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The Antitrust State Action Exemption: An Essay on Doctrinal Organization from Parker {Parker v. Brown, 317 U.S. 341} to Hallie {Town of Hallie v. City of Eau Claire, 105 S. Ct. 1713 (1985)} and Southern Motor Carriers {Southern Motor Carriers Rate Conference, Inc. v. United States; 105 S. Ct. 1721}

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THE ANTITRUST STATE ACTION EXEMPTION: AN ESSAY ON DOCTRINAL ORGANIZATION FROM *PARKER* TO *HALLIE* AND *SOUTHERN MOTOR CARRIERS*

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TABLE OF CONTENTS

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I. INTRODUCTION

The purpose of federal antitrust law is to promote and enforce the national policy of unrestrained market competition.[1] State and local governments, however, sometimes restrict competition in specific markets to facilitate improvement of the health and welfare of their residents. Furthermore, the principles of federalism allow states to regulate local markets in response to matters of local concern.[2] Therefore, a legal tension exists between the competitive objectives of federal antitrust law and the interests of state and local governments. This article examines the extent to which federal antitrust laws must accommodate sovereign acts of states and their political subdivisions that restrict competition.

Congress did not intend antitrust laws to "restrain state action or official action directed by a state."[3] A state, however, may not avoid the application of antitrust laws within its borders. Prudent implementation of state and local policies may require restriction or elimination of competition in some markets. These conflicting interests manifest themselves in the judicially created state action exemption, which shields some state and local government anticompetitive conduct from

1. *See* Justice Douglas' dissent in United States v. Columbia Steel Co., 334 U.S. 862 (1948).

2. *See* Weschler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

3. Parker v. Brown, 317 U.S. 341, 351 (1943).

antitrust law. Courts created the state action exemption to reconcile the national policy of free competition with unique state and local concerns.

Two recent Supreme Court cases clarified ambiguities in the application of the state action exemption to antitrust enforcement. In *Town of Hallie v. City of Eau Claire*[4] the Court refined application of the exemption to anticompetitive municipal conduct. The Court held that Eau Claire did not violate antitrust laws because Wisconsin statutes clearly contemplated the challenged conduct. Furthermore, the Court held that there is no absolute requirement that a state actively supervise or compel the challenged conduct for application of the exemption to municipal conduct. In *Southern Motor Carriers v. United States*[5] the Court addressed application of the state action exemption to anticompetitive conduct allegedly authorized by state or local government. The Court held the state action exemption applied to private conduct if a state clearly articulates no intent to replace competition with active supervision of the challenged conduct.[6] Most significantly, the Court held that a state need not "compel" the private conduct for the exemption to apply, but may merely "permit" it to occur.[7]

Hallie and *Southern Motor Carriers* are evaluated best in light of the case law they succeed. Neither case significantly alters the state action exemption, nor resolves all remaining uncertainties about its application. The cases, however, refine the limits of the state action exemption. *Hallie* and *Southern Motor Carriers*, therefore, should lead to a better understanding of when the state action exemption applies and, thus, will facilitate state and municipal decisionmaking.

This article analyzes the state action exemption by examining the case law to which it has given rise. The case law can be analyzed and synthesized. This is not to suggest that the state action doctrine is necessarily the best means to reconcile the Sherman Act and state sovereignty. The state action doctrine must nevertheless be appreciated for the flexibility it brings to antitrust enforcement. The doctrine, as it exists today, is capable of responding to changing market conditions and policy considerations.

4. 105 S. Ct. 1713 (1985).
5. 105 S. Ct. 1721 (1985).
6. *Id.* at 1728-29.
7. *Id.* at 1728.

A. *State Action Doctrine and the* Midcal *Test*

Every antitrust state action question can be traced to the 1943 *Parker v. Brown*[8] decision in which the Supreme Court held exempt from antitrust scrutiny a state raisin marketing program. The California Agricultural Prorate Act had directed state officials to establish commodity marketing programs. State officials designed, with the aid of raisin growers, the challenged program to control raisin supplies and prices to protect California growers. The Court observed that had concerted private activity created the price setting scheme it would have been per se illegal under the Sherman Act.[9] Chief Justice Stone's *Parker* opinion implies that state action may immunize conduct from antitrust enforcement only when the state legislature in its sovereign capacity authorized the challenged actions, and the specific program challenged was adopted and enforced pursuant to legislative authorization.[10]

Parker established that a court's threshold inquiry should be whether the state acted in its sovereign capacity to regulate independent entreprenurial activity. The *Parker* Court left unanswered an array of perplexing issues. Are all acts of a state "sovereign?" May a state delegate its authority to exempt to agencies or political subdivisions such as municipalities? Under what circumstances can private parties claim antitrust immunity? These issues remained relatively unlitigated until a series of Supreme Court decisions brought the state action doctrine into the forefront of antitrust litigation.[11] The Court did not advance a doctrinal formulation of the state action exemption until its 1980 opinion in *California Liquor Dealers v. Midcal Aluminum*.[12] The Court stated that "[f]irst, 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."[13]

The *Midcal* test captures the essence of the state action exemption by limiting its scope. The first part of the *Midcal* test examines whether a

8. 317 U.S. 341, 351 (1943).

9. *Id.* at 350.

10. *See id.* at 352.

11. *See* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); New Motor Vehicle Bd. of California v. Orrin W. Fox Co., 439 U.S. 96 (1978); Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

12. 445 U.S. 97 (1980).

13. *Id.* at 105.

state effectively used its power to exempt anticompetitive conduct. It unequivocably requires that a state articulate a policy to displace competition with regulation of a clearly bounded area of economic activity. A state must authorize the challenged conduct with at least an inferable intent to displace antitrust enforcement.[14] This so called "authorization requirement" applies to all categories of anticompetitive conduct and all classes of defendants seeking protection through exemption.[15] In nearly all circumstances a state extends its sovereign authorization to other parties through delegation of regulatory functions to an agent of the state.[16] Hence, delegation is a necessary and logical extension of part one of the *Midcal* test.

The second part of the *Midcal* test requires that a state maintain actual regulatory oversight of the potentially anticompetitive conduct of private parties.[17] This portion of the test ensures that private parties do not collude with the state to exempt their conduct from antitrust scrutiny. For the exemption to attach, the state alone must initiate the act of authorization and oversee the regulated conduct. The supervision requirement is necessary to insulate private conduct from antitrust scrutiny, but does not apply to municipalities vested with a public purpose.

Judicial application of the *Midcal* test has generated confusion because of the failure to distinguish two distinct issues of ancillarity. First, is the state's authorizing act necessarily ancillary to a clearly articulated state policy, or an over-extension of that policy? Second, is the challenged conduct of private parties reasonably ancillary to the state's authorization, narrowly construed to attain the state's legitimate purposes? These are especially difficult issues because the antitrust claims factually vary on the following two dimensions: (1) the nature of conduct challenged; and (2) the class of defendants asserting the exemption. Issues of ancillarity may be more satisfactorily approached by breaking the *Midcal* test into more discrete elements to crystallize the proof requisite to establish the exemption. A more subtle and accurate test for application of the state action doctrine might include the following three questions:

14. *See generally* 1 AREEDA & TURNER, ANTITRUST LAW 214 (1978) (a synthesis of case law up to 1978).

15. *See infra* notes 70-78, 109-17 and accompanying text.

16. *See infra* notes 70-78 and accompanying text.

17. *See infra* notes 118-37 and accompanying text.

(1) Did the state exercise its sovereign power to render private conduct subject to regulation?
(2) When applicable, did a state regulatory agent exercise authority within the limits of the state delegation to it and supervise the challenged private conduct within the terms of that delegation?
(3) Did the defendant act within the scope of that which the state or its agent effectively authorized and enforced?

These questions narrow the application of the state action exemption by requiring that each of the three affected parties—the state, the delegated agent of the state and the private market actor—behave in accordance with strict limitations. These questions, obviously, are intertwined: for example, to posit that a defendant acted outside the scope of its authorization implicates the state's delegation of regulatory authority as much as the defendant's market conduct. It is simplistic and fallacious to consider these questions sequentially, as if they refer to three discrete types of decisionmaking; instead, they are facets of one complicated inquiry which must, in every case, be viewed in totality.

Municipal defendants present an additional array of unique problems. A municipality often regulates the market conduct of others as an agent of the state. In that capacity, a municipality is virtually indistinguishable from a state agency. Application of the state action exemption focuses on the specificity of the state's delegation of regulatory authority and examines whether the municipality's actions are beyond the scope of that delegation.[18] Alternatively, a municipality may be a market participant operating a public service enterprise.[19] In this capacity, municipalities are analogous to private parties who may be held accountable for antitrust violations. Application of the exemption to municipal market activity requires examination of the peculiar status of the municipal defendant to determine whether its conduct was reasonable.

18. *See, e.g.*, Community Communications Co., Inc. v. City of Boulder, 455 U.S. 40 (1982) (broad state grant of home rule does not authorize a city to restrict cable television market).

19. *See, e.g.*, Town of Hallie v. City of Eau Claire, 105 S. Ct. 1713 (1985) (sewage treatment); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) (electric utility); Hybud Equipment Corp. v. City of Akron, 742 F.2d 949 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 1866 (1985) (solid waste processing).

II. THE REQUIREMENTS FOR STATE USE OF THE POWER TO EXEMPT

The *Parker* Court conditioned the state action exemption on the legislative command of the state operating in its sovereign capacity. To determine whether a state has effectively used its sovereign power, courts examine (1) what, if any, limitations have been exceeded by the state action, (2) what state apparatus has acted, and (3) what form the state action has taken.

A. *Limits State Power to Exempt*

Even as the *Parker* Court invoked the state action exemption, it recognized that a state may not merely authorize or declare lawful anticompetitive conduct, and thereby shield culpable acts from antitrust enforcement.[20] This limitation suggests that a state may not adopt a policy to displace the antitrust laws, but may confer the exemption only as to conduct that is ancillary to a legitimate state interest. Thus in *Parker*, California's interest in conserving the agricultural wealth of the state sufficiently legitimized the price regulation scheme. California did not override federal antitrust laws or deny their application within the state; if it had, federal law, which establishes competition as a fundamental economic value, would have preempted the state action.

A basic antitrust principle is that a contract that has an effect of restraining trade is not a violation if merely ancillary to a legitimate business transaction. In three decisions the Supreme Court adopted the same logic to define partially the limits of a state's power to exempt conduct from antitrust scrutiny.

Consider the Supreme Court's decision in *Schwegmann Brothers v. Calvert Distillers Corp.*[21] Interstate resale price fixing is per se illegal under the Sherman Act,[22] however, the Miller-Tydings Act exempted from coverage resale price contracts if lawful under state fair trade laws.[23] Louisiana law provided for enforcement of contractually fixed prices against signatory and nonsignatory retailers. Many Louisiana liquor retailers entered price fixing contracts with the plaintiff liquor distributors to fix minimum prices of plaintiffs' products. The plaintiffs

20. 317 U.S. at 351.

21. 341 U.S. 384 (1951).

22. 15 U.S.C. §§ 1-7 (1982).

23. Miller-Tydings Act, ch. 690, tit. VIII, 50 Stat. 673, 693 (1937), 15 U.S.C. § 1 (1982) (an amendment to § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (1982)).

then sued Schwegmann Brothers, a nonsignatory retailer, for cutting prices on their products. The district court enjoined Schwegmann Brothers' price cutting, and the Court of Appeals for the Fifth Circuit affirmed. The Supreme Court reversed, holding that the Miller-Tydings Act exempts from the Sherman Act only price agreements for articles purchased by contracting retailers.[24] The Court concluded that the State of Louisiana's compulsory price fixing scheme impermissably exceeded the Miller-Tydings Act's limited tolerance of voluntary private contractual price fixing.[25]

Thirteen years after *Schwegman*, the Supreme Court ruled, in *Sears, Roebuck & Co. v. Stiffel Co.*,[26] that an Illinois unfair competition law could not be used to enjoin a seller of lamps from copying unpatentable designs of another. The Court posited that the patent provision of the Constitution[27] is strictly limited and that a patent monopoly may not be used in disregard of antitrust laws. The Court noted that, under the supremacy clause, a state may not exceed federal patent protection provisions in a manner that disturbs the federal balance between free competition and promoting inventions.[28] *Schwegman* and *Stiffel* stood for the proposition that the preemption doctrine prohibits state attempts to bar enforcement of federal antitrust laws. Without such limits the *Parker* state action exemption would swallow antitrust law. In essence, a state may use its power to regulate commerce in a manner that contains competitive market conduct in accordance with legitimate state interests, but a state may not legalize anticompetitive processes per se and thereby preempt antitrust laws.

