ARTICLES

ANTITRUST IMMUNITY: STATE ACTION AND FEDERALISM, PETITIONING AND THE FIRST AMENDMENT

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In recent years, the United States Supreme Court has focused increasing attention on two doctrines that provide immunity from antitrust liability for certain anticompetitive activity: the state action doctrine and the petitioning immunity doctrine (sometimes known as the Noerr-Pennington doctrine, after the two cases that established it). These doctrines have been the subject of seven Supreme Court decisions in as many years. In spite of (or perhaps because of) the Court's numerous recent decisions, there remains a great deal of confusion about the source and the scope of these doctrines. This Article attempts to clarify both doctrines.

The Supreme Court and a number of commentators contend that the antitrust immunity doctrines are the product of statutory interpretation of the antitrust laws themselves. The Court contends that petitioning and state action are "essentially dissimilar" to the types of business activity the antitrust laws were designed to regulate. This Article disagrees. Both petitioning and state action present precisely the sorts of problems with which the antitrust laws are concerned—exploitation of consumers through the charging of supracompetitive prices.

To determine the source of antitrust immunity, the Court must look beyond the antitrust laws to the constitutional principles that are implicated by the doctrines. For the state action doctrine, the constitutional principle at stake is largely one of federalism, and the more general democratic principles embodied in the Court's non-delegation jurisprudence. For the petitioning immunity doctrine, the First Amendment protection of speech and petitioning provides the relevant principles. After examining the source of the antitrust immunity doctrines,

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this Article considers the appropriate scope of those doctrines in light of the constitutional principles at issue.

INTRODUCTION

Arizona state Senator Manuel Pena is a man with a firm grasp of reality. The Bank of America was on its way to completing its purchase of Security Pacific Bank, which threatened to consolidate ownership of over thirty percent of the deposits in Arizona in the hands of one bank. Senator Pena declared that the Arizona legislature would prevent the acquisition by amending the state's antitrust laws to prohibit sole ownership of over thirty percent of the deposits in the state. He had not heard that the Bank of America was divesting itself of enough Arizona deposits that it would own only twenty-nine percent, but the news did not throw

him. The state would just drop the cap to twenty-five percent, he said. In Pena's words, "The Senate giveth, and the Senate taketh away."[1]

Senator Pena has it right. State and local governments have enormous power to rearrange the competitive landscape in almost any field. That power, the circumstances in which it may be exercised without interference from the federal antitrust laws, and the manner in which constituents may seek to have that power exercised in their favor, are the subjects of this Article.

Antitrust is about competition—what practices are competitive, what practices impermissibly restrain competition, and how to tell them apart.[2] The rules dividing permissible methods of competition from impermissible restraints are reasonably clear in many cases. A firm can set its prices with an eye to its competitor's prices,[3] for example, but it cannot agree with its competitor what those prices should be.[4] Some practices are closer to the line than others, but the debate is at least well-defined. Whether vertical nonprice restraints are illegal per se or are subject to the rule of reason may never be settled for the commentators,[5] for example, but the ground they are arguing about is fairly clear.[6]

There are many ways to compete, and there are at least as many ways to restrain competition. One of the ways a firm can compete is by asking the government to confer a benefit on the firm or to impose a burden on its competitors. Firms compete in this political "market" for economic benefits they cannot otherwise get in economic markets. This political market has both legal and economic significance, but its competitive processes differ in many important respects from the processes in eco-

1. *Arizona Bill Targets B of A*, S.F. CHRON., Feb. 19, 1992, at B1 col. 4.

2. On this point, courts and commentators agree. *See, e.g.*, National Society of Professional Engineers v. United States, 435 U.S. 679, 697 (1978) (invalidating under the Sherman Act a canon of professional ethics that makes competitive bidding unethical); RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 23-24 (1976) [hereinafter POSNER, ECONOMIC PERSPECTIVE].

3. *See* In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 906 F.2d 432, 444 (9th Cir. 1990). Of course, price interdependence may in some cases be evidence of a conspiracy, which is illegal. *Id.* at 446-50.

4. To do so would constitute horizontal price fixing, which is illegal under section 1 of the Sherman Act, 15 U.S.C. § 1. For a full discussion of the issues raised by such practices, see, *e.g.*, PHILLIP AREEDA & LOUIS KAPLOW, ANTITRUST ANALYSIS 187-275 (4th ed. 1988).

5. The Supreme Court, however, has had its say. *See* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) (evaluating vertical territorial market division under the rule of reason).

6. *Compare* LARRY SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 399-431 (1977) *with* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 280-298 (1978) [hereinafter BORK, ANTITRUST PARADOX].

nomic markets. Companies that turn to the political markets to gain a competitive advantage almost always do so in order to achieve an anticompetitive result. If they could achieve the same result legally in the market—through innovation or more efficient management, for example—the company would do so and save the costs of transacting with the government.[7]

To choose a not completely random example, if a raisin grower wanted to join together with his competitors and pool their output to stabilize (raise) prices, the grower would be liable under the Sherman Act.[8] If the raisin growers collectively lobbied the government to set up their cartel for them, however, their conduct probably would not subject them to antitrust liability.[9] This would be so even though the growers could reap profits above both the market price and the private cartel price by obtaining a governmental imprimatur on their actions. This immunity from antitrust liability, and the attendant supracompetitive profits, are the results of the antitrust "state action" doctrine.

The political market also differs from economic markets because the rules of the game in the political market have a constitutional spin to them. In a democracy, citizens are supposed to communicate their wishes, anticompetitive and otherwise, to their representatives, who are supposed to respond. However badly this might break down in practice, in theory it is "the essence of self-government,"[10] and is by and large protected by the Speech and Petition Clauses of the First Amendment. But petitioning, in and of itself, can have dramatically anticompetitive effects, even if the petitioning is unsuccessful. Firms may waste scarce resources lobbying the government to ban a new product rather than develop a competitive product of their own. If many firms do so, the value to the consumer of a new product or a new competitor may be completely wasted through the expenditures used to fight the new development. Such effects are com-

7. In addition, firms may compete for political benefits out of fear that their competitors will get those benefits instead and unfairly exclude them from the economic market. Thus, the incentives to seek government benefits involve denying those benefits to others as well as obtaining them for oneself. *See infra* note 353.

8. These are the facts of Parker v. Brown, 317 U.S. 341 (1943), the Supreme Court's first look at these problems. *Parker* is discussed more fully *infra* notes 33-51 and accompanying text.

9. *Id.* at 351-52.

10. Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) (holding that state libel laws cannot punish true statements about public officials).

pounded when a petitioner succeeds in obtaining the assistance of a state or local government in implementing its plan.

Thus, a statutory preference for competition may conflict with a constitutional mandate for self-government and freedom of speech. Stated this way, the solution to the problem sounds easy. In any conflict between a constitutional provision and a statute, the Constitution must prevail. Unfortunately, the Supreme Court's treatment of this problem in a series of cases beginning with *Eastern Conference of Railway Presidents v. Noerr Motor Freight,*[11] has created needless confusion because the Court has nominally grounded its decisions in the antitrust laws instead of the Speech and Petition Clauses of the First Amendment.[12] We thus have the antitrust petitioning immunity doctrine, which holds the antitrust laws do not apply to firms' petitioning activity, even if the petitioning itself has anticompetitive effects and is not protected by any constitutional provision.[13]

The state action and petitioning doctrines have some important things in common. First, both doctrines deal with important questions involving the relationship between government and its constituents. For example, if a small group of constituents wants the government to transfer wealth to it from other constituents using a restraint of trade as the mechanism, is that permissible? Under what circumstances is it permissible, and what methods may the group use to obtain the transfer? The Supreme Court's current answer is that there is no antitrust problem. As stated in *City of Columbia v. Omni Outdoor Advertising, Inc.*,[14] at least with respect to requests directed at state legislators or those vested with state authority, the antitrust immunity doctrines "are complementary expressions of the principle that the antitrust laws regulate business, not politics; [*Parker*] protects the States' acts of governing, and [*Noerr*] the citizens' participation in government."[15]

That the antitrust laws "regulate business, not politics" is a truism supported only by the Court's repeated recitations. This Article will attempt to show that the Court's opinion in *Omni,* which reflects the Court's consistent statement of the doctrine in both state action and petitioning cases, implies two things that are not

11. 365 U.S. 127 (1961).
12. *Id.* at 135-36.
13. *See infra* notes 333-38 and accompanying text.
14. 499 U.S. 365 (1991).
15. *Id.* at 383.

true: First, that in the cases arising under *Parker* and *Noerr* there is a meaningful difference between politics and business and, second, that such a distinction, were one to be made, could be based on antitrust principles. In reality, both petitioning and state action may have severe anticompetitive consequences for consumers, and both legislators and constituents may behave in ways more commonly associated with Wall Street than with Pennsylvania Avenue.

There is an additional similarity between the doctrines, which helps to explain the confused state of the cases. The Court decided *Parker* and *Noerr* using a common methodology. In both cases the Court noted that the issue before it presented a potential conflict between important constitutional principles and strict adherence to the antitrust laws.[16] In both cases the Court construed the antitrust laws so as to avoid the conflict, implicitly following a principle most famously enunciated in *Crowell v. Benson*[17] and *Ashwander v. Tennessee Valley Authority*.[18] In *Parker*, the Court said that "[w]e find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."[19] In *Noerr* the Court expressed the same thought more clearly, declining to apply the Sherman Act to the conduct before it in part because "[t]he right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms."[20]

The Court's avoidance tactic has created doctrinal confusion. Because the Court said in *Parker* and *Noerr* that it was construing the antitrust laws, albeit in light of substantive constitutional principles, subsequent students of those opinions, judicial and otherwise, have focused their attention on the antitrust laws.[21] This Article contends that those who look to the antitrust laws for answers about state action and petitioning immunity are looking in the wrong place. The Delphic simplicity of the Sherman Act offers no answers to the very ambiguous questions these cases present. Simply put, when the Court construes a statute to avoid

16. *Noerr*, 365 U.S. at 138; *Parker*, 317 U.S. at 350.

17. 285 U.S. 22, 46 (1932) (holding that statutes are to be construed to be consistent with the Constitution if possible).

18. 297 U.S. 288, 341 (1936) (Brandeis, J., concurring) (holding that the Court should not rule on constitutional questions if the issue can be avoided).

19. Parker v. Brown, 317 U.S. 341, 350-51 (1943).

20. *Noerr*, 365 U.S. at 138.

21. *See infra* notes 67-107 and accompanying text.

a conflict with a constitutional principle, one must look to the scope of that principle for the answer to the question whether the statute applies. For if the principle applies, the statute will not.

Thus, in the state action cases, an explanation for the Court's cases and the development of the doctrine must be found in substantive principles of governance expressed in the Court's respect for the role of the states in our federal system and in principles analogous to the famous non-delegation doctrine, which has enjoyed a quiet renaissance in one line of the antitrust state action immunity cases.[22] The Court must draw a line between state action that in some meaningful sense represents *governance* and state action that more closely resembles the legislature brokering benefits from one group of constituents to another.[23] Public choice theory assists this analysis by providing a model of legislative behavior against which the Court's somewhat poorly articulated notions of federalism may be tested. The line between governance and brokering is of course unclear, but there is a distinction to be made here. The first point is that the distinction is made using principles of federalism, not antitrust.[24]

The Court's present line between brokering and governance is oddly formed and oddly placed. The Court has created a formal rule under which direct acts by a state legislature (or a local legislature acting with state authority), such as passing a law that itself

22. *See infra* notes 236-299 and accompanying text.

23. *Id.*

24. To address an obvious first objection, we note at the outset that the inquiry we advocate here is not the search for "traditional governmental functions" that so vexed the Court in the cases between National League of Cities v. Usery, 426 U.S. 833 (1976) (striking application of minimum wage and maximum hour provision of Fair Labor Standards Act to state governments), and Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) (holding that Congress may require state and local government employers to pay overtime wages under Fair Labor Standards Act). The approach we advocate in this Article is not concerned with identifying areas reserved to the states to regulate. Rather, the approach we advocate seeks to ascertain whether a state is actually governing, as opposed to bartering its power to immunize an anticompetitive program, without regard to the scope of the states' power to govern. The Court should be indifferent to the states' policies so long as it is assured that there are policies at work and that they belong to the state.

Similarly, the approach we advocate is constitutional in the sense that it is based on general principles of governance, not on the Supremacy Clause. The vague contours of the Sherman Act do not easily lend themselves to Supremacy Clause analysis. The analysis might be different with a more specific federal statute. Certainly a federal statute that regulated the ability of municipal utilities to control access to electric power on the part of neighboring utilities who were potential competitors would be more likely to prevail against a state action immunity argument than would a general federal mandate that competition is good.

restrains competition or granting an exemption from regulation, are immune from scrutiny. *Omni* is the best example of this rule, which, as the Court stressed in that case, is based on the fear that state and local legislation would be "chilled" by the prospect of antitrust liability.[25] By contrast, the Court has repeatedly held that "indirect" state acts, such as allowing private firms to set a rate schedule that becomes effective unless the state vetoes it, are not entitled to antitrust immunity.[26] Acts are "indirect" for the Court's purposes when the state involvement is merely a "gauzy cloak" for a system of private restraints.[27] As a practical matter, the Court employs techniques similar to the reasoning underlying the nondelegation cases (such as *Panama Refining Co v. Ryan*[28]) to determine whether the state has delegated its governing authority to a private party.[29] If so, the restraint is deemed indirect and is not immune from antitrust scrutiny.

In the petitioning cases, the Court has recently set forth some fairly clear ground rules for "petitioning" of courts and administrative agencies,[30] but these rules (and the rules governing immunity for petitioning in other fora) lack conceptual coherence. This conceptual deficiency exists because the basis for the rules emerging from the petitioning cases is even more vague than in the state action cases. The Court is clear that it does not want to encroach on the First Amendment rights identified in *Noerr* and elaborated in later cases.[31] But the Court has not used First Amendment principles in defining the scope of the doctrine. The scope of petitioning immunity has been broader than would be justified by the First Amendment. The result has been a doctrine developed solely by the desire to avoid a problem—trampling upon First Amendment rights—without reference to a theory that tells us when that problem arises or why. Without such a theoretical basis, there is no way to say that the result in a given case was right or wrong, and there is no theoretically sound way to predict, *ex ante*, what actions will and will not receive im-

25. *Omni*, 499 U.S. at 382.

26. *See, e.g.*, Federal Trade Comm'n v. Ticor Title Ins. Co., 112 S. Ct. 2169 (1992); Southern Motor Rate Carriers Conf. v. United States, 471 U.S. 48 (1985); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

27. *See, e.g.*, California Retail Liquor Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105-06 (1980).

28. 293 U.S. 388 (1935).

29. *Id.*

30. *See, e.g.*, Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., 113 S. Ct. 1920 (1993).

31. *See infra* notes 325-332 and accompanying text.

munity. In the state action cases, the Court at least relies expressly on principles of federalism, even if it has not defined what those principles are. The petitioning cases have no such intellectual foundation.

Principles of substantive First Amendment law should dictate the results in the petitioning cases. Petitioning in and of itself can have substantial anticompetitive consequences. There is thus no basis for the contention that petitioning is not the kind of conduct with which the antitrust laws are concerned. The only reason for exempting petitioning activity is that the Constitution takes precedence over the antitrust laws. It follows that when the First Amendment protections of speech and petitioning are inapplicable, anticompetitive petitioning activity should be subject to antitrust liability, assuming the substantive requirements of antitrust law are met. The Court's treatment of petitioning immunity should follow First Amendment doctrine. Previous petitioning cases should be modified or rejected to the extent they are inconsistent with First Amendment principles.[32]

The Court is correct in one respect—*Parker* and *Noerr* do have much in common. The similarities, however, are not found in the antitrust laws and have nothing to do with a search for an illusory distinction between politics and business. Rather, both doctrines work at the intersection of antitrust and governance. The contours of both doctrines should be determined by the fundamental goals and values of democracy in our constitutional system. These constitutional principles will necessarily constrain enforcement of the antitrust laws. Conversely, the antitrust laws should be constrained only to the extent dictated by these principles.

I. The Development of Antitrust Immunity

A. *Parker v. Brown*

We begin the discussion of both doctrines where the Court began it—in 1943, with the case of *Parker v. Brown*.[33] *Parker* dealt with the validity of the California Agricultural Prorate Act,[34] a

32. Of course, if a state action was inconsistent with the First Amendment it would be unconstitutional. The inconsistencies we discuss in this Article involve the Court and others giving more protection to anticompetitive activity than the First Amendment can provide.

33. 317 U.S. 341 (1943).

34. Act of June 5, 1933, ch. 754, 1933 Cal. Stat. 1969.

period piece of state legislation governing the California raisin industry, enacted in the 1930s and modeled on the Agricultural Adjustment Act that had been declared unconstitutional[35] and then reenacted as President Roosevelt and the Court fought over the New Deal.[36] According to the Court, "almost all the raisins consumed in the United States, and nearly one-half of the world crop," were produced in the quaintly-named Raisin Proration Zone No. 1.[37] Times, it will be recalled, were hard in the 1930s, and raisin producers were threatened with the loss of their business as they accumulated large crop surpluses and prices plummeted.[38] To protect the raisin growers, California decided to allow them to form a cartel to reduce raisin output, and to throw the state's enforcement authority behind the cartel.[39]

More specifically, the Act allowed producers in a given region to request the formation of a government committee—composed, not incidentally, of the raisin producers and packers themselves[40]—which would propose a plan for reducing output (and therefore increasing prices). Once devised, a committee's plan was presented to the California Agricultural Prorate Advisory Commission, which could modify or reject it. Whatever the Commission did was then sent out to the producers themselves, who voted on it. The producers thus had the final say on whether a restriction would be adopted by the state of California.[41] Not surprisingly, the result in Raisin Proration Zone No. 1 was that 70% of the raisin crop was taken off the market.[42]

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35. United States v. Butler, 297 U.S. 1 (1936).

36. Good descriptions of the history of the Prorate Act may be found in Paul R. Verkuil, *State Action, Due Process and Antitrust: Reflections on Parker v. Brown*, 75 COLUM. L. REV. 328, 331-33 (1975); John S. Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 716-19 (1986) [hereinafter Wiley, *Capture Theory*].

37. *Parker*, 317 U.S. at 345.

38. *Id.* at 364. In fact, some producers were selling raisins at prices below the cost of production. *Id.* at 364 n.10.

39. *Id.* at 346.

40. *Id.* at 346. The Act provided that committee members would be chosen by raisin growers and packers, presumably from their own ranks. *Id.*

41. *Id.* at 347. This feature of the Act has been consistently ignored by the Court and by commentators seeking to reconcile *Parker* with later state action cases. *See, e.g.*, California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 104 (1980) (claiming *Parker* turned on "extensive official oversight").

42. All raisin growers in the Zone were required to deliver their goods to the state for inspection. There, all "nonmarketable" raisins were removed. According to the plan, however, at least 20% of the raisins delivered had to be classified "nonmarketable." That done, the state then put fully 50% of the entire crop into a "stabilization pool"—that is, they threw them away. Raisin growers could then market the remaining 30% of their crop, after paying a fee to the state of $2.50 per ton. *Id.* at 347-48.

One might ask why California legislators would pass such a law. After all, more people eat raisins than grow them, so one would think a legislator would prefer to keep raisin prices low.[43] In a perhaps excessively candid preamble to the Act, the legislature provided its answer: "[t]he unreasonable waste of agricultural wealth" occasioned by the overproduction of raisins "is creating chaotic economic conditions in certain agricultural areas of the State of such severity as to imperil the ability of agricultural producers to contribute in appropriate amounts to the support of ordinary governmental and educational functions, thus . . . increasing the tax burdens of other citizens for the same purpose."[44] In other words, raisin prices were down, so the raisin growers were making less money and the legislature was receiving fewer tax dollars.

Leaving aside the entire idea that raisins were being "overproduced,"[45] the state's asserted reason for raising raisin prices—to be able to collect tax revenues from raisin growers—smacks more of fiscal self-interest than of a genuine concern for the public welfare. The state's justification was particularly troubling because ninety to ninety-five percent of the raisins grown in California were sold outside California.[46] Thus, the overwhelming majority of the higher prices charged by the raisin cartel would be paid by consumers in other states, who had no say over whether California legislators remained legislators from year to

43. This intuitive statement is wrong. Even if the majority of the raisins were sold in California, consumers would have had a tough time fighting the Act because of free rider problems. There are many consumers, each paying a slightly higher price for raisins because of the Act. There are far fewer raisin growers, each reaping a relatively substantial benefit from the Act. Under these circumstances, growers are far more likely than consumers to act collectively to influence the legislature. Each consumer rationally is unwilling to bear the costs of petitioning by herself, and will wait for someone else to do her job for her.

Consumers might try to get around this problem by banding together, so that each bears only part of the cost. But, as Mancur Olson and countless others have shown, such efforts are largely doomed to fail. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 127-28 (1971). Someone must bear the cost of organizing, as well as her share of the cost of petitioning. Potential organizers are at least as likely to free ride as potential petitioners.

44. 1933 Cal. Stat. 1969, § 1.

45. If farmers truly were losing money growing raisins, they might have shifted their land to a more profitable crop or, if that were not possible, ceased to be farmers. From the farmer's perspective, this economic answer is undeniably harsh. On the other hand, so was California's solution—raising food prices across the country in the midst of a depression. In any event, California seems to have been less concerned about overproduction of raisins—a problem which would have taken care of itself, particularly if raisin growers were pricing below cost, as the Court suggested—than it was about ensuring the continued employment of too many raisin growers.

46. *Parker*, 317 U.S. at 345.

year. One could view the Act as a deal between raisin growers and the state to bilk consumers nationwide and split the take—the state's cut coming from the increased tax revenues it admittedly wanted to collect. California consumers would be less likely to object to the Act, even though they were paying higher prices for raisins, if they were benefitting from either decreased tax rates or increased state benefits than they would have had without the cartels.[47]

Perhaps this is too cynical. Perhaps the California legislature's reference to tax revenues meant only that it felt the Act was in the best interests of all (California) citizens. Even if that were the case, however, one cannot avoid some deeply disturbing questions about the propriety of California's actions. As the Act was structured, producers had virtually unlimited control over the cartels. The state merely provided a compulsory enforcement mechanism, which increased the value of the cartel (and its anticompetitive effects) tremendously.[48]

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47. From this perspective, the Act was nothing less than a declaration of interstate trade war. Whatever the merits of the Court's answer to the antitrust question, it seems clear to us that the Court should have found the Act unconstitutional under the Dormant Commerce Clause. The Court's answer to the Commerce Clause argument was unpersuasive, to say the least. The Court first argued that the Act affected raisins before they entered interstate commerce, rendering the Commerce Clause inapplicable. *Parker*, 317 U.S. at 361. This argument is mere sophistry. Following the Court's reasoning, a state could avoid all constitutional limits on its regulatory powers by setting up state purchasing agencies somewhere in the chain of distribution. This statement was particularly baffling coming from a Court that had only a year earlier held that the commerce power extended to regulation of wheat grown and consumed on the same farm. Wickard v. Filburn, 317 U.S. 111 (1942).

The Court was understandably uncomfortable resting on this theory alone. It also concluded that California had adequately balanced "the competing demands of the state and national interests involved." *Parker*, 317 U.S. at 362. In particular, the Court was concerned that the plight of California's raisin farmers "because of its local character and the practical difficulties involved, may never be adequately dealt with by Congress." *Id.* This is nothing less than a rejection of the Dormant Commerce Clause doctrine itself. That constitutional protection loses all force if it is up to the states themselves to determine when they are violating its provisions by discriminating against interstate commerce.

Finally, the Court reasoned that the Act did not discriminate against interstate commerce at all, because California consumers had to pay higher prices as well. *Id.* at 367-68. But the entire point of the Act from California's perspective was that *all* of the benefits remained within California, while *most* of the burdens were shipped out of state. The Commerce Clause has few teeth if the imposition of a small burden on California consumers can save a law which imposes a comparatively huge burden on out of state consumers.

All that being said, *Parker* was, as we have noted, a period piece. The Court had just emerged from an era of striking down New Deal legislation in part on Commerce Clause grounds and it was determined not to go back. *See* Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and Political Process*, 96 YALE L. J. 486 (1987).

48. This is because cartelists have strong incentives to cheat absent a powerful enforcement mechanism. Such cheating destabilizes and eventually destroys most cartels. *See infra* note 122 and accompanying text.

In the end, the state brought one more thing to the cartel—antitrust immunity. Because the state was involved, the Court held that the raisin growers were not liable under the antitrust laws. As the Court put it, "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."[49] While Congress did have that power, the Court was unwilling "lightly" to attribute "an unexpressed purpose to nullify a state's control over its officers and agents."[50] Further, the raisin growers were entitled to ride the state's coattails, immune from antitrust liability, even though the growers proposed, orchestrated, controlled, and stood to benefit from the restrictions imposed by the Act.[51]

B. *Noerr*

Parker implied that if a state was immune from antitrust liability for enacting anticompetitive restraints, one could hardly punish those who asked that such restraints be enacted.[52] *Parker*'s implication regarding petitioning activity was made explicit in *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*[53]

The Eastern Railroad President's Conference was a trade association of East Coast railroad companies concerned about competition from the emerging long-haul trucking industry. Unwilling or unable to compete in the market,[54] the railroad companies jointly funded a massive and rather heavy-handed lobbying and media attack on the truckers, designed to procure protective legislation from the state government.[55] While the railroads did not succeed in their immediate goal—persuading the Pennsylvania legislature to bar heavy trucks from Pennsylvania freeways—they did manage to convince the governor to

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

50. *Id.* at 350-51.

51. *Id.* at 352.

52. On its facts *Parker* went even farther, granting immunity to the private actors who actually controlled the raisin cartel, but that aspect of the opinion has become the victim of selective judicial memory in later cases. *See, e.g.*, California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 104 (1980) (invalidating California's resale price maintenance scheme for wine because it was insufficiently supervised by the state).

53. 365 U.S. 127 (1961).

54. This is perhaps unfair. It is possible that railroads could have competed successfully with trucks (though history would seem to suggest otherwise). Nonetheless, any rational businessman would prefer not to face competition if he did not have to, and the railroad presidents felt they had found a way to avoid competition.

55. *Id.* at 129.

veto legislation the truckers favored. They also managed to convince a number of Pennsylvania residents that heavy trucks were a bad idea.[56]

The truckers sued the railroads, claiming the latter had conspired to restrain trade in violation of Section 1 of the Sherman Act. The truckers prevailed in the district court, but the Supreme Court reversed. It reasoned:

> [T]he Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly. Although such associations could perhaps, through a process of expansive construction, be brought within the general proscription of "combinations[s] . . . in restraint of trade," they bear very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements.[57]

This language appears unambiguous. If it is to be believed, the Court was not immunizing anything. Rather, the Court was simply considering—and rejecting—application of the antitrust laws to a new type of claim: one of anticompetitive restraint through petitioning.

There are a number of problems with this conclusion, which we discuss in detail in Part III. For now, it is enough to note that petitioning activity is often precisely the sort of thing with which the antitrust laws have always (and rightly) been concerned. Perhaps cognizant of the anticompetitive possibilities of petitioning, the Court did not end its analysis there. It continued:

> This essential dissimilarity between an agreement jointly to seek legislation or law enforcement and the agreements traditionally condemned by § 1 of the Act, even if not itself conclusive on the question of the applicability of the Act, does constitute a warning against treating the defendants' conduct as though it amounted to a common-law trade restraint. And we do think that the question is conclusively settled, against the application of the Act, when this factor of essential dissimilarity is considered along with the other difficulties that would

56. *Id.* at 130.
57. *Id.* at 136.

> be presented by a holding that the Sherman Act forbids associations for the purpose of influencing the passage or enforcement of laws.[58]

The Court identified two such "other difficulties" which combined to produce this result. The first difficulty was that "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."[59] Because government is supposed to be responsive to the demands of the electorate, the Court was unwilling to punish the electorate for making those demands. This difficulty was tied directly to *Parker*, which the Court cited in support of its concerns.[60]

The second difficulty the Court identified was the First Amendment right to petition.[61] This difficulty was simply a more specific statement of the general concern about representation. In order to facilitate representation, the Constitution guarantees the right to petition, which may not be infringed by a statute. The Court did not explicitly conduct a First Amendment analysis, however, preferring instead to avoid confronting the "important constitutional questions" that might be raised if it had ruled the other way.[62]

According to this analysis, *Noerr* creates a sort of penumbra around the state action doctrine in which anticompetitive petitioning may take place without antitrust liability. *Noerr* protects not only those private actors who obtain governmental benefits at the expense of their competitors, but private actors who *seek* government action, regardless of whether their petitioning is successful.

This penumbra is a fairly dramatic expansion of the immunity provided in *Parker*. That decision was based on the idea that in a federal system, state legislative choices are entitled to some deference so long as certain conditions are met.[63] Where the state does not act, however, there is no occasion to invoke such deference. *Noerr's* intellectual foundations, while related to *Parker*, are thus conceptually distinct.[64]

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58. *Id.* at 136-37.
59. *Id.* at 137.
60. *Id.* at n.17.
61. *Id.* at 137-38.
62. *Id.*
63. *Parker*, 317 U.S. at 351.
64. This rationale can also be construed as implying that no immunity would obtain for petitioning the government to do something it could not constitutionally do. In a similar

But what if the government, particularly a state government, had no power to restrain trade? What if *Lochner*[65] were still the law of the land, or if the "business affected with a public interest" doctrine of *Munn v. Illinois*[66] was good law? In that event, petitioning the government to dole out some anticompetitive benefit to one's firm would be to seek unlawful state action, because the government would have no power to restrain trade. Should that matter? No. The reason it should not matter highlights a distinction between *Noerr* and *Parker* that cannot be found in the antitrust laws. The First Amendment will, where applicable, protect a citizen from any liability arising out of efforts to petition the government, even if the government has no power constitutionally to give the citizen the relief she seeks. That the right to petition exists apart from limitations, antitrust or otherwise, on the government's ability to respond to petitioning, or the manner in which the government responds, suggests that *Noerr* immunity is based in something other than the antitrust laws.

