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## Raising the Price of Pork in Texas: A Few Thoughts on Ghosh, Bush, and the Future of Antitrust Immunity

Christopher L. Sagers

*Cleveland State University*, [c.sagers@csuohio.edu](mailto:c.sagers@csuohio.edu)

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# COMMENTARY

## RAISING THE PRICE OF PORK IN TEXAS: A FEW THOUGHTS ON GHOSH, BUSH, AND THE FUTURE OF THE ANTITRUST IMMUNITIES

*By Chris Sagers\**

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\* Associate Professor of Law, Cleveland State University. In my modest opinion this was an uncommonly stimulating and constructive conference, and I am very grateful to have been invited. In no small part, the conference succeeded because of the candid presentations of two law professors who were both Civil Aeronautics Board (CAB) officials during the years of the CAB's own deregulatory efforts *and* have both been airline executives. But maybe even more, it succeeded because of the spirited discussion their presentations invited. Also, as the faculty advisor to a law review myself, not of least satisfaction was that by all appearances every member of the *Houston Law Review's* staff attended virtually the entire conference. Anyway, for comments and discussion on the substantive matters in this Commentary my thanks to Professors Ghosh and Bush, Peter Carstensen, Jim Dick, Ken Lashins, and the audience and panelists in the Symposium.

## I. INTRODUCTION

Hailing originally as I do from the tranquil obscurity of small-town Iowa, a state that three million people share with fifteen million pigs,<sup>1</sup> my feelings are normally somewhat complicated about pork. My feelings are clear, however, about the special dish of fatty pork served up to American and Southwest Airlines not long ago in Dallas. The authorities there, under dubious circumstances,<sup>2</sup> cut a deal with those two airlines to head off what could have been a substantial, pro-consumer advance in competitive air transportation. They agreed to help replace a protectionist federal statute that sheltered the incumbent carrier in the Dallas–Fort Worth (DFW) area—American Airlines—with another that would extend new anticompetitive protection to a challenger that could no longer be ignored—Southwest Airlines. That agreement, as the parties intended, has been explicitly incorporated into federal law (in a statute I will refer to as the “Reform Act”).<sup>3</sup> It so happens that the agreement in some sense resolves more than thirty years of struggle to establish efficient airport service in North Texas, a drawn out and often bitter affair always punctuated by direct interventions by Congress, federal regulators, and the Texas congressional delegation.<sup>4</sup> But the agreement was at best a very costly and problematic solution.

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1. Jerry Adler, *A Tale of Two Hogs*, NEWSWEEK, Sept. 30, 2002, at 56, 56. Incidentally, the pigs don't yet have representation in the legislature, which is the real outrage. If they ever get it, those farmers are gonna have some 'splainin' to do.

2. The negotiations that led to the agreement at issue in this Commentary were conducted, during the summer of 2006, by Dallas and Fort Worth city officials and executives of the two private airlines behind closed doors—in a hotel conference room, of all things—and apparently at breakneck speed. See Margaret Allen, *Critics Blasting 'Backroom Deal'*, DALLAS BUS. J., June 30, 2006, at 1.

3. The negotiations resulted initially in a June 15, 2006 “Joint Statement” among the cities, the governing board of the Dallas–Fort Worth airport, Southwest Airlines, and American Airlines. Joint Statement Among the City of Dallas, the City of Fort Worth, Southwest Airlines, American Airlines, and DFW International Airport to Resolve the “Wright Amendment” Issues (June 15, 2006), available at [http://www.setlovetfree.com/pdf/agree\\_amendment.pdf](http://www.setlovetfree.com/pdf/agree_amendment.pdf) [hereinafter Joint Statement]. The Joint Statement called for a reduction of gate capacity at Dallas's Love Field airport by more than one-third and several steps to ensure that capacity was neither expanded nor converted to use for international commercial passenger service, which the parties intended to restrict exclusively to DFW. *Id.* Of critical importance to the agreement, each airline sought the incorporation of the Joint Statement into federal law and made the agreement contingent on the adoption of such a law. *Id.* Shortly thereafter, the Joint Statement was incorporated into a subsequent contract, the terms of which were largely adopted as law by Congress in the Reform Act. See Wright Amendment Reform Act of 2006, Pub. L. No. 109-352, 120 Stat. 2011.

4. See John Grantham, *A Free Bird Sings the Song of the Caged: Southwest Airlines' Fight to Repeal the Wright Amendment*, 72 J. AIR L. & COM. 429, 431–40, 453–54 (2007) (discussing the battle over airport service in North Texas and the effect of the Joint Agreement on the dispute).

While at least aspirationally it contemplates an end to all protectionism in North Texas aviation—after eight years from its adoption, that is—it would do so only after carving up that market between a few behemoth players who will enjoy the intervening years of well-protected market power.<sup>5</sup> An even bigger point, it seems to me, is that it remains pure speculation whether expiration of the eight-year term will actually be the end of government-granted monopoly in North Texas. Given the efforts of Southwest and American to keep competition at bay thus far, that seems unlikely.

Still, what seems somehow worst about the Love Field deal is that it will conclude in one very visible, tragically symbolic physical manifestation. The cities of Dallas and Fort Worth did not just conspire to use public dollars and their sovereign powers to *buy* a new, \$20 million luxury airline terminal at Love Field, with the intent to take it out of service. *The cities plan to physically destroy that terminal completely.*<sup>6</sup>

This was a bad deal, of a kind which should be prohibited by federal law. One might have guessed as much from the rhetoric that surrounded it—a senator behind it was a lady that I think protested a little too much,<sup>7</sup> and it was accompanied by the drearily familiar arguments of the conspirators that their critics were really just politically biased twits in ivory towers who ought to mind their own business.<sup>8</sup> Of course, the critics were not just of one political persuasion. How delicious it is, for example, that

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5. See *id.* at 454–55 (pointing out that during the eight-year period Continental, American, and Southwest Airlines will enjoy continued dominance of the market).

6. See Joint Statement, *supra* note 3 (providing for the “demolition of the Legend gates immediately upon acquisition of the lease”).

7. See 152 CONG. REC. S10,560 (daily ed. Sept. 29, 2006) (statement of Sen. Hutchison) (referring to herself as “sponsor of the legislation”). A press representative for Senator Kay Bailey Hutchison, who seems to have taken a keenly personal interest in the deal, suggested when Professor Bush criticized the deal that, because Bush was not a native Texan, he should pretty much just kiss off.

8. Interestingly, in reading through all the public statements and press releases, the conspirators’ main substantive defense, which they repeated like an incantation, was that the deal was “local.” See, e.g., 152 CONG. REC. S10,560–61 (daily ed. Sept. 29, 2006) (statement of Sen. Hutchison); 152 CONG. REC. S10,561–62 (daily ed. Sept. 29, 2006) (letter from Dallas Mayor Miller, Dallas City Attorney Perkins, Ft. Worth Mayor Moncrief, & Ft. Worth City Attorney Yett); Robert Dodge & Sudeep Reddy, *Wright Deal Raises Antitrust Questions*, DALLASNEWS.COM, July 25, 2006, <http://www.dallasnews.com/sharedcontent/dws/bus/stories/072606dnbuswright.148a88d.html>. With respect, Boss Tweed and Tammany Hall were also “local,” and I think Tip O’Neil might point out that *all* pork is local. So, one wonders just what the locality of this particular deal has to do with the price of tea in China. Also, it may be just a smidgen misleading to describe as “local” a conspiracy of two very large, publicly traded corporations that affects the cost of all air travel routed through one of the largest airports in the world and the major hub of one of the world’s largest airlines, especially when those conspirators have been only too eager to seek the help of *federal* policymakers, located in a city far away, when it suits their interests.

Darren Bush and Richard Epstein are in complete accord in their denunciations of villainy at Love Field.<sup>9</sup> The press, including the business press, pretty roundly condemned the deal as well.<sup>10</sup> Still, the Northern District of Texas just recently dismissed a suit in antitrust brought by the former owners of the condemned terminal in the case of *Love Terminal Partners v. City of Dallas*, holding the conspirators immune under the *Noerr-Pennington* doctrine.<sup>11</sup> That failure in court was a main impetus for the Symposium and was much talked about there.

