



**ARE THE WORST KINDS OF
MONOPOLIES IMMUNE FROM
ANTITRUST LAW?:
*FTC v. NORTH CAROLINA BOARD OF
DENTAL EXAMINERS AND THE STATE-
ACTION EXEMPTION***

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“You can get more with a kind word and a gun than with just a kind word,” in the apocryphal words of Al Capone.¹ Adam Smith, for his part, really did say that businessmen love to collude.² Put the two together and you get the deep truth that businessmen’s collu-

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¹ The phrase probably originated with comedian Irwin Corey. See *You Can Get Much Further with a Kind Word and a Gun than with a Kind Word Alone*, QUOTE INVESTIGATOR (Nov. 3, 2013), <http://quoteinvestigator.com/2013/11/03/kind-gun>.

² See ADAM SMITH, *THE WEALTH OF NATIONS*, Ch. 10, pt. 2 (1776) (“People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”).

sion is all the more effective—with no need to worry about pesky maverick competitors or cartel cheaters—when it’s enforced, in the last resort, by the guns of the state.

There is much to criticize about federal antitrust law,³ but one would think that at least state-sanctioned cartels present the problem of monopoly in particularly naked form—and that perhaps antitrust law might be of some help in this circumstance. One might think so, but one would generally be wrong: ever since *Parker v. Brown* in 1943, the Supreme Court has read a “state action” exemption into federal antitrust law.⁴ The most naked anticompetitive restraints—when an industry is cartelized by the direct mandate of the state legislature—now also provide the most immunity.

Still, for anticompetitive restraints, as in other areas of life, nakedness is a matter of degree, and so state-action antitrust immunity applies with lesser force the further out one gets from the actual sovereign. Legislatures—or a state supreme court acting in its legislative capacity⁵—have full immunity. Municipalities can earn the immunity if their allegedly anticompetitive acts were pursuant to a clearly articulated grant of authority.⁶ And even private parties can earn the immunity—as long as they can show *not only* clear articulation *but also* active supervision by the state.⁷ Public state agencies presumably fall into the same category as municipalities, but “how public is public enough?” The circuit courts have disagreed over what it takes for a nominally public agency to be in reality private (and thus require active supervision before antitrust immunity can

³ See, e.g., THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC-CHOICE PERSPECTIVE (Fred S. McChesney & William F. Shughart II eds., 1995).

⁴ 317 U.S. 341 (1943).

⁵ See *Hoover v. Ronwin*, 466 U.S. 558, 573 (1984).

⁶ *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985).

⁷ *Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

apply). The Supreme Court is poised to resolve the split this coming Term, in *North Carolina Board of Dental Examiners v. FTC*.⁸

I. THE SAGA OF THE DENTAL EXAMINERS

The Board of Dental Examiners is defined by statute as “the agency of the State for the regulation of the practice of dentistry” in North Carolina.⁹ The Board has the power to license dentists¹⁰ and to regulate the practice of dentistry, which is defined by statute to include teeth whitening services.¹¹ The Board consists of six dentists, one dental hygienist, and one citizen member.¹² The dentist members are elected by North Carolina-licensed dentists.¹³ The dental hygienist member is elected by North Carolina-licensed dental hygienists.¹⁴ The citizen member is appointed by the governor.¹⁵

Since the 1990s, dentists have been offering teeth-whitening services in North Carolina.¹⁶ Around 2003, non-dentists, seeking a

⁸ I myself have signed on to an antitrust scholars’ amicus brief. Brief of Antitrust Scholars as Amici Curiae in Support of Respondent, *N.C. Bd. of Dental Exam’rs v. FTC*, 717 F.3d 359 (4th Cir. 2013) (No. 13-534).

⁹ *N.C. State Bd. of Dental Exam’rs v. FTC*, 717 F.3d 359, 366 n.12 (4th Cir. 2013).

¹⁰ “No 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 or certificate of renewal of license duly issued by the North Carolina State Board of Dental Examiners.” N.C. Gen. Stat. Ann. § 90-29(a) (West 2011).

