DEMYSTIFYING ANTITRUST STATE ACTION DOCTRINE

STEVEN SEMERARO*

* Assistant Professor of Law at Thomas Jefferson School of Law and consulting attorney with the Antitrust Division of the United States Department of Justice. The views expressed in this article are mine and do not necessarily reflect the views of the Antitrust Division. I thank Robert Weisberg, Mark Kelman, Ian Ayres, David Steinberg, Joseph Gibson, James M. Carr, and Teresa Gillis for reviewing earlier drafts of this article and providing helpful comments and encouragement. I also thank Donna Brown and my old law-clerk friends at Covington & Burling for their wonderful research assistance. The remaining errors are mine.

Sometimes the most mystifying thing about legal doctrine is why so many commentators find it so mystifying. And so it is with antitrust state action doctrine. The federal antitrust laws do not apply to business activities that are the foreseeable

result of a state regulatory program so long as public actors, as opposed to private ones, supervise the conduct in question. Commentators aplenty have bemoaned the doctrine's theoretical incoherence—labeling it a practical mess that cannot be applied predictably.[1] The Court, they say, has simply failed to articulate a coherent theory to differentiate its conflicting decisions. For example, the doctrine has been used to exempt from antitrust scrutiny colluding motor carriers,[2] but not colluding insurance carriers,[3] even though both were subject to state regulatory schemes. At least four major law review articles have attempted to explain existing antitrust state action doctrine.[4] Unfortunately, they rely on four different theories

1. *See, e.g.*, Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23 (1983) (proposing an alternative test); Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 669-70, 674 (1991) (describing the predominate interpretation of current doctrine as "odd," "unfortunate because it precludes principled coherent resolution," and "spawn[ing] more confusion and litigation than certainty"); Daniel J. Gifford, *Federalism, Efficiency, the Commerce Clause, and the Sherman Act: Why We Should Follow a Consistent Free-Market Policy*, 44 EMORY L.J. 1227, 1229 n.5 (1995) (arguing for increased antitrust scrutiny of municipalities and noting that the "case law exhibits a remarkable lack of coherence . . ."); Thomas M. Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 CAL. L. REV. 227, 229 & n.16 (1987) (noting expanded inquiry into interstate spillovers of anticompetitive effects); David McGowan & Mark A. Lemley, *Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment*, 17 HARV. J.L. & PUB. POL'Y 293, 298-99 (1994) (describing the "confused state of the cases" and Court's attempt to interpret antitrust statutes to carve out a place for state regulation as "oddly formed and oddly placed"); M. Shawn McMurray, *The Perils of Judicial Legislation: The Establishment and Evolution of the* Parker v. Brown *Exemption to the Sherman Antitrust Act*, 20 N. KY. L. REV. 249, 250-51 (1993) (concluding that the Court's decisions have "only led to confusion and indeterminacy . . . mistake and mystery" and calling for the abandonment of the doctrine entirely); William H. Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After* Midcal Aluminum, 61 B.U. L. REV. 1099, 1109 (1981) (describing the current doctrine as "internally inconsistent" and proposing abandonment of one prong of current test); John Shepard Wiley Jr., *Revision and Apology in Antitrust Federalism*, 96 YALE L.J. 1277, 1280 (1987) (criticizing current doctrine as "irrational antitrust policy"). *But see* Jean Wegman Burns, *Embracing Both Faces of Antitrust Federalism:* Parker *and* ARC America Corp., 68 ANTITRUST L.J. 29 (2000) (expressing approval for current doctrine because it permits experimentation in economic regulation); Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L.J. 486 (1987) (arguing that existing doctrine fosters political participation).

2. *See* Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985).

3. *See* FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992).

4. *See* Elhauge, *supra* note 1, at 671 (proposing a test that looks to whether the individual making the operative decision was financially disinterested and politically accountable); Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 TEX. L. REV. 1203 (1997) (focusing on political

and propose four different tests to determine when state regulation exempts private parties from federal antitrust scrutiny.

This theoretical ambiguity does not bode well for the myriad state-federal regulatory conflicts destined to arise in the next century. New approaches to telecommunications convergence,[5] efforts to regulate internet commerce,[6] and continued deregulation of utilities[7] are but three examples sure to lead to regulatory schemes with varying goals and techniques that differ widely among states and municipalities as well as the federal government.

For example, suppose that a state seeks to regulate advertising on the start-up pages of internet service providers. Advertising restrictions ordinarily raise serious antitrust concerns,[8] and antitrust surely will play a role in evaluating such a regulated environment. But when will antitrust doctrine lead regulatory policy? When will it support other policy considerations? And when should it get out of the way? To avoid a hopeless legal tangle over the line where regulation

---

participation and proposing expanded inquiry into interstate spillovers of anticompetitive effects); McGowan & Lemley, *supra* note 1, at 358-60 (proposing a broad case-by-case analysis considering additional factors not incorporated in current doctrine); John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713 (1986) (proposing alternative test that limits federal antitrust law preemption of state regulation to cases in which state legislatures have been captured by producer groups).

5. *See* Telecommunications Act of 1996, Pub L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.); *see also* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999) (exploring changes imposed by 1996 Telecommunications Act on state regulation and the continuing duties of state and federal telecommunications regulators). *See generally* II ANTITRUST LAW DEVELOPMENTS 1140-91 (4th ed. 1997) (discussing the interplay between federal and state regulation and antitrust law in various telecommunications industries).

6. *See* James V. Grimaldi, *Microsoft Is Set to Take Its Chances in Court*, WASH. POST, Apr. 3, 2000, at A1 (reporting Microsoft allegations that the differing views among the federal and state regulators litigating the Microsoft antitrust suit prevented a settlement).

7. *See* Department of Energy Organization Act, 42 U.S.C. §§ 7101-7375 (1994); *see also* Nancy Vogel, *California Board Rejects Lower Electricity Price Cap*, L.A. TIMES, Jul. 7, 2000, at C2. *Compare* TEC Cogeneration, Inc. v. Florida Power & Light, 76 F.3d 1560 (11th Cir. 1996) (exempting a utility's conduct with respect to cogeneration facility from antitrust scrutiny despite failure of the utility commission to actually approve challenged aspects of utility conduct), *with* United States v. Rochester Gas & Elec. Corp., 4 F. Supp. 2d 172 (W.D.N.Y. 1998) (consent judgment entered against regulated electric utility for agreement with cogenerator restraining competition in supply of power). *See generally* II ANTITRUST LAW DEVELOPMENTS 1191-1231 (4th ed. 1997) (discussing the interplay of federal and state regulation and antitrust in various utility related industries).

8. *See, e.g.*, California Dental Ass'n v. FTC, 526 U.S. 756 (1999).

ends and antitrust begins (or is it the other way around?), a clear theory explaining antitrust state action doctrine must be found.

This Article has two purposes: (1) to articulate a descriptive theory to explain current antitrust state action doctrine, and (2) to evaluate that theory on normative grounds in comparison to the alternative theories and tests suggested by prior commentators. As to the descriptive project, the Article demystifies current antitrust state action doctrine by showing that it distinguishes government actors who are trusted to advance the collective good from businesspersons whose decisions are intended to advance their own interest in maximizing profit.[9] The doctrine is a by-product of our society's longstanding belief in two spheres of decision-making, public and private. This social organization, which might be called the *status choice model* assumes that individuals can choose to further either public-interested goals or self-interested goals, and social welfare can be maximized by dual spheres of public-interested governmental decisionmaking and self-interested private decisionmaking, each governed by appropriate background rules. Criticism of antitrust state action doctrine has invariably missed this distinction and—implicitly or explicitly—assumed that public actors seek to serve selfish interests just like private actors do.[10] No wonder current doctrine appears so mystifying to so many commentators.

As to the normative project, this Article concludes that current doctrine as explained by the status choice model provides an understandable and satisfying way to distinguish permissible from impermissible state regulation given modern American society's dual belief in self-interested private decisionmaking and public-interested government decisionmaking. Although one may fault current doctrine for requiring judges to rely on inherently uncertain intuitions about the extent and importance of government involvement in

9. In this Article, the terms *self interest* and *selfish* are used to describe actors who seek to serve their own interests by maximizing their wealth within the confines of certain background rules that forbid such things as theft, and to a limited extent, fraud and duress. The terms *public interest, public-spirited, altruism,* and *altruistic* are used to describe actors who seek, successfully or not, to maximize the interests of their society.

10. *See infra* Part III.B.2.

regulatory decisions, this intuitive test is as practical as any of the alternatives.

More importantly, current doctrine reinforces a healthy ideology that recognizes our individual capacity to put self interest aside and act in the public interest. By assuming that public actors behave as selfishly as private actors do, prior commentators deny this capacity and radically transform the world that antitrust state action doctrine seeks to order. Of even greater concern are the disturbing implications of these proposals. The focus on self-interested government decisionmaking is more than inaccurate; it is part of a disturbing trend in legal scholarship to accept, without analysis or reflection, stories of a world in which social life is determined entirely by selfish desire. Rules designed to govern such a world help create and cement in place a social order driven by self interest while masking our intuitive recognition that such an unhappy social ordering is not innate, and in fact does not—or at least need not—govern our lives.[11]

Part I first describes current antitrust state action doctrine. It then explains the status choice model and cites examples of American legal thought dating back to the *The Federalist Papers* and continuing through modern doctrine that rest on this model of social organization. The concluding Sub-Parts articulate the Article's primary descriptive thesis—that antitrust state action doctrine also rests on the status choice model—and responds to likely criticism of that thesis.

Part II sets out the leading commentary and explains how that commentary has failed on its own terms to achieve its stated goal of explaining current doctrine.

Part III takes up the normative question of whether current doctrine, as explained by the status choice model, or one of the alternatives proposed by the leading commentators, provides the soundest basis for distinguishing permissible from impermissible state regulation. First, this Part concludes that neither current doctrine nor any of the proposed alternatives offer definitive and coherent answers in complicated regulatory situations. Current doctrine does, however, provide a reasonable and practical way to approach the problem that the alternatives do not. Second, this Part raises the more

11. *See infra* Part III.C.1.

important criticism of the leading commentary: that it fails to perceive the distinction between public-spirited governmental behavior and self-interested business behavior. This Part concludes that the assumption that public actors pursue their own self interest does not bring theoretical coherence to the doctrine and poses the ideological risk of reading our desirable capacity for public-interested decisionmaking out of our social conception of government actors. Third, this Part provides a normative argument in favor of current doctrine as explained by the status choice model and responds to likely criticism of that argument.

I. ANTITRUST STATE ACTION AND THE STATUS CHOICE MODEL

This Part describes current antitrust state action doctrine and the status choice model of social organization. It then shows how legal doctrine in several distinct areas rests on status choice and, through case law, demonstrates that current antitrust state action doctrine also rests on this model of social organization. Finally, it responds to likely criticism that current doctrine actually rests on some theory of federalism.

A. Antitrust State Action Doctrine

When Congress enacted the Sherman Act in 1890, the prevailing interpretation of the Commerce Clause[12] was sufficiently narrow that conflicts between antitrust and state regulation of the economy were at most a remote consideration.[13] Cases considering what is now known as antitrust state action were thus quite rare.[14] The New Deal's

12. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States . . . .").

13. *See* Cantor v. Detroit Edison Co., 428 U.S. 579, 632-33 (1976) (Stewart, J., dissenting); Easterbrook, *supra* note 1, at 40; Herbert Hovenkamp & John A. Mackerron III, *Municipal Regulation and Federal Antitrust Policy*, 32 UCLA L. REV. 719, 725-28 (1985); Jorde, *supra* note 1, at 229 & n.16; Matthew L. Spitzer, *Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory*, 61 S. CAL. L. REV. 1293, 1295 (1988). For examples of the judicial interpretation of the Commerce Clause in the late nineteenth century, see *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) and *Paul v. Virginia*, 75 U.S. 168 (1868).

14. Those conflicts that did occur were resolved in a fashion consistent with the interpretation of current doctrine as explained by the status choice model. *Compare* Olsen v. Smith, 195 U.S. 332, 344-45 (1904) (holding that state regulation of harbor pilots was beyond the reach of the Sherman Act), *with* Northern Sec. Co. v. United States, 193 U.S. 197, 345-46 (1904) (holding that states cannot give corporations authority to restrain interstate commerce).

expansion of economic regulation and the permissible scope of federal law under the Commerce Clause redefined the landscape. Then, in 1943, the Supreme Court directly confronted the relationship between federal antitrust law and state regulation in *Parker v. Brown*.[15]

Parker involved a California regulatory program that restricted the supply of raisins in order to limit competition among raisin growers and maintain price levels.[16] The program helped producers at the expense of consumers, apparently conflicting directly with federal competition policy.[17] A unanimous Court nevertheless held that federal law did not preempt the regulatory program, because the Sherman Act was not meant "to restrain state action or official action directed by a state."[18] The Court distinguished between a state authorizing private parties to act anticompetitively, which presumably would violate the antitrust laws via the Supremacy Clause, and a state itself—either directly or through supervised private parties—regulating commerce, which is exempt from antitrust scrutiny.[19]

After *Parker*, antitrust state action doctrine remained virtually dormant for three decades.[20] From the mid-1970s through the early 1990s, in contrast, the Court decided more than a dozen antitrust state action cases.[21] By the mid-1980s, the

15. 317 U.S. 341 (1943).

16. *See id.* at 346-48 (the declared purpose of the Act was "to conserve the agricultural wealth of the state" and to "prevent economic waste in the marketing of agricultural products").

17. In some instances, state regulation may be defended as necessary to correct market imperfections. As Judge Easterbrook has recognized, however, "in most cases legislation is designed to defeat the market altogether." Easterbrook, *supra* note 1, at 23.

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

19. *See id.* at 351-52.

20. *But see* Flood v. Kuhn, 407 U.S. 258 (1972) (addressing state action issues in dicta); Schwegmann Bros. v. Calvert Corp., 341 U.S. 384, 389 (1951) (same).

21. The first cases focused on whether the state "as sovereign" made the operative anticompetitive decision or expressed a belief that such a decision was wise. *See* Hoover v. Ronwin, 466 U.S. 558 (1984) (exempting bar admission decisions made by state supreme court in its sovereign capacity); New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978) (exempting state regulation of market entry by new car dealers where state motor vehicle board oversaw the process); Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (exempting ban on lawyer advertising adopted and enforced by state supreme court); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) (refusing to exempt decision to sell light bulbs by a public utility); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (refusing to exempt decision by state agency consisting of private bar members to fix

Court had developed a two-part test, asking whether the state (1) "clearly articulated" its intent to displace competition with regulation; and (2) "actively supervised" the private parties in the regulated market.[22]

As applied, the test asks first whether the state has articulated a general intent to displace the forces of the free market with some form of state regulation.[23] To be state action in this context, an anticompetitive by-product of economic regulation need only be a foreseeable result of a particular statute. It need not be compelled or even necessary to the regulatory scheme.[24] More specifically, to satisfy the "clear articulation" prong of the test, a party must be able to point to

---

minimum legal fees).

22. *See* Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985) (applying and explaining the *Midcal Aluminum* test); Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) (applying test to municipal government conduct); California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97, 105-06 (1980) (establishing two prong test to determine antitrust immunity); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) (addressing considerations underlying the Midcal Aluminum test). Almost immediately, scholars began to criticize this test on the grounds that it (1) encouraged states to supplant more competition than they might like in order to ensure that the test was satisfied; and (2) required federal courts to become enmeshed in the workings of state agencies (e.g., by determining whether they acted within the scope of their authority). *See* Easterbrook, *supra* note 1, at 29-33; Page, *supra* note 1, at 1128-31, 1134-36. As the test has been applied, however, these fears have proven to be unwarranted. The two prongs of the test have not been interpreted as firm prerequisites. Rather, they have been employed as guidelines for evaluating whether competitive restraints are sufficiently likely to serve what state actors believe to be the public interest. *See* FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992); City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365 (1991); Patrick v. Burget, 486 U.S. 94 (1988).

23. *See Midcal Aluminum*, 445 U.S. at 105 (describing "intent" prong of test). The application of the antitrust state action test is easiest in cases in which the state as sovereign decides to implement a particular anticompetitive decision. For example, if the state supreme court makes bar admission decisions, the state is declaring both its desire for and approval of those decisions, no matter how anticompetitive they may be. The requirement that the decisions advance the state's view of the public interest is thus met. *See Hoover*, 466 U.S. 558 (exempting bar admission decisions made by state supreme court in its sovereign capacity). Decisions of municipalities, state agencies, and similar arms of the state present more difficult cases. Although these entities, like the state, are presumed to act in the public interest when they administer an anticompetitive program, only the state is presumed to act altruistically in deciding whether to supplant free market forces in the first place.

24. *See, e.g., Southern Motor Carriers*, 471 U.S. at 61; *Town of Hallie*, 471 U.S. at 41-46. Errors in the interpretation of a state regulatory program also will not impact the scope of the exemption from antitrust liability. *See Omni Outdoor Adver.*, 499 U.S. at 371-72 (adopting "a concept of legal authority broader than what is applied to determine the legality of the municipality's action under state law" and analogizing to the concept that judicial decisions within the court's jurisdiction broadly defined are entitled to respect even if erroneous) (citing Stump v. Sparkman, 435 U.S. 349, 356-57 (1978)).

legislation that has been (or, if not yet interpreted, could reasonably be) read by state courts, agencies, or municipalities to embody the view that the public interest would be served if a regulatory scheme displaced the forces of the free market. The existence of a statute satisfying this criterion ensures that the state legislature at least conceived of the possibility that the authorized regulation would have anticompetitive effects.

The mere existence of a state regulatory program with foreseeable anticompetitive effects, however, does not suffice to exempt private conduct from antitrust scrutiny. Government officials must also actively supervise the private conduct in a manner sufficient to ensure that the state's view of the public interest, rather than the private interests of the regulated parties, is served.[25] "Actual state involvement, not deference to private [anticompetitive] arrangements under the general auspices of state law, is the precondition for immunity from federal law."[26] The active supervision requirement ensures that the challenged "anticompetitive acts were truly the product of state regulation."[27]

Courts have never precisely defined the requisite level of state involvement where private parties restrain trade, presumably because the standard varies with the situation. Where private parties are engaged in naked horizontal price fixing, a greater level of state involvement would likely be required than where, for example, natural monopolies with regulated rate structures divide service territories.[28] The test is not mechanical. It requires judges to decide—based in large part on their intuitive understanding of human nature—whether a government actor's conception of the public interest is being furthered by the anticompetitive restraint.[29]

---

25. *See Ticor Title Ins.*, 504 U.S. at 633; *Patrick*, 486 U.S. at 100-01.

26. *Ticor Title Ins.*, 504 U.S. at 633.

27. *Patrick*, 486 U.S. at 100.

28. *See Ticor Title Ins.*, 504 U.S. at 639-40 (requiring greater scrutiny of state supervision in horizontal price fixing case); Lancaster Comty. Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397, 401-02 (9th Cir. 1991) (suggesting less scrutiny of state supervision where the conduct of pervasively regulated utilities is at issue).

29. *See Patrick*, 486 U.S. at 100-01 (holding that the active supervision "requirement is designed to ensure that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies").

B. Defining the Status Choice Model

This Article uses the term *status choice model* to describe a system of social organization in which social welfare is maximized by a combination of self-interested behavior in the private business sector and public-interested behavior in the governmental sector, subject to certain background rules.