C. *Immunity After* Noerr—*The Search For A Theory*

The Court has explored the relationship between *Parker* and *Noerr* immunity in two recent cases, which unfortunately do little to clarify either doctrine. In *Allied Tube & Conduit Corp. v. Indian Head, Inc.*,[67] the *Noerr* doctrine was asserted as a defense to anticompetitive activity taking place within a private trade organization. Indian Head made polyvinyl chloride electrical conduit for buildings. According to Indian Head, its conduit was more flexible, less expensive, and less likely to cause short circuiting than steel conduit, which was the industry standard.[68] Electrical conduit is one of the goods covered by the National Electrical Code, promulgated by the National Fire Protection Association (NFPA), a private association of (among others) electrical conduit manufacturers. The National Electrical Code approved of

vein, Justice Scalia wrote in *Omni* that it would be "peculiar in a democracy, and perhaps in derogation of the constitutional right 'to petition the government for a redress of grievances' . . . to establish a category of lawful state action that citizens are not permitted to urge." City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 379 (1991). The *Professional Real Estate Investors* Court similarly relied on the government's power "to take actions that operate to restrain trade." Professional Real Estate Investors, Inc. v. Columbia Pictures, Inc., 113. S. Ct. 1920, 1926 (1993).

65. Lochner v. New York, 198 U.S. 45 (1905).

66. 94 U.S. 113 (1877) (holding that states could regulate businesses that were "affected with a public interest").

67. 486 U.S. 492 (1988).

68. *Id.* at 496.

steel conduit, but not the new polyvinyl conduit. The Code was routinely adopted as law by many state and local governments "with little or no change."[69]

Indian Head therefore had a problem: in a large number of cities, it could not sell polyvinyl conduit without violating local building codes.[70] So Indian Head asked the NFPA to add polyvinyl chloride to the list of materials permitted by the National Electrical Code. Allied Tube, the nation's largest manufacturer of steel conduit and a member of NFPA, was understandably distressed by the prospect of a new source of competition. So it contacted other major steel conduit producers and agreed, in the words of the Court, to "exclude [polyvinyl] from the 1981 Code by packing the upcoming annual meeting with new Association members whose only function would be to vote against the polyvinyl chloride proposal."[71] The steel manufacturers recruited 230 new NFPA members, and paid $100,000 to register them and bring them to the meeting, where they voted down the polyvinyl proposal.[72]

The question in the case was whether such "lobbying" to affect the NFPA's decision was entitled to *Noerr* immunity. Although the NFPA is formally a private association, its electrical code is adopted wholesale, and presumably without detailed (or perhaps any) deliberation, by a majority of state and local governments in the country.[73] According to Allied Tube, this meant that NFPA was "akin to a legislature,"[74] and therefore that Allied's actions were akin to petitioning a legislature. There is something to this argument. Given the detailed nature of the Code and its widespread adoption by cities and states, the NFPA was realistically the only body which could change the laws governing conduit in the United States. The alternative—to lobby each of the fifty states and thousands of municipalities that adopt electrical codes—would hardly be cost-effective. Furthermore, given their

69. *Id.* at 495.

70. Furthermore, many underwriters would refuse to insure buildings not conforming to the Code, even if the local government had not adopted the Code as law. *Id.* at 496.

71. *Id.*

72. *Id.* at 496-97. The vote was 390-394. The new voters were "instructed where to sit and how and when to vote by group leaders who used walkie-talkies and hand signals to facilitate communication." *Id.*

73. For a description of the widespread adoption of the Code, see Indian Head, Inc. v. Allied Tube & Conduit Corp., 817 F.2d 938, 939 n.1 (2d Cir. 1987).

74. *Allied Tube*, 486 U.S. at 498.

demonstrated reliance on the NFPA Code, those governments would likely be unwilling to alter the Code.[75]

The Court was not persuaded. It fashioned a test for petitioning immunity that focused on "the source, context, and nature of the anticompetitive restraint at issue."[76] At least in *Allied Tube,* this meant that the result turned on whether the restraint of trade resulted from government action or private action. It is fair to ask why this should matter. Not only would the result be the same in either case—Indian Head would be unable to sell its polyvinyl conduit—but there is at least in theory legislative (that is, "public") review of NFPA decisions. Even if state and local legislatures were not undertaking a substantive review of the Code standards, there is a good argument that the real restraint on the sale of polyvinyl conduit was the adoption by these governments of the NFPA Code. As the Court characterized (and largely seemed to accept) Allied Tube's argument, "the lion's share of the anticompetitive effect in this case came from the *predictable* adoption of the Code into laws by a large number of state and local governments."[77] Had these governments not adopted the Code—had it been merely advisory—the market could presumably have discounted, at least to some extent, the NFPA's condemnation of polyvinyl conduit.[78] By this view, at least part of the trade restraint resulted from government action.

The Court's response to this argument was to distinguish public from private actors based on the Court's perception of their relative abilities to discern and obtain the public good. As the Court put it, "[w]e may presume, absent a showing to the contrary, that [government] acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or her own behalf."[79] This distinction provided the basis for the Court's decision:

75. This is true for a variety of reasons. First, they may trust the NFPA, as a group of experts, to make the right decision. Particularly if Indian Head had already lost its fight before NFPA, legislatures might be unwilling to second-guess that decision. Second, local governments might see the Code as a default rule, creating a presumption against changes. Finally, it would undoubtedly be difficult to persuade legislators to focus sufficient attention on the rather arcane subject matter at issue to push through a change in the law.

76. *Allied Tube,* 486 U.S. at 499.

77. *Id.* at 502 (emphasis added).

78. Of course, information costs might thwart such a process. It is possible that the cost of obtaining good information about polyvinyl chloride and the flawed NFPA processes would exceed the benefit to be had by using polyvinyl chloride instead of steel.

79. *Allied Tube,* 486 U.S. at 501, quoting Hallie v. Eau Claire, 471 U.S. 34, 45 (1985).

> [T]he decisionmaking body of the Association is composed, at least in part, of persons with economic incentives to restrain trade. . . . [W]here a restraint is imposed by persons unaccountable to the public and without official authority, many of whom have personal financial interests in restraining competition, we have no difficulty concluding that the restraint has resulted from private action.[80]

There is quite a lot to be said about these statements, but two points merit emphasis. First, although billed as a petitioning immunity case, *Allied Tube* is analytically a state action case.[81] Because of the posture in which the case reached the Court,[82] the Court did not decide the question whether the routine, uncritical adoption of the Code by states, and local governments exercising state authority, immunized both the Code and the competitors who had pushed it through.[83] Nevertheless, the Court seemed to assume that adoption of the Code would confer immunity for harm caused by such adoption, regardless of the care (or lack thereof) the legislators exercised.[84] Second, the Court's distinction between public and private decisionmakers rests upon a critical assumption—that the government will serve the public interest. The asserted reason for this assumption is that government officials (who either exercise or delegate power) have to account for their actions to the public.[85] Should their actions stray too far from the public's own conception of its interest, this theory holds, these government officials will rapidly become ex-government officials. We will return to this assumption[86] in some detail in Part II.

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80. *Id.* at 501-02.

81. The court of appeals had concluded that Indian Head had not sought any recovery for harm caused by the adoption of the National Electrical Code by any governmental body, and the Court took that conclusion as a given in its review. *Id.* at 498 n.2. The Court's broad discussion of the relative likelihood that public and private actors would serve the public interest thus seems unnecessary to the Court's decision on the issues before it.

82. *Id.* at 502.

83. If the legislatures had deliberated over the Code, made such changes as they deemed necessary, and otherwise taken matters into their own hands, the Court's conclusion could legitimately have been said to rest on the grounds that the legislators—by actively deliberating over the Code—had "cured" any bias or anticompetitive effect that went into its promulgation. As the record stands, however, that is apparently not what happened. *See id.* at 502-03.

84. At least one circuit court has read *Allied Tube* to say just that. *See* Sessions Tank Liners, Inc. v. Joor Manuf., Inc., No. 92-55085 (9th Cir. February 15, 1994) (defendant immune from liability for misleading standard-setting organization into enacting anticompetitive restriction in organization's fire code).

85. *Id.* at 501-02.

86. Actually, there are several assumptions wrapped up in this one large assumption. First, the Court must assume that the public can know what its own interest is. Second, it

The second case of interest is *City of Columbia v. Omni Outdoor Advertising, Inc.*[87] According to Omni's view of the facts, which were accorded the benefit of any doubt because Omni had won a jury verdict, Columbia Outdoor Advertising had 95% of the market for billboards in the city of Columbia, South Carolina.[88] How Columbia acquired such a large market share was unclear. How it sought to keep it is a different story. According to Omni, "[t]he mayor and other members of the city council were personal friends of [Columbia's] majority owner, and the company and its officers occasionally contributed funds and free billboard space to their campaigns."[89] When Omni entered the market and erected some billboards of its own, Columbia persuaded its friends in government to enact restrictions on new billboard construction that the Court said "severely hindered Omni's ability to compete."[90] Omni sued Columbia Outdoor and the city for violating the Sherman Act by conspiring to restrain trade. A jury agreed with Omni, but the Supreme Court reversed.[91]

Omni's importance lies in the Court's elaboration of the principles of *Parker*, which principles it expressly elevated over the efficiency valued by the Sherman Act. The Court began its discussion with a reference to "the role of sovereign states in a federal system" and a citation to *Parker*.[92] *Parker*, according to the Court, stood for the proposition that "in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators."[93]

In discussing *Parker*, the *Omni* Court made three main points. First, it viewed Columbia Outdoor's inputs into the legislative process—and their effects on the city's decisions—as good. As the Court put it, it is "both inevitable and desirable that public officials often agree to do what one or another group of private

must assume that the public can effectively police government officials. Finally, it must assume that legislators themselves, even if they seek to advance the public interest, can both identify it and effectively promote it.

87. 499 U.S. 365 (1991).

88. *Id.* at 367.

89. *Id.*

90. *Id.* at 368.

91. *Id.* at 384.

92. *Id.* at 370.

93. *Id.* at 374. The Court explained that the City of Columbia, while not a sovereign as far as federalism is concerned, was nonetheless entitled to immunity because its power was delegated to it by the state. *Id.* at 370.

citizens urges upon them."[94] Thus, *Omni* adopts as a partial justification for *Parker* the second reason provided for immunity in *Noerr*—the representative nature of government.[95]

The Court's second point was that the city was not required to adopt efficient policies.[96] As the Court put it, "[t]he fact is that virtually all regulation benefits some segments of the society and harms others; and that it 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."[97] This point is sound, as far as it goes. The question whether government should transfer wealth from A for the benefit of B is a political judgment,[98] and thus given to the legislature rather than to judges or jurors. The point is not very helpful here, however. *Omni* presents a conflict of two legislative preferences—the federal preference for efficiency reflected in the antitrust laws and the city's preference for conferring monopoly profits on Columbia Outdoor. How this conflict is to be resolved depends on the role of federalism in the antitrust laws,[99] a question the Court did not address in any meaningful way. The Court obviously believed that some values are more important than efficiency, and therefore trump the antitrust laws in the case of a conflict. But the Court did not make clear what those values are.

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94. *Id.* at 374.

95. Omni argued that, while this might be true, there is a difference between responsive public officials and co-conspirators. Justice Stevens' dissent echoes this point. In his view, the jury's finding that the city was involved in a conspiracy was enough to remove the case from the scope of *Noerr* immunity. *Id.* at 398 (Stevens, J., dissenting).

96. *Id.* at 377.

97. *Id.* This statement is perhaps a recognition of the economic truth that virtually all government-directed wealth transfers will decrease the aggregate wealth of society, both because they injure the losers more than they benefit the winners and because of transaction costs. *See, e.g.*, A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW & ECONOMICS 105-107 (1983).

98. *But see* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) (arguing that inefficient wealth transfers are constitutionally defective).

99. We must pause here for a moment to ask why the Court is concerned with federalism at all. One can argue that the Supremacy Clause takes care of the whole problem very simply: either a given state action conflicts with the antitrust laws or it does not. If it does, the state action is invalid under the Supremacy Clause. If it does not, one need not talk about federalism—the state wins on the merits of the antitrust claim. Professor Elhauge frames this issue admirably. *See* Einer R. Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 668, 669 (1991) [hereinafter Elhauge, *Antitrust Process*]; *see also* Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23, 24-25 (1983).

Nonetheless, the Court concluded in *Parker* that federalism does matter. *Parker*, 317 U.S. at 362. We will see why in some detail when we return to the issue in Part II. But the short answer to the Supremacy Clause point is that the state federalism interest at issue in the state action cases is of *constitutional* dimensions, and thus must be balanced against the federal interest in operation of its statute without state hindrance. *See supra* note 24.

The Court's third point was that determining whether legislators conspired with private actors would require judges and juries to inquire into the subjective motivation of legislators—to ask whether a legislator actually thought a vote was "in the public interest" when it was cast.[100] The Court found this "the sort of deconstruction of the governmental process and probing of the official 'intent' that we have consistently sought to avoid."[101] This concern was greatly overstated. The Court frequently undertakes to examine subjective legislative intent in the free speech,[102] free exercise,[103] and equal protection[104] areas. That the practice is less common in antitrust cases is not an indictment of such scrutiny *per se,* particularly where constitutional principles are at stake.

Finally, the *Omni* Court touched briefly on petitioning immunity, relying on *Noerr* to distinguish between trade restraints, with which the antitrust laws are concerned, and political activity, with which they are not concerned. Petitioning, the Court reasoned, must be protected because state action is protected.[105] In the Court's words, "it is obviously peculiar in a democracy, and perhaps in derogation of the constitutional right 'to petition the government for a redress of grievances' . . . to establish a category of lawful state action that citizens are not permitted to urge."[106] As noted above, this point cannot serve as the basis for petitioning immunity.[107] The Court's focus on the concept that there must be a dialogue between the government and the governed was appropriate, however. The Article returns to this point in Part III.

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100. *Omni,* 499 U.S. at 377.

101. *Id.* at 377.

102. *See, e.g.,* United States v. O'Brien, 391 U.S. 367 (1967) (sustaining statute prohibiting the burning of draft cards on the ground that the statutory purpose was unrelated to the suppression of speech).

103. *See, e.g.,* Department of Human Resources v. Smith, 494 U.S. 872 (1990) (holding that a law prohibiting use of peyote was neutral and therefore did not violate the Free Exercise Clause as applied to a Native American church member who claimed the right to use peyote in a religious ceremony).

104. *See, e.g.,* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (holding that the Equal Protection Clause prohibits only deliberate attempts by legislators to alter demographic patterns to affect the racial composition of public schools).

105. *Omni,* 499 U.S. at 379.

106. *Id.* at 379.

107. *See supra* notes 30-31 and accompanying text.

II. State Action Immunity As A Federalism Doctrine

A. *Essential Dissimilarity*

Both state action and petitioning the government can have severe anticompetitive consequences. Indeed, many of the very cases that established the immunity doctrines present paradigmatic examples of antitrust violations. This section considers some of the myriad ways in which state action raises anticompetitive concerns.[108] Some of the examples are unquestionably antitrust violations in themselves. Others merely constitute anticompetitive conduct with which the antitrust laws are properly concerned. The two need not be distinguished here. Regardless of whether anticompetitive conduct is itself an antitrust violation, that it is protected by the immunity doctrines proves both of the points to be made: that protected conduct is not "essentially dissimilar" from conduct governed by the antitrust laws, and that the existence of the immunity doctrines has anticompetitive consequences that should be considered in deciding whether to invoke those doctrines in particular circumstances.[109]

Governments act in anticompetitive ways all the time. Indeed, to the extent one considers market ordering to define the true competitive state of affairs with respect to any given product or service, government, which largely redistributes market allocations of resources, is necessarily anticompetitive. Governments from time to time create monopolies expressly by passing laws that prevent more than one company from competing in certain markets. Electric power, gas transmission, and local telephone service are three obvious examples.[110] More recently, cable televi-

108. The anticompetitive characteristics of petitioning are discussed *infra* section III.B.

109. We operate throughout under the assumption that the battle for the "soul" of antitrust, *see* Elanor M. Fox, *The Battle for the Soul of Antitrust*, 75 Cal. L. Rev. 917 (1987), is over, and that the economists (if not the Chicago School) have won. *But see* Eastman Kodak Co. v. Image Tech. Servs., Inc., 112 S. Ct. 2072 (1992); *but see again* Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578 (1993). However, that assumption is not essential to our argument. Readers who believe that the purpose of the antitrust laws is to protect competitors rather than competition, or even to prevent "bigness" in all its forms, as some have suggested, (*see, e.g.*, United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897); Elanor M. Fox & Larry Sullivan, Cases and Materials on Antitrust 33-37 (1989); Robert H. Bork, *The Role of the Courts in Applying Economics*, 54 Antitrust L.J. 21, 24 (1985)(collecting cases and commentators); Victor H. Kramer, *The Supreme Court and Tying Arrangements: Antitrust as History*, 69 Minn. L. Rev. 1013 (1985)), will no doubt find the conduct we describe here equally problematic.

110. *See, e.g.*, Federal Power Act, 16 U.S.C. § 791a et seq. (1988); Natural Gas Act, 15 U.S.C. § 717 et seq. (1988); Communications Act of 1934, 47 U.S.C. § 151 et seq.

sion service has joined the ranks of these "utility" monopolies.[111] Governments also grant monopolies to holders of patents and, to a lesser extent, to holders of other intellectual property rights.[112]

These government-granted monopolies may have laudable social purposes. Utilities, for example, are often cited as paradigm examples of "natural monopolies" in which government regulation is preferable to free competition.[113] Intellectual property rights are designed to promote innovation by giving inventors a reward in the market without suffering competition from copycat firms that did not incur the inventor's start-up costs.[114] But governments need not have such laudable social purposes behind their monopoly grants. The original patent statutes were designed to provide monopolies to friends of government officials, not to promote innovation.[115] Moreover, as the courts have made clear, regulated monopolies still present antitrust issues.[116] Finally, governments often grant monopolies to regulated industries that exceed the scope of the natural monopoly they would have obtained on their own.[117] Monopoly is the very evil the anti-

111. *See, e.g.*, Turner Broadcasting System v. FCC, 819 F.Supp. 32 (D.D.C. 1993), *cert. granted* 114 S. Ct. 38 (1993) (Supreme Court to review constitutionality of 1992 Cable Act, which imposes federal regulation); Community Communications Co. v. Boulder, 455 U.S. 40, 56 (1982) (reviewing Colorado municipality's regulation of cable television).

112. 35 U.S.C. § 154. As commentators have noted, an exclusive right to work a patent does not always (or even usually) translate into a monopoly in a relevant product market. *See, e.g.*, Nat'l Inst. on Indus. & Intellectual Prop., *The Value of Patents and Other Legally Protected Rights*, 53 ANTITRUST L.J. 535, 547 (1985); Mark A. Lemley, Comment, *The Economic Irrationality of the Patent Misuse Doctrine*, 78 CAL. L. REV. 1599, 1627 & n.181 (1990); William Montgomery, Note, *The Presumption of Economic Power for Patented and Copyrighted Products in Tying Arrangements*, 85 COLUM. L. REV. 1140, 1156 (1985). It certainly does so in some cases, however. Other exclusive rights, such as those provided by the copyright laws, 17 U.S.C. § 106, may also create product monopolies in some cases.

113. *See, e.g.*, ROGER D. BLAIR & DAVID L. KASERMAN, ANTITRUST ECONOMICS 66 (1985); DOUGLAS F. GREER, INDUSTRIAL ORGANIZATION AND PUBLIC POLICY 434-36 (1984); LEONARD W. WEISS & ALLYN D. STRICKLAND, REGULATION: A CASE APPROACH 176-77 (1982).

114. *See* Louis Kaplow, *The Patent-Antitrust Intersection: A Reappraisal*, 97 HARV. L. REV. 1813, 1817-18 (1984).

115. *See* Darcy v. Allen, 11 Coke 84b, 77 Eng. Rep. 1260 (K.B. 1603); William L. Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355, 359 (1954); Gary Minda, *The Common Law, Labor, and Antitrust*, 12 INDUS. REL. L.J. 461, 477-79 (1989).

116. *See, e.g.*, Cantor v. Detroit Edison Co., 428 U.S. 579, 595 (1976) (regulated utilities still subject to the dictates of the antitrust laws); Otter Tail Power Co. v. United States, 410 U.S. 366, 373 (1973) (power companies not exempt from antitrust laws); SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1204-06 (2nd Cir. 1981) (patent holders not immune from antitrust scrutiny); United States v. American Tel. & Tel. Co., 524 F. Supp. 1336, 1371-72 (D.D.C. 1981) (successful government antitrust suit against regulated telephone monopoly).

117. *Cantor*, 428 U.S. at 582-84, is a good example. In that case, the state of Michigan endorsed a Detroit Edison "lightbulb-exchange" program. Under this program, Detroit Edison supplies "free" lightbulbs to all its consumers. The light bulbs were free in name only, however. By aggregating the cost of lightbulbs with the cost of power, Detroit Edison

trust laws seek to prevent. Government-granted monopoly may be efficient in some cases, but government power to grant monopolies presents substantial competitive risks, particularly if such grants are immune from antitrust scrutiny.[118]

Governments also will at times form or support private cartels. Unlike regulated monopolies, which are generally imposed for economically defensible reasons, the justifications for government-supported cartels range from dubious to nonexistent. Governments have restricted or eliminated entry in markets ranging from air travel[119] to legal services[120] to raisin farming.[121] The result of such government action is to give cartel participants a legal means to enforce the cartel. This makes cartels much more stable, and further undermines the competitive tendencies of the market.[122] Other government actions may produce similar effects by setting price floors rather than restricting entry. A number of states have passed mandatory minimum resale price maintenance laws that fall into this category.[123] For maximum anticompetitive effect, states may combine price floors with restrictions

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had become a monopolist in the otherwise competitive lightbulb market, and could charge whatever price it wanted for lightbulbs (subject only to regulatory approval).

118. Not the least of these risks is that firms will waste resources petitioning the government for such monopolies. The expenditure of resources to chase inefficient outcomes is itself inefficient, and is properly counted as a cost of monopoly. *See* POSNER, ECONOMIC PERSPECTIVE, *supra* note 2, at 11-12.

119. *See* Civil Aeronautics Act of 1938, 49 U.S.C. § 401 et seq. (repealed 1978).

120. In Goldfarb v. State Bar, 421 U.S. 773, 776-78 (1975), the state of Virginia through the state and local Bar Associations not only limited entry into the legal market, but set a minimum price schedule for legal services. The Court held the fee schedules constituted price-fixing in violation of the Sherman Act. *Id.* at 776-78. Similar government-enforced legal cartels nevertheless remain common in most states.

121. *See* Parker v. Brown, 317 U.S. 341, 350, 359 (1943) and discussion thereof *supra* at section I.A.; *see also* Harold Pfaff, *Organic Farmer Says the State Plows Into Her Field of Dreams,* S.F. DAILY J., Oct. 1, 1993, at 1 (reporting that the San Joaquin Valley Cotton Board, which is dominated by industry officials, sets production limits for cotton in California under state law).

122. Cartels extract monopoly rents by agreeing to reduce total output and raise prices to the monopoly level. Thus, a cartel is more profitable than an oligopoly. GREER, *supra* note 113, at 263. Cartelists have a strong incentive to cheat on the cartel by expanding output, however, because if only one cartel member cheats, it can increase its profits dramatically. *See* BLAIR & KASERMAN, *supra* note 113, at 141-45 (documenting this problem). Cartels are thus inherently unstable because each member has an incentive to cheat first, POSNER, ECONOMIC PERSPECTIVE, *supra* note 2 at 52-54, a result akin to the classic prisoner's dilemma. *See* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 93 & n.3 (1988). A government-sponsored cartel can overcome this problem by using the legal process to enforce the cartel. Cartels with government backing are, therefore, a far more potent anticompetitive weapon than purely private cartels.

123. *See, e.g.,* 324 Liquor Corp. v. Duffy, 479 U.S. 335, 343 (1987); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 386-87 (1951) (both considering such statutes). Rent control ordinances may have similar (albeit less direct) effects. Indeed, the City of Berkeley's rent control ordinance was (unsuccessfully) challenged as illegal price-fixing by the government in cooperation with renters. Fisher v. City of Berkeley, 475 U.S. 260

on entry or production, as California did in supporting its raisin cartel in *Parker*.[124] In any case, the results are undeniably anticompetitive, and the policy justifications (for example, the need for professionalism[125] and to avoid "destructive competition,"[126]) are generally inadequate.

The government also interferes in markets by creating barriers to new entry. Such barriers generally take one of two forms. First, regulatory barriers may prevent new entry, delay it, make it more expensive, or limit its effectiveness. Any state licensing requirement restricts new entry, preventing it in some cases and imposing temporal and financial constraints in all cases. The medical professions are a good example,[127] but states and the federal government require licensing in numerous different industries. Licensing is at its worst when those who decide whether to approve the licenses are themselves competitors in the industry. This practice is quite common in the professions, where competitors are presumably best suited to know whether a potential entrant is "qualified" to enter.[128]

Regulatory "barriers" may also take the form of delays in product approval. Entry into the U.S. pharmaceutical industry, for example, is rendered far less attractive by the presence of the Food and Drug Administration, which may take years to approve a new product for sale.[129] During that time, a new company incurs operating expenses and the costs of pursuing FDA approval, but receives no benefit. The drawn-out FDA process favors both larger firms, which can better afford to pursue such long-term

(1986); *see* John S. Wiley, Jr., *The Berkeley Rent Control Case: Treating Victims as Villains*, 1986 SUP. CT. REV. 157.

124. *Parker*, 317 U.S. at 359.

125. *Compare* Goldfarb v. State Bar, 421 U.S. 773, 792 (1975) (holding that a state is entitled to restrict "demoralizing" competition in the legal profession) *with* National Soc'y of Prof. Engineers v. United States, 435 U.S. 679, 693-95 (1978) (holding that a private group cannot assert a similar justification).

126. *See Parker*, 317 U.S. at 355 ("[t]he declared objective of the California [Agricultural Prorate] Act is to prevent excessive supplies of agricultural commodities from 'adversely affecting' the market," and to "'conserve the agricultural wealth of the state' by raising and maintaining prices.").

127. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483, 486 (1955) (Oklahoma law restricting entry into the eye care market).

128. *See, e.g., Goldfarb*, 421 U.S. at 781 (lawyers' associations regulate entry and set minimum prices for the legal profession); *Williamson*, 348 U.S. at 485 n.1 (board of optometry restricts market entry by opticians); *cf. Parker*, 317 U.S. at 347 (statute entitles raisin farmers to control board regulating raisin production).

129. *See, e.g.*, Reginald Rhein, *BIO Circulates Orphan Drug Proposal on Capitol Hill*, BIOTECHNOLOGY NEWSWATCH, July 5, 1993, at 1 (noting FDA delays and actions proposed to deal with them); James M. Gomez, *Devices Languish in FDA Limbo*, L.A. TIMES, April 30, 1993, at A1 (noting criticism by medical community of multi-year delays at FDA).

benefits, and entrenched firms, which have already-approved drugs in the "pipeline" to help defray costs.[130]

Finally, trade quotas are powerful regulatory barriers in international markets.[131] Unlike tariffs, quotas limit the number of foreign goods of a particular type that may be imported in a given year. Quotas thus pose a powerful barrier to foreign entry, both because foreign market share is artificially limited and because low quotas may deter foreign firms from entering at all or from spending advertising resources on a comparatively small U.S. market.[132]

A different form of government-imposed barrier to entry protects favored firms by raising their rivals' costs.[133] For example, many governments have enacted "prevailing wage" statutes, which require companies to pay a certain wage to their workers.[134] Such statutes protect firms that use higher-priced union labor, at the expense of their non-union competitors and of consumers. The statute that rendered the union conduct immune in *United Mine Workers v. Pennington*[135] was a prevailing wage statute.[136] Tariffs are another good example. Just as a quota served as a partial barrier to entry, so tariffs raise the costs to foreign

130. To be sure, most pharmaceutical companies probably do not think of the labyrinthine FDA process as a "benefit" to them. It is true that they would be able to produce new drugs far more quickly and cheaply absent any regulation at all. Our point, however, is that potential entrants are hurt worse by the FDA rules than existing firms. To that extent, existing firms receive a relative benefit, however diffuse.

131. Barriers to international trade are a venerable political tradition, and are in fact enshrined in the United States Constitution, Art. I, § 8, cl. 1, 3. The significance of such barriers is growing dramatically, however, as the importance of international markets to domestic consumers and industries increases. *See* JAGDISH N. BHAGWATI, PROTECTIONISM 43-50 (1989); Thomas M. Jorde & David Teece, *Innovation, Cooperation, and Antitrust: Balancing Competition and Cooperation*, 4 HIGH TECH. L.J. 1, 33-34 (1989).

132. *See, e.g.*, BHAGWATI, *supra* note 131, at 7-9 (trade barriers such as quotas reduce gross national product, all other things being equal); RICHARD E. CAVES & RONALD W. JONES, WORLD TRADE AND PAYMENTS 212-14 (1985) (trade restrictions make imposing nation worse off); James Bovard, *America's Biggest Trade Secret*, L.A. TIMES MAG., April 12, 1992, at 33 (U.S. quotas raise domestic prices and cost the United States $80 billion per year).

While all trade barriers are inefficient, quotas are unquestionably inferior to tariffs. A tariff takes money from ultimate domestic consumers and puts it into the domestic treasury. Quotas take money from American consumers and give it to foreign firms in the form of higher prices. PAUL SAMUELSON, ECONOMICS 635 (1980).

133. Raising rivals' costs can be an effective way to obtain limited monopoly power. *See* Thomas G. Krattenmaker & Steven Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L. J. 209, 214 (1986).

134. *See, e.g.*, Walsh-Healey Act, 49 Stat. 2036, 41 U.S.C. § 35 et seq. (1958) (establishing prevailing wage for government contracts).

