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U.S. Convergence with International Competition Norms: Antitrust Law and Public Restraints on Competition

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PANEL III: ANTITRUST AND THE OBAMA ADMINISTRATION

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

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INTRODUCTION

From his early days as a practitioner in the 1960s, Joe Brodley has served the field of competition law brilliantly as a scholar, teacher, and mentor. Beyond his contributions as a superb analyst, Joe used his formidable skills with a great humanity. There is a note in a bottle quality to being an academic. It can take years to tell if anyone took the bottle from the sea, read the note, or acted on its contents. Joe has realized the deep satisfaction of knowing with certainty that many embraced and benefitted from his teaching and guidance. By participating in this Conference, we are pleased to celebrate him.

The Conference provides an occasion to reflect upon how the discipline of antitrust law has changed in the four decades since Joe began his legal career. One striking development is the growing significance of comparative study. By the mid-1960s, a handful of nations had adopted antitrust laws. Today the number of competition systems approaches 110. To those of a certain age, this development is most improbable. For example, who foresaw in 1967, the year Joe's article on oligopoly appeared in the *Stanford Law Review*,[1] the 2009 formation of the BRIC antitrust network – an endeavor that links the competition agencies of Brazil, Russia, India, and China? In the early stages of Joe's scholarship, none of those countries – least of all China and Russia – seemed likely candidates to enact antitrust laws.

The role of the United States has changed substantially amid the global adoption of competition laws. Years ago, the United States was chiefly an exporter of antitrust ideas. Today the experience of other jurisdictions increasingly offers a useful means for assessing the quality of the U.S. system and illuminates areas for improvement.[2] In this Article we focus upon an area in which greater convergence of U.S. policy with the practice of many foreign countries is long overdue: the treatment of public policies that suppress competition. Whereas the European Union ("EU") and numerous other jurisdictions have taken strong measures to limit restraints imposed by national

[1] *See* Joseph F. Brodley, *Oligopoly Power Under the Sherman and Clayton Acts – From Economic Theory to Legal Policy*, 19 STAN. L. REV. 285, 288-89 (1967).

[2] On the relevance of foreign experience in informing the development of competition policy in the United States, see WILLIAM E. KOVACIC, THE FEDERAL TRADE COMMISSION AT 100: INTO OUR 2ND CENTURY 1-9 (2009), *available at* http://www.ftc.gov/ftc/workshops/ftc100/docs/ftc100rpt.pdf; William E. Kovacic, *Lessons of Competition Policy Reform in Transition Economies for U.S. Antitrust Policy*, 74 ST. JOHN'S L. REV. 361, 363 (2000) [hereinafter Kovacic, *Lessons of Competition Policy Reform*].

government authorities and political subdivisions,[3] U.S. antitrust policy in many ways is more tolerant of public restraints upon business rivalry. Since the early twentieth century, Supreme Court doctrines have evolved to grant states and the federal government broad rights to enact laws that restrain competition.[4] Further, individual groups are largely free to lobby for laws designed to erect marketplace barriers, and in many cases to mire their competitors in a morass of governmental processes.[5]

Currently, advocacy is the primary tool available to both public and private enforcers of the U.S. antitrust laws to challenge state-imposed restraints on competition. Because government action (and private conduct to obtain such action) is challengeable in only relative narrow circumstances, much of the battle takes place in the legislative and regulatory arenas rather than in courts. Faced with the prospect of being legislated out of business, trade groups invest mightily in lobbying. Too often there are no trade groups to counter anticompetitive legislation, leaving the U.S. federal antitrust agencies (the Antitrust Division of the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC")) to devote modest resources to persuade state, and occasionally federal, regulators and legislators to consider competitive effects in formulating policy.

Although the U.S. competition advocacy program has achieved important success, it is not enough. United States enforcers should stand on equal footing with their EU and other foreign counterparts in being able to challenge state action that threatens competition in the same manner as they can challenge private conduct. This need, moreover, is increasingly urgent given the larger role that government now plays in the economy in the wake of the financial crisis.[6]

To that end, Part I of the Article presents reasons why public restraints upon competition should be a stronger concern of U.S. competition policy. Part II reviews the existing array of measures by which the U.S. competition policy system can challenge government restraints on rivalry. Part III then describes measures available to competition authorities in other jurisdictions to resist encroachments by government policies on the competitive process. Finally, Part IV suggests approaches by which the framework of controls upon

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[3] Kovacic, *Lessons of Competition Policy Reform*, *supra* note 2, at 400-04 (describing measures taken by relatively new competition systems to forestall public restraints upon competition); Timothy J. Muris, *State Intervention/State Action – A U.S. Perspective*, 2004 FORDHAM CORP. L. INST. 517, 523 (praising EU policies that limit public restraints upon competition).

[4] *See infra* notes 39-121 and accompanying text.

[5] *See infra* notes 122-29 and accompanying text.

[6] For example, through its efforts to rescue traditional North American automobile producers, the U.S. government has become a majority shareholder in General Motors. Neil King, Jr. & Sharon Terlep, *GM Collapses into Government's Arms*, WALL ST. J., June 2, 2009, at A1.

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.[12] In the early 1970s, a study sponsored by Ralph Nader denounced the anticompetitive effects of federal regulatory schemes governing areas such as communications, electric power, international trade, public procurement, and transportation.[13]

The notion that regulation is produced in a black box to maximize social welfare has given way to what has become known as the economic theory of regulation ("ETR").[14] The foundation of ETR is that politicians and constituents are rational economic actors. As such, constituents demand favorable regulation and politicians use the state's coercive power to supply it in return for political support. When adopting a policy, regulators weigh political support from those who stand to gain against political opposition from those who stand to lose. The interest group most able to translate its demand

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[10] WALTER ADAMS & HORACE M. GRAY, MONOPOLY IN AMERICA 177 (1955).

[11] CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY 189 (1959).

[12] GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916, at 2 (1963).

[13] RALPH NADER, THE MONOPOLY MAKERS: RALPH NADER'S STUDY GROUP REPORT ON REGULATION AND COMPETITION 35, 103, 193, 227, 319 (Mark J. Green ed., 1973).

[14] Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 373 (1983); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 212-13 (1976); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 4-18 (1971). ETR has generated a vast amount of empirical literature confirming the theoretical model. For example, several studies have shown a strong statistical relationship between campaign contributions and congressional voting. *See, e.g.*, W. KIP VISCUSI ET AL., ECONOMICS OF REGULATION AND ANTITRUST 330-31 (3d ed. 2000). However, note that although several empirical studies are consistent with ETR, taken as a whole the empirical support for ETR is "mixed." *Id.* at 330; Henry W. Chappell, Jr., *Campaign Contributions and Congressional Voting: A Simultaneous Probit-Tobit Model*, 64 REV. ECON. & STAT. 77, 77-80 (1982); Henry W. Chappell, Jr., *Campaign Contributions and Voting on the Cargo Preference Bill: A Comparison of Simultaneous Models*, 36 PUB. CHOICE 301, 301 (1981); Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279, 280-98 (1984); James B. Kau et al., *A General Equilibrium Model of Congressional Voting*, 97 Q.J. ECON. 271, 271 (1982); James B. Kau & Paul H. Rubin, *Self Interest, Ideology, and Logrolling in Congressional Voting*, 22 J.L. & ECON. 365, 365 (1979); James B. Kau & Paul H. Rubin, *Voting on Minimum Wages: A Time-Series Analysis*, 86 J. POL. ECON. 337, 337-41 (1978); Steven D. Levitt, *How Do Senators Vote? Disentangling the Role of Voter Preferences, Party Affiliation, and Senator Ideology*, 86 AM. ECON. REV. 425, 438 (1996).

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 to consumers, consumer interests are often subservient to industry interests in the regulatory process. Beyond a certain point, per capita benefits from a preferred regulatory outcome are diluted such that it becomes irrational to take part in the political process. A practical consequence of this is that small, concentrated groups with similar interests – like members of a particular industry – can organize political support more effectively than large diffuse groups – like consumers generally. Thus, the equilibrium outcome of the political process is likely that regulation protects a favored industry from competition at the expense of consumer welfare.

Politicians seldom present regulation to the public as the political bargain that it is. Instead, favored industries often claim the mantel of "consumer protection," and argue that they need to restrain market forces for the greater good. These sorts of consumer protection concerns are often raised as a sort of "trump card" against competition and consumer choice.[15] Although some groups may sincerely offer consumer protection concerns, because special interest groups often raise them as a fig leaf for their own narrow economic benefit, they should not necessarily be taken at face value.

Recognition of the competitive dangers of various forms of public intervention has led to the development of a broad international consensus among competition agencies about the importance of programs to curb anticompetitive public policies. In 2003, FTC Chairman Timothy Muris laid out the rationale for having competition agencies make public restraints a central focus of their work:

> Unless arrested and reversed, the expansion of the zone of immunity . . . will, by blunting the operation of our antitrust laws in key sectors, undermine the beneficial economic integration of the nation. The terrain that antitrust enforcement has gained through decades of strenuous effort

[15] Consider the example of unauthorized practice of law ("UPL") rules that prohibit non-attorneys from handling routine tasks associated with the closing of a residential real estate transaction. By protecting attorneys from having to compete against non-attorneys, UPL restrictions raise the prices for legal services. Although proponents of these restrictions tout their necessity in protecting uninformed consumers, empirical examination shows that these restrictions provide consumers with no cognizable benefits in terms of increased protection from fraud or incompetence. But consumers are unlikely to mount a challenge. First, bar associations often promulgate these rules and state supreme courts adopt them through processes that only members of the bar – the beneficiaries – are likely have knowledge. Second, even if consumers become aware that UPL restrictions are being considered, they would have to expend resources to understand that, despite the rhetoric from the bar associations, these restrictions are almost certain to harm consumers. Finally, once aware of the costs associated with a proposed UPL restriction, organizing to fight it would be difficult given the expense involved and the collective action problems.

> to establish the illegality of private cartels and other forms of demonstrably anticompetitive conduct will be surrendered at great economic cost if collusion and exclusion facilitated by government action become readily available alternatives.[16]

One year later, Ulf Böge, the President of the German Cartel Office and the Chair of the Steering Committee of the International Competition Network, underscored the growing international acceptance of a norm that treats public restraints as being as hazardous to competition and consumer interests as private conduct. Böge recognized:

> Economic policy researchers have increasingly come to realize, however, that a large number of these restrictions of competition, if not most, are not caused by private companies at all. It is rather the governments themselves which cause damage to consumers and reduce overall economic welfare due to distortions and restraints of competition resulting from their laws, regulations or concrete administrative practice.[17]

B. *Paradox of Effective Anti-Cartel Enforcement Programs*

The past fifteen years have featured general international acceptance among the world's competition policy systems of a norm that treats schemes among direct competitors to set prices, allocate customers, or divide geographic territories as extremely serious offenses.[18] This consensus is reflected in ever more aggressive efforts within many jurisdictions to detect cartels, prosecute their members, and punish firms and individuals alike.[19] Firms today face increasingly formidable civil fines, private treble damages, and criminal punishment if they agree among themselves to set the terms on which they will do business.

Successful efforts to address private collusive behavior can inspire firms to seek legislative dispensations from antitrust oversight or to pursue regulatory measures that place the power of the state behind efforts to forestall entry or expansion by rival firms. For prospective cartel members, public intervention that suppresses rivalry has important advantages over purely private collusive action. Public restraints may confer immunity from antitrust prosecution, and

[16] Timothy J. Muris, *Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy*, 2003 COLUM. BUS. L. REV. 359, 385.

[17] Ulf Böge, President, Bundeskartellamt, Speech on the Occasion of the Opening Session of the Seoul Competition Forum 2004: State-Imposed Restrictions of Competition and Competition Advocacy 2 (Apr. 20, 2004), *available at* http://www.bundeskartellamt.de/wEnglisch/download/pdf/04Seoul_e.PDF.

[18] Scholars have documented and analyzed this trend in international law. *See generally* CRIMINALIZATION OF COMPETITION LAW ENFORCEMENT: ECONOMIC AND LEGAL IMPLICATIONS FOR THE EU MEMBER STATES (Katalin J. Cseres et al. eds., 2006).

[19] *See* Org. for Econ. Cooperation and Dev., *Cartels: Sanctions Against Individuals*, 9 J. COMPETITION L. & POL'Y 7, 36-46 (2007) (reviewing enforcement trends).

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 governments from acquiescing in, demands for public restraints, competition law enforcement merely alters the form of collusive activity and does not diminish its harmfulness.[20]

C. *Complexity of the Regulatory Thicket*

Many fields of economic regulation present significant levels of complexity. Examples include regimes governing public procurement at the national, state, and local levels; controls on land use; and rules determining the manner in which pharmaceuticals can be introduced into the market. Today's regulatory state provides a target rich environment for those willing to invest the effort to understand the manners in which a regulatory program can be used to hinder competition. As the Federal Register and other compendia of public regulations continue to grow, so do opportunities for incumbents to shield themselves from rivalry that would benefit consumers.

