Constitutional Limitations on Anticompetitive State and Local Solid Waste Management Schemes: A New Frontier in Environmental Regulation

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The enactment of the Resource Conservation and Recovery Act (RCRA) and the expansion of the scope of interstate commerce have "nationalized" solid waste management, a field that was formerly the exclusive domain of state and local governments. Today, state and local governments act as both sovereigns and market participants in the solid waste management context; nonetheless, these entities may limit the role of private market participants in the solid waste management field only in a manner that does not obstruct the Sherman Act's objectives. Abate and Bennett explore the limits that the Sherman Act, the Commerce Clause, and the Supremacy Clause impose on anticompetitive state and local solid waste management activities within the framework of RCRA's regulatory scheme. The authors explain how the "market participant" doctrine illuminates the nature of the interplay among RCRA, the Sherman Act, and the Commerce and Supremacy Clauses and argue that this doctrine may provide the missing analytical link in resolving questions in this new area of the law. The Article concludes that any governmental entity held by a court to be acting as a market participant in a solid waste management scheme should be subject to possible antitrust liability for anticompetitive conduct. Such a rule would preclude such entities from using the state action immunity doctrine to avoid dormant Commerce Clause scrutiny.

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Introduction

Historically, responsibility for solid waste collection and disposal has rested exclusively with state and local governments. These waste management activities have been conducted in the public interest pursuant to the states' police power. The authority for such regulation arises out of the Tenth Amendment,[1] which empowers the states to enact legislation to protect the health, safety, morals, and general welfare of their citizens.

Since the enactment of the Resource Conservation and Recovery Act of 1976 (RCRA),[2] however, solid waste collection and disposal have not been purely local, intrastate activities. Under RCRA, Congress intended to engage the federal and state governments in a cooperative relationship to achieve national solid waste management goals. Waste management plans under RCRA must comply with federal guidelines and be approved by the Environmental Protection Agency (EPA) to qualify for federal funding and technical assistance. The national interests embodied in RCRA indicate that state and local solid waste management schemes implicate the Commerce Clause.

1. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

2. Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k (1988).

This Article explores the limits that the Sherman Act,[3] the Commerce Clause,[4] and the Supremacy Clause[5] impose on anticompetitive state and local solid waste management activities in the context of the "cooperative federalism"[6] scheme contemplated under RCRA. The Supremacy Clause and the antitrust policies of the Sherman Act require states to provide a role for private market participants in the solid waste management field so as not to obstruct the Sherman Act's objectives. In determining whether, and to what extent, states may limit competition in the solid waste management market, courts balance possible discrimination against interstate commerce imposed by solid waste management schemes against the purely local state interest advanced by the law or regulation.

The Article also examines the "state action immunity" doctrine announced in *Parker v. Brown*[7] and its application to antitrust challenges to state and local solid waste management schemes. The immunity accorded anticompetitive state economic regulations in *Parker* was premised on state sovereignty concerns. However, the post-*Parker* expansion of the scope of interstate commerce, the rejection of the concept of "traditional" local government functions,[8] and the identification of solid waste management as an "article of interstate commerce"[9] warrant a reexamination of the validity of state action immunity in the context of solid waste management. A reconsideration of the continuing relevance of *Parker* as a doctrine for antitrust claims in the solid waste management context must recognize that the dormant Commerce Clause and antitrust preemption analyses overlap.[10]

Nevertheless, in many cases in which some aspect of a state, county, or municipal solid waste management scheme has been challenged, courts have inappropriately separated their consideration of the constitutional issues from

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3. Sherman Act, 15 U.S.C. §§ 1-41 (1988 & Supp. 1993).

4. The Commerce Clause states: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

5. The Supremacy Clause states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, § 2.

6. "Cooperative federalism" refers to Congress' authority to influence state legislation consistent with federal policies by offering states the option to regulate private activity in accordance with federal standards in lieu of outright preemption by federal regulation. *See, e.g.*, New York v. United States, 112 S. Ct. 2408, 2423-24 (1992); FERC v. Mississippi, 456 U.S. 742, 764-65 (1982); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 289 (1981). Cooperative federalism enables the federal government to structure solutions to environmental problems through which compliance with federal standards is achieved by financial and regulatory incentives to states.

7. 317 U.S. 341 (1943).

8. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546-47 (1985) (rejecting as "unsound in principle and unworkable in practice" principle of state immunity from federal regulation premised on judicial interpretation of whether particular governmental function is "integral" or "traditional").

9. *See* C & A Carbone, Inc. v. Town of Clarkstown, 114 S. Ct. 1677 (1994).

10. Construction Aggregate Transp., Inc. v. Florida Rock Indus., Inc., 710 F.2d 752, 766 (11th Cir. 1983). *See also* United States v. Employing Plasterers Ass'n, 347 U.S. 186, 189 (1954) ("Wholly local business restraints can produce the effects condemned by the Sherman Act."); Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 743 (1976).

their consideration of the antitrust issues. This separation has resulted in judicial endorsement of anticompetitive state and local regulations that promote economic protectionism forbidden under the dormant Commerce Clause. Typically, the courts' review has been limited to assessing the extent to which a solid waste management scheme's regulation of interstate commerce is constitutionally permissible under the dormant Commerce Clause. Recently, however, private waste processors have challenged solid waste management schemes, particularly "flow control"[11] laws, on antitrust and constitutional grounds, contending that such schemes illegally interfere with interstate commerce.

The pivotal case that sparked this recent trend is *C & A Carbone, Inc. v. Town of Clarkstown*,[12] in which the Supreme Court invalidated a flow control regulation mandating that all garbage within a municipality be brought to a particular private solid waste management facility. Since *Carbone*, federal courts have in a number of cases been forced to determine how RCRA, the Sherman Act, and the Commerce and Supremacy Clauses interact. The most significant recent decisions dealing with this question are *Pine Ridge Recycling, Inc. v. Butts County*,[13] *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*,[14] and *SSC Corp. v. Town of Smithtown*.[15] Taken together, these decisions provide the framework for a consistent and coherent approach to this new wave of environmental litigation.

The "market participant" doctrine highlights the nature of the interplay among RCRA, the Sherman Act, and the Commerce and Supremacy Clauses and may provide the missing analytical link in resolving challenges to anticompetitive state and local solid waste management schemes. The market participant doctrine provides that state and local governments have a choice between regulating as a sovereign and acting as a market participant. When acting as a sovereign, state and local governments are shielded by antitrust immunity, yet remain subject to the prohibitions of the dormant Commerce Clause. As a market participant, state and local governments avoid Commerce Clause claims but are subject to antitrust law. In the solid waste management context, however, state and local governments often act as both sovereigns and market participants. For instance, a privately operated solid waste management facility may be purchased and run by the state after it is financed, with the support of a flow control ordinance like the one in

11. The term "flow control" refers to the legal mechanisms used by local governments to designate where municipal solid waste from a specified geographic area under the jurisdiction of the local government must be managed, stored, or disposed. *See* C & A Carbone, Inc. v. Town of Clarkstown 114 S. Ct. 1677, 1680 (1994).

12. 114 S. Ct. 1677 (1994).

13. 855 F. Supp. 1264 (M.D. Ga. 1994).

14. 48 F.3d 701 (3d Cir. 1995).

15. 66 F.3d 502 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 911 (1996).

Carbone. This Article argues that state and local governments should not be allowed to enjoy antitrust immunity yet avoid scrutiny under the *Carbone* Commerce Clause analysis.

Part I of this article discusses the role of RCRA and the Sherman Act in regulating anticompetitive state and local solid waste management schemes. Part II addresses the origin and development of the *Parker* state action immunity doctrine, both within and outside the solid waste management context, in light of the expansion of the scope of interstate commerce. Part III considers the role of preemption and the Supremacy Clause and addresses the overlap between the application of the Sherman Act and the dormant Commerce Clause analysis in resolving these disputes. Part IV examines the origin and development of the market participant doctrine, both within and outside the solid waste management context, and explores the doctrine's role in resolving challenges to anticompetitive state and local solid waste management schemes. After analyzing the interplay among RCRA, the Commerce Clause, the Supremacy Clause, and the Sherman Act, this Article concludes that state and local governments should be precluded from using the *Parker* state action immunity doctrine to regulate solid waste in a manner that violates the dormant Commerce Clause while remaining insulated from antitrust liability.

