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# *Parker v. Brown*, the Eleventh Amendment, and Anticompetitive State Regulation

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PARKER V. BROWN, THE ELEVENTH AMENDMENT, AND  
ANTICOMPETITIVE STATE REGULATION

WILLIAM H. PAGE\* & JOHN E. LOPATKA\*\*

ABSTRACT

*The Parker v. Brown (or “state action”) doctrine and the Eleventh Amendment of the Constitution impose different limits on antitrust suits challenging anticompetitive state regulation. The Supreme Court has developed these two versions of state sovereign immunity separately, and lower courts usually apply the immunities independently of each other (even in the same cases) without explaining their relationship. Nevertheless, the Court has derived the two immunities from the same principle of sovereign immunity, so it is worth considering why and how they differ, and what the consequences of the differences are for antitrust policy. The state action immunity is based on statutory interpretation of the Sherman Act; the Court has shaped the doctrine over seventy-five years, guided by both considerations of state sovereignty and antitrust policy, so it should reflect a balance of these two critical variables. The Eleventh Amendment immunity, by contrast, has nothing specifically to do with antitrust policy; it is a general constitutional doctrine based on state sovereignty, with some acknowledgment of the demands of general federal authority. Our concern is that the application of the broader immunity can thwart the balance between state sovereignty and antitrust policy reflected in the antitrust-specific immunity.*

*There are many differences between the immunities, but the only significant area of concern is in the subset of cases in which Eleventh Amendment immunity applies but the state action immunity does not—cases, in other words, in which the Supreme Court has chosen*

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*to deny Parker immunity to state-connected actors, in part because of considerations of antitrust policy. In those cases, the antitrust-specific version of sovereign immunity does not protect the state actors from damage liability, but the Eleventh Amendment immunity does. Is that a problem? To make a long story short, we conclude that the effect of the conflict on consumer welfare is probably small, because of the Eleventh Amendment immunity's own limitations, and because of adaptations that public and private enforcers can make in case of a conflict. The outcome may, entirely by accident, be efficient.*

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## INTRODUCTION

The *Parker v. Brown*<sup>1</sup> (or “state action”) doctrine and the Eleventh Amendment of the Constitution<sup>2</sup> impose different, sometimes conflicting, limits on antitrust suits challenging anticompetitive state regulation. The Supreme Court created these two versions of sovereign immunity in long, separate lines of cases, but has said almost nothing yet about the doctrines’ relationship to each other.<sup>3</sup> Lower courts have applied both doctrines in antitrust challenges to state regulation, but have also never explained the relationship between the doctrines, other than to say that the immunities apply independently of each other.<sup>4</sup> The lower courts’ approach is understandable: both immunities are convoluted and controversial, so any effort to reconcile them or to fully explain their relationship is likely to be problematic.<sup>5</sup> It is simpler to apply their standards separately to dispose of the claims each new case raises.

Nevertheless, the Court has derived both doctrines from the principle of sovereign immunity, so it is worth considering how and why they differ, and what the consequences of the differences are for antitrust policy. In this Article, we consider two important issues,

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1. 317 U.S. 341 (1943).

2. U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).

3. See Susan Beth Farmer, *Balancing State Sovereignty and Competition: An Analysis of the Impact of Seminole Tribe on the Antitrust State Action Immunity Doctrine*, 42 VILL. L. REV. 111, 169 (1997) (“The Supreme Court has not focused on either the interplay between the state action doctrine and the Eleventh Amendment or the inherent conflicts between the two doctrines.”). The Supreme Court recently granted certiorari in a case in which the appellate court held that the state-action doctrine, unlike the Eleventh Amendment, is a defense to liability rather than an immunity from suit, but the Court later dismissed the petition pursuant to a stipulation of the parties. See *SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist.*, 859 F.3d 720, 726 (9th Cir. 2017), *cert. dismissed*, 138 S. Ct. 1323 (2018).

4. See, e.g., *Rodgers v. La. Bd. of Nursing*, 665 F. App’x 326, 329 (5th Cir. 2016) (per curiam) (“[S]overeign immunity [under the Eleventh Amendment] and *Parker* immunity are distinct doctrines, providing different—if sometimes overlapping—spheres of protection.”).

5. See Farmer, *supra* note 3, at 169 (“Although state entities have had the option of pleading both the Eleventh Amendment and state action immunity, the number of antitrust decisions that discuss both doctrines is surprisingly, relatively small, and generally, these decisions do not discuss the relationship between the two doctrines of state sovereign immunity.”).

one under each doctrine. The antitrust issue—our primary focus—is whether application of the Eleventh Amendment in cases involving anticompetitive state regulatory choices reduces consumer welfare.<sup>6</sup> The state action immunity is based on statutory interpretation of the Sherman Act;<sup>7</sup> the Court has shaped the doctrine over decades,<sup>8</sup> guided by both sovereignty and antitrust considerations, so the doctrine should reflect an appropriate balance between the two.<sup>9</sup> The Eleventh Amendment immunity, by contrast, has nothing specifically to do with antitrust policy; it is a general constitutional doctrine that protects state sovereignty, while acknowledging the needs of general federal authority.<sup>10</sup> Our concern is that the application of the broader immunity is a blunt instrument that may thwart the balance between state sovereignty and antitrust policy reflected in the antitrust-specific immunity. Ultimately, we conclude that the effect of the conflict on consumer welfare is probably small, because of the constitutional doctrine's own limitations and because of adaptations that state governments and public and private enforcers can make in case of a conflict.

That conclusion has implications for the second issue: whether, as some scholars have argued, the Roberts Court's expansion of Eleventh Amendment immunity has improperly intruded on federal legislative power.<sup>11</sup> The antitrust experience is unique, because, unlike other federal legislative policies, antitrust's relationship to the Eleventh Amendment is overshadowed by its own immunity, which is also based on state sovereignty, and is in some ways broader. But the relatively minor practical consequences of the

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6. For discussion of earlier cases, see generally Farmer, *supra* note 3.

7. See William J. Martin, *State Action Antitrust Immunity for Municipally Supervised Parties*, 72 U. CHI. L. REV. 1079, 1081 (2005).

8. The state action doctrine is typically traced to 1943, when the Supreme Court decided *Parker v. Brown*, 317 U.S. 341, 351-52, 362-63 (1943), though the doctrine was foreshadowed by *Olsen v. Smith*, 195 U.S. 332, 341, 344-45 (1904) (holding that the antitrust laws did not invalidate state statutes requiring a license to perform marine pilotage services and fixing pilotage fees). The Court decided its most recent state action case in 2015. See *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1107 (2015).

9. See Farmer, *supra* note 3, at 114-15.

10. See U.S. CONST. amend. XI.

11. Some have argued (without discussing antitrust law) that the Roberts Court's sovereign immunity decisions impede the ability of Congress to advance important national policies. See, e.g., Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1012 (2000).

conflict between the immunities in antitrust litigation lends some support for the view that the expanded Eleventh Amendment immunity imposes no insurmountable barrier to the enforcement of federal law.<sup>12</sup> As we show in Part III, one can argue that the limited Eleventh Amendment immunity is an efficient supplement to *Parker* immunity.

Part I of this Article provides an overview of the two immunities: state action and the Eleventh Amendment. In Part II, we compare the sources and natures of the two immunities. In Part III, we show how the definitions of the two immunities affect their applicability to different state-connected entities and individuals in antitrust cases. At the same time, we consider whether the differences between the doctrines make a significant difference for antitrust policy. We show that the primary practical effect of Eleventh Amendment immunity is to limit private plaintiffs to prospective relief in antitrust suits against state officials. That effect is significant, however, only in the subset of cases in which Eleventh Amendment immunity applies but the state action immunity does not—cases, in other words, in which the Supreme Court has chosen not to shelter state-connected actors with *Parker* immunity, in part because of considerations of antitrust policy. In cases such as these, the antitrust-specific version of sovereign immunity does not shield the state actors from damage liability,<sup>13</sup> but the Eleventh Amendment immunity does.<sup>14</sup> We consider the extent to which this limitation on remedies in antitrust cases is likely to reduce consumer welfare in ways that conflict with antitrust policy. We conclude by considering the significance of this assessment for the scope of the two immunities.

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12. See Jesse H. Choper & John C. Yoo, *Who's Afraid of the Eleventh Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213, 215 (2006) (arguing that criticisms of the Rehnquist Court's Eleventh Amendment cases overstate the effect of these cases on enforcement of federal policy).

13. Congress acted to protect local governments and their officials from damage liability but not equitable remedies in the Local Government Antitrust Act of 1984 (LGAA), 15 U.S.C. §§ 34-36 (2012), after the Court adopted an interpretation of the state action doctrine that exposed these government actors to damage liability. See *infra* notes 178-86 and accompanying text.

14. See *infra* Part III.B.

## I. AN OVERVIEW OF THE TWO IMMUNITIES

The Eleventh Amendment and state action immunities are both expressions of the ancient principle of state sovereignty and its correlative principle of sovereign immunity.<sup>15</sup> But the Supreme Court has also drawn on other policies to formulate their content.

### A. State Action

First consider the antitrust-specific state action immunity. In *Parker*, the Supreme Court refused to apply the Sherman Act to invalidate a state-created agricultural prorationing scheme.<sup>16</sup> The Court did not believe that Congress, by enacting Section 1 of the Sherman Act in 1890, meant to intrude on states' sovereign regulatory powers as extensively as the requested remedy would entail:

[I]t is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. *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.*<sup>17</sup>

Under *Parker*, sovereignty is a constitutional attribute of state government, but it does not directly immunize states or their

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15. See generally Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 1-2 (1963) (describing the history of sovereign immunity in England and America, and noting that by 1268 "it was settled doctrine that the King could not be sued *eo nomine* in his own courts").

16. *Parker v. Brown*, 317 U.S. 341, 352 (1943).

17. *Id.* at 350-51 (emphasis added).



officers.<sup>18</sup> Instead, it functions as a background norm that requires a limiting construction of the Sherman Act. Because the doctrine excludes state-created restraints from the reach of the statute,<sup>19</sup> state action immunity forecloses any suits challenging covered restraints, whether brought by private antitrust plaintiffs, such as the raisin producer in *Parker*,<sup>20</sup> or public antitrust enforcers, such as the Federal Trade Commission (FTC)<sup>21</sup> or the Department of Justice (DOJ) in later cases.<sup>22</sup> Also notice that the quoted passage makes clear that the state action immunity applies not only to the agencies, but to their officials—both are immune or not immune in the same circumstances.<sup>23</sup> And because the immunity is based on an inference about congressional intent, Congress is presumably free both to expand the immunity and to restrict it by more explicit legislation.<sup>24</sup>

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18. *Id.* at 359-60.

19. *See id.* at 350-51.

20. *See id.* at 344, 368.

21. *See, e.g.,* N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1108-10, 1117 (2015) (applying the state action doctrine to a case brought by the FTC for a violation of the Federal Trade Commission Act (FTC Act) and holding that the state action doctrine does not provide immunity to a state board controlled by active market participants absent active supervision); FTC v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 222, 227 (2013) (applying state action doctrine to a case brought by the FTC for violation of the FTC Act and the Clayton Act § 7 and finding immunity absent for lack of clear state policy authorizing restraint); FTC v. Tigor Title Ins., 504 U.S. 621, 635 (1992) (noting that state action immunity had been considered in cases brought under the Sherman Act, and holding that the state action doctrine applied in this case brought by the FTC under the FTC Act).

The FTC does not claim that it can preempt state law any more broadly under the FTC Act. *See Tigor Title Ins.*, 504 U.S. at 635 (“[T]he Commission does not assert any superior preemption authority in the instant matter [than would exist under the Sherman Act].”); *see also N.C. State Bd.*, 135 S. Ct. at 1107-10 (applying the state action doctrine to an action brought by the FTC, but finding that the board was not entitled to state action immunity because it did not receive active supervision); *Phoebe Putney*, 568 U.S. at 222, 224-25 (recognizing state action immunity in suit brought by the FTC only when the standards were satisfied). For a recent argument that the FTC should have “superior preemption authority,” see Daniel A. Crane & Adam Hester, *State-Action Immunity and Section 5 of the FTC Act*, 115 MICH. L. REV. 365, 367-68 (2016).

22. *See, e.g.,* S. Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 50, 65-66 (1985) (finding rate bureaus were entitled to state action immunity in suit brought by the DOJ).

23. *See Parker*, 317 U.S. at 350-51.

24. *See id.*

Anticompetitive state regulation “involve[s] a blend of private and public decisionmaking.”<sup>25</sup> The issue under *Parker* has been what degree and form of state involvement justifies immunity.<sup>26</sup> A key determinant has been the proximity of the defendant to the state as a sovereign: the closer the defendant is to the state’s three constitutional branches, the fewer the conditions it must satisfy to warrant immunity.<sup>27</sup> The Court has recognized three main categories of protection. First, if the defendant is itself a coordinate branch of state government or its members, such as the state supreme court (or in some courts’ views, an executive branch department),<sup>28</sup> it is “ipso facto” immune from antitrust liability for anticompetitive acts attributed to it under *Hoover v. Ronwin*.<sup>29</sup> The Court has stated the

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25. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592 (1976).

26. *See, e.g., N.C. State Bd.*, 135 S. Ct. at 1110.

27. *See id.* at 1110-11 (“An entity may not invoke *Parker* immunity unless the actions in question are an exercise of the State’s sovereign power.... *Parker* immunity requires that the anticompetitive conduct of nonsovereign actors ... result from procedures that suffice to make it the State’s own.”); John E. Lopatka, *The State of “State Action” Antitrust Immunity: A Progress Report*, 46 LA. L. REV. 941, 956-57, 1038 (1986).

28. Several lower courts have suggested that ipso facto immunity extends to high-level executive branch departments and agencies. *See, e.g., Neo Gen Screening, Inc. v. New England Newborn Screening Program*, 187 F.3d 24, 29 (1st Cir. 1999) (“[W]e have rejected a ‘clear articulation’ test as applied to the state’s executive branch, at least where a full-fledged department is concerned.”); *Charley’s Taxi Radio Dispatch Corp. v. SIDA of Haw., Inc.*, 810 F.2d 869, 876 (9th Cir. 1987) (“We conclude that state executives and executive agencies, like the state supreme court, are entitled to *Parker* immunity for actions taken pursuant to their constitutional or statutory authority, regardless of whether these particular actions or their anticompetitive effects were contemplated by the legislature.”); *Deak-Perera Haw., Inc. v. Dep’t of Transp.*, 745 F.2d 1281, 1283 (9th Cir. 1984) (“We see no reason why a state executive branch, when operating within its constitutional and statutory authority, should be deemed any less sovereign than a state legislature, or less entitled to deference under principles of federalism.”); *see also VIBO Corp. v. Conway*, 669 F.3d 675, 687 (6th Cir. 2012) (holding that state attorneys general were entitled to automatic state action immunity when they were not functioning as market participants). *But see Builders Flooring Connection, LLC v. Brown Chambless Architects, LLC*, No. 2:11cv373-MHT, 2014 WL 197679, at \*4 (M.D. Ala. Jan. 16, 2014) (observing that Supreme Court precedents have cast “serious doubt” on the conclusion “that state-level executive officials and agencies, like the state legislature and supreme court, are ipso facto immune”). The Supreme Court expressly declined to decide whether a state governor is entitled to automatic immunity. *See Hoover v. Ronwin*, 466 U.S. 558, 568 n.17 (1984). However, a governor’s acts are presumably immune. *See, e.g., Fuchs v. Rural Elec. Convenience Coop., Inc.*, 858 F.2d 1210, 1214 (7th Cir. 1988) (“A state’s governor’s acts are also presumably immune, although the Court has yet to say so.” (internal citation omitted)).

29. 466 U.S. at 573 (holding that a state bar committee’s grading formula for the bar examination was immune because it was “in reality” an exercise of the state supreme court’s sovereign powers); *see also N.C. State Bd.*, 135 S. Ct. at 1110 (“State legislation and

principle of automatic immunity in absolute terms: these state actors' actions are, by definition, uniquely governmental decisions and are presumed to have been taken in the service of some positive value.<sup>30</sup> To the extent the actions respond to market failures, they are not antithetical to the antitrust laws; to the extent they serve an alternative value, they are not a naked repudiation of the policies of antitrust law, but a recognition that the action is ancillary to the state's choice of another positive value.<sup>31</sup> If the state's choice is unwise, it is still the choice of the state itself, and it is subject to correction by the political process.<sup>32</sup>

Second, if the defendant is a municipality or a "prototypical state agency"<sup>33</sup> (or its officials), it is immune under *Town of Hallie v. City of Eau Claire*<sup>34</sup> so long as its actions are taken pursuant to a policy that the state as sovereign has clearly articulated—for example, by legislation.<sup>35</sup> The "clear articulation" test means that the state must

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'decision[s] of a state supreme court, acting legislatively rather than judicially,' will satisfy this standard, and 'ipso facto are exempt from the operation of the antitrust laws' because they are an undoubted exercise of state sovereign authority." (alteration in original) (quoting *Hoover*, 466 U.S. at 567-68). Because all anticompetitive restraints are the product of multiple decisionmakers, a court must determine whether a particular restraint should be attributed to the relevant constitutional state actor. *Hoover*, 466 U.S. at 569 ("[T]he first critical step in our analysis must be to determine whether the conduct challenged here is that of the [state supreme] court.").