Shubha Ghosh and Darren Bush were personally involved in real-world opposition to this deal, organizing petitioning efforts in Congress and otherwise trying to get it stopped.<sup>12</sup> In their paper for this Symposium, they go a step further, arguing that Love Field was not just a bad deal, but that it is part of a larger trend that proves something important about the antitrust treatment of previously regulated industries.<sup>13</sup> Ghosh and Bush argue (in a way uncontroversial to just about anyone except a majority of our current Supreme Court) that predation of various

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9. Compare Letter from Darren Bush, Assistant Professor of Law, Univ. of Houston, et al. to Senator Arlen Specter et al., (Aug. 29, 2006), available at <http://www.antitrustreview.com/archives/date/2006/08/> (arguing that the proposed agreement hurts airline passengers, as well as advocating a repeal of the Wright Amendment), with Letter from Richard A. Epstein, Professor of Law, Univ. of Chi., to Alberto Gonzales, U.S. Attorney Gen. (Aug. 22, 2006) (calling the Wright Amendment an “economic bill of attainder” and the 2006 Love Field deal a “diabolical document” with which Southwest Airlines was “bought off”). Both documents were introduced in the *Love Terminal Partners* litigation. See Plaintiffs’ First Amended Complaint and Jury Demand at Exhibits J, N, *Love Terminal Partners, L.P. v. City of Dallas*, 527 F. Supp. 2d 538 (N.D. Tex. 2007) (No. 06-1279-D).

10. See, e.g., Allen, *supra* note 2 (noting critics’ attacks on the lack of transparency surrounding this “backroom deal,” viewed by many as “anti-competitive”); Trebor Banstetter & David Wethe, *Experts Assail Deal on Wright*, FORT WORTH STAR-TELEGRAM, Aug. 30, 2006, at C1 (discussing Professor Bush’s letter to Congress, which sought a rejection of the proposed Wright Amendment compromise); Robert Dodge, *Love Plan Faces Hard Questions and Antitrust Critics When Congress Returns*, DALLAS MORNING NEWS, Sept. 1, 2006, at D1 (summarizing criticisms); Steven Pearlstein, *Low-Fare, and Now No-Fair*, WASH. POST, July 28, 2006, at D1 (explaining how the deal negatively impacts the consumer); Mitchell Schnurman, *Wright Pact Needs To Be Open to Debate*, FORT WORTH STAR-TELEGRAM, June 28, 2006, at C1 (examining the agreement’s negative effect on other low-cost carriers).

11. *Love Terminal Partners*, 527 F. Supp. 2d at 558, 561; see also *id.* at 548 (“The essence of the [*Noerr-Pennington*] doctrine is that parties who petition the government for governmental action favorable to them cannot be prosecuted under the antitrust laws even though their petitions are motivated by anticompetitive intent.” (quoting *Video Int’l Prod., Inc. v. Warner-Amex Cable Commc’ns, Inc.*, 858 F.2d 1075, 1082 (5th Cir. 1988))); Shubha Ghosh & Darren Bush, *Predatory Conduct and Predatory Legislation: Exclusionary Tactics in Airline Markets*, 45 HOUS. L. REV. 343, 382–87 (2008) (analyzing the two cases leading to the doctrine).

12. See, e.g., Letter from Darren Bush et al. to Senator Arlen Specter et al., *supra* note 9 (appealing to members of Congress against the Shelby Amendment).

13. See Ghosh & Bush, *supra* note 11, at 378–91.

kinds has been common in deregulated industries, as legacy firms struggle to retain the privileges of regulation and preserve the inefficient industrial organization that it fostered.<sup>14</sup> They further add (maybe a little more controversially, though indisputably it seems to me) that antitrust suits against this predation have had disappointing results.<sup>15</sup> What seems more problematic is their claim that these disappointing results prove something more generally about antitrust as it applies to deregulated industries. Ghosh and Bush propose a theoretically ambitious approach to the problem they see—an approach that seems to call for abandonment of what they think is the courts' unduly deferential, kid-gloves treatment of the formerly regulated.<sup>16</sup> They also seem to want the law to acknowledge that the very essence of the traditionally regulated industries was horizontal collaboration, and perhaps hold those industries to a more stringent antitrust standard than others.<sup>17</sup>

There lies the nub of my commentary on Ghosh and Bush's paper. I think that neither the Love Field case nor the other cases they discuss actually had anything to do with *regulation* as such. Those cases would have come out in pretty much the same way regardless of the defendants' regulatory history. In fact, while Ghosh and Bush are on to something important in their invocation of a false judicial dichotomy between "politics" and "markets,"<sup>18</sup> I do not think they follow it to where it really ought to go. In particular, I think it is not useful to focus on an alleged judicial deference to the basic infrastructure industries, which happened once to be subject to old-fashioned rate-and-entry regulation.

My comments here basically ride two horses, because Ghosh and Bush raise two important and intriguing problems. First, I think the problem in the Love Field case and other case law they discuss is really just the problem with all of federal antitrust. Antitrust is in a dire state across the board. Lately, we seem near the completion of its euthanasia, which happened pretty much as Adams and Brock predicted, although it took a little longer than they thought it might.<sup>19</sup> Even prior to the 1980s, antitrust was a pockmarked and leprotic Swiss cheese of exemptions and

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14. *Id.* at 353.

15. *Id.* at 373–74.

16. *Id.* at 391–93.

17. *Id.* at 392.

18. *Id.* at 362.

19. See Walter Adams & James W. Brock, *The 'New Learning' and the Euthanasia of Antitrust*, 74 CAL. L. REV. 1515, 1515–20 (1986) (describing the attacks on antitrust laws from individuals and entities across the political spectrum in the 1980s).

immunities, created not only by the upwards of thirty—count 'em, *thirty*—federal statutory exemptions which give antitrust little or no purchase at all in broad swaths of American industry, but also by case law immunities for political activities, local government, labor, and regulated entities.<sup>20</sup> Since then, however, the infusion of a certain kind of economic theory and a certain rhetoric about the costs and benefits of litigation have made it harder and harder with each passing year for plaintiffs to press antitrust liability. So far the culmination of this trend was seen in last year's *Bell Atlantic Corp. v. Twombly* decision,<sup>21</sup> though even *Twombly* and the Court's other recent antitrust cases—almost all of which reversed lower court opinions favoring plaintiffs—are only one part of the Court's wide-ranging campaign against private plaintiffs, much of it driven by explicit tort reform rhetoric.<sup>22</sup> Who knows how much farther the trend will go from there.

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20. See SECTION OF ANTITRUST LAW, AM. BAR ASS'N., FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW 1-18 (2007) [hereinafter ABA, STATUTORY EXEMPTIONS] (discussing the federal statutory exemptions and their historical evolution, and the various case law immunities); see also *id.* at app. A (listing all statutory exemptions currently in force and presenting a chronological list of all statutory exemptions ever adopted).

21. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007). *Twombly* is discussed more fully at *infra* notes 55-68 and accompanying text.

22. In none of its recent opinions has the Court much expanded opportunities for plaintiffs (with the limited exception of *LaRue v. DeWolff, Boberg & Associates*, 128 S. Ct. 1020, 1026 (2008), allowing some individual ERISA fiduciary claims), but in *many* cases it has deliberately limited them, often considering the relevance of the asserted cost of litigation, the "frivolousness" of class lawsuits in general, and the risk of nuisance settlement.