More complex considerations arise when there is potential conflict between the preemption doctrine and the antitrust state action exemptions. In this regard consider the recent decision of *Rice v. Norman Williams Co.*,[29] in which the Supreme Court upheld a state law prohibiting liquor importers from accepting delivery unless the transporter is designated as an authorized agent of the distiller. Liquor importers claimed that the Sherman Act preempted the California statute. The California Court of Appeals held the statute unconstitutional because it gave distillers unfettered power to restrain competition at the distribu-

24. *Schwegman Brothers*, 341 U.S. at 387.
25. *Id.*
26. 376 U.S. 225 (1964).
27. U.S. CONST. art. I, § 8, cl. 8.
28. 376 U.S. at 230-31.
29. 458 U.S. 654 (1982).

tion level.[30] The Supreme Court unanimously reversed. The Court stated that state laws are not preempted by federal antitrust laws unless there is an irreconcilable facial conflict.[31] A conflict between state regulatory schemes and federal antitrust law that is not compelled but merely potential, is inadequate to support a holding of preemption.[32] *Rice*, therefore, establishes a boundary for the analysis developed in *Schwegman* and *Stiffel* by recognizing a fundamental distinction between a legitimate state regulatory policy which merely implicates competitive conduct from a state effort to limit the reach of federal law.[33] The test of legality of state regulatory efforts is whether the restraint imposed merely regulates, or is preempted because it directly suppresses antitrust enforcement. This distinction would seem to be the only way to maintain the state action exemption within recognizable bounds.

B. *Which Governmental Branches May Act in a Sovereign Capacity*

In most instances, a state exercises its power to exempt through legislative enactment of laws regulating commercial activity. State judicial and executive branches, however, may also act for a state in a manner that is exempt from antitrust scrutiny. If the state itself is accused of anticompetitive conduct, no other state action need be alleged to claim antitrust exemption.[34]

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30. Norman Williams Co. v. Rice, 108 Cal. App. 3d 348, 166 Cal. Rptr. 563 (1980).

31. *Rice*, 458 U.S. at 659, 661.

32. *Id.*

33. It is a fundamental limitation on the application of the state action exemption that there be conflict between state-authorized actions and federal antitrust law. If there is no conflict, then either state law is irrelevant to the evaluation of the conduct's antitrust culpability, or the challenged conduct is not culpable. Thus, in Battipaglia v. New York State Liquor Authority, 745 F.2d 166 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 1393 (1985), a state law requiring that liquor producers and wholesalers publish prices and maintain those prices for 30 days was held not to conflict with the Sherman Act because wholesalers and retailers could obey the law without conspiring to fix prices. Similarly, in Grendel's Den v. Goodwin, 662 F.2d 88 (1st Cir. 1981), *aff'd*, 459 U.S. 116 (1982), plaintiff applicant for a liquor license claimed that a Massachusetts statute granting churches and schools veto power over the licensing of liquor-serving establishments enabled the Holy Cross Church to use its veto power to exclude plaintiff on behalf of competing restauranteurs. The Court of Appeals for the First Circuit held that the state action exemption did not apply because there was no showing Massachusetts intended to "authorize and effectuate" the alleged private conspiracy. 662 F.2d at 100.

34. *See* New Mexico v. American Petrofina, Inc., 501 F.2d 363 (9th Cir. 1974), in which the court held that state legislation is not necessary to claim the state action

A series of Supreme Court cases has considered claims that a state's highest court can exercise the state power to exempt. In *Goldfarb v. Virginia State Bar*,[35] the Supreme Court held that the Virginia State Bar had no authority, absent legislative action, to fix and enforce minimum legal fee schedules. The Virginia legislature authorized the state supreme court to regulate the practice of law, thus relegating the state bar, an official state agency, to administer court adopted rules and regulations. Pursuant to its authority, the supreme court adopted ethical canons and went on record directing attorneys not to be controlled by fee schedules. The Virginia State Bar, however, enforced a minimum fee schedule, adopted by a county bar association, through disciplinary proceedings and issuance of ethical opinions. The plaintiffs, unable to secure the services of an attorney for less than the schedule minimum, challenged the schedule as illegal price fixing. The State Bar justified its acts as those of a state agency implementing ethical codes adopted by the Virginia Supreme Court. The United States Supreme Court characterized the State Bar as a state agency with limited authority which did not "create an antitrust shield that allows it to foster anticompetitive practices" of its members.[36] In short, the State Bar unilaterally fixed prices without legislative or judicial authorization and therefore did not act for the state in a manner exempt from antitrust laws.

In contrast, the Supreme Court, in *Bates v. State Bar of Arizona*,[37] upheld Arizona Bar Association enforcement of disciplinary rules promulgated by the Arizona Supreme Court that imposed restraints on lawyer advertising. The plaintiff attorneys claimed that the Bar Association restrained legal competition by invoking the rules against advertising. The Court identified the central issue as the rulemaking authority of the Arizona Supreme Court, not rule enforcement by the State Bar. Because the Arizona Supreme Court's rulemaking powers derived from the state constitution, the Court concluded that the rules "clearly and affirmatively" expressed the state's policy toward professional behavior of attorneys.[38] A legislative mandate, therefore, is un-

exemption when the state itself is the defendant. The court stated that legislative action is only one means of establishing state responsibility for an anticompetitive scheme. On that basis, the court dismissed a counterclaim against the state that it participated in a conspiracy to fix the price of asphalt.

35. 421 U.S. 773 (1975).

36. *Id.* at 791.

37. 433 U.S. 350 (1977).

38. *Id.* at 362.

necessary when a state constitution expressly grants rulemaking power to a state's highest court, and that court functions within the scope of the constitutional grant of authority.[39]

Most recently, the Supreme Court, in *Hoover v. Ronwin*,[40] followed *Bates* and reversed a Ninth Circuit decision that denied the state action exemption.[41] An unsuccessful applicant for admission to the Arizona Bar alleged that the state bar examination committee controlled the supply of attorneys by setting passing scores without reference to basic competence.[42] The Court found that the Arizona Constitution granted the Arizona Supreme Court the power to make final determinations on admission to the bar.[43] The Court also asserted that the state supreme court formulated bar exam rules and standards in a legislative capacity, advised by the state bar examination committee. Thus, a state supreme court could exercise a state's sovereign power to exempt if it derived its authority from the state constitution and if it acted in a legislative capacity.[44]

The post-*Goldfarb* cases unanimously find that a state properly exercised its power to exempt, even though the legislature did not directly authorize the state action. The unifying concept is that a state supreme court is exempt from antitrust scrutiny if, as a coequal branch of government empowered by a state constitution, it affirmatively expresses an intent to regulate challenged conduct. *Goldfarb*, therefore, does not limit state supreme court power, but rather addresses undelegated conduct of a state bar association.

The Ninth Circuit recently followed *Bates* and *Ronwin* to hold that

39. *Accord* Foley v. Alabama State Bar, 648 F.2d 355 (5th Cir. 1981).

40. 104 S. Ct. 1989 (1984).

41. 686 F.2d 692 (9th Cir. 1981).

42. Had the Ninth Circuit not found that state action did not apply, it is unlikely that the *Ronwin* dispute would have reached a jury much less the Supreme Court. The plaintiff's complaint alleging conspiracy on the part of the state bar to restrain trade by raising barriers to entry might well have been dismissed on substantive grounds. Proving that state-regulated, uniformly applied standards for entry to professional practice may constitute culpable exclusion would require improbable proof that the standards were unreasonably anticompetitive.

43. 104 S. Ct. at 1997-98.

44. *Id.* at 1995. *See also* Feldman v. Gardner, 661 F.2d 1295 (D.C. Cir. 1981), *vacated in part on other grounds*, 460 U.S. 462 (1983) (rules restricting admission to the bar to persons who had graduated from American Bar Association accredited law schools were exempt since the court of appeals was the final governmental body exercising control over admission to the District of Columbia bar and, therefore, had acted in a sovereign capacity).

the state *executive* branch may exercise the power to exempt when it acts in a legislative capacity. In *Deak-Perero Hawaii, Inc. v. Department of Transportation*,[45] the operator of the currency exchange at Honolulu International Airport challenged the Hawaii Department of Transportation's grant of an exclusive five year concession to a competitor. The Court of Appeals for the Ninth Circuit, affirming the dismissal of the complaint on state action grounds, stated that the executive branch was a coequal under Hawaii State Constitution provisions and that the Department was a duly constituted division of the executive.[46]

Deak-Perero extends *Bates* and *Ronwin*, suggesting that a state executive agency can exercise the power to exempt even when not acting in a legislative capacity.[47] This analysis emphasizes that determination of what entities constitute the "state" requires a court to inquire into what specific conduct is alleged to have been exempted by the entity. Though federal courts do not deny the limited sovereignty of state judicial and executive branches, state action requires more than the mere presence of a branch of state government.

C. *How States Must Act to Execute the Exemption*

Virtually every decision since *Parker* has required that the challenged act be within the ambit of an affirmatively expressed and clearly articulated state policy. This requirement responds to the concern that private market participants may attempt to masquerade their anticompetitive conduct as sovereign acts of a state. The Supreme Court's *Goldfarb* decision requires anticompetitive conduct to be "compelled," not merely "prompted" by a sovereign act of a state.[48] Similarly, in *Cantor v. Detroit Edison Co.*[49] the Court held that a private utility's program to provide light bulbs to consumers at no cost lacked sufficient state involvement to warrant exemption. Although the Michigan Pub-

45. 745 F.2d 1281 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 1756 (1985).

46. 745 F.2d at 1283.

47. *See also* Ajax Aluminum, Inc. v. Goodwill Industries, 564 F. Supp. 628 (W.D. Mich. 1983), in which the court held a low income weatherization program administered by the State Department of Labor automatically exempt. The court held that acts of the Department were sovereign acts of the state in view of statutory authority granting the Department control of the program. *Id.* at 633. Because the Department acted for the state, the court did not consider whether the state legislature authorized the challenged conduct. *Id.*

48. 421 U.S. 773, 791.

49. 428 U.S. 579 (1976). *See infra* notes 70-78 and accompanying text for a discussion of *Cantor*.

lic Utilities Commission approved the utility's tariff, which included the cost of the bulbs, the utility, not the state, initiated the tariff approval process. The Court stated that mere "state authorization, approval, encouragement, or participation" in private anticompetitive conduct does not merit antitrust immunity.[50]

Goldfarb and *Cantor* suggest that a state may effectively exercise its power to exempt only by compelling conduct under threat of legal punishment. Subsequent Supreme Court cases, however, indicate state compulsion of the challenged anticompetitive conduct is not required for the exemption to apply. In *New Motor Vehicle Board of California v. Orrin W. Fox Co.*,[51] for example, the Court held that a state statute establishing a comprehensive regulatory regime exempted defendants' conduct even though the statute did not compel the challenged act. The California Automobile Franchise Act[52] provided that automobile manufacturers must secure the approval of the state Motor Vehicle Board prior to opening a new franchise or relocating an existing franchise when an existing franchisee within the same territory complained of undue competition. Plaintiffs, prospective franchisees, challenged the scheme on the grounds that the delay in establishing franchises permitted privately initiated market restraints. The Court, without rigorously distinguishing *Goldfarb* and *Cantor*, held that the California Act was exempt because it "clearly articulated and affirmatively expressed" a state scheme to restrain the establishment and relocation of automotive dealerships.[53]

Four years later, in *Community Communication Co. v. City of Boulder*,[54] the Court held that the "clear articulation and affirmative expression" requirement is not met by mere state "neutrality" toward anticompetitive acts of municipalities.[55]

In *Southern Motor Carriers*, the United States challenged joint rate proposals filed on behalf of competing motor carriers with four state

50. *Id.* at 592-93 (citations omitted). The Court, however, assumed that it would *always* be improper to extend liability to a party compelled by state authority to do the challenged acts. *Id.* at 592.

51. 439 U.S. 96 (1978).

52. CAL. VEH. CODE §§ 3062-63 (West Supp. 1978).

53. *Orrin W. Fox Co.*, 439 U.S. at 109.

54. 455 U.S. 40 (1982).

55. *Id.* at 55. *See also* Schiessle v. Stephens, 525 F. Supp. 763 (N.D. Ill. 1981) (sham redevelopment plan not compelled by state statutes which permit municipal redevelopment).

Public Service Commissions. In response to the claim that such collective ratemaking constituted price fixing, the defendant carriers contended that the state action doctrine immunized their activity. The district court entered summary judgment for the government, finding that the states permitted, but did not compel, the challenged conduct.[56] The Fifth Circuit affirmed, holding that compulsion is a threshold requirement to a finding of state action immunity.[57] Four dissenting judges argued that even in the absence of compulsion, the challenged activity may be a legitimate response to flexible state regulatory programs.[58]

The Supreme Court reversed, asserting that states must have a free choice to adopt policies that permit, but do not compel, private party anticompetitive conduct.[59] The Court held that *Midcal*'s two-pronged test[60] applies to private claims of state action immunity and required proof of a clearly articulated state policy to displace private competition with regulation.[61] The Court indicated that state compulsion is merely sufficient, but not necessary evidence of such a state policy.[62] The Court stated that a requirement of state compulsion conflicts with federalism principles by restricting excessively state regulatory alternatives.[63] Furthermore, the Court stated that if other evidence conclusively showed a state intention to adopt a permissive regulatory approach, the absence of state compulsion "should not prove fatal to a claim of *Parker* immunity."[64] In his dissent, Justice Stevens, joined by Justice White, argued that courts disfavor exemptions to the Sherman Act and that price fixing among competing carriers substantially tampered with the impersonal forces of the competitive marketplace.[65]

Properly confined, the majority's opinion does not raise the concerns addressed by Justice Stevens. The Court does not hint that private par-

56. United States v. Southern Motor Carriers Rate Conference, Inc., 467 F. Supp. 471 (N.D. Ga. 1979).

57. United States v. Southern Motor Carriers Rate Conference, Inc., 702 F.2d 532 (5th Cir. 1983).

58. *Id.* at 546.

