IX. IMMUNITIES AND EXEMPTIONS

A. Overview

Although the antitrust laws establish a set of ground rules that apply broadly across the U.S. economy, their coverage has been limited by a modest number of immunities and exemptions. Some of these, like the statutory immunity for labor unions, have been established by Congress; others have been "recognized" by the judiciary for a variety of reasons over the long history of the antitrust system. This chapter surveys some of the most important of these carveouts from the general reach of the antitrust laws.

In part, these immunities reflect the fact that economic competition (and, particularly, the version of "competition" that antitrust doctrine acknowledges and protects) is not always or automatically the highest, or only, relevant value in our society. Within its scope, as we have seen, antitrust doctrine tends to give little room for parties to advance arguments unrelated to competition, as the antitrust laws define it.[743] As a result, such values are accommodated, in part, through the introduction of immunities. For example, the recognition that atomistic competition among workers is not always desirable helps to underpin the immunity of certain labor practices.

In general, antitrust exemptions are fairly rare: Congress and the courts have created them infrequently and with great caution. The Supreme Court has emphasized that judicial exemptions are generally disfavored, and that all exceptions to the antitrust laws—judicial and legislative alike—should be construed narrowly.[744]

In the following pages, we will meet a series of exceptions and immunities, and consider the scope and rationale of each. Section B considers the immunity accorded to "petitioning" conduct under the "*Noerr-Pennington*" doctrine; Section C introduces the "state action" doctrine that protects the conduct of state governments (and some others acting under some measure of state governments' authority) from antitrust scrutiny; Section D describes the immunity for certain practices relating to labor; Section E briefly presents a variety of other, narrower, antitrust exemptions, covering activities from agriculture to baseball.

B. *"Noerr-Pennington"* Petitioning Immunity

The "*Noerr-Pennington*" doctrine protects so-called "petitioning"—that is, conduct that involves soliciting some form of government action—from antitrust liability. It covers conduct ranging from legislative and executive lobbying to litigation. The core concept is that the antitrust system should not deter or punish efforts to access the government, on the basis that freedom of recourse to courts and to the political branches is even more important than the protection of competition. As we shall see, the doctrine has been understood as a reflection of the values of the First Amendment, as well as an interpretation of the intent of the Sherman Act legislators.

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[743] The seminal statement is National Soc. of Professional Engineers v. United States, 435 U.S. 679, 689 (1978) ("The early [antitrust] cases also foreclose the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition. That kind of argument is properly addressed to Congress and may justify an exemption from the statute for specific industries, but it is not permitted by the Rule of Reason."); *id.* at 692 ("the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress."); *id.* at 695 ("The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.").

[744] *See, e.g.*, Union Lab. Life Ins. Co. v. Pireno, 458 U.S. 119, 126 (1982); Grp. Life & Health Inc. Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979); *see also, e.g.*, Chicago Professional Sports Ltd. Partnership v. NBA, 961 F.2d 667, 671–72 (7th Cir. 1992) ("Recognition that special interest legislation enshrines results rather than principles is why courts read exceptions to the antitrust laws narrowly, with beady eyes and green eyeshades.").

But the exception is not limitless, and it does not give businesses free rein to use and abuse governmental processes in bad faith to harass and oppress rivals. One of the most important limits on the *Noerr-Pennington* doctrine is the "sham exception," which applies to very clear examples of bad behavior that lacks an objective basis. For example, if a monopolist uses baseless litigation in bad faith as a tool to drive up rivals' costs or punish competition, it may not hide behind the *Noerr-Pennington* shield. As we shall see, the "sham" category is generally reserved for egregious misbehavior.[745]

The *Noerr-Pennington* doctrine was first recognized in a trio of Supreme Court cases: *Noerr*, *Pennington*, and *California Motor Trucking*.[746] In *Eastern R.R. Presidents Conference v. Noerr Motor Freight* in 1961, a group of truck operators and a group of railroads—competing for long-haul freight—accused one another of violating the antitrust laws through their respective lobbying campaigns. In their complaint, the truck operators alleged that the railroads had:

> engaged [a PR firm] to conduct a publicity campaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business, to create an atmosphere of distaste for the truckers among the general public, and to impair the relationships existing between the truckers and their customers. The campaign so conducted was described in the complaint as "vicious, corrupt, and fraudulent," first, in that the sole motivation behind it was the desire on the part of the railroads to injure the truckers and eventually to destroy them as competitors in the long-distance freight business, and, secondly, in that the defendants utilized the so-called third-party technique, that is, the publicity matter circulated in the campaign was made to appear as spontaneously expressed views of independent persons and civic groups when, in fact, it was largely prepared and produced by [the PR firm] and paid for by the railroads. The complaint then went on to supplement these more or less general allegations with specific charges as to particular instances in which the railroads had attempted to influence legislation by means of their publicity campaign. One of several such charges was that the defendants had succeeded in persuading the Governor of Pennsylvania to veto a measure known as the "Fair Truck Bill," which would have permitted truckers to carry heavier loads over Pennsylvania roads.[747]

The railroads came right back with a counterclaim, which in turn alleged "a malicious publicity campaign designed to destroy the railroads' business by law, to create an atmosphere hostile to the railroads among the general public, and to interfere with relationships existing between the railroads and their customers."[748]

Can, or should, conduct of this kind form the basis for an antitrust challenge? In the following extract, the Court considered that question. Holding that the antitrust laws could *not* be invoked to punish or prohibit lobbying efforts, the Court set out a rationale for what would become known as *Noerr-Pennington* immunity.

Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc.

365 U.S. 127 (1961)

Justice Black.

[1] We accept, as the starting point for our consideration of the case, the same basic construction of the Sherman Act adopted by the courts below—that no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws. It has been recognized, at least since the landmark decision of this Court in *Standard Oil Co., of New Jersey v. United States*, that the Sherman Act forbids only those trade restraints and monopolizations that are created, or attempted, by the acts of "individuals or combinations of individuals or corporations." Accordingly, it has been held that where a restraint upon trade or monopolization is the result of

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[745] *See*, *e.g.*, Federal Trade Commission v. AbbVie Inc, 976 F.3d 327, 359–71 (3d Cir. 2020) (noting that "[g]enerally, a plaintiff seeking to show the sham litigation exception faces an uphill battle" and analyzing arguments) (internal quotation marks and citation omitted).

[746] Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers of America v. Pennington, 381 U.S. 657 (1965); Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 46 (1993).

[747] Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 129–30 (1961).

[748] *Id*. at 132).

valid governmental action, as opposed to private action, no violation of the Act can be made out. These decisions rest upon the fact that under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government so long as the law itself does not violate some provision of the Constitution.

[2] We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly. Although such associations could perhaps, through a process of expansive construction, be brought within the general proscription of "combination(s) in restraint of trade," they bear very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements. This essential dissimilarity between an agreement jointly to seek legislation or law enforcement and the agreements traditionally condemned by s 1 of the Act, even if not itself conclusive on the question of the applicability of the Act, does constitute a warning against treating the defendants' conduct as though it amounted to a common-law trade restraint. And we do think that the question is conclusively settled, against the application of the Act, when this factor of essential dissimilarity is considered along with the other difficulties that would be presented by a holding that the Sherman Act forbids associations for the purpose of influencing the passage or enforcement of laws.

[3] In the first place, such a holding would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade. In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act. Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms. Indeed, such an imputation would be particularly unjustified in this case in view of all the countervailing considerations enumerated above. For these reasons, we think it clear that the Sherman Act does not apply to the activities of the railroads at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws. . . .

[4] [The District Court held below that] the railroads' sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors for the long-distance freight business. But we do not see how this fact, even if adequately supported in the record, could transform conduct otherwise lawful into a violation of the Sherman Act. All of the considerations that have led us to the conclusion that the Act does not apply to mere group solicitation of governmental action are equally applicable in spite of the addition of this factor. The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors. . . . Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act. A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them. We reject such a construction of the Act and hold that, at least insofar as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had. [. . .]

[5] [T]he courts below rested their holding that the Sherman Act had been violated upon a finding that the purpose of the railroads was "more than merely an attempt to obtain legislation. It was the purpose and intent to hurt the truckers in every way possible even though they secured no legislation." Specifically, the District Court found that the purpose of the railroads was to destroy the goodwill of the truckers, among the public generally and among the truckers' customers particularly, in the hope that by doing so the over-all competitive position of the truckers would be weakened, and that the railroads were successful in these efforts to the extent that such injury was actually inflicted. The apparent effect of these findings is to take this case out of the category of those that involve restraints through governmental action and thus render inapplicable the principles announced above. But this effect is only apparent and cannot stand under close scrutiny. There are no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers. Moreover, all of the evidence in the record, both oral and documentary, deals with the railroads' efforts to influence the passage and enforcement of laws. Circulars, speeches, newspaper articles, editorials, magazine articles, memoranda and all other documents discuss in one way or another the railroads' charges that heavy trucks injure the roads, violate the laws and create traffic hazards, and urge that truckers should be forced to pay a fair share of the costs of rebuilding the roads, that they should be compelled to obey the laws, and that limits should be placed upon the weight of the loads they are permitted to carry. In the light of this, the findings of the District Court that the railroads' campaign was intended to and did in fact injure the truckers in their relationships with the public and with their customers can mean no more than that the truckers sustained some direct injury as an incidental effect of the railroads' campaign to influence governmental action and that the railroads were hopeful that this might happen. Thus, the issue presented by the lower courts' conclusion of a violation of the Sherman Act on the basis of this injury is no different than the issue presented by the factors already discussed. It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. And it seems equally inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns. We have already discussed the reasons which have led us to the conclusion that this has not been done by anything in the Sherman Act.

[6] There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified. But this certainly is not the case here. No one denies that the railroads were making a genuine effort to influence legislation and law enforcement practices. Indeed, if the version of the facts set forth in the truckers' complaint is fully credited, as it was by the courts below, that effort was not only genuine but also highly successful. Under these circumstances, we conclude that no attempt to interfere with business relationships in a manner proscribed by the Sherman Act is involved in this case.

* * *

A few years later, in *United Mine Workers of America v. Pennington* in 1965, the Court stated that "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose," and applied it to protect a union's actions in lobbying the Secretary of Labor and officials of the Tennessee Valley Authority.[749] The third seminal decision in the *Noerr-Pennington* line—*California Motor Transport*—came a few years later.

CASENOTE: California Motor Transport Co. v. Trucking Unlimited

404 U.S. 508 (1972)

In *California Motor Transport Co. v. Trucking Unlimited*, a group of trucking companies sued a group of their incumbent competitors for using litigation and agency action to hinder their access to the market, including by using state and federal proceedings to relentlessly oppose—in bad faith and regardless of the merits—the

[749] United Mine Workers of America v. Pennington, 381 U.S. 657, 670 (1965).

plaintiffs' ability to obtain, transfer, and register rights to operate their businesses. The Court grappled with two questions: first, whether petitioning protection should apply, in general, to conduct directed to the judiciary and administrative processes; and, second, under what circumstances a defendant might be deprived of petitioning immunity that would otherwise cover its conduct. In *Noerr*, the Court had pointed out that, at least in principle, liability might be appropriate for conduct that amounted to a "mere sham" (look back at paragraph 6 of the extract above): and in doing so, it had raised but not answered the question of how "sham" behavior would be defined. *California Motor Transport* now required the Court to take a clearer position on the law of sham petitioning.

The Court reiterated the importance of the *Noerr-Pennington* doctrine, and confirmed its general applicability to efforts to petition the judiciary and administrative agencies. However, the Court explained, this case was an unusual one. The complaint alleged "that the power, strategy, and resources of the [defendants] were used to harass and deter [plaintiffs] in their use of administrative and judicial proceedings so as to deny [the plaintiffs] free and unlimited access to those tribunals. The result, it is alleged, was that the machinery of the agencies and the courts was effectively closed to [plaintiffs], and [defendants] indeed became the regulators of the grants of rights, transfers and registrations to [plaintiffs]—thereby depleting and diminishing the value of the businesses of [plaintiffs] and aggrandizing [defendants'] economic and monopoly power." Crucially, the allegations here were "not that the conspirators sought to influence public officials, but that they sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process." Indeed, the Court explained, the complaint here alleged that the defendants "instituted the proceedings and actions with or without probable cause, and regardless of the merits of the cases."

There were many cases, the Court pointed out, in which misconduct or abuse relating to governmental process can result in liability or illegality. "Perjury of witnesses is one example. Use of a patent obtained by fraud to exclude a competitor from the market may involve a violation of the antitrust laws." And "bribery of a public purchasing agent may constitute a violation of s 2(c) of the Clayton Act, as amended by the Robinson-Patman Act." In sum: "There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." And such abuse does not "acquire immunity by seeking refuge under the umbrella of political expression."

So too here. "First Amendment rights may not be used as the means or the pretext for achieving substantive evils which the legislature has the power to control. . . . A combination of entrepreneurs to harass and deter their competitors from having free and unlimited access to the agencies and courts, to defeat that right by massive, concerted, and purposeful activities of the group are ways of building up one empire and destroying another. . . If these facts are proved, a violation of the antitrust laws has been established." The plaintiffs would be entitled to a trial on their claims.

California Motor Transport established beyond doubt that *Noerr-Pennington* immunity applied to efforts to petition the judicial and administrative organs of government, and that it was subject to a meaningful sham exception that was not merely theoretical. But the bounds of that sham exception would require further clarification.

Today the bounds of the "sham exception" are somewhat clearer. The leading treatment is found in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* In that case, Professional Real Estate Investors operated a resort in Palm Springs, California, and rented out videodiscs to guests for viewing in their hotel rooms.[750] Columbia, which owned the copyrights to the movies on certain videodiscs—and which offered a competing wired cable system for the viewing of movies in hotel rooms—sued PRE for copyright infringement; PRE counterclaimed for antitrust violations, alleging that "Columbia's copyright action was a mere sham that cloaked

[750] Videodiscs were a hard-copy storage format for audiovisual content, and a predecessor to the DVD format (which was a dominant means of distributing audiovisual content, such as movies, before the advent of streaming services).

underlying acts of monopolization and conspiracy to restrain trade."[751] The Supreme Court's opinion provided some detailed guidance on the sham exception.

Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.

508 U.S. 46 (1993)

Justice Thomas.

[1] Those who petition government for redress are generally immune from antitrust liability. . . . *Noerr*, however, withheld immunity from "sham" activities because application of the Sherman Act would be justified when petitioning activity, ostensibly directed toward influencing governmental action, is a mere sham to cover an attempt to interfere directly with the business relationships of a competitor. In *Noerr* itself, we found that a publicity campaign by railroads seeking legislation harmful to truckers was no sham in that the "effort to influence legislation" was not only genuine but also highly successful.

[2] In *California Motor Transport Co. v. Trucking Unlimited*, we elaborated on *Noerr* in two relevant respects. First, we extended *Noerr* to the approach of citizens to administrative agencies and to courts. Second, we held that the complaint showed a sham not entitled to immunity when it contained allegations that one group of highway carriers sought to bar competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process by instituting proceedings and actions with or without probable cause, and regardless of the merits of the cases. We left unresolved the question presented by this case—whether litigation may be sham merely because a subjective expectation of success does not motivate the litigant. We now answer this question in the negative and hold that an objectively reasonable effort to litigate cannot be sham regardless of subjective intent.

[3] Our original formulation of antitrust petitioning immunity required that unprotected activity lack objective reasonableness. *Noerr* rejected the contention that an attempt to influence the passage and enforcement of laws might lose immunity merely because the lobbyists' sole purpose was to destroy their competitors. Nor were we persuaded by a showing that a publicity campaign was intended to and did in fact injure competitors in their relationships with the public and with their customers, since such direct injury was merely an incidental effect of the campaign to influence governmental action. We reasoned that the right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. In short, *Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose. [. . .]

[4] We now outline a two-part definition of "sham" litigation. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor, through the use of the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon. This two-tiered process requires the plaintiff to disprove the challenged lawsuit's legal viability before the court will entertain evidence of the suit's economic viability. Of course, even a plaintiff who defeats the defendant's claim to *Noerr* immunity by demonstrating both the objective and the subjective components of a sham must still prove a substantive antitrust violation. Proof of a sham merely deprives the defendant of immunity; it does not relieve the plaintiff of the obligation to establish all other elements of his claim.

[5] Some of the apparent confusion over the meaning of "sham" may stem from our use of the word "genuine" to denote the opposite of "sham." The word "genuine" has both objective and subjective connotations. On one hand, "genuine" means "actually having the reputed or apparent qualities or character." Webster's Third New

[751] Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 46, 52 (1993).

International Dictionary 948 (1986). "Genuine" in this sense governs Federal Rule of Civil Procedure 56, under which a "genuine issue" is one "that properly can be resolved only by a finder of fact because [it] may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (emphasis added). On the other hand, "genuine" also means "sincerely and honestly felt or experienced." Webster's Dictionary, at 948. To be sham, therefore, litigation must fail to be "genuine" in both senses of the word. [. . .]

[6] We conclude that the Court of Appeals properly affirmed summary judgment for Columbia on PRE's antitrust counterclaim. Under the objective prong of the sham exception, the Court of Appeals correctly held that sham litigation must constitute the pursuit of claims so baseless that no reasonable litigant could realistically expect to secure favorable relief.

