

HARVARD LAW REVIEW

THE SCOPE OF ANTITRUST PROCESS

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ARTICLE

THE SCOPE OF ANTITRUST PROCESS

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Antitrust state action doctrine immunizes restraints of trade from antitrust scrutiny upon a sufficient showing of "state action." In this Article, Professor Elhaug argues that this doctrine has continued to spawn uncertainty and confusion because courts and commentators analyzing the doctrine currently view their task as accommodating an inherent conflict between a federal policy favoring competition and state policies favoring restrictions on competition. By instead focusing on the decisionmaking processes framed by the doctrine, Professor Elhaug explains that the antitrust case law distinguishing state from private action fits a simple process view: financially interested actors cannot be trusted to decide which restrictions on competition advance the public interest; disinterested, politically accountable actors can. Professor Elhaug also grounds this process view in the legislative history of the Sherman Act and defends it against various alternative process views, including those relying on theories of interest-group capture or the economics of federalism. Finally, Professor Elhaug explores the implications of the doctrine's process view in cases where political accountability itself creates a financial interest in restraints that inflict costs on those outside a governmental unit and in cases where financially disinterested but politically unaccountable actors restrain trade to further their own conceptions of the public interest.

A paradigm of conflict and accommodation dominates current understanding of antitrust state action doctrine. Under this paradigm, federal antitrust law is viewed as favoring competitive markets on the premise that competition furthers the public interest by advancing economic efficiency, consumer welfare, or sociopolitical conceptions of the public good.¹ The conflict arises because the effect and intent of state and local regulation is generally to restrain competition. Rent control, conservation measures, and occupational licensing, for example, fix prices, restrict output, and exclude entry. The motivation for such anticompetitive state and local regulation can range from the benign to the insidious: correcting economic inefficiencies resulting from market failures, furthering noneconomic conceptions of the public interest, or garnering monopoly profits for powerful

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¹ See, e.g., *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958). Which goal antitrust law should further in cases where these goals conflict is widely disputed. See *infra* pp. 697-98.

interest groups that have captured the regulators. But regardless of the regulatory motive, the conflict remains palpable because the regulation has rejected the antitrust premise that what is in the public interest is competition — specifically that brand of competition prescribed by federal antitrust law.

One could conclude from this that state and local regulations are largely preempted by antitrust law. But that, virtually all agree, is unthinkable: both for policy reasons grounded in federalism and anti-*Lochner*ism and as an interpretation of what Congress could have possibly intended in passing the antitrust laws.² The role of antitrust state action doctrine under this paradigm is thus to reach an appropriate accommodation between the federal interest in fostering competition and the conflicting state interests in restricting competition by immunizing some, but not all, state-authorized or enforced restraints from antitrust scrutiny.³

This paradigm of conflict and accommodation is both odd and unfortunate. It is odd because the notion that state regulatory interests can trump conflicting interests embodied in constitutionally valid federal statutes defies our ordinary understanding of preemption law. The very meaning of the supremacy clause⁴ is that conflicts between federal and state law must be resolved in favor of federal law. This principle is fully applicable to conflicts involving federal antitrust law.⁵ If, then, there is a genuine conflict between state regulation and

² See *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 110-11 (1978); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133-34 (1978); Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23, 24-25 (1983); Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L.J. 486, 499-501 (1987); 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, 1102-07 (1981).

³ The paradigm of conflict and accommodation has been used by Congress, see H.R. REP. No. 965, 98th Cong., 2d Sess. 7 (1984), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 4602, 4608, and by nearly every scholar to write in the area, see, e.g., Easterbrook, *supra* note 2, at 23-25; Garland, *supra* note 2, at 499-501; Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 CALIF. L. REV. 227, 227-29 (1987); Spitzer, *Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory*, 61 S. CAL. L. REV. 1293, 1293-94 (1988); Wiley, *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 713-15, 729-39 (1986). The Supreme Court has also articulated the problem in terms of the conflict paradigm, see, e.g., *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 61 (1985); *Orrin W. Fox*, 439 U.S. at 110-11; *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398-400 (1978), although the results reached in the cases, I hope to show, are explained more easily under another paradigm.

⁴ The "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme law of the Land . . ." U.S. CONST. art. VI, cl. 2.

⁵ See *California v. ARC Am. Corp.*, 109 S. Ct. 1661, 1665 (1989) (stating, in a case adjudicating the preemptive scope of federal antitrust law, that "state law is . . . preempted to the extent it . . . 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941))).

federal antitrust law, state regulation cannot preempt federal law, even if this "inverse preemption" is confined to only some types of conflict.⁶ Yet preemption of federal law is exactly what in effect follows from a finding of state action immunity under the current paradigm, for the state regulation nullifies the application of federal law to an anticompetitive restraint that (by hypothesis) would otherwise be within its scope.

The prevailing paradigm is unfortunate because it precludes principled coherent resolution. There is no principled way for courts to reconcile truly conflicting interests. Courts must choose. They can choose on an ad hoc, case-by-case basis. Or they can choose to favor one of the interests systemically. But choose they must. Nor is it any less a choice if the courts adopt a formal rule that attempts to strike a rough balance by favoring some interests in some cases and other interests in other cases. The choice of any such rule cannot, in any event, provide coherent resolution under the prevailing paradigm, for it cannot justify rulings or guide courts through the inevitable doctrinal ambiguities without some affirmative theory of why the interests favored by the rule deserve to be favored. It is precisely that affirmative theory that the conflict and accommodation paradigm fails to provide.

The Supreme Court's strategy has been the last one: avoiding any explicit balancing of the conflicting interests by addressing the cases solely on a formal level. Specifically, the Court treats "state action" as immune from antitrust scrutiny, and then endeavors to adjudicate cases based on some formal understanding of which actions can and cannot be attributed to "the State as sovereign."⁷ Through various elaborations (and manipulations) of this state action doctrine, the Court achieves a de facto, but conclusory, accommodation of conflicting state and federal interests. This effort to avoid the judicial embarrassment of open-ended choice through formalistic definitions of "state action" has, however, been a failure. The failure is both administrative — the main result has not been clarification but more and more litigation⁸ — and theoretical — the state action cases have repeatedly been criticized for drawing arbitrary lines that bear little relation to either the federal or state interests perceived to be in conflict.⁹ Thus far, theoretical critique has focused on substituting substantive accommodations for the Court's formal one. But these efforts to construct substantive accommodations cannot resolve the

⁶ Cf. Easterbrook, *supra* note 2, at 25 (describing state action doctrine as "inverse preemption").

⁷ See *infra* pp. 672-74.

⁸ See *infra* note 14 and pp. 674-75.

⁹ See *infra* pp. 675-76.

problem because they inevitably slight one (and often both) of the conflicting interests.

This Article aims to provide an overarching theory for resolution of the doctrinal ambiguities of state action doctrine by better illuminating its underlying ideals. My approach departs from the conflict and accommodation paradigm because it does not start with a definition of federal antitrust ideals that conflicts with state and local regulation. Instead I take the existence of state action immunity as evidence of nonconflict and examine its contours for insights into the nature of the underlying antitrust ideals. In particular, I focus on whether functional differences exist between the decisionmaking processes that produce those restraints the Court immunizes from antitrust scrutiny and the processes that produce those restraints the Court does not immunize. I conclude that functional differences do exist. Although the Court adjudicates antitrust state action issues on purely formal grounds, its rulings embody a largely consistent set of process views: that is, views about what types of decisionmaking processes do and do not provide sufficient assurance that restraints resulting from the process will serve the public interest.

The Article proceeds in four stages. Part I describes current doctrine and explains why, under the conflict and accommodation paradigm, neither formal notions of state action nor substantive accommodations are capable of constructing coherent and principled state action doctrine. Part II puts forth the Article's basic descriptive thesis: that antitrust case law adjudicating the distinction between state and private action embodies the process view that restraints on competition must be subject to antitrust review whenever the persons controlling the terms of the restraints stand to profit financially from the restraints they impose. Conversely, restraints are immune from antitrust review whenever financially disinterested and politically accountable persons control and make a substantive decision in favor of the terms of the challenged restraint before it is imposed on the market.¹⁰ This reveals a limiting principle that is generally obscured

¹⁰ I define an actor as "politically accountable" if his or her authority can be traced to an election, appointment by elected officials, or through some chain of appointment starting with elected officials. Ongoing political accountability is not required; it is sufficient that the political process can influence the initial selection of personnel to exclude those with unacceptable policy preferences. For example, within the meaning used here, the term "politically accountable" embraces a state judge with life tenure who was appointed by elected officials. It also embraces a state administrator serving a fixed, nonrepeatable term who was appointed by a state official who was herself appointed by elected officials. Such retrospective or derivative accountability to political forces is a common hallmark of our political system. See THE FEDERALIST No. 39, at 241 (J. Madison) (C. Rossiter ed. 1961) ("It is *sufficient* for [a republic] that the persons administering it be appointed, either directly or indirectly, by the people . . ." (emphasis in original)).

by the business context of most antitrust cases. Namely, it reveals that, contrary to prevalent notions, antitrust law does not stand for the proposition that all economically inefficient restraints of market competition are against the public interest. Rather, antitrust stands for the more limited proposition that those who stand to profit financially from restraints of trade cannot be trusted to determine which restraints are in the public interest and which are not.

Part III evaluates this process view normatively. I there reject several possible critiques, most notably the claim that the ability of financially interested special interest groups to "capture" state regulatory processes renders the nominal disinterest of those processes irrelevant. Such capture no doubt occurs, but in any realistic appraisal the relevant question is not whether the decisionmaking process framed by current state action doctrine is perfect but whether it is better than the alternatives. Part III argues that the Court's implicit process view represents a sounder reading of congressional intent and the relevant policy considerations than the alternative process views implicit in the various critiques, particularly the process of judicial decisionmaking that I show is implicit in the proposal that antitrust preemption should turn on judicial assessments of whether interest group capture has occurred.

Finally, Part IV addresses two sets of related issues. The first involves the possibility that governmental units may have collective financial interests in restraints whose anticompetitive effects are extraterritorial. Section A argues that this possibility, combined with the availability of dormant commerce clause review, helps explain the distinction antitrust case law draws between municipal action and state-wide action, as well as the distinction drawn between monopolization claims and other antitrust challenges to municipal restraints. The second set of issues involves whether and to what extent antitrust review does or should apply to restraints imposed by financially disinterested but politically unaccountable private actors. Section B shows how the process problems posed by such restraints differ from those ordinarily addressed by antitrust review, and explores how the doctrinal treatment of such restraints (currently addressed under the disparate rubrics of substantive antitrust law, the first amendment, and antitrust's *Noerr* doctrine) might be integrated with state action doctrine to define the scope of antitrust process in a more comprehensive fashion.

I. THE INABILITY OF FORMAL OR SUBSTANTIVE ACCOMMODATIONS TO RESOLVE THE CONFLICT UNDER THE PREVAILING PARADIGM

Antitrust doctrine currently uses a formal rule to mediate the perceived conflict between the federal policy favoring competition and the notion (based in federalism or anti-*Lochnerism*) that state and

local governments should be free to regulate in ways that interfere with competitive markets. Founded on the seminal case of *Parker v. Brown*,¹¹ which declared that the Sherman Act does not apply to "state action,"¹² this formal rule provides that anticompetitive restraints are immune from antitrust scrutiny if they are attributable to an act of "the State as sovereign."¹³ In a series of cases, the Supreme Court and, to an even greater extent, the lower courts have struggled with the problem of defining the degree of state or local government involvement necessary to confer this state action immunity.¹⁴

As it has evolved, antitrust state action doctrine employs three different tiers of immunity. The applicable level of immunity turns on which actor is deemed responsible for the challenged restraint. An anticompetitive restraint is deemed a direct act of the state as sovereign, and thus per se immune from antitrust scrutiny, if it represents the act of the state legislature, the highest state court acting legislatively, or (probably) the governor.¹⁵ At the other extreme, anticompetitive restraints by "private" persons are, under the two-prong test announced in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*,¹⁶ immune only if clearly authorized and actively supervised by the state.¹⁷

Intermediate immunity applies to the restraints of public entities that are subordinate to the top levels of state government. The restraints of municipalities and state agencies are *not* deemed direct acts of "the State as sovereign," and thus do not receive absolute immu-

¹¹ 317 U.S. 341 (1943).

¹² See *id.* at 350-52.

¹³ See, e.g., *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 64 (1985); *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 50-54 (1982); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 790-91 (1975).

¹⁴ To provide a rough sense of the magnitude and upward trend of litigation about antitrust state action immunity, I conducted a LEXIS search on November 15, 1990, for published federal opinions citing *Parker v. Brown*. The search, which encompassed opinions by federal district and appellate courts and the United States Supreme Court, uncovered a total of 670 cases. Only 83 of these opinions came down during 1943-70; 203 came down during 1971-80; and 384 came down during 1981-90. My examination of the Supreme Court cases reveals a total of 18 post-*Parker* cases actually adjudicating issues of state action immunity: two during 1943-70; seven during 1971-80; and nine during 1981-90.

¹⁵ See *Hoover v. Ronwin*, 466 U.S. 558, 567-69 (1984). The Supreme Court's approach suggests that the actions of state governors will also be per se immune, but it has left the issue open. See *id.* at 568 n.17.

¹⁶ 445 U.S. 97 (1980).

¹⁷ See *id.* at 105-06. An additional prong applies when a *facial* challenge is brought against a state statute or municipal ordinance. If the state action doctrine does not provide immunity, the statute or ordinance is facially preempted only if it authorizes or mandates conduct that per se violates the antitrust laws. See *Fisher v. City of Berkeley*, 475 U.S. 260, 264-65 (1986); *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982). This prong does not apply when plaintiffs challenge a statute or ordinance as applied. See *Fisher*, 475 U.S. at 270 n.2; *Rice*, 458 U.S. at 662 & nn.7-8.

nity.¹⁸ Rather, one of the entities that acts directly for the state (such as the state legislature, supreme court, or governor) must clearly authorize a restraint, even if embodied in a municipal ordinance or agency regulation, for the restraint to enjoy antitrust immunity.¹⁹ In contrast to private parties, however, municipalities and (probably) state agencies need not show active supervision by the state,²⁰ and apparently can themselves supply the active supervision needed to immunize private restraints that the state as sovereign has clearly authorized.²¹

Although the series of cases establishing this complex structure of multi-tier immunity has settled some of the many doctrinal issues raised by state action immunity, the doctrine has continued to spawn more confusion and litigation than certainty. It has been difficult to ascertain which actor should be deemed responsible for any given restraint of trade²² and which entities are entitled to be treated as state agencies or as "the State as sovereign" for the purposes of state action doctrine.²³ The clear authorization requirement has proved hard to apply, plunging federal antitrust courts into a morass of state legislative intent and making antitrust immunity turn on the happenstance of whether state legislatures have sufficiently documented their intent.²⁴ Courts also have had difficulty deciding whether to treat errors or abuses by state agencies as clearly authorized by the state.²⁵ The supervision requirement has created its own set of ambiguities, not only as to how much supervision is enough,²⁶ but also as to what actors need supervision and who can supervise on behalf

¹⁸ See *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 60-61, 62-63 (1985); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38-40 (1985); *Hoover*, 466 U.S. at 568-69; *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 50-54 (1982).

¹⁹ See *Southern Motor Carriers*, 471 U.S. at 57, 60-61, 62-63; *Hallie*, 471 U.S. at 38-40; *Hoover*, 466 U.S. at 568-69; *Boulder*, 455 U.S. at 51-52.

²⁰ See *Hallie*, 471 U.S. at 46-47 & n.10.

²¹ See *Patrick v. Burget*, 486 U.S. 94, 101-03 (1988) (evaluating whether supervision by various state agencies was sufficiently active); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 n.9 (1980) (stating in dicta that a law authorizing a state agency to fix liquor prices provides sufficient supervision).

²² See P. AREEDA & H. HOVENKAMP, *ANTITRUST LAW* ¶ 212.6, at 159-60 (Supp. 1989) (noting the question's "pervasive vexatiousness").

²³ See *Fuchs v. Rural Elec. Convenience Coop.*, 858 F.2d 1210, 1216 (7th Cir. 1988), cert. denied, 109 S. Ct. 1744 (1989); P. AREEDA & H. HOVENKAMP, *supra* note 22, ¶ 212.2, at 127-31, ¶ 212.9f, at 184-87.

²⁴ See P. AREEDA & H. HOVENKAMP, *supra* note 22, ¶ 212.3, at 132 (noting that "application [of the clear authorization requirement] has proved difficult"); Hovenkamp & Mackerron, *Municipal Regulation and Federal Antitrust Policy*, 32 UCLA L. REV. 719, 740-44 (1985).

²⁵ See P. AREEDA & H. HOVENKAMP, *supra* note 22, ¶ 212.3b, at 145-49.

²⁶ See *id.* ¶ 212.7, at 164-66 (stating that defining adequate supervision has been "troublesome").

of the state.²⁷ And the courts have been perplexed about whether and when to deny state action immunity where private and state actors are alleged to be "co-conspirators."²⁸

The trouble is not only that the doctrinal issues posed by current state action doctrine are difficult, but also that the state as sovereign theory depends on a purely formal construct that leaves courts with no overarching theory to guide their resolution of the inevitable doctrinal ambiguities.²⁹ Courts instead tend to answer the doctrinal questions in a largely conclusory fashion that gives little guidance in future cases. Nor, under the current paradigm, can guiding principles be derived from the ideals perceived to underlie the doctrine, for it is precisely the perceived conflict in underlying ideals that the formal doctrine is meant to avoid.

Indeed, the current three-tiered structure of immunity has, under the conflict paradigm, been subject to a simple but powerful critique: that neither the federal interest in competition nor notions of federalism or anti-*Lochnerism* offer any grounds (1) for distinguishing between the regulatory restraints of state legislatures and the regulatory restraints of lower-level state entities or local governments,³⁰ or (2) for distinguishing between clearly authorized restraints that the state has chosen to supervise actively and those it has chosen not to supervise.³¹ The critics emphasize three points. First, they argue that the federal interest in competition cannot justify distinguishing anticompetitive restraints issued by high versus low levels of government, with clear versus unclear authorization, and with active versus inactive supervision, because restraints with any of these pedigrees can equally obstruct competition.³² Indeed, state statutes or regulations may merely make anticompetitive cartels more reliable and durable.³³ Second, the critics argue that requiring local governments to seek state authorization for each type of regulatory restraint confounds principles

²⁷ See *id.* at 166-67; see also, e.g., *Patrick v. Burget*, 486 U.S. 94, 103-04 (1988) (leaving open the issue whether judicial review can satisfy the active supervision requirement).

²⁸ The Supreme Court recently granted certiorari to resolve a circuit conflict on this issue, see *City of Columbia v. Omni Outdoor Advertising, Inc.*, 110 S. Ct. 3211 (1990), *granting cert. to Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*, 891 F.2d 1127 (4th Cir. 1989), which I discuss below at pp. 704-06.

²⁹ As Congress put it: "The Court is open to criticism perhaps not so much for the results it has reached in individual cases, but rather for its failure to provide an analytical framework by which future state action cases can be predicted with reasonable certainty." H.R. REP. NO. 965, *supra* note 3, at 7, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4602, 4608.

³⁰ See *Wiley, supra* note 3, at 731-33; *Garland, supra* note 2, at 502 & n.90.

³¹ See *Easterbrook, supra* note 2, at 29-33; *Page, supra* note 2, at 1128-31, 1134-36; *Wiley, supra* note 3, at 731; *Wiley, Revision and Apology in Antitrust Federalism*, 96 YALE L.J. 1277, 1279-80, 1282 (1987).

³² See *Easterbrook, supra* note 2, at 29-33; *Wiley, supra* note 3, at 715, 729, 733; *Wiley, supra* note 31, at 1279-80.

³³ See *Easterbrook, supra* note 2, at 29-31; *Wiley, supra* note 3, at 733.

of local autonomy and federalism.³⁴ In fact, the doctrine leads to results that seem perverse from a federalism perspective. Home rule local governments, which states intended to endow with the broadest authority, have no immunity because the doctrine deems home rule provisions too general to provide sufficient state authorization.³⁵ Meanwhile, special local government units, which states intended to constrain narrowly, often enjoy immunity because their authority is, by nature, detailed with more specificity.³⁶ The third point made by critics is that requiring clear authorization and (for private restraints) active supervision embodies a policy of limiting intrastate delegation that cannot be squared with federalism and anti-*Lochner*ism because differences in the degree of delegation do not correspond to any real differences in a state's regulatory interest.³⁷ Indeed, federalism and anti-*Lochner*ism seem offended rather than furthered by an active supervision requirement that restricts a state's regulatory options and by a clear authorization requirement that turns antitrust courts into adjudicators of what are essentially issues of state administrative law.

Although within the prevailing paradigm these critiques are individually powerful, as a unit they merely demonstrate the futility of developing any coherent theory of state action doctrine within that paradigm. For the inevitable step after critiquing the formal accommodation for its poor correlation to the underlying substantive interests is to propose a substantive accommodation. And any proposed accommodation is in turn unavoidably vulnerable to the critique that it fails to comport with at least one of the substantive interests in conflict. Generally the proposals resulting from the critiques create this problem because they "resolve" the perceived conflict by effectively favoring one interest.³⁸ With differing particulars, they advocate either that antitrust courts defer more consistently to state policy

³⁴ See, e.g., Easterbrook, *supra* note 2, at 36-38 & n.31; Garland, *supra* note 2, at 502 & n.90; Hovenkamp & Mackerron, *supra* note 24, at 747-58; Robinson, *The Sherman Act as a Home Rule Charter*, 2 SUP. CT. ECON. REV. 131, 147-52 (1983); Wiley, *supra* note 3, at 735.

³⁵ See *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 54-56 (1982).

³⁶ See P. AREEDA & H. HOVENKAMP, *supra* note 22, ¶ 212.3C, at 152.

³⁷ See Easterbrook, *supra* note 2, at 30, 38; Wiley, *supra* note 3, at 715, 730-31, 733-34.

³⁸ In the 1970s, when case-by-case balancing tests were more in vogue, some commentators proposed that courts accommodate the conflict on an ad hoc basis by balancing the state interest in a challenged regulation against the federal interest in competition. See Slater, *Antitrust and Government Action*, 69 NW. U.L. REV. 71, 101-09 (1974); cf. Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. REV. 693, 703-14, 738 (1974) (proposing a somewhat more structured balancing test). Such proposals reveal but do not resolve the perceived conflict. They not only saddle judges with making open-ended choices without the guidance of any meaningful principles but also result in judgments that inevitably infringe either the federal or state interest put forth. Legally, these proposals have gone nowhere. The only Justice ever to suggest adopting a case-by-case balancing approach was Justice Blackmun, and even he has not repeated the suggestion since his opinion in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 610-12 (1976) (Blackmun, J., concurring in the judgment).

judgments (even if, for example, the state has decided to delegate the power to fix prices to private citizens)³⁹ or that antitrust courts review all restraints for substantive consistency with federal antitrust policy (even if, for example, the restraints are embodied in a regulatory statute).⁴⁰ The former proposals can be faulted for giving short shrift to federal antitrust interests. The latter proposals can be faulted for giving short shrift to values of federalism, to institutional concerns about judges sitting as suprale legislatures who second-guess economic regulations,⁴¹ and to the possibility that restraining competition may further noneconomic conceptions of the public interest.

Some proposals claim to minimize the conflict.⁴² These proposals do not avoid favoring one interest: they simply redefine it in some narrow fashion. As a result, they are vulnerable not only to the critique that they slight the disfavored interest but also to the critique that they do not sufficiently respect the favored interest.⁴³ Professor Wiley's proposal is illustrative. It would, on the assumption that economic efficiency is the goal of antitrust, allow states to defend a state-authorized restraint that would otherwise violate antitrust law by showing that the restraint addresses a market inefficiency.⁴⁴ But if efficiency is really the goal of antitrust and if the state-authorized restraint violates ordinary antitrust law, then the premise that the restraint advances efficiency must conflict with the antitrust premise that the restraint does not. This conflict is no less real than a conflict in goals.

For example, Wiley would allow a state to defend a regime of vertical price restraints on efficiency grounds.⁴⁵ As he points out, powerful efficiency arguments can be made for allowing vertical price

³⁹ See, e.g., Wiley, *supra* note 3, at 730-31, 739-40; see also Easterbrook, *supra* note 2, at 45-50 (arguing that doctrine should immunize any state or local regulation as long as the jurisdiction's residents bear its full costs); Page, *supra* note 2, at 1113-25 (arguing that any clearly articulated state regulation should trump conflicting federal antitrust law).

⁴⁰ See Cirace, *An Economic Analysis of the "State-Municipal Action" Antitrust Cases*, 61 TEX. L. REV. 481, 486 (1982) (advocating preemption of regulations that are not the least restrictive means of addressing a substantial market failure); Spitzer, *supra* note 3, at 1318-25 (suggesting as a possible option antitrust preemption of any state or local regulation that offends antitrust values by causing inefficiency or transferring wealth from consumers to producers); Wiley, *supra* note 3, at 742-43 (advocating preemption of any anticompetitive state regulation evidencing the kind of producer capture and inefficiency that conflicts with the purposes of antitrust law). Professor Wiley is cited for both proposals because he explicitly frames his normative thesis as a choice. See *id.* at 715, 739-41.

⁴¹ See, e.g., 1 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 215c, at 98 (1978); Garland, *supra* note 2, at 508-12; Hovenkamp & Mackerron, *supra* note 24, at 758-67.

⁴² See, e.g., Page, *supra* note 2, at 1113-25, 1137-38; Wiley, *supra* note 3, at 768-69.

⁴³ See, e.g., Wiley, *supra* note 3, at 731-36 (criticizing Page's proposal in part for failing to respect state policy judgments sufficiently).

⁴⁴ See *id.* at 743, 748-64.