¹¹ N.C. Gen. Stat. Ann. § 90-29(b) (West 2011) (defining the practice of dentistry to include anyone who “(2) Removes stains, accretions or deposits from the human teeth”). Teeth whitening exists “in several forms, including as an in-office dental treatment, as dentist-provided take-home kits, as over-the-counter products, and as services provided by non-dentists at salons, mall kiosks, and other locations.” *Dental Exam’rs*, 717 F.3d at 364-65. Note, though, that whether this apparently clear language truly covers modern teeth-whitening services is disputed. See Brief for Respondent, *N.C. State Bd. of Dental Exam’rs v. FTC*, No. 13-534 (U.S. argued Oct. 14, 2014) (July 30, 2014), 2014 WL 3749509, at *10-11.

¹² *Dental Exam’rs*, 717 F.3d at 364.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 365.

piece of the action, started to offer a discount version of the service—not quite as effective, but much cheaper.¹⁷ It wasn't long before dentists began filing complaints with the Board.¹⁸

The Board issued at least forty-seven cease-and-desist letters to twenty-nine non-dentist teeth-whitening providers,¹⁹ requesting that the targets “cease and desist ‘all activity constituting the practice of dentistry.’” The letters didn't threaten to impose fines, as this was beyond the power of the Board—all the Board can do to enforce the law is sue violators in state court—but they did threaten to hire private investigators, interview former customers, and the like.²⁰ As a result of these letters, non-dentist teeth whiteners were successfully excluded from North Carolina.²¹

In 2010, the FTC issued an administrative complaint against the Board, charging that this exclusion of non-dentist teeth whiteners was anticompetitive and thus violated the FTC Act.²² The Board, of

¹⁷ The Fourth Circuit explained the difference between dentist- and non-dentist-provided services:

Each of these teeth-whitening services involves applying peroxide to the teeth by means of a gel or strip, which triggers a chemical reaction that results in whiter teeth. The services differ, however, in the immediacy of the results, the ease of use, the necessity of repeat applications, the need for technical support, and price. Not surprisingly, in-office dentist whitening procedures are fast, effective, and usually do not require repeated applications, but they are also the “most costly” offering. In contrast, over-the-counter whitening products typically contain lower concentrations of peroxide and may require multiple applications to achieve results, but they cost far less.

Id. at 364-65 (citation omitted).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* “If the Board suspects an individual of engaging in the unlicensed practice of dentistry, it may bring an action to enjoin the practice in North Carolina Superior Court or may refer the matter to the District Attorney for criminal prosecution . . . the Board does not have the authority to discipline unlicensed individuals or to order non-dentists to stop violating the Dental Practice Act. *Id.* at 364.

²¹ *Id.* at 365.

²² *Id.*

course, argued state-action immunity.²³ The FTC disagreed—insisting that the Board was subject to the same active supervision requirement as private parties—and ordered the Board to stop issuing extra-judicial orders to teeth-whitening providers.²⁴ On appeal of the FTC’s order, the Fourth Circuit agreed.²⁵

II. THREE TIERS OF IMMUNITY, THREE (OR FOUR?) APPROACHES TO AGENCIES

The contours of state-action antitrust immunity—in particular, the three-tiered structure described in the Introduction, involving clear articulation and active supervision—have been shaped chiefly by three Supreme Court cases: *Parker v. Brown* (1943),²⁶ *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.* (1980),²⁷ and *Town of Hallie v. City of Eau Claire* (1985).²⁸

Parker concerned a California statute authorizing “the establishment, through action of state officials, of programs for the marketing of agricultural commodities produced in the state, so as to restrict competition among the growers and maintain prices in the distribution of their commodities to packers.”²⁹ The goal of the program was to keep raisin prices up by restricting how many could be sold.³⁰

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 366.

²⁶ 317 U.S. 341 (1943).

²⁷ 445 U.S. 97 (1980).

²⁸ 471 U.S. 34 (1985).

²⁹ *Parker*, 317 U.S. at 346.

³⁰ *Id.* Producers could only sell 30% of their crop through “ordinary commercial channels”. Of the remaining 70%, the better ones could be used to stabilize the price of raisins — the committee was to sell variable amounts to maintain the price — while the worse ones could only be used “for assured by-product and other diversion purposes.” *Id.* at 348.

