The FTC and State Action: Evolving Views on the Role of Government

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Overview

- Objective – striking an appropriate balance between conflicting priorities:
  -- federal competition policy
  -- state regulatory policy

- Guiding Principle – striking an “appropriate” balance depends on one’s views on the role of government

- Problems – doctrinal confusion results from:
  -- S. Ct.’s evolving views on the role of government
  -- S. Ct.’s failure to update its analytical framework
Evolution of the State Action Doctrine

1943 - 2004

Parker v. Brown

Freedom Holdings v. Spitzer

1943

Public Interest Theory
(deferential, label oriented)

Public Choice Theory
(skeptical, incentive oriented)

2004
Evolution of the State Action Doctrine

Parker v. Brown

- Objectionable Restraint: state-supervised market sharing scheme for California raisins
- Key Holding: actions of the “state itself” not subject to federal antitrust enforcement
- Confidence in Government:
  -- weak focus on federalism rationale
  -- indifferent to electoral accountability
  -- deferential to state oversight efforts
  -- deferential to purported state objectives
Evolution of the State Action Doctrine

1970’s

1943

Parker v. Brown

Goldfarb

City of Lafayette

1975

1978

2004

Public Interest Theory

Public Choice Theory
Evolution of the State Action Doctrine

City of Lafayette v. Louisiana Power & Light

- Objectionable Restraint: tying electric utility service to the purchase of monopoly gas and water service
- Key Holding: municipalities not equivalent to the “state itself” for purposes of state action analysis
- Breaks with Parker on: weak focus on federalism rationale
  -- federalist system recognizes only two sovereigns
  -- municipalities often pursue “parochial” interests
Evolution of the State Action Doctrine

1980’s

Public Interest Theory

1943 Parker v. Brown

1980 Midcal

1982 City of Boulder

1985 Southern Motor Carriers

1988 Town of Hallie

1988 Patrick

Public Choice Theory

2004
Evolution of the State Action Doctrine

*Town of Hallie v. City of Eau Claire*

- Objectionable Restraint: tying sewage collection and transportation to the purchase of monopoly sewage treatment service
- Key Holding: municipalities not subject to *Midcal’s* active supervision requirement
- Breaks with *Parker* on: indifference to electoral accountability
  -- municipality presumed to act in the public interest
  -- *because* exposed to “public scrutiny” and checked “through the electoral process”
Evolution of the State Action Doctrine

1990’s

Parker v. Brown

Superior Court
Trial Lawyers

Omni

Ticor Title

1992

1991

1990

1943

Public Interest Theory

Public Choice Theory

2004
Evolution of the State Action Doctrine

*Federal Trade Commission v. Ticor Title*

- Objectionable Restraint: collective ratesetting for title searches and title examinations

- Key Holding: “negative option” system does not satisfy the active supervision requirement

- Breaks with *Parker* on: deference to state oversight efforts
  -- mere *potential* for supervision is not sufficient
  -- doctrine reflects deference to actual state regulation, *not* the economics of price restraint
Evolution of the State Action Doctrine

Present Day

1943
- Parker v. Brown
- Public Interest Theory

2001
- FTC State Action Task Force Founded
- Task Force Report Issued
- Movers Cases
- Freedom Holdings
- South Carolina Board of Dentistry

2003
- Virginia Board of Funeral Directors

2004
- Task Force Report Issued

Public Choice Theory
Evolution of the State Action Doctrine

*Freedom Holdings v. Spitzer*

- Objectionable Restraint: legislation implementing output cartel of foreign and domestic cigarette mfrs.

- Key Holding: clear articulation requirement satisfied by conduct in furtherance of “legitimate” state policy goals and with a “plausible nexus” to those goals

- Breaks with *Parker* on: deference to purported state objectives
  -- skeptical of state policy of sharing in private cartel’s monopoly profits
  -- per package tax would have eliminated need for complex market sharing scheme
Analytical Framework

Problems with Current Approach

- S. Ct’s views on the role of government have evolved, but its analytical framework has not

- *Midcal* factors applied pursuant to Public Interest theory, rather than Public Choice theory

- Examples:
  -- interpretations of *Town of Hallie* “foreseeability” standard for clear articulation reflect deference
  -- interpretations of *Town of Hallie* exemption from active supervision reflect focus on labels
Analytical Framework

A Proposed “Tiered” Approach

- *Midcal* factors would be applied pursuant to tiered framework, with varying levels of rigor

- Level of rigor would be calibrated to reflect incentives (*i.e.*, likelihood that defendant will pursue own interests, rather than those of the state)

- Examples:
  -- active supervision: greater rigor for private parties and boards, less for municipalities
  -- clear articulation: greater rigor for *per se* conduct, less for rule of reason and unilateral conduct