⁴⁵ See Wiley, *supra* note 31, at 1279-80.

restraints.⁴⁶ But these arguments have been rejected by federal antitrust case law, which still holds vertical price restraints per se invalid.⁴⁷ Permitting states to authorize vertical price restraints does not, then, simply allow them to correct market failures; it permits them to correct perceived failures in federal antitrust law. This may seem attractive to those who view certain federal antitrust doctrines as unwise. But one should be under no illusion that the conflict is avoided. Any restraint that violates antitrust law in the name of correcting "antitrust failure" contradicts the federal antitrust premise that the type of competitive process prescribed by federal antitrust rules advances the public interest.⁴⁸

Two commentators have claimed to find support for the current *Midcal* test within the conflict and accommodation paradigm.⁴⁹ Professor Jorde suggests that current doctrine strikes a proper balance between antitrust policy and federalism values because the clear authorization and active supervision requirements promote the federalism value of citizen participation.⁵⁰ But current doctrine seems rather poorly tailored to promoting citizen participation. As Jorde recognizes, the actual opportunities for citizen participation in regulatory decisions are often minimal.⁵¹ And the active supervision requirement does nothing to prevent states from denying their citizens the opportunity to participate in the decisions of the supervising officials.⁵² Moreover, Jorde fails to explain why citizen participation in the initial decision to delegate open-ended or unsupervised authority to restrain trade should not be sufficient and why other federalism values are not undermined by antitrust requirements that foreclose some regulatory options entirely.⁵³ From an antitrust perspective, one might add that the citizen participation argument does not explain why an unrelated value (particularly one so weakly realized) should trump federal antitrust policy. And the question remains why this balance of federal

⁴⁶ See *id.* at 1280 & n.15; see also Page, *supra* note 2, at 1131-34 & n.182 (summarizing and collecting sources).

⁴⁷ See *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724 (1988).

⁴⁸ Cf. Page, *supra* note 2, at 1130-34 (justifying state regulation as necessary to correct "antitrust failure").

⁴⁹ See Garland, *supra* note 2, at 499-501, 507-08; Jorde, *supra* note 3, at 247-50. Garland believes, however, that current doctrine is unjustified in failing to accord municipalities the same immunity accorded states. See Garland, *supra* note 2, at 502-07.

⁵⁰ See Jorde, *supra* note 3, at 229, 247-50.

⁵¹ See *id.* at 250. No doubt the extent to which citizens exercise available opportunities is even more minimal.

⁵² Cf. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (holding that due process does not require an opportunity to be heard before a generally applicable rule is promulgated).

⁵³ See W. Page, *State Action and "Active Supervision"* (forthcoming 36 ANTITRUST BULL. (1991)).

antitrust policy and federalism values is more appropriate than other conceivable balances.

Merrick Garland has defended the *Midcal* test as "a relatively sensible compromise between the judiciary's obligation to respect the results of the democratic process at the state level and its obligation to respect that same process at the national level."⁵⁴ Why doesn't respect for the national political process and the supremacy clause require invalidating anticompetitive state laws? Because, Garland argues, that would nullify states' power to regulate their economies.⁵⁵ Why doesn't respect for state political processes dictate sustaining state laws that delegate unsupervised power to restrain trade? Because that would permit states to nullify the Sherman Act by authorizing private parties to violate the Act.⁵⁶ According to Garland, current doctrine achieves the necessary rough compromise by immunizing "[t]rue state action" or "action taken by the state *qua* state" but not conduct that is "effectively private action" or laws that delegate the power to restrain competition to "private parties."⁵⁷

The flaw with this argument is that it simply restates the conflict and asserts that current doctrine reflects a reasonable accommodation without providing any rationale other than a formal public/private distinction which Garland fails to explain on policy grounds.⁵⁸ If he did address the relevant policy issues, moreover, Garland's argument would face the same critique applied to current doctrine: that it is hard to justify because it bears little relation to any of the interests supposedly in conflict. Given, however, that there appears to be no principled resolution of the perceived conflict under the prevailing paradigm, perhaps relying on a formal distinction between state and private action can be justified on the modest grounds that it achieves a rough justice no worse than other accommodations and extracts the judiciary from making open-ended policy choices.

Purely formal concepts of state action are, however, incapable of striking the rough compromise necessary to accommodate conflicting interests without reference to those interests. The principal problem is the absence of formal grounds for satisfactorily determining which

⁵⁴ Garland, *supra* note 2, at 501.

⁵⁵ *See id.* at 500.

⁵⁶ *See id.*

⁵⁷ *Id.* at 501, 508.

⁵⁸ In response to Wiley's critique along these lines, *see* Wiley, *supra* note 31, at 1278-79, Garland has denied that his argument hinges on any inherent distinction between public and private action. *See* Garland, *Antitrust and Federalism: A Response to Professor Wiley*, 96 YALE L.J. 1291, 1294 (1987). Nonetheless, he provides no policy rationale for current doctrine or his distinction between a state decision to regulate through "state actors" and a state decision to delegate the authority to restrain trade to "private actors." In addition, his test can be applied only with, at a minimum, some formal understanding of how to distinguish state actors from private actors. *See* Garland, *supra* note 2, at 499-501, 507-08.

exercises of authority created or enforced by the state should be deemed state action and which should not. Every restraint resulting from the exercise of such authority cannot be viewed as state action immune from antitrust review, for whenever businesses restrain trade they are exercising authority created or enforced by the state. Take, for example, two competing businesses that agree to fix prices. If, as is likely, the two businesses are corporations, then their exercise of state-created authority is obvious, for the power of corporations to engage in business, own property, and set prices to sell products are all created by the state. Antitrust law would have little if any effect if exercising state-created authority of this type was enough to confer antitrust immunity.⁵⁹

Perhaps less obviously, even a price-fixing agreement between two noncorporate businesses involves the exercise of authority created or enforced by the state. This will be clearest if state contract law permits such agreements, for then the businesses will be exercising an authority to make agreements that the state defines and directly enforces.⁶⁰ But even if price-fixing agreements are unenforceable under state contract law, such agreements still involve the exercise of state-enforced authority, for they constitute agreements to exercise the authority persons have to exclude others from using their property (here, their products) without paying them the price they demand.⁶¹ This authority is defined and enforced not only by a state's property law but also by its criminal law (through prosecutions for theft) and by its tort law (through suits against product damage). If antitrust is to have any meaning at all, then, it must apply to at least some exercises of state created or enforced authority. It is therefore not surprising that, even as it announced the state action doctrine, the Supreme Court in *Parker* also announced that "a state does not give immunity

⁵⁹ The corporate immunity claim may today seem fanciful, but the Supreme Court was presented with just such a claim in 1904, when the controlling stockholders of two competing railroad corporations argued that the combination of their stockholdings into one holding corporation was immune from federal antitrust law because it was authorized by state corporation law. See *Northern Secs. Co. v. United States*, 193 U.S. 197, 321-22, 326, 332-33, 344-45 (1904) (plurality opinion). The Supreme Court had no trouble rejecting this argument, with a plurality concluding that "no state can endow any of its corporations, or any combination of its citizens, with authority to restrain interstate or international commerce" in violation of the Sherman Act. *Id.* at 350. Although disagreeing on other grounds, the dissenters expressed no disagreement with this statement.

⁶⁰ See Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 562, 585-87 (1933); Wiley, *A Capture Theory of Antitrust Federalism: Reply to Professors Page and Spitzer*, 61 S. CAL. L. REV. 1327, 1328 (1988).

⁶¹ See Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12-14 (1927); Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 603-06 (1943); Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 470-79 (1923); Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149, 198-99 (1935).

to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.⁶²

One is thus left with the problem of determining which exercises of state-enforced authority fall into the public side and which fall into the private side. Conceivably, such problems might be resolved by a complex of formal rules based on some combination of precedent, tradition, philosophy, natural law, or simple intuition.⁶³ But the existence of any determinate formal public/private distinction seems dubious in light of the rich literature establishing the formal incoherence of such distinctions in other fields of law.⁶⁴ The most likely candidate for determining the public/private nature of a type of activity in antitrust cases — a distinction between proprietary and traditional governmental activities — has in any event been rejected by antitrust state action case law.⁶⁵ And with good reason. The distinction is

⁶² *Parker v. Brown*, 317 U.S. 341, 351 (1943).

⁶³ Sometimes disputes about whether action is "public" or "private" center on whether the authority was truly "created" by the state and "delegated" to private parties or whether the state has merely "recognized" the authority "retained" by private parties. Cf. Goodman, *Professor Brest on State Action and Liberal Theory, and a Postscript to Professor Stone*, 130 U. PA. L. REV. 1331, 1338-39 (1982) (distinguishing delegation and permission). Such a rephrasing of the issue, however, does not illuminate it. The debate over whether authority should be regarded as "delegated" or "retained" merely reproduces the debate over which sorts of authority should be regarded as "public" and which "private." The key for our purposes is that the state through its laws defines the authority (whether "delegated" or "retained") and stands ready to enforce that authority.

A related formal approach might attempt to avoid these problems by regarding any exercise of authority by someone other than "the state" as private. Cf. *id.* at 1337-41 (distinguishing what the state authorizes from what it does). The problem with this approach is that the state always exercises authority through individuals. An approach that refuses to treat any exercise of delegated authority as state action thus eases the problem of defining state action at the cost of reducing it to a meaningless nullity. Alternatively, if some of these exercises of authority are regarded as exercises of authority by "the state" and others are not, see *id.* at 1338-39, then the approach again reproduces the problem of determining which exercises of authority are public and which private.

⁶⁴ See, e.g., Brest, *State Action and Liberal Theory: A Casenote on Flagg Bros. v. Brooks*, 130 U. PA. L. REV. 1296, 1302 n.21 (1982) (collecting public law critiques); Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1426 n.14 (1982) (collecting private law critiques). An approach that could provide certainty is pure formalism. State action could be deemed to exist whenever the state labels the actor exercising authority an "official agent of the state." All other actors exercising state-enforced authority would be deemed private actors, and their actions would be subject to antitrust review. Such an approach would, however, plainly be unacceptable for the same reason it has proven unacceptable under constitutional state action doctrine: a state could avoid all substantive limits by placing the right label on those exercising the authority in question.

⁶⁵ Chief Justice Burger is the only Justice ever to advocate relying on whether the challenged activity was proprietary or governmental, see *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 418-25 (1978) (Burger, C.J., concurring in the judgment), but the plurality in that case declined to accept his position, see 435 U.S. at 411-13, and the dissent harshly criticized it, see *id.* at 427, 432-34 (Stewart, J., dissenting, joined by White, Blackmun, and Rehnquist, JJ.). Subsequent cases have underscored this rejection by holding state action

notoriously unworkable.⁶⁶ Worse, it bears no relation to the policy concerns relevant to issues of antitrust immunity. The government poses at least as great a threat to competition when regulating as it does when running a business, and it has just as much potential to further the public interest as a business as it does as a regulator.⁶⁷

More generally, the results reached in antitrust state action cases seem hard to square with any normal or intuitive formal notions of state action. As the Court itself acknowledges, its conclusions about what constitutes "state action" under antitrust law are "by no means identical" with its conclusions about what constitutes "state action" under constitutional law.⁶⁸ If anything, the Court understates the degree of inconsistency. The disparate treatment of municipal action — ipso facto state action for constitutional purposes⁶⁹ but state action for antitrust purposes only if sufficiently authorized by state-wide legislation⁷⁰ — is the most glaring divergence. But divergence with constitutional or intuitive formal conceptions of state action pervades the antitrust doctrine, as we will see in the next Part.

II. EXPLAINING THE COURT'S DISTINCTION BETWEEN STATE ACTION AND PRIVATE ACTION UNDER THE PROCESS PARADIGM

Most Supreme Court state action cases address the issue of when restraints resulting from some mix of involvement by state-wide rep-

immunity inapplicable to various exercises of authority that are more regulatory than proprietary. See *Patrick v. Burget*, 486 U.S. 94 (1988) (adjudication of physician competence in a peer review hearing); *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982) (ordinance prohibiting business expansion); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (statutory price-setting authority).

⁶⁶ See Wells & Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073, 1073 & nn.1-8 (1980) (collecting critiques). The distinction breaks down in both directions. First, governments have long engaged in business activities and provided (and often charged for) various consumer services, such as transportation, education, garbage collection, electricity, and medical care. Second, it is hard to think of a governmental activity that has not or could not be performed by private persons. See *Indian Towing Co. v. United States*, 350 U.S. 61, 67-68 (1955). These problems have proven sufficient to force the Court to abandon the governmental-proprietary distinction in numerous fields, including tenth amendment law, see *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545-47 (1985), intergovernmental tax immunity, see *South Carolina v. Baker*, 485 U.S. 505, 523 n.14 (1988), and governmental tort immunity, see W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON TORTS* § 131, at 1053-54 (5th ed. 1984).

⁶⁷ See, e.g., Frug, *Property and Power* (Book Review), 1984 AM. B. FOUND. RES. J. 673, 687-90 (listing ways municipalities can further the public interest as market participants). Any governmental market participation that generated monopoly profits for the public treasury would, moreover, seem indistinguishable from a governmental tax.

⁶⁸ *NCAA v. Tarkanian*, 488 U.S. 179, 194 n.14 (1988).

⁶⁹ See J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* § 12.1(a), at 422 (3d ed. 1986).

⁷⁰ See *supra* pp. 673-74.

representatives and private actors should be immunized from antitrust review. Broadly conceived, this issue covers the waterfront of non-municipal restraints⁷¹ because the actions of state representatives are often initiated and influenced by private action⁷² and, as we saw in Part I, states are necessarily implicated in the restraints of private actors. As we also saw in Part I, neither formal conceptions nor the substantive policies implicated by the paradigm of conflict and accommodation can explain or justify state action doctrine, either in its current or any conceivable form.

Under a paradigm that focuses on the adequacy of the decision-making process, however, this problem is avoided. In particular, as detailed in section A, many features of antitrust state action doctrine that are particularly puzzling under formal conceptions — why some statutes are not state action, why some governmental commands are treated as agreements under the Sherman Act and others are not, and why some official state agents are treated like private actors — become readily explicable once one understands antitrust as embracing the proposition that those with financial interests in restraining competition cannot be trusted to determine which restraints are in the public interest. Section B then argues that this proposition also helps explain tendencies and trends in judicial interpretations of the clear authorization and active supervision requirements that are non-intuitive on formal grounds.

A. Explaining Apparent Anomalies in State Action Doctrine

If a litigant brings a constitutional challenge to a “state statute, . . . state action is obvious, and no formal inquiry into the matter is needed.”⁷³ One might think, given the per se antitrust immunity of state legislatures, that this would be just as obvious under antitrust doctrine. In fact, however, the issue is not at all obvious.⁷⁴ Indeed, in three separate cases the Supreme Court has held that the Sherman Act invalidated state statutes that compelled wholesalers or retailers to adhere to the resale prices set by their suppliers — each time

⁷¹ The immunity accorded municipal restraints is discussed below at pp. 729–38. As will be evident after the discussion there, the analysis in Part II also applies to restraints authorized by the state and resulting from some mix of involvement by municipal officials and private actors.

⁷² See, e.g., Wiley, *supra* note 3, at 731 n.85.

⁷³ L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 18-1, at 1688 (2d ed. 1988) (emphasis in original).

⁷⁴ See, e.g., Fisher v. City of Berkeley, 475 U.S. 260, 265 (1986) (“Legislation that would otherwise be pre-empted . . . may nonetheless survive if it is found to be state action immune from antitrust scrutiny” (emphasis added)).

concluding that the statute was not protected by antitrust's immunity for state action.⁷⁵

In each case the Court concluded that the statute's defect was that it allowed "private parties" (the suppliers) to set the terms of the vertical price restraints.⁷⁶ But it is difficult to see (and the Court never explains) under what formal conceptions this made the statutes delegating the power to these suppliers any less the act of the state. The conclusion that state action was not present is all the more striking when one notes: (1) that each case involved challenges to the imposition of statutory penalties against a noncomplying wholesaler or retailer,⁷⁷ (2) that two of these statutes did not make the decision to set some resale price discretionary, but rather required the supplier to post a fixed resale price,⁷⁸ and (3) that all the statutes did not simply enforce resale agreements independently reached by suppliers and their buyers but rather required wholesalers and retailers to comply with the resale prices unilaterally set by their suppliers.⁷⁹ By comparison, when the Supreme Court faced a constitutional challenge to such a statute, it directly addressed the merits of the constitutional claims, apparently finding the presence of state action so obvious as not to merit discussion.⁸⁰

⁷⁵ See *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 343-45 (1987); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-06 (1980); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). *Schwegmann* invalidated only those portions of the state statute that went beyond the now-repealed exemption provided by the Miller-Tydings Act. See *id.* at 386-95; *infra* note 96.

⁷⁶ See *324 Liquor*, 479 U.S. at 344-45 & nn.6-8; *Midcal*, 445 U.S. at 105-06; *Schwegmann*, 341 U.S. at 389 ("private conduct"); see also *Fisher*, 475 U.S. at 267-69 (explaining *Schwegmann* and *Midcal* in these terms).

⁷⁷ See *324 Liquor*, 479 U.S. at 340 (appealing judicial and administrative enforcement of a suspended license and \$1000 fine); *Midcal*, 445 U.S. at 100 (seeking to enjoin administrative enforcement that could lead to a fine or suspended license); *Schwegmann*, 341 U.S. at 385-86 (appealing a judicial injunction to comply with statute). For the contrasting constitutional position, see, for example, *Shelley v. Kraemer*, 334 U.S. 1, 19-20 (1948), which held that judicial enforcement of a racially restrictive covenant constitutes state action under the Constitution; and *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964), which held that judicial enforcement of tort law also constitutes state action.

⁷⁸ See *324 Liquor*, 479 U.S. at 337-38; *Midcal*, 445 U.S. at 99; see also *Patrick v. Burget*, 486 U.S. 94, 101-06 (1988) (holding that peer review mandated by state statute is not protected by antitrust state action immunity). In contrast, conduct by private parties mandated by statute or regulation is usually deemed state action under constitutional law. See, e.g., *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1411-12 (1989).

⁷⁹ See *324 Liquor*, 479 U.S. at 337-40; *Midcal*, 445 U.S. at 99-100; *Schwegmann*, 341 U.S. at 386-88. In contrast, the finding of constitutional state action in *Shelley v. Kraemer*, which continues to be controversial, see, e.g., *Brest, supra* note 64, at 1323 n.109, because it implies that constitutional review might apply to any private ordering enforced by the state, has been justified on the ground that it at least involved enforcement of a racially restrictive covenant against the wishes of a willing seller and buyer. See *J. NOWAK, R. ROTUNDA & J. YOUNG, supra* note 69, § 12.3, at 433-34.

⁸⁰ See *Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 193-98 (1936)

The strategy used by the Court to deal with these doctrinal problems was not particularly artful. In the antitrust cases, the Court simply ignored the clear state action involved in the statutes it was invalidating and focused its attention on the restraints the statutes were authorizing or mandating. Then the Court made the conclusory assertion that these restraints were "private" (even though mandated and enforced against other nonconsenting businesses by the state) and thus not immune without active state supervision. The state, the Court concluded, fails to provide active supervision (and its statutes become vulnerable to invalidation) when it "simply authorizes price setting and enforces the prices established by private parties" because such authorization merely "cast[s] . . . a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement."⁸¹ But the Court never explained the criteria used to reach its conclusions that the suppliers complying with their statutory obligations to regulate prices were acting in a "private" capacity and that price regulation mandated and enforced by the state was "essentially . . . private." Surely the authority exercised under these statutes, deemed "private regulatory power" by the Court,⁸² bears little resemblance to the type of economic combinations that are traditionally the focus of antitrust law.

Although state action doctrine thus proved malleable enough to exclude these statutes, a far more straightforward approach would have simply asked whether, under the statutory scheme, the person controlling the terms of the restraint (here, the supplier) was financially interested. This is the true dispositive feature of each statute the Court invalidated — each delegated the power to set the terms of vertical price restraints to suppliers financially interested in the resale prices of their products.⁸³ These statutes were not denied immunity because they did not constitute "state action" but because they set up a decisionmaking process that antitrust law views as suspect. Indeed, the Court in several places indicated that it would have viewed the cases differently if the statutes had mandated a fixed markup or if "the State" (presumably through some disinterested state agency) set the prices or reviewed their reasonableness.⁸⁴

(upholding a state statute requiring businesses to sell a brand at the prices set by fair trade contracts whether or not they were parties to the contract).

⁸¹ 324 *Liquor*, 479 U.S. at 344-45 (quoting *Midcal*, 445 U.S. at 105-06).

⁸² *See id.* at 345 n.8 (quoting *Fisher v. City of Berkeley*, 475 U.S. 260, 268 (1986)).

⁸³ Of course, a rich literature supports the proposition that the financial interest of suppliers in resale prices is often procompetitive. *See* sources cited *supra* note 46. It cannot be denied, however, that suppliers have a financial interest and that the argument that this interest is procompetitive has so far failed to persuade the Supreme Court to eliminate the per se rule against vertical price restraints.

⁸⁴ *See* 324 *Liquor*, 479 U.S. at 344 n.6, 345; *Midcal*, 445 U.S. at 105-06 & n.9.

Distinguishing the cases invalidating resale price statutes has also forced the Court into a rather tortured interpretation of what constitutes an agreement under the Sherman Act. Because section 1 of the Act applies only to a "contract, combination, . . . or conspiracy" in restraint of trade,⁸⁵ it requires proving an agreement.⁸⁶ In *Fisher v. City of Berkeley*,⁸⁷ the Court held that this requirement was fully applicable to section 1 suits brought against governmental restraints, and upheld a rent control law on the ground that a unilateral governmental command did not constitute an agreement under the Sherman Act.⁸⁸ The Court rejected claims that the rent control law formed a combination among landlords or between landlords and the city or its officials. "There is," the Court reasoned, "no meeting of the minds here. The owners of residential property in Berkeley have no more freedom to resist the city's rent controls than they do to violate any other local ordinance enforced by substantial sanctions."⁸⁹

But where, one wonders, was the "meeting of the minds" in the cases that invalidated the resale price maintenance statutes? Each statute was struck down under section 1 pursuant to the per se rule against vertical price-fixing agreements⁹⁰ even though it compelled wholesalers and retailers to adhere, whether they agreed or not, to the resale prices set by their suppliers. There was no meeting of the minds between the suppliers and their buyers⁹¹ or between the buyers and the state. Nor was there any meeting of the minds between the state and the suppliers — that indeed was the problem since the Court struck down the statutes on the grounds that the state did not participate in setting the terms of the vertical price restraint.⁹² The *Fisher* Court offered this explanation for the apparent anomaly:

Not all restraints imposed upon private actors by government units necessarily constitute unilateral action outside the purview of § 1. Certain restraints may be characterized as "hybrid," in that nonmarket

⁸⁵ 15 U.S.C. § 1 (1988).

⁸⁶ See, e.g., *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761, 763 (1984).

⁸⁷ 475 U.S. 260 (1986).

⁸⁸ See *id.* at 266–67. Although *Fisher* involved a municipal ordinance, the Court made clear that the doctrine it was announcing would apply equally to the unilateral commands of state or local governments. See *id.* at 265–70.

⁸⁹ *Id.* at 267 (citation omitted).

⁹⁰ See 324 *Liquor Corp. v. Duffy*, 479 U.S. 335, 341–43 (1987); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 102–03 (1980); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 386 (1951).

⁹¹ The Court has long held that there is no agreement under the Sherman Act when a supplier announces resale prices and refuses to deal with buyers who fail to comply. See, e.g., *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984). In such cases, it concludes, no "meeting of the minds" between the buyer and supplier exists. *Id.* at 764 & n.9.

⁹² See generally P. AREEDA & H. HOVENKAMP, *supra* note 22, ¶ 209.1, at 88–89, 93–94, 95 (concluding that there was no agreement in *Midcal*, *Schwegmann*, or 324 *Liquor*).

mechanisms merely enforce private marketing decisions. Where private actors are thus granted "a degree of private regulatory power," the regulatory scheme may be attacked under § 1.⁹³

The Court then distinguished the statutes invalidated in the resale price maintenance cases as involving hybrid restraints because they gave suppliers the exclusive discretion to select price levels.⁹⁴ The rent control law, in contrast, "places complete control over maximum rent levels exclusively in the hands of the Rent Stabilization Board."⁹⁵ This difference certainly distinguishes the cases. But it has no apparent bearing on whether a meeting of the minds had occurred because in each case the persons bound by the price restraint were subject to terms unilaterally imposed by someone else.

The key was thus not whether an agreement was reached but the identity of the person or entity setting the terms of the price restraint.⁹⁶ When a financially interested supplier unilaterally sets the prices imposed by statutory authority on others, the Court is willing to find an agreement in order to subject the restraint to antitrust scrutiny.⁹⁷ But when a financially disinterested "government official" or agency like a rent control board sets the prices, the Court is unwilling to find an agreement under the Sherman Act. Again, the Court could have achieved the same results with far less doctrinal strain had it simply asked whether the party setting the terms of the restraint was financially interested.

More direct support for the proposition that the scope of antitrust review depends on the financial interest of the party setting the terms of the restraint is provided by *Goldfarb v. Virginia State Bar*⁹⁸ and *Continental Ore Co. v. Union Carbide & Carbon Corp.*⁹⁹ *Goldfarb*

⁹³ *Fisher*, 475 U.S. at 267-68 (citations omitted).

⁹⁴ *See id.* at 268-69.

⁹⁵ *Id.* at 269.

⁹⁶ The Court's manipulation of the concept of an agreement is highlighted by the formal inconsistency with its prior analysis in *Schwegmann*. The first case to hold that the state action doctrine did not immunize a resale price statute, *Schwegmann* also presented the question whether the restraint was immune under the now-repealed Miller-Tydings Act, ch. 690, tit. 8, 50 Stat. 673, 693 (1937), repealed by Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801, which then immunized "contracts or agreements" fixing resale prices. The Court there concluded that the restraint was *not* an agreement because the retailers had not agreed to the resale prices set by suppliers under the statute. *See Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 387-90 (1951). Thus, the same restraint deemed a non-agreement under the Miller-Tydings Act satisfies the agreement requirement of the Sherman Act under current doctrine.

⁹⁷ The Court made this clear in 324 *Liquor*, a post-*Fisher* decision, when it rejected the argument that statutory vertical price restraints were not agreements under § 1 of the Sherman Act on the ground that the statute granted a degree of private regulatory authority to private actors. *See 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345 n.8 (1987) (citing *Fisher*).

⁹⁸ 421 U.S. 773 (1975).