A raisin marketer challenged the statute, claiming (among other things) that the program violated the Sherman Act.³¹ The Supreme Court held that while raisin growers could not privately agree to limit supply and stabilize price in this way, the Sherman Act was never meant to cover policies of the state legislature.³²

Midcal involved another California statute, which required wine producers and wholesalers to file “fair trade contracts or price schedules” with the state, and prohibited them from selling to retailers at any price other than the one set in their fair trade contract or price schedule.³³ The statute was challenged by a wholesaler that sold wine below its listed price and without filing a fair trade contract or price schedule.³⁴ *Midcal* held that these private actors could not benefit from state-action antitrust immunity unless (1) there was a “clearly articulated” state policy to limit competition, and (2) the actor’s policies were actively supervised by the state.³⁵ In this case, while there was a “clearly articulated” state policy to limit competition and fix prices, there was no active supervision:³⁶ the state passively accepted the prices set by the wine producers and wholesalers.³⁷

Finally, *Town of Hallie* addressed the status of municipalities.³⁸ Various towns in Wisconsin alleged that the city of Eau Claire was acting anticompetitively by refusing to allow them to use its sewage

³¹ *Id.* at 344.

³² *Id.* at 350.

³³ *Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 99 (1980).

³⁴ *Id.*

³⁵ *Id.* at 105.

³⁶ *Id.*

³⁷ *Id.* at 105-06. “The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any “pointed reexamination” of the program. 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.”

³⁸ *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985).

treatment plant.³⁹ Instead, Eau Claire offered the plant's services to individual landowners in the towns under certain conditions: that a majority of the residents of those areas vote to have their homes annexed by the city and to use the city's sewage collection and transportation services.⁴⁰ However, those towns already had their own sewage collection and transportation services, making them Eau Claire's competitors for these services.⁴¹ If Eau Claire had been a private corporation, this conduct might have been illegal tying; but the Court held that Eau Claire was immune from antitrust law. Eau Claire met the "clear articulation" prong of *Midcal* because various Wisconsin statutes clearly contemplated that cities could engage in anticompetitive conduct.⁴² And active supervision, the Court held, was not necessary for municipalities because of their public nature.⁴³ In a footnote, the Court wrote that it was "likely" that state agencies were also exempt from the "active supervision" requirement – though it didn't decide the issue then, and still hasn't decided it to this day.⁴⁴

These cases give us three categories of state-action antitrust immunity: (1) The state legislature itself is completely immune; (2) municipalities are immune if they can show that they were acting pursuant to a clearly articulated state policy; and (3) private actors are immune if they can show both clear articulation and active state supervision.

Courts all agree with the *Town of Hallie* dictum that true state agencies fall into category (2), but "determining whether an actor is sufficiently 'public' so as not to require supervision has often prov-

³⁹ *Id.* at 36-37.

⁴⁰ *Id.* at 37.

⁴¹ *Id.*

⁴² *Id.* at 47.

⁴³ *Id.*

⁴⁴ *Id.* at 46 n.10.

en difficult.”⁴⁵ The North Carolina Board of Dental Examiners might be thought to straddle categories (2) and (3), depending on whether it’s categorized as public or private. In fact, the Fourth Circuit’s holding creates a three-way circuit split—with the FTC’s approach representing even a fourth regime.

Some circuits adopt a cursory view that categorizes agencies as public based on minimal analysis, sometimes merely relying on the agency’s statutory labeling.⁴⁶ This approach does have the virtue of simplicity, but the focus on state labeling seems incorrect in light of the Supreme Court’s holding in *Goldfarb v. Virginia State Bar*⁴⁷ (as reinterpreted in *Town of Hallie*⁴⁸), that the Virginia State Bar, though a state administrative agency, was a “private part[y]” subject to the active supervision requirement.⁴⁹

Other circuits adopt more of a laundry-list view that weighs various factors cutting for or against publicness, such as open records, tax exemption, exercise of governmental functions, lack of possibility of private profit, and the composition of the entity’s decision-making structure.⁵⁰ Then-Judge Breyer opined, in *FTC v. Monahan*, that whether the Massachusetts Board of Registration in

⁴⁵ 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 226b, at 166 (3d ed. 2006).

⁴⁶ See, e.g., *Earles v. State Bd. of CPAs of La.*, 139 F.3d 1033, 1034, 1041 (5th Cir. 1998); *Porter Testing Lab. v. Bd. of Regents for Okla. Agric. & Mech. Colls.*, 993 F.2d 768 (10th Cir. 1993); *Cine 42nd St. Theater Corp. v. Nederlander Org., Inc.*, 790 F.2d 1032, 1047 (2d Cir. 1986).

