Chapter IV

Government Exceptions to Free-Market Competition

Chapter IV.A
The Robinson-Patman Act

1. INTRODUCTION

Congress passed the Robinson-Patman Act in 1936 to respond to the concern of small businesses—such as "mom and pop" grocery stores—that they were losing share to larger supermarkets and chain stores and in some cases were being forced to leave the market. Small businesses complained that they could not obtain from suppliers the same price discounts that larger businesses demanded and received.

To address this concern, Congress passed the Robinson-Patman Act (RP Act or Act), which prohibits sellers from offering different prices to different purchasers of "commodities of like grade and quality" where the difference injures competition.[1] Different discount levels, or lower prices, can be offered only where: (1) the same discount is practically available to all purchasers; (2) a lower price is justified by a lower per-unit cost of selling to the "favored" buyer; (3) a lower price is offered in good faith to meet (but not beat) the price of a competitor; or (4) a lower price is justified by changing conditions affecting the market or marketability of the goods, such as where goods are perishable or seasonal or the business is closing or in bankruptcy. Other provisions of the Robinson-Patman Act ensure the goal of equal pricing by restricting the use of commissions and promotional expenses, for example. The Supreme Court has described the purpose of the Act:

> The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages . . . .[2]

In its operation, however, the Act has had the unintended effect of limiting the extent of discounting generally and therefore has likely caused consumers to pay higher prices than they otherwise would. As one commentator has explained, the Robinson-Patman Act "was designed to protect small businesses from larger, more efficient businesses. A necessary result is higher consumer prices."[3] Moreover, the Act ironically appears increasingly to be ineffective even in protecting small businesses. Over time, many businesses have found ways to comply with the Act by, for example, differentiating products, so they can sell somewhat different products to different purchasers at different prices. Such methods are likely to increase the seller's costs—and thus increase costs to consumers—but do nothing to protect small businesses. The Act generally appears to have failed in achieving its main objective.

An act that *restricts* price and other forms of competition is fundamentally inconsistent with the antitrust laws, which *protect* price and other types of competition that benefit consumers. Less than twenty years after Congress enacted the Robinson-Patman Act, the 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws expressed hope that courts would reconcile interpretations of the Robinson-Patman Act with "broader antitrust policies" and "[a]ccommodate all legal restrictions on the distribution process to dominant Sherman Act policies."[4] Fourteen years later, the Report of the White House Task Force on Antitrust Policy (Neal Report) concluded, "the Robinson-Patman Act requires a major overhaul to make it consistent with the purposes of the antitrust laws."[5] In 1977 the Department of Justice Report on the Robinson-Patman Act (1977 DOJ Report) similarly found that the evidence "raises serious questions whether the Act advances the competitive goals of other antitrust laws."[6] Both the Neal Report in 1969 and the 1977 DOJ Report recommended repeal or substantial modification of the Act due to the Act's high costs, limited or non-existent benefits, and inconsistency with other antitrust laws.[7] In particular, the 1977 DOJ Report concluded that "serious consideration" should be given to repeal of the Robinson-Patman Act,[8] and presented draft legislative options.[9]

In light of these longstanding issues, this Commission also examined the Robinson-Patman Act. The Commission makes the following recommendation.

55. Congress should repeal the Robinson-Patman Act in its entirety.*

The time has come to abandon piecemeal proposals for legislative changes to, or new court interpretations of, the Robinson-Patman Act. The Act is fundamentally inconsistent with the antitrust laws and harms consumer welfare. It is not possible to reconcile the provisions of the Act with the purpose of antitrust law; repeal of the entire Robinson-Patman Act is the best solution.

* Commissioner Shenefield does not join this recommendation in full.
Commissioner Yarowsky joins this recommendation with qualifications.

2. BACKGROUND

A. The Robinson-Patman Act and Its Case Law

1. History of the Act

The history of the Robinson-Patman Act began in 1914, when Congress first acted to prohibit certain forms of differential pricing through passage of Section 2 of the Clayton Act. At that time, Congress was primarily concerned with price predation through which the trusts might selectively reduce prices to below-cost levels to drive rivals from the market and hamper entry by would-be rivals to replace that lost competition.[10] The statutory language of Section 2 of the Clayton Act was not limited to those situations, however; it was broad enough also to prohibit price differences that disadvantaged one purchaser over another.[11]

By 1936, during the Great Depression, Congress was concerned that the growth of large chain stores was harming small "mom and pop" competitors. Congress undertook to strengthen the original Clayton Act to give small businesses greater protection from what Congress saw as large, powerful buyers extracting favorable concessions from their suppliers to the detriment of smaller competitors.[12] In particular, Congress wanted to rein in volume discounts, which were then permitted under Section 2 of the Clayton Act, as construed by the courts.[13] To achieve this purpose, Congress removed the provision permitting volume discounts.[14]

At the same time, Congress added an alternative standard for the type of competitive injury required to violate the new statute. The courts had interpreted the original language in the Clayton Act to require a plaintiff to show that the price differences it faced had caused a "generalized competitive injury."[15] The language Congress added in 1936 also prohibited price differences where the effect may be "to injure, destroy, or prevent competition *with any person . . . or with customers of either of them*."[16] This language does not ask whether the price differences have caused higher prices, lower output, or other anticompetitive effects in a relevant market. Rather, as the Supreme Court later held, this language "was intended to justify a finding of injury to competition by a showing of 'injury to the competitor victimized by the discrimination.'"[17]

2. Conduct Prohibited by the Act

The Robinson-Patman Act is commonly known as a price discrimination statute. Although economists do not uniformly agree on the precise definition of price discrimination, their definitions generally focus on the sale from the seller's perspective. This Report will use the definition endorsed by some economists as the economic definition of price discrimination—that is, price discrimination is "charging different customers prices that are not in proportion to marginal costs."[18] Under this definition, whether conduct amounts to price discrimination depends on whether the seller's margin between price and cost differs among the buyers to whom it sells.