⁹⁹ 370 U.S. 690 (1962).

involved an antitrust suit against the Virginia State Bar Association for issuing an ethical opinion requiring attorneys to adhere to a minimum fee schedule. Even though the Bar was a statutorily designated state agency granted authority by the state to issue ethical opinions,¹⁰⁰ the Court held state action immunity inapplicable. It reasoned: "The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members. The State Bar . . . has voluntarily joined in what is essentially a private anticompetitive activity"¹⁰¹ In *Continental Ore*, the antitrust defendant had been appointed an agent of the Canadian government and delegated "discretionary agency power to purchase and allocate to Canadian industries all vanadium products."¹⁰² The Court nonetheless reversed two lower court holdings that the defendant's exercise of its governmental authority to exclude competitors from selling vanadium on the Canadian market was governmental action outside the purview of the Sherman Act. It found state action immunity inapplicable because the restraint had not been approved by any "official within the structure of the Canadian government."¹⁰³ The governmental agent's exercise of governmental authority to exclude competitors was apparently not deemed the act of an official, but rather "private commercial activity."¹⁰⁴

In short, both *Goldfarb* and *Continental Ore* refused to treat the exercise of governmental authority by official agents as state action immune from antitrust review because the action was deemed essentially "private activity" under the circumstances. Although the Court was hardly clear about what factors led it to label this official governmental activity "private," both cases involved restraints imposed by actors financially interested in restricting competition. The Court seemed to allude to this fact when it stressed in *Goldfarb* that the Virginia State Bar was restraining trade "for the benefit of its members"¹⁰⁵ and when it stated in *Continental Ore* that the activity was "commercial."¹⁰⁶ Furthermore, both cases stated that the challenged restraint would have been immune if it had been approved by certain other governmental actors, none of whom had any apparent financial interest.¹⁰⁷

¹⁰⁰ See *Goldfarb*, 421 U.S. at 776 & n.2, 789-90.

¹⁰¹ *Id.* at 791-92 (citations omitted).

¹⁰² *Continental Ore*, 370 U.S. at 703 n.11. To be precise, the governmental agent was a corporate subsidiary of the defendant. See *id.* at 692.

¹⁰³ *Id.* at 706-07.

¹⁰⁴ *Id.* at 707.

¹⁰⁵ *Goldfarb*, 421 U.S. at 791.

¹⁰⁶ *Continental Ore*, 370 U.S. at 707.

¹⁰⁷ See *Goldfarb*, 421 U.S. at 790-91; *Continental Ore*, 370 U.S. at 706. *Goldfarb* also

The view that *Goldfarb* and *Continental Ore* embody the principle that financially interested action is always "private action" subject to antitrust review appears to be confirmed by the Court's recent opinion in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*¹⁰⁸ *Allied Tube* addressed the intersection of antitrust state action doctrine with the *Noerr* doctrine, which provides antitrust immunity to efforts to petition the government.¹⁰⁹ The defendant in *Allied Tube* claimed petitioning immunity for its efforts to influence a standard-setting association to adopt an electrical code that excluded its competitor's product because that association's standards were regularly adopted into law by state and local governments. Rejecting this claim, the Court stressed that although petitioning immunity was absolute when the source of the restraint causing the antitrust injury is governmental action,¹¹⁰ the plaintiff's damages were predicated not on the restraints resulting from the incorporation of the association's code into law, but rather from the effect the association's code had of its own force in the marketplace.¹¹¹

What is interesting for our purposes is the Court's reasoning in rejecting the claim that the defendant was entitled to absolute immunity for any antitrust injury resulting from the association's code because the association was so influential — its code was routinely adopted into law with no or little change¹¹² — that the association should itself be regarded as a governmental actor. "Whatever *de facto* authority the Association enjoys," the Court reasoned, "no official authority has been conferred on it by any government, and the decisionmaking body of the Association is composed, at least in part, of persons with economic incentives to restrain trade."¹¹³ Significantly, the Court supported this proposition by citing to the discussions in

supported its conclusion that state agency status did not shield the state bar from antitrust review by citing *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973), which held that a state board composed of self-employed optometrists would violate due process by conducting hearings on whether to revoke the licenses of competitors. See *Goldfarb*, 421 U.S. at 791. This reliance is instructive for two reasons. First, *Gibson* explicitly based its holding on the pecuniary interest of the board's members in excluding competitors. This suggests that the *Goldfarb* Court was also focusing on financial interest and viewed it as the factor that rendered the state agency "private" for antitrust purposes. Second, comparing *Goldfarb* to *Gibson* underscores the divergence of constitutional and antitrust state action doctrine: the financial interest that prevents state agency action from being treated as state action for antitrust purposes does not prevent it from being treated as state action for constitutional purposes. In fact, it forms the basis for a constitutional violation only possible if state action is present.

¹⁰⁸ 486 U.S. 492 (1988).

¹⁰⁹ See *id.* at 499-502.

¹¹⁰ See *id.* at 499.

¹¹¹ See *id.* at 498 & n.2, 500.

¹¹² See *id.* at 495-96.

¹¹³ *Id.* at 501.

Goldfarb and *Continental Ore* mentioned above, thus suggesting that the Court shares the understanding of those cases pressed here.¹¹⁴ Indeed, since the clearest lesson of *Goldfarb* and *Continental Ore* is that conferring "official" authority on otherwise "private" actors does not render their exercise of that authority "state action" immune from antitrust review, the combination of these three cases suggests that the only real test is whether the actor controlling the terms of the restraint had a financial incentive to restrain competition.¹¹⁵ Whether the authority being exercised to restrain trade has been labeled "official" is irrelevant, and the reference in *Allied Tube* to the lack of "official authority" thus seems unnecessary to its reasoning.¹¹⁶

Why should the Court want to distinguish state action from private action based on the economic incentives of the person restraining trade? The Court's answer is based on its unwillingness to trust actors with such incentives to restrain trade in the public interest. "We may presume, absent a showing to the contrary, that [a government] acts

¹¹⁴ See *id.*

¹¹⁵ Later in *Allied Tube* the Court suggested that political accountability might sometimes be relevant, stating that "where, as here, the restraint is imposed by persons unaccountable to the public and without official authority, many of whom have personal financial interests in restraining competition, we have no difficulty concluding that the restraint has resulted from private action." *Id.* at 502. As discussed in Part IV, political accountability may in fact be relevant to determining whether financially disinterested restraints are immune from antitrust scrutiny. See *infra* pp. 738-46. It seems unlikely, however, that the Court intended to suggest that political accountability might be sufficient to render a financially interested actor immune from antitrust review, particularly since the Court mentions the two other factors, but not the lack of accountability, when it initially concludes the association is private. This issue is explored below at pp. 712-17, which argues that accountable but financially interested actors should not be immune and collects case law supporting that proposition.

¹¹⁶ The Court provided further evidence of this with its decision in *Washington State Electrical Contractors Association v. Forrest*, 488 U.S. 806 (1989) (mem.), *vacating and remanding* 839 F.2d 547 (9th Cir. 1988). *Forrest* involved an antitrust suit brought against a minimum wage regulation promulgated by a state council. The council was officially established by statute and exercising state-delegated regulatory authority, but six of its seven voting members were representatives of employees and employers, see *Washington State Elec. Contractors Ass'n v. Forrest*, 839 F.2d 547, 549 (9th Cir. 1988), *vacated and remanded*, 488 U.S. 806 (1989), and thus financially interested. Although the Ninth Circuit recognized that no active supervision would be required if the state council was a state agency for purposes of state action doctrine, the court "perceive[d] certain problems when a state agency is staffed with individuals who represent private interests." *Id.* at 553. It then held that in any event the council was immune because it was adequately supervised by various other officials. See *id.* at 553-55. The Supreme Court vacated and remanded for reconsideration in light of *Patrick v. Burget*, 486 U.S. 94 (1988), which clarified the showing necessary to show active supervision. See *Forrest*, 488 U.S. at 806. This decision may have simply reflected the Court's desire to clean up the Ninth Circuit's active supervision case law. But it is often the practice of the Court to deny certiorari rather than vacate and remand for reconsideration in cases where it is confident the judgment is correct. Because the judgment would have clearly been correct if the state council was entitled to the same immunity as typical state agencies, the Court's decision to vacate and remand is consistent with the view that financial interests disable an entity from being treated as a state agency for the purposes of state action doctrine.

in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf."¹¹⁷ The presumption that the private party is acting on its own behalf is revealing because it must presuppose that the party has interests at issue that can be advanced by restraining trade.

B. Explaining Shifts and Trends in State Action Doctrine

The thesis that concerns about financially interested restraints are what really drives state action case law also conforms with certain tendencies and shifts in judicial interpretations of the clear authorization and active supervision requirements. These interpretations often have little to do with intuitive linguistic understandings of what "clear authorization" and "active supervision" might mean.

It has, for starters, become increasingly evident that nothing has to be very clear or affirmative about state authorization to immunize regulation by a disinterested state agency. In *Southern Motor Carriers Rate Conference, Inc. v. United States*,¹¹⁸ the Court held that the clear authorization test does not require that an entity representing the state as sovereign authorize the specific restraint being challenged or articulate an intention to permit anticompetitive effects flowing from that restraint. It is enough, the Court concluded, if the state as sovereign demonstrated a clear but general intention "to displace competition in a particular field with a regulatory structure."¹¹⁹

The Court's decision to soften the clarity of the authorization needed to immunize an agency restraint was directly tied to its view that legislatures could not adequately regulate without delegating open-ended authority to state agencies. It reasoned:

If more detail than a clear intent to displace competition were required of the legislature, States would find it difficult to implement through regulatory agencies their anticompetitive policies. Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature. Requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness.¹²⁰

¹¹⁷ *Allied Tube*, 486 U.S. at 501 (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 45 (1985)).

¹¹⁸ 471 U.S. 48 (1985).

¹¹⁹ *Id.* at 64. Specifically, a Mississippi statute authorizing a state agency to set "just and reasonable" trucking rates was sufficient authorization to immunize a scheme whereby the state agency permitted trucking companies to agree collectively on the rates they would submit to the agency even though the statute itself did not authorize such collective ratemaking. See *id.* at 63-66.

¹²⁰ *Id.* at 64.

The Court is certainly correct on this point: a rich line of administrative law cases and scholarship establish the practical necessity of allowing broad legislative delegation to agencies.¹²¹ But if the scope of agencies' immunity is to be coextensive with the rationale for legislative delegation — even when that rationale includes agencies' ability "to deal with problems unforeseeable to, or outside the competence of, the legislature"¹²² — then the clear authorization requirement converges on the simpler test I suggest really drives the Court's conclusions. Namely, antitrust review should not apply whenever a financially disinterested state agency regulates.¹²³

Indeed, antitrust courts' eagerness to immunize disinterested state agencies has been so great that they have found clear authorization for agency action even when the state supreme court has found the action "unauthorized" by state law,¹²⁴ and have refused to consider evidence that the state officials abused their authority in bad faith.¹²⁵ The result represents sound policy. State administrative law, not antitrust review, is the proper remedy for preventing state agencies from exceeding or abusing their authority.¹²⁶ States can always provide further remedies if they find them necessary. Moreover, antitrust review of state agencies may thwart rather than aid the state administrative scheme because it will tempt parties aggrieved by state agency action to forgo state administrative review in hopes of winning treble damages in an antitrust suit.¹²⁷ Or the threat of antitrust liability may discourage compliance with state regulation pending state judicial review and a definitive determination on whether the regulation is authorized.¹²⁸ Notwithstanding the soundness of the result as a matter of policy, this doctrinal stretching of the clear authorization requirement to immunize actions that are in fact "unauthorized" and to find authorization for bad faith abuses of authority suggests that clear authorization has never really been the true test. The tendency of

¹²¹ See, e.g., *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398–99 (1940); Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 82, 91–99 (1985) (cataloging reasons for allowing broad delegation).

¹²² *Southern Motor Carriers*, 471 U.S. at 64.

¹²³ Since all that must be clearly shown under *Southern Motor Carriers* is a general intent to create a regulatory agency, it would be remarkable if a neutral state agency ever lacked sufficient authorization.

¹²⁴ See *Lease Lights, Inc. v. Public Serv. Co.*, 849 F.2d 1330, 1333–35 (10th Cir.), cert. denied, 488 U.S. 1019 (1988).

¹²⁵ See, e.g., *Llewellyn v. Crothers*, 765 F.2d 769, 774 (9th Cir. 1985).

¹²⁶ See P. AREEDA & H. HOVENKAMP, *supra* note 22, ¶ 212.3b, at 145–49.

¹²⁷ See *Llewellyn*, 765 F.2d at 774–75. Piercing immunity only when regulators act in bad faith would not be much of a limitation because plaintiffs could still raise antitrust suits against any regulatory action by challenging the subjective motivations of the regulators.

¹²⁸ See *Lease Lights*, 849 F.2d at 1334.

courts to demand much clearer authorization for financially interested restraints suggests the same.¹²⁹

As for the active supervision prong of the *Midcal* test, it has undergone a dichotomization and shift in meaning that also seems to be bringing the doctrine closer to the underlying process concerns. The dichotomization has resulted from the Court's suggestion that the active supervision requirement is probably inapplicable to state agencies,¹³⁰ a suggestion with which the lower courts have virtually all agreed.¹³¹ The reason for this doctrinal development was again based on the different incentive structure. "Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State."¹³²

At the same time that courts have been freeing state agencies from the active supervision requirement, the Court has, in *324 Liquor Corp. v. Duffy*¹³³ and *Patrick v. Burget*,¹³⁴ tightened up the supervision required over financially interested actors. Indeed, to term this prong a "supervision" requirement is a misnomer; what is actually now required is active control. "The active supervision prong of the *Midcal* test requires," the *Patrick* Court held, "that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy."¹³⁵ Procedural review will not suffice.¹³⁶ Nor will other forms of "state involvement or monitoring" that do not "exer[t] any significant control over" the terms of the restraint" being challenged.¹³⁷ The Court justified the stringency of this requirement in terms that, once again, seem consonant with concerns about financially interested decision-making.¹³⁸ "Absent such a program of supervision, there is no realistic

¹²⁹ See, e.g., *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592-95 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 790-91 (1975); *Northern Secs. Co. v. United States*, 193 U.S. 197, 245-46 (1904). Commentators also seem to vary the intensity of authorization demanded according to the financial interest of the actor. Compare 1 P. AREEDA & D. TURNER, *supra* note 41, ¶ 214a, at 80-82 (stressing the need for clear authorization in a discussion of cases that involved financially interested restraints) with P. AREEDA & H. HOVENKAMP, *supra* note 22, ¶ 212.3b, at 145-49 (stressing the need to interpret the authorization requirement loosely in a discussion of cases that involved restraints imposed by neutral state agencies).

¹³⁰ See *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 n.10 (1984).

¹³¹ See P. AREEDA & H. HOVENKAMP, *supra* note 22, ¶ 212.7, at 166 (collecting cases).

¹³² *Hallie*, 471 U.S. at 47.

¹³³ 479 U.S. 335, 344-45 & n.7 (1987).

¹³⁴ 486 U.S. 94, 100-05 (1988).

¹³⁵ *Id.* at 101; see also *id.* ("[T]he active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct.").

¹³⁶ See *id.* at 101-05; *324 Liquor*, 479 U.S. at 344-45 & n.7.

¹³⁷ *Patrick*, 486 U.S. at 101 (quoting *324 Liquor*, 479 U.S. at 345 n.7).

¹³⁸ In both *Patrick* and *324 Liquor*, the private persons controlling the challenged restraints

assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests."¹³⁹ In short, the active supervision requirement has shifted into a requirement that a state official control the terms of the restraint. Moreover, the Court's rationale for this control requirement suggests that the state official must not have "individual interests" that might lead her to sacrifice the public interest.

The importance of this doctrinal evolution can be seen by comparing the level of control required under the active supervision prong with the level of control that led the Court in *Hoover v. Ronwin*¹⁴⁰ to conclude that the challenged restraint was not that of the supervised party but rather that of the supervising state entity. In *Hoover*, a person who failed his state bar exam sued the state-appointed grading committee, which was composed of practicing attorneys, on the theory that the committee was grading on a curve in order to limit competition by restricting the number of entering lawyers.¹⁴¹ The Court concluded that although the suit was brought against the committee, the challenged restraint was actually that of the state supreme court and thus ipso facto immune under the state action doctrine. Three grounds were cited for this conclusion: (1) the committee had to file the grading formula with the state supreme court thirty days prior to the examination, (2) the state supreme court considered and rejected the plaintiff's challenge to this grading formula, and (3) the state supreme court made the final decision over whether or not to admit bar applicants.¹⁴² This, the Court found, meant that the state supreme court knew and controlled the number of attorneys permitted to enter the market, and thus controlled the terms of the restraint being challenged.¹⁴³

The Court's reading of the facts may seem naive — a strong argument can be made that bar exam committees exercise de facto

were financially interested. In *Patrick* they were doctors who competed with the doctor whose hospital privileges they terminated. See *id.* at 96–98. In *324 Liquor* they were wholesalers with financial interests in the resale prices of their retailers. See 479 U.S. at 337–40.

¹³⁹ *Patrick*, 486 U.S. at 101. The Court also quoted *Hallie* to the effect that "[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State" and that a "private party . . . may be presumed to be acting primarily on his or its own behalf." *Id.* at 100 (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 45, 47 (1984)).

¹⁴⁰ 466 U.S. 558 (1984).

¹⁴¹ See *id.* at 564–65, 569–70 & n.19.

¹⁴² See *id.* at 561–64 & n.11, 572–73, 575–78.

¹⁴³ "Even if Committee members had decided to grade more strictly, under the grading formula approved by the court, for the purpose of reducing the total number of lawyers admitted to practice, the court knew and approved the number of applicants. This was the definitive action." *Id.* at 576 n.28 (emphasis in original); see also *id.* at 578 n.31 (emphasizing that the plaintiff did not claim a conspiracy against himself in particular but solely a "conspiracy to limit the number of applicants admitted").

control over bar admissions and that state supreme courts make little use of their formal authority.¹⁴⁴ But the important point for our purposes is the following. If the level of control exercised in *Hoover* sufficed to make the restraint that of the state supreme court, then whenever a private party could establish active supervision under *Patrick* and *324 Liquor*, a court could just as well decide that the restraint was not that of the private party but that of the neutral state agency that controlled/supervised its terms. Accordingly, the Court should dispense with the potentially misleading supervision requirement altogether.

In short, given the generality of authorization satisfying the clear authorization requirement, the control needed to satisfy the active supervision requirement, and the Court's methodology for determining which actor is responsible for a restraint, its doctrine boils down to a simple rule: restraints by state agencies are immune and restraints by private parties are not. If one also takes into account the criteria by which the Court determines whether or not an official state agency will be treated as a private party, this rule can be restated more precisely: state action immunity applies only when a financially disinterested state official controls the terms of the challenged restraint.

Under any rubric, the problem of determining the degree of control needed to immunize restraints initiated by financially interested parties is a difficult one. But this difficulty can only be eased if decisions are explicitly justified and guided by the underlying concerns about the decisionmaking process behind the restraint. Pure formal control should not suffice or else the state could through inaction and rubber-stamping accomplish a de facto delegation that would be void de jure. Rather, a restraint would seem immune only if the financially disinterested actor whom antitrust law does trust to restrain competition not only knows about and has the power to control the restraint but also makes a substantive decision in favor of the restraint's terms.¹⁴⁵

¹⁴⁴ See *id.* at 589 n.12 (Stevens, J., dissenting).

¹⁴⁵ See *Patrick v. Burget*, 486 U.S. 94, 100-01 (1988) (stressing the need to have a state official determine whether the anticompetitive act accords with state policy); see also *Fisher v. City of Berkeley*, 475 U.S. 260, 269 (1986) (holding open the possibility that privately set restraints "ostensibly under the absolute control of government officials" might be subject to antitrust scrutiny). *Cantor* also seems to establish the proposition in text. *Cantor* involved a claim that an electric utility's practice of distributing free light bulbs created an illegal tie between light bulbs and electricity sales that foreclosed competition in the unregulated light bulb market. The Court held that even though the practice was described in a rate tariff approved by the state agency regulating electricity sales, the utility was not immune from antitrust liability because under the circumstances agency approval did not indicate that state policy favored the practice but rather that it was neutral on the issue. See *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 581-85, 594 (1976); *id.* at 604-05 (Burger, C.J., concurring in part); I P. AREEDA & D. TURNER, *supra* note 41, ¶ 214, at 82-83, 87-89.

Although Professors Areeda and Turner state that allegations of routine rubberstamping should ordinarily not oust *Parker* immunity, see *id.* ¶ 213c, at 75, they agree that a privately

It is only when the financially disinterested state representative has made such a substantive decision that there is any "realistic assurance" that the approved restraint is in the public interest.¹⁴⁶

III. EVALUATING THE PROCESS VIEW OF STATE ACTION DOCTRINE

We are now in a position to articulate a rule of decision for the Supreme Court's state action doctrine on nonmunicipal restraints that has more predictive force than either formal notions of state action or the clear authorization/active supervision test. Namely, the rule is that an anticompetitive restraint is immune from antitrust liability whenever a financially disinterested and politically accountable actor controls and makes a substantive decision in favor of the terms of the restraint. We are also in a position to describe the underlying policy rationale in terms more satisfactory than the accommodation of inherently conflicting interests. Namely, the rationale is that antitrust law embraces the principle that financially interested parties cannot be trusted to restrain trade in ways that further the public interest.¹⁴⁷ From these descriptive claims, at least one normative conclusion follows: the Court should recognize the process view that actually underlies its doctrine and, if it is going to decide cases based on that view, explicitly incorporate it into a rule of decision that better explains and fits its case law.

The larger normative questions, however, still remain: is the Court's implicit process view correct as a matter of statutory interpretation and wise as a matter of policy? I argue that it is. Section A presents the initial argument that the Court's process view is supported by the legislative history and relevant policy considerations,

set restraint cannot be immunized by agency inaction, *see id.* ¶ 213f, at 77-79, or even by agency approval unless the agency considers the anticompetitive effects of the restraint and makes an affirmative policy decision that the restraint is desirable as a matter of state policy, *see id.* ¶ 214, at 80-89. They thus apparently mean only to exclude allegations that agencies lacked an adequate basis for their substantive decisions to restrain competition, *see id.* at 85-86, or have been "captured" by financially interested parties. I agree that state action immunity requires only that a neutral state agency actually made a substantive decision in favor of the challenged restraint and that the doctrine thus excludes challenges to the adequacy of a neutral agency's consideration of anticompetitive effects. I also agree, for reasons explained below at pp. 717-29, that courts should not deny antitrust immunity because of "capture."

¹⁴⁶ *Patrick*, 486 U.S. at 101.

¹⁴⁷ The requirement of financial interest does not exclude nonprofit corporations, for nonprofit status does not preclude firms from reaping financial profits by restraining trade. It only disables them from distributing those profits to investors. *See Hansmann, Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 501 (1981). The Court has thus correctly held that nonprofit corporations are fully subject to the Sherman Act. *See NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 100 n.22 (1984). Nonprofit corporations may, however, in some instances be exempted from the Robinson-Patman Act, *see* 15 U.S.C. § 13(c) (1988), or the Federal Trade Commission Act, *see id.* § 44.

and shows how current doctrine channels collective resource allocation decisions into either a competitive or political process that each provides its own assurance that the resulting allocation advances the public interest. I then evaluate and reject three critiques of current state action doctrine that seem applicable to the process view I attribute to the Court. Section B addresses the claim that the state's (greater) power to restrain trade directly must or should include the (lesser) power to delegate restraint authority to financially interested actors. Section C discusses the arguments that any initial financial interest is rendered irrelevant by the availability of disinterested state processes for correcting restraints and by consumers' ability to exit states where such restraints are allowed. Finally, section D assesses the theory that interest group "capture" renders meaningless the nominal disinterest of politically accountable actors and that antitrust state action doctrine reflects, and should directly incorporate, the Court's efforts to correct such capture.

Although sections B, C, and D are structured around the various major critiques, the refutation of these critiques also forms a major portion of the affirmative argument for the process view of current doctrine. This is intentional, for it is misleading to judge any decisionmaking process by its conformity to some abstract ideal. The relevant question is not whether a given decisionmaking process has defects but whether it is worse than other processes we could frame with different legal rules. My argument is thus based not on sweeping (and naive) claims about the inherent reliability of the processes framed by current doctrine but on the more limited claim that those processes are preferable, both as a matter of policy and statutory interpretation, to the alternative processes implicit in the various critiques.

A. Distrusting Financially Interested Decisionmaking

The legislative history of the Sherman Act amply supports the view that antitrust embraces the premise that those with financial interests in restraining competition cannot be trusted to do so without judicial review. Of course, one hesitates in claiming to have found any fixed meaning in a legislative history that has been read to encompass such diverse purposes as economic efficiency (often meaning wealth-maximization even at the sacrifice of consumer welfare),¹⁴⁸ consumer welfare (often meaning the protection of consumer surplus even at the sacrifice of efficiency),¹⁴⁹ or general fairness criteria and the importance of deconcentration for political and social reasons

¹⁴⁸ See, e.g., R. BORK, *THE ANTITRUST PARADOX* 90-91, 110-12 (1978).

¹⁴⁹ See, e.g., Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 *HASTINGS L.J.* 65, 74-77, 82-106, 142-51 (1982).

(sometimes meaning the protection of small businesses at the expense of both consumers and efficiency).¹⁵⁰ The truth is that the legislative history is remarkably fuzzy about the standards Congress expected judges to use in policing restraints on competition. Indeed, the statements of congressmen in debating the Sherman Act repeatedly evidence an express intent to delegate the formulation of such standards to the courts.¹⁵¹

But the issue here does not require using the legislative history to derive the *standards* that antitrust courts should use in evaluating the restraints that fall within the scope of antitrust review. Rather, it requires using the legislative history to determine which *type* of decisionmaking process the legislators deemed sufficiently untrustworthy to need policing under judicially applied (and developed) antitrust standards.¹⁵² However ambiguous the legislative history is on the former issue, it is resoundingly clear on the latter: Congress had concluded that those who derived financial advantage from restraining competition were likely to do so in ways that harmed the public interest.