The status choice model posits that individuals have the capacity to choose their status in society and to permit either self interest or an altruistic concern for the public at large to govern their decisionmaking. Central to the model is the understanding that the distinction between public and private behavior is *not* the product of an inherent selfishness among private actors or a magical imbuing of government representatives with a capacity for altruism. Nor is it the necessary result of biology or of human interaction in a free society. Instead, the status choice model posits an individual capacity to (a) choose to behave selfishly or altruistically depending on the status or position they occupy; and (b) exercise the integrity necessary to live up to that choice.[30] Rousseau captures the difference between status choice and natural tendency: "[T]o be governed by appetite alone is slavery, while obedience to a law one prescribes to oneself is freedom."[31]

Further, individuals are not born with the ability to know which choice to make. The legal system can (and does) impose duties on individuals in certain situations as a means to advance social welfare. In so doing, the law assumes individuals are capable of acting in the interests of others or in their own interest, just as law assumes individuals can choose to follow the law generally.[32]

---

30. *Compare* THOMAS HOBBES, LEVIATHAN ch. 13 (Richard Tuck ed., Cambridge University Press 1996) (1651) (assuming human nature is inherently selfish and thus must be strongly constrained), *with* JOHN LOCKE, OF CIVIL GOVERNMENT 19, 21, 125 (J.M. Dent & Sons Ltd. 1943) (1690) (assuming individual capacity to pursue common interests subject to background legal principles).

31. JOHN JACQUES ROUSSEAU, THE SOCIAL CONTRACT bk. I, ch. viii (Maurice Cranston trans., Penguin Books 1979) (1762).

32. This Article focuses on the distinction between the pursuit of self interest in the competitive business environment and the pursuit of the public interest among legislators and government regulators. There exist many other examples of legal duties to act in the interest of others, however. Union leaders must "serve the interests of all members" and "fairly . . . represent all employees" without favoring their own interests or those with whom they have some special

In American society, private businesspersons are thus socially and legally encouraged to pursue their own interests in profit for themselves and for their companies. This encouragement rests on the belief that self-interested behavior will advance the public interest when it is governed by market forces and constrained in certain ways by legal principles such as antitrust.

Governmental actors, by contrast, are socially and legally encouraged to pursue the public interest (that is, the interest of society at large) rather than their own self interest. Just as private selfish behavior (appropriately constrained) helps maximize social welfare, so too does altruistic governmental behavior, when appropriately constrained by legal principles.[33]

The status choice model recognizes that individuals have the capacity to act selfishly or altruistically. But they may not always adhere to the role assigned to their status. Background rules in both the private and public realms correct for potential shortcomings in individual behavior. In the private realm, these background rules are generally common law legal doctrine as well as antitrust and regulatory rules. In the governmental realm, the background rules rest on principles of separation of powers[34] and dual sovereignty.

Placing the model in perspective, legal structures that

---

relationship. Vaca v. Sipes, 386 U.S. 171, 177 (1967). Lawyers generally must act in "the best interests of the client," regardless of the effect on the lawyer's own interests. In addition, criminal and tort law impose duties to assist others in certain circumstances. *See, e.g.*, Jones v. United States, 308 F.2d 307, 310 (D.C. Cir. 1962).

33. McGowan and Lemley clearly articulate a common criticism of the notion that government actors serve the public interest and thus decisions should be upheld in the face of antitrust attack. The authors argue that Congress has already determined that promoting consumer welfare by enforcing the antitrust laws is in the public interest. State government actors may not permissibly determine that anticompetitive behavior is in the public interest. This is particularly true, they argue, because the Supreme Court has never "provide[d] a means for ascertaining what this public interest is, and thus there is no way to know who is and who is not acting to further it." McGowan & Lemley, *supra* note 1, at 333. As explained more fully *infra* Part I.D.3, Congress has not determined that competition is always in the public interest, and competing values cannot be precisely articulated in advance. The issue is less analytical and more aesthetic than McGowan and Lemley recognize: Do we live in a society where individuals can collectively deliberate and advance the public interest, or are we doomed to a world where the individual pursuit of self interest is the best we can do?

34. In this context, the phrase *separation of powers* is not limited to the specific requirements embodied in the federal constitution. Rather, it refers to the conscious choice to employ separation of powers principles—albeit in somewhat different forms—at virtually all levels of public governance in the United States.

encourage self-interested conduct in the private realm as a means to maximize the public good have been central to social theory for centuries.[35] Adam Smith captured an aspect of this interaction between self-interested private behavior and social welfare in *Wealth of Nations*: "[B]y directing that industry in such a manner as its produce may be of greatest value, *he intends only his own gain*, and he is in this, as in many other cases, led . . . to promote an end [maximizing social utility] that was no part of his intention."[36] Contemporary legal analysis has embraced this view, emphasizing the particular need for background rules that permit free market forces to govern private interaction.[37] As Richard Posner has explained: "The individual may be completely selfish but he cannot, in a well-regulated market economy, promote his self interest without benefiting others as well as himself. Since . . . the social product of the productive individual in a market economy will exceed his earnings, such an individual cannot help creating more wealth than he takes out of society."[38]

The status choice model's description of the behavior of

---

35. *See e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 11-14 & nn.4-5 (1971) (connecting his use of the principle with John Locke's *Second Treatise of Government*, Jean Jacques Rousseau's *The Social Contract*, and Immanuel Kant's *The Foundations of the Metaphysics of Morals*).

36. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 477 (University of Chicago Press 1976) (1776) (emphasis added). More recently, the Federal Communications Commission has been an articulate proponent of this view. *See In the Matter of Policy and Rule Concerning Rules for Dominant Carriers*, 4 F.C.C. Rcd. 2873, 2886 (1989), *available at* 1989 FCC LEXIS 860 ("Although firms operating in a competitive environment simply are attempting to maximize their profits, the various means each uses to achieve this result—innovating, enhancing efficiency, providing quality services—benefit consumers individually and society as a whole.")

37. *See* Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293, 308 (1984) ("With the 'proper' backdrop of efficient rules, people calculating completely selfishly will inevitably serve the common good."); Mark G. Kelman, *Misunderstanding Social Life: A Critique of the Core Premises of 'Law and Economics'*, 33 J. LEGAL EDUC. 274, 276 (1983) [hereinafter Kelman, *Misunderstanding Social Life*]. Kelman argues that contemporary legal and economic reasoning can be described as follows:

> [B]y taking advantage of the fact that people are selfish and demand curves downward sloping, we can order the inexorable conflicts in social life, the clashes of selfish egos, without resorting to detailed central directives or inculcated communitarianism. We can rely, instead, on unregulated markets that are set against a backdrop of simple, general legal rules, where failure to observe these clear duties translates into an obligation to pay a price that varies in the particular circumstance in which the rule is applied.

Id.

38. Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 132 (1979).

government actors is consistent with the Madisonian or Federalist ideal in which the task of the legislator is not to respond to the private pressures of particular constituents but rather to pursue the best interest of society at large. Cass Sunstein described the Framers' conception of a government actor as one who "achieve[s] a measure of critical distance from prevailing desires and practices, subjecting these desires and practices to scrutiny and review."[39] The idea is not that government actors acquire some mystical power to access preferences "entirely external to private beliefs and values;" rather, "desires should be revisable in light of collective discussion and debate, bringing to bear alternative perspectives and additional information."[40] There is, however, an element of universalism in this conception of government: a belief that there exists—at least sometimes and in some areas—a common good distinct from individual private preference.[41]

The notion of altruistic public behavior is also well grounded in continuing theories of republicanism that enable us to believe that the United States is both governed *by the people* and yet has a government *of law, not men.* As Frank Michelman put it: "One possible way of making sense of this is by conceiving of politics as a process in which private-regarding 'men' become public-regarding citizens."[42] He concludes that "[r]epublicanism . . . is not optional with us . . . . It is essential to our understanding how self-rule and rule of law can coexist."[43]

The status choice model's conception of governmental behavior can be contrasted with both traditional republican and pluralist views of government. Where the status choice model values government service and assumes that government representatives seek to serve the public interest, the traditional republican view is skeptical of political

39. Cass R. Sunstein, *Beyond the Republican Revival,* 97 YALE L.J. 1539, 1548-49 (1988).

40. *Id.; see also* THE FEDERALIST NO. 10, at 81-82 (James Madison) (Clinton Rossiter ed., 1961) (distinguishing "pure democracy," in which all citizens "assemble and administer the government in person," from "a republic," in which "a small number of citizens elected by the rest" use their "wisdom [to] best discern the true interest of their country.").

41. *See* Sunstein, *supra* note 39, at 1554-55.

42. Frank Michelman, *Law's Republic,* 97 YALE L.J. 1493, 1502-03 (1988).

43. *Id.*

representation, favors direct local decisionmaking over representative government, and assumes that all citizens pursue the public interest in a political realm.[44]

Pluralism differs from the status choice model in its assumptions about the role of representatives. Instead of seeking the public good, pluralism assumes that lawmakers engage in a more mechanical and market-like process of aggregating individual preferences. Government conduct becomes "simply a reflection of the sum of the vectors of private conflict."[45] As Frank Michelman has explained, "[I]n pure pluralist vision, good politics does not essentially involve the direction of reason and argument towards any common, ideal, or self-transcendent end. For true pluralists, good politics can only be a market-like medium through which variously interested and motivated individuals and groups seek to maximize their own particular preferences."[46]

Admittedly, a large body of economic and political science literature rejects the status choice model's assumption of public-spirited government behavior and analyzes legislative and administrative action using self-interested motivational analysis.[47] But analysis of how legislatures really function is inconclusive at best.[48] One need look no further than any day's *Washington Post* to see that governmental action continues to be justified with reference to the public good rather than the mechanical summing of individual preference.[49] More

---

44. *See* Sunstein, *supra* note 39, at 1558. *See generally* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) (reviewing the history of republican theories of government in America) [hereinafter Sunstein, *Interest Groups*].

45. Michael J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1427 (1982). Pluralism in this sense *does not* refer to "the acceptance and celebration of diversity within a society." Michelman, *supra* note 42, at 1507.

46. Michelman, *supra* note 42, at 1508; *see also* Sunstein, *supra* note 39, at 1542-43.

47. *See, e.g.*, Spitzer, *supra* note 13, at 1302-08.

48. *See* Sunstein, *Interest Groups*, *supra* note 44, at 48-49 (collecting sources). *See generally* ARTHUR MAASS, CONGRESS AND THE COMMON GOOD (1983); Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279 (1984); Michael E. Levine, *Revisionism Revised? Airline Deregulation and the Public Interest*, 44 LAW & CONTEMP. PROBS. 179 (1981); Steven D. Levitt, *How Do Senators Vote? Disentangling the Role of Voter Preferences, Party Affiliation, and Senator Ideology*, 86 AM. ECON. REV. 425 (1996); Sam Peltzman, *Constituent Interest and Congressional Voting*, 27 J.L. & ECON. 181 (1984).

49. *See* Spitzer, *supra* note 13, at 1303 n.49 (explaining that the "public interest theory" of regulation "is still the dominant model used by politicians, regulators, and journalists").

importantly, academic models of legislative action assuming self-interested behavior do not reflect our societal ideals, but instead attempt only to analyze why reality may stray from the ideal. Substituting limited economic models for broad-based ideals as the foundation of legal doctrine would involve a dramatic shift and, although justifiable in appropriate circumstances, should be undertaken with the greatest of care.

C. Examples of the Public Interest Focus of Government Actors

This Part shows that the status choice model's description of government decisionmaking forms part of an unbroken line of thinking that dates back to this country's earliest days.

1. The Federalist Papers *and Status Choice*

In response to the Anti-Federalist arguments against a strong national government and in favor of local political decisionmaking, the authors of *The Federalist Papers* described a system of government in which national legislators would be guided by a civic duty to pursue the public good. For example, Publius wrote of the need to control *factions*, that is groups acting out of a private interest "adverse . . . to the permanent and aggregate interests of the community"[50] and of "the necessity of sacrificing private opinions and partial interests to the public good."[51] The Federalists believed that it was possible to select representatives who could serve this public good.[52] In Publius's words, "[T]hey will refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations."[53]

---

50. THE FEDERALIST NO.10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

51. THE FEDERALIST NO. 37, at 231 (James Madison) (Clinton Rossiter ed., 1961).

52. THE FEDERALIST NO. 57, at 350 (James Madison) (Clinton Rossiter ed., 1961) ("The aim of every political constitution is, or ought to be first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue the common good of the society . . . ."); *see also* THE FEDERALIST NO. 63, at 384 (James Madison).

53. THE FEDERALIST NO. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961); *see also* THE FEDERALIST NO. 63, at 384 (James Madison). In *The Federalist No. 63*, Madison writes,

> [A Senate] may be sometimes necessary as a defense to the people against their own temporary errors and delusions. . . . [T]here are particular

Some opposed the Federal Constitution on the ground that individuals were incapable of putting aside self interest to pursue the public good. To be sure, Publius recognized that "there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust."[54] Nevertheless, to assume too pessimistic a view of the representatives' capacity for virtue would be "to renounce every rule by which events ought to be calculated, and to substitute an indiscriminate and unbounded jealousy, with which all reasoning must be vain."[55] Publius thus stressed that "there are . . . qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form."[56] Were irresistible selfishness a "faithful likeness[] of the human character, the inference would be, that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another."[57]

Republican government as conceived by the Framers thus depended upon individual capacity to choose to serve the public interest rather than private interest. The Founders did recognize, however, that safeguards would be necessary to guard against corruption. As Publius comments: "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."[58] Those controls, however, were not rooted in a representative's selfish desire for re-election or to pad the resume for a post-public-service job hunt. On the contrary, "[d]uty, gratitude, interest, ambition itself, are

---

> moments in public affairs when the people, stimulated by some irregular passion . . . or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow meditated by the people against themselves . . . ."

Id. at 384.

54. THE FEDERALIST NO. 55, at 345 (James Madison) (Clinton Rossiter ed., 1961).

55. *Id.*

56. *Id.* at 346.

57. *Id.*

58. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961); *see also* THE FEDERALIST NO. 10, at 80 (James Madison) ("Enlightened statesmen will not always be at the helm.").

the cords by which [representatives] will be bound to fidelity and sympathy with the great mass of the people."[59] Rejecting the notion that representatives should simply sum the individual preferences of those they represent, Publius wrote that "[t]he republican principle . . . does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests"; on appropriate occasions, he continued, "it is the duty of the persons whom [the people] have appointed to be the guardians of [their] interests to withstand the temporary delusion in order to give them time and opportunity for more cool and sedate reflection."[60]

Rather than develop safeguards that assumed selfish behavior, the Framers incorporated into the Constitution a system of checks and balances. Competing branches of government were designed both to root out corruption and to ensure a filtering of varying conceptions of the public interest: two houses of Congress with different constituencies, three branches of government with unique roles in operating a rule of law, and a federal system of separate sovereigns each with ultimate authority within its sphere.[61] The Framers believed that together these checks would guard against both a subconscious tyranny in the pursuit of the public interest and a conscious tyranny in the pursuit of individual wealth or aggrandizement.[62]

2. The Bill of Rights and Status Choice

The United States Constitution as a whole, and the Bill of Rights in particular, are designed as much to limit the power of

59. THE FEDERALIST NO. 57, at 353 (James Madison) (Clinton Rossiter ed., 1961).

60. THE FEDERALIST NO. 71, at 432 (Alexander Hamilton) (Clinton Rossiter ed., 1961). A similar conception can be found in the writings of Burke. *See* Edmund Burke, Speech of November 3, 1774, *in* BURKE'S POLITICS 114, 116 (1949) ("Parliament is a *deliberative* assembly of one nation, with one interest, that of the whole—where not local purposes, not local prejudices, ought to guide, but the general good, resulting form the general reason of the whole.").

61. *See* THE FEDERALIST NO. 51 (James Madison).

62. That these checks and balances within the government structure—rather than a duty to further the private preferences of constituents—underlies the original conception of American government is supported by Congress's early rejection of proposals to permit constituents to instruct their representatives on how to vote on particular issues. Sunstein, *supra* note 39, at 1559, 1559 n.113.

the federal government as to convey authority. Nevertheless, the Bill of Rights implicitly but repeatedly recognizes certain powers that are entrusted to government but denied to private citizens. In each case, the Constitution recognizes a governmental power to disregard private property rights that is unequivocally denied to private citizens under basic property, tort, and criminal law principles.[63]

For example, the Fifth Amendment's requirement that government pay just compensation whenever it takes private property for public use[64] assumes a governmental right to force the sale of private property in certain circumstances.[65] Private citizens are not entrusted with any similar authority.

The Fourth Amendment prohibits unreasonable searches and seizures,[66] a prohibition that again presupposes a governmental right to conduct reasonable seizures. Although police officers engaged in the competitive enterprise of ferreting out crime are not always permitted to determine whether a particular search is reasonable, some government actor is given that authority. Private citizens, by contrast, generally are prohibited from invading the property of others, even if they have reason to suspect they could uncover evidence of a crime.

The Third Amendment recognizes the authority to quarter soldiers in private homes during wartime, provided the government acts in a manner prescribed by law.[67] Private citizens have no similar claim to shelter at the expense of other citizens, regardless of circumstance.

The status choice model explains these governmental

63. One commentator has argued that both the rationality requirement for upholding legislation in the face of an equal protection challenge and the constitutional contract clause doctrine are justified by the belief that governmental actors can and should choose to serve the public interest. Sunstein, *Interest Groups*, *supra* note 44, at 49-55.

64. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

65. *See, e.g.*, Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 241-42 (1984). Indeed, a statute affecting property rights that fits within the police power and is triggered at the discretion of a state actor will be upheld even though compensation has not been paid. *See* Miller v. Schoene, 276 U.S. 272, 280-81 (1928); *see also* Sunstein, *Interest Groups*, *supra* note 44, at 50.

66. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

67. U.S. CONST. amend. III ("No soldier shall, in time of peace be quartered in any house, without the consent of the Owner; nor in time of war, but in a manner to be prescribed by law.").

powers. Because government actors are presumptively serving the public interest, they are trusted with quite extraordinary authority. That trust would never be placed in the hands of market participants who operate in a sphere in which the pursuit of selfish interest is the expected behavior.

3. Government Corruption and Status Choice

Commentators discussing antitrust state action doctrine tend to emphasize the influence that private regulated parties wield over their regulators and even municipal and state legislatures.[68] Through legitimate lobbying (and less ethical means), the selfish views of the regulated parties likely do receive greater consideration than the views of the general public in many regulatory decisions. Such influence is not new, however. The American legal system, even in its earliest years, recognized that government actors may not live up to their status choice to let the public interest guide their decisions. Despite this reality, the legal system has institutionalized trust in the decisions of government actors. As Justice Cardozo observed some sixty years ago, "[t]here is a wise and ancient doctrine that a court will not inquire into the motives of a legislative body or assume them to be wrongful."[69] This doctrine dates back to Justice Marshall's 1810 decision for the Court in *Fletcher v. Peck*[70] and remains in full force today.[71]

Fletcher arose out of the great Yazoo land scandal of the late 1790s and required the Court to decide whether to void a Georgia statute that conveyed state lands to private parties because those private purchasers promised in turn to convey a share in the land to the legislators who voted for the bill.[72] The

68. *See* Easterbrook, *supra* note 1, at 23 & n.1 ("[M]any scholars believe, and much evidence shows, that regulatory laws owe more to interest group politics than to legislators' concern for the welfare of society at large."); *id.* at 27 ("[R]egulation often is procured by and designed for the benefit of those the regulation purports to control"); *see also* ROBERT H. BORK, THE ANTITRUST PARADOX 347-64 (1978); Page, *supra* note 1, at 1109.

69. United States v. Constantine, 296 U.S. 287, 299 (1935).

70. 10 U.S. (6 Cranch) 87 (1810).

71. *See, e.g.*, Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 n.18 ("The Court has recognized, ever since *Fletcher v. Peck* . . . that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government.").

