PANEL III: ANTITRUST AND THE OBAMA ADMINISTRATION

U.S. CONVERGENCE WITH INTERNATIONAL COMPETITION NORMS: ANTITRUST LAW AND PUBLIC RESTRAINTS ON COMPETITION

JAMES C. COOPER* **& WILLIAM E. KOVACIC****

government authorities and political subdivisions,[3]

anticompetitive government policies could be strengthened in the United States.

I. WHY SHOULD WE CARE ABOUT ANTITRUST SCRUTINY OF STATE ACTION?

Most competition policy specialists have heard Adam Smith's caution that "[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public."[7] They are less familiar with the passage that immediately follows Smith's famous admonition in *The Wealth of Nations*. "It is impossible indeed to prevent such meetings," Smith wrote, "by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary."[8]

In these observations, Smith anticipated the two fronts of the battle that competition policy systems would have to wage to be successful. Competition laws would need to subdue efforts by private economic actors and public entities to suppress business rivalry. In the discussion below, we consider why a program that does the former without addressing the latter ultimately is unavailing.

A. *Recognition of the Threat of State-Imposed Restraints to Competition Is Widely Shared in the United States and Abroad*

Policy makers sometimes can justify regulations that restrict competition when faced with markets that fail to produce goods or services that consumers value. For example, some markets may be so fraught with informational asymmetries between producers and consumers that governmental assurance of quality is warranted. Although regulation in these instances may deprive consumers of some of the benefits of competition, it may be warranted when the benefits of correcting market failures exceed the opportunity costs of displaced competition.

Regulation, however, also can be used to restrict competition, to transfer wealth from consumers to a favored industry, rather than to improve consumer welfare. A large body of commentary recognizes that public intervention cast as pro-consumer legislation can serve mainly to transfer wealth from consumers to a favored industry.[9] Observers from a wide range of perspectives have emphasized this phenomenon. In the 1950s, Walter Adams and Horace Gray drew attention to how numerous public policies damaged the competitive process and warranted closer attention as part of a comprehensive national

[7] ADAM SMITH, THE WEALTH OF NATIONS 128 (Modern Library ed. 1937) (1776).

[8] *Id.*

[9] For an excellent recent review of this commentary, see D. Daniel Sokol, *Limiting Anticompetitive Government Interventions that Benefit Special Interests*, 17 GEO. MASON L. REV. 119, 120 (2009).

competition policy.[10] In the same decade, Donald Turner and Carl Kaysen's famous synthesis of competition law and economics observed that "legislative exceptions cover significant areas of the nation's economy" and raised questions about "the economic justifications for exceptions to competition policy."[11] In the early 1960s, Gabriel Kolko challenged the public interest interpretation of federal regulatory measures adopted in the first decades of the twentieth century and concluded that major business interests supported these measures to hamper rivals and serve their own economic ends.

for a policy preference into political pressure is the one most likely to achieve its desired outcome. And this interest group is more often than not likely to represent industry, rather than consumer, interests. It has long been recognized that because of industry's superior efficiency in political organization relative

such restraints engage the machinery of the state in policing compliance with commands that set prices, output levels, or terms of entry. A competition policy that only addresses private restraints will motivate firms to turn away from private measures and to invest more effort in obtaining state-imposed restrictions. Without effective means to anticipate, and to discourage

regulatory authorities to petitions of newcomers to enter markets. In one sense, firms using this strategy work within the system by means that do not violate the law. They invoke governmental process to delay, or otherwise impose costs on a rival to hinder competition. Certain grocery store chains, for example, have found this strategy useful in raising Wal-Mart's costs of entry into many markets. Incumbent firms have become adroit at invoking environmental and zoning regulations that require hearings and lengthy studies. By doing so, such parties have been able to forestall competition from Wal-Mart. These efforts literally cost consumers in these communities millions of dollars.[23]

Other forms of activity use the regulatory state in ways that involve actual deceit or conduct that contradicts the spirit of a regulatory regime. Such strategies have been evident in the prescription drug market. For example, brand name manufactures have found myriad ways in which to block generic entry by taking advantage of the complexity of the Hatch-Waxman Act and the FDA's regulatory scheme. Misrepresenting the nature of patents held on brand name drugs in required FDA filings can forestall generic entry for over two years.[24] Further, brand name and generic drug makers have taken advantage of the 180-day exclusivity given to the first generic drug maker to challenge a branded drug's patents by entering into reverse-settlement agreements that allow them to share monopoly profits.[25]

Competition agencies can provide at least a partial antidote to both consequences of complexity. They can act as advocates for regulatory simplification measures that eliminate requirements that discourage entry and do not impede the attainment of legitimate regulatory objectives.[26]

---

[23] *See* R. Michelle Breyer, *Turf Wars: Big-Box Legal Battles Focus on Location, Location, Location*, HOME CHANNEL NEWS (National Report), May 19, 2003, *available at* 2003 WLNR 17143265; Editorial, *Public Good: Wal-Mart Shows Government How It's Done*, SAN DIEGO UNION-TRIB., Oct. 3, 2006, *available at* http://legacy.signonsandiego.com/uniontrib/20061003/news_lz1ed3bottom.html; Mike Mckee, *Small-Town Law, Big-Box Trouble: Wal-Mart Challenges Ordinance Banning 'Discount Superstores,'* RECORDER (S.F.), Feb. 24, 2006, *available at* 2006 WLNR 25577184.