The Sherman Act was directed at one central evil. Businesses were combining to restrain competition in order to charge high rates (or pay low ones) and reap monopoly profits.¹⁵³ Although Congress clearly felt this had to be stopped, the legislative history provides little to indicate that Congress viewed regulation of competition as inherently unwise and contains no criticism of any governmental restraints on competition. Indeed, the most relevant passage suggests precisely the opposite.¹⁵⁴

¹⁵⁰ See, e.g., Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1053-58 (1979).

¹⁵¹ See 21 CONG. REC. 2460 (1890) (remarks of Sen. Sherman) ("I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case."); *id.* at 4099 (Rep. Bland); *id.* at 4089 (Rep. Culberson); *id.* at 3148 (Sen. Edmunds); *id.* at 2558 (Sen. Turpie). For similar comments by the principal drafter of §§ 1-2 of the Sherman Act, see Edmunds, *The Interstate Trust and Commerce Act of 1890*, 194 N. AM. REV. 801, 813 (1911).

¹⁵² Cf. Easterbrook, *Statutes' Domain*, 50 U. CHI. L. REV. 533, 540-43 (1983). I differ from Easterbrook, who treats a statute's domain as effectively unlimited when it delegates "common law" authority to judges, *see id.* at 544-47, in that I believe that the Sherman Act gives judges common law authority but limits its domain to devising standards for judging anticompetitive restraints by financially interested actors.

¹⁵³ See 21 CONG. REC. 4101 (1890) (remarks of Rep. Heard); *id.* at 1768 (Sen. George); *id.* at 138 (Sen. Turpie); 20 CONG. REC. 1457-58 (1889) (Sen. Jones); Antitrust Planks of the Democratic Party Platform (June 5, 1888) and the Republican Party Platform (June 19, 1888) [hereinafter Antitrust Planks], reprinted in T. MCKEE, *THE NATIONAL CONVENTIONS AND PLATFORMS OF ALL POLITICAL PARTIES 1789-1905*, at 235, 241 (1906).

¹⁵⁴ See 21 CONG. REC. 2459-60 (1890) (remarks of Sen. Sherman) (quoting with approval opinions suggesting that the states could create monopolies but that companies could not usurp privileges not conferred by law by combining into one on their own).

What functional distinction did Congress perceive between state and business restraints? The key seems to be that unlike governments, which often represented both those benefited and those harmed by a restraint on competition, the trusts and business corporations restraining trade represented the financial interests of investors who derived a financial benefit from the restraints at the expense of other nonrepresented interests. As Senator Hoar, a member of the Senate Judiciary Committee that drafted the final version of the Sherman Act,¹⁵⁵ put it:

When . . . we are dealing with one of . . . the combinations aimed at chiefly by this bill, we are dealing with a transaction the only purpose of which is to extort from the community, monopolize, segregate, and apply to individual use, for the purposes of individual greed, wealth which ought properly and lawfully and for the public interest to be generally diffused over the whole community.¹⁵⁶

To this form of unilateral wealth redistribution, Congress was uniformly hostile. "[N]o class of persons in this country has any right to be enriched by indirect means at the expense of the many," declared Senator Jones.¹⁵⁷ Moreover, the ability of business combinations to profit by externalizing the costs of their activities onto others convinced Congress that many of these combinations and activities were not productive or economically efficient.¹⁵⁸ Congress delegated to the courts the task of sorting the combinations that should be allowed from those that should be condemned. But nowhere did it suggest a similar hostility, suspicion, or willingness to authorize broad judicial regulation of restraints on competition by decisionmakers who did represent all affected interests.

Instead, it was the financial incentives of the business combinations targeted by the Sherman Act that were stressed, again and again, in the legislative history. Congressmen repeatedly referred to the "greed"¹⁵⁹ of trusts and business combinations in "enriching" them-

¹⁵⁵ See I. E. KINTNER, *THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES* 23 n.1.151 (1978).

¹⁵⁶ 21 CONG. REC. 2728 (1890).

¹⁵⁷ 20 CONG. REC. 1458 (1889); see also sources cited *infra* notes 158, 166-67.

¹⁵⁸ The remarks of Representative Heard are instructive:

[Business combinations] extort millions from the citizens of this Republic without adding one cent of value to our productions or one iota of increase to our prosperity. In fact, the very object of these giant schemes . . . is not to increase the volume of supply, and thus less[e]n the cost of any useful commodity, but rather to repress, reduce, and control the volume of every article that they touch, so that the cost to consumers is increased while the expenditure for production is lessened, and thereby their profit secured.

21 CONG. REC. 4101 (1890). For similar statements, see *id.* at 4098 (Rep. Taylor); *id.* at 2457 (Sen. Sherman).

¹⁵⁹ 21 CONG. REC. 2728 (1890) (remarks of Sen. Hoar); 20 CONG. REC. 1457 (1889) (Sen. Jones).

selves,¹⁶⁰ to their "robbing"¹⁶¹ and "fleecing" the public,¹⁶² and to their "extortion"¹⁶³ of money out of the public's "pockets."¹⁶⁴ Not once did a congressman condemn a restraint imposed by financially disinterested actors.¹⁶⁵

The reason for this focus on financial interest was plain. Although Congress nowhere suggested that it categorically viewed restraints on competition as against the public interest, it left little doubt that it viewed the financial interest of business combinations as disabling them from determining when the public interest might be advanced by less competition.¹⁶⁶ As Senator Sherman stated in explaining the problems with the combinations his bill was meant to combat:

¹⁶⁰ 20 CONG. REC. 1458 (1889) (remarks of Sen. Jones); Antitrust Planks, *supra* note 153, at 235; *cf.* 21 CONG. REC. 2457 (1890) (Sen. Sherman) (attacking combinations that "increase the profits of the producer at the cost of the consumer").

¹⁶¹ 21 CONG. REC. 5959 (1890) (remarks of Rep. Anderson); *id.* at 4101 (Rep. Heard); *id.* at 4098 (Rep. Taylor); *id.* at 2646 (Sen. Reagan); *id.* at 2614 (Sen. Coke); *id.* at 1766 (Sen. George); 20 CONG. REC. 1457-58 (1889) (Sen. Jones); Antitrust Planks, *supra* note 153, at 235.

¹⁶² 21 CONG. REC. 1766 (1890) (remarks of Sen. George); 20 CONG. REC. 1459 (1889) (Sen. George); *cf. id.* at 2602 (Sen. George) (stressing the need to protect the public from being "plundered" by business combinations).

¹⁶³ *Id.* at 4101 (remarks of Rep. Heard); *id.* at 2461 (Sen. Sherman quoting Sen. George); *id.* at 1768 (Sen. George).

¹⁶⁴ *Id.* at 1457-58 (remarks of Sen. Jones); 21 CONG. REC. 2460 (1890) (Sen. Sherman).

¹⁶⁵ Indeed, the only congressional discussion of a financially disinterested restraint imposed by politically unaccountable parties suggests that Congress did not intend the Sherman Act to cover such restraints. *See infra* note 337 and accompanying text.

¹⁶⁶ The legislative history is ambiguous on whether the Sherman Act was intended to cover financially interested combinations by labor unions and farmers' associations. Some congressmen argued that such combinations should not be covered because they were needed to combat business combinations. *See* 21 CONG. REC. 2606 (1890) (remarks of Sen. Stewart); *id.* at 2561 (Sen. Teller). Others argued that, since the Act would prohibit business combinations, it ought to prohibit the labor and agricultural combinations opposed to business combinations as well. *See, e.g., id.* at 2726-27 (Sen. Edmunds); *id.* at 2562 (Sen. Reagan). Although at one point the Senate, meeting as a Committee of the Whole, passed an amendment exempting labor and farmer combinations, *see id.* at 2612, this exemption was deleted by the Senate Judiciary Committee in drafting the version that was eventually enacted, *see* S. 1, 51st Cong., 1st Sess., 21 CONG. REC. 3152-53 (1890). The reason for this is unclear. It may have indicated a victory for the views of Senator Edmunds, who was the principal drafter. *See* 1 E. KINTNER, *supra* note 155, at 23 & n.1.151. It may have indicated that the Committee thought a jurisdictional change narrowing the Act to combinations that restrained trade "among the several States," *id.* at 275-76, eliminated the problem as a practical matter because farmers and unions seldom restrained interstate transactions directly. Or it may have simply indicated a desire to sidestep a thorny issue that might hinder enactment by punting the issue to the courts. Today, the issue whether the Sherman Act itself exempts labor or agricultural combinations has largely been mooted because a variety of subsequent federal statutes provide explicit or implicit exemptions. *See generally* P. AREEDA & H. HOVENKAMP, *supra* note 22, ¶¶ 228-229, at 210-33 (discussing antitrust exemptions for labor unions and agricultural and fishermen's cooperatives). What is interesting for our purposes is that, although the congressmen who passed the Sherman Act differed on the desirability of permitting labor and agricultural combinations, absent some

The sole object of such a combination is to make competition impossible. It can control the market, raise or lower prices, as will best promote its selfish interests, reduce prices in a particular locality and break down competition and advance prices at will where competition does not exist. Its governing motive is to increase the profits of the parties composing it. The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer.¹⁶⁷

Numerous other congressmen echoed the view that any restraint on competition set by self-interested businesses would inevitably further the interests of those businesses at the expense of the public.¹⁶⁸

In short, the legislative history unambiguously demonstrates that Congress was concerned about (and wanted courts to police) restraints imposed by financially interested decisionmakers.¹⁶⁹ Economic theory

exemption or jurisdictional exclusion many congressmen viewed these financially interested restraints as falling within the statute. None, in contrast, expressed the view that the financially disinterested restraints of governmental decisionmakers might be covered.

¹⁶⁷ 21 CONG. REC. 2457 (1890). Senator Sherman also remarked:

It is sometimes said of these combinations that they reduce prices to the consumer by better methods of production, but all experience shows that this saving of cost goes into the pockets of the producer. The price to the consumer depends upon the supply, which can be reduced at pleasure by the combination. . . . The aim is always for the highest price that will not check demand.

Id. at 2460.

¹⁶⁸ *See, e.g.*, 21 CONG. REC. 6116 (1890) (remarks of Sen. Vest) (asserting that railroad combinations "fix the price of rates to suit themselves, without regard to the public at large or the consumers of the country"); *id.* at 4102 (Rep. Fithian) (arguing that trusts "enhance the price of commodities to the people beyond an honest profit"); *id.* at 4098 (Rep. Taylor) ("I am opposed to trusts . . .; they toil not . . . and yet they accumulate their numberless millions from the toil of others. They lay burdens, but bear none. The beef trust fixes arbitrarily the daily price of cattle, from which there is no appeal, for there is no other market."); *id.* at 1768 (Sen. George) ("They increase beyond reason the cost of the necessities of life and business They regulate prices at their will, depress the price of what they buy and increase the price of what they sell."); *id.* at 137 (Sen. Turpie) ("The ultimate fixing of a price [by these business combinations] . . . is done without the least consideration of any legitimate element.")

¹⁶⁹ Justices and commentators operating within the conflict and accommodation paradigm have viewed the legislative history differently. They stress that in 1890, when the Sherman Act was enacted, congressional authority to regulate interstate commerce was narrowly defined. *See, e.g.*, *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 632-40 (1976) (Stewart, J., dissenting); Easterbrook, *supra* note 2, at 40-41; Slater, *supra* note 38, at 84-86; Werden & Balmer, *Conflicts Between State Law and the Sherman Act*, 44 U. PITT. L. REV. 1, 49-58 (1982). A conflict between federal and state law, they argue, has arisen only because the scope of the Sherman Act has expanded along with the expansion in Congress' commerce clause authority. Some conclude from this that Congress affirmatively intended not to interfere with state regulation and that the present conflict should thus be resolved in favor of the states. *See Cantor*, 428 U.S. at 632-35 (Stewart, J., dissenting). Others resolve the conflict in favor of federal competition policy, emphasizing that the Sherman Act's jurisdictional expansion is premised on the Court's conclusion that Congress intended the Sherman Act to reach to the full extent of its commerce clause power. *See Werden & Balmer, supra*, at 56-58. Finally, some argue that the Sherman Act Congress could not have had any meaningful intent about how to resolve a conflict

and experience provide us with ample reason to believe that Congress was right as a matter of policy. An extensive body of literature establishes that, if freely permitted to restrain trade, those financially interested in the sale or purchase of goods or services have incentives to stifle competition, reduce output, and raise prices.¹⁷⁰ They are thus systematically prone to restrain trade in ways that injure the social, economic, and distributive goals of antitrust. Financially disinterested actors lack these incentives.

On the flip side, another body of economic literature establishes the potential for furthering the public interest by regulating and restraining competition to correct market imperfections.¹⁷¹ There are, moreover, noneconomic conceptions of the public good that might be furthered by limitations on free markets. Bans on prostitution, cocaine dealing, or baby selling spring to mind. Financially interested parties cannot be trusted to further these economic or noneconomic conceptions of the public good or to weigh them against the harm to efficiency, consumer welfare, and other antitrust objectives. Their financial incentives will bias them toward fixing profit-maximizing output and price levels irrespective of whether they further public goals. Indeed, furthering their financial interests will often require action that frustrates antitrust goals and ensures that market imper-

that arose after its time and that courts must thus reach their own conclusions about how to accommodate the conflict now presented. See Easterbrook, *supra* note 2, at 40-41; Slater, *supra* note 38, at 85-86.

I reject this approach for three reasons. First, as should be evident from the foregoing, this focus on the status of interstate commerce jurisdiction in 1890 can lead to a variety of conflicting conclusions and thus provides no useful guidance in addressing current doctrinal questions. Second, although the narrowness of Congress' jurisdiction in 1890 precluded many potential conflicts, it did not avoid them all. After all, state corporate and common law authorized and often enforced the very trusts and restraints of trade Congress was outlawing. See P. AREEDA & L. KAPLOW, *ANTITRUST ANALYSIS* ¶ 131, at 47-48 (4th ed. 1988); I E. KINTNER, *supra* note 155, at 10-11. Where trusts, corporations, or other businesses effectuated restraints on interstate commerce, Congress clearly intended to enjoin them and to nullify any state law enforcement or authorization. See *supra* note 59 (describing how in the most contemporaneous state action decision, *Northern Secs. Co. v. United States*, 193 U.S. 197 (1904), the Supreme Court held that the Sherman Act invalidated a holding corporation authorized by state law). The failure of the legislative history to address less traditional forms of state legal involvement in interstate commerce is probably due to the fact that direct state "regulation" of interstate commerce was forbidden at the time. See L. TRIBE, *supra* note 73, § 6-4, at 406-07. Third, and more generally, changed circumstances are no cause for discarding evidence of congressional intent. The best one can do is to identify the policy concerns Congress had, defined as those concerns were by the (jurisdictional) context of the time, and apply those identified policy concerns to the changed context. Although the past jurisdictional context helps explain why the legislative history does not contain more specific statements of congressional intent regarding state regulation, it does not alter the basic nature of Congress' policy concern: a desire to curb financially interested restraints. There is no difficulty applying this intent to the full extent of Congress' present regulatory authority.

¹⁷⁰ See, e.g., P. SAMUELSON & W. NORDHAUS, *ECONOMICS* 502-49 (12th ed. 1985).

¹⁷¹ See, e.g., Cirace, *supra* note 40, at 491-95.

fections remain uncorrected. Actors who are financially disinterested and politically accountable stand in a different light. They lack the structural financial incentives to restrain trade in ways that harm the public interest. Under the traditional liberal account, our assurance that they will act in the public interest derives from the fact that they represent all the affected personal interests and can aggregate them or weigh them against each other.¹⁷² To be sure, this representative process is far from perfect. But, as I will show in the following sections, it is preferable to the alternative processes we could structure with the different versions of antitrust state action doctrine others have proposed.

Thus an initial examination of the legislative history and policy considerations, and the comparative examination that follows, both support a process test that focuses on whether the decisionmakers controlling the restraints are financially interested. Naturally, this financial interest test will sometimes create line-drawing problems. It may, for example, sometimes be unclear whether a state board composed of all affected interests (producers, consumers, laborers, etc.) should be treated as financially interested. As the board composition looks more representative of the groups acting within the political sphere, close questions arise under the financial interest test. But such questions are not avoided by current state action doctrine.¹⁷³ They are simply addressed through more formal, and conclusory, adjudications of whether the board is public or private. A doctrine that explicitly incorporates the underlying process view at least focuses the inquiry on the relevant questions. For example, is the board truly representative? Or does it, as is typical, underrepresent consumers?¹⁷⁴

¹⁷² See, e.g., *Brown v. Hartlage*, 456 U.S. 45, 56 & n.7 (1982) (“[O]ur tradition of political pluralism is partly predicated on the expectation that voters will pursue their individual good through the political process, and that the summation of these individual pursuits will further the collective welfare.”). I later address the possibility that politically accountable actors will be disproportionately influenced by some affected interests, see *infra* pp. 717–29, and then consider the possibility that not all affected interests will be represented, see *infra* pp. 729–38.

In the civic republican account, disinterested accountable actors are trusted not because of their ability to aggregate and weigh the affected personal interests accurately, but because their participation in political debate and lack of corruption enables them to transcend those personal interests and discover or define the “true” public interest. See M. TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 11–17* (1988). Because this account recognizes that financial self-interest can corrupt civic virtue, see *id.* at 11, it is not inconsistent with my thesis. The influence of civic republicanism on the Court is, however, in doubt. Compare *id.* at 13 (suggesting little if any impact on the Court) with Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29, 49–68 (1985) (arguing that many judicial doctrines aim to promote civic republicanism).

¹⁷³ See *supra* note 116.

¹⁷⁴ The Supreme Court has in fact vacated a decision conferring state action immunity on a board which had employer and employee representation but no consumer representation. See *id.*

Adjudication of such questions should make the doctrine more predictable because, unlike current doctrine, it would apprise litigants and lower courts of the functional factors leading to past line-drawing conclusions.¹⁷⁵

Moreover, focusing on the process implications will sometimes resolve an apparent line-drawing problem. Take, for example, a case in which a disinterested politically accountable state actor has agreed to restrain trade on behalf of financially interested antitrust defendants because those defendants have coerced the state with their own anti-competitive restraint. The state legislature might, for example, fix minimum rates for medical services to stop a boycott by doctors. On a purely formal level the case may seem difficult. But because the decisionmaking process eliminates any assurance that the restraint furthers the public interest, clearly no immunity should apply.¹⁷⁶

The process framework also helps make sense of a state action issue currently before the Court in *City of Columbia v. Omni Outdoor Advertising, Inc.*:¹⁷⁷ should the Court recognize an exception to state action immunity when state and private actors "conspire" to restrain trade and, if so, what criteria should determine when this "co-conspirator" exception applies? The exception has support in dicta going back to *Parker v. Brown*,¹⁷⁸ but has created problems because courts can find a "conspiracy" whenever a private actor petitions for public action and gets it. After all, any process that relies on decisionmaking by disinterested (public) actors who are accountable to the affected interests requires input from those affected (private) interests to function properly. Indeed, such financially interested input generally enjoys antitrust immunity under the *Noerr* doctrine.¹⁷⁹ Any action by

¹⁷⁵ In resolving some technical line-drawing questions about financial interest, such as whether an administrator should be regarded as financially interested when her husband owns stock in a financially interested corporation, antitrust courts may be well advised to look to the existing standards for judging self-interest contained in various recusal statutes.

¹⁷⁶ Under current doctrine the Court could reach this conclusion by determining that the restraint was really that of the doctors rather than that of the state legislature. Cf. 1 P. AREEDA & D. TURNER, *supra* note 41, ¶ 214b, at 83-84 (concluding that immunity should not apply when the government is the "victim" of a restraint). For the same reasons, efforts by financially interested actors to procure governmental action by coercing the government with restraints of trade merit no antitrust petitioning immunity. So the Court has held. See *FTC v. Superior Court Trial Lawyers Ass'n*, 110 S. Ct. 768, 776 (1990). On the other hand, where the only coercion is of a type contemplated by the political process — such as threatening to withhold votes or campaign financing — the coercion does not eliminate the assurance that ordinarily attends the political process and both the petitioning and any resulting law should receive antitrust immunity. Whether that political process should be reformed (for example, through tight controls on campaign contributions) raises issues beyond the scope of this Article.

¹⁷⁷ 110 S. Ct. 3211 (1990), *granting cert. to* *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*, 891 F.2d 1127 (4th Cir. 1989).

¹⁷⁸ 317 U.S. 341, 351-52 (1943).

¹⁷⁹ See *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138-40 (1961).

public actors will thus almost always signal agreement with the views of some petitioners. This has led Professors Areeda and Hovenkamp to conclude that "conspiracy" for *Noerr* purposes, which also has a co-conspiracy exception supported by dicta,¹⁸⁰ cannot mean a "meeting of the minds."¹⁸¹ Rather they redefine it to mean "corrupt or bad faith decisions" by the government.¹⁸² But this redefinition has nothing to do with the ordinary antitrust definition of conspiracy, which uses precisely the "meeting of the minds" formulation Areeda and Hovenkamp reject in this context.¹⁸³

The "co-conspiracy" exception thus presents a doctrinal conundrum within the current paradigm. If it extends to all cases where the government ultimately agrees with some petitioners, then it eliminates state action immunity. If it does not extend to all such cases, however, the concept of "conspiracy" offers no relevant contribution: the decision whether to apply immunity turns on unrelated factors that often remain unexplained. "Conspiracy" threatens to become a label triers of fact apply to deny immunity based on their own substantive disapproval of the governmental action.

Within the process paradigm, however, the role of the co-conspiracy exception is clear: it enables courts to apply antitrust review where it seems doctrinally difficult to conclude that the governmental decisionmaker was "private" but where the decision was financially interested in a way that raises antitrust concerns. Where the alleged governmental "co-conspirator" is financially disinterested, the Court has refused to deny immunity.¹⁸⁴ And when one parses through Areeda and Hovenkamp's four-page definition of "corrupt and bad faith decisions," one discovers that it effectively limits the co-conspiracy exception to restraints imposed by governmental decisionmakers who are financially interested.¹⁸⁵ Accordingly, in order to limit judicial discretion and keep antitrust review within its proper scope, any co-conspiracy exception that is recognized should be defined so that a government acting in response to petitioning is not a "co-conspirator"

¹⁸⁰ See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 502 n.7 (1988).

¹⁸¹ P. AREEDA & H. HOVENKAMP, *supra* note 22, ¶ 203.3b, at 34.

¹⁸² *Id.* ¶ 203.3c, at 35.

¹⁸³ See *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 & n.9, 765 (1984).

¹⁸⁴ See *Hoover v. Ronwin*, 466 U.S. 558, 580 (1984).

¹⁸⁵ See P. AREEDA & H. HOVENKAMP, *supra* note 22, ¶ 203.3c, at 35-39. They conclude that the conspiracy exception should not apply unless a government official "(1) Accepts a bribe; (2) Decides out of personal bias and for no other reason; (3) Decides in favor of a personal financial interest in privity with or perhaps even closely allied to that of one or more of the plaintiff's rivals." *Id.* at 39. Cases (1) and (3) are clearly cases where the government official is financially interested and thus "private" within the meaning of state action doctrine articulated above. Case (2) is not, but although Areeda and Hovenkamp suggest that the "conspiracy" label would not be "inapt" where an official decides out of personal bias, they also stress that the difficulties of inquiring into bias should probably foreclose such inquiries. *Id.* at 36.

unless it or its officials have a financial interest in the action.¹⁸⁶ If the Court can clarify that its definition of private action includes any financially interested action, it can safely dispense with the "co-conspiracy" exception altogether.

State action doctrine's distrust of collective financially interested decisionmaking and its focus on framing appropriate decisionmaking *processes* that avoid substantive judicial review of outcomes also parallel prevailing standards of antitrust liability. A long line of antitrust cases reject defenses based on the purported public interest of restraining competition.¹⁸⁷ The Court will consider claims that restraints with anticompetitive effects have offsetting procompetitive virtues and thus on balance promote competition, but "the inquiry is confined to a consideration of impact on competitive conditions" and does not permit inquiry into whether less competition would serve the public interest in some cases.¹⁸⁸

The Court has offered two types of rationales for its refusal to consider claims that restraining competition has other public interest justifications. The first is that it has no authority to second-guess Congress' policy decision that what is in the public interest is competition.¹⁸⁹ As should by now be obvious, however, this reasoning is incomplete. State and local regulation frequently restrains trade in contradiction of the antitrust premise that competition furthers the public interest, yet in these cases the Court seems untroubled by Congress' contrary policy judgment. The key to reconciling these apparently inconsistent positions is to recognize that, contrary to some of the Court's overbroad statements, federal antitrust policy does not stand for the proposition that restraining competition can never serve the public interest. Rather, it stands for the more limited proposition

¹⁸⁶ This applies to the *Noerr* co-conspirator exception as well. Similarly, with respect to the claimed "commercial" exception to *Noerr*, governmental actions in response to a petition should not be considered "commercial" unless the government or its officials have a financial interest in the action. After all, *Allied Tube* cited both the commercial and co-conspirator exceptions to *Noerr* to support the proposition that "[t]he dividing line between restraints resulting from governmental action and those resulting from private action may not always be obvious." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501-02 (1988). This suggests that those exceptions are meant to help define the line between governmental and private restraints and as such should conform to the same process view that informs that line more generally.

¹⁸⁷ The rejected claims include assertions that restraining competition resulted in reasonable prices, see *United States v. Trenton Potteries Co.*, 273 U.S. 392, 395-401 (1927), deterred unfair copying, see *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457, 467-68 (1941), avoided unsafe construction, see *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 695-96 (1978), or improved the quality of dental care, see *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 462-64 (1986).

¹⁸⁸ *Professional Eng'rs*, 435 U.S. at 690; see also *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 101 n.23 (1984) ("[G]ood motives will not validate an otherwise anticompetitive practice.").

¹⁸⁹ See, e.g., *Professional Eng'rs*, 435 U.S. at 692, 695.

that certain persons — those with financial interests arising out of restraints of trade — cannot be trusted to determine which restraints are in the public interest and which are not.

The second rationale is the inability of courts to measure market outcomes accurately, assess their social value, monitor changes in market conditions, and balance conflicting interests.¹⁹⁰ As a result, in devising standards of antitrust liability the Court has focused not on whether the outcome is good or even competitive, but on whether the financially interested decisionmakers have subverted the process of competition and consumer choice.¹⁹¹ It is this competitive process that provides some realistic assurance that their financially self-interested activity will promote the public good. In economic terms the premise is a familiar one: self-interested profit-maximizers will, if forced to channel their resources into market competition, advance the public interest by driving down the costs of producing goods and allocating those goods to the users who value them the most.

