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Antitrust Immunity: The State of State Action

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STUDENT MATERIAL
Notes

ANTITRUST IMMUNITY: THE STATE OF "STATE ACTION"

I. INTRODUCTION*

Generally viewed with the perplexed indifference one finds associated with the mysticism of astrology, antitrust law has been conceptually cast into that nebulous amalgam which Mr. Serling appropriately termed "The Twilight Zone."[1] This is not too surprising, however, for just as the science of physics purports to explain the seemingly magical forces of gravity, the discipline of antitrust law professes to have mastered the complexities of the forces of competition in our political-economic state, and, while we feel the inescapable presence of both, each is much more elusive in practice than in theory. Emanating from the very core of human nature, self interest,[2] man's innate tendency to compete in all aspects of life (including the marketplace) operates in the modern state under the superimposed influence of governmental hierarchy and economic regulation.

The interdependence of politics, law, and economics has been laboriously studied and extensively documented;[3] it need not be developed fully here. Suffice it to say that antitrust immunity, by its very nature, connotes the widespread application of virtually unchecked power. Whenever the government is permitted to wield such carte blanche authority in the economic sector, serious socioeconomic and political issues may arise. State action immunity, the idea that the state is immune from federal antitrust violations, is no exception. First and foremost, the existence of a state-based immunity and the extent to which it will be conferred upon subordinate governing bodies requires an inquiry into the infra-structure of the system. This vexes the judiciary by calling upon it to reconcile the firmly entrenched con-

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[1] The "Twilight Zone" was a television show broadcast by CBS in the late 1960s and early 1970s. It featured Rod Serling as the narrator.

[2] *See* T. HOBBES, LEVIATHAN (1651).

[3] *See generally* B. MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY (1926) (examining the legal structure generated from the economic interdependence of men and tribes in food gathering and distribution); K. MARX, DAS KAPITAL (1929) (describing the virtues and cohesive stability of a socialist political state); D. RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION (1st Ed. London 1817) ("Like all other contracts, wages should be left to the fair and free competition of the market, and should never be controlled by the interference of the legislature."); C. GIDE & C. RIST, HISTORY OF ECONOMIC DOCTRINES FROM THE PHYSIOCRATES TO THE PRESENT DAY (1st English Ed. 1913) and E. ROLL, A HISTORY OF ECONOMIC THOUGHT (1942) (both works summarize the general development of modern economic thought.)

[4] Parker v. Brown, 317 U.S. 341, 351 (1943). The "dual system of government" refers to the doctrine of federalism which is the cornerstone of the Constitution. *See infra* text accompanying notes 5-9.

cept of a "dual system of government"[4] with the ever-expanding exigencies which attend the administration of the state and local governments. In this context, the judiciary has sought to determine whether subsidiary governing bodies—administrative agencies and municipalities—should be granted the same deference as their supervisory counterparts in the realm of economic regulation.

In order to appreciate the significance of state action immunity, one must first understand the concepts of federalism and state sovereignty, both involving the relationship between the state and federal government.[5] The founding fathers abhored the excesses of tyrannical government, not only with regard to the individual[6] but also with regard to the states.[7] Consequently, they committed themselves to maintaining the sovereign integrity of the states while at the same time establishing a strong central government. State sovereignty and strong central government are, of course, political priorities in diametric opposition. It is within this context that economic regulation must be evaluated and the future effects of federal antitrust laws assessed. Specifically, the inquiry is whether, as Justice Cardozo expressed it, the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together,"[8] or whether each state is a distinct, independent island subject only to the tidal forces of economic prosperity? This question is particularly timely in light of the "new federalism" propounded by the Reagan Administration, an "effort [which] supposedly breaks the mold of the last half century by reversing the transfer of power to the nation's capital."[9] State action immunity casts a somewhat different perspective on the traditional ebb and flow of political power from the states to the federal government; it is in fact an anomally of sorts, antithetical to the facially implicit declaration of the Sherman Act—the preiminence of national economic interests—as well as the historical allocation of power within the Republic.

Relying for the most part on the hour glass format of analysis,[10] this article will attempt to trace the development of state action immunity from the passage of the Sherman Act to the doctrines inception in the landmark case of *Parker v. Brown*.[11] This article will review significant case law development and offer some predictions of future judicial development. In this context, state and municipal action will be given separate treatment, with particular emphasis placed on vicarious

[5] "The development of the state action doctrine made clear that the Supreme Court's answers to [questions of antitrust applicability to state and local governments] were rooted in the constitutional concerns of federalism and state sovereignty, and not in a particular theory of antitrust economics." H.R. REP. No. 965, 98th Cong., 2d Sess. (1984) *reprinted in*, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 4602, 4606 [hereinafter H.R. REP. No. 965].

[6] *See* THE FEDERALIST No. 51 (J. Madison); No. 10 (J. Madison).

[7] *See* THE FEDERALIST No. 39 (J. Madison).

[8] Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935).

[9] J. SHENEFIELD, *The Parker v. Brown State Action Doctrine and the New Federalism of Antitrust*, 51 ANTITRUST L. J. 337 (1982).

[10] The "hour glass format" denotes the fact that the article will trace the development of state action immunity chonologically, moving from the general to the specific and culminating with an analysis of the likely grey areas in which the doctrine will develop in the future.

[11] *Parker v. Brown*, 317 U.S. 341.

state conduct involving governmental agencies and private parties. The analysis will conclude with a prognosis of the vitality of state action immunity in several ripe areas of controversy.

With the above considerations in mind, this overview of state action immunity is undertaken in response to recent developments in the case law, which until lately, in the opinion of one author, was an area of law characterized by "more confusion than cohesion."[12] Two cases in particular, *Southern Motor Carriers Rate Conference, Inc. v. United States*[13] and *Town of Hallie v. City of Eau Claire*,[14] seem to have at long last fashioned some discernible principles out of the Supreme Court's rather circuitous historical path of inconsistencies and nonsequitors. These decisions expand and somewhat clarify one of the Court's most befuddled judicial fabrications—state action immunity. In an effort to further clarify the extent of state action immunity, the analysis will also address a recent Ninth Circuit case, *Deak Perera Hawaii, Inc. v. Department of Transportation*[15] which extended state action immunity to some limited areas of a state's executive branch. Moreover, the Local Government Antitrust Act of 1984,[16] precluding the recovery of damages for antitrust violation from municipal officials,[17] has cloaked municipalities with antitrust immunity so that they are virtually completely shielded from the intensive scrutiny of federal antitrust law. The implications of this Act on state action immunity will also be discussed. The sum and substance of these neoteric developments is that the state action exemption has undergone a bifurcated metamorphosis, culminating in the refinement of vicarious state-agency standards and allowing the extension of municipal dominion over intrastate business activity.

II. THE SHERMAN ACT

Philosophically, the prohibitions of the Sherman Act,[18] a response to the social mutiny of Thomas Carlyle's *Captain of Industry*,[19] spring from the fountainhead

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[12] Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. LAW & ECON. 23, 26 (1983).

[13] Southern Motor Carriers Rate Conference, Inc. v. United States, 105 S. Ct. 1721 (1985).

[14] Town of Hallie v. City of Eau Claire, 105 S. Ct. 1713 (1985).

[15] Deak-Perera Hawaii, Inc. v. Department of Transportation, 553 F. Supp. 976 (D. Hawaii 1983), *aff'd*, 745 F.2d 1281 (1984), *cert. denied*, 105 S. Ct. 1756 (1985).

[16] 15 U.S.C. §§ 34-36 (1984).

[17] *See infra* notes 205-52 and accompanying text.

[18] The Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1982) provides in pertinent part:

> § 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony. . . .
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> § 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign states, shall be deemed guilty of a felony. . . .

15 U.S.C. §§ 1-2 (1982).

[19] T. CARLYLE, PAST AND PRESENT 259 (1843) (a call for heroic leadership from the leaders of industry).

of Oliver Goldsmith's admonition that

> Where wealth and freedom reign contentment fails
>
> And honor sinks where commerce long prevails.[20]

In this regard the Sherman Act was enacted by the Congress as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as a rule of trade."[21] The key term, for the intent and purpose of this analysis, despite its understated quality, is *comprehensive*. Indeed, "[l]anguage more comprehensive [than that of the Sherman Act] is difficult to conceive,"[22] and, as always, overbreadth begets imprecision. It is, in fact, "the inevitably imprecise language of the Sherman Act,"[23] which lays the foundation and creates the necessity for this analysis. In essence, the Sherman Act was little more than a congressional mandate for judicial law-making;[24] consequently, many jurists have turned to the legislative history of the Act in order to bring its parameters into sharper focus.[25] This history points with increasing clarity to the distinct realization that "the Act was designed to supplement rather than to abrogate existing state antitrust enforcement."[26] In short, at the time of the Act's inception, the intended relationship between the states and the national government was basically one of collateral and cooperative enforcement.[27] Moreover, there is evidence to support the contention that, notwithstanding its sweeping directives and prohibitions, the Act was never intended to restrain sovereign state action. In his autobiography, a likely co-author of the Sherman Act, Senator Hoar, stated that the carefully selected language of

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[20] O. Goldsmith, "The Traveller," L.91 (1764).

[21] Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 4 (1958) (emphasis added).

[22] United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553 (1944).

[23] Cantor v. Detroit Edison Co., 428 U.S. 579, 598-99 (1976).

[24] The "Sherman Act may be little more than a legislative command that the judiciary develop a common law of antitrust." P. AREEDA, ANTITRUST ANALYSIS § 104, at 5 (3d ed. 1981).

[25] *But see* Note, *State Action and the Sherman Antitrust Act: Should the Antitrust Law Be Given a Preemptive Effect?*, 14 CONN. L. REV. 135, 160 (1981) which states:

> The legislative history of the Sherman Act is singularly uphelpful for determining the Act's applicability to state action. Quotes from the history by members of the Court either have been taken out of context or have been given special emphasis unsupported by surrounding material. Moreover, evidence can be marshalled to support conflicting approaches to the issue.

[26] Hovenkamp, *State Antitrust in the Federal Scheme*, 58 IND. L. J. 375, 378-79 (1983).

[27] Senator Sherman maintained that the Act was intended:

> to supplement the enforcement of the established rules of the common and statute law by the courts of the several states in dealing with combinations that affect injuriously the industrial liberty of the citizens of these states. It is to arm the Federal courts within the limits of their constitutional power that they may co-operate with the State courts in checking, curbing, and controlling the most dangerous combinations that now threatens the business, property and trade of the people of the United States. . . .

21 CONG. REC. 2456-57 (1890).

the Sherman Act—"restraint of trade"—precluded any possible reference to state or local government. In 1984, the House Committee on the Judiciary quoted Senator Hoar's "restraint of trade" analysis with approval:

> It was expected that the Court, in administering that law, would confine its operation to cases which are contrary to the policy of the law, treating the words 'agreements in restrain of trade' as having the meaning, such as they are supposed to have in England. . . .We thought it was best to use this general phrase which, as we thought had an accepted and well-known meaning in the English law, and then after it had been construed by the Court, and a body of decisions had grown up under the law, Congress would be able to make such further amendments as might be found by experience necessary.
>
> Under English common law, "restraints of trade" applied solely to the actions of individuals; a "monopoly" could only arise from an act of sovereign power. Thus, restraint of trade prohibitions—such as those appearing in statutes forbidding "engrossing" and "forestalling"—were directed against "whatsoever person or persons . . . . " No status or reported case has been found in which a "body politic", as opposed to a private person or "body corporate", was subjected to sanction under restraint of trade statutes.[28]

The body of decisions which Senator Hoar anticipated eventually reenforced his interpretation with regard to both state and municipal liability.[29] Moreover, his analysis is remarkably prescient in view of the passage of the Local Governments Antitrust Act of 1984.[30] It must be noted, however, that after more than three-quarters of a century of judicial scrutiny and evaluation the precise relationship of municipalities to the Sherman Act—"the fundamental principle governing commerce in this country,"[31] "the polestar by which all must be guided in their business affairs,"[32] "the Magna Carta of free enterprise"[33]—remains somewhat uncertain.

III. The State Action Doctrine

A. *The* Parker *Decision*

The state action doctrine was introduced by the United States Supreme Court

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[28] H.R. Rep. No. 965, *supra* note 5, at 4605 n.2 (citations omitted).

[29] *See* Hoover v. Ronwin, 466 U.S. 558 (1984) (reenforcing the *Parker* rationale that action of state legislatures are *ipso facto* exempt from Sherman Act sanction); Town of Hallie v. City of Eau Claire, 105 S. Ct. 1713 (1985) (dispensing with the "compulsion" and "active supervision" requirements for municipalities).

[30] *See supra* note 16.

[31] City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 398 (1978).

[32] *Id.* at 406.

[33] United States v. Topco Ass'n, 405 U.S. 596, 610 (1972).

in *Parker v. Brown*,[34] in which an action taken by a state legislature was held to be immune from antitrust regulation.