[7] The existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation. The notion of probable cause, as understood and applied in the common-law tort of wrongful civil proceedings, requires the plaintiff to prove that the defendant lacked probable cause to institute an unsuccessful civil lawsuit and that the defendant pressed the action for an improper, malicious purpose. Probable cause to institute civil proceedings requires no more than a reasonable belief that there is a chance that a claim may be held valid upon adjudication. Because the absence of probable cause is an essential element of the tort, the existence of probable cause is an absolute defense. Just as evidence of anticompetitive intent cannot affect the objective prong of *Noerr*'s sham exception, a showing of malice alone will neither entitle the wrongful civil proceedings plaintiff to prevail nor permit the factfinder to infer the absence of probable cause. When a court has found that an antitrust defendant claiming *Noerr* immunity had probable cause to sue, that finding compels the conclusion that a reasonable litigant in the defendant's position could realistically expect success on the merits of the challenged lawsuit. Under our decision today, therefore, a proper probable cause determination irrefutably demonstrates that an antitrust plaintiff has not proved the objective prong of the sham exception and that the defendant is accordingly entitled to *Noerr* immunity.

[8] The District Court and the Court of Appeals correctly found that Columbia had probable cause to sue PRE for copyright infringement. Where, as here, there is no dispute over the predicate facts of the underlying legal proceeding, a court may decide probable cause as a matter of law. . . .

[9] When the District Court entered summary judgment for PRE on Columbia's copyright claim in 1986, it was by no means clear whether PRE's videodisc rental activities intruded on Columbia's copyrights. At that time, the Third Circuit and a District Court within the Third Circuit had held that the rental of video cassettes for viewing in on-site, private screening rooms infringed on the copyright owner's right of public performance. Although the District Court and the Ninth Circuit distinguished these decisions by reasoning that hotel rooms offered a degree of privacy more akin to the home than to a video rental store, copyright scholars criticized both the reasoning and the outcome of the Ninth Circuit's decision. The Seventh Circuit expressly declined to follow the Ninth Circuit and adopted instead the Third Circuit's definition of a public place. In light of the unsettled condition of the law, Columbia plainly had probable cause to sue.

NOTES

1) Is petitioning conduct likely to be very anticompetitive in practice? What are the worst examples you can think of?
2) The rules on sham litigation require, among other things, that a suit not be objectively baseless. Is this standard too harsh, because some "objectively baseless" litigation surely turns out to be successful? (For example: can you think of any famous Supreme Court cases that seemed "objectively baseless" when filed? Or is it too lax, because it allows parties to file suits that they do not expect to succeed for purely malicious and anticompetitive reasons?
3) In *California Motor* the Court said: "Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." After *PRE*, what is "sham" petitioning of a legislative or executive body? What kind of misrepresentation would be immune in a more traditionally "political" arena but not in a court? (And where do administrative agencies fit into this scheme?)

4) As we saw in Chapter VII, fraud on the Patent Office may be an antitrust violation (a "*Walker Process* claim"). Should there be a fraud exception to the *Noerr-Pennington* doctrine? How would you define it? Would you add any other exceptions?
5) If petitioning conduct is appropriate to accommodate the values of the Petition Clause, can you think of any other constitutional provisions that might provide a basis for an antitrust exemption?
6) Look back at *Superior Court Trial Lawyers* from Chapter V. Why wasn't that conduct covered by *Noerr-Pennington*?

C. State Action

The "state action" doctrine shields from antitrust liability certain conduct that can be attributed to the decisions of state and local governments. As the following extracts show, it is not quite clear whether the doctrine is best understood as an expression of the legislative history of the Sherman Act, as an independent accommodation for the constitutional value of federalism, or as something else.[752] The Court itself has referred to a wide variety of constitutional, legal, and practical concerns when describing the doctrine's foundations and functions.[753] Like other exemptions, the doctrine is construed narrowly.[754]

What about the Federal Government?

The Supreme Court has held that the federal government is not a "person" within the meaning of the antitrust laws and that, as a result, neither the federal government nor its components (such as the U.S. Postal Service) can be sued for antitrust violations.[755] The United States thus cannot be a defendant in an antitrust case, although it is specifically empowered to bring suit as a plaintiff, as we will see in Chapter XI.

The state action defense was recognized in *Parker v. Brown*. In that case, a California state statute—the California Agricultural Prorate Act—had created a program to limit and control the production and sale of raisins, in order to "restrict competition among the growers and maintain prices." This program was supervised by California's Director of Agriculture, and backed up with civil and criminal sanctions (!). In other words, the California statute authorized the state government to supervise and enforce a raisin-growers' cartel.

Brown, a producer and packer of raisins based in California, chafed under the program's restrictions, and sued the Director of Agriculture, challenging the Act as (among other things) an antitrust violation. But the Court held that the Sherman Act was simply inapplicable to conduct of this kind.

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[752] There is a lively and often critical literature on this doctrine. *See*, *e.g.*, Thomas B. Nachbar, *Antitrust and the Politics of State Action*, 60 Wm. & Mary L. Rev. 1395 (2019); Rebecca Haw Allensworth, *The New Antitrust Federalism*, 102 Va. L. Rev.. 1387 (2016); Alan J. Meese, *Antitrust Federalism and State Restraints of Interstate Commerce: An Essay for Professor Hovenkamp*, 100 Iowa L. Rev. 2161 (2015); Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. Pa. L. Rev. 1093, 1098 (2014); John F. Hart, *"Sovereign" State Policy and State Action Antitrust Immunity*, 56 Fordham L. Rev. 535, 546–47 (1988); Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 Yale L.J. 486 (1987); Thomas M. Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 Calif. L. Rev. 227, 230 (1987).

[753] *See*, *e.g.*, North Carolina State Bd. of Dental Examiners v. FTC, 574 U.S. 494, 503 (2015) ("If every duly enacted state law or policy were required to conform to the mandates of the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal antitrust law would impose an impermissible burden on the States' power to regulate. . . . [*Parker v. Brown*] recognized Congress' purpose to respect the federal balance and to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution."); FTC v. Phoebe Putney Health System, Inc., 568 U.S. 216, 224–25 (2013) (text and legislative history); FTC. v. Ticor Title Ins. Co., 504 U.S. 621, 633 (1992) ("Our decision [in *Parker*] was grounded in principles of federalism. The principle of freedom of action for the States, adopted to foster and preserve the federal system, explains the later evolution and application of the *Parker* doctrine in our [subsequent] decisions[.]"); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) (federalism and legislative intent).

[754] *See*, *e.g.*, FTC v. Phoebe Putney Health System, Inc., 568 U.S. 216, 225 (2013) ("disfavored").

[755] *See*, *e.g.*, USPS v. Flamingo Indus. (USA) Ltd., 540 U.S. 736, 744–48 (2004).

Parker v. Brown

317 U.S. 341 (1943)

Chief Justice Stone.

[1] The California Agricultural Prorate Act authorizes the establishment, through action of state officials, of programs for the marketing of agricultural commodities produced in the state, so as to restrict competition among the growers and maintain prices in the distribution of their commodities to packers. The declared purpose of the Act is to "conserve the agricultural wealth of the State" and to "prevent economic waste in the marketing of agricultural crops" of the state. It authorizes the creation of an Agricultural Prorate Advisory Commission of nine members, of which a state official, the Director of Agriculture, is ex-officio a member. The other eight members are appointed for terms of four years by the Governor and confirmed by the Senate, and are required to take an oath of office.

[2] Upon the petition of ten producers for the establishment of a prorate marketing plan for any commodity within a defined production zone, and after a public hearing, and after making prescribed economic findings, showing that the institution of a program for the proposed zone will prevent agricultural waste and conserve agricultural wealth of the state without permitting unreasonable profits to producers, the Commission is authorized to grant the petition. . . .

[3] If the proposed program, as approved by the Commission, is consented to by 65 per cent in number of producers in the zone owning 51 per cent of the acreage devoted to production of the regulated crop, the Director is required to declare the program instituted.

[4] Authority to administer the program, subject to the approval of the Director of Agriculture, is conferred on the program committee. [The Act] declares that it shall be a misdemeanor, which is punishable by fine and imprisonment, for any producer to sell or any handler to receive or possess without proper authority any commodity for which a proration program has been instituted. Like penalty is imposed upon any person who aids or abets in the commission of any of the acts specified in the section, and it is declared that each infraction shall constitute a separate and distinct offense. [The Act] imposes a civil liability of $500 for each and every violation of any provision of a proration program. [. . .]

[5] The seasonal proration marketing program for raisins, with which we are now concerned, became effective on September 7, 1940. . . . The committee is required to establish receiving stations within the zone to which every producer must deliver all raisins which he desires to market. The raisins are graded at these stations [as standard, substandard, or inferior]. All inferior raisins are to be placed in the "inferior raisin pool," to be disposed of by the committee . . . All substandard raisins, and at least 20 per cent of the total standard and substandard raisins produced, must be placed in a "surplus pool." Raisins in this pool may . . . be disposed of only for "assured by-product and other diversion purposes," except that under certain circumstances the program committee may transfer standard raisins from the surplus pool to the stabilization pool. Fifty per cent of the crop must be placed in a "stabilization pool."

[6] Under the program the producer is permitted to sell . . . 30 per cent of his standard raisins, denominated "free tonnage," through ordinary commercial channels, subject to the requirement that he obtain a "secondary certificate" authorizing such marketing and pay a certificate fee of $2.50 for each ton covered by the certificate. . . . [B]ut no raisins, (other than those subject to special lending or pooling arrangements of the Federal Government) can be sold by the committee at less than the prevailing market price for raisins of the same variety and grade on the date of sale . . . .

[7] Appellee's bill of complaint challenges the validity of the proration program as in violation of the . . . Sherman Act. [. . .]

[8] . . . We may assume for present purposes that the California prorate program would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate. . . .

[9] But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

[10] The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. The Act is applicable to "persons" including corporations, s 7, 15 U.S.C.A., and it authorizes suits under it by persons and corporations. A state may maintain a suit for damages under it, but the United States may not—conclusions derived not from the literal meaning of the words "person" and "corporation" but from the purpose, the subject matter, the context and the legislative history of the statute.

[11] There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only "business combinations." That its purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations, abundantly appears from its legislative history.

[12] True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful; and we have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade. Here the state command to the Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required vote on the referendum is one of these conditions.

[13] The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.

* * *

Parker inaugurated a complex line of cases that attempt to define when and how "state action" enjoys privileged treatment under the antitrust laws. Very crudely, the modern framework can be reduced to four broad categories:

1. **"Sovereign" acts of the state,** including legislation, are effectively *per se* immune from antitrust liability.[756]
2. **The acts of municipal and local government** are beyond the reach of the Sherman Act if those acts are taken are pursuant to a "clearly articulated and affirmatively expressed" state policy.[757]

[756] *See, e.g.*, North Carolina State Bd. of Dental Examiners v. FTC, 574 U.S. 494, 504 (2015) ("State legislation and decisions of a state supreme court, acting legislatively rather than judicially, will satisfy this standard, and ipso facto are exempt from the operation of the antitrust laws because they are an undoubted exercise of state sovereign authority.") (citations and internal quotation marks omitted); Hoover v. Ronwin, 466 U.S. 558, 567–68 (1984).

[757] *See, e.g.*, FTC v. Phoebe Putney Health System, Inc., 568 U.S. 216, 225–26 (2013); City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 372 (1991); Town of Hallie v. Eau Claire, 471 U.S. 34, 46–47 (1985); Community Communications Co. v. City of Boulder, 455 U.S. 40, 52–56 (1982).

3. **The acts of private entities** are also immune from antitrust scrutiny if such conduct is undertaken pursuant to a "clearly articulated" state policy and "actively supervised" by the state government itself.[758] The "active supervision" prong reflects an effort "not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices," but rather "whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties. Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy. The question is not how well state regulation works but whether the anticompetitive scheme is the State's own."[759]
4. **The acts of state administrative agencies and boards** will be analyzed under *either* the framework for municipal and local government, *or* the framework for private conduct, depending not on whether the agency is formally designated as a government agency but rather on a substantive analysis of whether the agency is vulnerable to a "risk that active market participants will pursue private interests in restraining trade" through the agency's activities.[760] At least when "a controlling number of decisionmakers are active market participants in the occupation the board regulates," the acts of the agency will be treated as private conduct: that is, subject to both the "clear articulation" and the "active supervision" tests.[761]

CASENOTE: FTC v. Phoebe Putney Health Sys., Inc., and "Clear Articulation"

568 U.S. 216 (2013)

Phoebe Putney involved an FTC challenge to a hospital merger. Specifically, it concerned the acquisition by the Phoebe Putney Health System ("PPHS"), which owned one of two hospitals in Dougherty County, GA, of the other, Palmyra Medical Center. PPHS was in turn owned by the Hospital Authority of Albany-Dougherty County: a county hospital authority created pursuant to a Georgia statute, the Hospital Authorities Law ("Law").

To defend the legality of the transaction, PPHS pointed to provisions of the Law empowering hospital authorities to "exercise public and essential governmental functions," and to the statutory delegation to such authorities of "all the powers necessary or convenient to carry out and effectuate" the purposes of the Law. The Law also specifically empowered hospital authorities to "acquire by purchase, lease, or otherwise and to operate projects," which included hospitals and other public health facilities. Hospital authorities were also prohibited from operating facilities for a profit: they were limited to covering expenses and maintaining reasonable reserves. PPHS argued that this statutory scheme created state-action immunity for the acquisition.

Writing for a unanimous Court, Justice Sotomayor rejected the state-action immunity defense on the ground that Georgia had not clearly articulated a policy of displacing competition. In so doing, the Court described the clear-articulation test in fairly demanding terms. It would be satisfied only "when it is clear that the challenged anticompetitive conduct is undertaken pursuant to a regulatory scheme that is the State's own." This means, among other things, "the State must have affirmatively contemplated the displacement of competition." Such a policy would be "sufficiently expressed where the displacement of competition was the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. . . . [T]he State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals."

Here, the merging parties' "claim for state-action immunity fail[ed] because there [was] no evidence the State affirmatively contemplated that hospital authorities would displace competition by consolidating hospital

[758] North Carolina State Bd. of Dental Examiners v. FTC, 574 U.S. 494, 504–07 (2015); FTC v. Ticor Title Ins. Co., 504 U.S. 621, 631 (1992); Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc., 445 U.S. 97, 105 (1980).

[759] FTC v. Ticor Title Ins. Co., 504 U.S. 621, 634–35 (1992).

[760] North Carolina State Bd. of Dental Examiners v. FTC, 574 U.S. 494, 510 (2015).

[761] *Id.* at 511.

ownership." Instead, the Law merely provided "general powers routinely conferred by state law upon private corporations." Such powers "should be, can be, and typically are used in ways that raise no federal antitrust concerns." And the mere fact that a reasonable legislature might have been able to anticipate that powers would be used in a way that would violate the antitrust laws "falls well short of clearly articulating an affirmative state policy to displace competition with a regulatory alternative." As Georgia had not clearly made such a choice, the claim of immunity failed and Section 7 applied to the transaction.

As you can imagine, state action immunity is particularly controversial when it protects private parties from antitrust scrutiny. Unsurprisingly, the courts have repeatedly had to adjudicate cases on this frontier.

The next two cases, *Midcal* and *North Carolina Dental*, illustrate some of the complexities in applying the state-action doctrine to the conduct of private parties. In *Midcal*, the Court dealt with the question: what constitutes a state policy to depart from the antitrust framework? The Court held that a state does not authorize private anticompetitive conduct merely by creating a scheme that permits, without requiring, action that violates the antitrust laws. And in *North Carolina Dental*, the Court grappled with the reality that many "state" licensing boards are in practice dominated by private incumbents, holding that a state board with a majority of private-competitor members should be treated just like a private actor for the purposes of assessing state-action immunity.[762]

CASENOTE: California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.

445 U.S. 97 (1980)

Despite its name, Midcal Aluminum was a wine distributor, which bought wine from producers and sold it to retailers. During the relevant time period, California law provided that wine producers must set price schedules that wholesalers and other wine distributors must then follow in reselling their wine. Pursuant to that law, E&J Gallo, a prominent wine producer, set a price schedule. But alas: Midcal violated the schedule by selling 27 cases of wine below the scheduled price. California's Department of Alcoholic Beverage Control charged Midcal with a violation of the statute, and Midcal went to state court to obtain an injunction against the state's wine pricing system on the ground that it violated the Sherman Act by mandating resale price maintenance. (As you will remember from Chapter VI, resale price maintenance was *per se* illegal in 1980.)

Several appeals later, the matter landed in the U.S. Supreme Court, where the Court acknowledged that "California's system for wine pricing plainly constitutes resale price maintenance in violation of the Sherman Act." Justice Powell's opinion grappled with a central question: did California's involvement immunize what would otherwise be illegal RPM? In particular, the Court focused on "whether the State's involvement in the price-setting program is sufficient to establish antitrust immunity under [*Parker*.]"

The Court held that California's legislative intervention was not enough to create state-action immunity. That immunity, the Court began by pointing out, "is grounded in our federal structure. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."

In the opinion's pivotal paragraph, the Court explained that California had satisfied the requirement of clear articulation. But the state would need to get its hands a little dirtier if it wanted to achieve active supervision:

[762] Fun fact: the California Agricultural Prorate Commission—the state body at issue in *Parker*—appears to have been a majority-market-participant commission. Would *Parker* come out differently today? *See* H.E. Erdman, *The California Agricultural Prorate Act*, 16 J. Farm Econ. 624, 626 (1934) ("[The Commission] consists of nine members. Four of them are producers of agricultural commodities, one is an experienced commercial handler of fruits and vegetables, another a cooperative marketing handler, one an agricultural economist, and one a agriculturist employed by a metropolitan chamber of commerce. The last two supposedly represent consumers."); *see also id.* at 627 (committees appointed by the Commission consist of "five producers and two handlers").

