

Mere Refinement of the State Action Doctrine Will Not Work

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Abstract

By proclaiming the State Action Doctrine, the Supreme Court aims to preserve the states' rights to enact economic regulation which conflict with the federal antitrust laws. The doctrine exempts regulated private parties from antitrust enforcement when they are insulated by the State. Without granting the exemption, private parties would have to decide between obeying anticompetitive state regulation and complying with federal antitrust laws, risking punishment either way. The doctrine provides a test to determine whether to grant the immunity. Far from being settled, the test is battled heavily all the way up to the Supreme Court. In *Ticor*, Justice Scalia expressed skepticism whether an "exemption for state-programmed private collusion" is justified at all. Other Justices have been more favorable towards state and local regulation of commerce. Beside this more philosophical clash about the proper scope of regulation, it is generally acknowledged that the doctrine bears inherent flaws and provides little guidance. Justice O'Connor has already pointed out that it is unfair to punish regulated parties with treble damages for their compliance with anticompetitive state regulation.

The State Action Task Force of the FTC acknowledges the inherent flaws of the State Action Doctrine, as do most scholars. However, all proposals made so far aim to clarify and refine the State Action Doctrine. The current proposals have their merits, but they will only mitigate the problems associated with the State Action Doctrine. The present standard requires a "clearly articulated state policy" and "active supervision" for immunity; these are purely procedural requirements. In this essay, I propose to include institutional and substantive changes to the State Action Doctrine. From an institutional perspective, the courts should reaffirm the FTC's mandate to preserve public policy; the FTC is best suited to defend the federal interest in unfettered competition. From a substantive point of view, the courts have to reengage in a moderate

review of the reasonableness of state regulation. I do not ask for a revival of the *Lochner* era; however, the competitive process needs at least minimal protection against arbitrary state regulation.

I. INTRODUCTION

The first sentence of Judge Easterbrook's article on antitrust and the economics of federalism reads: "There is an uneasy coexistence between federal antitrust laws and state regulatory regimes."¹ This sentence boldly understates the impact of economic regulation. There is no coexistence because economic regulation eliminates the elements of competition which that regulation addresses (e.g., price, quantity, market entry). In regulated markets, the remaining elements of competition after regulation may be so negligible that the positive effects of competition – low prices, innovation, etc. – are no longer triggered. Adopting this perspective, regulation and competition are mutually exclusive; and must prevail over the other. This is the purpose of the State Action Doctrine.

From an economist's perspective, regulation is only justified in the case of market failure: in other words if competition does not work. Thus, the incompatibility of regulation and competition is not a problem where regulation is used to cure inevitable breakdowns of (all or part) of the ordinary competitive process. In such cases, regulation only modifies the outcome (equilibrium) of a failed market (e.g., mitigating problems in connection with public goods, information asymmetry, transaction costs, and externalities). The equilibrium in a regulated market may try to simulate an outcome that would be achieved in a competitive process, but a regulated market can never match the unpredictable patterns of true competition. Where no workable competition exists and market failures are addressed by state regulation, additional intervention with antitrust laws may be counterproductive and may even topple the state's regulatory framework.

¹ Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 *Journal of Law and Economics* 23, 23 (1983).

However, the states' regulatory and intervention programs have crossed the line of "market failure justification" a long time ago.² Ever since the era of *Lochner v. New York*³ expired the federal, state, and local governments have had broad discretion whether and how to interfere with the freedom to contract, and whether and how to regulate private markets for public interest, even absent market failures.⁴ In working markets, regulated parameters replace the equilibrium which would be achieved by competition; e.g., the regulated price replaces the competitive price. In such markets (markets regulated by the states but not affected by market failures), application of federal antitrust laws may limit overreaching and harmful state regulation.

We live in a federation with strong antitrust laws intended to secure vibrant commerce between the states. However, we recognize that the states in this federation may also have a legitimate interest in regulating commerce in various ways. Thus, it must be decided which interest – the interest of the federation or the interest of the states – should prevail in case of a conflict.⁵ The standard to resolve this conflict is the State Action Doctrine, which was formed by the federal courts over a long history of cases. However, the created standard still leaves many questions unresolved, which will be discussed in section II. Section III takes a brief look at the conse-

² E.g., by promoting the production of merit goods like universal postal service (39 U.S.C. § 101 (2006) and 39 U.S.C. § 403 (2006)), by requiring telecommunication providers to ask only for just and reasonable charges (47 U.S.C. § 201 (2006)), or by reserving cable channels for public, educational, or governmental use (47 U.S.C. § 531 (2006)).

³ 198 U.S. 45 (1905).

⁴ *Nebbia v. New York*, 291 U.S. 502, 537 (1934) ("So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose"). *See also* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399-400 (1937).

⁵ The construction and legal history of the federal antitrust laws, which hint that those laws should primarily regulate the behavior of private parties, makes it impossible to find the prevailing standard by pointing at the Supremacy Clause, *M'Culloch v. Maryland*, 17 U.S. 316 (1819), and *Gibbons v. Ogden*, 22 U.S. 1 (1824); *see also infra* Part II(A).

quences of applying the standard; there are quite important drawbacks connected with the existing standard, which are not resolved merely by addressing the concerns raised in Section II. Instead of attempting to refine the existing standard, in Section IV(A), I will entertain a combination of possible improvements. These improvements, which are described in Sections IV(B)-IV(D) will modify the existing standard in its substance and provide additional procedural safeguards, thereby resolving most of the existing concerns.

I will not discuss the Congress-created exemption in the McCarran-Ferguson Act⁶, which provides that state law may take precedence over federal antitrust laws; this specific exemption is only for one industry and differs in its nature and scope from the general exemption provided by the judiciary's State Action Doctrine.⁷ Also, I will refrain from discussing conflicts between federal regulation and federal antitrust laws here: the relationship between federal regulation and federal antitrust laws is determined by considerations other than federalism. In his article, Paul Posner pointed out that "Congress clearly has authority to modify the impact of the antitrust laws so that the accommodation between antitrust and regulation may be a matter of interpretation of federal regulatory statutes."⁸

⁶ 15 U.S.C. § 1012(b) (2006) and 15 U.S.C. § 1013(b) (2006).

⁷ It seems an impossible task for Congress to try to compile a list determining the relationship between the Sherman Act and any possible kind of state regulation. For exemptions created by Congress *see* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*: Vol. I 321-355 (2nd ed. 2000).

⁸ Paul S. Posner, *The Proper Relationship between State Regulation and the Federal Antitrust Laws*, 49 N. Y. U. L. Rev. 693, 697 (1974). *See also* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) (arguing that Congress sought to establish a regime of competition as the fundamental principle governing commerce by enacting the Sherman Act). "For this reason, our cases have held that even when Congress by subsequent legislation establishes a regulatory regime over an area of commercial activity, the antitrust laws will not be displaced unless it appears that the antitrust and regulatory provisions are plainly repugnant. The presumption against repeal by implication reflects the understanding that the antitrust laws establish overarching and fundamental policies, a principle which argues with equal force against implied exclusions." *Id.* at 398-99 (internal citations omitted).

II. STATE ACTION DOCTRINE

The State Action Doctrine draws a line between the states' ability to regulate their commerce and the federal policy of unfettered competition. The doctrine allows uncovering, as some commentators point out, the "implied exemptions" of the federal antitrust laws.⁹ Unlike challenges under the Dormant Commerce Clause and, earlier, Substantive Due Process, when a state action immunity is denied it does not result in an invalidation of the state regulation.¹⁰ Without state action immunity, however, regulated actors who comply with state regulation are subject to federal antitrust scrutiny.¹¹

Under the State Action Doctrine, courts have developed a tiered test to determine whether to grant state action immunity from federal antitrust enforcement: basically, a state's regulatory framework has to emanate from a clearly articulated state policy and has to be adequately supervised. Although the basic framework of the test seems simple, the federal courts have struggled with its application in different factual circumstances. This section shows that the test is not applied in a consistent, uniform manner by neither the lower courts nor by the United States Supreme Court.

After describing the basic framework of the State Action Doctrine, I examine in detail, in sub-section A, which actors are held to be sovereign actors by the federal courts. In sub-section B I explain that regulatory frameworks enacted by a sovereign actor are not subject to the State Action Doctrine. Sub-section C continues to examine the framework by defining "clearly

⁹ Phillip E. Areeda & Herbert Hovenkamp, *supra* note 7, at 301.

¹⁰ Jim Rossi, *Political Bargaining and Judicial Intervention in Constitutional and Antitrust Federalism*, 83 Wash. U. L. Q. 521, 546 (2005).

¹¹ *Id.*

articulated state policy". Finally, sub-section D examines and defines the role of "active supervision" within this framework.

A. *Basic Framework: Parker and Midcal*

The United States Supreme Court developed the State Action Doctrine in 1943 when it decided *Parker v. Brown*.¹² There, the court had to decide the validity of California's prorate program, a state enacted marketing program for raisins, under the Sherman Act¹³ and the Commerce Clause.¹⁴ The prorate program decreased the amount of available raisins in the market by creating "pools" of raisins not available for general distribution. This reduced competition among producers, stabilized prices, and mainly affected interstate and foreign commerce in raisins.¹⁵

While noting that the prorate program may have been illegal under the Sherman Act¹⁶ and that Congress may probably choose to prohibit such a program, the Court held that the program derived its authority from the command of a sovereign state's legislature.¹⁷ Substantial

¹² 317 U.S. 341 (1943).

¹³ Sherman Anti-Trust Act, 15 U.S.C. § 1 (2006).

¹⁴ U.S. CONST. art. I, § 8, cl. 3.

¹⁵ *Parker*, 317 U.S. at 345-48. The program created an "inferior raisins pool", a "surplus pool" and a "stabilization pool" in order to reduce pressure on prices. Between ninety and ninety-five percent of all Californian raisins are ultimately shipped in interstate or foreign commerce; almost all raisins consumed in the U.S. and nearly half of the world crop originate from California. *Id.* at 345.

¹⁶ *Cf.* *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) (finding it *per se* illegal for oil companies to eliminate "distress" gasoline as a market factor of spot market prices for gasoline by purchasing the excess production of independent refiners).

¹⁷ *Parker*, 317 U.S. at 350-51.

participation by producers in establishing the program was not of relevance to the Court.¹⁸ The Sherman Act, according to the Court, gave "no hint that it was intended to restrain state action or official action directed by a state" as it was present in the prorate program.¹⁹ Also, the substantial effect of the program on interstate and foreign commerce did not render the program invalid under the Commerce Clause; in the Court's opinion, the program addressed a problem of local character, was non-discriminatory, was appropriate to the end sought, and outweighed any national interest in the free flow of commerce.²⁰

In the aftermath of *Parker*, courts further clarified the necessary amount of state involvement in economic restraints to trigger application of the State Action Doctrine.²¹ However, in these later cases, courts seemed to be less inclined to grant regulators the same leeway the Court granted in *Parker*. While *Parker* seemed to welcome state regulation, deemed to fight the evils of competition,²² subsequent cases adopted a more cautious approach and emphasized the beneficial effects of state regulation on social welfare, particularly regarding the regulation's ability to promote, e.g., lower prices or innovation.²³

¹⁸ *Id.* at 352. Although later in *Midcal*, the court emphasized the importance of the commission's oversight for the decision to grant immunity in *Parker*. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 104 (1980).

¹⁹ *Parker*, 317 U.S. at 351. However, the court added that a state may not grant immunity to persons violating the Sherman Act by authorizing violations or by declaring such violations lawful. *Id.*

²⁰ *Id.* at 359-68. In comparing the relative weights of the conflicting local and national interests involved, it was significant for the court that Congress already had enacted similar programs. *Id.* at 367. *But see* *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 386 (1951) (holding that the extension of vertical price-fixing arrangements on non-signers, as authorized by Louisiana law, violates the Sherman Act, absent approval by Congress). This seems to be a different line of argument, if compared to *Parker*.

²¹ *See infra*, II.B.-D.

²² Evils as there are, e.g., the "ruinous competition" between producers of raisins.

²³ *See* Frank H. Easterbrook, *supra* note 1, at 27.

In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.* the United States Supreme Court articulated the modern form of the State Action Doctrine, as it is applied today.²⁴ The *Midcal* case dealt with a California statute requiring producers and wholesalers to file fair trade contracts or price schedules with the State (i.e. to use vertical price fixing or resale price maintenance).²⁵ Midcal was charged with selling wine for less than the prices set by the applicable price schedules, and also for selling wines for which no fair trade contract or schedule had been filed.²⁶ In this case, the state exercised no control over wine prices, nor did it review the filed prices.²⁷ The corporation asked for an injunction against the State's wine-pricing scheme.

Midcal developed "two standards for antitrust immunity under *Parker v. Brown*. First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself."²⁸ The Court then held that California's wine pricing scheme satisfied the first standard of clear articulation because the "legislative policy was forthrightly stated and clear in its purpose to permit resale price maintenance."²⁹ However, the State failed the second prong as it did not supervise its pricing scheme:

The State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program. The national policy in favor of competition cannot be thwarted by casting

²⁴ 445 U.S. 97 (1980).

²⁵ *Id.* at 99.

²⁶ *Id.* at 100.

²⁷ *Id.* at 97-99.

²⁸ *Id.* at 105.

²⁹ *Id.*

such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.³⁰

After weighing the wide latitude of the states' power to regulate commerce in liquor against the federal interest in enforcing a national policy in favor of competition, the Court found the state's interest less substantial.³¹ The California resale price maintenance scheme neither reduced the consumption of liquor, nor sustained small retail establishments.³² By weighing the state's interest against the federal interest, the Court thus rooted the State Action Doctrine in Federalism, similar to *Parker*.

B. *State Sovereignty*

1. *State of the Law*

Thus, in *Parker* and *Midcal*, the United States Supreme Court based the State Action Doctrine on federalism.³³ Actions emanating from a sovereign state, i.e. actions, which can be attributed directly to the state, are exempted from the application of the antitrust laws.³⁴ A number of other cases further clarified the immunity of private actors from Sherman Act scrutiny when obeying anticompetitive regulation enacted by a sovereign entity.

In *Bates v. State Bar of Arizona*, the United States Supreme Court had to decide whether the Supreme Court of Arizona enjoys antitrust immunity when imposing and enforcing a discipli-

³⁰ *Id.* at 105-06.

³¹ *Id.* at 113.

³² *Id.* at 112-13. This finding was supported by evidence in *Rice v. Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d 431, 457-58 (1978).

³³ "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Parker v. Brown*, 317 U.S. 341, 351 (1943).

³⁴ *Id.* at 350-51.

nary rule that restricts advertising by attorneys.³⁵ Appellants John R. Bates and Van O'Steen advertised their fee schedule in violation of this rule.³⁶ The Court held that the Arizona Constitution vested its Supreme Court with the power over the practice of law, and that the Arizona Supreme Court's restraint on advertising was therefore compelled by the state acting as a sovereign.³⁷ The state's Supreme Court, when acting in a legislative capacity, occupied the same position as that of a state legislature.³⁸ The Court deemed it "significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active."³⁹

The holding in *Bates*, regarding the sovereignty of states' Supreme Courts, was confirmed in *Hoover v. Ronwin*.⁴⁰ In this case, the United States Supreme Court dealt with an unsuccessful candidate for admission to the Bar of Arizona.⁴¹ The candidate Edward Ronwin asserted that the members of the Arizona Supreme Court's Committee on Examinations and Admissions conspired to reduce the number of competing attorneys.⁴² The Court held that the Supreme Court of Arizona, by delegating only the bar examination, retained its sovereign power to determine who should be admitted to the Arizona bar.⁴³ The action, whether anticompetitive or not, was that of the Arizona Supreme Court and, therefore, non-delegated and immune from antitrust

³⁵ 433 U.S. 350 (1977).

³⁶ *Id.* at 354-55.

³⁷ *Id.* at 360-63.

³⁸ *Id.* at 360.