Among the more notable recent rulings outside the antitrust context are *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1007-08 (2008) (barring state personal injury claims as preempted by the federal Medical Devices Amendments of 1976, Pub. L. No. 94-295, 90 Stat. 575 (codified as amended in scattered sections of 15 U.S.C. and 21 U.S.C.)); *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 766, 769-72 (2008) (refusing to extend private right of action under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), or SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (2007), against business entities that knowingly helped an issuer prepare false financial statements by entering into sham transactions with issuer and providing it with fraudulent document; the Court's decision explicitly founded on fear of the cost of litigation and the risk of nuisance settlement); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2509-11 (2007) (announcing heightened pleading standard for securities fraud claims, which, though based on statutory authority, is reminiscent of new standard announced in *Twombly*); *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2171-72 (2007) (holding employment discrimination claim time-barred on narrow reading of administrative limitations rule); *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1062-65 (2007) (reversing state jury award of \$80 million in punitive damages and holding that damages awarded to punish defendant for injuries caused to nonparties violates constitutional due process). See also Robert Barnes & Carrie Johnson, *Pro-Business Decision Hews to Pattern of Roberts Court*, WASH. POST, June 22, 2007, at D1 (chronicling this trend); Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1 (same); cf. Michael S. Greve, *Does the Court*



But second, I think there *is* something interesting about Love Field and the regulated industries, and it *is* about “regulation” in some sense, just not in the sense that Ghosh and Bush claim. That is, it is not that the courts are especially deferential to formerly regulated industries. Instead, the really interesting problem is one that could be cast as a doctrinal problem with the antitrust political immunities. This is basically how I will approach it below, though even that doesn’t capture it especially well. The real problem is the relationship between federal competition policy and “government”—a relationship the federal courts have effectively defined but that, I think, they have mixed up on a very basic theoretical level, with bad consequences and for no good reason.<sup>23</sup>

Obviously enough, I will not try here to offer some definitive correction that would properly reset the relationship of competition policy and government. However, I will suggest that improvements could be made through corrections to the political immunity doctrines that would make it harder for state and local governments to pass out pork, as was done at Love Field. Now, one point made by an audience member at the Symposium is surely true: there will always be pork in U.S. politics, and in particular, federal antitrust can never do anything about protectionism, favoritism, and wasteful giving in the federal

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*Mean Business?*, FEDERALIST OUTLOOK, Sept. 20, 2007, available at [http://www.aei.org/publications/pubID.26834/pub\\_detail.asp](http://www.aei.org/publications/pubID.26834/pub_detail.asp) (while taking issue with claim that Court is ideologically anti-plaintiff, observing that recent terms have involved large proportions of “business” cases, and acknowledging that in these cases the Court has tended to favor defendants).

23. Incidentally, for all my criticism of Ghosh and Bush’s paper, I expect that many of us have a natural sympathy with the latter-day institutionalism that is implied in their paper—the sense that a running problem in antitrust law is its wide generalization of a very abstract theory across industries, and the implicit claim that the particular facts or structure of individual industries do not matter. It reminds one of Bush’s carefully argued institutionalist account of “deregulated” markets, under which markets are never literally “deregulated” and rather must be understood as facilities created and defined by law and other institutions in all cases, no matter how apparently “free.” See Darren Bush & Carrie Mayne, *In (Reluctant) Defense of Enron: Why Bad Regulation is to Blame for California’s Power Woes (or Why Antitrust Fails to Protect Against Market Power When the Market Rules Encourage Its Use)*, 83 OR. L. REV. 207, 208–10 (2004); see also Darren Bush, *Mission Creep: Antitrust Exemptions and Immunities as Applied to Deregulated Industries*, 2006 UTAH L. REV. 761, 762 (2006). This view has other eminent exponents; in particular, it has been a long-term project of Alfred Kahn. See, e.g., Alfred E. Kahn, *Deregulation: Looking Backward and Looking Forward*, 7 YALE J. ON REG. 325 (1990); Alfred E. Kahn, *Deregulatory Schizophrenia*, 75 CAL. L. REV. 1059 (1987); see also REZA R. DIBADJ, *RESCUING REGULATION* (2006) (arguing that even “deregulated” markets are regulated through other means); Peter C. Carstensen, *Evaluating ‘Deregulation’ of Commercial Air Travel: False Dichotomization, Untenable Theories, and Unimplemented Premises*, 46 WASH. & LEE L. REV. 109, 115–20 (1989) (same).

Congress.<sup>24</sup> That this is true, however, and that it is the ugly spectacle of democracies everywhere, does not mean that antitrust could not at least improve matters incrementally. If tinkering with antitrust immunities doctrine could raise the cost of pork to its recipients at the state and local levels, it might conceivably make our democracy work just a little bit better.

But in any case, completely aside from any instrumental benefits, I believe there is also something to gain from a much more serious critique than is normally given to the implied theoretical basis on which the courts so sharply distinguish public and private social ordering.<sup>25</sup>

## II. AIRLINE REGULATION AND THE *LOVE TERMINAL PARTNERS* CASE

After decades of old-fashioned rate-and-entry regulation, which covered virtually the whole of the industry's life until the mid-1970s, domestic passenger air carriage has come to look largely like a free market,<sup>26</sup> with the exception that it still enjoys statutory exemptions for international alliance arrangements<sup>27</sup> and for agreements reached to resolve airport congestion.<sup>28</sup> That history is of a piece, and is virtually synchronous with, the history of other basic infrastructure industries—transportation, energy, and communications—all of which were rate-and-entry regulated from roughly the Progressive years until they faced the

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24. Another audience member recommended a different solution to pork via government-granted monopoly, including pork at the federal level: some type of federal constitutional remedy. It was suggested, for example, that this could take the form of some sort of substantive due process doctrine. Some pork might also be challenged on the grounds of its impact on third persons, especially where the government's beneficiary enjoys some particularly restrictive or anticompetitive privilege. For example, local government restraints on transport competition might infringe the right of interstate travel recognized in *United States v. Guest*, 383 U.S. 745, 757 (1966).

25. I believe the significance of this problem extends well beyond problems in antitrust law. See generally Chris Sagers, *Monism, Nominalism, and Public-Private in the Work of Margaret Jane Radin*, 54 CLEV. ST. L. REV. 219 (2006) (arguing that the private-public distinction routinely and illogically causes similar entities to receive different legal treatment).

26. For one of the many authoritative histories of airline regulation and its dismantling since the mid-1970s, see generally ELIZABETH E. BAILEY, DAVID R. GRAHAM & DANIEL P. KAPLAN, *DEREGULATING THE AIRLINES* (1985) (detailing the rationale behind airline regulation and the effects of its removal on airlines' operation).

27. See 49 U.S.C. §§ 41308–41309, 42111 (2000) (granting the Secretary of Transportation the ability to exempt airline carriers from antitrust laws).

28. See Vision 100—Century of Aviation Reauthorization Act, Pub. L. 108-176, § 423, 117 Stat. 2490, 2552–53 (2003) (codified as amended at 49 U.S.C. § 40129) (creating the “collaborative decisionmaking pilot program,” whereby air carriers may collaboratively take steps to reduce congestion at specific airports without antitrust liability, subject to FAA approval).

deregulatory wrath of the Carter administration.<sup>29</sup> However, in the case of the airlines no one seems to think that deregulation has gone entirely the way it was supposed to go. By most accounts, the industry has performed poorly, with significant rates of business failure, several bankruptcies, and consolidations among legacy carriers.<sup>30</sup> As recently as 2001, the assets of a decades-old legacy carrier were purchased out of bankruptcy (its third since deregulation, this one following ten years without profit), and as of this writing the strong likelihood is that at least one merger of legacy airlines will be announced for 2008.<sup>31</sup> Though views differ as to why the industry has performed poorly,<sup>32</sup> no one seems seriously to doubt it, and even some of the original prophets of airline deregulation have come to question some of its results.<sup>33</sup>

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29. See generally STEPHEN BREYER, *REGULATION AND ITS REFORM* (1982); see also THOMAS K. MCGRAW, *PROPHETS OF REGULATION* 210–99 (1984).

30. See generally Severin Borenstein & Nancy L. Rose, *How Airline Markets Work . . . Or Do They? Regulatory Reform in the Airline Industry* 18–19 (Nat'l Bureau of Econ. Research, Working Paper No. 13452, 2007) (noting that, since deregulation, the industry has seen high rates of new entry, but also business failure of smaller entrants, as well as several bankruptcy reorganizations and a few outright liquidations of legacy carriers; these trends, to the authors, “appear[] to reflect more than transitional uncertainty in the aftermath of deregulation”).