59. Southern Motor Carriers Rate Conference, Inc. v. United States, 105 S. Ct. 1721, 1731-32 (1985).

60. *See supra* notes 12-18 and accompanying text for a discussion of *Midcal.*

61. *Southern Motor Carriers*, 105 S. Ct. at 1728-29.

62. *Id.* at 1729.

63. *Id.*

64. *Id.* at 1730.

65. *Id.* at 1737.

ties charged with price fixing may claim state authorization because of a vague or ambiguous or neutral state policy. Indeed, the *Southern Motor Carriers* opinion neither raises nor lowers *Midcal*'s threshold requirement of a clearly articulated state policy beyond that established by prior litigation.[66] The question presented should be viewed narrowly: may clearly articulated "permission" immunize private conduct undertaken within the scope of that articulation? That the answer is affirmative does not widen the coverage of the state action exemption; private parties must still demonstrate that their conduct was authorized properly. Thus, the concern that the exemption may expand beyond its intended limitations is addressed better by emphasizing state delegation of authority to regulate, rather than overstating the significance of compulsion as an independent requirement.

III. Delegation and Authorization

A. *Theoretical and Doctrinal Foundations*

Nonstate parties asserting the state action exemption to shield challenged conduct from antitrust scrutiny must establish that, in addition to state action, there is an essential relationship between the state action and the defendant's challenged conduct. The terms "delegation" and "authorization" define that link. "Delegation" refers to the extent to which the state deputized a subsidiary or agent to exercise the power to exempt. "Authorization" pertains to the next segment of the same relationship by examining whether the defendant's conduct is within the specified limitations of the state's exercise of its power to exempt.

These terms are not clearly separable. In some cases, the defendant's authority, valid or not, derives directly from the legislature itself, and thus the issues of delegation and authorization are identical. In other situations, the defendant's authority derives from the act of a state agent, who in turn traces its power back to the legislature, making the issues of delegation and authorization distinctly sequential. In many cases, although a state agency is an intermediate between the state and the regulated entity, the issues of delegation and authorization overlap—a problem made especially troublesome by the judiciary's apparent refusal to clarify terminology or doctrine.

66. *See* Hybud Equip. Corp. v. Akron, 742 F.2d 949 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 1866 (1985); Scott v. Sioux City, 736 F.2d 1207 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 1864 (1985); Central Iowa Refuse Sys. v. Des Moines, 715 F.2d 419 (8th Cir. 1983), *cert. denied*, 105 S. Ct. 1864 (1985); Town of Hallie v. City of Eau Claire, 700 F.2d 376 (7th Cir. 1983), *aff'd*, 105 S. Ct. 1713 (1985).

Courts tend, perhaps unavoidably, to consider the status of the defendant as either a private party or municipality as the key to the delegation and authorization issues. Accordingly, a municipality that acts pursuant to a governing statute may be said to be authorized to so act, and such authorization is distinguishable from a license received by a private business from a regulatory commission. This is a useful distinction, but it is difficult to apply to a municipally-owned private utility that is a market participant, or a wholly unregulated firm that receives authorization for allegedly anticompetitive activity directly from a municipality. The variable nature of intermediaries in the chain of delegation and authorization, plus the often multiple roles municipalities play, renders elusive the analysis of the defendant's status.

Another troublesome approach is to focus on the nature of defendant's conduct as determinant. Conduct that would, in the absence of state regulation, be deemed per se illegal, therefore, may require more explicit delegation and authorization to be exempt than conduct deemed subject to the rule of reason. *Parker* held exempt horizontal price fixing—the most "per se" illegal of all antitrust offenses. Given the evolving nature of substantive antitrust prohibitions, a criteria for the state action exemption premised on the conduct's per se characterization would be, at best, completely unpredictable.

Irrationally, courts are also predisposed to weigh the appropriateness of antitrust enforcement against the touted benefits that the defendant's challenged conduct offers to the state regulatory scheme. A balancing process evades the complex delegation and authorization issues by reopening settled disputes as to whether competition is a preeminent economic value. Judicial inquiry into whether the conduct sought to be protected was more or less beneficial to the state's regulatory interests than freely competitive conduct undercuts antitrust doctrine and enforcement because the court substitutes its own economic values for those established by Congress.

Courts should resist all of these tendencies and opt for an analysis focusing on delegation and authorization as a bequest of a limited sovereign power that can be narrowed but never broadened as it is handed down. The court's function in performing such an analysis is purely legal: to determine as a matter of law whether the state's exercise of limited power is reasonably related to the defendant's conduct. This is not an easy task, but it is one which the federal courts are well-suited to perform.

The landmark case in this area is *Cantor v. Detroit Edison Co.*[67] A light bulb retailer challenged defendant utility's program of furnishing light bulbs to residential customers free of additional charge (the costs of the program were part of the utility's operating costs and passed along through its rates). The plaintiff claimed that the defendant used its lawfully acquired monopoly power in electricity distribution to restrain the retail light bulb trade. Defendant showed that this marketing practice had been in effect for nearly ninety years and had been approved, as part of defendants' tariffs, by the Michigan Public Utilities Commission for over fifty years. Furthermore, the defendant could not terminate the program without Commission approval of a modified tariff. The district court granted summary judgment for the utility, holding that the *Parker* state action exemption applied for three reasons. First, the state empowered the Commission to regulate utilities. Second, the Commission authorized the challenged program. Last, the state compelled the program because the defendant could not end the program without Commission approval.[68] The Sixth Circuit affirmed.[69] In a plurality opinion the Supreme Court reversed.[70]

The Court held that neither Commission approval of the Utility's tariff nor the need for Commission approval to end the light bulb program were sufficient to find state action to justify exemption of the program from federal antitrust laws.[71] Justice Blackmun's concurrence explored the Sherman Act's effect upon the Michigan Commission's approval of the light bulb program. He rejected as overly simplistic three approaches: (1) a focus on whether the state requires, rather than merely authorizes, anticompetitive conduct; (2) a focus on whether private actors or the state initiated the anticompetitive scheme; and (3) a focus on the degree of affirmative articulation by the state.[72] Instead, he urged a rule of reason inquiry, which recognized that "state sanction figures powerfully in the calculus" especially where the state "regulates private activity to the same ends sought to be achieved by the

67. 428 U.S. 579 (1976).

68. 392 F. Supp. 1110, 1112 (E.D. Mich. 1974).

69. Cantor v. Detroit Edison Co., 513 F.2d 630 (6th Cir. 1975) (mem).

70. 428 U.S. 579 (1976). Justice Stevens wrote the plurality opinion in which Justices Brennan, White, and Marshall joined; Chief Justice Burger joined in two parts of the Stevens' opinion and in the judgment; Justice Blackmun concurring in the judgment, filed a separate opinion; Justice Stewart, joined by Justices Rehnquist and Powell, dissented.

71. 428 U.S. at 598.

72. *Id.* at 609-10.

Sherman Act."[73] Assessing the justifications for the challenged light bulb program, Justice Blackmun stated that blocking competition in the light bulb market was an impermissible state objective for a state action antitrust exemption unless it could be shown existing competition was ineffective.[74] The facts of the case demonstrated that the light bulb market was not inherently unstable, a natural monopoly or detrimental to the health and safety of Michigan residents.[75]

If the Court had affirmed the exemption in *Cantor*, it would have upheld the act of a regulatory agency without regard to the scope of the state's policy in subjecting private utilities to regulation. Such an approach would imply that a state agency possesses an open-ended power to exempt based solely upon a general delegation of regulatory authority. The Court's rejection of that approach demonstrates that anticompetitive conduct that is not ancillary to a state's legitimate purpose in regulating a marketplace may be invalidated even though the state affirmatively expresses a policy to displace unfettered business freedom. Justice Blackmun substantially clarified the matter by concluding that the Michigan Commission's approval of the program was not within the scope of the state's interest in regulating utilities. In this respect, Justice Blackmun attempted to bring the state action inquiry into line with the fundamental principles of antitrust law, which, under the rule of reason, sanction the adoption of only the lease restrictive restraints of trade are also necessarily ancillary to a legitimate regulatory scheme of market organization.

B. *Scope and Specificity*

The terms "scope" and "specificity" merit careful analysis. Although the terms are not mutually exclusive, and neither term limits the state's effective delegation of the power to exempt, they refer to different inquiries. To determine whether a state agent authorized conduct within the scope of its delegated power, a court must ask if the authorized conduct was wholly within the confines of the state regulatory scheme as contemplated by the legislature's enabling act. Thus, a "scope" problem may arise when a regulatory agent exceeds its delegated function by authorizing conduct outside of those confines, or when a private market participant engages in conduct that is not au-

73. *Id.* at 611.

74. *Id.* at 612-13.

75. *Id.* at 613.

thorized entirely by the delegated agent. The term "specificity" is related closely to scope, but focuses on whether the legislature specifically contemplated the particular activity in question. As a general matter, conduct that is reasonably ancillary to the accomplishment of legitimate state interests may be assumed to be legislatively contemplated, but more exceptional behavior requires a more specific statutory command.[76] "Scope" and "specificity" are interacting elements of a unified analysis in that "scope" refers to the breadth of authorization to establish outer limits of permissible activity, while "specificity" pertains to whether the allegedly authorized activity is sufficiently narrow to support an inference that it was reasonably contemplated by the legislature. Regardless of which term is used, the threshold inquiry is constant: can a traceable and confinable link be established between a legitimate act of state and the defendant's conduct such that it can be inferred that the challenged conduct was, in its entirety, the reasonable consequence of the state's policy to displace unfettered business freedom with regulation.[77]

As a starting point in the analysis, it must be recognized that while a state agency may possess the authority to act in a given area, it does not necessarily follow that all its actions are exempt. Consider some of the important applications of this principle in recent years. In its sim-

76. *See* Areeda, *Antitrust Immunity for "State Action" After* Lafayette, 95 HARV. L. REV. 435, 447 (1981).

77. Consider the meaning of the terms "scope" and "specificity" in the case of Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc., 562 F. Supp. 712 (D. Hawaii 1981), in which a taxi operator challenged a 15-year exclusive contract between a State of Hawaii-managed airport and an association of independent taxi owners (SIDA) as an unreasonable foreclosure of competition. The state defendant and SIDA moved to dismiss claiming that, under *Midcal*, their conduct was exempt as state action. The district court denied the motion finding that state statutes permitted Hawaii, through its Department of Transportation, to enter into contracts to operate the airport. The broad grant of authority, however, was insufficient to insulate the award of a 15-year exclusive contract. The court stated that neither the statutory scheme, nor its legislative history, suggested a "clear legislative intent" to replace competition with state regulation of taxi service. The court concluded that, at best, the legislation indicated state acquiescence to decisions by the Department of Transportation and the airport manager. *Id.* at 712. *See also* Springs Ambulance Service, Inc. v. City of Rancho Mirage, 1983-2 Trade Cas. (CCH) ¶ 65,646 (C.D. Cal. 1983), *rev'd in part*, 745 F.2d 1270 (1984). In *Springs* the court held that the alleged refusal by the city to refer ambulance calls to the plaintiff, conspiracy to fix ambulance rates, and predatory pricing were not immune from antitrust enforcement. The court held that though the city acted pursuant to a clearly articulated and actively supervised policy, which envisioned displacement of competition, the state did not envision the specific acts complained of. 1983-2 Trade Cas. (CCH) ¶ 65,646 at 69,284 (C.D. Cal. 1983).

plest manifestation, "scope" may be appreciated as a relevant variable in *Caribe Trailer Systems, Inc. v. Puerto Rico Maritime Shipping Authority*,[78] and in *Star Lines, Ltd. v. Puerto Rico Maritime Shipping Authority*.[79] In each case, defendant PRMSA asserted that it was a government agency created by the Commonwealth of Puerto Rico in 1974 to operate Puerto Rico's maritime transportation system as a public service. In each case, defendant pointed to the explicit legislative intent to exempt PRMSA from antitrust enforcement.[80] In both cases, the plaintiffs challenged PRMSA acquisition of shipping lines and reaching operating and lease agreements—a function specifically provided for by its enabling legislation. The plaintiffs in *Caribe* alleged that firms involved in formation and operation of PRMSA conspired to monopolize shipping between Puerto Rico and the United States' mainland. Plaintiffs claimed the defendants illegally excluded them from the Caribbean shipping trade. The Puerto Rico legislature, however, specifically had instructed PRMSA to take over and operate freight and passenger shipping between the island and the United States. The court held that the actions of PRMSA and private firms involved with it were immune from antitrust liability as state action.[81]

In contrast, plaintiffs in *Star* alleged that by terminating Star's service contract, PRMSA entered into a conspiracy to exclude Star from the vessel servicing market in the East Coast-Persian Gulf trade. After a lengthy review of Supreme Court precedent, the district court held that the state action doctrine did not apply to PRMSA's challenged activities.[82] Puerto Rico established PRMSA and granted it an express antitrust exemption to facilitate stabilization of shipping between Puerto Rico and the mainland. The plaintiff's challenges bore no relationship to shipping that served Puerto Rico. The court therefore stated that the relationship between the legislative grant of power and the challenged conduct was "too tenuous" to conclude the conduct was

78. 475 F. Supp. 711 (D.D.C. 1979).