[24] *See In re* Buspirone Patent Litig., 185 F. Supp. 2d 363, 380-81 (S.D.N.Y. 2002); FED. TRADE COMM'N, ENFORCEMENT PERSPECTIVES ON THE *NOERR-PENNINGTON* DOCTRINE 4-5 (2006), *available at* http://www.ftc.gov/reports/P013518enfperspectNoerr-Penningtondoctrine.pdf [hereinafter ENFORCEMENT PERSPECTIVES ON THE *NOERR-P*

Competition authorities also can use their powers to attack fraud, deception, and related forms of conduct that attempt to use the regulatory process to restrict entry or expansion by rival firms.[27]

F. *Distributional Issues*

A significant number of state restrictions on competition harm those who are at the bottom of the economic pyramid.[32] Most jurisdictions limit entry into legal and medical professions under the auspices of assuring certain levels of quality. No one seriously disputes the need for some form of professional regulation in the presence of large information asymmetries and serious spillover effects. In most cases it is difficult, if not impossible, for a consumer to judge the quality of her physician or attorney, and these practitioners are unlikely to internalize the full costs of their mistakes. Some level of state credentialing and regulation makes sense. In other areas, however, the need for stringent licensing requirements and regulation seems less obvious. For

regulatory schemes would have reduced the number of students who received dental care at all.

Not only do these barriers make purchasing certain services more expensive, but they also eliminate yet another option to earn a living for those who already have so few. Vocations involving health and beauty services, such as hair styling, teeth whitening, or exercise instruction require little formal training and can provide a relatively quick path for those with entrepreneurial DNA to work their way out of conditions of poverty. Additionally, such restrictions on competition have both macro and micro implications. At the macro level, robust competition is associated with higher incomes more generally; programs that curb public restraints on competition are likely to reduce poverty. At a more personal, micro level, these restraints not only reduce income but also the less quantifiable personal satisfaction that comes from being able to engage in the process of earning a living.

II. THE CURRENT U.S. TOOLKIT

The U.S. competition policy system provides some means for government agencies and private litigants to challenge government restraints on competition. On the whole, these measures supply relatively weak constraints, especially when compared to the powers available to a number of foreign authorities. Despite their limitations, the application of these tools has provided a useful curb upon some forms of public intervention and upon private parties who seek to invoke the protection of the state.

A. *Limits to Enforcement*

In the United States, the Supreme Court has crafted two judicial doctrines that greatly hamper the ability of the antitrust laws to deter state-imposed competition restraints. First, out of respect for federalism, restraints imposed directly by the state sovereign – a state legislature or a state supreme court, acting in a legislative capacity – are protected from antitrust challenge under the state action doctrine.[39] Further, the state action doctrine may shield actions taken by subsidiary government entities and by private parties in some circumstances. Guided by First Amendment concerns, the *Noerr-Pennington* doctrine prevents agencies from bringing actions against parties for the anticompetitive effects of state action they urge.[40]

[39] *See* Parker v. Brown, 317 U.S. 341, 352-53 (1943) (creating the state action doctrine); *see also* Hoover v. Ronwin, 466 U.S. 558, 567-68 (1984) ("[W]hen a state legislature adopts legislation, its actions constitute those of the State . . . and *ipso facto* are exempt from the operation of the antitrust laws." (citations omitted)). The Court also extended this ipso facto exemption to a state supreme court acting in a legislative capacity. *Id.* at 568.

[40] The doctrine takes its name from the first two cases that the Supreme Court considered in this jurisprudential line. *See* United Mine Workers of Am. v. Pennington, 381 U.S. 657, 670 (1965); E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 3. e., 365nc.R i75r56(th)-3.9e6118.6(383 T(r)

1. State Action Doctrine

Since 1943, through what has come to be known as the "state action doctrine," the Supreme Court has limited the ability of the federal antitrust laws to reach into state affairs. At its core, the state action doctrine allows federal courts to examine only the pedigree and the process governing a state regulatory regime, not its substantive effect on the economy.[41] Thus, anticompetitive state regulation is allowed to stand as long as the court is

regime must argue that compliance with the state regime results in an antitrust violation or that the regime conflicts with the "full purpose" of the antitrust laws.

When preemption is based on a state-federal conflict argument, Congressional intent is necessarily the touchstone of any analysis;[44] before a

may think that anticompetitive state laws would easily fall when pitted against

producers.[69] Because these regulations in effect allowed upstream suppliers to set downstream prices, the Court analogized them to resale price maintenance agreements, which were at the time per se illegal.[70] Hybrid restraints are to be contrasted with "unilateral" restraints, which involve the state directly dictating a market outcome, such as the rent control ordinance at issue in *Fisher v. Berkeley*. The application of the hybrid restraint doctrine to laws that facilitate cartel behavior by requiring posting and holding of prices, has led to a great deal of confusion among lower courts.[71]

Even if regulation authorizes conduct that would otherwise be per se illegal under the antitrust laws, it can still be saved from preemption if the state engages in sufficient oversight to convert private conduct into state action.[72] Thus, the antitrust laws reach only those state laws that permit or compel private entities to engage in unsupervised conduct that otherwise would result in per se illegal conduct.[73] Although the required content of active supervision

[69] *See, e.g.*, *Rice*, 458 U.S. at 665 (Stevens, J., concurring); *324 Liquor Corp*., 479 U.S. at 345 n.8.

