Edmund W. Kitch

Taxi Reform–The FTC Can Hack It

TAXICAB REGULATION has long been used in the scholarly literature as an example of a kind of regulation that reduces consumer welfare. Most city governments artificially limit entry to the taxi business, thus curtailing the availability of taxis and driving up the fares they charge. In some cities, one taxi operator enjoys an exclusive franchise, as if it were a public utility—although the taxi business lacks the economies of scale that are said to produce a "natural" monopoly.

Up to now, however, municipal reformers have frequently despaired of ever mounting a successful challenge to the system. Taxi owners have a huge stake in the current set-up: in New York, for instance, their monopoly power is so well established that the mere right to drive a cab—a so-called medallion—sells for $50,000 or more. They fight furiously to protect that investment against any proposal to loosen regulation. Moreover, the whole panoply of interests that profit from city franchising, contracting, and favoritism tend to close ranks against any outside scrutiny. The only way to break their grip, one might think, is to make a federal case of the issue.

Nonetheless, many observers were surprised May 10, when the Federal Trade Commission (FTC)—after more than a year of study by its staff—issued complaints against the cities of Minneapolis and New Orleans challenging their regulation of taxicabs as anticompetitive. In the public mind, the FTC is known for filing complaints against large business firms, not against cities for their regulation of small businesses. But the complaints should not have come as a surprise to the student of antitrust. They reflect three trends that have long been under way in the field of antitrust law.

THE FIRST TREND is the growing tendency of antitrust enforcers to take as part of their charge the impact of government regulation on competition. This enforcement interest followed the emergence of a consensus among scholars that regulatory restraints are often as important as private restraints in undermining competition and reducing consumer welfare. The Department of Justice (DOJ) led the way. Its Antitrust Division boasts of its "competition advocacy" in national and international forums. It has a special Regulated Industries Section that has made its presence felt in numerous federal agency proceedings. And some of the department's most important antitrust cases in the last decade, most obviously the AT&T case, have dealt with regulated industries.

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The second trend has been the Supreme Court's willingness to extend the reach of the Sherman Act to ever more local restraints on trade. The antitrust laws have always applied only to interstate commerce between the states. This was a significant limitation on their scope back in the days when the Court maintained a real distinction between commerce that was interstate and commerce that was not. The expanded concept of interstate commerce that entered constitutional doctrine in the late 1930s was slow in coming to the antitrust area, but it

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has now arrived. In *McLain* v. *Real Estate Board of New Orleans, Inc.* (1980) the Court held that local real estate brokers are engaged in interstate commerce for antitrust purposes. Thus small local businesses that formerly escaped Sherman Act coverage because they were not "in" interstate commerce can no longer do so.

A third trend has been the Court's steady contraction of the scope of antitrust immunity based on "state action." In the case of *Parker* v. *Brown* (1943) the Court had held that a California state program designed to reduce the output of raisins could not be challenged under the antitrust laws because it was state rather than private action. It was not until some years later that this doctrine began to erode. A key turning point was *Cantor* v. *Detroit Edison* (1976), which held that a regulated utility could not immunize its policy of offering free light bulbs to its customers on the grounds that free bulbs were an element of a rate package which it had filed with the state regulatory commission and was required to obey. The decision implied that to be protected by the state action doctrine, the conduct challenged had to be not simply formally required by state law, but the result of a state choice to compel the challenged conduct.

The logical culmination of this trend was to expose cities and their officials to liability for municipal regulatory actions taken by the cities on their own, as opposed to state, authority. In *Community Communications* v. *City of Boulder* (1982), the Court held that a city could be sued under the antitrust laws for actions taken pursuant to its own regulatory authority—in that case a "freeze" imposed by the city council upon the plaintiff's expansion of its cable TV services. The Court held that a city can claim immunity under the state action doctrine only if its action is explicitly authorized and supervised by the state. (Actions taken pursuant to properly enacted state regulatory requirements remain fully immune.) The cities are, so to speak, under the wing of their state "parents"; when the parents are watching them closely the federal government will defer to their authority, but it will step forward *in loco parentis* when the kids are off on their own.

These three trends coalesced to make it very likely that some federal enforcement agency would challenge restrictive municipal regulation of local businesses. It might even have been foreseen that taxicabs would be chosen as a target, since there has been an important (if little-noted) grass-roots movement toward taxi deregulation in cities as politically diverse as Berkeley, Charlotte, Dayton, El Paso, San Diego, and Spokane, among many others. In fact, to assist other cities in their reform efforts the FTC released an unusually thoughtful and cautious 176-page study of taxi regulation by Mark Frankena and Paul Pautler of its Bureau of Economics.