³⁹ *Id.* at 362 (underscoring further that, in contrast to *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), the regulation of the activities of the bar is at the core of the State's power to protect the public). Nevertheless, the ban on advertising was held unconstitutional on First Amendment grounds. *Id.* at 384.

⁴⁰ 466 U.S. 558 (1984).

⁴¹ *Id.*

⁴² *Hoover v. Ronwin*, 466 U.S. 558, 565 (1984).

⁴³ *Id.* at 572.

scrutiny.⁴⁴ The *Hoover* decision made clear that the Court was not going to examine actions of a sovereign entity, irrespective of its impact on competition – the judiciary showed willingness to intervene only in cases of delegated authority.⁴⁵

In contrast to state Supreme Courts, local governments are not deemed to be sovereign. In *City of Lafayette v. Louisiana Power & Light Co.*,⁴⁶ the United States Supreme Court dealt with the question of whether cities owning and operating electric utility systems may be reached under the Sherman Act.⁴⁷ The City of Lafayette allegedly conducted sham litigation in order to delay the construction of a nuclear power plant of a competitor, prevented competition within the city's boundaries through anticompetitive covenants, conspired with other parties to extend the provision of power to certain service areas beyond the time periods allowed by state law, and required customers outside its city limits to purchase electricity from the city in order to obtain gas and water.⁴⁸ The Court rejected the argument that public services of a municipality should be exempted just because the welfare of its citizens is assured by the political process, pointing to vulnerable consumers outside the community.⁴⁹ Moreover, the court did not question the ability of a community to take action against municipal enterprises.⁵⁰

⁴⁴ *Id.* at 573-74.

⁴⁵ *See also* *Parker v. Brown*, 317 U.S. 341, 351-51 (1943).

⁴⁶ 435 U.S. 389 (1978).

⁴⁷ *Id.* at 391.

⁴⁸ 532 F.2d 431, at 432-33 (5th Cir. 1976).

⁴⁹ *City of Lafayette*, 435 U.S. at 406-07. "The argument that consumers dissatisfied with the service provided by the municipal utilities may seek redress through the political process is without merit. While petitioners recognize, as they must, that those consumers living outside the municipality who are forced to take municipal service have no political recourse at the municipal level, they argue nevertheless that the customers may take their complaints to the state legislature. It fairly may be questioned whether the consumers in question or the Florida corporation of which LP&L is a subsidiary have a meaningful chance of influencing the state legislature to outlaw on an ad hoc basis whatever anticompetitive practices petitioners may direct against them from time to time. More fundamentally, however, that argument cuts far too broadly; the same argument may be made regarding anticompetitive ac-

The Court argued further that there are too many local governments which may affect the competitive process in a distorting way.⁵¹ Lacking sovereignty, municipalities should not be automatically afforded antitrust immunity.⁵² Although *Parker* immunity for municipalities is not as readily established as it is for states, the *Lafayette* Court made clear that adequate state mandate, authorization, or direction may shield municipalities from the antitrust laws.⁵³ By requiring "adequate" authorization, the Court emphasized that a specific, detailed legislative command is not necessary for the municipality to assert immunity.⁵⁴ Chief Justice Burger, concurring, underscored the "difference between a State's entrepreneurial personality and a sovereign's decision . . . to replace competition with regulation";⁵⁵ entrepreneurial, proprietary activity is not an attribute of sovereignty asking for protection under a federalist system.⁵⁶ In the aftermath of this case, the Court would also need to inquire whether "the implied exemption from federal law was necessary in order to make the regulatory Act work, and even then only [grant the exemp-

tivity in which any corporation engages. Mulcted consumers and unfairly displaced competitors may always seek redress through the political process. In enacting the Sherman Act, however, Congress mandated competition as the polestar by which all must be guided in ordering their business affairs. It did not leave this fundamental national policy to the vagaries of the political process, but established a broad policy, to be administered by neutral courts, which would guarantee every enterprise the right to exercise 'whatever economic muscle it can muster,' without regard to the amount of influence it might have with local or state legislatures." *Id.* (internal citation omitted).

⁵⁰ In light of public choice theory, this hypothesis may be questioned. *See infra*, Part III(E).

⁵¹ *City of Lafayette*, 435 U.S. at 407-08.

⁵² *Id.* at 412.

⁵³ *Id.* at 414-15.

⁵⁴ *Id.* at 415 (holding that it is enough to show that the state legislature contemplated the kind of action complained of).

⁵⁵ *Id.* at 422.

⁵⁶ Chief Justice Burger's distinction between proprietary and sovereign activity raises the question of a possible market participant exception, as will be discussed *infra*, IV(C).

tion] to the minimum extent necessary."⁵⁷ The dissenters, on the other hand, wanted the distinction between private and governmental action to control this case.⁵⁸

The United States Supreme Court used *Town of Hallie v. City of Eau Claire*⁵⁹ to elaborate further on the exemption of local governments. There, a Wisconsin statute authorized cities to construct, add to, alter, and repair sewage systems, and to describe with reasonable particularity the district to be served.⁶⁰ Adjacent townships alleged a Sherman Act violation, claiming that the City of Eau Claire violated the Sherman Act by acquiring a monopoly over the provision of sewage treatment services in the area and by tying the provision of these services to the provision of sewage collection and transportation services.⁶¹ According to the Supreme Court, anticompetitive "conduct was a foreseeable result of empowering the City to refuse to serve unannexed areas";⁶² the Wisconsin statutes "evidenced a 'clearly articulated and affirmatively expressed' state policy to displace competition with regulation in the area of municipal provision of sewage services."⁶³ Compulsion by the state was not a prerequisite to finding a municipality acting pursuant to a clearly articulated state action.⁶⁴

Another case, *Fisher v. City of Berkeley*, excluded most ordinary legislative activity of a municipality from the reach of the Antitrust Laws, and extended the State Action Doctrine in a

⁵⁷ *City of Lafayette*, 435 U.S. at 426 (internal citation omitted).

⁵⁸ *Id.* at 434. See *infra* Part IV.C. regarding an exception for entrepreneurial governmental activities (market participant exception).

⁵⁹ 471 U.S. 34 (1985).

⁶⁰ *Id.* at 41 (internal quotations and brackets omitted).

⁶¹ *Id.* at 36-37.

⁶² *Id.* at 42.

⁶³ *Id.* at 44.

⁶⁴ See *Town of Hallie*, 471 U.S. at 44.

significant way.⁶⁵ In this case, the United States Supreme Court confirmed that "[o]nly where legislation is found to conflict 'irreconcilably' with the antitrust laws, the question of state action immunity arises."⁶⁶ The *Fisher* case dealt with a municipal rent stabilization ordinance that imposed ceilings on rent increases.⁶⁷ According to the Court, the ordinance was unilaterally imposed and lacked an element of concerted action necessary to violate the Sherman Act.⁶⁸ Therefore, only hybrid restraints, which grant private actors some degree of regulatory power, could be attacked under the Antitrust Laws.⁶⁹

Justice Brennan, dissenting, pointed out that the ordinance effectively fixed prices for rental units in the city of Berkeley: "[the] vertical control destroys horizontal competition as effectively as if [the] landlords [had] formed a combination and endeavored to establish the same restrictions . . . by agreement with each other."⁷⁰ The coercive character of the law, according to Brennan, was no reason to dismiss a meeting of minds or to limit antitrust liability.⁷¹

In cases following *Fisher*, municipally owned entities whose directors are municipal officers and which perform traditional local government functions such as waste disposal have been

⁶⁵ *Fisher v. City of Berkeley, Cal.*, 475 U.S. 260, 265 (1986).

⁶⁶ 475 U.S. 260, 265 (1986); *see also* *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) (recognizing that the function of government may often be to tamper with free markets, correcting their failures and aiding their victims, the Court noted that "[a] state statute is not preempted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect").

⁶⁷ *Fisher*, 475 U.S. at 261-62.

⁶⁸ *Id.* at 266-67.

⁶⁹ *Id.* at 267-68.

⁷⁰ *Id.* at 276 (citing *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911) (internal quotation and citation omitted)).

⁷¹ *Id.* at 277.

treated like municipalities for antitrust purposes, thereby extending the scope of immunity for municipal actors.⁷²

The United States Supreme Court reserved the question of whether an action of a state's executive branch is that of the state for a later time.⁷³ The circuit courts seem to have accepted this invitation to rule in a permissive way.

The First Circuit, in deciding whether the Department of Health can confer a monopoly to a university in the screening of newborn babies, held that the Department's regulation is per se protected by the State Action Doctrine.⁷⁴

Two important cases of the Second Circuit dealt with the question whether modern forms of government, like governmental corporations, may be held sovereign and automatically immune from antitrust liability. In *Automated Salvage Transport, Inc. v. Wheelabrator Environmental Systems, Inc.*, the Second Circuit concluded that the Connecticut Resources Recovery Authority is a political subdivision of the state.⁷⁵ The court even considered whether the authority should be treated as the state itself, because the entity was created by the Connecticut General Assembly and lacked absolute operational autonomy.⁷⁶ However, in the earlier case of *Cine 42nd Street Theater Corp. v. Nederlander Organization, Inc.*⁷⁷, the Second Circuit decided that

⁷² *Tri-State Rubbish, Inc. v. Waste Mgmt., Inc.*, 998 F.2d 1073, 1077-78 (1st Cir. 1993) (treating waste management company as a municipality).

⁷³ *Hoover v. Ronwin*, 466 U.S. at 558, 568 n.17 (1984).

⁷⁴ *Neo Gen Screening, Inc. v. New England Newborn Screening Program*, 187 F.3d 24, 28-29 (1st Cir. 1999).

⁷⁵ *Automated Salvage Transp., Inc. v. Wheelabrator Env'tl. Sys.*, 155 F.3d 59, 71 (2d Cir. 1998).

⁷⁶ *Id.* (citing *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 61 (1994) (O'Connor, dissenting, underscored the importance of accountability to the state and, by extension, to the electorate, i.e. supervision of the elected government, for immunity under the Eleventh Amendment)).

⁷⁷ 790 F.2d 1032 (2d Cir. 1986).

New York's Urban Development Corporation could not claim state immunity for itself.⁷⁸ The entity was created as a corporate governmental agency of the state; in other words a political subdivision.⁷⁹ It was structured to operate independently, free from the political and bureaucratic inertia; thus, lacking sufficient state involvement, the entity could not be acting in a sovereign capacity.⁸⁰

The Ninth Circuit readily extended *Parker* immunity to state executives and executive agencies.⁸¹ The Fifth Circuit held that a University Interscholastic League, a division of a state university, is exempted from the Sherman Act.⁸² The Third Circuit held in two cases that private participants in state action cases enjoy *Parker* immunity only to the extent the states enjoy immunity.⁸³

The Circuit Courts have continuously expanded the scope of sovereign state actors. Still, regulators like public service commissions,⁸⁴ state bars,⁸⁵ or state regulatory boards,⁸⁶ are,

⁷⁸ 790 F.2d 1032, 1044 (2d Cir. 1986).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Charley's Taxi Radio Dispatch Corp. v. SIDA of Haw, Inc.*, 810 F.2d 869, 875-76 (9th Cir. 1987) (department of transportation); *Deak-Perera Haw., Inc. v. Dep't of Transp.*, 745 F.2d 1281, 1282-83 (9th Cir. 1984), *cert. denied*, 470 U.S. 1053 (1985).

⁸² *Saenz v. Univ. Interscholastic League*, 487 F.2d 1026 (5th Cir. 1973). *See also* *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, No. 3:97-1249, 2002 WL 32333036, at *1 (M.D. Tenn. Oct. 25, 2002) (holding that Tennessee Secondary School Athletic Association is a state actor).

⁸³ *Mariana v. Fisher*, 338 F.3d 189, 203 (3d Cir. 2003); *A.D. Bedell Wholesale Co., v. Philip Morris Inc.*, 263 F.3d 239, 266 (3d Cir. 2001). Both cases dealing with the Multistate Settlement Agreement between the States and the Cigarette Industry, the *Bedell* court held that sufficient state involvement was shown by the concerted action of state legislatures, state courts, and state attorneys to implement the agreement. *A.D. Bedell Wholesale Co.*, 263 F.3d at 260.

⁸⁴ *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 579; *Interface Group, Inc. v. Mass. Port Auth.*, 816 F.2d 9 (1st Cir. 1987).

⁸⁵ *Goldfarb v. Va. State Bar*, 421 U.S. 773, 791 (1975); *Hass v. Or. State Bar*, 883 F.2d 1453, 1456 (9th Cir. 1989) (holding that state bar selling malpractice insurance was not acting in a sovereign capacity).

with little exception, held not to be sovereign. Special tax districts like the Halifax Hospital Medical Center are not sovereign, either.⁸⁷ Acting alone, these instruments of government could not immunize private anticompetitive conduct.⁸⁸

2. Gaps in Defining Sovereign Actors

The federal courts have been successful in identifying the core sovereign state actors, i.e. state legislatures and state supreme courts. Also, it seems clear that private participation in boards, councils, and the like, generally precludes status as a state agency, since the private members have their own agenda which may or may not be responsive to state policy.⁸⁹ However, case law does not provide clear guidance with regard to the question of which subdivisions of the state should be regarded as sovereign state actors. This is particularly true for state agencies. As Floyd points out in a thorough analysis of the topic, "[s]ome courts have concluded that state agencies, like state legislatures, themselves may articulate anticompetitive state policy that is ipso facto immune from federal antitrust scrutiny."⁹⁰ Other courts have followed the suggestion in

⁸⁶ Compare *Earles v. La. Bd. of Certified Public Accountants*, 139 F.3d 1033, 1041-44 (5th Cir. 1998) (arguing further that the regulatory board is functionally similar to a municipality and exempted from the active supervision requirement). Compare also *FTC v. Monahan*, 832 F.2d 688, 689 (1st Cir. 1987) (enforcing subpoenas against the Massachusetts Board of Registration in Pharmacy). But see *Green v. State Bar of Tex.*, 27 F.3d 1083, 1087 (5th Cir. 1994) (granting state immunity to a law committee).

⁸⁷ *Bolt v. Halifax Hosp. Med. Ctr.*, 891 F.2d 810, 824 (11th Cir. 1990).

⁸⁸ But see *S. Motor Carriers Rate Conference, Inc. v. U.S.*, 471 U.S. 48, 62-63 (1985) (granting immunity to a public service commission).

⁸⁹ *Wash. State Elec. Contractors Ass'n v. Forrest*, 930 F.2d 736, 737 (9th Cir. 1991) (discussing an apprenticeship council's responsiveness for state labor policy).

⁹⁰ Douglas C. Floyd, *Plain Ambiguities in the Clear Articulation Requirement for State Action Antitrust Immunity: The Case of State Agencies*, 41 B. C. L. Rev. 1059, 1064 (2000). The author favors a treatment in between local governments and state legislatures. *Id.* at 1136. See, e.g., *Neo Gen Screening, Inc. v. New England Newborn Screening Program*, 187 F.3d 24, 28-29 (1st Cir. 1999). See *supra* note 74 and accompanying text.

*Town of Hallie*⁹¹, and have treated state agencies like municipalities, exempting them only from the supervision requirement. Therefore, it is not settled whether political subdivisions of the state are subject to the supervision requirement of the *Midcal* test. As the previously described cases point out, there exist similar problems with municipal entities, and circuit courts struggle with the question of how much supervision should be required for these.

C. *Conformity with a "Clearly Articulated" State Policy*

1. State of the Law

In many cases, the U.S. Supreme Court as well as some district courts focused on whether the state policy was articulated clearly enough to grant immunity from antitrust enforcement. As the following section shows, the courts have softened this prong of the State Action Doctrine over the years; in particular they do not require state actors to announce expressly their intent to displace competition.

