The 1990-91 Supreme Court Term and Antitrust: Toward Greater Certainty

Stephen Calkins
Wayne State University, calkins@wayne.edu

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Enthusiasm for bright lines ebbs and flows. There are times when the fashion is to strive for perfect, fine-tuned outcomes. Then the costs of uncertainty—both to litigants and to society—assume greater significance. Eventually the legal system celebrates the virtues of certainty and simplicity, until attention shifts to the inevitable errors that oversimplification yields.

The rhythm of shifting sentiments regularly plays itself out in antitrust law. Merger law becomes complex, then simple, and then complex again. Efforts to streamline the analysis of trade restraints confront rebellion against the alleged woodenness such approaches yield. Shifts are also evident in confidence in the jury process. The jury is treasured for a time; then society seeks to increase certainty or at least predictability by entrusting decisions to judges.

This last Supreme Court term produced three significant antitrust opinions that favor the virtues of certainty and predictability. In Palmer v. BRG of Georgia, Inc., the Court issued an old-style opinion relying on the traditional dichotomy between per se rules and the rule of reason. In City of Columbia v. Omni Outdoor Advertising, Inc., the Court, per Justice Scalia, broadened and clarified the exemptions for state action and for petitioning government. Two Justices joined Justice Stevens in a dissenting opinion that would have entrusted more to juries.

The most interesting antitrust case, however, was Summit Health, Ltd. v. Pinhas, to which this article will devote disproportionate attention in order to address adequately the opinions and the confusing interstate

* Professor of Law, Wayne State University Law School. The author thanks William Blumenthal, John F. Dolan, James D. Hurwitz, Neil P. Motenko, and Phillip A. Proger for reviewing drafts; Shelley Boland, Sarah J. Kopicki, and Cynthia Person for providing research assistance; and John DeQ. Briggs, Richard M. Steuer, and Daniel M. Wall for supplying copies of briefs. All errors are the author's.

commerce requirement they discuss. Justice Stevens' five-to-four Summit Health majority opinion is subject to conflicting interpretations, and failed to resolve the tensions and correct the misunderstandings that underlie the interstate commerce requirement. Justice Scalia’s dissenting opinion, which was joined by three junior Justices, potentially would have used the Sherman Act's commerce requirement to give judges greater authority over central antitrust issues. It is not clear that Justice Thomas would replace Justice Marshall in the Summit Health majority, or that stare decisis would prevent adoption of Justice Scalia’s approach. Were Justice Scalia’s apparent views eventually to prevail, the possible shift of power from juries to judges could increase certainty or at least predictability. Until the correct interpretation of Summit Health is resolved and accepted by a new Court majority, however, the law will likely remain unsettled.

I. PALMER v. BRG OF GEORGIA, INC.:  
CONTINUED RELIANCE ON PER SE RULES

Restraint of trade analysis has seen particularly fierce competition between the virtues of certainty and those of precision. Per se rules represent the triumph of perceived certainty, but this triumph was incomplete and short-lived.

In Palmer v. BRG of Georgia, Inc., the Court confronted the tension between its continued adherence to per se rules and its recently-repeated expressions of reluctance to apply per se rules in new situations. This now-familiar tension arose when, in Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., the Court rejected the Second Circuit’s finding that a blanket license was per se illegal price-fixing. The Court quoted Topco’s cautionary

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4 The lower court opinions in Palmer are discussed in Calkins, The October 1989 Supreme Court Term and Antitrust: Power, Access, and Legitimacy, 59 Antitrust L.J. 339 (1990). The following discussion is based in part on that article.

5 441 U.S. 1 (1979).

6 Although the Broadcast Music Court agreed that ASCAP, BMI, and their members had literally engaged in fixing prices, it said that “easy labels do not always supply ready answers.” 441 U.S. at 8. “ ‘Price fixing,’ ” said the Court, is merely “a short-hand way of describing certain categories of business behavior to which the per se rule has been held applicable,” id. at 9; applicability of the per se rule turns on “whether the [challenged] practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or instead one designed to ‘increase economic efficiency and render markets more, rather than less, competitive.’ ” Id. at 19–20. The Court’s hesitancy about per se rules also was evident two years earlier, in Continental TV., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977), where the Court ruled that vertical nonprice restraints should be judged under the rule of reason.
language about classifying business relationships as per se illegal, and the Broadcast Music Court took the admonition seriously.

In NCAA and again in Indiana Federation of Dentists the Court relied on Broadcast Music to apply the rule of reason to what the Court called "'naked restriction[s] on price or output.'" In Dentists, the Court wrote that it had been "slow . . . to extend per se analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious." Some lower courts drew from Broadcast Music or its progeny the lesson that the prudent course was to accept any plausible argument for using the rule of reason. On four separate occasions starting in 1980—Palmer is only the most recent—the Court has reversed a lower court and shown that it remains committed to per se rules.

Palmer's facts suggested classic market division. A major, national bar review firm and a Georgia bar review firm agreed to divide the country, with the national firm staying out of Georgia and the Georgia firm staying out of the other forty-nine states. The two firms agreed to share profits from Georgia. Not surprisingly, prices in Georgia subsequently soared, and some enterprising law students sued, alleging a per se violation.

The trial court granted a defense motion for summary judgment. It ruled that this arrangement was not per se illegal because (1) it was not price-fixing, the firms not having established specific prices, and (2) it

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7 United States v. Topco Assocs., 405 U.S. 596, 607–08 (1972) ("It is only after considerable experience with certain business relationships that courts classify them as per se violations . . . ."), quoted in Broadcast Music, 441 U.S. at 9.


9 476 U.S. at 458–59 (citing Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979)).


12 The students "were quite simply mad as hell and didn't want to take it any more," according to the law professor who worked with them. Coyle, 'Little Guys' Win Bar/Bri Suit, N.Y.L.J., Dec. 10, 1990, at 3.
was not market division, the firms not having agreed to split an area
where they previously had been competing but rather having agreed to
remain in separate areas (Georgia and the other forty-nine states). The
Eleventh Circuit affirmed, two to one, relying on the string of recent
Supreme Court cases expressing reluctance to use per se rules.\textsuperscript{13}

The Supreme Court reversed per curiam without waiting for argu-
ment.\textsuperscript{14} Much of the opinion consisted of quotations from two vintage
antitrust cases: \textit{Socony}\textsuperscript{15} and \textit{Topco}. \textit{Socony}'s condemnation of combina-
tions with the purpose and effect of influencing prices\textsuperscript{16} indicated that
the agreement to divide profits (which was followed by a price increase)
should not be upheld summarily. \textit{Topco}'s condemnation of horizontal
market division made the reservation of geographic areas "unlawful on
its face."\textsuperscript{17}

\textsuperscript{13} \textit{Palmer}, 874 F.2d 1417, 1423 (11th Cir. 1989), amended, 893 F.2d 293 (11th Cir. 1990)
(quoting, e.g., the language from \textit{Dentists} quoted supra text at note 9).

The story is somewhat more complicated than the above summary, although the subtleties
were unimportant to the Court's decision. At least until they began negotiating their initial
agreement (the "1980 Agreement"), the two firms had engaged in bitter competition in
Georgia. The national firm claimed but could not prove that before negotiations began it
had decided to abandon Georgia. The 1980 Agreement was challenged by an antitrust suit,
which was settled when the parties agreed (the "1982 Agreement") to delete express
coventions not to compete and to make nonexclusive the Georgia firm's right to use the
national firm's bar review materials. Significantly, however, the license of the national firm's
Certiorari to the United States Court of Appeals for the Eleventh Circuit}, at Appendix C
[hereinafter District Court Opinion].

The parties did not agree even about which agreement was at issue. The plaintiffs focused
on the 1980 Agreement and alleged that the conspiracy had continued. \textit{See, e.g.}, \textit{Brief for
the Appellants in the Eleventh Circuit.} The defendants focused principally on the 1982
Agreement. \textit{See, e.g., Respondents Brief in Opposition [to cert. petition], at 2. The trial
court held that neither agreement was per se illegal. District Court Opinion at 149. The
court of appeals affirmed but was ambiguous about which agreement it was considering.
It then amended its opinion to declare that the 1982 Agreement is not per se illegal. 893
F.2d at 293. The Supreme Court discussed only the 1980 Agreement except in a closing
footnote. That footnote observed that the district court never considered whether the 1982
Agreement ended the conspiracy begun in 1980, so this remained an unsettled factual
issue. 111 S. Ct. at 403 n.7. The Eleventh Circuit subsequently remanded the case for
proceedings consistent with that footnote and the Supreme Court's holding. \textit{Palmer, 7
Trade Reg. Rep. (CCH) ¶ 69,411 (11th Cir. Apr. 18, 1991) (per curiam).}

\textsuperscript{14} Justice Marshall agreed that the court of appeals probably erred, but dissented because
the litigants deserved a hearing. 111 S. Ct. at 403. Justice Souter did not participate.

\textsuperscript{15} United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

\textsuperscript{16} \textit{Palmer}, 111 S. Ct. at 402 ("We explained that '[u]nder the Sherman Act a combination
formed for the purpose and with the effect of raising, depressing, fixing, pegging, or
stabilizing the price of a commodity in interstate or foreign commerce is illegal \textit{per se}.")
(quoting from 310 U.S. at 223).

\textsuperscript{17} \textit{Palmer}, 111 S. Ct. at 402-03:

In \textit{United States v. Topco Associates, Inc.} we held that agreements between competi-

\textsuperscript{111} S. Ct. at 403.
Whether Palmer should be considered an important case depends on one's view of pre-Palmer law, and on the relative weight one attaches to the decision's result and to its wording. Prior to Palmer and the previous term's decision in Superior Court Trial Lawyers, many observers thought the per se rule passé. A favorite journalistic heading was "Towards a Structured Rule of Reason." The Federal Trade Commission had described per se rules and the rule of reason as "converging," and had suggested an elaborate decisional process to be applied in every case.

Palmer provides no support for blending per se rules and the rule of reason. Instead, the opinion is a simple, old-style application of the per se rule. Most advocates of a blended approach would have reached the

tors to allocate territories to minimize competition are illegal:

"One of the classic examples of a per se violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition... This Court has reiterated time and time again that '[h]orizontal territorial limitations... are naked restraints of trade with no purpose except stifling of competition.' Such limitations are per se violations of the Sherman Act."

(citations omitted).

18 E.g., Muris, The New Rule of Reason, 57 Antitrust L.J. 859, 859 (1989) ("It is sometimes said that there are two antitrust rules, per se and that of reason. This view is incorrect; there is only one form of analysis, the rule of reason.").


20 Detroit Auto Dealers Ass'n, 111 F.T.C. 417, 493 (1989):

The parties have engaged in the usual debate over whether to apply the per se rule or the rule of reason, but as we have recently said..., the utility of that approach has been called into question by the Supreme Court's recent pronouncements on horizontal restraints.

BMI, NCAA, and JFD [Dentists], read together, suggest that the per se rule and the rule of reason are converging.


First, we ask whether the restraint is "inherently suspect." In other words, is the practice the kind that appears likely, absent an efficiency justification, to "restrict competition and decrease output"?... If the restraint is not inherently suspect, then the traditional rule of reason, with attendant issues of market definition and power, must be employed. But if it is inherently suspect, we must pose a second question: Is there a plausible efficiency justification for the practice?... If it is not plausible, then the restraint can be quickly condemned. But if the efficiency justification is plausible, further inquiry—a third inquiry—is needed to determine whether the justification is really valid. If it is, it must be assessed under the full balancing test of the rule of reason. But if the justification is, on examination, not valid, then the practice is unreasonable and unlawful under the rule of reason without further inquiry....
Court's result, however, by quickly condemning the Palmer restraint for lack of a plausible efficiency justification.\textsuperscript{22} Thus, Palmer's holding is consistent with a blended approach to analyzing restraints of trade, but Palmer's language fits more comfortably with earlier thinking.

