



The FTC and State Action: Evolving Views on the Role of Government

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Overview

- ◆ Objective – striking an appropriate balance between conflicting priorities:
 - federal competition policy
 - state regulatory policy
- ◆ Guiding Principle – striking an “appropriate” balance depends on one’s views on the role of government
- ◆ Problems – doctrinal confusion results from:
 - S. Ct.’s evolving views on the role of government
 - S. Ct.’s failure to update its analytical framework



Evolution of the State Action Doctrine

1943 - 2004

*Parker v.
Brown*

*Freedom Holdings
v. Spitzer*

1943

2004

Public Interest Theory
(deferential, label oriented)

Public Choice Theory
(skeptical, incentive oriented)



Evolution of the State Action Doctrine

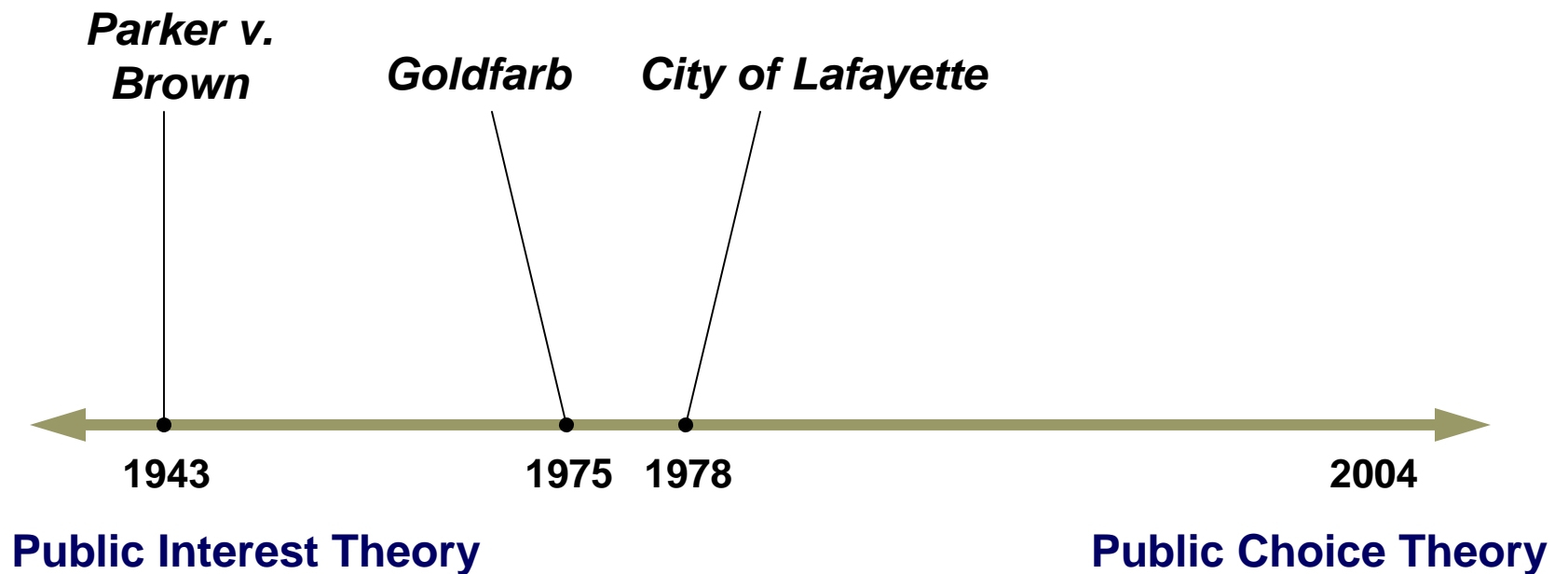
Parker v. Brown

- ◆ **Objectionable Restraint:** state-supervised market sharing scheme for California raisins
- ◆ **Key Holding:** actions of the “state itself” not subject to federal antitrust enforcement
- ◆ **Confidence in Government:**
 - weak focus on federalism rationale
 - indifferent to electoral accountability
 - deferential to state oversight efforts
 - deferential to purported state objectives