30. See *Hoover*, 466 U.S. at 567-68; John E. Lopatka & William H. Page, *State Action and the Meaning of Agreement Under the Sherman Act: An Approach to Hybrid Restraints*, 20 YALE J. ON REG. 269, 275 (2003).

31. See Lopatka & Page, *supra* note 30, at 277.

32. See William H. Page & John E. Lopatka, *State Regulation in the Shadow of Antitrust: FTC v. Ticor Title Insurance Co.*, 3 SUP. CT. ECON. REV. 189, 193-94 (1993).

33. See, e.g., *N.C. State Bd.*, 135 S. Ct. at 1114 (distinguishing "prototypical state agencies" from "specialized boards dominated by active market participants"); *Century Aluminum of S.C., Inc. v. S.C. Pub. Serv. Auth.*, 278 F. Supp. 3d 877, 886, 889 (D.S.C. 2017) (finding that a state-owned electric utility controlled by a board of political appointees, not active market participants, was not subject to an active supervision requirement), *appeal docketed*, No. 17-2192 (4th Cir. Oct. 11, 2017); *Turner v. Va. Dep't. of Med. Assistance Servs.*, 230 F. Supp. 3d 498, 507 (W.D. Va. 2017) (finding that a state Department of Medical Assistance Services was a "prototypical state agency" entitled to *Hallie* immunity).

34. 471 U.S. 34, 43-44 (1985) (holding that a city's policy for extension of sewage services to neighboring areas was pursuant to a clearly articulated statutory authorization and therefore immune from antitrust challenge); see also *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 373 (1991) (concluding that a city's zoning activities were immune because they were a foreseeable result of the state's authorizing statutes).

35. See *Town of Hallie*, 471 U.S. at 39-40; see also *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 227 (2013) ("[S]tate-action immunity applies if the anticompetitive effect was

give the municipality “the express authority to take action that foreseeably will result in anticompetitive effects.”<sup>36</sup> Congress went further in the Local Government Antitrust Act,<sup>37</sup> which immunizes local governments and their agents acting in an official capacity from all antitrust damage claims.<sup>38</sup> This sort of immunity is only necessary, of course, if the defendants’ actions actually violate antitrust law, which not all regulatory programs do.<sup>39</sup> For example, a municipal rent control ordinance, according to the Court, did not violate Section 1 of the Sherman Act because the ordinance fixed prices by a unilateral act of the city, not by any private agreement.<sup>40</sup>

Third, if the defendant is a private individual or corporation, then its actions are immune from antitrust liability if the regulatory scheme meets the familiar two-part test set out in *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*: the defendant’s actions must be *both* (1) taken pursuant to a clearly articulated state policy, *and* (2) actively supervised by a qualified state actor,

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the ‘foreseeable result’ of what the State authorized.”).

36. *Town of Hallie*, 471 U.S. at 43.

37. 15 U.S.C. § 35(a) (2012) (“No damages, interest on damages, costs, or attorney’s fees may be recovered under section 4, 4A, or 4C of the Clayton Act ... from any local government, or official or employee thereof acting in an official capacity.”); *id.* § 36(a) (“No damages, interest on damages, costs or attorney’s fees may be recovered under section section 4, 4A, or 4C of the Clayton Act ... in any claim against a person based on any official action directed by a local government, or official or employee thereof acting in an official capacity.”).

38. Then-Justice Rehnquist, dissenting in *Community Communications Co. v. City of Boulder*, argued that “questions involving the so-called ‘state action’ doctrine are more properly framed as being ones of pre-emption rather than exemption.” 455 U.S. 40, 62 (1982) (Rehnquist, J., dissenting). Justice Rehnquist argued that state and local regulations that conflict with the Sherman Act are preempted under the Supremacy Clause. *See id.* at 61. Under this view, the regulatory actions of a municipality, or presumably a state agency, are simply ineffectual: the governmental entity does not violate the antitrust laws and cannot be liable for damages. *See id.* at 68-69. The Court’s unwillingness to adopt Justice Rehnquist’s analysis led Congress to enact the LGAA. *See* W. Scott Campbell, Note, *Antitrust Immunity: The State of “State Action”*, 88 W. VA. L. REV. 783, 812-13 (1986).

39. *See, e.g., Fisher v. City of Berkeley*, 475 U.S. 260, 266-67 (1986); *cf. Mass. Food Ass’n v. Mass. Alcoholic Beverage Control Comm’n*, 197 F.3d 560, 564-66 (1st Cir. 1999) (finding in facial challenge that, because state statute prohibiting ownership of more than three liquor stores did not compel or authorize a per se antitrust violation and was therefore not preempted in the abstract, dismissal was appropriate regardless of state action immunity).

40. *Fisher*, 475 U.S. at 270 (“Because under settled principles of antitrust law, the rent controls established by Berkeley’s Ordinance lack the element of concerted action needed before they can be characterized as a per se violation of § 1 of the Sherman Act, we cannot say that the Ordinance is facially inconsistent with the federal antitrust laws.” (emphasis omitted)).

usually a regulatory agency.<sup>41</sup> The doctrine thus immunizes only private actions “that, in the judgment of the State, actually further state regulatory policies.”<sup>42</sup> Most recently, the Court held in *North Carolina State Board of Dental Examiners v. FTC* that *Midcal*’s two-part standard for immunity also applies to specialized professional regulatory boards that are controlled (as many are)<sup>43</sup> by private practitioners in the profession.<sup>44</sup>

If a state or municipal entity is entitled to *Parker* immunity, its actions are immune, even if they can plausibly be attributed to a conspiracy of state officials with private interests.<sup>45</sup> For instance, if

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41. *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-06 (1980) (holding that the state’s statutory resale price maintenance system was not immune; although it was implemented pursuant to a clearly articulated policy, the state did not actively supervise resale prices set by private actors).

42. *Patrick v. Burget*, 486 U.S. 94, 100-01 (1988) (holding that physicians were not immune for their actions on hospital peer-review committees, because they were not actively supervised by the state); *see also* *LaFaro v. N.Y. Cardiothoracic Grp., PLLC*, 570 F.3d 471, 480 (2d Cir. 2009) (“Although granting an exclusive contract to a private party is not itself a *per se* antitrust violation, a private party is not exempted from the ‘active supervision’ prong of the *Midcal* test simply by virtue of purporting to act pursuant to a contract with a governmental entity that itself would be entitled to state action immunity.” (emphasis omitted)).

43. Rebecca Haw Allensworth, *Foxes at the Henhouse: Occupational Licensing Boards Up Close*, 105 CALIF. L. REV. 1567, 1570 (2017) (reporting that 85 percent of licensing boards “are required by statute to be comprised of a majority of currently licensed professionals, active in the very profession the board regulates”).

44. *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101, 1111 (2015). As one court recently summarized the tiers of immunity:

[T]he Supreme Court has established the following principles: *ipso facto* [*Hoover*] immunity applies to state legislatures and state supreme courts, but not to entities that are state agencies for limited purposes; *Midcal* scrutiny applies to private parties and state agencies controlled by active market participants; and *Hallie* scrutiny applies to municipalities, and perhaps state agencies.

*Edinboro Coll. Park Apartments v. Edinboro Univ. Found.*, 850 F.3d 567, 573, 575 (3d Cir. 2017) (emphasis omitted) (concluding that a state university foundation must be judged under *Hallie* immunity); *see also* *Century Aluminum of S.C., Inc. v. S.C. Pub. Serv. Auth.*, 278 F. Supp. 3d 877, 884 (D.S.C. 2017) (recognizing the same “three-part doctrine”), *appeal docketed*, No. 17-2192 (4th Cir. Oct. 11, 2017). *Edinboro* qualified its attribution of *Hallie* immunity to state agencies because the Supreme Court has only applied immunity to state agencies in dicta. *See Edinboro*, 850 F.3d at 573 (“In cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue.” (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 n.10 (1985))). In *North Carolina State Board*, the Supreme Court quoted this dictum to distinguish the “specialized boards dominated by active market participants” at issue there from an “electorally accountable municipality,” which resembled “prototypical state agencies.” 135 S. Ct. at 1114.

45. *See, e.g., City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 374-75 (1991).

a governmental entity acts pursuant to valid zoning authority under state law to impose restrictions that benefit powerful local interests, its actions are immune.<sup>46</sup> There is no “conspiracy” exception that would impose antitrust liability if the entity were hijacked by private influence.<sup>47</sup> Rejecting such an exception, the Court in *Omni* reasoned that, because “it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them, such an exception would virtually swallow up the *Parker* rule: All anticompetitive regulation would be vulnerable to a ‘conspiracy’ charge.”<sup>48</sup>

The state action immunity thus does not rest on an implausible assumption that governmental actors always or even normally act in the public interest.<sup>49</sup> This immunity assumes only that Congress intended states to have the authority to make regulatory choices when they assume political responsibility for the costs of regulation. The threat of political “punishment” by electoral or other means provides a deterrent, however imperfect, to subverting the public interest, and political accountability at least assures that political representatives bear the responsibility for decisions to displace competition. And, of course, Congress can reverse those state choices by legislation more specific than the Sherman Act.<sup>50</sup>

Significantly, given our later focus on remedies in this Article, the state action doctrine also does not distinguish between actions for damages and actions for injunctions: if the immunity is not available to the state or local agency, all remedies are on the table.<sup>51</sup> The

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46. *See id.* at 370-71, 374-75.

47. *See id.* at 374-75.

48. *Id.* at 375.

49. Even apart from the private-interest dominance scenario, governments may have perverse incentives. Courts have recognized that governments may have parochial interests that give them an incentive to permit anticompetitive behavior within their borders, if the costs fall primarily on other states or countries. *See, e.g., Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 860 (7th Cir. 2012) (“The host country for [an international] cartel will often have no incentive to prosecute it.”). They have also recognized that governmental defendants do not represent all of the interests of private actors within their boundaries equally. *See, e.g., Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 973-74 (3d Cir. 1998) (recognizing that a government agency “represents numerous complex and conflicting interests” and that “straightforward business interests” of private entities “may become lost in the thicket of sometimes inconsistent governmental policies”).

50. *See supra* note 24 and accompanying text.

51. As noted earlier, Congress in the LGAA amended the antitrust laws to protect local

Court has suggested that private parties can be held liable for anti-trust damages despite acting pursuant to apparent state authority, if the conditions for immunity are not met.<sup>52</sup> If the immunity is present, however, it precludes actions for all types of relief.<sup>53</sup>

A doctrine related to, but separate from, state action holds that a statute may be preempted by the Sherman Act pursuant to the Supremacy Clause<sup>54</sup> if the statute *on its face* mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute.<sup>55</sup> “Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a per se violation.”<sup>56</sup> Conduct that is taken pursuant to a statute that is not preempted in the abstract may or may not be illegal under the rule of reason.<sup>57</sup>

To summarize, under *Parker*, antitrust law is a federal policy favoring competition, but it is “subject to supersession by state regulatory programs” when they substitute “[a]ctual state involvement,” not “fiat” or private action under the state’s “general

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governments and individuals connected to them from damage liability, regardless of clear articulation by the state. *See supra* note 37 and accompanying text. The LGAA thus removes the prospect of damage liability that would otherwise be available under the state action doctrine.

52. *See Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592-98 (1976) (suggesting that a regulated utility could be held liable for antitrust damages for a free light-bulb program the utility chose to adopt, even though a state public service commission had approved it); *see also Lopatka, supra* note 27, at 968-70.

53. *Cohn v. Bond*, 953 F.2d 154, 158 (4th Cir. 1991) (“[The] State Action Doctrine immunity precludes injunctive relief in this case. If an action falls within this doctrine, it is immunized from antitrust scrutiny.”).

54. U.S. CONST. art. VI, cl. 2.

55. *See Rice v. Norman Williams Co.*, 458 U.S. 654, 659-61 (1982).

56. *Id.* at 661 (emphasis omitted). California’s designation statute, which prohibited state liquor importers from importing a distiller’s product if the distiller had not authorized them to do so, was not preempted because it only authorized conduct that might be illegal under the rule of reason. *See id.* at 661-64.

57. *See id.* at 662 & n.8 (observing that the manner in which a party utilizes a nonpreempted statute is subject to Sherman Act analysis and might be found unreasonable or even per se illegal). Vertical price fixing, that between a manufacturer and a dealer, for example, is not per se illegal. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007) (repudiating the per se rule against vertical price restraints and holding them subject to the rule of reason).

auspices.”<sup>58</sup> The antitrust standard constrains private action; the state may choose to supersede that constraint, but only by taking ultimate responsibility for the choices. The levels of scrutiny for the different levels of state government correspond to the extent to which the defendant has authority to make choices on behalf of the state as sovereign.<sup>59</sup> The doctrine thus reflects concerns of both state sovereignty and antitrust law in drawing the line between unduly private on the one hand and sufficiently public on the other.

### *B. The Eleventh Amendment*

Now consider Eleventh Amendment immunity, and how it differs from *Parker* immunity. The express language of the Amendment excepts from the “[j]udicial power of the United States” actions against a state “by Citizens of another State, or by Citizens or Subjects of any Foreign State.”<sup>60</sup> On its face, and in the view of some modern Justices<sup>61</sup> and scholars,<sup>62</sup> this language only eliminates one category of diversity jurisdiction conferred by Article III of the Constitution.<sup>63</sup> But, under the Supreme Court’s interpretation, the immunity is not simply a limitation on the federal courts’ subject matter jurisdiction,<sup>64</sup> even though courts often resolve the issue on

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58. *FTC v. Ticor Title Ins.*, 504 U.S. 621, 632-33 (1992).

59. *See supra* note 44.

60. U.S. CONST. amend. XI.

61. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 289 (1985) (Brennan, J., dissenting) (“The language of the Eleventh Amendment, its legislative history, and the attendant historical circumstances all strongly suggest that the Amendment was intended to remedy an interpretation of the Constitution that would have had the state-citizen and state-alien diversity clauses of Article III abrogating the state law of sovereign immunity on state-law causes of action brought in federal courts.”).

62. John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 *YALE L.J.* 1663, 1721 (2004) (“[T]he Court should enforce an amendment as written if one could imagine rational reasons, pragmatic or political, for a precisely drawn text like the Eleventh Amendment to have taken the shape that it did.”).

63. U.S. CONST. art. III, § 2 (“The judicial Power shall extend to all Cases, in Law and Equity, ... between a State and Citizens of another State.”).

64. *See Floyd v. Thompson*, 227 F.3d 1029, 1035 (7th Cir. 2000) (“The Supreme Court has indicated that the Eleventh Amendment occupies its own unique territory.”); *see also Parks v. Va. Dep’t of Soc. Servs. Child Support Enf’t Servs.*, No. 1:16-cv-568 (JCC/TCB), 2016 WL 4384343, at \*2 (E.D. Va. Aug. 17, 2016) (noting that it is unclear whether Eleventh Amendment immunity should require dismissal for failure to state a claim under Rule 12(b)(6) or for lack of subject matter jurisdiction under Rule 12(b)(1), but ultimately choosing to dismiss under Rule 12(b)(1)), *aff’d*, 672 F. App’x 281 (4th Cir. 2016); *Trantham v. Henry Cty. Sheriff’s*



a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1).<sup>65</sup> According to the Court, “Eleventh Amendment immunity” is actually a misnomer, because the amendment itself is just one expression of an expansive doctrine of sovereign immunity that

neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution’s structure, its history, and the authoritative interpretations by this Court make clear, *the States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today* (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.<sup>66</sup>

This amorphous immunity applies to far more than the single category of diversity jurisdiction the Eleventh Amendment describes. It applies to actions in federal court under any source of

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Office, No. 4:10CV00058, 2011 WL 863498, at \*3 (W.D. Va. Mar. 10, 2011) (“Although subject matter jurisdiction and sovereign immunity do not coincide perfectly, there is a recent trend among the district courts within the Fourth Circuit to consider sovereign immunity under Rule 12(b)(1) [and authorize dismissal for lack of subject matter jurisdiction].”), *aff’d*, 435 F. App’x 230 (4th Cir. 2011); Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1700-01 (1997).

65. FED. R. CIV. P. 12(b)(1); *see supra* note 64.

66. *Alden v. Maine*, 527 U.S. 706, 713 (1999) (emphasis added); *see also* *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) (“[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty; and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the ‘plan of the convention.’” (internal citations omitted)); Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1819, 1822 (2010) (arguing that the text of the Amendment implements the framers’ assumption that Congress had no legislative power to coerce states directly); *cf.* Thomas D. Rowe, Jr., *Exhuming the “Diversity Explanation” of the Eleventh Amendment*, 65 ALA. L. REV. 457, 460-62 (2013) (observing that reading the Eleventh Amendment as a limitation on diversity jurisdiction “does not abolish state sovereign immunity, but rather unpins it from the Eleventh Amendment” and leaves it to federal common law and broader constitutional doctrine (emphasis omitted)).