135. 381 U.S. 657 (1965).

136. *Id.* at 660.

firms of doing business. Domestic firms benefit; foreign firms and U.S. consumers lose out.[137]

Finally, governments from time to time act as market participants, buying or selling non-public goods in competition with private firms. States acting in such a capacity may monopolize, cartelize, predate, or otherwise act just as anticompetitively as any private firm. Examples abound, but a few should suffice. A city in Maine recently passed an ordinance requiring that recyclable solid waste be treated at the facility run by a public non-profit corporation that it owned, rather than at either of two competing private facilities.[138] Government agencies that are the principal purchasers of a particular commodity may use their monopsony power[139] to reduce prices below the competitive level, to impose terms and conditions on sellers,[140] or to favor local businesses at the expense of out-of-state companies.[141] Similarly, governments often grant exclusive franchises for use of government facilities such as arenas and airports, and in some cases operate concessions themselves. In either case, the government acts by fiat to exclude the competition.[142]

The state action doctrine protects both governments and the private enterprises that lobby them from liability for anticompetitive government conduct, without regard to the consequences for competition or the legitimate concerns of the antitrust

137. *See supra* note 132 (discussing deleterious effects of protectionism).

138. Tri-State Rubbish, Inc. v. Waste Management, Inc., 998 F.2d 1073 (1st Cir. 1993) (immunizing the city ordinance from antitrust scrutiny under the state action doctrine).

139. Monopsony refers to the power an exclusive buyer has over sellers; it is the reverse of monopoly.

140. Some obvious examples of government monopsony power are the United States Department of Defense, which faces competition only from foreign governments and which may limit the sales to those governments in the interests of "national security," and federal power authorities like the Tennessee Valley Authority and the Bonneville Power Administration, which may purchase power from outside their geographic limits. *See also* Saenz v. University Interscholastic League, 487 F.2d 1026 (5th Cir. 1973) (schools may set standard for books and supplies to be purchased).

141. *See, e.g.*, Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) (upholding Maryland's program to pay cash to citizens who scrapped abandoned automobiles, but only if they used Maryland processors).

142. Such actions are commonplace and have elicited mixed reactions from the courts. *Compare* Duke & Co. v. Foerster, 521 F.2d 1277 (3d Cir. 1975) (overturning an exclusive franchise for the sale of beer on city property) *and* Hecht v. Pro-Football, 444 F.2d 931 (D.C. Cir. 1971) (holding a football team's grant of exclusive use of stadium unlawful) *with* Ladue Local Lines v. Bi-State Dev. Agency, 433 F.2d 131 (8th Cir. 1970) (upholding a city's exclusive franchise for local bus transportation, which excludes competitors) *and* Wiggins Airways v. Massachusetts Port Auth., 362 F.2d 52 (1st Cir. 1966) (approving an exclusive franchise for the sale of concessions at an airport).

laws.[143] The Supreme Court has made it more expensive for states to act anticompetitively by immunizing only anticompetitive conduct in which the government takes an active role,[144] and it has provided less protection for local governments and those who seek to influence them.[145] In the main, however, governments can and do act in ways the antitrust laws would roundly condemn in other circumstances.

Before leaving this point, one qualification must be added to this conclusion. The authors take the goal of the antitrust laws to be the enhancement of consumer welfare. Much ink has been spilled over whether this is or should be considered the proper goal. But the resolution of this particular debate does not matter here. Even if one were to consider the antitrust laws as designed to protect Justice Brandeis's (really Justice Peckham's) small dealers and worthy men,[146] one still would have to compare the effects of state and private competitive restraints with reference to that goal. There is no reason to believe state action would be deserving of more or less antitrust scrutiny under any alternative goal.

For example, if one were to favor the protection of small dealers as an antitrust policy one would tend to favor the creation of cartels.[147] Cheating is the bane of private cartels because mem-

143. *See, e.g., Pennington*, 381 U.S. at 663 (upholding government-imposed price constraints in labor market); Parker v. Brown, 317 U.S. 341, 350-51 (1943) (upholding state-sponsored raisin cartel).

144. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980). The Court required that an anticompetitive state restraint be both "clearly articulated" state policy and be "actively supervised by the State itself." It invalidated California's resale price maintenance scheme for wine producers because it was insufficiently supervised.

145. *See* Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 412 (1978) (municipalities are not automatically immune under *Parker* because they are not state actors). The Supreme Court has recently been more generous in protecting anticompetitive actions taken by local governments, however. In Hallie v. City of Eau Claire, 471 U.S. 34, 39-41 (1985), the Court held that cities are immune from antitrust scrutiny even if they act pursuant to an unsupervised state policy, as long as it is "clearly articulated." And in City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344, 1351-55 (1991), the Court held that both cities and private parties are immune from antitrust liability even if they conspire together to benefit the private party.

146. Justice Peckham's reference came in United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 323 (1897), and was picked up by Justice Brandeis in Chicago Board of Trade v. United States, 240 U.S. 231, 238-39 (1918). For a discussion of the different usages of this term by the two Justices see BORK, ANTITRUST PARADOX, *supra* note 6, at 25, 41-46.

147. This is because cartels raise the price of the cartelized product above the competitive level, providing a form of price cover for relatively inefficient firms, which by hypothesis could not price at the competitive level. *See* POSNER, ECONOMIC PERSPECTIVE, *supra* note 2, at 160. This leaves open the possibility that small dealers could suffer from limit pricing by cartelists, who might give up some of their monopoly profits to eliminate com-

bers have a strong incentive to reduce their prices marginally and expand output in order to capture sales from their competitors. If everyone cheats, the price is eventually reduced to the competitive level, and all the cartelists lose out. Because the state can police cheating better than the cartelists themselves—by throwing enforcement mechanisms such as administrative agencies, investigators, police, and the courts behind the cartel—state cartels work better than private ones. But that would argue only for creating more state cartels, it would not provide a basis for distinguishing between state and private cartels for antitrust purposes. If the antitrust laws sought to protect small firms, both a private cartel and a formal state cartel like the one in *Parker* would be immune from antitrust scrutiny. The private cartel would be considered a second-best option because it would have more cheaters, who would threaten small business by selling closer to the competitive price in an effort to steal business away from their fellow cartelists. But the cartel still would be immune from antitrust scrutiny.

This pattern holds true over the range of antitrust issues. It provides a strong clue that the answer to the question why state actors may be immune for doing the same things private actors could go to jail for necessarily lies outside the antitrust laws. At the very least, the answer cannot be found in any "essential dissimilarity" in purpose or effect between the conduct of state actors and the sorts of conduct the antitrust laws mean to prevent.[148]

B. *Explaining the State Action Doctrine*

The previous section establishes that the effects of legislative action are in fact essentially similar to the effects of private anticompetitive action. One thus must look elsewhere to explain state action immunity. The Court's repeated references to principles of federalism in *Parker* and cases following it suggest that the answer lies in something inherent in the state as the vehicle imposing the restraint.

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petitors. Of course, this worry is easy to exaggerate since the competitors we speak of here are by hypothesis inefficient; to "predate" against them the cartelists need only price at the competitive level.

148. Professor Elhauge offers a third possible dissimilarity, which he believes explains the state action doctrine on statutory grounds—a dissimilarity in *process* between governmental and private restraints of trade. We discuss this theory in detail in the next section.

This view has been disputed by several commentators, most notably Professors Wiley and Elhauge. This section steps back for a moment from the cases and the economics of state action and examines the theoretical implications of the two variables with which the Court and the commentators are wrestling in these cases—the definition of the public interest and the different ways that interest may be pursued by public and private actors.

1. *The Public Interest, the Public-Private Distinction, and Public Choice Theory*

Although the state action cases have inspired numerous theories and articles, for this Article's purposes, two commentators' critiques are particularly pertinent—the "capture theory" espoused by Professor Wiley and the "process theory" of Professor Elhauge. Professors Wiley and Elhauge begin their respective works from some common ground. Neither is satisfied with an explanation of the state action cases that focuses on whether the restraint of trade at issue was actually imposed by the state or by some private actor. Both authors thus reject federalism as a basis for state action immunity.[149]

Professor Wiley argues that a federalism-based theory is "vulnerable to a logical attack resembling the one that has been leveled at the constitutional public-private distinction."[150] Professor Elhauge expands on the point, arguing that "the principal problem" with distinctions between state-imposed restraints and privately-imposed restraints

> is the absence of formal grounds for satisfactorily determining which exercises of authority created or enforced by the state should be deemed state action and which should not. Every restraint resulting from the exercise of such authority cannot be viewed as state action immune from antitrust review, for whenever businesses restrain trade they are exercising authority created or enforced by the state.[151]

Professor Elhauge rejects a theory based on a distinction between state and private action because "the existence of any determinate formal public-private distinction seems dubious in light of the rich literature establishing the formal incoherence of such

149. Elhauge, *Antitrust Process*, *supra* note 99, at 680; Wiley, *Capture Theory*, *supra* note 36, at 731-32.

150. Wiley, *Capture Theory*, *supra* note 36, at 731.

151. Elhauge, *Antitrust Process*, *supra* note 99, at 680.

distinctions in other fields of law."[152] Both authors cite Professor Brest's well-known article on state action,[153] and Professor Elhauge adds some of the better-known articles from the then-emerging Legal Realist movement, arguing that common law rules were not neutral, and that the distribution of resources effected by those rules could be considered state action.[154]

Having thus disposed of the Court's stated rationale, Professors Wiley and Elhauge set out to develop their own very different theories. Professor Wiley first popularized the application of what Mancur Olsen called the "logic of collective action"[155] to the antitrust state action doctrine.[156] This logic holds that small groups, which enjoy relatively high per capita benefits from any given profitable action, can outmaneuver larger groups, whose members have relatively low per capita interests, and thus gain legislative benefits disproportionate to the small group's electoral size.[157]

According to this theory, larger groups suffer more from the "free rider" problem than do smaller groups because any benefit a member obtains for the group will be shared by the whole group and not just the member. The problem posed by the theory is that the most rational course for each member of the large group is to wait for other group members to obtain the benefit for the whole group. Each member believes she will obtain the benefit without effort, taking a free ride on the efforts of others. Small groups have a relatively easier time overcoming this problem because each member has more at stake.[158] Imagine a legislative action worth $100 obtainable at a cost of $8 per member by either of two groups, one of ten members and the other of twenty. Any member of the first group will seek the benefit, be-

152. *Id.* at 681.

153. Paul Brest, *State Action and Liberal Theory: A Casenote on Flagg Bros. v. Brooks*, 130 U. PA. L. REV. 1296 (1982).

154. Elhauge, *Antitrust Process*, *supra* note 99, at 680 n. 61.

155. *See* OLSON, *supra* note 43.

156. Wiley, *Capture Theory*, *supra* note 36.

157. *Id.* at 724-25.

158. Professor Wiley states the point in a slightly different way—he describes the problem as being that "individual members have little incentive to participate [in rent seeking] because participation is personally costly and contributes little to the group's chances for successful joint action." Wiley, *Capture Theory*, *supra* note 36, at 724. This statement may be slightly misleading. The effect an individual member has on the probability of the group's success in obtaining some benefit is relevant to the member's choice only insofar as it affects the member's expected return from her actions. Thus, it is theoretically possible for a small marginal increase in the group's probability of success to persuade an individual member to take action.

cause her share ($10) will exceed her cost in obtaining it ($8), while no member of the second group will do so, because the cost ($8) exceeds the benefit ($5). Even if the member of the smaller group does not want to go it alone (because then she would profit $2 while the other nine members received $10), her cost in coordinating the efforts of the other members of the group, or billing them for her efforts to obtain the benefits, will be lower than the costs facing the group with 20 members. The same logic applies when we ask where the $100 comes from. Maintaining our $8 assumption for the cost of transacting with the legislature, the small group will be able to make the large group pay the $100 because it would cost each member of the larger group more to fight the small group than simply to pay up.

For Professor Wiley, this logic carries profound implications for the antitrust state action doctrine (and indeed the Court's treatment of state economic regulations generally). The gist of the problem is that collective action logic implies minority rule. More specifically, the logic implies exploitation of consumers, whose interests tend to be relatively broad and diffuse, by producers whose interests in particular regulation are relatively more concentrated. The mechanism for exploitation Professor Wiley denominates "capture," a term he uses to signify that "regulation typically benefits private interests at the expense of the consuming public."[159] Professor Wiley believes the Court has given anticompetitive state actions greater scrutiny since *Parker* because it is more aware of the dangers of capture than it used to be.[160] Wiley endorses this approach, concluding that the Court ought to analyze state regulations for signs of producer capture, applying stricter scrutiny when those signs appear than when they are

159. Wiley, *Capture Theory, supra* note 36, at 724. Professor Wiley's use of "capture" is slightly different than the usual use of the term in the political science literature, though the two are related. In political science terms, capture is generally used to describe a regulated industry's dominance of the entity charged with regulating it. The term there encompasses such things as institutional expertise, superior information, and the like. *See generally* LAWRENCE DODD AND RICHARD L. SCHOTT, CONGRESS AND THE ADMINISTRATIVE STATE 173-184 (1979). Of course, the success of a regulated industry at such endeavors, in the face of at least potential competition from consumers for the agency's attention, may be and frequently is explained in collective action terms. *See* OLSON, *supra* note 43, at 147, 166 (comparing "generous regulatory policies" obtainable by business lobbies with collective action problems for consumers, who, despite being "as numerous as any other group in society . . . have no organization to countervail the power of organized or monopolistic producers").

160. Wiley, *Capture Theory, supra* note 36, at 727-28.

absent.[161] Although he does not expressly identify the justification for his theory, it is clear that Wiley believes the Sherman Act itself embodies the bias against public choice-type behavior he commends.[162] To avoid the confusion supposedly created by the public-private distinction, Professor Wiley suggests three criteria for distinguishing "public" from "private" action for purposes of antitrust liability.[163]

There is much in Professor Wiley's approach to discuss, starting with the somewhat disturbing suggestion that judges should scrutinize legislation on economic grounds, which quickly brought the inevitable charge that Professor Wiley was advocating the resurrection of *Lochner*-style judicial activism.[164] On the other hand, "capture" may in fact explain much regulatory behavior, and turning a blind eye to the problem is not a very satisfying solution.[165] Both judicial activism and regulatory capture suggest serious flaws in democratic processes. Professor Wiley suggests that the former may be used to cancel the latter, and thus effectively become a pro-democratic instrument.[166] Since Professor Wiley introduced his capture theory, the Court's *Ticor* opinion has lent some support to his premise that worries about

161. *Id.* at 743. Professor Wiley suggests four criteria for determining whether a given regulation is the product of capture, and thus a candidate for heightened scrutiny: whether the regulation restrains market rivalry, whether it is protected by a federal antitrust exemption (as for labor unions or insurance), whether the regulation responds directly to a substantial market inefficiency, and whether the regulation was produced by the decisive political action of financially interested firms in the regulated market. *Id.*

162. Thus Professor Wiley disputes the charge that increased judicial review of state actions with public choice characteristics will lead to a new *Lochner* era by arguing that, unlike *Lochner*, Congress could amend the Sherman Act to make it more tolerant of state actions displaying public choice tendencies. *Id.* at 779.

163. *Id.* at 773-76. Drawing on Professor Brest's work, Wiley argues that the problem with vesting the state action cases on a federalism rationale is that "such distinctions lack any obvious or rational foundations; instead each such distinction must be justified by underlying policy reasons. Because no policy reason exists for the public-private distinction made by the state action doctrine, that distinction lacks force and coherence." *Id.* at 773. The three criteria Professor Wiley advances to overcome this problem are intended to provide those absent policy reasons: "fairness to taxpayers, concern with antitrust enforcement, and fear of chilling desirable regulation." *Id.*

164. *See* Garland, *supra* note 47, at 509; William H. Page, *Interest Groups, Antitrust, and State Regulation: Parker v. Brown in the Economic Theory of Legislation*, 1987 DUKE L. J. 618; Matthew J. Spitzer, *Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory*, 61 S. CAL. L. REV. 1293 (1988). Indeed, Professor Wiley was sufficiently sensitive to this charge that he attempted to pre-empt it in his original article, Wiley, *Capture Theory*, *supra* note 36, at 779. He expanded on this defense in his response to Mr. Garland. *See* John S. Wiley, Jr. *Revision and Apology in Antitrust Federalism*, 96 YALE L.J. 1277, 1289-90 (1987).

165. *See* Wiley, *Capture Theory*, *supra* note 36, at 740.

166. *See id.* at 779.

capture have led the Court to scrutinize regulation for signs of capture effects.[167]

As a description of what the Court is actually doing in the state action cases, however, Professor Wiley's theory has little to commend it. The strong statement of immunity in *Omni* plainly indicates that the Court does not care whether a given governmental action could be described as the product of capture. After all, a jury in *Omni* had determined that the regulations at issue in that case were the product of a conspiracy between the City and Omni, a finding which certainly implies a form of capture, yet the Court held that the regulation was absolutely immune from scrutiny.[168] The Court's approval of the price-fixing schemes at issue in *Southern Motor Carriers Rate Conference v. United States*[169] similarly calls into question the idea that the Court is intolerant of regulations produced by "capture."[170]

Professor Wiley's theory is disturbing as a normative matter as well. Capture theory has a broad reach. Under its premises, strictly applied, all legislative action is suspect to some degree. Professor Wiley's application of capture theory would subject a state's actions to antitrust scrutiny so long as they were the result of the "decisive political efforts of producers who stand to profit from its competitive restraint."[171] Setting the problem of conflict with the antitrust laws to one side for a moment, an anticompetitive restraint proposed by a private party might be a good idea in the eyes of some people.[172]

Professor Elhauge challenges a substantial amount of Professor Wiley's theory in a more comprehensive treatment of the antitrust state action doctrine.[173] Professor Elhauge's project is in fact revolutionary. He aims to reconceptualize the purpose of the antitrust laws in an entirely new way, while bringing a new coherence to the state action doctrine as well. His theory is both descriptive—it aims to explain existing state action decisions—and normative—it suggests that what Professor Elhauge describes as the current approach is also the correct one. We believe Profes-

167. Federal Trade Comm'n v. Ticor Title Ins. Co., 112 S. Ct. 2169, 2176 (1992).

168. *Omni*, 499 U.S. at 369, 384.

169. 471 U.S. 48 (1985).

170. For additional cases illustrating this point, see Garland, *supra* note 47, at 490-98.

171. Wiley, *Capture Theory*, *supra* note 36, at 743.

172. Where the state manifests its adoption of such a policy and puts the force of its governance capacity behind it, principles of federalism also come into play. We discuss these issues in more detail in section II.C.

173. *See* Elhauge, *Antitrust Process*, *supra* note 99, at 717-29.

sor Elhauge's efforts are ultimately unsuccessful, but working through them yields several valuable insights.

Professor Elhauge believes the source of the state action doctrine may be found in the antitrust laws themselves.[174] He contends that there is no conflict between anticompetitive state regulation and the federal antitrust laws. Professor Elhauge argues that if a conflict truly exists there is no very interesting issue, because the Supremacy Clause commands that the conflict be resolved in favor of the federal law.[175] To show compatibility, Professor Elhauge works backwards. He "takes the existence of state action immunity as evidence" that there is no conflict between state regulation and federal antitrust laws, and he examines the contours of state action immunity "for insights into the nature of the underlying antitrust ideals."[176] His examination of state action immunity leads Professor Elhauge to conclude that

> antitrust law does not stand for the proposition that all economically inefficient restraints of market competition are against the public interest. Rather, antitrust stands for the more limited proposition that those who stand to profit financially from restraints of trade cannot be trusted to determine which restraints are in the public interest and which are not.[177]

Professor Elhauge's theory does a fairly good job of describing a portion of what the Court is actually doing in these cases. Unfortunately, much of the descriptive force of his theory derives from his definitions instead of his analysis. Professor Elhauge's theory essentially incorporates the public-private distinction he criticizes under a different rubric. "State action" becomes "disinterested-accountable action" and "private action" becomes "interested, profit-motivated action." As Professor Elhauge put it in a subsequent article, "'[p]rivate decisionmaking' is thus merely a shorthand for financially interested decisionmaking, and 'public decisionmaking' is a shorthand for decisionmaking that is financially disinterested and politically accountable."[178] The Court will

174. *See id.* at 696 ("The anticompetitive restraint is immune from antitrust liability whenever a financially disinterested and politically accountable actor controls and makes a substantive decision in favor of the terms of the restraint. . . . [A]ntitrust law embraces the principle that financially interested parties cannot be trusted to restrain trade in ways that further the public interest.").

175. Elhauge, *Antitrust Process*, *supra* note 99, at 669.

176. *Id.* at 671.

177. *Id.* at 672.

178. Einer R. Elhauge, *Making Sense of Antitrust Petitioning Immunity*, 80 CAL. L. REV. 1177, 1197 (1992) [hereinafter Elhauge, *Petitioning Immunity*].

stay the hand of antitrust laws in cases where a restraint was imposed by a state government. Because of his definitions, Professor Elhauge's theory will lead him to the same result.

Professor Elhauge's theory and the Court's opinions differ, however, in their treatment of restraints created by municipal governments. Professor Elhauge's theory strongly implies that a municipal government restraint should not be subject to antitrust liability if the restraint was imposed by disinterested and accountable actors, a conclusion that cannot be squared with the caselaw. Professor Elhauge attempts to explain this anomaly by suggesting that municipal regulations might have anticompetitive effects outside the geographic boundaries of the governmental entities imposing the regulations.[179] Consumers outside a city's limits have no power to hold the city's actors accountable for their acts.[180] This problem does not exist at the state level, he contends, because (notwithstanding *Parker*) the Dormant Commerce Clause serves to guard against anticompetitive interstate regulations. Professor Elhauge argues that the antitrust laws should be used to achieve the same result with respect to intrastate restraints.[181]

This argument has some very interesting implications for the normative portion of Elhauge's theory, as noted below.[182] For now, however, it is enough to note 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. In discussing the *Parker* line of cases, the Court has said that "the *Parker* exemption reflects the federalism principle that we are a Nation of States, a principle that makes no accommodation for sovereign subdivisions of states."[183]

From a normative perspective, the contention that the antitrust laws themselves distinguish between restraints imposed by disinterested (public) actors and profit-motivated (private) actors is flawed on several levels. Professor Elhauge's process-based approach shifts the focus of the antitrust laws away from the eco-

179. Elhauge, *Antitrust Process*, *supra* note 99, at 732.

180. As Professor Elhauge notes, the Court emphasized this point in City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 406 (1978). Elhauge, *Antitrust Process*, *supra* note 99, at 733.

181. *Id.* at 730.

182. *See infra* notes 184-187 and accompanying text.

183. Community Communications Co., Inc. v. City of Boulder, 455 U.S. 40, 50 (1982).

nomic or social effects of a given action, directing attention instead to the motivations of the actors.[184] Initially, at least, the Sherman Act seems to have little if anything to say about a distinction based on profit motivation. It is cast in terms of prohibited activities, which are defined in terms of economic effects. While many of those prohibited activities include an intent component,[185] which might make an inquiry into motivation relevant, motive itself only would be material insofar as it supported an inference that a party intended to obstruct competition. Given that businesses are commonly animated by the "profit motive," any such inference would be exceedingly weak.[186]

To incorporate a process-based component into the antitrust laws is inconsistent with both of the goals most commonly advanced to explain antitrust doctrine—the promotion of social welfare or the protection of small businesses.[187] 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. Similarly, small dealers will suffer equally from predatory pricing or exclusive dealing arrangements imposed by the state as from those imposed by private parties.

Professor Elhauge claims to find support for his view in the legislative history of the Sherman Act, but the support is unconvincing. Professor Elhauge cites the fleecing of consumers through the charging of high prices as the "one central evil" at which the Sherman Act was directed.[188] This, of course, is a goal cast in terms of the economic effects of a given activity, and is consistent with the interpretation that the goal of the antitrust laws is the advancement of consumer welfare. As noted above, a fleeced consumer will take little comfort from knowing that the state either sanctioned or imposed the fleecing. One could argue

184. Similarly, Professor Wiley also would use what could be called a process value—that decisions produced through free riding are suspect—to trigger application of the antitrust laws.

185. *See, e.g.*, 15 U.S.C. § 2 (1988).

186. *See* Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 626 (1953) ("While the completed offense of monopolization under Section 2 demands only a general intent to do the act, . . . a specific intent to destroy competition or build monopoly is essential to guilt for the mere attempt now charged."). Indeed, were it otherwise, the intent requirement as applied to private conduct would protect only non-profit organizations, because competition itself is the result of individual private actors each *intending* to maximize their own profit.

187. *See supra* notes 146-148 and accompanying text.

188. Elhauge, *Antitrust Process*, *supra* note 99, at 698.

that a consumer fleeced with the state's complicity can fight back through the electoral process, but that begs the question.[189] That a consumer may protect herself from exploitation by voting does not mean the antitrust laws were not meant for her protection as well.[190]

Professor Elhauge also notes that no objections were raised to state-imposed restraints in the legislative history of the Sherman Act.[191] This is not very surprising. As has been pointed out before,[192] Congress had no reason to think the law it was passing could even apply wholly within a state. The only conflict Congress would have worried about would have been with other federal laws, which cannot be resolved by reference to the Supremacy Clause or federalism.[193] Moreover, when the Sher-

189. It also is unlikely to be effective. As discussed in brief above and more fully below, if the state and a private actor act strategically, they can spread the cost of a given measure so widely among consumers that each individual consumer will be rationally ignorant of the source of the added expense, and thus effectively powerless to do anything about it. *See supra* notes 85-86 and accompanying text; *see infra* notes 211-218 and accompanying text.

190. See City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) ("Mulcted consumers and unfairly displaced competitors may always seek redress through the political process. In enacting the Sherman Act, however, Congress mandated competition as the polestar by which all must be guided in ordering their business affairs.").

191. Elhauge, *Antitrust Process*, *supra* note 99, at 698.

192. *See, e.g.* Easterbrook, *supra* note 99, at 40-41.

193. Professor Elhauge acknowledges this argument, but does not find it compelling. Elhauge, *Antitrust Process*, *supra* note 99 at 701-02 n. 169. He makes two main points. The first is that the Sherman Act Congress was familiar with the phenomenon of state authorization of things such as holding companies and trusts that the Sherman Act was designed to abolish. The problem with this argument is that, to the extent Congress's intent is accurately reflected in the Court's early interpretion of the Act, notably in Northern Secs. Co. v. United States, 193 U.S. 197 (1904), the Court found the Act to apply to the very trusts and holding companies the state had authorized. This hardly supports an inference that Congress intended to defer to anticompetitive state legislation. *See, e.g., id.* at 345-46 (rejecting argument that state's corporate approval of holding company created by merger immunized company from antitrust scrutiny). Far from suggesting that the legislature was ignorant of or unwilling to address the problem of state restraints of trade, these decisions suggest that the Congress that passed the Sherman Act was perfectly willing to apply that law to state-sanctioned monopolies. Professor Elhauge's citation of legislative history indicating that such monopolies were not Congress' major concern does not establish a congressional intent to immunize them altogether. Such an extrapolation is particularly suspect given the dramatic expansion in state regulation of the economy between 1890 and the present.

Professor Elhauge's second point is that even if Congress's intent was constrained by its view of its jurisdiction, we may still apply the principles Congress intended to embody in the Sherman Act to the expanded jurisdiction of the Act today. This is a fair point, even in view of the quasi-constitutional nature of textual interpretation of the antitrust laws. *See* Harlan M. Blake, *Conglomerate Mergers and the Antitrust Law*, 73 COLUM. L. REV. 555, 577 & n.83 (1973). But the argument does not establish that Congress intended to except state regulation from the Sherman Act because it trusted states more than private actors. If we take the principle embodied in the Sherman Act to be the promotion of consumer welfare, we still have to resolve the conflict Professor Elhauge hopes to avoid in his theory.

man Act was passed there was not as much reason to be concerned about state regulation of the economy as there is today. At that time, state regulation was more or less strictly limited to business "clothed with a public interest."[194] This limitation had teeth in 1890 and for some time thereafter. Chief Justice Taft stated as late as 1923 that "[i]t has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation."[195] It is hard to imagine why raisin growers would not fit into this category as well.

This point brings up a final one. There is a fair bit of difference between saying that the monopolists Congress wanted to rein in with the Sherman Act were private and saying that Congress therefore was not concerned about state-sanctioned fleecing. Professor Elhauge agrees that consumers were the intended beneficiaries of the Sherman Act. Even conceding that all else is ambiguous, one should at least demand a good reason for interpreting the antitrust laws to allow the consumers to be fleeced with the state's complicity—a better reason than seeking to infuse the legislative history with coherence along process, rather than substantive economic, lines.

The legislative history aside, Professor Elhauge's proposed distinction between profit-motivated actions and disinterested actions fails in its essential task—to provide a better explanation for the state action cases than the federalism-based rationale Professor Elhauge eschews. Professor Elhauge's distinction merely reintroduces under a different label the public-private distinction he originally rejected. Arguments about state action and petitioning immunity ultimately converge on substantive ideas of democracy and democratic values. Professor Elhauge's argument is no exception. The ultimate justification for Professor Elhauge's posi-

From a public choice perspective, Professor Elhauge would be better put arguing that the constituents of senators in 1890 were state legislators, not consumers. It is unlikely that senators would constrain the authority of their constituents to regulate. Senators have new constituents now, however, whose interests are perhaps more in tune with the goal of consumer welfare than are those of state legislators.

194. Munn v. Illinois, 94 U.S. 113, 132 (1877).

195. Charles Wolff Packing Co. v. Court of Indust. Relations, 262 U.S. 522, 537 (1923). As late as 1929, Justice Sutherland commented that affectation with a public interest had "become the established test by which the legislative power to fix prices of commodities, use of property, or services, must be measured." Williams v. Standard Oil Co., 278 U.S. 235, 239 (1929).

tion is cast in precisely those terms, and parallels the assumptions regarding public and private activity that the Court adopted in *Allied Tube*.[196] Because he draws heavily on the *Allied Tube* reasoning, the balance of Professor Elhauge's argument may be examined in light of the Court's assumptions.