31. Merger between Delta Airlines and Northwest Airlines seems to be almost certain pending regulatory approval by the Justice and Transportation Departments. See Jeff Bailey, *In the Math of Mergers, Airlines Fail*, N.Y. TIMES, Jan. 17, 2008, at C1 (noting the pending takeover of Delta Airlines by either Northwest Airlines or United Airlines); Andrew Ross Sorkin & Jeff Bailey, *Northwest and Delta Edge Closer*, N.Y. TIMES, Feb. 7, 2008, at C1 (same); 2008: *The Year of the Big Airline Merger?*, DealBook, <http://dealbook.blogs.nytimes.com/2008/01/09/2008-the-year-of-the-big-airline-merger/?oref=login> (Jan. 9, 2008, 12:36 PM). Most observers seem convinced that at least one more will follow, notably a possible merger between Continental and United. Bailey, *supra*. This suggests that in coming months the TEA Section at the Department of Justice may be stuck simultaneously reviewing two separate, gargantuan mergers of major airlines. (One remaining quirk of the industry's regulatory history is that its mergers are reviewed only by the Justice Department; in the past, major airline mergers have been reviewed by the TEA.)

32. Compare Paul Stephen Dempsey, *The Financial Performance of the Airline Industry Post-Deregulation*, 45 HOUS. L. REV. 421 (2008) (amassing data to the effect that airline performance has been poor since deregulation, and ever more so, and arguing that this outcome is a consequence of destructive competition), and Michael E. Levine, *Airline Alliances and Systems Competition: Antitrust Policy Toward Airlines and the Department of Justice Guidelines*, 45 HOUS. L. REV. 333, 334–35 (2008) (arguing, admittedly contrary to some of his own views during 1970s deregulatory debates, that for various reasons airlines are unlikely to perform well under unfettered competition subject to antitrust), with Peter C. Carstensen, *The Poor Financial Performance of Deregulated Airlines: Competition as Causation or Only Correlation? Reflections on Professor Dempsey's Article*, 45 HOUS. L. REV. 487, 492 (2008) (arguing that poor performance identified in Dempsey's paper, *supra*, has more to do with strategic decisions of airline executives that burden airlines with significant, long-term, fixed-payment obligations).

33. See, e.g., Dempsey, *supra* note 32, at 430 (illustrating how Alfred Kahn, one of “deregulation's principal architect[s],” holds deregulation partially responsible for the financial difficulties of the airline industry).

As for problems at Love Field, Dallas has long been thought to be a special case. From the beginning of passenger air carriage in the area, the neighboring cities of Dallas and Fort Worth have lived through a colorful and fairly bitter history of conflict. The conflict in some sense is still unresolved, though the 2006 Love Field agreement and the federal statute baptizing it might just have brought it close to an end. In any case, the two cities were thought to be too close geographically to support two competing airports, but too far apart to share one conveniently. Each city at different times sought to establish its own airfield, and each city at different times enjoyed some dominance to the detriment of the other.<sup>34</sup> These years of conflict resulted in a fair amount of litigation.<sup>35</sup> Fences were partially mended only by the Civil Aeronautics Board (CAB) itself, which in 1963 conducted a formal study of the situation and urged the creation of the consolidated airfield that is now DFW International Airport.<sup>36</sup>

Tellingly, one of the major protagonists of the 2006 Love Field deal has throughout its life also been the very symbol of Love Field. The modern history of Love Field and Congress's peculiar interventions there, which have been Schiavo-like in their hyper-local specificity, are intimately entwined with the very creation of Southwest Airlines itself. The airline's founding was a stroke of masterful opportunism at a time when DFW was almost complete but not yet operational, when other airlines in North Texas were vulnerable because they had all committed to cooperation in the DFW enterprise (and therefore to limit their competition from other fields), and, not coincidentally, when the whole scheme of federal airline regulation was just about to crumble.<sup>37</sup> When it was founded, Southwest promised to remain a low-cost alternative to traditionally dominant carriers, and that has been the thrust of its public relations for most of the time since (a fact that makes all the more unseemly Southwest's active complicity in the 2006 Love Field deal).<sup>38</sup> However, the threat Southwest posed to DFW and American Airlines was the impetus for the first direct intervention by Congress. Unlimited

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34. Grantham, *supra* note 4, at 433–35.

35. *Id.* at 434–35 (noting that the two cities “took it to the courts”).

36. *Id.* at 432–55 (setting out this history succinctly).

37. *Id.* at 438–39.

38. *See id.* at 430 (describing Southwest's attempts to win public support for repealing the Wright Amendment); Ryan Griffin, *State Aid, the Growth of Low-Cost Carriers in the European Union, and the Impact of the 2005 Guidelines on Financing of Airports and Start-Up Aid to Airlines Departing from Regional Airports*, 71 J. AIR L. & COM. 341, 343–44 (2006) (noting Southwest's business model as a low-cost carrier since its inception).

competition by Southwest was largely staved off by the so-called Wright Amendment of 1979, a peculiarly specific federal law applicable only to Love Field airport, which tightly limited service out of the airport.<sup>39</sup>

As it now exists, DFW is a major international outfit through which a huge portion of domestic and international air transport is routed. American Airlines maintains a major hub there, is headquartered nearby, and is by far the dominant carrier at DFW.<sup>40</sup> As a practical matter, the Wright Amendment, subject to some modifications, remains in effect there, sheltering American Airlines' dominance. This is the result of the 2006 Love Field deal, as ensconced in the federal Reform Act.<sup>41</sup>

### III. DOES *LOVE TERMINAL PARTNERS* REALLY HAVE ANYTHING TO DO WITH REGULATION AS SUCH?

For having said all that, I am afraid I cannot quite agree with Ghosh and Bush's view of things. They want primarily to show that anemic antitrust enforcement in the airline industry is in some way especially *about* regulation.<sup>42</sup> Ghosh and Bush believe that, though the industry is no longer pervasively regulated, the courts continue to treat it as if it were and that, to that extent, the airline case is symptomatic of the larger judicial attitude toward deregulated markets.<sup>43</sup> Interestingly, their ultimate concern seems to be that the federal courts have come to *model* the behavior of previously regulated industries, as a purely a priori theoretical matter, in such a way that those industries will be given the benefit of much more doubt than they deserve in antitrust litigation.<sup>44</sup>

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39. See International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, § 29, 94 Stat. 35, 48-49 (1980) (amended by Pub. L. No. 109-352, 120 Stat. 2011 (2006)). This Act is commonly known as the Wright Amendment, named after its sponsor, Rep. Jim Wright, a House Democrat from the Fort Worth area who was House Majority Leader at the time. See Grantham, *supra* note 34, at 440-44 (chronicling the origins of the Wright Amendment).

40. Delta Airlines also maintains a DFW hub, but it is considerably smaller than American's hub. See Richard D. Cudahy, *The Airlines: Destined to Fail?*, 71 J. AIR L. & COM. 3, 14 n.57 (2006) (discussing American Airlines' "hold" on its main hub at DFW).

41. See generally Grantham, *supra* note 34 (exploring the likely effect of the Reform Act).

42. See Ghosh & Bush, *supra* note 11, at 373-74 (discussing deference to regulatory schemes as a basis for courts' reluctance to discourage anticompetitive conduct).

43. See *id.* at 367-69 (arguing that courts are reluctant to acknowledge predatory practices in newly deregulated industries).

44. See *id.* at 373-74 (arguing that courts often fail to address anticompetitive behavior because of adherence to inaccurate or incomplete theories about deregulated markets).

For my part, I do not believe that *Love Terminal Partners* itself, or the other cases these authors discuss, would have come out differently had the underlying industries never been regulated. There is something harmful about the Love Field deal, and I believe that it is symptomatic of anticompetitive predation in the airline industry, but the story it tells is not about regulation as such. Instead, it is a story of the evisceration of antitrust as it applies in *every* industry.

Ghosh and Bush rest their argument on three main bases. First, they examine the case law of the past few decades on price predation as a violation of Section 1 or as the “bad conduct” element under Section 2.<sup>45</sup> In large part, their critique focuses on the Tenth Circuit’s recent rejection of a Justice Department monopolization claim against American Airlines.<sup>46</sup> But, critically, Ghosh and Bush seem to acknowledge that the opinion was virtually compelled by Supreme Court precedent involving predation in industries that were not only never regulated, but which are also paradigm examples of “commodities” markets that they believe the courts treat with less deference than deregulated firms—consumer electronics and cigarettes.<sup>47</sup> That is, the Court has simply made price predation extremely hard to prove whether the underlying industry was ever regulated or not.<sup>48</sup>

Next, Ghosh and Bush claim to find an important lesson in the Supreme Court’s recent handling of antitrust affairs in the context of the interminable, decades-long saga of telecom deregulation. They point to last year’s *Twombly* decision<sup>49</sup> and the *Trinko* case of a few years ago,<sup>50</sup> which together will make it very difficult to challenge anticompetitive deviations from the Telecommunications Act.<sup>51</sup> The bulk of this second argument is

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45. *Id.* at 346–61.