[70] For example, in *State Oil v. Kahn*, 522 U.S. 3, 7 (1997), the Supreme Court held that maximum resale price maintenance agreements were no longer per se illegal under the Sherman Act. Ten years later, in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 908 (2007), the Supreme Court held that minimum resale price maintenance agreements were no longer per se illegal, and instead courts must use a circumstance-specific "rule of reason." *Id.*

[71] *Compare, e.g.*, Costco Wholesale Corp. v. Maleng, 522 F.3d 874, 894 (9th Cir. 2008) (holding state regulation that required beer and wine wholesalers to post prices and adhere to them for thirty days to be a hybrid restraint and therefore subject to preemption by the Sherman Act), *and* TFWS, Inc. v. Schaefer, 242 F.3d 198, 213 (4th Cir. 2001) (holding Maryland liquor regulation that required wholesalers to post and adhere to prices and prohibited volume discounts to be a hybrid restraint), *with* Mass. Food Ass'n v. Mass. Alcoholic Beverage Control Comm'n, 197 F.3d 560, 565-66 (1st Cir. 1999) (holding that there are no private restraints "operating alone or in conjunction with state action" where a state statute limited licenses to three per company), *and* Battipaglia v. N.Y. State Liquor Auth., 745 F.2d. 166, 176 (2d Cir. 1984) (reasoning that there is a "grave question" whether a state regulation requiring wholesalers to post and maintain schedules of prices and discounts is enough to be a policy "actively supervised"os sn0603 T616ount310(e)9.7.6(d-ii6.9(i4(to pos)7.4(t.2(0.4(y)-6pere7.4

regulatory landscape. It also increases litigation risk for both the state and private parties subject to the regulatory scheme.[83]

Although the active supervision require

some arm of the state is unsettled law.[89] The Court has never directly weighed in on the treatment of other subsidiary state instrumentalities, but has hinted at least twice in dictum that state agencies are not private actors.[90] In *Town of Hallie*, where the Court held that the active supervision requirement does not

established by statute and makes and enforce minimum wage rates for apprentices performing electrical contracts in Washington, was subject to the active supervision requirement.[94]

articulation" risky in most cases.[100] Absent an active supervision requirement, much of this conduct effectively will remain beyond the reach of antitrust laws, and thus largely undeterred.

2. *Noerr-Pennington*

The *Noerr-Pennington* doctrine takes its name from two cases in which the Supreme Court first attempted to interpret the Sherman Act in light of the First Amendment right to petition the government for redress.[101] Since these early cases, the Supreme Court has revisited the issue a handful of times. Taken together, these holdings sketch out a general rule that legitimate attempts to secure government action – legislative, regulatory, and judicial – are immune from antitrust scrutiny.[102]

The *Noerr* doctrine rests on the primary principle of the right of citizens under the First Amendment to urge government action. In *Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc.*, the Supreme Court stressed the "essential dissimilarity" between concerted lobbying of the government to act and the type of agreements that the Sherman Act typically confronts, such as price fixing, boycotts, and market divisions.[103] The Court bolstered its interpretation that the Sherman Act does not reach the type of conduct at issue by noting that to conclude otherwise "would raise important constitutional questions. The 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."[104] More recently, the Court in both *Federal Trade Commission v. Superior Court Trial Lawyers Ass'n*[105] and *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*[106] has noted

[100] *But see* S.C. State Bd. of Dentistry, No. 9311, 2007 WL 2763994 (F.T.C.) (Sep. 11, 2007), *available at* http://www.ftc.gov/os/adjpro/d9311/070911decision.pdf.

[101] *See* United Mine Workers of Am. v. Pennington, 381 U.S. 657, 670 (1965); E. R.R. Presidents' Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135 (1961). The Court has always been careful to frame its *Noerr-Pennington* inquiries as ones of Sherman Act interpretation rather than resolution of a conflict between the First Amendment and the Sherman Act. *See* Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc. (*PREI*), 508 U.S. 49, 57 (1993); FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 431-32 (1990); *Noerr*, 365 U.S. at 137-38.

[102] *See* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 499 (1988).

[103] *Noerr*, 365 U.S. at 136.

[104] *Id.* at 137-38.

[105] *Superior Court Trial Lawyers*, 493 U.S. at 424 (stating that the Court in *Noerr* was "[i]nterpreting the Sherman Act in the light of the First Amendment's Petition Clause").