In *Goldfarb v. Virginia State Bar*, the allegedly anticompetitive conduct of the state bar was not based on a clearly articulated policy.⁹² In this case, the U.S. Supreme Court dealt with a minimum fee schedule of a state bar.⁹³ The fee schedule was mandatory, enforced by disciplinary sanctions of the bar, and had a significant effect on interstate commerce.⁹⁴ Neither the state legislature nor the Virginia Supreme Court, which would have the power to regulate attorneys,

⁹¹ *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 n.10 (1985).

⁹² 421 U.S. 773, 775 (1975).

⁹³ *Id.* at 773.

⁹⁴ *Id.* at 783-85.

had compelled the anticompetitive behavior in question.⁹⁵ The conduct of the state bar was, therefore, not the result of a clearly articulated state policy.⁹⁶

In *Cantor v. Detroit Edison Co.*⁹⁷, the U.S. Supreme Court rejected the argument that a state's intent to displace competition could be derived from a "neutral" regulatory scheme. In this case, a retail druggist selling light bulbs sued an electric utility, which was distributing light bulbs to residential customers "free" of charge.⁹⁸ This so called "lamp exchange program" formed part of respondent's filed rate schedule, which was approved by the Michigan Public Service Commission.⁹⁹ There was no statute authorizing regulation of the light bulb business, nor had the legislature or the Commission, ever made any specific investigation of the desirability of the "lamp exchange program" or of its possible effect on competition in the light-bulb market.¹⁰⁰ The utility was the only utility applying such a program.¹⁰¹

Based on these facts, the court inferred that the state law was neutral towards the "lamp exchange program".¹⁰² The electricity regulation of the state posed no necessary conflict with the federal antitrust standard, and the mere possibility of such conflict was insufficient to grant antitrust immunity.¹⁰³ The court further reasoned that regulation could not give rise to an implied

⁹⁵ *Id.* at 790-91 (arguing that, "although the Supreme Court's ethical codes mention advisory fee schedules they do not direct either respondent to supply them, or require the type of price floor which arose from respondents' activities").

⁹⁶ *Id.* at 790.

⁹⁷ 428 U.S. 579, 581 (1976).

⁹⁸ *Id.*

⁹⁹ *Id.* at 583.

¹⁰⁰ *Id.* at 584.

¹⁰¹ *Id.* at 584.

¹⁰² *Id.* at 585

¹⁰³ *Id.* at 596.

exemption if that exemption was not necessary in order to make the regulatory Act work, and even then the exemption may be granted only to the minimum extent necessary.¹⁰⁴ The court concluded that the light-bulb-exchange program was not necessary to make electricity regulation work, and that the State's interest in regulating its utilities' distribution of electricity will be almost entirely unimpaired.¹⁰⁵

Further, the Court applied *Bates*, but distinguished it on the facts. In *Bates*, the challenged restraint was the affirmative command of the Arizona Supreme Court. Being the ultimate body wielding the State's power over the practice of law, the State acting as a sovereign directed this restraint.¹⁰⁶ In *Cantor*, however, the judges argued that the complaint was directed against a private party.¹⁰⁷ Further, the court claimed that "regulation of the activities of the bar is at the core of the State's power to protect the public", in contrast to *Cantor's* light bulb exchange program only dealing with the scope of additional services of an utility.¹⁰⁸ Regulating lawyers was deemed in the state's interest since lawyers are essential to the primary governmental function of administering justice, and have historically been officers of the courts, whereas distributing light bulbs was not such a governmental function.¹⁰⁹

In *Southern Motor Carriers Rate Conference, Inc. v. United States*, several private rate bureaus (composed of motor common carriers) submitted joint rate proposals to the Public Ser-

¹⁰⁴ *Id.* at 597.

¹⁰⁵ *Id.* at 598.

¹⁰⁶ *Bates v. State Bar of Ariz.*, 433 U.S. 350, 360 (1977).

¹⁰⁷ *Id.* at 361.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 361-62.

vice Commission in four southeastern States.¹¹⁰ The collective ratemaking was authorized, but not compelled, by the respective States in which the rate bureaus operated.¹¹¹ The rates became effective if the service commissions took no action, or, if a hearing was scheduled after their approval.¹¹² The motor carriers remained free to submit individual rate proposals.¹¹³

The Supreme Court thus had to deal with the question of whether a state can articulate a clear and express policy, even in the absence of compulsion.¹¹⁴ The court answered the question in the positive, reasoning that motor carriers were still able to submit individual rate proposals if they did not want to participate in the joint rate making.¹¹⁵ Further, a compulsion-requirement would reduce the range of regulatory alternatives available to the state and could even result in greater restraints on trade.¹¹⁶ However, compulsion could still be an *indicator* of a clearly articulated state policy.¹¹⁷ The Court further applied a broad interpretation of the statute in question. Although the Mississippi statute did not specifically address collective ratemaking, the court was satisfied with the expressed clear intent of the legislature to determine intrastate motor carrier rates by regulation and not by the market; a detailed, specific legislative authorization was thus not required.¹¹⁸

¹¹⁰ 471 U.S. 48, 50 (1985).

¹¹¹ *Id.*

¹¹² *Id.* at 50-51.

¹¹³ *Id.* at 50-52.

¹¹⁴ *Id.* at 55.

¹¹⁵ *Id.* at 62-65.

¹¹⁶ *Id.*

¹¹⁷ *S. Motor Carriers Rate Conference, Inc.*, 471 U.S. at 58-62.

¹¹⁸ *Id.* at 62-66 (explaining that the government conceded that the active supervision requirement was met in this case). *See also* *Sandy River Nursing Care v. Aetna Cas.*, 985 F.2d 1138, 1146-47 (1st Cir. 1993) (upholding collective ratemaking prompted by state legislature and supervised by the Maine Superintendent of Insurance).

In *Community Communications Co. v. City of Boulder*¹¹⁹, the extensive powers of self-government in local and municipal matters granted by a "home rule"¹²⁰ were held not to be sufficient for antitrust immunity. The City of Boulder enacted an ordinance preventing petitioner's expansion of business within city limits in order to gain time to draft a more elaborate ordinance dealing with cable television.¹²¹ The Supreme Court relied on and affirmed its opinion in *City of Lafayette* that municipalities are not sovereign and thus not per se exempted from the antitrust laws.¹²² The court rejected the city's argument that regulation of cable television was encompassed within the home rule power granted by the state constitution.¹²³ The anticompetitive ordinance in question was, therefore, not backed by a clearly articulated and affirmatively expressed state policy.¹²⁴

Justice Rehnquist, dissenting, pointed out that the court's ruling would destroy a municipality's power to regulate its economy, "unless the municipality could point to an affirmatively expressed state policy to displace competition in the given area sought to be regulated."¹²⁵ Fearing *Lochner* era scrutiny, Rehnquist underscored that the "Sherman Act should not be deemed to

¹¹⁹ *Id.* at 56.

¹²⁰ Under the home rule of the constitution of the State of Colorado, a city is entitled to exercise the full right of self-government in both local and municipal matters, and with respect to such matters the City Charter and ordinances supersede the laws of the State. *Cnty. Communications Co. v. City of Boulder*, 455 U.S. 40, 43-44 (1982).

¹²¹ *Id.* at 44.

¹²² *Id.* at 50-51.

¹²³ *Id.* at 56.

¹²⁴ *Id.*

¹²⁵ *Id.* at 67.

authorize federal courts to 'substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws'."¹²⁶

The insufficiency of home rule powers to suppress competition was acknowledged in a number of future cases¹²⁷ despite the Supreme Court's most recent and more permissive ruling regarding the articulation requirement in *City of Columbia v. Omni Outdoor Advertising, Inc.*¹²⁸ In this case, the city council passed an ordinance restricting the size, location, and spacing of billboards.¹²⁹ These restrictions, particularly those on spacing, benefited the incumbent Columbia Outdoor Advertising, Inc., which already had its billboards in place.¹³⁰ The regulation severely hindered Omni's ability to compete.¹³¹ The applicable state statutes authorized municipalities to regulate and restrict the height, number of stories and size of buildings and other structures "for the purpose of promoting health, safety, morals or the general welfare of the community."¹³²

The Supreme Court relied on and affirmed *Town of Hallie* pointing out that it suffices for the purposes of *Parker* immunity if "suppression of competition is the 'foreseeable result' of

¹²⁶ *Cnty. Communications Co.*, 455 U.S. at 67.

¹²⁷ *Hertz Corp. v. City of New York*, 1 F.3d 121 (2d Cir. 1993). *See also* *Apani Southwest v. Coca-Cola Enters.*, 128 F. Supp. 2d 988 (N.D. Tex. 2001) (holding that home rule is insufficient to grant immunity).

¹²⁸ 499 U.S. 365 (1991).

¹²⁹ *Id.* at 368.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² S.C. Code Ann. § 5-23-10 (1976). Further, municipalities are granted the power for zoning by S.C. Code Ann. § 6-7-710. They may "regulate the location, height, bulk, number of stories and size of buildings and other structures. ... The regulations shall ... be designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers, to promote the public health and the general welfare, to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to protect scenic areas; to facilitate the adequate provision of transportation, water, sewage, schools, parks, and other public requirements". *Id.*

what the statute authorizes".¹³³ According to the court, this condition was "amply" met in this case.¹³⁴

Justice Scalia, writing for the court, rejected a conspiracy exception to the *Parker* immunity, fearing compromising the States' ability to regulate their domestic commerce.¹³⁵ Justice Stevens, dissenting, pointed out the distinction between economic regulation and regulation designed to protect the public health, safety, and environment.¹³⁶ Like *Boulder's* home rule, Justice Stevens asserted, the state's zoning statutes should be deemed neutral on the question of whether the City of Columbia is allowed to displace competition; a general grant of power to enact ordinances should not necessarily imply a state authorization to enact specific anticompetitive ordinances.¹³⁷

Omni was recently examined by the Second Circuit in *Electrical Inspectors, Inc. v. Village of East Hills*.¹³⁸ Several Municipalities in the State of New York required property owners to have their buildings inspected solely by the New York Board of Fire Underwriters, thereby granting the Board a de facto monopoly for fire inspections; the Uniform Fire Prevention and Building Code Act of the State of New York and the applicable secretary's regulations required

¹³³ *City of Columbia*, 499 U.S. at 373; see also *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42 (1985).

¹³⁴ *Id.*: "The very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants. A municipal ordinance restricting the size, location, and spacing of billboards (surely a common form of zoning) necessarily protects existing billboards against some competition from newcomers."

¹³⁵ *Id.* at 377. See also *Sandy River Nursing Care v. Aetna Cas.*, 985 F.2d 1138, 1144-45 (1st Cir. 1993) (rejecting consideration of an alleged use of unlawful activity to coerce favorable legislation for insurers as irrelevant for antitrust immunity). For a discussion of the conspiracy exception, see *infra* Part IV.C.

¹³⁶ *City of Columbia*, 499 U.S. at 387.

¹³⁷ *Id.* at 393. See also *Westborough Mall, Inc. v. Cape Girardeau*, 693 F.2d 733, 746 (8th Cir. 1982); *Whitworth v. Perkins*, 559 F.2d 378, 379 (5th Cir. 1977).

¹³⁸ 320 F.3d 110 (2d Cir. 2003), *cert. denied*, 540 U.S. 982 (2003).

no such restriction.¹³⁹ The Circuit Court refused to inquire as to whether the city's ordinance was actually authorized by state statute, i.e. whether the city's act were *ultra vires*.¹⁴⁰ The court held that it was sufficient if the local enactment is within a broad view of the authority granted by the state.¹⁴¹ The court further concluded that "the plaintiff's complete exclusion from the market for required electrical inspection services . . . is a foreseeable result of a statute that requires municipalities to enforce a uniform fire code and administrative regulations."¹⁴²

The court did not address the question whether state action immunity would also cover the Board's conduct regarding extension of its monopoly power into localities that have not made it the exclusive provider of inspection services. The board had allegedly threatened retaliation to customers using services of the plaintiff Electrical Inspectors, Inc. in localities where the Board had been granted exclusivity. Finally, the court held that the Village having the mere "negative option" to replace the Board at any time was alone likely inadequate supervision, and remanded the case for further inquiries in this regard.¹⁴³

¹³⁹ *Id.* at 115.

¹⁴⁰ *Id.* at 121 n.6.

¹⁴¹ *Id.* at 119-21 (arguing that it is a question for state authorities whether the act is actually violative of the state statute; it is not a question of federal antitrust law). *See also* *Consol. Tel. Cable Serv., Inc. v. City of Frankfort, Ky.*, 857 F.2d 354 (6th Cir. 1988) (holding that ordinary errors or abuses in the administration of powers conferred by the state should be left for state tribunals to control.).

¹⁴² *Elec. Inspectors, Inc.*, 320 F.3d at 121 (arguing that the regulation, by allowing municipalities to designate their own employees to carry out the inspection (town-operated monopoly), would include possible exclusivity for a private party). *See also* *Cine 42nd St. Theater Corp v. Nederlander Org., Inc.*, 790 F.2d 1032, 1045 (2d Cir. 1986). The Second Circuit held that the power of an entity to contract implied leasing property in an anticompetitive manner; to reach this decision, the court underscored the importance of the fact that the entity could dictate the criteria for contracting; exemption from competitive bidding was not regarded as decisive. Anticompetitive Effects in secondary market, i.e. the Broadway Theater market, were also foreseeable. *Id.* at 1046-47.

¹⁴³ *Elec. Inspectors, Inc.*, 320 F.3d at 129.

A more narrow reading of the foreseeability standard was applied by the Fifth Circuit in *Surgical Care Center of Hammond, L.C. v. Hospital Service Dist. No. 1 of Tangipahoa Parish*.¹⁴⁴ In this case, a Louisiana statute enabled the hospital service district to form joint ventures and to conduct closed meetings, thereby merely adding items to the district's list of available powers.¹⁴⁵ The statute did not subject all health care facilities to the authority of the hospital service district. The court concluded that an insulation of the hospital service district from the Sherman Act must be fairly signaled; such signal was not given in the case at hand because joint ventures are not necessarily anticompetitive.¹⁴⁶ With regard to the requirement to clearly articulate a state's anticompetitive policy, the court held that "it is not the foreseeable result of allowing a hospital service district to form joint ventures that it will engage in anticompetitive conduct."¹⁴⁷ The court concluded that a mere grant of authority was not sufficient grant of antitrust immunity for the hospital district's attempt to monopolize outpatient surgical care.¹⁴⁸

In *Earles v. State Bd. of Certified Public Accountants of Louisiana*¹⁴⁹, the Fifth Circuit held that a state board's authority to regulate the practice of public accounting in the state of Louisiana "includes the power to adopt rules that may have anticompetitive effects. It is thus the 'foreseeable result' of enacting such a statute that the Board may actually promulgate a rule that

¹⁴⁴ 171 F.3d 231 (5th Cir. 1999).

¹⁴⁵ *Id.* at 233.

¹⁴⁶ *Id.* at 235.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 236. In this case, the court, en banc, reversed an earlier decision; in this earlier decision, the court held that the state statute covered the conclusion of anticompetitive exclusive contracts with managed care plans; see *Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1 of Tangipahoa Parish*, 153 F.3d 220, 223-225 (5th Cir. 1998).

¹⁴⁹ 139 F.3d 1033, 1043 (5th Cir. 1998). The court argued further that the state board is exempted from the supervision requirement. *Id.* at 1041.

has anticompetitive effects."¹⁵⁰ This rather broad application of the foreseeability standard was also applied in *Martin v. Memorial Hosp. at Gulfport*.¹⁵¹ In *Martin*, the Fifth Circuit held that a Hospital's power "to enter a contract with an individual physician to operate any aspect, division or department of its operations" could have been reasonably anticipated by the Mississippi Legislature to result in anticompetitive conduct; for example, an exclusive contract with an individual physician to supervise and perform the critical functions of medical units.¹⁵²

In *Zimomra v. Alamo Rent-A-Car, Inc.*¹⁵³, the Tenth Circuit held that the City and County of Denver's broad authority to regulate airport services and the embarkation of passengers to and from airports was sufficient to impose an uniform usage fee on car rental services.