Palmer's heavy reliance on Topco—it quoted it at length and gave it perhaps greater attention than any other Court opinion\textsuperscript{23}—surprised some observers. Topco had fallen on hard times, being regularly lampooned as the quintessential example of reasoning-by-categorization.\textsuperscript{24} Commentators and even courts had come to regard it as significantly undermined, albeit implicitly, by subsequent decisions.\textsuperscript{25}

It is important not to exaggerate either the apparent death or resurrection of Topco. Topco has been subjected to two criticisms: for condemning a restraint irrespective of the parties' market power, and for condemning as per se illegal a restraint that arguably accompanied an efficiency-enhancing integration of functions.\textsuperscript{26} The second criticism is more powerful, but it leaves untouched Topco's per se condemnation of naked territorial market division.\textsuperscript{27}

\textsuperscript{22} See infra note 28 and accompanying text.

\textsuperscript{23} A LEXIS search showed that Topco is cited by the majority or dissent in only 28 Supreme Court cases, and most citations are brief. Except for several opinion's quoting Topco's eloquent but imprecise analogizing of the antitrust laws to the Magna Carta and the Bill of Rights, e.g., Community Communications Co. v. Boulder, 455 U.S. 40, 56 n.19 (1982); only one previous majority opinion quotes more than a sentence from Topco. That opinion is Justice Stevens's 4-3 opinion (joined by Justices Brennan, Marshall, and White) in Maricopa County, 457 U.S. at 343, 344 n.16, 354, 355 n.30, which pays considerable attention to Topco, quoting it twice and citing it three other times.

\textsuperscript{24} E.g., Muris, supra note 18, at 859 (adding that since Topco, "the Court has consistently applied one rule of reason"); see also H. Hovenkamp, Economics and Federal Antitrust Law 115–16, 131 (1985) (criticizing case).


\textsuperscript{26} This distinction is made nicely in E. Gellhorn, Antitrust Law and Economics 208–11 (3d ed. 1986).

\textsuperscript{27} Although some courts have been reluctant to apply the per se rule to market division, see supra notes 10–11, others have not hesitated; see, e.g., United States v. Suntar Roofing, Inc., 896 F.2d 469, 473 (10th Cir. 1990) (horizontal customer allocation per se illegal, relying on Topco); cf. ABA Antitrust Section, Sample Jury Instructions in Civil Antitrust Cases B-36-B-37 (per se instruction for territorial allocation). Moreover, some courts that object to applying the per se rule to restraints ancillary to procompetitive integration apply it where such integration is missing. Compare Polk Bros., Inc. v. Forest City Enters., Inc., 776 F.2d 185 (7th Cir. 1985) (Easterbrook, J.) (rule of reason where two retailers agreed not to compete with each other in new facility they jointly arranged to erect and
Palmer probably should be read as relying on Topco’s per se treatment of naked market division. One can conceive of an argument that the restraints challenged in Palmer enhanced efficiency, but the defendants did little to advance such an argument, and the trial court upheld the restraints on summary judgment without evaluating any such justification. Thus, although the Court in Palmer did not limit Topco to naked horizontal restraints, Palmer’s facts were consistent with such an interpretation.

Viewing Palmer’s holding as applicable only to naked horizontal restraints renders it an unremarkable opinion, but it remains an important reminder that the Court has not abandoned the per se rule approach to antitrust analysis. As in Superior Court Trial Lawyers, the Court unashamedly applied the per se rule-rule of reason dichotomy. The Court continues to be impressed by the perceived greater certainty of per se rules.


See Palmer, 874 F.2d at 1435 (Clark, J., dissenting) (“the record is devoid of any evidence that the agreement . . . was ancillary or that it had some procompetitive, efficiency-creating potential”). Since the agreements featured a license from the national bar review company to the Georgia company, conceivably defendants could have argued that any restraints were ancillary to this licensing arrangement. They chose not to make this argument and won below on different grounds. The Supreme Court’s reversal merely found error in those grounds, and implicitly assumed that the challenged agreements were not ancillary to lawful integration. Cf. Brief for the United States as Amicus Curiae at 14 n.14, Palmer (“different issues would be presented” had the restraints been ancillary to the licensing agreement).

The Solicitor General pointedly advised the Court that Topco’s condemnation of market allocation ancillary to a cooperative endeavor had “no bearing” on the issue before the Court. Brief for the United States as Amicus Curiae, Palmer, at 10 n.9.

One court has already interpreted Palmer narrowly. Chicago Professional Sports Ltd. Partnership v. NBA, 754 F. Supp. 1336 (N.D. Ill. 1991), declined to apply the per se rule to the NBA’s five-game reduction in the number of games teams can broadcast over television “superstations”:

Palmer recently confirmed that per se condemnation of horizontal agreements is still sometimes appropriate, even after [GTE Sylvania, Broadcast Music, and NCAA]. But in the wake especially of BMI and NCAA, it is clear that Topco and Sealy no longer stand for the proposition that every horizontal elimination of competition is automatically illegal, in case they ever did. Some horizontal restraints may still be branded illegal per se, as Palmer shows, but the NBA’s 5-game reduction is not one of them.

Id. at 1357 (restraint found illegal under rule of reason).

As an additional caution, note that, as explained below in Part III, Justice Scalia apparently might weaken per se rules by considering actual competitive effects as part of the commerce requirement inquiry.

Calkins, 1989 Term, supra note 4, at 351–52.

Justice Scalia has pointed to the per se prohibition of horizontal territorial division as a model exercise of judicial power. Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175 (1989) (championing court-made rules that are clear, definite, and general, even though over-inclusive).
II. *CITY OF COLUMBIA v. OMNI OUTDOOR ADVERTISING, INC.:* STATE ACTION AND NOERR-PENNINGTON EXEMPTIONS STRENGTHENED

In *Omni Outdoor Advertising* the Court, per Justice Scalia, increased certainty by extending and sharply defining the bounds of the exemptions for state action and petitioning government. The Court also addressed the "sham" exception to the protection for petitioning government, but in the process it may have lessened analytic clarity. Finally, the case provided another opportunity for Justices Scalia and Stevens to join issue on the desirability of deferring to juries.

The case arose when a newcomer threatened Columbia Outdoor Advertising, Inc.'s (COA's) comfortable role as Columbia, South Carolina's dominant (ninety-five percent share) billboard firm. Each member of the City Council was a friend of the family that owned COA, and the mayor "was a life-long personal friend" of one family member. The family had "occasionally contributed funds and free billboard space" to the campaigns of the mayor and certain Council members. When Omni Outdoor Advertising, Inc. began erecting billboards, COA responded in part by turning to its friends in local government. The City Council cooperated by banning all billboard construction without Council approval and then, when that effort was struck down as unconstitutional, by passing a strict billboard zoning ordinance that "severely hindered Omni's ability to compete." Omni sued the city, COA, and one of COA's owners, alleging a violation of Sherman Act Sections 1 and 2. The parties litigated the case fully and bitterly.

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32 Justice Scalia's opinion was joined by the Chief Justice and Justices Blackmun, O'Connor, Kennedy, and Souter.
33 This article will necessarily assume familiarity of the basic contours of these doctrines. For a more general overview, see ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 605-19 (2d ed. 1984 & Supp. 1988).
34 *Omni*, 891 F.2d 1127, 1134 (4th Cir. 1989), *rev'd*, 111 S. Ct. 1344 (1991); see also 111 S. Ct. at 1347.
35 111 S. Ct. at 1347.
36 It also responded by, among other things, erecting and improving billboards and by aggressive pricing.
37 111 S. Ct. at 1348. The ordinance required that new billboards be at least 500 feet away from existing billboards (1,000 feet if on same side of street). Given the number of COA billboards, the ordinance's effect "was to block Omni from large areas of the city." 891 F.2d at 1136.
38 The following excerpt from Omni's Supreme Court brief is indicative of the tone of some of the litigation:
   Mayor Finlay berated OMNI at meetings and on the radio. He made OMNI take down a three dimensional eagle sign, calling it an atrocity. The eagle sign said:
   "Columbia Your Progress is Soaring."
COA and the city lost at trial, with the jury awarding damages of $1 million against COA. The trial court granted a motion for judgment notwithstanding the verdict because the conduct was immune state action and petitioning of government, but the Fourth Circuit reversed. The court of appeals decided to join those circuits that recognized a co-conspirator exception to state action immunity. It found the exception applicable here because the city "conspired solely to further COA's commercial purposes to the detriment of competition in the billboard industry."\[39\] Noerr-Pen-

He never complained about COA's sign with a three dimensional life-size model of a man with his pants down.

Respondent's Brief, at 20.

39 The city was immune from damages actions, according to the district court. This issue was not before the Supreme Court. The reported decisions are unclear on the outcome of the cause of action against a COA owner.

40 891 F.2d at 1133. The court (2-1) concluded that the jury properly found "that there was a conspiracy between the City and COA in violation of Sections 1 and 2 of the Sherman Act, and therefore that the City, participating in the conspiracy solely for the purposes of restraint of trade and monopolization, was deprived of the Parker [state action] immunity to which it would have been entitled except for its involvement in the conspiracy." 891 F.2d at 1137. The court cited, among other things, a letter to Omni's owner from a member of the family that owned COA in which the author boasted of his "life long" friendship with the mayor, and a conversation in which a COA owner tried to discourage Omni by wondering aloud whether to "talk to my good friend, the Mayor" to get restrictive zoning. Id. at 1135-36.

The jury was instructed as follows:

Joint efforts truly intended to influence public officials to take official action do not violate the antitrust laws, even though the efforts are intended to eliminate competition, unless ... one or more of the public officials involved was also a participant in the alleged illegal arrangement or conspiracy.

Let me put it another way. It is perfectly lawful for any and all persons to petition their government, but they may not do so as a part or as the object of a conspiracy. Remember, a conspiracy being an agreement between two or more persons to violate the law, or to accomplish an otherwise lawful result in an unlawful manner.

I instruct you that a citizen's communication with a public official even if that official thereby is influenced to favor the constituent is part of the legislative process and cannot violate the antitrust laws.

This protection of the citizen fails, however, when one or more of the public officials joins in an illegal agreement or conspiracy with the person seeking the political action.

So if by the evidence you find that that person involved in this case procured and brought about the passage of ordinances solely for the purpose of hindering, delaying or otherwise interfering with the access of the Plaintiff to the marketing area involved in this case, that is to say, Richland and Lexington Counties, and thereby conspired, then, of course, their conduct would not be excused under the antitrust laws.

So once again an entity may engage in a legitimate lobbying committee [sic] to procure legislative [sic] even if the motive for the lobbying is anticompetitive.
nington immunity for COA’s petitioning of government was unavailable, the court ruled, because the petitioning had been “sham.” “COA’s purposes were to delay Omni’s entry into the market and even to deny it a meaningful access to the appropriate city administrative and legislative fora.” “Meaningful access” was denied, it seems, because the elected officials were so interested in accommodating COA.