46. *See id.* at 353–58 (analyzing *United States v. AMR Corp.*, 335 F.3d 1109 (10th Cir. 2003)).

47. *See id.* at 346–353 (discussing *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), respectively).

48. *See id.* at 349 (claiming that plaintiffs face nearly insurmountable hurdles when claiming predatory pricing).

49. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

50. *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

51. Telecommunications Act of 1996, Pub. L. No. 104-104, sec. 151, § 271, 110 Stat. 56, 86–88 (1996) (codified as amended at 47 U.S.C. § 271).

Incidentally, Ghosh and Bush support their interpretation of *Love Terminal Partners* by pointing out that the opinion explicitly cites *Twombly*, as indeed it does. *See Ghosh & Bush, supra* note 11, at 390–91 (citing *Love Terminal Partners, L.P. v. City of Dallas*, 527 F. Supp. 2d 538, 548 (N.D. Tex. 2007)). I believe their point here is incorrect.

based on the following observation from *Twombly*. Admittedly, the Court here suggested that the defendants should get the benefit of a certain doubt because they had not long previously emerged from regulation:

In a traditionally unregulated industry with low barriers to entry, sparse competition among large firms dominating separate geographical segments of the market could very well signify illegal agreement, but here we have an obvious alternative explanation. In the decade preceding the 1996 Act and well before that, monopoly was the norm in telecommunications, not the exception. . . . The [defendant telephone companies] were born in that world, doubtless liked the world the way it was, and surely knew the adage about him who lives by the sword. Hence, a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing.<sup>52</sup>

Still, I take a very different view of this language, which I think is darker and more ominous than Ghosh and Bush seem to acknowledge. This paragraph emerges in a long opinion in which seven of our current Justices insist that *all* Section 1 plaintiffs first make fairly detailed, specific allegations of “conspiracy” in the very complaint itself, which must also be a priori “plausible” under a presumption of rational profit maximization in a world of easy entry and low-cost transactions.<sup>53</sup> In itself, this was an alarming extension of the related evidentiary framework already set up in *Monsanto Co. v. Spray-Rite Service Corp.* and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*<sup>54</sup> because, at least in those cases, the plaintiff would have the full range of pretrial discovery before being called to make its case of

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The court’s only invocation of *Twombly* was the same general citation that all federal courts must now give in deciding motions under Rule 12(b)(6). See *Love Terminal Partners*, 527 F. Supp. 2d at 548.

52. *Twombly*, 127 S. Ct. at 1972.

53. *Id.* at 1965–66.

54. *Monsanto* held that a verdict finding Section 1 liability must be based on some evidence of conspiracy “tend[ing] to exclude the possibility” of independent action. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). *Matsushita* made clear that this new standard incorporated an explicitly microeconomic component, holding that plaintiffs’ theory of conspiracy must be “reasonable” in light of “competing inferences” to be drawn from the record and may not be “implausible.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88, 593–94 (1986). This in turn plainly meant that, in the absence of uncommonly strong evidence, the conspiracy alleged could not imply economically irrational conduct by defendants. The Court observed that—apparently as a matter of law—the defendants were “presumably rational businesses” and accordingly held that “if [defendants] had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations,” then the plaintiff’s claim should be dismissed at summary judgment. *Id.* at 595–97.

rationality. *Twombly* thus amounts to a large and strongly stated presumption of law in favor of a certain factual characterization of the world.<sup>55</sup>

But in response to Ghosh and Bush, I believe that the Court's alternative explanation of the *Twombly* defendants' conduct—the paragraph quoted above—actually only reflects the federal courts' ordinary application of the *Monsanto/Matsushita* framework, and I think that courts apply the framework as they do because they have made a substantive policy choice based on their estimate of the costs and benefits of private-plaintiff antitrust litigation. Courts not only ask plaintiffs to plead an economically rational conspiracy consistent with easy entry and low transaction costs, but they will also freely entertain alternative explanations favorable to defendants that *do not* satisfy that model or those assumptions.<sup>56</sup> Justice Souter's hypothetical excogitations of the Baby Bells' decisionmaking surely sounds possible enough, but it also arguably relaxes the assumption that they are economically rational profit-maximizers.<sup>57</sup> And here there is an answer for why the Court has made the basic policy choice to burden plaintiffs and the public with the costs of antitrust violations, while freeing defendants from much of the cost of litigating them: *tort reform rhetoric*. *Twombly* was studded with the Court's factual claims about the cost and burden of antitrust litigation,<sup>58</sup> unsupported but for a

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55. See *Twombly*, 127 S. Ct. at 1974 (holding that in order to avoid dismissal, a plaintiff must plead sufficient facts to make a claim of conspiracy "plausible on its face").

56. See, e.g., *United States v. AMR Corp.*, 335 F.3d 1109, 1118–19 & n.13 (10th Cir. 2003) (rejecting any test of price predation that would effectively hold defendants to a pricing standard of "short-run profit maximization," though not explaining why rational firms would fail to meet such a standard, and further arguing that such a standard "could lead to a strangling of competition"); cf. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 770 (2008) (rejecting securities fraud plaintiff's argument that fraudulent aiding and abetting causes plaintiff's injury wherever it assists issuer's fraudulent statements made to an efficient market).

57. *Twombly*, 127 S. Ct. at 1961. Note that one explanation favorable to defendants that would have been more consistent with the rationality assumption—a game theoretic oligopoly explanation—is one the Court doesn't seem much to consider. Instead, the Court considers it plausible that having been groomed during their years of regulation, telephone company executives do not know how to compete. See *id.* at 1972 (indicating telephone companies were reluctant to change noncompetitive behaviors following deregulation and instead preferred to "sit[] tight").

58. *Id.* at 1966 (stating the Court's concern that "a plaintiff with a 'largely groundless claim' [might] be allowed to 'take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value'" (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005))); *id.* ("[S]ome threshold of plausibility must be crossed at the outset before a[n] . . . antitrust case should be permitted to go into its inevitably costly and protracted discovery phase." (quoting *Asahi Glass Co. v. Pentech Pharms., Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003))); *id.* at 1966–67 ("[I]t is one thing to be cautious before dismissing an antitrust complaint in



student note, an essay by Frank Easterbrook, and a report from a conservative think-tank.<sup>59</sup> The Court made the new pleading standard it announced there applicable only to “subjects understood”—like antitrust, evidently—“to raise a high risk of abusive litigation.”<sup>60</sup> Thus, on its conviction that the only costs of antitrust we ought to care about are those that burden defendants—which seems to me plainly false<sup>61</sup>—the Court has chosen to make it very hard for Section 1 plaintiffs to get in the courthouse door.<sup>62</sup>

But again, whatever may be its merits, the point is that *Twombly* did not restrict its ruling to formerly regulated industries, and there is no reason to believe it will be so limited.

I think the case Ghosh and Bush make might be stronger on the face of *Trinko*, an argument that Bush has made before,<sup>63</sup> though it is not given too much attention here. But importantly, even *Trinko*—a case self-consciously *about* regulation, which arguably limited antitrust liability precisely *because* at the time of litigation the defendants were still regulated in some sense<sup>64</sup>—

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advance of discovery . . . but quite another to forget that proceeding to antitrust discovery can be expensive.”); *id.* at 1967 (“[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases . . .”).

59. *See id.* at 1964 (citing AEI-BROOKINGS JOINT CTR. FOR REGULATORY STUDIES, MOTIONS TO DISMISS ANTITRUST CASES: SEPARATING FACT FROM FANTASY 3–4 (2006)); *id.* at 1967 (citing Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989)); *id.* (citing William H. Wagener, Note, *Modeling the Effect of One-Way Fee Shifting on Discovery in Private Antitrust Litigation*, 78 N.Y.U. L. REV. 1887, 1898–99 (2003)).

