

ARTICLE

PREDATORY CONDUCT AND PREDATORY LEGISLATION: EXCLUSIONARY TACTICS IN AIRLINE MARKETS

Shubha Ghosh and Darren Bush***

TABLE OF CONTENTS

I. INTRODUCTION344

II. PREDATORY CONDUCT346

 A. *History of Chicagoan Disbelief*346

 1. Matsushita Electric Industrial Co. v. Zenith Radio Corp.346

 2. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.....350

 B. *The Ignoring of New Revelations*353

 1. United States. v. AMR Corp.....353

 2. Spirit Airlines, Inc. v. Northwest Airlines, Inc.....358

 C. *Where To From Here?*360

III. PREDATION THROUGH ANTICOMPETITIVE LEGISLATION361

 A. *Legislation as Agreement*363

 1. *Public Choice Theory and Antitrust Law*364

* Professor of Law, The University of Wisconsin Law School (beginning fall 2008; currently, Professor of Law, SMU Dedman School of Law).

** Associate Professor of Law, University of Houston Law Center. Ph.D., University of Utah. J.D., University of Utah. The Author is a former trial attorney at the U.S. Department of Justice’s Antitrust Division. The Author wishes to thank Chris Sagers for his helpful comments, both published and unpublished.

- 2. *Enter Twombly and the Heightened Pleading Standard*369
- 3. *Understanding Legislation as an Agreement*375
- B. *The Love Field Case Study*378
 - 1. *Freeing Love Field?*.....378
 - 2. *Analysis of State Level Deregulation*.....382
- C. *Suggestion for Reform*.....391

IV. CONCLUSION.....393

I. INTRODUCTION

Allegations of predatory activity in deregulated markets are nothing new. In particular, potential competitors seeking to enter nascent markets frequently argue that the dominant position enjoyed by the incumbent serves to enable the incumbent to prevent and restrain entry, often by engaging in conduct that amounts to sacrificing profits in certain markets to establish and maintain dominant positions in others. In addition, incumbents may seek to prevent entry by returning components of the market to the ancient regulatory tradition, namely by using legislation to prevent entry.

The first argument, that of predatory pricing, has traditionally not been accepted as a serious theory of harm in the world of antitrust. Largely due to the pervasiveness of neoclassical (“Chicago School”) economics, courts have largely taken an afactual and ahistorical view of such cases in examining predatory pricing claims, relying solely on a theory that makes questionable assumptions regarding firm behavior in an industry. Despite recent post-Chicago School approaches that appear to discredit the notion that predatory pricing and related harms are rarely tried and rarely successful, courts have been reluctant to adopt such a position for two reasons. First, the jurisprudence in the realm binds them to the Chicago School approach. Supreme Court case law is adamant in its philosophical viewpoint, and lower courts are bound to follow that viewpoint. Second, the factual post-Chicago School approach requires a deeper level of analysis into the motivations and behaviors of a dominant firm, an analysis in which courts traditionally have been reluctant to engage.

The second theory, that of predatory legislation, appears as an effort by stakeholder dominant firms in an industry to protect their interests by proposing and, in some instances, having

Congress pass legislation drafted by the stakeholder. Such legislative proposals are frequent, of course. The difficulty is that such regulatory schemes are protecting the interests of certain economic groups and spreading the costs and burdens to other groups. Congress, in passing such legislation, relies on information from the stakeholders without considering whether the costs and benefits of such legislation are properly aligned.

Courts have also been reluctant to inquire into the nature of the legislative process designed to create such regulatory barriers in nascent markets. Stakeholders in an industry may in fact seek to negotiate with one another, and often the regulator, over the terms of the agreement. A throwback to when the industry was regulated, such agreements may have a greater anticompetitive effect when there is in fact no active regulator. Courts, however, are loathe to analyze the purpose and effect of such agreements, instead relying on a whole host of defenses and exemptions to shield the agreement from antitrust attack under the auspices of being deferential to First Amendment considerations or to state legislators.

This Article examines the nature of predatory conduct in the context of one specific deregulated industry, namely, the scheduled air transportation of passengers. Part II of this Article will examine the nature of predatory “pricing” and related theories of harm, discussing briefly the dominant cases that have led to judicial disbelief in predatory pricing. In that context, this Article will discuss recent new approaches to the issue of predatory pricing and judicial reaction to them. In chief, the point of this Section is to argue that courts continue, with rare exception, to ignore recent economic theories, relying instead on an antiquated ahistorical approach that increasingly has little resemblance to reality. Part III of this Article discusses predatory legislation, addressing economic theories of legislation. Part III then discusses recent Supreme Court opinions to demonstrate how judicial treatment of antitrust plaintiffs serves to reinforce a traditional anti-analytic view of legislation. The Article proposes a different approach for courts to take in this regard, seeking to focus judicial inquiry into the nature of the agreement proposed as legislation.

Part IV of this Article offers concluding remarks on the relationship between predatory conduct and legislation—specifically, how courts have failed to examine each in precisely the same fashion, relying on ancient theories or misapplied jurisprudence to support a laissez-faire attitude regarding

anticompetitive conduct in the airline industry in particular and markets in general.

II. PREDATORY CONDUCT

A. *History of Chicagoan Disbelief*

1. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*¹ Modern judicial analysis of predatory pricing issues begins with *Matsushita*. American electronics manufacturers brought suit against twenty-one Japanese corporations and American firms controlled by Japanese parents, alleging a conspiracy to keep prices for television receivers artificially high in Japan while maintaining low prices for television receivers exported to the United States.² Plaintiffs further alleged that the prices at which the Japanese companies sold televisions in the United States were “at levels that produced substantial losses for petitioners.”³

The Supreme Court noted that the history of the case was extensive. The district court ruled against plaintiffs, issuing a 217 page opinion.⁴ The lower court focused primarily on whether such a conspiracy was reasonable and concluded that it was not.⁵ The lower court ruled that much of plaintiffs’ evidence was inadmissible and proceeded to grant summary judgment for defendants based on lack of evidence of a conspiracy.⁶ The court went further and suggested that, even if such a conspiracy existed, it was not anticompetitive.⁷

The Third Circuit reversed, asserting that a reasonable fact-finder could indeed find a conspiracy to depress prices in the American market for television receivers, funded by monopoly profits in the Japanese television market.⁸ The Third Circuit also reversed the lower court’s exclusion of certain types of evidence plaintiff produced to prove conspiracy.⁹

1. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

2. *Id.* at 577–78.

3. *Id.* at 578.

4. *Id.* at 578–79.

5. *Id.* at 579.

6. *Id.* at 578–79.

7. *Id.* at 579.

8. *Id.* at 580–81.

9. *Id.* at 580.

The Supreme Court reversed. Rather than discuss the factual underpinnings of the fact-intensive record, the Court engaged in a fairly cursory analysis of the facts.¹⁰ In doing so, the Court relied on a Chicago School-based analysis of predatory pricing. First, the Supreme Court noted that predatory pricing is essentially an investment, the forsaking of current profits with the “reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered.”¹¹ In addition to achieving monopoly in order to recoup, it is also necessary, according to the Court, for the monopolist to foreclose entry by new competitors who see the monopoly rents accrued by the predator as a signal for entry.¹² Because of the highly speculative nature of the investment, the Court concluded “there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful.”¹³

The consensus to which the Court cited is a string of six individual academics, all related to some degree to the Chicago School.¹⁴ This consensus is in fact mythical, except to the extent that members of the same school of thought agree with one another.

10. See *id.* at 577 (“Since we review only the standard applied by the Court of Appeals in deciding this case, and not the weight assigned to particular pieces of evidence, we find it unnecessary to state the facts in great detail.”).

11. *Id.* at 588–89.

12. *Id.* at 589.

13. *Id.* at 588–89.

14. *Id.* at 589–90 (citing works by then-Professor Robert Bork, Professors Phillip Areeda & Donald F. Turner, then-Professor Frank Easterbrook, Professor Roland H. Koller II, and Professor John S. McGee). Some have argued quite effectively that there are two schools of thought in modern antitrust analysis, a “Chicago School” and a “Harvard School,” yet it is unclear to at least one of the Authors that there is any significant difference between the two, except perhaps more willingness on the part of the latter to engage in antitrust enforcement. Compare William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 13–14 (noting the perceived dichotomy between the Chicago and Harvard Schools but arguing that “antitrust doctrine governing single-firm conduct today is not exclusively or predominantly a single strand of Chicago School ideas. Rather, the intellectual DNA of modern U.S. antitrust doctrine is chiefly a double helix that consists of two intertwined chains of ideas”), with Einer Elhauge, *Harvard, Not Chicago: Which Antitrust School Drives Recent U.S. Supreme Court Decisions?*, COMPETITION POLY INT’L, Autumn 2007, at 59, 77, available at http://www.law.harvard.edu/faculty/elhauge/Elhauge_Harvard_Not_Chicago_Final.pdf (asserting a clear distinction between the two schools and concluding that the Supreme Court has favored the Harvard School’s form of analysis).

For example, in a contemporary article, Harry S. Gerla argued that predatory pricing is in fact a tempting tactic for firms seeking to achieve greater market share.¹⁵ Terry Calvani similarly raised the specter of nonprice predation in an address, akin to the type to be alleged in twenty-first century antitrust cases in the airline industry.¹⁶ Ordover and Willig in a contemporary article discussed predatory pricing and innovation.¹⁷ Other commentators also recognized the existence of predatory pricing during this time period.

Indeed, much of the debate at the time was not about whether predatory pricing existed but instead centered on the judicial limitations on making such a finding—in particular, with many academics proposing rules for the determination of liability under a predatory pricing theory.¹⁸ It is only the Chicago School that “advocates no rule at all [and] is an analytically sterile denial of the existence of the problem.”¹⁹ Thus, the Court was being disingenuous to make the determination that predatory pricing is a unicorn, a mythical creature that does not exist in reality.²⁰

15. Harry S. Gerla, *The Psychology of Predatory Pricing: Why Predatory Pricing Pays*, 39 SW. L.J. 755, 757 (1985) (“[P]redatory pricing is a psychologically tempting tactic for managers of firms that are losing market share and . . . the successful use of the tactic creates psychological entry barriers for new firms seeking to enter the market.”).

16. Terry Calvani, *Non-Price Predation: A New Antitrust Horizon*, 54 ANTITRUST L.J. 409, 409–11 (1985) (discussing how nonprice predation could be more effective than price predation in effecting an anticompetitive goal and that nonprice predation could offer antitrust lawyers significant growth potential).

17. Janusz A. Ordover & Robert D. Willig, *An Economic Definition of Predation: Pricing and Product Innovation*, 91 YALE L.J. 8, 8–9 (1981).

18. See, e.g., Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 697–700 (1975) (acknowledging that “predatory pricing seems unlikely,” but arguing that this “does not necessarily mean that there should be no antitrust rules against it” and that courts need “meaningful and workable tests for distinguishing between predatory and competitive pricing”); Phillip Areeda & Donald F. Turner, *Williamson on Predatory Pricing*, 87 YALE L.J. 1337, 1338–39 (1978) (rejecting Professor Williamson’s output-limiting rule as inferior to the author’s short-run marginal cost rule); Joseph F. Brodley & George A. Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 66 CORNELL L. REV. 738, 740 (1981); Terry Calvani & James M. Lynch, *Predatory Pricing Under the Robinson–Patman and Sherman Acts: An Introduction*, 51 ANTITRUST L.J. 375, 393–96 (1982); Oliver E. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J. 284, 284–85 (1977) (rejecting Professors Areeda and Turner’s short-run marginal cost rule as inadequate where it “make[s] no allowance for strategic behavior by dominant firms” and proposing an output-limiting test that accounts for this strategic motivation).

19. Spencer Weber Waller, *The “New” Law of Monopolization: An Examination of MCI Communications Corp. v. American Telephone & Telegraph Co.*, 32 DEPAUL L. REV. 595, 606 (1983).

20. See Jonathan B. Baker, *Predatory Pricing After Brooke Group: An Economic*

The Court proceeded to discuss the unlikelihood of predatory pricing when formed under a conspiracy. The Court noted that a conspiracy must allocate gains realized from the success of the predatory campaign.²¹ Moreover, the Court argued that, because the success is speculative, each conspirator has “a strong incentive to cheat, letting its partners suffer the losses necessary to destroy the competition while sharing in any gains if the conspiracy succeeds.”²² The Court continued with a theoretical analysis:

Yet if conspirators cheat to any substantial extent, the conspiracy must fail, because its success depends on depressing the market price for *all* buyers of CEPs. If there are too few goods at the artificially low price to satisfy demand, the would-be victims of the conspiracy can continue to sell at the “real” market price, and the conspirators suffer losses to little purpose.²³

The Court did not cite to any facts in the voluminous record to suggest that the conspiracy, allegedly spanning several decades, was subject to disintegration. Rather, the Court suggested that the potential span of conspiracy is proof of only two things: that the conspiracy did not exist or that the conspiracy would be unable to recoup losses incurred during those decades of predation.²⁴ Either way, the Court argued, there appeared little in the way of anticompetitive conduct.²⁵

The dual effect of *Matsushita* was, first, to make it virtually impossible to achieve any victory in a predatory pricing case, particularly when the theory of harm involved a conspiracy as the monopolizing agent. Second, post-*Matsushita* cases involving predatory pricing are habitually dismissed either at the summary judgment stage or on motion for judgment notwithstanding the verdict, as if the facts of a predatory pricing claim are irrelevant because the theory of harm is impossible in reality.²⁶

Perspective, 62 ANTITRUST L.J. 585, 586 (1994) (claiming that a former FTC Commissioner once described price predation as a “‘unicorn,’ a complete myth”).

21. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 590 (1986).

22. *Id.*

23. *Id.* (emphasis in original).

24. *Id.* at 592.

25. *Id.* at 593.

26. See, e.g., Avishalom Tor, *The Fable of Entry: Bounded Rationality, Market Discipline, and Legal Policy*, 101 MICH. L. REV. 482, 553 (2002) (“Courts tend to dismiss predatory pricing allegations quickly, because they often believe that recoupment is impossible.”).

2. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*²⁷ The Supreme Court seemed to say as much in *Brooke Group*. Liggett sought to revive its lagging branded-cigarette business by introducing a black-and-white generic cigarette that was priced 30% below the price of rival branded cigarettes.²⁸ Liggett offered rebates at the wholesale level to increase the volume of cigarettes ordered.²⁹ The effect of Liggett's offering was to erode sales from its branded rivals.³⁰

Brown & Williamson countered with a rival black-and-white cigarette.³¹ Brown & Williamson offered its brand at a suggested retail price that matched Liggett's.³² However, Brown & Williamson's volume discounts were larger, in effect beating Liggett's prices.³³ Liggett instituted a price war in response and increased its own wholesale rebates.³⁴ The Court stated that "[t]his precipitated a price war at the wholesale level, in which Liggett five times attempted to beat the rebates offered by Brown & Williamson."³⁵ At the end, Brown & Williamson held an advantage over Liggett.³⁶ By the end of the price war, Liggett contended that Brown & Williamson was selling below cost.³⁷

The focus of the Court was whether Brown & Williamson could recoup its losses. Liggett theorized that Brown & Williamson sought to discipline Liggett in order to bring about tacit collusion in an otherwise oligopolistic marketplace.³⁸ The Court was skeptical of this theory of recoupment, noting that such an "anticompetitive minuet is most difficult to compose and to perform, even for a disciplined oligopoly."³⁹

The Court could have focused on the factors that were relevant to determine whether recoupment was feasible. According to Professors Elzinga and Mills, the Court listed these factors but failed to address them:

27. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

28. *Id.* at 214.

29. *Id.*

30. *Id.*

31. *Id.* at 215.

32. *Id.*

33. *Id.*

34. *Id.* at 216.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 227.

39. *Id.* at 227-28.

In *Brooke Group*, the Court cited several economic variables that might affect whether a defendant could expect to recoup its alleged predatory losses. These variables are:

- (1) The length of the predation period.
- (2) The extent to which the predator's prices are below cost.
- (3) The comparative financial strength of the predator versus target firms.
- (4) The "incentives and will" of predator and prey.
- (5) The size distribution of firms in the relevant market.
- (6) Entry conditions in the relevant market.
- (7) The predator's ability to absorb the output of target firms.⁴⁰

Instead, the Court examined the allegations through the lens of mainstream economics and indicated that recoupment could take place in theory under some factual scenarios.⁴¹ However, the Court then delved into the record before it to demonstrate that there is no evidence of recoupment that cannot be essentially explained away. The Court eschewed the idea that intent documents have any meaning whatsoever, instead focusing all of its analytic power on whether defendants had a dangerous probability of recoupment.⁴²

The result of *Brooke Group* is that plaintiffs now face a two-pronged assault on any ability to win, regardless of the facts.⁴³ First, the plaintiff must show that there is pricing below an appropriate measure of cost; second, the plaintiff must prove that the firm or firms in question possess the ability to recoup the losses arising from the predatory campaign.⁴⁴ The Court will be more skeptical on nonmonopolist theories, as conspiracies are thought to be less able to recoup losses as a rule of thumb. It thus becomes next to

40. Kenneth G. Elzinga & David E. Mills, *Trumping the Areeda-Turner Test: The Recoupment Standard in Brooke Group*, 62 ANTITRUST L.J. 559, 573-74 (1994).

41. *Brooke Group*, 509 U.S. at 229 ("A predatory pricing scheme designed to preserve or create a stable oligopoly, if successful, can injure consumers in the same way, and to the same extent, as one designed to bring about a monopoly. However unlikely that possibility may be as a general matter, when the realities of the market and the record facts indicate that it has occurred and was likely to have succeeded, theory will not stand in the way of liability." (citing *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 466-67 (1992))).

42. See Elzinga & Mills, *supra* note 40, at 579-80 (arguing the Court focused on an economic analysis showing the plan could not be carried out).

43. See *Brooke Group*, 509 U.S. at 226, 243 (holding plaintiffs must show evidence of "oligopolistic price coordination and sustained supracompetitive pricing" to "[determine] whether recoupment of predatory losses is likely").

44. *Id.* at 230-32 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986)).

impossible, regardless of the facts, for a plaintiff to succeed on a predatory pricing claim in any market where entry is not completely impossible.

The difficulty in the Court's reliance on economic theory is again that the Court's notion of economics lags substantially behind the development of the discipline.⁴⁵ The Court, stuck in its 1970s view of the economic world, chose to ignore substantial development concerning recoupment. The "post-Chicago School" of antitrust, as it later came to be known, was much more amenable to different theories of recoupment. For example, it was entirely plausible under post-Chicago School economic theory for a firm to develop a reputation as a predator, thus disciplining competitors not only in the predatory market but also in other markets in which it competed.⁴⁶ The post-Chicago School was also more amenable to single market recoupment theories. The latter theory was supported in the post-Chicago School mind by a conviction that recoupment and anticompetitive effect could take place even when the predatory prices were above average variable cost, and where imperfections in the capital market caused the prey of a predatory campaign to be unable to weather an attack.⁴⁷

Thus, in complicated markets like the airline industry, traditional economic theory is likely to yield a highly skeptical view of predatory pricing. This highly skeptical view may not be justified in the wake of factual evidence to the contrary. However, it appears that courts, for the most part, are siding with the Supreme Court in ignoring contemporary economics and factual analysis.

45. See generally Baker, *supra* note 20, at 602–03; William Comanor & H.E. Frech III, *Predatory Pricing and the Meaning of Intent*, 38 ANTITRUST BULL. 293, 294–97 (1993); Paul Milgrom & John Roberts, *New Theories of Predatory Pricing*, in INDUSTRIAL STRUCTURE IN THE NEW INDUSTRIAL ECONOMICS 112, 112–37 (Giacomo Bonanno & Dario Brandolini eds., 1990) (claiming that “despite the widespread belief in the existence and efficacy of predatory pricing” courts failed to consider it in their analysis until relatively recently); Janusz Ordover & Garth Saloner, *Predation, Monopolization, and Antitrust*, in 1 HANDBOOK OF INDUSTRIAL ORGANIZATION 537, 537–96 (Richard Schmalensee & Robert Willig eds., 1989) (discussing incumbent firm strategies used to protect against entering competitors).

46. Baker, *supra* note 20, at 590.

47. See *id.* at 591 (positing that imperfections in the market combined with “deep pockets” of the predator “may drive the prey to exit” as well as the possibility that “high prices following the exit of the prey [may be] unlikely to be eroded” by new competition).

B. *The Ignoring of New Revelations*

Airline incumbents periodically have used predatory tactics to preclude entry by potential competitors.⁴⁸ Specifically, the incumbent fears any level of competition. While the airline incumbent charges monopoly prices in the short term, it may lower fares to competitive (or below competitive) levels and significantly increase capacity on the route once it receives information that a competitor may enter.⁴⁹ This conduct may eliminate the threat of competition because entry is no longer profitable. Once the threat is eliminated, prices return to monopoly levels. This problem has generated a great deal of attention,⁵⁰ as well as major antitrust suits.

1. *United States v. AMR Corp.* In 1999, the Government filed a complaint alleging that American Airlines (AA) had monopolized, or attempted to monopolize, air passenger service to and from its Dallas–Fort Worth (DFW) International Airport

48. This is the “minority report” defense. Specifically, in the movie *Minority Report*, murderers are apprehended before the murder takes place. *MINORITY REPORT* (20th Century Fox 2002). Similarly, the minority report defense works by eliminating competitors before they enter.

49. See Einer Elhauge, *Why Above-Cost Price Cuts to Drive Out Entrants Are Not Predatory—and the Implications for Defining Costs and Market Power*, 112 *YALE L.J.* 681, 692 (2003) (discussing the U.S. Department of Transportation’s proposed regulation in 1998 that would ban the cutting of prices by incumbent airlines in response to the entrance of competitors).

50. There has been a great deal of academic interest in airline predatory tactics over the years. See, e.g., Robert G. Berger & Stephanie J. Mitchell, *Predatory Pricing in the Airline Industry: A Case Study—The Policies and Practices of the CAB*, 13 *TRANSP. L.J.* 287, 287–88 (1984); Mark T. Cloutre, *The Legacy of Continental Airlines v. American Airlines: A Re-Evaluation of Predatory Pricing Theory in the Airline Industry*, 60 *J. AIR L. & COM.* 869, 870 (1995); Elhauge, *supra* note 49, at 685–86; Russell A. Klingaman, *Predatory Pricing and Other Exclusionary Conduct in the Airline Industry: Is Antitrust Law the Solution?*, 4 *DEPAUL BUS. L.J.* 281, 282–83 (1992). For an innovative solution to predatory pricing, see Patrick Bolton, Joseph F. Brodley & Michael H. Riordan, *Predatory Pricing: Strategic Theory and Legal Policy*, 88 *GEO. L.J.* 2239, 2263 (2000) (proposing a new approach that “would permit the plaintiff to amplify its proof of predation by showing that, under the specific facts of the case, one or more strategic theories are economically plausible, and that surrounding economic conditions make recoupment likely in the light of such theory”).

The U.S. Department of Transportation proposed guidelines to regulate such practices, *Enforcement Policy Regarding Unfair Exclusionary Conduct in the Air Transportation Industry*, 63 *Fed. Reg.* 17,919, 17,920 (proposed Apr. 10, 1998), but these guidelines were never adopted. See *OFFICE OF THE SEC’Y, U.S. DOT DOCKET OST-98-3713, ENFORCEMENT POLICY REGARDING UNFAIR EXCLUSIONARY CONDUCT IN THE AIR TRANSPORTATION INDUSTRY* (2001) (deciding to use a case-by-case approach rather than publishing guidelines).

hub.⁵¹ AA operated a very large number of flights between DFW and other cities.⁵² When a low-cost carrier (LCC) entered a DFW route, AA matched the LCC fares, increased capacity—that is, added new flights or increased the size of planes for existing scheduled service—and adjusted its yield management system to allow more seats to be available at the lower fares.⁵³ Once the LCC ceased or moved operations, AA resumed its prior operations, increasing fares and reducing capacity somewhat to levels comparable to the period before LCC competition.⁵⁴ The U.S. Court of Appeals for the Tenth Circuit interpreted the Government’s complaint “[a]t its root” to allege that AA: “(1) priced its product on the routes in question below cost; and (2) intended to recoup these losses by charging supracompetitive prices either on the four core routes themselves, or on those routes where it stands to exclude competition by means of its ‘reputation for predation.’”⁵⁵ The district court granted summary judgment to AA and the Tenth Circuit affirmed, finding the Government’s measures of predatory pricing “invalid as a matter of law, fatally flawed in their application, and fundamentally unreliable.”⁵⁶

The Government alleged that AA responded to an entrant’s announcement of its intent to begin operation over routes from DFW.⁵⁷ As an example, in September of 1996, Vanguard Airlines announced that it would begin nonstop service between DFW and several other cities.⁵⁸ Vanguard was already flying a route between Wichita and DFW in competition with AA.⁵⁹ AA responded initially by lowering fares on an increasing number of seats over the route.⁶⁰ However, after Vanguard’s announcement

51. *United States v. AMR Corp. (AMR I)*, 140 F. Supp. 2d 1141, 1192 (D. Kan. 2001), *aff’d*, 335 F.3d 1109 (10th Cir. 2003).

52. *Id.* at 1146.

53. *United States v. AMR Corp. (AMR II)*, 335 F.3d 1109, 1112 (10th Cir. 2003).

54. *Id.*

55. *Id.* at 1111.

56. *Id.* at 1111, 1120. Predatory pricing cases habitually have been dismissed on summary judgment, and the court in this case followed the trend. *See, e.g.*, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 212 (1993); *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 117 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 598 (1986).

57. Brief of Appellant United States of America at 16, *United States v. AMR Corp.*, 335 F.3d 1109 (10th Cir. 2002) (No. 01-3202), *available at* <http://www.usdoj.gov/atr/cases/f9800/9814.pdf>.

58. *Id.*

59. *Id.*

60. *Id.*

of new service, AA responded by expanding capacity by 35% between Wichita and DFW.⁶¹ The Government alleged that, although AA “lost money on the capacity increase,” the conduct “got Vanguard out” of the route.⁶² Once Vanguard exited the route, the Government alleged that AA “decreased capacity 30 percent and raised fares over 50 percent.”⁶³ The Government alleged similar events in the other three routes Vanguard ultimately entered.⁶⁴ Furthermore, the Government alleged that AA’s conduct served as notice to would-be entrants on DFW routes that they would face a similar response.⁶⁵

The district court found that other LCCs were establishing service over other DFW routes.⁶⁶ Therefore, a plaintiff might find itself in the position of arguing that LCCs will not only enter certain DFW routes, but for AA’s conduct, but, to the extent that they are currently providing service in the predation markets, that level of service would be higher in the absence of predation. The difficulty in this approach lies in finding proof. LCCs have an interest in asserting that they would have entered, but for AA’s reputation, because a Department of Justice victory might eliminate competitive pressure placed on the LCCs by AA. But other factors leading to an LCC’s decision to abandon entry plans are also difficult to dismiss, such as an inability to obtain sufficient capital—even though limited access to capital may be tied to the incumbent’s behavior or misinformation about the market.⁶⁷

Defendants also face challenges. A defendant may argue that airline markets are national in scope—any airline may enter any route at any time. However, such an argument makes it difficult for the airline to assert that it is acting rationally by reducing fares after entry of an LCC. In theory, fares should

61. *Id.*

62. *Id.* at 17.

63. *Id.*

64. *Id.* at 14.

65. *See id.* at 20 (“No LCCs entered DFW during any of the five predation episodes. Five LCCs cautiously entered DFW after the government’s investigation became public . . .”).