A. State Action

On appeal, the Supreme Court ruled first that there is no general conspiracy exception to state action immunity. This ruling resolved a split in the circuits but is unremarkable. The Court recognized imperfections in the political process. “Few governmental actions are immune

If you find Defendants conspired together with the intent to foreclose the Plaintiff from meaningful access to a legitimate decision making process with regard to the ordinances in question, then your verdict would be for the Plaintiff on that issue.

Joint Appendix, Omni, quoted in part, Omni, 111 S. Ct. at 1352 n.5; id. at 1357 n.2 (Stevens, J., dissenting).

41 Under the Noerr-Pennington doctrine, certain petitioning of government does not violate the antitrust laws. For additional background on the doctrine see Calkins, Developments in Antitrust and the First Amendment: The Disaggregation of Noerr, 57 ANTITRUST L.J. 327 (1988). For convenience this article will refer to the doctrine as an exemption from the antitrust laws, although it can be viewed as referring to conduct simply not covered by those laws. Id. at 331-32.

42 891 F.2d at 1139. The court found it unnecessary to consider whether there is a co-conspirator exception to the Noerr-Pennington doctrine.

43 Cf. P. AREEDA & H. HOVENKAMP, 1990 SUPPLEMENT TO ANTITRUST LAW ¶ 212.3b (reviewing exception’s difficulties). The leading lower court cases are reviewed by the Fourth Circuit, 891 F.2d at 1135–34.

44 Interestingly, however, the Court did not cite the public choice literature. Some observers had anticipated an intellectual struggle as the Court sought to reconcile its interest in federalism with the burgeoning literature discussing public choice theory and “capture” of lawmakers by special interests. Proponents of theories of public choice and regulatory capture analyze political actors as rational, profit (or personal utility) maximizing individuals. Claims of acting in the public interest are viewed skeptically. (For an introduction to the literature see Farber & Frickey, The Jurisprudence of Public Choice, 65 TEX. L. REV. 873 (1987); Rubin, Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes, 66 N.Y.U. L. REV. 1 (1991); and Symposium on the Theory of Public Choice, 74 VA. L. REV. No. 2 (1988).) The application of “capture” theory in this context is associated most closely with Professor Wiley, who would preempt anticompetitive state and local regulation where (1) it is unprotected by a specific exception, (2) it is not responsive to a “substantial market inefficiency,” and (3) “the regulation is the product of capture in the sense that it originated from the decisive political efforts of producers who stand to profit from its competitive restraint.” Wiley, A Capture Theory of Antitrust Federalism, 99 HARV. L. REV. 713, 743 (1986); see also Wiley, A Capture Theory of Antitrust Federalism: Reply to Professors Page and Spitzer, 61 S. CAL. L. REV. 1327 (1988); Wiley, Revision and Apology in Antitrust Federalism, 96 YALE L.J. 1277 (1987). Professor Minda would have the “sham” exception turn on whether a private party had a “strategic capture objective.” Minda, Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine, 41 HASTINGS L.J. 905, 1013 (1990). Judge Easterbrook shares with Professor Wiley the observation that the
from the charge that they are 'not in the public interest' or in some sense 'corrupt,'" according to the Court. It is "inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them." The Court viewed political imperfections less as a reason to scrutinize local legislatures than as a reason not to probe. Examining legislative motivation would "require the sort of deconstruction of the governmental process and probing of the official 'intent' that we have consistently sought to avoid."

As if to emphasize the brightness of the line it was drawing, the Court said that even bribery or other illegal activity would not bar a state-action defense. Because tests turning on illegality would be unrelated to the purposes motivating the antitrust laws, the Court rejected such tests. The issue of bribery and other illegal activity was not before the Court, since the jury instructions and the Fourth Circuit opinion turned on a generic conspiracy exception. Nonetheless, the Court reached out to decide it.

Court increasingly assumes that state regulations should be strictly controlled because they advantage powerful political interests at the expense of consumers. Easterbrook, Antitrust and the Economics of Federalism, 26 J.L. & Econ. 23, 27 (1983) (advancing a state action test that would turn on whether monopoly overcharges would be borne entirely by residents of the political unit imposing the charge).

The introduction of "capture" theory into the state action debate set off a fire storm of criticism and controversy. See Garland, Antitrust and State Action: Economic Efficiency and the Political Process, 96 Yale L.J. 486 (1987); Page, Interest Groups, Antitrust, and State Regulation: Parker v. Brown in the Economic Theory of Legislation, 1987 Duke L.J. 618; Spitzer, Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory, 61 S. Cal. L. Rev. 1293 (1988). This furor apparently did not influence the Omni Court, which never entered the debate. None of the leading protagonists was cited in a brief, let alone by the Court. To the presumable dismay of academics who have devoted so much time to it, capture theory was universally ignored.

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45 111 S. Ct. at 1352 (referring to standards proffered in Omni's and its amicus' briefs).
46 Id. at 1351. Justice Stevens sharply disputed the frequency and desirability of such agreements: "The Court's assumption that an agreement between private parties and public officials is an "inevitable" precondition for official action . . . is simply wrong. Indeed, I am persuaded that such agreements are the exception rather than the rule, and that they are, and should be, disfavored." Id. at 1361 (Stevens, J., dissenting). Somewhat inconsistently, however, he added that "in many circumstances it would seem reasonable to infer . . . that the official action is the product of an agreement intended to elevate particular private interests over the general good." Id. at 1362.
47 Id. at 1352 (omitted footnote said Court makes this inquiry only rarely, to prevent discrimination or for other constitutionally required reasons).
48 Id. at 1353.
49 See supra note 40.
50 The Court left open one possible exception. A state or its subdivision may not necessarily be immune when it acts as a "commercial participant in a given market" rather than in a "regulatory capacity." 111 S. Ct. at 1351. This is a difficult issue and, given the percentage of the national economy that involves the government as a market participant, an important one. Already one court of appeals has declined to adopt a "market participant" exception, Paragould Cablevision, Inc. v. City of Paragould, Ark., 930 F.2d 1310 (8th Cir. 1991), and another has cited Omni's discussion only as a "cf." to its conclusion that a transportation
Justice Stevens (with Justices White and Marshall) agreed that there is no general conspiracy exception but dissented on other grounds. Justice Stevens relied in part on leading conspiracy-exception cases to conclude that the state-action exemption was inapplicable to Columbia's zoning ordinances. Key to his opinion was a distinction between economic regulation and regulation of health, safety, and general welfare. Columbia's economic regulation of the billboard market should be immune only if authorized by a state policy to displace competition with economic regulation, he argued, and no such policy should be inferred from a general grant of zoning power. He concluded that the defendants had engaged in a conspiracy that was not protected state action.

The majority would have none of this. Zoning regulations inevitably lessen competition. When a state legislature authorizes local zoning, it is clearly articulating a "'state policy to authorize anticompetitive conduct'" and thus satisfies the key prerequisite for immunizing that activity. The Court wrote that the proffered distinction between economic and general authority's status as a potential competitor engaging in a "proprietary" activity should not prevent immunity. Allright Colorado, Inc. v. City & County of Denver, 937 F.2d 1502, 1510 & n.11 (10th Cir. 1991).

Municipalities do not automatically enjoy immunity, the Court has ruled; they enjoy immunity only when acting pursuant to a "'clearly articulated and affirmatively expressed'" state policy "'to displace competition with regulation or monopoly public service.'" Town of Hallie v. City of Eau Claire, 471 U.S. 34, 39 (1985) (quoting Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410, 413 (1978) (plurality opinion of Justice Brennan)). The court of appeals concluded that this standard was satisfied by South Carolina's authorization of zoning. 891 F.2d at 1131-32. The issue was not raised on appeal or briefed by the parties. Nonetheless, Justice Stevens wrote that he "would hold that the city of Columbia's economic regulation of the billboard market pursuant to a general grant of zoning power is not exempt from antitrust scrutiny." 111 S. Ct. at 1361.

Justice Stevens used various phrasings of his standard and of his description of the defendants' actions. He said that juries "are capable of recognizing the differences between independent municipal action and action taken for the sole purpose of carrying out an anticompetitive agreement for the private party." 111 S. Ct. at 1362. An accompanying footnote read the jury instructions quoted above at note 40. as requiring proof that "the ordinance was enacted for the sole purpose of interfering with access to the market." Id. at 1362 n.9. That footnote also stated, however, that "the plaintiff must prove that the municipal action is the product of an anticompetitive agreement with private parties." Id. Justice Stevens concluded that the Court "errs in extending the state action exemption to municipalities that enter into private anticompetitive agreements under the guise of acting pursuant to a general state grant of authority to regulate health, safety, and welfare." Id. at 1363.

111 S. Ct. at 1350 (quoting Town of Hallie v. Eau Claire, 471 U.S. 34, 40 (1985) (internal quotation omitted)). Also quoting Hallie (at 42), the Court added that it is sufficient that "suppression of competition is the 'foreseeable result' of what the statute authorizes." For an interesting contrast compare Lancaster Community Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 997 (9th Cir. Jan. 18, 1991, as refiled July 15, 1991), where the Ninth Circuit amended its opinion, post-Omni, to support its conclusion that a hospital district lacked immunity because California's policy had been to promote competition.
welfare regulation is without precedential support and would "defy rational implementation."\(^{55}\)

Justice Stevens complained that the majority's approach stemmed from unreasonable "fear" of "subjecting the motivations and effects of municipal action to antitrust scrutiny."\(^ {56}\) He pointedly noted that problems of proof here are "substantially the same" as in most antitrust cases. Such problems should be dealt with, if at all, through heightened evidentiary standards. Justice Stevens's points were similar to those in his dissent in *Business Electronics Corp. v. Sharp Electronics Corp.*,\(^ {57}\) again from a majority opinion authored by Justice Scalia. Justice Stevens's *Business Electronics* dissent attracted only Justice Scalia; his dissent in *Omni* attracted only Justices White and Marshall. Most Justices seem comfortable with the greater certainty in antitrust law that at least some of Justice Scalia's efforts are achieving.

**B. Petitioning Government**

The *Omni Outdoor Advertising* Court also considered two *Noerr-Pennington* issues. It first ruled that the "sham" exception, the basis of the Fourth Circuit's decision, was not satisfied. It then addressed the question whether there is a conspiracy exception to *Noerr*—an issue not reached by the Fourth Circuit—and ruled that there is no such exception.

1. "Sham" Exception

As noted above, the Fourth Circuit ruled that the "sham" exception applied, thus eliminating any protection for COA's petitioning. This was a misapplication of the Supreme Court's teaching in *Allied Tube & Conduit v. Indian Head, Inc.* that the "sham" exception applies to "private action that is not genuinely aimed at procuring favorable government action."\(^ {58}\) It follows from *Allied Tube*'s analysis that bribery and conspiracy are normally not subject to the "sham" exception because, if anything, they

\(^{55}\) 111 S. Ct. at 1350 n.4.

\(^{56}\) Id. at 1361 (Stevens, J., dissenting).

\(^{57}\) 485 U.S. 717 (1988). In *Business Electronics* Justice Stevens complained that "the majority exhibits little confidence in the judicial process as a means of ascertaining the truth," and wrote that "the rule the majority fashions today is based largely on its concern that in other cases juries will be unable to tell the difference between truthful and pretextual defenses." *Id.* at 751–53. "Proof of motivation," according to Justice Stevens, is a "commonplace in antitrust litigation of which the majority appears apprehensive." *Id.* at 753. Justice Stevens's opinions in *Omni* and *Business Electronics* are compared nicely in Stoll & Goldfein, "Omni"—A Bright Line Test, N.Y.L.J., Apr. 16, 1991, at 6.