60. *Id.* at 1973 n.14.

61. The Court implicitly devalues the costs that antitrust plaintiffs face and the new costs that are added every time the Court increases evidentiary burdens. *See id.* at 1989 (Stevens, J., dissenting) (faulting the Court for failing to give appropriate weight to plaintiffs’ costs when determining the appropriate pleading standard). Moreover, if antitrust violations harm society, and if private enforcement importantly prevents some of that conduct, then the Court multiplies costs *for society* through the very literally legislative choice it makes in cases like *Twombly*.

62. One cannot say enough how significant and possibly detrimental a decision *Twombly* may turn out to be. It may be perfectly fine to erect a strong presumption against agreement or any other issue of fact, but such a thing surely does not appear on the face of the statute, and it is a surprising interpretation of a law that is supposed to “strike as broadly as it could,” since “[l]anguage more comprehensive” than that in Sherman Act “is difficult to conceive.” *United States v. Se. Underwriters Ass’n*, 322 U.S. 533, 553 (1944). Indeed, if private enforcement of federal antitrust policy has any positive value at all, then *Twombly* is by any measure a very scary case. For many years, the vast majority of U.S. antitrust enforcement has been by private plaintiffs. Anne K. Bingaman, U.S. Department of Justice, Antitrust Enforcement and the Consumer (1996), available at [http://www.pueblo.gsa.gov/cic\\_text/misc/antitrust/antitrus.htm](http://www.pueblo.gsa.gov/cic_text/misc/antitrust/antitrus.htm).

63. *See* Bush, *supra* note 23, at 789–92 (discussing the effect of *Trinko* on deregulated industries).

64. *Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411–14 (2004) (discussing high costs and limited benefits of layering antitrust enforcement on top of a regulatory scheme aimed at deterring anticompetitive practices).

is itself really just another tort-reform case. That is, *Trinko* was ultimately explained according to the Court's belief that antitrust is unduly costly given its uncertain benefits.<sup>65</sup>

Finally, as their third argument, Ghosh and Bush argue that the *Love Terminal Partners* court found *Noerr-Pennington* immunity under facts in which, they claim, straightforward application of well-settled immunities doctrine should have resulted in a clear rejection of any immunity.<sup>66</sup> They argue at some length that to recognize immunity for any of these defendants would not only be incorrect, but would also upset decades of well-settled precedent.<sup>67</sup> Ghosh and Bush seem to feel that the best explanation for the court's mistaken analysis is that formerly regulated industries are given some special judicial deference.

As a matter of fact, I think that *Love Terminal Partners* probably correctly applied existing immunities law, though only because that law remains so patently inadequate. Few federal courts under the current state of the law would fail to find immunity under these facts, regardless of whom the defendants happened to be. While the *Love Terminal Partners* court conceivably could have found ways around immunity through a handful of creative arguments, not only would those arguments not be obvious, mainstream applications of settled law, they would be seen as fairly radical departures.

There could be no doubt that the defendants in *Love Terminal Partners* genuinely desired the government action they purported to seek, for indeed their very agreement was made contingent on its adoption by Congress.<sup>68</sup> Therefore it obviously was not a "sham."<sup>69</sup> A different argument might be made that, under *Allied Tube* and *Superior Court Trial Lawyers*, defendants' conduct should not be considered *Noerr* "petitioning" at all.<sup>70</sup>

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65. *Trinko*, 540 U.S. at 412, 414.

66. Ghosh & Bush, *supra* note 11, at 386–87.

67. *Id.* at 382.

68. *Love Terminal Partners, L.P. v. City of Dallas*, 527 F. Supp. 2d 538, 550 (N.D. Tex. 2007).

69. *See id.* at 552 n.7 (explaining the idea of a "sham" situation, and stating that the present defendant's efforts did not fit this category).

70. In *Allied Tube*, the Court held that a fire safety code developed by a private, nonprofit SSO was not entitled to *Noerr* immunity even though the objective of the SSO and its members was that the code would be rubberstamped into law by state and local governments. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 495, 502, 504, 509–10 (1988). In effect, the Court held that this conduct did not constitute petitioning within the meaning of *Noerr* because the "nature and context of the activity" in question—the fact that it was conducted behind closed doors and with none of the democratic constraints ordinarily associated with the political process—rendered it too far removed from ordinary supplication of government to immunize it. *Id.* at 504. In *Superior*

Even though the *Love Terminal Partners* parties sought federal action as the central goal of their conduct, their negotiations were conducted behind closed doors with little public notice, possibly in violation of Texas open government laws.<sup>71</sup> Conceivably, this could be analogized to the closed-door standard setting in *Allied Tube*, the “context and nature” of which the Court found too dissimilar from traditional political conduct to immunize.<sup>72</sup> The problem is that the *Love Terminal Partners* parties then actively lobbied Congress through visible, public means, and the agreement they reached was made contingent on its adoption as law by Congress.<sup>73</sup> Therefore, presumably the agreement would have had no effect in and of itself.

Perhaps, too, some hay could be made about the fact that the negotiations were reduced to a writing among the defendants which they styled as a “contract.”<sup>74</sup> But giving emphasis to that particular institutional fact would not serve any obvious purpose under the Court’s immunity decisions, especially since, again, the contract itself was made explicitly contingent on its adoption into federal law.<sup>75</sup> Likewise, no headway could be made concerning the fact that the municipal defendants here acted in their “market participant” roles (as airport owners or stakeholders)<sup>76</sup> because, even though that has been suggested as an exception to local government immunity under *Town of Hallie*,<sup>77</sup> it could have no purchase where the municipal defendant itself is a *Noerr* supplicant. *Noerr* defendants almost always have some commercial motive.

Incidentally, Ghosh and Bush also seem to imply that there is some actual trend in which the lower courts, without admitting

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*Court Trial Lawyers*, the Court held that a “strike” by government-compensated criminal defense lawyers was not immunized by *Noerr* because even though the strikers’ boycott was plainly intended to bring about a government action—an increase in their government compensation—the strike itself was illegal. *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 425, 428, 435–36 (1990). Under *Superior Court Trial Lawyers*, conduct cannot constitute “petitioning” within *Noerr* if the conduct itself is an antitrust violation. *Id.* at 428.

71. See Allen, *supra* note 2 (discussing allegations that closed door meetings may have violated state law).

72. See *Allied Tube*, 486 U.S. at 509–10.

73. *Love Terminal Partners*, 527 F. Supp. 2d at 550.

74. *Id.* at 545.

75. *Id.* at 550.

76. Whether there is a “market participant” exception to the state action immunity was explicitly left unresolved in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 379 (1991) (citation omitted).

77. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985) (holding that local governments enjoy immunity from antitrust law where their actions are subject to no more than a “clearly articulated” policy of their state government that they restrain trade).

it or defending themselves, have more generously immunized defendants that were once regulated.<sup>78</sup> However, they do not attempt to prove that claim in their paper.

#### IV. THE REAL PROBLEM IN *LOVE TERMINAL PARTNERS*, AND DOING SOMETHING ABOUT IT

In the end, I think there is something wrong with “regulation,” in some sense, and it is something that antitrust might be well enough suited to address. But it is not that courts treat formerly regulated industries differently. Rather, some of the worst competitive problems in the country involve the icky and extensive intimacy of our governments and our businesses. If you want to have a monopoly in the United States, then the government is the best friend you can have, and I happen to think that antitrust might be able to do something about this problem. Unfortunately, I submit that, before it has a ghost of a chance of making a real difference, there must be some retooling of the entire big-picture theoretical toolkit by which the federal courts understand the relation between the private and public sectors.

In some sense, this has to have something to do with the political immunities doctrines. It is mainly in this area that the federal courts grapple with the relation of the federal policy of competition to the role of ad hoc government marketplace tinkering. In that case law, whether they like to admit it or not (they don’t), the courts have implicitly constructed an entire conceptual apparatus by which they apportion responsibility for competition values between public and private spheres.

So, there is something to be gained by thinking about revised immunities law as a way of addressing antitrust problems. I will introduce both the idea and the difficulty of achieving it through doctrinal reform by discussing one very impressive effort by Einer Elhauge, and one much humbler effort by myself.<sup>79</sup>

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78. See Ghosh & Bush, *supra* note 11, at 362–63 (“While deregulation does not create immunity, it creates a situation where a court is deferential to legislative determinations of how to structure a market.”).