Regulatory complexity has two potentially adverse consequences. First, the sheer mass and intricacy of regulatory controls give an advantage to larger incumbent enterprises that have deciphered the regulatory scheme and, compared to smaller firms or thinly funded new entrants, have more resources to navigate the regulatory process.[21] This condition serves to entrench the position of significant incumbents, discourage entry, or channel entrepreneurs into the informal sector of the economy, which affords business operators fewer protections than they would receive by registering their businesses through formal incorporation processes.[22]

The second disadvantage of complexity is that it leaves regulatory systems prone to gaming and manipulation by sophisticated incumbents. Some firms use their knowledge of complex systems to pull specific regulatory levers to forestall actual or potential rivals – for example, by filing objections with

[20] *See* Timothy J. Muris, *Principles for a Successful Competition Agency*, 72 U. CHI. L. REV. 165, 170 (2005) ("Protecting competition by focusing solely on private restraints is like trying to stop the water flow at a fork in a stream by blocking only one channel. A system that sends private price fixers to jail, but makes government regulation to fix prices legal, has not completely addressed the competitive problem. It has simply dictated the form the problem will take.").

[21] *See* William E. Kovacic, *Regulatory Controls as Barriers to Entry in Government Procurement*, 25 POL'Y SCI. 29, 34-37 (1992) (discussing how complete regulatory requirements can discourage entry into public procurement competitions).

[22] For the leading treatment of how complexity leads firms to operate informally without the protection of the law, see HERNANDO DE SOTO, THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD 12 (1989).

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]

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[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-PENNINGTON* DOCTRINE].

[25] *See In re* AndroGel Antitrust Litig., No. 1:09-MD-2084-TWT (N.D. Ga. Feb. 22, 2010); In the Matter of Schering-Plough Corp., et al., 136 F.T.C. 956, 89 (2003), *rev'd*, 402 F.3d 1056 (11th Cir. 2005); Complaint for Injunctive Relief at 1, Fed. Trade Comm'n v. Cephalon, Inc., 551 F. Supp. 2d 21 (D.D.C. Feb. 13, 2008) (No. 08-0244).

[26] Robert D. Anderson & William E. Kovacic, *Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets*, 18 PUB. PROCUREMENT L. REV. 67, 69 (2009).

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]

D. *Increased Role of Government in the Wake of the Financial Crisis*

Since the financial meltdown of 2008, the role of the federal government in the economy has increased at a rapid rate. Major financial institutions accepted government TARP money in exchange for an increased government role in their operations. Similarly, two of the "Big Three" automakers accepted financial assistance conditioned on greater government involvement in the industry.[28] When government-owned corporations operate in markets, there is always the temptation to alter the playing field in their favor. For example, the United States Postal Service ("USPS") competes in parcel post and expedited delivery markets with FedEx and UPS. Due to the network it has developed as a result of its government-protected monopoly over letter carriage and a host of other legal protections it enjoys, however, the USPS's presence distorts competition.[29] Further, in an attempt to ameliorate the economic effects of the financial crisis, Congress passed the American Reinvestment and Recovery Act ("ARRA") of 2009, which contained stringent "buy American" provisions that apply to certain infrastructure projects funded by the Act.[30] By erecting entry barriers to lower-cost foreign producers, this provision of the ARRA has proved a windfall to certain domestic concerned parties, who not coincidentally, lobbied for these provisions.[31]

The aftermath of the financial crisis has not only directly affected government involvement in the economy, but in general has fed impulses to rely less on competition, and more on government dictate, to organize the

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[27] *See, e.g.*, Union Oil Co. of Cal., 140 F.T.C. 123 (2005); Bristol-Myers Squibb Co., 135 F.T.C. 444 (2003); Biovail Corp., 134 F.T.C. 407 (2002); William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 GEO. MASON L. REV. 903, 911, 913 (2009) (describing FTC cases involving manipulation of government processes).

[28] *See* David E. Sanger, Jeff Zeleny & Bill Vlasic, *G.M. Heads to Bankruptcy Protection as U.S. Steps in: Obama Makes a Bet that the Carmaker Can Recover*, N.Y. TIMES, June 1, 2009, at A1; Matthew L. Wald, *$2 Billion in Grants to Bolster U.S. Manufacturing of Parts of Electric Cars*, N.Y. TIMES, Aug. 6, 2009, at B5.

[29] *See* FED. TRADE COMM'N, ACCOUNTING FOR LAWS THAT APPLY DIFFERENTLY TO THE UNITED STATES POSTAL SERVICE AND ITS PRIVATE COMPETITORS 93 (2007), *available at* http://www.ftc.gov/os/2008/01/080116postal.pdf.

[30] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1605, 123 Stat. 115, 303 (2009). Unlike previous buy-American provisions, those in the ARRA require one hundred percent American content and apply a hardship exception only if purchasing from an American source raises the cost of the entire project, as opposed to the specific component, by twenty-five percent. *Id.* § 1605(b)(3).

[31] *Id.*; *see also* Anthony Faiola & Lori Montgomery, *Trade Wars Launched with Ruses, End Runs; Outrage in Canada as U.S. Firms Sever Ties to Obey Stimulus Rules*, WASH. POST, May 15, 2009, at A1.

economy. These conditions have allowed those who would benefit from government restrictions on competition to point to the perceived failure of financial markets adequately to deal with risk as a justification for limiting competition in their industry. It is not hard to imagine, for example, attorneys and real estate brokers pointing to the financial crisis as a justification for requiring consumers to hire an attorney to handle residential real estate transactions and to restrict the entry of limited-service brokers, respectively.

These and other measures have powerful direct and indirect effects on competition in the affected industries. Competition agencies have a strong stake in seeing that competitive distortions are minimized and that what are depicted as temporary expedients do not become enduring elements of public policy.

E. *Increased Economic Integration*

Throughout the history of the United States, improvements in communications and transportation have facilitated the integration of the economies of individual states and have fostered the establishment of a unified domestic economic market. This was the case, for example, in the development of rail transport and telegraph communications in the second half of the nineteenth century. It is ever more the case today as e-commerce supplies a new means for distant sellers and buyers to transact business.

These technology-driven trends create a greater degree of interdependence among economic actors who previously operated in what might have seemed localized markets. In an earlier era, many regulatory controls imposed by states or municipalities mainly affected the jurisdictions that enacted the restrictions. For these types of government intervention, spillovers across state borders may have been negligible. In this context, the political process acted as a check on anticompetitive state practices. A jurisdiction that imposed onerous restrictions on its citizens faced the possibility that its citizens, realizing their comparative disadvantage vis-à-vis other states, would use the political process to replace public officials who adopted the policies and foster change in the underlying regulatory controls.

Today a smaller and smaller amount of commerce is truly "local." For many products and services, economic integration links firms and customers located in different states. This gives individual states a greater ability than they once had to adopt restraints that impose costs on other states and to protect the interests of firms within their own borders. Greater integration means that restrictive rules adopted in one state no longer can be assumed to generate effects only in that state. Spillovers are likely to be more common, and federalism arguments based on notions of state sovereignty and the local nature and effects of economic regulation arguably should be reassessed in light of the larger national interest in promoting a common economic union.

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 example, states have restricted entry into providing real estate brokerage and closing services,[33] hair braiding,[34] yoga instruction,[35] fluoride treatment,[36] and teeth whitening[37] under the auspices of protecting the public. A large body of empirical work has shown that these barriers are likely to lead to higher prices, reduce consumer choice, and provide few if any consumer benefits in terms of increased quality. For those in the higher range of income distributions, the higher prices paid to close a real estate transaction or to have their teeth whitened may be a minor nuisance. For the poor, the price increases often mean the difference between having access to a service or not. For example, recent FTC enforcement and advocacy efforts have targeted attempts to limit the ability of dental hygienists or mobile dentists to deliver routine dental care to poor children in South Carolina and Louisiana.[38] Fulfillment of these

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[32] The beneficial distributional effects of competition policy initiatives to curtail state-imposed limits on competition are discussed in William E. Kovacic, *Competition Policy, Consumer Protection, and Economic Disadvantage*, 25 WASH. U. J.L. & POL'Y 101, 116 (2007).

[33] *See, e.g.*, *Competition in Real Estate Brokerage Services, Remarks at the H.R. Subcomm. on Housing & Community Opportunity* (2006) (statement of J. Bruce McDonald, Deputy Assistant Att'y Gen., Antitrust Div.), *available at* http://www.justice.gov/atr/public/testimony/217299.htm (discussing "the competitive implications of developments taking place in the real estate brokerage marketplace").

[34] Mike Devaney, *Winners and Losers in the Preference Game*, ST. LOUIS POST-DISPATCH, Oct. 20, 1998, at B7, *available at* 1998 WLNR 903064 ("Sabrina Reese, who owns two African hair-braiding salons in Los Angeles, dropped out of cosmetology school because hair braiding wasn't covered in class or on the licensing exam. She currently faces a one-year jail term for 'practicing cosmetology without a license.'"); *Hair Braiders Won't Need License*, DULUTH NEWS TRIB., June 16, 2005, *available at* 2005 WLNR 22918441.

[35] Dan Walters, *Professionals and Politics*, THE SACRAMENTO BEE, May 17, 1994, at A3, *available at* 1994 WLNR 4729348.

[36] *See* S.C. State Bd. of Dentistry, 138 F.T.C. 229, 230-31 (2004).

[37] *See, e.g.*, *Mall Teeth-Whitening Business Shut Down*, WYFF NEWS 4 (Greenville, S.C.), Feb. 29, 2008, *available at* http://www.wyff4.com/news/15446468/detail.html.

[38] FED. TRADE COMM'N, THE FTC IN 2008: A FORCE FOR CONSUMERS AND COMPETITION 16 (2008), *available at* http://www.ftc.gov/os/2008/03/ChairmansReport2008.pdf.

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. 127, 136 (1961). For a detailed exposition of some of the issues presented by the *Noerr-Pennington*

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 satisfied that the restraint in question is truly state action. States can avail themselves of state action immunity to defend Supremacy Clause challenges to the constitutionality of anticompetitive regulatory schemes. Private parties and non-sovereign elements of state government entities also can take advantage of state action immunity to defend antitrust suits when they are acting under color of state law. Below we discuss in more detail the metes and bounds of this complex area of law.

a. *Preemption*

At its core, the state action doctrine is about federalism. It attempts to resolve the extent to which a state, in a system of dual sovereigns, can pursue policies that conflict with the national policy in favor of competition. Under Supremacy Clause jurisprudence, a court can invalidate a state law in three circumstances: when (1) Congress expressly preempts state law; (2) the scheme of federal regulation is such that it is reasonable to infer that Congress has "left no room" for states to regulate; or (3) there is a direct conflict between state and federal regulatory action so that either "compliance with both federal and state regulations is a physical impossibility," or "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[42] In the case of the interplay between state economic regulation and the federal antitrust laws, it is clear that (1) and (2) do not apply: there is no express preemption of anticompetitive state regulation in federal antitrust laws, and Congress left room for states to regulate anticompetitive behavior by explicitly allowing for state enforcement of the antitrust laws.[43] Thus, any Supremacy clause challenge to a state regulatory

doctrine, see ENFORCEMENT PERSPECTIVES ON THE *NOERR-PENNINGTON* DOCTRINE, *supra* note 24, at 16-36.

[41] *See Pennington*, 381 U.S. at 670.

[42] Hillsborough Cnty. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985) (internal citations and quotations omitted).

[43] This point highlights how antitrust preemption comes about in a different setting than most preemption settings. Preemption analysis often involves the reconciliation of differing federal and state standards that address the same concerns. For example, there is a robust debate as to whether the federal health privacy regime (HIPAA) should trump inconsistent state privacy regimes. *See* James C. Cooper & Daniel J. Gilman, *There Is a Time to Keep Silent and a Time to Speak, the Hard Part Is Knowing Which Is Which: Striking the Balance Between Privacy Protection and the Flow of Health Care Information*, 16 MICH.

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 court can determine the extent of any conflict, it must be able to discern how far Congress intended the law in question to reach into state affairs. The courts have said at various times that the antitrust laws express a national policy in favor of competition[45] and that Congress acted to the fullest extent of its commerce powers when enacting the antitrust laws.[46] Thus, at first blush one

TELECOMM. & TECH. L. Rev. 279 (2010). The analog in the antitrust context would be whether state antitrust laws can survive when they differ from federal standards. *See* California v. Atl. Richfield of Am. Corp., 490 U.S. 93, 101-02 (1989) (reconciling state and federal antitrust laws with respect to state legislation allowing indirect purchasers to have antitrust standing and holding that the federal antitrust laws supplement, rather than supplant, state antitrust laws). In the context of state action preemption, the issue is: to what extent can a state law promote anticompetitive conduct before it is preempted? That is, unlike the typical preemption case, in the state action context state and federal laws are at cross purposes – the federal regime is designed to root out anticompetitive conduct while the state regime purposely displaces competition in pursuit of a competing goal.