\(^{58}\) 486 U.S. 492, 508 n.4 (1988), quoted in *Omni*, 891 F.2d at 1138; *see also Allied Tube*, 486 U.S. at 500 n.10 ("activity that was not genuinely intended to influence governmental action" is "sham"). In *Omni* the Court quoted the *Allied Tube* language noted in the text but appended the words, "at all," which emphasizes the narrowness of the exception.
indicate particularly fervent intentions to influence government. If ever in doubt, reversal of the Fourth Circuit's conclusion seemed inevitable once Chief Justice Rehnquist quipped, during oral argument, that many legislative hearings would be subject to sanctions if legislators' failure to listen were actionable.

The Court never should have reached the "sham" exception, however. Allied Tube explained that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint." Harm by requested, valid governmental action cannot support antitrust liability against a private petitioner. Unless the plaintiff could show that its damages, which were caused by acts of the City Council, were not the result of valid governmental action, the defendant should have won. The "sham" exception is irrelevant. Although the Court's discussion of the exception was generally correct, the Court lessened analytic clarity by seeming to presume the exception was properly at issue.

2. Conspiracy Exception

Without significant analysis beyond that contained in its rejection of the state action conspiracy exception, the Court also rejected the much-debated possible "conspiracy" exception to the Noerr-Pennington doctrine. The Court's entire discussion fills about one-half page. The "same factors" that were "described above, make it impractical or beyond the purpose of the antitrust laws ... to identify and invalidate lobbying that has produced selfishly motivated agreement with public officials." Thus, even "unlawfulness" such as, presumably, bribery, is protected.

50 Calkins, supra note 41, at 388-40 (disagreeing with cases taking a broader view of exception).
60 See Supreme Court Hears Argument on Scope of Parker and Noerr in Ordinance Context, 59 Antitrust & Trade Reg. Rep. (BNA) 812 (Nov. 29, 1990).
61 486 U.S. 492, 499 (1988). Petitioners properly made this argument first, discussing the "sham" exception only as an alternative grounds for prevailing. Petitioners' Brief at 24-25.
62 This point is developed in Calkins, supra note 41, at 341-44.
63 The Court correctly reversed the Fourth Circuit and accurately quoted the Allied Tube standard, see supra note 58. The Court also said, however, that the "sham" exception applies only to "situations in which persons use the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon." 111 S. Ct. at 1354 (emphasis in original). To the extent that this shifts attention away from a petitioner's motivation to the source of the restraint, it introduces confusion and is not faithful to Allied Tube.
64 For background see Calkins, supra note 41, at 352-54.
65 111 S. Ct. at 1355. Justice Stevens's dissenting opinion briefly objected. Id. at 1363 ("the evidence in the record is sufficient to support the jury's finding that a conspiracy existed
If this broad rejection is law it is a sharp and relatively unexplained break with language in the *Allied Tube* opinion issued only three years ago. There the Court disagreed with the "absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action." Instead, *Allied Tube* said that immunity depends "on the source, context, and nature of the anticompetitive restraint at issue," and that it had "never suggested" that bribery "merits protection." Many commentators and lower courts have recommended or recognized some form of a conspiracy exception. Lower courts considering the antitrust immunity of questionable payments generally followed a wavering line tying antitrust immunity to the non-antitrust legality of those payments. Now, in dicta, the Court has reversed itself with respect to bribery and other unlawful petitioning and has broadly rejected any conspiracy exception.

Such a rejection of any conspiracy exception has implications for the very foundation of the *Noerr-Pennington* doctrine. Some courts and commentators view the doctrine as a First Amendment-based exemption from the antitrust laws; others insist it is simply an interpretation of those laws. The former position is weakened by a conclusion that *Noerr* protects even bribery from an antitrust challenge, because bribery probably does not enjoy First Amendment protection. 

between the private party and the municipal officials in this case so as to remove the private petitioner's conduct from the scope of Noerr-Pennington antitrust immunity").

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66 486 U.S. at 503.
67 486 U.S. at 498. This comparison is developed in a forthcoming monograph on the *Noerr-Pennington* doctrine by the ABA Antitrust Section.
68 *Allied Tube*, 486 U.S. at 504 (7-2); see also id. at 502 n.7 (noting dictum in California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972), that "bribery of a public purchasing agent may violate the antitrust laws").
69 For support for a "thoughtful co-conspirator exception," see Calkins, *supra* note 41, at 352–54. Professors Areeda and Hovenkamp argued that the conspiracy exception should be applied where a government official is bribed, makes a decision solely "out of personal bias," or favors a "personal financial interest" related to that of the private alleged conspirator. P. AREEDA & H. HOVENKAMP, *supra* note 43, at 42. Professor Elhauge thinks they go too far, but he would achieve some of the same results by regarding action by a financially interested official as private rather than governmental. Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 667, 706 (1991).
70 Calkins, *supra* note 41, at 354–56.
71 The very general "conspiracy exception" jury instructions are quoted above at note 40.
72 Resolving the *Noerr-Pennington* doctrine's basis has some important ramifications. For instance, if the doctrine were constitutional it would not apply to petitioning foreign governments. Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. Chi. L. Rev. 80, 120–21 (1977). The disagreement about the basis of the *Noerr* doctrine, the relationship between a possible bribery exception and this disagreement, and the implications of concluding that the
The Court's half-page rejection of a possible conspiracy exception mentioned none of these issues or implications. Although the language of that discussion is broad, it should be read in context. This was an easy Noerr case. Requested government action was responsible for all the harm at issue. Omni could not plausibly claim that COA had so closely controlled government officials that ostensible government action was actually private. Charges of corruption were frivolous. Campaign contributions totalled less than $300,73 and the free billboard space donated to political campaigns was worth no more than $1,500.74 “There was no evidence of any illegal conduct such as bribery, coercion, violence, kickbacks, or the like,” and no elected official “stood to gain any personal financial advantage by passing the billboard ordinances.”75 Under these circumstances the Court's Noerr outcome was undoubtedly correct. How far its words should extend beyond the facts of the case is less clear. Regardless, the bold strokes of Justice Scalia's opinion should increase certainty by making it easier for judges promptly to dispose of some state action and Noerr-Pennington cases.76

III. SUMMIT HEALTH: CONFUSION ABOUT INTERSTATE COMMERCE CONTINUES

Just as in Omni the four junior Justices, joined by the Chief Justice and Justice Blackmun, facilitated prompt disposition of certain cases, so too in Summit Health, Ltd. v. Pinhas77 the four junior Justices would have eased doctrine is merely one of statutory interpretation are discussed in Calkins, supra note 41, at 329–32, 356.

73 This is the figure in the petitioners' brief (at 6 n.6); see also Petitioners' Reply Brief at 9 n.12. The respondent's brief did not quantify amounts. Cf. Respondent's Brief at 23 (describing COA support of politicians).

74 This concession was elicited from the plaintiff's lawyer by Justice Marshall. Argument, supra note 60.

75 The quotation is from Judge Wilkins's dissenting opinion below, 891 F.2d at 1146; no subsequent brief or opinion disagreed with his observations. Much of petitioners' brief was devoted to emphasizing the complete absence of bribes or personal financial interests.

76 Cf., e.g., TeleSTAR Inc. v. MCI Communications Corp., Nos. 90-4125 & 90-4128 (10th Cir. Oct. 9, 1991) (unpublished opinion affirming dismissal of suit challenging non-sham opposition to issuance of FCC licenses), noted in 61 Antitrust & Trade Reg. Rep. (BNA) 511; Municipal Utils. Bd. of Albertville v. Alabama Power Co., 934 F.2d 1493 (11th Cir. 1991) (withdrawing pre-Omni opinion, ruling for defendants on conspirator-exception issue and authorization question, but remanding for consideration of active supervision issue); Allright Colorado, Inc. v. City & County of Denver, 937 F.2d 1502 (10th Cir. 1991) (rules and regulations disadvantaging off-site airport parking firms immune, relying on Omni to reverse lower court); Buckley Construction, Inc. v. Shawnee Civic & Cultural Dev. Auth., 933 F.2d 853 (10th Cir. 1991) (relying on Omni to affirm dismissal of suit by disappointed bidder); Fischelli v. Town of Methuen, 764 F. Supp. 2 (D. Mass. 1991) (summary judgment granted based solely on Omni in suit challenging decision of town council; court had previously refused to dismiss).

dismissal of Sherman Act cases, this time for want of the required effect on interstate commerce. In *Summit Health*, however, the Chief Justice and Justice Blackmun elected to join Justice Stevens and the other senior Justices, so the junior Justices could only dissent. That dissent, by Justice Scalia, is nonetheless the term's most provocative antitrust opinion. Had it attracted another vote, it might have shifted significant power from juries to judges. Such a shift would tend to increase the certainty or at least the predictability of antitrust law.

The Sherman Act's interstate commerce requirement is a particularly confusing fragment of antitrust law. Much of the confusion stems from tension between the relatively narrow words of the statute and the relatively broad gloss added by Supreme Court dicta. The discussion below examines this tension and some attempts to resolve it, and then considers the majority and dissenting opinions in *Summit Health*. It then reviews another source of confusion: disagreement as to whether the commerce requirement is substantive or jurisdictional, in the sense of controlling a court's power to hear a case (the sense in which this article will use the term). *Summit Health* missed an opportunity to clarify this issue. Finally, this article reflects on the law as it is and as it might be.

A. TENSION BETWEEN THE STATUTE AND THE 
SUPREME COURT'S GLOSS ON IT

The Sherman Act condemns "[e]very contract, combination . . ., or conspiracy in restraint of trade or commerce among the several States, . . ."

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78 Since *Summit Health* was a Sherman Act case, this discussion will be limited to that antitrust law. Much of the analysis has more general applicability, however, except that Clayton Act cases must meet a higher interstate commerce threshold. E.g., Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974).

79 Justice Stevens's majority opinion was joined by the Chief Justice and Justices White, Marshall, and Blackmun.

80 In addition to the issues discussed in the text, both opinions in *Summit Health* are noteworthy for their attention to *Klor's*, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959), which is as controversial as the *Topco* decision relied on in *Palmer*. See, e.g., Hovenkamp, supra note 24, at 277 ("The facts of *Klor's* are perplexing, and there is some reason to think the Court would reconsider its decision today."). The *Summit Health* majority quoted *Klor's* most famous line as part of its discussion of the application of the commerce requirement to an alleged boycott: "For if a violation of the Sherman Act occurred, the case is necessarily more significant than the fate of 'just one merchant whose business is so small that his destruction makes little difference to the economy.'" 111 S. Ct. at 1848 (quoting *Klor's*, 359 U.S. at 213, omitting footnote). Justice Scalia's dissent explained boycott law by relying on Judge Bork's explication of *Klor's*:

Since group boycotts are *per se* violations (not because they necessarily affect competition in the relevant market, but because they deprive at least some consumers of a preferred supplier; see R. Bork, The Antitrust Paradox 331–332 (1978)), Dr. Pinhas need not prove an effect on competition in the Los Angeles area to prevail if the Sherman Act applies.
or with foreign nations." The Court has regularly asserted, however, that "in enacting § 1 Congress 'wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements.'"