Article III jurisdiction—federal question,<sup>67</sup> diversity,<sup>68</sup> or admiralty.<sup>69</sup> It applies to actions under federal law by citizens of a state against the same state in the state’s own courts.<sup>70</sup> Indeed, it applies to actions under either state or federal law in any forum, including federal administrative agencies.<sup>71</sup> Other characteristics of the immunity distinguish it from limitations on subject matter jurisdiction. States may lose the immunity by waiver or by consenting to suit, explicitly or implicitly,<sup>72</sup> which would not be possible for other categories of federal subject matter jurisdiction.<sup>73</sup> A court is also

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67. See *Hans v. Louisiana*, 134 U.S. 1, 14-15 (1890) (holding Eleventh Amendment immunity barred a citizen from suing Louisiana in federal court on a claim that state statutes violated the Contract Clause).

68. See *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974) (“While the Amendment by its terms does not bar suits against a State by its own citizens, this Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens *as well as by citizens of another State.*” (emphasis added)); see also *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 53 (1994) (Stevens, J., concurring) (“[The Eleventh Amendment] when read in light of the historical evidence, is properly understood to mean that the grant of diversity jurisdiction found in Article III, § 2, does not extend to actions brought by individuals against States.”).

69. See *Ex parte New York*, 256 U.S. 490, 498 (1921) (holding that the Eleventh Amendment does not “leave open a suit against a State in the admiralty jurisdiction by individuals, whether its own citizens or not”).

70. *Alden*, 527 U.S. at 712 (“We hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts.”).

71. *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 747 (2002) (holding a state agency was immune from a claim before the Federal Maritime Commission that the agency had violated the federal Shipping Act).

72. See, e.g., *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 619 (2002) (holding that a state waived Eleventh Amendment immunity by voluntarily removing a suit to federal court); *Alden*, 527 U.S. at 755 (“Many States, on their own initiative, have enacted statutes consenting to a wide variety of suits. The rigors of sovereign immunity are thus ‘mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign.’” (citation omitted)); *Nair v. Oakland Cty. Cmty. Mental Health Auth.*, 443 F.3d 469, 474 (6th Cir. 2006) (observing that a state may waive the Eleventh Amendment immunity defense in several ways in litigation). *But cf.* *Edelman v. Jordan*, 415 U.S. 651, 678 (1974) (“[T]he Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court” if it is properly raised on appeal.).

State action immunity may also be waived. See, e.g., *Bolt v. Halifax Hosp. Med. Ctr.*, 874 F.2d 755, 756 (11th Cir. 1989) (en banc) (per curiam) (holding that the defendant medical center waived state action immunity by withdrawing the claim of immunity on oral argument in the court of appeals); *Daniel v. Am. Bd. of Emergency Med.*, 988 F. Supp. 127, 188 n.61 (W.D.N.Y. 1997).

73. See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009) (“Subject-matter jurisdiction

not required to consider an Eleventh Amendment defense if it has not been raised,<sup>74</sup> though the court may do so in its discretion.<sup>75</sup>

Eleventh Amendment immunity limits not only adjudicative power but also congressional legislative power. It is a constitutional attribute of state sovereignty that Congress cannot abrogate under its Commerce Clause power,<sup>76</sup> as Congress can do with state action immunity.<sup>77</sup> The only mechanisms open to Congress to abrogate Eleventh Amendment immunity have no practical application to antitrust.<sup>78</sup> This limitation on congressional power has significance for our argument because it means that Congress cannot limit the

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cannot be forfeited or waived and should be considered when fairly in doubt.”).

74. See *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 389 (1998); see also *Nicholl v. Bd. of Regents of Univ. Sys. of Ga.*, 706 F. App'x 493, 495 (11th Cir. 2017) (per curiam) (“While the Supreme Court has held that the Eleventh Amendment is not jurisdictional in the sense that courts must address the issue *sua sponte*, it has held that Eleventh Amendment immunity is in the nature of a jurisdictional bar.”).

75. See *Higgins v. Mississippi*, 217 F.3d 951, 953-54 (7th Cir. 2000).

76. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73 (1996) (holding that Congress may not abrogate Eleventh Amendment immunity using the Article I power to regulate commerce with Indian tribes); see also *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 636 (1999) (“*Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers; hence the Patent Remedy Act cannot be sustained under either the Commerce Clause or the Patent Clause.”).

77. See *Parker v. Brown*, 317 U.S. 341, 350 (1943) (stating the assumption that “Congress could, in the exercise of its commerce power, prohibit a state from maintaining” an anticompetitive program); see also *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 605 (1976) (Blackmun, J., concurring) (“No one denies that Congress could, if it wished, override those state laws whose operation would subvert the federal policy of free competition in interstate commerce.”). The congressional power to override anticompetitive state laws is the power to limit state action immunity. See *supra* note 24 and accompanying text.

78. There are two avenues available to Congress to abrogate state sovereign immunity, neither of which has been used in antitrust cases. Congress can extract a state's consent to liability as a condition of receiving federal funds provided under the Spending Power. See, e.g., *Sossamon v. Texas*, 563 U.S. 277, 285, 293 (2011) (holding that, though states may waive immunity by accepting funds provided under the Spending Power, waiver of damage liability must be explicit). And Congress can abrogate Eleventh Amendment immunity pursuant to its power under Section 5 of the Fourteenth Amendment. *Seminole Tribe*, 517 U.S. at 59. Even acting under its Fourteenth Amendment power, Congress will be understood to have abrogated sovereign immunity only if it makes its intent clear. See *Edelman v. Jordan*, 415 U.S. 651, 675-78 (1974) (holding that Congress did not abrogate Eleventh Amendment immunity when it enacted 42 U.S.C. § 1983 pursuant to its power under Section 5 of the Fourteenth Amendment). Further, even when its intent is clear, Congress may not constitutionally abrogate immunity unless it is acting under Section 5 to remedy conduct violating the substantive guarantees of Section 1 of the Fourteenth Amendment. See *Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 36 (2012) (plurality opinion); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 364-65 (2001).

Eleventh Amendment’s restrictions on private antitrust enforcement—although it can add new, legislative immunities in circumstances in which the Eleventh Amendment does not apply.

According to some courts, although Eleventh Amendment immunity protects the state from suit, state action immunity only protects it from liability.<sup>79</sup> Whether a court makes this distinction has important procedural implications. An interlocutory decision by a district court to deny a motion to dismiss on grounds of immunity from suit is immediately appealable under the collateral order doctrine;<sup>80</sup> a denial of a motion to dismiss on grounds of immunity from liability is only appealable after the court issues a final order, at which point the decision will usually have become moot.<sup>81</sup> In addition, under this distinction, the filing of a motion to dismiss on Eleventh Amendment grounds, but not one on state action grounds, justifies an immediate stay of discovery.<sup>82</sup>

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79. *SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist.*, 859 F.3d 720, 726 (9th Cir. 2017) (holding that the state action doctrine, unlike the Eleventh Amendment, provides immunity from liability but not suit), *cert. dismissed*, 138 S. Ct. 1323 (2018); *S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436, 444 (4th Cir. 2006) (same). *But see* *Danner Constr. Co. v. Hillsborough County*, 608 F.3d 809, 812 n.1 (11th Cir. 2010) (“[T]he immunity asserted here includes immunity from suit.”); *Earles v. State Bd. of Certified Pub. Accountants of La.*, 139 F.3d 1033, 1040 (5th Cir. 1998) (“State action is properly treated as an immunity from suit.”); *Martin v. Mem’l Hosp. at Gulfport*, 86 F.3d 1391, 1395 (5th Cir. 1996) (concluding that the state action doctrine, like Eleventh Amendment immunity, provides an entitlement “not to stand trial” (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985))); *Commuter Transp. Sys., Inc. v. Hillsborough Cty. Aviation Auth.*, 801 F.2d 1286, 1289 (11th Cir. 1986) (holding that *Parker* “provide[s] immunity from suit rather than a mere defense to liability” (emphasis omitted) (internal quotation marks omitted)).

80. *See Earles*, 139 F.3d at 1036 (noting that, under the collateral order doctrine, the court has jurisdiction to consider interlocutory appeal from denial of state action immunity); *Martin*, 86 F.3d at 1397 (same); *Askew v. DCH Reg’l Health Care Auth.*, 995 F.2d 1033, 1036-37 (11th Cir. 1993) (same); *Commuter Transp. Sys.*, 801 F.2d at 1290 (holding that denial of summary judgment sought by an entity on the basis of state action immunity is “an appealable ‘collateral order’”).

81. *SolarCity*, 859 F.3d at 727 (holding that a district court decision rejecting the state action defense is not immediately appealable under the collateral order doctrine); *S.C. State Bd.*, 455 F.3d at 441-45 (same); *Huron Valley Hosp., Inc. v. City of Pontiac*, 792 F.2d 563, 568 (6th Cir. 1986) (same).

82. *Digital Ally, Inc. v. Taser Int’l, Inc.*, No. 16-cv-2032-CM-TJJ, 2016 WL 5944497, at \*3-4 (D. Kan. Oct. 13, 2016) (recognizing that earlier cases had “stayed discovery during the pendency of a dispositive motion in which a government defendant ha[d] asserted sovereign, judicial, or Eleventh Amendment immunity,” but refusing to do so based on a private defendant’s assertion of *Parker* immunity).

As broadly as the Court has described the Eleventh Amendment immunity, and as jealously as the Court has guarded it, the immunity is subject to crucial limitations. First, as mentioned earlier, the state can waive Eleventh Amendment immunity, just as it can waive state action immunity.<sup>83</sup> Second, it applies only to actions by private plaintiffs, because the states are thought to have consented to suit by the federal government and other states as a condition of joining the union.<sup>84</sup> By contrast, as we have seen, the state action immunity applies to both public and private plaintiffs because it limits the substantive reach of the antitrust statutes.<sup>85</sup>

Third, and perhaps most important for our purposes, Eleventh Amendment immunity is limited by the peculiar doctrine of *Ex parte Young*,<sup>86</sup> which permits private suits under federal law against state agency *officials* acting in their official capacity, even if the agency itself is immune from suit.<sup>87</sup> The *Young* exception applies only to actions for prospective relief, such as an injunction or declaratory judgment, against an official with authority to enforce the relevant state law;<sup>88</sup> the *Young* exception does not apply if the relief sought is “tantamount to an award of damages for a past violation of federal law, even though styled as something else.”<sup>89</sup> Although the

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83. See *supra* note 72.

84. See *West Virginia v. United States*, 479 U.S. 305, 312 n.4 (1987) (holding that the Court’s decisions hold “dispositively that States retain no sovereign immunity as against the Federal Government”); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 328-29 (1934) (observing that “[s]tates by the adoption of the Constitution” waived their exemption from federal judicial power in suits by other states and that “[w]hile [federal] jurisdiction [over suits by the United States against a state] is not conferred by the Constitution in express words, it is inherent in the constitutional plan”).

85. See *supra* notes 20-22 and accompanying text.

86. See 209 U.S. 123 (1908).

87. See *id.* at 159-60.

88. See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 677 (1974) (“[A] federal court’s remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief and may not include a retroactive award which requires the payment of funds from the state treasury.” (internal citations omitted)); *Conrad v. Bevin*, No. 3:17-CV-00056-GFVT, 2018 WL 988071, at \*8 (E.D. Ky. Feb. 16, 2018) (finding that the *Young* exception did not apply to a suit against the state attorney general, who did not have authority to enforce statutes governing a state licensing board), *appeal docketed sub nom.* *Conrad v. Beshear*, No. 18-5609 (6th Cir. June 12, 2018).

89. *Papasan v. Allain*, 478 U.S. 265, 278 (1986). So, for example, an action for restitution of illegally withheld benefits payments is barred, even if plaintiffs characterize it as an equitable remedy. See, e.g., *Edelman*, 415 U.S. at 668 (characterizing the action as similar to a damages remedy because it would likely be paid from state funds).

*Young* doctrine is based on a dubious, if not incoherent, view of the role of agency officials, it is considered necessary to prevent state officials from acting unconstitutionally.<sup>90</sup> It implies that the Eleventh Amendment functionally, if not formally, is a remedial doctrine that limits the means of asserting federal challenges to the policy choices of states, but “does not bar all judicial review of state compliance with the Constitution and valid federal law,”<sup>91</sup> even in private litigation.

Eleventh Amendment immunity applies only if the agency acts as an “arm of the State.”<sup>92</sup> The Court has suggested that this characterization depends primarily on whether any judgment against the agency would have to be satisfied out of the state treasury,<sup>93</sup> but it also depends on whether requiring the agency to litigate would offend the state’s “dignity.”<sup>94</sup> Lower courts have formulated

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90. *See, e.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (noting, in dicta, “the ‘well-recognized irony’ that an official’s unconstitutional conduct constitutes state action under the Fourteenth Amendment but not the Eleventh Amendment”); James Leonard, *Ubi Remedium Ibi Jus, or, Where There’s a Remedy, There’s a Right: A Skeptic’s Critique of Ex Parte Young*, 54 SYRACUSE L. REV. 215, 235 (2004) (“Officer suits exist because judges cannot stomach the fact that a rigorously and logically applied rule of sovereign immunity would reward lawless conduct by government, and they wish to give private litigants redress for illegal government actions.”).

91. *Alden v. Maine*, 527 U.S. 706, 755 (1999). *Ex parte Young* may not lift the Eleventh Amendment bar when Congress has created “a detailed remedial scheme for the enforcement against a State of a statutorily created right.” *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996). But the antitrust laws do not contain such a scheme.

92. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977).

93. *See Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48-51 (1994) (noting that the “impetus for the Eleventh Amendment” was “the prevention of federal-court judgments that must be paid out of a State’s treasury,” and denying immunity to a bi-state port authority in part because it was financially self-sufficient); *Mt. Healthy*, 429 U.S. at 280-81 (denying Eleventh Amendment immunity to a local school board, in part because under state law it was more like a county than a state agency); *see also* *Edinboro Coll. Park Apartments v. Edinboro Univ. Found.*, 850 F.3d 567, 571 & n.2 (3d Cir. 2017) (“Plaintiffs did not sue the University, conceding that the University is an arm of the state subject to immunity under the Eleventh Amendment.”). Indeed, even a suit for damages against a state officer in his *individual* capacity is barred if the relief sought would come from the state treasury. *Alden*, 527 U.S. at 757.

94. *See Hess*, 513 U.S. at 39-40, 47 (“[C]urrent Eleventh Amendment jurisprudence emphasizes the integrity retained by each State in our federal system .... It thus accords the States the respect owed them as members of the federation.” (internal citations omitted)); *Ex parte Ayers*, 123 U.S. 443, 505 (1887) (“The very object and purpose of the Eleventh Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.”); *see also Fitchik v. N.J. Transit Rail Operations, Inc.*, 873 F.2d 655, 659 (3d Cir. 1989) (identifying three factors in determining the

multifactor tests to determine whether an entity qualifies as an arm of the state under these standards. For example, the Fifth Circuit analyzed several factors, such as:

- (1) whether the state, through statutes or case law, views the entity as an arm of the state;
- (2) the source of the entity's funding;
- (3) whether the entity is concerned with local or statewide problems;
- (4) the entity's degree of authority independent from the state;
- (5) whether the entity can sue and be sued in its own name; and
- (6) whether the entity has the right to hold and use property.<sup>95</sup>

These criteria can differ significantly from the various requirements for state action immunity. A county or municipality, for example, may be immune under *Parker* if it acts pursuant to a clearly articulated state policy to regulate sewage<sup>96</sup> or billboards,<sup>97</sup> even if it would be too autonomous to be considered an arm of the state for Eleventh Amendment purposes.<sup>98</sup> The standards are closer for entities entitled to *ipso facto* state action immunity under *Hoover*.<sup>99</sup>

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application of the Eleventh Amendment to an entity: "(1) [w]hether the money that would pay the judgment would come from the state ...; (2) [t]he status of the agency under state law ...; and (3) [w]hat degree of autonomy the agency has").

95. *Earles v. State Bd. of Certified Pub. Accountants of La.*, 139 F.3d 1033, 1037 (5th Cir. 1998); *see also Bolden v. Se. Pa. Transp. Auth.*, 953 F.2d 807, 816 (3d Cir. 1991) (en banc) (Alito, J.) (articulating the same test the court specified in *Fitchik*).

96. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 43 (1985) (holding a municipality immune for actions taken pursuant to a state's authorization "to provide sewage services" with "the express authority to take action that foreseeably will result in anticompetitive effects").

97. *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 373 (1991) ("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.>").