The Court's reasoning in *Parker* was, in part, a reaction to the questionable philosophy of the Court's tenure referred to as the *Lochner* Era—a term of art synonymous with the Court's assertion of supervisory power over the substance of state legislation and contractual relationships[35] in the private sector under the guise of the due process clause—in effect, a judicial determination that the states' sovereign interests must succumb to those of the central government, for

> . . .the same considerations that led the court to abandon the excesses of the *Lochner* era also led to its result in *Parker*.
>
> Chastened by its experience with substantive due process, the *Parker* Court was hesitant to override the considered economic choices of a state legislature under such a broad statutory mandate.[36]

Parker involved a clash between the California Agricultural Prorate Act[37] and the Sherman Antitrust Act.[38] Brown, a producer and packer of raisins in California initially brought suit to enjoin the State Director of Agriculture from enforcing a program established for marketing California's 1940 crop of raisins.[39] The raisin industry operated under a procedure whereby the growers sold their raisins to packers, who in turn marketed them through agents, brokers, or other middlemen.[40] California law authorized the establishment of regulatory programs for marketing various agricultural commodities by state officials in order to restrict destructive competition among growers and maintain prices at acceptable levels.[41] Of critical significance was the fact that the Act authorized the creation of the Agricultural Prorate Advisory Commission. This state commission was composed of one state official and eight appointed members and was vested with the authority to administer the program. However, the Commission's marketing plan could not be adopted

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[34] *Parker*, 317 U.S. 341.

[35] This development is traceable to Sir Henry Maine's observation that the movement of the progressive societies has hitherto been a movement from status to contract. *See* K.S. NEWMAN, LAW AND ECONOMIC ORGANIZATION: A COMPARATIVE STUDY OF PREINDUSTRIAL SOCIETIES 6-11 (1983).

[36] Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After Midcal Aluminum*, 61 B.U.L. REV. 1099, 1104-06 (1981).

[37] Act of June 5, 1933, ch. 754, Statutes of California of 1933, as amended by chs. 471 and 743, Statutes of 1935; ch. 6, Extra Session, 1938; chs. 363, 548 and 894, Statutes of 1939; and chs. 603, 1150 and 1186, Statutes of 1941. Its constitutionality under both Federal and State Constitutions was sustained by the California Supreme Court in Agricultural Prorate Commission v. Superior Court, 5 Cal.2d 550, 55 P.2d 495. *Parker*, 317 U.S. at 344, n. 1.

[38] *See supra* note 18.

[39] *Parker*, 317 U.S. at 344.

[40] *Id.* at 345.

[41] "The declared purpose of the Act is 'to conserve the agricultural wealth of the State' and 'to prevent waste in the marketing of agricultural products' of the state." *Id.* at 346.

without the mandatory petition of ten producers within the relevant geographical area.[42]

This specter of quasi-private involvement eventually formed the basis for extending qualified state action immunity to state regulatory programs involving a blend of public and private decision making.[43] The unanimous opinion authored by Justice Stone addressed the alleged Sherman Act violation in only three pages and was—in light of its significance—exceedingly brief and to the point:

> [The prorate program] 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.[44]

In distinguishing between state conduct and purely private action, the Court affirmed 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."[45] Characterizing the prerequisite approval of the producers as merely a "condition" for applying the regulatory program, the Court held that it was the state, acting through the Commission, which adopted and enforced the program;[46] consequently, "the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latters words and history,[47] it must be taken to be a prohibition of individual and not state action."[48] The *coup de grace* of the Supreme Court's steadfast defense of the principles of federalism[49] was its declaration that the state did not enter into a conspiracy or contract to restrain trade, but rather, acting

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[42] *Id.* at 346-47.

[43] In upholding the validity of such mixtures of state and private regulation in principal, although not in the case *sub judice*, the Court in *Cantor v. Detroit Edison Co.* relied upon the fact that "indeed, in Parker v. Brown itself, there was significant private participation in the formulation and effectuation of the proration program. As the Court pointed out, approval of the program upon referendum by a prescribed number of producers was one of the conditions for effectuating the program." *Cantor*, 428 U.S. 579, 592 n.25.

[44] *Parker*, 317 U.S. at 350-51.

[45] *Id.* at 351.

[46] The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required vote on the referendum is one of these conditions.

Id. at 352.

[47] *See supra* notes 18-33 and accompanying text.

[48] *Parker*, 317 U.S. at 352.

[49] *See supra* notes 5-9 and accompanying text.

"as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit."[50] Thus, the state action immunity doctrine was born.

B. *The Development of State Action Immunity After* Parker

Although initially considered to be a facially complete defense to state-endorsed violations of federal antitrust law, the state action exemption, as originally stated in *Parker*, was subsequently subjected to alternating forces of restriction and expansion by the myriad cases which the doctrine engendered—often calling into question the wisdom of the Court's ruling as well as its analysis of the factual circumstances *sub judice.*

1. Pure State Conduct: Act of the Sovereign

The most straightforward aspect of state action immunity—action by a state legislature or its supreme court[51]—is readily discernable in *Parker.* In fact, a careful reading of *Parker* indicates that a definitive legislative statement to regulate was the *sine qua non* of the newly established state action immunity, and with the satisfaction of this criterion, it became a virtual per se rule, shielding state officials from federal antitrust reprisals in the absence of clear congressional intent to supersede state regulation.[52] This view finds additional support in Justice Steven's plurality opinion in *Cantor v. Detroit Edison Co.*[53] In addressing what he termed the "narrow holding"[54] of *Parker*, Stevens noted *ad nauseum* that the *Parker* Court's holding was clearly directed at official action by state officers.[55]

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[50] *Parker*, 317 U.S. at 352.

[51] Goldfarb v. Virginia State Bar, 421 U.S. 773, 790 (1975) accorded state supreme courts the same deference as state legislatures for state action purposes.

[52] *See* Richards, *Exploring the Far Reaches of the State Action Exemption: Implications for Federalism*, 57 ST. JOHN'S L. REV. 274, 280 (1983).

[53] *Cantor*, 428 U.S. 579.

[54] *Id.* at 590.

[55] In his three page discussion of the Sherman Act issue in *Parker v. Brown*, Chief Justice Stone made 13 references to the fact that state action was involved. Each time his language was carefully chosen to apply only to official action, as opposed to private action approved, supported or even directed by the State. Thus, his references were to (1) 'the legislative command of the state,' (2) 'a state or its officers or agents from activities directed by its legislature,' 317 U.S. at 350; and to (3) 'a states' control over its officers and agents,' (4) 'the state as such,' (5)'a state action or official action directed by a state;' (6) 'state action', *id.*, at 351; and to (7) 'the state command to the Commission and to the program committee,' (8) 'state action,' (9) 'the state which has created the machinery for establishing the prorate program,' (10) 'it is the state, acting through the Commission, which adopts the program . . . (11) '[t]he state itself exercises its legislative authority,' (12) '[t]he state in adopting and enforcing

In the post-*Parker* years, the Court's docket was beset by a series of cases concerning the more peripheral aspects of state action immunity, including its applicability to the actions of subordinate governmental agencies, municipalities,[56] and private parties.[57] The "true state action" issue, however, remained in a curious state of unchallenged acceptance. In this regard, if *Parker* was the genisis of pure state action immunity, then its renaissance and clarification was clearly *Hoover v. Ronwin*.[58]

In *Hoover*, the plaintiff was an unsuccessful applicant for admission to the Arizona State Bar. The Arizona Constitution vested authority in the Arizona Supreme Court to govern the admittance to practice law in the state. Pursuant to that authority, the state court created a committee to screen applicants. Significantly, however, the court did not delegate the ultimate authority to the bar committee because the rules provided that the findings of the committee were merely recommendations. The final authority to either admit or deny admission rested with the court. Moreover, the court engaged in individualized review of adverse committee recommendations.[60]

The United States Supreme Court held that the action of the committee constituted action by the Arizona Supreme Court and thus was state action exempt from the antitrust laws. "[B]ased on the [Arizona] court's direct participation in every stage of the admissions process, including retention of the sole authority to admit or deny,"[61] the United States Supreme Court maintained that

> [t]he reason that state action is immune from Sherman Act liability is not that the State has chosen to act in an anti-competitive fashion, but that *the State itself has chosen to act*. 'There is no suggestion of a purpose to restrain state action in the [Sherman] Act's legislative history.' *Parker*, 317 U.S. at 351. The Court did not suggest in *Parker*, nor has it suggested since, that a state action is exempt from antitrust liability only if the sovereign acted wisely after full disclosure from its subordinate officers. *The only requirement is that the action be that of 'the State acting as sovereign.' Bates*, 433 U.S. at 360. The action at issue here, whether anti-competitive or not, clearly was that of the Arizona Supreme Court.[62]

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the prorate program * * * ,' and finally (13) 'as sovereign, imposed the restraint as an act of government * * * . *Id.* at 352.

"The cummulative effect of these carefully drafted references unequivocally differenciates between official action, on the one hand, and individual action (even when commanded by the State), on the other hand.

Cantor, 428 U.S. at 591 n. 24.

[56] *See infra* notes 180-252 and accompanying text.

[57] *See infra* note 64.

[58] *Hoover*, 104 S. Ct. 1989.

[59] *Id.* at 1991.

[60] *Id.* at 1992.

[61] *Id.* at 2000 n.30.

[62] *Id.* at 1998 (emphasis added).

Thus, *Hoover*, in summarizing the Court's interpretation of pure state conduct, returned to the underlying rationale of *Parker*: "when a state legislature adopts legislation, its actions constitute those of the state . . . , and *ipso facto* are exempt from the operation of the antitrust laws."[63]

2. Vicarious State Conduct: Private Parties and Agencies[64]

a. *The search for a standard.* In retrospect, *Parker's* ruling was indeed quite limited, addressing only the action of state officials—as that term was understood in 1943— and leaving little or no guidance for future governmental controversies involving agencies and parties with a more tenuous link to the state sovereign. Thus a more comprehensive inquiry became necessary. Moreover, it would be nearly thirty years before the state action question would come to the fore again,[65] a span encompassing the years from the 1940s to the 1970s—an era in which both the structure and philosophy of the federal government had undergone substantial change. For the most part, then, it was left to the Burger Court to formulate a workable yet practical interpretation of *Parker* immunity for the combined actions of state agencies and private parties. This endeavor was undertaken through a process of trial and error, in which the court engaged in ad hoc policy complemented by the corrective influence of hindsight and reevaluation.

The first of a series of four pioneer cases, *Goldfarb v. Virginia State Bar*,[66] established the initial point of inquiry for applying the state action doctrine. Goldfarb had contacted an attorney to perform a title examination in order to secure title insurance on a home that he had contracted to purchase in Fairfax County, Virginia. The attorney responded that he intended to comply with the minimum fee schedules

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[63] *Id.* at 1995.

[64] For the purpose of this discussion, the case law concerning the applicability of the state action exemption to private parties and agencies will be combined for singular treatment. It must be noted however, that there are other articles written by recognized authorities which accord the case law under the above referenced headings separate treatment. *See* Lopatka, *infra* note 77. This writer respectfully adopts the alternative approach, believing that any such attempt at classification during the doctrine's rudimentary stages would be both inconsequential and exceedingly confusing to neophytes of antitrust law. This categorical problem arises from varied interpretations of the *Parker* case. To begin with, some analysts maintain that *Parker* itself was characterized by "significant private participation," *see Cantor*, 428 U.S. at 592 n.25, an observation applicable to a majority of the case law to be considered forthwith. Two cases are explicitly referred to as "private action:" *Cantor* and *Southern Motor*. The remainder are characterized as "blends" of agency and private action, a problem which arises from the fact that many state regulatory boards are administered by private individuals engaged in the business which they license and regulate.

Following a summary of the Court's entangled development of these areas of law, the writer will make a distinction between state agency conduct and that of private parties based upon the long awaited clarification by recent Supreme Court and lower court cases. *See infra* notes 125-79 and accompanying text.

[65] *But see* Schwegmann Brothers v. Calvert Distillers Corp., 341 U.S. 384 (1951).

[66] Goldfarb, 421 U.S. 773

published by the Fairfax County Bar Association which provided for a fee of one percent of the value of the property in question. Goldfarb sent letters to thirty-six other Fairfax County lawyers requesting information regarding their fees; of the nineteen who replied, all maintained their allegiance to the price schedule.[67] Goldfarb challenged the minimum fee schedule on the grounds that it violated the Sherman Act.

In a unamimous opinion, the Court attempted to clarify and expressly limit the state-based immunity created by *Parker*. The linchpin of the Court's analysis was the finding that the State of Virginia acting through its supreme court did not require the anticompetitive activity under attack.[68] In fact, the General Assembly was silent on this matter, and while the Virginia Supreme Court had been involved to the extent of adopting "ethical codes which deal[t] in part with fees, . . . far from exercising state power to authorize binding price fixing, [the court] explicitly directed lawyers not 'to be controlled' by fee schedules."[69] Apparently, the relationship of the Virginia Supreme Court to the Virginia Bar was historically one of benevolent indifference and not implicit approval.[70]

In condemning what was "essentially a private anticompetitive activity,"[71] the Court held that the fee schedule violated the Sherman Act. Chief Justice Burger began where the *Parker* Court left off, declaring the "threshold inquiry" to be "whether the [anticompetitive] activity is required by the State acting as sovereign."[72] He took the analysis one step further, however, establishing a new criterion to accommodate the increasing involvement of regulatory boards and agencies: "It is not enough that, as the County Bar puts it, anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be *compelled* by the direction of the State acting as a sovereign."[73]

With the introduction of the "compulsion requirement" the Court, according to some, "shifted [the focus] from the identity of the actor to the nature of the act of regulation and implicitly extended the immunity of public officials to private parties."[74] However, this "qualified" extension of immunity was not the virtually

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[67] *Id.* at 776.