The statute and the Supreme Court's gloss on it are inconsistent. The statutory language requires, at a minimum, some connection between a challenged arrangement and interstate commerce. Congressional power is more sweeping. Congressional power can be invoked to prevent a clinic from denying a promotion because of racial discrimination, or from discriminating against a single patient. Congress can impose wheat-growing quotas that prevent a farmer from planting wheat for his own bread. Every instance of loan-sharking affects commerce, the Court has ruled, because Congress has regulated that "class of activities." An arsonist torching a single apartment commits a federal offense because renting is a "class of activities" that Congress has regulated. It is difficult to imagine anything otherwise violative of the antitrust laws that could not be reached by Congress, as a matter of Congressional power. The language about the reach of the Sherman Act, if taken seriously, would edit the commerce requirement out of that Act.

There once was an uneasy truce between the statute and the Court's gloss on it. The expansive language was repeated, but Supreme Court...
cases required that a challenged restraint either be in interstate commerce or (more typically) substantially affect interstate commerce.\(^8\) Lower court cases were not altogether consistent,\(^8\) but differences were manageable.

This changed in 1980. In *McLain v. Real Estate Board of New Orleans,*\(^9\) the Court disrupted the uneasy truce by seeming to take seriously the language about the reach of the Sherman Act. The Fifth Circuit had dismissed a class action challenging alleged price-fixing by New Orleans real estate brokers.\(^9\) Any such wrongdoing, the court of appeals said, was not in commerce and did not affect commerce. The Supreme Court could have reversed simply by finding a substantial effect on commerce, as it had done less than four years earlier in *Hospital Building Co. v. Trustees of Rex Hospital.*\(^2\) Instead, the Court, per Chief Justice Burger, wrote a singularly confusing opinion.

Responsibility may lie partly with (now) Judge Easterbrook. Petitioners in *McLain* submitted a fact-specific brief arguing that the challenged restraint affected commerce. In contrast, Judge Easterbrook, then deputy solicitor general, challenged the Court to take seriously its language about the reach of the Sherman Act.\(^9\) The government's brief opened

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\(^8\) E.g., Burke v. Ford, 389 U.S. 320, 321 (1967) (per curiam); see Mann, *The Affecting Commerce Test: The Aftermath of McLain*, 24 Houston L. Rev. 849, 860 (1987). A common phrasing was used in *Hospital Bldg. Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 743 (1976) (Marshall, J.): “As long as the restraint in question 'substantially and adversely affects interstate commerce,' the interstate commerce nexus required for Sherman Act coverage is established” (quoting *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195 (1974), and citing *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 234 (1948)). The “effect on commerce” test is almost always easier to satisfy than the “in commerce” test, so litigation (and this article) focus principally on the former.

Although the *Rex Hospital* phrasing requires “adverse” as well as "substantial" effects, it is doubtful that the Court intended to make this apparently dual requirement. *Rex Hospital* itself twice stated that Sherman Act coverage requires only a "substantial effect on interstate commerce," 425 U.S. 744, 747 n.5. *Rex Hospital* also explained, "An effect can be 'substantial' . . . even if its impact on interstate commerce falls far short of causing enterprises to fold or affecting market price." *Id.* at 745 (citing United States v. Employing Plasterers Ass'n, 347 U.S. 186 (1954)). For a good discussion of this point, see Note, *The Interstate Commerce Test for Jurisdiction in Sherman Act Cases and Its Substantive Applications*, 15 GA. L. REV. 714,717–19 (1981).

\(^9\) See Georgia Note, supra note 88, at 716 (nexus required between conduct and commerce); *Conflicting Interpretations of the Sherman Act's Jurisdictional Requirement*, 32 Vand. L. Rev. 1215 (1979) (many lower courts stricter than Supreme Court).

\(^90\) 444 U.S. 232 (1980).

\(^91\) 583 F.2d 1315 (5th Cir. 1978).

\(^92\) 425 U.S. 738 (1976) (sufficient that effort to block construction of a hospital, if successful, would affect significantly the amount of interstate purchases and payments).

\(^93\) Letter from Judge Frank H. Easterbrook to Stephen Calkins (Sept. 9, 1991) (The brief was written "to see whether the Supreme Court was willing to take seriously its oft-repeated, but ne'er followed assertion that the Sherman Act exercises Congress' full powers under the Commerce Clause." If the Sherman Act does exercise that power, that should virtually end the discussion. "And if the Sherman Act exercises less than the whole national power,
by discussing the reach of the Sherman Act, reviewed the incredible breadth of Congressional power, and then described the real estate business' effect on interstate commerce. The brief concluded: "Congress thus has the power, under the Commerce Clause, to regulate the affairs of real estate brokers. And because the Sherman Act expresses all the power Congress possesses, it applies to the market in realty services."  

The Supreme Court apparently was impressed with this argument. Chief Justice Burger's opinion noted the breadth of the Commerce Clause and the "corresponding broad reach of the Sherman Act." The Court then seemed to adopt the Solicitor General's view that it was sufficient that the brokerage business be in interstate commerce:

To establish the jurisdictional element of a Sherman Act violation it would be sufficient for petitioners to demonstrate a substantial effect on interstate commerce generated by respondents' brokerage activity. Petitioners need not make the more particularized showing of an effect.

I hoped the Court would say so and stop the pretense.

The three titled signatories of the government's brief in *McLain* were Solicitor General Wade H. McCree, Jr., Assistant Attorney General John H. Shenefield, and Easterbrook. Easterbrook argued for the government. In contrast, the three titled signatories of the government's brief in *Rex Hospital* and *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), which are discussed in the next footnote, were Solicitor General Robert H. Bork; Assistant Attorney General Thomas E. Kauper; and Assistants to the Solicitor General Robert B. Reich (*Rex Hospital*) and Gerald P. Norton (*Goldfarb*). Bork argued for the government in *Goldfarb*; the government did not participate in the *Rex Hospital* argument.

Brief for the United States as Amicus Curiae, text at n.18. A final section of the brief quickly argued in the alternative that petitioners should be permitted to show at trial any required effect on commerce. During oral argument Easterbrook explained that "if the Sherman Act expresses all of the power Congress has to exercise, and if...the Sherman Act does not apply to the activities of brokers at all, it must follow that Congress has no power over brokers. That seems an extraordinary proposition...

The government's brief in *McLain* differed notably from its briefs a few years earlier in *Goldfarb* and *Rex Hospital*. The *Goldfarb* brief argued simply that "the restraints challenged in this case substantially affect interstate commerce." Memorandum for the United States as Amicus Curiae, *Goldfarb*, at 32. The *Rex Hospital* brief is more complicated. One Raleigh, North Carolina, hospital allegedly conspired to prevent a 49-bed competitor from expanding to 140 beds. The Fourth Circuit ruled for defendants, relying in part on its findings that the alleged conspiracy would not affect "market price[s]," cause any institution to fail, or otherwise affect commerce "in the detrimental manner that concerned Congress." 511 F.2d at 684. The government objected, arguing that "the Sherman Act applies if the restraint affects a significant amount of interstate commerce, regardless of the competitive impact." Memorandum for the United States as Amicus Curiae, *Rex Hospital*, at 7. The brief argued that the dollar amount of affected commerce, i.e., interstate provision of financing and purchases of medicine, supplies, and management services, compared favorably with amounts previously found substantial. One sentence shifted attention away from the challenged restraint ("Jurisdiction is established if the restraint is imposed upon an activity...which involves a substantial amount of interstate commerce." Memorandum at 6.), and the brief repeated the standard Supreme Court language about the reach of the Sherman Act and noted briefly the breadth of Congressional power. The brief's focus, however, was on the challenged restraint's effect on commerce.

444 U.S. at 241.
on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of respondents' activity that are alleged to be unlawful. 96

Moreover, the Court's application of this legal standard considered merely the real estate business in general, and easily concluded that plaintiffs deserved to be heard at trial.

Had the Court stopped there, the dicta about the reach of the Sherman Act would have prevailed, and the commerce requirement would have been stripped of its importance. The Court continued, however, as follows:

To establish federal jurisdiction in this case, there remains only the requirement that respondents' activities which allegedly have been infected by a price-fixing conspiracy be shown "as a matter of practical economics" to have a not insubstantial effect on the interstate commerce involved. . . .

The broker charges a fee generally calculated as a percentage of the sale price. Brokerage activities necessarily affect both the frequency and the terms of residential sales transactions. Ultimately, whatever stimulates or retards the volume of residential sales, or has an impact on the purchase price, affects the [interstate] demand for financing and title insurance. . . . Where, as here, the services of respondent real estate brokers are often employed in the relevant market, petitioners at trial may be able to show that respondents' activities have a not insubstantial effect on interstate commerce. 7

It is not clear what the Court meant by "infected" activities (in the first quoted sentence) or by "respondents' activities" (in the last quoted sentence). 98 If these references were to the real estate business, the discussion added nothing to what went before. If the references were to the defendants' alleged illegal conduct, the Court apparently was endorsing a standard that its opinion had rejected earlier. The latter is more plausible, 99 but neither interpretation is satisfying.

96 Id. at 232, 242. The Court said this approach was supported by two considerations from case law, namely, that a per se violation can be based on "purpose" rather than effect, and that a plaintiff can qualify for injunctive relief without proof of "legally cognizable damages." Id. at 243.

97 Id. at 246 (emphasis added).

98 The word "infected" does not appear in the McLain briefs or oral argument transcript, or, to my knowledge, in previous cases. "Where 'infected' came from only Warren Burger and his clerks know." Letter from Judge Frank H. Easterbrook to Stephen Calkins (Sept. 9, 1991).

99 The opaque "infected activities" language is followed immediately by citations to Rex Hospital, Goldfarb, and Burke v. Ford, in each instance to a page on which a traditional formulation can be found: Rex Hospital, 425 U.S. at 745 ("the [Burke v. Ford] market division . . . substantially affected interstate commerce because as a matter of practical economics that division could be expected to reduce significantly the magnitude of purchases made by the wholesalers from out-of-state distillers") (footnote omitted); Goldfarb v. Virginia State Bar, 421 U.S. 773, 784 (1975) ("The necessary connection between the interstate transactions and the restraint of trade provided by the minimum-fee schedule is present because, in a practical sense, title examinations are necessary . . . to assure a lien on a valid
After McLain, confusion reigned in the lower courts. Some courts followed the thrust of the first part of McLain, by seemingly examining the general business activities of defendants or at least those business activities that had been "infected." Most lower courts, however, continued to insist on some nexus between challenged practices and interstate commerce. This division was exploited effectively by petitioners in Summit Health, who persuaded the Court to hear an appeal based on the interstate commerce issue.

B. THE MAJORITY OPINION

One of the odd things about Summit Health is that the interstate commerce issues played little role in the lower courts. The district court granted the defendants' motion to dismiss the antitrust claims in reliance on the state action defense. The Ninth Circuit reversed based on an intervening Supreme Court state action decision and then summarily addressed several other issues, including, in three paragraphs, interstate commerce.

The case involved a familiar claim. A single doctor was complaining about loss of medical staff privileges. Dr. Pinhas was the most productive eye surgeon at Los Angeles's Midway Hospital but had a disagreement with the medical staff. The medical staff insisted that eye surgeons

title of the borrower.); Burke v. Ford, 389 U.S. 320, 322 (1967) ("the state-wide wholesalers' market division inevitably affected interstate commerce"). The ensuing discussion seems to analyze how changes in brokerage prices would affect the (interstate) demand for financing and title insurance. In context, "activities" refers more likely to price-fixing activities than to general brokerage activities.