⁴⁷ 421 U.S. 773 (1975).

⁴⁸ 471 U.S. 34 (1985).

⁴⁹ *Id.* at 45.

⁵⁰ This list comes from *Bankers Ins. Co. v. Florida Res. Prop. & Cas. Joint Underwriting Ass’n*, 137 F.3d 1293, 1297 (11th Cir. 1998). See also *Interface Grp., Inc. v. Mass. Port Auth.*, 816 F.2d 9, 13 (1st Cir. 1987) (holding that that the Massachusetts Port Authority was similar to a municipality because it possessed “such typical governmental attributes as the power of eminent domain, rulemaking authority, bonding authority, and tax exempt status”); *Fuchs v. Rural Elec. Convenience Co-op. Inc.*, 858 F.2d 1210 (7th Cir. 1988) (conducting a multi-factor analysis where the entity’s nonprofit status is relevant); *Hass v. Ore. State Bar*, 883 F.2d 1453 (9th Cir. 1989).

Pharmacy was essentially private for the purposes of the active supervision requirement depended “upon how the Board functions in practice, and perhaps upon the role played by its members who are private pharmacists.”⁵¹

We can call that second view the “intermediate view,” since the FTC and the Fourth Circuit take even stricter views. The Fourth Circuit has found active supervision to be required whenever the agency is composed of private industry participants *and* when the agencies are politically accountable only to other private industry participants. The FTC would not require this second step of political accountability, so it would require active supervision in even more cases.

Before the Fourth Circuit, the FTC argued that the Board should be treated as private because the state-action exemption requires active supervision “in circumstances where the state agency’s decisions are not sufficiently independent from the entities that the agency regulates.”⁵² This includes cases where the agency has a “financial interest in the restraint that [it] seeks to enforce”⁵³ and is “controlled by private market participants”⁵⁴ “who [stand] to benefit from the regulatory action.”⁵⁵ Given that North Carolina law requires that six of the eight Board members be North Carolina licensed dentists, it is clear that North Carolina dentists control the Board.⁵⁶ Because dentists perform teeth whitening, “Board actions in this area could be self interested.”⁵⁷

The FTC argued that the need for active supervision is especially acute when the agency “is not accountable to the public but ra-

⁵¹ 832 F.2d 688, 690 (1st Cir. 1987).

⁵² *In re* N.C. Bd. of Dental Exam’rs, 151 F.T.C. 607, 620 (2011).

⁵³ *Id.* at 621.

⁵⁴ *Id.* at 623.

⁵⁵ *Id.*

⁵⁶ *See* N.C. Bd. of Dental Exam’rs v. F.T.C., 717 F.3d 359, 364 (4th Cir. 2013).

⁵⁷ *Dental Exam’rs*, 151 F.T.C. at 626.

ther to the very industry it purports to regulate.”⁵⁸ The Board is not directly accountable to the public, given that its six dentist members are elected directly by their professional colleagues. However, the FTC did not consider political unaccountability a necessary element to find that the Board was more private than public; under its view, being composed of self-interested market participants was sufficient.

The Fourth Circuit found the political accountability point to be important: it agreed with the FTC that there is no antitrust immunity when, as here, “a state agency is operated by market participants who are elected by other market participants.” But it remains an open question whether the Fourth Circuit would follow the FTC’s view if, say, the private dentists were gubernatorial appointees.

III. FIGHTING REGULATION WITH REGULATION

A. A NEGLECTED STATUTE AND TRICKY PRECEDENT

The FTC’s position, while normatively attractive, is not inescapable. In the first place, it’s doubtful that the framers of the Sherman Act or other antitrust statutes were trying to clamp down on the activities of statutorily recognized state agencies—even ones staffed by self-interested private parties.⁵⁹ The conventional wisdom today is indeed that Congress could write an antitrust law to cover such agencies—so state-action immunity is just a matter of statutory interpretation inspired by federalism concerns, not an immunity commanded by the Constitution. But from the perspective that takes the intentions of the enacting legislators into account, the FTC’s position might be hard to defend: in 1890, it would have

⁵⁸ *Id.* at 621.