79. 451 F. Supp. 157 (S.D.N.Y. 1978).

80. Act of Puerto Rico Maritime Shipping Authority, Act No. 62 (1974) states:
The legislature of Puerto Rico intends that [PRMSA] acquires and operates shipping lines and terminal facilities as a public service, and that in doing so, it shall not be subject to the antitrust laws nor any other limitation that could hinder the effective discharge of the endeavor that this act has imposed on [PRMSA].
Id.

81. *Caribe*, 475 F. Supp. at 724-25.

82. *Star*, 451 F. Supp. at 166.

within the "intended scope" of the legislation.[83] *Star* is distinguishable from *Caribe* solely because the scope of Puerto Rico's policy was limited to the Caribbean. Therefore, identical conduct by one party could be exempt within the boundary, but not exempt if outside the territory of the state's delegation of authority.

The PRMSA cases give some dimension to the term "scope." With regard to the term "specificity," contrast two decisions rendered by the same court pertaining to the conduct of the same defendant, but with different results: *Llewellyn v. Crothers*,[84] and *Phillips v. Crothers*.[85] In *Llewellyn* the court held that the medical director of a state workman's compensation department was immune from antitrust liability under a so-called "good faith doctrine." Chiropractors alleged that the defendant erroneously applied a state workman's compensation statute to fix low chiropractor reimbursement rates. The district court found that the statute authorized the director to stabilize and control workers' compensation costs, though no statute specifically empowered him to set the challenged fee schedule. The court then considered whether a properly delegated official acting pursuant to state policy may lose antitrust immunity because of a defective execution of that authority. The court held that the director did not act outside the scope of his authority. Even if his motives were hostile to chiropractors, to deny immunity would create an incentive for aggrieved parties to ignore the state-supervised regulatory mechanism and seek redress only in federal antitrust courts—an intolerable consequence according to principles of federalism.

In *Phillips*, the district court declined to exempt the medical director's refusal to authorize injured workers to seek treatment from plaintiff chiropractor. Though the defendant pointed to numerous state statutes empowering him to regulate workers' compensation, the court found that the statutes did not specifically direct the defendant to bar treatment of injured workers by a particular doctor.[86] The court stated that to invoke the state action exemption there must be a "very close nexus" between the challenged anticompetitive conduct and the statute

83. *Star*, 451 F. Supp. at 167 (citing City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434 (5th Cir. 1976)).

84. 1983-1 Trade Cas. (CCH) ¶ 65,358 (D. Or. 1983), *aff'd*, 765 F.2d 769 (9th Cir. 1985).

85. 1982-1 Trade Cas. (CCH) ¶ 64,667 (D. Or. 1982).

86. *See id.*

"allegedly compelling that conduct."[87]

It is difficult to distinguish the holdings of *Caribe* and *Star* or the holdings of *Phillips* and *Llewellyn*, and without an appreciation of the concepts of scope and specificity this task would be impossible. These decisions, collectively, reinforce the principle that a court will deny an exemption if the challenged act is not specifically contemplated and within the confines of the actual delegation of authority. Unfortunately, courts manipulate these concepts without clearly stating why they decide similar factual disputes differently. Indeed, a more thorough investigation of case law demonstrates that courts employ these concepts selectively according to the particular nature of the challenged conduct.

C. *Authorization of Private Conduct: Associational and Other Horizontal Restraints*

Professional associations are often antitrust defendants because of their efforts to limit entry into a profession or maintain standards of competence and ethical conduct. If these efforts are without any governmental imprimatur, then naturally no exemption applies, and restrictions are judged by the rule of reason. Professional associations, however, are usually subject to some form of state regulation that authorizes the associations to self-regulate aspects of their market. This section does not explore whether an association has received proper delegation to restrict the market pursuant to a legitimate state purpose,[88] but rather explores whether the association's challenged conduct is within the scope of its authority and specifically contemplated by the state.

Consider the Sixth Circuit's decision in *Gambrel v. Kentucky Board of Dentistry*,[89] in which a dental technician challenged a restriction promulgated by the Kentucky Board of Dentistry that prevented patients from choosing among denture makers. The Board required that prescriptions and orders for dental work be sent to a laboratory chosen by dentists. The defendants claimed that legislative policy placed the

87. *Id. See also* Health Care Equalization Comm'n of the Iowa Chiropractic Soc'y v. Iowa Medical Soc'y, 501 F. Supp. 970 (S.D. Iowa 1980), in which the court denied immunity to an agency official for conspiring with medical doctors to boycott chiropractors. The court found the agency itself exempt on the basis of interpretation of the state statute by the governor and attorney general.

88. *See supra* notes 31-47 and accompanying text.

89. 689 F.2d 612 (6th Cir. 1982), *cert. denied*, 459 U.S. 1208 (1983).

responsibility for the treatment and fitting of patients for dentures exclusively upon a licensed dentist and cited a Kentucky law that prohibited dental technicians from providing dental work "to any person other than a licensed dentist."[90] The Sixth Circuit affirmed summary judgment for the Board of Dentistry, and held that the state statutory scheme clearly articulated an intent to compel the challenged actions.[91]

The Sixth Circuit's decision is subject to criticism that the plain meaning of the Kentucky statute simply does not specify, compel or even suggest the restraint under challenge. At the very least, it is unfortunate that the court made no explicit attempt to connect the Board's tie-in restriction to Kentucky's legitimate interests in regulating dental care. Instead, the court placed great weight on the Board's statutory interpretation, which appears to be a circular application of the state action exemption. Nevertheless, the *Gambrel* opinion is clearly consistent with the approach taken by courts in at least three circuits. Thus, in *Princeton Community Phonebook, Inc. v. Bate*,[92] the Third Circuit held that a restriction on legal advertising in the yellow pages was exempt from the Sherman Act as state action. The Advisory Committee on Professional Ethics of the New Jersey Supreme Court adopted the restriction pursuant to a demonstrable state policy to regulate legal advertising. The Court stated that New Jersey "need not have contemplated the precise action complained of,"[93] it being sufficient that there was a "close relationship" between the state and the Committee and that the Committee exercised the state's sovereign power as an agent of the State Supreme Court.[94]

Similarly, in *Benson v. Arizona State Board of Dental Examiners*,[95] the Ninth Circuit applied the state action doctrine to reject claims that the Board illegally restricted entry into the dental profession. Arizona statutes conferred upon the Board authority to regulate dental practice and entry into the profession. Dentists licensed outside of Arizona challenged the state requirement that only dentists who pass the Arizona dental exam may obtain a license for unrestricted practice within

90. KY. REV. STAT. § 313.010(2) (1981).

91. 689 F.2d at 717.

92. 582 F.2d 706 (3d Cir.), *cert. denied*, 439 U.S. 966 (1978).

93. 582 F.2d at 717.

94. *Id.* at 719.

95. 673 F.2d 272 (9th Cir. 1982).

the state.[96] The court rejected as a conclusory allegation the plaintiffs' contention that the Board acted outside the scope of its legislative mandate. Most recently, in *Brazil v. Arkansas Board of Dental Examiners*,[97] a district court exempted the Board of Dental Examiners' adoption and enforcement of allegedly restrictive professional entry requirements. The court concluded that the Arkansas General Assembly clearly authorized the Board to regulate dental practice within the state with an intent to displace competition.

The cases holding exempt state commission authorized restrictions on professional practice entry are consistent with a line of cases holding that commission approved fee schedules and market divisions are also exempt from antitrust laws. Courts in the Third and Ninth Circuits have immunized purely private market restraints on the grounds that state commissions properly exercised their authority to regulate. Thus, in *Horseman's Benevolent and Protective Association v. Pennsylvania Horseracing Commission*[98] the court held that a Commission rule setting jockey fees was exempt as state action even though the legislature specifically did not grant the Commission power to fix fees. The court noted that legislative bodies, out of necessity, grant broad regulatory powers to state administrative agencies that cannot be considered per se invalid as lacking specificity.[99] An unambiguous holding of the state supreme court that jockey fee setting was within the regulatory powers conferred on the Commission by state statute supported the court's state action holding.

Similarly, in *Turf Paradise, Inc. v. Arizona Downs*,[100] the Ninth Circuit rejected a racetrack owner's claim that a date allocation provision in its lease with a track operator was an illegal horizontal market division. The lease agreement resulted from negotiations between plaintiff and defendant, which were supervised by the Arizona Racing Commission acting pursuant to its statutory authority. Plaintiff admitted that the legislature evinced a policy limiting the number of racing days, but argued that such limitations do not shield a combination of private

96. The state allowed nonresident licensed dentists to practice as unsalaried employees of charitable organizations.

97. 593 F. Supp. 1354 (E.D. Ark. 1984).

98. 530 F. Supp. 1098 (E.D. Pa. 1982), *aff'd mem.*, 688 F.2d 821 (3d Cir. 1984). *Accord* Euster v. Eagle Downs, 677 F.2d 992 (3d Cir.), *cert. denied*, 459 U.S. 1022 (1982).

99. *See* 530 F. Supp. at 1107.

100. 670 F.2d 813 (9th Cir.), *cert. denied*, 456 U.S. 1011 (1982).

parties to allocate those days. Furthermore, plaintiff argued that in view of *Cantor*,[101] the Commission's acquiescence in the market division defeated the exemption. The Ninth Circuit rejected these arguments, finding that "it was the stated policy of the Arizona Legislature that conflicts in dates be settled by the private parties and not by the Commission."[102]

These associational restraint decisions applied the state action exemption even though the connection between the state regulatory policy and the challenged conduct was less than compelling. The unanimity of these decisions is striking in view of the disparate state action case law. In some of the cases, it is at least arguable that the challenged restraint was neither compelled by the clear meaning of the state statute nor narrowly ancillary to the necessary accomplishment of a legitimate state purpose. These cases, therefore, create an inference that the judiciary is especially deferential to actions of state commissions that authorize private parties to adopt and obey horizontal restraints on competition. When these decisions are read with *Bates v. State Board of Arizona*[103] and *Hoover v. Ronwin*,[104] it is clear that associational restraints are exempt if they bear the minimum of state imprimatur.

D. *Authorization of Private Conduct—Natural Monopolies*

In stark contrast to the cases considered in the previous section, courts almost unanimously decline to exempt conduct of regulated utilities as state action. Consider the series of cases in which the American Telephone and Telegraph Company (AT&T) asserted the state action exemption to bar antitrust scrutiny of its efforts to prohibit interconnections with competing terminal equipment. In most cases, the court rejected application of the exemption.[105] In *Sound, Inc. v. American*

101. *See supra* notes 70-78 and accompanying text.

102. 670 F.2d at 824.

103. 421 U.S. 773 (1975). *See supra* notes 40-42 and accompanying text.

104. 104 S. Ct. 1989 (1984). *See supra* notes 43-47 and accompanying text.

105. Sound, Inc. v. Am. Tel. and Tel. Co., 631 F.2d 1324 (8th Cir. 1980); Essential Communications Sys., Inc. v. Am. Tel. and Tel. Co., 610 F.2d 1114 (3d Cir. 1979); Litton Sys., Inc. v. Am. Tel. and Tel. Co., 487 F. Supp. 942 (S.D.N.Y. 1980); Interconnect Planning Corp. v. Am. Tel. and Tel. Co., 465 F. Supp. 811 (S.D.N.Y. 1978). *But cf.* Capital Tel. Co. v. New York Tel. Co., 750 F.2d 1154 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 2325 (1985) (state intended to displace competition with regulation in the markets for radio telephones and paging systems).

Telephone and Telegraph Co.,[106] the Eighth Circuit held that state authorization of proposed rates did not exempt the utility from charges of conspiracy to exclude a competing equipment manufacturer from the market through predatory pricing. Emphasizing the limited nature of the agency action, the court discounted AT&T's supporting argument that the Iowa State Commerce Commission had approved its prices for terminal equipment in a process that included antitrust considerations. The court applied its expanded interpretation of the *Midcal* test[107] to hold that utility rate approval does not constitute a "clearly articulated and affirmatively expressed state policy" to restrain the terminal telephone equipment market.