Three assumptions are of interest here: (1) that there is a public interest separate and distinct from the aggregate private interest of producers and consumers; (2) that the private actors' interests diverge from the public interest; and (3) that the public actors' interests do not.[197] These assumptions are reflected in Professor Elhauge's premises that, unlike financially interested parties, "financially disinterested and politically accountable" actors "lack the structural financial incentives to restrain trade in ways that harm the public interest."[198] In his view, these premises constitute substantive antitrust doctrine: "Antitrust law embraces the principle that financially interested parties cannot be trusted to restrain trade in ways that further the public interest."[199]

The Court's first assumption, that there is a normative public interest that is different from private interests, may or may not be true, which is to say it is of questionable value as an assumption. It is clearly untrue much if not most of the time, which makes it of even more questionable value. In the first place, the antitrust laws themselves embody a conception of what is in the public interest. Those laws are designed to promote consumer welfare and, therefore, efficiency. By hypothesis, the public interest the Court refers to in *Allied Tube* must be different, because that public interest can be achieved by a state adopting inefficient measures. But neither the Court nor Professor Elhauge ever provides 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.

Professor Elhauge correctly contends that private parties often stifle competition and reduce output for their own benefit. But to conclude that private interests therefore diverge from the public interest ignores competition in the market as a method of ag-

196. *See* Elhauge, *Antitrust Process*, *supra* note 99, at 688.

197. *See supra* note 86 and accompanying text; *Allied Tube*, 486 U.S. at 501 (quoting Hallie v. Eau Claire, 471 U.S. 34, 45 (1985)) ("We may presume, absent a showing to the contrary, that [a government] acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf.").

198. Elhauge, *Antitrust Process*, *supra* note 99, at 703.

199. *Id.* at 696.

gregating preferences and allocating resources.[200] As this first assumption turns on the relationship between private interests and the public good, this is a substantial, perhaps fatal, omission. When one steps back from considering only one firm to look at the market as a whole, one sees numerous greedy firms competing to get ahead. To borrow a description, each producer "intends only his own security; and by 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 by an invisible hand to promote an end that was no part of his intention."[201] It takes the fallacy of composition to derive a preference against private action from the greed of an individual private actor. Under the normal conception of the goals of the antitrust laws, individual private greed is desirable; in fact it is precisely the state of affairs the antitrust laws are designed to maintain.[202]

Professor Elhauge offers an alternative to the elusive search for a "public interest" separate from aggregate private interests. He argues that his process theory is consistent with the idea that aggregate economic efficiency determines the "public interest"[203] because interested (profit-motivated) decisionmaking can be improved upon by antitrust review, but disinterested (non-profit motivated) decisionmaking cannot.[204] According to this argument, state actors enjoy immunity because applying antitrust law to the public sector will not promote competition any more effectively than leaving government alone, not because it is desirable for the states to pursue anticompetitive regulatory programs.[205]

200. Indeed, the market almost certainly holds a comparative advantage over almost any conceivable public process for measuring and aggregating preferences. The problems with state ordering of economic choices are legion. It is virtually unimaginable—much less possible—in today's interconnected world economy to collect enough information about supply and demand to set prices and production levels from a central source.

201. 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 477 (U. Chi. Press ed. 1976)(1776).

202. Indeed, we may safely say that efficient firms are acting in the public interest, while inefficient firms are not. Within the paradigm of consumer welfare, this is not an assumption but a truism. The public interest is defined by demand, and demand (or, more precisely, the lack of it) is the force that drives inefficient firms out of business. Even if one does not work from a consumer welfare model, however, the discussion in the text still holds true. Society derives no benefit from an inefficient firm, which is by definition misallocating resources that could be more useful elsewhere. If one wanted to protect the small dealers and worthy persons, one should favor a straight transfer payment from consumers to that class, leaving the resources free to seek their highest and best use.

203. Elhauge, *Antitrust Process*, *supra* note 99, at 703 n.172.

204. *Id.* at 707-08.

205. *See id.*

So long as we maintain the assumption, embodied by the antitrust laws, that competition is in the public interest, this theoretical construct is demonstrably untrue. Government regularly acts to place barriers in the way of private firms attempting to compete on the merits, and sometimes stifles competition entirely. We have discussed this anticompetitive government action in some detail above.[206] Antitrust can act toward governments in the same way it acts in the private context—as a facilitator for the market, enabling aggregate social welfare to be efficiently determined by removing the barriers to robust, unfettered competition. Government barriers are just as inimical to competition as private ones, and their removal is just as likely to promote competition and therefore aggregate economic efficiency.

Of course, Professor Elhauge's point could be a much more limited one—that the same sorts of incentives that cause "disinterested" legislators and executives to restrain competition will also hobble the courts. Professor Elhauge has advanced a similar argument in the context of constitutional interpretation.[207] Professor Elhauge contends that "identification of defects in the political process does not demonstrate that substituting a judicial process of decisionmaking would improve the situation."[208] His point is that judges might "err in assessing, weighing or maximizing" competing social interests.[209]

This argument has some force in the constitutional context, where courts sometimes lack what Professor Elhauge has termed normative baselines by which to judge a given law.[210] Professor Elhauge is rightly concerned by the prospect of judges weighing competing social interests, which is commonly considered a legislative task, especially in the absence of any statutory benchmarks. But unlike constitutional interpretation, here the antitrust laws provide the necessary benchmark for decision: economic efficiency. The question of defining the public interest thus reduces, at least so far as Professor Elhauge's theory is concerned, to whether judges applying the antitrust statutes in an effort to promote efficiency are more likely to reach efficient outcomes than legislators who are making no such effort. Thus posed, the ques-

206. *See supra* section II.A.

207. Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L. J. 31 (1991) [herineafter Elhauge, *Interest Group Theory*].

208. Elhauge, *Antitrust Process*, *supra* note 99, at 725.

209. *Id.*

210. Elhauge, *Interest Group Theory*, *supra* note 207, at 49.

tion answers itself in favor of application of the antitrust laws. If it did not, if courts performed so poorly at enforcing antitrust principles that competition was better off in the hands of legislators acting deliberately to restrain trade, then one would seriously have to question the point of applying the antitrust laws *at all*, whether to public or private actors.

The Court's second assumption, that the interests of private actors diverge from the "public interest," is similarly unpersuasive. Both the Court and Professor Elhauge have framed this assumption in terms of a presumed difference in the degree to which public and private actors are accountable to the public and, one may assume, to the "public good." This assumption is flawed because private actors would seem more likely to promote the "public interest" than government officials since private actors are accountable to consumers in a much more direct way than legislators are to voters, at least on relatively uncontentious issues.[211] A private actor in a competitive market who raises his prices finds he has no customers and, in relatively short order, will have no business. Relaxing the assumption of a competitive market may lengthen the firm's demise, but will not prevent it.[212]

The diference in accountability between private and governmental actors may be explained in terms of information costs and "rational ignorance."[213] Consumers in all markets want to get the most for their money, and they will try to gather the information necessary to do so.[214] This means they are already willing to incur information costs up to a certain level as part of the cost of buying a good or service. The rational ignorance problem will thus be less severe with consumers than with voters because con-

211. This is not to say that relatively contentious issues necessarily pose a big problem. Witness the phenomenon of the single-issue voter—one for whom a candidate's position on one issue determines the individual vote. A large number of truly single-issue voters could wreak havoc on the Court's presumption, because the legislator would be free to antagonize her constituents on all but one issue. Single-issue voters run the risk of paying dearly for their devotion to one issue, both in abstract terms of their legislator's responsiveness and (at least potentially) in direct monetary terms as well.

212. *See* WILLIAM BAUMOL ET AL., CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE (1982).

213. Rational ignorance is a term that indicates that consumers will spend only a certain amount to obtain information. If obtaining that information costs consumers more than the knowledge will save them, consumers will rationally choose not to acquire the information. *See* RALPH T. BYRNS & GERALD W. STONE, ECONOMICS 433 (4th ed. 1989); Jonathan R. Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 CORNELL L. REV. 43, 47 n.17 (1988).

214. By and large, this means consumers will seek out the most efficient firms, which by definition provide the most of a product or service relative to the cost of the product or service.

sumers are already motivated by the necessity or desire to make certain purchases to incur the costs necessary to hold sellers accountable. The Court at one time recognized this difference in the commercial speech context, noting that consumers may well be more interested in prices than in current events.[215] Just as it is harder to hide a transfer payment funded through taxes than one funded through some obscure regulation, it is harder for a producer, who does not have the luxury of passing an obscure regulation himself, to raise prices. For these reasons, private actors who displease consumers are more likely to be held accountable than are legislators.

The consequences of accountability for private actors are also likely to be more severe than is the case with public actors because the costs of *imposing* accountability will frequently be much lower for private actors. Assuming the consumer is willing to bear the cost of informing herself of the quality and price of other brands, which she is presumably doing anyway by virtue of being in the market, she can "vote with her wallet" and switch brands. At least for inexpensive and frequently purchased items this will require little if any extra effort. In other words, holding producers accountable may require a consumer to do little or nothing more than they would do anyway in an effort to be an efficient consumer.[216]

By contrast, a legislator will normally have some form of tenure, necessitating either the extraordinary measure of a recall vote or delaying accountability until the next election. Even then, the consumer's search for wealth maximization is likely to make him rationally ignorant of much in the public sector, largely because of collective action problems. In other words, while a consumer reaps an immediate benefit—lower prices—from switching brands, there is no corresponding benefit to voting

215. Virginia State Board of Pharmacy v. Virginia Citizen's Consumers Council, 425 U.S. 748, 765 (1976) (striking down state legislation that prohibited advertising of drug prices by pharmacies, in part because consumers need this information in order to make rational purchasing decisions).

216. This of course will not hold true in all circumstances. As Eastman Kodak Co. v. Image Technical Services, Inc., 112 S. Ct. 2072, 2085-87 (1992), illustrates, some consumers may be stuck with long-term obligations and be unable to do anything about a change in the cost of their product relative to the market. How frequently this is a problem is an empirical question we cannot answer here. The odds are fairly good that this does not affect the relative difficulty of changing brands in the market and ousting a wayward legislator, because problems such as the tenure of incumbency (or perhaps civil service protection in the case of a wayward bureaucrat) are pervasive, if not universal, in the public sector.

against a legislator. Only if a large number of voters act together will even one legislator (much less a majority party) be ousted. Thus, it will often be rational for a consumer-voter to educate herself about prices in the marketplace but not about voting records in Congress.

This is not to deny that, individually or in groups, greedy firms sometimes monopolize a market or cooperate and form a successful cartel. The question is what to do about it or, more precisely in this case, what assumption should we choose—one in favor of or against congruity of public and private interests. The value of an assumption depends on how accurately it reflects the real world,[217] 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.[218]

Answering this question is enormously difficult and the conclusions will of course vary with the substantive criteria, definitions and values the analyst incorporates into the concept of the public good.[219] For our present purposes, and working from the consumer welfare perspective, it is enough to say that the problems the Court perceives with private action are greatly overstated unless one takes into account market solutions to those problems. Greedy cartel members cheat, precisely because of their greed and self-interest, thus imperiling the cartel and driving the price toward a competitive level,[220] and other firms will be attracted, by

217. In cost-benefit terms one might say assumptions are valuable to the extent the savings (in information costs) gained through simplification exceed any error costs incurred through oversimplification.

218. Such an evaluation is not the end of the matter, of course. Even if Professor Elhauge is correct that public action is superior to private action in fostering the public good, he still must determine whether legislative or judicial action is the appropriate vehicle to that end, because a preference for legislative action justifies state action immunity while a preference for judicial action cuts against immunity. Similarly, if we are correct that private aggregation of preferences is superior, we still must decide under what circumstances judicial action (such as the antitrust laws) ought to supersede or modify private action.

219. If, for example, one considers the degree to which wealth is equally distributed as the criterion for judging whether a given action or system is good or bad, the market will be the worst of all possible worlds because it is (and at least within the consumer welfare paradigm should be) indifferent to distributional concerns. Thus the question of what assumption should be drawn folds quickly into the analyst's substantive view of what outcomes are desirable.

220. BLAIR & KAISERMAN, *supra* note 113, at 141-45 (focusing on the strong incentives cartel members have to expand production or reduce price secretly, thus enhancing their

virtue of their greed, to the cartelized industry. Professor Elhauge's theory lacks force to the extent one views the market (which is to say the aggregated private preferences of producers and consumers) as more closely tracking the "public interest" than does governmental intervention.[221]

Moreover, even if one grants that private actors frequently take steps inimical to the public interest, all that follows is that the antitrust laws should be applied to sanction such private actors. And if one assumes that private actors undercut the public interest when they contrive certain economic effects, by parity of reasoning one could argue that public actors should be subject to a similar assumption for producing similar effects. Far from justifying state action immunity, then, this assumed market breakdown may in fact provide a reason for applying the antitrust laws.

The Court's third assumption, that the interests of public officials do not diverge from the "public interest" (or at least diverge less than the interests of private actors) because public officials do not act for a profit, is equally problematic, though it has received surprisingly little attention in the state action literature.[222] If we take the actions of producers in seeking anticompetitive regulation as the "demand" for such regulation, we may look at legislators, regulators and other public actors as the "supply." If the demand side of anticompetitive regulation is characterized by collective action logic, what characterizes the supply side? The answer of public choice theory is that many of the same characteristics apply, including the notion that public actors have an essentially financial stake in the actions they take.

In 1784, John Marshall, then twenty-nine and a member of Virginia's General Assembly, complained in a letter to James Monroe that "[n]ot a bill of public importance, in which an individual was not particularly interested, has passed."[223] Things

market share in the short run but endangering the cartel in the long run); POSNER, AN ECONOMIC PERSPECTIVE, *supra* note 2, at 52-54 (same).

221. A similar line of argument may be found in Professor Epstein's critique of the civic republican theories of Professors Michelman and Sunstein. Richard A. Epstein, *Modern Republicanism—Or The Flight From Substance*, 97 YALE L. J. 1633 (1988).

222. It should be noted at the outset that Professor Elhauge is admirably frank in his discussion of the shortcomings of public officials' decisions. Elhauge, *Antitrust Process*, *supra* note 99, at 717-18. His point is not that such decisions are perfect, only that they are taken in an environment that, objectively speaking, is relatively more conducive to decisions in the public interest than are private decisions—they offer a comparative advantage both to private actors and judges. As discussed below, Professor Elhauge's theory overstates the comparative benefits of public decisionmaking even with these caveats.

223. 1 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 228 (1919).

have not changed much. Recall that in *Omni* the council members who voted to give Columbia anticompetitive regulations to shore up its monopoly position allegedly received free billboard advertising come election time.[224] From an economic perspective, the free billboard space was a share of Columbia's monopoly profits given to the legislators in exchange for their votes. On Omni's account of the case, it is impossible to distinguish on grounds of financial interest the private actions of Columbia from the public actions of the council members.[225] 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.

The ample evidence of financial collusion between Omni and the City provides further reason to reject Professor Elhauge's view of these cases. To call the municipal legislators in *Omni* "disinterested" would be to deprive the word of any meaning at all. Nonetheless, that is precisely what Professor Elhauge concludes.[226] In our view, that Professor Elhauge defends the city council's action in *Omni* as "disinterested" only serves to highlight his incorporation of what he criticizes as the formalism of the public-private distinction.

Professor Ehauge's assumption that government officials act in the public interest must also contend with the teachings of public choice theory. Public choice theory simply applies the presumption of rational, purposive behavior to legislators (and regulators).[227] Stated this way, the proposition is relatively uncontroversial. The dispute is over what goals legislators in fact attempt to maximize. As Professor Elhauge points out, on the traditional liberal account legislators consider the interests of all persons affected by their actions, weighing the varying interests in a deliberate fashion, and choosing the course that they con-

224. *See supra* text accompanying note 89.

225. It is likely that free billboard space and campaign contributions took only a small portion of Omni's monopoly profits. It would be impossible to construct a difference between public and private decisionmaking based on the amounts at stake in any given case, however, and Professor Elhauge's theory makes no such attempt.

226. *See* Elhauge, *Petitioning Immunity*, *supra* note 178, at 1244-45.

227. *See* Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 878 (1987).

sider best for the public as a whole—that is in the "public interest."[228]

The public choice account rejects such a model as naive.[229] Public choice theory presumes that once in office, legislators want to stay there. They maximize their own chances for reelection, or perhaps advancement to higher office.[230] At first this might not seem to pose any problem. If a legislator wants reelection or advancement, on a public choice account she presumably would act so as to benefit the greatest number of constituents, thus gaining the greatest number of votes. Unfortunately, however, the reelection or advancement-maximizing legislator is not as interested in acting for the benefit of most of her constituents as she is in doing so *as far as they know.* In other words, the problem is rational ignorance on the part of the electorate. A self-interested legislator will write laws whose burdens will be sufficiently diffuse that her constituents will not have enough at stake to make it worth their while to undertake the investigation necessary to discover that she is fleecing them. At the same time, the benefits of the law will be sufficiently concentrated to be both identifiable and significant to the beneficiaries. This state of affairs is optimal for the legislator. The beneficiaries of the regulations are happy and contribute funds or free billboard space to the legislator's next race, thus maximizing her chances of reelection. At the same time, there is little or no cost in terms of constituent dissatisfaction. This analysis implies that the legislator's best move is to transfer as much of her constituents' wealth as possible to groups that will give her a return on her efforts without raising the constituents' suspicion and thus incurring a cost.[231]

228. Elhauge, *Antitrust Process, supra* note 99, at 703. Of late this model has been adopted by what Professor Sunstein has termed a "revival" of civic republican theory. *See* Cass Sunstein, *Beyond the Republican Revival,* 97 YALE L. J. 1539 (1988); Cass Sunstein, *Interest Groups In American Public Law,* 38 STAN. L. REV. 29 (1985).

229. *See generally* Farber & Frickey, *supra* note 227, at 879.

230. *Omni* provides a good example of the more general point of public choice theory because of the identity of the anticompetitive regulation and the payoff to the public official — for the regulatory preservation of a billboard monopoly the regulators were paid in billboard space. But the same dynamic is at work throughout the legislative process. It may take the form of outright corruption—bribery or the notorious case of the "Keating Five" Senators. But it may also be more subtle. Consider the concept of "logrolling," a practice where legislators vote for measures valuable to one of their number in the expectation of a reciprocal vote in the future.

231. This is why legislatures are likely to prefer regulation to taxation (which is relatively more efficient) for transferring wealth from the general public to some special interest. As the previous discussion of private accountability demonstrated, it costs less to find out that one is being taxed than to find out that one is paying too much for raisins

It therefore does not assist Professor Elhauge in responding to public choice arguments to say, as he does, that his theory takes into account the differing incentives of public and private actors to pursue that good.[232] That does not refute public choice theory, but it begs one of most fundamental questions the theory presents. In public choice theory, the notion of some sort of ontological public good—the first assumption discussed above—is incoherent. To borrow the description of an Professor Sunstein, eloquent critic of public choice theory, "[t]he pluralist conception treats the . . . notion of a separate common good as incoherent, potentially totalitarian, or both."[233] If one must use the term "public good" in a public choice analysis, it would refer to "uninhibited bargaining among the various participants, so that numbers and intensities of preferences can be reflected in political outcomes. The common good amounts to an aggregation of individual preferences."[234]

To the extent Professor Elhauge defines the public good he is thinking of, it is by reference to the realization of that good through the actions of politically accountable and financially disinterested actors. Of course, the two strongest attacks made by public choice theory are that public officials frequently have a financial interest in the decisions they make and that they need not be accountable for the wealth they transfer. In other words, the argument of public choice theory is that as an empirical matter the "objective incentives" of public and private actors are largely the same. Professor Elhauge's argument lacks force because it provides no reasons to reject the public choice account of legislative action.

In sum, Professor Elhauge's theory is best read not, as he initially casts it, as a rejection of the public-private distinction itself, but as an effort to set forth meaningful criteria to make the distinction. But, as noted above, there is neither a sound empirical nor analytical basis to presume that legislators ("financially interested" or not) will act in some definable public interest while pri-

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and that the government is at fault, and constituents are therefore more likely to learn of the transfer of their wealth by tax and object to it at the next election. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 498 (3d ed. 1986).

232. Elhauge, *Antitrust Process*, *supra* note 99, at 719.

233. Cass R. Sunstein, *Interest Groups In American Public Law*, 38 STAN. L. REV. 29, 32 (1985) [hereinafter *Interest Groups*]. Professor Sunstein's reference to pluralism should not mislead. He uses pluralism to refer to "interest-group theories of politics." Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L. J. 1539, 1542 (1988).

234. Sunstein, *Interest Groups*, *supra* note 233 at 32-33.

vate actors will not. Nor does Professor Elhauge offer such support. He simply attributes the basis for his assumptions an unstated congressional intention lodged in the Sherman Act. This attribution does not withstand scrutiny. Consequently, Professor Elhauge's theory does not meaningfully improve on the public-private distinction. In part, this is because Professor Elhauge's goal of explaining the Court's state action cases requires him to define a disinterested, accountable actor as anyone who is either elected or was appointed by someone who was elected, or was appointed by someone who was appointed by someone who was herself elected.[235] That comprises most of the government, if not all of it, thus undermining Professor Elhauge's efforts to escape the public-private distinction he criticizes.

As this section argues below, the state action cases can only be justified and explained along the lines that Professor Elhauge criticizes but implicitly adopts. At least if one is to deem a given state of affairs as "in the public interest" when it comes from the legislature and "against the public interest" when it comes from the market, one must explain why the points of distinction between the legislature and the market are significant, and do so in terms of the public interest which must itself be defined in terms relevant to the debate. In other words, a process-based analysis adds a step to the definition of the public good, but it does not obviate the need for an underlying substantive norm or norms at which the process is directed.

2. *Clear Statements, Active Supervision, And Principles of Governance: How* Panama Refining Co. v. Ryan *and Deterrence Theory Became Part of The Antitrust State Action Doctrine*

This section discusses the Court's treatment of the intersection between antitrust and the public interest. It attempts to answer a perplexing question: how can we justify, on grounds of federalism, restrictions on a state's ability to adopt regulations that may give private actors control over output? In answering this question, we focus on the same principles that the Court has said

235. Elhauge, Antitrust Process, *supra* note 99, at 671 n. 10. According to Professor Elhauge, an actor is "politically accountable" if "his or her authority can be traced to an election, appointment by elected officials, or through some chain of appointment starting with elected officials. Ongoing political accountability is not required; it is sufficient that the political process can influence the initial selection of personnel to exclude those with unacceptable policy preferences."

guide it—theories of governance and basic principles of democracy. The Court conceives of federalism as serving in part to define the actors responsible for a given state of affairs, so that those actors may be subject to public approval or rejection. To this end, the Court has shaped the state action immunity doctrine to facilitate the dialogue between the governors and the governed, encouraging states to be frank about the policies they draft, and to watch over anticompetitive programs they implement.[236] The Court also has sought to ensure that the threat of liability will not impede the dialogue by holding that legislators will not be subject to liability for the votes they cast, with the corallary benefit that their intent in casting their votes will not be scrutinized by the courts.

The Court's rule, as stated in the most recent of these cases, is simple:

> A state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear and affirmative policy to allow the anticompetitive conduct, and second, the State provides active supervision of anticompetitive conduct undertaken by private actors."[237]

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236. *See, e.g.*, Federal Trade Comm'n v. Ticor Title Ins. Co., 112 S. Ct. 2169 (1992); Southern Motor Rate Carriers, 471 U.S. 48 (1985); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

237. Federal Trade Comm'n v. Ticor Title Ins. Co., 112 S. Ct. 2169, 2175 (1992), citing California Retail Liquor Ass'n v. Midcal Aluminum, Inc. 445 U.S. 97 (1980) (holding that state action immunity was unavailable under title insurance regulation in Wisconsin and Montana). The rule contains a substantial qualification. Because the immunity in question is rooted in the federalism principles cited in *Parker*, the Court has concluded that immunity does not apply to local governments, which "do not receive all the federal deference of the States that created them." City of Lafayette v. Louisiana Power and Light Co., 435 U.S. 389, 412-413 (1978) (holding that all governmental agencies, whether state organs or subdivisions, are not automatically exempt from antitrust laws by virtue of their state status). Though this statement is made in a portion of *City of Lafayette* which enjoyed the votes of only four justices, the rule and language were adopted by a majority of the Court in Community Communications Co., Inc. v. City of Boulder, 455 U.S. 40, 50-51 (1982) (finding insufficient state authorization under state "home rule" law for municipality's temporary prohibition on expansion of existing cable television franchise). The rule has also been applied in Town of Hallie v. City of Eau Claire, 471 U.S. 34, 38-39 (1985) (state granted municipality sufficient authority to enforce allegedly anticompetitive sewage treatment policy), and, of course, City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344, 1349-51 (1990) (holding a state grant to municipality of zoning authority over billboards sufficient to provide immunity under *Parker*). Professor Elhauge views the cases as creating a three-tiered structure in which acts of the state legislature and principal officers are genuine state action, actions of local governments require clear state authorization but not active supervision, which the localities may provide, and actions involving private parties require both a clear statement and active supervision. Elhauge, *Antitrust Process*, *supra* note 99, at 672-75. Professor Elhauge's view is consistent with the cases, and receives further support from both *Omni* and *Ticor*, which were issued after Professor Elhauge's article was published.

Understanding how we got that rule, whether it makes sense, and, if so, why, are all much harder questions.

In the first place, why is it a matter of antitrust concern whether an anticompetitive state policy is clearly stated or closely supervised? The short answer is that it is not, really. According to the Court, *Parker* and its progeny are "grounded in principles of federalism."[238] "Federalism," the Court continues, "serves to assign political responsibility, not obscure it."[239] Thus, "[s]tates must accept political responsibility for the actions they intend to undertake."[240] These are general principles of governance; they would apply just as well to any other area of law as to antitrust.[241] The clear statement and active supervision requirements demonstrate that the Court's willingness to grant antitrust immunity to anticompetitive state actions turns on such general principles, and provides further evidence that the rule of decision in these cases is not derived from the antitrust laws.

The clear statement branch of the Court's rule has an obvious relationship to the Court's substantive concern that states accept responsibility for their anticompetitive schemes. Voters cannot decide whether they approve of the state's actions unless they know what the state is doing. This simple principle is fundamental to democratic government, for "popular choice will mean relatively little if we don't know what our representatives are up to."[242] A state is more likely to admit what it is doing if the failure to do so would render its program subject to antitrust scrutiny. The clear statement requirement is thus designed to establish what Professor Ely termed a "visible legislative process."[243] The more visible the legislators' actions are to the public, the easier it will be for the public to hold the legislators accountable for their actions. In economic terms, the Court is attempting to diminish the probability that consumers will be ra-

238. *Ticor*, 112 S. Ct. at 2176.

239. *Id.* at 2178.

240. *Id.*

241. Professors Elhauge and Wiley argue that the active supervision requirement amounts to a contradiction in the Court's reasoning because it encourages states to regulate the market more closely, thereby offending the principles that animate federal antitrust law. *See, e.g.*, Elhauge, *Antitrust Process*, *supra* note 99, at 675-76; Wiley, *Capture Theory*, *supra* note 36, at 719-723. This argument is unpersuasive because it fails to account for the Court's view of what federalism means. As *Ticor* makes clear, the Court perceives a substantive component to federalism. Thus the Court can with perfect consistency deny antitrust immunity to a state regulation that does not satisfy those substantive minima.

242. JOHN HART ELY, DEMOCRACY AND DISTRUST 125 (1980).

243. *Id.* at 125-31.

tionally ignorant of anticompetitive state policies by decreasing the cost of discovering the existence of such policies and those responsible for them.

The clear statement requirement has not been the subject of much litigation, and certainly far less than its counterpart, the active supervision requirement, a fact which may suggest that it is not a particularly high hurdle for states to clear. States generally have managed to pass laws from which the Court could discern a clear anticompetitive purpose. As the Court put it in *Midcal Aluminum*, the case establishing the two-part test, "[t]he legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance."[244] *Midcal* points out a second limitation on the clear statement rule—it imposes no limits on *what* state purposes are permissible, so long as they are clearly articulated.

Like the clear statement requirement, the active supervision requirement is designed to ensure that state governments are held accountable for their actions. To borrow again from Professor Ely, this time in his discussion of the Court's nondelegation cases, "[t]here can be little point in worrying about the distribution of the franchise and other personal political rights unless the important policy choices are made by elected officials."[245] In fact, the famous nondelegation cases, *Panama Refining Co. v. Ryan*[246] and *A.L.A. Schecter Poultry Corp. v. United States*,[247] bear a striking resemblance to *Parker*. All three concerned statutes in the early New Deal mold.[248] The National Industrial Recovery Act (NIRA),[249] at issue in *Schecter*, could have served as a model for the Agricultural Prorate Act. NIRA allowed the President to promulgate codes of "fair competition," usually acting at the be-

244. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) (holding that California's wine pricing system violated federal antitrust law).

245. Ely, *supra* note 242, at 133. Professor Ely's defense of a vigorous nondelegation doctrine is cast in precisely the terms used by the Court in *Ticor*. Delegation "is undemocratic, in the quite obvious sense that by refusing to legislate, our legislators are escaping the sort of accountability that is crucial to the intelligible functioning of a democratic republic." *Id.* at 132.

246. 293 U.S. 388 (1935) (holding Section 9(c) of the National Industrial Recovery Act an unconstitutional delegation of congressional power).

247. 295 U.S. 495 (1935) (holding the National Industrial Recovery Act unconstitutional as applied).

248. The California statute was directly modeled on the Agricultural Marketing Agreement Act, 50 Stat. 246, 7 U.S.C. § 601 (1937), which was itself the re-enactment under the Commerce Clause of the Agricultural Adjustment Act of 1933. The AAA was enacted under Congress' spending power, and the Court struck it down on that ground. United States v. Butler, 297 U.S. 1 (1936). The history is recounted in Wiley, *Capture Theory*, *supra* note 36, at 719 n.18.