79. These two are by no means the only attempts to bring some comprehensive clarity to the immunities doctrines, which is frequently said to be *really* in need of clarification. For other efforts, see, e.g., Merrick Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L.J. 486 (1987); William H. Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After Midcal Aluminum*, 61 B.U. L. REV. 1099, 1102–07 (1981); John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 739–41 (1986).

A. *Elhaug's Peerlessly Elegant Synthesis That Doesn't Really Work*

In the early 1990s, Professor Elhaug tackled this problem in two articles, taking up approximately 100 pages of law review text that together set out a seamlessly unified theory of the Supreme Court's political immunity thinking.<sup>80</sup> For my money, Professor Elhaug's analysis is among the better doctrinal law review scholarship ever written. His ultimate argument is elegantly simple: the Supreme Court's immunities case law, taken as a whole, serves to ensure that in our society resource allocations can be made in only one of two ways.<sup>81</sup> First, allocations can be made through decisions in competitive markets subject to the regulatory discipline of market forces and as kept healthy by antitrust law.<sup>82</sup> Second, they can be made by decisions of democratically accountable officials.<sup>83</sup> Resource allocations made in any other way are illegal because only in those two permissible ways do we have some assurance that allocations are made in the public interest.<sup>84</sup>

However, a large problem remains with Elhaug's solution. Though he explicitly denies it, Elhaug's system would require that, where some anticompetitive harm challenged by an antitrust plaintiff is *caused* by an action of government, then it must be immunized whether the defendant is the government entity that caused it or a private person who petitioned for it.<sup>85</sup> As I will explain below, this is a fatal flaw for any theory of antitrust and government that hopes to tackle problems like the *Love Terminal Partners* case.<sup>86</sup> In Elhaug's case, it results from a serious, if understandable, methodological flaw: he did not allow himself to suggest any change to the Court's existing case law.<sup>87</sup> In other words, the central problem in his approach is simply the central problem in the Court's approach.

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80. See Einer Elhaug, *Making Sense of Antitrust Petitioning Immunity*, 80 CAL. L. REV. 1177 (1992) [hereinafter Elhaug, *Making Sense*]; Einer Elhaug, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667 (1991).

81. See Elhaug, *Making Sense*, *supra* note 80, at 1198 (summarizing antitrust state action immunity).

82. *Id.*

83. *Id.*

84. See *id.* at 1197–98 (arguing that each process protects the public interest).

85. See *id.* at 1199–1201 (indicating immunity would not apply when the restraint is imposed by a financially interested governmental decisionmaker).

86. See *infra* Part V (pointing out that “government-granted” monopolies have been a larger problem than those caused by private parties).

87. See Elhaug, *Making Sense*, *supra* note 80, at 1180 (limiting his analysis to an explanation of the Court's cases).

B. *A Problem Effort of My Own*

Some years ago I suggested a somewhat different approach to dealing with the undue intimacy of state and local governments and their private-sector counterparts.<sup>88</sup> While my effort was not a general unifying one like Professor Elhauge's, it did introduce what I still think were certain important distinctions and clarifications. In particular, case law has blossomed in the courts of appeals granting *Noerr-Pennington* immunity to standard-setting organizations (SSOs)<sup>89</sup>—private groups, typically comprised of businesspeople, academics, and government representatives, that promulgate regulatory codes within their fields of specialty and then try to get the world to follow them. SSOs have sometimes acquired very significant real-world power, and they often have strong incentives to abuse it. Notoriously, the American Bar Association's (ABA) role both as regulator of attorney ethics and as accreditor of law schools has given it extensive power to create wide-ranging policy, and that policy sometimes subsequently has the force of state law.<sup>90</sup> Yet the ABA functions without much oversight at all. Likewise, building codes, electrical, fire, and safety codes, product design standards, and similar codifications often come to have pervasive influence precisely because state and local governments, feeling the need to regulate in these areas but desiring uniformity and doubting their own competence, adopt them without modification or even any evidence of much deliberation.<sup>91</sup>

These groups often enough find themselves sued in antitrust. However, in these and similar scenarios, SSOs have managed to get themselves into a privileged situation in law. The courts have uniformly held that, where their codes come to have force (even by unreflective rubberstamp) through incorporation into *de jure* law, then *Noerr* immunity protects them from the key body of private law that would otherwise regulate their conduct—antitrust.<sup>92</sup> But notice that the same SSOs are quite

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88. See Christopher L. Sagers, *Antitrust Immunity and Standard Setting Organizations: A Case Study in the Public-Private Distinction*, 25 CARDOZO L. REV. 1393 (2004) (opining on the proper treatment of standard-setting organizations within the context of antitrust immunity).

89. See *infra* note 92 and accompanying text (listing several cases involving SSOs and antitrust immunity).

90. Sagers, *supra* note 88, at 1400 (claiming the government's support of the ABA is the source of the ABA's power over law schools).

91. See *id.* at 1398–1402 (noting the proliferation and potential problems associated with SSOs).

92. See, e.g., *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 107 F.3d 1026, 1034–44 (3d Cir. 1997) (holding ABA immune for law school accreditation activities);

unlikely to be subject to constitutional, administrative, or any other public law because they are perceived by the courts as “private.”<sup>93</sup> Therefore, the only deliberative body making substantive government policy in these cases—the SSOs—is subject to literally *no law at all*, and they are also obviously free from the democratic constraints of election or public oversight.<sup>94</sup>

My solution for this problem was a bit roundabout. I argued that the major thing the courts had gotten wrong in these cases was to label powerful SSOs as merely private “persons” who might enjoy *Noerr* immunity as mere individual supplicants of government.<sup>95</sup> Instead, they seemed more like the deputies of state government trade-restraining power that are normally subject to the so-called *Midcal* doctrine.<sup>96</sup> At the time, I thought the appeal of this approach was that for *Midcal* immunity to apply, the state government that granted the trade-restraining power must “actively supervise” the deputy’s conduct.<sup>97</sup> So, if *Noerr* were off the table for powerful SSOs, and *Midcal* was their only hope, the “active supervision” requirement might encourage state and local governments to actually do their jobs as democratically accountable public servants.<sup>98</sup>

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*Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 17 F.3d 295, 302 (9th Cir. 1994) (immunizing deliberate misrepresentations to SSO as valid attempts to influence government action); *Lawline v. Am. Bar Ass’n*, 956 F.2d 1378, 1387 (7th Cir. 1992) (finding ABA immune for promulgation of model ethical rules); *Zavaletta v. Am. Bar Ass’n*, 721 F. Supp. 96, 98 (E.D. Va. 1989) (holding ABA immune); *Sherman Coll. of Straight Chiropractic v. Am. Chiropractic Ass’n*, 654 F. Supp. 716, 722–23 (N.D. Ga. 1986) (holding chiropractic trade association immune for school accreditation activities), *aff’d*, 813 F.2d 349 (11th Cir. 1987); *cf.* *Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 250 (7th Cir. 1994) (determining that although psychiatric certification board’s decisions were basis of granting certain state benefits, board was not a “state actor”).

93. Sagers, *supra* note 88, at 1395–96.

94. *Id.* at 1396.

95. *Id.* at 1414–26.

96. So named for *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

97. *See id.* at 105–06 (quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978)) (identifying requirements that must exist before private parties are granted immunity from antitrust actions).