[44] *See Wyeth*, 129 S. Ct. at 1194 ("[W]e 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" (internal citations omitted)); Medtronic, Inc. v. Lohr, 518 U.S. 470, 485-86 (1996) ("'[T]he purpose of Congress is the ultimate touchstone' in every pre-emption case . . . . As a result, any understanding of the scope of a pre-emption statute must rest primarily on 'a fair understanding of *congressional purpose*.'" (quoting Cipollone v. Liggett Grp., 505 U.S. 504, 516, 530, n. 27 (1992))).

[45] United States v. Topco Assocs., 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete – to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy."); *see also* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978) ("'The heart of our national economic policy long has been faith in the value of competition.'" (quoting Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951))); Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 139 (1968) (observing that "the law encourages [the plaintiff's] suit to further the overriding public policy in favor of competition"); United States v. S. Motor Carriers Rate Conference, Inc., 672 F.2d 469, 481 (5th Cir. 1982) ("[T]here is the strong policy in favor of competition that underlies the federal antitrust laws.").

[46] *See* United States v. Frankfort Distilleries, 324 U.S. 293, 298 (1945); *In re* W. Liquid Asphalt Cases, 487 F.2d 202, 204 (9th Cir. 1973); United States v. Chrysler Corp. Parts

may think that anticompetitive state laws would easily fall when pitted against the national competition laws. When the Court first addressed the question head on, however, it reached the opposite result. In *Parker v. Brown*,[47] a case involving a preemption challenge to a California regulatory scheme that set up a raisin cartel, the Court resolved the question of conflict by finding none.[48] It interpreted the Sherman Act in light of the federal system of dual sovereignty to urge an abundance of caution when attributing to Congress intent to nullify a state regulatory regime.[49] Within this framework, the Court held that "nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."[50] Rather, the Sherman act is directed against "individual and not state action."[51] Thus, regardless of anticompetitive impact or intent, the antitrust laws cannot strike down state action that supplants competition with regulation. This has remained a bedrock principle in subsequent cases.[52]

The Court's holding in *Parker* must be seen in historical context. The Court had only recently engaged in a jurisprudential revolution, rebuking decades of holdings that struck down state regulatory schemes on the grounds that they interfered with economic liberties.[53] As others have noted, *Parker* then can be seen as a necessary concession to anticompetitive state regulation to avoid a return to the *Lochner* era.[54] Modern antitrust – with its focus on consumer welfare – and economic due process look very much the same. Once the federal judiciary got out of the business of second-guessing the wisdom of states' economic regulation under substantive due process analysis, it could hardly reopen this line of attack under the guise of antitrust. *Parker* prevented this outcome. Consistent with the post-*Lochner* rejection of economic substantive due process, the Supreme Court made clear in *Parker* that state

Wholesalers, Nw. Region, 180 F.2d 557, 559 (9th Cir. 1950) (holding that when enacting the Sherman Act, Congress exercised the full extent of its commerce power).

[47] 317 U.S. 341 (1943).

[48] *Id.* at 344-45, 351.

[49] *Id.* at 351.

[50] *Id.* at 350-51.

[51] *Id.* at 352.

[52] *E.g.*, Rice v. Norman, 458 U.S. 654, 659 (1982); New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96, 110-11 (1978); Exxon Corp. v. Governor of Md., 437 U.S. 117, 133 (1978).

[53] *See* Olsen v. Nebraska, 313 U.S. 236, 243 (1941); W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 391-92 (1937); Nebbia v. New York, 291 U.S. 502, 537-38 (1934).

[54] *See* Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L.J. 486, 499-501 (1987); William H. Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After* Midcal Aluminum, 61 B.U. L. REV. 1099, 1104 (1981); Paul R. Verkuil, *State Action, Due Process and Antitrust: Reflections on* Parker v. Brown, 75 COLUM. L. REV. 328, 331 (1975).

laws will not be preempted by federal antitrust laws merely because they have an anticompetitive effect.[55]

Although the Supreme Court has never expressed this concession directly, it is telling that in the two antitrust preemption cases that also included due process challenges, *Exxon Corp. v. Governor of Maryland*,[56] and *New Motor Vehicle Board of California v. Orrin W. Fox Co.*,[57] the Court mustered similar arguments to deal with both claims. For example, in *Exxon*, the Court quickly rejected the substantive due process objection to Maryland's scheme, explaining that although the evidence may cast doubt on the law's wisdom, "the Due Process Clause does not empower the judiciary to sit as a superlegislature to weigh the wisdom of legislation."[58] It concluded that "[r]egardless of the ultimate economic efficiency of the statue, we have no hesitancy in concluding that it bears a reasonable relation to the State's legitimate purpose in controlling the gasoline retail market."[59] Turning to the antitrust preemption challenge, the Court held that the mere fact that the Maryland divorcement regulation is likely to be anticompetitive, and thus "in this sense, there is a conflict between the statute and the central policy of the Sherman Act," is an insufficient reason to strike it down, "[f]or if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed."[60] Similarly, in *Orrin W. Fox*, the Court addressed a due process challenge by pointing to states' broad power to engage in economic

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[55] *Parker*, 317 U.S. at 351-52. Merrick Garland, currently a member of the U.S. Court of Appeals for the District of Columbia Circuit, has argued that because the Supreme Court rejected "the *Lochner*-era doctrine of substantive due process, under which federal courts struck down economic regulations they viewed as unreasonably interfering with the liberty of contract," it could not "resurrect *Lochner* in the garb of the Sherman Act." Garland, *supra* note 54, at 499-500; *see also* Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n, 197 F.3d 560, 565 (1st Cir. 1999) ("To allow federal judges to decide which of these legislative enactments should survive and which should be condemned comes close to reintroducing the kind of judgments that got the Supreme Court into so much trouble in the *Lochner* era."). Further, when there is a pre-legislative history of state regulation in a field, there is a presumption against finding congressional intent to preempt. This presumption is relevant in the state action area, because, as the Court's post-*Lochner* cases make painstakingly clear, the states have a long history of exercising their police powers to restrain competition for the sake of public health and safety. *See Nebbia*, 291 U.S. at 525-30 (collecting cases).

[56] 437 U.S. at 133.

[57] 439 U.S. at 110-11.

[58] *Exxon Corp.*, 437 U.S. at 124 (internal quotes and citations omitted).

[59] *Id.* at 124-25.

[60] *Id.* at 133.

regulation, and quoted language from *Exxon* to hold that to allow an antitrust challenge to anticompetitive state regulation would eviscerate this power.[61]

The clear conflict necessary for preemption does not exist when states directly undertake regulatory schemes, as it does in the case of wage or rent controls, but it may exist when it delegates its regulatory authority to private entities.[62] As the Court explained in *Parker*, a state cannot shield illegal conduct from the Sherman Act by "by authorizing them to violate it, or by declaring that their action is lawful."[63] The Court famously expanded on this point nearly thirty years later in *Midcal*, when it said that the state cannot save a regulatory scheme from preemption by placing a "gauzy cloak of state involvement over what is essentially a private price-fixing arrangement."[64] In the antitrust preemption context, these comments have come to mean that the conflict necessary to condemn a state regulatory regime in the abstract can be found only when it "mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute."[65] Only conduct that constitutes a per se violation will "constitute[] a violation of the antitrust laws in all cases," so state laws compelling conduct that would be judged under the rule of reason – such as a statute authorizing exclusive dealing, exclusive territories, or resale price maintenance – do not qualify for preemption.[66] On the other hand, a statute mandating, authorizing, or placing "irresistible pressure" on private entities to engage in actions that constitute per se violations – e.g., naked horizontal price fixing and market allocation agreements – would be subject to preemption.[67]

To deal with instances where the parties have formed no agreement, which is necessary to satisfy the plurality requirement of Section 1 of the Sherman Act, the Supreme Court has developed the concept of "hybrid restraints."[68] Hybrid restraints are regulations that allow private parties to compel adherence to an anticompetitive agreement. This concept arose in the context of cases involving laws that forced alcohol wholesalers to sell at prices set by

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[61] *Orrin W. Fox*, 439 U.S. at 106-07, 111 (1978). Dissenting in *City of Boulder*, Justice Rehnquist made a closer connection between antitrust and due process analysis, arguing that to subject municipalities to rule of reason claims would lead to the type of judicial micromanagement of state affairs that the Court repudiated in cases like *Nebbia* and *West*. Cmty. Commc'ns Co., Inc. v. City of Boulder, 455 U.S. 40, 67 (1982) (Rehnquist, J., dissenting).

[62] *See* Fisher v. City of Berkeley, 475 U.S. 260, 268 (1986). What constitutes a private entity for state action purposes is an area of some contention. *See infra* Part II.A.1.b.

[63] Parker v. Brown, 317 U.S. 341, 351 (1943).

[64] Cal. Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97, 106 (1980).

[65] Rice v. Norman Williams Co., 458 U.S. 654, 661 (1982).

[66] *See id.*

[67] *See id.*; *see also* 324 Liquor Corp. v. Duffy, 479 U.S. 335, 345 n.8 (1987).

[68] *E.g.*, Fisher v. City of Berkeley, 475 U.S. 260, 267-68 (1986).

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" by the state). See *infra* notes 175-80 and accompanying text for a fuller discussion.

[72] *See* Patrick v. Burget, 486 U.S. 94, 101 (1988) (reasoning that active supervision necessary to assure that private conduct "actually further state regulatory policies").

[73] *See* Cal. Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97, 104 (1980); *Rice*, 458 U.S. at 661; *Mass. Food Ass'n*, 197 F.3d at 563-64 ("It is one thing to say that a state may itself regulate in an 'anticompetitive' fashion; it is quite another to say that the state can effectively exempt *private* parties from obeying the antitrust laws."). See also Garland, *supra* note 54, at 500, who observed:

> On the one hand, the Court did not believe Congress had intended the Sherman Act to "nullify" a state's regulation of its own economy; on the other hand, it was equally sure that Congress would not have permitted a state to nullify the Sherman Act itself by "authorizing" private parties "to violate" the Act "or by declaring that their action is lawful."

remains hazy,[74] mere state authorization and enforcement of a private scheme will not suffice. Rather, the state involvement must involve a "pointed reexamination" of the conduct at issue,[75] sufficient to ensure that the state is "exerci[sing] ultimate control."[76]

The active supervision requirement has two rationales. The first is explicit: the requirement seeks to assure political accountability.[77] By actively supervising a price fixing scheme, state involvement will come into sharper focus. As the Court explained in *Ticor*:

> States must accept political responsibility for actions they intend to undertake. . . . Federalism serves to assign political responsibility, not to obscure it. Neither federalism nor political responsibility is well served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends. For States which do choose to displace the free market with regulation, our insistence on real compliance with both parts of the *Midcal* test will serve to make clear that the State is responsible for the price fixing that it has sanctioned and undertaken to control.[78]

This sort of state "ownership" will help provide assurance that anticompetitive market outcomes are the result of deliberate state policy rather than merely private agreements.[79]

The second rationale is implicit. The requirement of active supervision raises the costs to states to implement anticompetitive programs, and costs to private parties who stand to benefit from such programs.[80] For example, a state may no longer merely pass a law that allows attorneys to set "reasonable" fees for real estate closings.[81] Rather, if the state desires regulation in this area, it must expend scarce resources to set up a regulatory regime that will examine the "reasonableness" of the prices private upon which the attorneys agree.[82] The attorneys, who desired the regulation, are also worse off. Their proposed fees must undergo regulatory scrutiny, which probably reduces the scope for rent extraction and also imposes costs associated with navigating the

[74] *See* FED. TRADE COMM'N, OFFICE OF POLICY PLANNING, REPORT OF THE STATE ACTION TASK FORCE 22-24 (Sept. 2003) [hereinafter REPORT OF THE STATE ACTION TASK FORCE], *available at* http://www.ftc.gov/os/2003/09/stateactionreport.pdf.

[75] *Midcal*, 445 U.S. at 106.

[76] *Patrick*, 486 U.S. at 101.

[77] FTC v. Ticor Title Ins. Co., 504 U.S. 621, 635 (1992).

[78] *Id.*

[79] *See id.* at 634; *Patrick*, 486 U.S. at 106.

[80] *See* Richard Squire, *Antitrust and the Supremacy Clause*, 59 STAN. L. REV. 77, 119-20 (2006) (arguing that the state must incur "public costs" to supervise a price setting regime).

[81] *See Ticor*, 504 U.S. at 638-39.

[82] *See id.* at 644-45 (Rehnquist, J., dissenting).