The incapacity of courts to evaluate the desirability of deviations from market competition, however, has different implications for judicial review of restraints set by disinterested politically accountable bodies. Antitrust courts cannot reject out of hand public interest justifications offered by such bodies for restraints on competition because such justifications exist, and these bodies provide the only remaining process for collectively correcting or superseding the market.¹⁹² Given, then, their professed inability to evaluate deviations from market competition, the best that antitrust courts can do is channel decisions about such deviations into a disinterested, politically accountable process. This is not because such processes are perfect but rather because they are preferable to the alternatives of judicial or financially interested decisionmaking. In short, defining the scope

¹⁹⁰ See, e.g., *United States v. Topco Assocs.*, 405 U.S. 596, 611-12 (1972); *Trenton Potteries*, 273 U.S. at 397-98; *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 331-32 (1897).

¹⁹¹ See, e.g., *Indiana Dentists*, 476 U.S. at 462-63; *Professional Engrs*, 435 U.S. at 694-95. For example, the Sherman Act condemns not the possession of monopoly power but its attainment or preservation through nonproductive means. See, e.g., *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

¹⁹² Indeed, the availability of disinterested political forums for altering market operations may be necessary to justify the Court's refusal to admit public interest defenses by financially interested antitrust defendants: it enables the Court to point to some alternative avenue for relief. One might argue that those seeking to deviate from a regime of market competition should be forced to petition Congress. It seems unlikely, however, that Congress ever intended to retain a monopoly on enacting deviations from market competition. Nor, at least for state-set restraints without effects outside state boundaries, is there any reason to believe that Congress would generally be better than states at determining when anticompetitive deviations are warranted. See Hovenkamp & Mackerron, *supra* note 24, at 768-76 (arguing that, absent economies of scale in regulation, the optimal regulator is the smallest one encompassing the affected interests). See generally J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 247-49 (1980) (collecting noneconomic sources supporting federalism on related grounds).

of antitrust process along financial interest lines enables the Court to avoid assessing market outcomes by channeling all collective resource allocation decisions into either a competitive process or a political process that, for quite different reasons, each provide some realistic (though hardly perfect) assurance that the resource allocation is in the public interest.

*B. Why the Power to Restrain Does Not Include
the Power to Delegate Restraint Authority
to Financially Interested Decisionmakers*

The prior analysis puts us in a position to explain what has been regarded as an anomaly: if the state has the power to restrain competition, why can't it delegate that power to "private" parties? A critique, first developed by Professor Page, argues that any distinction between direct restraints and delegated (or unsupervised) restraints cannot be justified.¹⁹³ Page thus advocates eliminating the active supervision requirement and limiting antitrust review to those restraints that are not clearly authorized by the state legislature.¹⁹⁴

To the extent this argument relies on a logical claim that the "greater power must include the lesser," it lacks force. The greater power to mandate a result will not include the lesser power to seek that result through less absolute means whenever the purpose of judicial review is to police processes rather than outcomes.¹⁹⁵ If antitrust review aims to police decisionmaking processes that are financially interested, then the distinction between direct and delegated restraints (and thus the active supervision requirement) makes perfect sense because the direct restraints are imposed by disinterested actors whereas the delegated restraints are not.¹⁹⁶

As a policy matter, though, Page's critique poses the following question: if antitrust law trusts disinterested state officials to set restraints in the public interest, why doesn't it also trust them to decide when it is appropriate to delegate that power to financially interested parties? The answer is that the latter decision conflicts with Congress' empirical judgment that parties who personally profit from restraining trade generally do so to the public's detriment. Having informed itself

¹⁹³ See Page, *supra* note 2, at 1128-36; see also Easterbrook, *supra* note 2, at 30-33 (making a similar critique); Wiley, *supra* note 3, at 731, 733-36, 738-79 (same).

¹⁹⁴ See Page, *supra* note 2, at 1113-25.

¹⁹⁵ See Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1310-12 (1984).

¹⁹⁶ On the other hand, I wholeheartedly endorse Wiley's critique of the clear authorization requirement's role in policing administrative delegation. See Wiley, *supra* note 3, at 731-36. The Supreme Court has, however, effectively scuttled antitrust review of administrative delegation by weakening the clear authorization requirement where disinterested agency action is at issue. See *supra* pp. 691-93.

about the results of decisionmaking by economically interested actors,¹⁹⁷ Congress had ample grounds to make such a judgment and to condemn such decisionmaking as a matter of national policy.

Disabling states, however well-intentioned, from implementing empirical judgments contrary to those of national policy is hardly unusual. A state's general police power to regulate the environment does not, for example, empower it to legalize toxins banned by Congress based on the state's empirical judgment that the toxins do not actually harm the environment. The federal government's empirical judgment about the level of patent protection that best balances the creation of incentives to innovate with the value of disseminating that innovation preempts state laws that, based on contrary empirical judgments, offer patent-like protections extending beyond federal law.¹⁹⁸ Perhaps more telling, a state's general authority to define and adjudicate the state-law rights of its citizens does not entitle the state to presume that judges with conflicts of interest can be trusted to interpret those rights fairly.¹⁹⁹

In short, states are not free to adopt theories of human behavior in conflict with those of federal policy. When they do so by delegating to financially interested parties the authority to set trade restraints, they create a direct conflict with the federal antitrust premise that such parties cannot be trusted. When, in contrast, states restrain trade through nonpartisan decisionmakers, antitrust law does not apply — not because of some perverse doctrine of inverse preemption but because there is no conflict between federal and state policy. Antitrust does not claim that the market cures all ills or should allocate all resources or that competition is the sole good in society. Competition is, however, the sole means approved by antitrust law for harnessing self-interested market actions for the public good.²⁰⁰ Indeed, the incompatibility between Page's analysis and the premises of the Sherman Act is amply demonstrated by the fact that Page's po-

¹⁹⁷ See S. REP. NO. 829, 51st Cong., 1st Sess. (1890); H.R. REP. NO. 4165, 50th Cong., 2d Sess. (1889); H.R. REP. NO. 3112, 50th Cong., 1st Sess. (1888).

¹⁹⁸ See *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146-47, 152, 156-57 (1989).

¹⁹⁹ See, e.g., *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (finding due process violated when the adjudicator had a personal pecuniary interest in outcome); see also *supra* note 107 (discussing *Gibson v. Berryhill*, 411 U.S. 564 (1973)). Similarly, a state's power to prohibit or regulate a certain form of speech in content-neutral ways does not allow the state to make the empirical judgment that its officials can be trusted with unbridled discretion to regulate that speech in content-neutral ways. See *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 770 (1988).

²⁰⁰ Of course, unlike the states, Congress is free to conclude that its general judgment that self-interested combinations are likely to harm the public interest does not apply in particular circumstances. See, e.g., *Gordon v. New York Stock Exchange*, 422 U.S. 659, 683-86 (1975) (concluding that the Securities Exchange Act, 15 U.S.C. §§ 78a-78ll (1988), immunized a New York Stock Exchange rule); 15 U.S.C. § 17 (1988) (exempting labor organizations).

sition implies that a state repeal of federal antitrust law within state boundaries must be upheld if clearly articulated.²⁰¹

This focus on the nature of the empirical judgment made by antitrust law helps address what might otherwise be troublesome applications of the Court's process test. Take, for example, a state statute that delegated price-fixing authority to a personally disinterested official but that defined that official's statutory duty as fixing prices at whatever level most benefited General Motors, on the theory that what was good for General Motors was good for the state.²⁰² As a formal matter, the case seems ambiguous under my test. The official is accountable and has no personal financial interest but is clearly acting in a financially interested capacity: in fact, he occupies almost exactly the same position as a General Motors employee. Referring to Congress' empirical judgment, however, resolves the formal ambiguity because the statute regulates on the premise, rejected by Congress, that setting restraints to further the financial interests of market participants is likely to advance to the public interest.

Focusing on antitrust's empirical judgment also helps explain why current antitrust doctrine facially invalidates a state's delegation of restraint authority to interested actors only if it authorizes or mandates conduct that per se violates federal antitrust law.²⁰³ Some commentators have viewed this third prong for facial challenges as confused.²⁰⁴ But when the state has delegated authority in the face of such a per se rule, it has defied the antitrust judgment that those decisionmakers are systematically likely to harm the public interest when they impose such restraints.²⁰⁵ The delegation must thus be entirely preempted. When, on the other hand, the state delegates an authority to impose restraints that are subject to the rule of reason, antitrust law has not made any judgment that such restraints almost invariably harm the public interest. It has, however, made the judgment that such restraints must be subject to review by antitrust courts. States are not free to conclude that actors will always ignore their

²⁰¹ See Page, *supra* note 2, at 1137-38. Page responds that a state legislature is unlikely to pass such a statute and that "clear articulation" cannot be vague. *Id.* Efforts to encourage business collaboration seem increasingly popular, however, and one can easily imagine a state clearly articulating the view (supported by many economists) that the monopoly profits resulting from allowing cartels would lead to an increase in innovation that would improve efficiency and consumer welfare more than would the allocative efficiency resulting from competition. See, e.g., J. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 81-106 (1943).

²⁰² The example was posed by Frank Michelman during a talk I gave at Harvard Law School. In addition to the antitrust problems such a statute would face, the statute might not survive constitutional review. See Sunstein, *Naked Preferences and the Constitution*, 84 *COLUM. L. REV.* 1689, 1689-1732 (1984).

²⁰³ See *supra* note 17.

²⁰⁴ See, e.g., Wiley, *supra* note 3, at 729 n.75.

²⁰⁵ See, e.g., *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 8 & n.11 (1979).

financial interest in setting rule-of-reason restraints. Accordingly, the delegation is not struck down in its entirety but simply denied any general immunity.

Finally, the distinction between restraints set by states and self-interested restraints allowed by states conforms to the legislative history. Although there is no evidence that the Sherman Act Congress distrusted state-set restraints, there is substantial evidence that Congress was dissatisfied with state regulation of financially interested restraints. To be sure, this dissatisfaction partly stemmed from the inability of states to regulate interstate commerce under then-existing constitutional doctrine, and some congressmen made sweeping statements that the Sherman Act was merely designed to extend state common law regulation of restraints of trade to interstate commerce.²⁰⁶ But this seemed to be mainly political puffery: these congressmen were anxious to persuade their colleagues that the Sherman Act would do only what the states were doing in order to render more plausible what was then a controversial application of congressional authority.²⁰⁷ Congress would have had little reason to act had it been satisfied with state common law regulation. The common law remedies — voiding or refusing to enforce contracts, trusts, or corporate charters that unduly impaired competition — would have been equally available without the Sherman Act.²⁰⁸ Despite states' inability to regulate interstate commerce at the time, no one doubted that states could void trusts or revoke corporate charters of businesses that engaged in interstate commerce, and it seems that any court that had jurisdiction over a case could refuse to enforce such a contract or trust.²⁰⁹ The problem was that not every state declined to enforce anticompetitive agreements, and few states voided trusts or corporate charters that were used for anticompetitive ends.²¹⁰ Indeed, the very

²⁰⁶ See 21 CONG. REC. 2457, 2459 (1890) (remarks of Sen. Sherman); *id.* at 2563 (Sen. Sherman); *id.* at 3152 (Sen. Hoar).

²⁰⁷ See *supra* note 169 (noting that congressional commerce clause authority was narrow in 1890).

²⁰⁸ Congress may have been concerned, in that era before *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), that federal courts would not apply the same common law as state courts. But this seems unlikely if Congress were truly convinced that the common law uniformly condemned anticompetitive restraints of trade. The real concern, if any, about federal common law was more likely that the federal courts would be less aggressive than the most aggressive of the states.

²⁰⁹ See, e.g., *People v. North River Sugar Ref. Co.*, 121 N.Y. 582, 24 N.E. 834 (1890) (voiding a corporate charter because of anticompetitive corporate activities); *State ex rel. Attorney Gen. v. Standard Oil Co.*, 49 Ohio St. 137, 184-89, 30 N.E. 279, 290-91 (1892) (holding the Standard Oil trust agreement unlawful). This state power was well recognized by many congressmen. See, e.g., 21 CONG. REC. 4101 (1890) (remarks of Rep. Heard); *id.* at 4093 (Rep. Wilson); *id.* at 2571 (Sen. Teller); *id.* at 2467-68 (Sen. Hiscock); *id.* at 2567-68 (Sen. Hoar); *id.* at 2459 (Sen. Sherman); 20 CONG. REC. 1460 (1889) (Sens. Eustis and George).

²¹⁰ See P. AREEDA & L. KAPLOW, *supra* note 169, ¶ 131, at 47-48; 1 E. KINTNER, *supra* note 155, at 11.

trusts that federal antitrust law sought to break up were popular with cartelists precisely because, unlike more informal "pools," they could be enforced by state law.²¹¹ Moreover, the Sherman Act provided remedies beyond even the most vigorous of state remedies: authorizing affirmative injunctive relief against conduct that did not require legal enforcement, adding criminal punishment and treble damages as a penalty and deterrent, and conferring standing on the government and on private persons who were not party to the challenged agreement.²¹² In the end, Congress stressed not its satisfaction with the existing state regulation of anticompetitive activity but rather the need for states to "supplement" the Sherman Act by enacting similar state legislation.²¹³

C. Why Pre-Injury Process Is Required

Another possible critique of the process view implicit in current doctrine is that the ability of disinterested actors to remedy the restraints of financially interested actors should render those restraints immune. Judge Easterbrook, for example, proposes immunizing all restraints that do not have spillover effects outside state boundaries because states can "act if the results are unsatisfactory."²¹⁴ While containing some superficial appeal, this critique — and the alternative process view it offers — is flawed in at least two respects.

First, it ignores or misallocates the burden of seeking governmental action. Petitioning state governmental bodies for action — whether they be legislatures, agencies, or courts — is costly and difficult. Those costs will sometimes exceed the net benefits of obtaining relief. Other times net benefits may exceed costs but free rider and collective action problems will prevent parties from seeking relief because the benefits are shared among many while the costs are incurred only by those who seek relief.²¹⁵ Even when parties are willing to incur those costs, governmental inertia and overflowing agendas or dockets will often prevent or postpone effective relief. Because of these substantial obstacles to seeking governmental action, the formal availability of disinterested processes for relief cannot ensure the correction of abusive restraints imposed by financially interested actors. Of course, if these burdens are placed on financially interested actors, they will sometimes be unable to secure governmental approval of restraints that would advance the public interest. But given the motivations of such actors to sacrifice the public interest for their own profit as well

²¹¹ See I. E. KINTNER, *supra* note 155, at 10; see also 21 CONG. REC. 4092 (1890) (statement of Rep. Wilson).

²¹² See ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1988)).

²¹³ See H.R. REP. NO. 1707, 51st Cong., 1st Sess. 1 (1890).

²¹⁴ Easterbrook, *supra* note 2, at 38, 49.

²¹⁵ See M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* 11, 15-16 (1971).

as the strong distrust of such actors in the legislative history, it seems sensible on both normative and statutory grounds to put the burden of seeking governmental action on the self-interested actors rather than on those injured by their restraints.²¹⁶

Easterbrook ignores the burden of seeking governmental action based on his theory of the economics of federalism. He argues that as long as regulations inflict no out-of-state costs, people can "exit" states that regulate against their interest; competition among states for residents will thus lead to appropriate regulation regardless of the effectiveness of the mechanisms for "voice."²¹⁷ This analysis is unpersuasive. For most individuals, the transaction costs of moving likely outweigh the differences in inefficiency costs between the regulatory regimes of different states. Easterbrook argues that it may suffice if these inefficiency costs affect, at the margin, the locational choices of persons who are moving for other reasons.²¹⁸ But one suspects that even persons who are already moving rarely choose one state over another because of the relative efficiencies of their regulatory regimes. Access to family, friends, and jobs likely loom much larger. Even if the other factors are nearly in balance, it is doubtful that anyone will find it profitable to incur the informational costs of assessing and comparing the inefficiency costs associated with the complex regulatory regimes of various states.²¹⁹ More fundamentally, Easterbrook fails to offer any persuasive rationale for why states should generally want more residents. No doubt states desire taxpayers, but more residents also increase the need for costly governmental services and often impose negative externalities, such as increased congestion.²²⁰

²¹⁶ Putting the burden of seeking governmental action on these parties seems even more justifiable if one believes, as many economists argue, that financially interested producer groups have a systemic advantage in obtaining legislation favorable to their interests. See *infra* pp. 717-18.

²¹⁷ Easterbrook, *supra* note 2, at 28, 34-35, 43-45.

²¹⁸ See *id.* at 44.

²¹⁹ Capture theory bolsters this conclusion because it predicts that states are particularly likely to enact inefficient regulation when the informational costs of individual assessment outweigh the individual costs of inefficiency. See *infra* pp. 717-18.

²²⁰ Rather than providing a rationale, Easterbrook relies on "casual empiricism," noting, for example, that "Illinois offers inducements to stop migration to the Sunbelt." Easterbrook, *supra* note 2, at 43. But as those of us living in California are well aware, desirable locations often provide no-growth movements designed to reduce the influx of new residents. See generally Briffault, *Our Localism: Part I — The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 39-58 (1990) (describing the use of exclusionary zoning). The more formal empirical studies cited by Easterbrook measure the effects on choices among municipalities, see Easterbrook, *supra* note 2, at 44 n.46, 45 n.47, which are less likely to affect access to family, friends, and jobs than are choices among states.

Moreover, to the extent competition among states is important, putting the burden of moving on financially interested businesses seems justifiable. For businesses, the differences in the

The second flaw with the critique is that it fails to account for the problem of detecting abusive restraints and for the interim market injuries suffered before such restraints are corrected.²²¹ Where financially interested actors are permitted to initiate restraints on competition, sometimes those injured by the restraints cannot detect (or prove) the cause of their injury and cannot invoke the available processes for correction. Even when aggrieved parties do invoke disinterested processes to correct abusive restraints, such after-the-fact corrections may allow financially interested actors to inflict market injury in the meantime. A pre-injury process of disinterested decisionmaking, in contrast, requires financially interested actors to come forward first and thus provides some realistic assurance that the restraint is in the public interest before any market injury is suffered.²²²

The case law supports this analysis. The most direct language appears in *City of Lafayette v. Louisiana Power & Light Co.*,²²³ in which the defendant argued that a municipal restraint should be immune because injured "customers may take their complaints to the state legislature."²²⁴ Rejecting this argument, the Court reasoned:

It fairly may be questioned whether the customers . . . have a meaningful chance of influencing the state legislature to outlaw on an ad hoc basis whatever anticompetitive practices petitioners may direct

inefficiency costs associated with different regulatory regimes are likely to be relatively large compared with the informational costs. The costs of changing regulatory regimes are also often relatively low: they may merely involve reincorporating in another state or putting a choice-of-law provision in commercial contracts. Finally, states generally have greater incentives to compete for businesses than they do for residents, because businesses increase employment and tax revenues. Thus, even if "exit" is more important than "voice," Easterbrook's theory still embodies a misallocation of burden because he has misallocated the burden of "exit" as well as the burden of "voice."

²²¹ The Sherman Act Congress was sensitive to these concerns. *See, e.g.*, 21 CONG. REC. 5959 (1890) (remarks of Rep. Hill).

²²² True, federal antitrust law itself affords only post-injury relief and imposes on plaintiffs the burden of detecting violations and seeking judicial action. But the antitrust law contains numerous features specifically designed to address those problems. Most notably, the Sherman Act provides criminal sanctions, and plaintiffs proving violations can recover treble damages and litigation expenses. *See* 15 U.S.C. §§ 1-3, 15 (1988). It thus strongly deters market injuries from ever occurring by adjusting for the possibility of nondetection, richly compensates plaintiffs who suffer market injuries from proven violations, and provides powerful monetary incentives to litigate and overcome the burdens of seeking judicial action. Moreover, because the only defense allowed is that a restraint on balance furthers competition, *see supra* pp. 706-07, federal antitrust law encourages lawsuits by providing more certainty than could be provided if the question was whether the restraint advanced the public interest loosely defined. Finally, Congress authorizes and funds enforcement of its antitrust laws by the Justice Department and the Federal Trade Commission. If the availability of state remedies alone immunized a restraint from federal antitrust liability, all these mechanisms for policing the self-interested imposition of market injury would be rendered ineffective.

²²³ 435 U.S. 389 (1978).

²²⁴ *Id.* at 406.

against them from time to time. More fundamentally, however, that argument cuts far too broadly; the same argument may be made regarding anticompetitive activity in which any corporation engages. Mulcted consumers and unfairly displaced competitors may always seek redress through the political process. In enacting the Sherman Act, however, Congress mandated competition It did not leave this fundamental national policy to the vagaries of the political process²²⁵

Although less explicit about their rationales, other cases also conform with the proposition that a disinterested politically accountable actor can immunize a restraint only by approving it before it inflicts any market injury. In *Cantor v. Detroit Edison Co.*,²²⁶ for example, the Court refused to immunize an electric utility's tie between light bulbs and electricity even though a state commission could have disapproved it.²²⁷ In *324 Liquor*, the defendant claimed immunity based on two forms of post-injury review: the state legislature frequently considered whether to change the statute authorizing vertical price restraints, and a disinterested state agency was authorized to relieve wholesalers and retailers from the vertical price restraints set by their suppliers. The Court rejected the immunity claim, holding that neither review satisfied the active supervision requirement.²²⁸ Finally, in *Goldfarb and Continental Ore*, the Court held that restraints set by official but financially interested government agents did not enjoy state action immunity even though in both cases the agents were accountable to disinterested higher officials. In *Goldfarb* the agent (the state bar) was subject to plenary regulation by the state supreme court, which in particular had the authority to modify any restraints (there in the form of ethical opinions) adopted by the agent.²²⁹ In *Continental Ore*, the agent was delegated authority by the Metals Controller, who retained both ultimate authority over the challenged restraint and authority to remove the agent.²³⁰

At a minimum, these holdings establish that financially interested actors are not immune for their restraints even though they are accountable to or removable by disinterested, politically accountable actors who can also reverse or modify any restraints they dislike. Such accountability does not generally suffice to reverse the likely effects of financial interest, and thus, in *Midcal* terminology, should not constitute "active supervision."

²²⁵ *Id.*

²²⁶ 428 U.S. 579 (1976).

²²⁷ *See id.* at 584-85.

²²⁸ *See 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345 n.7 (1987).

²²⁹ *See Goldfarb v. Virginia State Bar*, 421 U.S. 773, 776 n.2, 789 & nn.18-19 (1975).

²³⁰ *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 702 n.11 (1962).

This puts us in position to evaluate an issue that the Court's 1988 *Patrick* opinion explicitly left open: does substantive state judicial review of private conduct satisfy the active supervision prong of *Midcal*?²³¹ One federal appellate panel and some commentators have already concluded that it does.²³² They observed that agency review can satisfy the active supervision requirement and found no principled basis for concluding either that judicial review would be of any lower quality than agency review or that states should be any less free to regulate through state courts than through state agencies.²³³ This reasoning led the appellate panel to conclude that the termination of a doctor's hospital privileges by a peer review committee composed of his competitors was immune because the terminated doctor had a cause of action in state court for breach of an implicit contract not to terminate his privileges wrongfully.²³⁴

The premise of this analysis — that there is no reason to view judges differently from agencies — seems correct. The key question, however, is not whether a court or agency provides the disinterested state process for controlling the terms of restraints, but whether that process occurs before or after the market injury. The Supreme Court has, after all, never held that *post*-injury agency review satisfies the active supervision test. Whether in an agency or a court, *post*-injury state review is insufficient because, however automatic the right to review, the effort and time necessary to invoke state review can discourage and delay vindication of the right to a competitive market.²³⁵ The absurdity of immunizing any conduct subject to *post*-injury state court review is evident when one considers that state judicial review of any conduct that might violate federal antitrust law is almost always possible under state antitrust law. If the availability of judicial relief under state antitrust law were itself enough to confer state action immunity, the result would be the wholesale preclusion of federal antitrust law. Clearly this is an untenable reading of the Sherman Act.²³⁶

In short, state review should immunize a restraint only when the review is disinterested, substantive, and provided before the restraint

²³¹ See *Patrick v. Burget*, 486 U.S. 94, 103-04 (1988).

²³² See *Bolt v. Halifax Hosp. Medical Center*, 851 F.2d 1273, 1282-84 (11th Cir. 1988), *vacated en banc and per curiam*, 874 F.2d 755 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1960 (1990); P. AREEDA & H. HOVENKAMP, *supra* note 22, ¶ 212.7, at 174; Note, *Judicial Review as Midcal Active Supervision*, 57 FORDHAM L. REV. 403, 404-05, 423 (1988).

²³³ See *Bolt*, 851 F.2d at 1282-84; P. AREEDA & H. HOVENKAMP, *supra* note 22, ¶ 212.7, at 174; Note, *supra* note 232, at 416-21.

²³⁴ See *Bolt*, 851 F.2d at 1280, 1283-84.

²³⁵ Cf. P. AREEDA & H. HOVENKAMP, *supra* note 22, ¶ 212.9, at 185-86 (noting the *in terrorem* effect on competition of a restraint that takes effect before judicial review).

²³⁶ Although the Supreme Court recently made clear that Congress did not intend to displace state antitrust law, it also made clear that Congress *did* intend to supplement it. See *California v. ARC Am. Corp.*, 109 S. Ct. 1661, 1665 (1989).

becomes effective. Because pre-injury review is typically more common for agencies than courts, agency review will provide active supervision more often than will judicial review. But that does not imply that judicial review never provides active supervision or that agency review always does.