Other decisions involving AT&T tend to focus on the lack of state compulsion of the challenged activity. Thus, the district court, in *Litton Systems, Inc. v. American Telephone and Telegraph Co.*,[108] cited *Cantor* in holding that the state action exemption "extends only to actions which are not merely at the instance of the state government, but which are specifically compelled by it."[109] The court held that because AT&T designed the scheme to impede interconnection of customer supplied terminal equipment, state agency approval of the challenged tariff was insufficient grounds to invoke the state action exemption. Yet, whether the purported reason for denying the exemption is the absence of a clearly articulated state policy or the absence of state compulsion, the issue is the same: was there a necessary connection between the state's policy and the defendant's conduct? Although states pervasively regulate the telephone industry, that regulation does not require the exclusionary conduct complained of; nor do tariff approvals received at the initiation of the private defendant broaden a limited regulatory scheme into a blanket antitrust immunity.

Courts have applied the same analysis to local energy utilities. In

106. 631 F.2d 1324 (8th Cir. 1980).

107. *Id.* at 1334. The court considered the following factors relevant to the determination of state action:

> [T]he existence and nature of any relevant statutorily expressed policy; the nature of the regulatory agency's interpretation and application of its enabling statute, including the accommodation of competition by the regulator; the fairness of subjecting a regulated private defendant to the mandates of antitrust law; and the nature and extent of the state's interest in the specific subject matter of the challenged activity.

Id.

108. 487 F. Supp. 942 (S.D.N.Y. 1980).

109. *Id.* at 958.

City of Kirkwood v. Union Electric Co.,[110] an electricity retailer claimed it was caught in a price squeeze between defendants' high wholesale price and lower retail rates. Following *Cantor*, the Eighth Circuit held that neither state nor federal legislative policy authorized the challenged price squeeze.[111] Furthermore, neither the state nor the federal government actively supervised the relationship between federally set wholesale rates and state set retail rates. Similarly, in *Hecht Co. v. Southern Union Co.*,[112] a district court held that a challenged conspiracy of natural gas producers to fix wellhead prices and simultaneously raise gas retail rates was not exempt because the state commission lacked power to regulate wellhead prices and therefore could not have prevented the alleged price fixing.[113]

Why the natural monopoly cases denied the state action exemption from antitrust laws while the associational restraint cases granted it is not answered easily by *Midcal* or any other test. It is simplistic to infer that application of the state action exemption should depend on whether the challenged conduct is characterized as restraint or monopolization. The ambiguities of employing such a test would soon defeat it. Yet there is some aspect of the state action inquiry that permits competitors to jointly regulate their competition but prohibits state regulated firms from individually taking competitive advantage of others. At the very least, the clear distinction deduced from both sets of cases proves that the substantive antitrust controversy is critical to the court's evaluation and application of the state action exemption.

E. *The Supervision Requirement*

1. In general

The adequate state supervision requirement—part two of the *Midcal* test—is a separate criterion for extension of the state action exemption to the challenged conduct of private parties. Supervision means that the state or its agent not only requires the challenged conduct but also oversees it, thereby insuring that allegedly anticompetitive conduct

110. 671 F.2d 1173 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983).

111. *Id.* at 1180.

112. 474 F. Supp. 1022 (D.N.M. 1979).

113. *Id.* at 1030. *See also* Winters v. Indiana and Michigan Elec. Co., 1979-2 Trade Cas. (CCH) ¶ 62,797 (N.D. Ind. 1979) (electric utility's acquisition of municipal power plant was not exempt from claims that it was part of an attempt to monopolize despite approval by voters and by state regulatory commission because the utility had voluntarily initiated the acquisition).

does not deviate from the scope of the state's authorized displacement of competition.

Supervision, though a distinct and separate requirement, is interwoven with the policy basis of the state action exemption.[114] The requirement addresses two distinct concerns rooted in the federalism principles that gave rise to the state action exemption. First, adequate state supervision of challenged conduct evidences that it intended to displace the federal policy of competition with respect to the specific acts in question. Continuing state oversight of the conduct demonstrates that the state is pursuing a defined public purpose that requires regulation in place of unfettered competition. Second, supervision minimizes the risk that independent private anticompetitive conduct will be characterized as state action, thereby circumventing federal antitrust law and policy. State supervision limits private anticompetitive conduct to the precise areas in which the state intends to displace competition. Consider the facts in the Supreme Court decision *California Liquor Dealers Association v. Midcal Aluminum, Inc.*[115] The respondent wine distributor, Midcal Aluminum, challenged a California statutory scheme for price posting and retail price maintenance in the wholesale wine trade. Midcal characterized the private price setting agreements as resale price maintenance in violation of the Sherman Act. The lower California courts concurred, granting Midcal's motion for an injunction against the enforcement of the state statutes.[116] The

114. A prominent treatise discusses the relationship in the following manner:
> The adequate supervision requirement responds directly to the federalism concerns that are at the core of *Parker*. It also reflects an attempt to reconcile those concerns with the policies behind the Sherman Act. The basic premise of the antitrust laws is that the market should both direct and constrain private behavior. . . . On the other hand, the antitrust laws provide no basis for distinguishing those areas of the economy where the market should be allowed to direct economic activity from those where other concerns warrant public control. The existence of a state action immunity enables states . . . to define areas inappropriate for market control. Moreover, the adequate supervision criterion ensures that state-federal conflict will be avoided in those areas in which the state has demonstrated its commitment to a program through its exercise of regulatory oversight. At the same time, it guarantees that when the Sherman Act is set aside, private firms are not left to their own devices. Rather, immunity will be granted only when the state has substituted its own supervision for the economic constraints of the competitive market.

AREEDA & TURNER, 1 ANTITRUST LAW § 213a (1978).

115. 445 U.S. 97 (1980).

116. Midcal Aluminum, Inc. v. Rice, 90 Cal. App. 3d 979, 153 Cal. Rptr. 757 (1979). Midcal had been charged with violating state statutes by selling wine at less than prices filed with the Department of Beverage Control. The California Supreme Court refused to hear an appeal of the lower court ruling.

Supreme Court, hearing the case on appeal from the California Court of Appeals, affirmed the injunction. The Court applied the following two-part test to determine if the price maintenance arrangement was exempt as state action: "[F]irst the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the state."[117] The Court found that the wine pricing scheme satisfied the first part of the test, but failed to meet the supervision requirement:

> The State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program.[118]

The federal courts have consistently refused to exempt challenged private conduct when the active supervision requirement is not met,[119] and to require active state supervision whenever private conduct is challenged.[120] There is a single circumstance in which the active state supervision requirement is waived with respect to exempting challenged private conduct—the self-executing statute rule. In *Allied Artists Picture Corp. v. Rhodes*,[121] plaintiff movie producers and distributors challenged an Ohio statute that prevented "blind bidding" by film theatre operators, thus requiring screenings and competitive bidding procedures. The plaintiffs alleged that this statutory scheme favored in-state over out-of-state producers and distributors who had to bear the additional costs of screenings. The Sixth Circuit found that the state had a valid public purpose in protecting small local operators against large out-of-state producers and that the challenged statutes clearly articulated and affirmatively expressed a state policy to displace competition. The court also held that in the limited circumstance where the challenged conduct is a direct extension of state statutory authority, and where there are no intervening nonstate parties needed

117. 445 U.S. at 105.

118. *Id.* at 105-06.

119. *See, e.g.*, Knudsen Corp. v. Nevada State Dairy Comm'n, 676 F.2d 374 (9th Cir. 1982); Miller v. Oregon Liquor Control Comm'n, 688 F.2d 1222 (9th Cir. 1982).

120. *See, e.g.*, Gambrel v. Kentucky Bd. of Dentistry, 689 F.2d 612 (6th Cir. 1982), *cert. denied*, 459 U.S. 1208 (1983); Euster v. Eagle Downs Racing Ass'n, 677 F.2d 992 (3d Cir. 1982), *cert. denied*, 459 U.S. 1022 (1982); Morgan v. Division of Liquor Control, 664 F.2d 353 (2d Cir. 1981).

121. 679 F.2d 656 (6th Cir. 1982).

for the imposition of the challenged restraint, it would not require active state supervision.[122] The rationale is transparent: there is neither any challenged private conduct subject to supervision nor any question of substantial state involvement.

This analysis leads to the issue of what constitutes adequate state supervision. The *Midcal* Court held that the state must "actively" supervise the challenged conduct of private parties and that active supervision requires more than simply a state mandate.[123] At least with respect to state authorized price fixing agreements among private parties, *Midcal* suggests that the state must at a minimum establish the prices, review the reasonableness of price schedules, engage in reexamination of the program, or monitor market conditions.[124]

Cases that held exempt state authorized price fixing articulate more clearly what actions are required for active state supervision. The Second Circuit, in *Morgan v. Division of Liquor Control*,[125] found exempt a Connecticut statute that mandated minimum liquor price markups at the wholesale and retail levels and prohibited sales below costs. The court found adequate state supervision because the state established the markups after frequent legislative debate.[126]

The variation in specific procedures courts find meet the active state supervision requirement reflects the courts' tendency to determine the necessary quantum of supervision on a case-by-case basis. Seemingly, the more egregious the conduct, the more detailed and direct state supervision must be to meet a court's state action exemption standard.

2. Supervision of Municipal Conduct

The question of whether the active state supervision requirement for

122. *See id.* at 662.

123. *Midcal*, 445 U.S. at 105-06.

124. *See also* Miller v. Oregon Liquor Control Comm'n, 688 F.2d 1222 (9th Cir. 1982) (price setting practices of beer and wine wholesalers not exempt since state did not set or review the reasonableness of prices); Knudsen Corp. v. Nevada State Dairy Comm'n, 676 F.2d 374 (9th Cir. 1982) (state requirements for advance filing of milk prices challenged as restraining price competition not exempt because state commission merely enforced privately set prices).

125. 664 F.2d 353 (2d Cir. 1981).

126. *See also* Euster v. Eagle Downs Racing Ass'n, 677 F.2d 992 (3d Cir.), *cert. denied*, 459 U.S. 1022 (1982) (jockey fee schedules held exempt because set by state Commission); Fisher Foods, Inc. v. Ohio Dept. Liquor Control, 555 F. Supp. 641 (N.D. Ohio 1982) (state regulation that permitted liquor control commission to set minimum retail markups held to be supervised adequately by commission).

the state action exemption applies to challenged municipal conduct has posed a problem for the federal courts. The lower federal courts have rarely applied the state supervision requirement to municipalities or subdivisions but instead developed the traditional governmental functions standard whereby challenged municipal acts that constitute functions historically performed by cities do not need to meet the active state supervision standard. In *Gold Cross Ambulance and Transfer v. City of Kansas City*,[127] the Eighth Circuit held that Kansas City's creation of a single operator ambulance system, to the exclusion of private competitors, was state action not subject to *Midcal*'s active supervision requirement.

The court observed that the Supreme Court had required active state supervision of challenged anticompetitive activity only when the defendants were private individuals or entities.[128] The court stated that the political accountability of municipal officials prevented possible abuse of the authority to engage in anticompetitive activity in a manner similar to the active state supervision requirement as applied to private parties.[129]

The Supreme Court's recent *Town of Hallie v. City of Eau Claire*[130] decision adopted the Eighth Circuit's *Gold Cross Ambulance* rationale. The Court held that the active state supervision requirement does not apply to municipal conduct.[131] The Court stated that there is little danger that a municipality will engage in price fixing for personal gain.[132]

127. 705 F.2d 1005 (8th Cir. 1983), *cert. denied*, 105 S. Ct. 1864 (1985).

128. 705 F.2d at 1014-15.

129. *Id.* The court also stated that "because the *Parker* doctrine requires that the state delegate to the local government the authority to engage in the challenged conduct, state supervision of Kansas City's conduct is unnecessary to find state action." *Id. See also* Hybud Equip. Corp. v. City of Akron, 742 F.2d 949 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 1866 (1985) (comprehensive state statutory scheme permitted city to monopolize market for trash collection and energy recycling); Scott v. City of Sioux City, 736 F.2d 1207 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 1864 (1985) (state delegated zoning and redevelopment powers to city alleged to have anticompetitively zoned); Golden State Transit Corp. v. City of Los Angeles, 726 F.2d 1430 (9th Cir. 1984) (state policy allowed city to replace competition in taxi business with regulation); Central Iowa Refuse Sys., Inc. v. Des Moines Metropolitan Solid Waste Agency, 715 F.2d 419 (8th Cir. 1983), *cert. denied*, 105 S. Ct. 1864 (1985) (state legislation affirmatively encouraged municipal regulation of trash collection and landfill operation); Campbell v. City of Phoenix, 1983-2 Trade Cas. (CCH) ¶ 65,753 (D. Ariz. 1983) (state delegation of zoning powers).

130. 105 S. Ct. 1713 (1985).

131. *Id.* at 1720-21.