[106] *PREI*, 508 U.S. at 56 (arguing that the Court in *Noerr* interpreted the Sherman Act, in part, to avoid imputing "'to Congress an intent to invade' the First Amendment right to petition").

that the interpretation of the Sherman Act in *Noerr* rests on a desire to avoid conflict with the right to petition.[107]

The rationale for *Noerr* also can be traced to other sources. For example, in *Noerr* the Court expressed concern that a rule limiting citizens' right to petition their government for anticompetitive rules may hinder governmental decision-making, noting that "to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."[108] Subjecting legitimate lobbying to antitrust scrutiny would deter this valuable conduct and hence "would substantially impair the power of government to take actions through its legislature and executive that operate to restraint trade."[109] The Supreme Court has echoed this basis for protecting certain petitioning activity in *California Motor Transport Co. v. Trucking Unlimited*[110] and *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*[111]

The Court also has hinted that federalism concerns may underpin *Noerr* doctrine, at least when the case involves petitioning a state government. For example, citing *Parker v. Brown*,[112] the Court explained in *Noerr*:

> To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a

[107] The recent application of *Noerr* principles to the National Labor Relations Act ("NLRA") provides additional insight into the role that the First Amendment plays in defining the scope of *Noerr* protection. *See* BE & K Constr. Co. v. NLRB, 536 U.S. 516, 524 (2001). As in *Noerr*, the Court in *BE & K* turned to statutory construction to avoid the constitutional question, holding that the NLRB's standard was invalid because there was nothing in the relevant statutory text to suggest that it "must be read to reach all reasonably based but unsuccessful suits filed with a retaliatory purpose." *Id.* at 536. In light of the *BE & K* decision, the Ninth Circuit recently concluded that the *Noerr* doctrine "stands for a generic rule of statutory construction, applicable to any statutory interpretation that could implicate the rights protected by the Petition Clause." Sosa v. DIRECTV, Inc., 437 F.3d 923, 931 (9th Cir. 2006); *see also BE & K*, 536 U.S. at 536 ("Under the *Noerr-Pennington* rule of statutory construction, we must construe federal statutes so as to avoid burdening conduct that implicates the protections afforded by the Petition Clause unless the statute clearly provides otherwise.").

[108] *Noerr*, 365 U.S. at 137.

[109] *Id.*

[110] 404 U.S. 508, 510 (1972).

[111] 508 U.S. at 56 ("In light of the government's 'power to act in [its] representative capacity' and 'to take actions . . . that operate to restrain trade,' we reasoned that the Sherman Act does not punish 'political activity through' which 'the people . . . freely inform the government of their wishes.'" (quoting *Noerr*, 365 U.S. at 137)).

[112] 317 U.S. 341 (1943).

> purpose which would have no basis whatever in the legislative history of that Act.[113]

Years later, the Supreme Court expanded on this notion in *Omni*, explaining that "*Parker* and *Noerr* are complementary expressions of the principle that the antitrust laws regulate business, not politics; the former decision protects the

Competition advocacy helps solve consumers' collective action problem by acting within the regulatory process to advocate for regulations that do not restrict competition unless there is a compelling consumer protection rationale for imposing such costs on citizens.[124] By representing consumer interests in the regulatory process, the Agencies can affect outcomes in different ways. First, and most directly, advocacy can persuade a decision-maker to oppose regulation by presenting a compelling case that it restricts competition more than is necessary to promote some consumer protection goal, and therefore is not in the public interest. At the same time, competitive advocacy can provide reasoned explanations that will help the decision-maker justify the decision to the public. Second, to the extent that a comment informs the public of the way a proposed regulation is likely to affect them, it can spur political action, and thus increase the political costs associated with supporting anticompetitive regulation. In this manner, competition advocacy can move the political equilibrium toward one that is more favorable to competition. Finally, advocacy can provide "political cover" for public-spirited politicians seeking to benefit consumers but opposed by a powerful industry; regardless of whether a comment increases the political cost of supporting anticompetitive regulations, a politician can hide behind it as an excuse for not supporting a favored industry.

establish that the FTC's effect on those decisions improved them; that is what cannot be measured."[126] More recently, the FTC conducted a survey of advocacy recipients and sponsors of bills or regulation that the FTC opposed from 2001-2006.[127] The study found that 53% of respondents agreed that the outcome of the regulatory process was largely consistent with the FTC position, and 54% of respondents (and 79% of those respondents who had an opinion) believed that the FTC comment influenced the outcome. Further, 81% of respondents responded that the fact that the comment came from the FTC caused them to give it more weight than they otherwise would.

Although advocacy can play an important role in reducing government restraints on competition, it has some serious shortcomings. First, and perhaps most importantly, advocacy can only inform the debate and suggest appropriate action; it cannot compel that action in the same manner as a tribunal. Although advocacy can argue that states should not pursue policies that undermine the national policy

interest groups, in the late 1980s, Congress attempted to cripple, if not totally eliminate the FTC's advocacy program.[129] Further, Congress and the

competition policies. Such measures give the competition agency a stronger platform to become directly involved in decisions made by other public ministries and to participate more actively in decisions about responses to economic crisis conditions.

IV. A PATH FORWARD FOR U.S. COMPETITION POLICY: TWO APPROACHES THAT WOULD PROVIDE A STRONGER ROLE FOR THE COMPETITION AUTHORITY VIS-À-VIS THE STATE

Broadly, there are two ways in which a competition authority can challenge anticompetitive abuse of the regulatory process. It can engage policy makers to achieve ex ante changes, or it can challenge anticompetitive regulation ex post under the antitrust laws. The U.S. competition authorities are severely circumscribed in both cases: FTC and DOJ can engage in advocacy, but have no formal authority to veto policy; the state action and *Noerr-Pennington* doctrines leave a vast array of anticompetitive conduct beyond the reach of enforcement.