I. The Federal Regulatory Context: RCRA, the Sherman Act, and Anticompetitive Solid Waste Management Schemes

A. *RCRA and Cooperative Federalism*

The first federal effort to define "solid waste" and to address the environmental problems associated with its disposal appeared in 1965 with the passage of the Solid Waste Disposal Act (SWDA).[16] The SWDA was primarily intended to promote research and to provide federal financing for the study of environmentally sound methods of solid waste management. However, few federal grant programs were actually pursued and, while SWDA-sponsored research led to valuable data on waste disposal, the legislation is viewed as having been generally ineffective.[17]

This first wave of federal legislation concerning solid waste did not disturb the states' traditional control over solid waste management activities. However, a growing awareness of the dangers that unsafe waste disposal practices posed to human health and the environment prompted Congress to

16. Solid Waste Disposal Act of 1965, Pub. L. No. 89-272, 79 Stat. 997, *repealed by* Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901-6992 (1995)).

17. *See* Note, *Michigan Gets Trashed: The Effect of the Dormant Commerce Clause on State Attempts to Regulate Solid Waste Disposal*, 39 Wayne L. Rev. 1665, 1667 n.18 (1993).

enact RCRA in 1976.[18] The enactment of this environmental legislation signalled a departure from the tradition of deferring to the states' autonomy in the solid waste management field.[19]

Throughout RCRA there are statements indicating that Congress considers solid waste management to be a national problem. The Act contemplates that state actions should be coordinated as part of a federal environmental program. In the congressional findings section of RCRA, Congress acknowledged that state, regional, and local agencies should continue to bear primary responsibility for the collection and disposal of solid waste. Nevertheless, Congress found that the problems of waste disposal are national in scope and require federal action through financial and technical assistance and leadership in the development, demonstration, and application of new and improved methods and processes to reduce the amount of waste and provide for proper and economical solid waste disposal practices.[20]

The objectives for state and regional solid waste plans described in Subchapter IV of RCRA include developing and encouraging environmentally sound solid waste disposal methods and utilizing recoverable energy resources from solid waste. Importantly, the statute contemplates private business participation in the pursuit of these objectives, which are to be achieved through federal assistance to states or regional authorities for comprehensive planning in accordance with federal guidelines designed to promote cooperation among federal, state, and local governments and private industry.[21] State and local activities in solid waste planning and management independent of RCRA are permissible, but must be consistent with the state plan approved by the EPA Administrator.[22]

Its comprehensive regulatory scheme makes RCRA a benchmark in the history of solid waste regulation. Despite the discretion afforded to states as to whether to submit plans for federal approval in return for assistance, all state activities in solid waste management are now subsumed within a federal program with national environmental objectives. In addition, the statute provides for the continued involvement of the private sector in solid waste activities.

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18. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901-6992 (1995)).

19. RCRA defines "solid waste" as:

> [A]ny garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materals in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of title 33 [Clean Water Act] or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923) [42 U.S.C. §§ 2011] et. seq.

42 U.S.C. § 6903.

20. 42 U.S.C. § 6901(a)(4).

21. 42 U.S.C. § 6941.

22. 42 U.S.C. § 6947(c).

Nevertheless, tension between federal and state interests in solid waste management has prompted a wave of Commerce Clause challenges to waste management schemes in the 1990s.[23] The Commerce Clause prohibits the states from unjustifiably discriminating against or burdening the interstate flow of commerce.[24] Once a law's effect on interstate commerce is established, there are two lines of inquiry: first, whether the law discriminates against interstate commerce under *City of Philadelphia v. New Jersey*; and second, whether the law imposes a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits."[25] As long as a state does not discriminate against nonresidents, it may impose incidental burdens on interstate commerce when exercising its police power to promote safety or the general welfare.[26]

B. *The Sherman Act: Commerce Clause Underpinnings and Congressional Intent*

The Sherman Act reflects Congress' determination that economic efficiency and national solidarity are related. Like RCRA, the Sherman Act's procompetitive mandate is national in scope; anticompetitive actions affecting interstate commerce implicate both the Supremacy Clause and the Commerce Clause.

Anticompetitive burdens on interstate commerce frustrate the national free market goals of the Sherman Act. Because commerce is an area of shared power, courts must determine when the national economic interest in competition preempts anticompetitive state and local regulation. In some cases, the issue of whether the Sherman Act preempts state anticompetitive regulation is not even raised. Some litigants apparently presume that state

23. These challenges typically have involved one of three types of waste management: import/export bans, see, for example, Fort Gratiot Landfill v. Michigan Dept. of Natural Resources, 112 S. Ct. 2019 (1992); tipping fee schemes, see, for example, Chemical Waste Mgmt., Inc. v. Hunt, 112 S. Ct. 2009 (1992); or flow control laws, see, for example, C & A Carbone, Inc. v. Town of Clarkstown, 114 S. Ct. 1677 (1994).

24. Oregon Waste Sys., Inc. v. Department of Envtl. Quality, 114 S. Ct. 1345, 1349 (1994).

25. C & A Carbone, Inc. v. Town of Clarkstown, 114 S. Ct. 1677, 1682 (1994) (quoting City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)). *See also* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

26. New York State Trawlers Ass'n v. Jorling, 16 F.3d 1303, 1307 (2d Cir. 1994). *See also* National Solid Waste Management Ass'n v. Williams, 877 F. Supp. 1367, 1376 (D. Minn. 1995) (invalidating flow control element of Minnesota's solid waste management statute requiring "arrangers" who transport metropolitan waste to out-of-state landfills to make trust fund payments and to indemnify waste generators).

statutes that explicitly (or implicitly[27]) displace competition with regulation in the solid waste market are immune from judicial scrutiny.[28]

To survive challenges to a court's subject matter jurisdiction, antitrust plaintiffs must demonstrate that the defendant's conduct involves interstate commerce.[29] Some courts have framed the jurisdictional inquiry for antitrust claims in terms of whether Congress may prohibit the challenged conduct under the Commerce Clause. If Congress may do so, then the conduct is deemed to be within the jurisdictional reach of the Sherman Act.[30]

Congressional debate in 1890 over the Sherman Act concerned an issue that remains controversial: the nature and extent of the states' police power with respect to matters concerning commerce. Senator Edmunds, who drafted the language addressing the Act's relation to commerce, asserted that the Constitution did not authorize Congress "to enter into the police regulations of the people of the United States."[31] Senator Vest maintained that the legislation was unconstitutional, asserting "[t]he police power of the State is an entirely different jurisdiction, as distinct and separate from the interstate-commerce clause in the Federal Constitution as any two subjects can possibly be."[32]

Despite the limited view of federal Commerce Clause authority that some members of Congress espoused, the final language of the Act and its far-reaching national economic goals demonstrate its expansive scope. In interpreting the language, the Supreme Court in *City of Lafayette v. Louisiana Power & Light Co.* stated: "Language more comprehensive is difficult to conceive. On its face it shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states."[33]

The consensus among courts reviewing the Sherman Act's legislative history has been that Congress intended "to establish a regime of competition

27. *See* City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365, 372 (1991) (state statute does not need to "explicitly permit . . . displacement of competition"); Town of Hallie v. City of Eau Claire, 471 U.S. 34, 42-43 (1985) ("It is not necessary . . . for the state legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects" so long as such effects would "logically" or "foreseeably" result.).

28. *See, e.g.*, C & A Carbone, Inc. v. Town of Clarkstown, 114 S. Ct. 1677, 1699 (1994) (preemption issue never addressed by Court even though the "flow control ordinance at issue here squelches competition in the waste-processing service altogether").

29. *See* Valley Disposal, Inc. v. Central Vermont Solid Waste Management Dist., 31 F.3d 89, 95 (2d Cir. 1994) (landfill operators failed to allege sufficient facts indicating activities of defendant solid waste management district had "not insubstantial" effect on interstate commerce as component of Sherman Act jurisdiction).

30. *See, e.g.*, Chatham Condominium Ass'ns v. Century Village, Inc., 597 F.2d 1002, 1008 (5th Cir. 1979).