See, e.g., Shahawy v. Harrison, 778 F.2d 636, 640 (11th Cir. 1985); Western Waste Serv. Sys. v. Universal Waste Control, 616 F.2d 1094 (9th Cir.) (Kennedy, J.), cert. denied, 449 U.S. 869 (1980). Respondent's opposition to certiorari was devoted principally to harmonizing Judge Kennedy's Western Waste opinion with opinions from other circuits. Ironically, in Summit Health Justice Kennedy joined the dissenting opinion, which preferred the standard he rejected in Western Waste.


E.g., Hayden v. Bracy, 744 F.2d 1338 (8th Cir. 1984); Furlong v. Long Island College Hosp., 710 F.2d 922 (2d Cir. 1983). Leading cases include Cordova & Simonpieri Ins. Agency Inc. v. Chase Manhattan Bank N.A., 649 F.2d 36 (1st Cir. 1981) (Breyer, J.) and Crane v. Intermountain Health Care, Inc., 637 F.2d 715 (10th Cir. 1980) (en banc).

894 F.2d 1024, 1027–28 (9th Cir. 1989).


There have been many such cases. See, e.g., Scott, Medical Peer Review, Antitrust, and the Effect of Statutory Reform, 50 Md. L. REV. 316, 332–37 (1991).
be assisted by a second surgeon, even after Medicare halted reimbursement for these services. When Dr. Pinhas protested, the medical staff initiated what he alleged to be unfair peer review proceedings that resulted in suspension of his staff privileges. When Dr. Pinhas sued, the defendants were in the process of circulating an adverse report about him that, he alleged, would have prevented him from practicing elsewhere in California or even beyond.

The Ninth Circuit found that "jurisdiction under the Sherman Act" had been adequately established because the plaintiffs had to show only that "the peer review process in general" has a "not insubstantial" effect on commerce—which, the court said, "can hardly be disputed." In fact, however, the complaint made no such allegation but merely alleged that the plaintiff and the defendants, and one defendant hospital's medical staff, were engaged in commerce.

The Supreme Court affirmed for reasons that are not altogether clear. The Court could have adopted the standard advocated by the government in McLain, i.e., a rule that the Sherman Act reaches everything Congress could reach. Although the Court repeated the usual language to this effect, it did not seem to regard this as controlling. Nor did the Court rely on or even discuss the leading expansive test, which looks at the general business activities of the defendants. Instead, the Court's opinion can and likely will be read at least three different ways:

(1) The Court gave special attention to the "congressionally regulated peer-review process." After noting that the restraint was accomplished through peer review, the Court concluded:

We have no doubt concerning the power of Congress to regulate a peer-review process controlling access to the market for ophthalmological surgery in Los Angeles. Thus, respondent's claim that members of the peer-review committee conspired with others to abuse that process . . . has a sufficient nexus with interstate commerce to support federal jurisdiction.

107 894 F.2d at 1031-32 (quoting McLain, 444 U.S. at 246).

108 See First Amended Complaint Allegations 5-8.

109 111 S. Ct. at 1846 nn. 7, 8, 10; see infra note 114. For the Solicitor General's views in Summit Health, see infra notes 115 & 117.

110 This test was advocated, as an alternative, by the respondent. Respondent's Brief, at part IV. Perhaps ironically, it also was advocated by 22 states in an amicus brief. Brief of Amici Curiae Submitted by the States of California et al., at 4 ("Congress' power under the Commerce Clause is very broad power, even extending to very small, remote and local activities that, in the aggregate, have some effect on interstate commerce.") (footnote omitted).

111 111 S. Ct. at 1848 & n.12.

112 Id. at 1848-49; see also id. at 1848 ("The restraint was accomplished by an alleged misuse of a congressionally regulated peer-review process, which respondent [plaintiff]
This emphasis on the peer-review process echoes the reasoning of the Ninth Circuit. Yet although the Court referred to Congress’s authority to regulate peer review programs, it never explained why this authority makes the Sherman Act applicable. The question is not whether Congress could regulate the peer review process or has regulated it with some other statute; the question is whether the Sherman Act reaches a particular exercise of peer review.

(2) The dissent read the majority as asking “whether the entire line of commerce from which Dr. Pinhas has been excluded affects interstate characterizes as the gateway that controls access to the market for his services.” (omitting footnote discussing the Health Care Quality Improvement Act of 1986’s antitrust immunization of certain peer-review programs, and noting Dr. Pinhas’s claim that the peer-review process at issue had not satisfied that Act’s requirements).

The Court quoted all of the Ninth Circuit’s analysis. 111 S. Ct. at 1846 (quoting 894 F.2d at 1032). That analysis is discussed above, text at notes 107–08. Respondent characterized the Ninth Circuit as having applied a McLain-based “infected activities test,” and devoted most of his brief to defending it. Respondent’s Brief, parts II & III.

If the Court referred to Congressional power over peer review merely to demonstrate that Congress could reach the challenged activity, it was over-proving the obvious, given the reach of Congressional power. See supra text at notes 84–87. The quoted language, with its “thus,” might seem to be taking seriously the language about the Sherman Act extending as far as Congressional power, but if this were the basis of the Court’s decision most of its analysis would have been unnecessary.

Conceivably the Court considered peer review a special “class of activities” that Congress chose to regulate. The Solicitor General argued in the alternative for a “class of activities” test asking whether “the provision of ophthalmological services affects commerce.” Brief for the United States as Amicus Curiae Supporting Respondent, Summit Health, at 11–18. He surveyed the classic commerce clause cases, and concluded that “once a class of economic activities is found to affect commerce, Congress can regulate all of the activities of that class.” Id. at 12. Petitioners properly responded that the “class of activities” cases generally involve review of explicit Congressional regulation of seemingly local activities (such as loan-sharking and apartment-renting), whereas in Sherman Act cases the question is whether the statute in fact applies. Petitioners’ Reply Brief, at part II; see, e.g., United States v. Staszcuk, 517 F.2d 53, 59 n.16 (7th Cir.) (Stevens, J.) (language of statute similar to Sherman Act prevents reliance on “class of activities” cases), cert. denied, 423 U.S. 837 (1975). If the question were whether Congress could regulate peer review it would be significant that Congress had done so without objection, but no one doubts that Congress has this power. The existence of a 1986 statute regulating peer review says little about whether an 1890 statute should be interpreted as applying to particular exercises of peer review. Professor Havighurst has argued that the anticompetitive potential of staff-privileges cases justifies a permissive interstate commerce inquiry, Havighurst, Doctors and Hospitals: An Antitrust Perspective on Traditional Relationships, 1984 Duke L.J. 1071, 1142–44; see also Brief of Richard A. Bolt, M.D., as Amicus Curiae Supporting Respondent (by Professor Havighurst), but although the Court reached Havighurst’s recommended result, it did not subscribe to his reasoning.

Nonetheless, at least one lower court seems to have read Summit Health as holding that the commerce requirement is satisfied by virtually every denial of staff privileges. In Brown v. Our Lady of Lourdes Medical Center, 767 F. Supp. 618, 626–27 (D.N.J. 1991), the court refused to rely on interstate commerce grounds to dismiss or grant summary judgment on a complaint when a hospital refused staff privileges to a surgeon who had practiced almost no medicine in a decade. The court said Summit Health required it to presume that such a
commerce,” thus adopting the test advocated in the alternative by the Solicitor General. Parts of the Court's opinion lend support to such an interpretation. “The competitive significance of respondent's exclusion from the market must be measured, not just by a particularized evaluation of his own practice, but by a general evaluation of the impact of the restraint on other participants and potential participants in the market from which he has been excluded.” The Court viewed Dr. Pinhas as having been excluded from the market for ophthalmological surgery in Los Angeles, and its recitation of factual allegations mentioned commerce only by saying that the parties were engaged in commerce and that there was a connection between this “market” (or part thereof) and interstate commerce. Such a connection satisfies the commerce requirement, by itself, only under a line of commerce test.

(3) The Court's opinion also can be read, however, as adopting a test turning on the restraint's effect or threatened effect on commerce. The Court's analysis of the interstate commerce issue is almost entirely a refusal would have an effect on the entire hospital staff and thus on interstate commerce. (Summary judgment was granted based on other grounds.)

116 111 S. Ct. at 1850 (Scalia, J., dissenting) (emphasis added) (“To determine Sherman Act jurisdiction it [the majority] looks neither to the effect on commerce of the restraint, nor to the effect on commerce of the defendants' infected activity, but rather, it seems, to the effect on commerce of the activity from which the plaintiff has been excluded.”).

117 Brief for the United States as Amicus Curiae Supporting Respondent, Summit Health, at 6–16. The Solicitor General supported a “line of business” test as an alternative to the "class of activities" test discussed in note 115, and identified the relevant line of business as “hospital ophthalmological services in general or those of this hospital.” Id. at 17 n.9. The Solicitor General relied on McLain's consideration of the real estate brokerage business and on then-Judge Kennedy's Western Waste opinion, which focused on the rubbish collection business. The Solicitor General thus regarded Western Waste as adopting a test narrower than the "general business activities" test with which it is often associated.

118 111 S. Ct. at 1848.

119 111 S. Ct. at 1846 (“The provision of ophthalmological services affects interstate commerce because both physicians and hospitals serve nonresident patients and receive reimbursement through Medicare payments.”); id. at 1847 (“It seems clear . . . that these [ophthalmological] services [apparently at Midway] are regularly performed for out-of-state patients and generate revenues from out-of-state sources. . . .”).

Justice Scalia protested that the complaint included no such allegations, 111 S. Ct. at 1853 (Scalia, J., dissenting), and he is correct. The Solicitor General argued that ophthalmological services at Midway Hospital affected commerce, but relied principally on the defendants' Ninth Circuit brief, in which they "appear to have acknowledged" that this business "receives out-of-state patients, as well as out-of-state revenues." Brief for the United States as Amicus Curiae Supporting Respondent, at 18.

120 For an opinion that appears to have interpreted Summit Health as having adopted a line of commerce test, see Loiterman v. Antani, 1991 U.S. Dist. LEXIS 8530 (N.D. Ill. June 25, 1991) (denying summary judgment). See also Flexner, Going Nowhere in Interstate Commerce, Legal Times, June 17, 1991, at 38 (controlling factor in Summit Health was “nexus between interstate commerce and the ‘market’ in which the restraint was alleged to occur”).
response to the argument "that respondent's complaint is insufficient because there is no factual nexus between the restraint on this one surgeon's practice and interstate commerce." Had the Court meant to adopt a line of commerce test or any of the other broad tests, the response would have been straightforward: the absence of nexus between the restraint and commerce is irrelevant. Instead of making such a response, however, the Court sought to show some potential connection between the restraint and commerce.

To show such a connection the Court asserted, albeit without much assistance from Dr. Pinhas's lawyers, that a successful conspiracy would reduce the provision of ophthalmological services in the Los Angeles market. If a physician is terminated for resisting what is in effect medical featherbedding, a successful conspiracy causing that termination probably would reduce provision of medical services by increasing cost. Anything that increases cost affects demand, as McLain observed. Summit Health relied on that observation. Thus, when the Court wrote that application of the Sherman Act turns on an "evaluation of the impact

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121 111 S. Ct. at 1847.

122 Relying upon the McLain analysis discussed infra at note 165, the Court explained that the nature of antitrust law compels examining potential rather than actual consequences. 111 S. Ct. at 1847-48.