66. *United States v. AMR Corp. (AMR I)*, 140 F. Supp. 2d 1141, 1188 (D. Kan. 2001), *aff’d*, 335 F.3d 1109 (10th Cir. 2003). The court pointed out in its opinion that six new carriers entered DFW routes since 1995. *Id.*

67. *See* Patrick Bolton, Joseph F. Brodley & Michael H. Riordan, *Predatory Pricing: Response to Critique and Further Elaboration*, 89 GEO. L.J. 2495, 2500 (2001) (discussing barriers to entry that may supersede or replace predation in cases where small companies are denied entry to markets dominated by large firms).

already be low because of the existence of a number of large, established airlines. Unfortunately, the court's predation analysis of a monopolization case permits an incumbent airline to engage in any conduct so long as the airline does not lower fares below some undefined and ambiguous measure of incremental cost.⁶⁸

Regardless, the Tenth Circuit view of predatory pricing does not yield to any sort of factual analysis of this kind. The court begins with an explicit nod to the Chicago School of economics:

Scholars from the Chicago School of economic thought have long labeled predatory pricing as implausible and irrational. Frank Easterbrook, a leader of the Chicago School, once concluded that "there is no sufficient reason for antitrust law or the courts to take predation seriously." Chicago scholars argued that lowering prices could only be pro-competitive and any prohibition on such conduct could ultimately deter firms from engaging in conduct that is socially beneficial. Commentators viewed below-cost pricing as irrational largely because of the uncertainty of recouping losses through later price increases. In order for a predatory pricing scheme to be successful, two future events had to take place: first, the victim of the alleged predation would have to exit and second, the predator would have to generate profits in excess of its initial losses.⁶⁹

However, the court continues by giving at least a casual nod to the post-Chicago School, noting that "[p]ost-Chicago economists have theorized that price predation is not only plausible, but profitable, especially in a multi-market context where predation can occur in one market and recoupment can occur rapidly in other markets."⁷⁰ The court stated that it would approach the matter with "caution" but not with the "incredulity that once prevailed."⁷¹

Unlike the Supreme Court in *Brooke Group*, the Tenth Circuit attacked the Government's contention that AA priced

68. For good critiques of the district court's test and proposals for other tests, see *id.* at 2496 (proposing a model to distinguish between predation and competition in order to avoid overenforcement of antitrust laws); Aaron S. Edlin, *Stopping Above-Cost Predatory Pricing*, 111 YALE L.J. 941, 941-44 (2002) (arguing that predation cases should not be limited only to below-cost pricing).

69. *United States v. AMR Corp. (AMR II)*, 335 F.3d 1109, 1111 (10th Cir. 2003) (citations omitted).

70. *Id.* at 1115.

71. *Id.*

below average variable cost.⁷² In particular, the Government posited four different price/cost tests.⁷³ The court noted that two of the price/cost measurements were based on AA's own internal accounting measure, FAUDNC (or "Fully Allocated earnings plus Upline/Downline contribution Net of Costs").⁷⁴ The court quickly dismissed these tests as being based on a total cost measure, as opposed to an incremental cost measure.⁷⁵ The court dismissed the remaining two tests as being measures of profit maximization and for including allocated costs in an otherwise variable cost measure.⁷⁶ Regardless, the Government was left without any price/cost test satisfying the court.

The court noted that the fully allocated measures are total cost measures, but failed to discuss the degree to which "fixed costs" could be incremental to a particular route. The court also failed to mention the degree to which fixed costs become incremental over certain periods of time. In other words, the notion of what is "fixed" and what is "variable" is an issue of much contention in the case, and the court made a Chicago-style assumption that variable costs are those costs directly attributable to the route, ignoring any allocation of system-wide costs that vary with increases in flights or capacity.⁷⁷

Moreover, the court ignored the post-Chicago School contention that imperfect capital markets may make predatory pricing successful.⁷⁸ In particular, prices above average variable cost may in fact eliminate competition by ensuring that the entrant does not meet break-even load factors. It may also injure the ability of low-cost carriers to obtain financing. This problem is exacerbated if in fact the strategy is common to legacy carriers in dominant hub positions.⁷⁹

72. *Id.* at 1120–21.

73. *Id.* at 1116–17.

74. *Id.* at 1117.

75. *Id.*

76. *Id.* at 1118–20.

77. *Id.* at 1120.

78. *Id.* at 1121.

79. The case law is replete with allegations suggesting that the major airlines have engaged in predatory conduct against entrants. *See, e.g.,* Int'l Travel Arrangers v. NWA, Inc., 991 F.2d 1389, 1394 (8th Cir. 1993); Pac. Express, Inc. v. United Airlines, Inc., 959 F.2d 814, 815 (9th Cir. 1992); Cont'l Airlines, Inc. v. Am. Airlines, Inc., 824 F. Supp. 689, 692–93 (S.D. Tex. 1993); *In re Air Passenger Computer Reservations Sys. Antitrust Litig.*, 694 F. Supp. 1443, 1451 (C.D. Cal. 1988), *aff'd sub nom.* Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536 (9th Cir. 1991); Brian Clewer, Inc. v. Pan Am. World Airways, Inc., 674 F. Supp. 782, 784, 788 (C.D. Cal. 1986); *see also* Paul Stephen Dempsey,

Finally, the court ignored one important dimension of the case: The Government's complaint alleged that the anticompetitive conduct was, in part, the expansion of capacity in the routes.⁸⁰ Thus, the Government's case could be styled as a straight monopolization case without any predatory pricing analysis. However, the case quickly became, at least in the courts, one solely about predatory pricing, the type of case with the least likelihood of success.⁸¹

There was evidence of expansion of capacity into routes entered by LCCs.⁸² Moreover, the capacity was removed when the LCCs exited.⁸³ This suggests classic predatory behavior, regardless of whether the strategy resulted in average fares being below cost.

In short, the court quickly dismissed a complicated predatory pricing case because the case appeared irreconcilable with Chicago School theory.⁸⁴ The result is that there is a great deal of airspace between what the court considers to be predatory and what could be utilized to drive a competitor out of the market.

2. *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*⁸⁵ A case similar to the Government's case against AA emerged out of the Sixth Circuit. Specifically, Spirit Air, an LCC operating out of Detroit with service to Boston and Philadelphia, sought to attract leisure passengers with fares ranging from \$49 in the Philadelphia route and \$69–\$109 in the Boston route.⁸⁶ The

Predation, Competition & Antitrust Law: Turbulence in the Airline Industry, 67 J. AIR L. & COM. 685, 688–89 (2002).

80. See Complaint at 1, *United States v. AMR Corp.*, 140 F. Supp. 2d 1141 (D. Kan. 2001) (No. 99-1180-JTM), available at <http://www.usdoj.gov/atr/cases/f2400/2438.htm> (“When small airlines try to compete against American on these routes, American typically responds by increasing its capacity and reducing its fares . . .”).

81. See C. Scott Hemphill, *The Role of Recoupment in Predatory Pricing Analyses*, 53 STAN. L. REV. 1581, 1585 (2001) (discussing the difficulty of winning a predatory price suit since *Brooke Group*).

82. See Complaint, *supra* note 80, at 1, 3 (stating the allegations and facts of the case).

83. *Id.*

84. See *United States v. AMR Corp. (AMR I)*, 140 F. Supp. 2d 1141, 1196, 1218–19 (D. Kan. 2001) (finding summary judgment appropriate and citing *Brooke Group*, a case that relies on the Chicago School theory), *aff'd*, 335 F.3d 1109 (10th Cir. 2003); *supra* text accompanying notes 45–47 (arguing that by not recognizing the post-Chicago school of antitrust in *Brooke Group*, the Court ignored a substantial development in theories of recoupment).

85. *Spirit Airlines, Inc. v. Nw. Airlines, Inc.*, 431 F.3d 917 (6th Cir. 2005).

86. Casey Burton, Note, *Antitrust—Predatory Pricing—Sixth Circuit Incorrectly*

district court rejected Spirit's determination that the relevant market was leisure passenger airport pairs, embracing instead Northwest's broader "all passengers" definition.⁸⁷ The broadened market definition caused Northwest's revenues to exceed its costs.⁸⁸ Even if the relevant market were leisure passenger city pairs, the court concluded that the plaintiffs' view of Northwest's costs and revenues was "implausible."⁸⁹ Thus, the lower court rejected Spirit's predatory pricing claim.⁹⁰

On appeal, the Sixth Circuit noted the "intellectual disagreement" among the parties' experts concerning the appropriate standard of cost and declined to uphold summary judgment given the disagreement raised a genuine issue of material fact.⁹¹ Spirit's experts sought to employ a strategy similar to one employed by the Government in *United States v. AMR Corp.* Spirit's experts sought to include in the measure of costs only those average variable costs attributable to price-sensitive leisure passengers on the relevant routes.⁹² In particular, Spirit's experts included flight costs, passenger costs, gate and ticket counter costs, labor and fuel costs, and the cost of additional aircraft brought in to serve incremental capacity in "Northwest's response to Spirit's presence."⁹³ This latter cost was based on the market lease rate of the aircraft.⁹⁴

The cost methodology could be considered an allocated cost.⁹⁵ It is unclear whether the Sixth Circuit was more amenable to the analysis than the Tenth Circuit, because the cost analysis was not offered as a package of variable cost tests; or, instead, whether the Sixth Circuit had a greater understanding of airline markets.⁹⁶ Regardless, the Sixth Circuit has done what courts

Uses Post-Chicago Economics and Analysis of Non-Price Predation to Overturn Summary Judgment Granted to an Antitrust Defendant: Spirit Airlines, Inc. v. Northwest Airlines, Inc., 72 J. AIR L. & COM. 391, 392 (2007) (citing *Spirit Airlines*, 431 F.3d at 922).

87. *Spirit Airlines*, 431 F.3d at 921.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 945.

92. *Id.* at 930, 939.

93. *Id.* at 930, 940.

94. *Id.* at 940.

95. *See id.* at 942–43, 946 (referencing the relationship between allocated costs and the cost methodology used by Spirit and Northwest's experts).

96. However, the Sixth Circuit discussed the airline industry in detail, in part noting that "[u]nlike a traditional manufacturer, however, the airline industry presents a more complicated scenario because the bulk of its variable costs are common costs shared

rarely do, namely, reverse a ruling in favor of defendants on summary judgment.⁹⁷

C. *Where To From Here?*

The lineage of predatory pricing cases can directly trace its roots to the utter skepticism of the Chicago School of Economics. Despite protestations to the contrary, the Supreme Court and lower courts have continued to view markets as static, two-dimensional entities. In such markets, there is no role for relatively recent economic innovations like game theory and strategic behavior.⁹⁸ Indeed, there is little room for factual analysis of any kind, so long as the standard theory suggests that recoupment is impossible or that variable cost means some short-term, static view of costs.

Against this backdrop, plaintiffs can rarely hope to achieve success. In complex and dynamic markets, wherein competitive responses are more sophisticated than in the commodity markets on which neoclassical economics is based, anticompetitive strategies may yield benefits beyond the elimination of a target. It may in fact be a prudent investment. This notion is lost on the

among all passengers on a flight.” *Id.* at 954.

97. See Bolton, Brodley & Riordan, *supra* note 50, at 2254 n.92 (“From 1983 to 1993, plaintiffs won only four cases. But, in nine additional cases, the court denied the defendant’s motion for summary judgment. None of these cases was subsequently reported, and one may surmise that favorable settlements may have been obtained in some.”). The Supreme Court’s *Brooke Group* decision made matters much worse for plaintiffs:

The *Brooke* decision had a powerful effect on cases in the lower courts. In the six years following *Brooke*, plaintiffs have not prevailed in a single case in the federal courts. Of thirty-nine reported decisions, defendants have won thirty-six cases, and of the remaining three cases in which plaintiffs survived motions for summary judgment or dismissal, two were settled while the disposition of the third could not be resolved. Strikingly, of the thirty-six cases won by defendants, all but one were decided on summary judgment, judgment notwithstanding the verdict, or were dismissed on the pleadings.

Id. at 2258–59 (footnotes omitted).

98. See Michael S. Jacobs, *The New Sophistication in Antitrust*, 79 MINN. L. REV. 1, 37–38 (1994) (stating that “post-Chicago scholars . . . emphasize the capacity of market imperfections to create market power” and “have applied insights from game theory to develop models of strategic behavior describing how small and moderate-sized firms can use market imperfections to disadvantage competitors”); Thomas A. Lambert, *Tweaking Antitrust’s Business Model*, 85 TEX. L. REV. 153, 157–58 (2006) (discussing how “‘post-Chicago’ antitrust . . . starts with the assumption that markets are messier and more complex than the Chicago School imagined and attempts to model strategic, anticompetitive behavior using game theory”).

courts, as they cling to the ancient relic of Chicago School economics.

Similarly, as will be discussed in Part III, courts are reluctant to relinquish the regulated vestiges of the airline industry in particular and regulated markets in general. Part III explores the defenses that courts have found acceptable when market participants seek to exclude rivals not via market mechanisms, but rather through legislation.

III. PREDATION THROUGH ANTICOMPETITIVE LEGISLATION

Predation does not occur only through conduct in the marketplace. Legislative politics can also provide a forum for the implementation of predatory and other anticompetitive schemes. Liberal political theory traditionally warned of the capture of the political process by big business and other private interests.⁹⁹ One of the justifications given for the use of antitrust laws to combat market concentration is the adverse consequences of wealth concentration and the unequal distribution of resources on government.¹⁰⁰ Conservative thought also has targeted redistributive or public interest legislation under the terms of public choice theory: concentrated interests capture the legislative process to procure legislation whose benefits inure to a small group at the expense of the polity as a whole.¹⁰¹ Whether framed in liberal or conservative terms, the potentially harmful influence of markets on politics has been widely recognized.

99. See, e.g., C. WRIGHT MILLS, *THE POWER ELITE* 231 (1956) (introducing the topic of the “shifting discourse of free competition . . . its changing relationship to property rights, liberty and equality” from 1968–1980); RUDOLPH J.R. PERITZ, *COMPETITION POLICY IN AMERICA, 1888–1992: HISTORY, RHETORIC, LAW* 6–7 (1996) (claiming the economy is controlled by “giant corporations” who strongly influence worldwide military, political, and economic activity).