31. 21 CONG. REC. 2727 (1890) (statement of Sen. Edmunds).

32. 21 CONG. REC. 2603 (1890) (statement of Sen. Vest).

33. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 398 (1978) (quoting United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553 (1944)).

as the fundamental principle governing commerce in this country."[34] For example, in dismissing the municipality's argument in *Community Communications Co. v. City of Boulder* that the Court's denial of antitrust immunity would have "adverse consequences" for cities, Justice Brennan stated that the argument was merely "an attack upon the wisdom of the longstanding congressional commitment to the policy of free markets and open competition embodied in the antitrust laws."[35] To support his response, Justice Brennan relied on Justice Marshall's eloquent explanation of the stature of the antitrust laws:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.[36]

II. *Parker* and the Development of the State Action Immunity Doctrine

The Supreme Court's decision in *Parker* blurred the scope of permissible anticompetitive state action under the Sherman Act. By failing to place its federalism analysis of the Sherman Act in the proper historical context, the *Parker* Court finessed the obvious conflict between anticompetitive state laws and the procompetitive mandate of the Sherman Act. The *Parker* Court's deference to state economic regulation ignored the fact that Congress exercised all the powers it thought constitutionally permissible when it enacted the Sherman Act, and that further applications of the Act, given its broad language and goals, should account for the judicial evolution of interstate commerce and the constitutional reach of the Commerce Clause.

A. *The Parker Decision*

In 1943, the Supreme Court issued its landmark decision in *Parker v. Brown*[37] concerning the applicability of the antitrust provisions of the Sherman Act to a state law that had created a cartel-like state administrative framework to orchestrate price and commodity distribution controls in the California raisin market. The outcome of the decision was deceptively

34. *Id.*
35. Community Communications Co. v. City of Boulder, 455 U.S. 40, 56 (1982) (footnote omitted).
36. United States v. Topco Assocs., 405 U.S. 596, 610 (1972).
37. Parker v. Brown, 317 U.S. 341 (1943).

simple—the Court held that the antitrust prohibitions of the Sherman Act do not apply to statutes enacted by states acting in their sovereign capacity. The Court determined that, in the absence of any express congressional intent to the contrary, a state is free to exercise its sovereign regulatory authority. The Court rationalized the resulting conflict between the California law at issue and federal law as an unavoidable aspect of federalism. The *Parker* Court's decision did not refer to the Supremacy Clause; its holding was limited to the conclusion that the Sherman Act did not prohibit an "act of government."

Subsequent cases have interpreted *Parker* as announcing a "doctrine" of either a "state action exemption" or "state action immunity." Both labels are misnomers, and their continued use reflects the analytical shortcomings that have distracted courts from establishing a constitutionally sound basis for determining whether, or under what circumstances, the Sherman Act preempts anticompetitive state regulation. The *Parker* decision launched courts and commentators into a constitutional debate that goes to the very foundation of our governmental system—the proper balance between federal and state authority, and how to achieve it.

The *Parker* decision concerned the California Agricultural Prorate Act.[38] The Act authorized the "establishment, through action of state officials, of programs for the marketing of agricultural commodities produced in the state, so as to restrict competition among the growers and maintain prices in the distribution of their commodities to packers."[39] The express purposes of the Act were to "conserve the agricultural wealth of the State" and to "prevent economic waste in the marketing of agricultural crops."[40] The effects of the Act were to restrict output and inflate prices.

The plaintiff, Porter L. Brown, a producer and packer of raisins in California, sued the State Director of Agriculture, the members of the State Agricultural Prorate Advisory Committee, and the Program Committee. Brown sought an injunction based on alleged violations of the Sherman Act and the Commerce Clause; however, the Court dismissed all of his claims.

The Court's treatment of Brown's Commerce Clause claim provides some insight into the judicial mindset involved in the Sherman Act question at issue in *Parker*, particularly with respect to the Court's understanding of the scope of interstate commerce and its relationship to the states' police power. The Court held that subjecting Brown to the output and price controls set by the government-sponsored cartel did not violate the Commerce Clause, even though the commodity (raisins) was to be packed and shipped out of state. The Court reasoned that the "governments of the states are sovereign within their territory save only as they are subject to the prohibitions of the Constitution or as their action in some measure conflicts with powers

38. California Agricultural Prorate Act, Cal. Food & Agric. Code §§ 59641-59620 (West 1986).
39. *Parker*, 317 U.S. at 346.
40. *Id.*

delegated to the National Government, or with Congressional legislation enacted in the exercise of those powers."[41]

The Court then articulated the dormant Commerce Clause principle that the grant of power to the federal government in the Commerce Clause "did not wholly withdraw from the states the authority to regulate the commerce with respect to matters of local concern, on which Congress has not spoken."[42] The Court determined that state-administered price and output controls are purely intrastate in nature, even though the commodity involved was destined for interstate shipment.

There are two fundamental constitutional doctrines embedded in the *Parker* Court's discussion of the Sherman Act issue: (1) intergovernmental comity, and (2) state sovereign immunity.[43] The Court began its discussion by assuming that California's prorate program "would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate." The Court also made it clear that it was not addressing a "question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade." Apparently, the existence of a technical Sherman Act violation by the state was irrelevant to the Court's analysis.[44]

The Court noted that the individual actions—which it assumed violated the Sherman Act—were made possible by the "legislative command of the state."[45] It then determined that the language of the Sherman Act and its legislative history lacked any indication that the Act was designed to "restrain a state or its officers or agents from activities directed by its legislature."[46]

In what amounts to little more than a basic statement of federalism, the Court further noted that "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."[47] This passage has served to misdirect courts in a

41. *Id.* at 359-60.

42. *Id.* at 360.

43. The Commerce Clause was the original focus of the case, and the basis for the lower court's opinion. The Sherman Act issue was not addressed until the case reached the Supreme Court. The Court raised the question sua sponte and requested supplemental briefs. The Justice Department, appearing as amicus curiae, argued that the Sherman Act preempted California's prorate program, because the statute was "designed directly to control the competitive aspects of an industry in a manner which will have more than local effect." *See* Brief for the United States as Amicus Curiae at 64-65, Parker v. Brown, 317 U.S. 341 (1943) (No. 41-1040). This position is consistent with the preemption analysis discussed in Part III.

44. *Parker*, 317 U.S. at 350-52. A subsequent Supreme Court case, however, relying on "traditional antitrust analysis" held that the Sherman Act did not preempt a municipality's rent control law imposing rent ceilings because it was a "unilateral" governmental action. Fisher v. City of Berkeley, 475 U.S. 260 (1986). By inserting "traditional antitrust analysis" as a threshold inquiry, the Court added a step not present in *Parker* and avoided the Supremacy Clause inquiry of whether government actions displacing competition conflict with the Sherman Act. The Court did not consider whether the anticompetitive effect resulted from "state action."

45. Parker v. Brown, 317 U.S. 341, 350 (1943).

46. *Id.* at 350-51.

47. *Id.* at 351.

series of subsequent cases. The Court's belief that for there to be preemption it must find an express statement concerning the applicability of the antitrust laws to the states in the Sherman Act or its legislative history vitiates the Supremacy Clause.[48]

The Court's deference to California's sovereign right to regulate the economic activity occurring within its borders based on the state's police power suggests a purely jurisdictional approach. The Court, however, waffled on this issue, stating that "[t]he regulation is thus applied to transactions wholly intrastate before the raisins are ready for shipment in interstate commerce."[49] On the other hand, when discussing the Sherman Act issue, the Court stated that it "may assume also, without deciding, that Congress could, in the exercise of its commerce power, prohibit a state from maintaining a stabilization program like the present one because of its effect on interstate commerce."[50]

The Court was at its clearest, however, in stating that this immunity was to be enjoyed solely by the state. Writing for a plurality of the Court some twenty-three years later in *Cantor v. Detroit Edison Co.*,[51] Justice Stevens observed that, in *Parker*, Chief Justice Stone carefully selected language that limited the Court's holding to official action taken by state officials.[52] Justice Stevens noted that the *Parker* opinion contains thirteen references to the fact that state action is involved.