123 Id. at 1848 ("if the conspiracy alleged in the complaint is successful, 'as a matter of practical economics' there will be a reduction in the provision of ophthalmological services in the Los Angeles market") (quoting McLain, 444 U.S. at 246, which was quoting Rex Hospital, 425 U.S. at 745). The complaint alleged merely "a conspiracy to effectuate a boycott and drive Dr. Pinhas out of business in order to capture for themselves a greater share of eye care and ophthalmic surgery in Los Angeles." Respondent's Brief at "Statement of the Case."

124 111 S. Ct. at 1848 (Dr. Pinhas alleged a "restraint on the practice of ophthalmological services" and that he had been terminated "because petitioners insisted upon adhering to an unnecessary costly procedure.").

125 McLain, 444 U.S. at 246; see also Brief for the United States as Amicus Curiae, McLain, text at note 20 ("No economic theory predicts that an increase in cost leaves the quantity supplied unaffected.") (citation omitted). During the McLain oral argument, then-Assistant to the Solicitor General Easterbrook carefully traced the causal chain that starts with an increase in prices.

126 Summit Health, 111 S. Ct. at 1848 (quoting the reference to "practical economics"). Summit Health's summary of McLain is indicative of its concern with the effect of the competitive restraint being challenged: "We have based jurisdiction on a general conclusion that the defendants' agreement... 'necessarily affect[ed]' the volume of residential sales and therefore the demand for financing and title insurance." 111 S. Ct. at 1848 (emphasis added, brackets by Court, quoting McLain, 444 U.S. at 246). McLain in fact had required that "[b]rokerage activities necessarily affect" the volume of sales. By interpreting "activities" to mean the allegedly illegal agreement, Summit Health sided with those who read McLain as requiring a connection between a restraint and commerce. See supra note 99. Confidence in this view of Summit Health is weakened only slightly by the opinion's also having quoted two sentences from McLain (quoted text at note 96) that appear to take a broader view of that case.
of the restraint on other participants and potential participants in the market from which he has been excluded," it was contemplating an increase in cost and a reduction of output. None of this analysis would have been necessary had the Court intended to adopt an "affected activities" or a "line of commerce" test. Accordingly, Summit Health should be read as requiring attention to the effect or potential effect on commerce of challenged restraints. The opinion probably would have been read that way and considered unexceptional if Justice Scalia had not taken issue with it so strenuously.

C. JUSTICE SCALIA'S DISSENT

Justice Scalia's dissent reviewed in detail the complaint's omissions, but that is not the heart of his opinion. Instead, he wrote a scathing history of commerce-requirement antitrust cases. Until McLain, he said, "the question was whether the restraint at issue, if successful, would have a substantial effect on interstate commercial activity." Without mentioning the dicta about the Sherman Act's reach, he said the question "is not whether Congress could reach the activity before us here if it wanted to, but whether it has done so via the Sherman Act." He lamented a missed opportunity to revert back to pre-McLain law.

Yet Justice Scalia's approach could do far more than merely remove McLain. He views pre-McLain law as somewhat clearer than it was, and presumably would adopt this clearer view, unsullied by talk about the Sherman Act's reach. Beyond that, however, he apparently would inject competition analysis into every decision about the scope of the Sherman Act. The Sherman Act does not apply, he said, unless a restraint either interrupts the flow of interstate commerce or "substantially affects interstate commerce by restricting competition."
The possible consequences of such a requirement are suggested by part II of his dissent. Here he read the complaint as alleging price-fixing for some eye surgery at Midway Hospital and concluded that the complaint should be dismissed nonetheless. Price-fixing at Midway would not affect "competition" in the huge Los Angeles market (the market identified by the majority), and any "allegations to the contrary . . . would have to be dismissed as inconsistent with simple economics." The lack of competitive harm meant that the Sherman Act's commerce requirement was not satisfied.

Adopting such an approach would be a potentially stunning change. In *Rex Hospital*, for instance, the Court said that the requisite effect on commerce can be shown even when an impact "falls far short of . . . affecting market price." Justice Scalia apparently would disagree. The *Summit Health* majority took it as given that elimination of Midway Hospital or its ophthalmological department would affect commerce. Justice Scalia might disagree. If a medical department is too small to "restrict competition" by price-fixing, its complete elimination might not "restrict competition." Justice Scalia might routinely require merger-type analyses in "affecting commerce" cases, which would undercut sharply the power of per se rules. The full impact of his approach would depend in part, however, on whether the commerce requirement is substantive or jurisdictional.

*Stores, Inc.*, 359 U.S. 207, 213 (1959), interrupts the flow of interstate commerce") (emphasis in original; parallel citations omitted).

Justice Scalia explained that Dr. Pinhas could be seen as having been terminated pursuant to a conspiracy to engage in price-fixing through "featherbedding." For the Sherman Act to apply to a termination pursuant to a conspiracy, "what counts is the impact of that entire price-fixing conspiracy." 111 S. Ct. at 1852 (citing Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 757-58 (1984)). This reading of the complaint is similar to that worked out by the majority, see supra text at notes 123-27.

111 S. Ct. at 1853 (Scalia, J., dissenting) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 593-95 (1986)).

Justice Scalia might disagree. If a medical department is too small to "restrict competition" by price-fixing, its complete elimination might not "restrict competition." Justice Scalia might routinely require merger-type analyses in "affecting commerce" cases, which would undercut sharply the power of per se rules. The full impact of his approach would depend in part, however, on whether the commerce requirement is substantive or jurisdictional.

135 111 S. Ct. at 1847.

136 I am indebted to James D. Hurwitz for the observation that requiring proof of competitive effect before applying per se rules would follow the example of tying law, where courts engage almost in a rule of reason analysis before applying a per se rule. See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984). The dissenting opinion can be read more narrowly, however. It notes, accurately, that the complaint is devoid of allegations connecting any restraint and interstate commerce. 111 S. Ct. at 1853 ("there is no allegation that any out-of-state patients call upon the hospital for eye surgery (or anything else)—let alone a sufficient number that overcharging them..."
D. THE INTERSTATE COMMERCE REQUIREMENT'S MISCARACTERIZATION AS JURISDICTIONAL**

Defendants use two quite different motions to question whether the Sherman Act's commerce requirement is met. A Rule 12(b)(1) motion challenges the court's subject matter jurisdiction. This puts at issue the court's judicial power to decide the case—something so important the issue may be raised at any time by a party or by the court itself. Once the issue is raised, the burden of establishing jurisdiction is on the plaintiff. If the relevant facts are disputed, the court need not accept the facts as alleged, but may receive evidence and make factual determinations. The plaintiff's burden is met in federal question cases merely by showing that a claim is "not frivolous." The Supreme Court made clear in Bell v. Hood that jurisdiction "is not defeated . . . by the possibility that the averments might fail to state a cause of action."

Defendants also raise interstate commerce issues by filing Rule 12(b)(6) motions to dismiss for failure to state a claim or, less typically, Rule 56 motions for summary judgment. A Rule 12(b)(6) motion should be filed before any responsive pleading and should not be accompanied by evidence, since the court must accept the truth of all well-pleaded facts. The burden of proof is on the defendant, and the motion should be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," according

would create a 'substantial' effect on commerce" (emphasis in original). Conceivably Justice Scalia was merely objecting to inadequate pleading. Still, it is unusual to read a complaint charitably enough to find allegations of price-fixing by a hospital surgery department, but not charitably enough to find an alleged effect on interstate commerce.

** The author benefited from discussing this issue with Robert H. Abrams, Thomas C. Arthur, and Edward H. Cooper, but retains responsibility for all errors.

Rule 12(b)(1) authorizes a motion to dismiss for "lack of jurisdiction over the subject matter." For simplicity I will call the person asserting a claim the "plaintiff."

138 2A Moore's Federal Practice 12-47-12-48 (1985). Consideration of such evidence does not convert the motion into one for summary judgment; a court may dismiss for want of jurisdiction by resolving a factual dispute that would prevent summary judgment. Id.

139 5A C. Wright & A. Miller, Federal Practice and Procedure § 1350 & text at n.49 (1990); see also 2A Moore's Federal Practice, supra note 140, § 12.07[2.-1], at 12-52 ("A federal claim should be dismissed for lack of subject matter jurisdiction only if the federal claim is clearly frivolous or wholly insubstantial."). Dismissal under Rule 12(b)(1) is not on the merits and has no res judicata effect. Federal Practice and Procedure at 225; Moore's Federal Practice at 12-45.

to the leading case, *Conley v. Gibson*. A court wishing to consider evidence may convert a Rule 12(b)(6) motion into a motion for summary judgment; a court may grant summary judgment if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Antitrust courts increasingly have been willing to consider granting summary judgment or dismissing cases for failure to state a claim. Summary judgment or dismissal for failure to state a claim is a decision on the merits and has res judicata effect.

Determining whether a federal court has subject matter jurisdiction to resolve an antitrust dispute, i.e., ruling on a Rule 12(b)(1) motion, ought to be easy. Federal district courts have original subject matter jurisdiction "of all civil actions arising under" federal laws. Few antitrust complaints are so frivolous as to not "arise under" the antitrust laws, so dismissals for lack of subject matter jurisdiction should be rare. Lack of a required effect on interstate commerce normally should be challenged by a Rule 12(b)(6) motion or a motion for summary judgment.

Many courts conclude nonetheless that there is a significant interstate-commerce-related limitation, i.e., beyond determining whether a complaint is frivolous, on whether courts have jurisdiction to decide Sherman Act cases. This misapprehension stems from the multiple roles played by commerce requirements. The Constitution's commerce clause limits Congressional power, i.e., what Congress could prohibit. The Sherman Act sought to rely on the commerce clause's authority by outlawing agreements "in restraint of trade or commerce," so this statutory language limits what Congress did prohibit (which is probably not the same thing as what it could prohibit today). Neither of these concerns limits the power of federal courts to hear cases initiated by nonfrivolous complaints, but it has become so common to regard the commerce require-

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144 FED. R. CIV. P. 56(c).
145 E.g., Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065 (1986).
146 MOORE'S FEDERAL PRACTICE, supra note 140, at 12-65.
147 28 U.S.C. § 1331. Until 1980 Section 1331 had a $10,000 threshold, so greater use was made of 28 U.S.C. § 1337, which confers jurisdiction of actions "arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies" regardless of the amount in controversy.
148 E.g., Gough v. Rossmoor Corp., 487 F.2d 373 (9th Cir. 1973) (error to submit jurisdictional issue to jury); Rose mound Sand & Gravel Co. v. Lambert Sand & Gravel Co., 469 F.2d 416 (5th Cir. 1972); see also Save Our Cemeteries, Inc. v. Archdiocese of New Orleans, Inc., 568 F.2d 1074 (5th Cir. 1978).
ment as jurisdictional that even Judge Becker, who analyzed the issue with elegant precision, felt compelled to follow this approach.149

The problem stems in part from the word "jurisdiction." It should be used, in this context at least, only to refer to a court's power to decide a case. Some courts use the term correctly and rule that interstate commerce issues normally should be decided on the merits, such as at trial or in response to a Rule 12(b)(6) motion.150 Most cases—including, unfortunately, most Supreme Court cases—use the word "jurisdiction" imprecisely. Some discuss what they term "jurisdiction," but do so in response to a Rule 12(b)(6) motion, or using a standard of review appropriate for such a motion, so they appear to be referring to the reach of the Sherman Act.151 Others discuss "jurisdiction" but blur the distinction between judicial power and the substantive reach or scope of the Sherman Act, or use the term in a context that does not reveal the meaning ascribed to it.152 Finally, some courts clearly err, seemingly using the term accurately and yet treating interstate commerce issues as normally jurisdictional.153

The Summit Health Court treated the interstate commerce requirement ambiguously. Justice Scalia’s dissent referred casually to the interstate commerce requirement as jurisdictional.154


150 Good discussions are in Wells Real Estate, Inc. v. Greater Lowell Board of Realtors, 850 F.2d 803, 811–12 (1st Cir. 1988) (Coffin, J.), which said it was not error to have the jury decide the interstate commerce issue, and in George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp., 554 F.2d 551, 554 n.3 (2d Cir. 1977) (Oakes, J.), and W.W. Mims v. Kemp, 516 F.2d 21 (4th Cir. 1974) (per curiam).