249. Act of June 16, 1933, c. 90, 48 Stat. 105, 106 (codified at 15 U.S.C. § 703).

hest of trade associations.[250] "Fair competition" under NIRA meant no competition, and the codes commonly set wages, prices, and hours on terms proposed and enforced by the trade association.[251] Justice Cardozo, who was not commonly opposed to New Deal measures, aptly termed this plan "delegation running riot."[252] The description fits *Parker* quite well, and bolsters the intuition that if *Parker* had been decided at a less tumultuous time, California's raisin cartel would not have received such favorable judicial treatment.

The active supervision requirement serves to keep delegation from running riot in the state action cases, thus preserving accountability, even though the nondelegation doctrine is all but dead at the federal level.[253] The Court's description of what it saw as the essential failing of the California statute in *Midcal Aluminum* is revealing:

> The state simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules. . . . The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.[254]

The Court's holding is in the tradition of *Parker's* statement that a state cannot "give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."[255]

This is a limitation with some teeth, as the Court's most recent case on the issue illustrates. In *Ticor*, the Federal Trade Commission (FTC) brought suit against six of the nation's largest title insurers for violation of the Federal Trade Commission Act.[256] The FTC alleged that the insurers had violated the Act's proscription of "unfair methods of competition" by fixing prices for title searches and examinations.[257] In the states at issue, the insurers belonged to rating bureaus—"private entities organized by title insurance companies to establish uniform rates for their mem-

250. *Schechter Poultry*, 295 U.S. at 534.
251. For examples, see *id.* at 537.
252. *Id.* at 553 (Cardozo, J., concurring).
253. For a recent notable attempt to revive the federal nondelegation doctrine, see Judge Williams' provocative opinion in International Union, UAW v. OSHA, 938 F.2d 1310, 1313 (D.C. Cir. 1991).
254. *Midcal Aluminum*, 445 U.S. at 105-06.
255. *Parker v. Brown*, 317 U.S. 341, 351 (1943).
256. 15 U.S.C. § 45(a)(1)(1914)(amended 1975).
257. *Ticor*, 112 S. Ct. at 2172.

bers."[258] The bureaus were licensed by the states and authorized to set rates and submit them for approval. If the state did not act within thirty days, the rates became effective and the insurers were bound to follow them.[259]

In light of their participation in this procedure, the insurers contended they were immune from liability under *Parker*.[260] The Court took the case to decide whether the states had exercised "active supervision" sufficient to immunize the insurers for setting collective rates.[261] Finding for the FTC, the Court held that a state has not exercised active supervision unless

> 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 an agreement among private parties. Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy.[262]

This is a far stricter standard than the one the Court articulated in *Panama Refining* and *Schechter Poultry*. In neither of those cases would the Court have required that the government exercise control over the "specifics" of a policy. The Court in those cases required only that the government establish principles for the recipients of delegated power to follow.[263]

To the analysis just described, the Court added some provocative thoughts on state action. Faced with the dissent's strong argument that the Court was infringing on the states' legitimate scope of regulation,[264] the majority responded that the supervision requirement it imposed actually increased state regulatory flexibility.[265] This paradoxical argument appears to have been prompted by a brief filed by thirty-four states, including, ironically, two of the states whose policies were at issue. These states argued that a broad rule of immunity would not serve them well because, in essence, sometimes their regulations develop in unexpected ways.[266]

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258. *Id.* at 2174.
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.* at 2177.
263. *Schechter Poultry*, 295 U.S. at 530; *Panama Refining*, 293 U.S. at 421.
264. *Ticor*, 112 S. Ct. at 2181-83 (Rehnquist, C.J., and O'Connor, Thomas, JJ., dissenting).
265. *Id.* at 2178.
266. *Id.*

How might this happen? The thought seems to have been that states could pass well-intentioned regulatory programs that would get out of hand, becoming anticompetitive (or more anticompetitive than they were supposed to be) even though the state did not desire that result. Wisconsin and Montana—and thirty-two other states as well—argued that they had intended to create regulatory schemes in the public interest, not give a plum to the title insurance industry. Things did not work out that way, however, and the states had no interest in seeing the insurers, who had profited from this regulatory failure, immunized against any kind of liability. In this context, one may read the states as wanting to preserve antitrust liability as a possible punishment for regulated industries that "captured" their regulators, and in so doing diminish the probability that such capture would be attempted. The Court's discussion indicates that it sympathized with such an approach. In the Court's words, it did not want antitrust state action immunity to "compel a result that the States do not intend but for which they are held to account."[267]

Of course, this put the title insurers in a quandry, as Justice O'Connor's dissent observed. She argued that it was unfair to subject the title insurers to potential liability under the antitrust laws for submitting a joint rate filing when their liability would turn on how actively the state scrutinized the filing—activity that necessarily took place after the filing had been made.[268] Justice O'Connor argued that "the regulated entity has no control over the regulator, and likely will have no idea as to the degree of scrutiny that its filings may receive,"[269] a statement that arguably reflects a more optimistic view of agency independence and rigor than is warranted by the facts. Her basic point is sound, however. The state action cases turn on whether the structure of a given anticompetitive program is sufficient to ensure that the state will be accountable for its actions. The beneficiaries of such regulations cannot control the accountability of public officials (at least after the adoption of the regulation). It thus makes no sense, and is more than a little unfair, to punish them because the government successfully avoided responsibility for its actions.

Justice Scalia concurred with the majority in *Ticor*, even though he said he is "skeptical about the *Parker v. Brown* exemption from

267. *Id.*
268. *Ticor*, 112 S. Ct. at 2183 (O'Connor and Thomas, JJ., dissenting).
269. *Id.* at 2184.

state-programmed private collusion in the first place."[270] This statement by the author of *Omni* highlights the Court's tendency to show less deference to a state program the further removed it is from an actual enactment by a state legislature or its proxy. *Parker* and *Ticor* both involved the delegation of authority to private actors with minimal or nonexistent state supervision, while *Omni* involved the direct exercise of traditional municipal zoning power.

The Court's distinction between direct and delegated restraints of trade can be viewed as an attempt to give legislators breathing space to carry out their functions. The plaintiff in *Omni* contended the regulation at issue was not exempt from antitrust scrutiny because it was the product of a "conspiracy" between Omni and the city government, thus falling within the scope of an exception left open and undefined in *Parker*.[271] The Court used *Omni* to limit this exception to cases in which the government acted as a market participant, and expressly disavowed reliance on the concept when the government was legislating.[272]

The Court's reason for limiting the co-conspirator exception was the fear that legislators might shy away from voting for desirable policies if they would be subject to antitrust liability for their votes.[273] The Court assumed that it is often desirable for legislators and their constituents to agree to pursue a given policy. That a constituent might obtain a competitive advantage from such an agreement did not change the Court's view that interplay between legislators and constituents is desirable.[274] The Court concluded that if the city's regulations were subject to antitrust scrutiny, "*with personal liability of city officials a possible consequence*," then the ability of the states to regulate their domestic commerce would be compromised.[275] This was perhaps the most important point raised in the opinion, and it deserves careful scrutiny.

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270. *Id.* at 2181 (Scalia, J., concurring).

271. *Omni*, 111 S. Ct. at 1351. In *Parker*, the Court rather casually emphasized that it was not faced with a case where the state was "a participant in a private agreement. . ." *Parker*, 317 U.S. at 351-52, giving rise to the "co-conspirator" exception.

272. *Omni*, 111 S. Ct. at 1351.

273. *Id.*

274. *Id.*

275. *Id.* at 1352 (emphasis added). This conclusion reinforced a concern the Court had expressed when addressing the question whether the state had delegated sufficient power to support the regulation. The Court there spoke of the possible criminal liability of legislators under the antitrust laws. *Id.* at 1350 n.4. The Court's use of the phrase "domestic commerce" to describe intrastate commerce, *id.* at 1356, is also revealing, as it is a

The Court's reasoning on this point must be understood in terms of basic deterrence theory. All laws carrying sanctions are designed to deter some form of conduct. The antitrust laws seek to deter price fixing and similar activities by imposing treble damages, and in some cases prison terms.[276] The deterrent effect of a given sanction depends on its severity discounted by the probability that it will be imposed. We can call this the expected detriment of a sanction, the discount factor applied to the expected value of unlawful conduct. Compared to other penalties for business conduct, the antitrust laws are fairly severe. Even for civil violations the penalties include treble damages and attorney's fees, which can be substantial.[277]

Deterrence in the real world is not precise. Sanctions may be applied to conduct that was not in fact illegal, as when an innocent man is wrongly convicted. Especially in cases concerning activity near the hypothetical line of illegality, an actor might not know whether her conduct was lawful until after the fact. Even then, the conclusion might simply be a function of the particular jury drawn for that case.[278] As a consequence, a risk-averse actor might steer clear of legal conduct that a jury might wrongly interpret as unlawful. That is what the Court feared in *Omni*.[279] Faced with the prospect of treble damage liability, legislators might be inclined not to vote for valid regulatory programs they feared might later be attacked on antitrust grounds. The Court removed the overdeterrence problem altogether by rejecting

> any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns to base their claims on 'perceived conspiracies to restrain trade'. . . . *[A]ny* action that qualifies as state action is '*ipso facto* . . . exempt from the operation of the antitrust laws.'[280]

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phrase more commonly used in reference to nations than states. The Court's language reinforced the point that states are considered limited sovereigns, and one area of their sovereignty (at least in theory) is *intra*state commerce.

276. *See, e.g.*, 15 U.S.C. § 15 (1982).

277. *Id.* Even if the damages actually awarded are low, the prospect of attorney's fees is significant. It is worth recalling that the defunct United States Football League won only a dollar (trebled to three) in its antitrust action against the National Football League. The USFL was still the prevailing party, however, and was awarded millions in fees. United States Football League v. National Football League, 704 F. Supp. 474 (S.D.N.Y. 1989).

278. This problem is greatly exacerbated in cases such as *Ticor*, because under the Court's current rule the legality of an actor's conduct does not depend on the antitrust laws or even on the actor—it depends on actions taken by the state.

279. *Omni*, 111 S. Ct. at 1353.

280. *Id.*, quoting Hoover v. Ronwin, 466 U.S. 558, 568 (1984).

The *Omni* plaintiff and *amici* had tried to persuade the Court to adopt a variety of rules they contended would allow antitrust claims to proceed in proper cases without deterring the legislators. They argued that the Court could craft a rule denying immunity when the regulation at issue was the product of "corrupt or bad faith decisions" or when the regulation was "not in the public interest."[281] The Court rejected these suggestions, however, holding that any inquiry into whether a legislator voted for a measure because she subjectively believed it was in the public interest or as a quid pro quo for some improper inducement would require the sort of deconstruction "we have consistently sought to avoid."[282] The Court also rejected the suggestion that immunity could be denied where it could be shown that some neutral (with respect to antitrust and competitive concerns) law had been violated, such as a bribery statute. The Court reasoned that violation of such a law did not necessarily mean that a statute was not in the public interest, and that such an approach was in any event not related to any antitrust concerns.[283]

The concern over chilling legislative behavior may or may not be valid. Regardless, the argument deserves greater attention than it received in *Omni.* Three points in particular merit consideration: (1) the Court's treatment of the suggestion that antitrust liability could be made to turn on violation of a neutral rule such as a bribery statute; (2) the Court's concern to avoid an inquiry into subjective legislative intent; and (3) the Court's solution of immunizing all direct state actions from antitrust liability.

The Court rejected the suggestion that antitrust liability could be imposed only when a neutral law such as a bribery statute had been broken because "[s]uch unlawful activity has no necessary relationship to whether the governmental action is in the public interest."[284] The Court concluded that "[t]o use unlawful political influence as the test of legality of state regulation undoubtedly vindicates (in a rather blunt way) principles of good government. But the statute we are construing is not directed to that end."[285] The problem with this analysis is that the conspiracy alleged in *Omni* is significant on two levels, only one of which involves the antitrust laws. The other level involves the very prin-

281. *Id.* at 1352.
282. *Id.*
283. *Id.* at 1353.
284. *Id.*
285. *Id.* at 1353.

ciples of governance that the Court has said provide the rules of decision in antitrust state action cases.

Simply put, the general principles of governance recognized by the Court as providing the rule of decision in every state action case since *Parker* do not permit states (or municipalities wielding state authority) to conspire with private actors. The Court in *Ticor*, for example, made it clear that it will not tolerate the delegation of state power to private actors because that impairs accountability, which is in turn crucial to the democratic process.[286] As Professor Ely put it, the vote is not worth very much if the real power lies with unelected officials.[287]

With this premise in mind, let us alter the facts of *Omni* slightly. Instead of passing a law banning new construction of billboards, suppose the city enacted legislation establishing a commission to investigate the billboard situation and make a recommendation that, if not altered or disapproved by the city, would become law in thirty days. Suppose further that to keep information costs down, the law provided that the board would comprise representatives from firms that already owned billboards in the city. Suppose finally that this commission recommended a ban on new billboard construction for ten years, that the city did nothing to investigate or analyze this recommendation, that it became law, and then was challenged by Omni.

Our hypothetical regulatory scheme could not survive application of the nondelegation principles embodied in the Court's active supervision requirement. In *Ticor's* terms, the construction ban would be subject to antitrust scrutiny because the city would not have "played a substantial role in determining the specifics of the economic policy."[288] Why should the analysis applicable to our hypothetical be any different given the actual facts of *Omni*? The democratic process the Court seeks to protect through the active supervision requirement is equally undermined by the agreements protected in *Omni* as by the delegation condemned in *Ticor*. The existence of bribery statutes, which have never been perceived as chilling legislative behavior, illustrate the point. The Court said nothing new when it argued that bribery statutes are unrelated to the goals of the antitrust laws. That is of course true. But the consistent rule of the antitrust state action cases has been

286. *Ticor*, 112 S. Ct. at 2177.
287. ELY, *supra* note 242, at 133.
288. F.T.C. v. Ticor Title Ins. Co., 112 S. Ct. 2169, 2177 (1992).

to judge the state action at issue against the Court's standards of governance, as in *Ticor.* If legislative action does not pass muster under those standards, then antitrust is normally allowed free reign.[289]

The notion that the governance principles of *Ticor* have a place in *Omni* brings up a second point—the Court's reluctance to engage in an analysis of subjective legislative intent. One difference between *Omni* and the *Ticor*-style cases is that in the latter cases the Court considers the structure of a regulation and the state's action or inaction in supervising the program. Both those elements are, relatively speaking, objective historical facts from which the Court may conclude that a state either did or did not relinquish its power of governance to private actors. When the anticompetitive state action at issue is a direct action such as a statute, the inquiry is harder. The Court then must determine if in passing the statute the state in fact relinquished its power of governance. All the facts Omni emphasized before the Court—the longstanding ties between Columbia Outdoor and the city, the free billboard space, and the jury's finding of agreement between the council members and the company—were relevant because they suggested that the purpose of the billboard regulations was to secure Columbia Outdoor's monopoly. If that were true, the analogy between the direct action in *Omni* and the indirect action in *Ticor* would be sufficiently strong that one would expect the Court to reach the same result in both cases.

The Court, however, desired to avoid the type of inquiry that would provide information relevant to determining the true purpose of regulations like those in *Omni.* The Court has recognized that subjective legislative intent is relevant to at least a few areas of law, notably the First Amendment's Speech Clause and the Equal Protection Clause, and that in those areas it traditionally

289. The *Omni* Court's attention was diverted from the principles of governance it generally employs in these cases because, on the particular facts of the case, the violation of these principles and the alleged antitrust violation stemmed from the same behavior and went by the same name—conspiracy. In fairness to the Court, the blurring of the antitrust and governance issues was almost inevitable because the case had been tried on a conspiracy theory below. City of Columbia v. Omni Outdoor Advertising, Inc., 566 F. Supp. 1444 (D.S.C. 1983). That choice by the plaintiff, and the trial judge's failure to separate the two questions, meant that the questions were inextricably intertwined before the Court. But that does not mean, as the Court claimed, that the antitrust laws were being used to clean up the city government. *Omni,* 111 S. Ct. at 1353.

examines the reasons a law was passed.[290] The *Omni* Court rejected such an inquiry in the antitrust context, however, because "where the action complained of . . . was that of the State itself, the action is exempt from antitrust liability regardless of the State's motives in taking the action."[291]

The Court's disavowal of an intent-based inquiry seems inconsistent with other state action cases, in which the validity of a state law is judged in part by whether the legislature has "clearly stated" its purpose in passing the law. The clear statement requirement is a form of intent inquiry, conducted through the mechanism of an irrebutable presumption, that forces state legislatures openly to avow any anticompetitive purposes they actually wish to achieve. A legislative confession of anticompetitive purpose is deemed sufficient and, more importantly, necessary, to protect an anticompetitive legislative program.[292] Anything else, whether it be a statement of a different purpose, silence, or ambiguity, is in effect conclusively presumed to be a confession that the legislature did not intend to create a program inconsistent with the antitrust laws. Actions taken pursuant such a program are thus denied state action immunity.

The inquiry dictated by the Court's previous decisions would be focused on determining whether the legislature had in substance chosen to turn over the legislative keys to Columbia Outdoor for purposes of billboard regulation. That is a familiar inquiry undertaken in bribery cases, among others.[293] The Court misapprehended the significance of the analogy to bribery statutes, however. Bribery will not tell us whether a statute is "in the public interest" because, as the Court rightly noted, legislators may take bribes to cast votes they would have cast for free.[294] Rather, bribery statutes are significant in this context for two reasons. First, the existence of such statutes confirms our intuitive sense that the government acts illegitimately, in terms of fundamental democratic principles, to the extent that it barters its powers to private parties. *Ticor* made a similar point.[295]

290. *Omni*, 111 S. Ct. at 1352 n.6. For cases in which the Court recognized subjective legislative intent in Speech Clause and Equal Protection Clause cases, see *supra* notes 102 and 104, respectively.

291. *Id.*, quoting Hoover v. Ronwin, 466 U.S. 558, 579-80 (1984).

292. *See supra* note 244 and accompanying text.

293. *See, e.g.*, United States v. Jannotti, 673 F.2d 578, 601 (3d Cir.)(en banc), *cert. denied*, 457 U.S. 1106 (1982).

294. *Omni*, 111 S. Ct. at 1353.

295. *Ticor*, 112 S. Ct. at 2178.

Additionally, the existence and enforcement of laws against bribery provide reason to believe that legislators' actions may be subjected to judicial scrutiny without overdeterring legislators. The argument has an intuitive appeal because we can take it as a given that legislators are fully aware of the impropriety of accepting bribes, then there is nothing wrong with holding them accountable if they do.[296] The bribery argument illustrates the point that there are well-recognized limits on permissible legislative behavior in all contexts, antitrust or otherwise. There is no reason an antitrust suit should not be allowed to proceed once such boundaries have been crossed.

This point leads to the final one: The Court's decision effectively placed all direct state restraints beyond antitrust scrutiny. That decision was based on the Court's concern that a failure to do so would deter legislative behavior, impairing the functioning of the very democratic principles it sought to enforce.[297] But, to borrow from Justice Frankfurter, the Court burned the house to roast the pig.[298] The existence of bribery and similar statutes regulating the behavior of legislators demonstrates that boundaries of permissible legislative behavior may be enforced without undermining the democratic process. There is no reason the Court could not have applied such standards directly in *Omni*, as it did in *Ticor*.[299]

3. *Recommendations*

Virtually all regulation is anticompetitive in the sense that it seeks to displace the distribution of wealth wrought by competition. If the Sherman Act, with its national mandate for competitive markets, were applied to all state regulations it would pose a serious threat to the states' very existence as meaningful governmental entities. This is a subject of legitimate judicial concern. A sovereign that cannot implement its policies is not much of a sovereign. On the other hand, if there is no state program be-

296. While it might be argued that antitrust liability is harder to determine *ex ante* than is bribery, the same argument cannot be made for campaign finance laws, which also test legislators' intentions.

297. *Omni*, 111 S. Ct. at 1351.

298. *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

299. One difference between the two cases is that the Court has itself applied the nondelegation principles at work in the *Ticor* cases for some time but has not done so with respect to direct legislative enactments such as were at issue in *Omni*. Legislators thus might (temporarily) feel blindsided by the imposition of such standards by the Court. As noted above, part of the appeal of using bribery standards to determine whether a legislative action was worthy or immunity is that it avoids such surprise.

yond mere authorization of a private restraint of trade, the state is not fulfilling any substantive mission, nor is it fulfilling its presumptive role in the federal system. It is simply declaring through legislation that, at least for a certain group of constituents, the federal antitrust laws stop at its borders. This is certainly not what the Court (or anyone else for that matter) has in mind when it speaks of the states as sovereign regulators, and allowing liability for such open defiance does not threaten the proper role of states in the federal system.

Federalism is not simply an mandate for an undifferentiated preference for state over federal decisionmaking.[300] Not since Spencer Roane has anyone considered every restriction on state authority by the federal government to be contrary to the principles of federalism. If the rejection of the Virginia and Kentucky resolutions at the bar of history is not enough to establish that proposition,[301] the Civil War was. Rather, the fundamental principle of federalism at issue in the state action cases is the distinction between states (or local governments) acting in their governance capacity and those acting merely to barter private immunity from the antitrust laws. States are entitled to deference when they are pursuing a legislative program toward some policy end, but not when they are simply enacting without significant review the anticompetitive policies proposed to them by private actors who stand to benefit.[302]

How can one distinguish between actions that represent merely a brokering of governmental immunity and actions that

300. Some commentators have taken this view. *See, e.g.*, Elhauge, *Antitrust Process*, *supra* note 99, at 676 ("[i]ndeed, federalism and anti-*Lochnerism* seem offended rather than furthered by an active supervision requirement that restricts a state's regulatory options and by a clear authorization requirement that turns antitrust courts into adjudicators of what are essentially issues of state administrative law").

301. These resolutions, it will be recalled, asserted that the states had the power to interpret the federal constitution for themselves. This idea had eminent supporters. Thomas Jefferson wrote the Kentucky Resolution, and James Madison the Virginia Resolution. *See* DUMAS MALONE, JEFFERSON AND THE ORDEAL OF LIBERTY ch. 25, at 401-07 (1962). Malone argues with some force, however, that these resolutions were more a reaction to the Federalist's efforts to eradicate the Republican party through the Sedition Act than a reflective statement of constitutional doctrine. *Id.* It is thus significant that not even these highly charged and partisan documents claimed that the states had the power merely to pass a law suspending the operation of a federal statute within its borders, although the power they did claim could easily be used to achieve similar results.

302. For this reason, we disagree with Professor Page's suggestion that state laws encouraging vertical agreements restraining trade are valid because they simply correct for "antitrust failure." *See* Page, *supra* note 164, at 622. The state "policy" in this instance is not the promotion of some social goal unrelated to competition, but purely the nullification of a federal law with which the state (and Professor Page) disagree.

actually implement a policy? The (somewhat unsatisfying) answer is that the courts must engage in a case-by-case analysis of the purpose and effect of suspect state action in deciding whether to confer immunity. The ultimate goal of this analysis should be to apply the principles of democratic governance discussed above. At least four factors may be relevant to that analysis: (1) whether the government has clearly stated the goals of its policy; (2) whether the government actively supervises implementation of its policy; (3) whether a private actor is responsible for initiating or facilitating passage of the state law, or both; and (4) whether the state policy discriminates in favor of certain competitors within a market at the expense of others.

Two of these factors can be found in the Court's existing state action jurisprudence, at least in some form. The clear statement and active supervision requirements are best read as substantive parameters imposed by the Court that effectively define legitimate anticompetitive state activity. The principles that determine where these parameters will be set are familiar, basic theories of governance. Prominent among these principles is the idea, plainly stated in *Ticor*, that "[s]tates must accept political responsibility for actions they intend to undertake."[303] As a theoretical matter, the consumers would then know where to place the blame for the higher prices they were paying and be able to remedy the situation by voting to replace the right people.[304] In economic terms, the Court is attempting to diminish the probability that consumers will be rationally ignorant of anticompetitive state policies by decreasing the cost of discovering the existence of policy and those responsible for it. The clear statement requirement serves this end by requiring the state to announce its intention to restrict output—it is easier for consumers to find out what the state is doing if the Court requires the state to tell them. The clear statement requirement is not particularly rigorous—it is sufficient if anticompetitive consequences are the "foreseeable result" of the state's announced program[305]—but it clearly aims

303. *Ticor*, 112 S. Ct. at 2178.

304. Of course, one of the lessons of public choice theory is that accountability is imperfect in the real world. Because of national consumer ignorance, collective action problems, and multidimensional voter choices, a legislature which "owns up" to its anticompetitive actions may still not be held liable for the consequences. Nonetheless, any measure which reduces the costs of voters informing themselves is a step in the right direction.

305. *Omni*, 111 S. Ct. at 1350.

at enhancing consumer awareness that they are being charged extra by reason of a state program.

As *Ticor* suggests, the active supervision requirement makes it more difficult for the state to claim that a scheme was merely the product of some renegade private actors, or that the state was ignorant of what was going on. It also should serve to locate responsibility within the state bureaucracy for the higher prices consumers are paying. One could envision the active supervision requirement as a norm of deliberation requiring the states to abstain from freewheeling public choice brokering of interests in favor of a more deliberative civic republican model, though the Court has not gone that far. Even in the less idealized world of public choice, the active supervision requirement may "encourage" such deliberation by raising the costs to legislators of taking action to benefit a particular interest group.[306]

The third factor, the role of private actors in procuring state legislation, is borrowed from Professor Wiley.[307] Essentially, this inquiry focuses on the role the private actor plays in proposing and enabling the adoption of state or local laws or regulations that benefit that actor. A company that proposes and secures passage of a legal rule which benefits itself—as Columbia Outdoor Advertising did in *Omni*—is necessarily more suspect than a company which took no affirmative action to influence the state. Unlike Professor Wiley, however, one should not afford this factor determinative weight.[308] Professor Wiley would deny immunity in virtually all cases in which a government action was the result of petitioning by an interested private party. He thus appears to foreclose the possibility that an anticompetitive regulation suggested by an interested party might be a good idea for some other policy reason. In practice, the result of Professor Wiley's approach is to abolish state action immunity entirely, and rely instead on the antitrust laws themselves and principles of causation to limit liability.

306. Just as the "clear statement" requirement may discourage legislators from acting in an anticompetitive fashion by increasing their accountability, so the "active supervision" requirement discourages such action by forcing the legislator to commit more resources on an ongoing basis to implement such a policy. As the legislator's costs of acting go up, the number of such anticompetitive actions should go down.

307. *See* Wiley, *Capture Theory*, *supra* note 36, at 723-29.

308. As noted above, while Professor Wiley offers four factors to aid the courts in determining whether capture of a state actor has occurred. However, the first three of those factors simply inquire into whether the state action violates the antitrust laws. They are not terribly helpful, therefore, in determining whether immunity should be granted for an antitrust violation. *See supra* note 161.

This section's more limited conception of this factor treats it instead as an affirmative defense, or a threshold requirement that must be met but will not alone justify a denial of immunity. Thus, if state action can be shown not to have been influenced by interested private actors, that fact will counsel strongly against a finding that the state was engaging in a brokering of immunity. This requirement may also have the salutary incidental effect of alleviating the concerns expressed by Justice O'Connor in *Ticor*. Justice O'Connor's dissent in that case lamented the use of "an after-the-fact evaluation of a State's exercise of its supervisory powers" to impose liability on private actors complying with a state law as "extremely unfair to regulated parties."[309] But holding private parties liable looks far less unfair if they are in fact responsible for promulgating the regulation that now binds them.

The final factor in this section's analysis is to determine whether a regulation discriminates among producers within an industry. State laws that prefer one competitor over another are significantly more likely to be the result of brokering than more general, or at least even-handed, laws. This is particularly true in combination with the third factor—when a particular company is responsible for enactment of a law that benefits that company at the expense of its competitors, the antitrust laws have great reason for concern. Again, the city council ordinance in *Omni* is a good example. Not only is a discriminatory law more likely to be the result of capture, but it is less likely to have some legitimate governance purpose behind it than a law of general applicability. This factor is in essence a type of fit analysis, which works from the premise that the purpose that fits the terms of a statute most closely is likely the purpose that generated it.[310]

III. *NOERR* AS A FIRST AMENDMENT DOCTRINE

The preceding section established that the antitrust laws are not the source of state action immunity; this section will draw on many of the same arguments to establish that those laws have

309. Federal Trade Comm'n v. Ticor Title Ins. Co., 112 S. Ct. 2169, 2184 (1992) (O'Connor, J., dissenting). We note in this regard that local governments are subject to injunctions under the antitrust laws, but not damages. *See* New Mexico v. American Petrofina, 501 F.2d 363 (9th Cir. 1974); 1 PHILLIP AREEDA & DONALD TURNER, ANTITRUST LAW 101-103 (1978). States, of course, are immune from damages liability under the Eleventh Amendment. *See* Edelman v. Jordan, 415 U.S. 651, 668 (1974).

310. *See* ELY, *supra* note 242, at 126.

even less to do with petitioning immunity. Instead, petitioning immunity is grounded in First Amendment principles protecting the freedom of speech and the freedom to petition the government for redress of grievances. The conclusion that petitioning immunity must be understood as a First Amendment doctrine is not new,[311] which is not to say that it has not been the subject of dispute.[312] The problem is that the analysis has usually stopped upon concluding that free speech is involved. The same is true of the Supreme Court, which has never explained why either the Speech or the Petition Clause shields a given activity from antitrust liability, although it has dismissed lawsuits on those grounds.[313] Not surprisingly, lower courts have mostly ignored the question as well.[314]

This cursory analysis has led to some unusual results. Perhaps most prominent is the Court's conclusion that the rights of petition and association confer upon the citizenry the right to "use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors."[315] Does this mean that the role of judges is akin to that of congressional representatives or the head of the Federal Energy Regulatory Commission?[316] Is there a difference between the First Amendment protection accorded petitioning a legislator and that accorded an ad campaign, such as the one run by

311. As we have noted, Professor Fischel was an early and prominent advocate of this view. *See* Daniel R. Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80, 81-84, 94-96 (1977). Other commentators have taken a similar view. *See, e.g.*, Garland, *supra* note 47 at 512-16; James D. Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr*, 74 GEO. L.J. 65, 66 (1985); Note, *Noerr-Pennington Immunity from Antitrust Liability Under Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.: Replacing the Sham Exception with a Constitutional Analysis*, 69 CORNELL L. REV. 1305 (1984).