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

Although the active supervision requirement places strictures on state regulation, the Court has been clear that this requirement is about process rather than substance. Active supervision is not an alternative way to reach a *Lochner*-like outcome. As promised in *Ticor*, "the purpose of the active supervision inquiry is not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices," but rather "to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties."[84]

b. *State Action Immunity for Non-Sovereign Actors*

The discussion thus far has concerned challenges to the constitutionality of state regulatory regimes. Often, however, private parties acting pursuant to a state regulatory regime are the target of antitrust suits that do not necessarily seek to invalidate the state law. These non-sovereign entities also can use the state action doctrine as a shield to avoid antitrust liability. Consistent with the preemption jurisprudence, private parties can avail themselves of this immunity if they can show that they are (1) acting pursuant to a clearly articulated and affirmatively expressed state intent to displace competition with a regulatory scheme; and (2) actively supervised by the state.[85] As noted above in the context of preemption, the rationale behind these requirements for immunity is that they provide the reviewing court with some assurance that the state has taken political ownership of the anticompetitive consequences flowing from the conduct at issue.[86]

The Supreme Court has said that municipalities, although not the sovereign, are also not private parties, and consequently are subject only to the clear articulation prong.[87] The treatment of non-sovereign subsidiaries of the state – such as regulatory boards or rate-setting commissions – remains unclear. Anticompetitive regulation promulgated by such boards that does not hew to a clear state policy is not immune from antitrust challenge.[88] The extent to which these non-sovereign governmental entities need active supervision by

[83] *See id*. at 647 (O'Connor, J., dissenting).

[84] *Id*. at 634-35 (majority opinion).

[85] Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

[86] *See supra* note 78 and accompanying text.

[87] Town of Hallie v. City of Eau Claire, 471 U.S. 34, 40 (1985).

[88] For a regulatory board to satisfy the clear articulation standard it must both have the authority to regulate and be acting pursuant to an "authority to suppress competition" that is the "foreseeable result" of a clearly articulated state policy. City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 372-73 (1991).

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 apply to municipalities, it further stated that "[i]n cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue."[91] In *City of Lafayette v. Louisiana Power & Light Co.*, moreover, the Court rejected petitioner's argument that *Goldfarb* applied only to private parties because "the State Bar, although a state agency by law acting in its official capacity, was somehow not a state agency because its official actions in issuing ethical opinions . . . benefited its member-lawyers by discouraging price competition."[92] The Court responded: "We think it obvious that the fact that the ancillary effect of the State Bar's policy, or even the conscious desire on its part, may have been to benefit the lawyers it regulated cannot transmute the State Bar's official actions into those of a private organization."[93]

At the same time, there are some appeals court decisions that suggest boards comprised of financially interested parties are private parties for state action purposes. For example, in *Washington State Electrical Contractors Ass'n v. Forrest*, the Ninth Circuit held that a state "apprenticeship council," which was

[89] *Compare* Hass v. Or. State Bar, 883 F.2d 1453, 1461 (9th Cir. 1989) (holding that "that the Bar, as an agency of the State of Oregon, need not satisfy the 'active supervision' requirement to qualify for protection under the state action exemption"), *and Town of Hallie*, 471 U.S. at 46 n.10 ("In cases in which the actor is a state agency, it is likely that the active state supervision would also not be required, although we do not here decide that issue."), *with* Crosby v. Hosp. Auth. of Valdosta & Lowndes Cnty., 93 F.3d 1515, 1524 (11th Cir. 1996) (focusing on "whether the nexus between the State and the [agency in question] is sufficiently strong that there is little danger that the [agency] is involved in" private anticompetitive action"), *and* Wash. State Elec. Contractors Ass'n v. Forrest, 930 F.2d. 736, 737 (9th Cir. 1991) (holding apprenticeship council could qualify as a state agency only if "the anticompetitive activity [is] supervised by the state itself"); FTC v. Monahan, 832 F.2d 688, 689-90 (1st Cir. 1987).

[90] *See, e.g.*, S. Motor Carriers Rate Conference v. United States, 471 U.S. 48, 62-63 (1985) (stating that a public utility commission not the "State itself"); Hoover v. Ronwin, 466 U.S. 558, 568 (1984) ("Closer analysis is required when the activity at issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization."); Goldfarb v. Va. State Bar, 421 U.S. 773, 789-90 (1975) (reasoning that attorney fee schedule established by county bar association was not immune from antitrust liability as the bar association was not a state agency); *see also* REPORT OF THE STATE ACTION TASK FORCE, *supra* note 74, at 23-32 (analyzing state action immunity doctrine, and reasoning that "[a]t its core, the active supervision requirement serves to identify those responsible for public policy decisions").

[91] *Town of Hallie*, 471 U.S. at 46 n.10.

[92] City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 411 n.41 (1978) (internal citations omitted).

[93] *Id.* at 413.

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] Noting that the council has "both public and private members, and the private members have their own agenda which may or may not be responsive to state labor policy," the court remanded the case to the district court to "make specific findings and conclusions on *both prongs*" of *Midcal*.[95] *Federal Trade Commission v. Monahan* concerned an appeal of an order to enforce an FTC subpoena on the grounds that the challenged activity – pharmacy board rules that restricted advertising and location of pharmacy branch locations – was immune under *Parker*.[96] The court upheld the order to enforce the subpoena, noting that "where state regulation by a private party is involved and where there is a gauzy cloak of state involvement over what essentially is private anticompetitive activity, . . . the state, in order to obtain antitrust immunity, must supervise actively the activity in question."[97] The court went on to acknowledge that the Board, although a state agency, may be engaged in activities that "are 'essentially' those of private parties," and that relevant to this inquiry was "how the Board functions in practice, and perhaps . . . the role played by its members who are private pharmacists."[98]

This uncertainty is troubling because non-sovereign entities are responsible for so much anticompetitive regulation, usually under the guise of consumer protection.[99] Regulatory boards often can point to legislation that provides authority for their conduct making litigation based solely on a lack of "clear

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[94] *Forrest*, 930 F.2d. at 737.

[95] *Id.* (emphasis added).

[96] FTC v. Monahan, 832 F.2d 688, 689 (1st Cir. 1987).

[97] *Id.* (internal quotations and citations omitted).

[98] *Id.* at 690.

[99] For example, state dental boards, typically made up of practicing dentists, have promulgated regulations to limit competition from dental hygienists. *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; Letter from FTC Staff to La. State Rep. Timothy Burns 5-6 (May 1, 2009), http://www.ftc.gov/os/2009/05/V090009louisianadentistry.pdf. Real estate boards, comprised of practicing real estate agents, have attempted to promulgate regulations to restrict limited service brokers and other novel business models. *See, e.g.*, United States v. Kentucky Real Estate Comm'n, Competitive Impact Statement, 70 Fed. Reg. 45424-25 (Aug. 5, 2005); Letter from FTC & DOJ Staff to Loretta DeHay, Gen. Counsel, Tex. Real Estate Comm'n 1 (Apr. 20, 2005), http://www.ftc.gov/os/2005/04/050420ftcdojtexasletter.pdf. Additionally, state bar ethics committees, comprised of practicing attorneys, have issued ethics opinions that limit the provision of online legal services and attorney advertising. *See, e.g.*, Letter from FTC Staff to John Glancy, Chairman, Prof'l Ethics Comm. for the State Bar of Tex. 1 (May 26, 2006), http://www.ftc.gov/os/2006/05/V060017CommentsonaRequestforAnEthicsOpinionImage.pdf; Letter from FTC Staff to Elizabeth Clark Tarbert, Ethics Counsel, Florida Bar 1 (Mar. 23, 2007), http://www.ftc.gov/be/V070002.pdf; *supra* notes 32-37 and accompanying text.

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 States' acts of governing, and the latter the citizens' participation in government."[114]

There are exceptions to *Noerr*'s general rule of petitioning immunity. First, as the Court explained in *Noerr*, the antitrust laws would apply to petitioning that although "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."[115] Over the years, the Court has refined the definition of sham, anchoring it in the concept of "genuineness"; genuine attempts to secure governmental action are immune, but mere attempts to use the governmental process, as opposed to the outcome of that process, are not shielded from the antitrust laws. Given the value that the Court has placed on First Amendment petitioning relative to competition, however, the evidentiary burdens to show such "sham petitioning" are formidable. The Court has held that "genuine" has both objective and subjective components: plaintiffs must first make a showing that petitioning is "objectively baseless" before they can delve into the issue of whether the defendant's petitioning was subjectively motivated to use the process to harm competition.[116] At least in the context of a single lawsuit, the Supreme Court has held that a suit is objectively baseless when no reasonable litigant could expect success on the merits.[117]

As we discuss in more detail in Part IV, the extent to which deceptive petitioning is protected remains unclear. The Court has held that patents procured by fraud are not protected from antitrust suits, but has never considered whether a more general misrepresentation exception to *Noerr* exists. Several lower courts, however, have held that attempts to procure favorable government action by fraud are not immune.[118] Drawing on dicta in *Allied Tube*, which states that the degree of immunity should vary by the

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

[114] City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 383 (1990).

[115] *Noerr*, 365 U.S. at 144.

[116] *PREI*, 508 U.S. at 56, 60 (outlining a two part definition of sham litigation which, under the *Noerr* doctrine, is excepted from immunity because such petitioning activity is a mere shame to cover an attempt to interfere directly with the business relationships of a competitor).

[117] *Id.*

[118] *See, e.g.*, Kottle v. Nw. Kidney Ctrs., 146 F.3d 1056 (9th Cir. 1998); St. Joseph's Hosp., Inc. v. Hosp. Corp. of Am., 795 F. 2d 948 (11th Cir. 1986); Israel v. Baxter Labs., Inc., 466 F.2d 272 (D.C. Cir. 1972); Woods Exploration & Producing Co. v. Aluminum Co. of Am., 438 F.2d 1286 (5th Cir. 1971).

"nature and context" of the petitioning,[119] these courts appear to have limited this exception to *Noerr* to instances involving adjudication rather than lobbying.[120] Some lower courts also have crafted an exception to *Noerr* for petitions that seek only a ministerial response – that is, a response that is automatic and thus requires no government deliberation. The underlying rationale for this exception is that requests for ministerial action do not involve petitioning in the first place, and thus do not implicate the First Amendment.[121]

B. *The Power of Persuasion: Competition Advocacy in the United States*

The economic theory of regulation posits that because of relatively high organizational and transaction costs, consumers will be disadvantaged relative to businesses in securing favorable regulation.[122] This situation tends to result in regulations – such as unauthorized practice of law rules or minimum-service requirements for real estate brokers – that protect certain industries from competition at the expense of consumers. Given the strictures imposed by the state action and *Noerr-Pennington* doctrines, this conduct is often beyond the reach of the antitrust laws.

Broadly, through competition advocacy, the FTC and the DOJ (the "Agencies") can use their expertise to persuade government entities to adopt policies that further (or at least do not impede) competition. Competition advocacy often takes the form of letters to interested regulators, but also consists of formal submissions, testimony, amicus curiae briefs, studies, reports, and informal discussions. By contrast, with the state action doctrine strictures that force competition agencies to focus only on process when using the antitrust laws to block a state restraint, advocacy focuses almost solely on the substance of the restraint at hand. Most advocacy comments, for example, argue that because the Supreme Court has declared that the antitrust laws represent a national policy in favor of competition, the burden should rest on a state to justify restraints based on a market failure, and then to craft them only so broadly as necessary to achieve the competing public goal.[123]

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[119] Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1987).

[120] *See* FTC, ENFORCEMENT PERSPECTIVES ON THE *NOERR-PENNINGTON* DOCTRINE (2006) [hereinafter *NOERR-PENNINGTON* REPORT].

[121] *See In re* Buspirone Patent Litig., 185 F. Supp. 2d 363, 369 (S.D.N.Y. 2002) (holding that when deciding whether to extend *Noerr-Pennington* immunity to acts through which private parties seek to influence governmental decisions, it is critical to distinguish between activities in which the decision maker acts "only after an independent review of the merits of a petition," and those in which the decision maker acts "in a merely ministerial or non-discretionary capacity in direct reliance on the representations made by private parties").

[122] *See, e.g.*, W. KIP VISCUSI, JOHN M. VERNON & JOSEPH E. HARRINGTON, JR., ECONOMICS OF REGULATION AND ANTITRUST 313-35 (3d ed. 2000).

[123] *See, e.g.*, Brief Amici Curiae of the Federal Trade Commission and the United States of America at 9, McMahon v. Advanced Title Services Co. of W. Va., 607 S.E.2d 519 (W. Va. 2004) (No. 31706), *available at* http://www.ftc.gov/be/V040017.pdf.

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.

