

PREPARED STATEMENT OF ROBERT M. LANGER¹
BEFORE THE ANTITRUST MODERNIZATION COMMISSION
HEARING PANEL ON IMMUNITIES AND EXEMPTIONS:
THE STATE ACTION DOCTRINE
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STATEMENT

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.² 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

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² The "Comments of the ABA Section of Antitrust Law on FTC Report re: State Action Doctrine" may be found at <<http://www.abanet.org/antitrust/comments/2005/05-05/report-restate-05.html>>.

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 as Appendix A,³ 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.*,⁴ 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.⁵ The article then draws the following conclusions:

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 –

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

⁹ 504 U.S. 621 (1992).

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 be 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

¹¹ See *Mazzola v. Southern New England Telephone Co.*, 169 Conn. 344, 355-59, 363 A.2d 170, 176-78 (1975); *Miller's Pond Co., LLC v. City of New London*, 273 Conn. 786, 803-06, 873 A.2d 965, 976-78 (2005).

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

* * *

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.

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APPENDIX A

Can the King's Physician (Also) Do No Wrong?

HEALTH CARE PROVIDERS AND A MARKET PARTICIPATION EXCEPTION TO THE STATE ACTION IMMUNITY DOCTRINE

Robert M. Langer & Peter A. Barile III

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I

INTRODUCTION

The federalism debate predates the Founding.¹ It has remained a catalyst of controversy throughout the constitutional epochs of our nation's history. Among the concerns prompting the Constitutional Convention was the enormous power of the states under the Articles of the Confederation.² The struggle over the balance of power between the states and the federal government was omnipresent in the Civil War and the Reconstruction.³ The relationship between the states and the federal government endured continued strain in the constitutional moments of the New Deal⁴ and the second Reconstruction of the 1960s.⁵

Although the power relationship between the states and federal government has ebbed and flowed at times,⁶ the overall trend (until recently) has favored the primacy of the federal government.⁷ However, the Rehnquist Court has wrought an era of a federalist jurisprudence that has diminished the constitutional power of the federal government in favor of state and local authority.⁸ A sharp divide has emerged in the Supreme Court, with those Justices favoring enhanced states' rights enjoying a five-to-four majority.⁹ According to one Court watcher, for this Court, "the question of the proper allocation of authority within the American system is not abstract or theoretical but urgent and fundamental, with the two sides holding irreconcilable visions of what the Constitution's framers had in mind."¹⁰ On the final day of its

latest term, the Court issued three opinions which struck down congressional and judicial efforts to make states amenable to federal claims.¹¹

This article examines the impact of the Court's latest federalism cases upon antitrust law—particularly upon the possibility of a market participation exception to the state action immunity doctrine. The import of the delicate balance of powers between the federal and state governments is of particular consequence in industries heavily regulated by state and federal regimes.¹² And the balance is of even greater consequence when the governmental impact transcends regulation to actual participation. Health care is such an industry. A substantial portion of health care providers are government-owned and operated. Such participation often comes in the form of legislatively created local hospital authorities. Because the national competitive marketplace is regulated by the federal antitrust laws, the participation of local hospital authorities in the marketplace creates a tension between local and national regulation. This article focuses on the health care industry as an example upon which to test the desirability of the application of a market participation exception to the state action immunity doctrine.

To provide a background for its analysis, this article will survey the Eleventh Amendment, the dormant Commerce Clause, and the state action immunity doctrine. What links these areas together is a gap through which (all too frequently) anticompetitive local governmental entities slip. As we will see, courts will hold local governmental entities buying and selling in the commercial marketplace to be market participants outside of the prohibitions of the Commerce Clause. Moreover, the same courts will often hold these entities to be immune from antitrust liability under the state action immunity doctrine, expressly rejecting the notion of a market participation exception to state action immunity. What we are left with are markets dominated by parties judged to be market participants that can (and do) engage in anticompetitive activity with impunity. While a market participation exception to the state action immunity doctrine may fill this gap, the latest word from the Supreme Court regarding an analogous exception, proposed in the context of Eleventh Amendment sovereign immunity, presents apparent problems.

Part II will provide an overview of the protections afforded states by the Eleventh Amendment with a discussion of the three federalism cases recently decided by the Supreme Court. Part III will outline the dormant Commerce Clause with particular focus upon the market participant doctrine's exception thereto. Part IV will then provide an overview of the contours of the state action immunity doctrine. Against this background, Part V will discuss the extent to which the federal courts have recognized or rejected a market participation exception to state action immunity, and assess the impact of the Court's recent Eleventh Amendment opinions upon the viability of the concept. Part VI will provide examples of

government-owned health care facilities participating in the market as a vehicle to test the efficacy of a market participation exception to the state action immunity doctrine. In Part VII, we will conclude that a market participation exception to the state action immunity doctrine not only is beneficial for the national competitive marketplace and consistent with the history and goals of antitrust law, but can also be reconciled with the Court's latest federalism jurisprudence. We further propose that in the event that a market participation exception to the state action immunity doctrine is judicially rejected, Congress should amend the antitrust laws to ensure that state and local governmental market participants are subject to the same rules of competitive engagement as are private market participants.

II

STATE SOVEREIGN IMMUNITY UNDER THE ELEVENTH AMENDMENT

The Eleventh Amendment has its roots in the 1793 case of *Chisholm v. Georgia*.¹³ In *Chisholm*, the Supreme Court, pursuant to its literal authority under the new Constitution to hear "Controversies . . . between a State and citizens of another State,"¹⁴ took original jurisdiction over a suit by two South Carolina citizens against the State of Georgia to collect Revolutionary War debt. This jurisdiction ran counter to the assurances of state sovereignty made by Publius just a short time earlier.¹⁵ Georgia responded by passing legislation that made compliance with *Chisholm* a felony punishable by hanging without benefit of clergy.¹⁶ With other states fearful of the prospect of lawsuits on Revolutionary War debts, *Chisholm* was overruled (within five years) by the Eleventh Amendment.¹⁷

A. Parameters of state sovereign immunity

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."¹⁸ Although its language might not suggest so, the Eleventh Amendment also provides sovereign immunity to states sued by citizens of their own state.¹⁹ Additionally, where a plaintiff seeks retroactive monetary damages for past conduct with the proceeds to be paid out of the state treasury, the Eleventh Amendment provides immunity to state officials acting in their official capacities, where the Eleventh Amendment would bar the suit against the state.²⁰

Eleventh Amendment immunity does not attach where the plaintiff complains of constitutional violations by a state official and seeks injunctive relief or damages to be paid by the official.²¹ Furthermore, the Eleventh Amendment does not bar

suits in federal court brought by the United States.²² Nor does the Eleventh Amendment block appellate review of a state court action that would have been barred had it originally been brought in federal court.²³ Also, the Eleventh Amendment does not bar suits against counties or municipalities or state governmental corporations.²⁴

A state may waive its sovereign immunity and consent to suit in federal court.²⁵ Additionally, Congress may abrogate state sovereign immunity from suit under federal law if Congress clearly expresses the intention to abrogate in the language of a statute.²⁶ While Congress once had the power to abrogate state sovereign immunity from federal claims under laws enacted pursuant to Congress's Article I²⁷ and Section Five of the Fourteenth Amendment powers,²⁸ in *Seminole Tribe of Florida v. Florida*,²⁹ the Supreme Court limited Congress's power to abrogate state sovereign immunity—Congress may only abrogate a state's Eleventh Amendment sovereign immunity pursuant to its remedial powers under Section Five of the Fourteenth Amendment.³⁰

B. Recent Eleventh Amendment developments

In three cases decided this year, the Supreme Court further vindicated states' rights at the expense of individual rights. The three cases were all decided five to four. Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas made up the majority in all three cases, with Justices Breyer, Ginsburg, Souter, and Stevens dissenting.³¹

1. State courts and Eleventh Amendment immunity

In *Alden v. Maine*,³² the Court held that a state may not be sued in state court without the state's consent for violations of federal law enacted pursuant to Congress's Article I legislative authority.³³ The dispute concerned the alleged failure of the State of Maine to compensate state probation officers for overtime worked, in violation of the wage and hour provisions of the Fair Labor Standards Act ("FLSA"). Under *Seminole Tribe*, the *Alden* complainants had been barred from pursuing their claims under the FLSA in federal court.³⁴ Then their federal claim, brought in state court, was dismissed.³⁵ In *Alden*, the dismissal was affirmed by the Supreme Court.³⁶ Although the Court has held that the FLSA does apply to the states,³⁷ after *Alden*, only the federal government may bring an enforcement action. Absent state consent, state employees are now unable to sue the state for violations of federal law in either federal or state court.³⁸ Justice Souter's forceful dissent argued that the *Alden* majority misunderstood the history of sovereign immunity as the Framers had understood it and that the majority misapplied that understanding

to the system of dual sovereignty in the United States.³⁹ To the dissenters, the state is not properly sovereign to federal claims, and the brand of federalism embraced by the majority is reminiscent of the “the *Lochner* era’s industrial due process.”⁴⁰

2. *The scope of congressional abrogation power*

In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,⁴¹ the Court limited the ability of Congress to abrogate a state’s Eleventh Amendment sovereign immunity under Congress’s remedial authority pursuant to Section Five of the Fourteenth Amendment.⁴² The plaintiff, College Savings Bank, had patented a financial methodology for certain annuity contracts that would “guarantee investors sufficient funds to cover the costs of tuition for colleges.”⁴³ College Savings Bank marketed its patented product as the CollegeSure CD.⁴⁴ Florida Prepaid Postsecondary Expense Board, “an entity created by the State of Florida,”⁴⁵ offered similar financing contracts to Florida residents.⁴⁶ The plaintiff sued the state for patent infringement.⁴⁷

Congress had explicitly abrogated sovereign immunity, and had purportedly done so under its Section Five remedial authority.⁴⁸ Nevertheless, expanding on the rationale of *City of Boerne v. Flores*,⁴⁹ the Supreme Court held that since Congress did not find a history of pervasive state patent infringement and there were state tort remedies available,⁵⁰ such an express abrogation was not sufficiently remedial so as to be a valid exercise of Congress’s Section Five authority.⁵¹ Interestingly, Justice Rehnquist considered common law conversion to be an acceptable alternative to a claim for patent infringement.⁵² The fact that federal statutory patent infringement grew out of an inadequacy of common law remedies was eclipsed by the majority’s constitutional concern for state sovereignty.