72. *See generally* C. MAGRATH, YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC: THE CASE OF *FLETCHER V. PECK* (1966).

Court declined to interfere with the legislation "clothed with all the requisite forms of a law," despite the "impure motives which influenced certain members of the legislature which passed the law."[73]

The Court's holding was limited to cases between private parties, but Chief Justice Marshall placed in considerable doubt whether a court could ever invalidate legislation based on the self-interested motivation of the legislature.[74] In particular, he questioned how a court could draw lines: "Must it be direct corruption? [O]r would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority? [O]r on what number of the members? Would the act be null, whatever might be the wish of the nation? [O]r would its obligation or nullity depend upon the public sentiment?"[75]

A century and a quarter later, the Supreme Court applied essentially the same reasoning to judges and administrative officials that *Fletcher* applied to legislators.[76] The Secretary of Agriculture was charged with the duty to set maximum fees for market agencies under the Packers and Stockyards Act.[77] After a decade-long debate, the Secretary was ordered to distribute fees paid above the maximum set fee that had been held in escrow by the lower court.[78] The market agencies attacked the Secretary's decision in part on the ground that he was furthering a private interest in the well being of farmers rather than upholding his duty to render a decision in the interests of the public at large.[79] The three-judge district court permitted the market agencies to take testimony from the Secretary and relied upon his testimony in striking down the order.[80]

In an opinion by Justice Frankfurter, the Supreme Court reversed, holding that the parties had a full opportunity to present relevant evidence and sufficient evidence supported

---

73. *Fletcher*, 10 U.S. (6 Cranch) at 131.

74. *See id.* at 130 ("It may well be doubted, how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme sovereign power of a state, to the formation of a contract by that power, are examinable in a court of justice.").

75. *Id.*

76. *See* United States v. Morgan, 313 U.S. 409 (1941).

77. 7 U.S.C. §§ 181-231 (1994 & Supp. 1997).

78. *See Morgan*, 313 U.S. at 413-14.

79. *See id.* at 420.

80. *See id.* at 414, 421-22.

the Secretary's order.[81] Justice Frankfurter then addressed whether it was proper to consider the motivations of the Secretary, whom Frankfurter described as "the guardian of the public interest in regulating a business of public concern."[82] And in a classic judicial pronouncement, Frankfurter wrote: "[T]he short of the business is that the Secretary should never have been subjected to this examination. . . . Just as a judge cannot be subjected to such a scrutiny, . . . so the integrity of the administrative process must be equally respected."[83]

Marshall's skepticism and Frankfurter's cautions remain influential. Today, courts inquire into motivation only "in the 'very limited and well-defined class of cases where the very nature of the constitutional question requires [this] inquiry.'"[84] Even in that limited class of cases, however, the inquiry does not question the altruistic character of the governmental decision. For example, a legislator voting to require school prayer might intend to advance religion in a way that violates the Establishment Clause of the First Amendment, but he presumptively does so in an attempt to advance his view of the public interest, not his own self interest.

The status choice model again explains this behavior. Governmental decisions are presumed to be in the public interest. Although corrupt public servants may be punished by the courts, the laws they enact may only be changed by a future legislature.

4. Due Process and Status Choice

In cases challenging *ex parte* state procedures permitting the attachment of private property without a pre-attachment hearing, the Court has recognized as a significant factor whether a government actor makes an independent decision based on evidentiary grounds sufficient to justify the attachment.[85] The Court has struck down on due process

81. *See id.* at 416-20.

82. *Id.* at 415.

83. *Id.* at 422.

84. City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 377 n.6 (1991) (quoting United States v. O'Brien, 391 U.S. 367, 383 n.30 (1968)).

85. *See* Connecticut v. Doehr, 501 U.S. 1, 10, 14 (1991); North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 607 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600, 605, 609-10, 615-16, 619 (1974); *id.* at 625 (Powell, J., concurring). *But see* Fuentes v. Shevin, 407 U.S. 67, 96 (1972) (4-3 decision) (requiring a pre-attachment

grounds statutes permitting pre-hearing attachment based on writs triggered by a conclusory affidavit by a private litigant, but has upheld statutes with more meaningful government involvement.[86]

In these cases, the Court used language reminiscent of antitrust state action doctrine. For example, in one case it emphasized that where "the process proceeds under judicial supervision and management," less process is due than where the process proceeds "at the unsupervised mercy of the [private litigant] and court functionaries."[87] Where the attachment statute "provides for judicial control of the process from beginning to end[,]" the Court concluded, the "risk that the *ex parte* procedure will lead to a wrongful taking" is reduced.[88]

Although the Court did not explain how judicial involvement would reduce the possibility of wrongful takings, the underlying assumption is clear and consistent with the status choice model. A judicial officer seeks to advance the public interest in deciding whether to issue the writ. A private litigant, by contrast, seeks to advance a selfish interest in furthering a litigation position. Like the business world, the adversary litigation process is based on the assumption that social welfare is maximized where each litigant seeks to advance its own interests in the litigation.

5. Judicial Approval of Class Action Settlements and Status Choice

Federal Rule of Civil Procedure 23,[89] by requiring judicial approval before a class action may be settled or dismissed, creates an exception to the standard rule that the litigants before a court may settle their differences and dismiss the action.[90] The exception is justified by the potential conflict of

---

hearing absent exigent circumstances).

86. *Compare North Georgia Finishing*, 419 U.S. at 607, *with Mitchell*, 416 U.S. at 603.

87. *North Georgia Finishing*, 419 U.S. at 619; *see also Mitchell*, 416 U.S. at 616, 619.

88. *Mitchell*, 416 U.S. at 616-17.

89. FED. R. CIV. P. 23(e) ("Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.").

90. FED. R. CIV. P. 41(a)(1) ("Subject to the provisions of Rule 23(e) . . . an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a

interest between the interests of class counsel and the class representative, on the one hand, and the interests of the remaining class members, on the other. The former might be tempted to settle on terms favorable to them, even though the remainder of the class is shortchanged.[91]

Often ignored, however, is that the class action judge also faces a conflict of interest. Class action lawsuits are time-consuming and difficult to manage. In a period of crowded federal dockets, judges surely have an interest in seeing cases settle, particularly complex class actions. Yet, the rule trusts judges—but not class counsel and class representatives—to put aside their own interests and act altruistically in the public interest.

As in the due process cases, the seldom-stated reason is that attorneys function in an adversarial environment in which they are encouraged to consider only the interests of their own client. Although the status choice of attorneys differs from that of businesspersons, in that they must advance the interests of their clients, not just their own profits, attorney decisionmaking is nonetheless governed by an essentially selfish motivation to maximize the position of the client. Judges, by contrast, are government actors who make a status choice to serve the public interest. They are trusted to put aside personal predilections and take account of the interests of others altruistically in a way that attorneys are not.

D. Antitrust Case Law and Status Choice

Antitrust state action case law, like the above examples, is best viewed as a product of the status choice model. The doctrine exempts a potentially anticompetitive decision from scrutiny only if a reviewing federal court is confident that the decision furthered a presumptively altruistic state actor's view of the public interest, rather than the interests of presumptively selfish private actors.

This Sub-Part starts with the case law supporting this view and then rejects the likely criticism that the case law can be read to suggest that either a respect for federalism or a belief

---

stipulation of dismissal signed by all parties who have appeared in the action.").

91. *See* CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD COOPER, FEDERAL PRACTICE AND PROCEDURE § 1797, at 340-41 & n.3 (2d ed. 1986); *id.* at 61 & n.3 (2d ed. Supp. 2000).

that state regulation produces a superior result underlies current doctrine. It concludes by rejecting the contention that the status choice model—even if it explains the case law—cannot rationalize current doctrine because exempting anticompetitive state regulation is fundamentally at odds with federal policy in favor of free market competition.

1. Case Law Support for the Status Choice Model

In *Parker v. Brown*,[92] the Court began its analysis by assuming that Congress could have prohibited a state entirely from adopting anticompetitive regulatory programs. It did not speak in terms of a constitutionalized respect for state sovereignty, but rather of *Congress's decision* to restrict only "individual and not . . . state action."[93] The *Parker* Court explicitly attributed to Congress the view that something about public actors "impos[ing] the restraint as an act of government" separates the decisions of government actors from those of private parties.[94]

A generation later, Justice Black wrote in a related context that the antitrust laws are "tailored . . . for the business world [and] are not at all appropriate for application in the political arena."[95] He explained that "where a restraint upon trade or monopolization is the result of valid government action, as opposed to private action, no violation of the [antitrust laws] can be made out."[96]

More recently, Justice Marshall, writing for the Court, again in a related context, recognized that "the function of government may often be to tamper with free markets, correcting their failures and aiding their victims . . . ."[97] This economic regulation will please some and anger others, but evaluating it normatively is a tricky business. As Justice Scalia

92. 317 U.S. 341 (1943).

93. *Id.* at 350-52.

94. *Id.* at 352; *see also* City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 370 (1991).

95. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 141 (1961); *see also Omni Outdoor Adver.*, 499 U.S. at 383 ("[T]he antitrust laws regulate business, not politics.").

96. *Noerr*, 365 U.S. at 136 (footnote omitted).

97. Fisher v. City of Berkeley, 475 U.S. 260, 264 (1986) (holding that a municipal rent control scheme does not violate antitrust law without reference to state action doctrine).

wrote for the Court, a court cannot simply count up the winners and losers: "[I]t is not universally considered contrary to the public good if the net economic loss to the losers exceeds the net economic gain to the winners[;] . . . 'the public interest' entails not merely economic and mathematical analysis but value judgment . . . ."[98]

Rather than interfere with the value judgment of public officials, antitrust state action doctrine looks to the status of the decisionmaker. Justice Powell, writing for a unanimous Court in a case detailing the bounds of the current antitrust state action test, explained that clear articulation and active supervision are merely "way[s] of ensuring that the actor is engaging in the challenged conduct pursuant to state policy."[99] Public actors, he wrote, are presumed to act "in the public interest"; "[a] private party, on the other hand may be presumed to be acting primarily on his or its own behalf."[100]

---

98. *Omni Outdoor Adver.*, 499 U.S. at 377.

99. Town of Hallie v. City of Eau Claire, 471 U.S. 34, 46 (1985).

100. *Id.* at 45. In *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985), the companion case to *Town of Hallie*, the Court stated: "Thus, through the self-interested actions of private common carriers, the States may achieve the desired balance between the efficiency of collective rate making and the competition fostered by individual submissions." *Southern Motor Carriers*, 471 U.S. at 59. Similar statements can be found outside the antitrust state action context. *See, e.g.*, C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 420-21 (1994) (Souter, J., dissenting) ("[P]rivate businesses . . . first serve the private interests of their owners . . . . The local government itself occupies a very different market position, however, being the one entity that enters the market to serve the public interest of local citizens quite apart from private interest in private gain."); Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 501 (1988) (relying on defendant's lack of "official authority . . . conferred . . . by any government" in imposing antitrust liability). Elhauge argues that the "no official authority clause" was unnecessary to the *Allied Tube* Court's decision. Elhauge, *supra* note 1, at 689-90. He reasons that *Allied Tube* relied on *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), and *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), cases in which the defendants had official state recognition but were nonetheless subject to antitrust liability, and therefore official recognition is not sufficient to trigger the exemption. A careful reading of those cases, however, reveals that the sort of official recognition the defendants had did not amount to what would be required to confer an exemption: a command to act in the best interests of the public in the situations in which the challenges arose. *See, e.g., Goldfarb*, 421 U.S. at 776. Elhauge thus correctly concludes that government recognition may not necessarily confer an exemption. But he wrongly concludes that it is irrelevant to the analysis. A fair reading of *Allied Tube* reveals that the Court held that a private standard-setting body charged with a duty to act in the public interest and clothed with adequate procedural safeguards would not pose an antitrust problem even if financially interested parties participated. *See Allied Tube*, 486 U.S. at 501, 510.

2. Federalism is Not the Basis for Antitrust State Action Doctrine

The Court has often invoked federalism and comity in explaining antitrust state action,[101] and the most recent commentary interprets the doctrine in light of this language.[102] Federalism, though, is a term susceptible to varying interpretation. It may mean a system in which the federal government and each state display a mutual respect for the sovereign acts of the others. Alternatively, federalism may refer to a belief that state-level decisionmaking is superior to federal decisionmaking in certain realms, either because it is likely to produce a substantively better result or because individual citizens are closer to the decision. A careful reading of the opinions reveals that neither of these versions of federalism can fully justify current doctrine.

Most of the Court's references to federalism are general in nature and are not directed to the contours of antitrust state action doctrine. Instead, such references go to the question of statutory interpretation: whether, in enacting the antitrust laws, Congress intended to displace state regulation. Because courts refuse to interpret the statutes to displace silently the regulatory schemes of a co-sovereign, federalism surely plays some role in antitrust state action jurisprudence. That role, however, is to create a need for the doctrine rather than to shape the contours of that doctrine.

a. Respect for Co-Sovereigns

A look beyond the Court's general wording to the actual contours of the doctrine reveals that respect for the pronouncements of a co-sovereign plays little or no role. The *Parker* Court stressed that although a *state* regulatory program was not subject to antitrust scrutiny, a state could not

101. *See, e.g.*, FTC v. Ticor Title Ins. Co., 504 U.S. 621, 633 (1992); *Omni Outdoor Adver.*, 499 U.S. at 370; 324 Liquor Corp. v. Duffy, 479 U.S. 335, 343 (1987); Parker v. Brown, 317 U.S. 341, 351 (1943); *Town of Hallie*, 471 U.S. at 38; California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 103 (1980); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 400 (1978). Other commentators have recognized that these references to federalism do not make it a decisive factor. Rather, federalism serves "as a background norm that counsels a narrow interpretation of the Sherman Act." William H. Page & John E. Lopatka, *State Regulation in the Shadow of Antitrust:* FTC v. Ticor Title Ins. Co., 3 SUP. CT. ECON. REV. 189, 189 (1993).

102. *See* Inman & Rubinfeld, *supra* note 4, at 1252-53.

immunize *private* action by merely declaring it lawful.[103] If respect for state sovereignty were the force driving antitrust state action jurisprudence, this distinction would make no sense. State decisions that sought to immunize certain private conduct would be no less *sovereign* than more extensive regulatory programs. As such, naked immunization would be fully as worthy of deference as regulatory programs carefully supervised by government actors.[104]

This distinction, originally articulated in *Parker*, plays a central role in current doctrine. The sovereign nature of the decision is not enough. By explicitly requiring that the state not only articulate a purpose to potentially substitute regulation for competition, but also that it fully supervise all private conduct within the scope of the regulatory program, the Court continues to require the active involvement of government actors. Federalism alone cannot justify this requirement.

The Court has also left open the possibility that antitrust's restrictions may apply to a government-owned entity where it acts as a commercial participant in the marketplace (for example, a municipally-owned electric utility or water and sewage service).[105] A state's decisions are no less sovereign when they involve market participation.

There must therefore be something more at work here than the respect federalism demands for a co-sovereign. That something is a notion of status choice. When government actors regulate, it is assumed that they are serving the public interest, even in the face of substantial evidence to the contrary. Where a government entity enters the competitive fray of the marketplace, however, it enters a realm in which selfish decisionmaking is the rule and the government actors may be required to play by that rule.

In *Ticor Title Insurance*, the Court attempted to tie the active supervision requirement to federalism concerns. As the Court explained, a supervision requirement grants states freedom to regulate without thereby granting unintended antitrust immunity to private parties. By requiring active supervision,

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

104. *See* Page, *supra* note 1, at 1129 ("Once a state has clearly articulated a policy through its legislative processes, it has fully satisfied the basis for such deference regardless of the form of regulatory choice.").

105. *See Omni Outdoor Adver.*, 499 U.S. at 374-75.

the doctrine forces the state to take responsibility for displacing the free market with regulation while ensuring that the state is not burdened with responsibility for an antitrust exemption that it did not intend to convey.[106] But these notions of political accountability sound more like rules to protect an immature adolescent from the unintended consequences of reckless behavior than an expression of respect for a co-sovereign. In *Ticor Title Insurance*, state agencies were set up to review rate filings. Respect for state sovereignty would have required the Court to let the state handle the matter from there. If there were inadequacies in the state regulatory system, the state could deal with them. If the state wanted to permit antitrust enforcement, it could incorporate appropriate principles into its regulatory scheme. Instead, the Federal Trade Commission and the Supreme Court rejected the state regulation as inadequate to protect the public interest.[107] The result, no doubt correct under existing doctrine, hardly reflects respect for a co-sovereign's ability to regulate.

The Court's decisions denying blanket immunity to municipalities on the ground that they are not sovereign entities appear to support the argument that respect for a co-sovereign is at the root of antitrust state action doctrine.[108] Because municipalities are no less governmental than states, the Court's refusal to exempt entirely municipal conduct from the antitrust laws, the criticism would run, must turn on the municipality's lack of sovereignty. But careful reading of the applicable cases suggests otherwise.

In holding that municipalities are subject to antitrust constraints, the Court did not reject the notion that cities—like states—are run by public actors who seek altruistically to serve the public interest. On the contrary, the Court assumed that municipal actors are no less altruistically motivated than state actors. For that reason, the active supervision requirement does not apply to them.[109]

In a very fact-specific analysis, however, the Court pointed

106. *See Ticor Title Ins.*, 504 U.S. at 634-37.

107. *See id.* at 637-39.

108. *See* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 403 (1978) (concluding that mere "status" as a governmental entity does not automatically provide state action immunity to a municipality).

109. *See* Town of Hallie v. City of Eau Claire, 471 U.S. 34, 46 (1985).

out that the scope of the public interest for municipal actors may be too narrow to justify a complete exemption from the antitrust laws. Justice Brennan, writing for a plurality of the Court in *Lafayette*, explained that "the economic choices made by public corporations in the conduct of their business affairs" are designed to maximize "benefits for the community constituency."[110] Unlike state and federal government actors who are presumed to serve the interest of the public at large, municipal actors represent parochial interests that "are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders."[111] As Brennan and many commentators have recognized, anticompetitive effects that benefit the residents of a town may impose costs beyond the municipality adopting the anticompetitive regulation, phenomena commentators have described as inter-jurisdictional spillovers.[112] Requiring clear articulation at the state level may help ensure that a purely parochial conception of the public interest does not drive municipal regulation.[113] Interpreting these cases in status choice model terms, the Court appears to recognize that a municipal government official makes a status choice to serve only a narrow slice of the public at large—those who live in the municipality. State or federal governmental officials represent constituencies that are more diverse, and they are thus presumed to serve a more universal common good.

---

110. *City of Lafayette*, 435 U.S. at 403.

111. *Id.* at 403, 412-13 ("In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, . . . we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach."); *see also Town of Hallie*, 471 U.S. at 47 ("Where the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals.").

112. *See* Elhauge, *supra* note 1, at 732; Inman & Rubinfeld, *supra* note 4, at 1255-56. *But see* McGowan & Lemley, *supra* note 1, at 329 (arguing that "the Court's stated reasons for denying immunity to municipal restraints have nothing to do with the risk of anticompetitive effects spilling over outside a given jurisdictional boundary").

113. *See Town of Hallie*, 471 U.S. at 47 (concluding that the danger of a municipality favoring parochial interests over a broader conception of the public good "is minimal . . . because of the requirement that the municipality act pursuant to a clearly articulated state policy").

Although anticompetitive interstate spillover effects may also exist, the Court might well ignore them because the dormant commerce clause provides a basis to strike them down.[114] Congress can also address these spillovers directly through more specific legislation, or they may simply occur so rarely that no one needs to worry about them.