In what follows, we consider modifications of existing antitrust doctrine and the institutional role of the competition authority that would provide a larger scope for both ex ante and ex post interventions.

A. *Reconsideration of Legal Protection of State-Imposed Restrictions*

As currently construed by the courts, the state action and *Noerr-Pennington* doctrines sweep too far, protecting anticompetitive conduct that harms consumers and advances neither the values of federalism nor freedom of

affairs.[134] Calls to reform the state action doctrine have a long pedigree and range from minor tweaks in existing doctrine to wholesale overalls. Some early critiques of the doctrine introduced public choice theory to argue that the antitrust laws should preempt all anticompetitive or inefficient state regulation,[135] or at least inefficient regulation that appears to be the product of capture.[136] The underlying rationale behind these proposals is that, when captured, the state becomes a mere vessel for private interests. When there is evidence that the process is tainted with private interests, there is no reason to suspect a regulatory scheme represents state action, and thus no reason for the courts to hold the antitrust laws in abeyance. More recent critiques have taken two paths to argue for a narrowing of state action immunity. Some attempt to divine congressional intent to fashion optimal boundaries between federal antitrust laws and state regulation. Others argue that the state action doctrine should be bound by the extent to which it vindicates principles of federalism. That is, there is no reason to assume that Congress did not intend the Sherman Act to reach anticompetitive state conduct. So the only limiting principle on this intent should be the extent to which Sherman Act intrusion impermissibly interferes with state sovereignty.

In an influential paper, Professor Einer Elhauge argues that the underlying rationale for the state action doctrine can be found in an interpretation of the antitrust laws.[137] He examines the legislative history of the Sherman Act and suggests that antitrust is at its core about prohibiting only those restraints that are the result of self-interested decision-makers.[138] Thus, a decision to restrain competition by a disinterested, politically accountable actor – such as a state legislator or governor, or someone accountable to such an elected official – is beyond the Sherman Act's reach.[139] Professor Elhauge's analysis is primarily descriptive, and he does not suggest an alteration in the current doctrine except for urging the Court openly to acknowledge the underlying forces driving its state action jurisprudence.

---

[134] *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 484-86 (1996).

[135] *See, e.g.*, John Cirace,

Also focusing on interpretation of the Sherman Act, Professor Richard Squire contends that the problem with the antitrust preemption doctrine is that it confuses issues of whether there has been an antitrust violation with Supremacy Clause questions.[140] He suggests retaining the current *Midcal* framework for implied exemption questions – that is, those that involve a defendant using the existence of an anticompetitive state law as a shield from antitrust liability – but scrapping the existing preemption framework for one that focuses more clearly on whether the state regulation in question conflicts with the purpose behind the federal antitrust laws.[141] Professor Squire examines the core values of the antitrust laws and concludes that a preemption test that focuses on consumer harm and producer enrichment, with important limitations, would vindicate congressional intent.[142] Conceding that laws that transfer wealth from consumers to producers are ubiquitous,[143] Professor Squire suggests allowing laws that bundle consumer benefits with producer benefits[144] and those that pursue "fair" or "reasonable" prices.[145]

Professors Daniel Rubinfeld and Robert Inman do not focus on congressional intent, but rather argue that the state action doctrine in its current

[140] *See* Squire, *supra* note 80, at 77.

[141] *See id.*

[142] *See id.*

[143] *Id.* at 106.

[144] *See id.*

form is approximately optimal in securing the goals of federalism.[146] Like Professor Elhauge, they believe that the current doctrine tends to immunize only that state action that is likely to be a product of a process that represents the "public interest."[147] They would suggest only modifications for interstate spillovers and municipalities.[148] Professors Lemley and McGowan also argue

At the most basic level, allowing federal courts to overrule state legislative judgments on tradeoffs between competition and other social values is an affront to democratic values; if citizens, through their elected representatives, choose to forego the benefits of competition to pursue another value, they should be allowed to do so. Apart from democratic concerns, it deprives the nation of the benefits of federalism – letting states adopt solutions that more closely fit the preferences of their populations,[154] and allowing the nation as whole to learn from this variation.[155]

A movement in this direction also would require the Court to overrule sixty years of precedent that rests on an interpretation of a relatively unchanged statute. Even if it could deliver a cogent rationale for such a stark departure from stare decisis, the Court would be forced to perform world-class jurisprudential gymnastics to distinguish antitrust preemption challenges to state regulation from *Lochner*

process and examine the political forces that shaped the regulation, however, have the potential to slide into a review of substance rather than process. For example, evaluating a regulatory scheme on its face to distinguish state programs that serve the "public interest" from those that are merely designed to enrich favored producers will force the development of normative criteria by which to judge the "public interest."[158] Even milder forms of this inquiry that ask only whether lobbying occurred in effect create a presumption that the ultimate regulatory outcome in the presence of lobbying is almost surely tainted with private interest rather than a representation of a politically accountable decision-maker's view of the public interest. Such a presumption, again, would require courts to judge the regulatory scheme pushed by private interests, and ultimately adopted, against some normative criteria.[159]

deter petitioning that is protected by the First Amendment.[162] Any rule that chills this protected behavior runs the risk of impinging on the First Amendment. This point seems in some ways a corollary to the Court's statement 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."