3. *Market participation and state sovereign immunity*

In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,⁵³ the companion case to *Florida Prepaid*, the Court eliminated the longstanding doctrine of constructive waiver.⁵⁴ In *College Savings Bank*, the Court addressed the plaintiff’s false advertising claim under Section 43(a) of the Lanham Act regarding the marketing of Florida’s college financing products.⁵⁵ As with claims against the state for patent infringement, Congress had expressly abrogated state sovereign immunity for Section 43(a) claims.⁵⁶ Writing for the majority, Justice Scalia held that there is no Section Five protectable property interest in a Section 43(a) claim.⁵⁷ Thus, the abrogation was beyond Congress’s power.⁵⁸ Undeterred, the plaintiff relied on *Parden v. Terminal Railway*,⁵⁹ under which a state could constructively waive Eleventh Amendment immunity where it acted in a sphere regulated by the federal

government.⁶⁰ The plaintiff (as well as the Clinton administration) argued that under *Parden*, the State of Florida waived its sovereign immunity by engaging in commercial activity.⁶¹ Justice Scalia held that Florida did not waive its sovereign immunity by competing in the commercial marketplace, expressly overruling *Parden*.⁶²

With respect to the issue of *Parden* waiver, Justice Breyer, dissenting, not only revisited his disagreement with *Seminole Tribe*, but also argued against the extension of *Seminole Tribe* to overrule *Parden*.⁶³ The dissenters would have reconciled *Parden* with *Seminole Tribe* by limiting *Seminole Tribe* to prohibit only unilateral congressional abrogation of sovereign immunity pursuant to Article I, thereby preserving the ability of Congress to provide for the conditions of constructive waiver as would be necessary and proper to exercise Congress's Article I powers.⁶⁴

Justice Breyer also would have provided for a "market participation" exception to Eleventh Amendment sovereign immunity.⁶⁵ Eliminating immunity for state commercial activity, reasoned Justice Breyer and the dissenters, "avoids an enforcement gap which, when allied with the pressures of a competitive marketplace, could place the State's regulated private competitors at a significant disadvantage."⁶⁶ Justice Breyer further argued that the "line the Court today rejects has been drawn by this Court to place states outside the ordinary dormant Commerce Clause rules when they act as 'market participants.'"⁶⁷

Justice Scalia responded to this proposed market participation exception to Eleventh Amendment sovereign immunity:

Permitting abrogation or constructive waiver of the constitutional right only when these conditions exist would of course limit the evil—but it is hard to say that that limitation has any more support in text or tradition than, say, limiting abrogation or constructive waiver to the last Friday of the month.⁶⁸

To Justice Scalia, "sovereign immunity itself was not traditionally limited by these factors,"⁶⁹ and so the dormant Commerce Clause jurisprudence is "inapposite."⁷⁰ Justice Scalia based this observation on what the majority perceived to be the difference in the rationales for the dormant Commerce Clause and for state sovereign immunity.⁷¹ Justice Scalia explained that the market participant/market regulator distinction is appropriate in Commerce Clause analysis since the reason for the dormant Commerce Clause is to promote "evenhandedness."⁷² To Justice Scalia, the evil addressed by the negative implications of the Commerce Clause, i.e., "the prospect that States will use custom duties, exclusionary trade regulations, and other exercises of governmental power (as opposed to the expenditure of state resources) to favor their own citizens . . . is *entirely absent where the States are buying and selling in the market*."⁷³ Justice Scalia further observed that the reason for the Eleventh

Amendment is not to promote “evenhandedness” but instead to preserve a distinction between states and individuals.⁷⁴

However, dating back to the Marshall Court, the Supreme Court has distinguished between the state as market participant and market regulator. For example, in *Bank of the United States v. Planters’ Bank of Georgia*,⁷⁵ the Court held that Planters’ Bank, which was partially owned by the State of Georgia, was amenable to suit in federal court notwithstanding the Eleventh Amendment. As Chief Justice Marshall explained:

It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.⁷⁶

Chief Justice Marshall’s *Planter’s Bank* analysis is consistent with the constitutional system of dual sovereignty, which places federal law as superior to state law.⁷⁷ Despite the Supremacy Clause and centuries of constitutional tradition,⁷⁸ after *College Savings Bank*, a state may engage in commercial activities with little regard to the cost of its violation of federal law, as federal rights have been stripped of significant federal remedies.

4. *But what about the spending power?*

The Spending Clause gives Congress the power to spend for the general welfare.⁷⁹ Under *South Dakota v. Dole*,⁸⁰ the federal government has broad authority to condition a state’s receipt of federal funding upon a state’s undertaking or refraining from certain actions.⁸¹ Such conditions need not be within the authority of Congress to unilaterally demand.⁸² In *Alden v. Maine*, Justice Kennedy made it clear that Congress can condition federal funding upon a state’s waiver of Eleventh Amendment sovereign immunity under *South Dakota v. Dole*.⁸³ The eventual effect of *Alden*, *Florida Prepaid*, and *College Savings Bank* may be to send Congress back to the drawing board to draft new legislation which will condition federal funding upon a waiver of sovereign immunity.

III

THE DORMANT COMMERCE CLAUSE

Article I, section 8, clause 3 of the Constitution provides: “The Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”⁸⁴ While the Import-Export Clause⁸⁵ explicitly forbids certain state interference with foreign commerce, no clause in the Constitution provides such an explicit mandate with respect to interstate commerce.⁸⁶ One of the “great silences of the Constitution,”⁸⁷ the negative implications of the Commerce Clause, as interpreted by the Supreme Court, have come to embody what is known in constitutional parlance as the “dormant Commerce Clause.” As the “Commerce Clause was designed ‘to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation,’”⁸⁸ the dormant Commerce Clause cordons off “at least some core area of interstate commercial regulation not as a palimpsest, but rather as a *tabula* that must remain *rasa* until Congress decides to legislate.”⁸⁹

The dormant Commerce Clause has been the subject of much academic and judicial criticism for its lack of “solid foundation in text or intent.”⁹⁰ However, according to one commentator, the clause “seems to be gaining, not losing, strength To paraphrase Mark Twain’s quip about the weather, the dormant Commerce Clause has become that doctrine that everybody complains about, but no one (on the Court at least) does anything to change.”⁹¹

A. State action that violates the dormant Commerce Clause

There are essentially two ways⁹² that a state may violate the dormant Commerce Clause: by (1) discriminating against other states⁹³ or by (2) placing an excessive burden upon interstate commerce.⁹⁴

1. *Discrimination against interstate commerce*

State regulations that discriminate against interstate commerce are subject to “a virtually *per se* rule of invalidity.”⁹⁵ Discrimination is defined as “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”⁹⁶ For example, the Supreme Court has held unconstitutional a state law which barred the importation of waste to be disposed in the state’s landfills.⁹⁷ In *C. & A. Carbone, Inc. v. Town of Clarkstown*,⁹⁸ the Court struck down, as violative of the dormant Commerce Clause, a “flow control ordinance” which required all non-hazardous waste to be deposited at a preferred waste transfer station in which the town enjoyed a future interest.⁹⁹

2. *Excessive burden on interstate commerce*

Where a state is found not to have patently discriminated against out-of-state interests, “the Court has adopted a much more flexible approach” for evaluating the challenged conduct.¹⁰⁰ As held in *Pike v. Bruce Church*,¹⁰¹ where a state regulation has only “incidental” effects on interstate commerce, that regulation “will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”¹⁰² The *Pike* test has been used to invalidate state laws which prohibit the import or export of certain products without local processing requirements.¹⁰³ The local processing requirements often have the effect of inducing out-of-state businesses to relocate to the regulating state or endure substantial costs.¹⁰⁴

B. **The market participant doctrine**

The market participant doctrine provides to the states a limited exception to the prohibitions of the dormant Commerce Clause. The market participant doctrine “differentiates between a State’s acting in its distinctive governmental capacity, and a State’s acting in the more general capacity of market participant.”¹⁰⁵ Where a state acts not as a market regulator, but as a market participant, its activities will not violate the dormant Commerce Clause.¹⁰⁶

The market participant doctrine has been invoked by the Supreme Court to shield state action from dormant Commerce Clause invalidation where the state has been a buyer of goods,¹⁰⁷ a buyer of services,¹⁰⁸ and a seller of state-produced goods.¹⁰⁹ In *Reeves, Inc. v. Stake*,¹¹⁰ the Court relied upon the *Colgate* doctrine to uphold a South Dakota policy which restricted the sale of cement from its state-owned facility to state residents.¹¹¹ According to the *Reeves* Court, “the basic distinction . . . between States as market participants and States as market regulators makes good sense and sound law.”¹¹² In justifying its holding, the *Reeves* Court was careful to observe that “state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants.”¹¹³ The Court further buttressed its recognition of a market participant exception to the dormant Commerce Clause by reasoning that “cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis. Given these factors . . . the adjustment of interests in this context is a task better suited for Congress than this Court.”¹¹⁴

In *South-Central Timber Development Co. v. Wunnicke*,¹¹⁵ a plurality of the Supreme Court limited the market participant doctrine to “allow[] a State to impose burdens on commerce within the market in which it is a participant, but . . . no further. The State may not impose conditions, whether by statute, regulation, or contract, that

have a substantial regulatory effect outside of that particular market.”¹¹⁶ At issue in *Wunnicke* were Alaska’s downstream restrictions on the processing of timber which it sold.¹¹⁷ The restrictions came in the form of regulatory requirements that contracts for the sale of government timber require that the timber sold be at least partially processed in state.¹¹⁸ Differentiating between the timber market and the timber-processing market, the plurality held that the state could not avail itself of the market participation exception for such downstream regulation.¹¹⁹ While the plurality confessed that it drew the line “simply as a matter of intuition,”¹²⁰ it explained that

downstream restrictions have a greater regulatory effect than do limitations on the immediate transaction. Instead of merely choosing its own trading partners, the State is attempting to govern the private, separate economic relationships of its trading partners; that is, it restricts the post-purchase activity of the purchaser, rather than merely the purchasing activity.¹²¹

Citing to *Dr. Miles*¹²² and *Sylvania*,¹²³ the plurality was influenced by antitrust law, which (according to the plurality) “place[s] limits on vertical restraints.”¹²⁴ However, the Court did not endeavor to borrow antitrust principles of market definition to aid in its analysis.¹²⁵

