I am honored to appear before the Antitrust Modernization Commission to address the State Action Doctrine. For over thirty years I have served at various times as a state government antitrust enforcer, a lawyer for the state advising and defending state agencies against numerous court challenges to state regulatory regimes alleged to have anticompetitive purpose or effect, a private practitioner advising clients regarding a wide array of transactions in which issues related to the state action immunity doctrine (under both state and federal antitrust law) were present, and a law professor with a keen interest in constitutional law and the principles of federalism.

As a current member of the Council of the American Bar Association, Section of Antitrust Law, I voted to approve the Comments that the Section submitted to the Federal Trade Commission in May 2005 regarding the FTC’s September 2003 Report of the State Action Task Force. I do not intend to repeat those comments here, but rather to focus my remarks on certain issues related to the state action doctrine that I hope will be of some value to you, the
Commissioners of the Antitrust Modernization Commission, during the course of your deliberations.

**Market Participant Exception**

I have previously addressed in a comprehensive article, co-written with Peter A. Barile III, and attached hereto, what I believe to be a serious enforcement gap in the antitrust laws, which is the result of the absence of a true market participant exception to the state action doctrine under the federal antitrust laws and the correlative existence of a market participant exception to the dormant Commerce Clause. The effect of this anomaly is that states are unconstrained by both the antitrust laws and the dormant Commerce Clause when venturing into markets, themselves, not as market regulators, but as full-fledged competitors with private businesses. Although the article sought to focus on the particular implications of the market participant exception in the context of its application to health care markets, the article in fact more broadly treats the history of state action immunity, as well as the constitutional underpinnings of Commerce Clause and Eleventh Amendment jurisprudence as it relates to national competition policy. We identify what we believe to be a very significant opinion of the Second Circuit, *Automated Salvage Transport, Inc. v. Wheelabrator Environmental Systems, Inc.*, in which conduct was held to be both immune under the antitrust laws and unconstrained by the Commerce Clause. We also identify, by way of contrast, the presence of a market participant exception to foreign sovereign immunity under the act of state doctrine. The article then draws the following conclusions:

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3 “Can the King’s Physician (Also) Do No Wrong? Health Care Providers and a Market Participation Exception to the State Action Immunity Doctrine,” ANTITRUST REPORT (Matthew Bender) October 1999.

4 155 F.3d 59 (2nd Cir. 1998).

5 See note 3, *supra*, at 19.
A market participation exception to the state action immunity doctrine would allow for both national and local regulation of certain markets but would subject state and local governmental market participation to federal antitrust scrutiny in order to serve the fundamental goals of the antitrust laws. Such an exception can be found in both the history and rationale of the antitrust laws. Furthermore, as the Eleventh Amendment concerns only private actions against the state itself and has fundamental concerns very different from those of the antitrust laws, such an exception in the antitrust context is not at odds with *College Savings Bank*. In the event of judicial disagreement with such a reconciliation, and recalling that state action immunity is but a rule of construction, this article calls for a congressional reconsideration of state action immunity. As we have seen in just a sample of the health care cases, to immunize conduct which transcends regulation to outright participation creates market conditions that are antithetical to the very purposes of the antitrust laws.⁶

While it is the case that the Eleventh Amendment limits the ability of private actors to enforce the antitrust laws as against states because there is no market participant exception to the Eleventh Amendment, the Eleventh Amendment is, of course, not a limitation upon the federal government, itself.⁷ Were a market participant exception to the state action immunity doctrine unqualifiedly recognized by the courts, it would, in my view, be incumbent upon the federal antitrust enforcement agencies to utilize their respective powers to enforce the antitrust laws against the states, no matter how politically uncomfortable that may be in certain instances. Despite my many years of service in state government and the articles I have written and speeches I have delivered extolling the principles of federalism,⁸ I am convinced, as a matter of national competition policy, that states, as market participants, should not have it both ways –

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⁶ *Id.* at 26. With regard to the reference in the quotation above to certain health care cases, I refer you to the discussion of *FTC v. Hospital Board of Directors of Lee County*, 38 F.3d 1184 (11th Cir. 1994), which is found at page 22 of the attached article.

⁷ *See id.* at 5-9 and the discussion of *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999).

⁸ *See, e.g.*, “60 Minutes with Robert M. Langer, Chair, NAAG Multistate Antitrust Task Force,” 60 *ANTITRUST L.J.* 197, 209 (1991); *see also* 61 *ANTITRUST L.J.* 211 (1992); “Should the Antitrust Division, the FTC, and State Attorneys General Formally Allocate the Market for Antitrust Enforcement?” *ANTITRUST REPORT* (Matthew Bender) October 1998.
unconstrained by the dormant Commerce Clause and shielded from the antitrust laws under the umbrella of the state action doctrine. It is bad economics and bad public policy.

**FTC v. Ticor Title Insurance Company**

I served as Chair of the NAAG Multistate Antitrust Task Force during the briefing and decision in *FTC v. Ticor Title Insurance Company*.\(^9\) Because of the involvement of Connecticut’s title insurance regulatory system in the case, the Connecticut Attorney General’s Office chose not to sign on to the amicus brief authored by Wisconsin and joined in many other states urging support for the position of the FTC. My own view, expressed on several occasions, was, and still is, that negative-option approvals do not comport with the active supervision prong of the state action immunity doctrine. The concern I continue to have, however, is with the appropriate remedy in those instances where a court determines that a state has utterly failed to fulfill its statutory mandate. In those circumstances where a regulated entity has no choice, as a condition of doing business in that state, but to submit a tariff filing to a state agency, and through no fault of the regulated entity the state agency does not “actively supervise” the conduct, it seems anomalous at best for the private entity to be subjected to any form of relief other than injunctive relief.\(^10\)


\(^{10}\) Justice O’Connor’s dissenting opinion in *Ticor* raises a similar concern about remedy but concludes that the solution is to find no liability in such a circumstance. See 504 U.S. at 646-47.
Codification of the State Action Immunity Doctrine

I wish to raise one further issue regarding the state action immunity doctrine. In Connecticut, the state action doctrine has been codified under the Connecticut Antitrust Act. Conn. Gen. Stat. § 35-31(b) states:

Nothing contained in this chapter shall apply to those activities of any person when said activity is specifically directed or required by a statute of this state or of the United States.

Connecticut’s immunity provision is substantially more restrictive than its federal counterpart. The provision has been substantively construed by the Connecticut Supreme Court on two occasions, and it is quite clear that conduct immune from the federal antitrust laws will not pass muster under Connecticut’s own statutory scheme.11

Let me clear. I am unquestionably not advocating that Connecticut’s version of the state action immunity doctrine be adopted and federalized by Congress; however, I raise the issue so that the Antitrust Modernization Commission may consider whether it would be prudent for Congress to codify the federal doctrine. While I am by no means convinced that codification of the doctrine would necessarily lead to greater clarity, were Congress to consider reconciling the web of complex immunity issues as they relate to municipal liability, market participation, foreseeability, spillover and remedy, codification of the doctrine would appear to be essential – and the fervent hope of all would be that the resulting statute would not be as opaque as either the Foreign Trade Antitrust Improvements Act or the Robinson-Patman Act. I also believe that were Congress to codify the doctrine, it is more likely than not that the states would seek congruence with the federal standard. The current state of affairs in which conduct immune

under federal law may still be challenged under state law does create an extraordinary challenge for business.

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I very much look forward to answering any questions that the Antitrust Modernization Commission may have regarding any portion of my prepared remarks, as well as any aspect of my experience as an antitrust practitioner that the Commission may find relevant in the course of its deliberations.