100. See Lester M. Salamon & John J. Siegfried, *Economic Power and Political Influence: The Impact of Industry Structure on Public Policy*, 71 *AM. POL. SCI. REV.* 1026, 1039 (1977) (discussing “the long-standing argument that antitrust policy is necessary to avoid not just undue concentration of economic power but also threatening concentrations of political power”).

101. See, e.g., Fred S. McChesney & William F. Shughart II, *Preface* to *THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC-CHOICE PERSPECTIVE* ix, x (Fred S. McChesney & William F. Shughart II eds., 1995) (“applying the fundamental assumptions and empirical methods of public choice to the analysis of antitrust”); see also DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 17–19 (1991) (analyzing literature about the influence of special interest groups and concluding “the national political process appears vulnerable on a variety of fronts, including domination largely by narrow economic interests”).

More controversial is the role of antitrust law in combating predatory legislation. Current antitrust doctrine, it would be fair to say, has created a wall of separation between markets and politics in terms of the application of antitrust law.¹⁰² Anticompetitive conduct that occurs through the political process is, for the most part, immunized from antitrust scrutiny.¹⁰³ Since the New Deal, the Supreme Court has recognized that state action, in the form of state legislation or regulation that restrains trade, is immune from antitrust review under the holding of *Parker v. Brown*.¹⁰⁴ Furthermore, lobbying efforts or other conduct in the legislative arena is immunized under the *Noerr–Pennington* doctrine.¹⁰⁵ While there are reasonable justifications for these limitations on the reach of antitrust law, they should be read narrowly and should not be used to immunize agreements to enforce anticompetitive restraints that are imposed legislatively.

Predatory legislation is particularly troublesome in a deregulatory environment where previously regulated actors are actively involved in drafting legislative reform to restructure the marketplace. Telecommunications is a salient example of such restructuring. Recent case law, however, has raised an interesting problem of proving antitrust violations in deregulated markets.¹⁰⁶ First, to the extent that congressional deregulation has itself created some market concentration and has addressed the relevant market conduct, the burden on an antitrust plaintiff to show monopolization has increased because congressional legislation sanctions either some degree of concentration or the conduct that the plaintiff is challenging.¹⁰⁷ While deregulation

102. See generally B. Dan Wood & James E. Anderson, *The Politics of U.S. Antitrust Regulation*, 37 AM. J. POL. SCI. 1, 2 (1993) (showing “that politics, not economics or bureaucracy, is the best explanation for the changing vigor and substance of U.S. antitrust regulation through time”).

103. See Mark A. Perry, *Municipal Supervision and State Action Antitrust Immunity*, 57 U. CHI. L. REV. 1413, 1413 (1990) (noting that the state action doctrine “effectively immunizes anticompetitive conduct by states from federal antitrust liability”).

104. *Parker v. Brown*, 317 U.S. 341, 352, 359 (1943) (holding that a prorate marketing plan, enacted by the California legislature to regulate interstate sale of raisins, was outside the scope of federal antitrust law).

105. See *infra* notes 230–237 and accompanying text (describing the protections offered by the *Noerr–Pennington* doctrine).

106. See, e.g., *Bell Atl. Corp. v. Twombly (Twombly III)*, 127 S. Ct. 1955, 1970, 1974 (2007) (dismissing a complaint alleging that parallel business conduct by telecommunications companies was unfavorable to communication); *Verizon Commc’ns Inc. v. Trinko*, 540 U.S. 398, 415–16 (2004) (finding no antitrust violation in monopolies built out of the prederegulation franchise groups of AT&T).

107. See *infra* notes 130–137, 176–180 and accompanying text (discussing the *Trinko*

does not create immunity, it creates a situation in which a court is deferential to legislative determinations of how to structure a market. Second, the Supreme Court has raised the standard for antitrust pleading under Section 1 of the Sherman Act by requiring the plaintiff to disprove noncollusive explanations of allegedly collaborative behavior.¹⁰⁸ For the purposes of Section 1 cases, congressional regulation may create a market environment in which participants engage in coordinated conduct absent an agreement. Therefore, the deregulated environment itself, as created by Congress, will often offer an alternative explanation for what looks like an anticompetitive agreement. The problem, however, is that the legislation itself may be the agreement among competitors to restrain trade. A more cohesive theory of predatory legislation would elucidate and resolve these dilemmas.

This Section presents a theory of predatory legislation in three parts. First, we define predatory legislation by reference to existing antitrust doctrine. This definition is developed with reference to Cass Sunstein's notion of "incompletely theorized agreements."¹⁰⁹ Second, we develop the theory with respect to a case study involving airline deregulation and the Wright Amendment governing flights from Love Field in Dallas, Texas.¹¹⁰ Third, we conclude our discussion of theory with reference to the recent district court decision involving attempts to appeal the Wright Amendment. The three parts of our analysis provides insights into both the theory and practice of predatory legislation.

A. *Legislation as Agreement*

This Section presents a theoretical structure for understanding legislation as an agreement among competitors that may be actionable under the Sherman Act.¹¹¹ The theory is developed in three parts. First, we show the relationship between markets and politics within antitrust law and its implication for

and *Twombly III* Courts' deference to an industry's regulatory history when assessing an alleged antitrust violation).

108. See *Twombly III*, 127 S. Ct. at 1970 (determining that parallel conduct without proof of agreement between the parties did not violate the Sherman Act).

109. CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 35 (1996).

110. See *infra* Part III.B (discussing *Love Terminal Partners v. City of Dallas (Love Field)*, 527 F. Supp. 2d 538 (N.D. Tex. 2007)); see also *International Air Transportation Competition Act of 1979 (The Wright Amendment)*, Pub. L. No. 96-192, 94 Stat. 35 (1980).

111. Sherman Act, 15 U.S.C. §§ 1-7 (2000 & Supp. IV 2004).

legislation. Second, we show how courts have failed to consider legislation as a type of agreement in deregulatory environments. Finally, we present an approach to treating legislation as an agreement for antitrust purposes. Our goal is to present a theoretical template through which the *Love Field* case study can be understood.

1. *Public Choice Theory and Antitrust Law.* Industry regulation has traditionally garnered special treatment under U.S. antitrust laws.¹¹² Typically, courts have looked to the substantive regulation to find either immunity from antitrust scrutiny or a different standard of review for the challenged conduct.¹¹³ The special treatment for regulated industries reflects, in part, an idealized view of competition as the normative goal of antitrust law.¹¹⁴ Antitrust law's goal is to ensure competition in the marketplace and, specifically, competition based on the provision of price and service through the free entry and exit of firms.¹¹⁵ Some industries, however, cannot meet this idealized vision of competition because of the existence of returns to scale or externalities. In other industries, the idealized model of competition is inconsistent with distributive goals, such as the provision of telecommunications service or necessities like education or housing. Regulatory schemes are implemented to meet goals other than the idealized model of competition and therefore trump antitrust law.

The treatment of regulated industries is consistent with antitrust's scrutiny of politics. Table One summarizes the basic parameters of the relationship between markets and politics within antitrust law. There are two sets of parameters based on the forum in which conduct occurs (market arena or political arena) and the type of actor (private actor or governmental actor). Each cell documents the relevant doctrine, discussed in greater detail below.

112. See generally Wood & Anderson, *supra* note 102, at 36 (suggesting that, after 1980, the Antitrust Division's philosophy toward antitrust enforcement was "consistent with a private interest theory of regulation," as evidenced by its primary emphasis on minor criminal complaints and not on "large-scale merger and monopoly complaints . . . in spite of the fact that the annual number of premerger notifications jumped nearly 300% between 1981 and 1989").

113. See HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 230–37 (2005) (discussing various doctrines of immunity granted by federal or state law).

114. *Id.* at 231.

115. *Id.*

Table 1: Markets and Politics in Antitrust Law

Actor/Forum	Market Arena	Political Arena
Private actor	Antitrust scrutiny	<i>Noerr–Pennington</i> immunity
Governmental actor	State Action Doctrine	No Antitrust Scrutiny

The schema in Table One provides a framework for understanding antitrust doctrine. First, states are largely immunized from antitrust review under the state action doctrine.¹¹⁶ If the state intervenes in the marketplace in a way that promotes an anticompetitive result, either by favoring one industry player over another or by limiting entry, then the anticompetitive state action is immune from scrutiny. Such immunity, originally found for the state level of government, was extended to municipalities and local governments when there was a clear directive from the state to undertake the conduct and the conduct was subject to active supervision by the state. Courts have scrutinized state regulation under antitrust law when the regulatory scheme was not actively supervised and was a veil for a private arrangement among members of industry.¹¹⁷ For example, in *Federal Trade Commission v. Ticor Title Insurance Co.*, the Supreme Court found that state regulation of title insurance was not subject to the state action doctrine because there was no active supervision of the rates by a state actor and, therefore, the rates were set by industry.¹¹⁸

Complementing the state action doctrine are antitrust immunities for citizens engaged in administrative or legislative processes to influence or petition the shape of administrative rules and legislation.¹¹⁹ Such engagement is immunized from antitrust scrutiny unless it is a sham for mere private agreements.¹²⁰ The sham exception is an impossible one to meet,

116. *See id.* at 233–34 (describing the “antitrust state action exemption”).

117. *See, e.g.,* Fed. Trade Comm’n v. Ticor Title Ins. Co., 504 U.S. 621, 632–40 (1992) (describing “[t]he principle of freedom of action for the States” and disallowing protection by the state action doctrine where the state did not actively regulate).

118. *Id.* at 638.

119. *See* HOVENKAMP, *supra* note 113, at 234–35 (discussing the *Noerr–Pennington* doctrine).

120. *Id.* at 235.

and no reported case has found antitrust liability for engaging in what is essentially a political, rather than a market, process.¹²¹ In this way, antitrust law creates a firm wall between politics and the market. Business entities can engage in the political process in pursuit of legislation that may have anticompetitive effects, but this conduct is accepted as the pursuit of one's interest. However, if the same entities pursue the same interests in the marketplace with anticompetitive consequences, then antitrust scrutiny applies.

Liberal theories of antitrust law might support skepticism of reduced antitrust scrutiny of the political process.¹²² If antitrust law is concerned with the harmful effects of the concentration of wealth, then the case could be made for the use of antitrust law to strike down uses of administrative and legislative processes that are harmful to market competition. But liberal theories would ultimately not support engaging antitrust scrutiny in this way. Politics and markets are separate arenas under liberal theory. If there is a danger that expansive market concentration may have adverse consequences on governmental processes, then the solution is to reduce market concentration and conduct in restraint of trade in the marketplace, which is the root of the problem.

While current antitrust doctrine is consistent with the separation of markets and politics derived from liberal political theory, a critique of current doctrine, as well as liberal political theory, stems from public choice theory.¹²³ Like liberal theory, public choice theory recognizes that economic interests can inform political processes.¹²⁴ Unlike liberal theory, public choice

121. See generally William M. Sage & Peter J. Hammer, *A Copernican View of Health Care Antitrust*, 65 LAW & CONTEMP. PROBS. 241, 285–86 (2002) (stating the Supreme Court has narrowly construed this doctrine, making it “virtually impossible” for a plaintiff to succeed).

122. See *supra* note 99 and accompanying text (discussing impact of special interests on the political process).

123. See McChesney & Shughart, *supra* note 101, at x (“applying the fundamental assumptions and empirical methods of public choice to the analysis of antitrust” to “dispel the naïve view that antitrust is the bulwark of free markets” and concluding that “antitrust enforcement is shaped largely by private interests and not by the public interest”); Wood & Anderson, *supra* note 102, at 2 (showing “that politics, not economics or bureaucracy, is the best explanation for the changing vigor and substance of U.S. antitrust regulation through time”).

124. See William F. Shughart II, *Public-Choice Theory and Antitrust Policy*, in THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC-CHOICE PERSPECTIVE, *supra* note 101, at 7, 11 (“To public-choice scholars, economic markets and political markets are one and the same in the sense that the individuals who interact in these markets are

theory promotes skepticism of public interest legislation.¹²⁵ Under the terms of public choice theory, all regulatory schemes are protecting the interests of certain economic groups and spreading the costs and burdens on other groups.¹²⁶ Courts, therefore, should scrutinize legislation to ensure that its benefits and costs are properly aligned.¹²⁷ What this proposition means in practice, however, is controversial. One strand of public choice theory would support aggressive judicial intervention into regulatory schemes in order to curb capture of the legislative process by strong political interest groups.¹²⁸ Another strand, by contrast, would guide courts to interpret regulatory statutes in a way that preserves the bargain among various interest groups.¹²⁹ Either strand endorses a less deferential approach than traditional liberal political theory and a different balance between politics and markets.

When applied to antitrust law, each strand of public choice theory leads to different recommendations. The aggressive approach would lead to an overruling of the state action doctrine and of the immunity for legislative and administrative politicking. But, as a practical matter, such an aggressive approach would lead to excessive litigation and potential confusion in the current case law. Consequently, we have tended to see a much more moderate application of public choice theory in the area of antitrust law. There have been some cases in which courts have applied antitrust law to state regulation on the grounds that the state action doctrine did not apply. More rarely have courts allowed successful antitrust claims based on engagement in administrative and legislative processes.

The Supreme Court's decision in *Verizon Communications Inc. v. Trinko* provides a good example of the soft approach

motivated by similar goals and their behavior can be analyzed with the same set of tools.”).

125. *Id.* at 14 (“Some may find the idea of the ‘public interest’ itself either incoherent or a tyrannical imposition upon dissenters.”).

126. *See* McChesney & Shughart, *supra* note 101, at x (describing antitrust regulation as favoring special interests at the taxpayers’ expense).

127. *See generally* Paul L. Joskow, *Transaction Cost Economics, Antitrust Rules, and Remedies*, 18 J.L. ECON. & ORG. 95, 95–96 (2002) (outlining obstacles that antitrust legislation must acknowledge in order to balance benefits of legislation with costs of regulation).

