *see also, e.g.*, Ind. Code Ann. § 4-6-2-1.5 (West, Westlaw through 2016 Legis. Sess.) (setting out duty of state attorney general to defend any state governmental official or employee, including teachers, in suits filed against them arising out of actions believed in good faith to be within the scope of the official’s or employee’s duties).

147. *See* Brief for the Respondent, *supra* note 146, at 54–55 (“[M]ost States have established schemes to supervise some or all of the conduct of self-interested dental boards. In at least 16 States, either the dental regulatory board is housed within an umbrella state agency that has supervisory authority over dental and other occupational licensing boards, or else the dental board performs primarily advisory functions, with decisions concerning the regulation of dentistry assigned to independent state officials. In at least 15 of the remaining States—including North Carolina—regulations adopted by the dental board must be approved by another state body to become effective or are subject to review and disapproval by disinterested officials. And in at least nine additional States, legislative committees or other officials are empowered to review regulations, to recommend that the legislature override them, and in some cases to suspend the operation of such regulations pending the legislature’s action.” (footnotes omitted)).

148. *See NC Dental*, 135 S. Ct. at 1115–16.

antitrust law for many occupational-licensing boards and their members is *in extremis*” and requested state attorneys general to respond to a series of questions about the state’s regulatory boards.¹⁴⁹ But this response to the *NC Dental* holding has been criticized as “an overreaction through fear mongering and a condescending tone [that] also contains misinformation about the scope of the Supreme Court opinion.”¹⁵⁰ In fact, the Federation of Associations of Regulatory Boards concludes that regulatory structures in many jurisdictions already satisfy both prongs of the *Midcal* test, and “[m]any states will likely determine that no action is necessary.”¹⁵¹ As one scholar has noted, the *NC Dental* decision “appears to have little applicability beyond the facts of this case,” because the North Carolina Board was uniquely structured in a way that does not meet the two *Midcal* requirements.¹⁵²

Some state boards already struggling with regulation oversight, such as the Medical Board of California, may find additional challenges in the supervision demand of *NC Dental*.¹⁵³ Attempts to meet the efficiency, collaboration, and consolidation requirements of the Affordable Care Act may increase the occurrence of anti-competitive action on the part of medical boards.¹⁵⁴ However, the increased restraint-of-trade conduct does not necessarily mean increased federal antitrust liability; the decisions to implement competition-reducing policies must simply be the state’s own, reviewed by state agents who are not active participants in the market being regulated.¹⁵⁵

The Court set forth three requirements for active supervision: (1) the supervisor must review not only the procedures that produce an anticompetitive decision, but also the substance of that decision, (2) the supervisor must have power to veto or modify decisions to accord them with state policy, and (3) the state supervisor must not be an active market participant.¹⁵⁶ The Court emphasized that, although active supervision is “flexible and context-dependent,”¹⁵⁷ the state’s review mechanisms must provide “realistic assurance” that the actions of the nonsovereign regulatory

149. Open Letter from Robert C. Fellmeth, Exec. Dir., Ctr. for Pub. Interest Law, Univ. of San Diego Sch. of Law, Lisa McGiffert, Dir., Safe Patient Project, Consumers Union & David Swankin, President & CEO, Citizen Advocacy Ctr., to State Att’ys Gen. 4 (May 4, 2015) (emphasis in original), <http://pdfserver.amlaw.com/nlj/licensing.pdf> [<https://perma.cc/Z97U-BPZY>].

150. Letter from Dale Atkinson, Exec. Dir., Fed’n of Ass’ns of Regulatory Bds., to State Att’ys Gen. 1 (May 22, 2015), <http://www.nascla.org/sites/nascla/files/FARBLettertostateAGs.pdf> [<https://perma.cc/3JQB-EE6K>].

151. *Id.* at 2.

152. 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, 215 (also asserting that “states should find it easy to structure agencies in ways that will satisfy the courts that regulators are being adequately supervised”).

153. See Craig B. Garner, *The Decay of California’s Prohibition of the Corporate Practice of Medicine*, ST. B. OF CAL: BUS. L. NEWS, Issue 2 2015, <http://garnerhealth.com/wp-content/uploads/2015/04/Decay-of-Corporate-Practice.pdf> [<https://perma.cc/L2KZ-8VN3>].

154. *See id.*

155. Unless the supervising entity for the Medical Board of California (MBC) vetoes MBC’s decisions, MBC will not “los[e] its voice” or efficacy to monitor corporate practice of medicine. In fact, it may receive a stronger voice by receiving the state’s endorsement of its actions. *Id.*

156. *NC Dental*, 135 S. Ct. 1101, 1116–17 (2015).

157. *Id.* at 1116

board indeed promote state policy rather than individual interests, and the “mere potential for state supervision” does not suffice to meet the three articulated requirements above.¹⁵⁸ But so long as the state meets these basic supervision requirements, state regulatory boards may engage in restraint-of-trade conduct (pursuant to state policy) without threat of antitrust liability.

CONCLUSION

The Court’s decision in *NC Dental* does not improperly shift authority from the states to the federal government. Rather, it accords the Sherman Act’s application with the scope of the Commerce Clause, which has expanded alongside the growth and integration of commercial activity across state and national borders.

The Sherman Act was designed to develop in tandem with congressional commerce power, which means that *NC Dental*’s application of the Act to the Board’s commerce-affecting conduct is consistent with legislative intent. The holding also gives credence to the *Parker* Court’s bestowal of antitrust immunity on state governments in carrying out their regulatory schemes. Just as *Parker* permitted state regulation to dispose of a laissez-faire market environment in which powerful business competitors thwarted public interests, *NC Dental* ensures that market competitors in positions of power do not undercut state government policies.

It is true that the Court has imposed a federal policy on the states. State regulatory schemes may not, without potential antitrust liability, delegate unsupervised regulatory authority to market competitors. But this “restriction” on state sovereignty does not deviate from the Court’s precedents or harm the states. It actually strengthens the state’s grip on regulatory action, and it promises not only healthier state economies but also state regulations that more assuredly align with the public interest. It guards against unmonitored cartels operating under the cloak of state designation to the detriment of the state itself and its citizens.

158. *Id.* (first quoting *Patrick v. Burget*, 486 U.S. 94, 100–101 (1988); and then quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 638 (1992)).