98. *See Lincoln County v. Luning*, 133 U.S. 529, 530 (1890) (holding that, under the Eleventh Amendment, "jurisdiction was limited only in respect to those cases in which the State is a real, if not a nominal defendant; and while the county is territorially a part of the State, yet politically it is also a corporation created by and with such powers as are given to it by the State.... [So] it is a part of the State only in that remote sense in which any city, town, or other municipal corporation may be said to be a part of the State."); *see also Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 369 (2001) ("[T]he Eleventh Amendment does not extend its immunity to units of local government. These entities are subject to private claims for damages under [federal law] without Congress' ever having to rely on § 5 of the Fourteenth Amendment to render them so." (internal citation omitted)).

99. *See, e.g., Rosenberg v. Florida*, No. 15-22113-Civ-Lenard/Goodman, 2015 WL

We are left with a mix of similarities and differences between the two immunities that make generalizing about them difficult. One might ask, having read thus far, which immunity is the greater barrier to the use of federal judicial or legislative power as a check on states' authority. On the one hand, the Eleventh Amendment immunity appears to be stronger, because it shields states from claims under all federal (and state) statutes;<sup>100</sup> Congress cannot alter it under its commerce power,<sup>101</sup> and it immunizes the state from suit, not simply liability.<sup>102</sup> None of these characteristics are true of *Parker* immunity. On the other hand, Eleventh Amendment immunity is weaker, because it only applies to private lawsuits, although it allows an exception for prospective relief in a suit against agency officials;<sup>103</sup> *Parker* immunity, in contrast, forecloses all public and private plaintiffs from any type of relief.<sup>104</sup> These latter distinctions are the reason we suggest that the Eleventh Amendment is primarily a remedial doctrine. Nevertheless, given the importance of private damage actions in the enforcement of antitrust policy, the limitations of the Eleventh Amendment are worthy of closer examination.

## II. THE TWO IMMUNITIES AND ANTITRUST POLICY

Both immunities constrain federal antitrust claims challenging anticompetitive state regulation, and the scopes of both depend in part on the nature of the named defendant and its relationship to the state. But standards of the two doctrines produce substantially different spheres of immunity. The differences have practical effects, which in turn raise policy questions. In this Part, we examine those practical and policy consequences by considering the four categories of cases that raise questions under these immunities: (1) actions that are subject to both immunities; (2) actions that are subject to

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13653967, at \*7 (S.D. Fla. Oct. 14, 2015) (finding that a state bar was not required to satisfy the two-prong *Midcal* test in an action for injunctive relief for an antitrust violation because it was “an arm of the state (a sovereign entity)”).

100. See *supra* note 71 and accompanying text.

101. See *supra* note 76 and accompanying text.

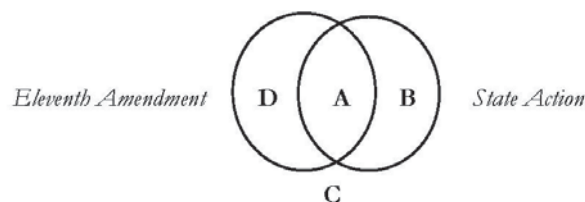
102. See *supra* note 79 and accompanying text.

103. See *supra* notes 84-89 and accompanying text.

104. See *supra* note 19-22 and accompanying text.



state action immunity but not Eleventh Amendment immunity; (3) actions (alleging violations by state-connected actors) that are subject to neither immunity; and (4) actions that are subject to Eleventh Amendment immunity but not state action immunity. As explained more fully below, it is only the last category that poses a risk that Eleventh Amendment immunity will subvert antitrust policy.<sup>105</sup> We can illustrate these categories by the following diagram, in which a circle illustrates the actions subject to immunity under each doctrine. The areas in which one, both, or neither of the immunities apply are designated with letters corresponding to the Sections of this Part in which we consider that category of actions:



Because of the relative complexity of the two doctrines, we begin each section with a positive discussion of the differing scopes of the two immunities in order to clarify their actual and potential applicability in antitrust cases. Those clarifications, we hope, will be a worthwhile exercise in themselves, as well as a starting point for the rest of our argument. They might be useful, for example, if they assist legislatures in deciding how to shape their regulatory mechanisms to bring them within, or exclude them from, one or both of the immunities, and they might conceivably assist a future Congress that decides to limit antitrust liability or remedies to increase a state's regulatory autonomy. The most important intrinsic benefit of the taxonomy, however, relates to litigation: it may help courts apply the immunities and public and private litigants choose claims or defenses tailored to the requirements of the immunities.<sup>106</sup> As we

105. *See infra* Part III.A.

106. Courts sometimes conflate the tests of Eleventh Amendment and state action immunities, perhaps in part because litigants purposely or inadvertently confuse them. *See, e.g.,* *Nicholl v. Bd. of Regents of Univ. Sys. of Ga.*, 706 F. App'x 493, 496 (11th Cir. 2017) (finding that the board of regents of a state university system was "outside the ambit" of the Sherman Act because it was "an arm of the state"); *Jackson v. Conn. Dep't of Pub. Health*, No. 3:15-CV-750 (CSH), 2016 WL 3460304, at \*13 (D. Conn. June 20, 2016) (concluding that a

will see, litigants still unaccountably waive available claims or defenses by failing to assert them.<sup>107</sup>

In the same discussions, we will consider the extent to which the conflicts between the doctrines pose a significant challenge for antitrust policy. In doing so, we take as given (for now) the basic contours of Eleventh Amendment immunity, whatever the theoretical infirmities of the Court's constitutional analysis. We also largely accept (for now) the framework of state action immunity the Court has developed over the last seventy years. Our objective, again, is to evaluate the consequences of the differences between the two immunities before drawing any possible lessons about their effects on antitrust policy.

The tension between the immunities arises because the Eleventh Amendment immunity is a constitutional doctrine that embodies a value that transcends any particular area of law, including antitrust. It constrains courts and federal agencies from hearing cases against state entities when doing so would infringe state sovereignty.<sup>108</sup> State action immunity, by contrast, is a statutory doctrine whose terms are shaped by both the general principle of state sovereignty and the policies of the Sherman Act.<sup>109</sup> In the *Parker* framework, sovereignty is a norm that counsels a limiting interpretation of the Sherman Act's substantive reach when the regulatory action is demonstrably an expression of state policy, but not when it is private anticompetitive behavior with only a veil of state involvement.<sup>110</sup> It immunizes some state-connected anticompetitive

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state department of health and two of its officials "are entitled to sovereign immunity pursuant to the Eleventh Amendment as to a Sherman Act claim," and citing as support a First Circuit case and two Second Circuit cases applying the test for state action immunity), *appeal dismissed*, No. 16-2282, 2017 WL 6759304 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 1326 (2018).

107. *See, e.g.*, *Henry v. N.C. Acupuncture Licensing Bd.*, No. 1:15CV831, 2017 WL 401234, at \*1, \*4 (M.D.N.C. Jan. 30, 2017). In *Henry*, plaintiff physical therapists alleged that the defendant licensing board and some of its members violated section 1 of the Sherman Act by determining that "dry needling" was a form of acupuncture that physical therapists could not practice without a license to practice acupuncture. *See id.* at \*2-4. The plaintiffs sought both injunctive relief and treble damages. *See id.* at \*4. The defendants moved to dismiss for failure to state a claim without, apparently, raising the issue of Eleventh Amendment immunity. *See id.* at \*10, \*14.

108. *See supra* Part I.B.

109. *See supra* Part I.A.

110. *See supra* Part I.A.

behavior, but intentionally leaves other state-connected behavior subject to antitrust liability.<sup>111</sup> The differing rationales of the doctrines predictably produce significantly different criteria for applicability.

The critical question is this: In what circumstances does Eleventh Amendment immunity disrupt the antitrust policy balance implicit in the scope of state-action immunity? Interestingly, most categories of overlapping and differing immunities pose few such challenges, as we show below. However, state regulatory actions subject to Eleventh Amendment immunity but not state action immunity—the last category we consider—do pose a challenge because of the Eleventh Amendment’s effect on antitrust remedies.<sup>112</sup>

This discussion addresses the outcomes in the application of the two immunities. Defendants may assert both immunities, and the parties will have to address both in pretrial motions. The Supreme Court may then have to consider both—not least because of an important potential difference in the treatment of the two immunities in pretrial procedure. As we noted earlier, the Eleventh Amendment immunizes the state from suit, so it is subject to special procedural protections.<sup>113</sup> For example, if the defendant moves to dismiss on Eleventh Amendment grounds, it is typically entitled to a stay of discovery until the motion is resolved;<sup>114</sup> if it loses the motion, it is typically entitled to interlocutory appellate review.<sup>115</sup> Under at least one view, state action immunity receives neither form of exceptional treatment.<sup>116</sup>

#### *A. Actions Subject to Both Immunities*

In this Section, we are concerned with actions against state-connected defendants in which the conditions for both immunities are met. Both immunities share a concern with the links between the state “as sovereign” and the defendant entity. Consequently, both immunities apply most clearly to private actions against the

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111. *See supra* Part I.A.

112. *See infra* Parts II.D, III.A.

113. *See supra* note 79 and accompanying text.

114. *See supra* note 82 and accompanying text.

115. *See supra* notes 80-81 and accompanying text.

116. *See supra* notes 81-82 and accompanying text.

state itself or a coordinate branch of state government. Those actors, which are entitled to “ipso facto” state action immunity, are undoubtedly also entitled to Eleventh Amendment immunity, because they are self-evidently also arms of the state.<sup>117</sup>

For executive branch agencies that are not themselves executive departments, both immunities apply, but in different ways. Eleventh Amendment immunity applies to agencies that act as arms of the state—a standard that encompasses a wide range of agencies with, for example, no independent funding power and little autonomy.<sup>118</sup> State action immunity also applies to some of these agencies.<sup>119</sup> For some courts, *Hallie* immunity applies to agencies acting based on clearly articulated standards contemplating the challenged conduct, a category that includes many of the agencies that are arms of the state under Eleventh Amendment standards.<sup>120</sup> Agencies dominated by private practitioners may still be arms of the state and immune under the Eleventh Amendment,<sup>121</sup> and may also

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117. *See Hoover v. Ronwin*, 466 U.S. 558, 567-68 (1984) (“[W]hen a state legislature adopts legislation, its actions constitute those of the State and ipso facto are exempt from the operation of the antitrust laws.” (internal citation omitted)); *see also Ammar v. L.A. City Coll.*, 727 F. App’x 412, 413 (9th Cir. 2018) (dismissing pro se antitrust claims against a state college district on Eleventh Amendment grounds); *Kennedy v. Maine*, No. 1:18-cv-00339-GZS, 2018 WL 4489459, at \*1-2 (D. Me. Sept. 19, 2018) (dismissing a pro se antitrust claim against the state of Maine (for monopolizing the practice of law) on Eleventh Amendment grounds); *Campbell v. Othoff*, No. 4:15-cv-00143, 2016 WL 1066287, at \*3 (D.N.D. Feb. 17, 2016) (holding that the Director of the state Department of Corrections was immune from damage liability under both the Eleventh Amendment and *Parker*).

118. *See supra* notes 92-95 and accompanying text.

119. *Cf. Heppler v. Pa. Liquor Control Bd.*, No. 10-3430, 2011 WL 2881221, at \*7, \*9 & n.7 (E.D. Pa. July 18, 2011) (holding the state liquor board immune as an arm of the state, and suggesting in dicta that it would also be immune under *Parker*, either ipso facto or because of clear state articulation).

120. *See, e.g., Jackson, Tenn. Hosp. Co. v. W. Tenn. Healthcare, Inc.*, 414 F.3d 608, 611-14 (6th Cir. 2005) (holding that a hospital district created only by state law was subject to the clear articulation requirement for immunity); *Turner v. Va. Dep’t of Med. Assistance Servs.*, 230 F. Supp. 3d 498, 505-06 (W.D. Va. 2017) (holding that the state health department was a “prototypical state agenc[y]” and therefore not subject to active supervision requirement); *In re Processed Egg Prods. Antitrust Litig.*, No. 08-md-2002, 2016 WL 4771865, at \*8 (E.D. Pa. Sept. 12, 2016) (finding the state department of agriculture was not subject to active supervision requirement because it was “more analogous to the municipality discussed in ... *Hallie*, as opposed to either the North Carolina Dental Board in [*North Carolina State Board*] or the Virginia State Bar in *Goldfarb*”).

121. *See, e.g., Rodgers v. La. Bd. of Nursing*, 665 F. App’x 326, 329-30 (5th Cir. 2016) (per curiam) (refusing to apply the active supervision requirement of state action immunity to Eleventh Amendment immunity of a state regulatory board allegedly dominated by private

be immune under state action, if they satisfy both prongs of the *Midcal* test.<sup>122</sup>

For agencies to which they apply, both immunities protect agency officials, but with differing scopes and effects. Agency officials are as fully protected by state action immunity as is the agency itself.<sup>123</sup> *Ex parte Young* withholds Eleventh Amendment immunity from agency officials sued in their official capacities only when they have authority to enforce the relevant state law, and, most significantly, only when they are sued for wholly prospective relief.<sup>124</sup> Consequently, agency officials who are sued for retroactive relief are immune under both standards.

In all of these cases in which both immunities apply, Eleventh Amendment immunity poses no problems for antitrust policy, because state action immunity is more encompassing. State action immunity denies all relief against both the agency and its officials, while *Ex parte Young* would permit an action for injunctive relief against state-empowered agency officials.<sup>125</sup> A paradigmatic example is a state regulatory agency and its officials, not dominated by private interests, acting pursuant to a clearly articulated state policy.<sup>126</sup> Such an agency and its officials would be immune from any liability under *Parker*, and the agency would be immune from

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practitioners); *Jemsek v. N.C. Med. Bd.*, No. 5:16-CV-59-D, 2017 WL 696721, at \*5-6 (E.D.N.C. Feb. 21, 2017) (“The Eleventh Amendment bars Jemsek’s claims against the NCMB,” independently of *North Carolina State Board*), *aff’d*, 697 F. App’x 234 (4th Cir. 2017).

122. See *supra* note 41 and accompanying text.

123. See *supra* note 23 and accompanying text.

124. See *Papasan v. Allain*, 478 U.S. 265, 278 (1986) (discussing difference between relief that is wholly prospective and can be obtained under *Young* and relief that is tantamount to damages and is prohibited); *supra* notes 86-89 and accompanying text.

125. See *Ex parte Young*, 209 U.S. 123, 159 (1908) (“The general discretion regarding the enforcement of the laws when and as he deems appropriate is not interfered with by an injunction which restrains the state officer from taking any steps towards the enforcement of an unconstitutional enactment to the injury of complainant.”); *supra* notes 103-04.

126. See, e.g., *Campbell v. Othoff*, No. 4:15-cv-00143, 2016 WL 1066287, at \*3 (D.N.D. Feb. 17, 2016) (“[A]ny claim against defendant Bertsch in her official capacity as [Director of the State Department of Corrections] for antitrust violations is a claim against the State for which the State has Eleventh Amendment immunity as to any claim for damages” and the defendant “would also have state-action (“*Parker*”) immunity .... because Bertsch is the Director of the NDDOCR, which is a department of the State and not a board comprised of otherwise private active market participants” such as the board in *North Carolina State Board*).

damage liability under the Eleventh Amendment.<sup>127</sup> Because *Parker* is the broader immunity, it would not matter that *Young* would permit prospective relief against the agency's officials—*Parker* would protect the agency and its officials from all antitrust remedies.<sup>128</sup>

*B. Actions Subject to Parker, but Not Eleventh Amendment, Immunity*

In this Section, we are concerned with actions against state-connected actors in which the conditions for *Parker* immunity are met, but the conditions for Eleventh Amendment immunity are not met. Eleventh Amendment immunity only protects agencies that are “arms of the state,” a standard that is not met by municipalities and most other local governmental bodies.<sup>129</sup> State action immunity, however, applies (1) to municipalities when they act pursuant to a clearly articulated state policy, and (2) to private individuals, if they act pursuant to such a policy and under active state supervision.<sup>130</sup> Consequently, no action against either private or local governmental defendants enjoys Eleventh Amendment immunity, but state action immunity does apply when its standards are satisfied.<sup>131</sup>

Even where it applies, Eleventh Amendment immunity does not block suits against state agency officials acting in their official capacity for wholly prospective relief.<sup>132</sup> State action immunity, by contrast, applies to agency officials to the same extent as to the agencies themselves, foreclosing all relief.<sup>133</sup> Consequently, actions

127. *See id.*

128. *See supra* notes 23, 86-89 and accompanying text.

129. *See Alden v. Maine*, 527 U.S. 706, 756 (1999).

130. *See Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); *see also Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40 (1985).

131. *See, e.g., Pa. Coach Lines, Inc. v. Port Auth. of Allegheny Cty.*, 874 F. Supp. 666, 669 n.1, 671 (W.D. Pa. 1994) (finding that the port authority was a state agency for purposes of state action immunity, but not for Eleventh Amendment immunity; if the port authority was a municipality, it was immune under *Hallie*).

132. *Nat'l Child Support, Inc. v. Hayes*, No. 1:02-CV-928, 2005 WL 1075029, at \*6 (S.D. Ohio Apr. 18, 2005).