The FTC's initiative brought a speedy reaction from Congress. The House with little debate passed an appropriations rider at the behest of the Louisiana and Minnesota delegations barring the use of FTC or DOJ funds to pursue actions against municipalities. In the Senate, however, that rider became entangled in the wider question, much discussed since the *Boulder* decision, of whether local governments should be subject to antitrust complaints at all. Congress had already been struggling with this question for some time.

It is easy to see why Congress has come under pressure to overrule *Boulder*. City officials are distressed by the possibility of being held personally liable for treble damage awards, just as if they were business executives. Of course, the city they work for might well agree to indemnify them as office holders for any such awards; this is what usually happens with judgments under the civil rights acts. But if so, it is arguably pointless to saddle the municipal taxpayer with yet another expense; bad enough for consumers to lose the first time through the anticompetitive behavior, without letting them lose a second time as taxpayers to some lucky plaintiff.

Finding a workable compromise between these concerns and the concerns of antitrust enforcement has not been easy. For example, the Department of Justice drafted a bill (S. 1578), introduced by Senator Strom Thurmond (Republican, South Carolina), that would give all municipal actions the same immunity as action by the state itself, with one exception. That exception would consist of actions taken by cities in their role as owners of property or enterprises, such as utilities and parking lots. The idea is that cities would assume only the same sort of antitrust liability private firms would assume if they operated the same enterprises. But the cities have found that bill unsatisfactory because it fails to provide complete immunity. At the same time, supporters of antitrust enforcement have found it unsatisfactory because it would leave cities free to impose unreasonable regulatory restraints on competition. It has languished in committee.

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Paradoxically, the FTC's action may have provided a way to break this legislative impasse. City officials have pointed to a "parade of horribles" that would result from municipal antitrust exposure. But the FTC taxicab complaints avoid those horribles. They do not seek either Draconian or retrospective penalties, merely the reform of municipal regulation in the future. They show how federal enforcement of municipal antitrust violations could act as a safety valve, permitting Congress to free local officials from the fear of devastating liability in private suits while preserving the chances of making progress in removing harmful municipal restraints. That would mean not restoring cities to full immunity, but limiting the remedy for a violation to the type of essentially injunctive relief sought by the FTC in the taxicab complaints. The terror would be gone; a solid core of reformist policy would remain. When lawmakers recessed for the Fourth of July, a compromise along these lines seemed to be emerging.

The principal argument that has been made in opposition to the new FTC complaints is that they are offensive to principles of federalism; that it is not the proper role of a government commission in Washington to tell local governments how to regulate their local businesses. But clogs on interstate commerce imposed by local regulation have long been viewed as an appropriate concern of the federal government. In the famous case of *Gibbons* v. *Ogden* (1824), Chief Justice John Marshall, upon flimsy statutory authority, invalidated the exclusive franchise New York State had granted to Fulton and Livingston steamships upon its navigable waters. The defendant Gibbons had flouted the franchise by providing steamship transportation between Manhattan and points on the New Jersey side of the harbor. The case of taxicabs is not so very different: a principal function of the contemporary taxicab is to carry passengers to and from airports in the course of their long-distance travel.

John Marshall's extended *obiter dictum* in *Gibbons* v. *Ogden* on the exclusiveness of the commerce power later flowered into the "negative" or "dormant" commerce clause doctrine, the doctrine that since the Constitution entrusts regulation of interstate commerce to the federal government, it implicitly forbids the states to interfere with some portion of it. For almost a century the Supreme Court has applied this doctrine by striking down some of the barriers state and local governments have erected to national competition. With so many pressing matters on its agenda, however, today's Court has little time either to analyze or to police these often mundane transgressions (although even the current Court takes an occasional quixotic stab at it on behalf of such causes as keeping the interstate highways open to large trucks).

WHAT CAN BE USEFUL, in this bureaucratic age, is an institutional successor to the spirit of the Supreme Court's negative commerce clause doctrine. Such an institution should have its own in-house economic expertise. It should have long experience with antitrust questions. It should be able to develop the type of sophisticated record necessary for an enlightened understanding of often complex regulations whose economic effects are felt at numerous different levels. And it should have the independence and visibility needed to be the antitrust policeman of the nation's local governments, whose multitudinous and varied regulations operate far from the center of political, media, and scholarly attention. One agency is best suited to collect information about and analyze the effects of local economic regulation—and to follow, in appropriate cases, with a complaint designed to remove the harmful features of the regulation. In short, this is a case for the FTC. ■