Evolution of the State Action Doctrine

1970's





Evolution of the State Action Doctrine

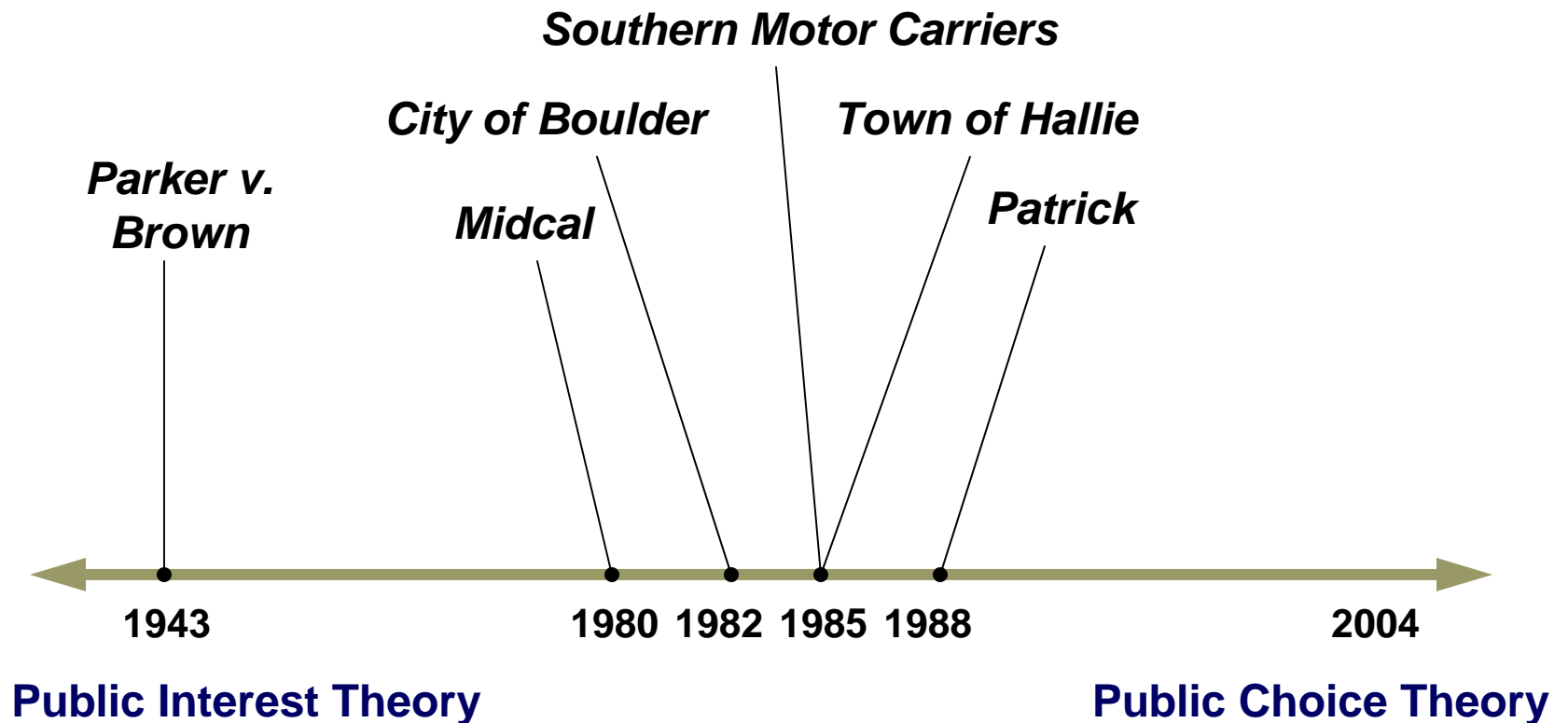
City of Lafayette v. Louisiana Power & Light

- ◆ Objectionable Restraint: tying electric utility service to the purchase of monopoly gas and water service
- ◆ Key Holding: municipalities not equivalent to the “state itself” for purposes of state action analysis
- ◆ Breaks with *Parker* on: weak focus on federalism rationale
 - federalist system recognizes only two sovereigns
 - municipalities often pursue “parochial” interests