It is precisely this interplay of public and private action that has, with few exceptions, been at the heart of every Supreme Court case addressing the state action immunity dilemma.[53] State economic regulations inevitably have a direct effect on private individuals and corporations. Indeed, such is the nature and purpose of governmental regulatory activity.

The flaw in the *Parker* Court's reasoning is that the Court's analysis was limited to examining the Sherman Act's legislative history to determine whether Congress intended to subject states to the antitrust laws. However, the operation of the Supremacy Clause is not necessarily determined by the express statutory language itself, but rather by whether the state and federal laws conflict,[54] as where "compliance with both federal and state regulations

48. *See* Gregory Werden & Thomas Balmer, *Conflicts Between State Law and the Sherman Act*, 44 U. PITT. L. REV. 1, 14 (1982) ("It is not at all clear why the Sherman Act was not held to preclude enforcement of the California raisin program. No case interpreting the Supremacy Clause was cited by the Court to support its reasoning, nor was any case distinguished from the instant one.").

49. Parker v. Brown, 317 U.S. 341, 361 (1943).

50. *Id.* at 350.

51. Cantor v. Detroit Edison Co., 428 U.S. 579 (1976).

52. *Id.* at 591.

53. As Justice Stevens noted in *Cantor*, "typically cases of this kind involve a blend of private and public decisionmaking." *Id.* at 592.

54. The preemption analysis is not merely formulaic, however, because absent express or implied preemption, the balancing test discussed in Part III is indispensable in determining whether a state statute conflicts with, or is an obstacle to the accomplishment of, federal law. Thus, the examination of congressional intent, though informative, is only the beginning of the inquiry in many cases.

is a physical impossibility,"[55] or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[56] The Court in *Parker* improperly relied on *Northern Securities Company v. United States*,[57] a case decided 39 years prior to *Parker*, to support its statement that a state cannot authorize violations of the Sherman Act.

Despite the language in *Parker* limiting antitrust immunity to states in the exercise of their sovereign regulatory authority, private parties and other governmental entities facing antitrust claims have invoked the *Parker* state action immunity doctrine. Because "it would be unacceptable ever to impose statutory liability on a party who had done nothing more than obey a state command,"[58] and since *Parker* and *Northern Securities* prohibited a state from authorizing Sherman Act violations, the specter of crippling the states' authority to enforce economic regulations resulted in the inevitable expansion of state action immunity.

B. *The Post-Parker Development of the State Action Immunity Doctrine*

Fears that subjecting the states to the antitrust laws would virtually preclude them from engaging in economic regulation contributed to the courts' reluctance to apply the Supremacy Clause strictly to anticompetitive state actions that conflict with the national economic policy embodied in the Sherman Act.[59] The Court's approach has been to formulate a test to determine whether an activity challenged as violative of the antitrust laws qualifies as "state action." Generally, the outcome will depend on whether a private party or political subdivision exercised sufficient decisionmaking authority to enable the Court to conclude that such a party should be held responsible for the consequences of its decision.[60]

1. *Antitrust Immunity for Municipalities*

The Court opened the door for state action immunity for municipalities in *City of Lafayette v. Louisiana Power & Light Co.*[61] The Court held that two

55. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

56. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

57. Northern Sec. Co. v. United States, 193 U.S. 197, 346 (1904) ("It cannot be said that any State may give a corporation, created under its laws, authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress.").

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

59. The Supreme Court has issued inconsistent decisions on this issue. *Compare Cantor*, 428 U.S. at 595 (stating that "[a]ll economic regulation does not necessarily suppress competition") *with* Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 133 (1978) (stating that "[i]f an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed").

60. *Cantor*, 428 U.S. at 593.

61. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978).

municipalities operating electric utilities were not immune from an antitrust claim based on their conditioning the provision of gas and water service on a customer's purchase of the municipalities' electricity. The municipalities argued that they were entitled to *Parker* immunity by virtue of their status as government entities.

The Court in *City of Lafayette* was concerned about the serious economic dislocation that could occur if cities were free to place their own parochial interests above the nation's economic goals as reflected in the antitrust laws.[62] The Court determined that a municipality is entitled to state action immunity when acting pursuant to a state policy requiring the anticompetitive restraint as part of a comprehensive regulatory system that is: (1) "clearly articulated and affirmatively expressed" as state policy; and (2) "actively supervised" by the State Supreme Court.[63]

Although the language for the two-prong test first appeared in *City of Lafayette*, the Court's decision in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*[64] is viewed as firmly establishing the test. In *Midcal*, the Court denied antitrust immunity where a state statute required wine wholesalers to charge prices dictated by the producers. The arrangement was held to be an illegal resale price maintenance scheme that, while "clearly articulated and affirmatively expressed" as a state policy, failed to include sufficient state supervision to satisfy the second prong of the test. The state action was limited to authorizing the price setting and enforcing the prices established by private parties. The state did not establish the prices, review them to ensure that they were reasonable, or oversee the terms of the contracts between the producers and the wholesalers. Accordingly, the Court held that there was insufficient "active state supervision" to satisfy the second prong of the test.

Midcal best exemplifies a case where "notwithstanding the state participation in the decision, the private party exercised sufficient freedom of choice to enable the Court to conclude that he should be held responsible for the consequences of his decision."[65] Seeking to ensure that regulatory decisions with anticompetitive consequences remain in the hands of those officially entrusted with the public interest, the Court stated: "The national policy in favor of competition cannot be thwarted by casting such a gauzy

62. *Id.* at 412-13.

63. *Id.* at 410.

64. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

65. Cantor v. Detroit Edison Co., 428 U.S. 479, 593 (1976). *Compare* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) (invalidating state statute requiring nonsignatories to resale price contracts to join state-approved, private price fixing cartel) *with* New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 109 (1978) (finding no impermissible delegation of state power to private citizens where state statute required car manufacturers to obtain approval from state board before opening new dealership in existing franchisee's market area if competing franchisee objected).

cloak of state involvement over what is essentially a private price-fixing arrangement."[66]

While the Court has maintained relatively strict standards for private parties seeking to come under the state action umbrella, it has significantly relaxed its application of the two-prong test in *City of Lafayette* to assertions of antitrust immunity by municipalities.[67] To obtain state action immunity, a municipality does not have to show that the state statute on which its actions are based "explicitly permit[s] the displacement of competition."[68] Nor is it necessary "for the state legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects," so long as such effects would "logically" or "foreseeably" result.[69]

Similarly, in distinguishing the standard for private parties from that required for municipalities with respect to the "active state supervision" element of the two-prong test, the Court observed that it "may presume, absent a showing to the contrary, that the municipality acts in the public interest."[70] The Court's rationale was that "[a]mong other things, municipal conduct is invariably more likely to be exposed to public scrutiny than is private conduct."[71]

2. *Municipal Antitrust Immunity in the Solid Waste Management Context*

Challenges to a state or municipality's regulation of solid waste collection and processing were made easier to defend in *Town of Hallie v. City of Eau Claire*[72] through the relaxation of the two-prong test. In *Town of Hallie*, the court held that so long as the displacement of competition in the solid waste market is a "foreseeable result" of state enabling legislation, local governments may employ anticompetitive means to achieve their objectives, even though the state does not actively supervise the programs.[73]

Courts have reached conflicting results when applying the *Town of Hallie* standard in situations where the state has delegated authority to political subdivisions to adopt solid waste management programs.[74] However, a municipality's adoption of anticompetitive measures for the express purpose

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

67. *See* City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365 (1991); Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985).

68. *City of Columbia*, 499 U.S. at 372.

69. *Town of Hallie*, 471 U.S. at 42-43.

70. *Id.* at 45.

71. *Id.* at 45 & n.9.

72. *Id.* at 34.

73. *Id.* at 42.