The value of competition advocacy should be measured by (1) the degree to which comments altered regulatory outcomes times (2) the value to consumers of those improved outcomes. For all practical purposes, however, both elements are difficult to measure with any degree of certainty. There have been two formal attempts to measure the effectiveness of competition advocacy in the United States. One study that assessed the advocacy program's impact on regulatory outcomes between 1987-1989 and found that 40% of comment recipients reported that the comments were at least "moderately effective," meaning that "the governmental entity's actions were totally or in large part consistent with at least some of the FTC's recommendations, and that any action taken was largely or partly because of those recommendations."[125] The author concedes, however, that this "does not

[124] As the 1989 "Kirkpatrick Report" observes:

> The FTC's competition advocacy program permits it to accomplish for consumers what prohibitive costs prevent them from tackling individually. It is the potential for the FTC to undo governmentally imposed restraints that lessen consumer welfare, and to prevent their imposition, that warrants the program's continuance and expansion. Because ill-advised governmental restraints can impose staggering costs on consumers, the potential benefits from an advocacy program exceed the Commission's entire budget.

Report of the American Bar Association, Section of Antitrust Law, Special Committee to Study the Role of Federal Trade Commission, 58 ANTITRUST L.J. 43, 94 (1989).

[125] Arnold C. Celnicker, *The Federal Trade Commission's Competition and Consumer Advocacy Program*, 33 ST. LOUIS U. L.J. 379, 391 (1989). Another 11% of the survey respondents found the comments to be "slightly effective," meaning that "the governmental

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 of competition without sufficient empirically based justification, the antitrust preemption doctrine in its current form makes this line of argument a legal fiction: that the Supreme Court has declared a national policy in favor of competition is of no moment as long as the state restrains competition in a manner consistent with the state action doctrine. This tension highlights one of the weaknesses of relying primarily on advocacy to curtain state restraints – there is no threat of legal sanction if the state refuses to heed the competition agency's advice. Further, although advocacy provides regulators with information concerning the likely economic consequences of a policy choice, the Agencies are not constituents; neither the FTC nor the DOJ can provide political support in the form of votes or campaign contributions. Another important consideration is that the Agencies themselves are regulatory bodies and may be subject to political pressure from interest groups in much the same manner as federal or state agencies or legislatures.[128] For example, due to complaints from adversely affected

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entity's actions were to a small degree consistent with at least some of the FTC recommendations, and that any action taken was largely or partly because of those recommendations." *Id.* Additionally, the author found that 47% of respondents gave the comments "substantial weight because [they] came from the FTC." *Id.* at 392. In 1989, a virtually identical survey was sent by the Director of the FTC's Advocacy Office to recipients of comments dated June 1, 1987 through June 2, 1989. The responses to this second survey were consistent with those from the first. (Results on file with authors).

[126] Celnicker, *supra* note 125, at 400.

[127] *See* DELEGATION OF UNITED STATES TO THE COMPETITION COMMITTEE, NOTE SUBMITTED FOR OECD ROUNDTABLE ON EVALUATION OF THE ACTIONS AND RESOURCES OF COMPETITION AUTHORITIES 7-8 (May 25, 2007), *available at* http://www.ftc.gov/bc/international/docs/evalauth.pdf.

[128] *See, e.g.*, Malcolm B. Coate, Richard S. Higgins & Fred S. McChesney, *Bureaucracy and Politics in FTC Merger Challenges*, 33 J.L. & ECON. 463 (1990); Timothy J. Muris, *Regulatory Policymaking at the Federal Trade Commission: The Extent of Congressional Control*, 94 J. POL. ECON. 884, 888 (1986); Barry R. Weingast & Mark J. Moran,

interest groups, in the late 1980s, Congress attempted to cripple, if not totally eliminate the FTC's advocacy program.[129] Further, Congress and the executive often apply more subtle pressure on the Agencies when competition advocacy activities threaten favored industry.

III. THE TOOLKIT USED BY THE REST OF THE WORLD

Many foreign competition systems provide stronger means than one sees in the United States to prevent or discourage government measures that suppress competition.[130] They accomplish this in essentially two ways. The first is to establish explicit legal commands that forbid or severely limit the ability of government institutions to curtail business rivalry. For example, the competition provisions of the European Treaty and the jurisprudence of the community courts strictly circumscribe the power of EU member states to enact anticompetitive legislation or regulations.[131] By these provisions and the Treaty's prohibition on state aids, EU competition policy regime places heavy emphasis on achieving economic integration and forestalling member state actions that would frustrate its attainment.[132] The laws of some jurisdictions make clear that state-owned enterprises are subject to the same competition policy commands as private firms. Some competition systems enable the competition authority to veto government acts that curtail competition unless the restrictive measure has been approved by the national legislature.

A second approach is to give the competition agency a seat at the table in the councils of government that make policy decisions about economic intervention. In South Korea, for example, the Chair of the Korea Fair Trade Commission ("KFTC") has the status of a minister and thus may participate in cabinet meetings as a regular member.[133] This arrangement permits the KFTC chairman to advocate, at the highest levels of government, the adoption of pro-

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Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission, 91 J. POL. ECON. 765, 792 (1983).

[129] Celnicker, *supra note* 125, at 421.

[130] *See* Kovacic, *Lessons of Competition Policy Reform*, *supra* note 2, at 400-04.

[131] Regarding state aids, see Treaty on the Functioning of the European Union, Arts. 107-109, and legislation enacted thereunder. *See Competition*, EUROPEAN COMMISSION, http://ec.europa.eu/competition/state_aid/legislation/legislation.html (last visited July 6, 2010). For a description of the state aid rules, the procedures for their enforcement, and judicial review, see Jonathan Faull & Ali Nikpay, THE EC LAW OF COMPETITION 16:01 (2d ed. 2007). Regarding other forms of anticompetitive actions by EU Member States, see generally Richard Wainwright & André Bouquet, *State Intervention and Action in EC Competition Law*, *in* INTERNATIONAL ANTITRUST LAW & POLICY: FORDHAM CORPORATE LAW INSTITUTE 539, 540 (Barry E. Hawk ed., 2003).

[132] Other than weak protections supplied by the Commerce Clause, the United States has no equivalent to the EU's ban upon state aids.

[133] Korea Monopoly Regulation and Fair Trade Act, Art. 38 (2); *see also* OECD Review of Regulatory Reform in Korea 187 (2000); *Overview*, KOREA FREE TRADE COMM'N, http://eng.ftc.go.kr/about/overview.jsp (last visited June 10, 2010).

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 speech. There are two possible corrective paths. First, the Supreme Court could reconsider some of its state action and *Noerr-Pennington* holdings. Second, as it has done in the past to correct perceived Supreme Court missteps, Congress could amend the antitrust laws to limit these antitrust doctrines. However, the extent to which these doctrines represent more than merely judicial interpretations of the Sherman Act, and instead suggest constitutional limits to the application of the antitrust laws, will present limits to the ability of either the courts or Congress to expose a larger set of state action and petitioning activity to antitrust scrutiny.

At the very least, going forward, the U.S. competition authorities should strive to contain the growth of these immunities through targeted Amicus briefs and advocacy opportunities. We also suggest, however, that the competition agencies engage in an affirmative program using both its enforcement and advocacy tools to move these doctrines in a more competition-friendly direction, which we detail below.

1. State Action

To narrow the reach of the state action doctrine requires expanding the current zone of conflict between state economic regulation and federal antitrust laws. The reach of the antitrust laws, and thus the size of this zone, in turn, rests on how far Congress intended the antitrust laws to intrude into state 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.

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

[135] *See, e.g.*, John Cirace, *An Economic Analysis of the "State-Municipal Doctrine" Antitrust Cases*, 61 TEX. L. REV. 481, 514-15 (1982) (proposing rules for determining the validity of competitive displacement and proposing reserving minimal state power to regulate).

[136] *See, e.g.*, John Shepherd Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 743 (1986).

[137] *See* Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV L. REV. 668, 668 (1991).

[138] *See id.*

[139] *See id.* Although Professor Elhauge states that his process inquiry is distinct from a public/private distinction, we tend to agree with Professors McGowan and Lemley that it is merely redefining – there is no meaningful difference between a public official and Professor Elhauge's "disinterested, politically accountable" decision-maker. *See* David McGowan & Mark A. Lemley, *Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment*, 17 HARV. J.L. & PUB. POL'Y 293, 328 (1994).

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.* at 111-13. Under this framework, Professor Squire argues that laws that create entry barriers would be immune because they "do not raise prices in the manner ideally suited for enriching a given set of producers." *Id.* at 112. Although we do not disagree with the ultimate conclusion – that entry barrier restrictions should not be preempted – we disagree with his characterization of entry barriers. They do not, as Professor Squire argues, raise prices because they force firms to move up increasing marginal cost curves. *See id.* at 113. Rather, entry barriers harm consumers by eliminating marketplace options and, when low-cost competitors are excluded (as is the case in typical entry-barrier legislation), depriving of them of competition between low-and high cost producers. For example, a restriction on limited-service brokers does not harm consumers because it forces existing full-service brokers to incur higher marginal costs by handling more transactions. Rather, they deprive consumers of a novel marketplace option that may better suit their preferences, and it deprives them of the lower prices and enhanced quality and service from full-service brokers that is likely to accompany competition from limited service brokers. The same analysis applies to barriers erected to keep online sellers at bay or to prevent non-attorneys from performing routine legal tasks. Professor Squire's scenario holds only in the special case where incumbent and entrant firms produce similar goods or services and enjoy similar costs structures.

[145] *Id.* at 116. Under this test, Professor Squire would allow a state regulatory scheme to stand if there is evidence that the regulator took consumer interests into account when determining prices. He suggests that evidence that the state is involved in pricing decisions is likely sufficient evidence of the pursuit of "fair" prices in most cases because it suggests that the state voluntarily has incurred "public costs" that could be avoided if its purpose was only to enrich producers without regard to consumers' interests. *Id.* at 119.

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 that the roots of state action immunity are federalism, not an interpretation of the antitrust laws.[149] Accordingly, they posit that only those state laws that can be truly said to be the product of state, rather than private action, should be immune.[150] They suggest that the antitrust laws have given too much ground to anticompetitive state regulation, and offer an augmented *Midcal* test that would narrow the scope of state action immunity.[151] Specifically, they suggest that in addition to demanding that a policy be clearly articulated and actively supervised, that the courts also should inquire into two additional factors to determine the extent to which it can be said that the regulation in question is the product of capture or true democratic governance: (1) whether the regulation was urged by a private, economically interested actor or interest group; and (2) whether the policy discriminates in favor of certain competitors at the expense of others.[152] Neither of these factors would be determinative, but rather would be probative of the extent to which the regulatory program is the result of capture rather than legitimate governance.[153]

Although these analyses of state action have much to commend them, we note a few areas of caution. First, any viable approach to reconcile the antitrust laws with anticompetitive state regulation must focus on the process that led to the restraints rather than its economic effect. For this reason, suggestions to improve the state action doctrine by evaluating the efficiency of a regulation should be discarded; these reforms are probably undesirable from a policy standpoint, and would be politically and jurisprudentially infeasible.

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[146] *See* Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 TEX. L. REV. 1203, 1298 (1997).

[147] *See id.*

[148] *See id.*

[149] McGowan & Lemley, *supra* note 139, at 293.

[150] *Id.* at 357 ("[T]he fundamental principal 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.").

[151] *See id.* at 358.

[152] *Id.*

[153] *See id.* at 359-60. For example, evidence that a company was the primary proponent of a regulation that benefits it at the expense of its competitors may be strongly suggestive that the state was merely a vessel to vindicate private anticompetitive interests rather than democratic preferences.

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*-esque challenges to the same thing. Although they could facially be challenged as concerning different constitutional clauses – substantive rights are included in the Fourteenth Amendment's Due Process Clause versus the Supremacy Clause – it may be distinction without a difference as it would end in the same way: federal courts second-guessing the efficiency of state economic regulation.[156] An easier way to achieve this result would probably be for Congress to amend the antitrust laws to note explicitly that it intended to supplant anticompetitive state regulation. Of course, this approach would be politically infeasible as both sides of the aisle have roundly excoriated the *Lochner* era: from the right, a return to *Lochner* is an affront to states' rights and the ability to craft local solutions to local problems; from the left, *Lochner* represents blind obedience to the free market without regard to market failures.[157]

When an anticompetitive restraint rightly can be considered the product of the state rather than private interests, federalism concerns counsel against application of the antitrust laws. Probing the process that gives rise to a regulatory scheme can shed light on this question. Inquiries that go beyond the

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[154] *See* Inman & Rubinfeld, *supra* note 146, at 1217-18 (1997).

[155] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (Brandeis, J., dissenting) ("There must be power in the States and the Nation to remould through experimentation, our economic practices and institutions to meet changing social and economic needs.").