Evolution of the State Action Doctrine

1980's





Evolution of the State Action Doctrine

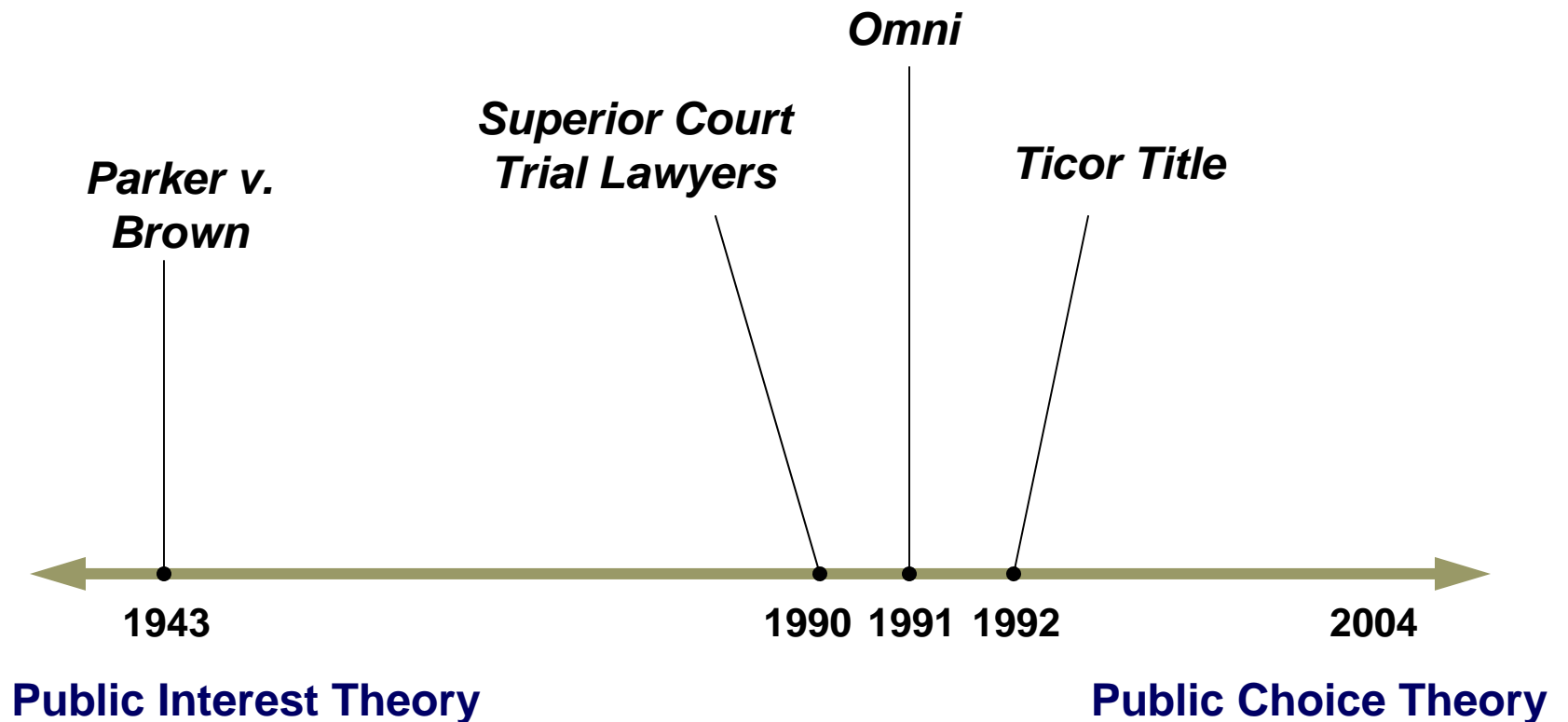
Town of Hallie v. City of Eau Claire

- ◆ Objectionable Restraint: tying sewage collection and transportation to the purchase of monopoly sewage treatment service
- ◆ Key Holding: municipalities not subject to *Midcal's* active supervision requirement
- ◆ Breaks with *Parker* on: indifference to electoral accountability
 - municipality presumed to act in the public interest
 - *because* exposed to “public scrutiny” and checked “through the electoral process”