133. *Parker* itself was a case against an agency official, and the passage we quoted previously refers directly to the immunity of agency officials. *See supra* note 17, 23 and accompanying text; *see also Nat'l Child Support*, 2005 WL 1075029, at \*8-9 (dismissing antitrust claims against the Ohio Department of Job and Family Services and its officials under the state action doctrine).

against state agency officials for injunctive relief may be subject to state action immunity, even if *Ex parte Young* would withhold Eleventh Amendment immunity for that remedy.<sup>134</sup>

A recent example of this category of cases is *Allibone v. Texas Medical Board*, in which a practitioner of “complementary and alternative medicine” sued the state medical board and its members for damages and an injunction alleging antitrust claims arising from disciplinary proceedings based on his unorthodox form of practice.<sup>135</sup> The board moved to dismiss for lack of subject matter jurisdiction and failure to state a claim.<sup>136</sup> The district court held that both the board and its members were entitled to Eleventh Amendment immunity, but the immunity for the board’s members did not extend to the physician’s claim for injunctive relief against a continuing violation of the Sherman Act.<sup>137</sup> Nevertheless, the court reasoned that “any immunity gap from the *Ex Parte Young* rule is covered by *Parker* immunity,” which “applies to a plaintiff’s request for prospective relief.”<sup>138</sup> The court assumed that, because most of the board’s members were practicing physicians,<sup>139</sup> the board had to meet both requirements of the *Midcal* standard.<sup>140</sup> Nevertheless, the court held the regulatory scheme indeed met both requirements, so any disciplinary action would “promote[ ] state policy” instead of the board members’ private interests.<sup>141</sup>

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134. See, e.g., *Earles v. State Bd. of Certified Pub. Accountants of La.*, 139 F.3d 1033, 1039, 1044 (5th Cir. 1998) (holding, before *North Carolina State Board*, that the state accounting board and its members were entitled to state action immunity, even though the individual members of the board were not entitled to Eleventh Amendment immunity under *Ex parte Young*).

135. No. A-17-CA-00064-SS, 2017 WL 4768224, at \*1 (W.D. Tex. Oct. 20, 2017), *appeal docketed*, No. 17-50984 (5th Cir. Nov. 7, 2017).

136. *Id.*

137. *Id.* at \*2-3; see also *Pharm. & Diagnostic Servs., Inc. v. Univ. of Utah*, 801 F. Supp. 508, 512-14 (D. Utah 1990) (concluding that the University of Utah was entitled to both Eleventh Amendment immunity from damages and state action immunity from injunction).

138. *Allibone*, 2017 WL 4768224, at \*3.

139. See *Texas Medical Board Overview*, TEX. MED. BOARD, <http://www.tmb.state.tx.us/page/medical-board> [https://perma.cc/NT7S-BK5P].

140. *Allibone*, 2017 WL 4768224, at \*3.

141. *Id.* (quoting *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101, 1116 (2015)). State law satisfied the clear articulation requirement by giving the board “broad power to regulate medical professionals,” including by professional discipline. *Id.* It satisfied the active supervision requirement by providing that disciplinary hearings would be “before an independent Administrative Law Judge, subject to judicial review” under statutory standards. *Id.*

In cases such as *Allibone* and actions against most municipalities, the Eleventh Amendment again poses no obstacle for antitrust policy. Despite Eleventh Amendment immunity, an entity itself (if it is a municipality) or its officials (if it is a state agency) are both subject to suit, at least for injunctive relief.<sup>142</sup> They are nevertheless entirely immune under the state action doctrine, if the regulatory scheme meets the doctrine's requirements.<sup>143</sup> For those agencies, state action immunity determines whether the agency would be liable for any form of relief. In such cases, state action immunity is solely the result of the Supreme Court's choices in accommodating antitrust standards to state sovereignty; the action is anticompetitive, but its costs are fully attributable to a state's sovereign choices.

### *C. Actions (Against State-Connected Actors) Not Subject to Either Immunity*

In this short Section, we touch on actions against state-connected entities and their officials or regulated individuals that do not meet the conditions for immunity under either the Eleventh Amendment or state action doctrine. Here, still more obviously, Eleventh Amendment immunity does not conflict with antitrust policy. For example, if a municipality acts without a clearly articulated state policy authorizing its action, it is not protected by the state action doctrine or the Eleventh Amendment.<sup>144</sup> Similarly, if a regulated private actor violates the Sherman Act without clear state authorization or sufficiently active state supervision, the actor would be subject to all public and private remedies.<sup>145</sup> Moreover, in *Parker*, the Court

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142. *Alden v. Maine*, 527 U.S. 706, 756 (1999); *Edelman v. Jordan*, 415 U.S. 651, 677 (1974); *Ex parte Young*, 209 U.S. 123, 159-60 (1908).

143. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40 (1985); *Parker v. Brown*, 317 U.S. 341, 350-51 (1943).

144. See *Alden*, 527 U.S. at 756; *Town of Hallie*, 471 U.S. at 40.

145. See *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 581-83, 598 (1976) (holding that a public utility, found not to have state action immunity for conduct described in a tariff approved by the state utilities commission, could be held liable for treble damages); *id.* at 614-15 (Stewart, J., dissenting) ("The Court today holds that 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."); *cf.* *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).



instructed that “a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.”<sup>146</sup> A statute that simply declared price-fixing by firms in a favored industry to be lawful would be a naked repeal of antitrust law, and it would confer no immunity on the private actors who fixed prices.<sup>147</sup> The law would be preempted because it “authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases.”<sup>148</sup> And, of course, the Eleventh Amendment would have no application to private defendants.<sup>149</sup> In all of these cases, there is no conflict between the immunities or threat to antitrust policy.

*D. Actions Subject to Eleventh Amendment, But Not Parker, Immunity*

To complete the picture, in this Section, we consider actions in which state-connected entities meet the conditions for Eleventh Amendment immunity but would be subject to antitrust liability under the *Parker* criteria. In some instances, Eleventh Amendment immunity is more inclusive than state action immunity. For example, Eleventh Amendment immunity applies broadly to all executive branch agencies that act as arms of the state.<sup>150</sup> It applies both to high-level state departments and to lesser boards and state entities, such as some state-supported universities that meet the criteria to be arms of the state.<sup>151</sup> By contrast, only those executive

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

147. In *Midcal*, for example, a state authorized wine producers and distributors to impose resale price schedules, with no regulatory supervision. *Cal. Retail Liquor Dealers Ass'n*, 445 U.S. at 99, 105-06. The Court denied immunity because “[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.” *Id.* at 106.

148. *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982).

149. *See Toranto v. Jaffurs*, 297 F. Supp. 3d 1073, 1082, 1102-03 (S.D. Cal. 2018) (holding that a physician who allegedly made false representations about the plaintiff in peer review proceedings was not protected by either immunity).

150. *See supra* note 92 and accompanying text.

151. *See, e.g., Maliandi v. Montclair State Univ.*, 845 F.3d 77, 85 (3d Cir. 2016) (recognizing that federal circuit courts “have almost uniformly concluded that state-affiliated universities are arms of their respective States” but noting that “each state university exists in a unique governmental context, and each must be considered on the basis of its own peculiar circumstances” (internal quotations omitted)). Again, we are considering only actions in which

branch state agencies that satisfy the requirements set out in either *Hoover* or *Hallie*, whichever is applicable,<sup>152</sup> are entitled to state action immunity.<sup>153</sup> Eleventh Amendment immunity would apply to an agency acting as an arm of the state, even if it authorizes or commits a per se antitrust violation without clear legislative authority to do so and therefore lacks state action immunity.<sup>154</sup> *Ex parte Young* would permit actions against agency officials in their official capacities for prospective relief; actions for damages in those circumstances would be foreclosed.<sup>155</sup>

For example, in *TFWS, Inc. v. Schaefer*, the plaintiff sought to prevent state officials from enforcing the state's regulation of liquor distribution, which required wholesalers to post and adhere to their prices and prohibited them from offering volume discounts.<sup>156</sup> The court found that the scheme was a public-private "hybrid restraint" because the post-and-hold requirement granted wholesalers "a significant degree of private regulatory power," and the volume discount ban "reinforce[d] the post-and-hold system by making it even more inflexible."<sup>157</sup> The regulatory system was a per se antitrust violation, and it was not protected by the state action doctrine because the state failed to actively supervise the price-setting conduct of private parties.<sup>158</sup> Nevertheless, Eleventh Amendment

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the agency is violating substantive antitrust standards. If the agency's action is unilateral or cannot violate Section 1 of the Sherman Act for some other substantive reason, the agency would be protected from antitrust liability, irrespective of either type of immunity.

152. *See supra* notes 25-40 and accompanying text.

153. A state agency, other than perhaps one treated as the executive branch of government, has no state action immunity unless it is acting in accordance with and pursuant to a clear policy articulated by a constitutional branch of government. *See Goldfarb v. Va. State Bar*, 445 U.S. 773, 789-92 (1975) (holding that the state bar, though a state agency, did not have state action immunity because its conduct was not authorized by state statute or supreme court rule).

154. *Cf. Rosenberg v. Florida*, No. 15-22113-CIV-Lenard/Goodman, 2015 WL 13653967, at \*7 (S.D. Fla. Oct. 14, 2015).

155. *See supra* notes 86-89 and accompanying text. Theoretically, state officials might be liable under antitrust law for actions in their individual capacity, but apparently no such claim has ever been seriously asserted. *See Chi. Studio Rental Inc. v. Ill. Dep't of Commerce & Econ. Opportunity*, No. 15 C 4099, 2016 WL 7213055, at \*4, \*6 (N.D. Ill. Mar. 29, 2016) (finding that the Eleventh Amendment did not bar an antitrust claim against a state official acting in her individual capacity but that the plaintiff did not adequately plead such a claim).

156. 242 F.3d 198, 201-02 (4th Cir. 2001).

157. *Id.* at 208-09.

158. *Id.* at 210-11.

immunity clearly applied.<sup>159</sup> *Ex parte Young* permitted the plaintiff's claim "to enjoin the Comptroller from committing violations of the Sherman Act,"<sup>160</sup> but the Eleventh Amendment foreclosed a claim for damages, which the plaintiff (undoubtedly recognizing this limitation) did not seek.<sup>161</sup>

Another area in which the Eleventh Amendment immunity is broader than state action immunity concerns traditional state agencies whose members have no financial interest in the entities they regulate, such as a typical public utilities commission.<sup>162</sup> This kind of an agency is not immune from antitrust liability under *Parker* unless its anticompetitive acts are authorized by a constitutional branch of government;<sup>163</sup> in other words, such an agency is only subject to the clear articulation requirement. Because of the Eleventh Amendment, however, the only available remedy in that case is a prospective injunction entered against the officials themselves.<sup>164</sup>

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159. *Id.* at 204-05.

160. *Id.* at 203.

161. *Id.* at 203-05. The district court also dismissed the claim on Twenty-First Amendment grounds, but the court of appeals vacated that as well. *Id.* at 202. The litigation dragged on for years, eventually ending with the preemption of the state's regulatory scheme by the Sherman Act. *TFWS, Inc. v. Franchot*, 572 F.3d 186, 188 (4th Cir. 2009).

162. For example, the statute creating the Public Service Commission at issue in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), provided:

[N]o member of said commission shall be pecuniarily interested in any public utility or public service subject to the jurisdiction and control of the commission.... No commission member shall be retained or employed by any public utility or public service subject to the jurisdiction and control of the commission during the time he is acting as such commissioner, and for [six] months thereafter.

MICH. COMP. LAWS § 460.1 (2018). In 1939, the Public Utilities Commission was abolished and its functions transferred to the Public Service Commission, *see id.* § 460.4, but the relevant membership qualifications remained the same. *History of the MPSC*, MICH. DEPT OF LICENSING & REG. AFF., <https://www.michigan.gov/MPSC/0,4639,7-159--40512--,00.html> [https://perma.cc/6Z5L-ZW8M].

163. *See, e.g., Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46-47, 46 n.10 (1985) (observing, without deciding, that state agencies likely satisfy the clear-state-policy but not the active-supervision requirement to receive state action immunity); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 789-92 (1975) (holding that, although the state bar was a state agency, it did not have state action immunity because its conduct was not authorized by a state statute or supreme court rule).

164. *See supra* notes 86-89 and accompanying text.

State action immunity for state agencies and their officials is also significantly limited by *North Carolina State Board*, which recognizes immunity for state boards controlled by active market participants only if they act pursuant to a clear state policy *and* are actively supervised by a superior state body.<sup>165</sup> In such a case, the Supreme Court has concluded that members of such state boards are not sufficiently independent of the profession they regulate to warrant state action immunity, unless they satisfy both prongs of *Midcal*.<sup>166</sup> Eleventh Amendment immunity, by contrast, does not distinguish between boards that are dominated by private practitioners and those that are not.<sup>167</sup> Regardless of its composition, the agency is immune, as long as it is an arm of the state, even if *Midcal*'s conditions for state action immunity are not met.<sup>168</sup> As emphasized above, *Ex parte Young* permits actions for prospective relief against the agency officials in these cases.<sup>169</sup>

Under the state action doctrine, then, certain agencies and officials may be liable under the Sherman Act for both damages and equitable remedies. If the agencies are arms of the state, however, the Eleventh Amendment forecloses private damages and injunctive relief against the agencies themselves, as well as private damages against the agency officials acting in their official capacity.<sup>170</sup> For example, in *Rodgers*, the plaintiff alleged that a state licensing board was not immune from antitrust liability under *North Carolina State Board* because it was composed of active practitioners, but

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165. See *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1110-13 (2015) (“*Midcal*'s active supervision test is an essential prerequisite of *Parker* immunity for any nonsovereign entity—public or private—controlled by active market participants.”).

166. *Id.* at 1110, 1117.

167. See *Jemsek v. N.C. Med. Bd.*, No. 5:16-CV-59-D, 2017 WL 696721, at \*5-6 (E.D.N.C. Feb. 21, 2017) (“The Eleventh Amendment bars *Jemsek*'s claims against the NCMB,” independent of *North Carolina State Board*).

168. See, e.g., *Rodgers v. La. Bd. of Nursing*, 665 F. App'x 326, 329-30 (5th Cir. 2016) (per curiam) (holding the Eleventh Amendment immunized the State Board of Nursing, regardless of whether *N.C. Dental*'s test for state action immunity was met); *Jemsek*, 2017 WL 696721, at \*5-6.

169. See *supra* notes 86-89 and accompanying text.

170. See *supra* Part I.B. In *North Carolina State Board*, the Supreme Court hinted at this result. *N.C. State Board*, 135 S. Ct. at 1115. The Court wrote that the case before it did “not offer occasion to address the question whether agency officials, including board members, may, under some circumstances, enjoy immunity from damages liability,” and cited a footnote in *Goldfarb* that referred to the possibility of Eleventh Amendment immunity. *Id.* (citing *Goldfarb v. Va. State Bd.*, 421 U.S. 773, 792 n.22 (1975)).

the court held that it was immune from damages under the Eleventh Amendment.<sup>171</sup> The plaintiff inexplicably named only the board itself as the defendant, and chose not to seek any type of relief against the members of the board,<sup>172</sup> even though she presumably could have sought injunctive relief under *Ex parte Young*.<sup>173</sup>

This category is the most interesting and problematic one from an antitrust standpoint: cases challenging anticompetitive actions of agencies that are agents of the state but do not meet the requirements of the state action doctrine. We consider the potential antitrust policy concerns this disjunction raises in this Article's final Part.

### III. SOVEREIGN AND OFFICIAL ANTITRUST IMMUNITIES BEYOND *PARKER*

At the end of the last Part, we explained that, in a significant range of antitrust cases, the Eleventh Amendment immunizes state agencies and officials for anticompetitive actions, even where state action immunity would not apply—that is, where antitrust law and its remedies would apply under the antitrust-specific standards of state action immunity. In these cases, *Ex parte Young* permits actions solely for prospective relief against state officials acting in their official capacities to prevent violations of valid federal law.<sup>174</sup> This curious exception to Eleventh Amendment immunity, as we saw earlier, is thought necessary to prevent unconstitutional enforcement of state laws that are inconsistent with federal laws,

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171. See *Rodgers*, 665 F. App'x at 330. The court specifically rejected the plaintiff's argument that the *North Carolina State Board* standard should be extended to Eleventh Amendment immunity. See *id.* The board was composed of eleven members appointed by the governor: eight registered nurses, one certified registered nurse anesthetist, and two non-nurse consumer representatives. See LA. STAT. ANN. § 37:914(B)(1) (2018). But see *Rodgers v. La. Bd. of Nursing*, No. 15-2176, 2015 WL 5307806, at \*1 (W.D. La. Sept. 10, 2015) (describing the board's composition as “[eight] registered nurses, [one] certified registered nurse anesthetist, and [two] ex officio non-voting physician advisors”), *aff'd*, 665 F. App'x 326 (5th Cir. 2016) (per curiam). The nine nurses must be “actively engaged in the practice of nursing as a registered nurse at the time of appointment.” LA. STAT. ANN. § 37:916(A)(1)(d) (2018).