128. *See* FARBER & FRICKEY, *supra* note 101, at 13–17 (discussing the scope of judicial intervention in legislative processes that are affected by special interest groups).

129. *Id.*

derived from public choice theory.¹³⁰ In *Trinko*, the Court was reviewing an antitrust claim of monopolization brought against a telephone company for failure to cooperate with a potential competitor in the provision of service.¹³¹ The plaintiff argued in part that such cooperation was required under the Telecommunications Act of 1996, an important piece of legislation in the deregulation of the telecommunications industry.¹³² The Court rejected the antitrust claim, providing the following analysis:

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.¹³³

The Court was clear that its conclusion did not rest on either express or implied immunity.¹³⁴ The existence of an antitrust savings clause in the regulation precluded a finding based on immunity.¹³⁵ Instead, the Court deferred to a regulatory scheme that it saw as complementary to the goals of antitrust law in combating anticompetitive conduct.¹³⁶ Within the language of the soft version of public choice theory, the Court was enforcing the bargain struck among the regulated parties and Congress in the regulatory scheme.¹³⁷

In conclusion, antitrust doctrine has traditionally adopted a separation between politics and markets. While this separation has been subject to criticism, it has continued, with conduct proscribed by regulation, as largely immune from antitrust review. More importantly, for the purposes of this Article, the separation between politics and markets continues in the courts'

130. See *Verizon Commc'ns Inc. v. Trinko*, 540 U.S. 398 (2004).

131. *Id.* at 404–05.

132. *Id.* at 405.

133. *Id.* at 411–12.

134. *Id.* at 406.

135. *Id.*

136. See *id.* at 411 (citing the 1996 Act as providing states with the power to enforce the essential facilities doctrine).

137. Cf. John T. Delacourt & Todd J. Zywicki, *The FTC and State Action: Evolving Views on the Proper Role of Government*, 72 ANTITRUST L.J. 1075, 1082 (2005) (describing the soft version of public choice theory, described as being a “more incentive-oriented and skeptical approach”).

analysis of agreements arising in the context of a regulatory scheme, the subject of the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*¹³⁸ and the focus of the next subsection.

2. *Enter Twombly and the Heightened Pleading Standard.* Twombly—the named plaintiff in a class of all users of telephone and Internet services in the continental United States—brought an antitrust suit against Bell Atlantic Company and three other regional telephone carriers.¹³⁹ The complaint alleged a conspiracy to restrict entry and foreclose competition in regional telecommunication markets throughout the continental United States.¹⁴⁰ The district court dismissed the complaint for failure to state a claim.¹⁴¹ The court held that the plaintiffs failed to make specific allegations that would show that the carriers acted in concert, rather than out of individual self-interest.¹⁴² The U.S. Court of Appeals for the Second Circuit reversed, holding that the standard for dismissal is only met if there could be no set of facts to support the allegations made in the complaint.¹⁴³ Bell Atlantic appealed to the U.S. Supreme Court on the grounds that the Second Circuit had misapplied the standard for dismissal for failure to state a claim of antitrust conspiracy.¹⁴⁴ The Supreme Court reversed.¹⁴⁵

The facts of this case are part of the longer saga of telecommunications deregulation, which started with the divestiture of AT&T in 1984 into regional telephone carriers and the debundling of local and long-distance services.¹⁴⁶ Under the

138. *Bell Atl. Corp. v. Twombly (Twombly III)*, 127 S. Ct. 1955, 1972 (2007) (looking at the history of the market in analyzing the sufficiency of the pleadings).

139. *Id.* at 1962 (naming the four regional telephone carriers included in the suit as Bell-South Corporation, Quest Communications International, Inc., SBC Communications, Inc., and Verizon Communications, Inc.).

140. *Id.* (claiming ILECs engaged in conduct to “inhibit the growth of upstart CLECs” and entered into agreements with other ILECS to “refrain from competing with each other”).

141. *Twombly v. Bell Atl. Corp. (Twombly I)*, 313 F. Supp. 2d 174, 176 (S.D.N.Y. 2003), *rev'd*, 425 F.3d 99 (2d Cir. 2005), *rev'd*, 127 S. Ct. 1955 (2007).

142. *Twombly III*, 127 S. Ct. at 1963 n.144.

143. *Twombly v. Bell Atl. Corp. (Twombly II)*, 425 F.3d 99, 118–19 (2d Cir. 2005), *rev'd*, 127 S. Ct. 1955 (2007).

144. Petition for a Writ of Certiorari at 1, *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007) (No. 05-1126).

145. *Twombly III*, 127 S. Ct. at 1974.

146. For background on telecommunications regulation and deregulation, see generally RICHARD H.K. VIETOR, *CONTRIVED COMPETITION: REGULATION AND DEREGULATION IN AMERICA* 167–233 (1994).

terms of the divestiture, seven regional carriers would provide local telephone service, subject to state regulations and franchising that limited entry.¹⁴⁷ Long-distance service, however, would be provided on a competitive basis.¹⁴⁸ Since 1982, restructuring of the telecommunications industry and advances in technology precipitated the Telecommunications Act of 1996, which allowed regional carriers to provide long-distance service in exchange for competition for regional service.¹⁴⁹ The terms of the Telecommunications Act of 1996 also imposed obligations on regional carriers to share aspects of their network with new entrants.¹⁵⁰ In addition, mergers had transformed the seven regional carriers into the four remaining carriers that were the defendants in this suit.¹⁵¹ The new regulatory environment created competitive tensions between incumbent local exchange carriers (ILECs) and competitive local exchange carriers (CLECs).¹⁵² These tensions gave rise to antitrust concerns that incumbents were engaged in anticompetitive conduct.¹⁵³ The current case is the most recent example of such concerns.

Twombly initially brought a claim of monopolization under Section 2 of the Sherman Act against ILECs in 2003.¹⁵⁴ After the Supreme Court ruled in 2004 that the Telecommunications Act of 1996 did not permit monopolization claims in *Trinko*,¹⁵⁵ Twombly abandoned his 2003 complaint and pursued the claim of a conspiracy to restrict entry under Section 1 of the Sherman Act that is at issue in this case.¹⁵⁶ The complaint alleged a conspiracy on “information and belief” based on lack of competition in the marketplace and parallel conduct among the incumbent carriers that the defendants had entered into an agreement to restrict entry into the marketplace.¹⁵⁷ The complaint also alleged that competition is possible in the marketplace and that the benefits of competition

147. *Id.* at 211–20.

148. *Id.* at 211–12.

149. 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).

150. *Id.*

151. See Joseph D. Kearny, *Will the FCC Go the Way of the ICC?*, 71 U. COLO. L. REV. 1153, 1183 (2000) (discussing the merger of the large local exchange carriers).

152. *Bell Atl. Corp. v. Twombly (Twombly III)*, 127 S. Ct. 1955, 1961–62 (2007).

153. *Id.* at 1962.

154. *Twombly v. Bell Atl. Corp. (Twombly II)*, 425 F.3d 99, 102–03 (2d Cir. 2005), *rev'd*, 127 S. Ct. 1995 (2007).

155. *Verizon Commc'ns Inc. v. Trinko*, 540 U.S. 398, 415 (2004).

156. *Twombly III*, 127 S. Ct. at 1962.

157. *Id.* at 1962–63.

would be revealed if defendants had not imposed barriers to entry.¹⁵⁸ Furthermore, the plaintiffs alleged that the structure of the industry and the marketplace permitted an anticompetitive agreement to be effective.¹⁵⁹ The complaint noted that the incumbents failed to compete with other incumbents in their regional market, suggesting the existence of an agreement.¹⁶⁰

At issue in this case was whether the district court properly dismissed Twombly's complaint for failure to state a claim under Federal Rule of Civil Procedure Rule 12(b)(6).¹⁶¹ The district court held that, under Federal Rule of Civil Procedure Rule 8(a), the plaintiffs must allege facts that, drawing all inferences in favor of the plaintiff, would establish the existence of an agreement.¹⁶² An antitrust plaintiff, according to the district court, cannot simply make a "bare bones" allegation of a conspiracy.¹⁶³ Instead, a plaintiff must allege facts that, given the nature of the market, render the defendants' parallel conduct and the resultant state of the market suspicious enough to suggest that the defendants are acting pursuant to a mutual agreement rather than their individual self-interest.¹⁶⁴ The district court concluded that, because it is within the self-interest of each incumbent to stave off competition, the absence of competition is not necessarily the result of an agreement.¹⁶⁵ In addition, the failure of incumbents to enter into the regional markets of other incumbents, in general, might suggest an agreement.¹⁶⁶ But the district court, reviewing the history of telecommunications deregulation, concluded that the absence of competition was the result of the structure of the industry, particularly the creation of regional carriers, rather than the result of an agreement.¹⁶⁷

The U.S. Court of Appeals for the Second Circuit reversed, finding that the district court had applied the incorrect standard for dismissal.¹⁶⁸ According to the Second Circuit, a bald assertion

158. *Id.* at 1972.

159. *Id.* at 1962–63.

160. *Id.*

161. *Id.* at 1963.

162. *Id.*; see also *Twombly v. Bell Atl. Corp. (Twombly I)*, 313 F. Supp. 2d 174, 180 (S.D.N.Y. 2003), *rev'd*, 425 F.3d 99 (2d Cir. 2005), *rev'd*, 127 S. Ct. 1955 (2007).

163. *Twombly I*, 313 F. Supp. 2d at 180.

164. *Id.* at 179.

165. *Id.* at 188–89.

166. *Id.* at 188.

167. *Id.* at 182–83.

168. *Twombly v. Bell Atl. Corp. (Twombly II)*, 425 F.3d 99, 102 (2d Cir. 2005), *rev'd*,

of conspiracy coupled with allegations of parallel conduct was sufficient to state a claim under the Federal Rules of Civil Procedure.¹⁶⁹ To dismiss a complaint for antitrust conspiracy, a district court would have to find that there are “no set of facts” that would allow the plaintiff to prove that the parallel conduct was the product of an agreement rather than coincidence.¹⁷⁰ In light of this standard, the Second Circuit did not need to address the district court’s analysis that the parallel conduct could be the result of self-interest, rather than agreement.¹⁷¹ Furthermore, the Second Circuit noted that the plaintiff had presented the temporal and geographic boundaries of the alleged conspiracy and had identified the key participants.¹⁷² This was sufficient, according to the court of appeals, to state a claim even though specific instances of conspiratorial conduct had not been identified.¹⁷³ The Second Circuit concluded that a difficult balance must be struck between giving the plaintiff access to the courts and the burdens on the defendants and the courts created by the discovery process and the manner in which business is conducted.¹⁷⁴ But the Second Circuit stated that, if that balance is to be struck differently, it is up to Congress or the Supreme Court.¹⁷⁵

The Supreme Court responded by arguably striking a new balance for the pleading requirements under Rule 12(b)(6). In reversing the Second Circuit, the Court demanded more of the plaintiff in stating a claim for an agreement in restraint of trade.¹⁷⁶ Relevant to our argument here, the Court expressly relied on the regulatory history of the industry in assessing the adequacy of the pleadings:

[Twombly’s complaint] was not suggestive of conspiracy, not if history teaches anything. 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

127 S. Ct. 1995 (2007).

169. *Id.* at 117–19.

170. *Id.* at 114.

171. *See id.* at 119 (declining to comment on the merits of plaintiff’s case).

172. *Id.* at 117.

173. *Id.* at 117–19.

174. *Id.* at 117.

175. *Id.*

176. *Bell Atl. Corp. v. Twombly (Twombly III)*, 127 S. Ct. 1955, 1970–74 (2007).

explanation. In the decade preceding the 1996 Act and well before that, monopoly was the norm in telecommunications, not the exception.¹⁷⁷

Hence, the Court goes on, the lack of entry into a neighbor's market is consistent with the regional Bells accepting the status quo before the 1996 Act and does not necessarily provide a basis to claim an agreement as required under Section 1.¹⁷⁸ In effect, the Court adopts the district court's view of the pleadings: if there is an explanation of the pleaded facts consistent with unilateral action, then the Section 1 claim is dismissed.¹⁷⁹ In *Twombly's* case, the explanation rested in the fact that the industry was structured as regional monopolies prior to 1996; the persistence of that structure was an alternative explanation to an agreement not to compete for why one regional company did not operate in another's territory.¹⁸⁰

We have discussed the *Twombly* case in detail here to emphasize the heightened pleading requirement the Supreme Court's decision has imposed in a Section 1 case. At one level, the outcome is consistent with the treatment of coordinated conduct in other areas of antitrust law. Just because firms concurrently follow the same conduct does not mean that they have entered into a conspiracy, contract, or some other type of agreement. For example, in a competitive market, all firms may end up setting the same price for an identical product or service. But this coordination does not mean that the firms have agreed to fix prices. At another level, the decision in *Twombly* demonstrates strong deference to regulated markets. If conduct is consistent with the history of a regulated industry and the structure of that regulation provides an alternative basis to explain the coordinated conduct, then a plaintiff has failed to establish an agreement. It is this implication of the opinion that is troubling.

The problem is that the Court's reasoning readily leads to the result that once a particular practice has been proscribed by a regulatory scheme, the regulatory scheme serves as an alternative explanation to an agreement in restraint of trade. Not only does this reasoning potentially fix an industry structure within the proscribed regulatory framework, but it also ignores

177. *Id.* at 1972.

178. *Id.* at 1960, 1972.

179. *Id.* at 1960, 1973.

180. *Id.* at 1972.

the lesson that the regulatory scheme might itself be the result of a bargain among the regulated entities and the regulator. Needless to say, one needs to be careful about this point. The lesson is not that all legislation is a conspiracy. That conclusion would push towards the extreme public choice perspective, which is suspect. Rather, the point is that the Court's deference to the regulation as an alternative explanation to an agreement ignores the possibility that the regulation itself may be the product of an agreement within the industry.