> [The Court's prior] decisions establish two standards for antitrust immunity under *Parker v. Brown*. First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself. The California system for wine pricing satisfies the first standard. The legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance. The program, however, does not meet the second requirement for *Parker* immunity. The State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program. The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. As *Parker* teaches, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.

North Carolina State Bd. of Dental Examiners v. FTC

574 U.S. 494 (2015)

Justice Kennedy.

[1] In its Dental Practice Act ("Act"), North Carolina has declared the practice of dentistry to be a matter of public concern requiring regulation. Under the Act, the North Carolina State Board of Dental Examiners (Board) is the agency of the State for the regulation of the practice of dentistry. [. . .]

[2] The Act provides that six of the Board's eight members must be licensed dentists engaged in the active practice of dentistry. They are elected by other licensed dentists in North Carolina, who cast their ballots in elections conducted by the Board. The seventh member must be a licensed and practicing dental hygienist, and he or she is elected by other licensed hygienists. The final member is referred to by the Act as a "consumer" and is appointed by the Governor. . . . The Act does not create any mechanism for the removal of an elected member of the Board by a public official.

[3] Board members swear an oath of office, and the Board must comply with the State's Administrative Procedure Act, Public Records Act, and open-meetings law. The Board may promulgate rules and regulations governing the practice of dentistry within the State, provided those mandates are not inconsistent with the Act and are approved by the North Carolina Rules Review Commission, whose members are appointed by the state legislature. [. . .]

[4] In the 1990's, dentists in North Carolina started whitening teeth. Many of those who did so, including 8 of the Board's 10 members during the period at issue in this case, earned substantial fees for that service. By 2003, nondentists arrived on the scene. They charged lower prices for their services than the dentists did. Dentists soon began to complain to the Board about their new competitors. Few complaints warned of possible harm to consumers. Most expressed a principal concern with the low prices charged by nondentists.

[5] Responding to these filings, the Board opened an investigation into nondentist teeth whitening. A dentist member was placed in charge of the inquiry. Neither the Board's hygienist member nor its consumer member participated in this undertaking. The Board's chief operations officer remarked that the Board was "going forth to do battle" with nondentists. The Board's concern did not result in a formal rule or regulation reviewable by the independent Rules Review Commission, even though the Act does not, by its terms, specify that teeth whitening is "the practice of dentistry."

[6] Starting in 2006, the Board issued at least 47 cease-and-desist letters on its official letterhead to nondentist teeth whitening service providers and product manufacturers. Many of those letters directed the recipient to cease "all activity constituting the practice of dentistry"; warned that the unlicensed practice of dentistry is a crime; and strongly implied (or expressly stated) that teeth whitening constitutes the practice of dentistry. In early 2007, the Board persuaded the North Carolina Board of Cosmetic Art Examiners to warn cosmetologists against providing teeth whitening services. Later that year, the Board sent letters to mall operators, stating that kiosk

teeth whiteners were violating the Act and advising that the malls consider expelling violators from their premises.

[7] These actions had the intended result. Nondentists ceased offering teeth whitening services in North Carolina. [. . .]

[8] In 2010, the Federal Trade Commission (FTC) filed an administrative complaint charging the Board with violating § 5 of the Federal Trade Commission Act. The FTC alleged that the Board's concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition. [. . .]

[9] In this case the Board argues its members were invested by North Carolina with the power of the State and that, as a result, the Board's actions are cloaked with Parker immunity. This argument fails, however. A nonsovereign actor controlled by active market participants—such as the Board—enjoys *Parker* immunity only if it satisfies two requirements: first that the challenged restraint be one clearly articulated and affirmatively expressed as state policy, and second that the policy be actively supervised by the State. The parties have assumed that the clear articulation requirement is satisfied, and we do the same. While North Carolina prohibits the unauthorized practice of dentistry, however, its Act is silent on whether that broad prohibition covers teeth whitening. Here, the Board did not receive active supervision by the State when it interpreted the Act as addressing teeth whitening and when it enforced that policy by issuing cease-and-desist letters to nondentist teeth whiteners. [. . .]

[10] Although state-action immunity exists to avoid conflicts between state sovereignty and the Nation's commitment to a policy of robust competition, *Parker* immunity is not unbounded. Given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, state-action immunity is disfavored, much as are repeals by implication.

[11] An entity may not invoke *Parker* immunity unless the actions in question are an exercise of the State's sovereign power. State legislation and decisions of a state supreme court, acting legislatively rather than judicially, will satisfy this standard, and ipso facto are exempt from the operation of the antitrust laws because they are an undoubted exercise of state sovereign authority.

[12] But while the Sherman Act confers immunity on the States' own anticompetitive policies out of respect for federalism, it does not always confer immunity where, as here, a State delegates control over a market to a nonsovereign actor. For purposes of *Parker*, a nonsovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself. State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity. Immunity for state agencies, therefore, requires more than a mere facade of state involvement, for it is necessary in light of *Parker*'s rationale to ensure the States accept political accountability for anticompetitive conduct they permit and control.

[13] Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability. Indeed, prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy. So it follows that, under *Parker* and the Supremacy Clause, the States' greater power to attain an end does not include the lesser power to negate the congressional judgment embodied in the Sherman Act through unsupervised delegations to active market participants.

[14] *Parker* immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own. The question is not whether the challenged conduct is efficient, well-functioning, or wise. Rather, it is whether anticompetitive conduct engaged in by nonsovereign actors should be deemed state action and thus shielded from the antitrust laws.

[15] To answer this question, the Court applies the two-part test set forth in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 [(1980)], a case arising from California's delegation of price-fixing authority to wine merchants. Under *Midcal*, a state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear policy to allow the anticompetitive conduct, and second, the State provides active supervision of the anticompetitive conduct.

[16] *Midcal*'s clear articulation requirement is satisfied where the displacement of competition is the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals. The active supervision requirement demands, inter alia, 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.

[17] The two requirements set forth in *Midcal* provide a proper analytical framework to resolve the ultimate question whether an anticompetitive policy is indeed the policy of a State. The first requirement—clear articulation—rarely will achieve that goal by itself, for a policy may satisfy this test yet still be defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated. Entities purporting to act under state authority might diverge from the State's considered definition of the public good. The resulting asymmetry between a state policy and its implementation can invite private self-dealing. The second *Midcal* requirement—active supervision—seeks to avoid this harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity. [. . .]

[18] The Board argues entities designated by the States as agencies are exempt from *Midcal*'s second requirement. That premise, however, cannot be reconciled with the Court's repeated conclusion that the need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade.

[19] State agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing *Midcal*'s supervision requirement was created to address. This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals.

[20] The Court applied this reasoning to a state agency in [Goldfarb v. Virginia State Bar, 421 U.S. 773 (2004)]. There the Court denied immunity to a state agency (the Virginia State Bar) controlled by market participants (lawyers) because the agency had joined in what is essentially a private anticompetitive activity" for "the benefit of its members. This emphasis on the Bar's private interests explains why *Goldfarb*, though it predates *Midcal*, considered the lack of supervision by the Virginia Supreme Court to be a principal reason for denying immunity. [. . .]

[21] In important regards, agencies controlled by market participants are more similar to private trade associations vested by States with regulatory authority than to [state agencies with general regulatory powers and no private interests]. And as the Court [has observed], there is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm. For that reason, those associations must satisfy *Midcal*'s active supervision standard.

[22] The similarities between agencies controlled by active market participants and private trade associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules. *Parker* immunity does not derive from nomenclature alone. When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. The Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*'s active supervision requirement in order to invoke state-action antitrust immunity.

Foreign Governments and U.S. Antitrust Law

We have already seen that state governments enjoy a form of special treatment under the antitrust laws. So too—in different ways—do foreign governments! The relevant law here is somewhat convoluted: we will just sketch the outlines of three legal doctrines that may protect defendants in cases involving the conduct of foreign governments.

The "foreign sovereign compulsion" doctrine is the simplest of this family of rules.[763] It provides that a defendant will not generally be held liable for unlawful conduct that is genuinely compelled by a foreign sovereign.[764] The illegal conduct must be required, not merely encouraged, by the foreign government.[765]

The "act of state" doctrine centrally provides that the acts of foreign sovereigns within their respective jurisdictions must be conclusively presumed valid. This doctrine is not a principle of abstention, nor a rule to prevent courts from entertaining "cases and controversies that may embarrass foreign governments": it simply prohibits courts from entertaining arguments that the acts of foreign states are or may be invalid.[766] Courts have relied on this doctrine to dismiss antitrust claims that explicitly or implicitly target foreign-state acts. For example, the Fifth Circuit has invoked it to dismiss a challenge to the OPEC oil cartel, among other things because "[t]he granting of any relief to Appellants would effectively order foreign governments to dismantle their chosen means of exploiting the valuable natural resources within their sovereign territories."[767] Likewise, the Seventh Circuit has dismissed an antitrust challenge to a Canadian trade restriction that was "contained in agreements entered into by the Ontario government and approved of in legislation."[768] But not all courts agree that a challenge to an act's *legality* under the antitrust laws amounts to a challenge to its *validity* under the act-of-state doctrine! The Second Circuit has refused to exculpate a defendant on act-of-state grounds despite claims that the President of Haiti had issued a directive to implement the challenged price-fixing scheme, on the basis that the plaintiff challenged the illegal conspiracy, not the validity of any official acts.[769] Nor is this the only point of difference among the circuits: for example, the D.C. Circuit has suggested that a "commercial exception" should permit suit for acts that are commercial rather than governmental.[770]

The principle of international comity expresses respect for foreign sovereigns. It can be a basis for dismissal of an antitrust (or other) suit if there is a "true conflict" between the law of the United States and the law of another nation, such that compliance with both laws is impossible.[771] A true conflict is a necessary, but not sufficient, condition for a comity dismissal.[772] Other relevant factors, in an influential Third Circuit formulation, include: (1) the "[d]egree of conflict with foreign law or policy"; (2) the "[n]ationality of the

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[763] It may also be unique to antitrust! *See* Unigestion Holding, S.A. v. UPM Tech., Inc., No. 3:15-CV-185-SI, 2022 WL 3017524, at *5 (D. Or. July 29, 2022) (foreign sovereign compulsion defense "appears only to apply in the context of antitrust cases").

[764] *See, e.g.*, Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 706–07 (1962); Mountain Crest SRL, LLC v. Anheuser-Busch InBev SA/NV, 937 F.3d 1067, 1080 (7th Cir. 2019); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1293 (3d Cir. 1979); Interamerican Ref. Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291, 1298 (D. Del. 1970).

[765] *See, e.g.*, Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1293 (3d Cir. 1979); United States v. Brodie, 174 F. Supp. 2d 294, 299–300 (E.D. Pa. 2001); *see also* Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers, 357 U.S. 197, 210 (1958) (requiring good faith effort to comply with U.S. law).

[766] W.S. Kirkpatrick & Co. v. Env't Tectonics Corp., Int'l, 493 U.S. 400, 409 (1990). *See also, e.g.*, Ricaud v. Am. Metal Co., 246 U.S. 304, 309 (1918) ("[W]hen it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision.").

[767] Spectrum Stores, Inc. v. Citgo Petroleum Corp., 632 F.3d 938, 955 (5th Cir. 2011).

[768] Mountain Crest SRL, LLC v. Anheuser-Busch InBev SA/NV, 937 F.3d 1067, 1085 (7th Cir. 2019).

[769] Celestin v. Caribbean Air Mail, Inc., 30 F.4th 133, 144–45 (2d Cir. 2022).

[770] *Compare* de Csepel v. Republic of Hung., 714 F.3d 591, 604 (D.C. Cir. 2013) with Spectrum Stores, Inc. v. Citgo Petroleum Corp., 632 F.3d 938, 955 n.16 (5th Cir. 2011) and Honduras Aircraft Registry, Ltd. V. Honduras, 129 F.3d 543, 550 (11th Cir. 1997).

[771] In Re: Vitamin C Antitrust Litig., 8 F.4th 136, 145 (2d Cir. 2021), cert. denied sub nom. Animal Sci. Prod., Inc. v. Hebei Welcome Pharm. Co., 143 S. Ct. 85 (2022).

[772] *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764, 799 (1993) (finding no true conflict, thus no need to consider other factors).

parties"; (3) the "[r]elative importance of the alleged violation of conduct here compared to that abroad"; (4) the "[a]vailability of a remedy abroad and the pendency of litigation there"; (5) any "[e]xistence of intent to harm or affect American commerce and its foreseeability"; (6) the "[p]ossible effect upon foreign relations if the court exercises jurisdiction and grants relief"; (7) "[i]f relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries"; (8) "[w]hether the [U.S.] court can make its order effective"; (9) "[w]hether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances"; and (10) "[w]hether a treaty with the affected nations has addressed the issue."[773] Other circuit courts have taken a similar approach.[774]

NOTES

1) Based on what you have read, do you think the state action doctrine is most plausibly understood as primarily grounded in (a) the legislative intent behind the Sherman Act; (b) the constitutional value of federalism; or (c) something else?
2) Should the state action doctrine apply even when the state action in question is in violation of some constitutional provision (*e.g.*, a protectionist measure that violates the dormant Commerce Clause doctrine)?
3) Why, if at all, should the state action doctrine apply to the actions of local governments? Do those governments have the same (or any) claim to independent constitutional dignity in our federal system?
4) When should we require affirmative evidence that the Sherman Act legislators did intend to cover some practice or phenomenon as a basis for applying the antitrust laws to that practice or phenomenon, rather than requiring affirmative evidence that they did not so intend as a basis for exempting it?
5) Should we be worried about local incumbents "capturing" state government and getting away with anticompetitive activity under cover of the state action doctrine? If so, what can we do about it? If not, why is this not a concern?
6) When and why should the reach of U.S. antitrust law be determined by the decisions of foreign governments?

D. Labor

It is not quite clear whether, and to what extent, any of the framers of the Sherman Act imagined that the federal antitrust laws—including the prohibition on combinations in "restraint of trade"—would or could be a weapon to be used against labor unions and their practices.[775] Nevertheless, in the Act's early years government prosecutors showed at least as much interest, and perhaps rather more, in using it for this purpose as for tackling practices by businesses. In a string of cases, the Sherman Act was pressed into service as an anti-labor device.[776] Congress eventually responded, enacting the Clayton Act of 1914 and the Norris-LaGuardia Act of 1932 to immunize certain labor activities from antitrust scrutiny.[777]

[773] Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297–98 (3d Cir. 1979).

[774] *See*, *e.g.*, In Re: Vitamin C Antitrust Litig., 8 F.4th 136, 159 (2d Cir. 2021); Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597, 614 (9th Cir. 1976).

[775] *Compare*, *e.g.*, Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 Md. L. Rev. 766, 779–83 (2019) *with* Herbert Hovenkamp, *Labor Conspiracies in American Law*, 1880-1930, 66 Tex. L. Rev. 919, 950–51 (1988). *See also*, *e.g.*, 51 Cong. Rec. 13,661 (Sen. Ashurst) (Aug. 13, 1914) ("It was not the intention of the [1890] legislators to apply the Sherman antitrust law to labor organizations, although the courts, by strained and harsh constructions, have sought to apply it to labor organizations.").

[776] *See*, *e.g.*, Loewe v. Lawlor, 208 U.S. 274 (1908); United States v. Debs, 64 F. 724 (C.C.N.D. Ill. 1894); United States v. Workingmen's Amalgamated Council, 54 F. 994 (C.C.E.D.La. 1893).

[777] For some perspectives on the history, *see*, *e.g.*, Hiba Hafiz, *Labor Antitrust's Paradox*, 86 U. Chi. L. Rev. 381, 383–91 (2019); Milton Handler, *Labor and Antitrust: A Bit of History*, 40 Antitrust L.J. 233 (1971); Ralph K. Winter, Jr., *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 Yale L.J. 14, 30–59 (1963); Hans B. Thorelli, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION (1955) 389–94; Archibald Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. Pa. L. Rev. 252 (1955). *See also*, *e.g.*, 51 Cong. Rec. 9,655 (Rep. Buchanan) (June 2, 1914) ("I do not think that as long as judges are going to construe laws in the narrowest possible way against labor that we will ever get anything right.").

15 U.S.C. § 17

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

29 U.S.C. § 52

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

29 U.S.C. § 102

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are enacted.

29 U.S.C. § 104

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title. {*Eds.: Section 103, not reproduced here, provides that contracts in violation of the public policy stated in § 102—including so-called "yellow dog" contracts prohibiting union membership—are unenforceable.*}

29 U.S.C. § 105

No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 104 of this title.