172. See *Rodgers*, 665 F. App'x at 327.

173. Cf. *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 203 (4th Cir. 2001).

174. See *supra* notes 86-89 and accompanying text.

while still protecting (at least to some extent) the state fisc.<sup>175</sup> As a result, Eleventh Amendment immunity forecloses damage liability but not prospective injunctive relief in many cases in which the state action doctrine (and the unqualified language of Section 4 of the Clayton Act) would apparently authorize damages.<sup>176</sup>

Interestingly, however, the Supreme Court suggested in *City of Lafayette v. Louisiana Power & Light Co.* that holding federal law applicable to a city did “not necessarily require the conclusion that remedies appropriate to redress violations by private corporations would be equally appropriate for municipalities.”<sup>177</sup> That reference indicated at least some discomfort with the notion of governmental damage liability. And, as we noted earlier, Congress allayed its discomfort by passing the LGAA, which forecloses damage liability for municipalities, other local governments (defined broadly), and their officials.<sup>178</sup> According to one court, the LGAA responded to a

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175. *See Alden v. Maine*, 527 U.S. 706, 748 (1999) (characterizing *Young* as an “essential ... part of our sovereign immunity doctrine”); *Green v. Mansour*, 474 U.S. 64, 68 (1985) (“[T]he availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause.”).

176. In *Goldfarb*, the only case directly raising the issue of whether a state agency not immune under the state action doctrine could be held liable for damages, the Court expressed no reluctance to impose liability. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 791-93 (1975). The plaintiffs brought a class action against a state bar and county bar for price fixing, seeking both injunctive relief and damages. *See id.* at 778. The Court recognized that the state bar was a state agency for some purposes but held it liable for “voluntarily join[ing] in what is essentially a private anticompetitive activity.” *See id.* at 791-92. The Court intimated no view on whether the state bar was protected under the Eleventh Amendment. *See id.* at 792 n.22. The case was remanded, and the petition for rehearing was denied. *Id.* at 793; *petition for reh'g denied*, 423 U.S. 866 (1975).

177. 435 U.S. 389, 401-02 (1978). *But cf. id.* at 440 n.30 (Stewart, J., dissenting) (doubting that a court “could possibly disregard [the] clear statutory command” to award treble damages); *id.* at 442-43 (Blackmun, J., dissenting) (doubting that a city would have a “conceivable defense to damages”). For other sources, see also *Cnty. Commc'ns Co. v. City of Boulder*, 455 U.S. 40, 56-57 n.20 (1982) (“[A]s in *City of Lafayette*, we do not confront the issue of remedies appropriate against municipal officials.”); *id.* at 65 n.2 (Rehnquist, J., dissenting) (“It will take a considerable feat of judicial gymnastics to conclude that municipalities are not subject to treble damages to compensate any person ‘injured in his business or property.’” (quoting Clayton Act of 1914 § 4, 15 U.S.C. § 15(a) (2012))).

178. *Supra* note 37-38 and accompanying text; see *Ne. Jet Ctr., Ltd. v. Lehigh-Northampton Airport Auth.*, 767 F. Supp. 672, 681 (E.D. Pa. 1991) (“Congress intended [in the LGAA] to create an absolute immunity for the conduct of a municipal authority, at least as far as monetary damages are concerned.”). The Act also protects private persons from liability “based on any official action directed by” a local government or its official. 15 U.S.C. § 36(a) (2012); see *Campbell v. Othoff*, No. 4:15-cv-00143, 2016 WL 1066287, at \*1-2 (D.N.D. Feb. 17,

perceived “immediate need to take a ‘remedies approach’ to saving local governments and their taxpayers from the potential financial ruin occasioned by large monetary awards under the Clayton Act,”<sup>179</sup> even if the governments had violated the antitrust laws and were ineligible for state action immunity.<sup>180</sup>

Congress apparently chose not to extend the LGAA’s protection to other state actors because it believed, incorrectly, that the state action doctrine or the Eleventh Amendment fully protected them from damage liability.<sup>181</sup> Sovereign state actors, such as the

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2016) (holding that a private firm operating a prison commissary was immune under the LGAA because it was acting under the direction of a county official).

179. *Jefferson Disposal Co. v. Par. of Jefferson*, 603 F. Supp. 1125, 1130 (E.D. La. 1985) (citation omitted). The court noted that the LGAA was enacted in response to *Unity Ventures v. County of Lake*, No. 81 C 2745 (N.D. Ill. Jan. 12, 1984), in which “a jury awarded the plaintiff \$9.5 million in damages in an antitrust action against the local governments and their officials.” *Id.* at 1130 n.7. Interestingly, after the enactment of the LGAA, the Illinois district court set that award aside on a post-trial motion because, among other reasons, the municipality was acting pursuant to a clearly articulated state policy. *Unity Ventures v. County of Lake*, 631 F. Supp. 181, 191 (N.D. Ill. 1986), *aff’d*, 841 F.2d 770 (7th Cir. 1988).

180. A local government entity, as well as its officials, have state action immunity if they act pursuant to clear state authorization. *See, e.g., Campbell*, 2016 WL 1066287, at \*2. To be immune from damage liability under the LGAA, local government officials and employees need only be “acting in [their] official capacity,” 15 U.S.C. § 35(a), a standard that is intentionally more expansive than the “clear state authorization” requirement of *Parker* immunity. *See Sandcrest Outpatient Servs., P.A. v. Cumberland Cty. Hosp. Sys., Inc.*, 853 F.2d 1139, 1145 (4th Cir. 1988) (“[O]n its face, the phrase ‘acting in an official capacity’ includes those lawful actions, undertaken in the course of a defendant’s performance of his duties, that reasonably can be construed to be within the scope of his duties and consistent with the general responsibilities and objectives of his position.”); *see also Wee Care Child Ctr., Inc. v. Lumpkin*, 680 F.3d 841, 849 (6th Cir. 2012) (concluding that employees act within their official capacity “when conducting duties that are ‘consistent with the general responsibilities and objectives’ of their positions” (quoting *Sandcrest Outpatient Servs.*, 853 F.2d at 1145)). *But see United Nat’l Maint., Inc. v. San Diego Convention Ctr. Corp.*, No. 07cv2172 AJB, 2012 WL 12845620, at \*3 (S.D. Cal. Sept. 5, 2012) (“[T]he appropriate standard for determining application of the LGAA is the same standard that is applied for the State Action Doctrine ..., with the only difference being the source of authority is local government, not state government.”), *aff’d in part and rev’d in part on other grounds*, 766 F.3d 1002 (9th Cir. 2014).

181. The legislative history of the LGAA indicates that Congress did not extend protection to “[s]tates or their agencies with [s]tate-wide jurisdiction” because “[s]uch entities receive antitrust immunity directly from the ‘state action’ doctrine.” H.R. REP. NO. 98-965, at 19 (1984). The premise was curious because the Court had decided *Goldfarb v. Virginia State Bar* before Congress passed the statute, and the Court there had expressed no reluctance to impose damage liability on a state agency. *See* 421 U.S. 773, 791-93 (1975). In that case, the plaintiffs brought a class action against a state bar and county bar for price fixing, seeking both injunctive relief and damages. *Id.* at 778. The Court recognized that the state bar was a state agency. *Id.* at 789-90. The Court intimated no view on whether the state bar was

legislature, supreme court, and perhaps high-level executive-branch agencies, are indeed categorically protected by the state action doctrine;<sup>182</sup> but inferior state agencies are only protected conditionally.<sup>183</sup> The Court has made clear since the passage of the LGAA that certain state regulatory agencies acting without legislative command or supervision have no *Parker* immunity<sup>184</sup>—they are protected, if at all, by the Eleventh Amendment as qualified by *Ex parte Young*.<sup>185</sup> Thus, together, the Eleventh Amendment and the LGAA shelter most state and local regulators from damage liability,<sup>186</sup> even where state action immunity would not apply.

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protected under the Eleventh Amendment. *Id.* at 792 n.22. The case was remanded, *id.* at 793, and the Court denied the petition for rehearing, 423 U.S. 886 (1975).

*Goldfarb* notwithstanding, Congress's idea seems to be that local government entities, which derive immunity from action of state sovereign actors, might be found to have no immunity from antitrust remedies, including damages, whereas states and state agencies with state-wide jurisdiction automatically have complete state action immunity. See H.R. REP. NO. 98-965, at 19. Though Congress did not mention the Eleventh Amendment, *see generally* H.R. REP. NO. 98-965, it had no reason to address it. The LGAA was provoked by *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982). See H.R. REP. NO. 98-965, at 3 (“Beginning early in the 98th Congress, a number of legislative initiatives were introduced in the aftermath of the Supreme Court’s 1982 decision in *Community Communications*.”). That decision threatened the imposition of damage liability on cities, *Cnty. Commc’ns*, 455 U.S. at 65 (Rehnquist, J., dissenting), and Congress surely knew that cities were not entitled to protection from damage liability under the Eleventh Amendment, *see* *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (explaining that “counties and similar municipal corporations” do not have Eleventh Amendment immunity).

182. A few months before Congress enacted the LGAA, the Supreme Court decided *Hoover v. Ronwin*, holding that a state supreme court, like a legislature, is ipso facto immune from the antitrust laws for anticompetitive actions. 466 U.S. 558, 567-68 (1984). Congress was aware of the decision. See H.R. REP. NO. 98-965, at 7 n.6 (“The Court’s most recent decision in the area, *Hoover v. Ronwin*, has done little to clarify the delegation of state immunity test.” (internal citation omitted)).

183. See, e.g., *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101, 1111-12 (2015) (holding that, for immunity, state regulatory agencies controlled by active market participants must be actively supervised by other state actors and act pursuant to clear state policy); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 & n.10 (1985) (holding that municipalities are not subject to the active-supervision requirement, and observing without deciding that the requirement would likely also not apply to state agencies); *cf.* *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 64-65 (1985) (holding that a state regulatory agency can articulate a policy authorizing a restraint that satisfies the first prong of the *Midcal* test in providing immunity to regulated private entities).

184. See *N.C. State Bd.*, 135 S. Ct. at 1116-17.

185. See *generally* *TFWS, Inc. v. Schaefer*, 242 F.3d 198 (4th Cir. 2001).

186. The exception would be state regulatory agencies that do not act as arms of the state, which are not protected under the Eleventh Amendment. See *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 52 (1994) (explaining that Port Authority did not have the



*A. Antitrust Injury and Eleventh Amendment Immunity*

In this Section we consider whether the protection from antitrust damage liability afforded some state actors by the Eleventh Amendment (and, by implication, its twin, the LGAA) in antitrust cases and to which they would be exposed to liability under the state action doctrine is inefficient, and, if so, whether such a result is somehow justified.

Any immunity may reduce efficiency. The state action doctrine immunizes state agencies and officials from antitrust liability, including damage liability, when their action is attributable to a conscious state choice to promote some other value even at the expense of consumer welfare.<sup>187</sup> This immunity necessarily means that anticompetitive conduct of public entities and officials will not be deterred by any penalty. Private actors have an economic incentive to restrict competition and increase monopoly profit; the threat of an antitrust sanction deters the anticompetitive conduct by reducing the expected gain. Public actors may have similar incentives to restrict competition, but immunity reduces their expected cost. As we explained earlier, the conditions of state action immunity are designed to assure that the state takes political responsibility for any such decision.<sup>188</sup>

State actors may have the greatest incentive to subvert the public interest in instances in which state action immunity does *not* apply. For example, in *North Carolina State Board*, state action immunity did not apply because regulators who are active practitioners have an incentive to act in the interests of the profession, not the public interest; they are “more similar to private trade associations vested by States with regulatory authority” than typical state agencies.<sup>189</sup> Similarly, in *Goldfarb*, the Court held that, by mandating

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protection of the Eleventh Amendment because it was distinct from the state).

187. See *supra* Part I.A.

188. See *supra* notes 49-50 and accompanying text.

189. *N.C. State Bd.*, 135 S. Ct. at 1114. The Court reasoned that “[s]tate agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing [that the active] supervision requirement was created to address.” *Id.* It added that its “conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants’ confusing their own interests with the State’s policy goals.” *Id.*

a minimum fee schedule, a state bar association, “voluntarily joined in what is essentially a private anticompetitive activity,” and was subject to antitrust liability.<sup>190</sup> In these circumstances, denial of state action immunity follows from a public choice analysis: the regulators who are also active practitioners are captured by the private interest and act essentially as its agents.<sup>191</sup> For similar reasons, the court of appeals in *North Carolina State Board* held that the members of the board had the “capacity to conspire” and had conspired to suppress a competing form of practice.<sup>192</sup>

State action immunity is also inapplicable where a state regulatory agency, even though not dominated by active practitioners, acts anticompetitively without clear state authorization.<sup>193</sup> In such a case, the agency’s action does not involve the private interest of the agency’s officials in the same sense as in the case of boards controlled by active practitioners.<sup>194</sup> Even in these circumstances, however, government regulators may act in the interest of regulated firms for their personal benefit, for instance to maximize their future employment potential.<sup>195</sup>

In the foregoing cases, the state action immunity does not apply because the state has not made the clear choice to displace competition with some form of anticompetitive regulation, or at least has not made sufficient provision to assure that its conscious choices have been carried out.<sup>196</sup> In other words, there is too much private

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190. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 791-92 (1975).

191. See John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 714 (1986).

192. *N.C. State Bd. of Dental Exam’rs v. FTC*, 717 F.3d 359, 371-73 (4th Cir. 2013), *aff’d*, 135 S. Ct. 1101 (2015); see also *Henry v. N.C. Acupuncture Licensing Bd.*, No. 1:15CV831, 2017 WL 401234, at \*12-13 (M.D.N.C. Jan. 30, 2017) (holding that physical therapists and their clients sufficiently alleged an agreement among members of the acupuncture board and the board itself to violate the antitrust laws by preventing physical therapists from performing a procedure common to both professions). *But see* *Robb v. Conn. Bd. of Veterinary Med.*, 157 F. Supp. 3d 130, 146-47 (D. Conn. 2016) (holding that a veterinarian failed to allege sufficiently that the defendants formed an agreement because he did not allege “any conduct of the individual Board members other than sitting in adjudication of an administrative proceeding brought by another state agency, *an action the Board members are required to take under state law*”).

193. See *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225-27 (2013).

194. See *id.* at 226.

195. See Wiley Jr., *supra* note 191, at 732 n.92.

196. See, e.g., *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-06 (1980).

(or nonsovereign public) choice in the regulatory arrangement to justify immunity under the antitrust-specific standards of the state action doctrine. In some of those instances, Eleventh Amendment immunity will not apply either, so state actors may be exposed to antitrust liability.

Nevertheless, in some of the cases in which state action immunity does not apply, the Eleventh Amendment provides immunity<sup>197</sup> at least from private damages,<sup>198</sup> and, because of *Seminole Tribe*, Congress cannot remove that immunity through legislation enacted under the Commerce Clause.<sup>199</sup> If, for example, fashion designers form a private association with retailers to deny distribution channels to firms that copy their designs, they violate the antitrust laws and may be subject to private damage liability.<sup>200</sup> But if a state dental board controlled by practicing dentists issues an order prohibiting nondentists from whitening teeth, they are immune from damages.<sup>201</sup> Or, if a state university hospital and a private university hospital agree not to poach one another's faculty, the private hospital's administrators are potentially subject to damage liability, but the state hospital's administrators in their official

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197. See *supra* Part II.D.

198. See *supra* note 170 and accompanying text.

199. See *supra* note 76 and accompanying text.

200. Cf. *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457, 461-64 (1941) (holding that an agreement among dress makers to refuse to deal with retailers who deal with style pirates violates the FTC Act).

201. Cf. *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1108, 1115 (2015) (explaining that this case did not offer an opportunity to decide the question of immunity from damages, but that states can extend *Parker* immunity to state agencies by establishing clear policies and providing active supervision). Similarly, if a state cosmetology board controlled by professional cosmetologists prohibited unlicensed hair stylists to blow-dry someone else's hair for money, the board members would be immune from damages. See Eric Boehm, *Inside the Insane Battle Over Arizona's Blow-Dry Licensing Bill*, REASON (Feb. 2, 2018, 10:47 AM), <http://reason.com/blog/2018/02/02/inside-the-insane-battle-over-arizonas-d> [<https://perma.cc/SE45-7HFG>].

capacities are presumably not.<sup>202</sup> What are the efficiency consequences of such a disparity in treatment?

In the remainder of this Section, we consider this question on the assumption that, if state action immunity does not apply, the action of agencies and officials are essentially private and therefore would be subject to the antitrust remedies as private actors. We apply the accepted standards for efficient antitrust damages to see what is lost, under these assumptions, by providing Eleventh Amendment immunity. In the next Section, we consider whether the special institutional circumstances of nonimmune public actors justify different treatment on remedial grounds.