Evolution of the State Action Doctrine

1990's





Evolution of the State Action Doctrine

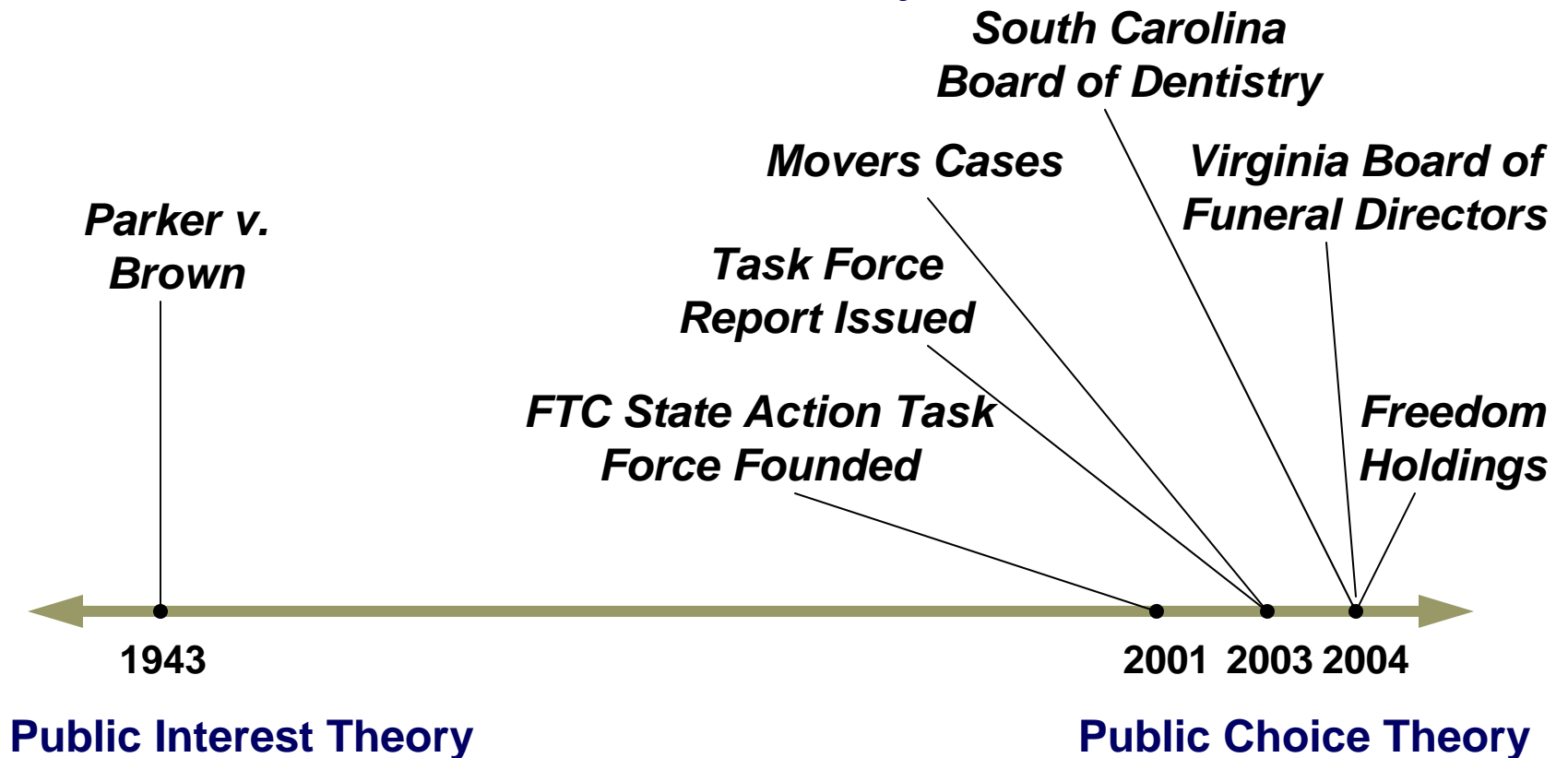
Federal Trade Commission v. Ticor Title

- ◆ Objectionable Restraint: collective ratesetting for title searches and title examinations
- ◆ Key Holding: “negative option” system does not satisfy the active supervision requirement
- ◆ Breaks with *Parker* on: deference to state oversight efforts
 - mere *potential* for supervision is not sufficient
 - doctrine reflects deference to actual state regulation, *not* the economics of price restraint



Evolution of the State Action Doctrine

Present Day





Evolution of the State Action Doctrine

Freedom Holdings v. Spitzer

- ◆ Objectionable Restraint: legislation implementing output cartel of foreign and domestic cigarette mfrs.
- ◆ Key Holding: clear articulation requirement satisfied by conduct in furtherance of “legitimate” state policy goals and with a “plausible nexus” to those goals
- ◆ Breaks with *Parker* on: deference to purported state objectives
 - skeptical of state policy of sharing in private cartel’s monopoly profits
 - per package tax would have eliminated need for complex market sharing scheme



Analytical Framework

Problems with Current Approach

- ◆ S. Ct's views on the role of government have evolved, but its analytical framework has not
- ◆ *Midcal* factors applied pursuant to Public Interest theory, rather than Public Choice theory
- ◆ Examples:
 - interpretations of *Town of Hallie* "foreseeability" standard for clear articulation reflect deference
 - interpretations of *Town of Hallie* exemption from active supervision reflect focus on labels



Analytical Framework

A Proposed “Tiered” Approach

- ◆ *Midcal* factors would be applied pursuant to tiered framework, with varying levels of rigor
- ◆ Level of rigor would be calibrated to reflect incentives (*i.e.*, likelihood that defendant will pursue own interests, rather than those of the state)
- ◆ Examples:
 - active supervision: greater rigor for private parties and boards, less for municipalities
 - clear articulation: greater rigor for *per se* conduct, less for rule of reason and unilateral conduct