[68] *Id.* at 790.

[69] *Id.* at 789.

[70] Although the State Bar apparently has been granted the power to issue ethical opinions, there is no indication in this record that the Virginia Supreme Court approves the opinion. Respondents arguments, at most, constitute the contention that their activities complemented the objective of the ethical codes. In our view that is not state action for Sherman Act purposes. *Id.* at 791.

[71] *Id.* at 792.

[72] *Id.* at 790.

[73] *Id.* at 791 (emphasis added).

[74] Burling, Lee, & Quarter, *"State Action" Antitrust Immunity—A Doctrine in Search of Definitions*, 1982 B.Y.U.L. REV. 809, 815. *See also Cantor*, 428 U.S. 579, 604 (Burger, C.J., separate opinion). "In interpreting *Parker*, the Court has heretofore focused on the challenged *activity* not upon

full-blown exemption which would result from later adjudications.[75] Moreover, this first initiative by the Burger Court to define the reaches of *Parker* immunity created more problems than it solved, for "[e]ver since, there has been confusion about whether state compulsion is a third requirement[76] to be satisfied by private parties claiming state action protection"[77]—a question which the Court would not put to rest until its 1985 term.

Cantor v. Detroit Edison Co.[78] indicated some dissention within the Burger Court regarding the character and extent of state action immunity. In a decision composed of several separate opinions, the Court considered the question of "whether the *Parker* rationale immunizes private action which has been approved by the State and which must be continued while the state approval remains effective."[79] In *Cantor*, the Detroit Edison Company was the sole supplier of electricity in southeast Michigan. Detroit Edison also historically provided light bulbs to its customers without additional charge—supplying almost fifty percent of all light bulbs used in the area.[80] The purpose of the program was to "increase the consumption of electricity;" however, its effect was to "foreclose competition in a substantial segment of the light bulb market."[81] Cantor, a druggist who sold light bulbs, argued that Detroit Edison used its monopoly power in the distribution of electricity to restrict competition in the light bulb market in violation of the Sherman Act.[82]

Complicating the controversy was the fact that the Court was confronted with a combination of regulated and unregulated industries. Although the distribution of electricity was "pervasively regulated by the Michigan Public Service Commission,"[83] the light bulb industry was completely unregulated. Central to the Court's

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the identity of the *parties* to the suit." Recall that Chief Justice Burger penned the plurality opinion in *Goldfarb*.

[75] The liberal interpretation of *Parker* immunity in forthcoming cases was foreshadowed by the Court's statement that: "We recognize that the States have a compelling interest in the practice of professions within their boundaries . . . [and] [i]n holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions."
Goldfarb, 421 U.S. at 792-93.

[76] The two other requirements implicitly referred to are the "clear articulation" and "active supervision" requirements. California Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

[77] Lopatka, *State Action and Municipal Antitrust Immunity: An Economic Approach*, 53 FORDHAM L. REV. 23, 42 (1984).

[78] *Cantor*, 428 U.S. 579.

[79] *Id.* at 581.

[80] *Id.* at 582-83.

[81] *Id.* at 584.

[82] *Id.* at 581.

[83] *Id.* at 584. A Michigan statute vests the Commission with: "complete power to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of such public utilities [particularly the] furnishing . . . [of] electricity for the production of light, heat or power. . . .MICH. COMP. LAWS § 460.501 (1970).

analysis was the fact that there had never been a specific investigation, by either the Michigan Legislature or the Commission, concerning "the desirability of a lamp exchange program or of its possible effect on competition in the light-bulb market."[84] Therefore, in the eyes of the Court, mere Commission approval did not translate into a statewide policy endorsement of Detroit Edison's light bulb scheme. On this basis, the Court inferred that Michigan state policy was "neutral"[85] on the merits of the program in question, and, due to this lack of any articulated state policy governing the distribution of light-bulbs, the program was effectively prohibited by the Sherman Act.

In so holding, the plurality stressed three fundamental points. First, as a "blend of private and public decision-making" which did not "call into question the legality of any act of the State of Michigan or any of its officials or agents, [*Cantor* was] not controlled by the *Parker* decision."[86] Second, that mere state "authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity."[87] Third, with regard to such mixtures of private and public decisionmaking, private parties would "be held responsible for the consequences" when they "exercised sufficient freedom of choice."[88]

Apparently, based upon the Court's holding in *Cantor*, in order to invoke state action as a grounds for immunity, the state must have clearly identified, regulated, and enforced the action of the agency in question. Thus, if the state went beyond mere tolerance of regulatory restrictions, manifesting its sovereign interest through active involvement by specific statutory endorsement, then the Court would seem to be willing to sanction state-delegated authority to agencies that compel anticompetitive practices which would otherwise be in conflict with federal antitrust law.

Reaffirming its line of reasoning in *Cantor*, the Court unanimously upheld state restrictions on attorney advertising *on state action grounds* in *Bates v. State*

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[84] *Cantor*, 428 U.S. at 584.

[85] *Id.* at 585.

[86] *Id.* at 591-92. "[T]he light-bulb program in *Cantor* was instigated by the utility with only the acquiescence of the state regulatory commission." Bates v. State Bar of Ariz., 433 U.S. 350, 362 (1977).

[87] *Cantor*, 428 U.S. at 952-93 (footnotes omitted).

[88] *Id.* at 593. It must be noted, that—based on *Cantor*—"responsibility" did not connote individual liability. In addressing the issue, the majority reasoned that:

> The Sherman Act proscribes the conduct of persons, not programs, and the narrow holding in *Parker* concerned only the legality of the conduct of the state officials charged by law with the responsibility for administering California's program. What sort of charge might have been made against the various private persons who engaged in a variety of different activities implementing that program is unknown and unknowable because no such charges were made. Even if the state program had been held unlawful, such a holding would not necessarily have supported a claim that private individuals who had merely conformed their conduct to an invalid program had thereby violated the Sherman Act. Unless and until a court answered that question, there would be no occasion to consider an affirmative defense of immunity or exemption.

Id. at 601.

Bar of Arizona.[89] Bates and his associate were members of the State Bar of Arizona. In violation of a state bar disciplinary rule, adopted by the Supreme Court of Arizona,[90] that banned advertising by attorneys, Bates placed an advertisement in the newspaper which offered "'legal services at very reasonable fees' and listed their fees for certain services."[91] Addressing the Sherman Act issue with brevity reminiscent of *Parker*, the Court summarized the factual distinctions between *Cantor* and *Bates* which justified the application of state action immunity in the latter:

> The situation before us is entirely different. The disciplinary rules [Disciplinary Rule 2-101(b) embodied in rule 29(a) of the Supreme Court of Arizona which prohibited attorney advertising] reflect a *clear articulation* of the State's policy with regard to professional behavior. Moreover, as the instant case shows, the rules are subject to pointed *re-examination by the policy maker*—the Arizona Supreme Court—in enforcement proceedings. Our concern that federal policy is being unnecessarily and inappropriately subordinated to state policy is reduced in such a situation; we deem it significant that the state policy is so *clearly and affirmatively expressed* and that the *state supervision* is so active.[92]

The advertising ban was summarily rejected on the basis of first amendment grounds; however, this does not negate the significance of the Court's holding with regard to state action immunity. First amendment concerns shed an entirely different light on anticompetitive restrictions, necessitating a higher, more fundamental, level of judicial inquiry in order to safeguard the vested rights of the citizenry to freedom of speech. Consequently, in the balancing of state's interest in economic regulation with the first amendment rights of the individual, the scales of justice at the outset weigh heavily against the aggrandizement of state economic interest via state action immunity.[93]

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[89] *Bates*, 433 U.S. 350.

[90] Disciplinary Rule 2-101(B) provides in part:

> (B) A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.

Id. at 355 (citing 17A ARIZ. REV. STAT. ANN. (Supp. 1976)).

[91] *Id.* at 354.

[92] *Id.* at 362 (emphasis added).

[93] First amendment concerns, for the purpose of antitrust analysis, encompass the issues of advertising restrictions and lobbying efforts to influence governmental decisions. For an introduction to the case law concerning advertising restrictions, *see generally*, Buckley v. Valeo, 424 U.S. 1 (1976); New York Times v. Sullivan, 376 U.S. 254 (1964); Smith v. California, 361 U.S. 147 (1959); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); *Bates*, 433 U.S. 350. For an introduction to the cases dealing with group solicitation of government action, *see* Eastern R.R. Presidents Conference v. Noerr Motor Freight Inc., 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1965); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972). *See also* Fishel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80 (1977).

Cantor and *Bates*, taken together, indicate the Court's emphasis on a clear expression of state policy and subsequent and continuing state review. For all intents and purposes these factors developed into de facto prerequisites for the application of *Parker* immunity to mixtures of state-based public and private economic regulation. Against this background of case law the Court decided *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*[94] Midcal Aluminum was a wholesale distributor of wine in southern California. The California Business and Professions Code provided that all wine producers and wholesalers must file price schedules or fair trade contracts and "[n]o state-licensed wine merchant may sell wine to a retailer at other than the price set."[95]

Justice Powell's unanimous opinion began with the observation that "California's system for wine pricing plainly constitutes resale price maintenance in violation of the Sherman Act."[96] The issue then was whether the plan qualified for state action immunity. The Court, for the first time, made a significant step toward clarifying the analysis to be employed in the application of state action immunity to mixtures of public and private action,[97] explicitly establishing "two standards for antitrust immunity under *Parker v. Brown*."[98] Relying upon the lower court's reasoning in *Rice v. Alcoholic Beverage Control Appeals Board*,[99] and its own earlier

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[94] *Midcal*, 445 U.S. 97.

[95] *Id.* at 99. The statute provided:

> Each wine grower, wholesaler licensed to sell wine, wine rectifier, and rectifier, shall:
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> (a) Post a schedule of selling prices of wine to retailers or consumers for which his resale price is not governed by a fair trade contract made by the person who owns or controls the brand.
>
> (b) Make and file a fair trade contract and file a schedule of resale prices, if he owns or controls a brand of wine resold to retailers or consumers.

Id. at 99 n. 1 (citing CAL. BUS. & PROF. CODE § 24866 (West 1984).

[96] *Id.* at 103.

[97] *Midcal* was originally brought as a mandamus action seeking an injunction against a state agency, the California Department of Alcoholic Beverage Control. The state played no role, however, in setting prices or reviewing the reasonableness of the activities carried out by the private wine dealers. *Midcal*, 445 U.S. at 100-10. The mere fact that the state agency was a named defendant was not sufficient to alter the state action analysis from that appropriate to a case involving the state regulation of private anticompetitive acts. *See Southern Motor*, 105 S. Ct. 1721; *Town of Hallie*, 105 S. Ct. 1713.

[98] *Midcal*, 445 U.S. at 105. Despite the uninamity in some of the case law discussed, it has been observed that:

> The five decisions before *Midcal* contain thirteen separate opinions . . . The court is open to criticism perhaps not so much for the results it has reached in individual cases, but rather for its failure to provide an analytical framework by which future state action cases can be predicted with reasonable certainty.

H.R. REP. No. 965, *supra* note 5, at 4608.

[99] In the price maintenance program before us, the state plays no role whatever in setting the retail prices. The prices are established by the producers according to their own economic interests, without regard to any actual or potential anticompetitive effect; the state's role is restricted to enforcing the prices specified by the producers. There is no control, or "pointed re-examination," by the state to insure that the policies of the Sherman Act are not "unnecessarily subordinated" to state police policy.

Rice v. Alcoholic Beverage Control Appeals Bd., 21 Cal. 3d 431, 445, 579 P.2d 476, 486 (1978).

opinions in *Goldfarb, Cantor*, and *Bates*, the Court stated, "First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the state itself."[100] The California plan satisfied the first criterion but failed to meet the active supervision requirement because the state failed to review, regulate, monitor, or "engage in any pointed reexamination of the program."[101] On this basis, the Court held that "such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement"[102] would never be accorded *Parker* immunity.

b. *Touchstones of immunity. Midcal* is noteworthy as a milestone in the Court's consistently deliberate and piecemeal development of state action immunity. There were, however, several critical ambiguities which clouded the newly elucidated standards of state action immunity for quasi-private state action, *e.g.*, "clear articulation" and "active supervision." Foremost on the slate of salient inquiries was the status of *Goldfarb's* "compulsion requirement." Significantly, *Midcal* did not address the issue of sovereign compulsion of anticompetitive activity; it was therefore uncertain if *Midcal* implicitly nullified the compulsion criterion or if it was perforce to be accorded consideration commensurate with the new *Midcal* standards. There was also a great deal of confusion regarding the applicability of these standards to the emerging body of law concerning municipal access to the state action exemption.[103] The perplexity which generated the debate on the precise relationship of these touchstones of immunity provoked a wealth of analyses concerning their individual merits as prerequisites for state action immunity. At this point, for purposes of continuity, a brief evaluation of the various prerequisites for state action immunity would be useful.[104]

(i) *Clearly articulated and affirmatively expressed state policy.* The requirement of a clearly articulated and affirmatively expressed state policy was unquestionably the nuts and bolts of the developing state action theory, superceding its counterparts and making them superfulous according to some commentators.[105] Serving a "substantial evidentiary"[106] function, it "constitutes a powerful analytical standard"[107] which effectively links the action of administrative agencies with the source of their authority—the state legislatures. In fact, "the approach forbids policy development solely by regulatory agencies."[108] Thus, the clear articulation require-

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[100] *Midcal*, 445 U.S. at 105.