In *Consolidated Television Cable Service, Inc. v. City of Frankfort, Ky.*, the Sixth Circuit held that the requirement for public utilities, including CATV services, to obtain a franchise from a municipality, foreseeably resulted in displacement of competition and was, thus, sufficient to grant immunity.¹⁵⁴

In *Bolt*, the Eleventh Circuit held that an alleged conspiracy of a peer-review committee to deny hospital privileges on pretextual grounds was not foreseeable by the state legislature.¹⁵⁵ Thus, this *ultra vires* conduct was not exempted from antitrust scrutiny.¹⁵⁶ Similarly, the alleged-

¹⁵⁰ *Id.* at 1042.

¹⁵¹ 86 F.3d 1391 (5th Cir. 1996).

¹⁵² *Id.* at 1400.

¹⁵³ 111 F.3d 1495, 1501-03 (10th Cir. 1997).

¹⁵⁴ 857 F.2d 354, 361 (6th Cir. 1988).

¹⁵⁵ *Bolt v. Halifax Hosp. Med. Ctr.*, 891 F.2d 810, 825 (11th Cir. 1990).

¹⁵⁶ *Id.* at 824-25.

ly anticompetitive conduct of the defendant Washington Natural Gas Co., i.e. off-tariff pricing, would not be protected by the state action immunity doctrine if in violation of Washington law.¹⁵⁷

The Ninth Circuit held in *Hass v. Oregon State Bar*¹⁵⁸ that the legislature's authorization of the Bar to compel all Oregon-based attorneys to carry malpractice insurance, and to own, organize, and sponsor any insurance organization was sufficient to establish an insurance monopoly of the Bar.

As one of several circuit courts dealing with the Multistate Settlement Agreement with the Tobacco Industry¹⁵⁹, the Second Circuit denied extending state action immunity to the settlement in *Freedom Holdings, Inc. v. Spitzer*.¹⁶⁰ According to the Court, the output cartel established by the settlement could "be immunized under the *Parker* State Action Doctrine only where it regulated commerce in furtherance of legitimate state policy goals and limited unnecessary anticompetitive effects."¹⁶¹ In a petition for rehearing, the court confirmed its earlier opinion and explained that "a state must act in furtherance of legitimate state policy goals and its acts must have a plausible nexus to those goals."¹⁶² In contrast to previous court decisions, the Second Circuit questioned the means applied to reach the state's policy goals; the court noted "that the

¹⁵⁷ *Cost Mgmt. Serv., Inc. v. Wash. Natural Gas Co.*, 99 F.3d 937, 942-43 (9th Cir. 1996).

¹⁵⁸ 883 F.2d 1453, 1458-59 (9th Cir. 1989).

¹⁵⁹ *See Bedell Wholesale Co., Inc. v. Philip Morris Inc.*, 263 F.3d 239, 260-65 (3d Cir. 2001). *See also Sanders v. Lockyer*, 365 F.Supp.2d 1093 (N.D.Cal. 2005).

¹⁶⁰ 357 F.3d 205 (2d Cir. 2004).

¹⁶¹ *Id.* at 223. However, the court found it "doubtful that a federal court would upset a state statute solely because it failed to meet the explanatory aspect of the first *Midcal* prong if it passed muster in all other respects." *Id.* at 227. The court relied on the fact that the settlement fails to provide for sufficient supervision. *Id.* at 231.

¹⁶² *Freedom Holdings, Inc. v. Spitzer*, 363 F.3d 149 (2d Cir. 2004) (explaining that a court facing an antitrust challenge to a state statute allowing price-fixing by car washes is not obliged to dismiss the complaint because the state asserts that the law will improve the performance of the state capital city's symphony orchestra).

State denies any anti-competitive effect and offers no explanation for the anti-competitive scheme."¹⁶³

2. Permissiveness in Identifying Clearly Articulated State Policies

The courts use different ways to probe the existence of a "clearly articulated state policy", the "intent of the state to displace competition", or "the intent of the state to establish an anti-competitive regulation". In September 2003, the State Action Task Force of the FTC issued a report pointing out as a major flaw of the State Action Doctrine being that some courts accept the mere existence of a regulatory scheme as intent to displace competition.¹⁶⁴ Thus, lower courts refuse to apply the Sherman Act to formerly regulated industries where there is still some state regulatory scheme, however incomplete it is.¹⁶⁵ As FTC's discussion of relevant cases displays, more scrutiny is applied if courts conduct inquiries into whether the anticompetitive impact was a foreseeable result of the state authorization.¹⁶⁶ Many courts conclude that a broad authorization by the state does cover nearly any conduct in terms of foreseeability – the actual intent of the state is hardly questioned. Furthermore, courts have acknowledged that the power to acquire goods or conclude contracts may result in the displacement of competition.¹⁶⁷

¹⁶³ *Freedom Holding, Inc.*, 357 F.3d at 229. Such an explanatory standard was rejected by the concurring opinion of Justice Blackmun in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 610-11 (1976).

¹⁶⁴ See OFFICE OF POLICY PLANNING, REPORT OF THE STATE ACTION TASK FORCE 26 (2003), available at <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>.

¹⁶⁵ See Jim Rossi, *supra* note 10, at 551.

¹⁶⁶ See OFFICE OF POLICY PLANNING, *supra* note 164, at 25-36.

¹⁶⁷ *Id.* at 26-28 (citing *Sterling Beef Co. v. City of Fort Morgan*, 810 F.2d 961 (10th Cir. 1987) and *Indep. Taxicab Drivers' Employees v. Greater Houston Transp.*, 760 F.2d 607 (5th Cir. 1985)). See Phillip E. Areeda & Herbert Hovenkamp, *supra* note 7, at 453 (arguing that ordinary corporate powers do not contemplate antitrust violation).

Fortunately, there are some examples in which courts have applied a stricter standard, such as the Fifth Circuit in *Hammond* holding that the power to form joint ventures does not foreseeably result in anticompetitive conduct.¹⁶⁸ In general, the foreseeability standard has proven to be of no bite – the broader the authority to act within a particular subject matter, the more likely anticompetitive conduct will be held to be the "foreseeable" result of the delegation.¹⁶⁹

Courts sometimes assume that regulatory regimes automatically displace all aspects of competition. Instead of inquiring into the scope of a state policy with regard to the affected elements of competition, they are satisfied if the conduct is within the broad authority of state law.¹⁷⁰ By refusing to delve deeper into questions of state law and proper delegation, the federal courts broaden the possibilities for state regulators to displace competition, even where such displacement cannot be affirmatively said to be covered by a respective state intent.¹⁷¹ Fortunately, there are some courts addressing alleged *ultra vires* conduct.¹⁷²

The Supreme Court keenly strengthened the clear articulation standard in *Cantor*, by arguing that a repeal of the antitrust laws is to be regarded as implied only if necessary to make the act work, and even then only to the minimum extent necessary.¹⁷³ Unfortunately, the Supreme

¹⁶⁸ 171 F.3d at 235. *See also* Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397 (9th Cir. 1991) (finding no intent to displace competition by mere authorization to engage in business).

¹⁶⁹ *See* Douglas C. Floyd, *supra* note 90, at 1076.

¹⁷⁰ *See supra* note 141.

¹⁷¹ *See* OFFICE OF POLICY PLANNING, *supra* note 164, at 34 (citing *Earles v. La. Bd. of Certified Public Accountants*, 139 F.3d 1033, 1043 (5th Cir. 1998). *But see* *Hardy v. City Optical*, 39 F.3d 765, 769 (7th Cir. 1994) (holding that a state "may have a regulatory program but one that can coexist happily with the full enforcement of federal antitrust principles because the program does not require the supplanting of competition"; citing *Lancaster Community Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397 (9th Cir.1991)).

¹⁷² *See* *Bolt v. Halifax Hosp. Med. Ctr.*, 891 F.2d 810, 824-825 (11th Cir. 1990). *See also* *Cost Mgmt. Serv., Inc. v. Washington Natural Gas Co.*, 99 F.3d 937, 942-43 (9th Cir. 1996).

¹⁷³ 428 U.S. at 596, n. 34.

Court has lost much of its courage displayed in the *Cantor* decision, and has not applied such a strict interpretation of permissible anticompetitive state regulation again. As a comparative note, such reluctance to restrict state regulation is not displayed in many other jurisdictions. For example, a provision of the Swiss Antitrust Statute regarding state action expressly states, analogously to the *Cantor* holding, that state action may displace competition, but is limited to the extent the state regulation really requires such displacement. Similarly, the European competition law applies a very narrow interpretation to governmental measures restricting competition.¹⁷⁴

In *Boulder*, the Court rejected the claim that a home rule statute shows a clear intent of the state to displace competition, implementing a rather strict standard.¹⁷⁵ This strict standard of a clearly articulated state policy was later softened in two ways. On the one hand, the court accepted in *Southern Motor Carriers* that the anticompetitive conduct does not have to be compelled by the state.¹⁷⁶ On the other hand, in *Town of Hallie* and *Omni*, the court did not require an express intent to displace competition – it was sufficient for the purpose of granting immunity if the anticompetitive conduct was the foreseeable result of the state policy.¹⁷⁷ The softer standard may probably be explained by the court's reluctance to apply the antitrust laws to municipalities; however, the softer standard is now valid for all defendants claiming immunity on grounds of state action.

¹⁷⁴ Swiss Cartel Act [Kartellgesetz], SR 251, art. 3(1) (2006); see HELMUTH SCHRÖTER ET AL., Commentary to Article 81 of the Treaty establishing the European Community [Kommentar zu Art. 81 EGV], 263 (2003). For a discussion of the reasons of the U.S. Supreme Court's permissive holdings after *Cantor*, see *infra*, III.E. and IV.B.

¹⁷⁵ *Cnty. Communications Co. v. City of Boulder*, 455 U.S. 40, 56 (1982).

¹⁷⁶ *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 50-52 (1985).

¹⁷⁷ *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 373 (1991); and *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42 (1985).

We may thus conclude that the requirement of a clearly articulated state policy to displace competition, in particular under the foreseeability standard, does not provide much restraint for state regulators.

D. *Active Supervision by the State*

1. State of the Law

The requirement of sufficient state supervision of anticompetitive schemes is mainly governed by the quite recent ruling of the Supreme Court in *FTC v. Ticor Title Ins. Co.*¹⁷⁸ In this case, the respondent was charged with horizontal price fixing in setting fees for title searches and examinations.¹⁷⁹ In four States, a rating bureau, licensed by the State and authorized to establish joint rates for its members, established uniform rates; submitted rates became effective unless the State rejected them within a specified period.¹⁸⁰ The Court held that it was not sufficient for the active supervision standard to establish that a "state's program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy".¹⁸¹ A "party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or rate setting scheme. The mere

¹⁷⁸ 504 U.S. 621, 646 (1992) (the FTC conceded that a clearly articulated state policy was established by the states).

¹⁷⁹ *Id.* at 624-625.

¹⁸⁰ *Id.* at 629.

¹⁸¹ *Id.* at 637 (abrogating *New England Motor Rate Bureau, Inc. v. FTC*, 908 F.2d 1064, 1071 (1st Cir. 1990), which required only "some basic level of activity directed towards seeing that the private actors carry out the state's policy" to satisfy supervision).

potential for state supervision is not an adequate substitute for a decision by the State."¹⁸² Under this standard, the active supervision requirement was not met since the rate bureaus merely checked the filings for mathematical accuracy and requests for additional information were not obeyed.¹⁸³

The Supreme Court also found the active supervision requirement not met in *Liquor Corp. v. Duffy*.¹⁸⁴ A State of New York statute required retailers to charge at least 112 % of the posted wholesale price for liquor, but permitted wholesalers to sell to retailers at less than the posted price.¹⁸⁵ The state legislature had clearly adopted a policy of resale price maintenance, thereby meeting the first part of the *Midcal* test.¹⁸⁶ However, the liquor pricing system was not supervised by the state since the price setting of private parties was simply authorized and enforced by the state but the liquor authority neither established prices nor reviewed the reasonableness of the price schedules, and did not monitor or reexamine market conditions.¹⁸⁷ These were the same reasons that induced the court in *Midcal* to find the California statute requiring all

¹⁸² *Id.* at 638 (arguing that much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy; the question is not how well state regulation works but whether the anticompetitive scheme is the State's own.).

¹⁸³ *Id.*

¹⁸⁴ 479 U.S. 335 (1987).

¹⁸⁵ *Id.* at 337.

¹⁸⁶ *Id.* at 344.

¹⁸⁷ *Id.* at 344 n.6. (arguing that a simple "minimum markup" requiring to charge 112 % of the actual wholesale cost may satisfy the "active supervision" requirement, in contrast to the present markup on the posted bottle price). *See also* Morgan v. Div. of Liquor Control, Conn. Dept. of Bus. Regulation, 664 F.2d 353 (2d Cir. 1981) (granting immunity since the legislature did conduct additional inquiries on the appropriate retail price, in contrast to the liquor authority of New York.); Miller v. Or. Liquor Control Comm'n, 688 F.2d 1222, 1226-27 (9th Cir. 1982) (holding that Oregon has failed to displace unfettered business freedom with its own power).

wine producers and wholesalers to file fair trade contracts or price schedules with the State in violation of the Sherman act.¹⁸⁸

Also, the Court held that if the supervised private party withholds key information from the authority which was repeatedly requested and which was needed in order to make an informed decision on whether to approve a tariff, then the active supervision requirement would probably not be met.¹⁸⁹

*Patrick v. Burget*¹⁹⁰ displays that it may be difficult for a state to establish active supervision over self-governing entities. In *Patrick*, the state failed to meet the supervision requirement for peer-review proceedings of the Astoria Clinic, Oregon. The peer review committee voted to recommend the termination of petitioner's privileges on the ground that petitioner's care of his patients was below the standards of the hospital, while petitioner claimed that his peers just wanted to reduce competition at the hospital.¹⁹¹ According to the Court, the state exercised no active supervision since all involved state actors¹⁹² lacked the ability to exercise ultimate control, i.e. to review and overturn peer-review decisions.¹⁹³

¹⁸⁸ Cal. Retail Liquor Dealers Ass'n v Midcal Aluminum, Inc., 445 U.S. 97, 105-106 (1980).

¹⁸⁹ Cost Mgmt. Serv., Inc. v. Wash. Natural Gas Co., 99 F.3d 937, 943 (9th Cir. 1996).

¹⁹⁰ 486 U.S. 94 (1988). The clear articulation standard was not considered by the court. *Id.* at 100.

¹⁹¹ *Id.* at 97-98.

¹⁹² This includes state courts, the review of which would probably be of a very limited nature; *id.* at 103-06.

¹⁹³ *Id.* at 100-01: "The requirement is designed to ensure that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies. To accomplish this purpose, the active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct. The mere presence of some state involvement or monitoring does not suffice. The active supervision prong of the Midcal test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests."

The Court rejected the policy argument that effective peer review is essential to the provision of quality medical care and that any threat of antitrust liability would prevent physicians from participating openly and actively in peer-review proceedings.¹⁹⁴ The Court reasoned that since the argument challenges the wisdom of applying the antitrust laws to medical services it has to be directed to the legislative branch.¹⁹⁵

The Eleventh Circuit, however, held in *Crosby v. Hospital Authority of Valdosta and Lowndes County* that a peer review committee of the hospital was acting as an agent of the Hospital authority; in this case, the authority retains the power to follow, modify, or even disregard the recommendations of staff committees, thereby adopting the actions of the committee as its own actions.¹⁹⁶

In *Bedell Wholesale Co., Inc. v. Philip Morris Inc.*¹⁹⁷, the Third Circuit held that private participants in the Multistate Settlement Agreement between the States and the tobacco companies are not shielded from antitrust claims. The court found that state supervision does not reach provisions regarding price fixing and provisions enabling cigarette producers to establish an output cartel; advertisement restrictions did not have effects on pricing.¹⁹⁸ The court also addressed

¹⁹⁴ *Id.* at 105.