312. For other views, *see, e.g.*, PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 14-16 (Supp. 1991); Calkins, *Developments in Antitrust and the First Amendment: the Disaggregation of Noerr*, 57 ANTITRUST L.J. 327, 346 n.96 (1988) (collecting cases and commentators); Note, *Allied Tube & Conduit Corp. v. Indian Head, Inc.: An Emerging Conceptual Framework for Claims of Noerr Immunity*, 41 S. CAL. L. REV. 633, 664-66 (1990).

313. Professional Real Estate Investors v. Columbia Pictures, Inc., 113 S. Ct. 1920 (1993) (affirming grant of summary judgment in favor of defendants on counterclaim alleging filing of lawsuit violated the antitrust laws).

314. *E.g.*, Sessions Tank Liners, Inc. v. Joor Manuf., Inc., No. 92-55085 (9th Cir. February 15, 1994) (defendant immune from liability for misleading standard-setting organization into enacting anticompetitive restriction in organization's fire code).

315. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

316. In some cases, the Court apparently does means that. Insofar as the Voting Rights Act is concerned, for example, state court judges are "representatives" of the people. *See* Chisom v. Roemer, 111 S. Ct. 2354 (1991).

the Eastern Railroad Presidents Conference? Why isn't the filing of a rate with a state agency, such as in *Midcal, 324 Liquor Corp.*, and *Ticor*, "petitioning" and therefore immune from liability? The Court's approach to the *Noerr* doctrine has not provided a framework for answering any of these questions. This section describes a conceptual approach, grounded in the First Amendment, to *Noerr* immunity.

The Speech Clause of the First Amendment has received considerably more attention than has the Petition Clause, probably because almost anything one could do to petition the government would necessarily take the form of communication protected under the Speech Clause. If campaign contributions[317] and nude dancing[318] are protected speech, the clause would surely encompass a letter to or a meeting with one's senator. Petitioning is an example of what the Court generally refers to as "core" speech, or speech "at the heart of the First Amendment"—speech about politics and the operation of the government.[319] We are thus fairly safe in applying the familiar principles of free speech jurisprudence to the problems raised in the cases following *Noerr*.[320]

As a practical matter, it is important to understand the real-world effects of the type of speech that is challenged in cases under the *Noerr* doctrine. Often the speech at issue will combine unquestionably protected characteristics and some characteristics that are of valid regulatory concern, which for our purposes generally take the form of costs imposed on competitors. In *Noerr*, for example, the railroads' publicity campaign allegedly interfered with the truckers' relationship with their customers.[321] In other cases, petitioning has slowed regulatory approval of an application to do business or to sell bonds.[322] The question is

317. Buckley v. Valeo, 424 U.S. 1 (1976).

318. Barnes v. Glen Theater, 111 S. Ct. 2456 (1991).

319. *See, e.g.*, Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988) (holding that *New York Times* rule structure applies to actions by public figures for intentional infliction of emotional distress).

320. *Cf.* McDonald v. Smith, 472 U.S. 479, 482 (1985) ("The right to petition is cut from the same cloth as the other guarantees of that amendment, and is an assurance of a particular freedom of expression."). In *McDonald*, the Court held the rules governing libel crafted in New York Times v. Sullivan, 376 U.S. 254 (1964), also applied to efforts to petition the government. The Court went on to conclude that the Petition Clause "was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble" and that "[t]hese First Amendment rights are inseparable." *McDonald*, 472 U.S. at 485 (citation omitted).

321. 365 U.S. at 129.

322. These cases are discussed in the text accompanying notes 344-348, *infra*.

whether, and, if so, how, such anticompetitive consequences may be redressed consistently with the First Amendment.

A. *The Uneven History of the Essential Dissimilarity Rationale In Petitioning Immunity Cases*

As discussed in Part II, *Noerr* and subsequent cases have asserted that there is an "essential dissimilarity" between petitioning activity and the evils the antitrust laws were designed to prevent. The *Omni* Court characterized the state action and petitioning cases as embodying the principle that the antitrust laws "regulate business, not politics."[323] This rationale allowed the Court in *Noerr* to cast its decision as an interpretation of the antitrust laws rather than as a construction of the First Amendment. Had the activity in *Noerr* not been held essentially dissimilar to activity covered by the Sherman Act, the Court would have had to resolve the constitutional issue directly, because the activity in that case was unquestionably speech within the meaning of the First Amendment.[324] The Court's methodology deprived the doctrine of the clarity that a frank discussion might have produced.

In practice, the Court's reliance on the essential dissimilarity doctrine has been inconsistent. In several cases, the Court has appeared to rely on the First Amendment to the exclusion of the essential dissimilarity rationale. This approach was most evident in *California Motor Transport Co. v. Trucking Unlimited*,[325] where the Court appeared to back away from the statutory interpretation theory of *Noerr*, and to engage in an openly constitutional analysis. In *California Motor Transport*, the Court identified only two grounds for *Noerr*—the need for the government to receive information in a representative democracy, and the First Amendment.[326] Further, the Court rested its holding, that *Noerr* applies to attempts to petition agencies and courts, squarely on the First Amendment rights to associate and to petition.[327]

Many of the Court's more recent cases demonstrate a similar analysis. In *FTC v. Superior Court Trial Lawyers' Association*,[328] the Court read *Noerr* as a case "[i]nterpreting the Sherman Act in

323. City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 383 (1991).
324. *See infra* text accompanying notes 422-428.
325. 404 U.S. 508 (1972).
326. *Id.* at 510.
327. *Id.* at 510-11.
328. 493 U.S. 411 (1989).

light of the First Amendment's Petition Clause,"[329] completely ignoring the essential dissimilarity rationale even though it would have provided an easy rule of decision in the case.[330] In his signal article on the source of the *Noerr* doctrine, Professor Fischel gave the essential dissimilarity rationale short shrift, rejecting it in a single paragraph.[331] He noted that the Court has applied the principle inconsistently, protecting some petitioning efforts but not others.[332]

One should not conclude from these cases, however, that the essential dissimilarity rationale is dead. The Court again ranked essential dissimilarity first as a justification for *Noerr* in its 1993 decision in *Professional Real Estate Investors v. Columbia Pictures, Inc.*[333] There, the Court stated that "the Sherman Act does not punish political activity through which the people freely inform the government of their wishes."[334] The Court saw this rule as one grounded in the Sherman Act, informed by both the "government's power to act in its representative capacity" and "the First Amendment right to petition."[335] Moreover, many federal district and circuit courts have relied on the essential dissimilarity rationale in explaining or applying *Noerr*.[336] While some of those decisions have involved petitioning that really was dissimilar to the anticompetitive activity seen in typical antitrust cases,[337] even

329. *Id.* at 424.

330. The defendants in *SCTLA* were criminal defense lawyers who agreed to charge higher prices for their services. This is a form of price fixing which certainly is not essentially dissimilar to an antitrust violation.

331. Fischel, *supra* note 311, at 83.

332. *Id.*

333. 113 S. Ct. 1920 (1993).

334. *Id.* at 1926 (quoting *Noerr*, 365 U.S. at 129).

335. *Id.*

336. *See, e.g.*, National Organization for Women v. Scheidler, 968 F.2d 612, 620-21 (7th Cir. 1992) (holding that petitioning immunity doctrine did not apply to antitrust suit brought against anti-abortion groups for alleged nationwide conspiracy to close all women's health care centers providing abortion services); Missouri v. National Organization for Women, 620 F.2d 1301, 1312-13 (8th Cir. 1980) (holding that defendant's campaign to influence state legislature's actions by organizing a convention boycott was beyond the scope of the Sherman Act); In re Airport Car Rental Antitrust Litigation, 521 F. Supp. 568, 575 (N.D. Cal. 1981) (holding that joint activity of defendants in encouraging public officials to act was beyond the scope of the Sherman Act). Many commentators have taken this view as well. *See, e.g.*, Stanley E. Crawford, Jr. & Andy A. Tschoepe, *The Erosion of the Noerr-Pennington Immunity*, 13 ST. MARY'S L.J. 291 (1981); Milton Handler & Richard A. DeSevo, *The Noerr Doctrine and its Sham Exception*, 6 CARDOZO L. REV. 1, 3-5 (1984); Note, *The Misapplication of the Noerr-Pennington Doctrine in Non-Antitrust Right to Petition Cases*, 36 STAN. L. REV. 1243, 1250 n.33 (1984). *Cf.* Calkins, *supra* note 312, at 346 n. 96 (1988) (viewing *Noerr* as a statutory interpretation doctrine with a constitutional "core").

337. For example, *Missouri v. NOW* involved a challenge to NOW's practice of encouraging organizations selecting convention sites to boycott states that had not passed the Equal Rights Amendment. 620 F.2d at 1302. *NOW v. Scheidler* was a suit against "Operation

those decisions treated the essential dissimilarity rationale as broadly applicable to all petitioning cases.[338]

B. *The Anticompetitive Effects of Petitioning*

The essential dissimilarity doctrine might be based on one of two different rationales.[339] First, it might mean that petitioning is not subject to antitrust liability because petitioning does not have, as a matter of law, the anticompetitive purpose required to impose liability under the antitrust laws. This interpretation would make sense if petitioning immunity were grounded in the antitrust laws themselves. In that case, the petitioning immunity would simply be an interpretation of the scienter requirement of the antitrust laws; no separate doctrine would be necessary. The problem with this interpretation is that its premise is demonstrably false. The railroads in *Noerr* had an avowedly anticompetitive purpose, as did the trucking firm in *California Motor Transport*, and the billboard company in *Omni*. The jury's finding of liability in that case necessarily entailed a finding of anticompetitive intent.

The second possible rationale is that petitioning simply does not have, as a matter of law, the kind of anticompetitive effects required to support liability. This interpretation again would base petitioning immunity in a construction of the antitrust laws. There is intuitive appeal to the idea that petitioning lacks the requisite anticompetitive effect to support liability. It is common knowledge that firms often act with the intent to invoke the government's resource reallocation power in their favor, and that such reallocations are inefficient.[340] But to many, the mere process of petitioning seems to be a far cry from actually rigging a price. That impression is misleading.

Rescue," alleging that group had violated the antitrust laws by seeking to drive abortion clinics out of business. 765 F. Supp. at 938. In both cases, commercial motivation is entirely lacking—the petitioners are merely using economic means to pursue an unrelated political or moral objective.

338. *See Missouri v. NOW*, 620 F.2d at 1312-13; *Scheidler*, 765 F. Supp. at 939-40 (both reading *Noerr* as applying to all political petitioning, while concluding that the conduct before them was more dissimilar to the antitrust laws than that in *Noerr*).

339. Just as with the state action doctrine, Professor Elhauge discerns a third dissimilarity between petitioning and the types of conduct the antitrust laws were designed to prevent. That dissimilarity relates to the process differences between petitioning and other private action. *See* Elhauge, *Petitioning Immunity*, *supra* note 178, at 1177. We discuss Professor Elhauge's theory in detail at the end of this Section.

340. *See supra* section II. A. discussing the anticompetitive consequences of state action.

As a practical matter, a petitioner's efforts must be matched by its rivals if they are to avoid harmful government action. Matching these efforts raises the rivals' costs, which can render rivals less competitive in the market.[341] The railroads' advertising campaign in *Noerr*, for example, had to be matched by the trucking industry.[342] Campaign contributions or other lobbying expenditures also must be matched. Finally, filing a lawsuit, which counts as petitioning under the *Noerr* doctrine, can entail enormous costs for the defendant, not the least of which is that a defendant must hire an attorney and respond to the complaint or suffer a default.[343]

Additionally, pending litigation or agency proceedings may cause problems for rivals outside the courtroom. These can range from the substantial costs of diverting management from productive activity and of engaging in discovery to indirect impediments to a firm's business.[344] Perhaps the best example of this is the famous *Otter Tail* case, in which a private utility with a monopoly over electricity thwarted the efforts of certain municipalities to construct their own utilities by filing lawsuits that impaired the municipalities' ability to sell bonds to finance their proposed plants.[345] The pending litigation slowed or stopped bond sales altogether because the bonds covenanted that no litigation was pending regarding the uses to which the bond proceeds would be put. As *Otter Tail* demonstrated, pending litigation can increase the riskiness of any new venture, and thus increase its cost of capital.

Admittedly, petitioning will not always be an effective anticompetitive tool. Petitioning might backfire in some cases, imposing higher costs on the petitioner than on its competitors. Petition-

341. *See, e.g.*, Krattenmaker & Salop, *supra* note 133, at 242-48 (explaining how raising rivals' costs can in some cases permit a competitor to engage in constrained monopoly pricing).

342. Eastern Railroads Presidents' Conference v. Noerr Motor Freight, 365 U.S. 127, 130-31 (1961).

343. *See, e.g.*, Premier Elec. Constr. Co. v. National Elec. Contractors, 814 F.2d 358, 376 (7th Cir. 1987) (discussing how the costs of defending against litigation may be used anticompetitively); Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 566-67 (1991) (noting that securities plaintiffs file suit without regard to the merits, because defendants will settle even baseless suits rather than pay the costs of litigation).

344. The authors can attest from painful personal experience that discovery may entail the photocopying and review of literally millions of documents for weeks on end. It is not unusual for litigation to comprise one of the largest monthly costs of even very large companies.

345. Otter Tail Power v. United States, 410 U.S. 366 (1973).

ing can be an effective anticompetitive tool, however, where the costs imposed are asymmetrical. Costs are likely to hurt competitors more than petitioners in two cases: first, where the costs competitors will incur are predictably greater than those the petitioner will incur;[346] and second, where the petitioner is substantially larger than its rivals, and therefore better able to bear equal costs.[347] In both cases, so-called "strike petitioning" may be an effective anticompetitive tool.[348]

Finally, petitioning may be inefficient[349] in a more insidious way. The very possibility of government-granted monopolies or preferences may encourage private firms to waste their resources in "rent-seeking."[350] The government—whether through legislatures, agencies, or courts—has the power to give away a wide variety of benefits or preferences to private companies at the expense of their competitors. Private firms want to obtain these benefits, and also fear that the benefits will be awarded to their competitors instead. Firms are willing to pay money (in the form of legal fees, lobbying, advertising, bribes, or whatever) to ensure

346. Alexander, *supra* note 343, at 528-34, has demonstrated convincingly that this occurs in securities litigation. The costs of defending a securities class action claim are far greater than the costs of prosecuting one. Thus, the potential exists for economically rational "strike suits."

347. Petitioning with a specific object in mind is essentially a fixed cost. That is, if it costs $75,000 in campaign contributions to influence a particular vote, both small firms and large firms will have to pay roughly the same amount to get the result they want. Obviously, large firms are better able to bear this fixed cost than small firms.

348. By referring to petitioning designed to raise rivals' costs as "strike petitioning," we do not mean to imply that it is objectively baseless. A petitioner may seek a legislative change that would in fact be in the public interest, or may bring a lawsuit that is in fact meritorious, with the intention of driving competitors out of the market. Assuming there were no First Amendment barrier, if a suit or petition has the purpose and effect of reducing competition, it is properly the concern of the antitrust laws, regardless of whether it is objectively well-grounded.

349. We have switched here from talking about competition to talking about efficiency. The two are closely related. Indeed, economists since Adam Smith have considered them to be inextricably intertwined. *See* SMITH, *supra* note 201, at 477; BLAIR & KASERMAN, *supra* note 113, at 21-22 (explaining why competition is efficient). While the antitrust laws themselves speak of competition rather than efficiency, competition is not an end in itself, but merely a means of achieving efficiency.

350. "Rent-seeking" is one element of the jurisprudence of public choice theory. *See generally* Farber & Frickey, *supra* note 227. Public choice theory is a branch of economics that treats government officials as rational actors interested in maximizing their own goals (such as reelection). As such, it is no different from conventional wisdom and the prevailing view in political science. *See, e.g.*, RICHARD F. FENNO, JR.,, HOME STYLE 136-169 (1978); JOHN W. KINGDON, CONGRESSMEN'S VOTING DECISIONS 47-54 (1981); DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974). This need not be as cynical as it may sound. For example, even an idealized view of the political process would encourage representatives in a democracy to vote the way their constituents wished. If they do not do so, one could argue, depending upon one's resolution of the Burkean dilemma, that they are not "representing" those constituents. *See* JOSEPH E. STIGLITZ, ECONOMICS OF THE PUBLIC SECTOR 124-25 (1986).

that they, and no one else, get the available benefits. Rent-seeking describes the tendency of private firms collectively to spend the value of the benefit offered, or perhaps even more than that value, by competing for it.[351]

Suppose several firms wish to obtain the same government benefit, and that each is willing to spend up to the value of the benefit to get it.[352] In that case, the total amount spent on petitioning to obtain the benefit might far exceed the value of the benefit itself.[353] If this seems counterintuitive, or if the reader

351. Not all rent-seeking is bad. Some such efforts are to be encouraged because they have positive side effects. For example, a group of firms seeking a government-provided patent monopoly will compete for it by developing innovations more quickly than their competitors. While duplicative investment in a so-called "patent race" is often undesirable, it does benefit society by speeding up the innovation process, and it may also produce valuable "spin-off" inventions. *See generally* Mark F. Grady & Jay I. Alexander, *Patent Law and Rent Dissipation*, 78 VA. L. REV. 305, 315 (1992); Robert P. Merges, *Rent Control in the Patent District: Observations on the Grady-Alexander Thesis*, 78 VA. L. REV. 359, 371-73 (1992).

352. This is a fundamental assumption of rational behavior in economic theory. *See* COOTER & ULEN, *supra* note 122, at 95-97. Actually, the statement in the text is technically inaccurate. Firms will be willing to pay up to the *expected value* of the benefit to them. The expected value of a benefit to a risk-neutral decision-maker is the value of that benefit, V, times the percentage chance that the firm will get the benefit, c. In other words, $\Sigma V_1 = c_1V_1$. The total all firms should be willing to pay, T, therefore equals $\Sigma_1^n cV$.

353. *See* DENNIS MUELLER, PUBLIC CHOICE II 232-35 (1989); Gordon Tullock, *Efficient Rent Seeking*, *in* JAMES M. BUCHANAN ET AL., TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 97-112 (1980). Specifically, in the simplest case, T = ncV, where n is the number of firms in the industry competing for the benefit. Thus, if ten firms competing for a $1,000 benefit are each willing to spend up to $1,000, then in the aggregate they will spend $10,000, a sum far in excess of the value of the benefit.

The reader might immediately object that, given perfect information, no firm will spend more than *cV*, and $\Sigma_1^n c = 1$. For example, a firm that knows it has only a ten percent chance of receiving a $1,000 benefit will spend only $100 towards receiving that benefit. If every firm accurately assessed its chances of winning the benefit, the total spent would not exceed $1,000.

Spending that $1,000 would be inefficient from a societal perspective, because the parties in the aggregate would have wasted the entire value of the benefit. But two factors make spending in excess of cV likely, and thus even more inefficient. First, c is not an exogenous variable. By increasing the amount it is willing to pay, T_1, firm 1 can increase its c, since (by hypothesis, as well as in the real world) legislators respond favorably to lobbying and other persuasive efforts. *See* MUELLER, *supra*, at 234. Assume a linear function, $c = x + rT_1$, where x is the exogenous value of c, and r is a function that reflects the influence of T on c. From our original formula $T_1 = cV$, we determine that $T_1 = (x + rT_1)V$, and therefore that $T_1 = xV-(1 - rV)$. To see the effects of making c endogenous in practice, suppose that the total benefit sought (V) = $1000, that the initial chance of receiving the benefit (c in the original formula, x in the subsequent formula) = .1, and that r = .0005. In our initial formula, firm 1 would spend up to cV; that is, up to .1($1000) = $100. Under the new formula, however, it will spend up to xV-(1 - rV), or .1($1000)-(1 - .0005($1000)) = $200. Thus, even with very small values of r (reflecting a minimal influence of expenditure on outcome), the amount each firm will spend increases dramatically.

Second, the firms in our example not only desire the benefit for themselves, but seek to deny it to their competitors. This makes sense, particularly if the benefits we are discussing are government-sanctioned monopolies or cartels or preferences which raise their competitors' costs. In effect, rent seekers in our example are risk preferential. *Cf.* Arye L.

wishes to avoid the math in the footnote, think of government restraints on competition as an auction. Private firms "bid" by lobbying the government, and the highest bidder wins the restraint. Unlike a normal auction, however, *bidders have to pay regardless whether they win or lose.* The result is that bidders—the private firms—spend far more as a group than any one of them thinks the government benefit or restraint is worth.[354] This excess spending is a major inefficiency associated with petitioning.[355]

Rent seeking occurs in a number of different contexts in the real world. Regulated industries (and sometimes consumer groups as well)[356] will fritter away the social surplus in an attempt to influence the decisions of regulators.[357] Domestic industries will compete for protective tariffs and quotas.[358] And govern-

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Hillman & Eliakim Katz, *Risk-Averse Rent Seekers and the Social Cost of Monopoly Power,* 94 ECON. J. 104, 110 (1984) (noting that risk aversion reduces total rent seeking; and suggesting that risk preference would have the opposite effect). Thus, V has two components, the (positive) value of receiving the benefit (V_r) and the (negative) value of losing it (V_L). Thus, EV = cV_r - (1-c)V_L. The fear of losing the benefit to a competitor makes firms willing to spend more than they otherwise would to obtain the rent. For example, if c = .1, V_r = $1,000, and V_L = -$250, EV = .1(1000) - .9(-250) = 100 - (-225) = $325. In this example, a firm which would spend only $100 to get the benefit for itself will spend up to $325 in order to deny the benefit to others as well.

In combination, of course, these factors are even more powerful. Combining the formulae for risk aversion and feedbacks yields $T_1 = (x + rT_1)(V_r) - (1 - (x + rT_1))(V_L)$. Algebraic manipulation demonstrates that $T_1 = (V_L - (V_r + V_L)(x)) - ((V_r + V_L)(r) - 1)$. Thus, to use the numbers chosen as examples above, T_1 = (-$250 - ($750)(.1)) - (($750)(.0005) - 1) = $520. In other words, under the assumptions we have made here, a firm which initially has only a ten percent chance of receiving a government benefit could rationally spend up to half of the value of the benefit in an attempt to obtain it.

354. Interestingly, the corollary is that the prevailing firm pays *less* than it thinks the benefit is worth. This follows because firms set expenditures based on EV, not V. Thus, unless $c_1 = 1$, which seems unlikely in most industries, the ultimately successful firm will have invested less than it was willing to pay for the benefit.

355. Estimates of the cost of rent seeking range from roughly 20 percent of the social surplus sought to several times the value of the surplus. *See* MUELLER, *supra* note 353, at 231-38; Hillman & Katz, *supra* note 353, at 105-07; Arye L. Hillman & Doc Samet, *Dissipation of Contestable Rents by a Small Number of Contenders,* 54:1 PUB. CHOICE 63, 79-82 (1987); Richard A. Posner, *The Social Costs of Monopoly and Regulation,* 83 J. POL. ECON. 807, 815-25 (1975).

356. *See* Sam Peltzman, *Toward a More General Theory of Regulation,* 19 J.L. & ECON. 211 (1976) (propounding a theory of optimum size for effective political coalitions that seek wealth redistribution through the regulatory process).

357. For an explanation of why this happens even if only one party is "competing" for the benefit, see George Stigler, *The Theory of Economic Regulation,* 2 BELL J. ECON. & MGMT. SCI. 3 (1971). For an effort to estimate the losses due to rent seeking n regulation, see Posner, *supra* note 355, at 815-25.

358. *See* MUELLER, *supra* note 353, at 238-42; *cf.* Howard P. Marvel & Edward J. Ray, *The Kennedy Round: Evidence on the Regulation of International Trade in the United States,* 73 AM. ECON. REV. 190 (1983) (providing indirect empirical support for rent-seeking in tariffs).

ment contracts will encourage rent-seeking by those who wish to be awarded the contract.[359]

As we have seen, both state action and private petitioning designed to secure such action present real threats to competition and efficiency. Far from being essentially dissimilar to antitrust violations, petitioning is directly related to actions with which the antitrust laws are very much concerned. The question then becomes why anticompetitive petitioning should be tolerated at all, at least when the anticompetitive consequences are significant enough to be material for purposes of the Sherman Act. The answer is that it should not be, unless some legal rule superior to the Sherman Act compels the abeyance of the antitrust laws. The First Amendment is such a rule, and is in fact the only basis for excepting anticompetitive petitioning from Sherman Act liability. It follows that petitioning protected by the First Amendment should be immune from antitrust liability, while petitioning not protected by the First Amendment may serve as the basis for antitrust liability.

C. *Petitioning Immunity as a First Amendment Doctrine*

Two First Amendment principles are relevant in determining the scope of petitioning immunity. The first is the public forum doctrine, which identifies governmental resources with which the right to petition can validly be exercised. The public forum doctrine gives extremely broad latitude to petitioners in some fora, such as holding a political rally in a public park, and virtually no protection in other fora, such as picketing on prison property[360] and soliciting in employee mailboxes.[361] The protection given to petitioners in other fora, including courts and administrative agencies, falls somewhere between the two extremes.

The second principle relevant to determining the scope of petititoning immunity is the deterrence theory the Court used in *Omni.* That Court relied on the "chilling effect" rationale which has been used in a number of specific First Amendment con-

359. *See, e.g.*, Peter M. Aranson & Peter C. Ordeshook, *Spatial Strategies for Sequential Elections*, in PROBABILITY MODELS OF COLLECTIVE DECISION-MAKING 298 (1972) (suggesting methods of choosing campaign strategy to maximize joint probabilities of nomination and election); Gordon Tullock, *The Cost of Transfers*, 4 KYKLOS 629 (1971) (asserting that even the possibility of transfers imposes significant costs on society).

360. Adderley v. Florida, 385 U.S. 39 (1967) (sustaining convictions for trespassing on prison grounds during demonstration).

361. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983) (holding that public school teachers' mailboxes are not public fora).

texts—such as the libel laws—to promote robust and freewheeling speech and debate by creating a buffer zone of immunity from liability for speech that might otherwise be foregone by a risk averse speaker.[362]

The First Amendment compels a distinction in the *Noerr* cases between petitioning Congress or a state legislature and "petitioning" a court or administrative agency in an adjudicatory proceeding. Petitioning is entitled to broad protection under the First Amendment, and thus is entitled to immunity from liability under the antitrust laws, when it takes the form of a publicity campaign to persuade the legislature to take action, as in *Noerr*, or of a direct appeal to the legislature. A lesser degree of protection is warranted for petitioning administrative agencies engaged in rulemaking proceedings. Petitioning is not entitled to such broad immunity when it takes the form of a lawsuit or a filing in an adjudicative proceeding. It follows that antitrust laws should apply fully in such cases, assuming the other requirements of an antitrust claim are met and liability imposed.

1. *The Structure of Government And Some Premises for Petitioning*

Perhaps the classic conception of the relationship between the citizen and the state underlying the First Amendment is Justice Brandeis's famous concurrence in *Whitney v. California*.[363] Justice Brandeis contended:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly, discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine. . . .[364]

362. *Cf.* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (holding that the First Amendment bars a civil libel judgment for criticism of public officials in respect to their official conduct unless the plaintiff shows "actual malice" by clear and convincing evidence).

363. 274 U.S. 357 (1927) (Brandeis, J., concurring).

364. *Id.* at 375.

The Framers might well have been surprised to hear what Justice Brandeis thought they thought. Those imprisoned under the Sedition Act,[365] passed and enforced by "those who won our independence," would surely be even more surprised. Justice Brandeis's model is, however, a fair description of First Amendment doctrine beginning with *New York Times v. Sullivan*,[366] which belatedly struck down the Sedition Act and gave extensive protections to political speech about public figures. But the *New York Times* rule's structure does not and cannot cover the full range of speech the Court has decided falls within the protection of the First Amendment.[367] The *Noerr* problem provides an excellent example, especially as it has been extended to the "petitioning" of courts and administrative agencies. To understand the considerations that must be taken into account, it is first useful to understand what Justice Brandeis had in mind when he wrote his description of the scope of the First Amendment.

Instead of the Framers and Revolutionary War veterans, Justice Brandeis reached further back in history, to Athens of 450 B.C. Brandeis's biographers and admirers contend that the quoted passage reflects Brandeis's admiration for Pericles' funeral oration rather than for the Framers of the United States Constitution.[368] The Athens described in Alfred Zimmern's *The Greek Commonwealth*,[369] reportedly Justice Brandeis' favorite book, could not be further removed from the America of 1927, to say nothing of the present. A theory of speech designed with such a society as a model is bound not to comport with modern society.

Brandeis attempted to fashion a theory of free speech in which the people participated actively in the government. Participation in the political life and governance of the state was, for the Athenians and for Brandeis, as much if not more a part of the citizens' life than the craft or trade in which one earned a living.

365. 1 Stat. At Large 596-97.

366. 376 U.S. 254 (1964).

367. For example, it would be hard to know how to apply the *New York Times* standard as applied to the nude dancers whose expression was assumed to be within the outer boundaries of the First Amendment in Barnes v. Glen Theater, 111 S. Ct. 2456 (1991).

368. *See* ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 87 (1991) (tracing the history of the *Sullivan* case and analyzing its effects on first amendment doctrine); Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 680-81 (1988) (linking the Brandeis opinion in *Whitney* to Pericles's funeral oration); Paul A. Freund, *Mr. Justice Brandeis: A Centennial Memoir*, 70 HARV. L. REV. 769, 789-90 (1957) (address given at ceremony commemorating the 100th anniversary of Justice Brandeis's birth).