29 U.S.C. § 113

When used in this chapter, and for the purposes of this chapter—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

* * *

In *Hutcheson* in 1941, the Supreme Court indicated that these statutory provisions create an antitrust shield for actions that are in a union's self-interest and that do not involve combination with "non-labor groups."[778]

CASENOTE: United States v. Hutcheson

312 U.S. 219 (1941)

In *Hutcheson* the Supreme Court gave a seminal account of the function and scope of the statutory labor exemption. The case involved a criminal prosecution under Section 1 of a union: the United Brotherhood of Carpenters and Joiners of America (the "Carpenters"). In an unusual twist, the challenged practices—a strike, picketing, and an invitation to members to boycott the products of an employer, Anheuser-Busch—sprang from a dispute not between the Carpenters and the employer itself, but from a dispute between the Carpenters and another union, the International Association of Machinists. The Court was required to determine whether the apparently broad language of the statutory exemptions really immunized efforts by one union to pursue a dispute with another union, rather than with an employer.

In an opinion that emphasized the breadth of the statutory exemption, and the clarity of Congress's purpose in enacting it, the Court concluded that the Carpenters were entitled to immunity. "The Norris-LaGuardia Act removed the fetters upon trade union activities" that the federal courts had continued to apply after 1914 notwithstanding the language of the Clayton Act. Its underlying aim was to "restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated." Correctly understood, the shield was a broad one: "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under [29 U.S.C. § 52] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means. There is nothing remotely within the terms of [29 U.S.C. § 52] that differentiates between trade union conduct directed against an employer because of a controversy arising in the relation between employer and employee, as such, and conduct similarly directed but ultimately due to an internecine struggle between two unions seeking the favor of the same employer." The immunity therefore extended to the familiar activities of striking, picketing, and boycotting in which the Carpenters had engaged.

In the following extract, the Ninth Circuit wrestled with the meaning and application of this test in an antitrust suit brought by a construction company plaintiff, BE & K, against a number of unions.

USS-POSCO Indus. v. Contra Costa Cnty. Bldg. & Const. Trades Council, AFL-CIO

31 F.3d 800 (9th Cir. 1994)

Judge Kozinski.

[1] USS–POSCO Industries ("UPI") is a joint venture between USX Corporation (formerly U.S. Steel) and Pohang Iron and Steel Co. of South Korea, formed to modernize and operate an old steel facility in Pittsburg, California (PITCAL). Interested unions allegedly attempted to coerce UPI into awarding the general contract to a unionized contractor. After bidding, UPI nevertheless awarded the $350 million construction contract—involving over 800 jobs—to appellant BE & K, a merit-shop [*i.e.*, non-unionized] contractor.

[778] United States v. Hutcheson, 312 U.S. 219, 232 (1941) ("If the facts laid in the indictment come within the conduct enumerated in s 20 of the Clayton Act they do not constitute a crime within the general terms of the Sherman Law because of the explicit command of that section that such conduct shall not be 'considered or held to be violations of any law of the United States'. So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under s 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.").

[2] BE & K alleges the unions then began a campaign to eliminate non-union construction in Northern California by making an example of PITCAL. Although none of the unions had a collective bargaining agreement with BE & K, defendants allegedly filed automatic protests to BE & K's permits in order to cause it gratuitous expense and delay; lobbied for a local toxic waste disposal ordinance that would require BE & K to obtain more permits; sued to enforce the ordinance at the PITCAL site; encouraged BE & K's subcontractors to protest nonexistent safety violations; brought suit against BE & K for allegedly violating environmental laws (the Piledrivers suit); and brought numerous grievances, arbitrations and enforcement proceedings against BE & K's partner, Eichleay Constructors, Inc. (the Eichleay actions). According to BE & K, the unions' purpose was not to organize BE & K's employees, but to cause such delay and expense that future project owners would only hire unionized contractors and subcontractors.

[3] UPI and BE & K originally brought suit alleging unfair labor practices [but the district court found that the challenged conduct constituted valid attempts to petition the government and were therefore protected by *Noerr-Pennington* petitioning immunity.]

[4] [BE & K subsequently amended its complaint (twice), and some—but not all—of the amended allegations were again dismissed under *Noerr-Pennington.*]

[5] The unions then advised the district court they intended to seek partial summary judgment on the antitrust claim on the ground that the surviving allegations involved activities protected by the statutory labor exemption. The court ruled that, in order to overcome the statutory exemption, BE & K would have to prove *both* a combination with non-labor groups *and* an illegitimate purpose in such combination. The court then limited BE & K's discovery to the first of these elements. Because BE & K was unable to show a triable issue of fact as to whether there was a combination with non-labor groups, the court granted the unions' subsequent motion for partial summary judgment.

[6] BE & K stipulated to dismissal of its remaining claims with prejudice. It appeals only the antitrust claims and the imposition of sanctions.

[7] In United States v. Hutcheson, 312 U.S. 219, 232 (1941), the Supreme Court examined the "interlacing" Sherman, Clayton and Norris-LaGuardia Acts, and held that they gave unions a statutory exemption to the antitrust laws:[2]

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

[8] This passage has been read as establishing a two-prong test for the statutory labor exemption: (1) Did the union combine with a non-labor group? (2) Did the union act in its legitimate self-interest? A key question in this case is whether these two prongs of *Hutcheson* are to be read in the conjunctive (*i.e.*, that plaintiff must establish both elements in order to get around the exemption), or in the disjunctive (*i.e.*, that plaintiff can bypass the exemption by proving either element).

[9] The district court read the *Hutcheson* test in the conjunctive and granted summary judgment on the antitrust claim because BE & K was unable to establish a triable issue of fact as to the first element—whether the unions had combined with non-labor groups. BE & K appeals this ruling, arguing first, that the district court defined non-labor group too narrowly; and second, that BE & K should have been allowed to show the union acted for an improper purpose, as an alternative avenue for defeating the statutory labor exemption.

[2] There is also a non-statutory exemption for agreements between unions and employers that are intimately related to the unions' vital concern with wages, hours and working conditions. As no such collective bargaining relationship existed here, the non-statutory exemption is not at issue.

[10] . . . What constitutes a non-labor group for purposes of the antitrust laws has never been very clearly defined. It is possible, however, to derive a fair approximation of what the term means based on certain common-sense observations.

[11] On the one hand, when a labor union combines with an entity that is competing in the plaintiff's market, this normally is deemed to be a combination with a non-labor group, stripping the union of the statutory labor exemption. Thus, in most statutory labor exemption cases, the focus has been on whether the union combined with a competitor of the targeted employer.

[12] At the other end of the spectrum, labor unions carrying out their normal functions must be free to hire law firms, contract for lease space and negotiate with other business entities, without risking antitrust liability. Even though many of the entities that unions deal with on a daily basis cannot fairly be described as labor groups, they are not deemed "non-labor groups" for purposes of the statutory labor exemption. Were it otherwise, this requirement—which lies at the heart of the test announced by *Hutcheson*—would be rendered utterly meaningless in the sense that everything unions do would become a combination with a non-labor group and possibly subject to antitrust liability.

[13] To allow unions breathing space in carrying out their legitimate functions without giving them free rein to extend their substantial economic power into markets for goods and services other than labor, we conclude that the definition of non-labor group must not stray too far from the paradigm of the union combining with the employer's competitors. To constitute a non-labor group for purposes of the statutory labor exemption, therefore, the entity in question must operate in the same market as the plaintiff to a sufficient degree that it would be capable of committing an antitrust violation against the plaintiff, quite independent of the union's involvement.

[14] . . . [A] competitor of the plaintiff clearly falls within that definition, as would a supplier or purchaser of the plaintiff's goods or services. Other entities, though more remote, may nevertheless stand in such a relationship to the plaintiff that they are deemed to be operating in the same market. When the union combines with such an entity, it loses the protections of the antitrust exemption.

[15] BE & K took discovery on this issue and, although the initial order seemed to restrict discovery to BE & K's competitors, the court subsequently explained that it did not mean to cut off any discovery reasonably designed to identify contractors, manufacturers or other commercial entities with whom the defendants may have formed illegal combinations. This was sufficiently broad to allow BE & K to identify anyone falling under the definition of non-labor group as explicated above, but BE & K has been able to point to no such entity. We therefore agree with the district court that BE & K has failed to raise a material issue of fact as to whether the unions combined with non-labor groups, and therefore did not carry its burden under this prong of the *Hutcheson* test.

[16] . . . The district court didn't allow BE & K discovery on the alternate prong of *Hutcheson* because it took the view that failure as to one prong was fatal to BE & K's case. In its most recent pronouncement on the subject, however, the Supreme Court clearly held that a union that combines only with other labor groups may nonetheless lose the statutory exemption under the second prong of *Hutcheson*. *H.A. Artists & Assocs. v. Actors' Equity Ass'n*, 451 U.S. 704 (1981), involved a challenge under the Sherman Act to certain rules of the Actors' Equity Union, including the exaction of a franchising fee from theatrical agents licensed by the union.

[17] The Supreme Court first inquired whether there was a combination between the union and any "non-labor groups," or persons who are not "parties to the labor dispute." The Court found that the theatrical agents were not a "non-labor group" for purposes of the statutory exemption. Had this been sufficient to establish the union's entitlement to the labor exemption, the Court could have stopped right there. Instead, it proceeded to evaluate whether the union's activities were undertaken in pursuit of its legitimate self-interest. While it found the union's activity generally exempt because the regulations were clearly designed to promote the union's legitimate self-interest, it found the fees that the union levied upon the agents might not be a permissible component of the exempt regulatory system. Because no evidence had been presented at trial to show that the costs justified the fees actually levied, the case was remanded for further factfinding.

[18] Had the Court in *H.A. Artists* eventually approved all aspects of the arrangement between the union and the agents, its examination of the fee structure might have been explainable on a belt-and-suspenders rationale. But the Court found fault with the fee structure—or at least found that there might be fault. Since *H.A. Artists* was an antitrust case, the only possible fault could be a violation of the antitrust laws. We read this as a clear holding that a union may violate the antitrust laws—in other words, that it may lose the benefit of the labor exemption—even when it does not combine with a non-labor group. Although, prior to *H.A. Artists*, there was some doubt on this point, there no longer is.

[19] What, then, does it mean for a union to pursue an illegitimate purpose? In the broadest sense, everything a union does serves its self-interest. But *Hutcheson* requires that it act in pursuit of its legitimate self-interest. Whether the interest in question is legitimate depends on whether the ends to be achieved are among the traditional objectives of labor organizations. Thus, if a union forces employers to funnel money into a commercial enterprise from which the union derives profits; or if it forces the employer to hire the union president's spouse; or if a union is involved in illegal activities unrelated to its mission, such as dealing drugs or gambling, those would not be objectives falling within the union's legitimate interest. In such cases, the unions cease to act as labor groups.

[20] Of course, the means employed by the union bear on the degree of scrutiny we will cast on the legitimacy of the union's interest. Thus, where a union engages in activities normally associated with labor disputes, these will be presumed to be in pursuit of the union's legitimate interest absent a very strong showing to the contrary. Where the union's activities are farther afield, the scrutiny is more searching.

[21] *H.A. Artists* casts a highly instructive light on this issue. The activity there—collection of franchise fees from the agents for the direct benefit of union members—was not a traditional union activity; it looked like the union may have been using its bargaining power with theatrical agents to generate a collateral source of revenue. The Court did not say the franchise fees violated the antitrust laws per se, but placed a substantial burden on the union to prove why this method of collecting revenues was not merely convenient but necessary. "Without the fees," the Court reasoned, "the dues of the union's members would perhaps have to be increased to offset the loss of a general revenue source," but there was "no reason to believe that any of its legitimate interests would be affected." The Court's concern thus seemed to be that the union may have funneled the market power granted to it by the labor laws into a money-making enterprise. That the money would then be used to finance labor-related activities was not, in the Court's view, exculpatory, unless the union could show it could not achieve those objectives some other way.

[22] Many of the activities of which BE & K complains are traditional organizational activities, closely related to traditional union ends. For example, the unions allegedly picketed and handbilled the plaintiffs' premises after BE & K refused to recognize them as the exclusive collective bargaining representative for the employees of BE & K and its subcontractors, and enter into a collective bargaining agreement with the defendants. And the unions encouraged work stoppages by unionized employees because of well-founded safety concerns at the project site.

[23] That these activities were not undertaken to unionize this particular employer but in order to eliminate non-union shops altogether by making an example of BE & K does not matter. Encouraging the use of unionized labor is an objective well within the legitimate interests of labor unions and, so long as this end is pursued by activities normally associated with labor disputes, there's a strong presumption that the unions are protected from antitrust liability by the statutory labor exemption.

[24] More troublesome are certain other activities allegedly undertaken by the unions, such as pressing frivolous lawsuits, automatically protesting against permits sought by BE & K, pressing for the passage of a regulatory measure and then agitating for its enforcement against BE & K—all allegedly to make an example of BE & K and discourage use of merit-shop contractors by parties such as UPI. Taking a cue from *H.A. Artists*, we cannot say that pursuing legitimate labor goals through this kind of activity is per se exempted from the antitrust laws. The question here, as in *H.A. Artists*, is whether the non-traditional means were appropriate—in other words, whether the non-traditional means were not only lawful, but necessary because the goals could not be achieved through traditional tactics. And the burden to show this lies with the unions.

[25] Because the district court erroneously construed *Hutcheson*'s two-part test in the conjunctive, it did not allow discovery on this issue. In this, we conclude, the district court erred. Plaintiff was entitled to try to raise a triable issue of fact on this point by gathering evidence in support of its allegations.

* * *

The statutory exemptions are supplemented by a penumbral "nonstatutory" zone of protection recognized by the Court.[779] In *Brown*, the Supreme Court considered a situation in which a group of employers—professional football club owners—had made a joint wage offer to a players' union. The offer was declined, and despite the impasse the club owners agreed to implement the wage offer. They were then sued for violating Section 1. The Court held that the agreement, growing directly from the collective-bargaining process, was immune from antitrust scrutiny, but left the outer bounds of this zone of immunity uncertain.

Brown v. Pro Football, Inc.

518 U.S. 231 (1996)

Justice Breyer.

[1] The question in this case arises at the intersection of the Nation's labor and antitrust laws. A group of professional football players brought this antitrust suit against football club owners. The club owners had bargained with the players' union over a wage issue until they reached impasse. The owners then had agreed among themselves (but not with the union) to implement the terms of their own last best bargaining offer. The question before us is whether federal labor laws shield such an agreement from antitrust attack. We believe that they do. This Court has previously found in the labor laws an implicit antitrust exemption that applies where needed to make the collective-bargaining process work. Like the Court of Appeals, we conclude that this need makes the exemption applicable in this case. [. . .]

[2] The immunity before us rests upon what this Court has called the "nonstatutory" labor exemption from the antitrust laws. The Court has implied this exemption from federal labor statutes, which set forth a national labor policy favoring free and private collective bargaining, which require good-faith bargaining over wages, hours, and working conditions; and which delegate related rulemaking and interpretive authority to the National Labor Relations Board (Board).

[3] This implicit exemption reflects both history and logic. . . . In the 1930's, when it subsequently enacted the labor statutes, Congress, as in 1914, hoped to prevent judicial use of antitrust law to resolve labor disputes—a kind of dispute normally inappropriate for antitrust law resolution. The implicit ("nonstatutory") exemption interprets the labor statutes in accordance with this intent, namely, as limiting an antitrust court's authority to determine, in the area of industrial conflict, what is or is not a "reasonable" practice. It thereby substitutes legislative and administrative labor-related determinations for judicial antitrust-related determinations as to the appropriate legal limits of industrial conflict.

[4] As a matter of logic, it would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time to forbid them to make among themselves or with each other any of the competition-restricting agreements potentially necessary to make the process work or its results mutually acceptable. Thus, the implicit exemption recognizes that, to give effect to federal labor laws and policies and to

[779] *See*, *e.g.*, Brown v. Pro Football, Inc., 518 U.S. 231, 250 (1996) ("[T]he implicit ('nonstatutory') antitrust exemption applies to the employer conduct at issue here. That conduct took place during and immediately after a collective-bargaining negotiation. It grew out of, and was directly related to, the lawful operation of the bargaining process. It involved a matter that the parties were required to negotiate collectively. And it concerned only the parties to the collective-bargaining relationship."); Connell Const. Co. v. Plumbers & Steamfitters Loc. Union No. 100, 421 U.S. 616, 622 (1975) ("The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws."); *see also* H. A. Artists & Assocs., Inc. v. Actors' Equity Ass'n, 451 U.S. 704, 714 (1981) ("While the Norris-LaGuardia Act's bar of federal-court labor injunctions is not explicitly phrased as an exemption from the antitrust laws, it has been interpreted broadly as a statement of congressional policy that the courts must not use the antitrust laws as a vehicle to interfere in labor disputes.").

allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions.

[5] The petitioners and their supporters concede, as they must, the legal existence of the exemption we have described. They also concede that, where its application is necessary to make the statutorily authorized collective-bargaining process work as Congress intended, the exemption must apply both to employers and to employees. . . . Consequently, the question before us is one of determining the exemption's scope: Does it apply to an agreement among several employers bargaining together to implement after impasse the terms of their last best good-faith wage offer? We assume that such conduct, as practiced in this case, is unobjectionable as a matter of labor law and policy. On that assumption, we conclude that the exemption applies.

[6] Labor law itself regulates directly, and considerably, the kind of behavior here at issue—the post-impasse imposition of a proposed employment term concerning a mandatory subject of bargaining. Both the Board and the courts have held that, after impasse, labor law permits employers unilaterally to implement changes in pre-existing conditions, but only insofar as the new terms meet carefully circumscribed conditions. For example, the new terms must be "reasonably comprehended" within the employer's pre-impasse proposals (typically the last rejected proposals), lest by imposing more or less favorable terms, the employer unfairly undermined the union's status. The collective-bargaining proceeding itself must be free of any unfair labor practice, such as an employer's failure to have bargained in good faith. These regulations reflect the fact that impasse and an accompanying implementation of proposals constitute an integral part of the bargaining process. [. . .]