¹⁹⁵ *Id.*

¹⁹⁶ 93 F.3d 1515, 1531 (11th Cir. 1996) (holding that the committee enjoys the same immunity as the authority). See also *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1462 (11th Cir. 1991) (relying entirely on the state's authorization of the denial of staff privileges by the hospital).

¹⁹⁷ 263 F.3d 239 (3d Cir. 2001).

¹⁹⁸ *Id.* at 260-65. See also *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205 (2d Cir. 2004). But see *Sanders v. Lockyer*, 365 F.Supp.2d 1093 (N.D.Cal. 2005) (finding that the Multistate Settlement Agreement itself is a sovereign act of the state of California).

the possibility of a "market participant" exception to *Parker*, an issue which will be addressed below.¹⁹⁹

Circuit Court decisions indicate that municipal supervision may be sufficient to trigger state action immunity, where such supervision is authorized by or is implicit in state legislation.²⁰⁰ In *Electrical Inspectors*, the Second Circuit held that active supervision by municipalities is required to grant state-action immunity in municipal contexts.²⁰¹ The court held that the mere negative option to replace a board is alone likely to be insufficient for supervision.²⁰² The court also raised the question whether lack of municipal supervision, triggering antitrust liability for involved private actors, may also affect the involved municipalities.²⁰³ The question is still not resolved.

In *Town of Hallie*, the Supreme Court held that the active state supervision requirement should not be imposed in cases in which the actor is a municipality; the danger that a municipality would seek to further purely parochial public interests was deemed minimal by the court, because of the requirement that the municipality act pursuant to a clearly articulated state policy.²⁰⁴

¹⁹⁹ *Bedell Wholesale Co., Inc.*, 263 F.3d at 265 n.55 (not applying such exception in the context of the Multistate Settlement Agreement, since the States did not enter the tobacco market as a buyer or seller, nor did they assume control or ownership of any entity within the market).

²⁰⁰ *Tri-State Rubbish, Inc. v. Waste Mgmt., Inc.*, 998 F.2d 1073, 1079 (1st Cir. 1993). *See also* *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005 (8th Cir. 1983), *cert. denied*, 471 U.S. 1003 (1985); *Tom Hudson & Assocs. v. City of Chula Vista*, 746 F.2d 1370 (9th Cir.1984), *cert. denied*, 472 U.S. 1028 (1985); *Savage v. Waste Mgmt., Inc.*, 623 F. Supp. 1505 (D.S.C. 1985). *But see*, e.g., *Riverview Invs., Inc. v. Ottawa Cmty. Improvement Corp.*, 774 F.2d 162 (6th Cir. 1985) (revising an earlier decision with regard to the sufficiency of municipal supervision).

²⁰¹ *Elec. Inspectors, Inc. v. Vill. of East Hills*, 320 F.3d 110, 129 (2d Cir. 2003), *cert. denied*, 540 U.S. 982 (2003); *but see* *Commuter Transp. Sys., Inc. v. Hillsborough County Aviation Auth.*, 801 F.2d 1286, 1290-91 (11th Cir. 1986) (arguing that the power to remove members of a authority would be sufficient supervision).

²⁰² *Id.*

²⁰³ *Elec. Inspectors, Inc.* 320 F.3d at 122, 129.

²⁰⁴ *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985).

The Court reasoned further that it was likely that active state supervision would also not be required for state agencies.²⁰⁵

Circuit Courts have granted to subdivisions of the state (if not treated as the state for antitrust purposes anyway) similar exemptions from the supervision requirement as granted to municipalities.²⁰⁶ The Eleventh Circuit for example, in *Bankers Insurance Co. v. Florida Residential Property and Casualty Joint Underwriting Ass'n*,²⁰⁷ held that "factors favoring political-subdivision treatment include open records, tax exemption, exercise of governmental functions, lack of possibility of private profit, and the composition of the entity's decisionmaking structure."

Similarly, in *Earles v. State Board. of Certified Public Accountants of Louisiana*,²⁰⁸ the Fifth Circuit granted exemption from supervision to a state board, holding it functionally similar to a municipality. Further, in *Martin v. Memorial Hospital at Gulfport*, the Fifth Circuit also granted an exemption from supervision to a Hospital, holding it "a subdivision of the state or municipal corporation thereof".²⁰⁹ In *Hass*, the Ninth Circuit exempted the State Bar from the active

²⁰⁵ *Id.* at 46 n.10 (not deciding the issue).

²⁰⁶ *Cine 42nd St. Theater Corp v. Nederlander Org., Inc.*, 790 F.2d 1032, 1047 (2d Cir. 1986) (citing *Town of Hallie*, 471 U.S. at 46 n.10); *Interface Group, Inc. v. Ma. Port Auth.*, 816 F.2d 9 (1st Cir. 1987) (granting exemption from supervision to the Massachusetts Port Authority); *Commuter Transp. Sys., Inc. v. Hillsborough County Aviation Auth.*, 801 F.2d 1286, 1290-91 (11th Cir. 1986) (holding that the Authority is subject to state "sunshine" laws, has police power jurisdiction, power of eminent domain, zoning authority, bonding authority, rulemaking power and is exempt from taxation. According to the court, there is also sufficient state supervision: The governor appoints, and may remove for cause, all the regular members of the Authority.).

²⁰⁷ 137 F.3d 1293, 1296-97 (11th Cir. 1998).

²⁰⁸ 139 F.3d 1033, 1041 (5th Cir. 1998).

²⁰⁹ 86 F.3d 1391, 1399 (5th Cir. 1996). *See also* *FTC v. Hosp. Bd. of Dirs. of Lee County*, 38 F.3d 1184, 1188 (11th Cir. 1994) (concluding that a health care authority was a "political subdivision" exempted from supervision because it was a special purpose unit of local government); *Crosby v. Hosp. Auth. of Valdosta and Lowndes County*, 93 F.3d 1515, 1525 (11th Cir. 1996) (holding that the mere grant of powers resembling a private corporation does not transform an otherwise governmental entity into a private actor of the type the court would expect to engage in a private price-fixing agreement; the exemption covers employees of the hospital as well, but not necessarily a peer review committee acting independently); *Consol. Tel. Cable Serv., Inc. v. City of Frankfort, Ky.* 857 F.2d 354, 360-61 (6th Cir. 1988).

supervision requirement because its record were open for public inspection, its accounts and financial affairs were subject to audits by a state auditor, its meetings were open to the public, and its Board members were public officials who had to comply with the Code of Ethics enacted by the state legislature to guide the conduct of all public officials.²¹⁰

In *Zimomra*, the Tenth Circuit applied the single-prong *Town of Hallie* test (without supervision) to a private defendant because defendant's actions were mandated and strictly controlled by the City and County of Denver via the applicable Ordinance.²¹¹

In dealing with a rural electric convenience cooperative, the Seventh Circuit held in *Fuchs v. Rural Electric Convenience Co-op. Inc.* that the entity lacked the attributes of a purely private actor;²¹² however, the court found that it is neither a state agency nor municipality. Being a hybrid entity with sufficient non-private attributes, the court held that its activities required some lower level of supervision to ensure that it is acting pursuant to state policy.²¹³ Similarly, the Ninth Circuit exempted a private, charitable corporation incorporated under the laws of the State of Nevada by direction of the Washoe County District Board of Health from the active supervision requirement.²¹⁴ An exemption from active supervision may also be granted if the actor has only very limited discretionary authority.²¹⁵

²¹⁰ *Hass v. Or. State Bar*, 883 F.2d 1453, 1460 (1989).

²¹¹ *Zimora v. Alamo Rent-a-Car, Inc.*, 111 F.3d 1495, 1499-1501 (1997).

²¹² 858 F.2d 1210, 1217-18 (7th Cir. 1988).

²¹³ *Id.* at 1217.

²¹⁴ *Ambulance Serv. of Reno, Inc. v. Nev. Ambulance Serv, Inc.*, 819 F.2d 910, 913 (9th Cir. 1987).

²¹⁵ *Mun. Utils. Bd. of Albertville v. Ala. Power Co.*, 934 F.2d 1493, 1503-04 (11th Cir. 1991).

2. Incoherence in Determining the Degree of Required Supervision

Without doubt, *Ticor* – as well as *Patrick*²¹⁶ – have strengthened the active supervision requirement. In *Ticor*, the Supreme Court rejected the holding of the First Circuit that the mere potential for state supervision is enough to invoke immunity.²¹⁷ It is not sufficient that the defendant establishes that a state program is in place, that it is staffed and funded, and that state officials have ample power to regulate and demonstrate some "basic level of activity".²¹⁸ "The party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting scheme."²¹⁹ As *Paul Posner* has noted, the state has to secure a certain quality of the review process, which requires rejection of all procedures that are ineffective or shallow, as when agencies have become rubber stamps.²²⁰ However, the Supreme Court failed to provide clear guidance how much supervision is sufficient to meet the requirement.²²¹

Unfortunately, the Supreme Court opened a loophole in the active supervision requirement by exempting municipalities from supervision.²²² The court reasoned that there is little or no danger that the municipality was involved in a private price-fixing arrangement, and only a

²¹⁶ *Patrick v. Burget*, 486 U.S. 94, 100-01 (1988) (holding that the "test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy").

²¹⁷ *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 632 (1992).

²¹⁸ *Id.* at 637.

²¹⁹ *Id.* at 638.

²²⁰ See Paul S. Posner, *supra* note 8, at 723.

²²¹ *Ticor*, 504 U.S. at 647 (Justice O'Connor, dissenting). See also Jeffrey M. Cross & Patrick J. Ahern, *FTC v. Ticor Title Insurance: Supreme Court puts State Action immunity under the Lens*, 7 Antitrust, Fall/Winter 1992, 24, at 25 (1992).

²²² *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985). See also Phillip E. Areeda & Herbert Hovenkamp, *supra* note 7, at 397 (regarding this development as inevitable consequence of the "common law" method of adjudication through successive decisions).

minimal danger that the municipality will seek to further purely parochial public interests at the expense of more overriding state goals.²²³ Yet, the Court seemed to ignore the high risk of interest group capture at the local level, "where incentives for ex ante lobbying are perhaps strongest".²²⁴

Based on a footnote in *Town of Hallie*²²⁵, lower courts extended the exemption from supervision to state agencies and other political subdivisions of the state. While case law is still clear that private actors are subject to the supervision requirement, it is still unclear which hybrid or local entities are exempted from supervision. There are no uniformly applied or even clear criteria to determine the status of these entities.²²⁶ It is also doubtful whether courts may find a clear standard to determine which entities are unlikely to pursue parochial interests. In fact, it may be easier to require some degree of state supervision for all entities engaging in anticompetitive conduct based on state regulation.

Also, the courts struggle to assess the required degree of supervision if a private actor is supervised by a municipality. Indeed, some scholars argue that the courts require relatively little from municipally supervised parties to grant immunity and that courts should also apply the principles of state supervision to municipally supervised parties.²²⁷

²²³ *Town of Hallie*, 471 U.S. at 47.

²²⁴ See Jim Rossi, *supra* note 10, at 549; See also William J. Martin, *State Action Antitrust Immunity for Municipally Supervised Parties*, 72 U. CHI. L. REV. 1079, 1085 (2005).

²²⁵ *Town of Hallie*, 471 U.S. at 46 n.10.

²²⁶ See OFFICE OF POLICY PLANNING, *supra* note 164, at 37-38 (such criteria are, e.g., the purpose of the entity, open records, tax exemption, exercise of governmental functions, etc.).

²²⁷ See William J. Martin, *supra* note 224, at 1081.

Summarizing, we may conclude that the active supervision requirement does not provide guidance with regard to the scope of entities needing supervision and to the extent such supervision has to be applied; there is no uniform standard established for supervision.

III. IMPACT OF THE APPLICATION OF ANTITRUST LAWS ON REGULATED MARKETS

In most cases, the federal courts pay deference to state regulation and state regulators (A). This may be partly explained by the vagueness of the *Midcal*-test, which provides little guidance for courts, regulators, regulated parties, and possible competitors (B). The vagueness of the standard affects considerations of justice and fairness (C), which are made worse by the threat of treble damages in antitrust lawsuits (D). Given the uncertainty of the present standard, we may welcome more foreseeable results, even if this means having to conduct delicate inquiries of the reasons behind state regulation (E).

A. *Deference to Regulators and Regulated Actors*

In *U.S. v. Topco Associates, Inc.*²²⁸, the Supreme Court showed a strong commitment to the Sherman Act stating its high expectations as follows:

Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete – to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.²²⁹

The Sherman Act, as it has been interpreted by the courts, sets strict limits for private actors engaging in anticompetitive conduct. The Supreme Court was never hesitant to recognize

²²⁸ 405 U.S. 596, 610 (1972).

²²⁹ *Id.*

the vast federal interest in preserving competition. In *Cantor*, the Supreme Court even argued that if the state imposed regulation inconsistent with the antitrust laws, it "could not accept the view that the federal interest must inevitably be subordinated to the State's."²³⁰ Also, Justice Stevens, dissenting in *Southern Motor Carriers*,²³¹ pointed out that "[r]egulated industries are not per se exempt from the Sherman Act." Yet, it has always seemed clear that federal antitrust laws may not be applied the same way to state action as to private action.²³²

Despite all of its strong commitments, the Supreme Court has generally refused to apply the strict limits of the Sherman Act to the regulating states. In *Southern Motor Carriers*, Justice Powell argued that "[t]he *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce."²³³ By recognizing the states' power to regulate intrastate commerce and interstate commerce by using the dormant commerce clause, the Supreme Court had to find a way to reconcile the federal interest in unfettered competition with the states' interest to enact regulation in public interest. In *Parker*, the Court put a limit on state regulation by declaring that the state may "not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."²³⁴ However, the Court indicated that it would it would

²³⁰ *Cantor v. Detroit Edison Co.*, 428 U.S. 595 (1976).

²³¹ *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 68 (1985) (citing *Ga. v. Pa. R.R. Co.*, 324 U.S. 439, 456 (1945)).

²³² See Paul S. Posner, *supra* note 8, at 703-07 (explaining the differences between state action and private action).

²³³ 471 U.S. at 56. See also *Parker v. Brown*, 317 U.S. 351 (1943) (holding that "[t]here is no suggestion of a purpose to restrain state action in the Act's legislative history.").

²³⁴ *Parker*, 317 U.S. at 351.

pay deference to a state, acting through its agents, which adopts a program and which enforces it with penal sanctions, in the execution of its policy goals.²³⁵

Later in *Midcal*, the Supreme Court explained that a state can not thwart the national policy in favor of competition by casting a gauzy cloak of state involvement over private anti-competitive conduct.²³⁶ Where private actors, regulatory boards, and other non-sovereign actors are claiming to execute state policy, they must follow a "clearly articulated and affirmatively expressed as state policy," and they must be "actively supervised" by the State itself.²³⁷ In other words, the Supreme Court will yield the federal interest to the states' interest, so long as the states' policy is not deemed to be ultimately of purely private origin (hybrid restraints²³⁸). Still, some commentators argue that courts impose a costly system of "command and control" regulation on the states as the price of obtaining antitrust immunity for their regulatory regimes. This could prevent the states from implementing these programs in the first place.²³⁹

The broad deference to state regulators in *Parker* reflects the Court's general confidence in government at that time, "with governmental entities widely regarded as unbiased and conscientious defenders of public interest."²⁴⁰ We may trace back the court's deference to the "Public Interest Theory", which was dominant back in these early cases.²⁴¹ Some scholars describe this

²³⁵ *Id.* at 352.

²³⁶ *Cal. Retail Liquor Dealers Ass'n v Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980).

²³⁷ *Id.* at 105.