Moreover, the requirement of clear articulation in this area is extremely flexible. There need only be a foreseeable possibility that the state's decision might lead a municipality to engage in anticompetitive regulation.[115] Whatever minor restriction the clear articulation prong places on municipal regulation vis-a-vis state regulation can be explained by factors other than federalism that are consistent with the status choice model if one defines the public interest for municipal officials as the general interest of the local community.

b. The Social Benefits of State Regulation

Although respect for a co-sovereign alone cannot explain the active supervision requirement, one could argue that antitrust state action doctrine is founded on a belief that state regulation likely serves the public interest better than federal antitrust enforcement. This might be true because state regulators are closer to local markets and better understand the need for regulation, or because citizens are closer to the regulators and participate more directly in the process. The active supervision requirement could be seen as a prerequisite to the assumption that state regulation really is a superior alternative. The Court, one might argue, believes that we should defer to state regulatory choices because they are likely to serve the public interest, at least when they are actively supervised by public actors.

Once again, however, the case law undermines either the substantive correctness or local democracy justifications for the doctrine. The Court explicitly rejected the correctness analysis in its most recent antitrust state action case, holding that the doctrine does not permit courts to ask whether "the State has met some normative standard, such as efficiency, in its

114. *See* C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 393-94 (1994).
115. *See Town of Hallie*, 471 U.S. at 45-46.

regulatory practices."[116] Rather, a court may ask only whether "the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties. . . . The question is not how well state regulation works but whether the anticompetitive scheme is the State's own."[117]

The argument that state regulation is presumptively superior because citizens contribute more directly to the political process also fails to find support in the case law.[118] The plurality in *City of Lafayette* described political participation as irrelevant to the availability of state action immunity, noting that "*Parker* did not reason that political redress is an adequate substitute for direct enforcement of the antitrust laws."[119] Rather, the plurality stated, *Parker* simply refused to infer a congressional purpose "that the antitrust laws be used to strike down the State's regulatory program imposed as an act of government."[120]

Were political participation a relevant factor, one would expect antitrust to reach private conspiratorial efforts to infect state regulatory processes with the selfish views of a small minority who are likely to benefit from anticompetitive regulation. State regulation resting on grass roots citizens groups and get-out-the-vote work, by contrast, should be entitled to more respect than apparent pandering to large corporate contributors. No distinction of this sort can be found in the doctrine, however. Indeed, just the opposite is true. Conspiratorial efforts by market competitors seeking to convince the government to impose anticompetitive restrictions designed solely for private benefit are beyond the reach of the antitrust laws.[121] If citizen contributions to state regulation

116. FTC v. Ticor Title Ins. Co., 504 U.S. 621, 634-35 (1992).

117. *Id.*; *see also* Hoover v. Ronwin, 466 U.S. 558, 574 (1984) (commenting that "[t]he Court did not suggest in *Parker*, nor has it suggested since, that a state action is exempt from antitrust liability only if the sovereign acted wisely after full disclosure from its subordinate officers").

118. Empirical studies of various types have also raised serious question about the effectiveness of state regulation. *See* Page, *supra* note 1, at 1109 (citing studies).

119. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 407 n.33 (1978).

120. *Id.*

121. Although free speech concerns certainly support some limitations on the Sherman Act, the Court has declined to rely on the First Amendment. Instead, it

justified antitrust state action doctrine, immunizing precisely the sort of conduct most likely to undermine citizen contribution would be the last thing the Court should do.

And the Court has not stopped there. In *Omni Outdoor Advertising*, it applied the antitrust state action doctrine in the face of findings that government actors actually joined the conspiracy with private parties and acted in a way that benefited those private parties.[122] Were antitrust state action founded on a belief in citizen participation in the formation of state regulation, these allegations should have justified an exception to the doctrine permitting an antitrust attack. The fact finder believed the decision was made as a result of a private arrangement that did not include citizen participation. Yet the Court held that state action doctrine prohibited the antitrust attack.[123]

The status choice model, by contrast, explains these holdings. The assumption that public actors can choose to—and actually do—act altruistically is extremely hard to overcome. The Court assumes that despite lobbying from organized groups with an interest in the outcome, government actors will act in the public interest. Even when public actors apparently betray our trust—for example by accepting a bribe—the laws they pass are no less binding and enforceable. Indeed, the decision in *Omni Outdoor Advertising* makes plain that we assume the public interest of the law notwithstanding behavior that casts serious doubt on the government actor's motives.[124]

Although this approach may be unsettling, it is consistent with lawmaking generally. Corruption does not of itself upset enacted law. Under the status choice model, we depend upon the checks and balances of governmental processes, the criminal law, and ultimately the power of the electorate to vote

---

has interpreted the Sherman Act not to reach this conduct. *See* City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 379 (1991); United Mine Workers v. Pennington, 381 U.S. 657, 664-65 (1965); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135-36 (1961).

122. *See Omni Outdoor Adver.*, 499 U.S. at 383 (recognizing that the governmental decisionmaking process had been "infected by selfishly motivated agreement with private interests").

123. *See id.* at 370.

124. *See* Llewellyn v. Crothers, 765 F.2d 769, 774-75 (9th Cir. 1985) (Kennedy, J.) (holding that "despite the possibility of improper motivation on the part of [the state actor] . . . [w]e must conclude that [his] conduct served the state's best interests. In the context of determining antitrust immunity, further inquiry into the subjective motivations of the Oregon officials is unwarranted").

bad government actors out of office. But the laws enacted by bad actors are no more subject to challenge than any other.

3. Antitrust Theory is Consistent with Status Choice

This Sub-Part responds to and rejects the likely critique of status choice that antitrust reflects a national policy choice in favor of an economy governed by free market forces, regardless of whether private or government actors displace those forces with a competitive restraint. The competitive market—a system for exchanging goods and services in which sellers vie for business based on the price and quality of their wares—is believed to be a desirable way to distribute goods and services. Faith in free market forces as an allocative mechanism rests on a utilitarian vision that the most people will obtain the benefits of the highest quality goods and services that a society with limited resources can produce.[125] Antitrust is best understood as a system of rules governing business conduct within the competitive market to ensure its efficient operation. These rules limit the ability of a business to enter anticompetitive agreements or take actions that tend to create a monopoly. But this proscription does not rest on the belief that agreements and monopolies are inherently undesirable. Rather, the antitrust laws prohibit them because they permit businesspersons to displace competition as the driving force behind price, quality, and innovation decisions. Agreements replace competition with the terms of the private agreement; monopolies replace it with the unilateral, self-interested decisions of the private, profit-maximizing monopolist. Where a public-interested actor makes the decision to displace free market forces, antitrust principles are not offended.

This conclusion is buttressed by Congress's refusal to draw a bright line in favor of any particular conception of how competition can serve the public good.[126] Although the

125. "In economic terms the premise is a familiar one: self-interested profit-maximizers will, if forced to channel their resources into market competition, advance the public interest by driving down the costs of producing goods and allocating those goods to the users who value them the most." Elhauge, *supra* note 1, at 707.

126. The Supreme Court has recognized this point in the context of both state and federal regulation. *See Omni Outdoor Adver.*, 499 U.S. at 470-72 (holding state is free to adopt anticompetitive regulation without violation of the Sherman Act); FCC v. RCA Communications, Inc., 346 U.S. 86, 91-92 (1953) ("That there is a

language of the Sherman Act in isolation contains no obvious limitations, context tells a more complete story. Congress has often enacted regulatory schemes that do not rely on free market forces,[127] and the legislature has vested the federal judiciary with broad discretion to define the contours of the antitrust laws. Courts have exercised that discretion to adopt exemptions from the antitrust laws, and Congress has generally permitted those exemptions to stand.[128]

Even in cases applying antitrust principles to private actors—where antitrust was surely intended to apply—judges have broad discretion to develop and apply rules and presumptions that separate permissible behavior from violations. Most business conduct is evaluated under the so-called *Rule of Reason*, in which courts consider a wide array of effects on competition in particular markets.[129] To be sure, the

---

national policy favoring competition cannot be maintained today without careful qualification. It is only in a blunt, undiscriminating sense that we speak of competition as an ultimate good."). The Supreme Court also recognizes this in cases applying antitrust law to private conduct. *See* Fisher v. City of Berkeley, 475 U.S. 260, 266 (1986); Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984) (stating that even where a single firm's restraints directly affect prices and have the same economic effect as concerted action might have, there can be no liability under section 1 of the Sherman Act in the absence of agreement).

127. There are numerous examples of congressional exemptions from the federal antitrust laws, including the following:

1. Not-for-profit "agricultural, or horticultural organizations, instituted for the purposes of mutual help." 15 U.S.C. § 17 (1994); *see also* Capper-Volstead Act, 7 U.S.C. § 291 (1994).

2. Certain aspects of the insurance industry subject to state regulation. *See* McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1994).

3. Certain activities by organized labor. *See* 15 U.S.C. § 17 (1994); 29 U.S.C. § 52 (1994); Norris-Laguardia Act, 29 U.S.C. §§ 101-110, 113-115 (1994) (expanding the original Clayton Act exemption).

4. Professional sports leagues pooling television broadcast rights. *See* Sports Broadcasting Act, 15 U.S.C. §§ 1291-1295 (1994).

128. The federal courts have adopted two non-statutory exemptions that Congress has not disturbed. *See* Connell Constr. Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622 (1975) (nonstatutory labor exemption); Flood v. Kuhn, 407 U.S. 258, 282 (1972) (non-statutory exemption for professional baseball).

129. The Supreme Court's traditional statement of the Rule of Reason test is as follows:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable, the history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

leading case requires courts to focus on whether a particular restraint is anticompetitive or procompetitive without reference to other social goals.[130] Other cases, however, recognize that health and safety concerns, along with special concerns about competitors in industries that differ from traditional models, such as professionals, municipalities, and universities, may also justify restrictions on the scope of antitrust scrutiny.[131] At a minimum, judges exercise discretion to ensure that they do not condemn business practices under the guise of preserving free market forces in situations where social welfare could be advanced through less overtly competitive practices. And Congress rarely interferes.

In sum, Congress's own exemptions to free market policy, its granting of the broadest discretion to the courts to devise antitrust doctrine generally, and its silence in the face of judicially created limitations and exemptions together are strong evidence of a congressional intent to create flexible competition policy that can be molded by government actors to serve social welfare in light of advances in economic learning and general conceptions of the public good.[132] The Supreme Court's doctrine in the antitrust state action cases thus fits neatly with Congress's apparent intent for antitrust law generally: that all government actors—charged as they are with a duty to act in the public interest—are equally capable of making the difficult judgment calls necessary to decide when to regulate market behavior. Within the structure of a system of checks and balances, all government actors seeking to serve the public interest can advance social welfare by regulating market

130. *See* National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688, 691 (1978).

131. *See* I ANTITRUST LAW DEVELOPMENTS 54 & nn.283-286 (4th ed. 1997) (citing cases).

132. One commentator has concluded that the legislative history of the Sherman Act also supports this view of the antitrust laws. *See* Elhauge, *supra* note 1, at 697-703; *id.* at 672 (asserting that "antitrust law does not stand for the proposition that all economically inefficient restraints of market competition are against the public interest"). Others disagree, concluding that the legislative history has little to offer either way. *See* Easterbrook, *supra* note 1, at 40-41 (concluding that Congress did not address the issue and that "members would have assumed that states could enact laws as they pleased, without interference from the new statute" and that one "cannot legitimately claim to *find* either the accommodation or the method of generating it in the statutory language, history, or structure" of the Sherman Act); McGowan & Lemley, *supra* note 1, at 330-32 (explicitly criticizing Elhauge's reading of the legislative history of the Sherman Act).

forces, so long as they do not turn the reigns over to presumptively self-interested private parties.

II. THE INADEQUACY OF EXISTING CRITICISMS OF ANTITRUST STATE ACTION DOCTRINE

This Part sets out the leading criticism of current antitrust state action doctrine and demonstrates that each ultimately fails to explain the contours of existing doctrine as well as the status choice model.[133] Among the wealth of scholarship exploring various aspects of antitrust state action doctrine, the following four articles stand out as the most thoughtful and thorough analyses.

A. Furthering Citizen Participation and Deterring Inter-Jurisdictional Anticompetitive Spillovers

In a 1997 *Texas Law Review* article, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, Dan Rubinfeld and Robert Inman describe the existing test as "a process-oriented test aimed . . . at enhancing political participation in the regulatory process" by requiring legislative involvement.[134] Current doctrine, Rubinfeld and Inman conclude, does not look to the economic consequences of state regulation "provided those regulations were decided by an open, participatory political process."[135] The authors believe that by disfavoring regulatory policies from politically isolated commissions and agencies in favor of policies formulated by elected legislatures, current doctrine encourages, in addition to political participation, "*intra*jurisdictionally efficient regulatory

133. Although status choice has never previously been articulated as a theoretical basis for current antitrust state action doctrine, the basic tenets relied upon by the articles described *infra* Parts II.A-D were introduced over a quarter century ago. *See* S. Paul Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. REV. 693, 703-07 (1974) (citing federalism and the antitrust laws as two possible explanations for the antitrust state action doctrine and identifying differences in motivations between private and governmental actors and government actors' responsibility to an electorate as possible reasons to temper the application of the antitrust laws in state action situations); *id.* at 718-19 (considering inter-jurisdictional spillovers); *id.* at 722-23 (discussing need for supervision by state officials without a financial interest in the regulation); *id.* at 729-32 (considering exemption from damage liability for private parties abiding by inadequately supervised state regulatory directives).

134. Inman & Rubinfeld, *supra* note 4, at 1251.

135. *Id.* at 1253.

performance."[136]

To support their interpretation of current doctrine, the authors cite excerpts from *Parker* discussing state sovereignty and a state's interest in regulation (but not political participation), and they interpret a number of cases to support the importance they attach to "evidence of sufficiently open political participation in setting the regulation."[137] But none of the cited cases actually say that political participation matters. On the contrary, a plurality of the Court said just the opposite in *Lafayette*.[138]

Even discounting the plurality's language in *Lafayette*, Inman and Rubinfeld have difficulty explaining the active supervision requirement. If the process is sufficiently open to render the legislature's clear articulation of a regulatory scheme sufficient under the test, why should federalism require more? Indeed, other commentators taking a federalism approach to antitrust state action reject active supervision as incoherent for just this reason. If a state has sovereign authority to choose to regulate, deference to that authority is inconsistent with a further requirement of active state oversight.[139]

Inman and Rubinfeld respond by positing that supervision helps ensure the success of the clearly articulated regulatory

---

136. *Id.* at 1269. Inman and Rubinfeld criticize existing doctrine for failing to take account of the out-of-state anticompetitive effects of state regulation or what they call "*inter*jurisdictional spillovers." They propose condemning regulation that creates anticompetitive effects outside the state that enacted the regulation if it was enacted without participation by affected out-of-staters. The state action exemption would apply only when all those affected by the regulation had a right to participate in the political process that produced the regulation. *See id.* at 1276-82.

137. *Id.* at 1254 (discussing Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), and Bates v. State Bar of Ariz., 433 U.S. 350 (1977)); *see also id.* at 1254-55 (discussing Cantor v. Detroit Edison Co., 428 U.S. 579 (1976)); *id.* at 1255-56 (discussing City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978)); *id.* at 1258-59 (discussing Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985)); *id.* at 1259-60 (discussing City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365 (1991)); *id.* at 1261-62 (discussing Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48 (1984), 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987), Patrick v. Burget, 486 U.S. 94 (1988), and FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992)).

138. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 406 n.32 (1978).

139. Commentators argue that by enforcing an anticompetitive scheme through active government regulation, the state enforces anticompetitive restraints more effectively than could any private price fixing agreement. *See* Easterbrook, *supra* note 1, at 29-33; Elhauge, *supra* note 1, at 675, 678; Wiley, *supra* note 4, at 715, 729, 733; Wiley, *supra* note 1, at 1279-80.

program. Supervision, they say, "gives meaning to [clear articulation], for without supervision, interested individuals cannot be assured that their initial participation in the political process will be meaningful."[140] Supervision also ensures that "all parties setting the initial regulatory framework continue to have a say in its implementation."[141] Finally, supervision makes certain that the "initial bargain will be enforced."[142] Inman and Rubinfeld admit that few people actually participate in the regulatory process, but they nonetheless see value in keeping the channels open.[143]

The authors' faith that active supervision would ensure an open process, even for those few who want to participate, rests on the shaky assumption that the legislature actively supervises or directly appoints the regulator. Again, the cases simply do not support this conclusion.

Nothing in the active supervision requirement as currently formulated prevents states from denying their citizens the opportunity to participate in the decisions of supervising officials.[144] *Hoover v. Ronwin*[145] and *Town of Hallie v. City of Eau Claire*,[146] which the authors cite, held actions by state or municipal actors exempt from antitrust scrutiny. Dicta in *Hoover* suggested that supervision of state agencies had been thought relevant in prior cases,[147] but *Town of Hallie* strongly contradicted any inference that supervision of state agencies was required.[148] Moreover, *Patrick v. Burget*[149] and *FTC v. Ticor*

140. Inman & Rubinfeld, *supra* note 4, at 1264.

141. *Id.* at 1261; *see also id.* at 1263 ("all affected parties still have their say").

142. *Id.* at 1257.

143. *See id.* at 1264.

144. *See* Elhauge, *supra* note 1, at 678. One commentator argues that the active supervision requirement may actually undermine citizen participation by foreclosing unsupervised regulatory options adopted through an open legislative process and favoring "a very dubious form of participation at the level of regulatory implementation. At that level, the quality of participation permitted by the agency or municipality is unpredictable and quite likely to be weighted heavily toward regulated interests." William H. Page, *State Action and "Active Suprevision": An Antitrust Anomaly*, XXXV ANTITRUST BULL. 745, 768-69 (1990).

145. 466 U.S 558 (1984).

146. 471 U.S. 34 (1985).

147. *See Hoover*, 466 U.S. at 571-72.

148. *See Town of Hallie*, 471 U.S. 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.").

149. 486 U.S. 94 (1988).

Title Insurance Co.[150] held only that the private decisions in those cases were not supervised adequately by public officials. They did not hold that the supervisor had to be the legislature itself or a direct appointee of the legislature. *Patrick* described them simply as "state officials" who had the authority to reject private conduct that failed to "promote state policy, rather than merely the party's individual interests."[151] These cases are more consistent with the status choice model in which any actor who has chosen to assume a public position and act on behalf of the public at large suffices to fulfill the active supervision requirement.

The political participation theory is also undercut by the Supreme Court's assertion that current doctrine is not based on "an unrealistic view of how legislatures work and of how statutes are written."[152] The notion that citizens directly participate in the implementation of most regulation is just such an unrealistic view. The technical intricacies of modern economic regulation are likely beyond the competency of most legislators, much less most citizens. In reality, we trust experts in these matters to gather relevant information, deliberate on the issues, and make the decisions that best serve the public.

The Court's refusal to grant a blanket exemption to, in Inman and Rubinfeld's words, "local governments [that] are in many ways the most participatory of all governments"[153] creates yet another problem for the political participation theory. States have a blanket exemption even though they are less participatory. The authors correctly attribute this aspect of the doctrine to the Court's concern about intrastate jurisdictional

150. 504 U.S. 621 (1992).

151. *Patrick*, 486 U.S. at 101. The defendant in *Patrick* argued that two state agencies and the state courts had adequately supervised the challenged action. The Court rejected that argument by engaging in a careful analysis of the authority and actual practice of the agencies and the state courts. Although the Court explicitly reserved judgment on whether a state's court system alone could ever provide adequate supervision, its analysis assumed that an agency may supervise private conduct. And the *Patrick* Court never suggested that a legislature must supervise agencies in order for the state action exemption to apply. *See id.* at 105; *see also* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 407 n.32 (rejecting the open political nature of state legislatures as a basis for state action).

