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North Carolina Dentists and the FTC's Anti-Exemptions Mission: Is Antitrust Consistent With Democracy? (Yes, actually. It is.)

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Some commentators are pretty alarmed over the Federal Trade Commission's ruling earlier this year denying antitrust immunity for a North Carolina regulatory board's outlawry of teeth-whitening by non-dentists. What has some of them using words like "epic," and what has the state regulator-defendant virtually threatening secession from the Union (just take a look at the rhetoric in the group's separately filed federal constitutional complaint against the Commission), is the sense of federal intrusion in the democratically chosen arrangements of state electorates.

Such a complaint in this case is hogwash, and the case is not even a hard one under the Supreme Court's state-action caselaw. But the defendants' lamentations pose a very interesting question. Is federal antitrust undemocratic? Is federal agency enforcement of the federal policy of competition against would-be local "regulators" an antimajoritarian intrusion in the choices of local electorates?

I think not, and the answer will shed light on the deeper political philosophy of our competition policy. At least in a case like this one, not only is federal antitrust enforcement not an intrusion, it is quite the opposite. It is a powerful tool—indeed, it is perhaps the only tool and surely the best one—to *protect* local democracy and ensure that it works the way it is supposed to.

As to the basic merits, the case is not revolutionary and the Commission's action is both desirable and deeply consistent in letter and spirit with decades of Supreme Court state-action cases. Like the defendants who have lost a number of other state-action cases, the defendant here is not much of a "state agency," despite its fondness for so characterizing itself. The North Carolina State Board of Dental Examiners is a panel of six dentists, a hygienist, and a consumer representative. Most striking among the facts is that not only may the dentist members remain financially interested in the markets they regulate—they are permitted to continue practice during their terms in office—but they are *privately elected by other North Carolina dentists*. They are also subject to no formal oversight except for a reserved and apparently unexercised power of review by a state legislative committee.

Defendants' state-action argument basically boiled down to how they should be treated under one specific, remaining doctrinal uncertainty in the state-action caselaw—whether state "agencies" must meet the "active supervision" element of the *Midcal* doctrine. In yet another scholarly and unimpeachable opinion, Commissioner Kovacic put the issue to rest in a way that should be hard to

dispute on appeal or elsewhere. First, the Commission took for granted that, though the Supreme Court has never reached it, the full, "ipso-facto" immunity of the *Parker* doctrine would apply to actions of a state governor and "executive agencies subject to plenary gubernatorial control." The Commission also assumed arguendo that there might be some other state "agencies" that must show only the "clear articulation" element required of municipalities under *Town of Hallie.* (See the opinion at p.7 n.7 and p. 8.)

But the opinion then elaborates at length why this defendant is not like a gubernatorially controlled agency or an elected city official. Like the wine sellers in *Midcal*, the insurance rate bureaus in *Ticor*, or the medical peer-review committee in *Patrick v. Burget*, this dentistry board is an essentially private group of self-interested actors imposing grossly anticompetitive trade restraints with no state oversight. It thus does not act as the state itself. The Supreme Court has explained frequently and painstakingly that the whole state-action doctrinal apparatus exists to inquire whether challenged conduct is that of the state itself. This case is therefore an easy one as far as the immunity is concerned. Indeed, as the opinion explained at length, the case is nearly on all fours with the Supreme Court's own decision in *Goldfarb.* (See opinion pp. 9-10.)

Democratic Values

So what about the asserted disregard of democratic values? There are two senses in which this enforcement action is not only not contrary to democratic values, but is decisively, fundamentally pro-democratic. The first is obvious: antitrust is a statute too (I mean, duh). It is a law chosen by democratically elected legislators, no less than North Carolina's dental regulatory system. Therefore, to assert the primacy of federal antitrust is no more undemocratic than any other consequence of the Supremacy Clause. And indeed when federal law trumps state law it is probably most often to protect our common national market against locally entrenched economic interests. We have the dormant Commerce Clause, the Privileges and Immunities Clause, and numerous explicit statutory provisions to serve just this purpose. So even if the local is necessarily the more democratic (as some would assert in this Tea Party age of ours), perhaps most of us might agree that the need of a well functioning interstate economy trumps the parochial interests of local electorates.

But much more interesting and important is the second way in which antitrust supports democratic values in cases like this one. Contrary to the dental board's rhetoric, the Supreme Court's state action caselaw does *not* force state governments to submit to the federal policy choices. The cases do no more than require that state government officials do their jobs, and "doing their jobs" does not mean choosing policies consistent with the federal preference for competition. State governments that desire to employ private trade restraints in their economic policy must do no more than "clearly articulate" that goal, and thereafter "actively supervise" the restraints that are adopted. So long as they do those two basic things, the states remain free to restrain trade in whatever bizarre, foolish, or evil manner they desire.

In other words, the real consequence of antitrust enforcement in a case like this one is to ensure that local government works the way that it is supposed to, rather than subject to the control of parochial economic interests. As Commissioner Kovacic put it:

> [I]f a state permits private conduct to go unchecked by market forces, the only assurance the electorate can have that private parties will act in the public interest is

> if the state is politically accountable for any resulting anticompetitive conduct; when conduct subject to political review is not in the public interest, it can be stopped at the ballot box. Decisions that are made by private parties who participate in the market that they regulate are not subject to these political constraints unless these decisions are reviewed by disinterested state actors to assure fealty to state policy.

(*Id.* at 10-11.) So, in the end, the challenge these defendants have posed for themselves is actually this one: Is anyone seriously to believe that it is *pro*-democratic to ensure that state governments may appoint currently practicing, for-profit professionals to restrain their markets, with the backing of state law but with no oversight or public accountability? Isn't that the opposite of democracy?

For those interested in further reading, this view of the Court's political immunities caselaw is explained at length in a pair of brilliant law review articles by Einer Elhauge, from about 20 years ago: Einer Elhauge, *Making Sense of the Antitrust Petitioning Immunity*, 80 Cal. L. Rev. 1177 (1992); and Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 667 (1991).

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