⁵⁹ Einer Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 669 (1991) (“[T]hat state and local regulations are largely preempted by antitrust law . . . , virtually all agree, is unthinkable: both for policy reasons grounded in federalism and anti-*Lochner*ism and as an interpretation of what Congress could have possibly intended in passing the antitrust laws.”).

been doubtful whether the regulation of the practice of dentistry in North Carolina was even interstate commerce. Still, that's obviously not the only position: a textualist could always reason that the reference to interstate commerce in the Sherman Act is dynamic language that takes the form of whatever is recognized as interstate commerce under current constitutional doctrine.

Moreover, when the Supreme Court declared, in *Town of Hallie*, that active supervision wasn't necessary for municipalities, it stated that the active supervision really served an evidentiary purpose, to make sure the challenged party was really pursuing state policy.⁶⁰ How much evidence do we need in the case of North Carolina dentists, where the anticompetitive purpose—to suppress non-dentist teeth whiteners—is plain on the face of the statute?⁶¹

The FTC's position is also in some tension with the granddaddy of the whole doctrine, *Parker* itself. In that case, the raisin marketing program became effective when approved by the state's Agricultural Prorate Advisory Commission—a body that was not subject to any state supervision. Yet the Court granted immunity, treating the Commission's acts as those of the state, even though "six of the nine Commission members were required to be engaged 'in the production of agricultural commodities as their principal occupation.'"⁶² Of course *Parker* predated the whole three-tier, two-factor system, and the *Dental Examiners* point wasn't squarely addressed in the case; still, it can look a bit embarrassing if one is trying to portray the Fourth Circuit's view as a straightforward application of doctrine.

Perhaps the proper response to all this trickiness, though, is to embrace it. The antitrust laws have long been divorced from any

⁶⁰ 471 U.S. 34, 46 (1985).

⁶¹ See N.C. Gen. Stat. Ann. § 90-29(b) (West 2011).

⁶² Brief for Petitioner at 21-22, *N.C. State Bd. of Dental Exam'rs v. FTC*, No. 13-534 (U.S. argued Oct. 14, 2014) (July 30, 2014), 2014 WL 3749509 (citing *Parker v. Brown*, 317 U.S. 341, 346 (1943)).

original text, being treated instead as a delegation of power to the judiciary to develop an optimal competition policy, common law-style. In such a context, statutory *stare decisis* has reduced force, and one need feel no shame in making frank policy arguments. The arguments may be unconvincing to those who place a high value on the state's "sovereign ability to judge the 'public interest'"⁶³—but while it's true that a robust state sphere can guard against overweening federal power and thus advance liberty,⁶⁴ this is not invariably the result of states' rights.⁶⁵ Sometimes, the Supremacy Clause has its benefits.

B. THE UNEXPECTED *NOERR-PENNINGTON* ANGLE

An additional complication is that demand letters, such as those issued by the Board, are generally immune from antitrust scrutiny under the *Noerr-Pennington* doctrine. The *Noerr-Pennington* doctrine is another judge-made antitrust exception inspired by constitutional considerations—in this case, the First Amendment right to petition the government for redress of grievances. Lobbying the legislature to enact anticompetitive laws isn't an antitrust violation, even though it may harm competition⁶⁶—and even if you have an explicit agreement with your competitors. Same with lobbying agencies: that's petitioning the Executive Branch.⁶⁷ And suing your competitors is also a form of petitioning: you're asking the Judicial Branch to redress a grievance against you by making the defendant pay money or stop doing something that harms you.⁶⁸

⁶³ *Id.* at 20.

⁶⁴ *United States v. Lopez*, 514 U.S. 549, 576 (1995) ("federalism secures to citizens the liberties that derive from the diffusion of sovereign power") (internal citations omitted).

⁶⁵ No citation needed; *but see, nonetheless*, CLINT BOLICK, *GRASSROOTS TYRANNY: THE LIMITS OF FEDERALISM* (1993).

⁶⁶ *E. R. R. Pres. Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

⁶⁷ *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).

⁶⁸ *Cal. Motor Transp. Co. v. Trucking Unltd.*, 404 U.S. 508 (1972).