The optimal sanction for an economic offense is the social harm caused by the offense, adjusted for the probability of imposition.<sup>203</sup> For antitrust offenses, the social harm is the “net harm to persons other than the offender” caused by the practice.<sup>204</sup> The concept of an optimal penalty implies that a penalty can be excessive or inadequate.<sup>205</sup> It might be excessive because antitrust rules and costly processes are imperfect and may result in liability for harmless or even procompetitive conduct. An excessive penalty can also induce an actor to over-invest in measures to avoid liability. When a prospective antitrust violator faces a sanction equal to the social cost of the conduct, appropriately adjusted for the probability of enforcement, the person will engage in it only when it returns greater benefits than the social cost it imposes.<sup>206</sup> Efficiency increases when that socially beneficial conduct is not deterred.<sup>207</sup> The essence of the

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202. Cf. *Seaman v. Duke Univ.*, No. 1:15-CV-462, 2018 WL 718961, at \*2 (M.D.N.C. Jan. 4, 2018) (approving settlement against University of North Carolina defendants, and noting that plaintiff “would be limited to recovering only injunctive relief from [an individual defendant] in his official capacity, as official capacity suits against State agents are limited to injunctive relief”); Emery P. Dalesio, *Lawsuit: Duke, UNC Agreed to Not Hire Each Other’s Doctors*, ASSOCIATED PRESS (Jan. 2, 2018), <http://www.apnews.com/675793130b184364a9d0d8e7764c05cc/Lawsuit:-Duke,-UNC-agreed-to-not-hire-each-other’s-doctors> [http://perma.cc/B5VA-CEHK].

203. William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652, 656-57 (1983).

204. *Id.* at 656.

205. *See id.* at 658.

206. *See id.* at 678.

207. *See id.* at 655.

optimal sanction, therefore, is that it forces an antitrust violator to internalize the costs of its anticompetitive conduct.<sup>208</sup>

The antitrust injury and standing doctrines are designed to result in damage awards that approximate the optimal penalty.<sup>209</sup> The antitrust injury doctrine limits recovery to harms caused by the anticompetitive aspect of the alleged violation<sup>210</sup>—for example, the overcharge in price-fixing cases and lost profits of the victim of an inefficient exclusionary practice.<sup>211</sup> Antitrust standing doctrine further limits the right to recover to relatively efficient plaintiffs among those who have suffered antitrust injury.<sup>212</sup> Section 4 of the Clayton Act, on its face, allows “any person” injured by an antitrust violation to recover treble damages from anyone responsible for the injury.<sup>213</sup> But many antitrust violations are large-scale economic activities that harm numerous actors in different ways unrelated to

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208. *See id.* at 678; Wiley Jr., *supra* note 191, at 774 n.287.

209. An antitrust violation may incur criminal penalties as well as civil damages. *See* 15 U.S.C. § 1 (2012) (specifying that a contract in restraint of trade is a felony and specifying criminal sanctions); *id.* § 2 (specifying similar attributes of monopolization). When prospective violators face expected criminal sanctions as well as damage liability, the optimal penalty will approximate the combination of the two. *See* RICHARD A. POSNER, *ANTITRUST LAW* 47 (2d ed. 2001) (“Criminal and civil remedies for antitrust violations are usually considered and evaluated separately, but this is a mistake.”). The analysis in the text assumes that criminal sanctions will not be imposed.

210. *See* *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (“[I]njury, although causally related to an antitrust violation, nevertheless will not qualify as ‘antitrust injury’ unless it is attributable to an anticompetitive aspect of the practice under scrutiny.” (citation omitted)); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (holding that a private antitrust plaintiff seeking damages “must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful”).

211. *See, e.g.*, *Henry v. N.C. Acupuncture Licensing Bd.*, No. 1:15CV831, 2017 WL 401234, at \*11-12 (M.D.N.C. Jan. 30, 2017).

212. *See* *Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519, 542 (1983) (recognizing that the existence of direct victims of an antitrust violation may prevent more remote victims from having antitrust standing); *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 772 (2d Cir. 2016) (recognizing that to have antitrust standing plaintiffs must be “efficient enforcers of the antitrust laws”). *See generally* John E. Lopatka & William H. Page, *Who Suffered Antitrust Injury in the Microsoft Case?*, 69 *GEO. WASH. L. REV.* 829, 831 (2001) (“Antitrust law has set limits on the scope of liability because actions that violate antitrust law may have both efficient and inefficient consequences, and those consequences may be felt, directly or indirectly, by a multitude of economic actors.”).

213. 15 U.S.C. § 15(a) (“[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States ... and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”).

consumer welfare.<sup>214</sup> If every remote or tangential harm associated with antitrust violations were compensable by treble damages, the remedy would raise a substantial risk of overdeterrence.<sup>215</sup> Together, antitrust injury and standing doctrines aim to minimize the costs of overinclusion and underinclusion otherwise associated with rules of antitrust liability, and to assure optimal deterrence.<sup>216</sup>

If the Supreme Court's limits on *Parker* immunity establish the appropriate scope of antitrust laws, then the Eleventh Amendment is inefficient to the extent that it forecloses a damage remedy that would otherwise deter an actor from implementing an anticompetitive state regulation that reduces economic welfare. In *North Carolina State Board*, for example, the Court denied state action immunity to a state licensing board controlled by active practitioners because it was not actively supervised by an independent state body.<sup>217</sup> If we consider the case from a strictly interest group perspective, the risk of anticompetitive effects is clear.<sup>218</sup> As an amicus brief signed by forty-five public choice scholars put it,

When an economic interest group is given free rein to enact regulations that exclude potential competitors from the marketplace, should we expect that group to use its power in the service of legitimate governmental interests, or should we instead expect that group to promote its own private interests and those of its friends? One does not need a Ph.D. in economics—or even a particularly keen insight into human nature—to guess the answer to this question.<sup>219</sup>

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214. See Lopatka & Page, *supra* note 212, at 831.

215. See Gelboim, 823 F.3d at 772; cf. Wiley Jr., *supra* note 191, at 774 n.286.

216. See generally William H. Page, *The Scope of Liability for Antitrust Violations*, 37 STAN. L. REV. 1445, 1483-85 (1985).

217. N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1117 (2015).

218. See Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 375, 394-95 (1983); see also William H. Page, *Interest Groups, Antitrust, and State Regulation: Parker v. Brown in the Economic Theory of Legislation*, 1987 DUKE L.J. 618, 629, 636 ("An interest group that is seeking state protection from competition will necessarily prefer a clear legislative preference to a simple delegation of the issue to an administrative agency. The clear preference is more valuable because it is more certain to produce the desired anticompetitive consequences.").

219. Brief of Scholars of Public Choice Economics as Amici Curiae in Support of Respondent at 6-7, N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101 (2015) (No. 13-534).

If, as this reasoning predicts, the board's members agreed, in service of their private professional interests, to use the board's powers to exclude a disfavored form of practice, the board acted essentially as a private entity. As private actors, the board and its members would normally be liable for the social costs they impose.<sup>220</sup> The excluded competitors would presumably have antitrust standing, and their lost profits would be antitrust injury and therefore compensable in treble damages in a suit against those responsible.<sup>221</sup> Moreover, state enforcement of the exclusionary action (not available, obviously, to private offenders) could arguably make the harm even more certain, severe, and durable. The absence of a damage remedy might have left an antitrust violation by the board undeterred.

Optimal deterrence not only requires that the sanction imposed be optimal but also that an enforcer seek to impose it.<sup>222</sup> The prospect of damages encourages victims to seek relief. Most antitrust suits are motivated by the prospect of a damage recovery augmented by a proportional attorney's fee.<sup>223</sup> Indeed, the prospect of a damage recovery may be necessary to motivate the filing of meritorious claims, even if it also motivates strike suits. Large-scale class actions alleging concealable offenses, such as price fixing, can take years to litigate,<sup>224</sup> and they carry a substantial risk of a defense victory.<sup>225</sup> An action that survives a motion to dismiss for failure to state a claim because it alleges a plausible price-fixing conspiracy often fails at the summary judgment stage after lengthy and expensive discovery fails to turn up evidence that the defendants conspired within the meaning of Section 1.<sup>226</sup> Only the possibility of a

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220. See *supra* notes 203-08 and accompanying text.

221. See 15 U.S.C. § 15(a) (2012).

222. See Landes, *supra* note 203, at 657.

223. See Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 VAND. L. REV. 675, 675-76 (2010). See generally 15 U.S.C. § 15(a) (providing for treble damages and the recovery of an attorney's fee).

224. Cf. Crane, *supra* note 223, at 692 (focusing on a study involving "private antitrust litigation").

225. Cf. Jeffrey M. Perloff et al., *Antitrust Settlements and Trial Outcomes*, 78 REV. ECON. & STAT. 401, 403-04 (1996) (finding that plaintiffs won approximately 31 percent of private antitrust suits that went to trial).

226. See, for example, *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 869-70, 879 (7th Cir. 2015), in which the Seventh Circuit affirmed summary judgment more than four years after it had affirmed (on interlocutory review) the denial of a motion to dismiss. *In re Text*

damage award would justify bringing an action when the plaintiff faced such a risk.

By foreclosing any damage remedy against the state or its officials for antitrust violations,<sup>227</sup> the Eleventh Amendment increases the probability that some meritorious private antitrust suits are never brought and hence some inefficient antitrust violations are not deterred. It removes a significant incentive for regulators to take antitrust concerns into account. Actions that inflict substantial competitive harm, but are then discontinued, cannot support any kind of relief in antitrust suits against either the state agency or its officials.<sup>228</sup> For example, one state medical board adopted rules limiting competition from telemedicine providers.<sup>229</sup> In doing so, the board was evidently not deterred by the prospect of damage liability or an equitable order. The state legislature overrode the rules,<sup>230</sup> making prospective relief irrelevant, but no antitrust remedy was available to competing medical providers for past harms. The costs of anticompetitive regulations such as these may be substantial. A recent study concluded that 85 percent of the 1790 state licensing boards in the United States are composed predominantly of practicing members of their professions and face little supervision.<sup>231</sup> If a large share of these boards lack state action immunity under *N.C. Dental*,<sup>232</sup> then the risk of anticompetitive conduct that raises prices and excludes rivals in ways that may not immediately provoke an injunction action seems substantial. Eleventh Amendment immunity all but assures that no damage remedy is available.

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Messaging Antitrust Litig., 630 F.3d 622, 627, 629 (7th Cir. 2010).

227. See *supra* note 170 and accompanying text.

228. See *supra* notes 154-55 and accompanying text.

229. See, e.g., Press Release, Fed. Trade Comm'n, Federal Trade Commission Closes Investigation of Texas Medical Board After Texas Passes Law Expanding Telemedicine and Telehealth Services (June 21, 2017), <https://www.ftc.gov/news-events/press-releases/2017/06/federal-trade-commission-closes-investigation-texas-medical-board> [https://perma.cc/VRC8-UW7R].

230. See *id.*

231. See Allensworth, *supra* note 43, at 1572, 1609.

232. *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1117 (2015).



*B. Are There Benefits of Sovereign and Official Antitrust Immunities Beyond the Parker Doctrine?*

So far, we have assumed that state action immunity strikes the optimal balance between the demands of antitrust law and state sovereignty, and that state-connected officials who are not immune are in the same position as private actors, subject to all antitrust remedies. But Eleventh Amendment immunity shelters agencies and officials where, under the *Parker* doctrine, they would remain exposed to damage liability.<sup>233</sup> In the last Section, we analyzed the consequences of this incongruity under the usual standards of antitrust injury and standing. We concluded that Eleventh Amendment immunity from damage liability may tend to impede optimal deterrence of anticompetitive state regulation.

The analysis of optimal deterrence in the previous Section assumed that state officials respond to the prospect of liability in the same way as private actors.<sup>234</sup> But the issue is more complicated than it seems. If we extend the optimal deterrence analysis beyond the assumptions of antitrust injury and standing to take account of the institutional position of state officials, the picture changes. Even if the officials are acting without clearly articulated authority, or without necessary supervision, imposing antitrust damage liability may overdeter regulation.

Regulators, even those in agencies without *Parker* immunity, must make a different calculation than purely private actors. A private actor held liable for antitrust damages, properly defined, internalizes the costs and benefits of committing the offense; it commits the violation when its private benefits exceed its costs.<sup>235</sup> But if a government actor imposes an anticompetitive restraint through the power of the government, the actor and her agency capture at best only a small fraction of the monopoly profits that the restraint causes. Even an active practitioner that participates in imposing a restraint that excludes competing practitioners receives only a small share of the benefits to her profession, yet the damages calculated in accordance with the theory of the optimal penalty

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233. See *supra* notes 154-55 and accompanying text.

234. See *supra* Part III.A.

235. Cf. *supra* notes 203-08 and accompanying text.

would far exceed the actor's private gain. And the regulator may act in many different markets, increasing its exposure. Moreover, an agency official who is not an active practitioner receives only an indirect economic benefit from anticompetitive regulation. One could argue, then, that the general threat of damage liability for anticompetitive regulation creates a disincentive to regulate at all, even for the public benefit. As the Court in *North Carolina State Board* recognized, private practitioners may not agree to serve as regulators, unless the system makes accommodations.<sup>236</sup>

True, private corporate conspirators can also face a risk of damage liability out of proportion to their potential gain from the offense.<sup>237</sup> If the plaintiff chooses to sue a group of rivals and settles early with some of them for relatively small amounts, the last firm to settle will be liable for the full amount of the harm minus the settlement amounts, regardless of the relatively small benefit that the defendant received from the violation because of the doctrine of joint and several liability, the principle of claim reduction, and the absence of a right to contribution among the conspirators.<sup>238</sup> Defendants are encouraged to race to settle. But, in this instance, each defendant also has a chance of paying less than his or her proportionate liability.<sup>239</sup> Ex ante—when the offense is occurring—each defendant faces an expected liability commensurate with his or her gain. This is not the case when a government regulator can be held liable for the full extent of the damage caused by anticompetitive regulation.

The benchmark rates cases present a closer analogy to the regulator. If banks conspire to fix a benchmark rate that benefits them in the sale of financial securities but also injures a vast

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236. See 135 S. Ct. at 1115.

237. See ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 251-54 (2007).

238. See *id.* (concluding that the current rules are “fundamentally unfair” and recommending legislation that would allow reduction of a claim by the settling defendant's proportionate share of liability); see also *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981) (recognizing joint and several liability in antitrust cases with no right of contribution); *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, No. 13 Civ. 7789 (LGS), 2016 WL 5108131, at \*7 (S.D.N.Y. Sept. 20, 2016) (rejecting the argument of nonsettling defendants “that the antitrust laws’ imposition of treble damages and the provision for joint and several liability are themselves ‘disproportionate’”).

239. *Contra* ANTITRUST MODERNIZATION COMM'N, *supra* note 237, at 251-52.

number of traders in other markets, total losses can dwarf the conspirators' gain.<sup>240</sup> Imposing liability for all losses in such a case might result in overdeterrence,<sup>241</sup> but excessive private precaution does not represent the magnitude of social cost that unduly timid regulation does.

In other contexts in which state actors are subject to damage liability, the law has also hedged or limited the imposition of liability to avoid the danger of overdeterrence. In the case of governmental takings, the Constitution itself creates a remedy for just compensation.<sup>242</sup> But the Takings Clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking."<sup>243</sup> State actors may also be liable for damages pursuant to § 1983 for infringement of federal constitutional or statutory rights.<sup>244</sup> But the law tightly circumscribes governmental liability,<sup>245</sup> and even where it is imposed, state law routinely indemnifies private actors.<sup>246</sup> With these limitations, the deterrent effect of governmental damage liability in these contexts has been contested.<sup>247</sup>

Similar concerns about exposing those acting on behalf of governmental entities to damage liability are evident in the

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240. *Cf. Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 779 (2d Cir. 2016) (noting that "if the Banks control only a small percentage of the ultimate identified market" affected by London Interbank Offered Rate (LIBOR) collusion, this case may raise a "concern of damages disproportionate to wrongdoing"). *See generally* Andrew J. Fuller, Comment, *Let the State Decide: The Efficient Antitrust Enforcer and the Avoidance of Anticompetitive Remedies*, 10 J. BUS. ENTREPRENEURSHIP & L. 203 (2017) (arguing that antitrust standing should be denied where damage liability would bankrupt defendants and result in less competitive market structures).

241. *See* ANTITRUST MODERNIZATION COMM'N, *supra* note 237, at 246-47.

242. U.S. CONST. amend V; *see* *First English Evangelical Lutheran Church of Glendale v. County of L.A.*, 482 U.S. 304, 315-16 (1987) ("[T]he compensation remedy is required by the Constitution [for a governmental taking].").

243. *First English Evangelical Lutheran Church of Glendale*, 482 U.S. at 315.

244. 42 U.S.C. § 1983 (2012).

245. For actions in the official capacity of the defendant, the action must be pursuant to a policy or practice of the agency. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691-94 (1978). For actions in the individual capacity of the defendant, the plaintiff must show that the defendant's actions violate a clearly established right. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

246. *See, e.g., Williams v. Horvath*, 548 P.2d 1125, 1131, 1134 (Cal. 1976).