There are a few implications of this argument. First, to consider the regulation itself as an agreement is not to contradict the traditional immunity given to involvement in administrative and legislative processes that are anticompetitive. The point is not to hold members of the industry liable for being involved in the construction of the regulation. Rather, the point is to question the reliance on a regulatory scheme as an alternative explanation to the existence of an agreement. Second, we are not suggesting that the plaintiff need only point to the existence of a regulation to plead the existence of an agreement. We are questioning the use of a regulatory scheme as a means to defeat the existence of an agreement and not suggesting a regulatory scheme should be used in an affirmative way.

In light of this argument, the Court should have been less deferential to a regulatory scheme in assessing the adequacy of a pleading in the context of a Section 1 claim. If in fact the regulation was the product of negotiation among the regulated entities and the regulator, which it very likely was, the Court should have been more deferential to the plaintiff in letting the case proceed beyond the Rule 12(b)(6) stage. The Second Circuit had the better approach in this regard by allowing allegations of coordinated conduct and conspiracy to meet the pleading requirement. The only caveat we would add to the Second Circuit's approach is to place the dispute in the context of a regulated industry in which there had been much negotiation over time in determining the structure of regulation. In such a situation, certainly the Court's approach of deference would not be appropriate, and the Second Circuit's liberal standard would be.

With this discussion of the treatment of regulated industries under antitrust law as background, we complete our discussion of the theory of predatory legislation in the next Section with reference to Professor Cass Sunstein's notion of partially theorized agreements.

3. *Understanding Legislation as an Agreement.* The concept of predatory legislation is understood against the background of the antitrust treatment of politics and markets. We have made the case that, while the separation of politics and markets is understandable, this separation should not blind courts to the use of legislation for anticompetitive purposes.¹⁸¹ The strong version of public choice theory would lead to judicial intervention that is overly aggressive and not appropriately deferential to legislative processes. From this perspective, liberal theory is correct that antitrust law should be focused on anticompetitive conduct in the market arena rather than be aimed at policing legislative and administrative processes. Recent Supreme Court opinions are consistent with a mild form of public choice theory, which would be deferential to regulation in order to enforce the bargain among regulated entities and regulators.¹⁸² Our theory of predatory legislation, however, is skeptical of this milder version of public choice theory in action. Our point is that courts should be aware that regulation itself is an agreement among regulated entities and regulators and, therefore, should not be deferential to regulatory schemes. Instead, contra the result in *Twombly*, a court should apply antitrust scrutiny to regulated industries and not defer to congressional judgments about competition. In order to maneuver between the strong and mild versions of public choice theory, we turn to Professor Sunstein's theory of incompletely theorized agreements.¹⁸³

The concept of incompletely theorized agreements is used to explain how actors (judges, legislators, writers of constitutions) can reconcile their varied political convictions under the canvass of law.¹⁸⁴ In drafting various legal texts and designing legal institutions, actors are forced to compromise if the goal is to build and design cohesive and workable systems.¹⁸⁵ But compromise

181. See *supra* text accompanying notes 102–30 (explaining the “wall of separation between markets and politics” and its role in predatory legislation).

182. See *supra* text accompanying notes 130–36 (discussing *Verizon Commc'ns, Inc. v. Trinko*, a case that takes a “soft approach” to public choice theory).

183. See SUNSTEIN, *supra* note 109, at 35–61 (dedicating a chapter to “Incompletely Theorized Agreements”).

184. See *id.* at 35–36 (explaining how constitutions, for example, “include many abstract provisions” in order to avoid dealing with the disputes that specifying rights would create).

185. See *id.* at 36 (stating that incompletely specified agreements have many practical advantages, including “allow[ing] people to develop frameworks for decisions and judgments despite large-scale disagreements”).

entails more than just trading various commitments in order to reach an acceptable, majoritarian solution. Vagueness, openness, and ambiguity will often be built into legal doctrines and texts to recognize that parties agree to disagree.¹⁸⁶ Such openness in texts is not a failure or the result of “passing the buck” to some other entity (e.g., the court, the market) or to future generations, but instead a deliberate choice to permit play and fluidity in the implementation and evolution of the rule of law.¹⁸⁷ Examples of incompletely theorized agreements can be found in the use of broad language, such as “due process” in constitutions, multifaceted balancing tests in statutes, and in the structure of regulation.¹⁸⁸

Professor Sunstein provides two examples of incompletely theorized agreements in regulation. The first is the use of private incentives in environmental or telecommunications regulation.¹⁸⁹ Instead of commanding particular outcomes, regulations can be written to create incentives to alter behavior that may lead toward the desired equilibrium outcome.¹⁹⁰ The use of incentives may lead to unexpected outcomes or to a gradual transition to the desired regulatory result that a direct, command approach would otherwise be less successful in securing.¹⁹¹ A second example is the use of—what I would describe as—market mimicking regulations that attempt to implement a desired outcome through trade among regulated entities. Markets for tradable pollution rights and auctions for broadcast rights are examples of constructing markets to supplement administrative

186. *See id.* (explaining that incompletely specified agreements are frequently built into constitutions and have “the advantage of allowing people to show one another a high degree of mutual respect”).

187. *See id.* (“By refusing to settle concrete cases that raise fundamental issues of conscience, they permit citizens to announce to one another that society shall not take sides . . . until required to do so.”).

188. *See id.* at 36 (describing the legislature’s use of incompletely specified agreements in drafting regulations).

189. *Id.* at 159–60.

190. *See id.* at 159–61 (explaining, for example, that environmental laws could be drafted to create incentives for pollution reduction instead of imposing taxes and fees on companies).

191. *See id.* at 158–59 (arguing for the use of privately adoptable rules as opposed to rules that specify end-states); *see also* CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 294 (1997) (advocating “a system that is entirely unembarrassed by the use of government to reflect democratic aspirations, to promote economic welfare, and to foster distributional equity, while at the same time insisting on strategies that embody the flexibility, adaptability, productive potential, and decentralization characteristic of private markets”).

regulation.¹⁹² In both examples, private orderings and transactions are tapped in order to create additional regulatory institutions that aid administrative agencies in furthering their regulatory mandate.¹⁹³ Put another way, a market is being used as a tool of regulation.

Although Professor Sunstein does not apply his theory of incompletely theorized agreements to antitrust law, the treatment of regulated industries under antitrust law demonstrates the theory's applicability. Industry regulation is often the compromise of many interested parties and not simply the command of the legislature. As a compromise, regulation should be understood as an agreement on how to allocate rights and obligations among the set of interested parties. The agreement may also defer final action to certain key decisions and confer tacit authority on other institutions to fill in the gaps. In the case of regulated industries, especially in a deregulated environment, the "other institution" will often be private market decisionmakers. For example, the Telecommunications Act of 1996 imposed must-carry obligations on cable providers to include broadcast channels in their menu of options.¹⁹⁴ These must-carry obligations are met through negotiations among cable providers and broadcast channels to determine the contract terms on which the broadcast channels will be carried.¹⁹⁵ Furthermore, these obligations are complemented by the compulsory licensing provisions of the Copyright Act of 1976, which requires broadcast companies to license their copyrighted materials to cable providers.¹⁹⁶ This web of regulations, in short, creates a market which carries out an essentially regulatory function to manage the relationship between broadcast and cable television.

The concept of incompletely theorized agreements complements our theory of predatory legislation in two ways. First, Professor Sunstein's notion underscores our point that regulations are a type of agreement. Second, the notion suggests how purely private decisionmaking, what can be referred to quite

192. SUNSTEIN, *supra* note 109, at 160–61.

193. *Id.* at 160.

194. Telecommunications Act of 1996, Pub. L. No. 104-104, § 653(b)(1); 110 Stat. 56, 122 (codified at 47 U.S.C. § 573(b)(1) (2000)).

195. Telecommunications Act of 1996, Pub. L. No. 104-104, § 653(b)(2); 110 Stat. 56, 123 (codified at 47 U.S.C. § 573(b)(2) (2000)).

196. Copyright Act of 1976, Pub. L. No. 94-553, § 111(d), 90 Stat. 2541, 2553–55 (codified as amended at 17 U.S.C. § 111(d) (2000)).

broadly as “the market,” can be the product of a regulatory decision. Put starkly, the market institution is a type of regulatory institution. Consequently, it is problematic to conclude that antitrust law need defer to how Congress has constructed competition through alternative regulatory schemes as the Supreme Court seems to have done in *Trinko* and *Twombly*. More to the point, the regulation may be part of the industry agreement in restraint of trade. Therefore, it is even more problematic for a court to defer to a regulatory scheme as an alternative explanation for an agreement in restraint of trade, as the Supreme Court expressly did in *Twombly*. To emphasize, we are not suggesting that a regulatory scheme should suffice as proof of an agreement in restraint of trade under Section 1 of the Sherman Act.¹⁹⁷ Instead, we are questioning the Court’s marked deference to Congress’s view of competition. With this theoretical understanding, we now proceed to a case study of *Love Field*¹⁹⁸ as an illustration of predatory legislation.

B. *The Love Field Case Study*

Our case study is divided into two parts. We first present the background to the *Love Field* dispute in the Airline Deregulation Act of 1978 and describe the dispute over “freeing Love Field” that resulted in the 2007 district court decision. We then provide a legal analysis of the 2007 dispute and decision.

1. *Freeing Love Field?*¹⁹⁹ Two background events inform our *Love Field* case study. The first is the Airline Deregulation Act of 1978, enacted by Congress to dismantle a half-century old system of airline regulation and replace it with a market-based system.²⁰⁰ The second is the construction of the DFW International Airport, located between the twin cities of Dallas and Fort Worth, which opened for commercial service in 1974.²⁰¹ The DFW International Airport was a half-century project that came into fruition in the

197. See Sherman Act, 15 U.S.C. § 1 (2000 & Supp. IV 2004) (prohibiting agreements “in restraint of trade or commerce”).

198. *Love Terminal Partners v. City of Dallas (Love Field)*, 527 F. Supp. 2d 538 (N.D. Tex. 2007).

199. The facts are drawn from *Love Field. Id.* at 543–46.

200. See *id.* at 544 (discussing the 1978 Airline Deregulation Act and the subsequent Wright Amendment); VIETOR, *supra* note 146, at 57–61 (noting the purpose of the Airline Deregulation Act and describing the pressures in the market following deregulation).

201. See Carol Marie Cropper, *Dallas and Fort Worth in Airport Showdown*, N.Y. TIMES, Dec. 1, 1997, at A14 (describing the development of DFW International Airport).

1960s as part of an agreement between Dallas and Fort Worth, under which the respective cities would close their municipal airports for interstate commercial service.²⁰² However, in 1979, Southwest Airlines announced plans to offer service to New Orleans from Love Field in Dallas, its base of operations for intrastate service since 1971.²⁰³ This business plan precipitated Representative Jim Wright of Fort Worth to sponsor an amendment to the International Air Transportation and Competition Act of 1979 to ban all interstate flights from Love Field.²⁰⁴ The result was the Wright Amendment of 1979, which restricted interstate service from Love Field to four contiguous states (Louisiana, Arkansas, Oklahoma, and New Mexico).²⁰⁵

Since 1979, the Wright Amendment itself has been amended twice to allow service to nine neighboring states.²⁰⁶ In 1997, Congress enacted the Shelby Amendment to allow unrestricted flights to and from Love Field via certain smaller commercial aircraft.²⁰⁷ This Amendment was passed as Legend Airlines expressed interest to provide air service from Love Field.²⁰⁸ In 1999, additional terminal space was constructed at Love Field by Love Terminal Partners and Virginia Aerospace and licensed to Legend Airlines.²⁰⁹ But the fledgling airlines' plans were foiled because of litigation brought by the City of Fort Worth and American Airlines (headquartered in Fort Worth) seeking to enjoin enforcement of the Shelby Amendment.²¹⁰ Legend consequently filed for bankruptcy in 2000, and the additional terminal space reverted back to the original owners, who entered into negotiations with Pinnacle Airlines in 2006 for use of the space.²¹¹

202. *Id.*; see also History of DFW Airport, <http://www.dfwairport.com/visitor/history.htm> (last visited Apr. 11, 2008) (noting that the proposal for a joint airport occurred in 1927 and land for the airport was purchased by the late 1960s).

203. *Love Field*, 527 F. Supp. 2d at 544; see also Dallas Love Field Chronology of Events (1917–Present), <http://www.dallas-lovefield.com/lovenotes/lovechrono.html> (last visited Apr. 11, 2008).

204. *Id.*; see Robin Toner, *Texans' Acts Show They Want Wright to Stay On*, N.Y. TIMES, June 20, 1989, at A19 (discussing Wright's continued representation of Fort Worth as a congressman).

205. *Love Field*, 527 F. Supp. 2d at 544.

206. *Id.*

207. *Id.* For codification, see Shelby Amendment, Pub. L. No. 105-66, § 337, 111 Stat. 1425, 1447 (1997).

208. *Love Field*, 527 F. Supp. 2d at 544.

209. *Id.*

210. *Id.*

211. *Id.*

Responding to consumer pressure, several bills were introduced in Congress in 2005 seeking outright repeal of, or modifications to, the Wright Amendment.²¹² While Southwest Airlines supported these measures, American Airlines lobbied for continuation—or expansion—of the Wright Amendment.²¹³ In 2006, “members of Congress suggested that Dallas and Fort Worth jointly propose a solution to the Wright Amendment,” and both cities passed resolutions asking Congress not to act until late summer 2006.²¹⁴ Starting in August 2005 and continuing through 2006, Southwest Airlines, American Airlines, DFW International Airport, the City of Dallas, and the City of Fort Worth engaged in varied negotiations to resolve the Wright Amendment issue.²¹⁵ These negotiations resulted in the issue of a joint statement by these parties in June 2006, which was followed by orders from the Dallas City Council and the Fort Worth City Council authorizing execution of a contract among these parties regarding the Wright Amendment.²¹⁶ Pursuant to these orders, the parties executed a contract on July 11, 2006, that memorialized the items from the June joint statement.²¹⁷ These items are analyzed in the next subsection and became the basis for the antitrust suit filed against Southwest Airlines, American Airlines, DFW International Airport Board, the City of Dallas, and the City of Fort Worth by Love Terminal Partners and Virginia Aerospace, dismissed by the district court on October 31, 2007.²¹⁸ Many of the provisions of the contract, except for the provision on antitrust immunity, were enacted as Senate Bill S. 3661 (“The Reform Act”) in September 2006 and signed into law by the President in October 2006.²¹⁹

The contract and subsequent Reform Act had specific provisions intended to limit the impact of the Wright Amendment.²²⁰ Through ticketing from Love Field was permitted for travel to all fifty states or any foreign destination as long as

212. *Id.*

213. *Id.* at 544–45.