IV

THE STATE ACTION IMMUNITY DOCTRINE

The state action immunity doctrine provides antitrust immunity in certain situations to conduct which would otherwise be actionable under the antitrust laws. Originating in the case of *Parker v. Brown*,¹²⁶ the doctrine is rooted in concerns for federalism and state sovereignty. The Sherman Act, according to Chief Justice Stone, writing for a unanimous Court in *Parker*, was not “intended to restrain state action or official action directed by a state.”¹²⁷ The doctrine is not limited to Sherman Act cases, but is applicable to the antitrust laws generally.¹²⁸ While *Parker* concerned action by an agricultural commission created by state statute,¹²⁹ the doctrine has been extended to immunize state agencies,¹³⁰ state courts,¹³¹ state executive officials,¹³² local municipalities,¹³³ and even, in certain circumstances, private parties.¹³⁴

A. State action immunity and the Constitution

A discussion of the state action immunity doctrine must begin by emphasizing that the doctrine is a rule of construction rather than a rule of jurisdiction. As the Fifth Circuit Court of Appeals observed in *Surgical Care Center of Hammond v. Hospital Service District No. 1 of Tangipahoa Parish*: “While thus a convenient shorthand, ‘Parker

immunity' is more accurately a strict standard for locating the reach of the Sherman Act than the judicial creation of a defense to liability for its violation."¹³⁵ In recognizing that the "price of the shorthand of using similar labels for distinct concepts is the risk of erroneous migrations of principles,"¹³⁶ the Fifth Circuit explained that the Eleventh Amendment "is far stingier in protecting instruments of local government."¹³⁷ As we have seen, the Eleventh Amendment does not insulate municipalities from federal claims, but state action immunity (in some cases) may so do.

Areeda and Hovenkamp view the state action immunity doctrine as an alternative form of preemption brought about by the nature of the case in which the defense is raised.¹³⁸ In cases where the state action immunity defense is directly at issue, an actor (public or private) is alleged to have violated the antitrust laws. The actor then raises the *Parker* defense as a shield. If an actor is entitled to *Parker* immunity, then the statute under which he operates is not inconsistent with the Sherman Act. On the other hand, where preemption is expressly at issue, the nature of the action is the challenge to a statute (or regulation or ordinance) rather than the challenge of conduct. Such a challenge alleges the inconsistency between federal and state law, and the case is decided using the preemption doctrine.¹³⁹

B. The standards

The standards required for state action immunity to attach depend largely upon the identity of the defendant.¹⁴⁰ Where the defendant is sovereign, i.e., the state legislature or state supreme court, the conduct is automatically entitled to state action immunity.¹⁴¹ In the case of state agencies, municipalities, or other political subdivisions, however, the defendant seeking the shield of *Parker* immunity must be acting pursuant to a clearly expressed state policy to displace competition with regulation.¹⁴² Where the defendant is a private person or entity, a second level of analysis must be satisfied. In addition to acting pursuant to a clearly articulated state policy, the defendant's conduct must be actively supervised by the state.¹⁴³ No such active supervision is required to immunize municipalities.¹⁴⁴

1. Clearly articulated state policy to displace competition with regulation

For the state action doctrine to immunize state agencies, municipalities, or other political subdivisions, the conduct at issue must be taken pursuant to a clearly articulated and affirmatively expressed state policy designed to replace competition with regulation.¹⁴⁵ The conduct need not be compelled by state statute (although compulsion will suffice); mere statutory authorization will generally satisfy the clear articulation requirement.¹⁴⁶ However, the conduct must be a foreseeable consequence of the authorization.¹⁴⁷ The application of the foreseeability requirement has

been the subject of much disagreement among courts and commentators (see part VI(B), below).

2. *Active supervision*

A second element, “active supervision,” must be satisfied before state action immunity will attach to the conduct of private parties. The Supreme Court explained in *FTC v. Ticor Title Insurance Co.* that this additional element is required in order to ensure that “the anticompetitive scheme is the state’s own.”¹⁴⁸ As the Court has observed in declining to require this second element for municipal liability: “Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.”¹⁴⁹

In *Patrick v. Burget*,¹⁵⁰ the Court held that statutorily authorized physician peer review proceedings were not sufficiently supervised so as to provide immunity.¹⁵¹ Writing for a unanimous Court, Justice Marshall explained that “the active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct.”¹⁵² Mere veto power over transactions or arrangements will not suffice.¹⁵³ To achieve state action immunity, a private actor “must be able to prove that state officials actually fulfilled the active role granted to them under the statute by undertaking the necessary steps to review the specifics of the challenged conduct and evaluating whether it complies with the state regulatory policy.”¹⁵⁴ Although the issue is not completely settled by the Supreme Court, most courts disregard the active supervision requirement and use an analysis which is similar to that used for municipalities to determine if *Parker* immunity applies to state agencies.¹⁵⁵

C. Local Government Antitrust Act of 1984

In 1984, Congress amended the Clayton Act so as to preclude private parties from obtaining “damages, interest on damages, costs or attorney’s fees” from municipalities in antitrust actions.¹⁵⁶ The Local Government Antitrust Act of 1984 was Congress’s response to “an increasing number of antitrust suits, and threatened suits, that could undermine a local government’s ability to govern in the public interest.”¹⁵⁷ By the terms of the Act, this immunity from the payment of damages extends to “any local government, or official or employee thereof acting in an official capacity.”¹⁵⁸ Additionally, the immunity attaches in actions “against a person based on any official action directed by a local government, or official or employee thereof acting in an official capacity.”¹⁵⁹

“Local governments” are defined to include not only cities, towns, and villages, but also “special function governmental unit[s]” (“SFGUs”).¹⁶⁰ While only two types

of SFGUs are specifically listed in the Act, school districts and sanitary districts,¹⁶¹ the legislative history provides a list of entities that were intended to be included in the definition: “planning districts, water districts, sewer districts, irrigation districts, drainage districts, road districts, and mosquito control districts.”¹⁶²

Kintner has summarized the factors considered in determining whether an entity is a SFGU:

- P the functions that the entity performs;
- P the nature of the authority conferred upon it by the enabling legislation;
- P the impact of any monetary award that might be made if immunity is unavailable, including whether it will affect taxpayers; and
- P any indication by the legislature of its views of the treatment of that type of entity.¹⁶³

The issue of whether health care facilities are SFGUs has been the subject of a fair amount of litigation under the Act, with most courts holding governmental health care facilities immune from antitrust damages as SFGUs.¹⁶⁴

V

IS THERE A MARKET PARTICIPATION EXCEPTION TO THE STATE ACTION IMMUNITY DOCTRINE?

While its precise contours may be subject to debate, it is clear that there is a market participation exception to the dormant Commerce Clause (see part III(C), above). After *College Savings Bank*, it is equally clear that there is no longer a market participation exception (if ever there was one) to Eleventh Amendment sovereign immunity (see part II(B)(3), above). What is less clear is whether there is a market participation exception to the state action immunity doctrine.

A. Express indications from the Supreme Court

Although the Supreme Court has abandoned the distinction between governmental and proprietary activity in other contexts, it has recognized the possibility of a market participation exception to the state action immunity doctrine.

1. *Indications in favor of the exception*

Dating back to *Parker*, the Court has indicated that the state action doctrine may not apply when a state acts as a market participant:

True, a state does not give immunity those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful, and we

have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade .¹⁶⁵

In *City of Lafayette v. Louisiana Power & Light Co.*,¹⁶⁶ Chief Justice Burger, in a concurring opinion, observed that:

There is nothing in *Parker* . . . or its progeny which suggests that a proprietary enterprise with the inherent capacity for economically disruptive anticompetitive effects should be exempt from the Sherman Act because it is organized under state law as a municipality.¹⁶⁷

In *City of Columbia v. Omni Outdoor Advertising, Inc.*,¹⁶⁸ Justice Scalia, writing for the majority, opined that “with the possible market participation exception, any action that qualifies as state action is *ipso facto* exempt from the operation of the antitrust laws.”¹⁶⁹ Justice Scalia explained that state action “immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market.”¹⁷⁰

In *Jefferson County Pharmaceutical Association, Inc. v. Abbott Laboratories*,¹⁷¹ the Court interpreted the Robinson-Patman Act to allow a state to be sued where “a State has chosen to compete in the private retail market.”¹⁷² In *Wunnicke*, then-Justice Rehnquist cited to *Abbott Laboratories* in his dissent.¹⁷³ The *Wunnicke* plurality had referred to the antitrust limits on vertical restraints as a rationale to condemn the downstream restrictions as unconstitutional market regulation.¹⁷⁴ Rejecting the rationale, Justice Rehnquist explained:

Perhaps the State’s actions do raise antitrust problems. But what the plurality overlooks is that the antitrust laws apply to a State only when it is acting as a market participant. [Citation to *Abbott Laboratories*] When the State acts as a market regulator, it is immune from antitrust scrutiny. [Citation to *Parker*] Of course, the line of distinction in cases under the Commerce Clause need not necessarily parallel the line drawn in antitrust law. But the plurality can hardly justify placing Alaska in the market-regulator category, in this Commerce Clause case, by relying on antitrust cases that are relevant only if the state is a market participant.¹⁷⁵

The Court has acknowledged the existence of a market participation exception to the state action immunity doctrine.

2. *Indications against the exception*

In *Garcia v. San Antonio Metropolitan Transit Authority*,¹⁷⁶ the Supreme Court overruled *National League of Cities v. Usery*,¹⁷⁷ which held that the Commerce Clause does not empower Congress to impose wage and hour regulations on the states as employers.¹⁷⁸ The *Garcia* Court abandoned the *Usery* analysis that provided state immunity for “traditional governmental functions.”¹⁷⁹ In *Garcia*, the Court abolished this “historical standard,”¹⁸⁰ which rested upon a reserved powers rationale of the Tenth Amendment, with citation to the “governmental/proprietary” distinction abandoned in the intergovernmental tax immunity line of cases.¹⁸¹ The *Garcia* Court also observed that a “nonhistorical standard for selecting immune governmental functions is likely to be just as unworkable as is a historical standard” because those categories would prove so narrow as to be “negligible.”¹⁸² The Court included, as “nonhistorical” bases for immunity, tests for “uniquely” governmental functions and “necessary” governmental functions.¹⁸³ The *Garcia* Court summarized: “We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is ‘integral’ or ‘traditional.’”¹⁸⁴

B. Other federal authority

A majority of the lower federal courts have rejected a market participation exception to state action immunity.¹⁸⁵ The Second Circuit recently focused upon the intersection of the market participant doctrine and the state action immunity doctrine in *Automated Salvage Transport, Inc. v. Wheelabrator Environmental Systems, Inc.*¹⁸⁶ *Automated Salvage* provides an illustrative analysis of the lower federal courts’ reluctance to recognize such an exception.