152. *Town of Hallie*, 471 U.S. at 43.

153. Inman & Rubinfeld, *supra* note 4, at 1255; *see also id.* at 1266 (stating preference for a rule eliminating clear articulation requirement for municipalities in some circumstances to increase "overall participation in regulatory policy").

conflicts, that is, one municipality favoring its own parochial interests at the expense of another.[154] These cases, however, cannot support Inman and Rubinfeld's reliance on political participation. If the political process at the municipal level gives play to parochial interests in the formation of regulatory programs and therefore is not immune from federal antitrust scrutiny, parochial interests could well affect the supervision of those programs as well. Increased political participation at the municipal level thus cannot alone explain existing doctrine. A concept of status choice is needed to explain why municipal officials will properly administer a state program in ways that serve the broader public interest.

B. Furthering Constitutional Principles of Governance

In a 1994 *Harvard Journal of Law & Public Policy* article, *Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment,*[155] David McGowan and Mark Lemley argue that antitrust state action doctrine must resolve a conflict between two legislative judgments, a federal judgment in favor of competition and a state judgment in favor of regulation. Resolution of this conflict, they contend, requires analysis of constitutional principles of federalism that the Court has not addressed.[156] McGowan and Lemley argue that the relevant distinction is between cases in which state actors govern, and are thus exempt from antitrust attack, and cases involving "state action that more closely resembles the legislature brokering benefits from one group of constituents to another," and are thus subject to antitrust scrutiny.[157]

McGowan and Lemley argue that the antitrust laws' prohibitions on anticompetitive behavior cannot help distinguish between governing and brokering. A wide range of

154. See *id.* at 1260. The authors also suggest that greater political control over municipal legislatures vis-a-vis state agencies and private parties supports the Court's decision not to impose an active supervision requirement on municipalities. The cases, though, conflict on this point. *City of Lafayette* rejected the political participation argument as a reason to grant municipalities the same level of state action protection as the state. *See City of Lafayette,* 438 U.S. at 406 n.32. *Town of Hallie,* however, noted that "municipal officers, unlike corporate heads, are checked to some degree through the electoral process." *Town of Hallie,* 471 U.S. at 45 n.9.

155. McGowan & Lemley, *supra* note 1.

156. *See id.* at 313.

157. *Id.* at 299.

government programs, they point out, may be inefficient, including price support programs, government created monopolies, minimum wage laws, trade quotas, and patent grants.[158] All of this government conduct produces precisely the type of harm the antitrust laws are intended to prevent: "The consumer pays more than the competitive price regardless of whether the market is distorted by a private, profiteering cartel or a state-sanctioned (and presumptively 'public-spirited') cartel."[159] Thus, the authors believe current antitrust doctrine cannot explain why some anticompetitive government programs are legitimate and others are not.

To make the governing/brokering distinction, McGowan and Lemley would look to what they describe as constitutional principles of federalism. The authors' principles, however, are not rooted in those constitutional provisions typically associated with federalism, the Tenth Amendment and the Supremacy Clause. Instead, they are "general principles of governance" that supposedly *dictate* an exemption from antitrust scrutiny in certain situations.[160] According to McGowan and Lemley, prohibiting state regulation with a legitimate policy goal would raise this sort of constitutional concern, but displacing regulation when a state "simply enact[s] without significant review the anticompetitive policies proposed to them by private actors who stand to benefit" would not.[161]

The authors describe current doctrine as both misguided and incomplete.[162] The Court, they argue, should look not only to state involvement, as it did in *Ticor Title Insurance*, but also to the purpose of the government actors, as it refused to do in

158. *See id.* at 315-20 (listing examples including creating monopolies, issuing patents and other exclusive rights in intellectual property, restricting entry to certain industries, establishing price floors, licensing requirements, approval requirements, trade quotas, minimum wage laws, and monopsony buyers and sellers).

159. *Id.* at 330.

160. *Id.* at 299 n.24, 301.

161. *Id.* at 356-57.

162. The authors conclude that clear articulation and active supervision are principles of governance that ensure state accountability for their regulation. Clear articulation ensures that the citizens know what the state is doing. Active supervision both ensures that the state does not delegate responsibility for its regulation, and raises the cost of regulation that seeks to benefit a specific group at the expense of the general public. *See id.* at 344-47, 358-59.

Omni Outdoor Advertising.[163] According to McGowan and Lemley, a government that "barters its powers to private parties" is no different from a government that fails to supervise private parties.[164]

Current doctrine is incomplete, they contend, because it fails to look at other relevant factors such as the role of private parties in bringing the regulation into being and the extent to which the regulation discriminates against certain market competitors.[165] McGowan and Lemley thus conclude that the distinction between protected and unprotected state regulation can be drawn only on a case-by-case basis that takes account of each of these factors.

Apart from the serious practical question of how a court could distinguish brokering from governing, McGowan and Lemley fail to explain convincingly the theoretical underpinnings of current doctrine. When state regulation conflicts with federal policy, the Supreme Court has never hesitated to strike it down.[166] In a footnote McGowan and Lemley attempt to distinguish traditional Supremacy Clause cases on the ground that antitrust establishes a broad principle of competition. "The analysis might be different," they say, "with a more specific federal statute."[167] The specificity of a statute, however, cannot be determined simply by reading it; judicial interpretation counts too. By that standard, some antitrust rules are clear. For example, naked horizontal price fixing is illegal *per se*.[168] Yet, antitrust state action doctrine applies even in these clear cases.[169] McGowan and Lemley thus fail to justify their assertion that principles of governance *dictate* a state right to circumvent clear antitrust rules.

The status choice model resolves this dilemma between

---

163. *Id.* at 352-54.

164. *Id.* at 355.

165. McGowan and Lemley see the influence of private actors as a legitimate consideration because holding a private party accountable for following the dictates of state regulation is much less problematic if the private party was responsible for the enactment of the regulation. Discrimination is relevant, the authors believe, because discriminatory regulation is more likely to be anticompetitive and less likely to have some socially beneficial purpose than non-discriminatory regulation. *See id.* at 358.

166. *See* Posner, *supra* note 133, at 702-03 (citing cases).

167. McGowan & Lemley, *supra* note 1, at 299 n.24.

168. *See* Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 342-55 (1982).

169. *See, e.g.*, 324 Liquor Corp. v. Duffy, 479 U.S. 335, 343-45 (1987).

antitrust and other federal statutes by recognizing that antitrust applies only to private actors and was not intended to formulate a national policy that would preempt state economic regulation. McGowan and Lemley assume that antitrust law favors competition in all fora and thus should condemn all anticompetitive state regulation. The Court's refusal to employ antitrust to interfere with anticompetitive state regulation, however, demonstrates just the opposite. Antitrust was never intended to reach government action, in spirit or in practice. The competitive process is not a fundamental value protected from government interference; it is instead a device used to maximize social welfare in a private realm that encourages self-interested behavior.[170] Governments legitimately act anticompetitively in many circumstances because competition is not essential to maximizing social welfare when presumptively public-interested government actors make the applicable decisions.[171]

C. Avoiding Capture by Producers

In a 1986 *Harvard Law Review* article, *A Capture Theory of Antitrust Federalism*,[172] John Wiley asks whether a state regulation was adopted because the legislative or administrative body was "captured" by a producer group. By capture, Wiley means that producers played a "decisive *and preponderant*" role in bringing about the regulation.[173] Wiley bases his proposal on interest group theory that predicts that "there is a systematic tendency for exploitation of the great by the small."[174] Large groups have more difficulty mobilizing effective lobbying efforts than small groups because, in short,

---

170. *See supra* Part I.D.3.

171. McGowan and Lemley also contend that the active supervision requirement furthers the same principles as the federal nondelegation doctrine. *See* McGowan & Lemley, *supra* note 1, at 346-56. This analogy does little to improve the explanatory power of their thesis because (as they admit) the active supervision requirement is much stricter than the nondelegation requirement. To convincingly demonstrate that active supervision is animated by nondelgation principles, McGowan and Lemley would need to explain more precisely why antitrust questions are treated differently than other legal questions. If the same principles are at stake, the test should be the same.

172. Wiley, *supra* note 4.

173. John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism: Reply to Professors Page and Spitzer*, 61 S. CAL. L. REV. 1327, 1341 (1988) (emphasis added).

174. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 29 (1965) (emphasis and quotations omitted).

all members of a large group know that others can carry the water and the benefits will be dispersed among many. Members of a small group, by contrast, realize that *if they don't do it, it won't get done.* Small groups, such as producers in a particular market, may thus be able to lobby more effectively and convince government actors to impose anticompetitive restrictions that benefit the producers at the expense of consumers.[175]

Wiley condemns current doctrine for failing to take account of producer capture. He describes the doctrine as imposing broad, but superficial, scrutiny that sometimes condemns beneficial regulation and needlessly taxes legitimate state programs while permitting more harmful regulation than would his capture test. He concludes that current doctrine fails to advance a federal policy sufficient to justify the intrusion upon state sovereignty.[176] As an alternative, Wiley proposes restricting antitrust scrutiny to situations in which the public body is captured, thereby enabling antitrust state action doctrine to broadly condemn anticompetitive programs without overburdening the states with federal review of all types of state economic regulation.[177] To be sure, some anticompetitive state regulation may survive if antitrust scrutiny is not applied outside of capture situations. But Wiley believes that the tradeoff is reasonable.

---

175. Although a thorough criticism of interest group theory is beyond the scope of this Article, a comparison of the satisfaction level and success of producer and consumer interest groups casts some doubt on the thesis. Producers, the smaller, more concentrated group, generally seem more dissatisfied with regulation than consumers, the larger, more diffuse group. Further, numerous consumer groups have had significant success in shaping legislation. Ralph Nader's work comes to mind. The success of groups such as the National Rifle Association and the Christian Coalition suggests that a critical mass of individuals with sufficiently intense feelings about an issue may be more important to the ultimate effectiveness of lobbying efforts than the large or small absolute size of the group. *Cf.* Elhauge, *supra* note 1, at 719 (arguing that because large groups have more votes, legislators often seek to minimize harm to them).

176. *See* Wiley, *supra* note 4, at 715, 738-39.

177. *See id.* at 741, 751. The actual capture analysis is only the final step in the four-part test that Wiley proposes. The first two prongs ask whether the regulation reduces market rivalry and whether it is protected by a separate federal statutory antitrust exemption. Third, and more controversially, Wiley would ask whether the restraint violates a critical substantive principle of antitrust law. He proposed using allocative efficiency for this purpose in his initial article, but subsequently argued that his capture theory would apply equally well if this prong of the test focused on whether the regulation transferred consumer surplus to producer surplus. *See* Wiley, *supra* note 173, at 1335-38.

Wiley makes both descriptive and normative claims for his proposed test. Descriptively, his focus on producer capture may explain the shift he perceives in the Supreme Court's attitude toward state regulation from *Parker* to its more recent state action cases.[178] Wiley claims that *Parker* exemplified strong deference to state regulation, because the prevailing New Deal attitudes considered regulation generally beneficial. Over the last three decades, however, state regulation has come to be viewed with considerably more skepticism. Wiley identifies as the primary source of that skepticism the realization that concentrated groups of producers can capture legislatures more easily than can diffuse groups of consumers.[179]

Normatively, Wiley asserts that only state-sponsored anticompetitive conduct by captured state actors should be subject to the antitrust laws. Legislation is struck down, he says, because it is anticompetitive, not because of producer capture. Capture, though, is a useful tool to identify the state regulation that is most likely to be anticompetitive, because federal courts cannot seriously scrutinize every state law without unduly burdening the states.

Wiley's attempt to explain current doctrine with the capture model was never firmly grounded in the case law.[180] Now, it can be squarely rejected in light of *Omni Outdoor Advertising.* There, the Court accepted factual findings that a municipal legislature had been completely captured and enacted anticompetitive billboard regulations in exchange for the

178. Wiley argues "that the Court has [shown a willingness to disregard deference to states' rights] in a largely unarticulated but historically understandable response to growing fears of regulatory capture." Wiley, *supra* note 4, at 728. *But see* Elhauge, *supra* note 1, at 720-21.

179. "A growing suspicion that producers have 'captured' the political bodies regulating them has inclined people to view regulation as the product and protector of producer interests. . . . Regulation, formerly conceived of as a method of advancing public interest over private advantage, in many instances came to be conceived of as a method of subsidizing private interests at the expense of the public good." Wiley, *supra* note 4, at 714, 723.

180. *See* Elhauge, *supra* note 1, at 721 (describing Wiley's descriptive claim as "wholly manufactured" and arguing that "from the beginning the Court has demonstrated neither boundless deference nor limitless intrusion"); *see also* Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 133 (1978) ("[A] conflict between the statute and the central policy of the Sherman Act . . . cannot itself constitute a sufficient reason for invalidating the Maryland statute. For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed.").

support of the regulated entity.[181] Even in this extreme situation, the Court stated unequivocally that state regulation cannot be evaluated by asking whether it serves a legitimate antitrust principle.[182] Government actors may make value choices that are inefficient and contrary to principles embodied in the antitrust laws, but such actors may nonetheless serve the public interest. The Court found influence over legislatures, however improper, irrelevant to the state action question. The actions of government actors are presumed to be in the public interest even when one may legitimately question the motives of those actors.

Wiley's normative claim also fails because he cannot explain why antitrust should thwart state regulation sponsored by producer groups but not anticompetitive regulation sponsored by other groups.[183] Anticompetitive legislation sponsored by a producer group may well serve the interests of the producer group at the expense of the public at large, but consumer-sponsored anticompetitive regulation such as rent controls or price caps are just as likely to be inefficient and thus harmful to the general public.[184] If one can trust the state legislators and regulators to impose anticompetitive legislation sponsored by consumer groups only when that legislation is socially beneficial, Wiley needs to explain why state officials can no

---

181. *See* City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 377 (1991).

182. *See id.*

183. This point has been made before. For example, Professor Spitzer has argued,

> To justify Wiley's position, there must be some reason to think that regulation generated by producer capture is less legitimate than other anticompetitive, inefficient regulation. This requires some plausible model of democratic legitimacy which demonstrates that producer capture lacks some crucial feature of legitimacy. Yet Wiley merely outlines the Olsonian mechanism of producer capture and labels it illegitimate, while treating all other regulatory outcomes as legitimate.

Spitzer, *supra* note 13, at 1302.

Spitzer examines more recent work analyzing the motives driving legislation and regulation and concludes that "no fundamental difference exists between producer capture and other forms of regulation-seeking political activity." *Id.* at 1308; *see also* Elhauge, *supra* note 1, at 723; William H. Page, *Capture, Clear Articulation, and Legitimacy: A Reply to Professor Wiley*, 61 S. CAL. L. REV. 1343, 1351 (1988) ("[P]roducer capture is not a distinct phenomenon; it is an artificially isolated fragment of a broader, constitutionally defined process that we accept as legitimate.").

184. *See, e.g.*, Werner Z. Hirsch, *From "Food for Thought" to "Empirical Evidence" About Consequences of Landlord-Tenant Laws*, 69 CORNELL L. REV. 604 (1984).

longer be trusted when producers sponsor the legislation.[185] That consumers are a larger group than any particular set of producers is no answer. Legislation may well be in the public interest even though it is supported only by a small group that fully understands its ramifications.[186] Current doctrine recognizes this fact and exempts all state legislation actively supervised by government actors. The status choice model explains the exemption as a product of our society's charge to government actors to pursue the public interest rather than self interest or the interest of any particular constituency.

D. The Financial/Political Accountability Interest Focus

In a 1991 *Harvard Law Review* article, *The Scope of Antitrust Process*,[187] Einer Elhauge proposes that state regulation should be exempt from antitrust scrutiny whenever a politically accountable and financially disinterested actor "controls and makes a substantive decision in favor of the terms of the restraint."[188] This test, he contends, "has more predictive force than either formal notions of state action or the clear authorization/active supervision test."[189] Elhauge claims that his test will yield the same results reached in existing cases, because it embodies the rationale that he believes the Supreme Court is already *de facto* applying.[190]

---

185. The capture test has been attacked on First Amendment grounds because it "impos[es] an absolute penalty upon producers' political activities" and "makes the validity of legislation turn on the identity of the person who lobbied for it." Merrick B. Garland, *Antitrust and Federalism: A Response to Professor Wiley*, 96 YALE L.J. 1291, 1292 & n.4 (1987) (citing Garland, *supra* note 1, at 512-18). Wiley has responded to this attack. *See* Wiley, *supra* note 4, at 779-81; Wiley, *supra* note 1, at 1288.

186. Wiley's theory implicitly and correctly rejects the pluralist conception of the legislature as simply summing the preferences of individual constituents, because under pluralist theory the more numerous consumer voting block would always prevail. Wiley thus recognizes that legislators are meaningful independent agents. He simply errs in reading current doctrine to assume that legislators can be so easily swayed from their chosen course to pursue the public interest.

187. Elhauge, *supra* note 1.

188. *Id.* at 696. Elhauge was not the first to look to political accountability and financial interest as part of the state action test. Jared Ben Bobrow proposed using it in a much more limited way in Note, *Antitrust Immunity for State Agencies: A Proposed Standard*, 85 COLUM. L. REV. 1484, 1500 (1985) ("In determining whether a state agency is sufficiently like a private party to invoke the 'active state supervision' test, courts should consider whether the agency is politically insulated or financially interested in the welfare of the regulated group.").

189. Elhauge, *supra* note 1, at 696.

190. *See id.* at 671, 695, 714-16, 721 & n.267.

He also asserts that his approach is superior as a matter of public policy.[191] Economic literature, he maintains, supports the notion that "if freely permitted to restrain trade," financially-interested market participants will be "systematically prone to [undermine] the social, economic, and distributive goals of antitrust."[192] In other words, as Elhauge concludes in a subsequent article, financially-interested actors "cannot be trusted to further the public interest unless subjected to a process of market competition policed by antitrust review."[193] In contrast, government actors have different incentives and can be trusted to displace the competitive process only in ways that benefit the public by correcting market imperfections and by furthering non-economic goals.[194] To this point, Elhauge's approach is similar to the status choice model. He deviates from status choice, however, by resting society's trust in government officials on the supposedly financially disinterested and politically accountable nature of their decisions.[195]

This approach fails to adequately explain the doctrine, primarily because government actors are neither. To justify his claim of financial disinterestedness, Elhauge points to recusal statutes that prohibit certain public actors from exercising their governmental role when they have a personal interest in the outcome.[196] These recusal provisions, he presumably believes, define the scope of potential interest. Public actors therefore do not make a choice to act altruistically in the public interest, but rather they have no self-interested stake in the outcome of their decisions, enabling them to serve as neutral decisionmakers guided by their political ambitions. Where a self interest is introduced, the law presumes the public actor will be

191. *See id.* at 696-702 ("Economic theory and experience provide us with ample reason to believe that Congress was right as a matter of policy.").

192. *Id.* at 702 & n.170 (citing PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 502-49 (12th ed. 1985)).

193. Einer Elhauge, *Antitrust Petitioning Immunity*, 80 CAL. L. REV. 1177, 1200 (1992).

194. *See* Elhauge, *supra* note 1, at 702-03 (citing John Cirace, *An Economic Analysis of the 'State-Municipal Action' Antitrust Cases*, 61 TEX. L. REV. 481, 491-95 (1982)).

195. Elhauge describes his test as process oriented in that it does not turn on subjective motives: "Bad motives will not deprive disinterested accountable decisionmakers of their antitrust immunity." Elhauge, *supra* note 193, at 1197.

196. *See* Elhauge, *supra* note 1, at 704 & n.175.

influenced by it and thus requires that actor to recuse.