214. *Id.* at 545.

215. *Id.*

216. *Id.*

217. *Id.*

218. *See id.* at 543 (stating that plaintiff’s suit is based on defendants’ conduct prior to and pursuant to the Reform Act).

219. *Id.* at 545, 547.

220. *See id.* 545–47 (detailing the pertinent provisions of the contract and the Reform Act).

one stop was made in Texas, New Mexico, Oklahoma, Kansas, Arkansas, Louisiana, Mississippi, Missouri, or Alabama.²²¹ Permitting through ticketing eliminated the need to buy two separate tickets and recheck one's luggage for connections from one of the neighboring states covered by the Wright Amendment.²²² Furthermore, the Reform Act, following one of the provisions of the contract, would repeal the Wright Amendment eight years after the Act was enacted.²²³ Specifically, the contract spoke to the issue of Southwest and American Airlines providing service out of DFW International Airport and Love Field, respectively.²²⁴ Under the terms of the contract, American and Southwest Airlines must relinquish one gate at Love Field for every new gate opened within eighty miles of Love Field with up to a total of eight gates for Southwest and one and one-half gates for American.²²⁵ Furthermore, either American or Southwest Airlines can take a forfeited gate if another carrier does not take the gate.²²⁶ More controversially, the Reform Act, pursuant to the contract, mandated that the City of Dallas reduce the number of gates at Love Field to a maximum of twenty, and gave the City "authority to 'determine the allocation of leased gates and manage Love Field in accordance with contractual rights and obligations existing as of the effective date of [the] Act for . . . air carriers providing . . . service at Love Field on July 11, 2006.'"²²⁷ In October 2006, the Dallas City Council voted to use its eminent domain power to condemn the unused gates at Love Field that had been built for Legend Airlines.²²⁸ What this brief history shows is that airline regulation has shifted to the state and municipal level and that regulation is the product of compromise and agreement among regulated entities and regulators. In the next subsection, we show how antitrust scrutiny should be applied to these facts. To look ahead to the conclusion, the

221. *Id.* at 547.

222. *See id.* ("[T]he Reform Act allows immediate through service and ticketing to or from Love Field to all 50 states or any foreign destination . . ."); *see also* Paul J. Gessing, *Re-Deregulate the Airlines*, NAT'L REV. ONLINE, Aug. 15, 2005, http://www.nationalreview.com/nrof_comment/gessing200508150848.asp (describing the ticketing and baggage checking system at Love Field prior to the Reform Act).

223. *Love Field*, 527 F. Supp. 2d at 547.

224. *Id.* at 545.

225. *Id.* at 546.

226. *Id.*

227. *Id.* at 547.

228. *See* David Wethe, *Council Votes to Condemn Terminal*, FORT WORTH STAR-TELEGRAM, Oct. 19, 2006, at C2 (discussing the Dallas City Council's decision).

district court for the Northern District of Texas dismissed the antitrust claims, following the *Twombly* decision on the analysis of agreement.²²⁹ Under our analysis, however, the *Love Field* case study offers a clear example of what is wrong with *Twombly* and illustrates the need for our theory of predatory legislation as a solution.

2. *Analysis of State Level Deregulation.* This Section presents the case against immunity for the agreement among the airlines and the cities in fashioning state-level deregulation. Even though the district court rejected many of the arguments presented in this Section, these arguments are discussed in order to better understand the logic and scope of the district court's analysis. We make two points here: (1) traditional immunity under *Noerr–Pennington* and *Parker* does not apply to the efforts to free Love Field, and (2) the state-level deregulation should itself be understood as an agreement in restraint of trade. The first point is made in two parts; the second is presented at the end of this subsection.

a. The Inapplicability of Petitioning Immunity. While petitioning of a governmental body to enact legislation that has anticompetitive effect is immunized from antitrust laws by the *Noerr–Pennington* doctrine,²³⁰ the actions of Southwest and American Airlines go beyond the scope of this immunity. Therefore, the grant of statutory immunity would be inconsistent with well-established notions, developed through forty years of Supreme Court precedent, on the scope of antitrust immunity for private influence on the enactment of legislation.

The *Noerr–Pennington* doctrine originated in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*²³¹ In *Noerr*, a trade association for truckers alleged that the campaign by a railroad trade association to promote extensive regulation of the trucking industry and to create a negative public perception of trucking violated antitrust laws.²³² The railroad's campaign at

229. *Love Field*, 527 F. Supp. 2d at 560–61.

230. *See 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))).

231. *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

232. *Id.* at 129.

issue included planting negative publicity about the truckers in the press and lobbying the Governor of Pennsylvania to veto a bill favorable to truckers.²³³ The Supreme Court unanimously held “that no violation of the [Sherman] Act can be predicated on mere attempts to influence the passage or enforcement of laws.”²³⁴ The holding of *Noerr* was affirmed by the Supreme Court four years later in *United Mine Workers of America v. Pennington*.²³⁵ In a cross-claim, small coal mine operators brought an antitrust challenge against the coal miner’s union, alleging that there was an industry-wide collective bargaining agreement, which included petitioning the Secretary of Labor to enact minimum wage regulations for contractors selling coal to the Tennessee Valley Authority (TVA).²³⁶ The Court, reversing a jury finding of an antitrust violation, stated that “[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.”²³⁷

The activities of Southwest and American Airlines in negotiating and entering into the contract with the Cities of Dallas and Fort Worth and the DFW International Airport Board are not protected by the *Noerr–Pennington* doctrine for two reasons. First, the factual situations at issue in *Noerr* and *Pennington* are different from those posed by the enactment of the contract. Second, the policy justifications for the *Noerr–Pennington* doctrine are not present in the contract among the two private airlines and the three governmental entities.

Factually, both the *Noerr* and *Pennington* cases are distinguishable. The conduct of Southwest and American Airlines went beyond the petitioning of government that was at issue in *Noerr*. As the Court made clear, petitioning in favor of legislation is protected by the Bill of Rights and, therefore, must be given special protection from antitrust liability.²³⁸ In contrast to the actions of the trucking association in *Noerr*, Southwest and American Airlines have not simply petitioned for the enactment of favorable legislation; rather, they have entered into an

233. *Id.* at 129–30.

234. *Id.* at 135.

235. *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

236. *Id.* at 659–61.

237. *Id.* at 670–71.

238. *Noerr*, 365 U.S. at 138.

agreement with local government authorities, the scope of which has been enacted into federal law.²³⁹ This conduct is also distinguishable from the facts of *Pennington*. In that case, employers and the labor union petitioned the Secretary of Labor to enact minimum wage regulation that was allegedly part of a scheme of the employers and the union to impose restraints of trade on the relevant market for coal.²⁴⁰ Antitrust immunity was found because the setting of the wage was not done by the private parties, but, as the Court emphasized, the Secretary of Labor.²⁴¹ In the case of the proposed bills, Southwest and American Airlines have gone beyond mere petitioning a government authority to enact favorable legislation to playing a role in drafting the legislation itself through the terms of the negotiated contract. Therefore, neither *Noerr* nor *Pennington* is applicable to the facts of *Love Field*.

The Court's analysis in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*,²⁴² a case holding that the *Noerr–Pennington* doctrine did not apply,²⁴³ is directly relevant to the facts raised by the contract described in *Love Field*. At issue in *Allied Tube & Conduit* were the activities of manufacturers of steel electrical conduits to prevent the inclusion of polyvinyl chloride in the proposed industry standard, which was to be enacted into the National Electrical Code.²⁴⁴ The polyvinyl chloride manufacturers sued the steel electrical conduit manufacturers for antitrust violations. The Court rejected the defendant's *Noerr–Pennington* defense.²⁴⁵ The Court relied on what is known as the sham exception to the *Noerr–Pennington* doctrine, which states that “[t]here 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

239. See *Love Terminal Partners v. City of Dallas (Love Field)*, 527 F. Supp. 2d 538, 550–52 (N.D. Tex. 2007) (describing the development of the contract between the cities and the airlines and indicating that provisions from this contract were incorporated into the Reform Act).

240. *Pennington*, 381 U.S. at 660.

241. *Id.* at 671.

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

243. *Id.* at 495.

244. *Id.* at 495–96.

245. *Id.* at 495–97.

competitor and the application of the Sherman Act would be justified.”²⁴⁶

In *Allied Tube & Conduit*, the Court concluded that private standard setting is “the type of commercial activity that traditionally had its validity determined by the antitrust laws themselves.”²⁴⁷ While the campaign in *Noerr* was “a classic ‘attempt . . . to influence legislation by a campaign of publicity,’ an ‘inevitable’ and ‘incidental’ effect of which was ‘the infliction of some direct injury upon the interests of the party against whom the campaign is directed,’”²⁴⁸ the activity in *Allied Tube & Conduit* “did not take place in the open political arena, where partisanship is the hallmark of decisionmaking.”²⁴⁹ As the Court went on to say, “[t]he validity of conduct within that process has long been defined and circumscribed by the antitrust laws without regard to whether the private standards are likely to be adopted into law.”²⁵⁰

The contract described in *Love Field* is also the product of private negotiation that is within the scope of review under antitrust law. While it is true that the enactment of the contract through the proposed bills opens the terms of the contract to public scrutiny, the proposed statutory immunity from antitrust laws would trump the application of the sham exception as articulated in *Noerr*. In effect, the proposed statutory immunity would be in conflict with the Supreme Court’s statement in *Allied Tube & Conduit* that immunity does not extend to “every concerted effort that is genuinely intended to influence governmental action.”²⁵¹ The statutory immunity would make the *Noerr–Pennington* immunity absolute in this case. Such a result would be inconsistent with Supreme Court precedent set in *Noerr*, *Pennington*, *Allied Tube & Conduit*, and cases in which the Court concluded that *Noerr–Pennington* immunity did not apply.²⁵² As the concurrence in *Pennington* emphatically asserted:

246. E. R.R. Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961).

247. *Allied Tube & Conduit*, 486 U.S. at 505.

248. *Id.* (quoting *Noerr*, 365 U.S. at 143).

249. *Id.* at 506.

250. *Id.*

251. *Id.* at 503.

252. See *Fed. Trade Comm’n v. Superior Court Trial Lawyers Ass’n.*, 493 U.S. 411, 428 (1990) (“The exceptions derived from *Noerr* . . . have no application to respondents’ boycott.”); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 509, 515–16 (1972) (holding that the respondents’ allegations that petitioners harassed and deterred respondents from having “free and unlimited access” to agencies and courts by “massive,

“Congress can design an oligopoly for our society, if it chooses. But business alone cannot do so as long as the antitrust laws are enforced.”²⁵³ By enacting a privately negotiated agreement into law, and not allowing the sunshine of antitrust law to test its anticompetitive effects, Congress is allowing business to set antitrust policy in conjunction with local governments.

Finally, and most importantly, applying *Noerr–Pennington* immunity to the contract would be inconsistent with the policies underlying the immunity. As the *Noerr* Court clearly articulated, two policies underlie the immunity for petitioning of legislation. First, the immunity prevents the impairment of “the power of government to take actions through its legislature and executive that operate to restrain trade.”²⁵⁴ Such impairment would interfere with the government’s role in representing the electorate. Here, there is a real concern that the proposed bills represent privately negotiated law that does not represent the will of the electorate. The anticompetitive concerns, discussed below in Part III.C, strongly suggest that the contract may not be in the best interest of the community. Therefore, a grant of immunity would be inconsistent with the first policy justification for *Noerr–Pennington* immunity. Second, the Court crafted the *Noerr–Pennington* immunity doctrine in order to avoid a constitutional conflict between antitrust laws and the constitutional right to petition and free speech.²⁵⁵ By immunizing petitioning from antitrust scrutiny, the Court avoided the conflict. Here, Southwest and American Airlines have gone beyond mere petitioning, and the constitutional conflict with the First Amendment is simply not present. The constitutional right to petition does not include a citizen’s right to draft legislation as the citizen sees fit.

In conclusion, the proposed statutory immunity would not be consistent with the *Noerr–Pennington* doctrine and would

concerted, and purposeful activities . . . come within the ‘sham’ exception in the *Noerr* case”).

253. *United Mine Workers v. Pennington*, 381 U.S. 657, 674 (1965) (Douglas, J., concurring).

254. *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136–37 (1961).

255. *See id.* at 137–38 (stating that a construction of the Sherman Act that would prohibit petitioning for legislation “would raise important constitutional questions” and that “[t]he 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”).

upset several decades of Supreme Court precedent on antitrust immunity for private petitioning of legislation.

b. The Inapplicability of the State Action Doctrine. The proposed statutory immunity greatly expands the scope of immunity for state and municipal governments from antitrust liability, as announced by the Court in *Parker v. Brown*²⁵⁶ and subsequent cases.²⁵⁷ The Court held in *Parker* that “[t]here is no suggestion of a purpose to restrain state action in the [Sherman] Act’s legislative history.”²⁵⁸ But against the immunity for enactments of anticompetitive regulation by state governments, the Court cautioned that “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.”²⁵⁹ The Court also presented a fact pattern that distinguished the state regulation in *Parker* that was held to be immune: “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.”²⁶⁰ By immunizing the contract from antitrust scrutiny, the proposed amendments would contradict the Court’s denial of immunity to state action in the form of “a private agreement or combination by others for restraint of trade.”²⁶¹

While *Parker* addressed governmental immunity from antitrust law at the state level, subsequent case law has established that municipalities, like the Cities of Dallas and Fort Worth, and governmental agencies, like the DFW International

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

257. See, e.g., *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 372–73 (1991) (“Besides authority to regulate, however, the *Parker* defense also requires authority to suppress competition—more specifically, ‘clear articulation of a state policy to authorize anticompetitive conduct’ by the municipality in connection with its regulation. . . . It is enough, we have held, if suppression of competition is the ‘foreseeable result’ of what the statute authorizes” (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40, 42 (1985))); *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (“[There are] 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.” (quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978))); *La. Power*, 435 U.S. at 413 (holding that “the *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service”).