²³⁸ *Fisher v. Berkeley*, 475 U.S. 260, 267-68 (1986) (quoting *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982)). See also *Liquor Corp. v. Duffy*, 479 U.S. 335, 345 n.8 (1987).

²³⁹ See Douglas C. Floyd, *supra* note 90, at 1061.

²⁴⁰ See John T. Delacourt & Todd J. Zywicki, *The FTC and State Action: Evolving Views on the Proper Role of Government*, 72 ANTITRUST L. J. 1075, 1075 (2005).

²⁴¹ *Id.* at 1077-79.

still existing, general judicial reluctance to intervene in disputes involving political institutions as a "deference trap", creating a strong presumption of no judicial intervention.²⁴² This deference was confirmed by *Town of Hallie*, in which the Court argued that, absent a showing to the contrary, a municipality is presumed to act in the public interest.²⁴³ The Court underscored that "municipal conduct is invariably more likely to be exposed to public scrutiny than is private conduct. Municipalities in some States are subject to 'sunshine' laws or other mandatory disclosure regulations, and municipal officers, unlike corporate heads, are checked to some degree through the electoral process. Such a position in the public eye may provide some greater protection against antitrust abuses than exists for private parties."²⁴⁴

B. *Standard Bears Little Guidance*

Before turning to the question of how the State Action Doctrine, as applied by the courts, affects fairness and justice, it is important to assess how much guidance the State Action Doctrine provides to regulated parties. The first chapter of this paper shows that the *Midcal* test is not applied in a consistent, uniform manner by the lower courts as well as the Supreme Court.²⁴⁵ If anticompetitive regulation is not imposed directly by the state or by one of its subdivisions, affected private actors may have difficulties predicting whether they are shielded from

²⁴² See Jim Rossi, *Moving Public Law out of the Deference Trap in Regulated Industries*, 40 Wake Forest L. Rev., 2005, 617.

²⁴³ *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 45 (1985). See also *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 594 (1976).

²⁴⁴ *Town of Hallie*, 471 U.S. at 45 n.9.

²⁴⁵ See also OFFICE OF POLICY PLANNING, *supra* note 164, at 26; John T. Delacourt & Todd J. Zywicki, *supra* note 240, at 1087-89.

antitrust immunity.²⁴⁶ If the court fails to provide clear standards, it simply "substitutes its own policy judgment about the desirability of disregarding any facet of state economic regulation that it thinks unwise or of no great importance."²⁴⁷

In *Ticor*, Justice O'Connor challenged the court's determination regarding lack of sufficient active supervision by the state.²⁴⁸ O'Connor, dissenting, argued that the majority does not offer any guidance as to what level of supervision would suffice.²⁴⁹ She continued that the "substantial role" standard is not only ambiguous, but also runs the risk of being counterproductive.²⁵⁰ In her opinion, the more reasonable a rate schedule filed by the regulated entity with the authority, the less likely that a State will have to play any role other than simply reviewing the rate for compliance with statutory criteria.²⁵¹ While *Ticor* clarified the supervision requirement for extreme cases, we still do not know how to apply the standard in difficult but less than extreme cases. The supervision requirement probably bears only little guidance for the bulk of possible cases.²⁵²

²⁴⁶ See *Cantor*, 428 U.S. at 640 (J. Stewart, dissenting) (arguing that a state regulated utility "must at its peril successfully divine which of its countless and interrelated tariff provisions a federal court will ultimately consider 'central' or 'imperative.' If it guesses wrong, it may be subjected to treble damages as a penalty for its compliance with state law.").

²⁴⁷ *Id.*

²⁴⁸ *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 646 (1992).

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* at 647.

²⁵² See also William J. Martin, *supra* note 224, at 1087-88.

C. *Impact on Promotion of Fairness and Justice*

The weak guidance of the State Action Doctrine for regulated parties has a negative impact on fairness and justice. In *Cantor*, the Supreme Court was confronted with the claim that, "if a private citizen has done nothing more than obey the command of his state sovereign, it would be unjust to conclude that he has thereby offended federal law."²⁵³ The court argued that "there may be cases in which the State's participation in a decision is so dominant that it would be unfair to hold a private party responsible for his conduct in implementing it"²⁵⁴ Such a dominant position, excluding any liability of private parties, would probably be assumed in cases like *Fisher v. City of Berkeley*.²⁵⁵ However, the Court deemed the private party in *Cantor* to exercise sufficient freedom of choice to be held responsible for the consequences of its decision.²⁵⁶

It seems fair that compelling state action may not trigger antitrust liability for obeying private actors.²⁵⁷ Antitrust immunity, however, has been extended in cases where anticompetitive behavior was only "prompted" but not compelled by a state.²⁵⁸ In *Southern Motor Carriers*²⁵⁹, the Supreme Court granted state action immunity to private parties, although their joint rate filings were authorized, but not compelled by the state. This extension of state action immunity

²⁵³ *Cantor*, 428 U.S. at 592.

²⁵⁴ *Id.* at 594-95.

²⁵⁵ 475 U.S. 260 (1986). In this case, the City of Berkeley unilaterally imposed rent ceilings via an ordinance on landlords to the exclusion of private control. The ordinance placed complete control over maximum rent levels exclusively in the hands of a Rent Stabilization Board. *Id.*

²⁵⁶ *Cantor*, 428 U.S. at 594.

²⁵⁷ See *Fisher*, 475 U.S. 260 (holding that unilaterally imposed behavior does not violate the Sherman Act).

²⁵⁸ See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 360 (1977); *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975).

²⁵⁹ *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 50-52 (1985).

makes it even more difficult for regulated parties, compared to *Cantor*, to assess their antitrust exposure.

The dissent of Justice Stewart in *Cantor* pointed out that now, a "public utility company, pervasively regulated by a state utility commission, may be held liable for treble damages under the Sherman Act for engaging in conduct which, under the requirements of its tariff, it is obligated to perform."²⁶⁰ The dissent was also concerned that effective and efficient regulation may be hampered because such regulation depends on active participation of the regulated parties.²⁶¹

Concerns regarding fairness and promotion of effective regulation were also expressed by Justices Rehnquist and O'Connor in *Ticor*. Justice Rehnquist noted that the exposition of regulated actors to treble damages will make it highly unlikely that that private actors will choose to participate in such a joint filing.²⁶² Justice O'Connor joined in, adding that "regulated entities that have the option of heeding the State's anticompetitive policy would be foolhardy to do so; those that are compelled to comply are less fortunate."²⁶³ O'Connor argued further that an after-the-fact evaluation of a state's regulatory program is "extremely unfair" to regulated parties.²⁶⁴ Antitrust liability would then depend on how "enthusiastically" a state official carried out his or her statutory duties, something over which the regulated entity has no control.²⁶⁵ The different

²⁶⁰ *Cantor*, 428 U.S. at 614-15.

²⁶¹ *Id.* at 627.

²⁶² *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 644 (1992).

²⁶³ *Id.* at 646.

²⁶⁴ *Id.* at 647.

²⁶⁵ *Id.*

degree of supervision applied by states could result in antitrust liability of a private actor in one state, but not in another.²⁶⁶

Summarizing, there may be many cases where application of antitrust laws to regulated parties may be appropriate. In other cases, particularly where anticompetitive behavior is compelled by a state, the application of antitrust laws may appear unfair. In most cases, however, it is difficult to draw a clear line where private involvement is sufficient to trigger antitrust liability. The State Action Doctrine is too vague to provide clear guidance for regulated parties.

D. *Treble Damages Threat to Regulated Parties*

A state utility commission may be held liable for treble damages under the Sherman Act for engaging in conduct which it is obligated to perform.²⁶⁷ Such application may result in a disruption of operation of a state-regulated public utility company by creating the prospect of massive treble damage liabilities, payable ultimately by the companies' customers.²⁶⁸

Similarly, in *Boulder*, dissenting Justice Rehnquist claimed that the application of antitrust laws to municipalities will "impede, if not paralyze, local governments' efforts to enact ordinances and regulations aimed at protecting public health, safety, and welfare, for fear of subjecting the local government to liability under the Sherman Act."²⁶⁹ Because of policy reasons and fairness considerations, the concern of exposure to treble damages was also shared by *Paul*

²⁶⁶ *Id.*

²⁶⁷ See, e.g., 428 U.S. 579 at 614-15 (Justice Stewart, dissenting).

²⁶⁸ *Id.* at 615.

²⁶⁹ *Cnty. Communications Co. v. Boulder*, 455 U.S. 40, 60 (1982). See also Frank H. Easterbrook, *supra* note 1, at 38 and 40 (taking a more deferential approach).

Posner, who asked for a privilege against damage liability for good-faith actions of private firms in securing or operating under state regulation.²⁷⁰

The Local Government Antitrust Act of 1984²⁷¹ addresses some of the concerns which have been expressed by Justice Rehnquist in *Boulder*. The act removes the danger of treble damages for local governments, encompassing cities, counties, parishes, towns, townships, villages, school districts, sanitary districts, or any other general function governmental unit.²⁷² Under the statute, no damages, interest on damages, costs, or attorney's fees may be recovered from any local government, or official or employee thereof acting in an official capacity.²⁷³ The statute, however, does not preclude the right to an injunction, and a prevailing plaintiff may recover attorney's fees.²⁷⁴

While the statute removes the most severe remedy – damages – for local governments, it leaves many questions unanswered. In light of *Omni's* rejection of a conspiracy exception,²⁷⁵ one such question would be in which cases an official is not "acting in an official capacity". Secondly, the applicability of the exception to private parties, which may violate the Sherman Act by carrying out the municipal command, remains unclear. Finally, the act does not deal at all with the scope of antitrust immunity conferred on municipalities under the State Action Doctrine.

²⁷⁰ See Paul S. Posner, *supra* note 8, at 729.

²⁷¹ 15 U.S.C. §§ 34-36.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ See HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 753 (2005) (citing several Circuit Courts' decisions).

²⁷⁵ *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 375 (1991).

The threat of treble damages may reduce the willingness of private parties to cooperate in drafting regulations or to carry out public policy. It is much more costly for regulated actors if they have wrongly assessed their chance of liability under the vague standard set by the Supreme Court.²⁷⁶

E. *"Lochner" Consequences?*

*Lochner v. New York*²⁷⁷ stands for an era when the Supreme Court invalidated – on grounds of Substantive Due Process – state laws that interfered with the freedom to contract. The *Lochner* era represented a major confrontation between the Supreme Court and the other branches of Government, ending with the Court's total withdrawal from scrutinizing economic regulation.²⁷⁸ The times when "when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy" are over.²⁷⁹ This said, one of the few remaining promising grounds on which to attack state regulation is showing that the regulation violates federal anti-trust laws.

The question then arises whether this constitutes the same "undue" influence of courts on economic policy as in the *Lochner* cases. In *Cantor*, for example, dissenting Justice Stewart argued that, "[i]n adopting this freewheeling approach to the language of the Sherman Act, the

²⁷⁶ While denial of State Action immunity does not equal a per se violation of the Sherman Act, the mere possibility of being exposed to Sherman Act lawsuits may constitute a significant burden.

²⁷⁷ 198 U.S. 45 (1905).

²⁷⁸ See *Nebbia v. New York*, 291 U.S. 502, 539 (1934); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937).

²⁷⁹ *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963).

Court creates a statutory simulacrum of the substantive due process doctrine I thought had been put to rest long ago."²⁸⁰

In *Boulder*, dissenting Justice Rehnquist discussed the legal nature and the consequences of the *Parker* immunity at length.²⁸¹ He feared that, should the immunity be construed as exemption rather than pre-emption, a municipality could be forced to justify the anticompetitive effects of its regulation by proving its benefits to society under a rule of reason.²⁸² The courts would have to assess whether the benefits of the regulation to the community, in terms of traditional health, safety, and public welfare concerns, outweigh the anticompetitive effects.²⁸³ Social regulation would be subject to a review based on a "wide-ranging, essentially standardless inquiry into the reasonableness of local regulation".²⁸⁴ In Rehnquist's opinion, "[t]he Sherman Act should not be deemed to authorize federal courts to 'substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.'"²⁸⁵ Indeed, state policies are often written broadly, and courts think they might be ill-suited to determine whether private conduct fits within the purposes of a specific law or policy.²⁸⁶ Some scholars argue, based on this

²⁸⁰ *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 640 (1976). *See also Ferguson*, 372 U.S. at 728-29.

²⁸¹ *Cnty. Communications Co. v. Boulder*, 455 U.S. 40, 65-70 (1982).

²⁸² *Id.* at 60.

²⁸³ *Id.* at 66.

²⁸⁴ *Id.* at 67.

²⁸⁵ *Id.* at 68 (citing *Ferguson*, 372 U.S. at 730). *See also* Page I. Austin, *The State Action Doctrine and the Sufficiency of State Regulation*, 5 *Antitrust*, Summer 1991, 38 (1991) (reviewing several court decisions expressing unease in trying the regulator).

²⁸⁶ *See* William J. Martin, *supra* note 224, at 1086.

argument, that the State Action Doctrine should not be used at all to overturn regulation, or any other results of the political process.²⁸⁷

However, the reason for the Court's refusal to sit as a "superlegislature to weigh the wisdom of legislation"²⁸⁸ may be questioned. First of all, the Supreme Court is not hesitant to question the wisdom of legislation if non-economic issues are scrutinized. There is no reason why the Supreme Court should be more apt to protect privacy as opposed to economic liberties.²⁸⁹

Second, there is no logic in the conclusion that the Court has to pay deference to anticompetitive state regulation just because no standard exists; no standard would justify both, deference to state regulation as well as deference to federal interests. The Court could decide that every kind of state regulation displacing competition pre-empts the Sherman Act; this would be the only way to avoid inquiries whether state regulation is reasonable, i.e. whether its social benefits outweigh its anticompetitive effects. However, there seems to be no valid reason why such inquiry should not take place as long as the states' constitutional powers to regulate commerce are not entirely destroyed, as during the *Lochner* era.

Third, we may cast doubt on the Court's implied assumption that the political process is able to restrain anticompetitive state regulation. Representatives are not elected just because they did or did not promote rate regulation for, e.g., motor carriers. Regulation may serve special interests, while its effects are dispersed widely in the public. Public Choice Theory suggests that special interest groups find it easier to organize and lobby for favorable regulation, while the

²⁸⁷ See Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L. J. 486, 519 (1987) (exempting only delegations to private actors from immunity).

²⁸⁸ *Ferguson*, 372 U.S. at 731.

²⁸⁹ See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 481-82 (2001); Paul R. Verkuil, *State Action, Due Process, and Antitrust: Reflections on Parker v. Brown*, 75 COLUM. L. REV. 328, 329 (1987).

politicians' likelihood to get punished by voters remains small. Keeping in mind that regulators are even more distant from the electorate, the political process may not be powerful enough to influence anticompetitive regulation.

Moreover, there is not even a theoretical possibility of being held responsible by the electorate if the anticompetitive effects of the state regulation occur in other states.²⁹⁰ In *Parker*, the California Agricultural Prorate Act affected the price of raisins, of which between 90 to 95 % were ultimately shipped in interstate or foreign commerce.²⁹¹ Such regulatory burdens carried by consumers in other states – sometimes addressed as "interstate spillovers" or "negative externalities" – are largely ignored in the reasonings of the courts.²⁹² The report of the State Action Task Force also pointed out that similar spillovers occur in municipal regulation.²⁹³ Some scholars focus exclusively on this point and want courts to deny state action immunity to regulation with significant state spillovers unsupported by a negotiated interstate agreement.²⁹⁴ Such an approach would honor the roots of *Parker*, which are grounded in federalism.

The lack of political accountability in case of regulatory spillovers is displayed in *City of Lafayette*, where the court observed that a municipality may charge higher rates to customers

²⁹⁰ Easterbrook seems to suggest that competition among the states may replace electoral accountability and may result in better regulation. Easterbrook, *supra* note 1, at 33-55.