[101] *Id.* at 105-06.

[102] *Id* at 106.

[103] "*Midcal* . . . did not decide whether these standards were applicable to the conduct of local government." H.R. REP. No. 965 *supra* note 5, at 4607 n. 5. *See infra* notes 180-252 and accompanying text.

[104] For a similar analysis, *see* Lopatka, *supra* note 77, at 39-43.

[105] *See* Page, *supra* note 36, at 1136.

[106] Lopatka, *supra* note 77, at 40.

[107] Page, *supra* note 36, at 1122.

[108] *Id.* at 1123.

ment reduces the likelihood of undetected ultra vires activity and provides the judiciary with a palpable process of evaluation for the inevitable antagonism of state and federal economic priorities. In this respect, "[t]he clear articulation standard removes [the] uncertainty while at the same time retaining the deference principle of the *Parker* doctrine,"[109] ensuring that the activity in question was "contemplated"[110] by the state.

Subjected only to the criticism of being, perhaps, overly simplistic,[111] the clear articulation approach may also place an inordinate amount of confidence in the ability of state legislatures; however, if the Court wishes to remain true to the principles of federalism then this is—by necessity—the *quid pro quo.*

(ii) *Active state supervision. Midcal's* "active supervision" requirement was greeted by a resounding groan throughout the academic community—a lament of bewilderment which questioned the wisdom, utility, and problematic enforcement of such a requirement. With the applicable adjectives running the gamut from "oxymoronic" to "ill-founded,"[112] the active supervision standard was the most criticized touchstone of state action immunity. The Court's critics have had difficulty reconciling it with the federalist underpinnings of the original *Parker* decision.[113] Moreover, "[t]he regulatory agency in *Parker*, for example, simply implemented the program; neither it nor the state legislature engaged in any 'pointed reexamination' of the program itself."[114] Thus, the *Midcal* Court appears to have misconstrued the basis as well as the extent of *Parker.*[115]

There are also practical difficulties with the active supervision requirement that make it unduly burdensome, foremost of which is the cumbersome nature of its enforcement. In considering the degree of supervision to be employed, Professors Areeda and Turner posit the question of whether "the court [should] scrutinize the rigor with which the state supervises the challenged activity to ensure that supervision is more than pro forma?"[116] They respond negatively, maintaining that

> [t]here simply is no way to tell if the state has "looked" hard enough at the data, and there certainly are no manageable judicial standards by which a court may

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[109] *Id.* at 1125.

[110] *Hoover*, 104 S. Ct. at 1995.

[111] *See* Page, *supra* note 36, at 1122.

[112] *Id.* at 1134.

[113] "The supervision requirement, although persistent, misconceives the nature and function of state economic legislation. More significantly, it undercuts the accepted rationale for the *Parker* doctrine—deference to clearly articulated state regulatory policy—by imposing a requirement of command-and-control regulation." *Id.* at 1137.

[114] *Id.* at 1135.

[115] Even Professors Areeda and Turner, leading authorities in the antitrust field who recognize the requirement's usefulness, admit that "[t]he federalism concerns at the heart of *Parker* cannot be reconciled with federal court probing of the 'true' motives of state legislatures and agencies." P. AREEDA & D. TURNER, ANTITRUST LAW § 213 (1978).

[116] *Id.*

> weigh the various elements of a "public interest" judgment in order to determine whether the legislature or agency decision was correct. Those are political judgments and ought to be made by the legislature and its delegates.[117]

Again, relegation of supervisory responsibility to the state legislatures reaches the very heart of the issue—the inviolability of state legislative action, which, according to *Hoover*, is "*ipso facto* . . . exempt from the operation of antitrust laws."[118]

Justifiably, the supervision requirement—at least for state agencies and municipalities—did not survive the scrutiny of the Court's 1985 term. In this regard, W. H. Page, gazing into the crystal ball of jurisprudence, wrote in 1981, that "[a]bandoning the supervision requirement would restore doctrinal consistency to this area of the law and would leave the clear articulation test as a simple and effective standard for antitrust analysis."[119]

(iii) *State compulsion. Goldfarb's* proclamation that "anticompetitive activities must be compelled by the direction of the state"[120] in order to enjoy immunity under the state action doctrine generated more confusion than criticism. This uncertainty was perpetuated in large part by *Midcal's* failure to include state compulsion in its "standards of immunity" and also by the *Hoover* dissent's apparent extollment of its analytical significance.[121] These conflicting signals from the Court caused one critic to commiserate that "[t]he role of compulsion in *Parker* analysis continues to bedevil both courts and commentators."[122] There were, however, some authors, particularly John E. Lopatka,[123] who reasoned that "[a]lthough compul-

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[117] *Id.*

[118] *Hoover*, 104 S. Ct. at 1995.

[119] Page, *supra* note 36, at 1137.

[120] *Goldfarb*, 421 U.S. at 791.

[121] In his dissenting opinion, Justice Stevens made four references to the fact that there was an absence of sovereign compulsion. His references were: (1) "The test stated in *Goldfarb* and *Bates* is that the sovereign must *require* the restraint," *Hoover*, 104 S. Ct. at 2007; (2) "Here no decision of the sovereign, the Arizona Supreme Court, is attacked; only a conspiracy of petitioners which was neither compelled nor directed by the sovereign is at stake," *Id.* at 2007-08; (3) "It is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign," *Id.* at 2008 (quoting *Goldfarb*, 421 U.S. at 791); and (4) "Unless the Arizona Supreme Court affirmatively directed petitioners to restrain competition. . . ." *Id.* at 2009.

[122] P. AREEDA & D. TURNER, *supra* note 115, at § 212.5 (Supp. 1982).

[123] In an article preceding the Court's opinion in *Southern Motor Carriers Rate Conference*, 105 S. Ct. 1721, abandoning the compulsion requirement, Mr. Lopatka had the foresight to aver that:

> Although the issue is not yet settled, a fair reading of the cases indicates that state compulsion is not an independent, necessary condition for effective authorization of private conduct. This is also the correct position. Surely a restraint carried out by a private party may be indisputably intended by or within the contemplation of the state without the state having compelled the private conduct. In *Midcal*, the Court said that a private restraint must be consistent with a clearly articulated and affirmatively expressed state policy; it did not explicitly say, and should not be understood to have said, that the only suitable affirmative expression of policy is compulsion.

Lopatka, *supra* note 77, at 42.

sion should not be, and probably is not, a necessary condition for immunity, at times it should be a *sufficient* condition."[124]

c. *Clarification and expansion*—Southern Motor Carriers *and* Town of Hallie. The Court responded to the criticism and uncertainty which plagued its convoluted criteria for applying state action immunity to vicarious state conduct in two significant cases decided in the Court's 1985 term. At this writing, the Court's decision and dicta in these cases constitute the state of the law in this area; as such, their importance to the practitioner cannot be overstated.

Southern Motor Carriers Rate Conference, Inc. v. United States[125] concerned the collective ratemaking practices of "rate bureaus," composed of motor common carriers, operating in the southeast United States. The two rate bureaus submitted joint rate proposals for consideration by several state Public Service Commissions. Each public service commission "exercise[s] ultimate authority and control over all intra-state rates;"[126] however, "[a] proposed rate becomes effective if the state agency takes no action within a specified period of time."[127] Of critical significance was the fact that "collective rate-making is not compelled by any of the States."[128] The United States argued that the two rate bureaus' conduct amounted to action tantamount to conspiratory price fixing in violation of the Sherman Act.[129] The Court granted certiorari to "consider whether the petitioner's collective ratemaking activities, though not compelled by the States, are entitled to Sherman Act immunity under the 'state action' doctrine of *Parker v. Brown*."[130]

Justice Powell's opinion, reflecting the views of a seven member majority, breathed new life into the *Midcal* test while simultaneously putting the quietus to the controversy surrounding the "compulsion requirement." Beginning with the assumption that "[a]lthough *Parker* involved an action against a state official, the Court's reasoning extends to suits against private parties,"[131] the Court validated

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[124] *Id.*

[125] *Southern Motor*, 105 S. Ct. 1721.

[126] *Id.* at 1724.

[127] *Id.* at 1723-24.

[128] *Id.* at 1724.

[129] *Id.* at 1725.

[130] *Id.* at 1723.

[131] *Id.* at 1726. The majority defended this assumption with the following observation:

> The *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States ability to regulate their domestic commerce. If *Parker* immunity were limited to the actions of public officials, this assumed congressional purpose would be frustrated, for a State would be unable to implement programs that restrain competition among private parties. A plaintiff could frustrate any such program merely by filing suit against the regulated private parties, rather than the state officials who implemented the plan. We decline to reduce *Parker's* holding to a formalism that would stand for little more than the proposition that Porter Brown sued the wrong parties. Cantor v. Detroit Edison Co., 428 U.S. 579, 616-17, n.4 (1976) (Stewart, J., dissenting).

Id. at 1726-27.

the applicability of the *Midcal* standards to the action of private parties; "[t]he success of an antitrust action should depend upon the nature of the activity challenged, rather than on the identity of the defendant."[132] The Court also liberalized *Midcal's* "clear articulation" requirement, holding that a private party seeking to invoke the *Midcal* shield "need not 'point to a specific, detailed legislative authorization' for its challenged conduct."[133] A *clear intention* on behalf of the state acting as sovereign to displace competition would satisfy the test.[134]

The Court immolated the compulsion requirement in "one fell swoop,"[135] and renounced it in the name of "unfettered competition and the principles of federalism."[136] Striking at its primordial roots in *Goldfarb*, the Court reasoned that "the focal point of the *Goldfarb* opinion was the *source* of the anticompetitive policy, rather than whether the challenged conduct was *compelled*."[137] The Court held that "*Goldfarb* . . . is not properly read as making compulsion a *sine qua non* to state action immunity:"[138]

> In summary, we hold *Midcal's* two-pronged test applicable to private parties claims of state action immunity. Moreover, a state policy that expressly *permits*, but does not compel, anticompetitive conduct may be 'clearly articulated' within the meaning of *Midcal*. Our holding today does not support, however, that compulsion is irrelevant. . . .Nevertheless, when other evidence shows that a state intends to adopt a permissive policy, the absence of compulsion should not prove fatal to *Parker* immunity.[139]

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[132] *Id.* at 1728.

[133] *Id.* at 1731 (quoting *City of Lafayette*, 435 U.S. 389, 415).

[134] *Southern Motor*, 105 S. Ct. at 1731. The Court, in streamlining the "clear articulation" requirement reasoned that:

> If more detail than a clear intent to displace competition were required of the legislature, States would find it difficult to implement through regulatory agencies their anticompetitive policies . . . requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy its usefulness . . . the State's failure to describe the implementation of its policy in detail will not subject the program to the restraint of the federal antitrust laws.

Id. (citation omitted).

[135] W. SHAKESPEARE, MACBETH (1605-1606) IV, iii, 216.

[136] *Southern Motor*, 105 S. Ct. at 1729.

[137] *Id.*

[138] *Id.*

[139] *Id.* at 1732. The Court's opinion here reversed a Fifth Circuit decision which held (five to four) that private parties did have to meet the compulsion requirement. United States v. Southern Motor Carriers Rate Conference, Inc., 702 F.2d 532 (5th Cir. 1983). One author, lauding the wisdom of the Fifth Circuit's opinion stated that:

> The decision in *Southern Motor Carriers* [Fifth Circuit] presents the correct interpretation of state action requirements for private parties . . . .
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> . . .The *Cantor* decision . . . established that private parties would be treated differently than state parties under the state action doctrine.
>
> State defendants need not meet a compulsion test, because they are acting as an

Thus, where the actor is a private party, in order to invoke state action immunity he need only show a clear state intention to displace competition combined with active state supervision of the conduct in question.[140]

Where the actor is state agency, the standard is apparently even more relaxed. *Town of Hallie v. City of Eau Claire*,[141] a landmark case dispensing with the "compulsion" and "supervision" requirements for municipal immunity,[142] stated in dicta that "[i]n 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."[143] Such language is consistent with *Southern Motors'* interpretation of state supervision occurring "through their agencies."[144] Furthermore, the concept of meaningful self-supervision by a state agency is sufficiently incongruous to preclude the need for discussion. Therefore, given the Court's recent statement in *Town of Hallie* and its continually expanding interpretation of state action immunity, it is likely that in the future the sole criterion for state action immunity for *most* state agencies will be a "clearly articulated" state policy—a requirement satisfied by merely a "clear intention" to displace competition. However, based on the discussion below, there is now authority which indicates that *some* state agencies may in fact be *ipso facto* immune from antitrust prosecution, qualifying for such sweeping protection under the auspices of "sovereign activity," thus preempting the application of even a bare bones standard of "clear articulation."

d. *Expansion of state act is immunity by the lower courts. Deak-Perera Hawaii, Inc. v. Department of Transportation*[145] is an exceedingly perplexing case for purposes of state action analysis. In this regard, the author freely admits that the following interpretation is purely conjecture and is utterly without secondary support by any recognized authority. *Deak-Perera* is a product of an ommission in the reasoning of the *Hoover* case—a loophole of sorts through which the haze of uncertainty has seeped to faintly cloud the *Parker* doctrine. In establishing its *ipso facto* rule of sovereign immunity, the *Hoover* Court stated that "[c]loser analysis is required

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extension of the state. Private parties, in contrast, must show that their actions constitute action, and compulsion is the clearest way to do so.