[156] Cmty. Commc'n Co. v. City of Boulder, 455 U.S. 40, 67 (Rehnquist, J., dissenting) (forcing a municipality to defend the reasonableness of an anticompetitive regulation "on the basis that its benefits to the community outweigh its anticompetitive effects" will cause courts "to review social legislation in a manner reminiscent of the *Lochner* era" (citation omitted)). *But see* Wiley, *supra* note 136, at 779. Wiley argues that these inquires would be distinct because an inquiry into efficiency under an antitrust preemption case does not impose a constitutional mandate for free markets, as a Due Process challenge does, but rather merely represents a congressional preference for free markets, which can be revoked. Thus, the courts are merely vindicating congressional intent rather than forcing their own preferences for free markets onto states.

[157] *See* Squire, *supra* note 80, at 104.

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]

Inquiry into regulatory causation also poses administrative and constitutional concerns. First, as others have pointed out, trying to tease out the true motivations behind a regulatory scheme is difficult – most lobbying efforts to obtain regulation that impairs competition at the expense of another group are opposed.[160] When the anticompetitive outcome is achieved, it would be a purely subjective judgment to say that a state legislature adopted the anticompetitive policy because its members were "captured," rather than because they believed the adopted policy was in the public interest. The Court stressed this point in *Omni*, where it closed the door on any conspiracy exception that does not involve the state as a market participant, and eschewed inquiries that would examine extrinsic evidence, including evidence of bribery, to discern whether state actors who adopt anticompetitive legislation are truly concerned with the public interest.[161] As in other areas of antitrust law, liability rules based on speculative assessments of subjective intent should be avoided, especially when error costs are likely to be high. And, they are likely to be high in these cases – the possibility of ex post liability may chill willingness to lobby for, or to enact, regulation or legislation.

This brings us to our constitutional point. The Court has been clear since *Noerr* that First Amendment concerns counsel an interpretation of the antitrust laws that do not reach lobbying for even anticompetitive regulation. The same caution in *Noerr* applies with equal force here. Explorations into the extent to which industry lobbyists shape governmental officials' motives are likely to

[158] *See* McGowan & Lemley, *supra* note 139, at 360 (advocating the examination of regulation to determine if it discriminates among producers within the same industry); Squire, *supra* note 80, at 112 (advocating examination of text of regulations to see if they have mixed beneficiaries rather than merely enriching producers); Wiley, *supra* note 136, at 770-71 (advocating examination of text to determine if it clearly benefits one group of producers and advances no plausible legitimate public interest).

[159] *See* Elhauge, *supra* note 137, at 723.

[160] *See* City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 375, 377 (1991).

[161] *See id.* at 375, 378-79.

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."[163] If this statement is true, it appears equally true that courts cannot narrow the states' ability to regulate based on the degree to which such regulation derives from First Amendment protected speech.

With the above admonitions in mind, we offer a hybrid approach that focuses both on vindicating congressional intent behind the antitrust laws and federalism principles, but would retain much of the Court's current framework. Specifically, below we argue that fealty to congressional intent should lead to preemption of a broader class of laws than only those that promote or permit unsupervised per se illegal conduct. We also contend that to the extent that federalism animates the preemption question, courts should be more willing to find clear conflict with the antitrust laws when state-imposed restrictions on competition are the product of regulatory boards comprised of private actors or result in costs that are predominantly exported to neighboring states.

Broadening the concept of "inherent conflict." As described above, current preemption doctrine finds an inherent conflict only when a law mandates or authorizes unsupervised per se illegal conduct. Although some have criticized this approach,[164] we believe that it is consistent with the broader strain of conflict preemption doctrine that strikes down state laws only when they directly frustrate the purpose of a federal regulatory regime. Determining whether conflict exists in the first place is a fairly easy exercise when the federal and state regimes set out specific standards, for example, parts-per-million of a pollutant. What differentiates antitrust preemption from preemption in other areas is that Congress set out notoriously vague antitrust

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[162] Wiley recognizes this potential but argues that allowing petitioning for efficient regulations and exemptions from the antitrust laws would sufficiently vindicate firms' First Amendment rights. *See* Wiley, *supra* note 136, at 779-80.

[163] *Omni*, 499 U.S. at 379 (citation omitted). *Omni* further stated:

> Insofar as the identification of an immunity-destroying "conspiracy" is concerned, *Parker* and *Noerr* generally present two faces of the same coin. . . . The same factors which . . . make it impracticable or beyond the purpose of the antitrust laws to identity and invalidate lawmaking that has been infected by selfishly motivated agreement with private interests likewise make it impracticable or beyond that scope to identity and invalidate lobbying that has produced selfishly motivated agreement with public officials.

Id. at 383.

[164] *See* Squire, *supra* note 80, at 93-96.

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 reviewed under the rule of reason, courts will not entertain any efficiency defenses to this class of behavior;[169] thus a statute authorizing per se illegal behavior, creates a conflict with the antitrust laws with one hundred percent likelihood. There are, however, regulatory schemes that do not authorize parties to engage in per se violations, but rather authorize or compel them to engage in conduct that is highly likely to facilitate conduct that violates the antitrust laws. Several states, for example, require wholesalers of alcoholic beverages to post their future prices with the state agency in a manner that allows them to share price information with their competitors, and to hold these prices for a certain period of time, often thirty to sixty days.[170] These

[165] *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1183 (1989) ("One can hardly imagine a prescription more vague than the Sherman Act's prohibition of contracts, combinations or conspiracies in restraint of trade.").

[166] *See* Wiley, *supra* note 136, at 777. *See generally* Daniel A. Crane, *Antitrust Antifederalism*, 96 CAL. L. REV. 1 (2008) (arguing that antifederalist tendencies led Congress to allow the substantive standards in antitrust to develop through common law rather than from a federal regulation).

[167] For example, under Squire's proposal, *Midcal* would not be preempted because the resale price maintenance scheme at issue in that case was likely efficient, and thus did not serve solely to enrich producers. *See* Squire, *supra* note 80, at 123-24. This scenario would involve evaluating the efficiency of the state program. *See id.*

[168] *See supra* notes 62-73 and accompanying text.

[169] *See* Thomas G. Krattenmaker, *Per Se Violations in Antitrust: Confusing Offenses with Defenses*, 77 GEO. L.J. 165, 178 (1988).

[170] *See, e.g.*, CONN. GEN. STAT. §§ 30-63 (2010); IDAHO CODE ANN. § 23-1029 (2010); GA. COMP. R. & REGS. 560-2-3.45 (2010); OKLA. ADMIN. CODE § 45:30-3-7 (2010).

post-and-hold rules neither mandate nor authorize wholesalers to engage in price fixing, but the regulatory regime makes such collusive agreements highly likely.[171] Courts do not condemn private agreements to share future prices per se.[172] Nonetheless, they should be treated with a high degree of suspicion given their ability to facilitate tacit or explicit collusion.

Consonant with the underlying antitrust analysis of inherently suspect arrangements, preemption analysis of regulatory regimes that appear very likely to facilitate per se illegal behavior should start with a rebuttable presumption that these laws are in clear conflict with the antitrust law.[173] A plaintiff will meet its burden of persuasion with, for example, market structure evidence suggesting that the market in question is conducive to collusion or empirical evidence that similar regulations have led to collusion in other markets. This presumption would be sharply strengthened if a plaintiff can show that those subject to a regulatory regime actually have engaged in per se illegal behavior, either through direct documentary and testimonial evidence or econometric evidence that pricing patterns are more likely the product of collusion than competition. The burden of persuasion would then shift to the defendant to prove that the regulatory regime is not likely to facilitate per se illegal behavior with, for example, evidence that contradicts plaintiff's characterization of the market's predisposition to per se illegal behavior. In the case that there is evidence of actual per se conduct, to avoid preemption, the state would have to show that the regulatory regime was not a facilitator.[174]

[171] In one case, for example, a wholesaler testified that he and rival wholesalers used the public posting to reach an agreement on a new price for beer. *See* Miller v. Hedlund, 717 F. Supp. 711, 714 (D. Or. 1989) ("Maletis testified that in 1986 . . . his wholesale business and one of the largest beer and wine wholesalers in the State of Oregon, used the price posting exchange at the OLCC as a starting point for communicating with competing wholesalers of keg beer until agreement was reach by all wholesalers of keg beer on a new wholesale price for keg beer."); *see also* James C. Cooper & Joshua D. Wright, *State Regulation of Alcohol Distribution: The Effects of Post-and-Hold Laws on Output and Social Harms* (George Mason Univ. Law & Econ. Research Paper No. 10-32, 2010) (finding that post-and-hold laws raise reduce consumption of alcoholic beverages but do not have any effect on drunk driving or underage drinking), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1641415.

[172] *See* United States v. Citizens S. Nat'l Bank, 422 U.S. 86, 113 (1975).

[173] *See* 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2113 (3d ed. 2006) ("[W]e would consider directly interseller communications of current prices on specific transactions to be 'nearly naked' restraints subject only to a quick look for possible cost reducing or output increasing circumstances.").

[174] This approach is the analog to the rule used by courts presented with evidence of information exchange and parallel pricing, which requires the plaintiff to establish a link between the information exchange and the parallel pricing that excludes the possibility of unilateral conduct. *See* Blomkest Fertilizer, Inc. v. Potash Corp. of Sask., 203 F.3d 1028, 1034 (8th Cir. 2000) (requiring plaintiffs to show that information exchanges had an effect on pricing). In our proposed framework, the burden is on the defendant to provide evidence

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] Although from a policy standpoint, striking down these post-and-hold laws is desirable, the legal reasoning to reach the result is suspect. It is hard to distinguish the rent ceiling ordinance in *Fisher* from the required holding requirement. If the Court in *Fisher* was clear that the fact that all landlords had to abide by the rent ceiling did not transform the ordinance into a conspiracy,[178] it is unclear how an ordinance that compels wholesalers to hold their prices can be transformed into a price fixing arrangement. Neither regime mandates or allows per se illegal behavior, but rather requires each producer unilaterally to following a state-invented pricing rule. That is, unlike the resale price maintenance schemes at issue in *Midcal* and *Schwegmann*,[179] the government, as opposed to private parties, have restrained pricing freedom.[180] By keeping the focus on the natural or likely unsupervised private behavior – per se illegal price fixing or market allocation – that flows from the state-compelled conduct, our proposed test would avoid the current doctrinal mess and lead to results consistent with *Fisher*.

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that tends to exclude the possibility that the observed pricing was not the product of the regulatory regime.

[175] *See* Liquor Corp. v. Duffy, 479 U.S. 335, 340 (1987) (authorizing a regulatory scheme that allowed wholesalers to dictate retail margins); Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 99-100 (1980) (authorizing a scheme whereby wholesalers were required to adhere to manufacturer-set price schedule).

[176] *See* Costco Wholesale Corp. v. Maleng, 522 F.3d 874, 887 (9th Cir. 2008); Freedom Holdings, Inc. v. Spitzer, 357 F.3d 205, 224 n.7 (2d Cir. 2004); TFWS, Inc. v. Schaefer, 242 F.3d 198, 210 (4th Cir. 2001); Battipaglia v. N.Y. State Liquor Auth., 745 F.2d 166, 173 (2d Cir. 1984); Flying J., Inc. v. Van Hollen, 597 F. Supp. 2d. 848, 857 (E.D. Wis. 2009); Lotus Bus. Grp. LLC v. Flying J., Inc., 532 F. Supp. 2d 1011, 1023 (E.D. Wis. 2007).

[177] *Costco Wholesale*, 522 F.3d at 895 (citing Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 649-50 (1980)); *TFWS*, 242 F.3d at 209-10 (citing *Catalano*, 446 U.S. at 649-50).

[178] *See* Fisher v. City of Berkeley, 475 U.S. 260, 267 (1986) ("[T]he mere fact that all competing property owners must comply with the same provision of the Ordinance is not enough to establish a conspiracy among landlords.").

[179] Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951).

[180] *See Fisher*, 475 U.S. at 269.

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 marks omitted); Polygram Holding, Inc. v. FTC, 416 F.3d 29, 36-37 (D.C. Cir. 2005) ("[A]s economic learning and market experience evolve, so too will the class of restraints subject to summary adjudication.").

[182] *See, e.g.*, *Leegin*, 551 U.S. at 886-87; *Khan*, 522 U.S. at 20.

[183] *See Ind. Fed'n of Dentists*, 476 U.S. at 459; *Polygram Holding*, 416 F.3d at 36.

[184] For example, most real estate commissions, state bar ethics committees, and boards of dentistry are comprised of practitioners. *See, e.g.*, sources cited *supra* note 99.

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 it be allowed to justify anticompetitive actions with other societal goals?[186] Clearly, under *National Society of Professional Engineers*, courts will not accept the defense from private parties that competition itself is undesirable. Of course, to limit a state board to defend its actions without reference to non-competition values would be to ignore their nature; as creatures of the state, they are charged with making policy based on considerations beyond competition and it would be unfair to penalize them for taking these values into account.[187] But, if we grant state agencies an exception from *National Society of Professional Engineers*'s strictures on defenses, however, do we risk a return to *Lochner*-ian federal oversight of state affairs? Although these concerns are not without merit in the context of municipal regulation by

[185] *See* 1 AREEDA & HOVENKAMP, *supra* note 173, at ¶ 228 (recommending classifying as private any organization in which the decisive coalition is made up of market participants).