standards that the courts have filled in through common law.[165] Unlike the case of an environmental law that requires the Environmental Protection Agency to set a ceiling for pollutant levels, we can know which state laws conflict with the antitrust laws only by knowing what conduct violates the antitrust laws, and we can only know this by looking at what federal courts have said violate the antitrust laws. In this manner, the federal courts have acted as bureaucrats, promulgating regulations that flesh out more precise standards of conduct.[166] Setting aside more than one hundred years of precedent that let us know, broadly, what conduct is likely to violate the antitrust laws to develop a parallel set of core principles that should guide preemption inquiries is likely to be confusing, inefficient, and facilitate judicial oversight of state regulatory decisions.[167]

A more modest, and hence more feasible, solution than scrapping the *Midcal* approach to preemption, would be for the Court to expand the class of private unsupervised conduct that necessarily conflicts with the antitrust laws, and thus is subject to preemption. In its current formulation, the Court has said that clear conflict exists when a law causes a private party to violate the antitrust laws in all cases.[168] The only type of conduct that satisfies this standard is that which constitutes a per se violation – unlike unilateral acts or conduct that is

Shifting the focus in this manner could have the collateral benefit of helping to clear up the currently messy concept of "hybrid restraints" as it is applied to horizontal restraints. As noted above, the Supreme Court developed the notion of hybrid restraints to create the fiction of agreement in preemption cases involving government regulation that required downstream sellers to adhere to prices set by upstream suppliers.[175] Lower courts have had difficulty applying this concept, however, to regimes that create conditions that are likely to facilitate collusive agreements, but which neither authorize nor mandate collusion.[176] For example, some courts addressing post-and-holds have held that the state-mandated price holding acts as an agreement to hold prices constant, which is a per se violation under Supreme Court precedent.[177]

In theory, Congress could accomplish such a modification of the state action, but it would be hard to envision a legislative fix that would neither be over- nor under-inclusive in defining ex ante the set of circumstances that merit a rebuttable presumption of preemption. Courts fashion rules that govern antitrust analysis based on cumulative experience and economic learning.[181] Indeed, these factors have led courts to move certain practices from the per se column to the rule of reason column,[182] and to develop strong presumptions of illegality for other restraints.[183] Thus, given the needed flexibility in defining the exact nature of the government restraint, this modification should be accomplished judicially.

Treatment of regulatory boards comprised of private actors. Another tweak at the margins of the state action doctrine would be to make it clear that subdivisions within the state comprised of market participants are considered private parties. As discussed in Part I.B, this uncertainty has important negative consequences for competition policy. Much anticompetitive conduct is not the result of legislation, but rather emanates from regulatory boards made up of decision makers who wear their regulatory hat at the board's monthly meetings, but earn a living in the very profession that they have been charged to regulate the other 353 days of the year.[184] Given their financial self interest, there seems to be no principled reason to consider these actors

[181] *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886-87 (2007) ("[T]he *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason. It should come as no surprise, then, that 'we have expressed reluctance to adopt *per se* rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious.'"(citations omitted)); Cal. Dental Ass'n v. FTC, 526 U.S. 756, 781 (1999) (stating that the ability of a court to draw "a confident conclusion about the principal tendency of a restraint . . . may vary over time, if rule-of-reason analyses in case after case reach identical conclusions"); State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) ("[W]e have expressed reluctance to adopt *per se* rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious." (internal quotation marks omitted)); FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 458-59 (1986) (exhibiting hesitancy to condemn and subject particular conduct to unreasonable per se analysis, and, in general, to extend per se analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious); Broad. Music, Inc. v. Columbia Broad. Sys., 441 U.S. 1, 9 (1979) ("[I]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations." (internal quotation

anything but private.[185] Treating these actors as private parties would have two implications: first a state law that delegated to a board or commission comprised of private actors the ability to engage in unsupervised per se illegal conduct – for example, setting prices or banning advertising – would be preempted; second, the state entity itself would be subject to an antitrust suit if it were not supervised by a sovereign state component.

Of course, critics of this approach may argue that it allows an unacceptable level of federal oversight of state regulations. When state boards are rightly characterized as private actors, however, there is no reason for courts not to explore the anticompetitive effects of their concerted action in that same way they would for private corporations that unsuccessfully tried to take refuge in the state action doctrine. At the same time, several important firewalls would be built into such a framework to prevent unwarranted judicial intervention into state affairs. First, antitrust claims can be directed only at state regulation that impairs competition. For example, some state safety regulations may be unwise from a policy standpoint – imposing costs greater than benefits – but, because it applies equally to all firms, would not be subject to antitrust challenge because there is no underlying antitrust violation. On the other hand, a regulation that fixes commission rates or erects entry barriers for low-cost competitors clearly implicates competition.