369. ALFRED ZIMMERN, THE GREEK COMMONWEALTH (5th ed. 1931).

The State was small enough, and the number of decisions was small enough, that it was possible for the Athenians to come closer to the democratic ideal than Americans could ever hope to come. As Zimmern noted, "The Greek City State differs from our modern democracies in enlisting not all but merely a far larger proportion of its representative in active public work. Whereas with us, however democratic our constitution, the few do the work for the many, in Greece the many did it for themselves."[370] It is possible, in other words, to fit Brandeis's theories to a society in which 6,000 of the 40,000 citizens could be called for jury duty each day,[371] or in which substantially all the citizens could come to a theater to hear argument and to deliberate on whether to go to war, to offer tribute, or to decide some other pressing question.[372] The transaction costs of full citizen participation in, and thus constitution of, government were low enough to make the effort feasible.

Drawing on an Athenian model to give meaning to the First Amendment is bound to create problems for a modern society, however. In Athens, the problem of trying to broker a deal with a legislator, whose tenure is entrenched by contributions from political action committees and by plum committee assignments, simply did not exist as it does today. The theory animating Brandeis's vision of the First Amendment is simply inadequate to deal with modern problems. Entrenched bureaucracies, both independently and at the behest of legislators, dole out the government benefits that create the anticompetitive consequences of the *Parker* and *Noerr* cases.[373] Clearly, as the size of the *polis* ex-

370. *Id.* at 160.

371. This number was divided among different matters, so each jury consisted of "only" several hundred jurors. Zimmern states that no jury consisted of less than 201 jurors. ZIMMERN, *supra* note 369, at 162-63.

372. This point should not be taken too literally. As Zimmern points out, and which we would know instinctively if he did not, "[n]o state has ever been composed of citizens all of whom have the leisure or the desire or the knowledge to attend to public affairs." *Id.* at 160. Citizens—meaning men over the age of 18 who owned property—were members of the parliament (Ecclesia) and could attend its sessions, voting on matters of policy. *Id.* at 159, 169. Zimmern estimates that the number of citizens was between 35,000 and 44,000. *Id.* at 174. According to Zimmern, other than on truly important occasions, it was difficult to get more than 5,000 in attendance. *Id.* at 169. Still, having 5,000 of, say, 40,000 eligible to attend is a representation radically different from 536 out of 250 million.

373. The Athenians had a permanent governing body known as the Council, comprised of 500 members. But this body was chosen annually by lot, and no citizen could sit on it more than two times. *Id.* at 164. These qualifications greatly diminish the problem of entrenchment and self-perpetuating behavior with which much of the public choice literature is concerned.

pands, the transaction costs of true self-governance quickly become prohibitive, even at a fairly local level.

We therefore must adapt our theories of speech and petitioning so that they work in a modern environment. For Congress, an administrative agency, or a court to work effectively, restrictions on speech simply must be imposed as necessary concomitants of a formal decision-making process.[374] Fortunately, we have a substantial body of First Amendment cases from which we may draw the principles necessary to deal with the problem the Court created in *Noerr* and *California Motor Transport.*

The public forum doctrine provides the principles necessary to analyze the problems presented by *Noerr.* The Court has used the public forum doctrine to resolve conflicts between an asserted right to use a public resource for speech purposes and a governmental claim that nature of the resource compels a restriction on speech. The Court "adopted a [public] forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes."[375] Under the Court's approach, "the extent to which the Government can control access depends on the nature of the relevant forum."[376] The references in public forum cases to the "place" of the speech are simply a shorthand method of referring to the purpose to which a given resource is dedicated.[377] Thus, while the public forum cases do not deal directly with administrative agencies, the doctrine offers principles with which to understand the Court's invocation of the First Amendment in *Noerr* and *California Motor Transport.*

The public forum doctrine divides the universe of governmental petitioning fora into three types: public fora, designated pub-

374. Athens undoubtedly imposed some such restrictions within the Ecclesia, though the Athenians probably had less of a need for formal restrictions enforceable by, for example, pecuniary sanctions.

375. Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 800 (1985).

376. *Id.*

377. Indeed, in Frisby v. Schultz, 487 U.S. 474, 479 (1988), the Court acknowledged this with its own quotation marks: "To ascertain what limits, if any, may be placed on protected speech, we have often focused on the 'place' of that speech, considering the nature of the forum the speaker seeks to employ." The focus of the public forum doctrine on the purpose of a resource, rather than its location, is explored at length in Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum,* 34 U.C.L.A. L. Rev. 1713 (1987).

lic fora, and nonpublic fora.[378] The second category has little if any substantive significance apart from the first. Whatever the Court's original intent, the difference between the two is now primarily chronological: public fora are such by virtue of history and tradition, and designated public fora are such because of a governmental choice to open them to the public.[379] The government may only regulate speech in public fora, traditional or designated, if the regulations are "narrowly drawn to achieve a compelling state interest."[380] In nonpublic fora, by contrast, government regulations "need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view."[381]

The classic cases involving public fora concern demonstrations on public streets and sidewalks, such as a march on a public street near a courthouse,[382] and picketing on a public sidewalk in front of a doctor's home.[383] These cases have given binding legal effect to Justice Roberts' famous assertion in his plurality opinion in *Hague v. CIO* that "streets and parks . . . have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[384] There is no longer any dispute that "all public streets are held in the public trust and are properly considered public fora."[385]

Application of the public forum doctrine has not been limited to public streets and sidewalks, however. The more interesting cases have involved regulations of speech on property owned by the government and dedicated to a specific purpose, but nevertheless open to considerable use by the public. The Court has

378. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983).

379. *See* International Society for Krishna Consciousness v. Lee, 112 S. Ct. 2701, 2705 (1992) (sustaining and striking down regulations pertaining to solicitation in airports).

380. *Id.* at 2705. Although the Court was badly fragmented in *ISKCON*, Chief Justice Rehnquist wrote for a majority in setting forth the applicable standard of scrutiny, about which the parties agreed. *Id.* at 2706 (noting that parties did not dispute three-part division of fora or the attendant levels of scrutiny).

381. *Id.* at 2705-06.

382. *See* Cox v. Louisiana, 379 U.S. 536 (1965).

383. *See* Frisby v. Schultz, 487 U.S. 474 (1988).

384. 307 U.S. 496, 515 (1939).

385. *See, e.g.*, Frisby v. Schultz, 487 U.S. 474 (1988). The Court's statement came in the course of rejecting an argument that quiet residential streets should not automatically be treated as public fora in the same way a major street would be. There may be some degree of protection for domestic tranquility through the application of restrictions on the volume or other aspects of a demonstration. *See* Kovacs v. Cooper, 336 U.S. 77, 86-87 (1949) (sustaining restrictions on the use of sound trucks).

generally concluded such fora are not public, and has tolerated most regulations of speech in such places. *Adderley v. Florida*,[386] *Greer v. Spock*,[387] *United States v. Kokinda*,[388] and *International Society for Krishna Consciousness v. Lee*,[389] all reach this result, and the logic these cases employ is important for evaluating both *Noerr* and *Parker* immunity.

Adderley provided the logical basis for this line of cases. In *Adderley*, a group of students went to a Florida jail to protest the arrest of certain other students, and to protest segregation, which was enforced at the jail. The protestors occupied the "curtilage of the jailhouse" and refused to leave when the sheriff ordered them to.[390] The student-protestors were convicted of trespass and, in an opinion by Justice Black, the Court upheld the convictions. The Court reasoned that the "State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."[391] Two elements of this brief quotation deserve attention. First, the Court draws a distinction between the state in its capacity as the proprietor of a prison, and the state in its capacity as an enforcer of laws. There would not normally be any question that an order from a sheriff to disperse a demonstration would be subject to the most stringent scrutiny.[392] But, where the sheriff issues the order in his capacity as jailkeeper, the Court is willing to give greater deference to the sheriff's judgment that the demonstration must disperse. Justice Black's analogy to a private property owner reveals the Court's position that state officials are less "public" when running a jail than they are when they are performing other functions.

The second point established in *Adderley* is that, of necessity, the state must have the power to control property to operate a jail. In the Court's terms, if property is "lawfully dedicated" to a "use," then the state has the same power as would an owner of

386. 385 U.S. 39 (1967) (addressing a demonstration on prison grounds).

387. 424 U.S. 828 (1976) (addressing a prohibition of a political rally on an army base).

388. 497 U.S. 720 (1990) (addressing efforts to solicit contributions on a sidewalk dedicated to a post office).

389. 112 S. Ct. 2701 (1992) (addressing airport regulations regarding the solicitation of money and distribution of literature).

390. *Adderley*, 385 U.S. at 47.

391. *Id.*

392. *See, e.g.*, Gregory v. Chicago, 394 U.S. 111 (1969) (reversing conviction for disturbing the peace by failing to obey police order to terminate demonstration); Shuttlesworth v. Birmingham, 382 U.S. 87 (1969) (reversing conviction based on, among other things, refusal to obey police order to disperse).

private property to "preserve" that property for the lawful use. On this point even Justice Douglas's dissent agrees: "[I]t may be necessary to adjust the right to petition for redress of grievances to the other interests inhering in the uses to which the public property is normally put."[393] In other words, if the state is to run a jail it needs, and therefore has the right, to control the environment in and around the jail.

With this common-sense point, the disparity between this and Justice Brandeis's Athenian model becomes apparent. Dedicating property to specific governmental purposes necessitates a division of labor within the state, which necessarily implies a division between the state and the *polis*. The state is managing its own affairs as a distinct entity. Some of the state's divisions will be dedicated to receiving the petitions of the *polis*, others will not. If putative practitioners of the freedom of speech mistake the latter for the former, according to the *Adderley* Court, they will not be protected by the First Amendment. While the First Amendment will provide robust protection of speech directed to the proper divisions of government, that protection should not extend into fora not dedicated to petitioning activity. Justice Black's opinion in *Adderley* embodies the First Amendment doctrine he forged and for which he is justly famous: What the First Amendment covers, it covers absolutely. And, what it does not cover, it does not cover at all.[394]

Both points made in *Adderley* turn on the purpose to which government property is dedicated, and that for which state officials are working. The state's power to control First Amendment activity is limited to control "for the use to which [the property] is lawfully dedicated."[395] This requires that there be a connection between the limitation on speech and the state's purpose, that "[t]he reasonableness of the Government's restrictions on

393. *Adderley*, 385 U.S. at 54 (Douglas, J., dissenting). Prior to the portion of the dissent quoted in the text, Justice Douglas had written that "[t]here may be some public places which are so clearly committed to other purposes that their use for the airing of grievances is anomalous. . . . A noisy meeting may be out of keeping with the serenity of the statehouse or the quiet of the courthouse." *Id.* Five years later, of course, Justice Douglas wrote that the right to petition extended to filing lawsuits with administrative agencies, with no mention of a need to "adjust" the right to petition to fit the location in which it unexpectedly found itself. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

394. *Adderley*, 385 U.S. at 48. For an informative discussion of this view generally, and Justice Black's views in particular, see Alexander Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245.

395. *Adderley*, 385 U.S. at 47.

[speech in a nonpublic forum] must be assessed in light of the purpose of the forum and all the surrounding circumstances," or that "the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved."[396] The cases since *Adderley* demonstrate that once the Court concludes that a forum is nonpublic, the Court is tolerant of restrictions on speech that plausibly relate to the purpose to which the forum is dedicated.

The Court seems to have concluded that the narrower the purpose to which a forum is dedicated, the more lenient the Court will be on speech restrictions, and vice versa. For example, in *Greer v. Spock*[397] the Court allowed the army to prohibit political campaign speeches on land frequently used by the public, largely because the military has a unique and fairly narrow mission.[398] In *Krishna Consciousness* the Court upheld a restriction on face-to-face solicitation but struck down a restriction on leafletting. The difference in the restrictions seems to have been Justice O'Connor's view that the airport had opened itself to so many different uses that leafletting was not constitutionally inconsistent with the airport's purpose.[399] She wrote, "the wide range of activities promoted by the [airports] is no more directly related to facilitating air travel than are the types of activities in which ISKCON wishes to engage."[400] The *Krishna Consciousness* Court measured the challenged regulation against the purpose of the forum, and suggested that fora with broader purposes will have to accommodate a wider array of speech than fora with narrower ones.[401]

396. International Society for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2711, 2712 (1992) (O'Connor, J., concurring) (quoting Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 473 U.S. 788, 809 (1985) and United States v. Kokinda, 497 U.S. 720, 732 (1990) (quoting Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 650-51 (1981))).

397. 424 U.S. 828 (1976).

398. *Id.* at 837-38.

399. Justice O'Connor noted, for example, that airports subject to the regulation contained "restaurants, cafeterias, snack bars, coffee shops, cocktail lounges, post offices, banks, telegraph offices, clothing shops, drug stores, food stores, nurseries, barber shops, currency exchanges, art exhibits, commercial advertising displays, bookstores, newsstands, dental offices and private clubs." *ISKCON*, 112 S. Ct. at 2712.

400. *Id.* at 2713. The distinction between leafletting and personal solicitation, of course, does not necessarily follow from this observation.

401. At a certain point the Court is likely to hold that the breadth of a forum's purposes makes it a public forum. *See* Widmar v. Vincent, 454 U.S. 263 (1981) (holding university had created a public forum by opening it facilities for use by student groups, and therefore could not prevent religious groups from using rooms it allowed secular groups to use).

A brief examination of one other type of public forum case will complete the background needed to evaluate *Noerr* using First Amendment standards. This type of case addresses the use of governmental resources dedicated to competitive and quasi-competitive ends—those in which the government acts as an employer or proprietor providing a service. The illustrative cases are *Cornelius v. NAACP Legal Defense And Education Fund*,[402] and *Lehman v. City of Shaker Heights*,[403] perhaps the most infamous of the public forum cases.[404]

At issue in *Cornelius* was the Combined Federal Campaign, a charitable fundraising drive for federal employees.[405] The campaign allowed only voluntary, charitable, health and welfare agencies that provide or support direct health and welfare services to individuals or their families to participate in the campaign by soliciting funds in a letter to federal employees.[406] The NAACP Fund and similar groups were denied this opportunity.[407] The government argued that the campaign was designed to accommodate the desirable goal of making charitable contributions easy for federal employees while not disrupting the workplace.[408] The government contended that allowing political organizations to solicit funds through the campaign would lead to political debates at work, with an attendant decrease in job performance. Finally, the government wanted to avoid the appearance that it was siding with the view of the groups that were allowed to solicit.[409]

The NAACP Legal Defense and Educational Fund, and several similar but lesser-known groups, wanted to solicit funds through the campaign but did not fit this description. Each of the groups was devoted to influencing public policy through "political activity, advocacy, lobbying, or litigation on behalf of others."[410] When the Court examined the groups' challenge to the government's policy, it first "looked to the policy and practice of the government to ascertain whether it intended to designate a place

402. 473 U.S. 788 (1985).
403. 418 U.S. 298 (1974).
404. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983), falls into this category as well.
405. *Cornelius*, 473 U.S. at 790-91.
406. *Id.* at 792.
407. *Id.* at 795.
408. *See id.* at 806.
409. *Id.* at 807.
410. *Id.*

not traditionally open to assembly and debate as a public forum."[411] The Court found it significant that the government had consistently imposed strict limitations on the types of groups that could solicit in the campaign. The Court concluded that the government had not turned the workplace into a public forum because it had drawn a line beyond which concerns for an orderly workplace trumped the desire to allow broad access to the campaign.[412] The Court then concluded that the regulations were reasonable, and remanded the case to consider whether the plaintiffs' claim constituted viewpoint discrimination based on the political content of their messages.[413]

While the Court was willing to defer to the government's authority as an employer, the Court was concerned that the government would (mis)use its authority as an emnployer pretextually to pursue its policy goals. The pursuit of those goals would involve the exercise of what Professor Post has called "governance" authority,[414] to which the Court gives little deference at all.[415] When the state acts in a governmental capacity, the standard First Amendment rules apply.[416] For the content-based distinctions at issue in *Cornelius,* that would have required strict scrutiny.[417]

In *Lehman v. City of Shaker Heights,* the city of Shaker Heights acted as a market participant by operating a bus company. Shaker Heights sold advertising space on the buses operated by its municipal bus system. It refused all political advertisements. Harry J. Lehman, who was a candidate for public office, sued, claiming that the First Amendment compelled the city to accept his political advertisement. In a plurality opinion by Justice Blackmun, the Court rejected the claim that the First Amendment denied the city the discretion to refuse to accept political advertising, and noted:

411. *Id.* at 802.

412. *Id.* at 804-05.

413. *Id.* at 811-13.

414. Post, *supra* note 377.

415. The Court has consistently held that, in its capacity as governor, the state may not use speech restrictions to favor one view over another. Though stated in innumerable cases, the most recent extensive discussion of this point may be found in the Texas flag-burning case. Texas v. Johnson, 491 U.S. 391, 410 (1989) (holding that a statute prohibiting flag burning is unconstitutional).

416. For a full discussion of the application of constitutional standards to the government, see Teresa Gillen, Comment, *A Proposed Model of the Sovereign Proprietary Distinction,* 133 U. PA. L. REV. 661 (1985).

417. *See supra* note 413.

> [T]he city is engaged in commerce. It must provide rapid, convenient, pleasant, and inexpensive service to the commuters of Shaker Heights. The car card space, although incidental to the provision of public transportation, is part of the commercial venture. In much the same way that a newspaper or periodical . . . need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the types of advertising that may be displayed in its vehicles.[418]

The Court recognized that the city was acting in its proprietary capacity, and affirmed that Shaker Heights had the right to refuse political advertising because:

> [t]here could be lingering doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians. In these circumstances, the *managerial decision* to limit car card space to . . . less controversial commercial and service advertising does not rise to the dignity of a First Amendment violation.[419]

In other words, from a managerial perspective, the city had the discretion to decide that leasing political advertising was potentially too controversial. If the city had discriminated among causes or candidates, the Court no doubt would have recognized that the city was using its managerial authority as cover for its policy choices and would have employed a far stricter standard of review.[420]

The distinction in public forum jurisprudence between the exercise of what Professor Post has called governmental and managerial authority[421] provides a basis for a reasoned analysis of the variety of cases that have arisen under *Noerr*. Because the Court will construe the antitrust laws to avoid a conflict with the First Amendment, the first question in any *Noerr* case should be whether the First Amendment protects the conduct at issue. If the First Amendment does not apply, the challenged conduct may be subject to antitrust sanction, assuming the substantive requirements of antitrust liability are met. Public forum principles

418. *Lehman*, 418 U.S. at 303.

419. *Id.* at 305.

420. *Lehman* was decided well before the other two cases and before the Court had undertaken to develop its doctrine in this area. Perhaps for that reason, it has provoked a wide array of academic responses. Professor Shiffrin (quoting Professor Karst) has dubbed it an "easy case, wrongly decided," Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 581 (1980), while Professor Post finds ground to defend it. Post, *supra* note 377, at 1795.

421. Post, *supra* note 377, at 1734 (arguing municipality exercises managerial authority over commercial venture in which it participated).

provide a theoretical basis for deciding whether and, if so, how the First Amendment might apply in a given case.

Under this framework, the analysis of the continuum of petitioning activity should focus on two variables. The first is the type of speech activity at issue, and the second is the kind of governmental entity toward which the speech is directed. Thus, for example, a speech made at a town meeting would be treated differently than a letter sent to a municipal utility.[422] When the governmental entity being petitioned is designed to receive and deliberate upon public grievances, the First Amendment protection of such activity would be at its greatest, and the antitrust laws could impose no sanction on the activity. When the governmental entity is designed for a different purpose, such as the formal adjudication of a specific dispute, the First Amendment protection would not be absolute, if it applied at all, and the applicability of the of the antitrust laws would be much stronger. The continuum of governmental activity can safely be represented by Congress or a state legislature at the one end, and a governmental entity acting as a market participant, such as the utility in *City of Lafayette* and, at least arguably, the bus line in *Lehman*, at the other. Agencies engaged in rulemaking would be treated more like courts for these purposes.

Using this approach, *Noerr* was an easy case that could and should have been quickly decided according to basic First Amendment principles. The railroads conducted "a publicity campaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business, to create an atmosphere of distaste for the truckers among the general public."[423] The conduct at issue was classic speech. By analogy to *New York Times v. Sullivan*[424] it did not matter that the railroads had subjectively malicious inclinations towards the truckers. Given the *New York Times* premise that debate on public issues (of which transportation was one)

422. In some cases it may be appropriate to focus on the content of the speech as well. The Court has in the past been more inclined to give First Amendment protection to speech on topics of public concern than to more "private" speech. *See* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 603, 667-74 (1990). Thus, a letter to a utility complaining about the utility's compliance with the environmental laws seems intuitively different than a complaint about a bill, and that intuition may play a role in any given case.

423. *Noerr*, 365 U.S. at 129.

424. 376 U.S. 254 (1964).

should be "uninhibited, robust, and wide-open"[425] and the corollary, as Justice Powell later stated, that some false speech must be tolerated to avoid chilling "speech that matters,"[426] it is hard to see how the railroads' publicity campaign could have been sanctioned without violating the First Amendment.[427] This is especially so because the relief the truckers sought included an injunction against further publicity campaigns by the railroads.[428] In First Amendment jurisprudence, this would be a prior restraint, the single most suspect form of speech restriction and the one least likely to be upheld.[429]

Unfortunately, the easy decision in *Noerr* has been inappropriately applied in a wide variety of cases, primarily because the Court announced in its decision that *Noerr* was an antitrust case. Thus, in subsequent cases, when faced with a plausible claim that unchallenged actions should be deemed petitioning rather than part of a conspiracy to monopolize, courts have applied *Noerr*.

Closer to the market participant end of the spectrum of governmental fora lie the large number of cases that deal with the "petitioning" of judicial and quasi-judicial bodies. Because the *Noerr* cases concern anticompetitive activity, and because one of the better ways to harm competitors is to impose costs on them, *Noerr* has been most frequently interpreted in the context of administrative adjudications and ordinary judicial proceedings. Such proceedings offer the greatest prospect of imposing costs on competitors because petitioners (plaintiffs) in such fora gain

425. *Id.* at 270.

426. Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).

427. Of course, the First Amendment does not directly protect false statements of fact. *Gertz*, 418 U.S. at 339 (1974) ("there is no constitutional value in false statements of fact"). The plaintiffs in *Noerr* thus could get some mileage out of their claim that the defendants' speech was deceptive, and therefore undeserving of protection. As we shall see, however, concerns about overdeterring (or "chilling") legitimate speech may justify protecting even deceptive speech in certain circumstances. *See infra* section III.C.2.

428. As Justice Black described it,

> [t]he prayer for injunctive relief was much broader, however, asking that the defendants be restrained from disseminating any disparaging information about the truckers without disclosing railroad participation, from attempting to exert any pressure upon the legislature or Governor of Pennsylvania through the medium of front organizations, from paying any public or private organizations to propagate the arguments of the railroads against the truckers or their business, and from doing . . . [any similar acts.]

Noerr, 365 U.S. at 131. Reading this sweeping request for injunctive relief, one gets the impression that the truckers' biggest problem was that they got greedy.

429. *See, e.g.*, Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.").

rights of discovery, and because the rival is forced to defend itself or risk a default judgment or adverse agency ruling.

As mentioned above, *California Motor Transport Co. v. Trucking Unlimited*[430] is the leading case. At issue were the efforts of a dominant trucking firm to keep its competitors out of the market by opposing applications its competitors had to file with two government agencies to do business in the market.[431] The competitors brought an antitrust lawsuit against the dominant firm. In the course of considering the trucking firm's claim to immunity from antitrust liability, the Court issued sweeping dicta on the nature of the right to petition.

"Certainly," Justice Douglas wrote, "the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right to petition."[432] Yet, from a First Amendment perspective, it is unclear why this proposition is "certain," if only because there are vast differences between courts and other governmental bodies to which the right to petition might apply. Courts, for example, have almost plenary power to control the actual proceedings in the courtroom. Courts may forbid the publication of material obtained in discovery to preserve the integrity of the litigation process,[433] control (within limits) media coverage of a trial,[434] pass rules limiting the right of attorneys to speak about a case,[435] place gag orders on attorneys during trial,[436] and sanction the filing of "petitions" interposed for an improper purpose or filed without adequate investigation.[437] An entire line of administrative law cases is devoted to the circumstances in which administrative decision-makers may engage in *ex parte* communications with the

430. 404 U.S. 508 (1972).

431. *Id.* at 509.

432. *Id.*

433. *See* Seattle Times Co. v. Rinehart, 467 U.S. 20 (1984); *see also* Robert C. Post, *The Management of Speech: Discretion and Rights*, 1984 SUP. CT. REVIEW 169.

434. *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333 (1966) ("'legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper'") (reversing conviction where trial tainted by adverse media coverage), quoting Bridges v. California, 314 U.S. 252, 271 (1941).

435. *See* Gentile v. State Bar of Nevada, 111 S. Ct. 2720 (1991) (striking down sanction under rule as applied, while sustaining the general validity of the rule).

436. *See, e.g.*, Levine v. U.S. District Court, 764 F.2d 590 (9th Cir. 1985) (sustaining restraining order as appropriate remedy for excessive pretrial publicity).

437. Fed. R. Civ. P. 11.

outside world,[438] a set of restrictions that would be totally unthinkable in a legislative setting.

Justice Douglas did qualify his bold statement in *California Motor Transport* by acknowledging such obvious differences and gave an instructive example: "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process."[439] Thus, the majority concluded, the defendants had "the right of access to the agencies and courts to be heard on applications sought by competitive highway carriers. That right, as indicated, is part of the right of petition protected by the First Amendment. Yet that does not necessarily give [the defendants] immunity from the antitrust laws."[440]

The Court's statement must be read carefully. According to the Court, the First Amendment grants a right of *access*—it gives a petitioner the right to get inside the courthouse door. The opinion does not indicate what level of protection is afforded to speech that takes place once the petitioner is inside. In fact, the disposition of the case indicates that the Court would allow the antitrust laws to be applied to a pattern of anticompetitive petitioning if such a pattern could be shown.

In support of its decision, the Court cited *Gibboney v. Empire Storage & Ice Co.*,[441] in which the Court had held that the First Amendment did not protect the union's coercive tactics (including picketing) against an ice company.[442] The Court concluded that the union's actions in the aggregate formed "a single and integrated course of conduct, which was in violation of Missouri's valid law."[443] With this background, the *Gibboney* Court wrote that "placards used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from state control."[444] The Court concluded that

438. *See, e.g.*, Home Box Office, Inc. v. Federal Communications Commission, 567 F.2d 9 (D.C. Cir. 1976), *cert. denied* 434 U.S. 829 (1977) (requiring FCC to hold hearing to determine effect of *ex parte* contacts on agency regulation). The *Home Box Office* Court linked *ex parte* contacts to the type of public choice behavior discussed in Part II, noting that "we are concerned that the final shaping of the rules we are reviewing here may have been by compromise among the contending industry forces, rather than by exercise of the independent discretion in the public interest the Communications Act vests in individual commissioners." 567 F.2d at 53.

439. *California Motor Transport*, 404 U.S. at 513.

440. *Id.*

441. 336 U.S. 490 (1949).

442. *Id.* at 492-93. The union also persuaded the ice company's truck drivers, 85% of whom were union members, to refuse to deliver the company's ice. *Id.*

443. *Id.* at 497.

444. *Id.* at 502.

"[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."[445] Stated this way the point is a truism, because many crimes require some form of communication. But even stated less strongly, the point is indisputably correct, and the Court has consistently applied neutral laws to cases incidentally involving speech.[446]

In light of this necessary qualification, the Court's sweeping statement regarding First Amendment protection becomes even more difficult to understand. A right that allows one into a court or an agency adjudication but offers no further protection is not much of a right.[447] Moreover, the idea of a right of access alone might pose some interesting questions. Are the ripeness and mootness doctrines in violation of the First Amendment because they allow courts to dismiss litigants' claims without a hearing on the merits?[448] Is the congressional power to remove certain subjects from the jurisdiction of the federal courts in conflict with (or even trumped by) the First Amendment?[449] What of the well-settled doctrine that a lawyer's incompetence may lead to the dis-

445. *Id.*

446. It has not done so without controversy, however. The most recent case in this line was a 5-4 decision with a vigorous dissenting opinion. *See* Cohen v. Cowles Media Co., 111 S. Ct. 2513 (1991).

447. As Chief Justice Rehnquist noted in Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 334 (1985), most of the cases addressing First Amendment issues in connection with litigation have focused on the right to associate for the purpose of putting a litigation strategy together rather than a right to file a lawsuit seeking relief on behalf of some individual. The case most often cited (beside *California Motor Transport*) in support of a First Amendment right of access to the courts is NAACP v. Button, 371 U.S. 415, 421 (1963), which involved the right of the NAACP to hold meetings, recruit plaintiffs, and organize litigation strategies *prior* to filing suit. Justice Brennan incorrectly relied on these cases in his concurring opinion in *California Motor Transport*. 404 U.S. at 517 (Brennan, J., concurring). In that concurrence Justice Brennan stated that, absent bribery or other misconduct, "I can see no difference, so far as the antitrust laws and the First Amendment are concerned, between trying to influence executive and legislative bodies and trying to influence administrative and judicial bodies." 404 U.S. at 518. As we discuss below, this position is simply insupportable.

448. We here assume that these doctrines are judicially created, rather than commands from the "case" and "controversy" language of Article III. Justice Brandeis referred to the doctrines this way, calling them ways of dealing with cases "confessedly within our jurisdiction" but that were not suitable for judicial disposition. Ashwander v. TVA, 297 U.S. 288 (1936) (Brandeis, J., concurring). If, as some have argued, these doctrines are compelled by Article III, the question is not as difficult.