²⁹¹ *Parker v. Brown*, 317 U.S. 341, 345 (1943).

²⁹² See OFFICE OF POLICY PLANNING, *supra* note 164, at 40, 56-57 (requesting a more thorough recognition and consideration of spillover issues in case law).

²⁹³ *Id.* at 40-44.

²⁹⁴ See Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 TEX. L. REV. 1203, 1297-98 (1997); Frank H. Easterbrook, *supra* note 1, at 39-40 (arguing that competition among jurisdictions would be facilitated by prohibition on the export of monopoly charges).

outside the geographical scope of regulated tariffs.²⁹⁵ By doing this, it "would provide maximum benefits for its constituents, while disserving the interests of the affected customers."²⁹⁶

The effects of interstate spillovers were also neglected in *Goldfarb*.²⁹⁷ In this case, the Supreme Court acknowledged, at first, the effect of the involved state action on interstate commerce.²⁹⁸ The Court rejected the argument of the county bar that the effects of its fee schedule on interstate commerce were only incidental and remote in order to conclude that the challenged behavior was within the reach of the federal antitrust laws.²⁹⁹ Unfortunately, the court did not consider the anticompetitive effects of the state action to assess the validity of the state action under *Parker*.³⁰⁰

The affected electorate outside the jurisdiction of the regulator is not able to assert its interest by electing representatives who are favorable to their interests. Their only way to attack these spillovers is to file a lawsuit in a federal court. While interstate spillovers may be addressed in court by claiming a violation of the Dormant Commerce Clause, it may be much more difficult to address municipal spillovers. Also, it may be impossible to state a case under the Dormant Commerce Clause in cases lacking blatant discrimination.³⁰¹ Keeping in mind the loopholes in the Clause (e.g. if states are acting as market participants themselves) and the Clause's

²⁹⁵ *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 404 (1978).

²⁹⁶ *Id.*

²⁹⁷ *Goldfarb v. Va. State Bar*, 421 U.S. 773, 783 (1975) (abrogating the fee schedule since it was not compelled by direction of state acting as a sovereign).

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *See Id.*

³⁰¹ *See Jim Rossi, supra* note 10, at 529 (arguing that challenges against public utility laws were infrequent; when challenges were brought, federal courts typically deferred to state and local regulation).

overarching goal to prevent discrimination, it seems misguided that the Dormant Commerce Clause could serve as constitutional mandate to promote competition by abrogating excessive regulation.³⁰²

As a comparative note, we may keep in mind that the European Union fights interstate spillovers successfully by subjecting state regulation under the strict regime of article 28-30 of the Treaty establishing the European Community.³⁰³ According to article 28-29 of the Treaty, quantitative restrictions on imports, exports, and all measures having equivalent effect shall be prohibited between Member States.³⁰⁴ Exceptions have to be justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property.³⁰⁵ However, such prohibitions or restrictions shall not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.³⁰⁶ This constitutes a much stronger version of the United States' Commerce Clause.³⁰⁷

³⁰² *Id.* at 534-36 (arguing that the dormant commerce clause responds to an implicit bargaining failure in the market for interjurisdictional regulation).

³⁰³ Treaty Establishing the European Community, Dec. 24, 2002, 2002 O.J. (C325) 33, art. 28-30 (hereinafter Treaty Establishing the European Community).

³⁰⁴ Art. 28-29 of the Treaty Establishing the European Community.

³⁰⁵ Art. 30 of the Treaty Establishing the European Community.

³⁰⁶ *Cf.* EUROPEAN COMMISSION, GUIDE TO THE CONCEPT AND PRACTICAL APPLICATION OF ARTICLES 28-30 EC 8-21 (2001), available at http://www.europa.eu.int/comm/enterprise/regulation/goods/docs/art2830/guideart2830_en.pdf (summarizing the case law of the European Court of Justice).

³⁰⁷ See Margaret Bloom, *The U.S. and EU move towards substantial Antitrust Convergence on Consumer Welfare based Enforcement*, 19 Antitrust, Summer 2005, 18, at 23 (2005).

F. *Preliminary Conclusion*

In summary, the State Action Doctrine addresses the need for a standard to separate the realms of the federal interest of unfettered competition and the states' interests of regulating domestic commerce. However, today's State Action Doctrine constitutes a vague standard, providing little guidance to regulated entities as well as regulators. Particularly, the threat of treble damages may affect fairness considerations, since regulated entities are held responsible for anti-competitive behavior which they may even be compelled to perform. The fear of a new *Lochner* era, as mentioned by the courts, is not very convincing in explaining the courts' refusal to inquire whether state regulation is reasonable. We may note that the European Court of Justice requires state competition authorities to invalidate national legislation which compels or facilitates conduct contrary to article 81 of the treaty establishing the European Community.³⁰⁸ There seems little reason to adopt an approach in the U.S, which is more deferential towards state actors.

The above concerns regarding the impact of denied state action immunity on regulated actors may explain why the courts have adopted a rather permissive approach, being deferential to state regulators and neglecting the goals of competition law.³⁰⁹

IV. ALTERNATIVES TO DETERMINE STATE ACTION IMMUNITY

In contrast to the findings of the State Action Task Force of the FTC, as summarized below in (A), a mere refinement of the State Action Doctrine and the *Midcal* test will not resolve the issues described in section III. If the federal antitrust laws should be given more bite and if

³⁰⁸ *Id.* See *Consorzio Industrie Fiammiferi v. Autorita Garante della Concorrenza e del Mercato*, Case C-198/01, 2003 E.C.R. I-08055 (dealing with a state imposed monopoly in matches).

³⁰⁹ See Jim Rossi, *supra* note 10, at 555-65.

deference to state regulators should be decreased, courts have to start looking behind the reasons of state regulation. They have to assess whether regulation addresses legitimate concerns of state policy, and whether these concerns outweigh the regulation's harmful effects (B). Courts would also have to combat abuses of regulatory power (C). Taking into account the reluctance of courts to scrutinize state regulation or resolve conflicts of interests of state regulators, the FTC may be well-suited to spearhead challenges to state regulation (D).

A. *State Action Task Force: Refine the Existing Test*

The State Action Task Force of the FTC did not share the skepticism against *Parker* (as expressed by scholars,³¹⁰ and, e.g., Justice Scalia in *Ticor*³¹¹). The Task Force's research resulted in rather pragmatic recommendations regarding further refinement of the State Action Doctrine,³¹² which address the most severe problems already identified above.

First, the Task force recommended a stricter application of the clear articulation standard.³¹³ It asserted that courts jump too quickly from finding a general regulatory scheme to concluding that such a scheme intends to displace competition. It also argued that the foreseeability standard is used too broadly.³¹⁴ The Task Force recommended an in-depth inquiry whether the conduct has been authorized and whether the state has deliberately adopted a policy to displace competition.³¹⁵ Unfortunately, the Task Force did not answer whether the authorization inquiry

³¹⁰ See, e.g., Steven Semeraro, *Demystifying Antitrust State Action Doctrine*, 34 Harv. J. L. & Pub. Pol'y 203, 239-253 (2000) (providing an overview on current criticism).

³¹¹ *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 641 (1992).

³¹² See OFFICE OF POLICY PLANNING, *supra* note 164, at 50.

³¹³ See *id.*

³¹⁴ See *id.* at 26.

³¹⁵ See *id.* at 51.

should be carried out by applying a strict standard as in *Bolt*³¹⁶, or a broad standard as in *Electrical Inspectors*³¹⁷.

Second, the Task Force recommended a clarification of the active supervision standard.³¹⁸ The Task Force claimed that the current standard lacks guidance, in particular outside extreme situations as seen in *Ticor*; state officials must engage in a pointed re-examination of the private conduct, meaning that they have to develop a factual record, write a decision on the merits, and assess how the private action comports with state legislation.³¹⁹

Third, exemptions from supervision for quasi-governmental entities should be clarified and rationalized.³²⁰ In particular, supervision should be required for entities participating in a market.³²¹

Such strengthening of the existing standard would probably result in a tiered approach to determine immunity, as favored by *Delacourt* and *Zywicki*. The level of clear articulation and supervision required would vary with the nature of the anticompetitive conduct and the nature of the entity engaging in the conduct.³²² The Task Force's proposals aim to implement a stricter standard, which would undoubtedly strengthen competition. However, the Task Force's proposals hardly address the vagueness of the existing standard, which leaves most problems described in section 2 unresolved.

³¹⁶ *Bolt v. Halifax Hosp. Med. Ctr.*, 891 F.2d 810, 824-25 (11th Cir. 1990).

³¹⁷ *Elec. Inspectors, Inc. v. Vill. of East Hills*, 320 F.3d 110, 119-21 (2d Cir. 2003), cert. denied, 540 U.S. 982 (2003).

³¹⁸ See OFFICE OF POLICY PLANNING, *supra* note 164, at 52.

³¹⁹ See *id.* at 53-55. See also William J. Martin, *supra* note 224, at 1087-88 (arguing that the courts shed little light on how to apply the active supervision requirement in more difficult cases).

³²⁰ See OFFICE OF POLICY PLANNING, *supra* note 164, at 55.

³²¹ See *Id.* at 55-57.

³²² See John T. Delacourt & Todd J. Zywicki, *supra* note 240, at 1089-90.

B. *Demand for Justification and Application of a Rule of Reason*

Justice Blackmun, concurring in *Cantor*, proposed a simpler rule to determine immunity. He would insist on some degree of affirmative articulation by the state of its conscientious intent to sanction the challenged scheme, and its reasons therefore.³²³ This solution would guarantee that the state had at least considered displacement of competition, and regulators would have to take such considerations into account. It would also require states to develop a proper legislative history, even for regulation whose justification is plain.³²⁴ However, it was also pointed out that the intent of state legislators or Congress may be unclear, at best, keeping in mind that the legislature seldom speaks with one voice.³²⁵

Inquiries with regard to the reasons behind state regulation would result in the application of a rule of reason for anticompetitive regulatory schemes; courts would have to determine a scheme's potential harms outweigh its benefits. The protection of health and safety, e.g., would in most cases be justifiable. However, in *Boulder*, dissenting Justice Rehnquist pointed out that it may be difficult for the municipality to prove that the regulation benefits the community in terms of traditional health, safety, and public welfare concerns, which outweighs the regulation's anticompetitive effects.³²⁶ By asking to apply a rule of reason in *Cantor*, Justice Blackmun implicitly rejected the application of per se rules to state regulation. The rejection of per se rules takes into account that states and municipalities may have a legitimate interest in regulating intrastate or local commerce, if necessary even by regulating prices.

³²³ *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 610 (1976).

³²⁴ *Id.*

³²⁵ See Jim Rossi, *supra* note 10, at 562.

³²⁶ *Cnty. Communications Co. v. City of Boulder*, 455 U.S. 40, 66 (1982).

It is obvious that the proposed solution goes beyond what is required under the foreseeability threshold of the clear articulation requirement, as it is applied today. Although it seems reasonable to require some positive articulation of a state's intent to displace competition, such articulation will require a new court rule which would determine how much articulation is sufficient to secure immunity; the statement of only one representative will probably not be sufficient. Blackmun's solution in *Cantor* would strengthen the clear articulation requirement and implement a rule of reason to judge state regulation.

With regard to clear articulation, other countries have found ways to implement articulation-requirements in their legislative schemes. The Swiss constitution, for example, requires that all regulation displacing competition has to be covered by a constitutional authorization.³²⁷ Another example is the Canadian Charter of Rights and Freedoms of 1982. According to the Charter, the federal parliament or a state legislature may give effect to legislative acts notwithstanding certain individual rights incorporated in the charter; such declaration "notwithstanding" has to be made expressly in the legislative act.³²⁸ At first glance, the requirement to expressly declare intent to displace competition seems an easy solution to resolve the courts' unease in investigating the motivation of legislatures.³²⁹ Still, the courts would have to articulate standards for states how to express their intent to displace competition.

Further, Blackmun's solution would require the courts to inquire whether justifications of the anticompetitive scheme brought forward by the state are sufficient. This requires some balancing between effects which are very difficult to determine. Courts would have to find ways

³²⁷ Federal Constitution of the Swiss Confederation [Bundesverfassung], SR 101, art. 94(4) (2006)).

³²⁸ Canadian Charter of Rights and Freedoms, art. 33 (1982).

³²⁹ See *supra* Part III(E).

to deal with pretextual or unconvincing justifications.³³⁰ In some instances, it would mean substituting the courts' social and economic beliefs for the judgment of legislative bodies.³³¹ Justice Blackmun remains silent with regard to the question of what sort of justifications he would consider sufficient; his opinion rather hints at the traditional public interest justifications of health and safety.³³² Only few circuit courts have carried out inquiries whether a regulation is supported by legitimate state policies, such as the Second Circuit in *Freedom Holdings, Inc. v. Spitzer*.³³³

Some Scholars would like the courts to address considerations of efficiency, capture of regulators, or undue wealth transfers when determining whether to grant state action immunity.³³⁴ Such investigations are delicate and require a deep analysis. It may be easier to draw a line *ex ante* between permissible and non-permissible regulation; e.g., health and safety regulation on the one hand, and price and entry controls on the other.³³⁵ A similar distinction is made, e.g., by the Swiss Supreme Court to determine permissible and impermissible state regulation.³³⁶ However, to have a justification of the regulatory regime does not solve issues of supervision, which may be needed, e.g., to put a check on private power.³³⁷

³³⁰ See *Freedom Holdings, Inc. v. Spitzer*, 363 F.3d 149 (arguing by way of example that the connection between allowing price-fixing by car-washes and improvement of the state capital city's symphony orchestra may be implausible).

³³¹ *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

³³² See also Steven Semeraro, *supra* note 310, at 212 (requiring judges to decide whether a government actor's conception of the public interest is being furthered by the anticompetitive restraint).

³³³ 357 F.3d 205 (2d Cir. 2004). See also *infra* note 330.

³³⁴ See John S. Wiley, *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 739-88 (1986); John Cirace, *An Economic Analysis of the 'State-Municipal Action' Antitrust Cases*, 61 TEX. L. REV. 481, 490-96 (1982).

³³⁵ See Paul S. Posner, *supra* note 8, at 707-14. Posner further argues that adequate consideration must be given by legislators to issues normally addressed by competition, such as consumer welfare. *Id.* at 717.

³³⁶ See, e.g., *J. v. Department of Health of the State of Zurich*, BGE 125 I 335, 337 (1999).

³³⁷ See Paul S. Posner, *supra* note 8, at 720-26.

There may be also a need for some safeguards to prevent courts from acting as superlegislatures (which they would refuse to do). Such safeguards may be provided by having the FTC attack state regulation.³³⁸

We have to also keep in mind that such inquiry into the reasonableness of regulation would constitute a departure from the traditional State Action Doctrine, which requires states to meet certain procedural requirements (clearly stated policy, active supervision) only. For the time being, states do not have to meet substantive requirements. Only such substantive requirements – e.g. justification of regulation by concerns for health, safety, and public welfare – would limit the possible impact of their regulation on competition.

C. *Market Participant Exception*

By introducing a market participant exception into the State Action Doctrine, *Parker Immunity* would be inapplicable or more difficult to obtain in cases where the state or a municipality is acting as an ordinary participant in the market. In *Omni*, Justice Scalia argued that the *Parker* "immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market."³³⁹ He further argued "that, with the possible market participant exception, any action that qualifies as state action is 'ipso facto... exempt from the operation of the antitrust laws'."³⁴⁰ The Report of the State Action Task Force identified

³³⁸ See *infra* Part IV(D)(2).

³³⁹ *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 374-75 (1991).