This proposal also presents the same concern that Chief Justice Rehnquist raised in his *City of Boulder* dissent: if the regulatory board is to be treated as a private entity (or a collection of private interests) for antitrust purposes, should

elected city officials, they are insufficient to insulate state boards comprised of

state. Thus, anticompetitive regulations promulgated by self-interested boards still can be saved if it can be shown that they are acting for the state rather than on their own account. Requiring a state board's anticompetitive regulations to be actively supervised may reduce a st

of a program – higher prices – and capture the full benefits – rents to a favored group, it will set inefficiently high levels of regulation.[197]

It is hard to envision a transaction that does not in some way export costs to neighboring states – allowed to run rampant, an interstate spillover exception ultimately could swallow the whole state action doctrine. Accordingly, this exception should be limited to instances where the spillovers are large – both in terms of the magnitude of the overcharge and the proportion of the overcharge that is exported to other states. First, with respect to the latter condition, courts should focu.8(tio). e.s TJ16.t

jurisprudence.[201] In *Pike v. Bruce Church, Inc.*,[202] the Supreme Court held a non-discriminatory local regulation that indirectly affects interstate commerce is constitutional as long as it is directed at a legitimate local interest, and it does not place an unduly large burden on interstate commerce in relation to its purported local benefits.[203] Steering away from laws that are not otherwise subject to preemption would limit the extent to which a spillover exception to the state action doctrine could become a back-door way to challenge local regulation that otherwise would be constitutionally firm under a *Pike* balancing test.

At the same time, we believe that Supremacy Clause analysis should take precedent over Dormant Commerce Clause analysis when spillover effects are sufficiently large.[204] There is a danger of conflict between a spillover exception to the state action doctrine and *Pike* when a state law allows supervised per se illegal behavior in an industry that exports a large majority of its output. The Court has been clear that promoting supracompetitive prices is a legitimate state interest in *Pike* balancing.[205] The Court also explicitly blessed *Parker*, a case in which a cartel exported ninety-five percent of its product to other states or countries.[206] Thus, there may be cases in which Dormant Commerce Clause and Supremacy Clause challenges would reach different conclusions because, for example, exported overcharges were small in relation to the purported local benefits.

These inconsistent outcomes should not be troubling, because Dormant Commerce Clause and Supremacy Clause actions have different rationales. Dormant Commerce Clause analysis concerns states' powers to affect interstate commerce in an area where Congress has not exercised its commerce

[201] That is, there needs to be a set of conduct that impermissibly burdens interstate commerce, but otherwise is not subject to preemption, on the one hand, and a set of conduct that is subject to preemption, but does not burden interstate commerce, on the other.

[202] 397 U.S. 137 (1970).

[203] *See id.* at 142 ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be

power.[207] Antitrust preemption, on the other hand, concerns a state's power to act inconsistently with a policy that Congress expressed to the fullest extent of its commerce power.[208] That is, when Congress has spoken, Dormant Commerce Clause analysis is irrelevant; the task becomes one of accommodating inconsistent state and federal policies. When the costs of anticompetitive state action fall on those who have no say in the decision, the core rationale underlying the state action doctrine – federalism – is not present,

norms in agricultural markets through their political participation at the federal level. Had the price support program in *Parker* taken place beyond the umbrella of a consonant federal policy to support agricultural prices, it is not at all clear that the outcome would have remained the same.

2. *Noerr-Pennington*

Like the state action doctrine, the *Noerr-Pennington* doctrine has evolved as the Court attempted to avoid a conflict between the antitrust laws and the Constitution. *Noerr*

baselessness, moreover, is a stringent one – it is only met upon a showing that no reasonable litigant could possibly expect success on the merits.[215]

The Court thus requires an antitrust plaintiff to satisfy an objective screen before it will entertain a full-fledged inquiry into the subjective intent behind petitioning. This is consistent with antitrust jurisprudence that shows concern for over-deterring procompetitive conduct when information is imperfect.[216] Although one may infer intent from the available evidence, it can never be directly ascertained. Intent resides only in the defendant's mind, and, in the face of an antitrust suit, the defendant will always claim that its intent behind filing was to obtain relief, not to impose direct costs. Thus, any inquiry into intent is necessarily subjective and thus prone to error because it is not subject to external verification. An objective measurement, on the other hand, is based on observable phenomena that look the same to all observers and that are therefore untainted by personal opinion.[217]

For a single filing, the objectively baseless threshold is understandably high.

Thus, in the repetitive petitioning scenario, we suggest that courts should still adhere to an objective threshold before engaging in a full-fledged intent inquiry, but that they adopt a less-stringent objective baselessness test than the one in *PREI*. We think that given the accuracy that goes along with enhanced data, the risk of deterring protected speech is minimal – thus, this rule would address "breathing space" concerns. Further, because this test addresses harm coming from abuse of the process rather than the outcome, it in no way infringes upon states' rights to engage in economic regulation.