T. Friedrichsen, *New Life for the Compulsion Requirement of the State Action Doctrine after United States v. Southern Motor Carriers Rate Conference, Inc.*, 1984 J. CORP. L. 626, 632-34 (citation omitted). In view of the Court's rather capricious deletion of the compulsion requirement the above referenced concerns may be put forth again once the dust has settled and the Court's critics begin to sink their teeth into the logic of *Southern Motor*.

[140] After declaring that the "clear articulation" standard had been met, the *Southern Motor* Court concluded that "[t]he second prong of the *Midcal* test is likewise met, for the government has concedeed that the relevant States, *through their agencies*, actively supervise the conduct of private parties." *Southern Motor*, 105 S. Ct. at 1732 (emphasis added).

[141] *Town of Hallie*, 105 S. Ct. 1713.

[142] *See infra* notes 213-25 and accompanying text.

[143] *Town of Hallie*, 105 S. Ct. at 1720, n. 10.

[144] *Southern Motors*, 105 S. Ct. at 1732. *See supra* note 145.

[145] *Deak-Perera*, 745 F.2d 1281.

when the activity at issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization."[146] This author believes that the body of state action law would have been better served had the Court simply stopped there; however, the Court qualified its statement with a footnote: "[t]his case does not present the issue whether the *Governor* of a State stands in the same position as the state legislature and supreme court for purposes of the state action doctrine."[147] Using this cursory addendum as the starting point for its analysis, the Ninth Circuit, in *Deak-Perera*, maintained that "[a]lthough *Hoover v. Ronwin* declares that state legislatures and state supreme courts exercising legislative powers have antitrust immunity without further investigation, it expressly leaves open the circumstances under which the activities of a state *executive branch* are entitled to antitrust immunity."[148] The court liberalized the prior reservation of judgment on the *governor* of a state—arguably a direct and limited reference to the singular executive official—to encompass the much more expansive activities of the *executive branch*. The two distinctions are not coterminous. The term "executive branch" embraces the vast array of assorted agencies, boards, commissions, and departments operating under the authority of *the executive*. The problem arises from the fact that the supervisory link between the executive and these subsidiary governing bodies is often quite tenuous, complicating the evaluation of what manner of conduct qualifies a particular agency for sovereign immunity.

Deak-Perera was the operator of a currency exchange concession at Honolulu International Airport; its services were terminated when the Hawaii Department of Transportation awarded Citicorp a five year exclusive concession. Deak-Perera initiated the suit, alleging violation of federal and state antitrust laws. The state claimed immunity under the *Parker* doctrine.[149] The court began with the observation that "[a]s *Hoover* puts it, the rationale of *Parker* rests on 'principles of federalism and state sovereignty.'"[150] In holding that "[t]hese principles entitle the executive branch of the State of Hawaii to state action immunity,"[151] the court relied exclusively on the Hawaii State Constitution which creates the executive as a *coequal* branch of the state government and establishes departments under the supervision of the governor.[152] "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."[153] The Ninth Circuit opinion provides little in the way of

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[146] *Hoover*, 104 S. Ct. at 1995.

[147] *Id.* at 1995 n. 17 (emphasis added).

[148] *Deak-Perera*, 745 F.2d at 1282 (emphasis added). *But see* Justice Stevens dissenting opinion in *Hoover*: "The fact that petitioners are part of a state agency under direction of the sovereign is insufficient to cloak them in the sovereign's immunity." *Hoover*, 104 S. Ct. at 2007.

[149] *Deak-Perera*, 745 F.2d at 1282.

[150] *Id.* (*Hoover*, 104 S. Ct. at 1995).

[151] *Deak-Perera*, 745 F.2d at 1282.

[152] *Id.*, (*citing* HAWAII CONST. art. V, § 6).

[153] *Deak-Perera*, 745 F.2d at 1283.

clarification as to which entities of the *executive branch* should be accorded blanket *Parker* immunity. Its only effort in that direction was a broad-based distinction between public and private action:

> In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S. Ct. 1123, 55 L. Ed.2d 364 (1978), the Supreme Court . . . specifically rejected the argument that "all governmental entities, whether state agencies or subdivisions of a State, are, simply by reason of their status as such, exempt from antitrust laws." *Id.* at 408, 98 S. Ct. at 1134. However, *Lafayette* involved a government delegation of authority to private parties. We note that this is not a case of private parties imposing competitive restraints in conjunction with state authorities. In such a case the inquiry would be different.[154]

All that one is able to surmise from this rather opague qualification is that executive subsidiaries which are a blend of government and private authority will be singled out for "different" treatment. Presumably, given the Supreme Court's later decisions in *Southern Motor* and *Town of Hallie*, the "clear articulation" and "active supervision" standards will be applied.

The district court opinion,[155] which the Ninth Circuit affirmed, contains a more in-depth analysis and is more helpful in determining which executive branch bodies qualify for the newly established *Deak-Perera/Parker* immunity. To begin with, the district court classifies the Department of Transportation as an *"instrumentality"*[156] of the state, emphasizing the fact that it has "full power to enter into contracts"[157] and is "authorized and required to act in the name of the State of Hawaii."[158] The court elaborated that "[f]or the purposes of this case, it is manifest that the DOT has been delegated the responsibility for the construction, operation and maintenance of all the state-operated commercial airports in Hawaii."[159] Viewing the airport system as serving a "*fundamental* government function,"[160] which was "*vital* to the State of Hawaii from both functional and economic points of view,"[161] the court determined that the actions taken by the DOT were "acts of the state in its sovereign capacity for the public good."[162] In this regard, the court analogized the airport system to "schools, police services, and fire protection" as a *vital* service.[163]

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[154] *Id.*

[155] *Deak-Perera*, 553 F. Supp. 976.

[156] *Id.* at 982 (emphasis added).

[157] *Id.* at 985.

[158] *Id.*

[159] *Id.* at 982; "Haw. Rev. Stat. § 26-19 provides for a department of transportation, headed by a director, which 'shall establish, maintain, and operate transportation facilities of the State, including highways airports, harbors.' " *Id.*

[160] *Id.* at 984 (emphasis added).

[161] *Id.* at 985 (emphasis added).

[162] *Id.*

[163] *Id.* at 984-85.

Notwithstanding the amorphous language employed by the district court (*i.e*,. "instrumentality," "fundamental," and "vital"), when one combines the two *Deak-Perera* opinions, at least the semblance of a workable rule can be discerned. However, to get to the crux of the matter, one must first return to the logic of *Hoover*. In extending the protection of state action immunity to the Arizona Supreme Court's Committee on Examinations and Admissions, the Court was careful to note that "[o]ur holding is based on the court's *direct participation* in every stage of the admissions process, including the *retention of sole authority*. . . ."[164] Presumably, for state action purposes, the Committee on Examinations and Admissions in *Hoover* stands in the same position to the Supreme Court of Arizona as the Department of Transportation in *Deak-Perera* does to the governor of Hawaii. Thus, reading the Ninth Circuit opinion in light of the Court's reasoning in *Hoover*, it would be fair to assert that *Deak-Perera* speaks to bodies of the executive branch which are statutorily created, which do not rely upon authority of private parties, which retain sole authority for their direct participation in the area of their expertise, and which are involved in vital, sovereign-mandated conduct for the public welfare—clearly, a standard not easily met.

The real mystery of *Deak-Perera*, for purposes of legal application, is that the Supreme Court denied a petition for writ of certiorari from the United States Court of Appeals for the Ninth Circuit on March 18, 1985,[165] thereby leaving *Deak-Perera's* extension of *Parker* immunity to the so called "pure breed" of executive branch bodies intact. That was exactly nine days before the court handed down its decision in *Town of Hallie*, stating that active state supervision would probably not be required of state agencies in the future[166] and thus implicitly leaving the clear articulation requirement firmly entrenched.[167] But to which state agencies was the *Hallie* Court referring? Was it simply alluding to agencies which do not qualify for immunity under *Deak-Perera*, or was it tacitly indicating that no manifestation of "state agency," as that term is strictly construed, can be accorded *Deak-Perera* immunity?[168] While the author has no ready answer for these questions, their very

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[164] *Hoover*, 104 S. Ct. at 2000 n. 30 (emphasis added).

[165] *Deak-Perera*, 105 S. Ct. 1756 (1985) (certiorari denied).

[166] *Town of Hallie*, 105 S. Ct. at 1720 n. 10.

[167] For discussion of the merits of the "clear articulation" requirement *see supra* notes 105-11 and accompanying text. The district court's opinion in *Deak-Perera* goes to great length to demonstrate the superfluousness of a clear articulation requirement in "executive branch" antitrust controversies, relying on legislative action to prove its point. If the DOT's activities are to be held exempt from antitrust prosecution on the basis of an *executive* immunity, would not a clear articulation of sovereign executive approval be called for rather than a demonstration of a legislative mandate? *See Deak-Perera*, 553 F. Supp. at 985-88.

[168] Interestingly, and regretfully, Justice Powell took no part in the consideration or decision of the petition for writ of certiorari for *Deak-Perera*. Moreover, he did not take part in any of the writ of certiorari petitions considered on that same day, March 18, 1985, 105 S. Ct. 1740-85 (1985)—leading this writer to the conclusion that his absence is attributable to reasons other than intent. This is significant. Justice Powell penned the Court's opinions in *Midcal, Hoover, Southern Motor*, and, subsequent to the Court's denial of certiorari in *Deak-Perera*, *Town of Hallie*. He is, in a very real sense, the

existence indicates that "state agencies" of "the executive branch" are not likely to be held *ipso facto* immune under *Deak-Perera*. Furthermore, given the quasi-private character of many subordinate executive regulatory boards, the likelihood of their qualifying for *Deak-Perera* immunity is minimal.[169] Having thus narrowed the field somewhat, the process of elimination leads to larger executive bodies such as "departments"—many of which are established by statute. In light of the *Deak-Perera* Court's reference to "schools, police services, and fire protection"[170] as *vital* services these would probably be a safe bet for potential candidates of *Deak-Perera* immunity.[171]

Shedding additional—but not quite illuminating—light on the *Deak-Perera* enigma is a subsequent case decided by the district court for the Eastern District of North Carolina, *Flav-o-Rich v. North Carolina Milk Commission*.[172] The Milk Commission had suspended Flav-o-Rich's license to distribute milk in North Carolina; Flav-o-Rich sought injunctive relief, and the Commission claimed immunity under the state action doctrine. Not only did the Commission appeal for state action immunity, it maintained that it was in fact, an "instrumentality"[173] through which the state acted in a sovereign capacity, thus making the *Midcal* two-prong test inappropriate—in essence asserting *ipso facto* immunity via *Hoover* and *Deak-Perera*. The court distinguished the case before the bench from *Deak-Perera*, reasoning that

> [i]t is not the status of a defendant as an agency, however, which entitles it to

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modern articulator of the state action immunity. Perhaps if he had considered the *Deak-Perera* petition, he would have duly noted and addressed the inconsistencies noted above in his *Town of Hallie* opinion.

[169] *See* Address by Charles F. Rule, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, *Municipal Liability Under the Antitrust Laws: Where We Are and Where We Must Go*, before the National Association of Home Builders (Oct. 25, 1984) (published by U.S. Department of Justice) [hereinafter cited as Justice Dept. Statement]:

> The Department of Justice continues to believe that some statewide governmental units, and in particular professional regulatory boards composed of members of the regulated industry, have the capacity for significant anticompetitive mischief. Unlike local governmental units that generally serve the interests of a broad spectrum of constituents in their geographic area, these statewide bodies protect and promote the interests of a narrow segment of the society. While many of their actions are commendable, there is the danger that these groups will use their power to protect the economic self-interest of their constituency at the expense of the rest of the citizenry. We believe that such groups should be fully subject to the antitrust laws, and indeed have acted to prevent the most serious abuses by such groups. Our support of relief for units of local government should not be taken as a signal that we intend to slacken efforts to prevent private anticompetitive action in the guise of statewide regulation.

[170] *Deak-Perera*, 553 F. Supp. at 984-85.

[171] *But see Id.* at 982 n.30 which refers to "the rather unclear and *incorrect* analysis as to what sort of 'government entities' might require *Midcal* analysis other than a 'state commission, state board, and a state department' mentioned in *Hoover v. Ronwin*." *Id.* (emphasis added).

[172] Flav-o-rich v. North Carolina Milk Comm'n, 593 F. Supp. 13 (1983).

[173] *Id.* at 16.