449. *See* Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Agency Debate*, 36 STAN. L. REV. 895, 905 (1984) (arguing against proposals to strip the Court of jurisdiction on policy grounds while contending that Congress has broad discretion to enact such measures).

missal of his client's case?[450] How can a lawyer's ineptitude waive his client's constitutional rights?

The Court did not resolve the conflict between First Amendment values and competing interests in *California Motor Transport*, nor did it establish principles from which answers to these questions could be derived. It left only the proclamation that the First Amendment grants access to courts and adjudicative agency proceedings, and the result that this right of access did not compel the dismissal of a complaint alleging that the petitioning violated the antitrust laws. In fairness to the Court, however, it is hard to see what theoretical basis it could have established. Some lawsuits and agency challenges have merit and some do not. Of the meritless challenges, some are so meritless that they are sanctionable and some are not. The answer in each case must depend on the circumstances and, at least for purposes of Rule 11, the investigation done before the challenge is brought.[451]

As the foregoing discussion indicates, the complexities of government in the modern era dictate that some governmental entities are simply not appropriate fora for petitioning activity, and that fact poses no First Amendment problems. With respect to such fora, there should be no bar to the operation of the antitrust laws. The question remaining is whether courts and adjudicatory agencies fall into that category. Insofar as federal courts are concerned, there is strong reason to conclude that courts are not proper fora for petitioning, at least if that term is used to refer to the type of petitioning activity at issue in *Noerr*. Federal judges have life tenure and salary protection because their independence must be protected from any force that might distort their application of law to the facts of a case before them.[452] As the Court recently stated, the Framers "established that Article III judges would be appointed, rather than elected, and would be sheltered from public opinion by receiving life tenure and salary protection."[453] We have come to entrust the Bill of Rights to the courts precisely because they are less likely to be swayed by temporary flights of public opinion, thus ameliorating "the effects of

450. *See, e.g.*, Ball v. City of Chicago, 2 F.3d 752 (7th Cir. 1993) (affirming dismissal based on failure to prosecute).

451. Fed. R. Civ. P. 11.

452. *See* THE FEDERALIST No. 78 at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

453. Chisolm v. Roemer, 111 S. Ct. 2354, 2367 (1991) (holding that state judges count as "representatives" for purposes of the Voting Rights Act).

occasional ill humors in the society."[454] These factors should give us pause in declaring that courts are proper fora for the type of petitioning envisioned by the First Amendment.[455]

There are competing considerations, of course, that make courts look more like First Amendment fora than this somewhat formal analysis would indicate. Throughout its history, the Court has handed down decisions that have radically affected the course of the nation. From the early bank cases[456] through the desegregation cases, the Court has served as a forum in which battles over competing conceptions of the national good have been fought. The proliferation of federal statutes that have been read to give almost any citizen standing to challenge almost any government action in court, such as the Endangered Species Act, suggests that courts could function as protected First Amendment fora. The Court's battles over standing in public law cases, such as *Lujan v. Defenders of Wildlife*,[457] are instructive on this point because these cases reflect the Court's struggle to define exactly what kind of petitioning forum it is. Even if one adheres to the concept of courts as adjudicators of private rights, it is a fair question whether the Court will be able to retain that character in an era of broad statutory entitlements.

There are those who would give the Court sufficiently broad powers that one would not be surprised at their conclusion that the First Amendment should apply to judicial proceedings.[458] As

454. *See* THE FEDERALIST No. 78 at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

455. These observations apply to federal judges; state courts may be established differently. Many states elect their judges, and there is nothing preventing a state from establishing a judiciary empowered to give advisory opinions or otherwise set up as an appropriate forum for first amendment activity. The Court's recent decision in *Chisolm*, that the provisions of the Voting Rights Act pertaining to the election of "representatives" may apply to elections for state judges, may tend to confirm this view. Nonetheless, it is probably fair to say that most states conceive for their judges a form of judicial independence similar to that found in the Federal system.

456. The Court sustained the constitutionality of the Bank of the United States in McCulloch v. Maryland, 17 U.S. 316 (1819). Justice Marshall's opinion in that case seems to have drawn heavily on an opinion written by Alexander Hamilton as Secretary of the Treasury when President Washington was considering whether a national bank would be constitutional. *See* DUMAS MALONE, THE SAGE OF MONTICELLO 352 (1977) (stating that Hamilton's written opinion to Washington arguing in favor of the constitutionality of the bank "had come into Marshall's hands in the papers of Washington and was directly drawn upon in his own opinion in the case of *McCulloch vs. Maryland*, sometimes almost word for word"). There is some irony in this, given that Hamilton gave the judiciary the appellation of the least dangerous branch, but there could be little question that he would have applauded the expansion of national authority by the Court.

457. 112 S. Ct. 2130 (1992).

458. This is not an exaggeration, as can be verified by an examination of the plaintiffs' claims in *Lujan*. These included an "ecosystem nexus" theory, *id.* at 2138-40, that would

Lujan demonstrates, however, that moment is not yet at hand. Quoting John Marshall, the *Lujan* Court argued that "the province of the Court is solely to decide on the rights of individuals."[459] "Vindicating the *public* interest," the Court concluded, "is the function of Congress and the Chief Executive."[460] The Court has attempted to maintain enough of the traditional, private litigation model to keep the exercise of its powers "judicial" in some meaningful sense, while still accommodating all the litigants Congress has sent to it.[461]

At present, the Court's accommodation is inconsistent with a vision of courts as public fora for petitioning activity fully protected by the First Amendment. Fortunately, from the perspective of doctrinal consistency, the Court has not applied *California Motor Transport* to hold anything other than that there is a right of access to the courts. Once in court, plaintiffs' First Amendment rights are at the mercy of the rules of the forum. Because of the nature and purpose of these fora, the First Amendment should not impair the ability of courts and agencies to enforce their own rules, including rules designed to punish claimants who bring worthless claims and abuse the relevant judicial processes.

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have done for standing what *Wickard v. Filburn* did for the Commerce Clause, 317 U.S. 111 (1942) (upholding a quota applied to the production and consumption of wheat even on one individual's private property).

459. *Lujan*, 112 S. Ct. at 2145, quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). Professor Haskins has persuasively argued that this statement was made in the context of Chief Justice Marshall's efforts to carve out an uncontroversial sphere of influence in which the Federalist-dominated judiciary could operate without fear of reprisal from the Republican party, which had recently ascended to control of the other two branches. *See* GEORGE L. HASKINS, FOUNDATIONS OF POWER: JOHN MARSHALL 1801-1815 (1981). Dangers such as the politically motivated impeachment of justices (Samuel Chase comes to mind) seem now a remnant of the past, which might argue for a more aggressive judicial role in this new, safer environment. The Court does seem to have fewer and less dangerous enemies than it did in 1803. On the other hand, it may be that the judiciary has fewer and less dangerous enemies precisely because it has, for the most part, hewed to the relatively uncontroversial line Justice Marshall marked out in *Marbury*.

460. 112 S. Ct. at 2145.

461. This is a concern that the advocates of an expansive view of standing rarely address directly. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L. J. 221 (1988); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992). It is, however, a serious question. If Congress wishes to shift certain issues to the courts for resolution by, for example, passing statutes granting vague substantive rights with plain private rights of action, what effect will that have on the courts?

2. *The Misplaced Concern Over Chilling Speech in Judicial "Fora"*

Does this First Amendment right of access provide absolute immunity from the antitrust laws? The Court's most recent case, *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.*,[462] defined the circumstances in which litigation might be deemed a "sham," and thus not protected by *Noerr* immunity. *Professional Real Estate Investors* is the most recent in a line of cases interpreting the *Noerr* Court's statement that

> [t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.[463]

The Court distinguished *Noerr* because "[n]o one denies that the railroads were making a genuine effort to influence legislation and law enforcement practices."[464]

Professional Real Estate Investors was a classic case of *Noerr* immunity in the litigation context. At issue were the efforts of a resort hotel to rent videodiscs to its guests for use in videodisc players installed in the rooms. Columbia and seven other major movie studios sued, claiming the rental of their movies violated their copyrights. The hotel counterclaimed, alleging that the studios had conspired to obtain a monopoly in violation of the Sherman Act.[465] The Supreme Court affirmed the district court's grant of summary judgment in favor of the studios on the counterclaim.

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462. 113 S. Ct. 1920 (1993).

463. *Noerr*, 365 U.S. at 144. It is worth noting here that Justice Black apparently thought that interfering with the business relationships of a competitor could be enough to support liability under the antitrust laws. This statement is surprising in light of the oft-cited statement that "the antitrust laws protect competition, not competitors" in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), and it seems unlikely that the statement would be made today. *See* Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578, 2589 (1993) ("Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition, or 'purport to afford remedies for all torts committed by or against persons engaged in interstate commerce'") (citation omitted)). In fairness to Justice Black, however, there is some evidence that the Court did not take that statement very seriously in 1968, when *Noerr* was decided. *See, e.g.*, Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 820 (1968) (reversing summary judgment granted against claim that wholly-owned credit subsidiary of steel company had tied real estate loans to prefabricated houses); Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967) (affirming jury verdict on price discrimination theory based on evidence that prices charged by all competitors in the relevant market decreased).

464. 365 U.S. at 144.

465. *Professional Real Estate Investors*, 113 S. Ct. at 1923-24.

The Court began its analysis by reaffirming the applicability of petitioning immunity in judicial fora. Quoting *Noerr*, the Court stated that "the Sherman Act does not punish 'political activity' through which 'the people . . . freely inform the government of their wishes.'"[466] In *Professional Real Estate Investors*, the hotel operators certainly informed the Court of their wishes; they sought treble damages and attorney's fees. But the Court did not explain how this amounted to "political activity." The Court then limited the "sham" exception created in *Noerr* by holding that litigation could not be a "sham" if it were "objectively reasonable," that is, if a reasonable person could have brought the action in good faith.[467]

The significance of this holding for the Court was that it foreclosed the possibility of antitrust liability simply because the plaintiff subjectively intended to harm a competitor by bringing the litigation. The Court thus created a two-tiered process in which a plaintiff must "disprove the challenged lawsuit's *legal* viability before the court will entertain evidence of the suit's *economic* viability."[468] The Court supported its decision by drawing an analogy to the tort of malicious prosecution, which requires a finding that an action be brought without probable cause before liability may be imposed.[469]

There are good reasons for such a rule in malicious prosecution cases, where bringing the lawsuit (with the proper degree of malice or recklessness) is the only requirement for liability. The antitrust laws do not impose liability for filing lawsuits, however, unless the substantive requirements of the antitrust statutes are also met. But even then, under the Court's rule in *Professional Real Estate Investors*, antitrust counterclaims get special treatment when the counterclaim is based on allegedly anticompetitive litigation. Why? In all the *Noerr* cases, only Justice Stevens' concurrence in *Professional Real Estate Investors* offers a theoretical justification for immunity: "Access to the courts is far too precious a right for us to infer wrongdoing from nothing more than

466. *Id.* at 1926.

467. *Id.*

468. *Id.* at 1928. The Court went on to say that "even a plaintiff who defeats a defendant's claim to *Noerr* immunity by demonstrating both the objective and subjective components of a sham must still prove a substantive antitrust violation." *Id.* In practice this will likely require only proof of economic effect, for the scienter element almost certainly would have been satisfied under the Court's requirement that litigation be subjectively intended to harm competition to get past *Noerr* immunity.

469. *Id.* at 1929.

using the judicial process to seek an anticompetitive advantage in a doubtful case."[470] Justice Stevens attempts to justify *Noerr* immunity in the litigation context using a basic First Amendment concept—the chilling effect. Justice Stevens argued that if potential litigants were faced with possible antitrust liability for filing a suit, they would be less likely to do so. To reassure prospective litigants, the Court required a greater showing for claims that litigation violates the antitrust laws. For Justice Stevens, the right to bring a lawsuit was "precious,"[471] though the precise reason was not explained. Yet, an explanation is necessary, especially because the Court's previous First Amendment cases in this area dealt with pre-litigation organizational efforts, not litigation per se.[472] Only *California Motor Transport* makes the jump from organizing to filing, and it is not very convincing.

Even leaving these questions aside for the moment, the idea that petitioning immunity is necessary to prevent litigation from being "chilled" is not particularly persuasive. As Professor Schauer has suggested, a better description of the "chilling" phenomenon would be "deterrence."[473] This description might avoid the judicial paralysis that often accompanies a litigant's claim that his speech will be "chilled" by a given act. Deterrence is not all bad. Some types of speech should be deterred. Slander causes harm to its subject and is (by definition) of little or no social value. It follows that slander should be deterred, which is why it is a tort. Baseless lawsuits, or suits filed to obtain a collateral advantage, should also be deterred because they impose costs on society and serve no valid purpose. The relevant question for our purposes is how much deterrence of petitioning activity is constitutionally permissible. Beginning with *Speiser v. Randall*,[474] the Court has developed doctrines that "overprotect" certain kinds of speech to lessen the deterrent effect of sanctions, such as tort liability. Justice Stevens' theory would place petitioning immunity in the same category.

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470. *Id.* at 1933 (Stevens, J., concurring).

471. *Id.*

472. *See, e.g.*, NAACP v. Button, 371 U.S. 415 (1963); *see also supra* note 446.

473. *See* Frederick Schauer, *Fear, Risk And the First Amendment: Unraveling The "Chilling Effect,"* 58 B. U. L. Rev. 685 (1985) (defining chilling effect doctrine in terms of deterrence theory).

474. 357 U.S. 513 (1958)(holding state could not place on taxpayers the burden of proving they were entitled to tax exemption).

New York Times Co. v. Sullivan[475] provides the best context for analyzing Justice Stevens' theory. In *New York Times*, the Court concluded that if liability for defamation were imposed under the standard common law rules, newspapers and other commentators would tone down their speech to stay on the safe side of the line between robust commentary and libel. As the Court explained, "A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . self-censorship."[476] The Court concluded that "[u]nder such a rule, would-be-critics of official conduct may be deterred from voicing their criticism . . . . They tend to make only statements which 'steer far wider of the unlawful zone.'"[477] To solve this problem, the Court created the actual malice requirement for defamation plaintiffs suing public figures. This requirement created a much higher threshold for liability to push back the line that separates libel from vigorous commentary. Under the actual malice requirement, there can be no liability unless the defendant was at least reckless with regard to the truth of his or her statement.[478]

In theory, the *New York Times* rule enables criticism for which there is some basis, to be made without fear of liability, for even if such criticism inches over the line toward libel, the defendant would still be immune from liability unless she was reckless. The difference between imposing tort liability for crossing the line between commentary and libel, and imposing tort liability only for recklessly libelous statements, creates a kind of buffer zone in which overzealous (meaning false but not knowingly or recklessly so) comments may be made. This buffer zone allows a "pure heart, empty head" defense to libel actions, and thus denies recovery to some plaintiffs who have in fact been libeled. The buffer zone denies some libel plaintiffs the recovery to which they would have been entitled under the standard common law rules.[479] This departure from the common law rule was justified by reference to "a profound national commitment to the princi-

475. 376 U.S. 254 (1964).
476. *Id.* at 279.
477. *Id.*, quoting *Speiser*, 357 U.S. at 526.
478. *Id.* at 279-80.
479. *See* Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321 (1992).

ple that debate on public issues should be uninhibited, robust, and wide-open . . . ."[480]

When Justice Stevens stated in *Professional Real Estate Investors* that the right of access to the courts is too precious to be infringed by imposing liability for "using the judicial process to seek a competitive advantage in a doubtful case,"[481] he endorsed rules that effectively create for antitrust cases the type of buffer zone created in defamation cases by the actual malice rule. The *New York Times* deterrence structure is appropriate, perhaps indispensible, in fora where uninhibited debate is the norm, such as in the media campaign in *Noerr* or the informational advertisements at issue in *New York Times* itself. Lawsuits, however, are not such a forum. As interpreted in the litigation context in *Professional Real Estate Investors, Noerr* immunity in the litigation context encourages plaintiffs to bring suits by making it less likely that they will be successfully sued for violating the antitrust laws by filing their original action.[482] Two questions are immediately apparent: does *Noerr* immunity actually create a buffer zone and, if so, is such immunity desirable?

The answer to the first question must take account of the sanctions available to courts to deter litigants from bringing meritless claims or from bringing claims for an improper purpose. Potential plaintiffs must already contend with the risk of sanctions for Rule 11 violations and the possibility of malicious prosecution and abuse of process torts. Why a litigant who is not deterred by the prospect of these sanctions would be deterred by potential antitrust liability is not apparent. Rule 11 sanctions are presumably far more common than successful antitrust counterclaims. Even though the malicious prosecution and abuse of process torts do not provide for treble damages and attorneys fees, they may support punitive damage awards, which may be a more effec-

480. 376 U.S. at 270. Whether it is fair to let the loss lie on the plaintiff is another question, especially because the benefits of the *New York Times* rule—less inhibited reporting and thus more robust debate—accrue to the public at large while the costs are borne solely by plaintiffs who have been libeled but cannot show actual malice. One could imagine alternative ways of achieving the benefits of the rule while dispersing the costs more fairly, such as free defamation insurance for the media funded by a tax on newspapers and television. There are of course obvious problems in administering such a program, especially if it were to be attempted by the courts. For a provocative discussion of these issues, *see* Schauer, *supra* note 479.

481. *Professional Real Estate Investors*, 113 S. Ct. at 1933 (Stevens, J., concurring).

482. This lessens the potential costs of non-antitrust litigation by increasing the discount (a function of the likelihood that a given cost will be incurred) applied to an antitrust counterclaim.

tive deterrent. And, while there may be a due process cap on how many times a punitive damage award may exceed compensatory damages, it is greater than three.[483] In light of these factors, it is hard to see why a rational plaintiff would base a litigation decision on *Noerr* immunity, yet only rational plaintiffs could do the type of cost-benefit calculation that Justice Stevens's concurrence seems to ennvision. It seems highly unlikely that the *Noerr* doctrine preserves litigation as an option in any but a trivial number of cases.

Even if an intelligible distinction could be drawn between antitrust and other types of sanctions for filing lawsuits, however, it is not at all clear that it makes sense to do so. As noted above, and as Justice Stevens aptly pointed out in *Professional Real Estate Investors*, litigation can serve as the means of violating the antitrust laws.[484] Such litigation *should* be deterred, just as libel should be deterred. This fact, combined with the (at best) dubious status of courts and agencies as fora for First Amendment activity, strongly suggests that there is no interest compelling the adoption of speech-protective rules in the litigation context that is similar to the interest in uninhibited debate that supported the actual malice rule in *New York Times*. Debate in courts and agencies is, must be, and should be constrained by the characteristics of those fora.

This conclusion calls into question the *Professional Real Estate Investors* holding that objectively reasonable lawsuits are always immune from antitrust liability under *Noerr*. As Justice Stevens' concurrence noted, quoting Judge Posner's well-reasoned opinion in *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*,[485]

> [t]he existence of a tort of abuse of process shows that it has long been thought that litigation could be used for improper purposes even when there is probable cause for the litigation; and if the improper purpose is to use litigation as a tool for suppressing competition in its antitrust sense . . . it becomes a matter of antitrust concern.[486]

It is telling that the majority and Justice Stevens's concurrence in *Professional Real Estate Investors* rely on two different common

483. *See, e.g.*, TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993) (sustaining $10 million punitive damage award based on $19,000 compensatory damage award).

484. *See Professional Real Estate Investors*, 113 S. Ct. at 1933; *see also supra* notes 341-359 and accompanying text.

485. 694 F.2d 466, 472 (7th Cir. 1982).

486. *Id.* (citation omitted).

law torts to support their analysis. The majority refers to the malicious prosecution tort, which is committed by filing a claim without probable cause.[487] By contrast, the concurrence refers to the abuse of process tort, which is committed by filing a claim (meritorious or not) to obtain an advantage collateral to the proceedings.[488] Of the two analogies, the abuse of process tort best seems to fit the description of *Noerr* immunity that emerged from *California Motor Transport.* The Court there invoked the First Amendment, but held that immunity did not extend to situations in which speech was "used as an integral part of conduct which violates a valid statute."[489] The Court did not create an exception for "speech" that was unsupported by probable cause. Rather, its language implied, and its citation to *Gibboney* confirmed, that the First Amendment right it was invoking would not protect a course of conduct in which speech activity was an incidental part, which is essentially the position reached by the abuse of process tort if one considers a lawsuit to be speech.[490]

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487. *Professional Real Estate Investors,* 113 S. Ct. at 1929.

488. *Id.* at 1933.

489. *California Motor Transport,* 404 U.S. at 514.

490. *California Motor Transport* described the "sham" exception as applicable to litigants who "instituted . . . proceedings and actions . . . with or without probable cause and regardless of the merits of the cases." 404 U.S. at 512. It is ironic that the *Professional Real Estate Investors* Court cited this very language with approval in holding that a suit brought with probable cause could not serve as the basis for antitrust liability. *See* 113 S. Ct. at 1926. The distinction described in *Gibboney,* and tracked through First Amendment cases such as *O'Brien,* provides a foundation for the Court's decision in FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990), a case in which a group of trial lawyers agreed not to represent indigent criminal defendants in an effort to force the local government to raise the hourly fees they would be paid for such cases. The Court sustained a finding that the lawyers had violated the antitrust laws on the ground that the alleged speech activity involved, boycotting and picketing, was the means by which the restraint of trade was imposed, not petitioning activity designed to secure the imposition of a restraint. *Id.* at 428. The antitrust laws could validly regulate the restraint itself, regardless whether the form it took could nominally be deemed speech.

Professor Elhauge wrongly criticized the *Trial Lawyers* Court on the ground that the distinction between speech as a direct restraint and speech seeking a restraint could not support the result in *Noerr,* in which the publicity campaign was alleged to have interfered with the truckers' relationships with some of their customers. Elhauge, *Interest Group Theory, supra* note 207 at 1188. Professor Elhauge makes much too much of this allegation in *Noerr.* The only way the railroads' media campaign could have impaired the truckers' relations with their customers would have been by persuading the customers that non-truck options, such as railroads, were better than trucks. That is simply competition. At least outside the area of incitement to civil disorder, the First Amendment would cut strongly against any sort of liability based on the theory that a group of people had been persuaded by some sort of speech. *See* Boos v. Barry, 485 U.S. 312 (1988) (reaction to speech could not count as "secondary effect" under time, place, and manner doctrine). Even apart from these points, Justice Stevens' distinction between *Noerr* and *Trial Lawyers* was correct. The harm in *Noerr,* both the veto of pro-trucking legislation and the supposed disturbance of the truckers' relationship with their customers, depended on *reactions* of third parties to the media campaign, and thus on the effect of the speech on third parties.

If it is correct that petitioning immunity can rest only in the First Amendment, then the grant of immunity in *Real Estate Investors* seems too broad. When courts and regulatory agencies are at issue, the First Amendment has no meaningful role to play because those fora are not devoted to the airing of disputes and redressing of grievances (except those brought in accordance with court and agency procedures). Courts are instrumentally devoted to ascertaining the facts and applying the law to them. That mission requires that courts and agencies in adjudicative proceedings be given near-plenary authority to control the speech that takes place in the fora, subject to review (for the most part) only for errors affecting the substantive rights of the parties. In those situations it makes no sense to invoke the First Amendment.

As with state action immunity, Professor Elhauge has recently taken the lead in analyzing the scope and basis of antitrust petitioning immunity.[491] Building on the process-based model of financial interest and government accountability he developed in the state action context,[492] Elhauge has attempted to harmonize the Supreme Court's petitioning immunity cases. Professor Elhauge recognizes that the First Amendment informs the scope of petitioning immunity, but he contends that "[a]ntitrust immunity extends beyond First Amendment protections because the competitive process guarantees of antitrust are fundamentally inapplicable to disinterested accountable governmental processes of decisionmaking."[493]

Our disagreements with Professor Elhauge's process-based approach were explained at some length in the previous Section. It suffices to reiterate that public actors are not as accountable as his theory must presume to achieve its goals, and private actors are not as suspect. Three points are worth mentioning here, however. First, as discussed above, petitioning, especially in the litigation or agency adjudication contexts, may have dramatically anticompetitive consequences, which are not confined to instances in which the government has a financial interest or lacks

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In *Trial Lawyers*, by contrast, the restraint was present regardless of the reaction to the speech, or indeed regardless of what type of speech was used. *Trial Lawyers* was thus no more a First Amendment case than was *Gibboney*, which is to say it was not a case for *Noerr* immunity.

491. Elhauge, *Petitioning Immunity*, *supra* note 178.

492. Elhauge, *Antitrust Process*, *supra* note 99, at 672.

493. Elhauge, *Petitioning Immunity*, *supra* note 178, at 1195, 1250.

accountability.[494] Antitrust law is—and properly should be—concerned with precisely the sorts of actions that petitioning immunity protects because antitrust law is concerned with economic effects on consumers, not the identity of anticompetitive actors.

Second, it makes no sense to distinguish between subjectively profit-motivated and non-profit-motivated actors for purposes of petitioning immunity, even assuming that the public choice critique of legislative behavior discussed above had no validity at all. The Court has repeatedly disavowed reliance on profit motivation as a rule of decision in the First Amendment context. Indeed, the Court summarily dismissed the argument in *New York Times*, holding "[t]hat the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold."[495] It is useful to remember in this connection that the Court has held that direct payments to legislators, in the form of campaign contributions of various types, may be speech.[496] Yet in such a case, there can be no question that both the petitioners and the government are "financially interested." Do the petitioners therefore pay treble damages? The answer has to be "no" under the First Amendment, and it is "no" even though both the petitioners and the municipality are financially interested.[497]

Nor does Professor Elhauge's construct of the "objectively" disinterested actor help matters. The problem is that, as noted above, Professor Elhauge's construct includes the entire government. But, as he rightly notes, the scope of petitioning immunity varies depending on the forum in which the petitioning takes place. For example, Professor Elhauge concedes that "[a]ntitrust immunity is narrower in the adjudicative process."[498] But his the-

494. *See supra* section III.A.

495. New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964).

496. Buckley v. Valeo, 424 U.S. 1 (1976) (holding that the Federal Election Campaign Act's expenditure restriction violated the First Amendment). In fairness to Professor Elhauge's theory, one must admit that *Buckley* is an odd decision. It would be hard to improve on Anthony Lewis's report of Professor Freund's reaction to the case: "They say that money talks. We thought that was the problem, not the solution." Anthony Lewis, *In Memoriam: Paul A. Freund*, 106 HARV. L. REV. 16, 17 (1992).

497. Suppose in *Noerr* the governor of Pennsylvania owned stock in the railroads that were running advertisements urging him to sign legislation that would hurt the truckers. Even if he did, and even if both he and the railroads got richer because of his action, it is inconceivable that the *railroads* could be held liable for treble damages if all they did was publically call for the governor to sign the legislation. This conclusion would not change one bit if we knew to a certainty that the governor's decision would not cost him a single vote at the next election. Yet in that circumstance, he could hardly be called accountable, and he would by definition be interested in the restraint he imposed.

498. Elhauge, *Interest Group Theory*, *supra* note 207, at 1226.

ory offers no way to explain this narrower scope of immunity because judges under his theory are just as accountable as legislators.[499] If they are just as accountable, how can immunity for actions before judges be narrower? First Amendment theory can provide the necessary explanation, as has been demonstrated above, but notions of accountability and context cannot.

3. *Recommendations*

The petitioning immunity doctrine must be reformed along First Amendment lines. The Court's efforts to avoid creating a constitutional issue have prevented it from undertaking a serious analysis of the First Amendment principles it implicitly admits are at work in the petitioning immunity cases. The Court should openly apply the principles established in the public forum cases to distinguish among the range of petitioning activities that might come before it. As mentioned above, this should result in a continuum running from full First Amendment protection for *Noerr*-style publicity campaigns to minimal protection, in the form of a right of access and no more, in the litigation context.

As with the state action cases, the Court should fully apply antitrust laws a free hand where the conduct at issue does not receive First Amendment protection. This does not mean, as the Court has implied on many occasions, that the antitrust laws will be used to regulate the scope of the right to petition, any more than the antitrust laws would have been used to enforce the nondelegation principles applied in *Ticor*. Instead, the approach suggested here works from the premise that the antitrust laws apply to all conduct that would violate their terms, except in cases where such conduct is protected by an interest superior to those of antitrust law, such as the First Amendment. Where no such protection exists, there is no reason not to apply the antitrust laws.

499. *Id.* at 1197 n. 112 ("An actor is politically accountable in the special sense I mean if his or her authority can be traced to an election or some chain of appointment starting with elected officials. The accountability can be retrogressive rather than ongoing (it embraces judges with life tenure who were initially appointed by elected officials). . . ."). This broad, formal definition of accountability is necessary to Professor Elhauge's theory because, as noted above, the theory is a restatement of the state action-private action distinction. The theory cannot explain distinctions among state actors, however. For that the forum-based analysis in the text is required.

Conclusion

The antitrust immunity doctrines, both for state action and for petitioning, exist because in a democracy there must be room for a dialogue between the governors and the governed. That dialogue often involves parties seeking anticompetitive results, using anticompetitive means, or both. All this conduct is of potential concern to the antitrust laws, which exist to protect consumers from the adverse effects of restraints on competition. The antitrust laws themselves have no preference for or against petitioning or state action. Those laws are concerned only with protecting consumers and competition. The antitrust laws apply to problems involving restraints on competition unless they are preempted by a superior rule of law. Both federalism and the First Amendment are such rules and, in some circumstances, both federalism and the First Amendment will stay the hand of the antitrust laws to further other, superior interests.

To ascertain the scope of antitrust immunity, courts must look to the substantive law governing federalism and the First Amendment. For if valid federalism or First Amendment concerns apply in a case, the antitrust laws will not. By the same token, if such concerns are not applicable in a given case, the antitrust laws either will or will not apply based solely on the merits of the antitrust claims asserted. The search for a preference in the antitrust laws for a residual grant of power to courts to implement public choice theories of legislation, or for a preference for nonprofit decisionmaking over profit-motivated decisionmaking, will ultimately fail because the antitrust laws simply will not bear the weight ascribed to them by such theories.