74. *Compare* Pine Ridge Recycling, Inc. v. Butts County, 855 F. Supp. 1264, 1271 (M.D. Ga. 1994) (municipal defendants not entitled to state action immunity because state cannot grant its local governments authority to violate Commerce Clause) *with* Bonollo Rubbish Removal, Inc. v. Town of Franklin, 886 F. Supp. 955, 962-65 (D. Mass. 1995) (municipal defendants immune from antitrust liability in challenge to town law requiring haulers to deliver waste to designated waste management facility).

of financing a waste management program, such as in *Central Iowa Refuse Systems, Inc. v. Des Moines Metro Solid Waste Agency*[75] and *Hybud Equipment Corp. v. City of Akron*,[76] is presumptively invalid under *Carbone*.[77]

Antitrust immunity for solid waste management regulation by counties has also been addressed by the courts. In *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*,[78] a challenge was brought under the Sherman Act and state antitrust law to a county ordinance that required solid waste within the county to be disposed of at a particular incinerator. The court held that the state action immunity doctrine shielded the county from liability for its allegedly anticompetitive conduct.[79] The legislative scheme authorized the county to require that all or any portion of the solid waste generated within its borders be delivered to a designated disposal facility. Thus, the court concluded, the scheme evidenced a "clearly articulated and affirmatively expressed" state policy to "displace competition with regulation in the area of municipal provision of solid waste disposal services."[80]

III. Preemption, the Dormant Commerce Clause, and Anticompetitive Solid Waste Management Schemes

The doctrine of preemption is based on the Supremacy Clause.[81] In the earliest judicial pronouncement on this constitutional provision, Chief Justice Marshall stated that the Supremacy Clause's import is that "[t]he States have no power, by taxation, or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress, to carry into effect the powers vested in the national government."[82] Despite the constitutional requirements embodied in the Supremacy Clause, the *Parker* doctrine has protected state anticompetitive economic regulations under the guise of seeking to ensure state sovereignty over matters of local concern.

75. 715 F.2d 419 (8th Cir. 1983) (upholding as immune from antitrust liability monopoly over local disposal).

76. 742 F.2d 949 (6th Cir. 1984) (upholding as immune from antitrust liability municipal waste disposal monopoly over waste generated within its borders that employed a private contractor to build and operate a designated waste management facility).

77. C & A Carbone, Inc. v. Town of Clarkstown, 114 S. Ct. 1677 1684 (1994) ("By itself, of course, revenue generation is not a local interest that can justify discrimination against interstate commerce.").

78. Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County, 867 F. Supp. 1430 (D. Minn. 1994).

79. *Id.* at 1436.

80. *Id.*

81. There are conceptual distinctions between the constitutional bases for, and operation of, "preemption" and "supremacy." Supremacy means that valid federal law overrides otherwise valid state law, whereas preemption occurs when states are deprived of their power to act at all in a given area, regardless of conflict. Thus, preemption is "jurisdiction-stripping," whereas supremacy is "conflict-resolving." *See* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 770 (1994).

82. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 317 (1819).

A. *The Constitutional Dynamics of Preemption*

Applying the Supremacy Clause is difficult in cases involving commercial regulation because such regulation is an area of shared or overlapping power. Therefore, the polestar for supremacy questions concerning commercial regulation matters is the extent to which the subject of the action is a matter of national concern requiring uniformity.

There are three ways in which federal law may preempt state law.[83] First, and easiest to apply, is where Congress expressly defines the extent to which state law is preempted.[84] Second, there may be a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[85] Finally, even when Congress has not completely displaced state regulation, state law is preempted to the extent that it conflicts with federal law, as where "compliance with both federal and state regulations is a physical impossibility,"[86] or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[87]

The analysis of whether and when the Sherman Act preempts anticompetitive state regulations falls into the last category—whether state economic regulations displacing competition create an "obstacle" to the accomplishment of the procompetitive purposes of the Sherman Act. Congress did not believe that it could expressly subject the states to the Sherman Act's antitrust prohibitions. What is certain, however, is that Congress intended to promote the procompetitive objectives of the legislation to the fullest extent allowable under its Commerce Clause power.[88]

B. *The Dormant Commerce Clause and Conflict Preemption*

One of the main problems with *Parker* and its progeny is the confusion between "exemptions" from statutory mandates—enacted by the same sovereign—and preemption. As Justice Rehnquist noted in his dissenting opinion in *Community Communications*:

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83. Typically, cases reviewing a preemption claim begin with an overview of the categories of federal preemption, which are essentially boilerplate statements of law. *See* Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597 (1991); Michigan Canners & Freezers v. Agricultural Mktg. & Bargaining Bd., 467 U.S. 461 (1984).

84. *See* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95-96 (1983); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

85. Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982).

86. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

87. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

88. In interpreting the reach of the Federal Arbitration Act under the Commerce Clause, Justice Breyer, writing for the majority, observed that "it is not unusual for this Court . . . to ask whether the scope of a statute should expand along with the expansion of the Commerce Clause power itself, and to answer the question affirmatively—as, for the reasons set forth above, we do here." Allied-Bruce Terminix Co. v. Dobson, 115 S. Ct. 834, 840 (1995). *See also* Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 743 n.2 (1976) (observing that Congress intended reach of Sherman Act to expand with expansion of Commerce Clause power).

> The question addressed in *Parker* . . . is not whether state and local governments are exempt from the Sherman Act, but whether statutes, ordinances, and regulations enacted as an act of government are pre-empted by the Sherman Act under the operation of the Supremacy Clause . . . questions involving the so-called "state action" doctrine are more properly framed as being ones of pre-emption rather than exemption.[89]

When a court conducts a dormant Commerce Clause analysis, a determination that an anticompetitive state economic regulation violates the Commerce Clause on the basis of preemption supersedes the *Parker* state sovereignty premise. Subjecting private solid waste activities to anticompetitive state or local regulatory measures transcends political and geographical boundaries, thereby colliding with the national economic interest in free markets and open competition.

Because of the nature of congressional authority under the Commerce Clause, the dormant Commerce Clause analysis has significant implications for preemption doctrine. Congress engages its preemption power to ensure uniformity within a given area of regulation. When a state displaces competition with regulation in an area of interstate commerce—such as the solid waste management field—the Commerce and Supremacy Clauses dovetail and provide a basis for a test to determine whether the state action is an obstacle to the antitrust laws. A judicial determination that a state regulation imposes a constitutionally impermissible burden on, or discriminates against, interstate commerce supports the conclusion that it conflicts with, and therefore is preempted by, the federal antitrust laws. State economic regulations incidentally burden interstate commerce only when they address purely local interests. However, the federal definition of solid waste as a national problem in RCRA and the judicial determination that solid waste activities amount to interstate commerce render state anticompetitive regulations inherently protectionist.

Unlike express or implied preemption, conflict preemption requires balancing. This balancing is undertaken to determine whether an alleged conflict frustrates the purposes of federal law. Only then does the state action become constitutionally impermissible. The strict scrutiny warranted by the protectionist nature of state anticompetitive regulations requires more than mere balancing, however. In this context, if the state's objective can be achieved by means that do not require or result in the elimination of competition, it violates the Commerce Clause and is therefore preempted. State economic regulation of purely intrastate matters, which do not

89. *See* Community Communications Co. v. City of Boulder, 455 U.S. 40, 60-62 (1982) (Rehnquist, J., dissenting).

"substantially affect" interstate commerce,[90] will not be subject to judicial review because a court will not have subject matter jurisdiction under such circumstances.

In his concurring opinion in *Cantor v. Detroit Edison Co.*,[91] Justice Blackmun stated that, while the Sherman Act "generally preempts" inconsistent state laws, "the more difficult question [is] which such laws are pre-empted and to what extent."[92] Justice Blackmun urged the adoption of a balancing test, observing that the Court is constitutionally bound to balance implicated federal and state interest, "with a view to assuring that when these are truly in conflict, the former prevail."[93]

Justice Blackmun described this balancing process as a "familiar one to the federal courts," noting that a state action that interferes with competition among the States is already subject to a similar balancing process under the Commerce Clause.[94] Unfortunately, incorporating the balancing of federal and state interests that has traditionally been performed in dormant Commerce Clause cases into preemption analysis raises the specter of *Lochner*[95] and substantive due process. To permit such balancing could involve the courts "in the same wide-ranging, essentially standardless inquiry into the reasonableness of local regulation that this Court has properly rejected."[96]

However, the Supreme Court's consideration of the preemption of state economic regulation in the few cases in which it has been explicitly presented suggests that fears of far-reaching and intrusive *Lochner*-type judicial review are unfounded. For example, in *Exxon Corp. v. Governor of Maryland*,[97] the Court held that a Maryland statute prohibiting oil producers and refiners from operating retail gas stations in the state, and requiring that all temporary price reductions be extended uniformly to all service stations, was reasonably related to the state's legitimate purpose of controlling its gasoline market. In addition to holding that the statute did not discriminate or otherwise impermissibly burden interstate commerce, the Court rejected the contention that no state can regulate retail marketing of gasoline because the economic market for petroleum products is national in scope.