> the exemption. In *Deak*, for example, the defendant was the state department of transportation. Because the state can act only through its agents, the action of the state transportation department can be considered an act of the state itself. In contrast, defendant is a regulatory commission which acts much like the agency in *Midcal*. Accordingly, the two-pronged test is appropriate.[174]

The court went on to grant the Commission immunity based on the two-tier analysis of *Midcal*; it is significant, however, that the court reaffirmed the contention that a regulatory commission is not to be accorded the same deference as a "state department".[175]

However, lest the analysis be too precise, the United States District Court for the Eastern District of Michigan recently denied the Michigan Department of Public Health state action immunity in *Huron Valley Hospital, Inc. v. City of Pontiac*.[176] Relying on "allegations of action taken ultra vires and in bad faith,"[177] the court denied the Department of Public Health immunity under *Hoover*, not even citing *Deak-Perera*, because the department officials "act neither as a legislature nor as a supreme court. They are officials of a state administrative agency."[178] The logic espoused here is in sharp contrast to that of the *Deak-Perera* court, undermining the proffered distinction between state departments and other executive entities such as regulatory boards and commissions. Returning to the *Deak-Perera* discussion, one plausible explanation for the disparity might lie in the penumbra of the court's discussion couched in terms of the "fundamental" and "vital" nature of the respective activities involved. Perhaps the action of the Michigan Department of Public Health did not warrant such deferential status.

While the author certainly recognizes the utility of executive branch immunity as well as the fact that several of its criteria are subject to empirical verification, he nevertheless remains somewhat wary of it and thus accepts it only begrudgingly. To begin with, the newly established *Deak-Perera* immunity is, in a very real sense, a bastardization of *Hoover*.[179] It is both incongruous and unfortunate, as a more stable basis would surely aid in clarifying the new immunity's application. Moreover, the implicit foundation of executive branch immunity—sovereign approval by the

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[174] *Id.* (citation omitted).

[175] *See also* J.A.J. Liquor Store, Inc. v. New York State Liquor Auth., 102 A.D.2d 240, 478 N.Y.S.2d 318, 1984-2 Trade Cas. (CCH) ¶ 66,070 (1984) (holding the *Midcal* test applicable to the State Liquor Authority); Desoto Medical Center, Inc. v. Methodist Hosp. of Memphis, 48 ANTITRUST & TRADE REG. REP. (BNA) 640 (March 12, 1985): "The factual setting in [*Hoover*] is distinguishable in that there are substantial allegations of actions by the [commission] which go far beyond the legislative grant of authority . . . the state action immunity from the antitrust laws protects only those actions required by the sovereign."

[176] Huron Valley Hosp., Inc. v. City of Pontiac, 48 ANTITRUST & TRADE REG. REP. (BNA) 1119 (June 17, 1985).

[177] *Id.*

[178] *Id.*

[179] *See supra* notes 145-49 and accompanying text.

executive—fares well in theory but collapses in the reality of state government administration due to the inherently attenuated link between state governors and the multitude of subsidiaries within their administrations. Finally, the writer fears that the intangibles of executive branch immunity will result in discretionary application, fostering more chaos than conformity.

3. Municipal Conduct

The fact that municipalities fall within the purview of federal antitrust laws has been long established.[180] Moreover, their turbulent quest for *Parker* immunity has been extensively chronicled.[181] Thus, it is not for a lack of historical or academic background that a review of law in this area is undertaken. Quite to the contrary, the *raison d'etre* for the following analysis is the immediate, on-going evolution of the status of the municipal animal in the eyes of both the Court and the Congress—a transformation evinced by the Local Government Immunity Act of 1984 as well as the Court's ruling in *Town of Hallie*, which reduced all previous documentations of municipal antitrust immunity to a state of obsolescence, save for their historical significance. Mindful of the practitioner's need for case law relevant to municipal regulation the following discussion is intended to provide the latest chapter in the continuing saga of municipal antitrust immunity.

a. *Judicial restraint.* The first Supreme Court case to consider a municipal claim to *Parker* immunity was *City of Lafayette v. Louisiana Power & Light Co.*[182] Lafayette, along with several other cities had been authorized by the state to own and operate electric utility systems within as well as beyond city limits; the cities

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[180] *See* Chattanooga Foundry and Pipe Works v. City of Atlanta, 203 U.S. 390 (1906); Georgia v. Evans, 316 U.S. 159 (1942).

[181] Lopatka, *supra* note 7, at 23 n.15, lists some relevant sources:

See, e.g., ANTITRUST & LOCAL GOVERNMENT (J. Siena ed. 1982); Areeda, *Antitrust Immunity for "State Action" after* Lafayette, 95 Harv. L. Rev. 435 (1981); Brame & Feller, *The Immunity of Local Governments and Their Officials for Antitrust Claims After* City of Boulder, 16 U. Rich. L. Rev. 705 (1982); Cirace, *An Economic Analysis of the "State-Municipal Action" Antitrust Cases*, 61 TEX. L. REV. 481 (1982); Civiletti, *The Fallout from* Community Communications Co. v. City of Boulder: *Prospects for a Legislative Solution*, 32 Cath. U.L. Rev. 379 (1983); Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. Law & Econ. 23 (1983); Robinson, *The Sherman Act as a Home Rule Charter*: Community Communications Co. v. City of Boulder, 2 Sup. Ct. Econ. Rev. 131 (1983); Rogers, *Municipal Antitrust Liability in a Federalist System*, 1980 Ariz. St. L.J. 305 (1980); Sentell, *The United States Supreme Court as Home Rule Wrecker*, 34 Mercer L. Rev. 363 (1982); Slater, *Local Governments and State Action Immunity after* City of Lafayette and City of Boulder, 51 Antitrust L.J. 349 (1982); Stroll, *Home Rule and the Sherman Act After* Boulder: *Cities Between a Rock and a Hard Place*, 49 Brooklyn L. Rev. 259 (1983); Vanderstar, *Liability of Municipalities Under the Antitrust Laws: Litigation Strategies*, 32 Cath. U.L. Rev. 395 (1983); Note, *The Preemption Alternative to Municipal Antitrust Liability*, 51 Geo. Wash. L. Rev. 145 (1982); Note, *Antitrust: The* Parker *Doctrine and Home Rule Municipalities*, 22 Washburn L.J. 534 (1983); Note, *Municipal Government Exemption from Federal Antitrust Laws: An Examination of the* Midcal *Test After* Boulder, 40 Wash. & Lee L. Rev. 143 (1983).

[182] *City of Lafayette*, 435 U.S. 389.

brought an action against a privately-owned electric utility alleging antitrust violations, and the utility counterclaimed on the same grounds. The cities claimed immunity under the state action doctrine. Even though the Supreme Court remanded the case to determine if the municipal activities in question were in fact directed by the state and thus never reached the state action issue, the Court nevertheless emphasized the apparent congressional intent to hold municipalities amenable to the Sherman Act. Justice Brennan, writing for a bare five member majority, maintained that "a Congressional purpose to subject to antitrust control the States' acts of government will not lightly be inferred. To extend that doctrine to municipalities would be inconsistent with that limitation. Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them."[183]

The Court also stressed the "serious economic dislocation" which would result if mere parochial goals were permitted to supercede national economic priorities.[184] In order to prevent this serious imbalance of interests and to better accommodate the inherent tension between federalism and the national commitment to unfettered competition, the Court concluded that " . . . the *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivision, pursuant to state policy to displace competition . . . ."[185] In this regard, the Court established an evidentiary requirement, which did not necessitate reference "to a specific, detailed legislative authorization,"[186] but did require an indication that "the legislature contemplated the kind of action complained of."[187] Thus, after *Lafayette*, in order to immunize municipal conduct on state action grounds the state policy relied on must by "clearly articulated and affirmatively expressed," and must also be "actively supervised"[188] by the state.

Community Communication Co. v. City of Boulder,[189] was the next salient case to evaluate city immunity. It is one of the few cases in which the Court refused to uphold municipal action via state action immunity; consequently, the particular facts at issue in the case would figure prominently in future decisions. Boulder was a "home rule" municipality granted extensive powers of self-government under the Colorado Constitution. Pursuant to this authority, the city had attempted to restrict the expansion of Community Communication's cable television business.

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[183] *Id.* at 412. *See, e.g.*, Edelman v. Jordon, 415 U.S. 651, 667 n. 12 (1974); Lincoln County v. Luning, 133 U.S. 529 (1890) (political subdivisions not protected by eleventh amendment from suit in federal court).

[184] *City of Lafayette*, 435 U.S. at 412.

[185] *Id.* at 413.

[186] *Id.* at 415.

[187] *Id.*

[188] *Id.* at 410.

[189] Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982), *rev'g*, 630 F.2d 704 (10th Cir. 1980).

The cable company alleged that a restriction of that nature would violate the Sherman Act; the city responded that it was immune under the state action doctrine.

Returning to the original dictates of *Parker*, Justice Brennan reiterated *Parker's* pronouncement that "[o]urs is a *dual* system of government which has no place for sovereign cities."[190] All sovereign authority resides either with

> the Government of the United States, or [with] the States of the Union. *There exist within the broad domain of sovereignty but these two.* There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these.[191]

Or, as the court of appeals more succinctly stated, "[w]e are a nation not of 'city states' but of States."[192]

Using these fundamental tenets of federalism as a springboard for its analysis, the Court launched into a precedential excoriation of Boulder's undue restraint of trade. Emphasizing *Lafayette's* declaration that a "subordinate state governmental body is not *ipso facto* exempt from the operation of the antitrust laws,"[193] the Court took the City of Boulder to task for failing to satisfy the "clear articulation" and "affirmative expression" requirements. The Court found the unrestrained authority under the "home rule" provision to be inapposite for state action immunity standards; apparently a much more directed grant of authority was required:

> [P]lainly the requirement of "clear articulation and affirmative expression" is not satisfied when the State position is one of mere *neutrality* respecting the municipal action challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive action for which municipal liability is sought. Nor can these actions be truly described as "comprehended within the powers *granted*," since the term, "granted," necessarily implies an affirmative addressing of the subject by the State.[194]

Thus, in rejecting the City of Boulder's claim to state action immunity, the Court relied heavily on the fact that there was "no interaction of state and local regulation, [finding] only the action or exercise of authority by the city."[195] The Court noted however, that it was expressly reserving judgment on whether a municipality was bound to the second of *Midcal's* criteria—"active state supervision,"[196] leaving the impression that, in the future, municipalities would not be

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[190] *Id.* at 53.

[191] *Id.* at 53-54.

[192] *City of Boulder*, 630 F.2d at 717.

[193] City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434 (5th Cir. 1976).

[194] *City of Boulder*, 455 U.S. at 55.

[195] *City of Boulder*, 630 F.2d at 707.

[196] In *Midcal* we held that a California resale price maintenance system, affecting all wine producers and wholesalers within the State, was not entitled to exemption from the antitrust laws. In so holding, we explicitly adopted the principle, expressed in the plurality opinion

subjected to the level of scrutiny applicable to private parties. In toto, *Lafayette* and *Midcal*[197] connote the synthesis of the Court's criteria for the application of *Parker* immunity, *e.g.*, "clearly articulated," "affirmatively expressed," and "active state supervisions."[198] The Court's opinion in *City of Boulder* should be read as neither resolving the status nor the exact relationship of these factors, due, in large part, to the particular facts of that case. What was clear, however, was that municipalities would be faced with the very real threat of antitrust damage liability for official conduct of local government officials as provided in the Clayton Act.[199]

b. *Congressional initiative: The Local Government Antitrust Act of 1984.*[200] By opening the floodgates for private action against municipalities,[201] the Court's decision in *Boulder* was subjected to a welter of criticism by Congress, much of it to the effect that "the *Boulder* decision was an incongruous, unrealistic, and

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in *City of Lafayette*, that anticompetitive restraints engaged in by state municipalities or subdivisions must be "clearly articulated and affirmatively expressed as state policy" in order to gain an antitrust exemption. *Midcal*, 445 U.S. at 105. The price maintenance system at issue in *Midcal* was denied such an exemption because it failed to satisfy the "active state supervision" criterion described in *City of Lafayette*, 435 U.S. at 410, as underlying our decision in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). Because we conclude in the present case that Boulder's moratorium ordinances does not satisfy the "clear articulation and affirmative expression" criterion, we do not reach the question whether that ordinance must or could ratify the "active state supervision test" focused upon in *Midcal*.

City of Boulder, 455 U.S. at 51 n.14.

[197] *See supra* notes 94-102 and accompanying text.

[198] *See supra* notes 104-24 and accompanying text.

[199] 15 U.S.C. § 15, 15a, 15c (1982). There are three salient damages provisions of the Clayton Act, sections 4 (treble damage claims by "persons"), 4A (single damage claims by the United States), and 4C (treble damage claims by states). *See* H.R. REP. No. 965 *supra* note 5, at 4603.

[200] 15 U.S.C. § 34-36 (1984) [hereinafter cited as The Act].

[201] In addressing "the argument that risks faced by local governments in the area of antitrust liability warrant special treatment," the House Report on the Local Government Antitrust Act of 1984 observed that

> [a]t the time of the *Boulder* decision, no monetary judgment had been assessed against a municipality, although over 30 antitrust suits were then pending. In January of 1984, a jury awarded a group of plaintiffs $28.5 million in damages (after trebling) against Lake County, Illinois, and the village of Grayslake. *Unity Ventures v. County of Lake*, No. 81 C-2745 (N.D. Ill. 1984).
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> Proponents of legislation argue that, given the potential damage awards to which localities are now subject, a judgment could possibly "bankrupt" a municipality, or at a minimum, severely restrict a local government's capacity to provide essential services. In addition, they point out that payment of any antitrust judgment would ultimately be drawn from the "general revenues," thus shifting the burden of the punitive damage award (in the form of threefold damages) from the local officials to the "innocent" taxpayers—a most misdirected and inequitable result. Finally, litigation following the *Boulder* decision has increased, necessitating local units to seek special legal assistance to bolster local governmental counsel, who are usually not trained or experienced in the intricacies of antitrust litigation. These costs may be substantial.