151 For instance, Chief Justice Burger’s opinion in McLain referred repeatedly to “jurisdiction” and said that plaintiffs must “demonstrate” the truth of any controverted allegations, but the Court read the pleadings “most favorably to petitioners” and relied on the Conley v. Gibson Rule 12(b)(6) standard to reverse the granting of a Rule 12(b)(1) motion—without explaining the proper use of each motion. 444 U.S. at 242, 245–46. McLain would have been a good vehicle for clarifying the issue because the Fifth Circuit had said (wrongly) the issue is jurisdictional, 583 F.2d 1315, 1325 (5th Cir. 1978), but neither petitioners nor the Solicitor General objected.

152 A good example is Rex Hospital, 425 U.S. 738, 742 n.1 (1976). The defendant filed motions under both Rules, and the Fourth Circuit, sitting en banc, explained that the interstate commerce issue normally should be challenged as a failure to state a claim. 511 F.2d 678, 680–81 (4th Cir. 1975) (Craven, J.). The Supreme Court casually stated that it would treat the dismissal as had the Fourth Circuit, but that this did not affect its analysis. Earlier, in Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 203 n.19 (1974), the Court “assumed” that the commerce requirements of the Clayton Act are jurisdictional rather than substantive, but said the legal issues are identical. Justice Douglas, dissenting, explained some of the differences. Id. at 212–14 nn.9 & 10.

153 E.g., cases cited supra at note 148.
commerce issue as "jurisdictional," but the context does not reveal whether the reference was to judicial power. The majority also referred casually—twice—to "jurisdiction." The issue had been presented by a Rule 12(b)(6) motion, however, and the majority seemed to treat it as such by assuming "the truth of the material facts as alleged in the complaint." Thus, Summit Health can be read as regarding the issue as substantive.

E. Comment

Interstate commerce issues normally should be considered issues of substantive law, challengeable by Rule 12(b)(6) motions or motions for summary judgment, rather than issues of jurisdiction, challengeable by Rule 12(b)(1) motions. This is only partly for reasons of clarity and accuracy. As indicated above, there are important differences between Rules 12(b)(1) and 12(b)(6)—differences in the obligation to accept well-pleaded facts, in the legal standard to be applied, and in the placement of the burden of proof. Plaintiffs enjoy some significant advantages when resisting 12(b)(6) motions that are lacking when challenged by a Rule 12(b)(1) motion. Differences in outcomes may not be as great as differences in phrasings might suggest, but judges tend to approach decisions about judicial power differently than decisions about the merits. Judges must determine judicial authority, even if the question is close; on occasion they should defer to juries to decide merits issues.

At one time courts may have been tempted to treat interstate commerce issues as jurisdictional, because prompt disposition of weak cases on

115 111 S. Ct. at 1849 & 1854.
116 Id. at 1845, 1849.
117 Id. at 1845; Summit Health, 894 F.2d at 1028.
119 E.g., Mortensen v. First Federal Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977) (footnote omitted):

Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction—its very power to hear the case—there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional issues. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist.
The consequences of adopting Justice Scalia’s *Summit Health* position would be especially far-reaching were the commerce question considered jurisdictional. Such an approach would require antitrust plaintiffs to demonstrate anticompetitive effects before courts had power to decide their cases. This would transplant the heart of antitrust law into the jurisdictional issue. Such a change could significantly shift power from juries to judges. This would tend to enhance certainty or at least predictability once the law was settled, but it is not what Congress intended.

In addition to being read as considering interstate commerce issues ordinarily ones of substantive law, *Summit Health* should be read as continuing to require some nexus between challenged conduct and interstate commerce. Such a requirement is not onerous; to the contrary, it is easily satisfied. There is no need to show that the flow of interstate commerce has been diminished; all that is required is to show that a restraint has

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150 See generally 5 Moore’s Federal Practice ¶ 38.36[2.-2] (1988) (“As a matter of policy, there is much to be said for approaching problems of statutory coverage as triable to the court when reasonably separable from the facts of violation.”). For arguments that jurisdictional treatment is justified as a necessary tool for disposing of weak antitrust cases, see *Expanding Jurisdiction*, supra note 157, at 167-73.

160 See e.g., Calkins, supra note 145.

161 In *Omni*, as in *Business Electronics*, Justice Stevens complained that Justice Scalia lacked confidence in juries. *Supra* text at notes 56–57. Whether or not he distrusts juries, Justice Scalia clearly is unhappy about what he perceives as excessive antitrust litigation in the federal courts:

> Disputes over the denial of hospital practice privileges are common, and most of the circuits to which they have been presented as federal antitrust claims have rejected them on jurisdictional grounds. . . . Federal courts are an attractive forum, and the treble damages remedy of the Clayton Act an attractive remedy. We have today made them available for routine business torts, needlessly destroying a sensible statutory allocation of federal-state responsibility and contributing to the trivialization of the federal courts.

*Summit Health*, 111 S. Ct. at 1854 (Scalia, J., dissenting).

162 For instance, the leading case reading *McLain* narrowly is the Tenth Circuit’s opinion in *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715 (10th Cir. 1981) (en banc), yet the Tenth Circuit has repeatedly found interstate commerce requirements satisfied, see *Anesthesia Advantage, Inc.* v. *Metz Group*, 912 F.2d 397 (10th Cir. 1990); *Lease Lights, Inc.* v. *Public Serv. Co.*, 701 F.2d 794 (10th Cir. 1983); *Mishler v. St. Anthony’s Hosp. Sys.*, 694 F.2d 1225 (10th Cir. 1981); see also *Nelson v. Monroe Regional Medical Center*, 925 F.2d 1555 (7th Cir. 1991) (another relatively strict circuit found commerce requirement satisfied in suit by patient challenging acquired medical clinic’s refusal of treatment).

affected or reasonably can be expected to affect interstate commerce in a not insubstantial way.\(^{164}\) In conspiracy cases, this means examining the likely effect on commerce if the conspiracy were to succeed.\(^{165}\) One is reminded of Chicago Board of Trade's observation that "[e]very agreement concerning trade, every regulation of trade, restrains."\(^{166}\) The principal Sherman Act inquiry asks whether the restraint is unreasonable. The interstate commerce inquiry is different. It focuses merely on a challenged restraint's actual or potential connection with interstate trade.

Justice Scalia apparently prefers a more searching scrutiny of competitive effects as part of the commerce requirement inquiry, and perhaps in deciding whether a court has jurisdiction. His view might have prevailed had Justice Thomas already replaced Justice Marshall, who provided an essential fifth vote for the majority. Summit Health saw the five senior Justices outvote the four Justices nominated by Presidents Reagan and Bush. Now the Reagan-Bush appointees have a majority.

Justice Thomas's limited record as a jurist, moreover, evidences an interest in closely scrutinizing assertions of judicial authority. A good example is Cross-Sound Ferry Services, Inc. v. ICC.\(^{167}\) The District of Columbia Circuit, in an opinion by Judge Mikva (joined by Judge Williams), upheld an ICC action on the merits without deciding whether the plaintiff had standing, since the merits were obvious but the standing issue

\(^{164}\) Professors Areeda and Hovenkamp endorsed Judge Breyer's formulation in Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A., 649 F.2d 37, 45 (1st Cir. 1981) (it must be "logical, as a matter of practical economics, to believe that the unlawful activity will affect interstate commerce"), quoted in P. AREEDA & H. HOVENKAMP, supra note 43, at 255.

\(^{165}\) Attention to the potential effect of a successful conspiracy is necessary because agreements may violate the Sherman Act even before implemented. This was a key consideration in McLain. 444 U.S. at 243 ("If establishing jurisdiction required a showing that the unlawful conduct itself had an effect on interstate commerce, jurisdiction would be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect."), quoted in Summit Health, 111 S. Ct. at 1847. Rex Hospital focused similarly on the effects that would have been caused by a successful conspiracy. 425 U.S. at 746 (sufficient that "allegations fairly claim that the alleged conspiracy, to the extent it is successful," will burden commerce).

\(^{166}\) Board of Trade of the City of Chicago v. United States, 246 U.S. 231, 238 (1918):

[T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

\(^{167}\) 934 F.2d 327 (D. C. Cir. 1991). For another example, see Doe v. Sullivan, 938 F.2d 1370, 1383 (D.C. Cir. 1991) (Thomas, J., dissenting). The court of appeals addressed a serviceman's challenge to an inoculation required by "Desert Storm" regulations. Judge Thomas dissented on grounds of mootness. "The war has ended and the troops are home, but to the majority this case lives on."
was difficult and far-reaching. Then-Judge Thomas agreed that the ICC finding should be upheld but objected strenuously to the court's addressing the merits:

Federal courts are courts of limited jurisdiction. When federal jurisdiction does not exist, federal judges have no authority to exercise it, even if everyone—judges, parties, members of the public—wants the dispute resolved. It follows that federal courts have a "special obligation" to appraise at the outset their own jurisdiction, even when the parties, or the lower courts, have not raised any jurisdictional questions themselves. This tenet is as solid as bedrock and almost as old.

The truistic constraint on the federal judicial power, then, is this: A federal court may not decide cases when it cannot decide cases, and must determine whether it can, before it may.\(^{168}\)

Justice Thomas's instincts on issues of judicial authority thus seem to be closer to Justice Scalia's than to Justice Stevens's.

Of course, Summit Health is now the law of the land, and principles of stare decisis should apply. Since the Court's opinion can be read a number of different ways, however, confusion may continue and the Court likely will have opportunities to revisit the issue. Some are starting to question the strength of stare decisis in other contexts;\(^{169}\) query how strong it is here.

**IV. CONCLUSION**

Two of the antitrust cases decided by the Supreme Court during its October 1990 term are easily characterized. Palmer v. BRG of Georgia, Inc. is an additional corrective, if one were needed after Superior Court Trial Lawyers, of any excessive hesitancy to apply settled per se rules. City of Columbia v. Omni Outdoor Advertising, Inc. is a ringing assertion of the primacy of federalism. The strengthening of the state action and Noerr-
Pennington exemptions already has made it easier for judges to terminate antitrust suits.

The Palmer and Omni decisions have increased certainty in antitrust law. Certainty or at least predictability would have been increased further had Justice Scalia's position in Summit Health, Ltd. v. Pinhas attracted an additional vote, because he apparently would have had judges consider competitive effects as part of determining their authority to hear cases. Such a charge could shift power from juries to judges, who are often considered more consistent decision-makers.

As it is, however, the Sherman Act's interstate commerce requirement will be governed by Justice Stevens's majority opinion. That opinion should be read to find that the commerce requirement is ordinarily substantive, rather than jurisdictional, and that it requires some connection between the challenged restraint and interstate commerce. The opinion is subject to conflicting interpretations, however, and the strenuousness of Justice Scalia's dissent—which would have increased predictability had it attracted a majority—will contribute to the likely unsettled state of this part of the law.