The plaintiffs in *Automated Salvage* complained that the defendant, a state organized “trash-to-energy” entity, violated both the Sherman Act and the dormant Commerce Clause.¹⁸⁷ The Second Circuit held the defendant to be a market participant outside of the prohibitions of the Commerce Clause.¹⁸⁸ Additionally, the court held the defendant to be immune from antitrust liability under the state action doctrine.¹⁸⁹ The court expressly rejected the notion of a market participation exception to state action immunity.¹⁹⁰ The result was a defendant adjudged to be a market participant that could engage in anticompetitive activity with impunity.

The plaintiffs raised the concern that failing to recognize the market participation exception to the state action immunity “would unfairly permit [the defendant] to compete as a private party without being subject to antitrust liability like private parties.”¹⁹¹ Curiously, the Second Circuit initially addressed plaintiffs’ concern by stating that it did not “perceive ‘a potential conflict’ between the *Parker* and market participant doctrines that would automatically render a market participant a regulator

of interstate commerce, even though it lacked any regulatory power, if it invoked the *Parker* exemption from antitrust scrutiny.”¹⁹² However, what was at issue was not the fiction that *participants would be cast as regulators* if *Parker* was invoked; instead it was advocated that *participants should be recognized as participants* when *Parker* is invoked. The court did eventually change course, relying upon *City of Lafayette* (instead of *Omni*) for the proposition that there is no market participation exception to the state action immunity doctrine.¹⁹³ What was left was an entity engaged in arguably anticompetitive interstate commerce free from the constraints of federal regulation. This is a prime example of what Justice Breyer termed an “enforcement gap which, when allied with the pressures of a competitive marketplace, could place the State’s regulated private competitors at a significant disadvantage.”¹⁹⁴

C. The implications of *College Savings Bank*

As we have seen in *College Savings Bank*, a five-to-four majority of the Supreme Court has rejected a proposed market participation exception to Eleventh Amendment sovereign immunity (see part II(B)(3), above). Given the reluctance of the federal courts to adopt a market participation exception to the state action immunity doctrine, upon first glance one could feel rather confident that the death knell had sounded on the prospect that the Court would soon recognize a market participation exception to the state action immunity. But an examination of the rationale supporting *College Savings Bank* reveals that its analysis is not so readily transferred to the antitrust context.

Writing for the majority in *College Savings Bank*, Justice Scalia observed that the danger of state anticompetitive proprietary conduct is “entirely absent where the States are buying and selling in the market.”¹⁹⁵ Justice Scalia further explained that an exception based on market participation was arbitrary since “sovereign immunity itself was not traditionally limited by these factors”¹⁹⁶ When applied to antitrust law, such considerations actually counsel in favor of a market participation exception to the state action immunity doctrine. The assumption that states and their agencies and subdivisions do not engage in anticompetitive activities when participating in the commercial marketplace is sheer folly. The Court will not be able to rely on the assumption that state anticompetitive proprietary conduct is “entirely absent” when confronted with a case alleging that a government actor had indeed engaged in anticompetitive conduct. Furthermore, tradition and evenhandedness, the considerations which led the Court to reject a market participation exception to Eleventh Amendment immunity, actually counsel in favor of recognizing a market participation exception to the state action immunity doctrine.

1. *The traditional approach to sovereign immunity: the commercial activity exception in foreign relations law and the act of state doctrine*

Justice Scalia rejected the argument of the dissenters in *College Savings Bank* that the commercial participant exception to foreign sovereign immunity supports the recognition of such an exception to the Eleventh Amendment.¹⁹⁷ Justice Scalia failed to see the relevance of the development of international relations law to the interpretation of a 200-year-old constitutional amendment. Such a strict intentionalist approach, while perhaps appropriate for constitutional interpretation, has been rejected in the statutory construction of antitrust. The law of antitrust continues to evolve as the language of the Sherman Act remains the same. As the developing economic literature continues to influence antitrust doctrine, so too should developments in other areas of the law that are relevant to antitrust principles.

The commercial activity exception to foreign sovereign immunity counsels for the recognition of a market participation exception to state action immunity. While foreign sovereign immunity was once considered virtually absolute, as it was rooted in the “perfect equality and absolute independence of sovereigns,”¹⁹⁸ the modern view is that “[u]nder international law, a state is not immune from the jurisdiction of the courts of another state with respect to claims arising out of commercial activity.”¹⁹⁹ For example, under the Foreign Sovereign Immunities Act, federal courts may exercise jurisdiction over claims against a foreign state arising out of commercial activity.²⁰⁰

In addition to Congress’s formal recognition of a commercial participation exception to foreign sovereign immunity, the Supreme Court has recognized a commercial participation exception to the act of state doctrine.²⁰¹ Narrower in scope than sovereign immunity, the act of state doctrine “merely requires that . . . the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.”²⁰² The doctrine is rooted in a judicial reluctance to intrude upon the foreign relations domain of the executive branch.²⁰³ In *Alfred Dunhill of London, Inc. v. Republic of Cuba*, a plurality of the Supreme Court held the act of state doctrine inapplicable to the repudiation of a commercial debt by an instrumentality of the Cuban government.²⁰⁴ At issue was the ability of a cigar importer to obtain funds mistakenly paid for cigar shipments by the importer to the Cuban government, which had confiscated the five leading cigar manufacturers in 1960.²⁰⁵ Relying on Chief Justice Marshall’s *Planters’ Bank* analysis (see part II(B)(3), above), the Court observed that “[d]istinguishing between the public and governmental acts of sovereign states on the one hand and their private and commercial acts on the other is not a novel approach.”²⁰⁶ The Court reaffirmed that the exception is a “sound principle,” which “assure[s] those engaging in commercial transactions with foreign sovereignties that

their rights will be determined in the courts whenever possible.”²⁰⁷ The commercial participation exception to the act of state doctrine has enjoyed considerable support in the lower federal courts,²⁰⁸ and has been incorporated into the 1995 Department of Justice and Federal Trade Commission Antitrust Enforcement Guidelines for International Operations.²⁰⁹

While such traditional exceptions may not have persuaded a majority of the Court to adopt a market participation exception to Eleventh Amendment immunity, both the commercial activity exception to foreign sovereign immunity and the act of state doctrine support a market participation exception to the state action immunity doctrine.

2. “Evenhandedness” and antitrust

A comparison of the goals of antitrust law with the goals of the market participant doctrine reveals that a *College Savings Bank* analysis of the market participation exception to the state action doctrine will yield a result markedly different from that of the proposed market participation exception to Eleventh Amendment sovereign immunity. Justice Scalia declined to apply the exception to state sovereign immunity because, unlike the dormant Commerce Clause, the Eleventh Amendment was not designed with principles of “evenhandedness” at its core. While Eleventh Amendment sovereign immunity may not be designed to promote the principle of evenhandedness, the rationale for the antitrust laws is analogous to such a principle.

“Congress designed the Sherman Act as a ‘consumer welfare prescription.’”²¹⁰ In *Reeves*, the evenhandedness promoted by freeing a state engaged in proprietary activity from the limitations of the dormant Commerce Clause contemplated that “state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants.”²¹¹ As the Court explained in *Reeves*, the regulation of governmental proprietary activity is better left to Congress: “[C]ases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis. . . . [T]he adjustment of interests in this context is a task better suited for Congress than this Court.”²¹² Recognizing a market participation exception to the state action doctrine would leave Congress, through the antitrust laws it has passed, to adjust the interests in disputes involving state proprietary activity—an approach that the Court has deemed appropriate.

VI

MARKET PARTICIPATION AND THE HEALTH CARE INDUSTRY

We have seen that a state itself will be immune from private antitrust actions for damages under the Eleventh Amendment (see part II, above). We have also seen that under the state action immunity doctrine municipalities and other governmental subdivisions are immune when acting pursuant to clearly articulated state policies designed to displace competition with regulation (see part IV(B)(1), above). Even where such governmental entities fail to meet this standard, under the Local Government Antitrust Act, such entities may be sued only for injunctive relief (see part IV(C), above). What of the anticompetitive acts of municipally owned and operated hospitals? Where state policy sufficiently authorizes municipal hospital market participation, should that conduct be immunized despite the harm visited upon private hospitals competing in the same market as the municipal hospital? And consumers deprived of a marketplace protected by antitrust law? And the market deprived of the benefits of antitrust law?

The state action immunity cases reveal that the balance between respect for state sovereignty and concern for effective competition policy is achieved by classifying some, but not all, conduct as immune from federal scrutiny. *Town of Hallie* draws a line of demarcation for municipalities and other political subdivisions based upon the conduct of the entity at issue. Conduct that is the foreseeable result of state statutory authorization will be immunized, but conduct falling outside of the foreseeable zone of conduct will be subject to federal antitrust scrutiny. While the Supreme Court has indicated that it might recognize a market participation exception to state action immunity, the federal courts have almost uniformly rejected a market participation exception to the state action doctrine despite the indications of the Court, analogous doctrines, and policy considerations that counsel in favor of such an exception.²¹³

Courts entertaining antitrust actions with defendants in the health care field are no exception. Yet the Supreme Court has consistently held that individual²¹⁴ and institutional health care providers²¹⁵ should not receive special treatment under the antitrust laws despite arguments that the health care industry significantly differs from other industries.²¹⁶ Furthermore, the Court has recognized the substantial role that the health care industry plays in interstate commerce by holding that the local boycott of only one physician is sufficient to invoke the jurisdiction of the Sherman Act.²¹⁷ Nevertheless, government-owned health care facilities will not endure antitrust scrutiny of their participation in the market so long as the providers are immune under the state action doctrine.