98. The *Midcal* immunity as written also requires that the delegation of trade-restraining power be “clearly articulated” as a policy of the state government itself. *See Midcal*, 445 U.S. at 105–06 (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978)). This would be a problem for even the most influential SSOs because, while their standards are routinely rubberstamped into state and local law after the fact, they almost never have affirmative de jure delegations of authority to make government policy. For this reason, I believed that *Midcal* should be modified so that wherever there is a de facto “clear articulation”—wherever the “challenged restraint . . . is made under such circumstances that the defendant is effectively able to write state policy,” Sagers, *supra* note 88, at 1417—then *Midcal* immunity should be available if there was also “active supervision.” *See Midcal*, 445 U.S. at 105–06 (citation omitted). But the point was not to protect the SSO. Rather, the courts routinely mischaracterized SSOs

Again, any approach to this fundamental problem of government-and-the-marketplace will have to tackle basic theoretical problems; I think these problems are nicely illuminated by this little doctrinal alternative. As I explained in that earlier paper, and as I still think is true, the serious problem with existing *Midcal* doctrine is its implicit commitment to a rigid public-private distinction. The distinction does not work as a judicially administrable doctrine, and, despite the strong instincts of most of the federal bench, it is neither compelled by the Sherman Act<sup>99</sup> or its history, nor does it serve any substantive purpose of antitrust policy.<sup>100</sup> Moreover, the argument in my earlier paper could be made without criticizing any Supreme Court opinion and only distinguishing one small portion of (inapt and often misunderstood) language in *Allied Tube*.<sup>101</sup> I believed this was important because it ran counter to the strong instinct of the federal courts and most other lawyers that my suggestion would unfairly—indeed, in a manner contrary to the very foundations of the American Way—hold “private” entities responsible for consequences “caused” by government.<sup>102</sup>

With this being said, my alternative still leaves a lot to be desired: it might appear to threaten antitrust liability for all *kinds* of lobbying since common anecdotal experience reports that legislation is routinely adopted that was drafted by lobbyists, enacted as law more or less verbatim, and passed by legislators who have never even read it.<sup>103</sup> Indeed, under this theory, there would be no real reason that lobbyists of the *federal* government should not face antitrust liability if they come to have de facto policymaking capacity.

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as mere private supplicants of government precisely because the “clear articulation” requirement left *Noerr* as their only possible avenue for immunity. Sagers, *supra* note 88, at 1416. Creating a possibility of immunity for de facto deputies might help clear up that confusion. *See id.* at 1416–17 (proposing the *Midcal* strict de jure requirement be relaxed to allow for situations where state policymaking has in effect been delegated).

99. Sherman Act, 15 U.S.C. §§ 1–7 (2000).

100. *See Sagers, supra* note 88, at 1409–10.

101. *See id.* at 1418–20 (suggesting an alternative analysis of the *Allied Tube* issues without reference to the public-private distinction).

102. *See id.* at 1420 (examining policy rationale behind these instincts).

103. *Cf. FAHRENHEIT 9/11* (Lions Gate Films 2004) (showing Representative John Conyers, during an interview with filmmaker Michael Moore, responding to a question seeking to understand how so many congresspersons voted on the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of 26 U.S.C.), before reading it: “Sit down, my son. We don’t read most of the bills.”).



## V. THE LIKELIHOOD OF EVER ACTUALLY DOING ANYTHING ABOUT IT

Truly addressing the problem of cases like *Love Terminal Partners*—and addressing them as *antitrust* problems—calls for two significant developments, neither of which seems especially likely. First, a more comprehensive theoretical framework for application of competition policy to politics would need to be devised. Second, there would have to be a political will to impose that theory in ways that would run contrary to certain strong instincts in our philosophy of liberal capitalism, and that would gore some pretty sacred private sector cattle.

Fundamentally, the framework now existing as the state action and *Noerr* immunities should be revised into a comprehensive, uniform theory. However discrete and separate they may seem, any effective approach should see these two as complementary applications of one internally coherent policy. This is because the two situations that these doctrines deal with—private supplication of government and (usually responsive) government action<sup>104</sup>—are part of one problem. That unitary problem is the fluid, changing institutional amalgam of forces that make our policy, which is only poorly captured by the traditional dichotomy between “government” and “business.” In other words, the problem is that the immunities have incorporated a bright public–private distinction, making them poorly suited to serve the real policies of either antitrust or constitutional law. It is hazardous to continue applying these rules without putting them in context of the overall relation of government and marketplace. The courts have recognized this in some sense,<sup>105</sup> but they normally give no explicit attention to the overall theoretical picture when applying the doctrines to individual cases.

Within the unified theory I envision, it is absolutely critical that two things be established—two corrections to doctrinal mistakes that have caused inadequacy and confusion in the case law and will frustrate meaningful reform. First, it should be made clear that the protection given to “petitioning” under the *Noerr* doctrine is not required by the First Amendment. This

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104. See Sagers, *supra* note 88, at 1408 (examining the types of immunity available to the two distinct, recognized classes of potential defendants: state actors and private persons).

105. See, for example, Justice Scalia’s famous and oft-quoted observation in *City of Columbia*: “*Parker* and *Noerr* are complementary expressions of the principle that the antitrust laws regulate business, not politics . . . .” *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 383 (1991).

really should not be controversial. As the *Noerr* Court itself was careful to point out, the doctrine was merely a pragmatic construction of the Sherman Act,<sup>106</sup> and as soon as any careful thought is given to it, the idea that the *Noerr* rules are required by the First Amendment would produce a number of absurd and problematic results.<sup>107</sup> But, nevertheless, many, many people, including several federal courts of appeals, have gotten this wrong,<sup>108</sup> and so has at least one Supreme Court Justice.<sup>109</sup>

Second, the unified theory should do away entirely with the notion that immunity depends on whether some government entity “caused” the harm in question. Government “cause” apparently holds mystifying, talismanic significance for most courts, and in fact, this is the main tool by which the public-private distinction operates within the immunities doctrines. However, the courts never seem much to consider (1) just how irrelevant government “cause” actually is to *either* antitrust policy or the constitutional values they believe they are protecting or, (2) how quickly the causation inquiry creates a formalistic loophole for private-sector entities to make the policy they want, with little or no government input, and then bless it with a nearly impenetrable antitrust immunity by the simple artifice of getting it rubberstamped by some friendly government body. As for whether government causation is relevant to important policies, recall that prior to the mid-nineteenth century, the larger competitive concern in American politics was not ill-gotten private monopoly, but government-granted monopoly.<sup>110</sup> Moreover, whatever might be the costs of such an

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106. See *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 132 n.6 (1961) (explaining First Amendment defense was not applicable to the analysis of the case). For argument on this point, see Christopher L. Sagers, *The Legal Structure of American Freedom and the Provenance of the Antitrust Immunities*, 2002 UTAH L. REV. 927, 946–71 (discussing at length the relationship between petitioning immunity and First Amendment protections).

107. See Sagers, *supra* note 106, at 951–68.

108. Notably, a number of courts, state legislators, and law professors during the past two decades have opposed what they call “SLAPP” suits (standing for “Strategic Litigation Against Public Participation”) and have argued that “SLAPP” suits are unconstitutional on the theory that the *Noerr* doctrine is itself an application of the Petition Clause of the First Amendment. For discussion of cases and scholarly literature on this matter, see *id.* at 946–50.

109. Namely, Justice Douglas appears to have created the basis for the confusion in one off-hand dictum in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 512–13 (1972). For detailed explanation of how his moment of carelessness caused decades of confusion and scores of poorly decided judicial opinions, see Sagers, *supra* note 106, at 946–50.

110. See generally RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION: AND THE MEN WHO MADE IT* (1948) (explaining that because businesses had to apply directly to state legislature for incorporation, the legislature could close out opportunities for

approach (and the burdening of private defendants with costs properly to be borne by government is the chief defense of a bright distinction based on government causation), many of those costs belong appropriately on the shoulders of the business entities that had become so close to state and local government, and not on consumers. On the other hand, if the fear is that government defendants will be too heavily burdened by antitrust, federal statute already protects local governments, their officials, and persons acting under their direction from money damages, interest, fees, or costs.<sup>111</sup>

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people without much influence or power); HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW: 1836–1937* (1991) (noting that state and local governments granted numerous monopolies in an attempt to encourage economic development); STANLEY I. KUTLER, *PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE* (1971) (discussing the challenge faced by courts in the nineteenth century when government-granted monopolies outlived their usefulness); *see also Omni Outdoor Adver.*, 499 U.S. at 386 (Stevens, J., dissenting) (criticizing majority's grant of state action immunity to defendant city, noting that classic common law examples of trade restraint involved government-granted monopoly).

111. *See* 15 U.S.C. §§ 35(a), 36(a) (2000) (explaining that no claim for damages may be sustained against a party acting in his official capacity on behalf of the government). *See generally* ABA, *STATUTORY EXEMPTIONS*, *supra* note 20, at 285–90.

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