132. *Id.*

The Court also noted that the more substantial danger that a municipality will put local interests before state interests is minimized because it must still act pursuant to a clearly articulated state policy.[133]

IV. PECULIAR PROBLEMS OF MUNICIPALITIES

Every municipality exists by virtue of a state charter that grants it rights and powers. Yet no city can claim its mere status exempts it from antitrust enforcement. Municipalities occupy a hazy no-man's land in antitrust law that defies simple categorization. Municipalities engage in a wide range of conduct that cloud their legal posture. For example, municipalities employ police (a purely governmental function), license private development and services (a "mixed" governmental and proprietary function) and engage directly in the market place as public service monopolists or competitors. There are additional layers of complexity because antitrust claims vary greatly, depending upon whether the defendant is a municipality or a municipally authorized private party, and upon the nature of the substantive antitrust claim. These sources of confusion have made anticompetitive municipal conduct and regulation one of the most litigated areas of antitrust law in recent years. The Supreme Court's recent pronouncements on municipal antitrust liability in *Town of Hallie v. City of Eau Claire*,[134] therefore, should be appreciated as the culmination of considerable judicial analysis.

A. *Doctrinal Foundations*

In *City of Lafayette v. Louisiana Power & Light Co.*[135] and *Community Communications Co. v. Boulder*[136] the Supreme Court defined what municipal conduct constitutes state action for application of the state action exemption. In *Lafayette*, municipally owned electric utilities claimed that the defendant private utility violated antitrust laws. The defendant counterclaimed, alleging that the cities conspired to preempt entry into the market. The district court granted the plaintiff's motion to dismiss the counterclaim, based upon the state action exemption. The Fifth Circuit reversed, stating that a trial court must determine whether the challenged action "was clearly within the legislative

133. *Id.*
134. 105 S. Ct. 1713 (1985).
135. 435 U.S. 389 (1978).
136. 455 U.S. 40 (1982).

intent," though it need not find an express statutory mandate for the action to invoke the state action exemption.[137]

The Supreme Court affirmed. The *Lafayette* plurality[138] adopted the Fifth Circuit's approach, clearly holding that municipalities do not enjoy automatic antitrust immunity under the state action exemption. The Court based its holding upon reasoning in *Bates* and *Goldfarb*, viewing states as sovereign.[139] The Court concluded that for the state action exemption to apply, challenged anticompetitive municipal conduct must be based upon a clearly articulated and affirmatively expressed state policy to displace free competition with regulation or public monopoly.[140] The state mandate, however, need not be specific or detailed with respect to the particular challenged act.[141] The Court found that the state legislation that permitted cities to operate electric utilities was at best neutral with respect to the challenged conduct, and held that neutrality was insufficient to meet the clearly articulated and affirmatively expressed standard.[142]

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

138. Justices Marshall, Powell and Stevens joined in Justice Brennan's plurality opinion. Chief Justice Burger concurred in the judgment and wrote a separate opinion concurring in part. Justices White and Rehnquist joined in a dissent written by Justice Stewart. Justice Blackmun also dissented, with a separate opinion.

139. *City of Lafayette*, 435 U.S. at 409-12.

140. *Id.* at 413-17.

141. *But see* City of Mishawaka v. American Elec. Power Co., 465 F. Supp. 1320 (N.D. Ind. 1979), *aff'd in part*, 616 F.2d 976 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981). The district court granted the cities' motion to dismiss a counterclaim on state action exemption grounds. Defendant, a privately owned electric utility, alleged that municipally operated utilities attempted to engage in predatory pricing by tying water and sewage services to their electric utility service. The court distinguished *Lafayette* on the grounds that the relevant Indiana statutes specifically enabled municipalities to operate their own utilities and authorized them to determine which utility services should be provided publicly.

142. 435 U.S. at 414-15. The Court rejected several arguments put forth by the plaintiff cities. The Court rejected the argument that cities only exercise power delegated by the state and, therefore, the state action exemption must apply. The Court observed that this proposition could stand only if the cities were able to demonstrate "some overriding public policy which negates the construction of [Sherman Act] coverage." *Id.* at 397. The Court identified two sufficiently weighty public policies that would override the preference for antitrust enforcement—the right to petition government and the state action exemption—and concluded that neither applied automatically to municipalities. *Id.* at 399-400.

The Court also rejected the municipalities' contention that it would be "anamolous to subject municipalities to the criminal and civil liabilities imposed upon violators of antitrust laws," on the grounds that municipalities must comply with other federal laws.

The Chief Justice, who held the swing vote for the majority, joined only that part of the Court's opinion that affirmed the Fifth Circuit's decision and rejected an implied immunity for local governments. He did not join the plurality's rationale for denying the exemption nor the standards applied. Rather, the Chief Justice proposed distinguishing between governmental acts and proprietary enterprises of municipalities.[143] Governmental acts should be treated as automatically exempt, and proprietary enterprises should be treated under the same standards as privately owned publicly regulated utilities.

Four years later, the Supreme Court ruled in *City of Boulder* that a state grant of home rule powers to municipalities was "merely neutral" with respect to the specific challenged conduct of placing a moratorium on cable television franchise expansion. Mere neutrality did not constitute a clearly articulated and affirmatively expressed state policy to displace competition with regulation or monopoly service.[144] The municipality's challenged act, therefore, could not have been in furtherance of a state policy and could not be exempted inferentially as state action.[145]

Id. at 400. Many commentators have criticized the *Lafayette* decision for having a potential freezing effect on municipalities by exposing them to treble damages under Section 4 of the Clayton Act. *See* AREEDA & TURNER, ANTITRUST LAW ¶ 212.2(a) (1982 Supp.); Areeda, *Antitrust Immunity for State Action After* Lafayette, 95 HARV. L. REV. 435 (1981); Bangassee, *Exposure of Municipal Corporations to Liability for Violation of Antitrust Laws: Antitrust Immunity After the* City of Lafayette *Decision*, 11 URBAN LAWYER vii (1979). Stewart, J. raised the same criticism of the plurality's opinion in his *Lafayette* dissent. 435 U.S. at 439. These concerns have been mitigated by the recent passage of the Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. 2750 (1984). The Act provides that neither local governments nor local government officials acting in their official capacity can be held liable for damages under Section 4 of the Clayton Act where the challenged act is taken directly by the local government or at its direction.

The Court also rejected the plaintiffs' "public service" argument that "the antitrust laws are intended to protect the public only from abuses of private power and not from actions of municipalities that exist to serve the public use." 435 U.S. at 403. In the view of the plurality, the municipalities' local interests were too narrow to justify this rationale. To permit municipalities to have their policies on parochial interests would weaken antitrust protection and be directly contrary to the national policies of the Sherman Act.

143. 435 U.S. at 422.

144. *City of Boulder*, 455 U.S. at 55.

145. Commentators have criticized the *City of Boulder* decision for exposing municipalities to antitrust liability in the exercise of governmental powers. *See, e.g.*, Civiletti, *The Fallout from* Community Communications Co. v. Boulder: *Prospects for a Legislative Solution*, 32 CATH. U.L. REV. 379 (1983); Handler, *Reforming the Antitrust Laws*, 82 COLUM. L. REV. 1287 (1982); Vanderstar, *Liability of Municipalities Under the Anti-*

In *Boulder*, the plaintiff cable television franchisee claimed that a city ordinance that placed a moratorium on the expansion of cable networks[146] violated Section 1 of the Sherman Act. The district court granted the plaintiffs a preliminary injunction and denied the city's motion to dismiss on state action exemption grounds. The Tenth Circuit reversed and granted the exemption, reasoning that the municipality's ordinance was an exercise of home rule powers and represented the city's active supervision over the cable television market.[147] The Tenth Circuit distinguished *Lafayette* by asserting that the instant action did not involve a proprietary function, thereby relying on the Chief Justice's *Lafayette* concurrence.[148]

The Supreme Court, per Justice Brennan,[149] reversed, reasoning that the city's action must meet the clearly articulated and affirmatively expressed state policy standard of the *Lafayette* plurality without regard to the distinction between proprietary and governmental functions.[150] The Court found that home rule powers upon which the city relied failed to meet the standard because the state's neutral position, which allowed municipalities to "do as they please," did not "contemplate" the specific challenged anticompetitive actions of the city of Boulder.[151]

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trust Laws: Litigation Strategies, 32 CATH. U.L. REV. 395 (1983); Note, Community Communications Co. v. City of Boulder: *The Emasculation of Municipal Immunity from Sherman Act Liability*, 32 CATH. U.L. REV. 413 (1983).

146. Plaintiff's permit had been granted in 1964 by municipal ordinance and had allowed plaintiff to operate in a limited area of the city. In 1979 plaintiff sought to expand its business into new areas of the city. The city responded by passing an ordinance placing a moratorium on its expansion for 90 days during which time the city council would devise a model cable television ordinance and invite new competitors into the market. The city reasoned that the moratorium was necessary to prevent plaintiff's expansion from discouraging the entry of new competitors in the municipal market. *See City of Boulder*, 455 U.S. at 43-46.

147. Community Communications Co., Inc. v. City of Boulder, 630 F.2d 704 (10th Cir. 1980).

148. *Id.* at 708.

149. Justice Blackmun, who dissented in *Lafayette*, joined the plurality in *Boulder*. The Chief Justice dissented in *Boulder*. Justice Stevens filed a separate concurring opinion in *Boulder* but did not raise objection to any of the legal points raised in Justice Brennan's majority opinion. Justice Stevens emphasized that liability and exemption are separate issues; the nonapplication of the exemption does not automatically result in municipal liability because the culpability of municipal conduct is a severable issue to be resolved by the trial courts on the facts of the case. 455 U.S. at 61 (concurring opinion of Stevens, J.).

150. *Id.* at 54.

151. *Id.* at 55.

The majority also rejected the argument that a finding of liability would impair the allocation of power between a state and its subdivisions. The Court declared that state subdivisions must obey antitrust laws in the absence of state authorization or direction of an anticompetitive practice.[152]

The *Boulder* Court clarified two of the issues left open in *Lafayette*. First, the Court rejected the application of the proprietary-governmental functions distinction proposed by the Chief Justice in *Lafayette*. Second, the Court found that a grant of home rule powers to a municipality was merely neutral with respect to the challenged act and did not constitute an effective use of the state's power to exempt. The Court did not specify what authorization would be sufficient to claim the exemption, nor did it consider the possibility that unauthorized conduct could be wholly without antitrust significance and therefore per se legal.[153] *Boulder* left municipalities in an insecure position with respect to potential antitrust liability for conduct not expressly authorized by state statute. In response to *City of Boulder*, municipalities pursued several options, including securing specific legislative authorization from the state, finding an alternative state legislation more specific than home rule as the grounds for the exemption, or asserting that even broadly gauged state legislation contemplates the challenged anticompetitive act.

B. *Municipalities as Licensors and Franchisors*

The majority of antitrust claims involving municipalities challenge the award of a license or a franchise by a municipal authority to a private party. Usually, the plaintiff is a competitor of the successful applicant who claims that the award is part of an anticompetitive scheme. It is important to remember in this context that a municipality or a private party may enter into a contract for the provision of services, and thereby deny opportunities to other parties, without violating the antitrust laws. Thus, a municipal award of a license or

152. *Id.* at 56-57.

153. The city was not a horizontal competitor offering its own cable service, nor was it engaged in an effort to boycott or otherwise exclude plaintiff from the market in a conspiracy with horizontal competitors. The plaintiff's claim should have been dismissed on substantive grounds for failure to state a claim on which relief could be granted. In short, the city had committed no palpable antitrust wrong. Cities, therefore, have to be concerned with defending themselves against antitrust claims even where the claim, interpreted most favorably for the plaintiff, does not allege facts which could lead to antitrust culpability.

franchise to one private party instead of another does not, by itself, raise any antitrust issues. In considering the volume of recent case law it is thus imperative that the municipality's allegedly culpable antitrust conduct be identified. As case law demonstrates, liability lies only when the municipality enters into an illegal conspiracy. The state action doctrine does not protect municipalities that engage in such conspiracies.

Consider initially *Corey v. Look*,[154] wherein a parking lot operator claimed that the defendant steamship authority's termination of the plaintiff's contract to operate the authority's lot was the consequence of a conspiracy between the authority and the defendant Town of Falmouth. The plaintiff claimed that the defendants subverted normal competitive bidding to prevent it from competing and that the town harassed the plaintiff when it leased alternative parking lot space. The district court granted defendants' motion to dismiss on state action grounds, but the First Circuit reversed, finding that state legislation empowered the steamship authority to regulate ferry boat competition but not parking lots, and the town was not expressly authorized to regulate parking lots. The court did not deny that state legislation authorized the town to own and lease parking lots. The First Circuit stated, however, that without express statutory language authorizing the anticompetitive conduct, the town must show "convincing reasoning" that the conduct was "necessary" to carry out the state's legislative scheme.[155] The court held that state legislation permitting the town to be a market competitor did not require it to engage in anticompetitive conduct.[156]

Contrast *Corey* with the most oft-cited municipal licensing case, the Eighth Circuit's decision in *Gold Cross Ambulance and Transfer v. City of Kansas City*.[157] Kansas City adopted a single-operator ambulance system concept to follow a "public utility model," thereby excluding all competition for ambulance services. A Kansas City ordinance creating the Metropolitan Ambulance Service Trust (MAST), which acquired all of the outstanding stock, equipment, and licenses of one of the existing competitive services. MAST thereupon provided ambulance service within Kansas City as a utility, without private competitors. The

154. 641 F.2d 32 (1st Cir. 1981).