A defendant's win rate is one possible candidate for a less stringent objective screen. The only two federal courts of appeal to have addressed squarely how pattern cases like *California Motor Transport* should be analyzed after *PREI* have adopted this standard. In *USS-POSCO Industries v. Contra Costa County Building & Construction Trades Council*,[220] the Ninth

in *Primetime 24 Joint Venture v. National Broadcasting Co.*,[224] which involved allegations that the defendants coordinated a series of signal-strength challenges under the Satellite Home Viewer Act, without regard to the merits D(,)TTm(224)Tj10.537.92 641.

It is also important to point out that a misrepresentation designed to procure anticompetitive government regulation is likely to cause harm orders of magnitude larger than harm caused by the abuse of process; although the latter can inflict competitive harm by imposing costs on a rival, the former conduct, if successful, will result in government enforcement of an anticompetitive scheme that will linger unless invalidated by a court or repealed by future regulators, both unlikely outcomes. Because the stakes are higher in the context of misrepresentations, therefore, the breathing space concerns should be minimal.

Additionally, an exception for intentional misrepresentations does not offend notions of federalism or limit government's ability to obtain the information necessary to govern. First, intentional falsehoods usurp the governmental process; the resultant anticompetitive regulation does not represent the will of the people, but, rather, a hijacking of the regulatory structure. Second, we do not want government to make decisions based on false information, so a rule that deters misrepresentations is likely to enhance the accuracy of information provided to the government.

There is no principled reason to afford false speech in the political arena any more protection than false speech made in other, more formal arenas, such as regulatory or adjudicatory proceedings: falsehoods, regardless of their context, advance no First Amendment interests, and there is no reason to think that anticompetitive legislation obtained by fraud is any less likely to cause competitive harm than fraudulently procured regulation or adjudication. Nonetheless, as a practical matter, evidentiary concerns militate toward limiting any such exception to more formal proceedings, such as adjudication and rulemaking. The same reasons that counsel against allowing state action immunity to turn on the motives underlying regulatory decisions, suggest that it would be nearly impossible for an antitrust plaintiff to establish causation in cases involving a decision-maker who enjoys broad discretion and does not rely on the veracity of input to craft an output.

B. *Containment: Ex Ante Review of Proposed Measures*

The previous Section discussed relaxing current interpretations of immunities that hinder ex post challenges to anticompetitive state actions or

At the state level, ex ante prevention is a political and practical non-starter.

concerns. If this regime arose from a federal mandate, however, federalism and political concerns would still exist. Further, not all states' attorneys general have sufficient staff expertise in competition law to perform adequate review. Thus, as in the case of federal review, state review would require major increases in staff or a reallocation of funding from their enforcement mission.

Ex ante competition authority review is likely to be a feasible option only at the federal level, and because federal competition agencies cannot bring suit against sister federal agencies or the legislative branch to stop anticompetitive policies, ex ante review is likely to be the only effective tool to address potentially anticompetitive policies. There is precedent for this approach. Some laws require FTC and DOJ review of federal agency actions.[246] Further, the FTC and DOJ are often required to consult with agencies developing rules that implicate competition,[247] and currently engage in informal dialogue with sister agencies and congressional staff on the competition effects of various proposals. The FTC and DOJ, moreover, engage in formal advocacy with federal agencies through the notice-and-comment portion of rule-making procedure.[248]

Although it is clear that U.S. competition authorities have enjoyed input into federal policy-making for some time, formal review requirements would strengthen the agencies' ability to force federal policy makers to take competition values into account. At one end of the spectrum, Congress could require legislative committees or federal agencies to consider the agencies' competitive analysis when passing a law.[249] Thus, the FTC and DOJ would not exercise a veto power, but could instead force a public explanation of why some values trump competition values. Congress also could give the FTC and DOJ a veto power over some agency decisions. That is, policy makers would have to address competition concerns to the agencies' satisfaction before a

[246] For example, the Department of Interior must seek antitrust review of its outer continental shelf oil exploration leasing decisions. *See* 43 U.S.C. § 1337(c)(3) (2010). Likewise, the Department of Energy must consult with the antitrust agencies on potential competitive impacts when promulgating a rule that authorizes or requires a commercial standard. *See* 15 Ua

policy could be implemented. The political feasibility of this approach at the legislative level is slight, however, as it is highly unlikely that Congress would agree to circumscribe itself. Another doubtful, if slightly more likely, scenario would require the agencies that promulgate regulations to obtain FTC and DOJ approval prior to final enactment.

C. *Ex Post Assessment: A Research Program to Evaluate Effects*

Competition agencies could devote greater resources to conduct research to measure the effects of public policies that restrict competition. A research program could accumulate and analyze empirical data that assesses the consumer welfare effects of specific restrictions. Such a program could also assess whether the stated public interest objectives of government restrictions are realized in practice. By making the competitive costs of public intervention more evident, such a program would inform public debate about the continuation of existing restrictions and the future adoption of similar measures. This form of analysis would be especially valuable if the government restrictions were made subject to a sunset provision that forced periodic reconsideration of the measures in question.

D. *Adjustments in Federal/State Collaboration*

Existing U.S. jurisprudence governing the antitrust significance of state action accords considerable discretion to state legislatures to enact measures that restrict competition. In practice, this means that the front line of debate and policy-making take place within the state legislative process. One can imagine that antitrust units of the state attorneys general might expand their efforts to track legislative developments and to advocate against measures that cupe