And if suing someone is protected activity, then it seems strange to say that *threatening* to sue someone is unprotected: why would you be allowed to sue but not to say that you'll sue (and possibly settle without the need for a lawsuit)? And, indeed, some circuits have recognized that demand letters fall within *Noerr-Pennington* as conduct incidental to a petition.⁶⁹

In light of the treatment of demand letters under *Noerr-Pennington*, the FTC's order seems a bit strange. The FTC issued (and the Fourth Circuit upheld) an order prohibiting the Board from continuing with its practice of hounding non-dentists out of the teeth-whitening business. The FTC directed the Board to stop ordering non-dentists to cease providing teeth-whitening services, stop communicating to non-dentists that their practice violates the law, and the like. But the FTC's order also preserves the Board's authority to investigate and sue non-dentists for suspected statutory violations, as well as to tell them of its "belief or opinion" regarding whether a teeth-whitening method violates the law. The order even preserves the Board's ability to give the non-dentists "notice of its bona fide intention" to sue, provided it includes a disclaimer clarifying, for instance, that "[o]nly a court may determine" whether there's been a violation.⁷⁰

Perhaps the FTC might have been complaining about the tone of the letters: rather than merely informing the non-dentists that they were breaking the law and could expect a lawsuit, the Board was demanding that they cease providing the illegal services. The requirement that the Board include a disclaimer in future letters suggests that some non-dentist providers may have been confused about the extent of the Board's authority, not understanding that its

⁶⁹ See *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 933–39 (9th Cir. 2006); *McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552, 1560 (11th Cir. 1992); *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1367–68 (5th Cir. 1983). On conduct incidental to a petition, see also *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180 (9th Cir. 2005).

⁷⁰ *In re N.C. Bd. of Dental Exam'rs*, 152 F.T.C. 640 (2011).

authority was only to investigate and to bring ordinary lawsuits in court. The FTC's/Solicitor General's brief in opposition to certiorari suggests something along those lines:

The distinction between petitioner's "orders" and mere threats of litigation is critical here, as in many contexts. In *Sackett v. EPA* (2012), for example, [the Supreme] Court recognized that the issuance of an administrative "order" generally connotes the imposition of some "legal obligation" in a way the mere articulation of a legal position in a demand letter sent as a prelude to judicial action would not.⁷¹

I don't know if that's right: an administrative "order" indeed connotes the imposition of a legal obligation, but that's because such an order generally comes from agencies that have that sort of power. If something with the word "order" came from an agency that lacked such power but only had the power to initiate litigation in a court, I would interpret the order as being a threat to comply or face litigation. Again, maybe some non-dentists weren't legally savvy and interpreted it otherwise, but the FTC doesn't seem to have found that people were actually confused on this point. And the substance of the old letters seemed mostly unobjectionable, reciting the statute, stating that the non-dentists were engaged in the illegal practice of dentistry, and threatening various legal activities. Is the difference between an illegal "cease now" letter and a legal "expect a lawsuit" letter a bit too fine?

Now perhaps government agencies themselves have no First Amendment rights, or perhaps their own prosecutions can't be seen as petitioning the government. The first point is an interesting and

⁷¹ Brief for Respondent, *supra* note 11, at 8 n.3 (citing *Sackett v. EPA*, 132 S. Ct. 1367, 1371-72 (2012)).

unresolved area of First Amendment law;⁷² I think state governments do have free-speech rights as against the application of federal law, but if the FTC is right that the Board is really private, then that question doesn't even need to arise. As to whether a state's Executive Branch is really "petitioning" when it prosecutes someone in the state's Judicial Branch: I think it is, but perhaps that question also doesn't need to arise if the Board, rather than "prosecuting," just has the same power as anyone else to sue in state court.

In the end, I think *Noerr-Pennington* immunity doesn't apply on these facts for a fairly narrow reason: as far as I can tell, the letters didn't even threaten a lawsuit. The letters I've seen threaten that "[t]he Board may use any legal means at its disposal to conduct this investigation including, but not limited to, interviews with current and former patients, surveillance, and the hiring of undercover agents."⁷³ So these letters can't be read as preludes to litigation, because they simply fail to threaten litigation. Therefore, they're not conduct incidental to a petition, and therefore they're not covered by *Noerr-Pennington* immunity. But this points to an easy way for the Board to be able to continue doing what it was doing, even if it loses this case: merely rephrase the letters in trivial ways to threaten legal action. This one weird trick will allow it to bypass the FTC's order, both because the order explicitly preserved the Board's ability to do this and because, regardless of the FTC's order, a letter phrased in this way might benefit from *Noerr-Pennington* immunity.