³⁴⁰ *Id.* at 379.

some Circuit Court decisions favorably inclined towards a market participant exception.³⁴¹ However, some circuits see no meaningful distinction between governmental and proprietary activities of the state.³⁴² A market participant exception will make it more difficult for state actors to obtain immunity. There is no reason to treat states differently from private actors if a state is becoming a participant in a private agreement or in a combination with others to restrain trade.³⁴³

There were some hopes that the court would also scrutinize anticompetitive abuses of regulatory power, which are only carried out to favor a state-owned or otherwise affiliated enterprise. In *California Motor Transport Co. v. Trucking Unlimited*,³⁴⁴ the Supreme Court stated that "[c]onspiracy with a licensing authority to eliminate a competitor" or "bribery of a public purchasing agent" may constitute a violation of the antitrust laws. In *Allied Tube Conduit Corp. v. Indian Head, Inc.*,³⁴⁵ the Supreme Court stated that "one could imagine situations where the most effective means of influencing government officials is bribery, and we have never suggested that that kind of attempt to influence the government merits protection." One could argue with good reasons that such an exception should also apply to *Parker* immunity.

The *Omni* Court, however, rejected introducing a conspiracy exception into *Parker* immunity: "These sentences should not be read to suggest the general proposition that even governmental regulatory action may be deemed private – and therefore subject to antitrust liability –

³⁴¹ See OFFICE OF POLICY PLANNING, *supra* note 164, at 47-48 (citing *Genentech, Inc. v. Eli Lilly and Co.*, 98 F.2d 931, 948 (Fed. Cir. 1993); *A.D. Bedell Wholesale Co. v. Philip Morris Inc.*, 263 F.3d 239, 265 n.55 (3d Cir. 2001); *Hedgecock v. Blackwell Land Co.*, No. 93-166604, 1995 WL 161649, at 2 (9th Cir., April 7, 1995)).

³⁴² See, e.g., *McCallum v. City of Athens, Ga.*, 976 F.2d 649, 653 n.7 (11th Cir. 1992); *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 402 n.9 (9th Cir. 1991).

³⁴³ *Parker v. Brown*, 317 U.S. 341, 351-52 (1943). See also OFFICE OF POLICY PLANNING, *supra* note 164, at 57 (recommending application of the supervision requirement for municipal enterprises).

³⁴⁴ 404 U.S. 508, 513 (1972) (in the context of the Noerr-Pennington Doctrine).

³⁴⁵ 486 U.S. 492, 504 (1988) (in the context of the Noerr-Pennington Doctrine).

when it is taken pursuant to a conspiracy with private parties."³⁴⁶ Therefore, abuses of a state's regulatory power cannot be attacked. Still, such abuses are not motivated by public interest, but rather aimed at shoveling advantages to the state-owned or associated enterprises, either by establishing a monopoly or imposing other restraints on competitors. The participation of a state or a municipality in a market as a competitor of private actors creates a conflict of interest with its capacity as regulator. This conflict of interest calls for higher scrutiny, which was denied by the Supreme Court's rejection of a conspiracy exception. If we focus on prevention of damage to the competitive process, the rejection of a conspiracy exception seems misguided.

In summary, we may welcome the introduction of a market participant exemption to *Parker*. There is no reason why a state-owned enterprise should be treated differently from private competitors, absent further regulatory restraints.³⁴⁷ However, the Supreme Court's refusal of a conspiracy exception to *Parker* opens a door for abuses of the state's regulatory power to favor state-owned or otherwise affiliated enterprises.

D. *FTC Enforcement*

The FTC already makes use of a competition advocacy program to combat inefficient regulation. The program is designed to persuade governmental actors at all levels of the political system to further competition and consumer choice. Advocacy is not an instrument of enforce-

³⁴⁶ *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 374-75 (1991).

³⁴⁷ After several abuses of market power by state-owned enterprises (all held immune against antitrust scrutiny by the Swiss Supreme Court), the Swiss legislature amended Article 2 of the Swiss Cartel Act to grant equal protection for antitrust violations of state-owned and private enterprises. Anyone offering or requesting goods in the economic process, independent of its form of organization, is subject to antitrust liability. The law may provide exceptions to this general rule.

ment, and it is used when antitrust immunity is likely to provide a shield from FTC Actions.³⁴⁸ Particularly because of the extended reach of the FTC Act³⁴⁹ (1.), the FTC would also be well-suited to spearhead challenges to anticompetitive regulation in enforcement proceedings (2.).

1. The Reach of Section Five of the FTC Act

The FTC is given authority to enforce the substance of all antitrust laws.³⁵⁰ In particular, Section 5 of the FTC Act grants the FTC authority to challenge "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."³⁵¹ Section 5 of the FTC Act includes all unlawful practices under the Sherman Act, which encompasses state action not meeting the *Midcal* standard. Further, there are some hints that the reach of Section 5 could be even broader.³⁵²

In *F.T.C. v. Sperry & Hutchinson Co.*,³⁵³ the Supreme Court addressed the question whether Section 5 of the FTC Act is limited to conduct which violates the letter or spirit of the antitrust laws. After a careful analysis of the act's legislative history and precedent, the Court ruled that the "Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encom-

³⁴⁸ See James C. Cooper et al., *Theory and Practice of Competition Advocacy at the FTC*, 72 ANTITRUST L. J. 1091, 1091 (2005).

³⁴⁹ 15 U.S.C. § 45 (2006).

³⁵⁰ See Herbert Hovenkamp, *supra* note 274, at 596 (the FTC has direct authority to with respect to the Clayton Act and the Robinson Patman Act; § 5 of the FTC Act has been interpreted to include all practices under the Sherman Act).

³⁵¹ 15 U.S.C. § 45 (2006).

³⁵² See ROBERT PITOFKY ET AL., *TRADE REGULATION: CASES AND MATERIALS* 74 (2003).

³⁵³ 405 U.S. 233 (1972).

passed in the spirit of the antitrust laws."³⁵⁴ Thus, the powers of the FTC reach beyond the established grounds of the Sherman Act.

The reach of Section 5 of the FTC Act was more precisely defined in *FTC. v. Indiana Federation of Dentists*³⁵⁵: "[t]he standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, ... but also practices that the Commission determines are against public policy for other reasons."³⁵⁶ We find a similar holding already in *Atlantic Refining Co. v. FTC*,³⁵⁷ where the Supreme Court held that "all that is necessary in § 5 proceedings to find a violation is to discover conduct that 'runs counter to the public policy declared in the' Act."³⁵⁸

*FTC v. Brown Shoe*³⁵⁹ confirmed that Section 5 of the FTC Act goes beyond the reach of the other federal antitrust laws. The Supreme Court held "that the Commission has power under § 5 to arrest trade restraints in their incipency without proof that they amount to an outright violation of § 3 of the Clayton Act or other provisions of the antitrust laws."³⁶⁰

The scope of conduct which can be reached by the FTC in its incipency is rather unclear, however. In *E.I. du Pont de Nemours & Co. v. FTC*,³⁶¹ the Second Circuit acknowledged that the FTC may bar incipient violations of the federal antitrust statutes;³⁶² however, the court

³⁵⁴ *Id.* at 244.

³⁵⁵ 476 U.S. 447 (1986).

³⁵⁶ *Id.* at 454.

³⁵⁷ 381 U.S. 357 (1965).

³⁵⁸ *Id.* at 369.

³⁵⁹ 384 U.S. 316 (1966).

³⁶⁰ *Id.* at 322.

³⁶¹ 729 F.2d 128 (2d Cir. 1984).

³⁶² *Id.* at 136.

was not willing to reach facilitating practices for an oligopoly without seeing some evidence of agreement, anticompetitive intent, or absence of an independent legitimate business reason.³⁶³ In *Russell Stover Candies, Inc. v. FTC*,³⁶⁴ the Second Circuit refused to accept the FTC's strict interpretation of the *Colgate* Doctrine³⁶⁵.

In summary, enforcement by the FTC has some more bite than enforcement by the Anti-trust Division, private parties, or the States' Attorneys Generals. The courts generally acknowledge that the FTC may challenge anticompetitive acts in their incipiency, and acts that run counter the public policy declared in the antitrust laws. However, both of these grounds lack clear definition. We can not predict today whether the FTC would be given more authority to challenge state action.

2. Advantages of FTC-Enforcement

There are several reasons why challenges of State Action under Section 5 of the FTC Act are more promising than the other possibilities of enforcement. FTC-enforcement addresses many concerns, which I have expressed under section III of this essay. In particular, FTC-enforcement mitigates issues with federalism, the vagueness of the standard, the unfairness of the

³⁶³ *Id.* at 139. *See also* *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 581 (9th Cir. 1980) (holding that "we are unable to sustain an approach that finds a non-collusive pricing method to be illegal despite the absence of some reliable indicator that the practice had an effect on overall price levels.").

³⁶⁴ 718 F.2d 256 (8th Cir. 1983).

³⁶⁵ *United States v. Colgate & Co*, 250 U.S. 300 (1919). In *Colgate*, the U.S. Supreme Court held that the Sherman Act does not apply to suppliers' unilateral refusals to deal with distributors that do not charge the resale prices "suggested" by the suppliers. In long-lasting supplier-distributor relationships, the *Colgate* decision grants the supplier substantial influence over resale prices as long as the supplier avoids entering into agreements to this effect. In *Russell Stover Candies*, the FTC unsuccessfully challenged *Colgate* on the ground that it was tantamount to per-se illegal minimum resale price maintenance. Subsequently, *Colgate* was reaffirmed by the Supreme Court in *Monsanto Co. v. Spray-Rite Service Co.*, 465 U.S. 752 (1984).

application of antitrust laws, the threat of treble damages, and the refusal of courts to inquire into the reasonableness of state regulation.

The courts acknowledge FTC's power to challenge acts against the public policy expressed in the federal antitrust laws. Any state regulation displacing competition can be regarded as an infringement of the (federal) public policy of unfettered competition. The FTC, as an independent regulatory agency, is best suited to defend the federal policy interest. There is no way to avoid the clash of public policies, i.e. the state's interest to regulate its commerce and the federal interest in competition. Still, it may be more acceptable for the courts if an independent federal agency attacks state regulation, compared to challenges brought by regulated parties, competitors, or consumers.

Federalism is a concept to divide sovereignty between a federation and its states; regulated parties, competitors, and consumers pursue only their private interests and may be biased when dealing with issues of federalism. Shifting the weight of enforcement to the FTC in state action cases does not abrogate federal jurisdiction in parallel cases based on Section 1 and 2 of the Sherman Act. These cases may still be brought by (biased) consumers or competitors. Compared to FTC enforcement, however, the federal courts may be expected to deny consumers and competitors the same leeway in challenging state regulation, in particular because of the different origin and legal basis of such claims.

In the European Community, the European Commission may bring actions to challenge the member state's failure to comply with provisions of the Treaty establishing the European Community. Particularly this is important with regard to infringements of the provisions securing the internal market in articles 28-30 of the Treaty. Enforcement by the Commission also pro-

vides an unbiased enforcement instrument.³⁶⁶ The Swiss federal law on the internal market incorporates a more innovative solution: it allows the Competition Commission to appeal all administrative decisions of the states, which affect access of private parties to regulated markets.³⁶⁷

The lack of guidance provided by the State Action Doctrine is one of the major problems for state actors, regulated parties, or competitors when regulation is attacked. Courts never deal with state regulation in the abstract. Instead, they address the problems of state action in specific cases, each of which is surrounded by special factual circumstances and by its own history. Judges may be overwhelmed by the task of having to apply a vague standard on state regulation to concrete facts, since the Supreme Court precedents also deal with cases surrounded by unique circumstances.

We may argue with good reasons that the FTC may be more able to provide clear guidance with regard to the interpretation of the doctrine. Approximately one hundred-eighty attorneys in the FTC Bureau of Competition support five Trade Commissioners,³⁶⁸ providing a lot of expert knowledge to deal with the effects of state action. Instead of seeking to clarify the vague standard in courts, the FTC could draft guidelines clarifying the existing standard³⁶⁹ and file enforcement actions accordingly. This would require some willingness on the part of the courts to pay deference to these FTC-Guidelines on state action.

³⁶⁶ Art. 226 and 230(2) of the Treaty Establishing the European Community.

³⁶⁷ Swiss Law on the Internal Market [Binnenmarktgesetz], SR 943.02, art. 9(2) (2006). The approach is innovative because the burden to seek market access in the first place is still laid on the affected private parties.

³⁶⁸ See Federal Trade Commission, Bureau of Competition, *What is the FTC's Bureau of Competition?*, available at http://www.ftc.gov/bc/recruit/what_is.html.

³⁶⁹ See 15 U.S.C. § 57a(a).

Since the *Lochner* era, courts have been very reluctant to substitute their social and economic beliefs for the judgment of legislative bodies, or to sit as a superlegislature. The FTC, however, may provide the expert knowledge to assess the anticompetitive effects of state regulation in the markets. It may also provide a thorough analysis with regard to the importance of the state's interest in sustaining the regulation, compared to the federal interest in abolishing it. As I have described, the FTC is probably less biased in carrying out this analysis, since it is not immediately affected by the state action. It may be easier for courts to overcome their reluctance to (indirectly) abrogate state regulation in an enforcement action of the FTC because of two further reasons. First, the courts are generally obliged to accept the factual findings of the FTC, if supported by evidence.³⁷⁰ Second, the courts generally give great weight to the FTC's interpretation if the law.³⁷¹

Enforcement actions by the FTC also address concerns regarding the fairness of applying antitrust laws and imposing treble damages upon regulated parties. Most likely, the remedy in case of state action would consist in an order to cease and desist.³⁷² Regulated parties do not have to fear civil penalties, except if they violate a previous cease and desist order of the Commission.³⁷³ State action in violation of Section 5 of the FTC Act, which may be outside the scope of the Sherman Act, will not support subsequent private actions for treble damages.³⁷⁴ In particular, no violation of Section 5 of the FTC Act will serve as *prima facie* evidence in subsequent

³⁷⁰ 15 U.S.C. § 45(c).

³⁷¹ See Herbert Hovenkamp, *supra* note 274, at 597.

³⁷² We may think of state action which requires private actors to merge; in such a case, e.g., an order of the FTC would result in dissolution or divestiture, and not in cease or desist.

³⁷³ 15 U.S.C. § 45(m).

³⁷⁴ See Herbert Hovenkamp, *supra* note 274, at 597.

trials.³⁷⁵ Therefore, cease and desist orders of the FTC would not discourage regulation of interstate commerce by states or municipalities. Cease and desist orders do not expose regulated parties to treble damages, which could discourage their participation in drafting regulation.

In summary, challenges of state action by FTC enforcement actions overcome most problems described in section 2 of this essay. Such challenges should be pursued as one of the promising alternatives to addressing anticompetitive state action.

V. CONCLUSION

The *Parker* and *Midcal* tests, as applied today, provide very little guidance for regulators, regulated parties, and possible competitors. In fact, the existing standard used to determine immunity from antitrust laws is not applied in a consistent, uniform way. This lack of guidance results in strong concerns regarding the vague standard's impact on fairness of justice. It is not easy to justify why a regulated party, possibly compelled to engage in anticompetitive behavior by regulation, should be liable to treble damages. Moreover, the uncertainty of the standard may induce regulators to refrain from legitimate regulation, or to make use of inefficient or ineffective instruments to regulate private market participants.

These concerns will not be resolved by mere refinement of the existing standard, but only by an implementation of a combination of measures. Such a combination of measures would require courts to resume inquiries into the reasons behind state regulation, and would require courts to assess whether the benefits of regulation, enacted in pursuance of legitimate state policy, outweigh its anticompetitive effects. Since courts will be reluctant to initiate such inquiries,

³⁷⁵ 15 U.S.C. § 16(a).

the FTC as federal agency, unbiased to private interests, should carry out the necessary inquiries and defend the federal interest of unfettered competition. Enforcement actions by the FTC have further advantages in the context of state regulation, such as the broader range of Section 5 FTC Act, the predominant use of cease and desist orders as a remedy, and the reduced threat of treble damages. Courts would be required to extend today's deference to FTC-decisions; they would also have to be more ready to accept the FTC's findings regarding state regulation.

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