[186] *See* Cmty. Commc'n Co. v. City of Boulder, 455 U.S. 40, 67 (1982) (Rehnquist, C.J., dissenting).

[187] The analysis that follows implicitly applies to per se offenses too. Although private parties are barred from offering defenses to per se offenses because the court has deemed them to be anticompetitive in almost all cases, the same bar would not apply to state boards that enact per se illegal regulations because they will be able to offer non-competition benefits to justify the almost certain anticompetitive effects their policy.

elected city officials, they are insufficient to insulate state boards comprised of market participants from antitrust scrutiny.

First, fealty to federalism may counsel giving state sovereigns (legislatures, supreme courts acting in legislative capacity, and likely the executive) wide berth when developing policy that has negative impacts on competition. Private parties who occasionally are cloaked in a modicum of state authority, however, are not sovereign, so deference to their anticompetitive policies does not vindicate the federalism principles that animate the state action doctrine.[188] Second, boards composed of private market participants pose greater competitive dangers than elected representatives, and hence deserve more invasive antitrust oversight. Because of the risk that private parties will pursue their own interests, states cannot merely authorize them to violate the antitrust laws to pursue state policies – they must supervise their conduct to assure consonance with state policy. There simply is no principled difference between wholly private actors and those clothed in state authority, via their title (e.g., "real estate commissioner," or member of the "board of dentistry" or "board of optometry"), for a few days each year. If public choice theory has taught us anything, it is that those who work in government do not check their private incentives at the entrance to their building. This lesson is all the more relevant in situations involving those who are charged with governing in tandem with their private enterprise. As then-Judge Breyer noted in *FTC v. Monahan*,[189] the Massachusetts Pharmacy Board may be engaged in activities that "are 'essentially' those of private parties," and that the relevant state action inquiry was "how the Board functions in practice, and perhaps upon the role played by its members who are private pharmacists."[190] In this manner, antitrust review of the reasonableness of anticompetitive policies enacted would merely take the place of state review that is lacking. Third, as Professor Wiley has pointed out, *Lochner*-era decisions left no escape valve because they were grounded in the Constitution.[191] If Congress were displeased with courts' review of reasonableness for state boards comprised of private actions, however, it could always revoke this power by amending the antitrust laws.

Another check on judicial meddling is found in *Midcal*: private parties can engage in conduct that otherwise would violate the antitrust laws if they are acting pursuant to a clear government policy and are actively supervised by the

[188] The Court has been clear about this distinction between sovereign and non-sovereign actions in its jurisprudence. *See, e.g.*, Hoover v. Ronwin, 466 U.S. 558, 568 (1984) (stating that action taken by "a nonsovereign state representative" requires "a showing that the conduct is pursuant to a 'clearly articulated and affirmatively expressed state policy' to replace competition with regulation"); Goldfarb v. Va. State Bar, 421 U.S. 773, 791 (1975) ("The threshold inquiry into determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign.").

[189] 832 F.2d 688 (1st Cir. 1987).

[190] *Id.* at 690.

[191] *See* Wiley, *supra* note 136, at 779.

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 state's flexibility in implementing its policies,[192] but this is the price the state must pay when it desires to thwart the national policy in favor of competition. There need to be assurances that the state, rather than a collection of private self-interested actors working under the color of state authority, has made the choice to restrain competition.

Congress could amend the definition of private party for the antitrust laws, but given the reaction in the wake of *Hallie*, this would be politically unlikely.[193] The better course would probably be for the Court to effect this change since it has never ruled on the issue.[194] To assuage concerns that subjecting state regulators to the potential of treble damages may deter efficient administration of state law, another possible congressional fix would be to allow only the FTC, under the FTC Act, to bring actions against state boards. This approach would ensure that at most, states would be subject only to equitable remedies (e.g., enjoining anticompetitive regulation and perhaps fencing-in relief) and, moreover, there that there could be no follow-on private litigation that may pose the threat of treble monetary damages.[195] It is also similar to the congressional reaction to *Hallie*, which was to allow only injunctive relief in antitrust suits against municipalities.[196]

Interstate spillovers. The federalism-based justification for the Court's current state action construction rests on a theory of political accountability. When the sovereign restricts competition as part of a broader regulatory scheme – either directly or indirectly through supervised private parties – it is acting (at least in theory) on behalf of a population that has chosen through the democratic process to forego the benefits of competition to achieve another goal. When a state exports the costs attendant to its anticompetitive regulatory scheme to those who have not participated in the political process, however, there is no political backstop; arguments for immunity based on federalism concerns are severely weakened, if not wholly eviscerated, in these situations. Leaving aside disenfranchisement concerns, it is well-known that the ability to externalize costs leads to overconsumption; when citizens can export the costs

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[192] *See* FTC v. Ticor Title Ins. Co., 504 U.S. 621, 646-47 (1992) (O'Connor, J., dissenting).

[193] *See* Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 (2006).

[194] In *Town of Hallie v. City of Eau Claire*, the Court stated in dicta that "[i]n cases in which the actor is a state agency, it is likely that active supervision would also not be required, although we do not here decide that issue." 471 U.S. 34, 46 n.10 (1985).

[195] Although equitable remedies may not provide adequate deterrence, at least injunctions provide a vehicle for stopping ongoing anticompetitive conduct, which will inure to consumers. Further, the cost of defending a federal antitrust suit is likely to provide additional deterrence.

[196] *See* 15 U.S.C. § 35.

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 focus on instances where more than half of the industry output is sent into interstate commerce. Second, it is also important to realize that even if a state exports most of the output from the industry subject to the anticompetitive regulatory scheme, when the regulated industry faces substantial interstate competition, it will be unable to force extraterritorial customers to pay the overcharge.[198] Professors Rubinfeld and Inman, for example, suggest following the U.S. Department of Justice's and the Federal Trade Commission's Horizontal Merger Guidelines to limit an interstate spillover exception to those instances in which an industry could profitably raise prices to non-residents by at least five percent.[199] A more tractable approach that would economize on judicial resources and limit battles of economic experts may be to use a threshold national or regional market share of roughly seventy percent as a screen before delving into more complex analysis.[200]

An additional cabin to a spillover exception would again be that the underlying conduct mandated or promoted by the law would otherwise violate the antitrust laws. Although health and safety regulations or taxes that more or less affect all market participants equally but that export costs could be challenged under the Dormant Commerce Clause, they could not be challenged under a Supremacy Clause theory that they conflict with the antitrust laws. These limitations also would help to assure that a spillover exception to state action immunity does not eviscerate Dormant Commerce Clause

[197] *See* Frank Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23, 38-39 (1983); Inman & Rubinfeld, *supra* note 146, at 1238-39.

[198] Of course, this observation suggests that industries that export most of their product into competitive national markets would have little incentive to seek this kind of regulation.

[199] *See* Inman & Rubinfeld, *supra* note 146, at 1277-80.

[200] Courts generally support a finding of monopoly power with shares at or above the seventy percent range. *See, e.g.*, Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 484 (1992); United States v. Microsoft Corp., 253 F.3d 34, 54 (D.C. Cir. 2001). A seventy percent threshold screen strikes a good balance between costs associated with wasted judicial resources and erroneously allowing a suit to preempt an anticompetitive state law to go forward when interstate effects are negligible, on the one hand, and the possibility of erroneously allowing a law with appreciable interstate effects to stand, on the other.

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

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[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 upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."); *see also* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986) ("[When a local law] has only indirect effects on interstate commerce and regulates even-handedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.").

[204] *See* Easterbrook, *supra* note 197, at 45-46 (arguing that federal antitrust laws should apply to state regulation only in the case of substantial interstate spillovers). *But see* Elhauge, *supra* note 137, at 732 (commenting that the courts may have trouble determining whether a law disproportionately burdens outsiders and contending that in-state consumers who have a political voice are good proxies for those affected out of state).

[205] *Pike*, 397 U.S. at 143 (citing Parker v. Brown, 317 U.S. 341 (1943)).

[206] *Parker*, 317 U.S. at 345.

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, and hence there is no reason to interpret antitrust laws so as not to cover the suspect regulation.

Although it would need to finesse *Parker*, the Court probably could effect this approach without serious stare decisis concerns. In *Parker*, the Court rejected commerce clause arguments in large part because the economic support of farmers was a matter of state and national concern during the Depression.[209] Indeed, the *Parker* Court's Dormant Commerce Clause analysis relied heavily on the panoply of federal policies that existed to support agricultural prices.[210] *Parker*, therefore, must be seen in its historical context – the antitrust laws existed side-by-side with a federal policy to stabilize agricultural prices in an attempt to stem the severe economic downturn. As the Court explained, the proration scheme was a local regulation "whose effect upon national commerce is such as not to conflict but to coincide with a policy which Congress has established with respect to it."[211] Viewed through this lens, *Parker* did not really present a state-federal conflict;[212] rather, the conflict was between the federal policy in favor of competition and the federal and state polices that saw robust competition as the root of depressed agricultural prices. Because competition concerns often lost out to New Deal programs at the federal level, it is safe to assume that California's scheme in *Parker* would be inoculated against antitrust challenge under our proposed spillover test. Although citizens in raisin-importing states did not acquiesce in California's raisin proration regulation, they had indirectly agreed to suspend competition

[207] *See id.* at 362 (explaining that a Dormant Commerce Clause inquiry reconciles state regulation of local matters that affect interstate commerce "[w]hen Congress has not exerted its power under the Commerce Clause").

[208] *See* United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 298 (1945) ("Congress, in passing the Sherman Act, . . . 'exercised all the power it possessed.'" (quoting Apex Hosiery Co. v. Leader, 310 U.S. 469, 495 (1940))).

[209] *See Parker*, 317 U.S. at 367.

[210] What's more, the California program at issue in *Parker* had at least some connection to a federal price support program. *See id.* at 366 (discussing that Raisin Proration Zone No. 1 received loans from the Commodity Credit Corporation that were conditioned on the creation of a proration zone and that its surplus crops were sold to the Federal Surplus Commodities Corporation).

[211] *Id.* at 363.

[212] *See id.* ("There may also be, as in the present case, local regulations whose effect upon the national commerce is such as not to conflict but to coincide with a policy which Congress has established with respect to it.").

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* has developed as a doctrine of statutory interpretation in the face of First Amendment concerns. This evolutionary path has created an interstice between the reach of the antitrust laws and the First Amendment, which means that the Court (or Congress) has room to make Pareto improvements to the doctrine; that is, there is room to clarify *Noerr* in a way that permits antitrust scrutiny of previously immune anticompetitive conduct without diminishing incentives to engage in First Amendment protected speech or reducing the scope and effectiveness of governmental decision making. Below we identify two areas that are especially ripe for such clarification.

Broadening the scope of the sham exception for a pattern of filings. *Noerr* does not protect attempts to use the governmental process, as opposed to the outcome of that process, to hinder competition. Thus, a company that sues a competitor in the hopes of enjoining it from using copyrighted software enjoys immunity. On the other hand, a firm that initiates a zoning proceeding without any interest in the ultimate outcome and solely to delay a competitor's market entry and to force it to it to pay a higher interest rate for bonds[213] does not enjoy *Noerr* protection. This dichotomy makes sense because the former scenario implicates a legitimate attempt to secure governmental action, which is constitutionally protected, whereas the latter scenario does not involve the exercise of a First Amendment right.

In reality, however, distinguishing legitimate attempts to secure government action from "sham" petitioning, which is designed to use process as an anticompetitive weapon, can be a difficult task because it ultimately involves an inquiry into the intent behind a decision to initiate a government proceeding. *PREI*, the Court's most recent pronouncement on the topic, held that the inquiry – to determine whether a suit was a legitimate attempt to procure government action or merely an attempt to impose process-based costs on a rival – is two-fold: the threshold question is whether a filing is objectively baseless; only if this condition is met may the fact finder inquire into subjective motivation for bringing the suit.[214] The *PREI* standard for objective

[213] *See* Otter Tail Power Co. v. United States, 410 U.S. 366, 372 (1973).

[214] *See* Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc. (*PREI*), 508 U.S. 49, 50, 57 (1993) ("[A]n objectively reasonable effort to litigate cannot be a sham regardless of subjective intent.").

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. Courts have very little information, and the stakes are significant. The threat of treble damages that hinge on an overarching inquiry into subjective intent will likely chill legitimate petitioning activity.[218] Thus, *PREI* probably strikes the right balance between competition values and the First Amendment in the context of a single – or very few – filings. When courts are faced with a host of filings directed at the same competitor, however, a less stringent inquiry into objective baselessness than the one the Court used in *PREI* makes sense. *Ceteris paribus*, larger data sets mean more precise parameter estimates.[219] In the context of petitioning, courts use the available evidence to estimate an answer to the threshold question – was the defendant using the process to harm a competitor rather than to obtain governmental action? With more information, and hence more accurate estimates of underlying purpose, courts can be both more confident in the inferences they take from the evidence and less worried about falsely condemning true petitioning. For example, a data set of fifty identical zoning challenges filed to delay a rival's entry provides a far more accurate estimate of underlying intent than one lawsuit filed to enjoin a competitor from using allegedly copyrighted material.