[7] Multiemployer bargaining itself is a well-established, important, pervasive method of collective bargaining, offering advantages to both management and labor. . . . [It] plays a significant role in a collective-bargaining process that itself constitutes an important part of the Nation's industrial relations system.

[8] In these circumstances, to subject the practice to antitrust law is to require antitrust courts to answer a host of important practical questions about how collective bargaining over wages, hours, and working conditions is to proceed—the very result that the implicit labor exemption seeks to avoid. And it is to place in jeopardy some of the potentially beneficial labor-related effects that multiemployer bargaining can achieve. That is because unlike labor law, which sometimes welcomes anticompetitive agreements conducive to industrial harmony, antitrust law forbids all agreements among competitors (such as competing employers) that unreasonably lessen competition among or between them in virtually any respect whatsoever. . . .

[9] If the antitrust laws apply, what are employers to do once impasse is reached? If all impose terms similar to their last joint offer, they invite an antitrust action premised upon identical behavior (along with prior or accompanying conversations) as tending to show a common understanding or agreement. If any, or all, of them individually impose terms that differ significantly from that offer, they invite an unfair labor practice charge. Indeed, how can employers safely discuss their offers together even before a bargaining impasse occurs? A preimpasse discussion about, say, the practical advantages or disadvantages of a particular proposal invites a later antitrust claim that they agreed to limit the kinds of action each would later take should an impasse occur. . . . All this is to say that to permit antitrust liability here threatens to introduce instability and uncertainty into the collective-bargaining process, for antitrust law often forbids or discourages the kinds of joint discussions and behavior that the collective-bargaining process invites or requires. [. . .]

[10] [W]e hold that the implicit ("nonstatutory") antitrust exemption applies to the employer conduct at issue here. That conduct took place during and immediately after a collective-bargaining negotiation. It grew out of, and was directly related to, the lawful operation of the bargaining process. It involved a matter that the parties were required to negotiate collectively. And it concerned only the parties to the collective-bargaining relationship.

[11] Our holding is not intended to insulate from antitrust review every joint imposition of terms by employers, for an agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process. We need not decide in this case whether, or where, within these extreme outer boundaries to draw that line. Nor would it be appropriate for us to do so without the detailed views of the [National Labor Relations]

Board, to whose specialized judgment Congress intended to leave many of the inevitable questions concerning multiemployer bargaining bound to arise in the future.

CASENOTE: William Morris Endeavor Entertainment, LLC v. Writers Guild of America

432 F. Supp. 3d 1127 (C.D. Cal. 2020)

The bounds of the statutory and nonstatutory labor exemptions were recently put at issue in the *Writers Guild* litigation. That case concerned an alleged effort by two writers' unions to end the practice of "packaging" by talent agencies. "Packaging" involves talent agencies charging fees ("packaging fees") for furnishing a group or set of creative individuals for a production (writers, actors, directors, etc.) to a movie studio, rather than taking a customary 10% commission from the relevant talented individuals.

The writers' unions had become concerned that the packaging-fee practice harmed writers by encouraging agencies to maximize their packaging fee rather than writers' compensation. As a result, they had adopted a "Code of Conduct" which forbade their members from accepting representation by any talent agency that: (1) received packaging fees; or (2) held any interest in a movie production company. Three Hollywood talent agencies sued the unions under Section 1, and the unions moved to dismiss the complaint, citing both the statutory and non-statutory antitrust exemptions. But the district court refused to dismiss the antitrust claims on either ground.

First, the court considered and rejected the unions' argument that the challenged conduct was covered by the statutory exemption. The plaintiffs had alleged that the defendants had compromised their immunity by combining with "non-labor groups," including: "(1) other talent agencies, (2) showrunners acting in a producer-only capacity who are thus exempt from the [writers' collective bargaining agreement, which covered only writers rather than producers], and (3) unlicensed lawyers and managers." The defendants argued that showrunners should be treated as a labor group because the employment of a showrunner on a production displaces the need to employ a writer. But the court rejected this argument, pointing out that the alleged conduct had embraced showrunners even when they were working in a role that did *not* displace a writer. The presence of plausible allegations of combination with non-labor groups precluded the application of the statutory exemption.

Second, the court considered and rejected the unions' effort to invoke the nonstatutory exemption. The court acknowledged two previous formulations of the nonstatutory exemption in the Ninth Circuit. In Phoenix Elec. Co. v. Nat'l Elec. Contractors Ass'n, 81 F.3d 858, 861 (9th Cir. 1996), the court of appeals had stated that: "[T]he parties to an agreement restraining trade are exempt from antitrust liability only if (1) the restraint primarily affects the parties to the agreement and no one else, (2) the agreement concerns wages, hours, or conditions of employment that are mandatory subjects of collective bargaining and (3) the agreement is produced from bona fide, arm's-length collective bargaining." And in California ex rel. Harris v. Safeway, Inc., 651 F.3d 1118, 1129 (9th Cir. 2011) (en banc), the court had more recently indicated that the nonstatutory exception should be guided by a totality-of-the-circumstances approach that included scrutiny of whether the challenged practice is an "extensively regulated and carefully circumscribed practice in labor negotiations," whether it relates to a "core subject matter" of collective bargaining, such as wages, hours, or working conditions, and whether it "operates primarily in the labor market with only tangential effects on the business market."

Under neither standard could the defendants qualify for the nonstatutory exemption. The *Phoenix Electric* formulation was inapposite because the plaintiffs had plausibly alleged that the conduct primarily affected a broader group than just the parties to the Code of Conduct. "In particular," the court explained, "Plaintiffs allege that the Code of Conduct's packaging restrictions prohibit actors and directors, who are not Defendants' members, from benefiting from packaging as well. Plaintiffs further allege that the Code of Conduct's packaging restrictions will reduce the amount of content created overall, resulting in harm to media consumers."

And the challenged conduct fell outside the more recent *Harris* formulation even more clearly. Plaintiffs had alleged that packaging had been accepted and endorsed by defendants themselves for "more than forty years," with no previous bans. They also alleged that the effort to prohibit packaging fees was not only overbroad, rather than circumscribed to reflect the "idiosyncratic" nature of individual packaging agreements, but that it also "has substantial effects on the larger media market, reducing employment for directors and actors, and reducing the overall amount of media content produced." In sum, the plaintiffs had alleged a claim sufficient to avoid the nonstatutory exemption.

As a result, neither the statutory nor the nonstatutory exemption would apply. The case would be permitted to proceed to discovery.

Today, the scope and application of the labor exemption remains controversial. In particular, the asymmetry of treatment between, on the one hand, employees who are members of a traditional labor union (who enjoy protected treatment under the antitrust exemption), and, on the other, gig workers who operate outside these traditional structures (who are often assumed to fall outside the exemption) has attracted comment and criticism.[780]

CASENOTE: Columbia River Packers Ass'n v. Hinton

315 U.S. 143 (1942)

Columbia River exemplifies the relationship between antitrust's labor exemptions and the status of "employee"—rather than "independent contractor"—in labor law. In that case, Columbia River (a fish processing and canning business with facilities in Oregon, Washington, and Alaska) had been confronted with a demand by the Pacific Coast Fishermen's Union—which represented "independent entrepreneur[]" fishermen—to agree to buy only from Union fishermen. Columbia River refused, found that Union fishermen would not supply it with fish, and sued the Union for violating Section 1. The Union argued that its actions were immune from antitrust scrutiny, and the Ninth Circuit agreed.

But the Supreme Court, in a short and unanimous opinion, did not. The Court held that the challenged conduct did not arise from a "labor dispute" within the meaning of the Norris-LaGuardia Act [i.e., 29 U.S.C. § 113]. "That a dispute among businessmen over the terms of a contract for the sale of fish is something different from a controversy concerning terms or conditions of employment, or concerning the association of persons seeking to arrange terms or conditions of employment," held the Court, "calls for no extended discussion." The statutory exemption is intended to help workers "obtain acceptable terms and conditions of employment" and protection from "the interference, restraint, or coercion of employers of labor." Congress's attention "was focussed upon disputes affecting the employer-employee relationship . . . the Act was not intended to have application to disputes over the sale of commodities." And while it was true that the statute expressly covered circumstances in which the disputants were not in the relation of employer and employee, "the statutory classification, however broad, . . . does not expand the application of the Act to include controversies upon which the employer-employee relationship has no bearing."

The conclusion followed inexorably. "The sellers are not employees of the petitioners or of any other employer nor do they seek to be. On the contrary, their desire is to continue to operate as independent businessmen, free from such controls as an employer might exercise. That some of the fishermen have a small number of employees of their own, who are also members of the Union, does not alter the situation. For the dispute here, relating solely to the sale of fish, does not place in controversy the wages or hours or other terms and conditions of employment of these employees." As a result, there would be no antitrust immunity.

[780] *See, e.g.*, Marina Lao, *Workers in the "Gig" Economy: The Case for Extending the Antitrust Labor Exemption*, 51 U.C. Davis L. Rev. 1543 (2018).

As Sanjukta Paul notes in the following extract, the decisions reflected in the law's definitions of "worker" and "collusion" raise sharp questions about antitrust's conceptual foundations.

Sanjukta M. Paul, The Enduring Ambiguities of Antitrust Liability for Worker Collective Action

47 Loyola U. Chi. L.J. (2016)

The labor exemption currently immunizes most worker collective action from antitrust liability. Employee status, much discussed in its impact on workers in terms of the receding reach of labor and employment law protections, is also the trigger for extending the grasp of antitrust regulation of workers' autonomous collective action to better their working conditions. In other words, a phenomenon that is commonly understood as exemplifying deregulation actually extends regulation over the conduct of workers even as it withdraws it from the conduct of employers. As a result, individual workers classified as independent contractors may be subject to antitrust prosecution for organizing for decent wages or working conditions under the price-fixing doctrine, regardless of the reasonableness of the wage or the broader social or economic outcome.

Assuming for the moment that the labor exemption does not apply to a given set of independent contractor workers, and that they are not able to prove that they are misclassified employees, the law of price-fixing is likely to govern their concerted action. The modern neoclassical interpretation of antitrust, which mostly still reigns, takes market actors as black boxes: they are just "firms," whether they are massive corporations or a single truck driver. [. . .]

Antitrust law itself, leaving aside how it plays out in the price-fixing or boycott doctrine or its application to labor, is . . . an embodiment of the fact that the market society is not some "natural" or default state of affairs but, on the contrary, the product of an affirmative and often costly set of policy decisions on the part of the state itself. Today, competition is something that courts undertake to promote, and various policies and practices by private actors are to be evaluated specifically according to whether they promote competition. This is truly a far cry from the original classicist position on markets, according to which almost anything a private actor did in furtherance of interest was, ipso facto, competition. The very idea that competition is a normative ideal separate from what firms actually do in furtherance of their economic self-interest makes space for affirmative state intervention (to bring affairs closer to that normative ideal). To be sure, the classicists had a notion of legitimate and illegitimate competition, but that distinction was drawn on the basis of moral or normative concepts distinct from competition itself. In the neoclassical framework, by contrast, competition itself is the normative benchmark used by antitrust. In other words, the classical framework put bounds on the acts of market actors, but on the basis of conflict between competition and other normative ideals. The neoclassical framework bounds the acts of market actors on the basis of ideal of competition itself. That fact betrays the irreducible normative content of the concept of competition as it is used by contemporary courts, over and above the content of the concept of competition employed by classicist courts.

The law of price-fixing is about preventing restraints on competition, or coordinated conduct that tends to have anti-competitive effects. The reason that I say there is an irreducible normative component in its application is that *some* restraints on competition are always present in a market; they function as the walls within which competition will take place. At the most basic level, these include all sorts of commercial regulation such as the rules defining and legally constituting the entities that will engage in competition, as well as industry-specific regulation.

The goal of "maximizing competition" is simply not tenable, as a practical and logical matter, without incorporating some kind of limits. Then it is an unavoidable question what those appropriate limits, embodied for example in the scope of the price-fixing law, are. The limits we actually have are arguably as much the result of historical accident as they are of rational economic science. Thus, the logic of price-fixing has an inherent openness or indeterminacy, such that effectively extrinsic normative considerations are necessary to determine the precise circumstances under which concerted action to constrict supply of a given commodity is prohibited by antitrust law. The role these considerations play is rarely overt; courts typically fold them under the concepts of "maximizing competition" or "legitimate competition."

This is particularly so with respect to antitrust's relationship to labor, which was formed under the pressure of normative considerations that would likely not be endorsed openly by today's courts. That relationship raises a set of normative questions no matter how it is constituted—not only if labor is exempted from antitrust prosecution. One can imagine a whole variety of arrangements relating antitrust law to labor—from total subjection of worker collective action to price-fixing, treating each worker as an individual firm, and with no labor exemption whatsoever, on one end; to a complete exemption for workers' organizations with no restrictions, on the other. Any of these arrangements would then simply become background legal facts; they would constitute the markets within which economic interactions take place.

* * *

In light of *Columbia River* and the concern with the employment relation that it (arguably) exemplifies, antitrust leans heavily on labor law for an account of what relationships can be labeled those of "employment." The following amicus brief, filed by DOJ with the National Labor Relations Board, gives an enforcer's perspective on the importance of labor law's employee / contractor distinction for antitrust analysis.

Brief of the United States Department of Justice as Amicus Curiae in Support of Neither Party, The Atlanta Opera, Inc.

National Labor Relations Board Case 10-RC-276292 (Feb. 10, 2022)

[1] . . . [T]he antitrust laws were intended by Congress to be interpreted in harmony with the aims of the labor laws, including the National Labor Relations Act of 1935 ("NLRA"), which encourages the practice and procedure of collective bargaining to restore equality of bargaining power between employers and employees. To harmonize these two bodies of law, including to preserve protections for worker organizing, courts have recognized both the "statutory" and "nonstatutory" labor exemptions from the antitrust laws.

[2] The statutory exemption excepts specific union activities, including secondary picketing and boycotts, from the operation of the antitrust laws. It has been interpreted broadly to cover substantially all, if not all, of the normal peaceful activities of labor union[s]. But it does not cover agreements between workers (or unions) and "non-labor groups," i.e., their employers.

[3] The nonstatutory labor exemption insulates certain agreements between workers and their employers imposed through the bargaining process from challenge under the antitrust laws, under the view that Congress intended rulemaking and interpretive authority on these topics to be delegated to the NLRB.

[4] In doing so, the exemption accommodates the congressional policy favoring collective bargaining under the NLRA. But that accommodation has limits. For example, the nonstatutory exemption offers no similar protection when a union and a nonlabor party agree to restrain competition in a business market, e.g., with an agreement on how much consumers will pay for a product. Nor does it protect agreements among competing employers—imposed outside the collective bargaining process—that restrain competition in labor markets, e.g., agreements to fix prices or allocate markets.

[*]

[5] A dramatic expansion during the past decade in the number and variety of workers who are categorized as independent contractors has created significant ambiguity about the appropriate treatment of such workers under antitrust law. While the statutory and nonstatutory labor exemptions provide important protections for worker organizing and bargaining, courts have historically held that these exemptions only protect employees and their unions, not independent contractors.[16] By contrast, concerted action by independent contractors traditionally has been subject to antitrust scrutiny.[17]

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[16] *See*, *e.g.*, [H.A. Artists & Assocs. v. Actors' Equity Ass'n, 451 U.S. 704, 717 n.20 (1981)] ("[A] party seeking refuge in the statutory exemption must be a bona fide labor organization, and not an independent contractor or entrepreneur."). Antitrust courts typically draw on common law principles to evaluate whether workers are employees or independent contractors. *See*, *e.g.*, United States v. Women's Sportswear Mfg. Ass'n, 336 U.S. 460, 463–64 (1949) ("The stitching contractor, although he furnishes chiefly labor, also

[6] Because of this distinction, if the NLRB adopts or maintains an ambiguous or overly narrow definition of "employee," certain workers . . . may be subjected to antitrust liability for organizing to improve their conditions—a risk that is heightened by the tendency of courts to construe the labor exemptions narrowly. Consistent with the reasoning in these and other cases, there may be potential benefits to extending certain labor protections to workers who seek to bargain with a single employer—including digital platforms and other firms whose business models have led to the proliferation of the "gig economy." Clarity as to employee status is important, in part, because the antitrust laws otherwise scrutinize collective action among independent contractors or independent professionals, where they are not employees.

[7] The potential for confusion with respect to the applicability of the labor exemption among both courts and workers is likely to be compounded by the growing number of states and other federal agencies which have recently adopted a broader definition of employment than that used in [the NLRB's *SuperShuttle DFW Inc.* decision, 367 NLRB No. 75 (2019)], thereby creating an interpretive split among labor regulators. Even if the Antitrust Division were to exercise its prosecutorial discretion not to pursue action against workers whose status as employees is unclear, the threat of private antitrust lawsuits and treble damages might nonetheless substantially chill worker organizing, since employers and other interested parties would remain free to pursue antitrust litigation. Such an outcome would leave affected workers with fewer tools to combat the exercise of monopsony power or superior bargaining leverage by employers in the manner that Congress intended when it passed the NLRA.