247. *See, e.g., Jon O. Newman, Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447 (1978).

legislative history of the LGAA.<sup>248</sup> The Supreme Court's decisions in *Boulder* and *Lafayette* triggered numerous damages actions against local governments,<sup>249</sup> which, in turn, prompted the governments to lobby Congress for the shelter of statutory immunity.<sup>250</sup> Congress was persuaded that the availability of damages liability for local governments' antitrust violations would do more harm than good:

The Senate Judiciary Committee studied the effects of *Lafayette* and *Boulder* on the operation of local governments over a two year period. It found that “[m]ore than one hundred Federal antitrust suits seeking treble damages [were presently] pending against cities, counties, townships and virtually every other type of local government.” After considering the testimony of several antitrust scholars [including Phillip Areeda], the Committee concluded that “in many instances, the practical impact of *Boulder* and *Lafayette* has been to paralyze the decisionmaking functions of local government. The threat of antitrust treble damage actions has caused local officials to avoid decisions that may touch on the antitrust laws even when such decisions have involved critical public services.” The Committee also concluded that “regardless of whether a local government has violated the antitrust laws, it is inappropriate to assess damages which ultimately must be borne by taxpayers.”<sup>251</sup>

Congress was concerned that the threat of liability would chill individuals from acting decisively in areas that might implicate antitrust.<sup>252</sup> A similar concern induced Congress to enact protection for health care peer review activities in the Health Care Quality Improvement Act of 1986 (HCQIA).<sup>253</sup> Congress was concerned that “the threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law,

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248. See, e.g., *Local Government Antitrust Liability: The Boulder Decision: Hearings Before the Committee on the Judiciary*, 97th Cong. (1982) (statement of Tom Moody, Mayor of Columbus, Ohio).

249. See *Jefferson Disposal Co. v. Par. of Jefferson*, 603 F. Supp. 1125, 1130 (E.D. La. 1985).

250. See David R. Spiegel, *Local Governments and the Terror of Antitrust*, 69 A.B.A. J. 163, 163 (1983).

251. *Jefferson Disposal Co.*, 603 F. Supp. at 1130 (citations omitted).

252. See *id.*

253. Pub. L. No. 99-660, 100 Stat. 3794 (codified at 42 U.S.C. §§ 11101-11152 (2012)).

unreasonably discourages physicians from participating in effective professional peer review.”<sup>254</sup> The Act confers immunity from antitrust treble damage liability on a professional review body and individuals constituting or working with the body when they act reasonably in taking professional review actions.<sup>255</sup> Absent immunity, a hospital peer review committee and its members were at risk of antitrust challenge by physicians they disciplined, such as by withdrawing hospital privileges; even when peer review is authorized by state law, state action immunity might be unavailable for failure to satisfy the two-prong *Midcal* test.<sup>256</sup> Notably, both the LGAA and the HCQIA insulate both the relevant entity and its officials and employees from damage liability.<sup>257</sup> In other areas, such as § 1983, the law has drawn a distinction between the liability of the entity and the liability of officials and employees.<sup>258</sup>

### C. Accidental Efficiency

The current incongruity of state action and Eleventh Amendment immunities is an accident of the application of two frameworks of sovereign immunity to similar settings. It was not a considered (or explained) choice to leave some agencies subject only to Eleventh Amendment immunity in antitrust cases, and to permit injunctive relief in those cases only against agency officials.<sup>259</sup> This Section, however, offers a rationale for the present state of affairs.

One way of thinking about this issue is to ask whether it would make sense to harmonize the two immunities in cases in which, under present law, Eleventh Amendment immunity applies but *Parker* immunity does not. One path to harmony would be to extend

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254. 42 U.S.C. § 11101(4) (2012).

255. *See id.* § 11111(a)(1).

256. *See, e.g.,* Patrick v. Burget, 486 U.S. 94, 100, 105-06, 105 n.8 (1988) (holding in a case decided after enactment of the HCQIA, but to which the Act did not apply, that hospital peer review activities did not have state action immunity because they lacked active supervision).

257. 15 U.S.C. § 35(a) (2012); 42 U.S.C. § 11111(a)(1).

258. *See* Owen v. City of Independence, 445 U.S. 622, 637-38, 657 (1980) (holding that even though municipal officials have immunity from damage liability for actions that violate § 1983, municipalities have none).

259. *See* Susan Beth Farmer, *Altering the Balance Between State Sovereignty and Competition: The Impact of Seminole Tribe on the Antitrust State Action Immunity Doctrine*, 23 OHIO N.U. L. REV. 1403, 1416-17, 1423-28 (1997).

state action immunity to the cases in which Eleventh Amendment immunity applies—in other words to expand category A to include the cases in category D in our earlier diagram. But that choice would probably not be optimal. State action immunity shields all agencies and officials from all types of relief, prospective and retrospective, and from claims by public and private plaintiffs.<sup>260</sup> If the Court was correct to deny state action immunity to agencies that restricted competition without a clearly articulated state policy or without adequate supervision, it would be costly to immunize fully those agencies and officials from all liability. Eleventh Amendment immunity limits those costs by permitting public or private claims for injunctive relief.<sup>261</sup> These differences reduce any costs of underdetering anticompetitive regulation. The antitrust remedial gaps created by the Eleventh Amendment seem modest and generally justified.

That leaves the possibility of restricting Eleventh Amendment immunity to the cases in which state action immunity applies, making the affected state agencies and officials subject to treble damage liability—in other words, simply eliminating category D in our earlier diagram. Of course, under *Seminole Tribe*, Congress cannot abrogate Eleventh Amendment immunity using its Commerce Clause power.<sup>262</sup> But that limitation on congressional power seems purely academic in this instance—given its enactment of the LGAA in the parallel instance of municipal liability,<sup>263</sup> and its continuing solicitude for state autonomy, Congress would certainly not take that path.

Nor would such a course be justified, even if it were conceivable. As we showed in the last part, exposing state officials to damage liability would involve costs of both underdeterrence and overdeterrence. Which costs predominate is an empirical question, but it seems probable that the costs of underdeterrence are small, because of the Eleventh Amendment doctrine's own limitations on the scope of its immunity.<sup>264</sup> First, in some instances, a plaintiff might recover

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260. See *supra* Part I.A.

261. See *supra* Part I.B.

262. See *supra* note 76 and accompanying text.

263. See *supra* notes 248-52 and accompanying text.

264. See *supra* Part I.B.

damages from firms who acted pursuant to nonimmune state regulatory authorization.<sup>265</sup> In such a case, damage liability is imposed on some of the actors responsible for an antitrust violation. Under the doctrine of joint and several liability, the private actors would be liable for all of the harm caused by the overcharge or exclusionary contracts,<sup>266</sup> even though state actors partially responsible for the harm escape liability.<sup>267</sup> And in this instance, the private actors would be the primary beneficiaries of the regulation.

Second, even if damages are not available from private actors, the injunctive remedy may provide sufficient incentives to sue for many offenses and mitigate, if not eliminate, the potential harm they cause. The Eleventh Amendment itself does not preclude the federal government from obtaining any remedy, including damages.<sup>268</sup> But the antitrust laws themselves largely confine the FTC and DOJ to equitable relief.<sup>269</sup> This authority is likely to be adequate in many cases. Most state-created restraints are not concealed—if an agency excludes a firm from the market or facilitates price fixing, everyone is likely to know about it. State agencies are subject to sunshine

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265. See *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592-98 (1976) (suggesting that a regulated utility could be held liable for antitrust damages for conduct taken pursuant to authorization by a state regulatory agency); see also Lopatka, *supra* note 27, at 968-70 (examining the *Cantor* decision). The Court in *Cantor* reviewed its case law and concluded that in

each of these cases the initiation and enforcement of the program under attack involved a mixture of private and public decisionmaking. In each case, notwithstanding the state participation in the decision, the private party exercised sufficient freedom of choice to enable the Court to conclude that he should be held responsible for the consequences of his decision.

*Cantor*, 428 U.S. at 593. *But cf.* *FTC v. Tigor Title Ins. Co.*, 504 U.S. 621, 647 (1992) (O'Connor, J., dissenting) ("Liability under the antitrust laws should not turn on how enthusiastically a state official carried out his or her statutory duties. The regulated entity has no control over the regulator, and very likely will have no idea as to the degree of scrutiny that its filings may receive. Thus, a party could engage in exactly the same conduct in two States, each of which had exactly the same policy of allowing anticompetitive behavior and exactly the same regulatory structure, and discover afterward that its actions in one State were immune from antitrust prosecution, but that its actions in the other resulted in treble-damages liability.").

266. See ANTITRUST MODERNIZATION COMM'N, *supra* note 237, at 251.

267. See *supra* Part I.B (explaining that Eleventh Amendment immunity shields state actors from damages liability).

268. William Van Alstyne, *When Can a State Be Sued?*, 66 POPULAR GOV'T 44, 44 (2001).

269. See John E. Lopatka & James F. Mongoven, *After Preliminary Relief in Merger Cases is Denied, What Then?*, in 17 RESEARCH L. LAW AND ECONOMICS, 149, 154-56, 160-65 (Richard O. Zerbe, Jr. & William Kovacic eds., 1995).

laws,<sup>270</sup> and their actions are often covered by the press.<sup>271</sup> At the very least, disadvantaged entities will know they have been harmed and will have reason to voice their displeasure. State-enforced restraints may actually be more likely than purely private restraints to attract the attention of the federal antitrust enforcers, as they did in *North Carolina State Board* and subsequent investigations.<sup>272</sup>

Public agencies may be more aggressive enforcers than private plaintiffs in seeking injunctive relief. Unlike private parties, public agencies do not maximize profits. For public agencies, the expected cost of a failed injunction action does not enter into a profit calculus, though of course it entails an opportunity cost in light of a budget constraint.<sup>273</sup> Although federal antitrust agencies face various institutional, political, and bureaucratic pressures, they act (at least in theory) to promote the public interest.<sup>274</sup> As a result, the agencies may pursue cases for equitable relief that private parties would not pursue.<sup>275</sup> They have no power to impose a civil or administrative fine, so they cannot penalize past anticompetitive conduct, except in circumstances unlikely to be present in actions involving anticompetitive regulation.<sup>276</sup> Nevertheless, an injunction can prevent

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270. All states and the federal government have “sunshine laws,” which require governmental agencies to open certain meetings and records to the public. See THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE FIRST AMENDMENT HANDBOOK 69-70 (Gregg P. Leslie ed., 7th ed. 2011).

271. See, e.g., Patrick McGeehan, *On the Waterfront, a Mob Watchdog Is Fighting to Survive*, N.Y. TIMES (Jan. 17, 2018), <https://www.nytimes.com/2018/01/17/nyregion/waterfront-commission-new-york-new-jersey-mob.html> [<https://perma.cc/5BYV-PMZH>] (discussing actions of the Waterfront Commission of New York Harbor).

272. See *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101, 1107-08 (2015); see also *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 220-22 (2013); *FTC v. Tigor Title Ins.*, 504 U.S. 621, 625 (1992); *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 50-51 (1985).

273. See Lopatka & Mongoven, *supra* note 269, at 180.

274. *Cf. id.* at 167-78 (discussing alternative hypotheses to explain enforcement decisions of antitrust agencies).

275. See *id.*

276. The United States may recover damages for injuries to its business or property. See Clayton Act of 1914 § 4A, 15 U.S.C. § 15(a) (2012). Both the FTC and the DOJ claim the right to obtain the disgorgement of profits as an equitable remedy. See, e.g., *United States v. Morgan Stanley*, 881 F. Supp. 2d 563, 565, 567 (S.D.N.Y. 2012) (approving consent decree requiring disgorgement by financial services firm to resolve complaint by United States alleging violation of Sherman Act Section 1); *United States v. Keyspan Corp.*, 763 F. Supp. 2d 633, 638-40 (S.D.N.Y. 2011) (holding that the United States has authority to obtain



a continuing violation and thus limit the long-term anticompetitive consequences of a state regulator's action.

Apart from actions by the federal antitrust enforcement agencies for equitable relief, private injunction actions under *Ex parte Young* can limit the harm from anticompetitive state agency conduct.<sup>277</sup> In some cases, only future harm is at stake. Even if harm has occurred, prospective relief may provide a sufficient reason to sue, particularly since the Clayton Act authorizes courts to award successful plaintiffs the cost of suit and a reasonable attorney's fee.<sup>278</sup> The prospect of an injunction may not deter anticompetitive regulation, but the injunction can at least end harmful conduct when it occurs. In *Rodgers v. Louisiana Board of Nursing*, for example, had the plaintiff sought an injunction prohibiting members of the board in their official capacities from terminating her nursing program, she might have satisfied *Ex parte Young*, and the suit (if it had substantive merit) might have protected the students from harm.<sup>279</sup> In fact, if the court had entered a temporary injunction early in the litigation, the students might not have suffered any cognizable damages, and they would have recovered the costs of suit and attorney's fees.<sup>280</sup> As *Rodgers* suggests, the kind of regulatory conduct that would support an antitrust action against an arm of the state will likely have continuing effects that the court can enjoin.<sup>281</sup>

Finally, state law may serve as a check on anticompetitive state agency behavior. Most states have antitrust laws similar to the

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disgorgement as an antitrust remedy); *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 37 (D.D.C. 1999) (holding that the FTC has authority to obtain monetary relief for antitrust violations). *But cf.* *Kokesh v. SEC*, 137 S. Ct. 1635, 1643-44 (2017) (holding that disgorgement imposed as a sanction for violating federal securities law is a "penalty" for purposes of the applicable statute of limitations and thereby calling into question whether it is an authorized equitable remedy under the antitrust laws).

277. *See* Clayton Act of 1914 §§ 4, 16, 15 U.S.C. §§ 15, 26 (2012).

278. *See* Clayton Act of 1914 § 16, 15 U.S.C. § 26. *Ex parte Young* includes the judicial power to impose attorney's fees. *See* *Missouri v. Jenkins*, 491 U.S. 274, 279 (1989) ("[A]n award of attorney's fees ancillary to prospective relief is not subject to the strictures of the Eleventh Amendment.").

279. *Cf.* 665 F. App'x 326, 327, 330 (5th Cir. 2016) (per curiam); *see supra* note 278 and accompanying text.

280. *See* *Rodgers*, 665 F. App'x at 327-28; *supra* note 278 and accompanying text.

281. *See* *Rodgers*, 665 F. App'x at 330.

federal antitrust laws.<sup>282</sup> These laws, which are not preempted by federal law,<sup>283</sup> often mirror federal law in substance.<sup>284</sup> They vary among themselves and with federal law in their enforcement structures and the remedies they authorize.<sup>285</sup> Moreover, anticompetitive regulatory actions may be challenged under theories other than antitrust, such as that they are ultra vires and therefore void.<sup>286</sup> Importantly, the Eleventh Amendment does not affect the enforcement of state law in state courts;<sup>287</sup> for that matter, state action immunity does not directly apply. Whether state law represents a substantial bulwark against anticompetitive state administrative action is debatable.<sup>288</sup> But it may help fill the gaps in federal antitrust enforcement created by the Eleventh Amendment.

#### CONCLUSION

The state action doctrine and the Eleventh Amendment both provide a version of sovereign immunity from the federal antitrust laws for state-connected anticompetitive conduct.<sup>289</sup> But these immunities have evolved separately, and they now vary in the scope of their protection.<sup>290</sup> State action immunity would leave some conduct exposed to the full range of remedies available under the antitrust statutes that the Eleventh Amendment protects. At first glance, this enforcement gap would seem to create a substantial risk that serious anticompetitive conduct will go undeterred, especially because the state actors protected by the Eleventh Amendment wield the power of the government in pursuing their objectives. On closer examination, however, the risk proves modest. The Eleventh Amendment itself does not preclude all remedies against state actors.<sup>291</sup> It permits private injunctive actions against state officials

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282. See WILLIAM T. LIFLAND, *STATE ANTITRUST LAW* § 1.02 (2017).

283. See *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) (“Congress has not preempted the field of antitrust law.”).

284. See LIFLAND, *supra* note 282, § 1.02.

285. See *id.* § 1.07.

286. See Page & Lopatka, *supra* note 32, at 213-14.

287. See U.S. CONST. amend. XI.

288. See ANTITRUST MODERNIZATION COMM’N, *supra* note 237, at 444-46.

289. See *supra* Part I.

290. See *supra* Parts I-II.

291. See *supra* notes 86-89 and accompanying text.

and federal actions for any remedy against state governmental entities and their officials.<sup>292</sup> It does not preclude actions against private antitrust violators enabled by state actors.<sup>293</sup> It has nothing to say about actions under state antitrust laws in state courts.<sup>294</sup> Eleventh Amendment immunity, with all these limitations, seems less costly than eliminating the immunity or eliminating its limitations.

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292. *See supra* Part I.B.

293. *See supra* Part II.B.

294. *See supra* Part III.C.