A. The case of the county in need of a market participation exception

*FTC v. Hospital Board of Directors of Lee County*²¹⁸ provides an excellent example of where a market participation exception to the state action immunity doctrine might have been well served. In *Lee County*, the FTC challenged the acquisition of a private hospital by a county hospital board on the ground that such an acquisition would substantially lessen competition in the acute health care market.²¹⁹ According to the FTC, the acquisition would lessen competition in violation of the Clayton Act, in that it would reduce the number of hospitals from four to three and increase the county hospital's market share from 49 percent to 67 percent.²²⁰ The county hospital board was authorized to engage in acquisitions generally by state statute.²²¹ Applying the *Town of Hallie* foreseeability analysis, the Eleventh Circuit viewed the question presented as whether the anticompetitive effects of the merger authorization were foreseeable.²²² Although the FTC had argued that where a political subdivision acts as a market participant its conduct is not foreseeable, the court dismissed the argument in a footnote with citation to an earlier Eleventh Circuit case that relied upon *Garcia* to eliminate any governmental/proprietary distinction.²²³ Moving beyond the market participant speed-bump, the court found that the anticompetitive effects were a foreseeable result of the statutory authorization:

In 1963, when the Board was originally created, there was only one hospital in existence in Lee County. Pursuant to the powers given it, the Board acquired the hospital, creating a monopoly. In 1987, the legislature, with the knowledge that it had given the Board the power to create a monopoly in 1963, further expanded the implicit power of the Board to acquire other hospitals. Thus, if the legislature knew at the time it expanded the Board's acquisition powers in 1987 that a monopoly had resulted from the 1963 legislation, the legislature must have reasonably anticipated that further acquisitions, resulting from the 1987 legislation, would increase the Board's market share in an anticompetitive manner.²²⁴

At least in the Eleventh Circuit, the “clear articulation” standard appears to have devolved into a “vague allusion” standard. It is no mean feat of judicial gymnastics to interpret the purchase of the only hospital in town as an authorization to “substantially lessen competition.” When the county originally purchased the private hospital, the private hospital had 100 percent market share; the market conditions did not change as a result of the transaction. This original transaction would not have implicated the Clayton Act, and therefore cannot (legitimately) be said to be an implicit authorization to lessen competition with abandon. Furthermore, authorization to engage in acquisitions generally need not (nor should not) be interpreted as an authorization to engage in illegal acquisitions.

B. Clear articulation: regulation versus participation

If we take seriously what the Supreme Court has stated with regard to the standards for attaching *Parker* immunity, then the appropriateness of a market participation exception to state action immunity becomes evident. The Court has consistently required that the conduct at issue flow from a clearly articulated state policy to “displace competition with regulation.”²²⁵ An authorization to participate, as opposed to an authorization to regulate, should not necessarily give rise to *Parker* immunity. As has been posited, “state authorization to regulate is more logically associated with the policy to displace competition than is state authorization to participate in and control the market or competitive marketplace.”²²⁶

Such an approach has been taken in the Fifth Circuit. In *Surgical Care Center of Hammond, L.C. v. Hospital Service District No. 1 of Tangipahoa Parish*,²²⁷ the court reasoned that the statutory creation of a hospital service district and accompanying authorization to participate in the competitive marketplace did not automatically bring with it federal antitrust immunity.²²⁸ In *Tangipahoa*, the Fifth Circuit confronted a statutory scheme designed to “promote the goal of allowing ‘a hospital service district to compete effectively and equally.’”²²⁹ The court did not equate participation with regulation, but instead interpreted the legislature’s use of the word “equally” in the authorization to contemplate amenability to antitrust scrutiny.²³⁰

In *Lancaster Community Hospital v. Antelope Valley Hospital District*,²³¹ the Ninth Circuit employed a similarly restrictive application of the foreseeability standard.²³² In rejecting the hospital district’s state action immunity defense, the court took a broad view of the state’s competition policy and a narrow view of the authorization.²³³ According to the court: “When there are abundant indications that a state’s policy is to support competition, a subordinate state entity must do more than merely produce an authorization to ‘do business’ to show that the state policy is to displace competition.”²³⁴

Unfortunately, the foreseeability standard has received differing interpretations.²³⁵ Harris has classified these differing foreseeability analyses as objective and subjective, with *Antelope Valley* (and presumably *Tangipahoa*) falling into the objective category, while *Lee County* resides in the subjective category.²³⁶ Instead of recommending a market participation exception,²³⁷ however, Harris advocates that the foreseeability standard should be abandoned in favor of a standard that would deny state action immunity in the absence of compulsion, natural monopoly, or express statutory authority exceeding the authority ordinarily granted to private business organizations.²³⁸ While this approach would indeed subject a great deal of anticompetitive conduct to antitrust scrutiny that would not be subject to antitrust scrutiny under the *Lee County* approach, it falls short of the mark. In essence it changes the “clear articulation” standard to a “*really* clear articulation” standard. The

future would inevitably bring other authors clamoring for a “*really, really* clear articulation” standard. With respect to governmental market participants, the foreseeability standard has proven too unpredictable to be manageable.²³⁹ A market participation exception would help provide predictability to a clear articulation standard which has grown opaque.

C. Public hospitals and state action immunity: some possible detrimental effects

To fail to recognize a market participation exception to the state action immunity doctrine allows local governmental power to expand at the expense of private entrepreneurial power. One consequence of unfettered anticompetitive local market participation is that such conduct acts as a tax upon the public—local governmental cartels and monopolies create a wealth transfer from citizens to the government.²⁴⁰ This transfer will be greater than the transfer to private actors commonly associated with private monopoly because governmental market participants are not under the same business constraints as private monopolists. Governmental market participants have the luxury of tax subsidy. For example, a hypothetical local hospital authority could receive enough state funding to allow it to engage in below-cost pricing long enough to drive its competition out of the market and facilitate a monopoly. Or, the hospital authority could receive funding sufficient to acquire a private hospital, making it the only hospital in the geographic market. There are, of course, an infinite number of examples and permutations that can be developed to make the point. It suffices to say that unchecked governmental market participation may have an even greater deleterious effect upon the economy than does unchecked private anticompetitive market participation. In addition to the undesirable economic effects associated with private anticompetitive activity, governmental abuse has the attendant problem of taxing the populous.²⁴¹

The expansion of local governmental power resulting from the lack of a market participation exception to the state action immunity doctrine also raises the problem of the substantial barriers to entry associated with competing with the government. Barriers to entry permit governmental market participants to “earn returns above the competitive level while deterring outsiders from entering.”²⁴² In an industry such as health care, where permission to enter (and remain) in the market must be sought from the very entity with which the potential entrant seeks to compete,²⁴³ the barriers to entry can be substantial, if not insurmountable. While a private market participant enjoying such enviable market power would be subject to exacting antitrust scrutiny, the governmental market participant, unless an exception is recognized, is free to command the relevant market. As the Supreme Court recognized in *Aspen Skiing Co. v. Aspen Highlands Skiing Co.*,²⁴⁴ “[i]f a firm has been

attempting 'to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory."²⁴⁵ If private monopolists must justify their refusals to deal, why not public monopolists? It will be argued that health care is different, that the market imperfections, most notably the "moral hazard" caused by health insurance that dull patients' price sensitivity, decrease the likelihood that the detrimental economic and political effects described above will actually occur.²⁴⁶ Such arguments are better suited for rule of reason determination of liability rather than in support of an exemption from antitrust scrutiny. As the threat of litigation deters anticompetitive behavior,²⁴⁷ the exemption from antitrust rules encourages anticompetitive behavior. Detrimental market conditions will pervade markets dominated by anticompetitive actors.

VII CONCLUSION

This article has examined the recent wave of federalism which threatens to visit upon the marketplace conditions the likes of which private enterprise has not seen since before the passage of the Sherman Act—perhaps even before the Constitutional Convention. In concurring with Chief Justice Marshall in *Gibbons v. Ogden*,²⁴⁸ Justice Johnson described some the problems under the Articles of Confederation:

For a century the States had submitted, with murmurs, to the commercial restrictions imposed by the parent State; and now, finding themselves in the unlimited possession of those powers over their own commerce, which they had so long been deprived of, and so earnestly coveted, that selfish principle which, well controlled, is so salutary, and which, unrestricted, is so unjust and tyrannical, guided by inexperience and jealousy, began to show itself in iniquitous laws and impolitic measures, from which grew up a conflict of commercial regulations, destructive to the harmony of the States, and fatal to their commercial interests abroad .²⁴⁹

As Justice Johnson explained: "This was the immediate cause, that led to the forming of a convention."²⁵⁰ While the American economy has flourished in the post-*Lochner* era of the regulatory state, a new era of state-controlled markets looms ominously on the horizon. State-marketed goods and services not only are immune from constitutional challenge under the market participation exception to the dormant Commerce Clause, but may also be immune from the antitrust laws under the state action immunity doctrine. While some courts have placed a demanding standard upon states and their subdivisions to meet state action immunity criteria, still more courts remain deferential to the interests of state and local governments in ordering their own affairs. Where the *Town of Hallie* standard is liberally interpreted to immunize most governmental market participation regardless of

competitive consequences, serious deleterious effects are felt in the competitive marketplace. If the Articles of Confederation proved unsuccessful in the agrarian economy of eighteenth-century America, how can the United States expect to thrive under such a regime in the information age of the twenty-first century? As Justice Breyer observed in his dissent in *College Savings Bank*: “Modern commerce and the technology upon which it rests needs large markets and seeks government large enough to secure trading rules that permit industry to compete in the global market place”²⁵¹

This article has argued that in as much as a market participation exception has been recognized in the dormant Commerce Clause context, and in the foreign sovereign immunity and act of state contexts, a market participation exception should supplement the current state action immunity doctrine. This article has further attempted to demonstrate that the interpretive rationale supporting the Supreme Court’s rejection of a market participation exception to Eleventh Amendment state sovereign immunity is not readily transferable to the antitrust context. 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 very purposes of the antitrust laws.