[8] In addition to harming workers, ambiguity about the definition of employment may also create uncertainty and risk of antitrust liability for employers. In general, firms can decide how much they pay their employees and, in turn, how much to charge consumers for their employees' services. But independent contractors generally cannot coordinate their pricing decisions absent some exemption from the antitrust laws. Nor can they do so through a third party. Thus, firms that set the prices at which their workers offer services to consumers may face uncertainty about their potential antitrust exposure if there is ambiguity about whether those workers are independent contractors rather than employees. [. . .]

[9] [T]he [Antitrust] Division supports clarifying the NLRB's definition of "employee." Evidence collected by the Division at our recent Labor Workshop as well as a growing body of legal and economic scholarship both support the view that labor markets are currently undergoing substantial change and disruption, including but not limited to changes resulting from the rise of the so-called "gig economy." Given these changes in the underlying economic realities, the Division believes that the NRLB is in a position to better protect both labor market competition and the welfare of workers by adopting a sound, up-to-date, consistent approach to worker classification that adequately protects workers' rights to organize. Such an effort would not only be consistent with the legislative history of the statutory sources of the antitrust labor exemptions, such as the Norris-LaGuardia Act, which were explicitly passed to clarify the Congress's interest in harmonizing antitrust law and labor law in a way that reflects the special status of labor organizing within our economic and political system, but would also would help to increase the effectiveness of antitrust enforcement and aid the Division's efforts to protect competition, particularly in markets where employee misclassification may harm competition.

* * *

In light of the preceding extracts, what do you make of the First Circuit's 2022 decision in *Confederación Hípica de Puerto Rico* to apply labor immunity to a group of independent-contractor jockeys who went on strike for higher pay? In that case—which surprised many observers—the First Circuit took a fresh look at the scope of the statutory exemption and concluded that it should not be limited to employer-employee bargaining at all. *Confederación Hípica* leaves observers wondering whether the scope of labor immunity might be somewhat broader than many had previously thought: and it challenges the idea that *Columbia River*—along with other cases like

utilizes the labor through machines and has his rentals, capital costs, overhead and profits. He is an entrepreneur, not a laborer."); Chamber of Com. of United States of Am. v. City of Seattle, 426 F. Supp. 3d 786, 788 (W.D. Wash. 2019).

[17] *See*, *e.g.*, Columbia River Packers Ass'n v. Hinton, 315 U.S. 143, 146-47 (1942) (agreements between fish sellers); [United States v. Women's Sportswear Mfg. Ass'n, 336 U.S. 460, 463–64 (1949)] (garment workers); FTC v. Superior Court Trial Lawyers' Ass'n, 493 U.S. 411 (1990) (trial lawyers).

Superior Court Trial Lawyers, which you may remember from Chapter V—closes the door to labor immunity for independent contractors. The Supreme Court declined to grant cert, leaving lower courts to puzzle it over for now.[781]

Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños, Inc.

30 F.4th 306 (1st Cir. 2022)

Judge Lynch.

[1] The Sherman Antitrust Act usually forbids would-be competitors from staging a group boycott. Federal statutes and controlling Supreme Court case law create an exemption for certain conduct, commonly called the labor-dispute exemption.

[2] In this action, brought by an association of horse owners ("Hípica") and the owner of a racetrack ("Camerero") against a group of jockeys who demanded higher wages and refused to race, the district court erroneously determined that the labor-dispute exemption does not apply. The district court preliminarily and permanently enjoined the work stoppage, awarded summary judgment against the jockeys, their spouses and conjugal partnerships, and an association representing them ("Jinetes"), and imposed $1,190,685 in damages. [. . .]

[3] Puerto Rico is home to one horse-racing track, the Hipódromo Camarero in Canóvanas, which is operated by plaintiff Camarero. Horse owners hire jockeys on a race-by-race basis. Since 1989, the jockeys have been paid a $20 mount fee for each race they participate in. The fortunate jockeys who finish in the top five positions in each race share in the "purse"—the prize money for the top five horses. A Puerto Rico government agency, established in its current form in 1987, regulates the sport. It embodied the compensation structure we have described in regulations in 1989.

[4] The jockeys have long chafed at their employment conditions. They object to the mount fee, which is about one-fifth what jockeys receive in the mainland United States. They also complain about pre-race weigh-in procedures and about the conduct of racing officials.

[5] In early June 2016, those long-simmering grievances boiled over. On June 10, several jockeys delayed the start of a race to demand that racing officials discuss the weigh-in procedures. As a result of that delay, the officials fined those jockeys. The jockeys responded through a pair of associations: defendant Jinetes and a second smaller group ("AJP"). On behalf of dozens of jockeys, the associations disputed the fines and objected to jockey compensation. The associations then attempted to negotiate employment conditions with plaintiff Hípica, the representative of the horse owners. Those negotiations resolved none of the issues, and the racing regulators declined the jockeys' request to mediate.

[6] After negotiations failed, in pursuit of their demands for increased compensation, thirty-seven jockeys refused to race for three days. Jinetes claimed credit for organizing the work stoppage. As no jockeys had registered to ride on June 30, July 1, and July 2, 2016, Camerero canceled the races scheduled for those days.

[7] Hípica and Camerero sued the jockeys, their spouses and conjugal partnerships, and Jinetes, alleging that the defendants engaged in a group boycott in violation of federal antitrust law. The defendants counterclaimed, alleging that the plaintiffs violated federal civil rights and antitrust law. [. . .]

[8] T]here is an inherent tension between national antitrust policy, which seeks to maximize competition, and national labor policy, which encourages cooperation among workers to improve the conditions of employment. Most of the time, antitrust law forbids would-be competitors from colluding to increase prices. When the price is a laborer's wage, however, a different set of rules apply. That must be so, lest antitrust law waylay ordinary

[781] For a recent perspective, *see* Jack Samuel, *Confederación Hípica v. Confederación de Jinetes Puertorriqueños*, N.Y.U. L. Rev. Case Comments (Apr. 23, 2023).

collective bargaining. Thus a pair of exemptions—one statutory and one nonstatutory—shield legitimate labor conduct from antitrust scrutiny. We deal here with the statutory exemption.

[9] The statutory labor-dispute exemption flows from both the Clayton Act and the Norris-LaGuardia Act. Through those two statutes, Congress exempted labor disputes from antitrust law.

[10] The Clayton Act declares that "[t]he labor of a human being is not a commodity or article of commerce," subject to antitrust law. 15 U.S.C. § 17. To implement that policy, the Norris-LaGuardia Act provides that persons participating or interested in a labor dispute may engage in an enumerated set of acts—including entering agreement to refuse to perform work—without falling afoul of the Sherman Act's prohibition on engaging in an unlawful combination or conspiracy. 29 U.S.C. §§ 104, 105. The Norris-LaGuardia Act defines a "labor dispute" by specifically providing that:

> (a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein . . . when the case involves any conflicting or competing interests in a "labor dispute" . . . of "persons participating or interested" therein . . .
>
> (b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry . . . in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry . . . .
>
> (c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

29 U.S.C. § 113.

[11] The Supreme Court has explained that the statutory exemption applies when four conditions are met. First, the conduct must be undertaken by a bona fide labor organization. Second, the conduct must actually arise from a labor dispute, as defined under the Norris-LaGuardia Act. Once those two prerequisites are satisfied, we apply a further two-prong test: the organization must act in its self-interest and not combine with non-labor groups. To summarize, then, the statutory labor-dispute exemption applies to conduct arising (1) out of the actions of a labor organization and undertaken (2) during a labor dispute, (3) unilaterally, and (4) out of the self-interest of the labor organization.

[12] We discuss the elements of the exemption in turn. First, a labor organization is a "bona fide" group representing laborers. It need not be formally recognized as a union. Second, a labor dispute broadly encompasses any controversy concerning terms or conditions of employment. Third, a labor group acts unilaterally unless it coordinates with a nonlabor group. And fourth, a labor organization acts in its self-interest when its activities bear a reasonable relationship to a legitimate union interest.

[13] We apply the statutory framework, emphasizing the first two elements, as the second pair are not seriously disputed here. We conclude that the jockeys' action fell within the labor-dispute exemption. Jinetes, which advocates for the jockeys' terms of employment, is a labor organization. The defendants sought higher wages and safer working conditions, making this a core labor dispute. The plaintiffs make no assertion that the defendants coordinated with any nonlabor group. And the defendants acted to serve their own economic interests. Because the dispute meets the statutory criteria, the labor-dispute exemption applies.

[14] The district court erred when it concluded that the jockeys' alleged independent-contractor status categorically meant they were ineligible for the exemption. We express no opinion on whether the jockeys are independent contractors, because, by the express text of the Norris-LaGuardia Act, a labor dispute may exist "regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U.S.C. § 113(c). The Court interpreted that provision in New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938). There, a community association encouraged a boycott of a grocery store in protest of the store's

refusal to hire black employees. The Supreme Court held that the association's conduct fell within the labor-dispute exemption because the association sought to influence the store's terms of employment. It explained that the text of the Norris-LaGuardia Act was intended to embrace controversies other than those between employers and employees; between labor unions seeking to represent employees and employers; and between persons seeking employment and employers. *New Negro Alliance* thus precludes an interpretation of the exemption limited to employees alone.

[15] The key question is not whether the jockeys are independent contractors or laborers but whether what is at issue is compensation for their labor. We draw that principle from Columbia River Packers Ass'n v. Hinton, 315 U.S. 143 (1942). In that case, a group of fishermen tried to force exclusive contracts on the canneries to which they sold fish. Relying on the fact that the fishermen were "independent entrepreneurs," the Supreme Court held that the labor-dispute exemption did not apply. Instead, it explained that the dispute "is altogether between fish sellers and fish buyers" and "relates solely to the sale of fish," without implicating "wages or hours or other terms and conditions of employment." From *Columbia River Packers*, thus, comes a critical distinction in applying the labor-dispute exemption: disputes about wages for labor fall within the exemption but those over prices for goods do not. Whether or not the jockeys are independent contractors does not by itself determine whether this dispute is within the labor-dispute exemption. [. . .]

[16] The plaintiffs also appear to advert to a line of cases holding unlawful private restraints of trade intended to influence government action. Yet they fare no better with that argument. Even if the jockeys ultimately sought to influence a political body through their work stoppage, their political activism would make no difference. As long as an employee-employer relationship—broadly understood—is at the core of the controversy, as here, then any political motivations for a work stoppage would not take a dispute out of the labor exemption.[4]

[17] As the labor-dispute exemption applies, the district court erred in granting the plaintiffs an injunction and summary judgment. The plaintiffs are legally precluded from prevailing on their antitrust claims. On remand, the district court must dismiss the complaint.

NOTES

1) How would you explain the best case for a labor exemption? Does that case suggest other areas in which an exemption might be appropriate?
2) Why do you think the courts generated a "non-statutory" antitrust exemption in addition to the immunity created by Congress?
3) Should the antitrust exemption for labor unions be limited to (a) formal employees and/or (b) members of a formal union? If so, why? If not, why not?
4) How, if at all, does or should the logic of the labor exemption (*i.e.*, permitting collusion among covered workers) relate to antitrust's treatment of firms (*i.e.*, permitting collusion among members of an incorporated firm)?
5) Section 6 of the Clayton Act says that "The labor of a human being is not a commodity or article of commerce." Doesn't that mean that *anything* related to a labor market is outside the scope of antitrust?[782]
6) How, and how persuasively, did the *Confederación Hípica* court: (a) conclude that statutory antitrust immunity was not chained to the employer/employee relation? (b) distinguish *FTC v. Superior Court Trial Lawyers* (in which, as you will remember from Chapter V, the Supreme Court held *per se* illegal an effort by D.C. criminal defense lawyers to strike for higher wages)? (It may take you a minute to find the reference.)
7) How, if at all, should antitrust immunity apply to conduct by or among labor unions: for example, "no-raid" agreements or other practices that may limit or eliminate inter-union competition to represent workers? *See* Jackson K. Maxwell, *Solidarity Forever? Toward a Competitive Market for Organized Labor*, 100 N.Y.U. L. Rev. (forthcoming 2025).

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[4] None of the Supreme Court's subsequent cases about politically motivated anticompetitive actions alter that rule. *See* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 499-501 (1988) (curtailing politically motivated boycott rule for sale of goods); FTC v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 425 (1990) (labor exemption not argued); *see also* Superior Ct. Trial Laws. Ass'n v. FTC, 856 F.2d 226, 230 n.6 (D.C. Cir. 1988).

[782] *See* Daniel A. Crane, *Antitrust Antitextualism*, 96 Notre Dame L. Rev. 1205, 1223–26 (2021).

E. Other Exemptions

Beyond petitioning, state action, and labor, antitrust is subject to a variety of other exceptions and carveouts. This subsection presents a selection. But there are plenty of others not included here, including exemptions for shipping lines, medical residency matching programs, export cartels, and others.[783]

1. Implied Repeal

In very rare cases, courts will conclude that a later federal statute has repealed the antitrust laws, within its zone of application, by implication. The leading Supreme Court decision on this issue remains 2007's *Credit Suisse*: at the time, commentators feared that this decision would herald a wave of carveouts and subtractions from the antitrust laws, but in practice the category has remained largely unpopulated.[784]

Credit Suisse Securities (USA) LLC v. Billing

551 U.S. 264 (2007)

Justice Breyer.

[1] In January 2002, respondents, a group of 60 investors, filed two antitrust class-action lawsuits against petitioners, 10 leading investment banks. They sought relief under § 1 of the Sherman Act; § 2(c) of the Clayton Act; and state antitrust laws. The investors stated that between March 1997 and December 2000 the banks had acted as underwriters, forming syndicates that helped execute the IPOs of several hundred technology-related companies. Respondents' antitrust complaints allege that the underwriters abused the practice of combining into underwriting syndicates by agreeing among themselves to impose harmful conditions upon potential investors—conditions that the investors apparently were willing to accept in order to obtain an allocation of new shares that were in high demand.

[2] These conditions, according to respondents, consist of a requirement that the investors pay additional anticompetitive charges over and above the agreed-upon IPO share price plus underwriting commission. In particular, these additional charges took the form of (1) investor promises to place bids in the aftermarket at prices above the IPO price (*i.e.*, "laddering" agreements); (2) investor commitments to purchase other, less attractive securities (*i.e.*, "tying" arrangements); and (3) investor payment of "non-competitively determined" (*i.e.*, excessive) commissions, including the purchase of an issuer's shares in follow-up or "secondary" public offerings (for which the underwriters would earn underwriting discounts). The complaint added that the underwriters' agreement to engage in some or all of these practices artificially inflated the share prices of the securities in question.

[3] The underwriters moved to dismiss the investors' complaints on the ground that federal securities law impliedly precludes application of antitrust laws to the conduct in question. . . . The District Court agreed with petitioners and dismissed the complaints against them. The Court of Appeals for the Second Circuit reversed, however, and reinstated the complaints. We granted the underwriters' petition for certiorari. And we now reverse the judgment of the Court of Appeals. [. . .]

[4] Sometimes regulatory statutes explicitly state whether they preclude application of the antitrust laws. Where regulatory statutes are silent in respect to antitrust, however, courts must determine whether, and in what respects, they implicitly preclude application of the antitrust laws. Those determinations may vary from statute to statute, depending upon the relation between the antitrust laws and the regulatory program set forth in the particular statute, and the relation of the specific conduct at issue to both sets of laws. [. . .]

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[783] 15 U.S.C. § 37b (medical residency matching programs); 15 U.S.C. § 62 (export arrangements); 46 U.S.C. § 40307 (shipping lines).

[784] *See generally* Howard A. Shelanski, *The Case for Rebalancing Antitrust and Regulation*, 109 Mich. L. Rev. 683 (2011).

[5] This Court's prior decisions . . . make clear that, when a court decides whether securities law precludes antitrust law, it is deciding whether, given context and likely consequences, there is a clear repugnancy between the securities law and the antitrust complaint—or as we shall subsequently describe the matter, whether the two are clearly incompatible. Moreover, [previous cases], in finding sufficient incompatibility to warrant an implication of preclusion, have treated the following factors as critical: (1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; and (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct. We also note (4) that in [previous cases] the possible conflict affected practices that lie squarely within an area of financial market activity that the securities law seeks to regulate. [. . .]

[6] These principles, applied to the complaints before us, considerably narrow our legal task. For the parties cannot reasonably dispute the existence here of several of the conditions that this Court previously regarded as crucial to finding that the securities law impliedly precludes the application of the antitrust laws.

[7] First, the activities in question here—the underwriters' efforts jointly to promote and to sell newly issued securities—is central to the proper functioning of well-regulated capital markets. The IPO process supports new firms that seek to raise capital; it helps to spread ownership of those firms broadly among investors; it directs capital flows in ways that better correspond to the public's demand for goods and services. Moreover, financial experts, including the securities regulators, consider the general kind of joint underwriting activity at issue in this case, including road shows and bookbuilding efforts essential to the successful marketing of an IPO. . . . Thus, the antitrust complaints before us concern practices that lie at the very heart of the securities marketing enterprise.

[8] Second, the law grants the SEC authority to supervise all of the activities here in question. Indeed, the SEC possesses considerable power to forbid, permit, encourage, discourage, tolerate, limit, and otherwise regulate virtually every aspect of the practices in which underwriters engage. Private individuals who suffer harm as a result of a violation of pertinent statutes and regulations may also recover damages.