⁷² See generally David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637 (2006).

⁷³ See Sasha Volokh, *The Surprising First Amendment Angle (and Easy Workaround) in the Dental Examiners Antitrust Case*, VOLOKH CONSPIRACY (Jan. 31, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/01/31/the-surprising-free-speech-angle-and-easy-workaround-in-the-dental-examiners-antitrust-case>.

C. OF HEDGEHOGS AND HENHOUSES

So if we're back to policy arguments, and if First Amendment-inspired petitioning immunity doesn't apply in this particular case, the simple reason to rule in favor of the FTC has to do with foxes. Foxes, we all know, shouldn't watch henhouses. But if the Board of Dental Examiners—and all other industry self-regulatory bodies—are foxes, antitrust law is the hedgehog, which “knows one big thing.”⁷⁴ What one big thing does antitrust law know? Since the late 1970s, it has reoriented itself to pursue efficiency-like goals (whether consumer surplus maximization or total surplus maximization) at the expense of all other, non-economic goals.⁷⁵ And while it does give limited respect to anticompetitive state regulation, it also recognizes the simple truth that “those who stand to profit financially from restraints of trade cannot be trusted to determine which restraints are in the public interest and which are not.”⁷⁶

Aaron Edlin and Rebecca Haw explain why there is a close fit between antitrust law and the harms of occupational licensing:

To cut hair legally in Tennessee, a candidate must pass a test—designed by her would-be competitors—proving she can file and polish nails. But when a gas burner manufacturer was denied approval by a private standard-setting association that used a test influenced by his competitors and “not based on objective standards,” the Supreme Court found Sherman Act liability appropriate. Similarly, the Ohio Rules of Professional Conduct prohibit attorneys from

⁷⁴ ISAIAH BERLIN, *THE HEDGEHOG AND THE FOX: AN ESSAY ON TOLSTOY'S VIEW OF HISTORY* 3 (First Elephant Paperback ed., Ivan R. Dee, Inc. 1993) (1953) (“The fox knows many things, but the hedgehog knows one big thing.”).

⁷⁵ See, e.g., Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551 (2012).

⁷⁶ Elhauge, *supra* note 59, at 672.

advertising their prices using words such as “cut rate,” “discount,” or “lowest.” But when similar restrictions on price advertising are imposed by private associations of competitors, rather than as a licensing requirement, they are per se illegal. Additionally, all lawyers must prove their “good moral standing” to join a state bar. But when a multiple listing service (a private entity not created by the state) comprised of competing real estate agents tried to impose a “favorable business reputation” requirement on its members, a court found the requirement to violate the rule of reason because the standard was vague and subjective. The requirement failed Sherman Act scrutiny because it gave the listing service the power to exclude competitors in arbitrary and anticompetitive ways.⁷⁷

On this view, the Fourth Circuit is on the right path—and the other circuits are excessively deferential to the states—but doesn’t go far enough. The FTC’s view, which would deny immunity whenever industry participation is present and which wouldn’t additionally require lack of political accountability, would do more to prevent states from suppressing competition.⁷⁸ Active state supervision is necessary to ensure that agencies run by self-interested actors promulgate restraints in what *accountable and financially disinterested actors* see as the public’s best interests.

Not that other approaches wouldn’t also work: for instance, as I’ve written elsewhere, the Due Process Clause can also be used to

⁷⁷ Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1132 (2014) (footnotes omitted).

⁷⁸ Brief of Antitrust Scholars, *supra* note 8 (explaining that the Fourth Circuit’s approach requiring lack of political accountability is insufficient because most industry board members are gubernatorial appointees).

attack regulators with financial biases.⁷⁹ But antitrust also makes sense. Whether or not antitrust is generally justified as applied to private businesses, any doctrine that privileges government action through extra immunities should be viewed with skepticism and limited as far as possible—especially where, as here, the government action involved is monopolization of the most pernicious kind.

⁷⁹ See Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931 (2014); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Gibson v. Berryhill*, 411 U.S. 564 (1973).