In addition to the federalism concerns first brought to light in *Parker*, concerns for the relative positions of state and federal law in our system of dual sovereignty must inform the analysis. Currently, the thrust of the state action immunity analysis focuses on whether the action challenged was one contemplated by the state. The Supremacy Clause should first prompt us to ask a threshold question: Is the challenged action one that the state could *constitutionally* contemplate? Where a governmental entity is buying and selling in interstate commerce, its actions would run afoul of the dormant Commerce Clause if its conduct were to unreasonably burden interstate commerce, but for its characterization as a market participant. *Reeves* assures us that such a characterization is justified since “state proprietary

activities may be, and often are, burdened with the same restrictions imposed on private market participants.”²⁵² This same entity, characterized as a market participant, may then unreasonably restrain trade in interstate commerce, in violation of the antitrust laws, unless a market participation exception to state action immunity is recognized. This article argues not that all governmental market participation be eradicated, but only that such participants be amenable to antitrust scrutiny. If the market is such that governmental participation of the kind complained of does not unreasonably restrain trade, monopolize the market, or otherwise violate the antitrust laws, then the conduct should, of course, be permitted. But a thorough evaluation of the restraints at issue, the markets at issue, and the defendants charged should inform the judgment, rather than a cursory foreseeability analysis at a preliminary stage in the proceedings.

The Supreme Court’s movement away from engaging in rigid characterization, and toward requiring a comprehensive market analysis, before condemning business practices as violative of the antitrust laws, as recently reflected in the approaches taken in *California Dental Association v. FTC*,²⁵³ *NYNEX Corp. v. Discon*,²⁵⁴ and *State Oil Co. v. Khan*,²⁵⁵ is persuasive. In *California Dental*, the Court ruled that a professional association’s prohibitions on certain types of truthful, nondeceptive advertising, with the asserted objective of preventing false or deceptive advertising, deserved a thorough evaluation of competitive and anticompetitive effects before the restrictions could be considered to have violated the antitrust laws.²⁵⁶ What once may have been summarily condemned as *per se* illegal, now requires more rigorous analysis. Conversely, what once may have been summarily declared legal deserves thoughtful antitrust scrutiny.

Senator Sherman intended that the reach of the Sherman Act should “[g]o as far as the Constitution permits Congress to go.”²⁵⁷ The Supreme Court has generally heeded Senator Sherman’s words in interpreting the antitrust laws, traditionally following the maxim that “exemptions from the antitrust laws must be construed narrowly.”²⁵⁸ The reason the Court construes statutory antitrust exemptions narrowly is to promote the “longstanding congressional commitment to the policy of free markets and open competition.”²⁵⁹ In passing the antitrust laws, Congress “meant to deal comprehensively and effectively with the evils resulting from contracts, combinations, and conspiracies in restraint of trade, and to that end to exercise all the power it possessed.”²⁶⁰ Municipalities and governmental subdivisions such as local hospital authorities are not entitled to Eleventh Amendment sovereign immunity—such entities need not be granted a degree of deference that disrupts the workings of the national economy. In an industry such as health care, which so directly affects the health and welfare of our nation’s citizenry, parochialism must take a back seat to “evenhandedness”—and sound antitrust policy.

NOTES

1. See Geoffrey R. Stone et al., *Constitutional Law* 147-48 (3d ed. 1996).
2. See *id.*
3. See generally 1 Bruce Ackerman, *We the People: Foundations* (1991).
4. See generally 2 Bruce Ackerman, *We the People: Transformations* (1998).
5. See generally Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (1998).
6. See, e.g., *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).
7. See Laurence H. Tribe, *American Constitutional Law* § 5-20, at 378 (2d ed. 1988).
8. See, e.g., Marie L. Garibaldi, *The Rehnquist Court and State Constitutional Law*, 34 *Tulsa L.J.* 67, 69-70 (1998).
9. See *Florida Prepaid Postsecondary Educ. Exp. Bd. v. College Sav. Bank*, 119 S. Ct. 2199 (1999) (Rehnquist, C.J.); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Exp. Bd.*, 119 S. Ct. 2219 (1999) (Scalia, J.); *Alden v. Maine*, 119 S. Ct. 2240 (1999) (Kennedy, J.).
10. Linda Greenhouse, *States are Given New Legal Shield by Supreme Court*, *N.Y. Times*, June 24, 1999, at A24.
11. See *id.* at A1.
12. For reflections upon the allocation of antitrust enforcement authority between the federal and state governments, see Robert M. Langer, *Should the Antitrust Division, the FTC, and State Attorneys General Formally Allocate the Market for Antitrust Enforcement?*, *Antitrust Rep.*, Oct. 1998, at 2.
13. 2 U.S. (2 Dall.) 419 (1793).
14. U.S. Const. art III, § 2.
15. See *The Federalist* No. 81, at 487-88 (Clinton Rossiter ed., 1961) ("It is inherent in the nature of sovereignty, not to be amenable to suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States . . .").
16. See Tribe, *supra* note 7, § 3-25, at 174.
17. See *id.*
18. U.S. Const. amend. XI.
19. See *Hans v. Louisiana*, 134 U.S. 1, 20-21 (1890).
20. See *Edelman v. Jordan*, 415 U.S. 651, 678 (1974).
21. See *Ex parte Young*, 209 U.S. 123, 1678 (1908).
22. See *United States v. Texas*, 143 U.S. 621, 646 (1892).
23. See *McKesson Corp. v. Florida Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 26 (1990).
24. See *Lincoln Cty. v. Luning*, 133 U.S. 529, 530 (1890).
25. See *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883).
26. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985).
27. See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 14 (1989).
28. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).
29. 116 S. Ct. 1114 (1996).
30. See *id.* at 1128. The rationale for this limitation is that the framers of the Fourteenth Amendment intended to enhance individual rights at the expense of state's rights and expressly granted Congress the remedial power as against the states in derogation of the Eleventh Amendment. See *id.*
31. See Greenhouse, *supra* note 10, at A24.

32. 119 S. Ct. 2240 (1999) (Kennedy, J.).
33. *See id.* at 2246.
34. *See id.*
35. *See id.*
36. *See id.* at 2246.
37. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555-56 (1985).
38. *See Alden*, 119 S. Ct. at 2246.
39. *See id.* at 2287-91 (Souter, J., dissenting).
40. *Id.* at 2294 (Souter, J., dissenting). *See Lochner v. New York*, 198 U.S. 45 (1905).
41. 119 S. Ct. 2199 (1999) (Rehnquist, C.J.).
42. *See id.* at 2210-11.
43. *Id.* at 2202-03.
44. *See id.* at 2202.
45. *Id.* at 2203
46. *See id.*
47. *See id.* at 2203.
48. *See Patent and Plant Variety Protection Remedy Clarification Act*, Pub. L. No. 102-560, 106 Stat. 4230 (codified at 7 U.S.C. §§ 2561, 2541(a)-(b), 2570; 35 U.S.C. §§ 271(h), 296(a)-(b) (1994)). Remember that after *Seminole Tribe*, Congress's authority to abrogate sovereign immunity cannot rest in the Commerce Clause or the Patent Clause, but instead must reside in Section 5.
49. 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act as violating the Free Exercise Clause). As the Court stated: "Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." *Id.* at 519.
50. Of course, Congress has limited suits for patent infringement to the federal courts. *See* 28 U.S.C. § 1338 (1994).
51. *See Florida Prepaid*, 119 S. Ct. at 2210-11.
52. *See id.* at 2209 n.9.
53. 119 S. Ct. 2219 (1999) (Scalia, J.).
54. *See id.* at 2228.
55. *See id.* at 2223-24.
56. *See Trademark Remedy Clarification Act*, Pub. L. No. 102-542, 106 Stat. 3567 (codified at 15 U.S.C. §§ 1051, 1114(1), 1122, 1125(a), 1127 (1994)).
57. *See College Savings Bank*, 119 S. Ct. at 2225.
58. *See id.*
59. 377 U.S. 184 (1964).
60. *See id.* at 192.
61. *See College Savings Bank*, 119 S. Ct. at 2228.
62. *See id.* at 2226-2233 ("Whatever may remain of our decision in *Parden* is expressly overruled.").
63. *See id.* at 2234-40 (Breyer, J., dissenting).
64. *See id.* at 2237-38 (Breyer, J., dissenting).
65. *Id.* at 2237 (Breyer, J., dissenting).
66. *Id.* at 2235 (Breyer, J., dissenting).
67. *Id.* at 2237 (Breyer, J., dissenting).
68. *Id.* at 2230.
69. *Id.*
70. *Id.*
71. For a discussion of the dormant Commerce Clause, see Part III, *supra*.
72. *Id.* at 2230-31.
73. *Id.* at 2230 (emphasis added).
74. *See id.* at 2230-31. Another interesting element of Justice Scalia's analysis was his use of individual rights authority to vindicate State's rights. Justice Scalia found justification for not recognizing constructive waiver of sovereign immunity in, of all things, the fact that one cannot constructively waive a right to a jury trial. *See id.* at 2229.
75. 22 U.S. (9 Wheat.) 904 (1824) (Marshall, C.J.).
76. *Id.* at 907. Justice Scalia had reaffirmed the teaching of Justice Marshall by distinguishing *Planter's Bank* in holding that Amtrak Railroad (a governmental corporation) was a state actor

for First Amendment purposes. *See* *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 398-400 (1995).

77. *See* U.S. Const., art. VI, cl. 2 (Supremacy Clause); *cf.* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (Maryland may not impose tax upon federal bank located in the state of Maryland); *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819) (“Whenever the terms in which a power is granted to congress, or the nature of the power, require that it should be exercised exclusively by congress, the subject is as completely taken from the state legislatures, as if they had been expressly forbidden to act on it.”).

78. U.S. Const. art. VI, cl. 2.

79. *See id.* art. I, § 8, cl. 1.

80. 483 U.S. 203 (1987).

81. *See id.* at 206.

82. *See id.*

83. *See Alden*, 119 S. Ct. at 2267 (citing *South Dakota v. Dole*, 483 U.S. 203 (1987)) (“Nor, subject to constitutional limitations, does the Federal Government lack the authority or the means to seek the States’ voluntary consent to private suits.”).

84. U.S. Const. art. I, § 8, cl. 3.

85. *Id.* art. I, § 10, cl. 2. *See* *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123, 136 (1868) (limiting Import-Export Clause to foreign commerce). *But see* *Camps Newfound/Owatonna v. Harrison*, 520 U.S. 564, 621-37 (Thomas, J., dissenting) (arguing that Import-Export Clause should not be so limited); *but see also* Brannon P. Denning, *Justice Thomas, The Import Export Clause, and Camps Newfound/Owatonna v. Harrison*, 70 U. Colo. L. Rev. 155 (1999).

86. *See* *Tribe*, *supra* note 7, § 6-2, at 403.

87. *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 535 (1949).

88. *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979)).

89. *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 508 (2d Cir. 1995) (Cabranes, J.).