H.R. REP. No. 965, *supra* note 5, at 4611-12.

unworkable decision."[202] One may indeed wonder if the Court did not underestimate the hostile response which its opinion would engender in light of Justice Rehnquist's observation that "it will take a considerable feat of judicial gymnastics to conclude that municipalities are not subject to treble damages [based on the Clayton Act mandatory language]."[203] Owing to our Madisonian system of separation of powers,[204] judicial gymnastics are often subject to the floor rules of Congress. The Local Government Antitrust Act of 1984 (the Act) is indicative of Congress' prerogative to change the rules.

The Act provides in pertinent part:

> Sec. 3(a) No damages, interest on damages, costs, or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity.
>
> (b) Subsection (a) shall not apply to cases commenced before the effective date of this Act unless the defendant establishes and the court determines, in light of all the circumstances, including the stage of litigation and the availability of alternative relief under the Clayton Act, that it would be inequitable not to apply this subsection to a pending case. In consideration of this section, existence of a jury verdict, district court judgment, or any stage of litigation subsequent thereto, shall be deemed to be prima facie evidence that subsection (a) shall not apply.
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> Sec. 4(a) No damages, interest on damages, costs or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) 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.
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> (b) Subsection (a) shall not apply with respect to cases commenced before the effective date of this Act.[205]

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[202] 130 CONG. REC. H12187 (daily ed. October 11, 1984) (statement of Rep. Seiberling).

[203] *City of Boulder*, 435 U.S. at 66 n.2.

[204] *See* THE FEDERALIST No. 51 (J. Madison).

[205] 15 U.S.C. § 35-36. In its interpretation of section 3, subsection (a), the House Report stated:

> Subsection (a) precludes actions for damages under Section 4, 4A, and 4C of the Clayton Act against a local government, or its officials, employees, or agents, resulting from official conduct of a local government. This subsection also provides the same protection for damage suits against persons if the claim results from conduct expressly required by a local government.
>
> Agents of a local government will receive the same protection under this section accorded to the local government, or its officials or employees. As set forth in the analysis of section 2, *supra* [sic] the term agent would include agencies or departments of a local government, or persons employed as consultants, to perform professional services, or to represent the local government. But the term would generally not include persons that operate a business for profit to market a service or product under a license or franchise agreement with a local government—such persons would receive protection only if their conduct is "expressly required" by a local government.
>
> An express requirement may be found, for example, in a law, ordinance, or regulation, or in an authorized contract, license, or franchise agreement. An authorized agreement award-

Significantly, the Act's proscriptions on antitrust liability apply only to actual damages; injunctive remedies remain a viable alternative for claimants pressing antitrust suits. In this respect, at least, the Act can be said to encourage competition, while at the same time providing municipalities with the protection for which cities had been grumbling.[206] Six bills were considered, containing variations of the following liability structures: (1) relief limited to actual damages and injunctive relief or only injunctive relief; (2) relief restricted to single damages and injunctive relief or only injunctive relief; (3) local government immunity based on the acts of its officials or agents or on state authorities of local conduct; and (4) the application of a municipal rule of reason test.[207] After debate, which focused on the exorbitant liability confronting our nation's cities, Congress accorded municipalities, the most expansive protection possible—damages limited to only injunctive relief.

"As to the core concept of these bills—that of providing local governments with the same immunity currently enjoyed by States"[208]—the sponsors of the Act stated as follows:

> In referring in section 4 to the application of the antitrust laws to the conduct of non-governmental parties directed by a local government, the conferees borrowed the phrase "official action directed by" a local government from *Parker v. Brown*, 317 U.S. 341, 351 (1943); and the conferees intend that *Parker* and subsequent cases interpreting it shall apply by analogy to the conduct of a *local government in directing the actions of non-governmental parties, as if the local government were a state.*[209]

The points which the above-quoted language raise are twofold. First, the Act clearly immunizes action of private parties in certain circumstances.[210] Second, the stan-

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ing an exclusive franchise to a firm that will operate a restaurant in an airport, for example, would ordinarily be sufficient to insulate that firm from damage actions brought by disgruntled unsuccessful bidders.

H. R. REP. No. 95, *supra* note 5 at 4622.

[206] This bill gives substantial protection to our Nation's cities and counties. They will not be subject to ruinous monetary damages arising out of actions held to be antitrust violations.

At the same time, the act ensures that the national policy of free competition will be preserved, for cities and counties will be subject to injunctive relief by private parties injured by anticompetitive actions, and by both Federal antitrust enforcement agencies, the Department of Justice and the Federal Trade Commission.

130 CONG. REC. S14368 (daily ed. October 11, 1984) (statement of Sen. Metzenbaum).

[207] H. R. REP. No. 965, *supra* note 5 at 4614. "Rule of Reason" analysis incorporates a balancing approach, whereby state restraints would only be upheld if the potential benefits offset potential harm. *See* P. Areeda & D. Turner *supra* note 115 at § 215(c).

[208] H.R. REP. No. 965, *supra* note 5 at 4615.

[209] *Id.* at 4627. (emphasis added).

[210] *But see* the Additional Views of Congressman Jack Brooks:

First, the scope of the bill as it was reported may be too broad. It applies not only to local governments and their officials, but also private parties whose actions have been expressly required by a local government. This extension to private firms is an attempt to express and codify the existing court developed "state-action" doctrines at the local level. While that

dards to be applied in determining such circumstances are to be discerned from the body of state "state action"[211] law. However, at the time the Act was passed, the House Report expressed concern that "antitrust jurisprudence as it applies to states and state agencies remains case-specific, highly uncertain and, in some areas undefined."[212] Perhaps, the Court had an ear to the floor of the Congress when it granted certiorari to review *Town of Hallie v. City of Eau Claire.*

c. Town of Hallie v. City of Eau Claire *and the Local Government Antitrust Act. Town of Hallie v. City of Eau Claire* concerned four townships seeking *injunctive* relief from the City of Eau Claire's monopoly over sewage treatment services which it in turn had tied to collection and transportation services.[213] The Court accepted the case to consider "whether a municipality's anticompetitive activities are protected by the state action exemption to the federal antitrust laws . . . when the activities are authorized, but not compelled, by the State, and the State does not actively supervise the anticompetitive conduct."[214] In upholding the State of Wisconsin's anticompetitive regulatory scheme, the Court stressed the factual inconsistencies between *City of Boulder* and those in *Town of Hallie*:

> That Amendment to the Colorado Constitution allocated only the most general authority to municipalities to govern local affairs. We held that it was neutral and did not satisfy the "clear articulation" component of the state action test. . . .Here, in contrast, the State has specifically authorized Wisconsin cities . . . to take action that foreseeably will result in anticompetitive effects.[215]

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result may be warranted, I fear that the formulation will create a new and broad doctrine of protection for private firms' actions in conjunction with local governments.

The exemption for private firms should not extend beyond the tightly drawn judicial doctrines which afford protection only if the private activity has been compelled by the government. . . .

Id. at 4625.

[211] This section, dealing with the potential liability of a "person" acting in conjunction with a local government is the most complex aspect of the Act. The problem lies with the language, "official action directed by a local government" as interpreted by the Statement of Managers, which indicates that the nongovernmental relationship will be interpreted as if the municipality is a state, based upon the reasoning of *Parker and subsequent cases.* The grey area is the question whether the language "and subsequent cases" includes the Supreme Court's pending holdings in *Southern Motor* and *Town of Hallie.* Fortunately, the controversy is purely an exercise in legal semantics, significant only in theory and not in practice. Even if the managers did not intend an interpretation based on future cases, the result would be the same. The applicable "state" standard at the time the Act was written was that of *Midcal,* which established a test for private parties consisting of "clear articulation" and "active supervision" requirements, implicitly rejecting the "compulsion" criterion. The only analytical addition which *Southern Motor* provided was the explicit rejection of compulsion. In this respect, it merely reaffirmed *Midcal.* Likewise, *Town of Hallie* (despite the fact that it was a municipal case), if it were in fact intended to be interpretive of the damage prohibition of the Act, would not have incorporated any substantive provision with regard to private parties, since it too propounded a test of "clear articulation" and "active supervision."

[212] H.R. REP. No. 969, *supra* note 5 at 4615.

[213] *Town of Hallie,* 105 S. Ct. at 1715.

[214] *Id.*

[215] *Id.* at 1718-19.

The Court noted that the provisions in question "plainly show that 'the legislature contemplated the kind of action complained of.'"[216] Thus, the Court held that the "clear articulation" requirement had been satisfied. Furthermore, the Court rejected the town's contention that based on *Cantor*[217] and *Goldfarb*,[218] the "clear articulation" test necessitated a demonstration of state compulsion:

> *Cantor* and *Goldfarb* concerned private parties—not municipalities—claiming the state action exemption. This fact distinguishes those cases because a municipality is an arm of the State.
>
> We may presume, absent a showing to the contrary, that the municipality acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf. . . .In short, although compulsion affirmatively expressed may be the best evidence of state policy, it is by no means a prerequisite to a finding that a municipality acted pursuant to clearly articulated state policy.[219]

On the issue of active state supervision, the Court conceded that "[i]t is fair to say that our cases have not been entirely clear."[220] *Lafayette* had suggested that active state supervision was required; however, *Midcal* seemed to limit the supervision requirement to actions undertaken by private parties, and—as noted previously—*City of Boulder* explicitly left the issue open.[221] In limiting the supervision requirement to an essentially evidentiary function, the Court reaffirmed its longstanding distinction between governmental and private conduct:

> Where the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the extent of more overriding state goals. This danger is minimal, however, because of the requirement that the municipality act pursuant to a clearly articulated state policy. *Once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function.*[222]

Clearly, the importance of *Town of Hallie* as guidance for determining municipal immunity should not be underestimated. First, the Court reinforced its "contemplation" interpretation of the "clear articulation" requirement; second, the Court laid to rest the contention that compulsion was the *sine qua non* of a clearly articulated state policy, thereby facilitating municipal access to the broad protection of state

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[216] *Id., citing City of Lafayette*, 435 U.S. at 415.

[217] *See supra* notes 78-88 and accompanying text.

[218] *See supra* notes 66-77 and accompanying text.

[219] *Town of Hallie*, 105 S. Ct. at 1720. For an earlier explication of this view see J. E. Lopatka's discussion, *supra* note 128-29 and accompanying text.

[220] *Town of Hallie*, 105 S. Ct. at 1720.

[221] *See supra* note 196 and accompanying text.

[222] *Town of Hallie*, 105 S. Ct. at 1720-21.

action immunity; and third, the Court nullified the requirement that a state must actively supervise municipal activities. Underlying the above developments is "the Court's presumption that local governments will act in the public interest"[223]—a sea change from the Court's previous philosophy that "cities will follow their parochial interests, just like private parties."[224] Simply stated, in the eyes of the plaintiff's attorney in *Town of Hallie*, "the Court's ruling simply 'eliminates' antitrust action against local governments."[225]

Subsequent to the Court's decision in *Town of Hallie*, the key question became, how is *Town of Hallie* to be interpreted in light of Congress' antecedent passage of the Local Government Antitrust Act? To address this question, one must first look to the House Report on the Act which provides that

> there will be no change in the substantive antitrust law applicable to local governments or persons with whom they deal in suits for *injunctive* relief. . . .
>
> The Committee understands that the substantive law has changed, and will *continue to change*, based on court interpretations. During its recently completed term, the Supreme Court accepted certiorari to review two cases that could directly affect application of the antitrust laws to local government conduct. *Town of Hallie v. City of Eau Claire*, No. 82-1832; *Southern Motor Carriers Rate Conference, Inc. v. United States*, No. 82-1922.[226]

Based upon this language from the House Report, Congress intended that *Town of Hallie* would be relevant to future injunctive actions but that the Act would be independently determinative of damage actions. To this end, recall the interpretation of section 4 of the Act, dealing with "official action of non-government parties directed by a local government," by the statement of the sponsors of the Act; they indicated that the Act should be interpreted based on applicable "state" law.[227] This analysis is subject to rather vague but consistent interpretation. The Justice Department maintains that

> [t]he Act provides somewhat more limited protection from antitrust damage actions to private parties that are subject to local governmental action. Damages may not be obtained from such parties in claims based on "official action directed by a local government, or official or employee thereof acting in an official capacity." This language, borrowed from the Supreme Court's *Parker v. Brown* decision, is intended to incorporate evolving judicial standards for determining whether private parties may claim *Parker's* "state action" defense in a particular case. Thus, the Act creates a "local government action" defense for private parties that parallels the existing state action defense, but is limited to protection against antitrust damage

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[223] Stewart, *Suing Local Governments*, 71 A.B.A. J. 112, 113 (1985).

[224] *Id.*

[225] *Id.* (emphasis added); *See also* Justice Dept. Statement, *supra* note 169 at 11, "the Antitrust Division has no intention of launching enforcement efforts against local governments."