[9] Third, the SEC has continuously exercised its legal authority to regulate conduct of the general kind now at issue. It has defined in detail, for example, what underwriters may and may not do and say during their road shows. It has brought actions against underwriters who have violated these SEC regulations. And private litigants, too, have brought securities actions complaining of conduct virtually identical to the conduct at issue here; and they have obtained damages.

[10] The preceding considerations show that the first condition (legal regulatory authority), the second condition (exercise of that authority), and the fourth condition (heartland securities activity) . . . are satisfied in this case as well. . . . [T]here is here no question of the existence of appropriate regulatory authority, nor is there doubt as to whether the regulators have exercised that authority. Rather, the question before us concerns the third condition: Is there a conflict that rises to the level of incompatibility? Is an antitrust suit such as this likely to prove practically incompatible with the SEC's administration of the Nation's securities laws? [. . .]

[11] [S]everal considerations taken together lead us to find that, even on . . . pro-respondent assumptions, securities law and antitrust law are clearly incompatible.

[12] First, to permit antitrust actions such as the present one still threatens serious securities-related harm. For one thing, an unusually serious legal line-drawing problem remains unabated. In the present context only a fine, complex, detailed line separates activity that the SEC permits or encourages (for which respondents must concede antitrust immunity) from activity that the SEC must (and inevitably will) forbid (and which, on respondents' theory, should be open to antitrust attack). [. . .]

[13] Under these standards, to distinguish what is forbidden from what is allowed requires an understanding of just when, in relation to services provided, a commission is "excessive," indeed, so "excessive" that it will remain permanently forbidden. And who but the SEC itself could do so with confidence?

[14] For another thing, evidence tending to show unlawful antitrust activity and evidence tending to show lawful securities marketing activity may overlap, or prove identical. Consider, for instance, a conversation between an underwriter and an investor about how long an investor intends to hold the new shares (and at what price), say, a conversation that elicits comments concerning both the investor's short and longer term plans. That exchange might, as a plaintiff sees it, provide evidence of an underwriter's insistence upon "laddering" or, as a defendant sees it, provide evidence of a lawful effort to allocate shares to those who will hold them for a longer time. [. . .]

[15] We believe it fair to conclude that, where conduct at the core of the marketing of new securities is at issue; where securities regulators proceed with great care to distinguish the encouraged and permissible from the forbidden; where the threat of antitrust lawsuits, through error and disincentive, could seriously alter underwriter conduct in undesirable ways, to allow an antitrust lawsuit would threaten serious harm to the efficient functioning of the securities markets.

[16] Second, any enforcement-related need for an antitrust lawsuit is unusually small. For one thing, the SEC actively enforces the rules and regulations that forbid the conduct in question. For another, as we have said, investors harmed by underwriters' unlawful practices may bring lawsuits and obtain damages under the securities law. Finally, the SEC is itself required to take account of competitive considerations when it creates securities-related policy and embodies it in rules and regulations. And that fact makes it somewhat less necessary to rely upon antitrust actions to address anticompetitive behavior.

[17] We also note that Congress, in an effort to weed out unmeritorious securities lawsuits, has recently tightened the procedural requirements that plaintiffs must satisfy when they file those suits. To permit an antitrust lawsuit risks circumventing these requirements by permitting plaintiffs to dress what is essentially a securities complaint in antitrust clothing.

[18] In sum, an antitrust action in this context is accompanied by a substantial risk of injury to the securities markets and by a diminished need for antitrust enforcement to address anticompetitive conduct. Together these considerations indicate a serious conflict between, on the one hand, application of the antitrust laws and, on the other, proper enforcement of the securities law. [. . .]

[19] The upshot is that all four elements . . . are present here: (1) an area of conduct squarely within the heartland of securities regulations; (2) clear and adequate SEC authority to regulate; (3) active and ongoing agency regulation; and (4) a serious conflict between the antitrust and regulatory regimes. We therefore conclude that the securities laws are "clearly incompatible" with the application of the antitrust laws in this context.

* * *

In *Trinko*—a monopolization case you will remember from Chapter VII—the Court relied on the existence of a parallel regulatory scheme in a somewhat softer way: as a reason to refrain from extending the reach of antitrust liability. The complaint in that case concerned Verizon's refusal to provide a competitor with necessary interconnection services: a complaint, the Court noted, that could have been addressed to a sectoral regulator—the Federal Communications Commission ("FCC")—under the Telecommunications Act 1996.[785]

Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP

540 U.S. 398 (2004)

Justice Scalia.

[1] [W]e do not believe that traditional antitrust principles justify adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors. Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. Part of that attention to economic

[785] For a thoughtful argument that this analysis depends on the effectiveness of the regulatory regime, *see* Michael A. Carrier, *Unsettling Drug Patent Settlements: A Framework for Presumptive Illegality*, 108 Mich. L. Rev. 37, 70–71 (2009).

context is an awareness of the significance of regulation. As we have noted, careful account must be taken of the pervasive federal and state regulation characteristic of the industry.

[2] One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny. Where, by contrast, there is nothing built into the regulatory scheme which performs the antitrust function, the benefits of antitrust are worth its sometimes considerable disadvantages. Just as regulatory context may in other cases serve as a basis for implied immunity, it may also be a consideration in deciding whether to recognize an expansion of the contours of § 2.

[3] The regulatory framework that exists in this case demonstrates how, in certain circumstances, regulation significantly diminishes the likelihood of major antitrust harm. Consider, for example, the statutory restrictions upon Verizon's entry into the potentially lucrative market for long-distance service. To be allowed to enter the long-distance market in the first place, an incumbent [local exchange carrier (LEC)] must be on good behavior in its local market. Authorization by the FCC requires state-by-state satisfaction of [Telecommunications Act 1996] § 271's competitive checklist, which . . . includes the nondiscriminatory provision of access to [unbundled network elements (UNEs)]. Section 271 applications to provide long-distance service have now been approved for incumbent LECs in 47 States and the District of Columbia.

[4] The FCC's § 271 authorization order for Verizon to provide long-distance service in New York discussed at great length Verizon's commitments to provide access to UNEs, including the provision of OSS. Those commitments are enforceable by the FCC through continuing oversight; a failure to meet an authorization condition can result in an order that the deficiency be corrected, in the imposition of penalties, or in the suspension or revocation of long-distance approval. Verizon also subjected itself to oversight by the PSC under a so-called "Performance Assurance Plan" (PAP). The PAP, which by its terms became binding upon FCC approval, provides specific financial penalties in the event of Verizon's failure to achieve detailed performance requirements. The FCC described Verizon's having entered into a PAP as a significant factor in its § 271 authorization, because that provided a strong financial incentive for post-entry compliance with the section 271 checklist, and prevented backsliding.

[5] The regulatory response to the OSS failure complained of in respondent's suit provides a vivid example of how the regulatory regime operates. When several competitive LECs complained about deficiencies in Verizon's servicing of orders, the FCC and PSC responded. The FCC soon concluded that Verizon was in breach of its sharing duties under § 251(c), imposed a substantial fine, and set up sophisticated measurements to gauge remediation, with weekly reporting requirements and specific penalties for failure. The PSC found Verizon in violation of the PAP even earlier, and imposed additional financial penalties and measurements with daily reporting requirements. In short, the regime was an effective steward of the antitrust function. {*Eds.: § 251(c) of the Telecommunications Act , 47 U.S.C. § 251(c), required Verizon to share "unbundled" elements of its network with competitors.*}

[6] Against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs. Under the best of circumstances, applying the requirements of § 2 can be difficult because the means of illicit exclusion, like the means of legitimate competition, are myriad. Mistaken inferences and the resulting false condemnations are especially costly, because they chill the very conduct the antitrust laws are designed to protect. The cost of false positives counsels against an undue expansion of § 2 liability. One false-positive risk is that an incumbent LEC's failure to provide a service with sufficient alacrity might have nothing to do with exclusion. Allegations of violations of § 251(c)(3) duties are difficult for antitrust courts to evaluate, not only because they are highly technical, but also because they are likely to be extremely numerous, given the incessant, complex, and constantly changing interaction of competitive and incumbent LECs implementing the sharing and interconnection obligations. Amici States have filed a brief asserting that competitive LECs are threatened with death by a thousand cuts, the identification of which would surely be a daunting task for a generalist antitrust court. Judicial oversight under the Sherman Act would seem destined to distort investment and lead to a new layer of interminable litigation, atop the variety of litigation routes already available to and actively pursued by competitive LECs.

2. Agricultural Cooperatives

The Capper-Volstead Act of 1922 creates a limited antitrust exception for certain cooperative activities in agricultural markets. Section 1 of the Act, codified at 7 U.S.C. § 291, creates the exemption; Section 2, codified at 7 U.S.C. § 292, aims to supervise and soften its effects.

17 U.S.C. § 291

Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: Provided, however, That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

> First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,
>
> Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

> Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.

17 U.S.C. § 292

If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. . . . .

* * *

The core rationale for the agricultural exemption is generally understood to be the persistent asymmetry of economic power between large, integrated incumbent buyers in the agricultural supply chain and individual growers.[786] In 1978, Justice Blackmun explained the point in *National Broiler*.

National Broiler Marketing Ass'n v. United States

436 U.S. 816 (1978)

Justice Blackmun.

[1] The Capper-Volstead Act removed from the proscription of the antitrust laws cooperatives formed by certain agricultural producers that otherwise would be directly competing with each other in efforts to bring their goods to market. But if the cooperative includes among its members those not so privileged under the statute to act collectively, it is not entitled to the protection of the Act. . . . .

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[786] *See generally* Michael Kades, *Protecting livestock producers and chicken growers: Recommendations for reinvigorating enforcement of the Packers and Stockyards Act*, Center for Equitable Growth (May 2022); U.S. Dept. of Agriculture, *Antitrust Status of Farmer Cooperatives: The Story of the Capper Volstead Act* (Sept. 2002), https://www.rd.usda.gov/files/CIR59.pdf; David L. Baumer, Robert T. Masson, and Robin Abrahamson Masson, *Curdling the Competition: An Economic and Legal Analysis of the Antitrust Exemption for Agriculture*, 31 Vill. L. Rev. 183 (1986).

[2] The Act protects "[p]ersons engaged in the production of agricultural products *as farmers, planters, ranchmen, dairymen, nut or fruit growers*" (emphasis added). A common-sense reading of this language clearly leads one to conclude that not all persons engaged in the production of agricultural products are entitled to join together and to obtain and enjoy the Act's benefits: The italicized phrase restricts and limits the broader preceding phrase "[p]ersons engaged in the production of agricultural products . . . ."

[3] The purposes of the Act, as revealed by the legislative history, confirm the conclusion that not all those involved in bringing agricultural products to market may join cooperatives exempt under the statute, and have the cooperatives retain that exemption. The Act was passed in 1922 to remove the threat of antitrust restrictions on certain kinds of collective activity, including processing and handling, undertaken by certain persons engaged in agricultural production. Similar organizations of those engaged in farming, as well as organizations of laborers, were already entitled, since 1914, to special treatment under § 6 of the Clayton Act. This treatment, however, had proved to be inadequate. Only nonstock organizations were exempt under the Clayton Act, but various agricultural groups had discovered that in order best to serve the needs of their members, accumulation of capital was required. With capital, cooperative associations could develop and provide the handling and processing services that were needed before their members' products could be sold. The Capper-Volstead Act was passed to make it clear that the formation of an agricultural organization with capital would not result in a violation of the antitrust laws, and that the organization, without antitrust consequences, could perform certain functions in preparing produce for market. . . . .

[4] Farmers were perceived to be in a particularly harsh economic position. They were subject to the vagaries of market conditions that plague agriculture generally, and they had no means individually of responding to those conditions. Often the farmer had little choice about who his buyer would be and when he would sell. A large portion of an entire year's labor devoted to the production of a crop could be lost if the farmer were forced to bring his harvest to market at an unfavorable time. Few farmers, however, so long as they could act only individually, had sufficient economic power to wait out an unfavorable situation. Farmers were seen as being caught in the hands of processors and distributors who, because of their position in the market and their relative economic strength, were able to take from the farmer a good share of whatever profits might be available from agricultural production. By allowing farmers to join together in cooperatives, Congress hoped to bolster their market strength and to improve their ability to weather adverse economic periods and to deal with processors and distributors.

[5] NBMA argues that this history demonstrates that the Act was meant to protect all those that must bear the costs and risks of a fluctuating market, and that all its members, because they are exposed to those costs and risks and must make decisions affected thereby, are eligible to organize in exempt cooperative associations. The legislative history indicates, however, and does it clearly, that it is not simply exposure to those costs and risks, but the inability of the individual farmer to respond effectively, that led to the passage of the Act. The congressional debates demonstrate that the Act was meant to aid not the full spectrum of the agricultural sector but, instead, to aid only those whose economic position rendered them comparatively helpless. It was very definitely, special-interest legislation. Indeed, several attempts were made to amend the Act to include certain processors who, according to preplanting contracts, paid growers amounts based on the market price of processed goods; these attempts were roundly rejected. Clearly, Congress did not intend to extend the benefits of the Act to the processors and packers to whom the farmers sold their goods, even when the relationship was such that the processor and packer bore a part of the risk.

[6] Petitioner suggests that agriculture has changed since 1922, when the Act was passed, and that an adverse decision here might simply accelerate an existing trend toward the absorption of the contract grower by the integrator, or might induce the integrators to rewrite their contracts with the contract growers to designate the latter as lessor-employees rather than independent contractors. We may accept the proposition that agriculture has changed in the intervening years, but, as the second Mr. Justice Harlan said, when speaking for the Court in another context, a statute is not an empty vessel into which this Court is free to pour a vintage that we think better suits present-day tastes. Considerations of this kind are for the Congress, not the courts.

* * *

The agricultural exemption reflects, in part, the idea that the creation of market power may in some cases help to "countervail" against existing market power on the other side of the bargaining table.[787] This idea underpins some calls for antitrust exemptions in other settings where some degree of market power is or may be present.[788] However, as other commentators have pointed out, there are reasons to approach the creation of "countervailing power" with real caution.

Laura M. Alexander, Countervailing Power: A Comprehensive Assessment of a Persistent but Troubling Idea

American Antitrust Institute White Paper (Oct. 15, 2020)

At a high level, the theory of countervailing power is that where a firm at one level of a supply chain enjoys market power, entities that transact with (and thus negotiate with) that firm should be allowed to either merge or collaborate, even if doing so would otherwise be anticompetitive or illegal, because doing so will enable them to more effectively bargain with the powerful counterparty.

While this argument may seem facially appealing, it is also deeply concerning. The arguments in favor of countervailing power as a response to increasing and seemingly intractable market concentration are not driven by methodological, fact-based analysis; indeed, the economic evidence strongly suggests that countervailing market power, particularly among intermediaries in the supply chain, leads to increased prices, inefficiency, and worse outcomes for consumers in most cases.

Moreover, the adverse legal and policy consequences of adapting antitrust laws and competition policy to recognize countervailing market power as a defense to market concentration are profound and may be underappreciated. What is often overlooked is that concentrated firms at the two levels do not have the incentive to charge competitive prices. To the contrary, after the buying firms are permitted to join together to countervail the power of the sellers, the now-concentrated firms at the two levels have the mutual incentive to exclude rivals and charge higher monopoly prices to consumers.

While countervailing market power may seem like a quick fix to the problem of increased concentration, in-depth analysis suggests it is a cure worse than the disease, at least insofar as competition remains the goal of antitrust. Simply put, countervailing power is not a competition-based response to market power. And, it is a response that risks significant additional harm to competition, consumers, and workers. [. . .]

What countervailing power does reliably do, is to improve the outcomes for the parties allowed to exercise it. . . . [I]t is this feature of the economics of countervailing power that has been behind the instances where lawmakers have instituted legislative solutions rooted in countervailing power. Antitrust exemptions, such as labor unions and agricultural cooperatives, for example, represent a policy decision to bolster the bargaining leverage of workers and family farms because we, as a society, determined that it is in our best interest to prioritize the living standards of these groups over competition in affected labor and agricultural markets. Allowing these groups to exercise countervailing power is viewed as a means toward that end.

3. Insurance

In 1945, Congress passed the McCarran-Ferguson Act, broadly exempting the "business of insurance" from antitrust scrutiny so long as it is subject to state law, and except for boycotts, coercion, and intimidation. This broad exemption remained undisturbed for more than 75 years until 2021, when it was cut back to subject much

[787] *See generally* GAO, *Dairy Cooperatives—Role and Effects of the Capper-Volstead Exemptio*n, GAO/RCED-90-186 (Sept. 1990).

[788] For thoughtful discussions, *see* Jonathan B. Baker, Joseph Farrell, & Carl Shapiro, *Merger to Monopoly to Serve a Single Buyer: Comment*, 75 Antitrust L.J. 637, 640-41 (2008); John B. Kirkwood, *Collusion to Control a Powerful Customer: Amazon, E-Books, and Antitrust Policy*, 69 U. Miami L. Rev. 1, 60 (2014). *Compare also* Written Testimony of Daniel Francis before U.S. Senate, Committee on the Judiciary, Subcommittee on Competition Policy, Antitrust, and Consumer Rights, Hearing on "Breaking the News: Journalism, Competition, and the Effects of Market Power on a Free Press" (February 2022) (opposing antitrust exemption) *with* Written Testimony of Hal J. Singer, before U.S. Senate, Committee on the Judiciary, Subcommittee on Competition Policy, Antitrust, and Consumer Rights, Hearing on "Breaking the News: Journalism, Competition, and the Effects of Market Power on a Free Press" (February 2022) (supporting antitrust exemption).

of the business of health insurance to antitrust scrutiny. In *Group Life*, the Supreme Court summarized the Act's history and purpose.