While the Court in *Exxon* determined that the Commerce Clause, by its own force, did not preempt the field of retail gasoline marketing, it noted that

90. *See* McLain v. Real Estate Bd., 444 U.S. 232, 241 (1980) (observing that Sherman Act was designed to reach activities that "while wholly local in nature, nevertheless substantially *affect* interstate commerce").

91. 428 U.S. 579 (1976).

92. *Id.* at 609.

93. *Id.* at 611.

94. *Id.* at 612. *See also* Dean Milk Co. v. Madison, 340 U.S. 349 (1951).

95. Lochner v. New York, 198 U.S. 45 (1905).

96. Community Communications Co. v. City of Boulder, 455 U.S. 40, 67 (1982) (Rehnquist, J., dissenting). *See also* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 438-41 (1978) (Stewart, J., dissenting).

97. 437 U.S. 117 (1978).

when a lack of uniformity would impede the flow of goods, "the Commerce Clause acts as a limitation upon state power even without congressional implementation."[98] Without expressly acknowledging it, the Court's discussion confirms the dovetailing of the Commerce and Supremacy Clauses upon which the balancing test is based.

The *Exxon* Court also rejected the argument that Maryland's statute "undermined" the competitive balance struck in the antitrust laws. In oft-quoted language, the Court noted the statute's "anticompetitive effect," but stated:

> [T]his sort of conflict cannot itself constitute a sufficient reason for invalidating the Maryland statute. For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed.[99]

Cases addressing whether a particular state economic regulation conflicts with the Sherman Act are invariably placed within the "state action" analytical context set forth in *Parker*.[100] Therefore, there is no weighing of interests or consideration of alternative means as in dormant Commerce Clause cases, and the outcomes are not expressed in terms of whether the federal objective of free markets for our national economy override the state interest in its economic regulation.

Similarly, cases in the solid waste management context have been characterized by a dormant Commerce Clause analysis independent of the question of preemption. However, in *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*,[101] the court observed that "[t]he parties have not advanced either a preemption or authorization argument . . . and we decline to examine the issue further."[102]

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98. *Id.* at 128 (quoting Hunt v. Washington Apple Advertising Comm'n., 432 U.S. 333, 350 (1977)).

99. *Id.* at 133. This statement does not amount to a blanket holding that the antitrust laws do not preempt state economic regulations. Rather, it follows from, and is consistent with, the Court's holding on the Commerce Clause issue.

100. *Parker*, 317 U.S. 341 (1943). In cases where the Court denied immunity, which typically involved resale price maintenance systems, the analysis concerned whether the conduct of private parties bore a sufficient relation to state regulatory policy to warrant such immunity. *See* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) (state may not immunize private action that violates antitrust laws merely by authorizing that action); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 98 (1980) ("The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement."). While the Court in *Midcal* at least noted the national procompetitive policy embodied in the Sherman Act, the outcome would have been different had there been "active" supervision by the state. Under a Commerce/Supremacy Clause balancing test, the Court still would have weighed the conflicting interests, rather than relying exclusively on the *Parker* state action formula.

101. 48 F.3d 701 (3d Cir. 1995).

102. *Id.* at 710.

Unlike the *Atlantic Coast* court, the court in *Pine Ridge Recycling, Inc. v. Butts County*[103] did make an express connection between the Sherman Act/preemption issue and the Commerce Clause. In *Pine Ridge*, a municipal solid waste landfill developer filed an action against the county, its commissioners, and its solid waste management authority for allegedly obstructive conduct in the plaintiff's efforts to obtain a landfill permit.[104] The defendants contended that the state action immunity doctrine shielded their conduct from liability. Rejecting the defendants' assertion of antitrust immunity, the court held that the State of Georgia "cannot grant its local governments the authority to violate the Commerce Clause."[105]

Citing *Carbone* in connection with the limitations the Commerce Clause places on local government regulation of the solid waste processing markets, the court observed that *Carbone* also was instructive with respect to the plaintiff's antitrust claim. By excluding the plaintiff from the local solid waste disposal market, the court held, the Georgia statute conflicted with the Commerce Clause, as in *Carbone*. Accordingly, taking a restrictive view of the state's authority, the court concluded that the defendant's conduct was not entitled to state action immunity.[106]

Under *Pine Ridge*, if state action results in a violation of the Commerce Clause, the state and its agents "implementing" the policy are deprived of *Parker* state action immunity, at least insofar as the state purports to delegate authority to local governments to adopt anticompetitive programs. The court also reaffirmed the principle from *Carbone* that the article of interstate commerce is not the waste itself, but the processing and disposal of it.[107]

Courts should adopt the reasoning in *Pine Ridge* in deflecting claims for *Parker* immunity. By acknowledging the connection between the preemption and Commerce Clause analyses, the *Pine Ridge* court has offered a helpful analytical method for resolving certain aspects of challenges to anticompetitive state and local solid waste management schemes. However, one important component of the inquiry in cases addressing the interplay among RCRA, the Sherman Act, and the Commerce and Supremacy Clauses was not addressed in *Pine Ridge*—the role of the market participant doctrine in resolving these disputes.

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103. 855 F. Supp. 1264 (M.D. Ga. 1994).

104. City officials actually invited the lawsuit by publicly stating their intention to construct a municipally run solid waste landfill without competition. The plaintiff drafted its complaint based largely upon the City's public statements and underlying intentions. Telephone Interview with Stephen E. O'Day, Esq., attorney for plaintiff in *Pine Ridge* (Feb. 2, 1995).

105. *Pine Ridge*, 855 F. Supp. at 1271.

106. *Id.*

107. *Id.* at 1275.

IV. The Market Participant Doctrine and the Future of Challenges to Anticompetitive Solid Waste Management Programs

A. *Legal and Conceptual Foundations of the Market Participant Doctrine*

The distinction between governmental and non-governmental acts alluded to in *Parker* lies at the heart of the controversial market participant doctrine. The market participant doctrine is a jurisprudential tool for determining the circumstances under which state actions will be subject to federal authority. While a state may not discriminate through regulations amounting to economic protectionism favoring local interests, the doctrine exempts from the scope of the Commerce Clause state actions as a "market participant" in the manufacture and sale of products, the provision of subsidized services, and the procurement of products. As the Court stated when it first embraced the doctrine, "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."[108]

The market participant doctrine's principal concern is whether state "market participation" is truly analogous to that of private companies. The Supreme Court endorsed the market participant doctrine in a series of landmark cases beginning 30 years after *Parker*.[109] In *South-Central Timber Development v. Wunnicke*,[110] the Court established the outer limit of the doctrine by rejecting Alaska's attempt to reach beyond the timber market in which it was a seller/participant by requiring in-state processing of timber by the purchasers. Concluding that the state's sales amounted to a regulatory measure that was inconsistent with its status as a market participant, the Court stated:

> The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant . . . . [T]he State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market.[111]

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108. Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976).

109. *See* White v. Massachusetts Council of Constr. Employers, Inc., 460 U.S. 204, 214-15 (1983) (sustaining executive order requiring at least one-half staffing of city-funded public works construction projects with city residents); Reeves, Inc. v. Stake, 447 U.S. 429, 446 (1980) (rejecting challenge to preferences afforded in-state residents in sale of government-produced cement); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 814 (1976) (upholding state program providing payments for auto scrap where payments restricted to in-state processors for state-titled vehicles).

110. 467 U.S. 82 (1984).

111. *Id.* at 99 (emphasis added).