Recusal provisions, however, are quite narrow and focus on direct and immediate financial or familial interests in the outcome of a specific proceeding. In a broader sense, as other commentators have indicated, "public officials frequently have a financial interest in the decisions they make . . . ."[197] For example, telecommunications regulators pay local, long distance, and cell phone bills, and the judge in the Microsoft antitrust case probably browses the Internet. Beyond that, many people move between government regulatory positions, private industry, and private law firm jobs. Regulators therefore have a significant and direct, albeit not immediate, interest in the work they do. If Elhauge is correct that such problems as bribery and direct financial interests render government decisionmakers unable to put the public interest first, then other personal, direct financial interests should do so as well.[198]

Elhauge also purports to incorporate political accountability into his analysis. But just as he narrows financial interest beyond all realistic definitions of that term, he broadens the definition of political accountability to encompasses virtually anyone who is in a position to make policy decisions and who is not financially-interested (in Elhauge's own narrow sense).[199] All that is required is that "the authority can be traced to an election or some chain of appointment starting with elected officials."[200] Further, "[o]ngoing political accountability is not required; it is sufficient that the political process can influence

197. McGowan & Lemley, *supra* note 1, at 341-42; *see also id.* at 339 (recognizing that "public actors have an essentially financial stake in the actions they take").

198. *Cf. id.* at 340 ("If the presence of an individual financial incentive compels the conclusion that the interests of a private actor diverge from the public good, the same conclusion should apply when a public actor has such an incentive.").

199. *See* Elhauge, *supra* note 1, at 671 n.10.

200. Elhauge, *supra* note 193, at 1197 n.112 ("The accountability can be retrogressive rather than ongoing (it embraces judges with life tenure who were initially appointed by elected officials) and derivative rather than direct (it embraces officials appointed by officials appointed by elected officials)."); *see also* Elhauge, *supra* note 1, at 671 n.10. To support this view of accountability, Elhauge cites *The Federalist No. 39*: "It is *sufficient* for [a republic] that the persons administering it be appointed, either directly or indirectly, by the people . . . ." THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961) (emphasis in original). Madison's arguments in *The Federalist*, however, presuppose that elected and appointed public officials are capable of serving a public interest that extends beyond a narrow, private interest in re-election. *See supra* Part I.C.1.

the initial selection of personnel to exclude those with unacceptable policy preferences."[201] As other commentators have pointed out, Elhauge's political actors "need not be accountable for the wealth they transfer."[202] Citizens are simply too distant from virtually all regulatory processes to meaningfully police the minutia of state regulation through elections.

In short, Elhauge makes his theory fit current doctrine by redefining the terms financial interest and political accountability in a fashion that robs them of all practical content. The status choice model more comfortably explains current doctrine by resting the distinction between exempted decisions and those subject to antitrust scrutiny on the choice public actors make to serve the public interest, a choice they are capable of making despite a financial interest and a lack of significant accountability in any particular case.

III. NORMATIVE ANALYSIS OF THE ANTITRUST STATE ACTION DOCTRINAL ALTERNATIVES

The previous Part demonstrates that the leading commentators have failed to explain current doctrine as well as the status choice model does. The alternative proposals advanced by the commentators might nonetheless be superior to current doctrine if their proposed tests were either demonstrably better at resolving hard cases, that is, if they provided practical benefits to litigants and courts trying cases, or if they were theoretically more coherent. This Part first rejects the argument that any of the tests have practical benefits over current doctrine. Although existing law is difficult to apply and relies on inherently uncertain intuitions about the importance of state-actor involvement in regulatory decisionmaking, the alternatives prove no easier to apply and indeed would transform the state action question into a much more time-consuming and expensive inquiry than it currently

201. Elhauge, *supra* note 1, at 671 n.10. For example, life tenure judges and state administrators serving fixed, non-repeatable terms appointed by an appointed official are included.

202. McGowan & Lemley, *supra* note 1, at 342. The political accountability requirement thus serves no meaningful purpose in Elhauge's analysis. Indeed, he eventually concludes that antitrust should not apply to financially disinterested decisions whether or not they are made by politically accountable actors. *See* Elhauge, *supra* note 1, at 740-45.

is. Second, this Part rejects the notion that any of the alternative proposals are theoretically more coherent. At their cores, each of these very different criticisms of current doctrine rests on the assumption that state actors are driven by selfish motivation just as private actors are. This Part shows that adopting this self-interested motivational analysis does not provide theoretical cohesion and, more significantly, poses the serious risk of discouraging altruistic behavior that our society has always held in high regard.

A. The Proposed Alternatives Fail to Resolve the Hard Case More Coherently Than Current Doctrine

To focus the inquiry, this Part uses the following hypothetical to evaluate current doctrine and the four proposed alternatives described above from a practical perspective: A utility regulated by a state commission is required to negotiate and enter with other utilities into interconnection agreements (i.e., contracts governing the terms by which two or more utilities connect their facilities). Under the hypothetical scheme, there is no direct state involvement unless a utility or a citizen complains, at which point the commission would hold a hearing to resolve the dispute.[203]

Under current doctrine, the issue would be whether the state has done enough to ensure that any anticompetitive restraints imposed within the state's regulatory system will serve the public interest as defined by presumptively public-interested government actors. To be sure, that question is difficult to answer. It would require some examination of the workings of the state commission to determine whether in fact the commission sets interconnection policy or whether the regulated utility freely dictates the terms of agreement. Have there been complaints? Are utility decisions ever overruled? Although these questions would require courts to use their intuition about the role actually played by government actors, the data on which to base the answers are available in the

203. This hypothetical poses a typical antitrust state action case. *See* TEC Cogeneration, Inc. v. Florida Power & Light, 76 F.3d 1560 (11th Cir. 1996) (posing, *inter alia*, this question); Elhauge, *supra* note 1, at 682-83 ("Most Supreme Court state-action cases address the issue of when restraints resulting from some mix of involvement by state-wide representatives and private actors should be immunized from antitrust review.").

public record of the commission's decisions.

Also relevant would be the court's evaluation of the type of industry and the type of restraint involved. If the industry is one that has traditionally been regulated, like the utility industry in the above example, an exemption may be more appropriate, because government actors play a larger role in the direction of the industry. As to the restraint, perhaps the interconnection issue could be analogized to a refusal to deal, not one of the more suspect categories of trade restraints, but one that has given rise to antitrust liability in certain circumstances. Although hardly precise, this analysis again draws from readily available information about existing regulatory schemes and antitrust case law.

Ultimately, a federal court will need to make an intuitive judgment about whether government actors are meaningfully setting regulatory policy or permitting private parties to circumvent free market forces for their own benefit. There will be no definite answers, but the tools to answer the question as part of a threshold inquiry are easily accessible. The court could look to the public record of the state commission's regulatory efforts, the type of industry and restraint, and the judge's own intuitive understanding of how individuals act when charged with a duty to pursue self interest or public-interested goals. Armed with these tools, a judge could make reasonably coherent decisions as to whether a particular restraint results from self-interested private motivation or public-spirited government motivation.[204]

The other proposals fail to provide more definite answers and generally pose questions that are either unanswerable in a coherent way or would require inaccessible information or information available only through extensive and expensive discovery.

1. Political Participation

Inman and Rubinfeld believe that post-restraint review by a government actor should suffice to exempt clearly articulated

204. *Cf.* MARGARET JANE RADIN, REINTERPRETING PROPERTY 165 (1993) ("Some of the apparent disarray in the takings doctrine, as applied in practice, disappears if we see the courts as engaged in the pragmatic practice of situated judgment in light of both partial principles and the unique particularities of each case.").

state regulation.[205] But their answer does not flow from their focus on political participation. Rather, it appears in the context of an argument to avoid the criticism that active supervision requires states to inefficiently overregulate.

The political participation rationale for current doctrine provides no principled answer to such criticism. Is the opportunity for a citizen to complain, thereby triggering a hearing, sufficient? Or would there need to be some specific level of citizen participation at the hearing, and if so, what level will suffice? Is simply opening the hearing enough, or do citizens actually need to participate? How many must participate to ensure a sufficiently democratic decision?

Given enough judicial decisions, clear rules might emerge. Still, this would not serve to answer the underlying question: Why is a particular level of citizen participation sufficient in a particlar case?

2. Principles of Governance

Far from helping to resolve hard cases, the case-by-case principles of governance analysis that McGowan and Lemley propose is so vague and imprecise that it would produce no predictable results even in cases that current doctrine could easily resolve. The Court addressed this problem explicitly in *Omni Outdoor Advertising*, rejecting inquiries into the purpose of government actors and the extent of private involvement in the enactment of statutes. In short, purpose is an illusory concept. Any individual's purpose for a particular decision may be mixed or uncertain. Discerning the purpose of a multi-person entity like a legislature is an inherently uncertain task.

Examining the extent of private involvement in lawmaking is no less problematic. Private parties are always and appropriately involved in the formation of legislation. The First Amendment, after all, protects the right to petition the government.[206] A legislative enactment of a statute written entirely by a private party is simply not *per se* inappropriate because we trust government actors to further the public interest subject to the background rules of government.

---

205. *See* Inman & Rubinfeld, *supra* note 4, at 1267-68.

206. U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people to petition the Government for a redress of grievances.").

Petitioning by private parties is a constitutionally protected and legitimate part of the deliberative process.

In sum, McGowan and Lemley's open-ended inquiry would turn every case into a hard one, requiring inaccessible or extremely costly information and threatening to penalize constitutionally protected petitioning. Further, the state action question would be transformed from one that is essentially legal to one that would almost invariably be factual. McGowan and Lemley's approach would encourage disruption of state regulatory processes by hindering efforts to dismiss or summarily resolve cases challenging regulatory decisions.[207]

3. Capture

When it comes to resolving hard cases, Wiley's test suffers from the same problems as that of McGowan and Lemley: Determining whether particular decisionmakers are in fact captured necessitates an inquiry into legislative motives.[208] The capture question is simple in form: Have producer interests decisively influenced the public decisionmaking body?[209] But it is not so easy to answer.[210] Wiley postulates that "[j]udges could demand that plaintiffs, on pain of dismissal, identify producers who profit from the regulation's competitive restraint and who played a *decisive* political role in its adoption."[211] He would allow plaintiffs to satisfy their burden with "direct evidence of decisive producer political activity or through indirect inferences showing that the regulation's facial characteristics clearly suggest that it arose by virtue of decisive

---

207. In part for these reasons, the federal courts have long rejected this type of inquiry into legislative motivation. *See supra* Part I.C.3.

208. *See* Elhauge, *supra* note 1, at 723.

209. To be sure, Wiley's four-part test asks three prerequisite questions, but they must be answered in the context of an antitrust trial. In effect, Wiley simply transforms the state action question from a preliminary one akin to an immunity to the last step in the analysis more like an affirmative defense. Thus, in any antitrust trial the court must determine whether rivalry has been reduced, whether other exemptions apply, and whether a significant purpose behind the antitrust laws is advanced.

210. *See* Thomas Heller, *Is the Charitable Exemption from Local Property Taxation an Easy Case? General Concerns About Legal Economics and Jurisprudence, in* ESSAYS ON THE LAW AND ECONOMICS OF LOCAL GOVERNMENTS 183, 185 (Daniel L. Rubinfeld ed., 1979) ("The problem is that the discourse demands reference to what empirically cannot be known.").

211. Wiley, *supra* note 4, at 769 (emphasis added).

capture influence."[212]

Wiley concedes that this inquiry would require counterfactual analysis, that is, would require a court to determine whether the restraint would have arisen "but for" the producer support. He argues, however, that sometimes, when "the *only* political support for a market restraint came from a narrow interest group," the answer is easy.[213] And even "when political support is mixed, the inquiry remains theoretically coherent, analytically tractable (particularly when combined with a suitably demanding burden of proof that plaintiffs must satisfy), and analogous to other questions that courts routinely settle."[214]

But the inquiry is more difficult than Wiley suggests. He ignores the possibility that the legislature might impose the regulation pursuant to an understanding of the public interest that was not advanced by the producer lobbyists.[215] One could address this problem by requiring a court to uphold the regulation if any doubt exists as to whether the regulation serves the public interest.[216] Such a formulation of the test might ask "whether the legislature could reasonably have determined that the regulation was in the public interest."[217] As Professor Page points out, however, "a court would only rarely find capture in this sense," because legislatures "may define their state's public interest however they choose."[218]

Wiley would surely reject that formulation. Indeed, he would shift to the state the burden of proving a public interest motivation whenever the plaintiff articulates an anticompetitive explanation for the regulation and the court finds the public interest explanations "strained and less credible."[219] Determining which public interest explanations are sufficiently "strained" to shift the burden is an uncertain

212. *Id.* at 764-65; *see also id.* at 770.

213. *Id.* at 770 (emphasis added).

214. *Id.*

215. As one commentator has written, "capture, in any meaningful sense, implies that the legislature enacted the law simply to benefit an interest group and not to advance some independent conception of the public interest." Page, *supra* note 183, at 1352; *id.* at 1351 (unless efficiency is the only legitimate public interest, "capture becomes a question of legislative motivation").

216. *See* Wiley, *supra* note 4, at 772.

217. Page, *supra* note 183, at 1352.

218. *Id.* at 1352-53.

219. Wiley, *supra* note 4, at 771-72.

task, to say the least, but it would be easier than determining what rationales actually influenced the legislators.

In the end, Wiley relies on the ability of judges to answer the capture question just as finders of fact routinely answer questions of mental state, negligence, or other similar questions. Matters typically presented to judges and juries, however, involve questions of human nature, a subject on which we may all claim some insight. Capture, by contrast, is a very different type of concept. Wiley offers no reason to think that judges have an inherent understanding of the extent to which powerful lobbyists influence the political process in particular cases.

To enable judges to answer the capture question coherently, Wiley would have to permit discovery even more intrusive than that proposed by McGowan and Lemley. If state action immunity turned on capture alone, litigants with millions of dollars at stake could not be denied the opportunity to take full discovery to determine the influences on all concerned. Moreover, that inquiry would be hindered because legislatures would likely hide their true motives in order to bolster state policy.[220]

4. Financial Interest and Political Accountability

Elhauge's approach falls victim to the same practical problems that plague the other approaches. An antitrust plaintiff could argue against state action immunity in virtually every case by contending that regulators often work as consultants for private, regulated companies after they leave the agency, and that current agency members are motivated in their decisions by the financial rewards of those future job opportunities. If financial interest becomes the test for future state action antitrust cases, plaintiffs seeking treble damages would likely find and litigate even the most remote connections between government actors and the private sector.

If such inquiries into the financial and other influences of politically accountable parties are not permitted, the financial interest test would simply collapse back into a formal distinction between public and private actors, the very

220. *See* Page, *supra* note 183, at 1355.

distinction that Elhauge seeks to escape.[221] The collapse is inevitable because the very act of drawing lines among degrees of self interest presupposes that public parties can withstand some self-interested temptation. And to concede this is to concede that status choice, not a financial interest test, underlies current antitrust state action doctrine.

Elhauge offers a subsidiary proposal: The state action exemption applies only when a state actor makes an affirmative, substantive decision in favor of the restraint before it becomes effective. Substantive, post-injury agency or judicial review, no matter how automatic and even if conducted by a financially disinterested, politically accountable actor, cannot trigger an exemption.[222] Elhauge justifies his position with policy arguments based on the appropriate distribution of risk for antitrust harm between anticompetitive actors and their victims. He strikes the balance in favor of victims, and his conclusion would help clarify some antitrust state action decisions. But this clarity is not a product of his primary financial interest analysis. And it would come at the cost of regulatory flexibility. Once one admits—as Elhauge does—that state actors can be trusted to advance the public interest through anticompetitive regulation, mandating pre-restraint decisions is more likely to reduce social welfare than advance it.

For example, a state utility commission might adopt a number of more or less direct regulatory schemes that leave certain decisions in the hands of financially-interested companies. For example, the commission could set the terms for interconnection, dictating how interconnection agreements work. Alternatively, as in the above hypothetical, an agency might rely on the company to justify its interconnection practices under some definition of the public interest only if a complaint is filed. If no one complains, the proposal could become the regulatory rule. Although control is more direct when the agency dictates the interconnection procedure itself, under either scheme the agency exercises control over the terms of the restraints. The regulated company cannot adopt any interconnection policy it chooses. Rather, it must draft its

221. *See* Elhauge, *supra* note 1, at 696.
222. *See id.* at 695, 716-17.

interconnection agreement with the knowledge that it may be required to defend its proposal on public interest grounds.

One could imagine a regulatory scheme in which competitor proposals were challenged so rarely that the company could act as if it were unregulated. One could just as easily imagine a regulatory scheme in which the utility was constrained to put forward fair interconnection procedures that comported with the state's definition of the public interest even though the state agency rarely blocked a proposal. This latter option might be vastly superior because of the uncertainty inherent in economic regulation. Agency bureaucrats, no matter how expert, often lack the economic tools to predict in advance what the socially optimal policy would be. In some cases, only after observing a policy in action can regulators make a sufficiently informed decision. Even though private parties with initial control may improperly favor their own interests, the policies that evolve from private interaction and regulatory review may be vastly superior to regulations imposed by public actors in advance without the benefit of observing policy solutions that evolve from private interaction.

Current doctrine preserves regulatory flexibility. But it also requires courts to grapple with the question whether the state's view of the public interest is advanced. Elhauge's requirement of substantive, pre-restraint review would provide a clearer answer to the state action question. There is no reason, however, to assume that pre-restraint regulatory decisions would better serve the public than the decisions produced through an ongoing give-and-take between regulators and private parties, and the Supreme Court has wisely never adopted Elhauge's proposal.[223]

B. The Commentators' Assumption of Self-interested Governmental Conduct

All of the leading commentary, albeit in different ways, relies

223. *See* Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48, 59 (1984) (recognizing the value in permitting states to "achieve the desired balance between the efficiency of collective ratemaking and the competition fostered by individual submissions"); *see also* Patrick v. Burget, 486 U.S. 94, 101 (1988) (comparing agency regulation with other forms of state review and suggesting that "significant control," not actual pre-injury substantive review, is required).

on some form of self-interested motivational analysis, a mode of analysis that predicts and governs behavior by "assuming that man is a rational maximizer of his ends in life, his satisfactions—what we shall call his 'self-interest.'"[224]

1. The Inability to Resist Private Gain

McGowan, Lemley, and Wiley assume that all state actors are ripe for capture by any group with the ability to form a coherent lobbying campaign. They must assume that the selfish desire for the perks of the political process controls legislative decisionmaking whenever those perks are present.[225] Why else would legislators turn their backs on the larger consumer group, the group with more votes? Indeed, Wiley proposes that a law that favored producer interests would satisfy his test without specific proof of bribery or the like, presumably because the selfish regulators must be getting something.[226]

McGowan and Lemley would not make capture, in the Wiley sense, the determinative factor. Their effort to distinguish governance from interest peddling, however, is a vaguer version of the same concept. Ultimately, McGowan, Lemley, and Wiley cannot explain why we should ever trust state regulation to serve the public interest.

2. The Selfish Pursuit of Votes

Inman, Rubinfeld, and Elhauge give greater weight to the notion that government actors will serve the public interest. Yet, all three attribute public-interested actions to a selfish desire for re-election.[227] By focusing on civic participation and

---

224. RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 3-4 (5th ed. 1998). Posner emphasizes that "self-interest" in law and economics analysis "should not be confused with selfishness; the happiness (or for that matter the misery) of other people may be a part of one's satisfactions." *Id.* at 4. In taking action to benefit others, however, individuals often face significant conflict between what they would rather do (from a self-interested perspective) and what they know that they should or ought to do. It is highly artificial and demeaning to our status as human beings to define our capacity for altruism as the mere satisfaction of a self-interested taste for helping others. Anyone who has struggled with the decision between what they want to do and what they should do understands this distinction.