[215] *See id*. at 62-63.

[216] *See* Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109, 1120 (2009); Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004); Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226 (1993).

[217] The difference between objective and subjective inquiries is the difference between scoring figure skating and football: determining the winner in the former contest is often a matter of contention because it requires subjective assessments; determining the winner in the latter merely requires looking at the scoreboard.

[218] *See PREI*, 508 U.S. at 69-70 (Stevens, J., concurring).

[219] An estimated parameter's standard error defines the level of confidence one has in its accuracy. Standard errors decrease as sample sizes increase.

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 Circuit stated that *PREI*'s evaluation of a single suit is "essentially retrospective: If the suit turns out to have objective merit, the plaintiff can't proceed to inquire into subjective purposes, and the action is perforce not a sham."[221] Because the Supreme Court recognized in *California Motor Transport* that a series of suits can inflict much more harm on a competitor than a single suit, the Ninth Circuit reasoned that

> When dealing with a series of lawsuits, the question is not whether any one of them has merit – some may turn out to, just as a matter of chance – but whether they are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival.[222]

The court used the success rate to infer whether the litigation was filed without regard to the merit, but because the defendants had succeeded in over half of its suits, the court concluded that plaintiffs could not overcome defendants' *Noerr* defense.[223] The Second Circuit subsequently adopted similar reasoning

[220] 31 F.3d 800 (9th Cir. 1994) (Kozinski, J.).

[221] *Id.* at 811.

[222] *Id.*

[223] *See id.* (that more than half of the actions turned out to have merit "cannot be reconciled with the charge that the unions were filing lawsuits and other actions willy-nilly without regard to success"); *see also* Amarel v. Connell, 102 F.3d 1494, 1519 (9th Cir. 1996) (approving of the *USS-POSCO* test but finding it inapplicable to the two lawsuits alleged). At least one district court has employed the *USS-POSCO/Primetime 24* test to strip a defendant of *Noerr* protection for a pattern of litigation. *See* Livingston Downs Racing Ass'n, Inc. v. Jefferson Downs Corp., 192 F. Supp. 2d 519, 538 (M.D. La. 2001). Some district courts appear to have adopted the *USS-POSCO/Primetime 24* test for repetitive petitioning but have found insufficient allegations or facts to deny the defendants *Noerr* protection. *See, e.g.*, Twin City Bakery Workers & Welfare Fund v. Astra Aktiebolag, 207 F. Supp. 2d 221, 224 n.2 (S.D.N.Y. 2002); Gen-Probe, Inc. v Amoco Corp., 926 F. Supp. 948, 959 (S.D. Cal. 1996).

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 of each, for the purpose of injuring a market rival.[225] Applying this standard, the court concluded that defendants were not entitled to *Noerr* protection because Primetime 24 alleged a sufficiently low win-rate to suggest that the signal-strength challenges were "'brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival.'"[226]

Another possible approach is to look at the financial viability of suits. Some suits may be reasonable in the sense that the probability of winning is sufficiently greater than zero but may appear unreasonable when probabilities are weighted by outcome values and costs are taken into account.[227] For example, a reasonable inference to be taken from filing a suit with an expected value of $1000, but that costs $10,000 to prosecute, may be that the suit has an additional value of at least $9001 flowing from the direct effects on rivals. Although the majority in *PREI* explicitly rejected an expected value test as an objective screen in the context of a single suit,[228] it may remain a viable approach when applied to multiple filings. Further, despite *PREI*'s seeming equation of economic viability with subjective motivation,[229] this screen clearly lends itself to objective measurement. Indeed, the *PREI* concurrence suggested the expected value test as a method to evaluate shams in a series of filings: "The label 'sham' . . . might also apply to a plaintiff who had some reason to expect success on the merits but because of its tremendous cost would not bother to achieve that result without the benefit of collateral injuries imposed on its competitor by the legal process alone."[230]

Clarify that intentional misrepresentations do not qualify for immunity. The extent to which parties who use fraud or deceit to procure favorable governmental action enjoy *Noerr* protection remains unclear. The Supreme Court has addressed the issue of fraud on the patent office as a stand-alone

[224] 219 F.3d 92, 101 (2d Cir. 2000).

[225] *Id.*

[226] *Id.* (quoting *USS-POSCO*, 31 F.3d at 811).

[227] Judge Posner articulated this approach in *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 472 (7th Cir. 1982): "Many claims not wholly groundless would never be sued on for their own sake; the stakes, discounted by the probability of winning, would be too low to repay the investment in litigation."

[228] Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc. (*PREI*), 508 U.S. 49, 65-66 (1993).

[229] *Id.* at 61 (explaining that plaintiff must disprove legal viability before it will entertain evidence of economic viability); *id.* at 65-66 (inquiring whether the expected award could justify Columbia's investment in litigation "concern[ing] Columbia's economic motivations in bringing the suit, which were rendered irrelevant by the objective legal reasonableness of the litigation").

[230] *Id.* at 68-69 (Stevens, J., concurring).

antitrust offense,[231] and has twice hinted at the existence of a misrepresentation exception to *Noerr*.[232] However, the Court expressly declined to address whether a general misrepresentation exception to *Noerr* exists,[233] and to date, the "sham" exception is the only exception to *Noerr* that the Supreme Court has recognized. Under various theories, however, several lower courts have refused to provide *Noerr* protection to misrepresentations.[234] One theme that emerges from this jurisprudence is that misrepresentations are condoned in the political arena, but enjoy no immunity in more formal arenas, where fact finders must assume the veracity of the parties before them.[235]

Despite some lower court rulings,[236] because parties who lie to procure favorable regulation are genuinely seeking government action, it appears difficult to squeeze misrepresentations into the sham exception.[237] A separate exception is needed – one that is not grounded in notions of genuineness, but, rather, that focuses on the extent to which falsehoods designed to procure government action really advance any of *Noerr*'s underpinnings.

On its own, false speech does not advance any First Amendment interests. Thus, there is no reason to protect fraud calculated to procure anticompetitive government action. Nevertheless, in an effort to provide "breathing space" for legitimate speech, the Supreme Court has crafted rules that offer some protection for false speech.[238] Consistent with the notion of crafting rules that are unlikely to deter legitimate speech, the Court has held that baseless suits should enjoy protection similar to that which false speech enjoys.[239] Accordingly, only a baseless suit that is also subjectively motivated by an unlawful purpose falls outside of *Noerr*'s protection.[240] By limiting a misrepresentation exception to *Noerr* to intentional falsehoods that are calculated to obtain the government action at issue, courts take into account deterrence concerns, leaving ample breathing space for legitimate petitions.[241]

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231 *See* Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 174 (1965).

232 *See* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 503 (1987); Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972).

233 *See PREI*, 508 U.S. at 61-62 n.6 ("We need not decide here whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations.").

234 *See NOERR-PENNINGTON* REPORT, *supra* note 120, at 25-26 (citing cases from the Second, Fifth, Sixth, Seventh, Eighth, Ninth, Eleventh, Federal, and District of Columbia circuits that support a misrepresentation exception to the *Noerr* doctrine).

235 *Id.* at 26-27.

236 *See, e.g.*, Kottle v. Nw. Kidney Ctrs., 146 F.3d 1056, 1060-61 (9th Cir. 1998).

237 *See, e.g.*, 1 AREEDA & HOVENKAMP, *supra* note 173, at ¶ 203a.

238 *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271-72 (1964) (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

239 BE & K Constr. Co. v. NLRB, 536 U.S. 516, 531 (2002).

240 *See id.*

241 *See, e.g.*, Union Oil Co. of Cal., 140 F.T.C. 123, 150 (2005).

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 anticompetitive uses of the regulatory process. This Section explores the possibility of ex ante intervention to prevent anticompetitive harm before it occurs. An alternative to the ex post antitrust challenge to anticompetitive state regulation is to allow the U.S. competition authority to have ex ante input into policy-making. This power could range from informal input to veto power. Correcting problems ahead of time is likely to be more efficient than ex post remediation via the antitrust laws.[242] As discussed in Part III, competition authority input is commonplace in other jurisdictions.

[242] *See* James C. Cooper, Paul A. Pautler & Todd J. Zywicki, *Theory and Practice of Competition Advocacy at the FTC*, 72 ANTITRUST L.J. 1091, 1110-11 (2005).

At the state level, ex ante prevention is a political and practical non-starter. It is hard to envision politicians from any party acquiescing to a rule that requires federal competition authority input into purely state matters. Further, because states promulgate literally thousands of regulations that may affect competition every year, the FTC and DOJ could not possibly perform even a cursory review of state laws at current staff levels. Indeed, current FTC and DOJ staff barely manage thirty advocacies annually.[243] To review all relevant state proposals would require dramatically increasing FTC and DOJ staff or shifting most resources from enforcement to regulatory review. Finally, it is not at all clear that a federal mandate requiring this type of review would survive a challenge as an unconstitutional expansion of Congress's commerce power.[244] A regime set up by federal mandate, moreover, would be inconsistent with the Court's reluctance to second-guess the competitive effects of state regulation under the antitrust laws. Required ex ante review by federal executive branch or independent agency staff to assess the competitive effects of state regulation seems little different.

An alternative to federal review would be to have review performed by state attorney general staff expert in competition law.[245] This arrangement would alleviate federalism concerns, and it is likely to reduce informational costs because a state attorney general is in a much better position than federal authorities to handle anticompetitive regulation and to alleviate state-level staff

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[243] *Advocacy Filings by Date*, FED. TRADE COMM'N, OFFICE OF POL'Y PLANNING, http://www.ftc.gov/opp/advocacy_date.shtm (last visited Apr. 8, 2010) (listing thirteen advocacy filings for the FTC and DOJ in 2009).

[244] Despite the Court's modern, expansive interpretation of the Commerce Clause, Congress's power is still subject to outer limits and

> must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937); *see also* United States v. Morrison, 529 U.S. 598, 610, 618 (2000) (stating that although "'[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained,'" regulation "of intrastate [matters] that [are] not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States" (quoting United States v. Lopez, 514 U.S. 549, 560 (1995))); *Lopez*, 514 U.S. at 565-68 (explaining that the Court "[does] not doubt that Congress has authority under the Commerce Clause to regulate numerous commercial activities that substantially affect interstate commerce," yet "[t]hat authority, though broad, does not include the authority to regulate each and every aspect of local [matters]"; moreover, "[t]o do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This [the Court is] unwilling to do").

[245] This review would be different from review to determine antitrust compliance, which already occurs in many states.

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 U.S.C. § 788(c) (2010).

[247] *See, e.g.*, Postal Accountability and Enhancement Act, Pub. L. No. 109-435, § 703(a), 120 Stat. 3198 (2006) (codified as amended in scattered sections of 39 U.S.C.).

[248] *See generally* Letter from Timothy J. Muris, Chairman, Fed. Trade Comm'n, to Dep't of Transp. (June 6, 2003), *available at* http://www.ftc.gov/os/2003/06/dotcomment.htm; Letter from Donald S. Clark, Sec'y, Fed. Trade Comm'n, to Jean A. Webb, Sec'y to the Comm'n, Commodity Futures Trading Comm'n (Jan. 12, 2004), *available at* http://www.ftc.gov/os/2004/01/040113cftccommenttext.pdf; Comment from the Staff of the Bureau of Econ. et. al, Fed. Trade Comm'n, to Food & Drug Admin. & Dep't of Health & Human Servs. (Oct. 9, 2003), *available at* http://www.ftc.gov/os/2003/10/fdafattyacidscomment.pdf.

[249] This could be similar to Congressional Budget Office scoring for budgetary implications.

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 curb competition.[250] This expansion could be part of a federal/state partnership in which federal antitrust agencies formally join their state counterparts in preparing advocacies on these measures or providing assistance – in the form of research and analysis – to states that making appearances in their own name.

CONCLUSION

Discussions about the appropriate content of competition policy among the many jurisdictions with antitrust laws reflect a consensus that public restraints upon rivalry deserve as much attention as private behavior. The U.S. antitrust system, however, lags behind a number of other jurisdictions in its capacity to deal effectively with government measures that restrict competition. A valuable frontier for future U.S. work to achieve convergence in competition policy is to pursue policies that align the United States more closely with its global counterparts in their treatment of public intervention.

[250] The possibilities for doing so are discussed in William E. Kovacic, *Toward a Domestic Competition Network*, *in* COMPETITION LAWS IN CONFLICT 316, 326 (Richard A. Epstein & Michael S. Greve eds., 2004).