15 U.S.C. § 1012(b)

[A]fter June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

15 U.S.C. § 1013(b)

Nothing contained in this chapter shall render the . . . Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

Grp. Life & Health Ins. Co. v. Royal Drug Co.

440 U.S. 205 (1979)

Justice Stewart.

[1] The [McCarran-Ferguson antitrust exemption] was enacted in 1945 in response to this Court's decision in *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944). The indictment in that case charged that the defendants had conspired to fix insurance rates and commissions, and had conspired to boycott and coerce noncooperating insurers, agents, and insureds. In the District Court the defendants had successfully demurred to the indictment on the ground that the insurance industry was not a part of interstate commerce subject to regulation under the Commerce Clause. On direct appeal, this Court reversed the judgment, holding that the business of insurance is interstate commerce, and that the Congress which enacted the Sherman Act had not intended to exempt the insurance industry from its coverage. [. . .]

[2] The primary concern of Congress in the wake of that decision was in enacting legislation that would ensure that the States would continue to have the ability to tax and regulate the business of insurance. This concern is reflected in §§ 1 and 2(a) of the [McCarran-Ferguson] Act . . . . A secondary concern was the applicability of the antitrust laws to the insurance industry. Months before this Court's decision in *South-Eastern Underwriters* was announced, proposed legislation to totally exempt the insurance industry from the Sherman and Clayton Acts had been introduced in Congress. Less than three weeks after the actual decision, the House of Representatives passed a bill which would also have provided the insurance industry with a blanket exemption from the antitrust laws, thus restoring the state of law that had existed before the decision in *South-Eastern Underwriters*.

[3] Congress, however, rejected this approach. Instead of a total exemption, Congress provided in § 2(b) that the antitrust laws "shall be applicable" unless the activities of insurance companies are the business of insurance and regulated by state law. Moreover, under § 3(b) the Sherman Act was made applicable in any event to acts of boycott, coercion, or intimidation. To allow the States time to adjust to the applicability of the antitrust laws to the insurance industry, Congress imposed a 3-year moratorium. After the expiration of the moratorium on July 1, 1948, however, Congress clearly provided that the antitrust laws would be applicable to the business of insurance "to the extent that such business is not regulated by State law."

[4] By making the antitrust laws applicable to the insurance industry except as to conduct that is the business of insurance, regulated by state law, and not a boycott, Congress did not intend to and did not overrule the South-Eastern Underwriters case. While the power of the States to tax and regulate insurance companies was reaffirmed, the McCarran-Ferguson Act also established that the insurance industry would no longer have a blanket exemption from the antitrust laws. It is true that § 2(b) of the Act does create a partial exemption from those laws. Perhaps more significantly, however, that section, and the Act as a whole, embody a legislative rejection of the concept that the insurance industry is outside the scope of the antitrust laws—a concept that had prevailed before the *South-Eastern Underwriters* decision. [. . .]

[5] References to the meaning of the "business of insurance" in the legislative history of the McCarran-Ferguson Act strongly suggest that Congress understood the business of insurance to be the underwriting and spreading of risk. Thus, one of the early House Reports stated: "The theory of insurance is the distribution of risk according to hazard, experience, and the laws of averages. These factors are not within the control of insuring companies in the sense that the producer or manufacturer may control cost factors."

[6] Because of the widespread view that it is very difficult to underwrite risks in an informed and responsible way without intra-industry cooperation, the primary concern of both representatives of the insurance industry and the Congress was that cooperative ratemaking efforts be exempt from the antitrust laws. The passage of the McCarran-Ferguson Act was preceded by the introduction in the Senate Committee of a report and a bill submitted by the National Association of Insurance Commissioners on November 16, 1944. The views of the NAIC are particularly significant, because the Act ultimately passed was based in large part on the NAIC bill. The report emphasized that the concern of the insurance commissioners was that smaller enterprises and insurers other than life insurance companies were unable to underwrite risks accurately, and it therefore concluded:

> For these and other reasons this subcommittee believes it would be a mistake to permit or require the unrestricted competition contemplated by the antitrust laws to apply to the insurance business. To prohibit combined efforts for statistical and rate-making purposes would be a backward step in the development of a progressive business. We do not regard it as necessary to labor this point any further because Congress itself recently recognized the necessity for concert of action in the collection of statistical data and rate making when it enacted the District of Columbia Fire Insurance Rating Act. [. . .]

[7] The floor debates also focused simply on whether cooperative ratemaking should be exempt. Thus, Senator Ferguson, in explaining the purpose of the bill, stated:

> This bill would permit—and I think it is fair to say that it is intended to permit—rating bureaus, because in the last session we passed a bill for the District of Columbia allowing rating. What we saw as wrong was the fixing of rates without statutory authority in the States; but we believe that State rights should permit a State to say that it believes in a rating bureau. I think the insurance companies have convinced many members of the legislature that we cannot have open competition in fixing rates on insurance. If we do, we shall have chaos. There will be failures, and failures always follow losses.

[8] The consistent theme of the remarks of other Senators also indicated a primary concern that cooperative ratemaking would be protected from the antitrust laws. President Roosevelt, in signing the bill, also emphasized that the bill would allow cooperative rate regulation. He stated that "Congress did not intend to permit private rate fixing, which the Antitrust Act forbids, but was willing to permit actual regulation of rates by affirmative action of the States."

* * *

The insurance exemption was often criticized,[789] but it was not until January 2021 that the exemption was cut back through the introduction of language restoring ordinary-course antitrust scrutiny to most health insurance.

15 U.S.C. § 1013(c)

(1) Nothing contained in this chapter shall modify, impair, or supersede the operation of any of the antitrust laws with respect to the business of health insurance (including the business of dental insurance and limited-scope dental benefits).

(2) Paragraph (1) shall not apply with respect to making a contract, or engaging in a combination or conspiracy—

[789] *See, e.g.*, Statement of Christine Varney, U.S. Dept. of Justice, before the Committee on the Judiciary, U.S. Senate, Hearing on Prohibiting Price Fixing and Other Anticompetitive Conduct in the Health Insurance Industry (Oct. 14, 2009) (summarizing criticism).

(A) to collect, compile, or disseminate historical loss data;

(B) to determine a loss development factor applicable to historical loss data;

(C) to perform actuarial services if such contract, combination, or conspiracy does not involve a restraint of trade; or

(D) to develop or disseminate a standard insurance policy form (including a standard addendum to an insurance policy form and standard terminology in an insurance policy form) if such contract, combination, or conspiracy is not to adhere to such standard form or require adherence to such standard form.

4. Baseball

Perhaps the strangest antitrust exemption is the one enjoyed by the game of baseball. This judge-made exemption owes its existence to the following brief opinion of Justice Holmes in a 1922 case. Recent attention to sports antitrust—and particularly the Supreme Court decision in *NCAA v. Alston*—has encouraged some plaintiffs to take a fresh run at this strange exception from the reach of antitrust.

Fed. Baseball Club of Baltimore v. Nat'l League of Pro. Base Ball Clubs

259 U.S. 200 (1922)

Justice Holmes.

[1] This is a suit for threefold damages brought by the plaintiff in error under the Anti-Trust Acts of July 2, 1890. The defendants are the National League of Professional Base Ball Clubs and the American League of Professional Base Ball Clubs, unincorporated associations, composed respectively of groups of eight incorporated base ball clubs, joined as defendants; the presidents of the two Leagues and a third person, constituting what is known as the National Commission, having considerable powers in carrying out an agreement between the two Leagues; and three other persons having powers in the Federal League of Professional Base Ball Clubs, the relation of which to this case will be explained. It is alleged that these defendants conspired to monopolize the base ball business, the means adopted being set forth with a detail which, in the view that we take, it is unnecessary to repeat.

[2] The plaintiff is a base ball club incorporated in Maryland, and with seven other corporations was a member of the Federal League of Professional Base Ball Players, a corporation under the laws of Indiana, that attempted to compete with the combined defendants. It alleges that the defendants destroyed the Federal League by buying up some of the constituent clubs and in one way or another inducing all those clubs except the plaintiff to leave their League, and that the three persons connected with the Federal League and named as defendants, one of them being the President of the League, took part in the conspiracy. Great damage to the plaintiff is alleged. The plaintiff obtained a verdict for $80,000 in the Supreme Court and a judgment for treble the amount was entered, but the Court of Appeals, after an elaborate discussion, held that the defendants were not within the Sherman Act. . . . .

[3] The decision of the Court of Appeals went to the root of the case and if correct makes it unnecessary to consider other serious difficulties in the way of the plaintiff's recovery. A summary statement of the nature of the business involved will be enough to present the point. The clubs composing the Leagues are in different cities and for the most part in different States. The end of the elaborate organizations and sub-organizations that are described in the pleadings and evidence is that these clubs shall play against one another in public exhibitions for money, one or the other club crossing a state line in order to make the meeting possible. When as the result of these contests one club has won the pennant of its League and another club has won the pennant of the other League, there is a final competition for the world's championship between these two. Of course the scheme requires constantly repeated travelling on the part of the clubs, which is provided for, controlled and disciplined by the organizations, and this it is said means commerce among the States. But we are of opinion that the Court of Appeals was right.

[4] The business is giving exhibitions of base ball, which are purely state affairs. It is true that in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and States. But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business. According to the distinction insisted upon in *Hooper v. California*, 155 U. S. 648, 655 [(1895)], the transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money would not be called trade of commerce in the commonly accepted use of those words. As it is put by defendant, personal effort, not related to production, is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place. To repeat the illustrations given by the Court below, a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another State.

[5] If we are right the plaintiff's business is to be described in the same way and the restrictions by contract that prevented the plaintiff from getting players to break their bargains and the other conduct charged against the defendants were not an interference with commerce among the States.

* * *

In *Flood v. Kuhn*, the Supreme Court effectively conceded that *Federal Baseball* was wrongly decided but declined to disturb it, on *stare decisis* grounds, and indicated that it would be up to Congress to fix the problem.[790] In 1998 Congress enacted a limited repeal of the baseball exemption.[791] And in *Alston* (a restraint of trade case you will remember from Chapter IV), the Supreme Court went out of its way to cast some doubt on this exemption:

> [T]his Court once dallied with something that looks a bit like an antitrust exemption for professional baseball. In *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922), the Court reasoned that "exhibitions" of "base ball" did not implicate the Sherman Act because they did not involve interstate trade or commerce—even though teams regularly crossed state lines (as they do today) to make money and enhance their commercial success. But this Court has refused to extend *Federal Baseball*'s reasoning to other sports leagues—and has even acknowledged criticisms of the decision as "unrealistic" and "inconsistent" and "aberrational." Indeed, as we have seen, this Court has already recognized that the NCAA itself is subject to the Sherman Act.
>
> The orderly way to temper that Act's policy of competition is by legislation and not by court decision. The NCAA is free to argue that, because of the special characteristics of [its] particular industry, it should be exempt from the usual operation of the antitrust laws—but that appeal is properly addressed to Congress. Nor has Congress been insensitive to such requests. It has modified the antitrust laws for certain industries in the past, and it may do so again in the future. But until Congress says otherwise, the only law it has asked us to enforce is the Sherman Act, and that law is predicated on one assumption alone—competition is the best method of allocating resources in the Nation's economy. [792]

Private litigation followed,[793] and the Justice Department took the opportunity to speak up.

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[790] 407 U.S. 258 (1972). Inexplicably, the opinion dedicates two pages to listing favorite baseball players. *Id.* at 262–64.

[791] See 15 U.S.C. § 26b. *See generally* John T. Wolohan, *The Curt Flood Act of 1998 and Major League Baseball's Federal Antitrust Exemption*, 9 Marq. Sports L. J. 347 (1999).

[792] NCAA v. Alston, 141 S.Ct. 2141, 2159–60 (2021).

[793] *See, e.g.*, Complaint, Nostalgic Partners, LLC v. Office of the Comm'r of Baseball, Case 1:21-cv-10876 (S.D.N.Y. filed Dec. 20, 2021) ¶ 4 ("Virtually no other business in the United States would have even *considered* such a brazen horizontal agreement among competing businesses. MLB and its Clubs, however, had no such qualms because for almost a century they have laid claim to an anomalous, judicially created "get-out-of-jail-free card" from antitrust scrutiny. The so-called "baseball exemption" from the Sherman Act was first articulated by the Supreme Court in *Federal Baseball Club v. National League*, 259 U.S. 200 (1922). If not for this anomalous precedent, MLB knows that the type of anticompetitive conduct challenged here would warrant per se condemnation. The time is at hand to cast the baseball exemption into the dust bin of antitrust history.").

Statement of Interest of the United States, Nostalgic Partners LLC v. Office of the Commissioner of Baseball,

Case No. 1:21-cv-10876 (S.D.N.Y. filed June 15, 2022)

[1] Baseball may be our national pastime, but our national economic policy long has been faith in the value of competition. The Sherman Act is a comprehensive charter of economic liberty aimed at preserving free and unfettered competition, and as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.

[2] The baseball exemption established in *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922), is a judicially created exception to this national economic policy established by Congress. The Supreme Court has itself recognized the exemption as an exception and an anomaly and an aberration confined to baseball. Just last year, the Court acknowledged that although it once dallied with something that looks a bit like an antitrust exemption for professional baseball, it has refused to extend *Federal Baseball*'s reasoning to other sports leagues. Accordingly, the Court has expressly declined to create similar exemptions for boxing, and football. Lower courts have likewise refused to recognize exemptions for other sports leagues. [. . .]

[3] In addition to being unique among sports leagues, the baseball exemption is also distinct among antitrust exemptions in that it was not created to reconcile competing legal authorities or substantive policy goals. For example, the "state-action doctrine" exempts certain actions taken by state governments from the scope of the federal antitrust laws. The Supreme Court has explained that nothing in the language of the Sherman Act or in its history suggested that Congress intended to restrict the sovereign capacity of the States to regulate their economies, and thus the state-action doctrine is intended to foster and preserve the federal system. Similarly, the nonstatutory labor exemption immunizes certain activity from the Sherman Act to accommodate . . . the congressional policy favoring collective bargaining.

[4] By contrast, the "baseball exemption" rests on a repudiated Commerce Clause rationale. In *Federal Baseball*, the Supreme Court concluded that "the business of giving exhibitions of base ball" involved "purely state affairs" and therefore did not satisfy the interstate-commerce element of the Sherman Act. [However, in later cases, including *Flood v. Kuhn*, 407 U.S. 258, 282 (1972), the Court has recognized that baseball is a business and that it involves interstate commerce.] [. . .]

[5] Thus, today, the baseball exemption that was born from *Federal Baseball*'s interstate commerce analysis persists as a freestanding exemption despite [the subsequent] repudiation of its original rationale. [. . .]

[6] While *Federal Baseball* and its progeny remain binding precedent, lower courts should narrowly construe the judicially created exemption for the business of baseball, and should not extend its scope beyond what the Supreme Court has articulated—conduct that is central to providing professional baseball games to the public. [. . .]

[7] [L]ower courts should not extend the baseball exemption beyond the scope recognized by the Supreme Court in its baseball [cases], which [have] limited the exemption to conduct that is central to the actual exhibition of professional baseball games. In *Federal Baseball*, the Court identified "[t]he business" at issue as "giving exhibitions of base ball." Indeed, the distinction the Court drew between exhibitions (games) and activity "incident" to the exhibitions, such as the teams' travel, was central to the Court's reasoning. "[O]ne or the other club cross[ed] a state line in order to make the meeting possible," the Court acknowledged, but the games themselves—the "business" in dispute—were "purely state affairs" and thus outside the scope of the Commerce Clause (as interpreted in *Federal Baseball*). [*Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356 (1953)] likewise characterized the scope of *Federal Baseball*'s holding as the business of providing public baseball games for profit between clubs of professional baseball players. [. . .]

[8] Thus, while the exemption may cover antitrust challenges to Major League Baseball's league structure and its reserve system, it would not cover conduct beyond the scope of the offering of exhibitions of professional

baseball. Such conduct would include agreements between baseball teams and baseball card manufacturers to fix the prices at which cards are sold to consumers, or restraints on broadcasting baseball games.

NOTES

1) One consequence of *Trinko* is that a complainant with a possible Section 2 claim may be on *weaker* ground, not stronger ground, if the defendant is simultaneously violating a regulatory obligation. Is that a desirable result? Why, or why not?
2) The baseball example looks like an example of striking judicial innovation. But is it really different from other judge-created antitrust rules, like the state-action defense or the rule of reason? How?
3) If you could create one new antitrust exemption, which one would you create and why?
4) If you could abolish one existing exemption, what would you abolish and why?
5) Might we want an exemption from private enforcement without also creating an exemption from government enforcement (or the other way around)? Under what circumstances? What plausible examples can you suggest?
6) Should games and sports be subject to antitrust rules at all? Do you fear the use of antitrust to undermine or distort a fair and balanced competition? Would you fear or welcome the consequences of a general "games of recreation" antitrust exemption?
7) Should an antitrust exemption always, or usually, be accompanied by some kind of alternative measure to protect competition within the scope of the exemption?
8) How would you describe the standard that you think a legislature should apply when deciding whether or not to create an antitrust exemption?