D. Does Capture Theory Render Nominal Disinterest Irrelevant?

A more thoroughgoing critique of the process view implicit in state action doctrine arises from the insights developed by the interest group theory of lawmaking. According to this theory, small groups with concentrated (high per capita) interests in lawmaking enjoy a systematic advantage over large groups with diffuse (low per capita) interests.²³⁷ Both types of groups face a collective action problem even when the total benefits the group expects to derive from informing themselves about and seeking or opposing legal change exceed the costs of such activity: namely, that no single member may be willing to incur all those costs because each only receives a share of the benefits. This would not be a problem if every group member would voluntarily contribute her share of the costs, but because each member will enjoy her share of the benefits of a successful group effort whether or not she contributes to it, individual members have an incentive to free ride off the efforts of others. The disadvantage of large diffuse groups is twofold. First, they are more susceptible to free rider problems because any benefits from a particular law must be spread out over a larger number of beneficiaries. Second, they are less able to avoid free riding because their size makes it more difficult to reach collective agreements and to monitor and punish failures to contribute to the group's efforts.²³⁸

As a result, these theorists argue, small groups with concentrated interests (such as producers) will predictably be able to "capture" lawmakers and secure laws that favor their interests even when those laws injure large groups with diffuse interests (such as consumers) and impose a net loss on society.²³⁹ To the extent this analysis is correct,

²³⁷ See, e.g., M. OLSON, *supra* note 215, at 33-36; Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 212 (1976); Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

²³⁸ A third disadvantage suffered by diffusely interested groups and individuals is that voting normally requires a choice among a limited set of candidates who offer a package of positions, of which some are more important to the voter than others. Even a perfectly informed voter can thus often do no better than to choose between candidates based on the issues that intensely interest the voter, even though a candidate's stands on other issues harm the voter in more diffuse ways. To the extent this happens, the diffuse interests can be systematically underrepresented even if voters face no collective action problem in informing themselves and taking the time to vote.

²³⁹ See M. OLSON, *supra* note 215, at 127-28. The mechanisms of capture include making campaign contributions, influencing the information voters or government officials receive, and

and empirical evidence suggests that it sometimes is,²⁴⁰ the implications are disturbing. It means that nominally disinterested governmental actors may be acting to further the financial interests of their captors rather than the public interest. A critique of the process view implicit in state action doctrine might thus be that its focus on the involvement of nominally disinterested governmental decisionmakers is misplaced. Requiring a disinterested process may be useless because price-fixing by a captured legislature may not differ from direct price-fixing by businesses.²⁴¹ The true focus should be on whether the governmental decisionmaking process has been "captured" by those who are financially interested in the outcome.

Professor Wiley has developed just such a line of argument. He argues that state action doctrine embodies an incoherent public/private distinction both because private actors may carry out a state policy of delegating decisions to market participants and because "sovereign" decisions are commonly shot through with 'private' influences."²⁴² Moreover, he claims, the actual results in state action cases reflect the Court's growing concern about regulatory capture.²⁴³ He accordingly advocates that the Court directly incorporate capture theory into its doctrine by subjecting to antitrust efficiency review any "state or local regulation" that "is the product of capture in the sense that it originated from the decisive political efforts of producers who stand to profit from its competitive restraint."²⁴⁴ Wiley's argument thus embraces an analytic claim about the incoherence of the Court's public/private distinction, a descriptive claim about what the Court is doing, and a normative claim about what it should do. All three claims are unfounded.

Although Wiley is correct that a formal public/private distinction cannot explain state action doctrine, he fails to see that the doctrine can be explained by a distinction between financially interested decisionmaking and disinterested, politically accountable decisionmaking.

mobilizing group members to vote or write letters. Diffusely interested groups will go underrepresented because they have a harder time collecting the resources to monitor developing issues, make campaign contributions, present information to voters or officials, and keep group members informed. Their members may also rationally decide that their diffuse interests are not worth the effort of reading, writing, or voting about the issues.

²⁴⁰ For sources, see Spitzer, *supra* note 3, at 1304 n.54; and Wiley, *supra* note 3, at 724 & n.49.

²⁴¹ Requiring a governmental process can, in fact, be counterproductive because it provides a means of enforcing cartels. See Easterbrook, *supra* note 2, at 29-31; Wiley, *supra* note 3, at 733.

²⁴² Wiley, *supra* note 3, at 731 & n.85.

²⁴³ See *id.* at 715-28.

²⁴⁴ *Id.* at 743. Under Wiley's test, a regulation that is the product of capture would fail antitrust efficiency review and be preempted whenever the regulation (1) "restrains market rivalry," (2) "is not protected by a federal antitrust exemption," and (3) "does not respond directly to a substantial market inefficiency." *Id.*

To accept the latter distinction, one need not rely on the notion that some delegations of authority are inherently "private" in some formal sense. Nor must one deny that disinterested politically accountable actors can be disproportionately influenced by small groups with financial interests in imposing restraints that injure the general public. One merely has to deny that the disinterested accountable actors are just as likely to restrain trade in ways that injure the public interest as actors with direct financial interests in the restraints.²⁴⁵ Large groups do after all have one considerable advantage over small groups: more votes. Sometimes, as with environmental and consumer protection legislation, these large groups win.²⁴⁶ Even when they lose, disinterested governmental bodies seeking to benefit small groups are often motivated to minimize the harm to large voting interests.²⁴⁷ Decisionmakers with direct financial interests will, even if accountable, be less likely to respond to such political pressure.

Moreover, Wiley's capture theory does not escape the public/private distinction he criticizes. Rather, he incorporates it as an implicit threshold requirement when he states that his test only applies to "state and local regulation."²⁴⁸ Some limiting threshold is clearly necessary. If, as Wiley argues, retained and delegated authority really do not differ, then without some threshold every party using its common law rights or corporate law powers to restrain trade would, under his test, be immune from antitrust scrutiny, for those laws delegate authority and are not (at least to most capture theorists) the product of capture.²⁴⁹ But immunizing every exercise of common law and

²⁴⁵ Whether a capture test is a better means of determining when laws are likely to be against the public interest than a test which focuses on personal financial interest is a matter I address below at pp. 723-29. The point here is merely that capture theory does not demonstrate that there is no process distinction between disinterested politically accountable decisionmakers and financially interested ones. Indeed, even disinterested decisionmakers known to be captured should be less likely to restrain trade in ways that harm the public interest than decisionmakers with direct financial interests because the former still face some (although perhaps less effective) political pressure from the interests adversely affected by a restraint. See *infra* note 247.

²⁴⁶ Moreover, economic theorists have shown that the competition among interest groups to influence disinterested accountable processes can lead to efficient laws. See Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 386-88, 396 (1983).

²⁴⁷ In fact, the interest group model of regulation predicts that:

no interest group is likely to have its demand for regulation completely satisfied; most rules will consist of compromises in which no single group actually "captures" the process. Legislators will maximize their own well-being by distributing political favors among various groups so as to equalize their net marginal returns from all sources.

Spitzer, *supra* note 3, at 1304-05 & nn.61-62 (collecting sources).

²⁴⁸ Wiley, *supra* note 3, at 743. This is quite different from the public/private distinction Wiley draws regarding remedies, which he explains in terms of underlying policies. See *id.* at 773-76.

²⁴⁹ See *supra* pp. 679-82.

corporate law powers would obviously be intolerable as a policy matter. It would obliterate antitrust. Moreover, the Sherman Act Congress clearly was dissatisfied with the way the states and the common law had defined market processes: the very trusts the antitrust laws were aimed at were, after all, authorized by state common law. Wiley's limiting of his test to "state and local regulation" is apparently designed to avoid this result. But defining the term proves problematic under his analysis. One could imagine definitions that rely on whether the regulation is in some sense "attributable" to the state or local government, on whether the state or local government has articulated some policy in favor of the delegation, or on some implicit baseline under which the delegations authorized by the common law differ from those authorized by more modern regulation. But none of these definitions aids Wiley. The first is a purely formal public/private distinction; the second relies on a clear authorization requirement that Wiley explicitly rejects;²⁵⁰ and the last simply uses the *Lochnerian* public/private distinction that has been critiqued since the advent of legal realism.²⁵¹ Thus, in attempting to define a test that ostensibly avoids a public/private distinction, Wiley merely reinscribes the distinction in another form.²⁵²

As for Wiley's descriptive claim, he concedes that his theory does not fit the reasoning or results of the Court's state action cases.²⁵³ His claim that state action doctrine reflects capture concerns is instead based on the argument that there was a shift in doctrine that paralleled growing concerns about regulatory capture.²⁵⁴ He begins with the proposition that *Parker's* sweeping logic and procedural history demonstrate that it stood for absolute deference to state policy choices.²⁵⁵ "*Parker's* premise," in his view, was "that state autonomy is *always* more important than federal antitrust goals."²⁵⁶ Given his reading of *Parker's* premise, he argues that "a state repeal of federal antitrust law would seem to be an example of sovereign policy expression

²⁵⁰ See Wiley, *supra* note 3, at 729-39.

²⁵¹ See Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874-83, 917-19 (1987).

²⁵² Wiley adopts a similarly unexplained private/public distinction by allowing only the state to offer a market imperfection defense. See Wiley, *supra* note 3, at 751-64. Private parties would apparently still be subject to the antitrust doctrine that they cannot defend restraints on the ground that competition does not work. See *supra* p. 706.

²⁵³ See Wiley, *supra* note 31, at 1277-78, 1282 n.29. In addition to being inconsistent with state action doctrine, the whole premise of capture theory — that antitrust courts should police efforts by self-interested producers to lobby for anticompetitive laws — runs counter to the *Noerr* doctrine, which immunizes precisely such self-interested petitioning efforts from antitrust review. See *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139-40 (1961).

²⁵⁴ See Wiley, *supra* note 3, at 715.

²⁵⁵ See *id.* at 715-19.

²⁵⁶ *Id.* at 722-23 (emphasis in original).

deserving broad deference.²⁵⁷ Wiley then derives a "shift in doctrine" from the denial of immunity in post-*Parker* cases where state policy choices were implicated.²⁵⁸ Finally, he argues that a "change in intellectual climate" resulting from capture theory paralleled and "caused" this "shift in doctrine toward wider application of federal antitrust policy."²⁵⁹ He attributes the imperfect match between current doctrine and capture concerns to a continuing "tension" between capture concerns and the initial premise of absolute deference.²⁶⁰

But this shift in doctrine is wholly manufactured. The initial position of the Court was never as simplistically deferential as Wiley suggests. In 1904, long before *Parker*, the Court in *Northern Securities* rejected the claim that state authorization immunized a financially interested merger²⁶¹ and, in the same year, decided in *Olsen v. Smith*²⁶² to immunize a restraint imposed by a financially disinterested state governor.²⁶³ *Parker* embraced both holdings: citing *Northern Securities* to affirm that mere state authorization could not confer antitrust immunity;²⁶⁴ and citing *Olsen* to support the Court's conclusion that the Sherman Act did not apply to governmental restraints.²⁶⁵ True, the restraints challenged in *Parker* had to be proposed and approved by financially interested producers. But the terms of the restraints had also been approved and adopted without modification by a financially disinterested state commission charged with the statutory duty of assuring that the producers did not exact "unreasonable profits."²⁶⁶ Thus, from the beginning the Court has demonstrated neither boundless deference nor limitless intrusion but has consistently immunized only restraints where a financially disinterested person controlled the terms of the restraint before it was imposed. Indeed, not one of the thirteen post-*Parker* cases that addressed the immunity of restraints involving state officials has deviated from this proposition.²⁶⁷ In short, there has been no shift in doctrine, and any tension is eased if one abandons the conflict-and-accommodation paradigm.

²⁵⁷ *Id.* at 730.

²⁵⁸ *Id.* at 715, 719-23.

²⁵⁹ *Id.* at 723-28; see also Easterbrook, *The Supreme Court, 1983 Term — Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 52-54 (1984) (making the same argument).

²⁶⁰ See Wiley, *supra* note 3, at 715; Wiley, *supra* note 31, at 1278, 1283 n.29.

²⁶¹ See *supra* note 59 (discussing *Northern Secs. Co. v. United States*, 193 U.S. 197 (1904)).

²⁶² 195 U.S. 332 (1904).

²⁶³ See *id.* at 340, 344-45 (holding the Sherman Act inapplicable to a claim that the governor was restraining trade by refusing to grant a pilot's license).

²⁶⁴ See *Parker v. Brown*, 317 U.S. 341, 351 (1943).

²⁶⁵ See *id.* at 352.

²⁶⁶ See *id.* at 352, 346-47.

²⁶⁷ Ten of the cases are discussed above in Part II: *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*,

The normative claim that the Court should examine state and local regulation for evidence of capture is more formidable but ultimately unconvincing. An initial problem the claim faces is that the legislative history of the Sherman Act provides no indication that Congress authorized the Court to use antitrust law as a tool for rooting out legislative and regulatory capture. True, Congress did delegate to courts the task of formulating standards for judging the validity of restraints falling within the scope of antitrust review.²⁶⁸ But nothing in the legislative history indicates that this delegation included a willingness to give judges open-ended common law authority to define the scope of activity subject to its standards or to allow judges to extend their review beyond the cases of financially interested restraints that Congress felt needed judicial policing.²⁶⁹ To the extent the legislative history does touch on capture theory (and obviously Congress could not have been contemplating a theory developed long after the Act's passage), it suggests hostility to allegations of capture rather than a willingness to base antitrust on it.²⁷⁰

445 U.S. 97 (1980); *Hoover v. Ronwin*, 466 U.S. 558 (1984); *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985); *Fisher v. City of Berkeley*, 475 U.S. 260 (1986); *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987); and *Patrick v. Burget*, 486 U.S. 94 (1988). Rounding out the 13 are *Bates v. State Bar*, 433 U.S. 350, 359-62 (1977), which immunized a ban on attorney advertising that was promulgated by a financially disinterested state supreme court, *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 109-10 (1978), which immunized a restraint on establishing new auto dealerships pending a hearing that could be triggered by competitors where a financially disinterested state board controlled the duration of the restraint, and *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 465 (1986), in which the Court declined to immunize a horizontal agreement by financially interested dentists to withhold x-rays from insurers where, even if the use of x-rays by insurers was against state policy, state officials did not approve the dentists' collective restraint.

²⁶⁸ See *supra* note 151 and accompanying text.

²⁶⁹ See *supra* pp. 698-701. Spitzer's suggestion that courts judge all restraints by whether they are efficient or transfer wealth from consumers to producers suffers the same defect. See Spitzer, *supra* note 3, at 1318-25. Efficiency or distributive justice may be proper standards for judging a restraint once we know it was created by a person with a financial incentive to restrain trade, but they are not proper standards for judging all restraints. Prohibitions on prostitution, for example, impose a restraint that is clearly based on moral or social grounds. It would be anomalous and meaningless to judge such a restraint by whether it promotes economic efficiency or, by restricting entry by new prostitutes less capable of avoiding detection, transfers wealth from johns to pimps and practicing prostitutes. Nothing in the legislative history suggests Congress intended antitrust standards to apply so broadly. Moreover, it seems particularly unwise to use antitrust law to judge the substantive merit of state and local regulation given the widespread controversy over what the substantive standards of antitrust are and the even more widespread admission that Congress had little idea what substantive standards it expected to be applied. See *supra* note 151 and accompanying text. It is one thing for Congress to appoint courts as the policemen of self-interested market behavior with a general command to do good; it is quite another for Congress to appoint courts as the general policemen of governmental action without specifying what they should be policing.

²⁷⁰ See 21 CONG. REC. 2560 (1890) (remarks of Sen. Teller) ("It is suggested by a Senator near by, 'Suppose the trusts control the State.' I do not know that they are any more likely to

Legal authority aside, the idea of judges policing state and local regulation for capture is deeply problematic in its own right. It is, to begin with, hard to see how courts could meaningfully determine when "decisive" producer support occurred. The counterfactual inquiry into what the state or local government would have done without the producer support faces all the practical and conceptual problems that have long plagued efforts to determine legislative motives.²⁷¹ Most important, courts generally can determine what a government would have done "but for" certain support only by using some implicit model of how proper government behaves.²⁷² These implicit models threaten to become the de facto norms against which laws are judged. If courts are to make such normative choices at all, it would be better if they were made openly rather than smuggled into the nominally factual determination of whether producer support was "decisive."

Even where the decisiveness of producer support seems clear, the concept of producer "capture" itself has severe problems. Producers

control a State than they are to control this body or any other legislative body."). A related problem is the lack of any reason to view capture as a problem only when an attack on state regulation can be framed as an antitrust violation. Restraints on competition are not the only product of capture: capture can occur whenever small intensely interested groups are pitted against large mildly interested groups. Indeed, to many it explains the success of the National Rifle Association despite large majorities favoring gun control. The problem of capture is thus not special to antitrust and far too general to be resolved by it. If judges should police governmental processes to correct for capture, it would make more sense to do so by means (such as constitutional review or general statutory interpretation) that could apply to all captured lawmaking.

Moreover, policing capture under antitrust law leaves open the possibility of capturing Congress to change antitrust standards. See Baxter, *The Political Economy of Antitrust*, in *THE POLITICAL ECONOMY OF ANTITRUST* 3, 3-4 (R. Tollison ed. 1979) (arguing that many aspects of antitrust reflect the self-interested exercise of political influence because they retard efficiency). The main reason Wiley gives for putting capture review under the antitrust laws rather than the Constitution — Congress' ability to overrule disfavored judicial decisions, see Wiley, *supra* note 3, at 779 — may thus be a vice rather than a virtue under capture theory.

Nor is it clear that state and local governments are more susceptible to capture than Congress. Although some argue that the smaller size of states renders them more susceptible to capture, see R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 173 (1985), the theoretical basis for this link between size and susceptibility to capture is unclear, see *infra* pp. 727-28 (arguing that increasing transaction costs can increase capture). Moreover, the greater ease of "exiting" state and local governments may make them less susceptible to capture. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* § 19.6, at 504 (3d ed. 1986). The empirical evidence is far from clear. See Kitch, *Regulation and the American Common Market*, in *REGULATION, FEDERALISM, AND INTERSTATE COMMERCE* 9, 36-45 (A. Tarlock ed. 1981) (arguing that federal regulators have in fact enacted more anticompetitive legislation than states). The only congressional statement on the issue seemed to regard the susceptibility of federal and state legislation to capture as equivalent. See 21 CONG. REC. 2560 (1890) (remarks of Sen. Teller).

²⁷¹ See, e.g., Kreimer, *supra* note 195, at 1335-38 (describing the problems).

²⁷² See *id.* at 1337. For example, a judge who believes that without subversive influences proper governments would not adopt inefficient regulations will reach different conclusions than one who believes that proper governments advance noneconomic values at the expense of efficiency.

are not the only financially interested group that can capture governmental bodies. The interest group model of lawmaking applies whenever a group finds it worthwhile to organize to seek laws that financially benefit itself at the expense of others.²⁷³ Yet once one generalizes beyond producer capture, capture becomes indistinguishable from political success. Rent control, for example, can be seen as the product of the successful efforts of existing renters (who have high per capita interests in rent control) to secure a law that benefits them by exploiting landlords (who have high per capita interests but few votes) and prospective tenants (who have low per capita interests and perhaps no voting rights).²⁷⁴ Restrictions on housing development can be viewed as current homeowners' successful exploitation of owners of undeveloped land and prospective home buyers.²⁷⁵

But the conceptual problem goes even deeper, for the phenomenon of small intensely interested groups besting larger diffusely interested groups cannot be considered undesirable unless we have independent normative standards for evaluating the outcome. A law might, for example, be deemed socially undesirable (under some stipulated measure of desirability) because it causes much more harm than good, but might do so by conferring small benefits on a large number of people and imposing enormous injury on a small number of people. Under those circumstances, the ability of the small intensely interested group to achieve an influence in disproportion to their numbers and block majoritarian exploitation must be regarded as not only desirable but perhaps even necessary to the legitimacy of majoritarian rule.²⁷⁶ By

²⁷³ See Spitzer, *supra* note 3, at 1303-08, 1310-13, 1315-18 (collecting and describing literature extending capture theory beyond instances of producer capture).

²⁷⁴ See *id.* at 1311-12.

²⁷⁵ See *id.* at 1317. In response to Spitzer's attack, Wiley has essentially abandoned producer capture as a process test; he now argues that the two substantive policies of antitrust are efficiency and distributive justice for consumers and that producer capture is useful "evidence" that one of those policies has been infringed. See Spitzer, *supra* note 3, at 1299 n.38, 1317 n.102; Wiley, *supra* note 60, at 1333-39. But, as the rent control example suggests, it is not clear why producer capture should be regarded as more probative evidence of inefficient regulation than successful organization by any group. On the other hand, producer capture does seem to be probative if the goal of antitrust is not efficiency but protecting against transfers of wealth from consumers to producers. But Wiley offers no reason why producer capture should be regarded as evidence *necessary* rather than simply *relevant* to a judicial determination of the ultimate issue whether the regulation violates the substantive policy of distributive justice for consumers.

²⁷⁶ To take two different sorts of examples, assume that under moral standards it is undesirable for a racist majority to vent its prejudice through legislation punishing a racial minority and that under efficiency standards it is undesirable for a majority to enact legislation confiscating the wealth of a minority. In either case, the ability of the minority to block the legislation must be deemed desirable (under the stipulated standards of desirability) even if the legislation would confer benefits on many by injuring a few.

using "capture" pejoratively, then, we must mean only a group's success in achieving influence that is "excessive" to the magnitude of the group's interest in some normative sense. Economists may implicitly adopt a normative baseline of efficiency. For judges, however, the grounds for adopting a particular normative baseline are, to say the least, not self-evident. A judge might, for example, under some normative baselines regard an efficient (that is, wealth-maximizing) regulatory regime that does not redistribute wealth²⁷⁷ as failing to maximize social welfare and thus reflecting "capture" by the most economically productive persons in society. In any event, where independent normative standards *are* available, little is gained by using them indirectly: instead of implicitly using them to judge the "excessiveness" of a group's influence, the normative standards could be applied to judge the legal outcome itself.

Finally, and perhaps most importantly, the identification of defects in the political process does not demonstrate that substituting a judicial process of decisionmaking would improve the situation.²⁷⁸ Capture theory provides a handy tool in one's own analysis of how apparently undesirable regulation comes about. But any proposal to use capture theory to make *collective* judgments to strike down state law must recognize that those judgments will be made not by wise philosopher-kings (with whose philosophy we all agree) but by judges deciding cases. As the last paragraph shows, those judgments will be intensely normative. Capture review thus does not so much rechannel or reinforce the political process as replace it with a process of substantive judicial decisionmaking.

Presumably the virtue of judicial decisionmaking is that judges are shielded from political influence. It is, however, not clear why we should have faith that decisionmakers divorced from political influence will be better at aggregating the affected social interests (or otherwise defining the public interest) than the political process. Judges may be less biased, but dice are unbiased too. The very lack of responsiveness to (and familiarity with) the affected interests that lessens judicial bias also makes judges more likely to err in assessing, weighing or maximizing those interests. A process of judicial decisionmaking would seem attractive only to those who believe that most societal decisions

²⁷⁷ Possible examples include antitrust or, according to Posner, the common law. See R. POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 270, § 8.1, at 229-33. To a radical, the efficiency of the common law may simply demonstrate that the most economically productive members of society have disproportionate influence on *judges*, who usually come from their same economic class.

²⁷⁸ This critique of Wiley's proposal applies as well to the proposals advocating judicial case-by-case balancing of state regulatory interests against federal competition policy. See *supra* note 38.

(and judges) are objective or that the distortion in the political process is so great that it cannot be worsened. I find either claim implausible.²⁷⁹

Furthermore, to some extent courts themselves are also vulnerable to capture. The same organizational problems confronting political action often confront litigation action as well. Parties or small groups with concentrated interests will be more likely to litigate and seek favorable precedent than large diffuse groups, and will be better positioned to finance high-quality legal representation.²⁸⁰ Even though federal antitrust courts are largely shielded from ongoing political pressures,²⁸¹ more frequent and more skillful litigation should tend to benefit those with concentrated interests.²⁸² Moreover, the

²⁷⁹ See generally J. CHOPER, *supra* note 192, at 4-59 (arguing, in part based on numerous empirical studies, that despite various defects in the political process, the elected branches are better than the Supreme Court at reflecting the will of the majority of voters). Of course, when a state has delegated policymaking authority to state judges with life tenure, capture review does not substitute a judicial process of decisionmaking for a political one: it substitutes a federal judicial process for a state one. But capture theory provides no grounds for believing federal judges will make better decisions than state judges with similar job security. And though a state could not change federal capture review, a state can always revoke a delegation of policymaking authority to state judges if the state becomes displeased with the results.

²⁸⁰ Cf. Rubin, *Common Law and Statute Law*, 11 J. LEGAL STUD. 205, 211-13 (1982) (describing how the structure of litigation can influence the evolution of case law). The problems confronting large groups may be ameliorated by the ability to finance litigation collectively through fees payable out of class action funds. But class actions will not always be possible, see Chayes, *The Supreme Court, 1981 Term — Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 30-39 (1982) (outlining obstacles), and the risk of losing and earning no fees will discourage others, see P. AREEDA & L. KAPLOW, *supra* note 169, ¶ 527, at 871 n.29. Even when class actions are brought, class action attorneys have incentives to secure settlements with favorable fee arrangements even though class members might prefer other settlements or further litigation. See Coffee, *Understanding the Plaintiff's Attorney*, 86 COLUM. L. REV. 669, 671-72 & n.5, 714-20 (1986).

²⁸¹ Lower court judges do, however, have some ongoing accountability to the extent they are interested in promotion to higher courts. Cf. W. SHUGHART, *ANTITRUST POLICY AND INTEREST-GROUP POLITICS* 7, 133 (1990) (citing studies suggesting that judges are more likely to decide antitrust cases "in the government's favor when vacancies exist on higher courts and increased opportunities for promotion are perceived"). Granted, the chances of promotion are often slight. See R. POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 270, § 19.7, at 505-06. But they may not be much smaller than the chances of an incumbent legislator losing her seat. See Tushnet, Schneider & Kovner, *Judicial Review and Congressional Tenure*, 66 TEX. L. REV. 967, 972-83 (1988). To some extent, the political accountability of both judges and legislators may be marked by "retrospective responsiveness" to the political forces that first won them office. *Id.* at 984-85.