225. Wiley does suggest that campaign contributions and the like play a key role in the issue. *See* Wiley, *supra* note 173, at 1331-33.

226. *See id.*

227. McGowan and Lemley argue that "private actors are accountable to consumers in a much more direct way than legislators are to voters, at least on

calling for almost constant direct electoral participation by interested citizens, Inman and Rubinfeld display a lack of faith in representatives. Underlying this approach is an assumption that representatives merely aggregate the individual preferences of their constituents in an effort to garner votes and campaign contributions for re-election. Missing is the status choice model's assumption that an elected representative will abide by a duty to serve the public interest.

Inman and Rubinfeld also cling to the view that individual participation is the key to ensuring that the government serves the public interest. But unless one rejects the notion that individuals seek their own interests in their political affairs—

---

relatively uncontentious issues." McGowan & Lemley, *supra* note 1, at 336. Consumers are much more attuned to the prices they pay than to much of what goes on in the public sector:

> The value of an assumption depends on how accurately it reflects the real world, and our criterion for decision should be to prefer the assumption that most accurately describes reality. Thus the question comes down to whether, as an empirical matter, the net of private actions is in harmony with the public interest more often than the unconstrained actions of state and local governments.

Id. at 338.

Although recognizing that the answer to this question necessarily turns on the criterion employed, McGowan and Lemley conclude that because of private action's self-correcting features (cartel members cheat, cartels encourage entry), private conduct leads to a publicly beneficial outcome more often than does government action. *See id.* at 338-39. These arguments have also been made by Frank Easterbrook and Richard Epstein. Easterbrook forthrightly denies that a public sphere exists in which truly effective public-interested decisionmaking is possible. He argues that, try as they might, legislatures simply cannot advance the public interest by attempting to regulate free-market forces. He nonetheless believes that we are bound to respect democratically chosen alternatives, and that we would be better off permitting states to simply eliminate the antitrust laws, if they so choose, in lieu of more active regulation such as price-setting. Economic theory predicts private cartels break down because one of the participants eventually cheats. Because the result of regulation is to punish cheating and insulate inefficient behavior, a regulated market will likely be more inefficient than one with no antitrust law at all. *See* Easterbrook, *supra* note 1, at 32-33. Professor Epstein makes a similar case, albeit in a context broader than antitrust state action:

> Even though people cannot agree upon a single account of the common good, they can enter into exchange transactions with each other. Price thus becomes the transmitter of the social central nervous system that links together individuals whose personal preferences are otherwise separate, unknowable, and incomparable . . . . With a well-defined system of individual property rights, each of us can reach higher levels of private satisfaction from exchange. . . . To overcome the inevitable frictions of ordinary human affairs, the correct uniform response is to lower the cost of information and bargaining, not to lock in monopoly returns through political deals.

Richard Epstein, *Modern Republicanism—Or The Flight From Substance*, 97 YALE L.J. 1633, 1640-43 (1988).

and Inman and Rubinfeld do not—one is hard pressed to explain why individual political action would optimize social welfare. In the private business realm, market forces make that assumption plausible. In the political arena, there is no analog for transforming private selfish conduct into welfare maximizing conduct.[228]

Elhauge correctly recognizes that antitrust merely regulates the conduct of those who presumptively would adopt anticompetitive restraints to serve their selfish interests.[229] In seeking to identify this group, however, he assumes that anyone with a financial interest in an outcome will serve that interest if given the chance. Government actors are trusted to advance the public interest through anticompetitive regulation, not because they have assumed a duty to serve the public, but because they have no financial interest and are politically accountable.[230] Without financial interest, government actors will not be tempted to seek wealth for themselves, and political accountability gives government actors another selfish interest to pursue—their own continued political life. Elhauge writes, "The traditional liberal account" of the role of legislatures provides an acceptable, although imperfect, "assurance that financially disinterested legislators will act in the public interest."[231] By this, he means that legislators will sum the individual self-interested views of their constituents and act accordingly to maximize the number of votes they receive.[232]

Rather than recognize that legislators choose to act in the public interest pursuant to a duty emanating from the integrity of their position, these commentators make a legal process leap of faith to a wonderland where legislators simply "represent all the affected personal interests and can aggregate them or weigh them against each other."[233] By taking this leap, they

228. *See infra* note 271.

229. *See* Elhauge, *supra* note 1, at 706-07; *see also id.* at 709 (arguing that "states are not free to adopt theories of human behavior in conflict with those of federal policy").

230. *See* Elhauge, *supra* note 1, at 685, 687, 690-91, 695-96, 706-07.

231. *Id.* at 703.

232. *See id.* This technique "attempt[s] to organize reality [in a way that allows us] to convince ourselves [that] we understand both particular motivation and social life as the simple aggregate of these motivated individuals." Kelman, *Misunderstanding Social Life*, *supra* note 37, at 275.

233. Elhauge, *supra* note 1, at 703. Elhauge recognizes, but apparently rejects, the notion that legislators seek a true public interest independent of their desire

transform public actors into a group just as motivated by selfish desire as private actors, the only difference being that public actors crave votes rather than money.

C. The Troublesome Implications of Imputing Selfishness to Public Actors

Given the acceptance of self-interested motivational analysis as a way to understand and order private conduct in law and economics generally, coupled with widespread skepticism about the integrity of government actors, it is not surprising that commentators on antitrust state action doctrine would extend the assumption of self-interested behavior to government actors. Their approach might bring theoretical cohesion to the doctrine by avoiding the need to rely on an indeterminate public/private distinction and by providing an objective basis for antitrust state action decisions. This Part concludes that in the context of antitrust state action, theoretical coherence does not emerge from essentially objectifying the public/private distinction. More importantly, this Part demonstrates that attributing self-interested motivation to public actors has the disturbing ideological consequence of reading the capacity for altruistic, public-spirited behavior out of our understanding of state actors.

1. To Avoid an Indeterminate Public/Private Distinction

The commentators may resort to self-interested motivational analysis to resolve antitrust state action questions in order to avoid the indeterminacy of formal distinctions between public and private realms. Elhauge and Wiley make this argument explicitly, contending that there is no natural or inherent public/private distinction, and that any analysis relying on such a distinction will fail to serve meaningful substantive ends and will lack predictive power.[234] Elhauge writes: "[T]he existence of any determinate formal public/private distinction

---

for votes. *See id. But see* Sunstein, *supra* note 39, at 1543-47 (critiquing the pluralist conception of government on which Elhauge relies).

234. Wiley writes, "But by seeking to separate state policy from the actions of individuals, *Parker* left itself vulnerable to a logical attack resembling the one that has been leveled at the constitutional public/private distinction." Wiley, *supra* note 4, at 731. "[T]he problem is that such distinctions lack any obvious or natural foundations; instead each such distinction must be justified by underlying policy reasons." *Id.* at 773.

seems dubious in light of the rich literature establishing the formal incoherence of such distinctions in other fields of law."[235] Courts left with no meaningful basis for decision may then resort to any basis that seems correct to a particular judge in a particular case. Antitrust state action doctrine could better serve its substantive goals and provide more predictable outcomes, the argument runs, by focusing directly on the substantive issue, the motivation of the state decisionmaker imposing the restraint.[236]

The commentators' concern about the public/private distinction draws on the wealth of legal scholarship discussing state action in the Fourteenth Amendment context.[237] Applying the teaching of that scholarship to antitrust state action, however, fails to distinguish between two different concepts—constitutional state action and antitrust state action—that happen to have the same name.[238]

The constitutional and antitrust state action concepts differ in two ways: (1) state action in the constitutional context refers to any action fairly attributable to the state, whereas state action in the antitrust context refers only to action sufficiently likely to advance a state regulatory interest as opposed to the interest of the regulated party; and (2) the constitutional distinction divides the world into public/coercive and private/consensual spheres, whereas the antitrust distinction divides the world into public-interested and self-interested spheres.[239] The following Sub-Parts explain these distinctions and conclude that there is no reason to reject the public/private distinction in

235. Elhauge, *supra* note 1, at 681.

236. *See id.* at 679-82.

237. *See generally* Lawrence A. Alexander, *Cutting the Gordian Knot: State Action and Self-Help Repossession*, 2 HASTINGS CONST. L.Q. 893 (1975); Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967); Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933); Robert L. Hale, *Force and the State: A Comparison of 'Political' and 'Economic' Compulsion*, 35 COLUM. L. REV. 149 (1935); Harold W. Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957); Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 PA. L. REV. 1358 (1982); Ira Nerken, *A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the Civil Rights Cases and State Action Theory*, 12 HARV. C.R.-C.L. L. REV. 297 (1977).

238. *See* Garland, *supra* note 185, at 1294 (suggesting a difference between the public/private distinction in the Fourteenth Amendment context and in the antitrust context).

239. Wiley notes the distinction, but not its import. *See* Wiley, *supra* note 4, at 730-31.

the antitrust context.

a. State Acts vs. State Decisions to Further a Regulatory Interest

Wiley and Elhauge derive their opposition to the public/private distinction principally from an article by Paul Brest, in which he argues that a determinate public/private distinction is incompatible with legal positivism: Where all rights are created by the government, there can be no distinctly private sphere.[240] Furthermore, any effort to preserve a private sphere results in a concept so malleable that it effectively means whatever a particular judge wants it to mean.[241]

Elhauge makes a similar argument to support his conclusion that "a complex of formal rules based on some combination of precedent, tradition, philosophy, natural law, or simple intuition" could not coherently determine when to apply antitrust state action immunity.[242] He suggests that the state effectively regulates nearly all private action through corporate, contract, property, criminal, and tort law.[243] Because no meaningful difference exists between common law and more overt forms of regulation, he concludes that it is incoherent to permit immunity from the antitrust laws to turn on the mere fact that a state regulatory agency is involved.

Elhauge's reasoning, however, does not follow from Brest's point that a legal positivist must conclude that all legal conduct is the product of state action. Elhauge relies on the additional assumption that legal positivism is unassailable, and at that point his argument breaks down. Locke's theories of government—which undoubtedly influenced the Framers—recognized individual rights not derived from government,[244] and Brest emphasizes that the natural rights tradition "remain[s] vital in modern liberal theory."[245] Further, Brest

240. Paul Brest, *State Action and Liberal Theory: A Casenote on* Flagg Brothers v. Brooks, 130 U. PA. L. REV. 1296, 1301-02 (1982).

241. *See id. at* 1302 (rejecting a normative theory of rights "renders the [public/private] distinction at best meaningless and at worst a vehicle for manipulating outcomes to suit the Justices' distributive tastes").

242. Elhauge, *supra* note 1, at 679-81.

243. *See id.*

244. JOHN LOCKE, OF CIVIL GOVERNMENT 129-41 (E.P. Dutton & Co. 1948) (1690).

245. Brest, *supra* note 240, at 1297-99, 1297 n.3, 1299 n.9 (citing examples of contemporary scholarship relying on theories of natural rights); *see also* PruneYard Shopping Center v. Robins, 447 U.S. 74, 93-94 (1980) (Marshall, J.,

recognizes that a public/private distinction "serve[s] an important ideological function: it reflects and reinforces the ideas of natural spheres of autonomy and a natural regime of property rights."[246] It thus supports the notion that most people, and particularly most non-lawyers, would likely share—that the government could not prohibit us from entering agreements or owning property, nor could it take away our right to compensation from those who injure us.[247] To be sure, one can extend the argument for inherent rights too far.[248] The specific content of contract, tort, property, and criminal law as well as corporate law is not the product of natural rights. No particular property law regime that happens to exist at some particular time is necessarily more natural or inherently correct than any another. The state may shape these legal doctrines, but it does so as a facilitator, not a creator. The state sets the rules that make social life work to the benefit of its citizens. But the basic right to enter agreements, to be compensated for wrongs, possess property, and to be free from the forceful invasion of others are fundamental to our understanding of personhood in modern American society and do not become something endowed by the government simply because they are shaped by the government in ways that change over time.[249]

Brest did not deny that there is a meaningful difference between state and private action. Rather, he raged against the invitation to "manipulation and mystification"[250] that results from distinguishing public from private, as the Supreme Court has done in the Fourteenth Amendment context, without a "substantive, normative theory of rights."[251] In such a context,

concurring) ("The constitutional terms 'life, liberty, and property' do not derive their meaning solely from the provisions of positive law. They have a normative dimension as well, establishing a sphere of private autonomy which government is bound to respect."); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 7-18 (1985) (explaining the influence of natural rights theory in the formation of takings law).

246. Brest, *supra* note 240, at 1330.

247. *See id.* at 1323 (discussing "our psychological and ideological need to believe that there are essentially private realms, albeit circumscribed by state and society, in which actions are autonomous. To treat all relations among individuals as state action contradicts any sense we have of such autonomy and denies its very possibility.").

248. *See, e.g.*, EPSTEIN, *supra* note 245.

249. *See generally* RADIN, *supra* note 204, at 171.

250. Brest, *supra* note 240, at 1302.

251. *Id.* at 1330.

there is no reason to believe that distinguishing public from private will serve appropriate ideological ends and, in Brest's view, it has not in the Fourteenth Amendment context.[252]

Antitrust state action doctrine is not subject to the same attack that Brest levies at Fourteenth Amendment state action doctrine because antitrust law has substantive, normative content—a belief in the superiority of free market forces to govern the economy—that a majority of the Supreme Court has refused to recognize in Fourteenth Amendment cases. The state *acts* in the antitrust context only when it alters free market forces in ways generally incompatible with the federal antitrust laws. Unlike Fourteenth Amendment doctrine, antitrust state action doctrine can, in a principled fashion, differentiate the type of state activity that alters market forces from the type of state activity that merely facilitates the operation of market forces, such as basic contract, tort, property, and corporate law, as well as state antitrust law.[253]

Antitrust thus provides the normative content to justify the distinction. Where the state makes a law that promotes or enhances competition, it does not *act* in the antitrust state action sense, and individual conduct pursuant to that law is not exempt from the antitrust laws.[254] Only where the state displaces market forces by permitting conduct that the antitrust laws would prohibit, thereby empowering private parties to act free from marketplace forces, does an antitrust state action question arise. In that case, a court answers the state action question not by asking whether the state acted at all, but by asking whether the state has both recognized that altering

252. *See id.*

253. Elhauge argues that post-injury review would not be sufficient to establish state-action immunity, because any act reviewable under state antitrust laws would then become immune. *See* Elhauge, *supra* note 1, at 716. The distinction drawn in the text, however, explains why state antitrust law, which typically is modeled directly on federal law, cannot supplant it. State antitrust, like most state law, is intended to enhance the operation of free market forces, not displace them with regulation.

254. *See* Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397, 402-03 (9th Cir. 1991) (holding that a state's decision to grant the right to operate a hospital does not exempt the hospital from antitrust scrutiny because "the state has [not] displaced competition with regulation in the provision of hospital services"). Conversely, when a state law has anticompetitive tendencies, it is judged under the state action doctrine. *See* 324 Liquor Corp. v. Duffy, 479 U.S. 335, 341-43 (1987) (describing the question whether the state regulation "is inconsistent with the antitrust laws" as a "threshold question" and deciding it before applying state action doctrine).

market forces could foreseeably benefit the public and supervised the exercise of any such conduct in a manner likely to ensure the advancement of the state's view of the public interest.

b. Public Coercion vs. Public Altruism

Antitrust state action also differs from Fourteenth Amendment state action in that the former divides society into private/selfish and public/altruistic realms, whereas the latter divides society into private/consensual and public/coercive realms. In short, the antitrust public/private distinction makes more sense in modern American society.

Brest was far from the first commentator to criticize attempts to divide social life into a public/coercive sphere and a private/consensual sphere.[255] This distinction rests on the notion that public decisions coerce individual behavior and therefore must be fair and non-discriminatory, or at least reasonable. Private decisions, by contrast, are thought to be consensual in that a person is bound to adhere to the decision of other private citizens only by voluntarily contracting with them.[256]

Antitrust state action presents a different concern. Rather than distinguishing between a coercive and a consensual sphere of human activity, it distinguishes presumptively self-interested (private) decisionmakers from presumptively altruistic (public) decisionmakers. In Fourteenth Amendment analysis, all governmental action is presumed to be intrusive upon individual rights to contract and must be curtailed; in antitrust analysis, collusive private action is viewed suspiciously because of its potential to inflict harm on those not privy to the bargain.

In a sense, both distinctions seem equally dubious if one

255. *See, e.g.*, Cohen, *supra* note 237, at 558-59.

256. A compelling case has been made that private coercion is at least as pervasive as public coercion in everyday life. *See, e.g., id.* at 560, 569 ("The freedom to make a million dollars is not worth a cent to one who is out of work. . . . The greater economic power of the employer exercises a compulsion as real *in fact* as any now recognized by law as duress."); Hale, *supra* note 237, at 147, 197. But not all legal scholars agree on the matter. *See, e.g.*, Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1520 (1982). Nevertheless, the Supreme Court shows no indication of abandoning the Fourteenth Amendment public/private distinction. *See, e.g.*, Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991).

focuses on natural tendencies, whether they be coercive/consensual or altruistic/selfish. If individuals are naturally one or the other, a public sphere—necessarily operated by individuals—could not be different from a private one.[257] In another sense, however, the distinction between private/selfish and public/altruistic decisionmaking seems more plausible than the consensual/coercive distinction. Individuals are capable of choosing to don their selfish caps in the business world and their altruistic caps when they become government actors. After all, our legal and social systems require (or at least strongly encourage) businesspersons to make self-interested decisions and require (or at least strongly encourage) legislators and other governmental decisionmakers to make public-spirited decisions.

The Fourteenth Amendment coercive/consensual distinction, by contrast, does not similarly track current legal or social conventions. Despite a strong ideological preference for democratic government, the distinction rests on the assumption that legislative decisions "coerce" in the pejorative sense; and despite a social fabric that encourages individuals to exploit each other, the people are presumed to consent to everything. The point is not that the altruistic/selfish distinction is superior to the coercive/consensual distinction in some natural or necessary way, but rather that our current legal and social structure is more consistent with the private/selfish and public/altruistic distinction.

Far from achieving some desirable avoidance of an indeterminate public/private distinction, self-interested motivational analysis in the antitrust state action context undermines a positive view of human nature that should not be abandoned: Individuals can choose to act altruistically, and the law and social norms create social structures that can encourage such a choice. The attempt to eliminate the distinction is thus unnecessary and, in Professor Horwitz's words, reflects "a symptom of the collapse of a belief in a distinctively public realm standing above private self-interest. It is not only a dangerous symptom of the unraveling of all sense of community, but also a relapse into a predatory and

257. *See, e.g.*, Cohen, *supra* note 237, at 560 ("all government is by individual men").

vicious conception of politics."[258]

2. The Quest for an Objective Rule to Govern Individual Intentional Choice

Each of the commentators may claim that self-interested motivational analysis allows them to rely on objective rules that look to concrete factors such as political participation, capture, or financial interest to guide the antitrust state action decision. In contrast, current doctrine uses a vaguer standard that looks to the degree of supervision necessary to ensure that the state's view of the public interest is being advanced by anticompetitive practices within a particular regulatory scheme.[259] Because government actors are not (or at least need not be) motivated by self interest, however, these supposedly objective rules do not provide theoretical coherence. Instead, they tend to read the capacity for altruism out of our legal discourse.