90. Denning, *supra* note 85, at 1.

91. *Id.*

92. The Commerce Clause also provides a basis for assessing the constitutionality of state and local taxation. A serious tax discussion is beyond the scope of this article, but an excellent overview can be found in Boris I. Bittker & Brannon P. Denning, *Bittker on the Regulation of Interstate and Foreign Commerce* § 8 (1999). For example, to pass constitutional muster a state tax may not be discriminatory. *See, e.g., General Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997); Chad A. Landmon, Note, *Creation of a Less Perfect Union: The Implications of General Motors v. Tracy for Commerce Clause Analysis of State Taxation*, 30 Conn. L. Rev. 1121, 1133-34 (1998).

93. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

94. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

95. *City of Philadelphia*, 437 U.S. at 623-24. *See* Bittker & Denning, *supra* note 92, § 6.06[A].

96. *Oregon Waste Sys., Inc. v. Department of Env'tl. Quality*, 511 U.S. 93, 99 (1994).

97. *See City of Philadelphia*, 437 U.S. at 629.

98. 511 U.S. 383 (1994).

99. *See id.* at 393-94.

100. *City of Philadelphia*, 437 U.S. at 624.

101. 397 U.S. 137 (1970).

102. *Id.* at 142.

103. *See* *Tribe*, *supra* note 7, § 6-9, at 426.

104. *See id.*

105. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 277 (1988).

106. *See* *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 93 (1984).

107. *See* *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 808-10 (1976).

108. *See* *White v. Massachusetts Council of*

- Construction Employers, 460 U.S. 204, 214-15 (1983).
109. *See Reeves, Inc. v. Stake*, 447 U.S. 429, 440 (1980).
110. 447 U.S. 429 (1980).
111. *See Reeves*, 447 U.S. at 438-39 (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (relying upon “the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal”)).
112. *Id.* at 436.
113. *Id.* at 439 & n.13 (citing *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978)).
114. *Id.* at 439.
115. 467 U.S. 82 (1984).
116. *Id.* at 97.
117. *Id.* at 84.
118. *Id.*
119. *Id.* at 98-99.
120. *Id.* at 98.
121. *Id.* at 99.
122. *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 383 (1911) (resale price maintenance per se illegal).
123. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 53 n.21 (1977) (nonprice vertical restraints evaluated under rule of reason analysis).
124. *Wunnicke*, 467 U.S. at 98-99.
125. *See id.*
126. 317 U.S. 341 (1943).
127. *Id.* at 351.
128. *See, e.g., Yeager’s Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260 (3d Cir. 1994) (applying state action doctrine to the Robinson-Patman Act); *Askew v. DCH Reg’l Health Care Auth.*, 995 F.2d 1033 (11th Cir. 1993) (applying state action doctrine to Clayton Act); *California State Bd. of Optometry v. FTC*, 910 F.2d 976 (D.C. Cir. 1990) (applying state action doctrine to FTC Act).
129. *See Parker*, 317 U.S. at 352.
130. The Supreme Court has indicated that “[i]n cases in which the actor is a state agency, it is likely that active state supervision would ... not be required, although we do not here decide that issue.” *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 n.10 (1985).
131. *See, e.g., Hoover v. Ronwin*, 466 U.S. 558, 569 (1984).
132. *See, e.g., Fuchs v. Rural Elec. Convenience Coop., Inc.*, 858 F.2d 1210, 1214 (7th Cir. 1988); *Charley’s Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.* 810 F.2d 869, 876 (9th Cir. 1987); *Limeco, Inc. v. Division of Lime of Miss. Dep’t of Agric. & Commerce*, 778 F.2d 1086, 1086-87 (5th Cir. 1985). However, the Supreme Court, in *Hoover v. Ronwin*, 466 U.S. at 568 n.17, explicitly left open the question.
133. *See Town of Hallie*, 471 U.S. at 40.
134. *See FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992); *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).
135. 171 F.3d 231, 234 (5th Cir. 1999), *cert. filed*, No. 99-210 (Aug. 2, 1999).
136. *Id.*
137. *Id.*
138. *See I Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law* ¶ 217d, at 319 (rev. ed. 1997).
139. *See id.*
140. *See 1 Julian von Kalinowski et al., Antitrust Laws and Trade Regulation: Desk Edition* § 6.02[3] (1999).
141. *See Ronwin*, 466 U.S. at 569 (“Where the conduct at issue is in fact that of the state legislature or supreme court, we need not address the issues of ‘clear articulation’ and ‘active supervision.’”).
142. *See Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 61-63

- (1985) (for purposes of the *Parker* doctrine, not every act of a state agency is that of the state as sovereign); *Town of Hallie*, 471 U.S. at 40 (municipality must satisfy clear articulation requirement).
143. *See Tigor*, 504 U.S. at 631.
144. *See Town of Hallie*, 471 U.S. at 46.
145. *See Tigor*, 504 U.S. at 631; *Town of Hallie*, 471 U.S. at 40.
146. *See Southern Motor Carriers Rate Conference*, 471 U.S. at 61.
147. *See City of Columbia v. Omni Outdoor Adver.*, 499 U.S. 365, 373 (1991).
148. *Tigor*, 504 U.S. at 635. *See* William H. Page & John E. Lopatka, *State Regulation in the Shadow of Antitrust*, FTC v. Tigor Title Ins. Co., 3 Sup. Ct. Econ. Rev. 189 (1993).
149. *Town of Hallie*, 471 U.S. at 47. The Court also acknowledged: "We may presume, absent a showing to the contrary, that the municipality acts in the public interest." *Id.* at 45. Unfortunately, the Court did not say to what "public" it was referring.
150. 486 U.S. 94 (1988).
151. *See id.* at 102-03.
152. *Id.* at 101.
153. *See Tigor*, 504 U.S. at 638.
154. Robert M. Langer, *A Practitioner's Guide to State Antitrust Health Care Issues*, Antitrust, Fall 1995, at 34.
155. *See Town of Hallie*, 471 U.S. at 46 n.10; *see also* 10 Earl W. Kintner & Joseph P. Bauer, Federal Antitrust Law § 76.7, at 155 (1994).
156. Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. 2750 (codified at 15 U.S.C. §§ 34-36 (1994)).
157. H.R. Rep. No. 98-965, at 2 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4602, 4603 [hereinafter LGAA House Report].
158. 15 U.S.C. § 35 (1994).
159. *Id.* § 36.
160. *Id.* § 34(1)(B).
161. *Id.*
162. LGAA House Report, *supra* note 157, at 4620-21.
163. Kintner & Bauer, *supra* note 155, § 76.13, at 181-82.
164. *See, e.g., Tarabishi v. McAlester Reg'l Hosp.*, 951 F.2d 1558, 1566 (10th Cir. 1991) (hospital that acted as public trust for benefit of city not a SFGU); *Sandcrest Outpatient Servs., P.A. v. Cumberland Cty. Hosp. Sys., Inc.*, 853 F.2d 1139, 1142 (4th Cir. 1988) (hospital owned and operated by a nonprofit county corporation conceded to be a SFGU); *Daniel v. American Board of Emerg. Med.*, 988 F. Supp. 127, 191-97 (W.D.N.Y. 1997) (locally funded hospitals are SFGUs, but state university hospitals are not); *Crosby v. Hospital Auth.*, 873 F. Supp. 1568, 1581 (M.D. Ga. 1995), *aff'd*, 93 F.3d 1515 (11th Cir. 1996) (hospital authority is a SFGU); *Bloom v. Hennepin Cty.*, 783 F. Supp. 418, 423 (D. Minn. 1992) (undisputed that county hospital is a SFGU); *Sweeney v. Athens Reg'l Med. Ctr.*, 705 F. Supp. 1556, 1562 (M.D. Ga. 1989); (public hospital authority a local government unit); *Griffith v. Health Care Auth.*, 705 F. Supp. 1489, 1501 (N.D. Ala. 1989) (health care authority is a local government); *Wicker v. Union Cty. Gen. Hosp.*, 673 F. Supp. 177, 186 (N.D. Miss. 1987) (public hospital owned and operated by a county immune from suit for damages); *Palm Springs Med. Clinic, Inc. v. Desert Hosp.*, 628 F. Supp. 454, 456-57 (C.D. Cal. 1986) (hospital district is SFGU).
165. *Parker v. Brown*, 317 U.S. 341, 351-52 (1943).
166. 435 U.S. 389 (1987).
167. *Id.* at 418 (Burger, C.J., concurring).
168. 499 U.S. 365 (1991).
169. *Id.* at 379 (citations, internal quotation marks, and alterations omitted).
170. *Id.* at 374-75.
171. 460 U.S. 150 (1983).
172. *Id.* at 154.
173. *See South Central Timber Dev., Inc. v.*

Wunnicke, 467 U.S. 82, 102 (1984) (Rehnquist, J., dissenting).

174. *See id.* at 98 (citing *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977)).

175. *Id.* at 102-03.

176. 469 U.S. 528 (1985).

177. 426 U.S. 833 (1976).

178. *See id.* at 852.

179. *Id.*

180. *Garcia*, 469 U.S. at 543-45

181. *Id.* at 542 (citing *New York v. United States*, 326 U.S. 572 (1946)).

182. *Id.* at 545.

183. *Id.*

184. *Id.* at 546-47.