²⁸² See Rubin, *supra* note 280, at 211-13. Within capture theory, then, the choice between the political and judicial process turns in part on difficult empirical questions about the costs of informing and organizing different groups and the relative costs of organizing for lobbying versus litigation. See *id.* at 221-22. To the extent one believes that special interest groups mainly capture agencies and legislatures by influencing the information they receive, see Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 230-31 (1986), the same phenomenon would seem to apply to

initial selection of judges might be influenced (and perhaps "captured") by special interest groups who would be favored by the appointment of judges with certain predictable ideological bents.²⁸³ Nominations and confirmations are issues over which special interest groups can and have exercised disproportionate influence, just as they have for regulatory legislation. Indeed, if judges started to exercise the power to make regulatory policy, one would expect to see powerful groups interested in economic regulation exert much more pressure than they now do, just as the decision in *Roe v. Wade*²⁸⁴ has made prochoice and prolife groups much more active and influential in the nomination and confirmation process.

Active judicial review of economic regulation might be justified on the more modest grounds that it would make capture more difficult by requiring special interest groups to capture not one governmental body but two. In law and economics terms, activist judicial review increases the transaction costs of capture.²⁸⁵ An initial problem with this justification is that judicial capture may often be the only step necessary. Franchisees may, for example, persuade judges to strike down an efficient law enforcing franchise agreements on the ground that the law was the product of "capture" by franchisors. Even when this is not true, increasing the transaction costs of legal change may encourage capture by making any law that survives judicial review less vulnerable to repeal and thus more valuable to the captors.²⁸⁶

the judicial process. One distinction is that at least two opposing views will be represented (though perhaps unequally) in every litigated case. This will not, however, always ensure adequate consideration of all affected interests. The fact that most vertical restraint cases involve manufacturers and terminated dealers, for example, may have led the Supreme Court to adopt antitrust rules that pay insufficient attention to the interests of consumers and nonterminated dealers. Moreover, repeat players with concentrated interests are likely to spend more than members of large diffuse groups on litigation efforts to influence the information courts receive and to settle cases involving information likely to lead to unfavorable precedent.

²⁸³ To be sure, many issues will be unforeseeable and thus hard to influence through "appointment capture." Another difficulty with appointment capture is that the appointed judge will vote on a large number of issues. Many groups may thus have equivalent potential interests, so that none can gain an advantage. The overall effect may be socially positive. For example, it may be that businesses that would otherwise push for inefficient regulation protecting their industry will settle on appointing a pro-efficiency judge because as a general policy efficiency will advance each business's interests. Nonbusiness, pro-equity groups may, however, still claim appointment capture in this example. See *supra* note 277.

²⁸⁴ 410 U.S. 113 (1973).

²⁸⁵ Professor Macey, for example, though not taking account of the possibility of judicial capture, justifies separation of powers on the ground that it increases the transaction costs of capture. See Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 494-505 (1988).

²⁸⁶ See Landes & Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877-85 (1975). Landes and Posner also claim that judges enforce statutes embodying interest group deals to maintain their general independence. See *id.* at 885. Macey's response to Landes and Posner basically disputes their claim about judicial incentives. See

Moreover, where increasing the transaction costs of legal change does discourage interest group efforts to secure exploitative legislation, it will also discourage the efforts of other groups to seek "public interest" laws and may thus be desirable only where strong grounds exist for preferring the status quo. Indeed, it seems plausible that increasing transaction costs will hurt diffuse groups more than concentrated groups because the latter are (by definition) better able to fund efforts to seek or oppose legal change. The *relative* advantage of concentrated groups, then, may actually be improved by increasing transaction costs.²⁸⁷

In short, the Court's refusal to review for capture seems less a reflection of the Court's naivete about the political process than a reflection of its lack of naivete about the alternatives. This does not mean that antitrust review under state action doctrine does nothing to restrain capture. By restricting delegations to financially interested decisionmakers, it forces captors into alternatives that often have less value. Either the captors will have to repeat their capture over time,²⁸⁸ or they will have to seek fixed laws that may be less profitable if the market changes.²⁸⁹ No doubt undesirable capture will still often

Macey, *supra* note 285, at 496-99. But this does not disprove the point that increasing the costs of legal change makes legal change more valuable and interest group activity more likely. One need only modify Landes and Posner's claim as follows. Judicial review (whether truly independent, prone to enforce statutory deals, or subject to capture itself) increases the transaction costs of securing a legal change *that survives judicial review*. This makes such legal changes more valuable. Given certain assumptions, the increased value will increase interest group incentives to seek legal change more than the increased transaction costs decrease their incentives. Cf. Landes & Posner, *supra*, at 880-85 (showing that, under certain assumptions, the extra durability an independent judiciary will confer on legislation will outweigh the extra costs).

This modified analysis does, however, have two problems. First, if seeking legal change that survives judicial review takes a long time and requires substantial investments, then risk aversion and the discounting of future profits may decrease the value of the investment. Second, if judges are truly independent and utilize their independence to increase costs for legal change that reflects capture more than it increases costs for legal change that "undoes" capture, then interest group activity may be discouraged. I thus do not claim that more active judicial review would encourage interest group activity. I make the more modest claim that it is ambiguous, without empirical evidence, whether increasing the transaction costs of legal change would encourage or discourage capture.

²⁸⁷ Judges can avoid this only if they can somehow increase the transaction costs for "private interest" group petitioning more than for "public interest" group petitioning. But this, I argue above, is impossible through capture review without normative standards that could, if agreed upon, be applied directly to legal outcomes. On the other hand, I agree with Macey that traditional statutory interpretation, which interprets statutes according to their articulated purposes even when they deviate from the underlying interest group bargains, can selectively discourage interest group capture without requiring courts to determine whether statutes are captured or "public-regarding." See Macey, *supra* note 282, at 227, 238, 250-56.

²⁸⁸ See Landes & Posner, *supra* note 286, at 888-89 (arguing that legislation requiring annual action is less valuable to captors).

²⁸⁹ Take, for example, an industry of four producers who seek monopoly pricing. The best

be profitable. But, given the difficulties with direct judicial evaluation of capture or the desirability of laws, this does not demonstrate that the current regime is worse than the alternatives.²⁹⁰

IV. RELATED PROCESS ISSUES

The distinction state action doctrine implicitly draws between restraints imposed by financially interested actors and financially disinterested politically accountable actors raises two natural questions. What happens when political accountability itself creates a potential financial interest because a restraint inflicts anticompetitive effects on those whose interests the actor does not represent? And to what extent should antitrust review apply to restraints imposed by financially disinterested but politically unaccountable actors?

A. Restraints Imposing Costs Outside Governmental Boundaries

Sometimes the restraints of state or local governments inflict spillover costs outside their boundaries. When the restraint exploits or threatens to create market power against outsiders, those inside a governmental unit may have a collective financial interest in the restraints their government imposes.²⁹¹ For example, suppliers within a government unit may, if they act collectively, enjoy monopoly power against buyers outside the unit. If so, a law that sets minimum prices or imposes production controls could further the financial interests of insiders at the expense of outsiders.²⁹² Governmental units repre-

solution for the producers would be a statute that delegates the authority to fix prices to themselves, for then they could easily adjust prices to maximize profits as costs and demand change. Otherwise they must settle for a statute that fixes rates directly or delegates ratesetting authority to a disinterested state agency, in which case the producers must either repeatedly capture the legislature or state agency to adjust prices over time or settle for rates that will not maximize profits if the demand and cost curves shift.

²⁹⁰ Cf. Macey, *supra* note 282, at 244-46 (arguing that judicial review can optimize but not eliminate the agency costs of representative government).

²⁹¹ A community can be financially interested in exploiting its market power against outsiders even though that power in part exploits consumers residing inside the community because the monopoly profits garnered from the outsiders may outweigh (and even compensate for) the loss to the inside consumers. Similarly, a business corporation is ordinarily financially interested in its restraints even though some of its shareholders are also consumers of its products.

²⁹² If buyers within a governmental unit collectively enjoy monopsony power against out-of-state sellers, the unit might exploit that power with price ceilings. Sometimes the government can create market power against outsiders by restraining competition in selling or buying. For example, a city might be able to create market power for resident laborers by restricting the ability of employers to hire nonresidents. If those employers are predominantly outsiders and cannot easily move their facilities from the city, then the city will have created market power against outsiders. Or a city might prohibit outsiders from buying resources, goods, or services existing or produced within city limits. If those resources or means of producing goods or services are predominantly owned by outsiders and cannot easily be moved outside the city, then the city has created a monopsony power (by excluding competing buyers) that exploits outsiders.

senting the interests of those insiders would thus have a financial interest undermining the likelihood that their restraint advances the public interest.²⁹³ Under the ideals articulated above, this collective financial interest may well call for antitrust review. As we will soon see, the possibility of such collective financial interests (and the difficulty of determining them) explains much of the relevant doctrine.

But first, to forestall possible confusion, I must stress the difference between the proposition that a government's collective financial interest may require antitrust review and three other propositions that I reject. The first is that governments should be subjected to antitrust review when they are running businesses. As the example above shows, a governmental unit need not engage in business to confer financial benefits on insiders by exploiting outsiders: normal regulation can accomplish the same. By the same token, although governmental businesses may profit financially from the restraints they impose, the governmental unit does not have the sort of collective financial interest of concern here unless the financial gain arises out of the fact that the restraint imposes costs on outsiders whom the government does not represent. The concern about collective financial interests thus does not embody a governmental/proprietary distinction which, as I argued in Part I, has rightly been rejected.

The second proposition I would distinguish is that antitrust law should, as Hovenkamp and Mackerron argue, preempt governmental restraints imposing substantial spillover costs.²⁹⁴ The presence of substantial spillovers does not necessarily mean that those inside the governmental unit are exploiting market power against outsiders to further the collective financial interests of insiders. Safety regulations, for example, may impose significant costs on both insiders and outsiders without exploiting insider market power. Nor does the presence of spillovers necessarily demonstrate that the regulating governmental unit is not the best decisionmaker available. A city or state may be the optimal decisionmaking group even though it is too small to represent all affected interests. To begin with, because governmental units are generally organized geographically, a governmental decisionmaker large enough to encompass all affected interests (such as the

²⁹³ The relevant government official need not have a personal financial interest if she represents those who do. Cf. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 403 (1978) (stating that decisions designed to maximize benefits for a city's constituency are no less likely to harm the national economic well-being than are decisions to maximize benefits for a corporation's shareholders); *Ward v. Town of Monroeville*, 409 U.S. 57 (1972) (holding that due process was violated when, sitting as a traffic court judge, a town's mayor assessed fines constituting a major portion of the town's income).

²⁹⁴ See Hovenkamp & Mackerron, *supra* note 24, at 775-76 (advocating spillover preemption for municipal regulations lacking active state supervision).

federal government or the state in which a city sits) will also necessarily encompass — and be accountable to — many unaffected interests. To the extent this accountability to unaffected interests renders decisionmaking less reliable,²⁹⁵ there may be a tradeoff between the distortion created by spillovers and the distortion created by accountability to unaffected interests. In addition, because the costs of collective decisionmaking (including the costs of collecting and disseminating information) often increase with group size, there will often be a tradeoff between minimizing decisionmaking costs and ensuring that all affected interests are represented.²⁹⁶ Finally, because different individuals prefer different types of legal regimes, optimal decisionmaking may be promoted (despite increased spillovers) by decreasing the size of governmental units. Such decreases both enhance the mobility of individuals (and thus their ability to choose their legal regimes) and enlarge the number of legal regimes from which mobile individuals may choose.²⁹⁷ In other words, because governmental units that encompass all affected interests are often too removed to understand and address problems that are primarily localized, and because human diversity requires a variety of local responses, some local autonomy is desirable, and we may have to tolerate some major spillovers if we are to have meaningful local autonomy. Antitrust review that preempts such spillovers (and thus forces regulatory decisions into a higher level of government) may impair rather than improve the overall quality of decisionmaking and make meaningful local autonomy impossible.

A third, and related, proposition I mean to distinguish is that antitrust review should apply whenever a governmental unit disproportionately burdens outsiders.²⁹⁸ A governmental unit may, for example, ban nonresidents from selling in the unit. Because these non-resident sellers are not directly represented within the governmental unit, the decision to restrain trade to their detriment may be less likely to advance the public interest than when all affected interests are represented. But the governmental unit has no collective financial interest in such a case, for the consumers within the governmental unit are also adversely affected by the restraint (which creates market power against insiders) and will, assuming the exclusion is inefficient, have a greater aggregate financial stake in opposing the restraint than the resident sellers have in imposing it. The inside consumers, moreover, will likely be represented in greater numbers than the resident

²⁹⁵ See R. HALE, *FREEDOM THROUGH LAW* 544-45 (1952).

²⁹⁶ See J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT* 113-14 (1962).

²⁹⁷ See D. MUELLER, *PUBLIC CHOICE* II 155 (1989).

²⁹⁸ Cf. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 *YALE L.J.* 425, 460-68 (1982) (proposing similar review under the dormant commerce clause).

sellers who benefit from excluding their competitors. This gives the nonresident sellers surrogate representation.²⁹⁹ Of course, capture theory predicts that the political process may underweigh such diffuse consumer interests despite their greater voting power and aggregate financial interest. But capture theory also shows that such underweighing may occur whether or not a regulation disproportionately burdens nonresident business interests, and the same reasons that counseled against judicial capture review apply if judges are required to decide which statutes imposing disproportionate externalities resulted in an "excessive" political imbalance between resident sellers and consumers.³⁰⁰

Putting aside these three propositions, we return to the process problem with which antitrust is centrally concerned: financially interested decisionmaking. Given the possibility that states might have collective financial interests in exploiting outsiders, how can one justify the absolute antitrust immunity of state legislatures and the effectively absolute immunity of any state-wide officials who do not have personal financial interests? The answer is that under a gamut of constitutional doctrines, most notably the dormant commerce clause,³⁰¹ the Court already polices state efforts to exploit market power against out-of-staters.³⁰² Why distinguish between state and municipal action in defining the scope of antitrust review? Because when a municipality inflicts market injuries outside municipal boundaries but inside state boundaries, dormant commerce clause review does not apply.³⁰³ The point is not that municipalities are more likely than states to exploit market power against outsiders, but rather that, because of the contours of the dormant commerce clause, only municipal action presents a problem of unpoliced exploitation.

The lesser antitrust immunity accorded municipal action stems from just such concerns about extraterritorial exploitation. The case

²⁹⁹ See M. TUSHNET, *supra* note 172, at 80-82.

³⁰⁰ Moreover, the Court's prior experience under the dormant commerce clause suggests it will have trouble determining whether a law disproportionately burdens outsiders. See, e.g., L. TRIBE, *supra* note 73, § 6-6, at 415.

³⁰¹ Constitutional review is also provided under the privileges and immunities clause, the equal protection clause, and the right to travel. To simplify the exposition, I use "dormant commerce clause review" to refer to the combination of constitutional doctrines under which courts review state and municipal laws with out-of-state effects.

³⁰² See Levmore, *Interstate Exploitation and Judicial Intervention*, 69 VA. L. REV. 563, 575-626 (1983). *Parker v. Brown* itself involved a state production control that seemed to exploit monopoly power and was sustained under the dormant commerce clause. But the common explanation for that holding is that Congress implicitly approved the state restraint. See, e.g., *id.* at 627-28.

³⁰³ Cf. *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354-56 (1951) (using dormant commerce clause review to strike down a municipal ordinance that did affect out-of-state interests). Nor is there much other constitutional review. See *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 66-75 (1978) (upholding municipal regulation of nonresidents).

that first distinguished municipal action from state action, *Lafayette*, involved claims that the City of Lafayette, which operated an electric utility both inside and outside city limits, had committed various antitrust violations that affected the market for electricity.³⁰⁴ The Court rejected the argument that the city should be presumed to act in the public interest because the city's decisions to act anticompetitively "may be made by the municipality in the interest of realizing maximum benefits to itself without regard to extraterritorial impact and regional efficiency."³⁰⁵ As a result:

the economic choices made by public corporations in the conduct of their business affairs, designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders.³⁰⁶

Motivated by these process concerns about intrastate spillover costs, the *Lafayette* Court thus established the proposition that municipalities would not be treated like states.³⁰⁷

The *Lafayette* Court was, however, unable to agree on when municipalities should enjoy antitrust immunity. This proved to be a difficult doctrinal problem because the Court had trouble incorporating concerns about extraterritorial exploitation into a state action doctrine that was formally concerned only with whether restraints could be attributed to the state as sovereign. The next municipal action case, *Community Communications Co. v. City of Boulder*,³⁰⁸ presented the Court with a dilemma. On one hand, because the restraint at issue merely froze expansion of a cable company within city limits, the restraint had no apparent extraterritorial impact on competition. On the other hand, because the only relevant state authorization was the home rule authority commonly bestowed on municipalities,³⁰⁹ the Court could hardly find the restraint sufficiently attributable to the sovereign to merit immunity without effectively forgoing review of

³⁰⁴ See *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 391-92 & n.6 (1978).

³⁰⁵ *Id.* at 404. The Court reasoned that the city might, for example, "increase the cost of electric service to these customers [in another city]. Moreover, a municipality conceivably might charge discriminatorily higher rates to such captive customers outside its jurisdiction Both of these practices would provide maximum benefits for its constituents, while diserving the interests of the affected customers." *Id.*

³⁰⁶ *Id.* at 403.

³⁰⁷ Although the *Lafayette* opinion is perhaps more famous for other portions that garnered only a plurality, the analysis described above commanded five votes.

³⁰⁸ 455 U.S. 40 (1982).

³⁰⁹ All 50 states have home rule provisions. See Hovenkamp & Mackerron, *supra* note 24, at 748 n.182 (citing statutes).

financially interested municipal restraints. The Court's temporary solution was to hold that home rule authority was too general to satisfy the clear authorization requirement but to leave open the possibility that special liability rules might apply to municipalities.³¹⁰

Since then, three distinct doctrinal developments have occurred. To take the last development first, the Court decided in *Fisher v. City of Berkeley*³¹¹ that restraints imposed by unilateral municipal action could not violate section 1 of the Sherman Act. *Fisher* left open the possibility that municipal restraints that monopolized or attempted to monopolize might violate section 2.³¹² The formal basis for this distinction was the absence of an agreement in *Fisher*. But, as we saw in Part II, this formal distinction is unsatisfactory because there was no real agreement (or monopolization) in the three resale price maintenance statutes that the Court has struck down.³¹³

The distinction is, however, explicable in process terms. Assuming that the Court ultimately does hold that municipal restraints can form the basis for a section 2 claim, the doctrine would in effect provide antitrust review of spillovers only where the city has or might create the sort of market power against outsiders creating a collective financial interest. Where a municipal restraint exploits or threatens to create monopoly or monopsony power against outsiders, antitrust review will be provided because a monopolization or attempted monopolization claim can be made.³¹⁴ But where no such monopoly or monopsony power is implicated, the restraint will be beyond the scope of antitrust review even though, like the restraint in *Fisher*, it may have some extraterritorial impact.³¹⁵ This conforms to the above

³¹⁰ See *Boulder*, 455 U.S. at 54-57 & n.20.

³¹¹ 475 U.S. 260 (1986).

³¹² See *id.* at 270 n.2.

³¹³ See *supra* pp. 686-87.

³¹⁴ For such review to be effective in policing financially interested decisionmaking, the Court will have to recognize monopolization claims not only when the municipality itself has (or will have) monopoly or monopsony power, but also when those who reside within the municipality have (or will have) monopoly or monopsony power against nonresidents. Even then, this review may be somewhat narrower than the full extent of the financial interest concern because proving monopolization or attempted monopolization may, absent particularly egregious conduct, require a showing of "substantial" or "significant" market power. See 3 P. AREEDA & D. TURNER, *supra* note 41, ¶¶ 800-815, at 289-304, ¶¶ 831-836, at 335-55. The rationale for this limitation is practical: unilateral exercises of modest market power (for example, pricing by the corner convenience store) are so ubiquitous that subjecting them to plenary antitrust scrutiny would impose excessive litigation costs and deter much desirable conduct. See *id.* ¶ 813, at 301, ¶ 833d, at 342. Ordinary businesses are instead provided with some safe harbor by limiting the Sherman Act either to conduct they can easily avoid (such as conspiracies or obviously egregious conduct) or to broader forms of anticompetitive conduct by actors with substantial market power. This practical rationale for limiting antitrust review of certain modest unilateral business decisions despite the businesses' financial interest seems equally applicable to municipalities that may routinely exercise or create modest market power via unilateral regulation.

³¹⁵ The restraint in *Fisher* necessarily affected any nonresident landlords and any nonresi-

analysis which distinguishes antitrust's focus on financially interested decisionmaking from a more general focus on spillovers.

The other two developments were the Local Government Antitrust Act of 1984,³¹⁶ which eliminated damage claims in cases involving municipal action, and the Court's decision in *Town of Hallie v. City of Eau Claire*,³¹⁷ which held that municipal conduct of a type authorized by the state was immune without any showing of active state supervision.³¹⁸ The effect of these two developments was to make the scope of antitrust review of municipal spillover costs similar to the scope of dormant commerce clause review of state spillover costs. Under both, restraints imposing spillover costs can only be enjoined³¹⁹ and are immune from judicial review if they are of a type previously authorized by a higher level of government that represents all affected interests. The state authorization requirement under *Midcal* parallels the federal authorization requirement under dormant commerce clause review. State authorization immunizes municipal restraints from antitrust review,³²⁰ and congressional authorization immunizes state restraints from commerce clause scrutiny.³²¹ Giving home rule authority to municipalities, like admitting states to the union, does not itself provide sufficient authorization. The symmetry is not yet complete because intracity exploitation of monopoly power may require state authorization to gain immunity from antitrust review, whereas intrastate exploitation of monopoly power does not require congressional authorization to be immune from dormant commerce clause review. But this inconsistency can be corrected if, as my analysis suggests, the Court fulfills *Boulder's* dicta about special municipal liability rules by holding that municipal restraints without extraterritorial effects do not violate antitrust law.

dents who might have been able to rent in Berkeley (in part because more housing might have been built) had there not been rent control. The litigants did not argue that the rent control plan constituted a monopsonistic exploitation of nonresident landlords by resident tenants.

³¹⁶ Pub. L. No. 98-544, §§ 3-4, 98 Stat. 2750 (codified at 15 U.S.C. §§ 35-36 (1988)).

³¹⁷ 471 U.S. 34 (1985).

³¹⁸ See *id.* at 41-44, 46-47.

³¹⁹ Compare *Will v. Michigan Dep't of State Police*, 109 S. Ct. 2304, 2309-11 (1989) (holding that neither states nor state officials acting in their official capacities are subject to damages for constitutional violations under 42 U.S.C. § 1983) with 15 U.S.C. § 35(a) (1988) (exempting from antitrust damages "any local government, or official or employee thereof acting in an official capacity").

³²⁰ Because home rule statutes are insufficient authorization under *Boulder*, the authorization requirement has more bite for municipalities than for state agencies. Indeed, it seems more than likely that the type of legislation typically enacted to create regulatory agencies will (unlike home rule statutes) always be sufficiently specific to satisfy their authorization requirement. See *supra* pp. 691-93.

³²¹ See *L. TRIBE*, *supra* note 73, § 6-33, at 524-25. The burden of seeking upper-level governmental action is thus placed on the party seeking to restrain competition under both antitrust and commerce clause review. Cf. *supra* pp. 712-17 (arguing that the burden of seeking governmental action should be placed on the party seeking to restrain competition).

Although largely consistent with the scope of dormant commerce clause review, the resulting antitrust review of municipal action does not perfectly match that applicable to financially interested nonmunicipal action.³²² In particular, a municipality financially interested in a restraint that exploits its monopoly power against outsiders need not show that a disinterested actor accountable to all the affected interests has controlled the terms of (that is, actively supervised) that particular restraint. Under *Hallie*, state authorization will be enough.³²³ This may have simply reflected the Court's sense that municipal restraints rarely involve the sort of extraterritorial exploitation of market power that raises concerns about financially interested decisionmaking, and its determination (at that pre-*Fisher* time) that requiring active supervision would thus extend antitrust review far beyond its intended scope. Requiring only clear authorization may have seemed the best doctrinal compromise available between underpolicing financially interested decisionmaking and overdetering disinterested accountable decisionmaking. But two other reasons may also support the lack of an active supervision requirement for municipal action.

The first lies in the nature of the empirical judgment underlying antitrust law and the difficulty of determining when geographically organized entities have a collective financial interest. Congress has never made the same generic empirical assumption about municipal restraints that it made about business restraints.³²⁴ Whereas businesses almost always have a financial interest in their restraints because the effects largely fall on those they do not represent, the same presumption does not apply to municipalities.³²⁵ Municipalities rarely

³²² One difference is that, even when financially interested, state and local governments are immune from damages. See *supra* p. 735. This is arguably justified by three factors: (1) a reluctance to inflict penalties on taxpayers who may not benefit from the anticompetitive restraint and may in fact be hurt as consumers; (2) the greater visibility of public action, which decreases the need for deterrence; and (3) the fear that damages will excessively deter desirable state and local regulation because state or local officials have no personal profit motive spurring them to act despite the financial risk of damages. See Wiley, *supra* note 3, at 773-75 (offering variations of these three reasons as a functional justification for immunizing public action from damages).

³²³ See *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 41-44 (1985). Indeed, in *Hallie*, the claim was precisely that the town of Hallie had illegally acquired and exploited a local monopoly in sewage treatment against other cities. See *id.* at 36-37.

³²⁴ At least, "the legislative history of the Sherman Act reveals no evidence of an *express* Congressional intent to apply the antitrust laws to either state or local governments." H.R. REP. No. 965, *supra* note 3, at 4, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 4602, 4605 (emphasis added).

³²⁵ See *id.* at 8, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 4602, 4609 (citing "testimony that a local government's policy may at times be antithetical to the principles underlying antitrust theory, which seeks to prevent private interests from increasing profits as a function of curtailing competition"); see also *Hallie*, 471 U.S. at 45 (observing that a municipality is presumed to act "in the public interest" whereas a private party is presumed to act "primarily on his or its own behalf").

wield significant market power against outsiders and often regulate in ways that mainly affect their residents.³²⁶ A general delegation by a state of restraint authority to municipalities, then, does not contravene Congress' empirical judgment that financially interested actors cannot be trusted to act in the public interest. Of course, plaintiffs arguably should be able to prove in a particular case that the delegation, as applied, contravenes Congress' empirical judgment about financially interested actors because the municipality is exploiting market power against outsiders. But in cases where a city's market power exploits both insiders and outsiders, courts may have difficulty judging whether enough of the burden of exploitation falls on outsiders to make the city (as a collective) financially interested.