[226] H.R. REP. No. 965, *supra* note 5 at 4603 (emphasis added).

[227] *See supra* notes 207-11 and accompanying text.

> remedies. Local governments, their officials, and private parties subject to local government action remain subject to antitrust injunctive suits under the existing standards of *City of Lafayette* and its progeny.[228]

While a prominent antitrust attorney posits that "the . . . question . . . whether you can still go after private parties who are in collusion with the municipalities . . . remains an open question . . . but will be controlled by the 1984 statute, not by the Supreme Court's recent decision."[229]

Apparently, then—synthesizing the Act with *Town of Hallie* and *Southern Motor*—the rule appears to be thus: plaintiffs seeking damages from local governments or their officials will be barred by the Act; plaintiffs seeking damages based on the combined action of local governments and private parties will be subject to the *state* involvement standards of *Midcal* or *Midcal/Southern Motor*[230] and must prove a lack of *clear articulation of state policy* or *active supervision*. Actions merely to enjoin municipal conduct—controlled exclusively by *Town of Hallie*—will be successful if they can demonstrate a lack of a clearly articulated state policy or, if private parties are involved, a lack of active supervision.

d. *Recent federal decisions*. The standards of municipal review established by the Act and *Town of Hallie* have received consistent if not uniform treatment by recent federal decisions. In *Cine 42nd Street Theater Corp. v. Nederlander*,[231] a suit was filed against the City of New York opposing New York City's and a state-created development corporation's conditional designation of other developers in the Times Square area. The state legislature created the development corporation, and the city was authorized to carry out its implementation. The district court for the Southern District of New York held that the city qualified for state action immunity since it "acted pursuant to a clearly articulated state policy"[232] per *Town of Hallie*.

Montauk-Caribbean Airways, Inc. v. Hope[233] is insightful, as it accords separate and distinct treatment to treble damage claim in light of the Local Government Antitrust Act and the claim for injunctive relief. The plaintiff airline instituted the action against the Town Board of East Hampton for refusal to grant it a full year lease. Several other individuals were also joined in the complaint—the town attorney, a town-employed manager of the airport, and the chief executive officer of Carribbean's competitor, East Hampton Aire, which operated under a year round lease with the town. The district court for the Eastern District of New York first

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[228] Justice Dep't. Statement, *supra* note 169, at 9-10.

[229] Stewart, *supra* note 223, at 113-14.

[230] *See supra* note 211.

[231] Cine 42nd Street Theater Corp. v. Nederlander, 48 ANTITRUST & TRADE REG. REP. (BNA) 713 (April 16, 1985).

[232] *Id.* at 714.

[233] Montauk-Caribbean Airways, Inc. v. Hope, 710 TRADE REG. REP. (CCH) ¶ 66,660 (May 30, 1985).

considered the town's claim of immunization from damage actions under the Local Government Antitrust Act:

> Here, the Court believes that the Local Government Antitrust Act bars that part of the complaint based on the Clayton Act. First, we are concerned in this case with local government employees and officials as contemplated under the Act. This is apparent as the Town defendants were either connected to the Town's general governmental functions through the Town board and its Attorney's office, or by virtue of being appointed and employed by the Town. Second, the Town defendants were acting in their official capacities in executing and enforcing the lease in question, and in overseeing airport operations.[234]

On the airline's claim for injunctive relief under the Sherman Act, however, the court correctly noted that "the aim of the [Act] is to preclude suits . . . [under] the Clayton Act;"[235] it was not intended to preempt Sherman Act appeals for injunctive relief. However, based upon the court's position that all the town defendants were acting in an official capacity and the absence of any reference to the consideration of any private defendants,[236] the court appears to have applied an inappropriate state action analysis. This is so because the court used the clearly articulated state policy and active supervision test of *Community Communication Co. v. City of Boulder*.[237] In *City of Boulder* however, the Court specifically reserved judgment on the supervision issue.[238]

As noted previously, *Town of Hallie* spoke to the official conduct of municipalities with unmistakable clarity and dispensed with the active supervision requirement: "we now conclude that the active state supervision requirement should not be imposed in cases where the actor is a municipality."[239] For this reason, the author believes that the district court opinion will fail on appeal.

In *Woolen v. Surtran Taxicab, Inc.*,[240] the district court for the Northern District of Texas considered a taxicab operator's antitrust claims based on a competitor's exclusive right to provide taxi services at the Dallas/Fort Worth airport. The case involved both the city and the competing cab company, a private defendant. Noting that "the decision to grant an exclusive airport taxi franchise 'is a logical and reasonable consequence of the [s]tates' broad allocation of authority to cities to jointly acquire, own and operate municipal airport,"[241] the court determined that "both criteria a private party must satisfy to enjoy state action immunity under

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[234] *Id.* at ¶ 63,104. For discussion of Clayton Act see supra note 199.

[235] *Id.* (citing H.R. REP. 965 *supra* note 5, at 4603).

[236] Included in the suit was a chief executive officer of East Hampton Aire, clearly a private individual. However, his involvement appears to be limited to a counterclaim for defamation. Moreover, every reference by the court to the parties is in the language, "town defendants."

[237] *City of Boulder*, 455 U.S. 40.

[238] *See supra* note 196.

[239] *Town of Hallie*, 105 S. Ct. at 1720.

[240] Woolen v. *Surtran* Taxicab, Inc., 49 ANTITRUST & TRADE REG. REP. (BNA) 369 (August 8, 1985).

[241] *Id.* at 370.

Town of Hallie are met in the instant case . . . the challenged restraint is clearly articulated . . . and the regional airport board actively supervised the private defendants' conduct."[242] Thus, unlike the situation in *Hope*, active supervision is still a requirement for regulated private conduct.

Employing the clear articulation standard for municipal conduct in *Town of Hallie*, the Fifth Circuit upheld the City of Houston's exclusive concession contract with a taxicab company at a city airport in *Independent Taxicab Driver's Employees v. Greater Houston Transportation Co.*[243] The city owned and operated the airport. Moreover, the Texas Legislature "vested extensive regulatory discretion in its cities over the taxicab industry."[244] Despite the fact that the state statute did not expressly address ground service transportation, the court interpreted "the statutes broad phrasing [as] a strong indication of the state's desire to abdicate in favor of municipal presence with regard to airport management."[245] This "indication" was all that the district court needed to justify the application of the state action doctrine.

In *Riverview Investments, Inc. v. Ottawa Community Improvement Corp.*,[246] the Sixth Circuit echoed the Fifth Circuit's lenient application of *Town of Hallie's* clear articulation requirement. Examining a mixture of municipal and private regulation of the issuance of industrial revenue bonds, the court succinctly summarized "the Supreme Court's recent reaffirmation of a two-pronged state action test."[247] "The first prong requires that the anticompetitive behavior derive from a clearly articulated state policy, the second prong requires active supervision of the anticompetitive behavior, but only when the actor is a *private* party rather than a municipality, a modification or clarification of previous law."[248]

The court held that the clear articulation requirement is satisfied when the restrictive action by the municipality is a "logical and necessary outcome of the authority"[249] granted. The court remanded the case to ascertain the private character of the action in question.

In cases similar to the two above, the Eighth Circuit espoused a liberal interpretation of "clear articulation." In *L&H Sanitation, Inc. v. Lake City Sanitation, Inc.*,[250] the court immunized the City of Heber Springs, Arkansas which granted

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[242] *Id.*

[243] Independent Taxi Driver's Employees v. Greater Houston Transp. Co., 48 ANTITRUST & TRADE REG. REP. (BNA) 929 (May 17, 1985).

[244] *Id.*

[245] *Id.*

[246] Riverview Inv. Inc. v. Ottawa Community Improvement Corp., 49 ANTITRUST & TRADE REG. REP. (BNA) 300 (July 31, 1985).

[247] *Id.*

[248] *Id.*

[249] *Id.*

[250] L & H Sanitation, Inc. v. Lake City Sanitation, Inc., 49 ANTITRUST & TRADE REG. REP. (BNA) 371 (August 9, 1985).

an exclusive solid waste disposal franchise. The court construed the clear articulation requirement from the standpoint of inferred legislative intent. The court stated that "the legislative intent to displace competition can be inferred from the statutory scheme because it is a necessary and reasonable consequence of engaging in the authorized activity."[251]

Even the most perfunctory examination of the cases cited above should lead the reader to two inescapable conclusions. First and foremost, of the six post *Hallie* lower court opinions considered, not one court refused to cloak the municipality in question with the immunity which it sought[252] according relief from both damages and injunctive suits as per the Local Government Antitrust Act and *Town of Hallie*. Second, the courts gave liberal interpretation to the "clear articulation" requirement in injunctive suits, deeming that requirement to be satisfied on the basis of a mere "indication" or a "logical, reasonable, or necessary" inference of state legislative intent to displace competition. Moreover, the courts appear somewhat reluctant to afford injunctive relief to the complaints of combinations of municipal and private party conduct.

C. *Summary*

Despite its complex and inconsistent development, the present state of "state action immunity" can be briefly stated. Legislative action by a state legislature is immune, as are measures adopted by a state supreme court or subsidiaries acting pursuant to court authority as evidenced by "the court's direct participation in every stage"[253] of the conduct in question. Similarly, some, but not all, activities of a state's executive branch will be accorded state action immunity; state departments, created by statute, which do not rely on private authority and which provide "vital"[254] service to the state will qualify. Other state entities such as state regulatory boards and state commissions will be immune only upon showing that they acted according to a "clearly articulated" state policy to displace competition.

The intrusion of private activity into state or municipal economic regulation necessitates the application of a two-pronged standard. Not only must the private conduct be pursuant to a "clearly articulated" state policy, it must also be subject to "active state supervision."

Suits against municipalities fall into two categories, those for damages and those for injunctive relief. Under the Local Government Immunity Act of 1984, no one may recover damages from a municipality or its official based on action taken in an official capacity. If, however, private activity is involved, immunity will be granted

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[251] *Id.*

[252] Note however that *Montauk* and *Riverview* were remanded to ascertain the extent of the private action involved.

[253] *Hoover*, 104 S. Ct. at 2000 n.30.

[254] *Deak-Perera*, 553 F. Supp. at 985.

only if the private party can prove that it acted upon the direction of the local government. To this end, the party must meet the burden of the state standards of a "clearly articulated" state policy and "active supervision." Actions merely to enjoin municipal conduct under the Sherman Act appear to remain a viable alternative. In order to be successful, claimants must prove a lack of a clearly articulated state policy, or, if private activity is involved, a lack of active supervision.

IV. CONCLUSION

The focus of this article has been directed specifically at state action immunity strictly in terms of an exemption-oriented analysis. Sacrificing breadth for brevity, the author elected not to discuss the separate areas of preemption analysis[255] and first amendment concerns.[256]

Justice White, summarizing what he termed "a not unusual characteristic of legal development," once observed that "broad principles are articulated, narrowed when applied to new contexts, and finally replaced when the distinctions they rely upon are no longer tenable"[257]—an observation not inapplicable to state action immunity. To begin with, the broad principles of federalism which formed the basis of the original *Parker* decision have not only become untenable, they are virtually obsolete in the realm of economics. With regard to economic regulation, we are truly no longer a "dual system of government" as the *Parker* Court observed in 1943. With the advent of blanket immunity for municipalities in 1984 we have indeed become the nation of "city states" which the *Boulder* Court sought to suppress. The evolution of this third body politic—a third sovereign—goes to the very core of the concerns generated by bourgeoning governmental immunity.

An argument can be made that such a sweeping decentralization of economic control, the "new federalism," is actually an unprecedented conferral of the regulatory sword and the shield of immunity to governing bodies with inherently limited interests and an intrinsic susceptibility to the corruption by parochial interests. The preeminent question is whether Congress has placed an inordinate amount of confidence in the administration of local governments. Intensifying the problem is the fact that claimants finding themselves in harm's way, or, rather that of provincial progress, will be lucky to be afforded only the relief of cessation and not compensation, giving poignant meaning to the adage, what is done cannot be undone.

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[255] *See generally* Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978); New Motor Vehicle Bd. of Cal. v. Arrin W. Fox Co., 439 U.S. 96 (1978); *City of Boulder*, 455 U.S. 40 (1982) (J. Rehnquist dissenting); Rice v. Norman William Co., 458 U.S. 654 (1982); Note, *supra* note 30; Comment, *Antitrust—State Action—Home Rule Municipality's Ordinance Not Exempt from Sherman Act*—Community Co. v. City of Boulder, 12 SETON HALL L. REV. 835, 851-64 (1982).

[256] *See supra* note 93.

[257] Cabell v. Chavez-Salido, 454 U.S. 432 (1982).

Abuse of this unchecked authority will not only distort the free flow of commerce, if wielded arbitrarily or capriciously the manifold immunity of federal, state, and now municipalities, will also threaten the core philosophy of our democratic republic, challenging the concept that for every wrong suffered by the individual there is a remedy and diluting the accountability of the elected. To be sure, these are not traditional antitrust priorities. Nevertheless, as economic pragmatism spawns political and judicial invention, history teaches that it is always prudent to keep a watchful eye on the fragile "egg of democracy."[258]

W. Scott Campbell

[258] J. R. LOWELL, LITERARY ESSAYS, *New England Two Centuries Ago.*