155. *Id.* at 37.

156. *Id.*

157. 705 F.2d 1005 (8th Cir. 1983), *cert. denied*, 105 S. Ct. 1864 (1985).

plaintiff challenged the arrangement as unreasonably exclusionary, but the Eighth Circuit affirmed the district court's dismissal of the claim.

The Eighth Circuit's conclusion that the state legislature authorized the challenged conduct is a vivid example of broad and imaginative statutory interpretation. The court reasoned that Missouri indicated an intent to displace unregulated competition when it authorized cities to provide ambulance services by contracting "with one or more competitors," because monopoly service was the necessary consequence of having only one municipal ambulance operator.[158] Furthermore, by requiring all operators and vehicles to be licensed by the state, detailing the service records which must be kept, and mandating necessary equipment and insurance, the state could not be merely neutral regarding the operation of ambulance services. Finally, the court held that state supervision was unnecessary because the state did not authorize private parties to make anticompetitive decisions.[159]

The Eighth Circuit's assemblage of Missouri statutes cannot hide the fact that none of the legislation leads to the inference that a single operator system which excluded existing competitors from the market was necessary to effectuate the state's policy of regulating ambulance services for the public health and safety. The statutes authorizing the regulation and licensing of ambulance services assuredly demonstrated a state decision that unfettered private activity was inappropriate for this area of vital public concern. The legislation, however, indicates only that the state gave cities a wide range of options to provide ambulance services. It did not specifically contemplate the replacement of all competition by a utility model.

The Ninth Circuit has cited *Gold Cross* favorably in three municipal licensing cases. In *Golden State Transit Corp. v. City of Los Angeles*[160] a cab company unsuccessfully claimed that a city and other cab companies conspired to deprive the plaintiff a license renewal. The city argued it denied the renewal because the plaintiff failed to file required papers, and argued that it was therefore exempt because the California Public Utilities Code authorizes city regulation of cab companies. Sim-

158. *Id.* at 1013.

159. *Accord* All American Cab Co. v. Metropolitan Knoxville Airport Auth., 547 F. Supp. 509 (E.D. Tenn. 1982), *aff'd mem.*, 732 F.2d 908 (6th Cir. 1983) ("public service and public necessity" statutory language sufficed to exempt airport authority from antitrust challenge for maintaining an exclusive taxi cab dispatch service with one company).

160. 726 F.2d 1430 (9th Cir. 1984).

ilarly, in *Catalina Cablevision Associates v. City of Tuscon*,[161] the Ninth Circuit upheld the city's grant of an exclusive cable television franchise. The court held that specific statutory authorization for cities to regulate construction, operation, and maintenance of cable television systems constituted an affirmative expression of a state policy to displace unfettered private activity.[162] Finally, in *Preferred Communications, Inc. v. City of Los Angeles*,[163] the Ninth Circuit reaffirmed statutory articulation of a policy to regulate cable franchising even though the state statute merely permitted, rather than compelled, anticompetitive franchising.

Other courts have not been as obedient to *Gold Cross* as the Ninth Circuit. In *Campbell v. City of Chicago*,[164] the district court refused to exempt a challenged agreement between the city and two taxicab companies, whereby the two cab companies secured binding agreements to receive a specified number of cab licenses in perpetuity in exchange for withdrawing lawsuits against the city. The plaintiffs alleged a conspiracy between the two cab companies to control licenses and to secure a municipal ordinance that froze the number of licenses. The court applied *Lafayette*'s "reasonable and necessary consequences of engaging in the authorized activity" standard and concluded: "The statute at issue in this case authorizes the licensing and regulation of taxicabs, but it nowhere sanctions the creation of a set of private rights that are perpetually binding on the city."[165] Similarly, in *Springs Ambulance Service, Inc. v. City of Rancho Mirage*,[166] the district court declined to bar an antitrust claim based upon municipal refusal to refer emergency calls to plaintiff private ambulance services, conspiracy to fix ambulance service rates and predatory pricing of such services. The court held that the state's regulation of ambulance services did not demonstrate an intent to displace competition completely but rather to create a responsive system. Such regulation did not encompass price fixing or predation.

161. 745 F.2d 1266 (9th Cir. 1984).

162. It is arguable that in neither *Golden State* nor *Catalina* the plaintiff presented a viable antitrust claim. Neither case involved an allegation of an illegal conspiracy, plaintiffs simply challenged the grant of a franchise. Absent a claim of conspiracy, the choice of one bidder over another would not seem to raise an antitrust issue.

163. 754 F.2d 1396 (9th Cir. 1985).

164. 577 F. Supp. 1166 (N.D. Ill. 1983).

165. *Id.* at 1174.

166. 1983-2 Trade Cas. (CCH) ¶ 65,646 (C.D. Cal. 1983), *rev'd in part*, 745 F.2d 1270 (9th Cir. 1984).

This brief review of the recent litigation involving municipal licensing pursuant to general grants of state delegated authority indicates considerable inconsistency regarding whether the challenged conduct must necessarily be derived from a state regulatory policy or only reasonably contemplated by that policy. This inconsistency must be appreciated in the context of a number of disputes that have been barred even though plaintiff's claim lacked substantive antitrust merit. Thus, it is not clear whether the *Gold Cross* line of cases derive from a judicial effort to prevent antitrust liability from attaching to municipalities or simply reflects the employment of the state action exemption to dismiss a meritless claim. It is clear that the law's hostility to conspiracy, as reflected in *Corey* and *Campbell*, will not be defeated by an open-ended application of *Gold Cross*. Nevertheless, the ambiguity in these cases creates the risk that culpable antitrust conduct will be exempted because of a vague state judgment that a legitimate public purpose should constrain free competition.

C. *Municipalities as Zoners and Controllers of Land Development*

A common municipal function is to regulate land development through the use of zoning powers. While state delegation of land use authority to municipalities protects legitimate use of zoning powers, courts have held that sham manipulation of the zoning process is subject to antitrust enforcement.[167] Recent decisions split evenly on application of the state action exemption to zoning.

In *Westborough Mall, Inc. v. City of Cape Girardeau*,[168] a shopping mall developer alleged that a city, its officials and the developer of a competing mall conspired to prevent the plaintiff's commercial development. The city zoned the plaintiff's property for commercial use but changed the classification to noncommercial use, allegedly at the instigation of the defendant competing developer. Concurrently, the defendant developer received commitments from city officials for zoning modifications to permit mall development prior to the official adoption of those modifications by the appropriate authorities. The district

167. The court in Schiessle v. Stephens, 525 F. Supp. 763 (N.D. Ill. 1981), stated as follows:

> [S]tatutes that permit a municipality to redevelop property within its boundaries do not in any way suggest that the State of Illinois has authorized, let alone compelled, a municipality and its officials to violate the federal antitrust laws by passing a "sham" redevelopment plan to further a conspiracy with private developers.

Id. at 776.

168. 693 F.2d 733 (8th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983).

court granted the defendants' motion to dismiss on state action grounds,[169] but the Eighth Circuit reversed.[170]

The Eighth Circuit held that a conspiracy to deprive the plaintiffs of their property rights through manipulation of the zoning process did not further any clearly articulated state purpose and therefore did not merit exemption. The primary purpose of zoning powers is to control land use for the health, safety, welfare and convenience of the community. In *Westborough*, however, the alleged purpose of the conspiracy was to favor the interests of one private developer against those of a competitor. The court found that the city had acted beyond its legitimate authority to regulate land use and engaged in conduct culpable under antitrust laws.[171] No valid state purpose existed to exempt such conduct.[172]

Most recently, the Eighth Circuit applied the state action exemption on facts similar to *Westborough* in *Scott v. City of Sioux City*.[173] Property owners near the city limits of Sioux City challenged the city council's passage of zoning ordinances preventing commercial development of their property. The plaintiffs claimed that the ordinances arose from a conspiracy between a downtown developer and members of the city council designed to restrain trade and monopolize shopping center development. In 1966 the city zoned the plaintiffs land for commercial development. Nearly simultaneously, the city prepared an urban renewal plan that included a central business district shopping center. In 1974 the city entered into a contract with defendant Metro Center to develop a shopping center, and shortly thereafter sold additional property to the plaintiffs, announcing that plaintiffs would construct a regional shopping mall on the site. Metro Center expressed concern about competing for tenants with plaintiff's mall. The city council im-

169. Westborough Mall, Inc. v. City of Cape Girardeau, 532 F. Supp. 284 (E.D. Mo. 1981).

170. *Westborough Mall*, 693 F.2d at 746.

171. *See also* Stauffer v. Town of Grand Lane, 1981-1 Trade Cas. (CCH) ¶ 64,029 (D. Colo. 1980) (state delegated zoning authority contemplated displacement of competition with regulation, but not alleged conduct of defendants); Mason City Center Ass'n v. Mason City, 468 F. Supp. 737 (N.D. Iowa 1979) (city not automatically exempt from Sherman Act when it exercised state delegated zoning powers to allegedly enter anticompetitive agreement with private developers).

172. *But see* Campbell v. City of Phoenix, 1983-2 Trade Cas. (CCH) ¶ 65,753 (D. Ariz. 1983) (liability of city does not rest on the effectiveness of its policy).

173. 736 F.2d 1207 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 1864 (1985).

mediately thereafter rezoned plaintiffs' property in a classification that did not allow commercial development.

Holding that the defendants' acts were exempt as state action,[174] the Eighth Circuit noted: "[T]he state policy to displace competition can be inferred if the challenged restraint is a necessary and reasonable consequence of engaging in the authorized activity."[175] The court found authorization for zoning and land use controls in the Iowa Urban Renewal Law, which provided that cities may do "any and all things to carry out and effectuate" their urban renewal plans.[176] The court reasoned that the broad grant of authority, the significance of central business district renewal and the city's financial involvement in the project made the rezoning of plaintiffs' property a "necessary and reasonable consequence" of the state's authorization. Therefore, both the municipal and private defendants' conduct were beyond the reach of antitrust law. The court left open the issue of whether a city council could act beyond the scope of its authority and enter into agreements with private developers in restraint of trade in violation of the federal antitrust laws, holding that the facts did not present that issue.[177]

The zoning cases demonstrate that the federal courts are unlikely to grant the state action exemption on the basis of a city's exercise of general governmental powers without the presence of additional state statutory authority. The additional statutory authority does not, however, have to establish that the challenged act was necessary to effectuate the statute. Rather, the courts have cited the additional authority either to override the *Boulder* "mere neutrality" limitation, or to find a general state sanction for the area of activity affected by the challenged conduct, thereby endowing the challenged act with a state purpose.

D. *Municipalities as Providers of Public Services*

In voluminous recent litigation, municipal defendants proferred the state action exemption as a bar to claims that, as market participants,

174. The case had a complex litigation history. The district court originally rejected application of the exemption, 1983-1 Trade Cas. (CCH) ¶ 64,352 (N.D. Iowa 1983), but reconsidered, in light of *Gold Cross*, and granted the exemption, 1983-2 Trade Cas. (CCH) ¶ 65,589 (N.D. Iowa 1983).

175. 736 F.2d at 1211. *See also* Reasor v. City of Norfolk, 606 F. Supp. 788 (E.D. Va. 1984) (legislature contemplated allegedly anticompetitive activities of city when it authorized city to finance a redevelopment authority to undertake activities private enterprise refused to do without assistance).

176. 736 F.2d at 1212.

177. *Id.* at 1215.

they committed exclusionary acts against private parties or political subdivisions. The challenged conduct is not municipal regulation of private commercial activity within municipal borders but commercial activity in markets beyond municipal borders. The courts have had no difficulty in refusing to exempt the conduct of a municipal enterprise merely because of its governmental status.[178] A more difficult issue is presented, however, when a municipality claims the exemption because it seeks to provide a public service. Four cases prior to *Town of Hallie v. City of Eau Claire*[179] raised this issue, and the opinions provide a framework for interpreting the *Hallie* decision.