258. *Parker*, 317 U.S. at 351.

259. *Id.*

260. *Id.* at 351–52.

261. *Id.*

Airport Board, enjoy narrower protections than that accorded to the state.²⁶² One antitrust treatise summarizes the law as follows: “Municipal action . . . is not action by the state, whether that action is commercial or governmental in nature and whether the city has ‘home rule’ powers.”²⁶³ According to the Court, *Parker* immunity is granted to “a municipality’s restriction of competition” when it is “an authorized implementation of state policy.”²⁶⁴

The issue of immunity for governmental agencies was addressed by the Court in *California Retail Liquor Dealers Ass’n. v. Midcal Aluminum, Inc.*²⁶⁵ The Court determined that a governmental or quasi-governmental agency is immunized from antitrust scrutiny if (1) the agency action is “one clearly articulated and affirmatively expressed as state policy” and (2) “the policy [is] ‘actively supervised’ by the State itself.”²⁶⁶ The proposed statutory immunity of the contract from antitrust scrutiny would greatly expand the scope of traditional municipal and agency immunity in the case of the agreement among the cities of Dallas and Fort Worth, the Airport Board, and Southwest and American Airlines, two private companies, by allowing the agreement to escape antitrust scrutiny when there is no articulated state policy or state supervision of municipal conduct.

What is troubling about the proposed immunity is that the agreement is neither based in state policy nor subject to active state supervision. The recitals to the contract state that “certain Congressional leaders informed the Cities . . . that it would be preferable for the Cities to present a local solution for addressing airport issues . . . in the Dallas/Fort Worth metropolitan area, prior to any further action being taken by Congress”²⁶⁷ The contract was thus the product of neither state regulation nor state policy, but instead a federal mandate to resolve regional

262. See *infra* notes 263–64 and accompanying text.

263. LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* § 14.6c, at 803 (2d ed. 2000) (citing *Cnty. Commc’ns Co. v. City of Boulder*, 455 U.S. 40, 52–53 (1982); *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 412 (1978)).

264. *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 370 (1991).

265. *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 99 (1980).

266. *Id.* at 105 (quoting *La. Power*, 435 U.S. at 410).

267. *Love Terminal Partners v. City of Dallas (Love Field)*, 527 F. Supp. 2d 538, 551 (N.D. Tex. 2007).

issues involving local government and private companies that stemmed from federal legislation. Furthermore, as stated on the website for DFW International Airport, the Board “may enter into contracts without approval of the city councils.”²⁶⁸ In negotiating the terms of the contract, the Board was not acting with the active supervision required for antitrust immunity.²⁶⁹ Therefore, traditional antitrust immunity is not available to the Cities and the Airport Board for its agreement entered into with Southwest and American Airlines.

Finally, it should be noted that we are not concluding that the contract does in fact violate antitrust laws. The issue is whether antitrust scrutiny can be applied to the contract under traditional antitrust principles. Antitrust actions against municipalities have resulted in the imposition of liability²⁷⁰ and the finding of no liability.²⁷¹ But unless the municipal conduct is an authorized implementation of state policy, the act of a government agency articulated in state policy, and actively supervised by the state, an agreement among municipalities, a government agency, and private parties should not be immunized from review under the antitrust laws. Such immunity would be inconsistent with the clearly established policy of competition law. As the Court stated, “[i]n light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation’s economic goals reflected in the antitrust laws, we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach.”²⁷² The proposed amendment would similarly place “parochial interests” above those of the economic goals of competition and deregulation of the airlines and deeply upset the current scope of governmental immunities crafted through sixty years of Supreme Court precedent.

268. Airport Administration, <http://www.dfwwairport.com/airport/administration.htm> (last visited Apr. 11, 2008).

269. See *Cal. Retail Liquor Dealers*, 445 U.S. at 105 (stating that to establish “antitrust immunity under *Parker v. Brown* . . . , the policy must be ‘actively supervised’ by the State itself” (quoting *La. Power*, 435 U.S. at 410)).

270. See *La. Power*, 435 U.S. at 408, 413 (rejecting arguments for excluding municipalities from the antitrust laws and limiting the *Parker* doctrine as applied to municipalities to exempt “only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy”).

271. See *Fisher v. City of Berkeley*, 475 U.S. 260, 270 (1986) (holding that municipal rent control ordinance did not violate the antitrust laws).

272. *La. Power*, 435 U.S. at 412–13 (citation omitted).

c. The Case for Liability Under Section 1 of the Sherman Act. The contract and attendant Reform Act have substantial anticompetitive consequences that have been documented by economists. A study by Professors M. Theodore Farris II and Terrance L. Pohlen of the University of North Texas asserts that there are potentially anticompetitive effects that warrant further scrutiny.²⁷³ Their study concludes that the proposed plan to repeal the Wright Amendment eight years after Southwest and American Airlines have allocated gate spaces at Love Field results in an eight billion dollar cost to the consumer.²⁷⁴ Professors Farris and Pohlen base this estimate of costs on the destruction of gates at Love Field and the creation of a dominant position for Southwest and American Airlines in Love Field and DFW International Airport, respectively.²⁷⁵ The study also concludes that the planned closing of the Legend Airlines terminal would result in the loss of revenues from airlines, vendors, and visitors.²⁷⁶

Despite the evidence and the analysis presented above, the District Court of the Northern District of Texas dismissed the antitrust claims of Love Terminal Partners and Virginia Aerospace, alleging an agreement in restraint of trade and monopolization by Southwest Airlines, American Airlines, DFW International Airport Board, the City of Dallas, and the City of Fort Worth.²⁷⁷ The court's decision rested largely on the *Noerr-Pennington* doctrine, finding that the activities of the two airlines were immunized from antitrust scrutiny as lobbying.²⁷⁸ Furthermore, the court found that anticompetitive conduct, such as condemning the gates at Love Field, would also be immunized from antitrust analysis because it was compelled by the Reform Act and implemented Congress's vision for competition in the local airline market.²⁷⁹ The court expressly cited the *Twombly* decision as requiring the plaintiffs to provide evidence of an

273. See M. Theodore Farris II & Terrance L. Pohlen, *Lost Opportunity: How the Current Wright Amendment Agreement Fails the Community—and Consumers* 17 (unpublished manuscript), available at http://citizensforeconomicprogress.com/pdf/reports/Lost_Opportunity.pdf (observing that “[i]t is interesting to follow the claims that the agreement is not anti-competitive” because of contrary claims).

274. *Id.* at 29.

275. *Id.* at 22, 29.

276. *Id.* at 22–27.

277. *Love Terminal Partners v. City of Dallas (Love Field)*, 527 F. Supp. 2d 538, 543, 547, 560 (N.D. Tex. 2007).

278. *Id.* at 549.

279. *Id.* at 558, 560–61.

agreement and a regulatory scheme as an alternative explanation to the existence of an agreement.²⁸⁰ Finally, the court concluded that the actions of the City of Dallas in condemning the gates and entering into agreements with the two airlines did not constitute antitrust injury.²⁸¹ While the plaintiffs were injured by the condemnation of the gates, the resulting injury was not to competition and hence not the type of injury that antitrust law was aimed at remedying.²⁸²

The court's opinion, while disappointing, is completely consistent with the style of analysis supported by the Supreme Court in both its *Trinko* and *Twombly* decisions. Regulated industries are given deference under the antitrust laws, and the plaintiff has a greater burden to show monopolization and the existence of an agreement in restraint of trade.²⁸³ Not only did the district court fail to conclude how the conduct in this case went beyond mere lobbying, the court also failed to recognize how the state-level regulatory scheme was itself a type of agreement, one that did not demand deference for Section 1 analysis. The *Love Field* case provided the best opportunity to recognize the precepts of a predatory legislation theory that has been presented in this Section.

C. Suggestion for Reform

Academic commentary may sometimes be seen as tilting at windmills, and perhaps such can be said for the theory of predatory legislation. But, while the weight of the current case law seems to be leaning towards greater deference to regulatory schemes for the purpose of antitrust review, our proposal is rather modest. We are not advocating an aggressive theory of judicial review consistent with strong public choice theory. Instead, we are proposing a pragmatic approach, consistent with the flexible notion of incompletely specified agreements that underlies our theory of predatory legislation. Consistent with the balance between markets and politics drawn by traditional

280. *Id.* at 553.

281. *Id.* at 554–55.

282. *Id.* at 555.

283. See *supra* Part III.A.2 (describing how the heightened pleading standard put forth in *Twombly* resulted from deference to regulated industries under the antitrust laws); see also *Verizon Commc'ns Inc. v. Trinko*, 540 U.S. 398, 412 (“Where such a [regulatory] structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small . . .”).

antitrust doctrine, courts should recognize that much regulation is the product of agreement among regulated entities and regulators. Therefore, deference to regulation as seen in *Twombly* is inappropriate. While the existence of regulation alone is not evidence of an agreement, regulation should not be used as proof of lack of an agreement.

Two reforms follow from our theory of predatory legislation. The first is a rethinking of the *Twombly* decision—particularly, its reliance on a regulatory scheme as an alternative explanation to the existence of an agreement.²⁸⁴ To the extent that a regulatory scheme is an incompletely theorized agreement under which regulated actors and regulators defer to private market orderings to fill in gaps, regulation should be understood as part of a possible agreement. Therefore, the fact that an industry is or has been regulated should not lead to lower antitrust scrutiny or a heightened burden on the plaintiff. On the contrary, the presence of regulation would support some increased scrutiny, certainly at the pretrial stage, raising the burden on defendants for dismissal. The *Love Field* case provides a perfect example of why the rule in *Twombly* is inappropriate.

The second reform is one of antitrust immunity more broadly. As we have argued throughout this Section, current antitrust law creates a balance between markets and politics that is represented in such doctrines as *Noerr–Pennington* and state action immunity. Courts have chipped away at a strict application of state action immunity by requiring clear articulation and active supervision by the state.²⁸⁵ Perhaps, it is time that courts start to scrutinize more carefully what constitutes lobbying for the *Noerr–Pennington* doctrine. As the *Love Field* case indicates, lobbying can be quite broad and seemingly includes any agreement between a private company and a state body on the content of regulation.²⁸⁶ For the purposes

284. See *Bell Atl. Corp. v. Twombly (Twombly III)*, 127 S. Ct. 1955, 1972 (2007) (“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.”).

285. See *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (“[There are] 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.” (quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978))).

286. See *Love Field*, 527 F. Supp. 2d at 550 (“[D]efendants’ conduct in forming the

of *Noerr–Pennington* immunity, it seems that the Court has tilted the balance of markets and politics, which traditionally was designed to limit the interference of the judiciary in legislative processes. In the *Love Field* case, the court sanctioned broad intrusions of the market in the legislative process, effectively allowing market actors to draft the regulatory contours of a market as they see fit. Lobbying, if that is what we should call this activity protected from antitrust scrutiny, now seems to mean more than just influence and persuasion. If the decision in the *Love Field* case is correct, regulated entities writing laws to divide up a market have become immunized from antitrust review.

IV. CONCLUSION

The commonality between how courts examine predatory conduct and predatory pricing are fairly striking. In each instance, the courts have clung slavishly to past applications of judicial doctrine without examining the dynamism of the markets in question, in particular airline markets, or the factual underpinnings of the plaintiffs' claims.

It is convenient to look to alternative explanations for conduct that appears predatory. In the context of predatory pricing claims, courts have viewed predatory responses through the lens of the Chicago School's views of rationality. Once the courts have determined through this a factual lens that conduct could not occur in reality if it cannot possibly take place in an ahistorical, static, and unyielding theory, there is little jurisprudence left to undertake. No examination of facts is required, and the courts may engage in sweeping dismissals of entire cases without regard to any idiosyncrasies inherent in each case. This is certainly the case with predatory pricing, where, with rare exception, judges have bounced the cases out of courts with little regard for facts.

In the context of predatory legislation, courts cling not to the Chicago School theory but, instead, to judicial doctrines created in the realm of regulation, whose applications are far more dubious in the realm of deregulation. Clinging to these outmoded judicial doctrines create two difficulties. First, the existence of a

Joint Statement and Contract was clearly a part of their efforts to petition Congress to adopt what eventually became the Reform Act. Thus a *Noerr–Pennington* defense appears on the face of plaintiffs' complaint”).

regulatory scheme does not mean today what it did in the early phases of regulation. Regulation today is based primarily on private agreements created in a marketplace within some regulatory overlay, where the regulator is passive, only asserting authority when the market somehow fails. In such a regulatory scheme, the foundation is a private contract and regulation is a vital role in that contract. Thus, it should not be said, *a la* Twombly, that regulation absolves private orderings. Instead, regulation nowadays complements such private orderings.

Thus, any immunity in the context of a regulated/deregulated market should be examined with severe scrutiny. The immunities at issue served regulatory purposes when full-blown, traditional cost of service ratemaking was the norm. Under the new realm of market-based regulation, such immunities may not only foster predatory conduct, but may also serve as the basis for immunizing agreements between state actors and private actors that thwart competitive outcomes, even where such agreements run contrary to an intended regulatory scheme. The Love Field example is perfect in that it displaces the deregulated airline market with legislation that confers monopoly power and erects insurmountable barriers to entry for competitors.

We do not here seek to remedy all predatory ills related to airline markets. We only seek to make clear that the lenses used by courts to examine illegal agreements, conduct, and legislation in the airline realm, or otherwise, is fated to make competitive markets worse. The lenses are in fact covered by blinders of outdated economic theory and outmoded judicially created defenses and exemptions in light of the outdated views of how regulation functions in modern society.