Self-interested motivational analysis provides an appearance of objectivity by assuming that individuals will intentionally choose to serve their own interest, and legal rules based on that assumption will thus achieve their desired result.[260] Individual autonomous choice appears to be preserved within a structure that effectively dictates what that choice will be. This approach is attractive because it seems to imbue individuals with autonomy and permit the adoption of clear, objective legal rules. Unlike the rules of the physical sciences, however, rules based on an assumption of self interest do not necessarily describe properties of the real world. Whether the objective rules put forward by the commentators will in fact help to rationalize antitrust state action doctrine depends on the validity of the underlying assumption that a government actor tempted with the prospect of personal gain will place self

258. Horwitz, *supra* note 45, at 1427-28.

259. Although the alternative proposals are more objective in form than current doctrine, obtaining the information necessary to answer the objective questions may be more difficult than obtaining the information necessary to answer the more intuitive inquiry under current doctrine. *See supra* Parts III.A.1-4.

260. As one commentator has noted, "The [economist's] behavioral claim is secure in large part because the dominant strain in American jurisprudence requires *some* theory of behavior under law, and the *economic* theory of legal behavior is the only systematic theory available." Lewis A. Kornhauser, *The Great Image of Authority*, 36 STAN. L. REV. 349, 361 (1984).

interest above the public interest.

Motivational analysis is usually seen as an external mode of analysis that operates on a fixed world in which self interest does in fact motivate individual choice. In situations where that is true, that is, where self interest does motivate individual choice, the analysis works well. But self interest is not the only conceivable motivator. Furthermore, individuals are not fixed entities; they are shaped by their society, including its legal rules. Legal rules based on an assumption of self interest will therefore tend to reinforce individual reliance on self interest as a basis for decision.

Viewed in this way, motivational analysis is not an external method of analyzing social action; it is an internal statement expressive of a society. Motivational analysis does more than reflect or describe what *is*; it also conveys a sense of what *ought to be*. As the self-interested view becomes more dominant, it becomes more correct.[261] The simplicity and predictability of the rules it generates come not from greater insight into the society the rules seek to govern, but from redefining that society to fit the rules.

With regard to antitrust state action doctrine, the commentators fail to recognize that individuals who choose to enter public service in modern American society do not invariably pursue self interest. The simple rules of motivational analysis thus have limited predictive power in the real world, but they have the disturbing effect of helping to create and cement in place a governmental realm that is just another bastion for self-interested decisionmaking.[262]

D. Normative Evaluation of Current Antitrust State Action Doctrine

To this point, this Article has *described* existing antitrust state action doctrine and criticized alternative interpretations and reform proposals. This Part evaluates existing doctrine informed by the status choice model.

---

261. *See* Mark Kelman, *Spitzer and Hoffman on Coase: A Brief Rejoinder*, 53 S. CAL. L. REV. 1215, 1220-21 (1980).

262. *See* Mark G. Kelman, *Comment on Hoffman and Spitzer's* Experimental Law and Economics, 85 COLUM. L. REV. 1037, 1044, 1047 (1985) [hereinafter Kelman, *Comment*]; Kelman, *Misunderstanding Social Life*, *supra* note 37, at 283; Kelman *supra* note 261, at 1220-21.

1. The Case for an Intuitive Standard

Current antitrust state action doctrine, when viewed as an instance of the status choice model, avoids creating a disturbing ideology of selfishness by drawing on legal theory that persuasively pictures real people who behave far less *rationally* in pursuing self interest than motivational theory predicts, but who show far greater capacity for sensitivity and observation.[263] This analysis recognizes that our actions are neither wholly a product of individual intentional choice nor wholly determined by outside influences. Individuals generally follow the roles society defines for them in a particular place, but they do so, in some sense, intentionally. Most of us obey the criminal law most of the time not from fear of punishment, but from our own conception of right and wrong. That conception, though, is shaped in part by our society's criminal law, as well as by other factors such as social and familial pressures and the tendency to follow the crowd.

The status choice model captures this aspect of real decisionmaking in a way that motivational analysis does not. Business decisions are assumed to be self-interested, but not because businesspersons are greedy at heart and unable to act any other way. Rather, a society makes a conscious choice to encourage through its legal system certain selfish behavior that is believed to provide a net benefit for everyone. Businesspersons usually intend to act in their own self interest, but that intentional decision is shaped by social and legal structures.

Governing or regulatory decisions under the status choice model are assumed to be public-interested. Again, this assumption is not based on a view that government actors are saintly people. Rather, such actors have simply adopted a position of integrity that society expects of its public servants as part of a broader legal structure that optimizes public welfare.[264]

Existing antitrust state action doctrine incorporates this more complex understanding of human action. It requires federal

263. *See* Kelman, *Comment*, *supra* note 262, at 1044.

264. Federal judges are a case in point. They are presumed to act in the public interest even though they are not accountable to an electorate. The same can be said of many officials appointed to set, non-repeating terms of office.

courts to determine whether the presumptively altruistic conception of the public interest formed by state actors is likely to be served by a challenged restraint. Most practicing lawyers litigating cases involving antitrust state action immunity, as well as the judges deciding those cases, intuitively recognize the need to grapple with various influences affecting the government and private parties involved. Unlike the commentators, however, lawyers and judges do not assume that some form of self interest must govern. The most important factor in antitrust state action analysis is whether particular parties are charged with a duty to advance the public interest,[265] but other factors are considered as well. For example, courts look to the perniciousness of the antitrust violation or the type of industry, and its history and market structure, as guides to deciding whether the state legislature contemplated that the regulation could beneficially supplant competition.[266] The analysis is intuitive, and no formal inquiry into any particular factor is necessarily required. Different situations will call for different levels of scrutiny, but the analysis remains principled and rational.

This analysis, unlike motivational analysis, accounts for the

265. The Court's tone and citation to *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978) (holding that "[a] judge will not be deprived of immunity [under the civil rights laws] because the action he took was in error, was done maliciously, or was in excess of his authority; rather he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction'"), in *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 372 (1991), evinces the consideration of social station in the immunity analysis. The Court in *Omni Outdoor Advertising* explicitly rejected financial interest or capture alone as the sole limit of state-action immunity by holding that even bribery would not abrogate the immunity created by an articulated and supervised regulatory scheme. *See Omni Outdoor Adver.*, 499 U.S. at 378-79. In addition, cases such as *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (rejecting state action immunity for a state board of lawyers enforcing a minimum fee schedule), and *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1985) (rejecting an exemption from antitrust scrutiny in a slightly different context for a standard setting group consisting of representatives of competitors in the industry), may reflect the Court's intuitive recognition that the individuals involved in making the anticompetitive decisions in those cases had not accepted the duty to serve the public interest that most government actors accept. On the contrary, they were more likely to be influenced by the pressure on private businesspersons to act in their own self interest.

266. *See* FTC v. Ticor Title Ins. Co., 504 U.S. 621, 639 (1992); Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397, 401-02 (9th Cir. 1991) (observing that a clear articulation is more likely to be found where a statute address a naturally monopolistic industry (e.g., electricity, water, cable TV) than where a statute addresses a traditionally competitive industry, because regulation is commonly viewed as superior to competition in naturally monopolistic industries).

situations in which resolution of the self interest question would not conclusively determine the outcome of the decision. For example, the results of a legislature's consideration of campaign finance, term limitation, or franking privilege reform are presumptively altruistic under the traditional view of the legislative process despite the economic self interest of the legislators and the obvious effect of that interest on their deliberations. In other instances, private parties with no political accountability make altruistic decisions contrary to their financial interest.[267] For example, an investor-owned utility could call for conservation measures, or a group of doctors could recommend that their patients eat a healthy diet.

Existing antitrust state action doctrine is thus superior to the proposed alternatives at least in the sense that it admits that the distinction between selfishness and altruism turns on alterable social policy choices that influence, but do not dictate, the decisions of both public and private actors. No inevitable pattern of human behavior is presumed.

The flexible standard articulated by existing antitrust state action doctrine trusts the experience and intuition of judicial decisionmakers to differentiate between altruistic/public and selfish/private decisionmakers. Without relying on an objective rule (because none exists) current doctrine identifies the situations in which an actor is likely to make selfish or altruistic decisions by drawing on judicial intuition about how individuals make decisions within the existing legal regime in the United States today.

Judicial attempts to use intuition and flexible guidelines to grapple with social life as it is may be formally indeterminate, but they may nonetheless lead to relatively predictable and

---

267. The following example from a popular children's story makes the point so well that I couldn't leave it out:

> The next day, Mason Mintz came down the alley. 'I want your doodle flute,' Kevin Spoon said. 'I know you do,' Mason Mintz said. 'I offered you all my stuff for it.' 'You did.' 'But you won't trade.' 'I won't.' 'And you won't sell it for money.' 'That's right.' 'If I asked you to give it to me, would you?' 'Ask me and see.' 'Mason Mintz, will you give me the doodle flute?' 'Yes.' 'You will?' 'Sure.' Mason Mintz gave Kevin Spoon the doodle flute. 'I don't understand,' Kevin Spoon said. 'What don't you understand?' Mason Mintz asked. 'Why are you giving me this? You wouldn't trade for all my stuff.' 'That's just the kind of guy I am,' Mason Mintz said, and walked away up the alley, wearing his plaid hat.

DANIEL PINKWATER, DOODLE FLUTE 24-26 (1991).

substantively better results than those produced by applying formally clear and objective rules. To the degree that these clear and objective rules are designed to operate in a fictitious world where government and private actors make decisions with reference only to their own self interest, they will operate quite poorly in the real world.[268]

2. The Response to Likely Criticism

Prior criticism of antitrust state action doctrine suggests two obvious normative criticisms of the status choice interpretation of that doctrine. First, viewing the role of the citizenry as merely selecting representatives to act in the public interest may strike some as elitist and undemocratic. Second, the role of government actors as striving to serve the public interest may seem incredibly naive in light of big money politics and strong-arm lobbying. Although both criticisms have some merit, on balance, the status choice model is superior to the alternatives proposed to date for structuring antitrust state action doctrine.

a. Individual Contribution Is and Should Be Focused Through Non-Political Channels

Those commentators who see current doctrine as aimed at bolstering political participation by the citizenry at large engage in a curious form of popular-democratic nostalgia that has little support in the American constitutional structure.[269]

---

268. Current doctrine recognizes altruism as a basis for decision that is no less privileged than self-interest (i.e., one that can be intentionally chosen by an individual or encouraged by legal and social norms). This approach is superior to the proposed alternatives that rely entirely on self-interested motivational analysis. Real reform of existing doctrine might recognize more clearly that legal doctrine can positively influence the private realm in which individuals serve their self-interest, insouciant of the effects of their actions on others. For example, individual economic actors could be encouraged to view their role as contributing to the fulfillment of social needs to the best of their ability. Markets would still serve an allocative function, and successful participants would continue to receive greater benefits, but the driving force would be social responsibility rather than individual remuneration. Absent empirical evidence that people will act selfishly in spite of the structure of the social and legal system, there is no compelling reason why social and legal influences could not be based on such a definition of private social role rather than the pursuit-of-self-interest definition that is invariably assumed by economic analysis. *See generally* Thomas C. Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127 (1984) (outlining the role of structuralism and post-structuralism in legal analysis).

269. *See* EPSTEIN, *supra* note 245, at 30 ("The Constitution clearly does not endorse any version of popular democracy . . . .").

The citizenry in the United States has never been actively involved in run-of-the-mill government decisions, and there is reason to wonder whether real involvement is even theoretically possible in modern society.[270]

We tend to remember the big issues—war, depression, impeachment—and recall how they swung elections because the people adopted strong views one way or the other. Even on these issues, however, it is likely that the citizenry was overwhelmingly ignorant of what their representatives were actually debating. On matters of more mundane economic regulation, it is pure fantasy to think that any sizable percentage of the population would spend even a minimal amount of time considering the issues handled by legislators and regulators. These observations are not premised on some elitist notion that citizens are incapable of adequately educating themselves and thus require the oversight of an educated governing class. Most people simply have better things to do. While most citizens are upset by electric rate increases, they are willing to leave the details of utility administration to the state public service commission, and trust it to regulate rates in the public interest.

Some people do inform themselves about particular issues and advocate on behalf of others. Examples include Nader's Raiders, the Sierra Club, and the National Rifle Association. These representative groups convey their message to government actors while simultaneously informing their fellow citizens of problems in the political process. Instead of directly gathering information on policies and candidates, citizens can rely on informed groups of this type.

If a representative citizen group can act altruistically in the

270. *See* McGowan & Lemley, *supra* note 1, at 337 ("the consumer's search for wealth maximization is likely to make him rationally ignorant of much in the public sector"); Michelman, *supra* note 42, at 1506 ("Perhaps the answer is that republican constitutionalism as I have presented it is just not possible any more, or for us: either not at all (that is, its possibility depends on false or incredible assumptions about social facts), or only on conditions of social ordering or control that are too onerous or repellent to accept"; it may "depend on the existence of a normative consensus that can hardly survive the diversification of the political community by inclusion of persons of widely and deeply differing experiences and outlooks");Michael Zuckerman, *Charles Beard and the Constitution: The Uses of Enchantment*, 56 GEO. WASH. L. REV. 81, 95-100 (1987) (questioning the possibility of an "informed active citizenry['s involvement] in the political process" in modern society).

interests of others, however, those who are elected or appointed to fulfill government roles can as well. The status choice model assumes that those who choose to serve in government assume the duty to work in the public interest on behalf of the entire citizenry. Moreover, within government, but not necessarily in private representative groups, principles of separation of powers and co-sovereignty help guard against the abuse of power.

Other commentators look to the citizenry as a body that guides government through preference expression by voting rather than through more active political engagement. The formal possibility of a system of social decision that works this way is at best a matter of debate.[271] Even if it were formally possible, in reality, individuals likely cast most votes ignorant of the overwhelming majority of the issues that those being selected for office will confront. In a very general sense, the electorate is expressing preferences, but to say that representatives can directly translate these expressions into economic regulations is to indulge in pure fantasy. Even up/down votes on single issues are plagued by the problem of judging the strength of preferences and are only meaningful on the most highly charged issues. What individuals can meaningfully do in an election, aided by information disseminated by the candidates, is express the community's belief that a certain candidate will best serve the public will.

This vision of a citizenry unwilling to engage the political issues of the day and unable to meaningfully express preference through voting is not a cynical one. Individuals can do more good through their private affairs than they can through concerted political engagement. Economically, doing productive work in one's chosen field creates benefits for society at large.[272] But that's just the beginning. Individuals have the capacity to create beauty, alleviate sadness, and share experience, friendship, and love with those around them every

271. In discussing the problem of counseling public officials "to implement the values of other citizens as given by some rule of collective decision-making," Kenneth Arrow concludes "that no consistent social ordering could be found to serve as a criterion of social choice in the counseling of the official in question." KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 107 (John Wiley & Sons 2d ed. 1963) (1951) (quoting and agreeing with Samuel Bergson, *On the Concept of Social Welfare*, 68 Q. J. ECON. 233, 242 (1954)).

272. *See* Posner, *supra* note 38, at 132.

single day. Individuals exploiting this capacity bring a measure of joy to their world that arguably dwarfs the good they might do through actively debating economic and regulatory issues.[273]

b. The Role of the Legislator

Perhaps the most serious criticism of current doctrine takes aim at the assumption that public actors truly seek the public interest. Most commentators see today's government actor as overly influenced by special interests and beholden to campaign contributors. Consequently, a theory predicated on the notion that government actors invariably seek the public interest rather than their own self interest appears naive.

But the status choice model on which antitrust state action doctrine is based does not rest on this naive assumption. The model recognizes that government actors will sometimes seek to serve their own interests at the expense of the public at large, but it characterizes that self-interested conduct as deviant and potentially subject to sanction under appropriate criminal or civil laws. Once a law is enacted it is considered to be *in the public interest,* regardless of the motivation of particular government actors.

The status choice model does reject the notion that our legal rules ordering economic regulation must assume that government actors pursue their own self interest, because the model recognizes that public actors are capable of adopting a public-spirited character. The contrary assumption that we must assume self-interested behavior is a cynical and

---

273. If altruistic behavior is possible, why not demand it always? To be sure, there is a strain of traditional republican thought that sought to do just that, to have each member of a society strive in a political realm to serve the public good. Hanna Pitkin wrote:

> Only in public life, can we jointly, as a community exercise human capacity
>
> ....
>
> . . . [A]n entire community consciously and jointly shaping its policy, its way of life . . . . [O]nly in public citizenship can we jointly take charge of and responsibility for those principles.
>
> . . . As long as we live only by habit or tradition, unaware that they mask an implicit choice, there is something about ourselves as actors in the world that we are not seeing and for which we are not acknowledging our responsibility.

Hanna Pitkin, *Justice: On Relating Private and Public,* 9 POL. THEORY 327, 344-45 (1981).

paralyzing view of politics that admits of no solution. As discussed above, a call for political engagement by the citizenry at large is unrealistic and probably undesirable. We must find a way to make representative government work without transforming the citizenry into a watchdog army perpetually focused on the missteps of their representatives.

Some antitrust state action commentators seek a solution through a structural view of government patterned on the market that would enable representatives to serve their own self interest yet still serve the public interest. This approach assumes that legislators want to be re-elected and will selfishly seek votes to ensure that re-election. The pluralist account of the representative assumes that the self-interested motivation to seek votes will lead the representative to sum the preferences of a constituency and act accordingly. Putting aside the difficulty of individuals expressing preference through up/down votes, a representative could not possibly know how to interpret and sum the preferences that were expressed. Perhaps they could look to polling data, letters, or e-mails, but that information is incomplete, subject to manipulation, and difficult to determine.

Because of the uncertainty inherent in any attempt to sum constituent value choices and reflect them in legislative behavior, this view of the representative presents little real restraint on governmental behavior. Conversely, the status choice model includes the assumption that representatives will seek to determine the public good through debate and exploration. The requirement that regulatory measures be justified with reference to a coherent conception of the public good has a disciplining effect on policymaking.[274]

In the end, the notion that government actors recognize that choosing a life in public service comes with a duty to serve the public interest is as realistic as any other. To be sure, money plays an important role in politics and representatives must fund their election campaigns, but those representatives need not allow their contributions to affect their governing decisions. Moreover, the theory of funding campaigns through contributions has always assumed that separation of this type is possible. Contributions are no different than votes. They are

274. *See* Sunstein, *Interest Groups*, *supra* note 44, at 83-84.

ways to help ensure that a representative will be elected who will act in the public interest. One can debate whether contributions from certain sources may distort the candidate selection process, but one must accept that individuals have the ability to separate governance from fundraising.

IV. CONCLUSION

This Article first shows that the status choice model coherently explains antitrust state action doctrine, positing a social structure in which government actors are supposed to act in the public interest, subject to checks imposed by the separation of powers and dual sovereignty, and private actors are supposed to act in their own self interest, subject to check by certain background legal doctrines including antitrust. The doctrine relies on intuition, but nonetheless is as effective as any of the other proposed alternatives for deciding when conduct pursuant to state regulation should be exempted from the scope of the federal antitrust laws.

Second, this Article contends that prior commentators on antitrust state action doctrine have applied the simplifying assumption of self-interested motivational analysis to government actors in order to demystify the law. They fail in that effort, because the rules they design to govern in the hypothetical world they create work poorly in the real world. More importantly, the process of analyzing law based on undesirable assumptions about human behavior may impose a significant cost. As more mainstream legal analysis unreflectively incorporates the assumptions underlying motivational analysis, the possibility of resuscitating alternatives such as the status choice model becomes ever more remote.

In the area of antitrust state action, the status choice model is an alternative to self-interested motivational analysis that lies just below the surface of mainstream legal doctrine. Struggling to explore its implications is harder than applying well-formulated motivational analysis, but the assumption that the pursuit of self interest is our only option is an unfortunate surrender.