B. *The Market Participant Doctrine in the Solid Waste Management Context*

Prior to Congress' recognition of the dangers that prompted the adoption of legislation addressing it as a national problem, solid waste collection and disposal had been handled at the local level. This tradition may have prompted the deference that courts have given to notions of state sovereignty when deciding federalism issues in this area.[112]

Under the market participant doctrine, a state or municipality that acts as a market participant rather than a market regulator "is not subject to the restraints of the Commerce Clause."[113] Distinguishing between a state's regulation of a market and its involvement as a market participant is particularly problematic with respect to solid waste management programs, which typically include market participation within a larger regulatory program, such as choosing with whom a state-operated landfill will do business.[114] The Supreme Court has yet to address the applicability of the doctrine to government-owned waste facilities with respect to either discriminatory practices under the dormant Commerce Clause or anticompetitive effects under antitrust law.[115]

In the solid waste management context, the Third Circuit held in *Swin Resource Systems, Inc. v. Lycoming County*[116] that a county was acting as a market participant in attempting to preserve its landfill's capacity for local residents by charging a higher price to dispose of distant waste in the landfill and limiting the volume of distant waste that the landfill would accept.[117] Distinguishing the outcome in *Wunnicke*, the court concluded that Lycoming County's alleged market participation was contained

> only in rules concerning the price and volume conditions under which persons may use the disposal service that Lycoming itself offers. In setting these price and volume conditions, Lycoming has not crossed the line that Alaska crossed [in *Wunnicke*] when that state attempted to regulate the timber processing market by conditioning its timber sales

112. *See* C & A Carbone, Inc. v. Clarkstown, 114 S. Ct. 1677, 1694 (1994) (Souter, J., dissenting). *See also* U.S. ENVIRONMENTAL PROTECTION AGENCY, RESOURCE CONSERVATION AND RECOVERY ACT, SUBTITLE D STUDY: PHASE 1 REPORT, tbl. 4-2 (1986) ("[T]radition as well as state and federal law recognize [waste disposal] as the domain of local government . . . today 78 percent of landfills receiving municipal solid waste are owned by local governments.").

113. Swin Resource Sys., Inc. v. Lycoming County, 883 F.2d 245, 249 (3d Cir. 1989) (quoting White v. Massachusetts Council of Constr. Employers, Inc., 460 U.S. 204, 208 (1983)).

114. *See generally* William A. Kovacs & Anthony A. Anderson, *States as Market Participants in Solid Waste Disposal Services—Fair Competition or the Destruction of the Private Sector?*, 18 ENVTL. L. 779 (1988) (explaining difficulty of separating state roles as market participant and market regulator and urging closer judicial scrutiny of competitive aspects of state's activities in open market to ensure equal economic footing for private sector competitors).

115. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 627 n.6 (1978).

116. 883 F.2d 245 (3d Cir. 1989).

117. *Id.* at 249.

> on guarantees that the purchasers would act in a certain way in a downstream market. The price and volume conditions to which Swin objects do not pertain to the operation of private landfills and do not apply beyond the immediate market in which Lycoming transacts business.[118]

Other courts have upheld the market participant defense to immunize flow control ordinances from Commerce Clause scrutiny.[119] Like *Swin Resources*, however, each of these cases concerned factual scenarios in which the favored disposal site was directly owned and operated by the municipality whose actions were challenged under the Commerce Clause.[120]

Several courts have rejected cities' attempts to assert the market participant defense. In *Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority*,[121] private carting companies challenged municipal contracts and flow control ordinances that required solid waste collected within the cities to be delivered to a public waste disposal site owned and operated by the Alabama Solid Waste Disposal Authority. The court rejected the cities' market participant defense, holding that because the flow control ordinances authorized the cities to threaten civil enforcement and misdemeanor penalties against violators, the cities were acting as regulators and not as private participants in the market.[122]

The Court's decision in *Carbone* provides a credible basis for arguing that the exercise of regulatory power within the same market would also compromise the state's status as a market participant. In determining that a flow control ordinance requiring all solid waste to be processed at a designated transfer station before leaving the municipality violated the Commerce Clause, the Court stated that "having elected to use the open market to earn revenues for its project, the town may not employ discriminatory regulation to give that project an advantage over rival businesses from out of State."[123] Clarkstown was financing the facility (indeed, with tipping fees that the flow control ordinance was intended to

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118. *Id.* at 250.

119. *See* LeFrancois v. Rhode Island, 669 F. Supp. 1204 (D.R.I. 1987); Evergreen Waste Sys., Inc. v. Metropolitan Serv. Dist., 643 F. Supp. 127 (D. Or. 1986); Shayne Bros., Inc. v. District of Columbia, 592 F. Supp. 1128 (D.D.C. 1984).

120. *See* Brief for Plaintiff-Appellee at 34-35, SSC Corp. v. Smithtown, 66 F.3d 502 (2d Cir. 1995) (No. 94-9192). *But see* GSW, Inc. v. Long County, 999 F.2d 1508 (11th Cir. 1993) (denying market participant status to county because flow control ordinance required that solid waste be sent to landfill wholly owned by private company).

121. 814 F. Supp. 1566 (M.D. Ala. 1993).

122. *Id.* at 1573. *See also* Empire Sanitary Landfill, Inc. v. Pennsylvania, 645 A.2d 413 (Pa. Commw. Ct. 1994) (county that adopted flow control ordinances acting as market regulator).

123. C & A Carbone, Inc. v. Clarkstown, 114 S. Ct. 1677, 1684 (1994). The town did not claim to be a market participant, which would have enabled it to avoid the Commerce Clause, apparently because at the time of the litigation a local private contractor was operating the facility.

ensure) and agreed to assume control of the facility within five years of its construction by "buying" it for one dollar.

In his dissent in *Carbone*, Justice Souter argued that the town's flow control ordinance did not amount to the kind of economic protectionism prohibited by the dormant Commerce Clause, precisely because the law "bestow[ed] no benefit on a class of private actors, but instead directly aid[ed] the government in satisfying a traditional governmental responsibility."[124] Justice Souter's description of the town's actions both evokes the market participant doctrine and highlights the difficulty of distinguishing market participation from market regulation.

In criticizing the majority's failure to distinguish between public and private enterprises, Justice Souter appears to argue that the government's exercise of regulatory authority for its own benefit in the market is only an incidental burden on interstate commerce, and is permissible as long as it satisfies the *Pike*[125] balancing test. Justice Souter stated:

> The local government itself occupies a very different market position, however, being the one entity that enters the market to serve the public interest of local citizens quite apart from private interest in private gain. Reasons other than economic protectionism are accordingly more likely to explain the design and effect of an ordinance that favors a public facility.[126]

Since *Carbone*, federal courts have continued to grapple with the market participant doctrine in the solid waste management context. For instance, in *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*,[127] the Third Circuit invalidated New Jersey's regulatory waste flow scheme, which required that residual waste from mixed waste loads be returned to the designated district facility unless the facility was compensated for lost revenue. The court held that the waste flow scheme discriminated against interstate commerce and was subject to strict scrutiny under the dormant Commerce Clause.[128] Relying on *Swin Resources*,[129] the court reaffirmed the market participant concept, but concluded that the doctrine does not provide an automatic exemption from the dormant Commerce Clause for state waste flow regulations, even when states purport to act as market participants.

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124. *Id.* at 1692.

125. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

126. C & A Carbone, Inc. v. Clarkstown, 114 S. Ct. 1677, 1697 (1994).

127. Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders, 48 F.3d 701 (3d Cir. 1995).

128. *Id.* at 249.

129. Swin Resource Sys., Inc. v. Lycoming County, 883 F.2d 245, 249 (3d Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990) (sustaining higher disposal fee at county-operated landfill for non-county waste against Commerce Clause challenge on grounds that county was "deciding the conditions under which [a private waste processor] could use [the public] landfill").

In *Atlantic Coast*, the state's operation of the solid waste facilities was subject to Commerce Clause scrutiny because the state attempted to control the activities of other private market participants, rather than merely the manner in which the facilities would be operated or with whom they would deal.[130] Thus, by limiting the doctrine within the market in which the state participates when it attempts to gain an advantage by regulating other market participants' activities, the Third Circuit went further than the Supreme Court in *Wunnicke*. This outcome is consistent with the rationale of *Carbone*.

C. *The SSC Corporation Decision*

The most important case in the context of challenges to anticompetitive state and local solid waste management schemes was the Second Circuit's decision in *SSC Corp. v. Town of Smithtown*.[131] *SSC* brings together many of the themes discussed in this Article. Within the same decision, the court correctly applied, and then misapplied, the market participant doctrine.