Take, for example, a municipally imposed monopoly on airport taxi service that exploits both air travelers who reside in the city and those who are just passing through. Can courts accurately assess whether the monopoly profits accruing to taxicab drivers outweigh the market injuries suffered by resident air travelers? And can cities accurately predict what courts will decide? If not, then antitrust review may pose a serious obstacle to meaningful local autonomy by deterring or interfering with municipal action that merely imposes the type of spillover costs that are a routine incidence of local governance.³²⁷ The decisionmaking process might be better served, then, by relying on the relative certainty of state authorization and on state judgments about the wisdom of delegating certain types of authority to municipalities.

Second, the distinction between municipal and nonmunicipal financially interested restraints might be justified by the implications of Coasian bargaining. The Coase theorem provides that, if bargaining has zero transaction costs, the efficient outcome will occur regardless of the legal rule chosen because wealth-maximizing parties can always bargain to avoid inefficient outcomes.³²⁸ Scholars subsequent to Coase

³²⁶ Of course, they often can and do create market power against their residents by restraining competition within municipal limits.

³²⁷ See *supra* pp. 730-31.

³²⁸ See Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2-8 (1960). This is because, if efficiency is defined as wealth-maximization, the economic gain from an inefficient outcome is less than the economic loss. Thus, there will always exist an amount that those who would lose by an inefficient outcome would pay those who would gain that can induce agreement to avoid the inefficiency and improve the situations of both. This does not necessarily mean that the same efficient outcome will occur regardless of the legal rule chosen. See Hovenkamp, *Marginal Utility and the Coase Theorem*, 75 CORNELL L. REV. 783, 785 (1990). Because the allocation of legal entitlements itself can affect the wealth of the concerned parties, it may alter their ability or willingness to pay (or accept payment) to alter outcomes. Where it does, the choice of legal rule itself affects which outcome is "efficient" under the wealth-maximization definition. For similar reasons, the Coase theorem cannot guarantee that zero transaction costs and perfect bargaining will (irrespective of the legal rule chosen) lead to the most desirable

have emphasized that, even if transaction costs are zero, the efficient outcome may not occur because bargaining can break down as a result of parties' rational strategic efforts to gain a bigger share of any surplus created by a successful bargain.³²⁹

Given these factors, it seems clear that, relative to nonmunicipal parties, cities can more easily engage in Coasian bargains to avoid harmful exploitation. For common business restraints, the transaction costs of Coasian bargaining are prohibitive. Consumers face enormous information costs in detecting every anticompetitive restraint and identifying all the parties benefited and hurt by each restraint. In addition, consumers would incur huge transaction costs and free rider problems in organizing themselves to make a bargain, and would have a difficult time monitoring and enforcing any bargain struck. Cities representing the constituents injured by another city's extraterritorial exploitation, by contrast, should have an easier time surmounting these problems because they are fewer in number. Cities are also more likely to be repeat players, which reduces the likelihood of strategic breakdowns in bargaining.³³⁰ Finally, they have a ready forum and mechanism for enforceable bargaining: their district representatives can trade votes in the state legislature to provide the necessary authorization.³³¹

B. Disinterested But Unaccountable Actors

One must be careful to separate analytically the issues discussed in previous sections from the issue to which I now turn: antitrust's applicability to restraints imposed by financially disinterested but politically unaccountable private actors. A conclusion about the latter is not strictly necessary to my main thesis. Whether or not disinterested but unaccountable restraints are or should be policed by antitrust

outcome if utility maximization or distributional justice is the measure of social desirability. See *id.* at 798-808. For a discussion of distributional issues, see note 331 below.

³²⁹ See Cooter, Marks & Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 225-27, 242-47 (1982).

³³⁰ See *id.* at 232-33, 241.

³³¹ See Inman & Rubinfeld, *A Federalist Fiscal Constitution for an Imperfect World: Lessons from the United States*, in FEDERALISM: STUDIES IN HISTORY, LAW, AND POLICY 79, 88-89 (H. Scheiber ed. 1988). Further, relegating cities to the protection of Coasian bargains is more justifiable than requiring such bargaining from consumers. A purpose of antitrust, in addition to efficiency, is protecting consumers from having their wealth expropriated by producers' anticompetitive combinations. See Lande, *supra* note 149. Even if Coasian bargaining could avoid all inefficient outcomes in the event a state delegated restraint authority to interested businesses, the payments consumers would have to make to producers to avoid inefficient restraints would still constitute an unjustifiable transfer of wealth. When a state delegates restraint authority to cities, on the other hand, cities are within both the potentially exploiting and exploited classes. Transfer payments among them inflict no obvious harm to antitrust goals. Moreover, the bargaining will often take the form of agreements to avoid protectionist retaliation. Such bargains can advance efficiency without any unjustifiable wealth transfer.

courts, my prior conclusions still hold that antitrust review does and should apply to financially interested restraints but not disinterested accountable ones. Nonetheless, the issues are naturally related and the framework developed so far proves useful both in analyzing those relations and in isolating an issue that so far has only been touched on in a nonsystematic fashion under the rubrics of substantive antitrust law, the first amendment, and antitrust's *Noerr* doctrine.

Two sorts of related but distinct issues should be distinguished at the outset. The first concerns claims that a restraint controlled by financially interested actors has a nonfinancial motive. A long line of Supreme Court cases has rejected such defenses,³³² but all those cases involved restraints imposed by actors who had actual financial interests making their claims of nonfinancial motives suspect. Those cases thus have no necessary implication for restraints controlled by decisionmakers who objectively lack any financial interest. The second set of issues concerns claims that, in a particular case, a restraint had no anticompetitive effect and thus did not actually confer financial benefits on the defendants. The Court has denied defendants the opportunity to prove such claims in cases in which any effect the restraint might have had would financially benefit the defendants.³³³ But these decisions rest more on practical than theoretical grounds. In such cases, antitrust law presumes that the anticompetitive effects will flow (and that the restraint is thus financially interested) because a contrary rule would vastly complicate the legal inquiry, increase litigation costs, and lessen deterrence.³³⁴ Such concerns, and therefore these cases, have little application where any lessening of competition resulting from a restraint would not benefit (and might even harm) the financial interests of those imposing the restraint.³³⁵

Should, for example, antitrust apply if consumers boycott fruit containing certain pesticides? Because the boycott cannot restrict competition in a way that financially benefits the boycotters, it seems hard to escape the conclusion that the boycotters must not be financially

³³² See cases cited *supra* notes 187-88.

³³³ See, e.g., *FTC v. Superior Court Trial Lawyers Ass'n*, 110 S. Ct. 768, 780-82 (1990) (refusing to consider a defense that a restraint aimed at increasing prices could not have done so because the defendants lacked market power); *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 213 (1959) (refusing to consider a defense that a restraint injuring a defendant's competitor could not have affected competition because numerous other competitors were left in the market).

³³⁴ See *Trial Lawyers*, 110 S. Ct. at 780-81 & n.16.

³³⁵ I also put aside the set of issues concerning claims that, although the defendant is financially interested in the restraint, its financial interest is procompetitive. Manufacturers in vertical restraint cases might, for example, argue that their financial interest is furthered by making dealers more rather than less competitive. See Bork, *The Rule of Reason and the Per Se Concept*, 75 *YALE L.J.* 373, 403 (1966). This argument often has force but is addressed (and properly so) in the context of determining the content rather than scope of antitrust review.

interested. Or what if, based on concerns about safety, medical association members agree not to prescribe a drug, or manufacturers agree not to make an unsafe product, in circumstances where it is clear the members or manufacturers could make a bigger profit by prescribing the drug or making the product? Should such professional self-regulation or product standard-setting be subject to antitrust review even though financially disinterested?

Where the lack of financial interest is clear, the process view that has so far been stressed — that financially interested actors cannot be trusted to restrain trade in the public interest — has no application. Rather, the fact that these persons are politically unaccountable raises two other types of process concerns. First, they may have bad intentions in the sense that their actions are arbitrary, capricious, vindictive, or motivated by personal nonfinancial reasons. Second, even if they act with the best intentions to further the public interest, they may act overzealously or pursuant to a view of the public interest that is idiosyncratic.

These are valid concerns. It is dubious, however, whether they are concerns encompassed by antitrust law. As detailed in Part III, the legislative history demonstrates that the focus of the Congress that passed the Sherman Act was on financially interested restraints on competition. The legislative history does contain many expressions of concern about business combinations being “tyrannies,” having the power of a “king” or “emperor,” and “dictating” or “controlling” trade, but always in the context of discussing financially interested combinations.³³⁶ Indeed, Congress only discussed one type of restraint that was financially disinterested — a temperance society boycott of liquor retailers — and all the congressmen who discussed it agreed that it should not be covered by the Sherman Act.³³⁷

Perhaps surprisingly, Supreme Court precedent does not directly address the applicability of antitrust law to financially disinterested restraints. True, the Court’s opinions stress that boycotts and agreements limiting consumer choice cannot be sustained “[a]bsent some countervailing procompetitive virtue.”³³⁸ But in those cases any lessening in competition resulting from the restraints financially benefited the defendants. Moreover, there is evidence in the Court’s opinions

³³⁶ 21 CONG. REC. 2726 (1890) (remarks of Sen. Edmunds) (“tyrannies”); *id.* at 2457, 2462 (Sen. Sherman) (“king,” “emperor,” “dictating,” and “controlling”); *id.* at 3147 (Sen. George); *id.* at 4101 (Sen. Heard); *id.* at 2570 (Sen. Sherman).

³³⁷ *See id.* at 2658–59; 20 CONG. REC. 1459 (1889). To be sure, the legislative history is not as clear as it might be because some senators expressed concern that an unenacted version of the Act might cover temperance society boycotts. *See Note, The Scope of Noerr Immunity for Direct Action Protestors*, 89 COLUM. L. REV. 662, 672–73 (1989). But no one argued that the statute *should* cover such boycotts.

³³⁸ *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 459 (1986); *see also* cases cited *supra* notes 187–88.

that its understanding of what is "procompetitive" or "anticompetitive" may hinge on the financial interest of the restrainer.

For example, *National Society of Professional Engineers v. United States*,³³⁹ which stressed that antitrust review "is confined to a consideration of impact on competitive conditions,"³⁴⁰ has a curious footnote suggesting that restraints preventing the sale of unsafe products may not have an "anticompetitive effect."³⁴¹ Since the footnote relies on a case in which the restraint prevented consumers from buying a product from a retailer,³⁴² and thereby constricted consumer choice, it is hard to see what the Court means by saying that the restraint had no "anticompetitive" effect. Perhaps the Court means only that the seller's lack of any financial incentive to curtail sales of its product was sufficient for the Court to credit the seller's "purpose of protecting the public from harm."³⁴³

In *Allied Tube*, the Court demonstrated a similar willingness to stray from common understandings of what "competition" means. It stated that a business association's product safety standard could be "procompetitive" if the "standard-setting process [was not] biased by members with economic interests in stifling product competition."³⁴⁴ Although one can readily see how the lack of financial bias would make the standard-setting more reliable and desirable, it is hard to see in what sense the disinterest made the product standard "procompetitive." After all, as the Court itself recognized, an "[a]greement on a product standard is . . . implicitly an agreement not to manufacture, distribute, or purchase certain types of products."³⁴⁵ Surely this limits consumer choice and competition in producing those types of products.

Some courts have based an exemption for financially disinterested restraints on the *Noerr* doctrine, which provides antitrust immunity to otherwise valid petitioning activity genuinely designed to secure governmental action.³⁴⁶ They rely on language in Supreme Court cases contrasting political activity immune under *Noerr* with "commercial" activity subject to antitrust review.³⁴⁷ But this political/commercial distinction is not meant to immunize all activity that is political in the sense that it is ideologically motivated or noncommercial in the sense that it is financially disinterested. Rather, it is meant to immunize traditional political means of seeking governmental action

³³⁹ 435 U.S. 679 (1978).

³⁴⁰ *Id.* at 690.

³⁴¹ *Id.* at 696 n.22.

³⁴² See *Tripoli Co. v. Wella Corp.*, 425 F.2d 932 (3d Cir. 1970).

³⁴³ *Professional Eng'rs*, 435 U.S. at 696 n.22.

³⁴⁴ *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988).

³⁴⁵ *Id.* at 500.

³⁴⁶ See Note, *supra* note 337, at 670 n.48, 678 n.93 (collecting cases).

³⁴⁷ See, e.g., *Allied Tube*, 486 U.S. at 505-07 & n.10.

despite its commercial impact and to deny immunity to traditional economic activity despite its political impact.³⁴⁸ The focus is on the context and nature of the activity, not the subjective motivation behind it. Indeed, in *Noerr* itself the Court held that the activity was political in nature and immune from antitrust review even though the defendants were acting to further their financial interests.³⁴⁹ The *Noerr* doctrine is designed to facilitate input into the political process and thus has no particular implication for financially disinterested restraints that are not part of an effort to petition the government.

Nor, on the other hand, is an exemption foreclosed by the language in *Fashion Originators' Guild of America v. FTC*³⁵⁰ that emphasizes the Court's concern that businesses boycotting to prevent allegedly undesirable conduct might act as an "extra-governmental agency."³⁵¹ Concerns about such extra-governmental activity are, of course, present when financially disinterested actors boycott or otherwise restrain trade to further their view of the public interest. But the defendants in *Fashion Originators'* had financial interests that seemed certain to bias their extra-governmental conduct and thus create even more severe process problems. In cases where boycotters have lacked any such financial interest, the lower courts have been reluctant to find liability.³⁵²

Interpreting antitrust law not to cover any financially disinterested restraints seems more attractive once one considers the conceptual (and constitutional) problems such an interpretation would avoid. To begin with, if antitrust covers only financially interested restraints, courts could avoid deciding whether or not a financially disinterested actor was sufficiently accountable politically to merit state action immunity. More significantly, if antitrust covers disinterested but unaccountable restraints, courts must somehow decide which to condemn and which to sustain. The bright-line counterpart to exempting all

³⁴⁸ See *id.*

³⁴⁹ See *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138-40 (1961).

³⁵⁰ 312 U.S. 457 (1941).

³⁵¹ *Id.* at 465.

³⁵² In *Molinas v. National Basketball Association*, 190 F. Supp. 241 (S.D.N.Y. 1961), for example, a federal district court dismissed an antitrust suit against a team and league that had suspended a player for gambling. See *id.* at 244. This was literally a boycott by the league teams and posed concerns about extra-governmental activity, but the team and league also had no apparent financial interest in depriving themselves of players unjustifiably. For other cases dismissing antitrust suits against disinterested leagues, see *Neeld v. National Hockey League*, 594 F.2d 1297 (9th Cir. 1979); and *Manok v. Southeast District Bowling Association*, 306 F. Supp. 1215 (C.D. Cal. 1969). When, on the other hand, the Ladies Professional Golf Association suspended a player for alleged cheating, the restraint was condemned as per se unlawful. See *Blalock v. Ladies Professional Golf Ass'n*, 359 F. Supp. 1260, 1266 (N.D. Ga. 1973). Here the members of the association, other players who competed with the suspended player, did have a financial interest in excluding their rival whether or not she cheated.

disinterested restraints — condemning all of them that lack real pro-competitive virtues to offset their anticompetitive effect — is no longer available after *NAACP v. Claiborne Hardware Co.*³⁵³ In *Claiborne Hardware*, the Court held that state law could not, under the first amendment, punish a black consumer boycott of white merchants designed to secure equality and racial justice by forcing those merchants to effect changes both in their businesses and in their roles as government leaders. The two key factors, the Court has explained in subsequent antitrust cases, were that the boycotters “did not stand to profit financially from a lessening of competition in the boycotted market” and sought only to vindicate “rights of equality and freedom lying at the heart of the Constitution.”³⁵⁴ At a minimum, then, antitrust law does not cover disinterested boycotts designed to end racial discrimination.

How can courts decide what other types of disinterested restraints are and are not covered by antitrust law? One suggested method is for courts to balance the public interest furthered by the disinterested restraint against its anticompetitive effect.³⁵⁵ But how in the world can courts determine whether a legitimate (and sufficiently strong) public interest is served, for example, by a boycott of hotels in states that did not ratify the equal rights amendment,³⁵⁶ of doctors who perform abortions,³⁵⁷ or of businesses shipping to a foreign country whose conduct the boycotters regard as reprehensible?³⁵⁸ Judges' own

³⁵³ 458 U.S. 886 (1982). The position that the antitrust laws should condemn all noncommercial boycotts per se was ably argued, before *Claiborne Hardware*, in Bird, *Sherman Act Limitations on Noncommercial Concerted Refusals to Deal*, 1970 DUKE L.J. 247, 275-88.

³⁵⁴ *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 508-09 (1988); *accord* FTC v. Superior Court Trial Lawyers Ass'n, 110 S. Ct. 768, 776-78 (1990).

³⁵⁵ See Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 NW. U.L. REV. 705, 747 (1962). Another approach is for courts to focus on whether the restraint embodies a simple agreement to do X, an agreement to enforce that agreement against members who do not do X, or (in the worst case) an agreement to force others to do X by inflicting economic injury on them if they do not. Cf. Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847, 872 (1955) (laying out a similar approach). But it is plain that even the “worst case” type of restraint can be valid under *Claiborne Hardware*. Moreover, the first type of agreement is not categorically more benign or less “extra-governmental” than the others. A simple “self-regulatory” agreement, such as an agreement not to prescribe Laetrile, does, after all, lessen consumers' ability to procure that drug and Laetrile manufacturers' ability to sell it.

³⁵⁶ See *Missouri v. National Org. for Women, Inc.*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980).

³⁵⁷ See *Barr v. National Right to Life Comm., Inc.*, 1981-2 Trade Cas. (CCH) ¶ 64,315 (M.D. Fla. 1981).

³⁵⁸ See *International Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212 (1982); cf. *Doubts on Idaho Abortion Bill*, San Fran. Chron., Mar. 30, 1990, at A18, col. 4 (reporting the National Organization for Women's threat to organize a boycott of Idaho potatoes if Idaho enacted a law restricting abortion); Garchik, *Personals*, San Fran. Chron., Mar. 30, 1990, at A10, col. 4 (reporting the National Rifle Association's efforts to organize a boycott of entertainers who support gun control).

views about which goals actually advance the public interest hardly seems a persuasive ground, let alone one compatible with first amendment traditions.

Courts might seek to avoid making such open-ended value choices by upholding only financially disinterested restraints whose objectives have been incorporated into law.³⁵⁹ This approach at least avoids the concern that the public interest view embodied in the restraint is idiosyncratic. A problem with this approach is that the Court has rejected efforts to defend financially interested restraints on the ground that they enforced the law or furthered legal objectives,³⁶⁰ even when those objectives were embodied in constitutional law.³⁶¹ These cases are by no means dispositive since the defendants were financially interested. But they underscore the point that even when the legitimacy of the asserted objectives is clear, the concern about extra-governmental enforcement and adjudication remains. In cases involving financially interested restrainers of trade, the concern is that financial incentives will bias enforcement decisions and determinations of whether a violation occurred. But to the extent that process concerns about unaccountable financially disinterested decisionmaking have force, they are in the main also applicable to the exercise of enforcement discretion or adjudication of guilt. For example, despite the accepted validity of a safety concern, unaccountable actors may be arbitrary, capricious, vindictive, overzealous, or motivated by personal reasons in deciding whose products are unsafe and whether (and how much) to punish the manufacturers.³⁶²

The Court's decision in *International Longshoremen's Association v. Allied International*³⁶³ suggests two possible limitations to *Claiborne Hardware's* first amendment protection of boycotts designed to enforce legal objectives. In *Longshoremen's*, a union decided to protest the Soviet invasion of Afghanistan by refusing to handle Soviet cargo. This was held to be an illegal secondary boycott under the National Labor Relations Act³⁶⁴ and, more important here, unprotected by the

³⁵⁹ Such an approach was suggested in Coons, *supra* note 355, at 749, 755. Interestingly, the Sherman Act Senate at one point did approve an amendment exempting "combinations among persons for the enforcement and execution of the laws of any State." 21 CONG. REC. 2658 (1890). However, for reasons that are unclear, the amendment was dropped when the Senate Judiciary Committee redrafted the bill. See 1 E. KINTNER, *supra* note 155, at 275-76.

³⁶⁰ See *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 465 (1986); *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457, 468 (1941).

³⁶¹ See *FTC v. Superior Court Trial Lawyers Ass'n*, 110 S. Ct. 768, 775 (1990).

³⁶² The adjudicatory questions might be reassessed de novo by antitrust courts. But antitrust courts may be less competent in making policy decisions about enforcement discretion. And one may hesitate to place on antitrust courts the burden of supervising private adjudication and enforcement for any allegedly illegal activity.

³⁶³ 456 U.S. 212 (1982).

³⁶⁴ See 29 U.S.C. § 158(b)(4) (1988) (prohibiting secondary boycotts as an unfair labor practice by unions).

first amendment even though national foreign policy at the time condemned the invasion of Afghanistan.³⁶⁵ One limitation this suggests is that financially disinterested boycotts to enforce public interest objectives may be unprotected if the objective is not embodied in the Constitution. This at least limits antitrust review of enforcement, adjudication, and penalty decisions to the cases that arguably raise the gravest concern. It also limits the scope of permissible restraints to those enforcing the laws that may be most subject to underenforcement by state governments or the other branches of federal government.³⁶⁶ Another limitation is suggested by the fact that in *Longshoremen's* the government had already assessed its own economic sanction (a grain embargo) and disapproved of the extra sanctioning by the Longshoremen's boycott.³⁶⁷ This suggests that boycotts to enforce the law may be unprotected where the government has already determined the level of sanctions appropriate for the occasion.³⁶⁸

In any event it makes good sense, within the limits set by *Claiborne Hardware* and *Longshoremen's*, to take an absolutist approach. Either all anticompetitive financially disinterested but unaccountable restraints should be condemned unless protected by the first amendment or all should be excluded from antitrust review. The former approach has the salutary effect of channelling most grievances into a governmental process that is accountable as well as financially disinterested and thus better able to define public policy objectives and decide how they will be enforced and adjudicated. The latter has the advantage of avoiding difficult line-drawing questions. Because some of these line-drawing questions are constitutional, interpreting the Sherman Act to exclude disinterested restraints would also comport with the traditional canon of statutory construction that, where (as here) legislative intent is unclear, "courts should construe statutes to avoid not only constitutional invalidity but also constitutional doubts."³⁶⁹ Moreover, there may sometimes be a legitimate concern that the pressure of competition will make moral, disinterested business activity, such as refusing to produce a profitable but dangerous product, impossible without a collective restraint because the competition will drive out of business those who do not offer the product.³⁷⁰ Although the threat

³⁶⁵ See *Longshoremen's*, 456 U.S. at 226-27.

³⁶⁶ Why actions under 42 U.S.C. § 1983 (1988) or *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), should not be sufficient enforcement is a question *Claiborne Hardware* does not answer.

³⁶⁷ See *Longshoremen's*, 456 U.S. at 222 n.17.

³⁶⁸ Under this principle *Claiborne Hardware* may not have come out the same way if, after obtaining a limited injunction against constitutional violators, civil rights activists started a punitive boycott.

³⁶⁹ Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 469 (1989).

³⁷⁰ Such restraints would seem unjustifiable if the government affirmatively decided that

of extra-governmental abuse remains, the issue is often policed under state laws that may be better suited for the task because they embody sanctions less draconian than criminal punishment or treble damages.³⁷¹

V. CONCLUSION

The prevailing conflict and accommodation paradigm for framing issues of antitrust state action doctrine puts courts in the untenable position of carving exceptions out of a valid federal statute based on ideals understood to conflict with the basic purposes of the statute. Such a paradigm cannot be squared with ordinary understandings of how conflicts between state and federal law should be resolved. Rather, it reflects the Court's current inability to articulate exactly why some forms of state regulation should stand in the face of federal antitrust law. A paradigm that focuses on functional differences between different decisionmaking processes both avoids the spectacle of such open-ended inverse preemption and better illuminates the underlying ideals.

Under current doctrine, the financial interest or disinterest of the actor who controls the terms of a challenged restraint is the basic determinant of the scope of antitrust process. The financial interest test explains every Supreme Court antitrust case that has struggled with the distinction between state and private action. In each of the cases finding antitrust immunity, a financially disinterested, politically accountable actor controlled and made a substantive decision in favor of the terms of the restraint before it was imposed on the market. In each of the cases rejecting antitrust immunity, the decision was made by a financially interested actor.

The financial interest test also helps explain the distinction between section 1 and section 2 claims against municipalities and, coupled with dormant commerce clause case law, the distinction between state and municipal antitrust immunity. Making municipal immunity turn on whether the state has authorized the type of municipal action being challenged deviates from the financial interest test, but is arguably justified by the unlikelihood of municipal action furthering collective financial interests, the difficulty of determining when it does, and the possibility of Coasian bargaining between municipalities.

The explanatory power of the financial interest test for antitrust review of restraints imposed by financially disinterested but politically unaccountable actors remains to be seen because the Supreme Court

regulation was inappropriate. But one might hesitate before finding antitrust liability for restraints imposed in the interim before the government takes affirmative action.

³⁷¹ See generally Coons, *supra* note 355, at 713-26 (collecting common law cases).

has yet to adjudicate such a case. The only clear conclusion so far is that the first amendment will not protect restraints imposed by financially interested actors. Nevertheless, constitutional considerations and the legislative history suggest that antitrust should not apply to such financially disinterested restraints, and the case law indicates that any antitrust review that does apply will have little bite.

Explaining doctrine within a process framework does not, of course, demonstrate that the doctrine is correct. The process views implicit in doctrine are no more immune from normative and empirical objections than the substantive views. But for antitrust state action doctrine, focusing on the decisionmaking processes for restraining trade is essential if the doctrinal distinctions are to have functional significance. In my judgment, the Court's process views are defensible and largely correct because they serve to channel collective resource allocation decisions into either a political or competitive process that, though inevitably imperfect, each provides some realistic assurance that the decisions will further the public interest. Others with more faith in judicial decisionmaking or interstate competition for residents may reach different conclusions. Regardless of whether one agrees with the way the case law currently structures the decisionmaking processes, I hope I have at least shown that the process paradigm provides a more fruitful framework for policy debate than the prevailing paradigms of formal or substantive accommodation.