In *Central Iowa Refuse Systems, Inc. v. Des Moines*,[180] the Eighth Circuit held that the state action exemption applied to acts of a metropolitan area solid waste agency that directly prevented the operation of competitive landfills. The defendant solid waste agency was a cooperative venture of fifteen municipalities formed under Iowa law to operate a single solid waste disposal facility. The intergovernmental agreement stipulated that no other solid waste disposal sites would be licensed by the member municipalities during the period that revenue bonds, issued for purposes of constructing the facility, were outstanding. A private solid waste landfill operator claimed that the denial of operating licenses constituted exclusionary conduct violating antitrust laws. The district court granted the defendants' motion to dismiss on state action exemption grounds. The Eighth Circuit affirmed. The Eighth Circuit stated that while state statutory authority did not expressly indicate an intent to displace competition in the area of solid waste disposal, a "comprehensive legislative scheme" encouraging municipalities to construct sanitary landfills and requiring counties and municipalities to provide environmentally safe disposal was sufficient to infer the requisite state intent.[181] The court concluded that restrained competition was a "necessary and reasonable consequence" of building a waste disposal facility under the state scheme.[182]

In *Hybud Equipment Corp. v. Akron*,[183] on facts remarkably similar

178. *See* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978). *See also* Grason Electric Co. v. Sacramento Mun. Util. Dist., 526 F. Supp. 276 (E.D. Cal. 1981).

179. 105 S. Ct. 1713 (1985).

180. 715 F.2d 419 (8th Cir. 1983).

181. *Id.* at 427.

182. *Id.*

183. 742 F.2d 949 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 1866 (1985).

to *Des Moines*, the Sixth Circuit held exempt the challenged acts of a municipality aimed at securing financing for a solid waste energy recycling plant. A licensed hauler of waste in Akron challenged a municipal ordinance that required all rubbish collected in the City of Akron to be deposited at the municipal recycle energy system facility (RES) for a "tipping fee" set by the city's public service director. Trash haulers failing to comply faced both loss of their license and criminal prosecution. The plaintiff contended that the ordinance eliminated competition among disposal sites, prohibited haulers from seeking lower tipping fees and restrained haulers' business in selling recyclable materials. The district court granted the defendants', the city and the Ohio Water Development Agency (OWDA), motion to dismiss the antitrust claims. The Sixth Circuit affirmed.

The Sixth Circuit found statutory authorization for municipalities to engage in solid waste disposal, and construction of solid waste facilities. Also, the state authorized OWDA to regulate and finance solid waste disposal, to enter into cooperative agreements with municipalities and to do all acts necessary or proper to carry out its express power.[184] Furthermore, Akron enacted the challenged municipal ordinance as a function of its cooperative agreement with OWDA to insure the marketing of revenue bonds for the construction of RES. The court expressly rejected the district court's conclusion that state legislation governing OWDA provided the requisite "clear articulation and affirmative expression" of state policy to extend the exemption to the municipality.[185] The court of appeals, however, held that delegation of regulatory power to Akron, in combination with the "powers and aims" of OWDA constituted a clearly articulated and affirmatively expressed policy to displace competition.[186] Thus, the challenged conduct of both the agency and the municipality were necessary inferences of the legitimate state purposes to regulate solid waste disposal and to promote the construction of solid waste facilities. The financial inability to construct RES without the challenged restraint reinforced the inference that the restraints were in furtherance of state policy to displace competition.[187]

184. *Id.* at 962.

185. *Id.* at 961.

186. *Id.* at 962.

187. *Accord* Pueblo Aircraft Serv. v. City of Pueblo, 679 F.2d 805 (10th Cir. 1982), *cert. denied*, 459 U.S. 426 (1983). In *City of Pueblo* the defendant municipality owned and operated a municipal airport. The plaintiff, a fixed base operator providing services such as aircraft refueling and maintenance and lessee of facilities from the city, chal-

Both *Des Moines* and *Akron* involved the total displacement of competition by a publicly-owned monopoly in an enterprise that demanded the centralization of local facilities. Although the defendants in both cases directly entered the marketplace as commercial participants, the purpose of their entry required a unified effort under public control. In this regard, both municipalities functioned in a manner analogous to regional planning authorities, and the elimination of competition was necessarily ancillary to their public purpose. Similarly, in *City of North Olmsted v. Greater Cleveland Regional Transit Authority*,[188] a municipality alleged that a county transit authority (GCRTA) attempted to monopolize public transportation by refusing to permit federal transportation subsidies to flow to a parallel bus line operated by the city. The state empowered the defendant GCRTA to operate public transportation as a state subdivision. The GCRTA entered into an agreement with the City of North Olmsted whereby the authority financially assisted city operation of parallel bus lines. The agreement remained in effect for five years after which the GCRTA refused to extend it and discontinued subsidies. The city claimed that these actions by the GCRTA constituted an attempt to monopolize public transportation in the county. The defendant moved for summary judgment on state action exemption grounds. The district court found that the GCRTA acted pursuant to state legislation in which the legislature had ". . . contemplated the conduct about which North Olmsted complained,"[189] and granted the defendant's motion. The Sixth Circuit affirmed, relying on state court construction of the general Ohio statute permitting formation of regional transit authorities.[190] The Ohio courts interpreted the statute to create a duty for GCRTA to provide county-wide transportation, and no duty to continue its agreement with North Olmsted. The Sixth Circuit concluded that the challenged

lenged the acts of the city and other fixed base operators leading to the failure to renew plaintiff's lease upon its expiration and granting plaintiff's lease to another fixed base operator under a bidding procedure. The defendants moved for dismissal on grounds of state action exemption and for failure to state a genuine claim against noncity defendants. The district court granted the motion, and the Tenth Circuit affirmed: "Here, the Colorado legislature . . . has expressly declared the operation of airport facilities '. . . to be public governmental functions, exercised for a public purpose, and matters of public necessity.' " 679 F.2d at 811. This language, in the view of the Tenth Circuit, was sufficient to establish that the operation of the airport was not a proprietary function, and the language of the statute contemplated the challenged municipal conduct.

188. 722 F.2d 1284 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 2387 (1984).

189. *See* 722 F.2d at 1286.

190. *Id.* at 1288.

actions of GCRTA were "contemplated and authorized" by state law and constituted acts of a state subdivision in furtherance of an affirmatively expressed state policy.[191] The court, therefore, found that exclusion of competition was a necessary consequence of successfully operating a county-wide transit system.

North Olmsted helps explain *Des Moines* and *Akron*, and the three cases stand for the proposition that area-wide consolidation of services pursuant to a legitimate state policy authorizing public provision of such services is exempt as state action. A more difficult issue arises, however, when the municipality's challenged act is not the regional replacement of competition with a public service, but the use of municipal power to exclude competition. In *Parks v. Watson*,[192] a geothermal well owner requested that the defendant city vacate streets so an apartment complex could be developed to use its surplus energy. The city stated it would deny the request unless the owner dedicated the land and the wells to the city. The well owner charged that the city's refusal to vacate for reasonable compensation foreclosed it from developing the land or competing in the geothermal heating market. The city claimed state action immunity, based on an Oregon statute authorizing public ownership of geothermal resources. The district court granted summary judgment to the defendants, but the Ninth Circuit remanded for trial. The court stated that for a defendant to claim the state action exemption it must demonstrate that the legislature contemplated not only a state policy to displace competition, but also the "kind of action complained of."[193]

The Ninth Circuit, in *Parks v. Watson*, indicated that there may be a limit to the *Des Moines-Akron-North Olmstead* holdings favoring municipal or regional consolidation of "natural monopoly" functions. In *Parks*, unlike the other cases, there was no economic or public purpose to be achieved by the exclusionary activity. Indeed, because the municipal conduct was not minimally ancillary to its authorized interests, the city could not claim the state action immunity. When a municipal provision of public services is challenged as anticompetitive it is therefore critical to assess whether the exclusionary conduct is merely the consequence of pursuing legitimate public interests or is a deliberate and

191. *Id.*

192. 716 F.2d 646 (9th Cir. 1983).

193. *Id.* at 663. *Cf.* Lockary v. Koyfeta, 587 F. Supp. 631 (N.D. Cal. 1984) (comprehensive state statutory policy specifically granted defendants authority to impose the complained of moratorium on extension of water lines during a "water emergency").

unjustified use of market power for the primary purpose of augmenting that power. That assessment turns partially upon the scope of authority delegated to the municipality in question.

In *Hallie*, four Wisconsin townships adjacent to the defendant city of Eau Claire challenged the city's refusal to deliver sewage treatment services to the townships unless they agreed to annexation by the city. The townships contended that the city monopoly of sewage treatment in effect excluded them from the market for sewage collection and transportation, leaving them no means of disposing of sewage once collected. The district court granted the city's motion to dismiss Sherman Act claims on state action grounds. The Seventh Circuit affirmed.[194] The court examined a state statutory scheme that, on similar facts, state courts held exempted municipal actions from antitrust laws. The court held that state policy clearly contemplated the actions of the City of Eau Claire.[195] State statutes expressly permitted cities to deny sewage treatment services to towns that refused to become annexed by the city. Furthermore, the court found that the state policy evidenced an intent to displace competition with monopoly public service or regulation. The court stated that the requisite state intent was inferable from the state's general authorization provision for municipal sewage treatment service, and more specific statutory authority permitting a city to deny requests to extend service.[196]

The Supreme Court affirmed.[197] The Court held that although a state may not validate anticompetitive municipal conduct by simply declaring it lawful, the state action exemption applies to conduct permitted by a clearly expressed state policy that contemplates anticompetitive conduct.[198] The Court rejected the townships' contention that the state action exemption applies only to anticompetitive municipal conduct expressly contemplated by a state.[199] The Court stated that in *Hallie* it was "sufficient" that Wisconsin authorized the city to determine where it would provide sewage treatment services.[200] The Court held that the Wisconsin scheme clearly contemplated anticompetitive

194. Town of Hallie v. City of Eau Claire, 700 F.2d 376 (7th Cir. 1983).

195. *Id.* at 383.

196. *Id.* at 381.

197. 105 S. Ct. 1713 (1985).

198. *Id.* at 1718.

199. *Id.* at 1719.

200. *Id.*

effects from municipal actions under it.[201] Anticompetitive effects were a "forseeable" and "logical" result of the broad state grant of authority to regulate sewage treatment services.[202]

Hallie is the leading decision in a growing body of case law concerning the interaction among municipalities as competing participants in economic markets. In the context of state authorization for refusals to extend sewage treatment services to unannexed towns, allegations that such a refusal is anticompetitive are exempt from antitrust scrutiny. It is not relevant that the defendants pursued an anticompetitive motive that was not expressly approved. The issue turns on neither motive nor effect, but upon the nature of the challenged conduct as within or outside the reasonable contemplation of the state authorization. As indicated earlier, *Hallie* does not change the law—it does not permit municipalities to engage in unauthorized anticompetitive activity. In addition, *Hallie* does not change the criteria for distinguishing exempt from nonexempt conduct, although it does clarify and focus the analysis exclusively on the scope of state authorization.

V. CONCLUSION

In policy terms, the state action exemption is the accommodation of antitrust law to the sovereign power of states in the American federal system. In functional terms, the exemption bars antitrust scrutiny of state regulation of commercial activity. In addition, the exemption is functionally an affirmative defense asserted by private parties to shield anticompetitive conduct from antitrust enforcement.

Doctrinally, the exemption is analyzed by the two-part *Midcal* test—clear articulation plus active state supervision. The simplicity of the *Midcal* test masks the complexities of its application. Nonetheless, the federal courts have developed consistent standards through which to resolve the widely varied assertions of the exemption. In so doing, the courts focused on the authorizing act of the state, the nature of the challenged conduct and the relationship between the conduct and the authorization. The result is an analytical approach fully demonstrative of the rule of reason.

The doctrinal fundamentals are remarkably clear and concise. Only the state, in its sovereign capacity, can authorize anticompetitive conduct. Effective authorization requires a clear articulation and affirma-

201. *Id.*
202. *Id.*

tive expression of the state's intent to displace competition ancillary to a valid state purpose. The "reasonable contemplation test," alluded to in *Lafayette* and articulated in *Hallie*, suggests limits to the "clear articulation" component of the *Midcal* test. Authorization presupposes delegation, which is required as a matter of practicality, in nearly all cases, for the sovereign's passive authorization to become active regulation, but delegation can never broaden the scope of the sovereign's authorization. Supervision, the second prong of the *Midcal* test, now clearly applicable only to private parties, is a preventative mechanism against the possible abuse of the exemption by private parties who might otherwise masquerade culpable conduct as exempt state action.

Southern Motor Carriers and *Hallie* clarify specific issues without disturbing established doctrine. The Court held in *Southern Motor Carriers* that compulsion of a private party's challenged conduct is not a separate requirement; rather, it is evidence of authorization not needed when the state's action is facially clear. Hence, state authorization that clearly permits, but does not compel, the challenged private conduct meets the first prong of *Midcal. Hallie* resolves the issue of whether supervision of challenged municipal conduct is required; it is not. This holding recognizes the unique status of a municipality as a public entity infused with a public purpose, however parochial it may be. The same recognition is reflected in the Court's requirement of a lesser degree of specificity in the state's articulation of policy in order to exempt municipal conduct due to the lower risks of abuse of the exemption. Nonetheless, authorization must be present.

That neither *Southern Motor Carriers* nor *Hallie* substantially change prior doctrine is the source of their significance. These newest Supreme Court additions to the state action exemption doctrine further demonstrate its evolutionary character and the capacity of the antitrust courts to resolve exceedingly complex issues by retaining a disciplined analytical focus on the rule of reason.