185. *See, e.g.*, *Automated Salvage Transp., Inc. v. Wheelabrator Env'tl. Sys., Inc.*, 155 F.3d 59, 79-80 (2d Cir. 1998) (entity could be both immune from Sherman Act under state action doctrine and market participant for purposes of dormant Commerce Clause analysis); *FTC v. Hospital Bd. of Directors of Lee Cty.*, 38 F.3d 1184, 1192 (11th Cir. 1994) (county hospital board acquisition of private hospital immune); *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310, 1312-13 (8th Cir. 1992) ("As yet, . . . the market participation exception is merely a suggestion and is not a rule of law."); *McCallum v. City of Athens*, 976 F.2d 649, 653 & n.7 (11th Cir. 1992) (citing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 541-43 (1985)) (distinction between proprietary and governmental functions no basis for limiting *Parker* immunity); *Lancaster Community Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 402 & n.9 (9th Cir. 1991) ("In *Garcia*, the Supreme Court repudiated the unworkable distinction between 'integral' and 'proprietary' government functions in the context of state sovereign immunity analysis. In the instant case we do not attempt to revive this discredited approach for use in the field of state-action immunity."); *Allright Colo., Inc. v.*

City & Cty. of Denver, 937 F.2d 1502, 1510 (10th Cir. 1991) ("The City's additional status as a possible competitor, or its possible engagement in a 'proprietary' activity, is not determinative."); *Limeco, Inc. v. Division of Lime of Miss. Dep't of Agric. & Commerce*, 778 F.2d 1086, 1087 (5th Cir. 1985) (rejecting "commercial exception" to the state action doctrine since such an exception "would have to rest on a congressional purpose to extend the Sherman Act to certain state functions but not to others" without a statutory basis); *Willis-Knighton Med. Ctr. v. City of Bossier City*, 2 F. Supp. 2d 842, 849-50 (W.D. La. 1997) ("the current state of jurisprudence" compelling the court not to recognize a market participant exception, although "a market participant exception to the immunity doctrine might eventually be recognized for certain commercial activities"); *Forest Ambulance Serv., Inc. v. Mercy Ambulance of Richmond, Inc.*, 952 F. Supp. 296, 301 (E.D. Va. 1997) (declining to acknowledge existence of market participation exception, but not deciding issue); *Helen Brett Enters. v. New Orleans Metro. Convention and Visitors Bureau, Inc.* 1996-2 Trade Cas. (CCH) ¶ 71,529 (E.D. La. 1996) (rejecting exception since "the Supreme Court's statement in *Omni* simply acknowledges the possibility of a market participant exception"); *In re Recombinant DNA Tech. Patent & Contract Litig.*, 874 F. Supp. 904, 912 (S.D. Ind. 1994) ("We . . . join the Eighth and Tenth Circuits in their refusal to recognize any such [market participation] exception."); *Wall v. City of Athens*, 663 F. Supp. 747, 761-62 (M.D. Ga. 1987), *aff'd*, 976 F.2d 649 (11th Cir. 1992) (reluctant rejection exception as mandated by *Garcia*); *Midwest Constr. Co. v. Illinois Dep't of Labor*, 684 F. Supp. 991, 994 (N.D. Ill. 1988) ("The state action exemption shields the state and its representatives regardless of whether the state is engaged in governmental or commercial activities."); *cf.* *Greenwood Utils. Comm'n v. Mississippi Power Co.*, 751 F.2d 1484, 1497-98 (5th Cir. 1985) (rejecting "commercial exception" to *Noerr-Pennington* immunity); *Daniel v. American Bd. of Emergency Medicine*, 988 F. Supp. 127, 153-54 (W.D.N.Y. 1997) (rejecting commercial participant exception to Eleventh Amendment sovereign immunity); *Capital Freight Servs.,*

- Inc. v. Trailer Marine Transp. Corp., 704 F. Supp. 1190, 1199 (S.D.N.Y. 1989) (Congress rejected proprietary/governmental distinction in definition of Special Function Governmental Unit under Local Government Antitrust Act). *But see* Genentech, Inc. v. Eli Lilly and Co., 998 F.2d 931, 948 (Fed. Cir. 1993) (“To warrant *Parker* immunity the anticompetitive acts must be taken in the state’s ‘sovereign capacity,’ and not as a market participant in competition with commercial enterprise.”).
186. 155 F.3d 59 (2d Cir. 1998).
187. *Id.* at 62-63.
188. *See id.* at 78-79.
189. *See id.* at 74.
190. *See id.* at 79-81.
191. *Id.* at 79.
192. *Id.* at 80.
193. *See id.* at 81.
194. College Sav. Bank v. Florida Prepaid Postsecondary Educ. Exp. Bd., 119 S. Ct. 2219, 2235 (1999) (Breyer, J., dissenting).
195. *Id.* at 2230.
196. *Id.*
197. *Id.* at 2231 n.4.
198. Schooner Exch. v. M’Faddon, 11 U.S. (7 Cranch) 116, 137 (1812) (Marshall, C.J.).
199. Restatement (Third) of Foreign Relations Law § 453 (1987).
200. *See* 28 U.S.C. §§ 1605(a)(2), 1603(d) (1994).
201. *See* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 695-706 (1976) (plurality opinion).
202. W.S. Kirkpatrick & Co. v. Environmental Techonics Corp., Int’l, 493 U.S. 400, 409 (1990).
203. *See* *Alfred Dunhill*, 425 U.S. at 697.
204. *See id.* at 705.
205. *See id.* at 685.
206. *See id.* at 695.
207. *Id.* at 699.
208. *See, e.g.*, Hunt v. Mobil Oil Co., 550 F.2d 68, 73 (2d Cir. 1977); Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines, 965 F.2d 1375, 1388 (5th Cir. 1992); Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1048 & n.25 (9th Cir. 1983); Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 316 & n.38 (2d Cir. 1981); Eckert Int’l, Inc. v. Government of the Sovereign Democratic Republic of Fiji, 834 F. Supp. 167, 171 (E.D. Va. 1993); Drexel Burnham Lambert Group Inc. v. Committee of Receivers for A.W. Galadari, 810 F. Supp. 1375, 1391 (S.D.N.Y. 1993); Ampac Group v. Republic of Honduras, 797 F. Supp. 896, 905 (E.D. Mich. 1981). *But see* Bokkelen v. Grumman Aerospace Corp., 432 F. Supp. 329, 333 (E.D.N.Y. 1977).
209. *See* U.S. Dep’t of Justice & Federal Trade Comm’n, Antitrust Enforcement Guidelines for International Operations § 3.33 (1995), *reprinted in* Antitrust Laws and Trade Regulation: Primary Source Pamphlet (Matthew Bender 1998).
210. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (quoting Robert H. Bork, *The Antitrust Paradox* 66 (1978)).
211. *Reeves*, 447 U.S. at 439 & n.13.
212. *Id.* at 439.
213. *See supra* note 185 and cases cited therein.
214. *See* Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 332-33 (1991).
215. *See* Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 739-40 (1976).
216. *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 26-29 (1984); Arizona v. Maricopa Cty. Med. Soc’y, 457 U.S. 332, 348-49 (1982). In recognition of some of the unique characteristics of health care markets the Department of Justice and the Federal Trade Commission have issued statements of enforcement policy for the health care industry. *See* U.S. Dep’t of Justice & Federal Trade Comm’n, Statements of Antitrust Enforcement Policy in Health Care (1996), *reprinted in* Antitrust Laws and Trade Regulation: Primary

- Source Pamphlet (Matthew Bender 1998).
217. *See Summit Health*, 500 U.S. at 333.
218. 38 F.3d 1184 (11th Cir. 1994).
219. *See id.* at 1185.
220. *See id.* at 1186-87.
221. *See id.* at 1188. The parties stipulated to the authorization. *See id.*
222. *See id.* at 188-89.
223. *See id.* at 1191 & n.5.
224. *Id.* at 1192. The court cited the state's Certificate of Need regulations as further evidence of the legislature's contemplation of anticompetitive market conditions in the health care field. *See id.*
225. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 39 (1985).
226. James F. Ponsoldt, *Balancing Federalism and Free Markets: Toward Renewed Antitrust Policing, Privatization, or a "State Supervision" Screen for Municipal Market Participant Conduct*, 48 SMU L. Rev. 1783, 1797 (1995) (advocating a market participation exception to the state action immunity doctrine).
227. 171 F.3d 231 (5th Cir. 1999).
228. *See id.* at 235-36.
229. *Id.* at 235.
230. *See id.*
231. 940 F.2d 397 (9th Cir. 1991).
232. *See id.* at 403.
233. *See id.*
234. *Id.*
235. *See, e.g., FTC v. Hospital Bd. of Directors of Lee Cty.*, 38 F.3d 1184 (11th Cir. 1994).
236. Dean M. Harris, *State Action Immunity from Antitrust Law for Public Hospitals: The Hidden Time Bomb for Health Care Reform*, 44 U. Kan. L. Rev. 459, 490-502 (1996).
237. Harris rejects a market participation exception to state action immunity as insufficiently deferential to federalism concerns. *See id.* at 505-06.
238. *See id.* at 510-11.
239. For an excellent discussion of the competing interests of predictability and flexibility, comparing common law and civil law systems, in view of both the efficiency-of-the-common law and public-choice theories, see Nicholas L. Georgakopoulos, *Predictability and Legal Evolution*, 17 Int'l Rev. L. & Econ. 475 (1997).
240. *Cf. IIA Phillip E. Areeda et al.*, Antitrust Law ¶ 401, at 2 (1995) ("By controlling cartels and monopolies, moreover, competition limits wealth transfers from consumers to capital owners.").
241. *Accord* Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 667, 682 n.67 (1991).
242. IIA Areeda et al., *supra* note 240, at 56.
243. Market entry is at least partially controlled by state Certificate of Need ("CON") laws. Generally speaking, a CON must be applied for and obtained by the appropriate governmental agency before a new health care facility may be opened or an existing health care facility may be expanded. These laws have been described as "statutory market allocation programs." *See* 2 John J. Miles, *Health Care and Antitrust Law: Principles and Practice* § 16:4, at 16-12 (1998). This article does not necessarily dispute the propriety of CON regulation.
244. 472 U.S. 585 (1985).
245. *Id.* at 605.
246. *See* 1 John J. Miles, *Health Care and Antitrust Law: Principles and Practice* § 1:5, at 1-32 (1998).
247. *See* William E. Kovacic, *Designing Antitrust Remedies for Dominant Firm Misconduct*, 31 Conn. L. Rev. 1285, 1288-92 (1999).
248. 22 U.S. (9 Wheat.) 1 (1824) (Marshall, C.J.).
249. *Id.* at 224 (Johnson, J., concurring).
250. *Id.*
251. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Exp. Bd.*, 119 S.Ct. 2219, 2239 (1999).

252. *Reeves, Inc. v. Stake*, 447 U.S. 429, 439 & n.13 (1980) (citing *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978)).
253. 119 S. Ct. 1604 (1999).
254. 119 S. Ct. 493 (1998).
255. 522 U.S. 3 (1997).
256. *See California Dental*, 119 S. Ct. at 1618.
257. 20 Cong. Rec. 1167 (1889).
258. *Union Labor Life Ins. v. Pireno*, 458 U.S. 119, 126 (1982).
259. *Id.* (quoting *Community Communications Co. v. Boulder*, 455 U.S. 40, 56 (1982)).
260. *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 435 (1932). ☞