In *SSC*, the towns of Smithtown and Huntington entered into a municipal agreement to provide joint waste disposal service for the towns' residents.[132] The scheme was implemented, in part, through contractual arrangements with haulers. The hauling contracts incorporated by reference a Smithtown flow-control ordinance requiring all local residential waste to go to the town's designated facility in the town of Huntington.[133]

The case involved the SSC Corporation's alleged breach of contract through its diversion of waste to out-of-state landfills with lower tipping fees. SSC contended that the hauling contract was unenforceable because it violated the Commerce Clause.[134] In response, the towns attempted to extend the *Parker* state action immunity doctrine. The towns contended that because they were acting as "market participants" in the solid waste disposal scheme, the flow control ordinance and the hauling contracts should not be subject to the *Carbone* Commerce Clause analysis.[135]

Unlike the town of Clarkstown in *Carbone*, however, the *SSC* municipalities actively operated the facility and assumed the financial risk of the solid waste disposal operation. Only a small portion of the tipping fees collected were to be used to finance the facility, which was funded largely

130. *Id.* at 712-13.

131. 66 F.3d 502 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 911 (1996). On the same day that it issued its decision in *SSC*, the Second Circuit decided a companion case that addressed Commerce Clause and market participant issues in the context of a challenge to a waste management plan adopted by the Town of Babylon. *See* USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272 (2d Cir. 1995).

132. *See SSC Corp.*, 66 F.3d at 506.

133. *See id.* at 507.

134. *See id.* at 508.

135. *See id.* at 512.

through general tax revenue.[136] In support of their alleged market participant status, the towns argued that "all monopolists are necessarily participants in the market they monopolize."[137] The Second Circuit rejected the town's market participant argument, concluding that the flow control ordinance "constitutes a 'regulation' of the waste disposal market, rather than participation in that market."[138]

In *SSC*, the Second Circuit reaffirmed the principle that a state or local government's actions constitute market participation only if a private party could have engaged in the same actions.[139] Like the *Waste Recycling* case, the flow control ordinance in *SSC* threatened garbage haulers with criminal prosecution if the haulers failed to do business with the town of Smithtown at the Huntington incinerator.[140] The court concluded that "[n]o private company in the open market could force others to buy its services under pain of criminal penalties."[141] The court went on to conclude that the ordinance at issue was indistinguishable from the one struck down in *Carbone* and therefore held that the ordinance violated the dormant Commerce Clause.[142]

The decision in *SSC* has far-reaching ramifications. Its effects will be felt immediately on Long Island, where several other municipalities have invested money in solid waste disposal technology under programs similar to the scheme reviewed in *SSC*.[143] Amicus briefs were filed in *SSC* by haulers who were plaintiffs in other then-pending cases on Long Island.[144] Beyond its effects on Long Island, the decision has troubling implications for the future of this area of the law. The court's invalidation under the dormant Commerce Clause of the flow control ordinance is consistent with *Carbone* and a number of other cases.[145] However, the court's conclusion that the town acted as a market participant (whose actions are not subject to Commerce Clause limitations) in contracting for waste disposal services in fulfillment of the

136. Telephone interview with James Joyce, Esq., attorney for the Town of Smithtown in *SSC* (Mar. 15, 1995).

137. Brief of Defendants at 33, SSC Corp. v. Town of Smithtown, 66 F.3d 502 (2d Cir. 1995) (No. 94-9192).

138. *SSC*, 66 F.3d at 513.

139. *Id.* at 512. *See also* Wyoming v. Oklahoma, 502 U.S. 437 (1992).

140. *Id.* at 512.

141. *Id.*

142. *Id.* at 514.

143. Telephone Interview with James Joyce, Esq., Attorney for the Town of Smithtown in *SSC* (Mar. 15, 1995).

144. *Id.*

145. In the only case analyzing the *SSC* decision to date, the Second Circuit, in *Gary D. Peake Excavating Inc. v. Town Board of Hancock*, 93 F.3d 68 (2d Cir. 1996), held that *Carbone* and *SSC* did not apply to the facts at issue. *Peake Excavating* involved a challenge to a town law that prohibited the disposal of any waste in the town, except at the town-operated transfer station. Unlike the ordinances in *Carbone* and *SSC*, which required all waste within the town to be disposed of at a town-designated facility to the exclusion of out-of-state competitors, the ordinance in *Peake Excavating* did not prevent town residents from disposing of waste at any out-of-town facility and did not deny out-of-town competitors access to the town's waste market. *Id.* at 75. Thus, the local law in *Peake Excavating* did not raise the antitrust and dormant Commerce Clause concerns that were present in *Carbone* and *SSC Corp.*

objectives of the flow control ordinance is inconsistent with its ruling on the flow control ordinance and sets a bad precedent.

The court's holding regarding the waste hauling contracts at issue in *SSC* allows the town to "have it both ways" by simultaneously escaping *Carbone* Commerce Clause scrutiny and enjoying antitrust immunity.[146] In essence, what the court precluded the town from pursuing on a broad scale in the form of the flow control ordinance, it enabled the town to undertake on a cumulative, piecemeal basis in the form of the waste hauling contracts. The *SSC* decision could send a dangerous message to municipalities in the solid waste management field by encouraging them to enter into waste hauling contracts with individual private contractors as market participants to achieve anticompetitive results. This would allow them to make an "end run" around what they otherwise would be prohibited from achieving as market regulators.

Conclusion

The enactment of RCRA and the expansion of the scope of interstate commerce have nationalized solid waste management, a field that was formerly the exclusive domain of state and local governments. Among the economic safeguards for those now participating in the solid waste management field are the Sherman Act, the Commerce Clause, and the Supremacy Clause. Courts evaluating challenges to anticompetitive state and local solid waste management schemes must consider the delicate and often confusing interplay among RCRA, the Sherman Act, and the Commerce and Supremacy Clauses.

Consistent with Justice Marshall's proclamation that antitrust laws in general, and the Sherman Act in particular, are the "Magna Carta of free enterprise,"[147] state and local governments may limit the role of private market participants in the solid waste management field only in a manner that does not obstruct the Sherman Act's objectives. In determining whether, and to what extent, state and local governments may limit competition in the solid waste management market, courts must also consider possible burdens on interstate commerce imposed by solid waste management schemes. This should be done by balancing the anticompetitive burdens imposed on interstate commerce against the purely local state interest advanced by the law or regulation.

Flow control ordinances, the importation and exportation of waste, and tipping fees have blurred the roles of state and local governments in the solid

146. Telephone Interview with William L. Kovacs, Esq. (Feb. 14, 1995). Mr. Kovacs, a partner in the Washington, D.C. office of Eckert, Seamans, Cherin & Mellott, was the Chief Counsel for the U.S. House of Representatives Subcommittee on Transportation and Commerce during the development and enactment of RCRA in 1976.

147. United States v. Topco Assocs., 405 U.S. 596, 610 (1972).

waste management context. The traditional line of demarcation between acting as a market participant and serving as a market regulator is no longer clear. Understanding the market participant doctrine in the solid waste management context is essential to clarifying issues and resolving controversies in this area of the law. This Article suggests that if a court determines that a governmental entity is acting as a market participant in a solid waste management scheme, it should subject that entity to possible antitrust liability for its alleged anticompetitive conduct, as in *Pine Ridge*. Otherwise, state and local governments could evade Commerce Clause problems and antitrust liability while undertaking anticompetitive regulatory schemes that achieve anticompetitive effects similar to those created by the flow control ordinances that were invalidated in many of the cases discussed in this Article.

The amorphous nature of government regulation in the modern solid waste management arena undoubtedly contributed to the Second Circuit's misapplication of the market participant doctrine and its poorly reasoned and potentially dangerous decision in *SSC Corp. v. Town of Smithtown*. Courts should realize that both the Sherman Act and the dormant Commerce Clause revolve around the effects of state and local government action on interstate commerce and the national economy. If courts recognize this necessary connection, they may preclude governmental entities from using the *Parker* state action immunity doctrine to engage in economic protectionism that violates the dormant Commerce Clause.