By contrast, "price differences"—that is, charging different prices to different buyers—focus on the sale from the buyer's perspective. The key question is whether different buyers pay different prices for products of like grade and quality. The Robinson-Patman Act asks this question and allows such differential pricing only if particular, limited justifications are proven. Thus, the Act is arguably more of a "price differences" statute than a "price discrimination" statute.[19] Nonetheless, because the Act is understood as a price discrimination statute, this Section generally uses the term "price discrimination" to refer to price differences that the Act addresses.

The structure of the Robinson-Patman Act is to prohibit certain conduct and then provide exceptions from those prohibitions. As a general matter, Section 2(a) of the Robinson-Patman Act prohibits non-cost-justified price discrimination that causes competitive injury.[20] For example, if a manufacturer sold the same product to a large retailer at a lower price than to a small retailer, the disfavored, small retailer could allege that the manufacturer (and possibly the favored, large buyer) violated the Robinson-Patman Act.

To establish seller liability under Section 2(a), a plaintiff must show: (1) the relevant sales were made in interstate commerce; (2) the products were of like grade and quality; (3) the seller (defendant) discriminated in price between the plaintiff and another purchaser; and (4) the effect of such discrimination may be to injure, destroy, or prevent competition to the advantage of the favored purchaser.[21] Courts have allowed the plaintiff to prove the "favored competitor received a significant price reduction over a substantial period of time" as a means to show the price discrimination substantially lessened competition.[22]

The Robinson-Patman Act addresses other forms of discrimination in the terms of sale as well, largely to prevent sellers from effectively price discriminating through other means. To prevent disguised price discrimination, Section 2(c) prohibits parties to a transaction from receiving brokerage fees or commissions, except for services rendered.[23] Sections 2(d) and 2(e) require that promotional allowances and services be available on proportionately equal terms to all competing customers.[24]

Liability under the Robinson-Patman Act is not limited to sellers. Section 2(f) of the Act makes it unlawful for buyers "knowingly to induce or receive a discrimination in price" that is prohibited by the Act.[25] This provision was designed to address concerns that large buyers would use their buyer power to extract lower prices from manufacturers or suppliers.[26] Many observers argue that it is difficult to prove buyer liability, however.[27] Buyers cannot be held liable unless the plaintiff can establish a *prima facie* case against the seller and overcome any affirmative defenses that a seller could raise.[28]

Robinson-Patman Act claims generally can be characterized as either primary-line or secondary-line claims.[29] Primary-line claims allege that price discrimination by a manufacturer injures competition at the manufacturer level by harming one or more of the manufacturer's competitors. The theory behind primary-line claims is that a manufacturer might sell its product below cost to certain stores, so that a competing manufacturer would not be able to meet the lower prices and would go out of business; this theory depends on high entry barriers that would prevent entry to replace the lost competitor. In such a case, the competing manufacturer would complain of a primary-line injury.

This type of conduct—price predation at the manufacturer level—involves the acquisition or maintenance of market power through below-cost sales. In 1993 the Supreme Court held that primary-line claims must meet standards similar to those applied to predatory pricing claims brought under Section 2 of the Sherman Act.[30] The Court explained that primary-line injury is "of the same general character as the injury inflicted by predatory pricing schemes actionable under § 2 of the Sherman Act."[31] This interpretation has largely eliminated calls for further reform regarding primary-line claims.

A broad range of cases may raise claims of secondary-line injury, however. Secondary-line claims involve injury alleged at the level of the distributor or retailer, one step removed from the manufacturer that offered the discount. For example, a small retailer that did not receive the same discount as a larger retailer from the same manufacturer might allege secondary-line injury.

Section 3 of the Robinson-Patman Act authorizes the government to seek criminal penalties against any person who participates in a transaction he knows discriminates against a competitor of the purchaser or involves charging "unreasonably low prices" or different prices in a different part of the United States "for the purpose of destroying competition or eliminating a competitor."[32] This criminal provision of the Act has not been enforced since the 1960s.[33]

3. Affirmative Defenses to Section 2(a) of the Act

Four basic affirmative defenses are available to Robinson-Patman Act defendants. Section 2(a) itself provides for an affirmative defense if the difference in price is cost-justified.[34] For example, if volume discounts for a product are attributable solely to lower per-unit production and shipping costs—that is, if it is cheaper per unit for the manufacturer to make and send 100 widgets than just 20 widgets to a retailer—then those cost savings are permitted to be passed on to that retailer in the form of a lower price per unit. Section 2(a) also provides an affirmative defense for price differences resulting from a "response to changing conditions affecting the market for or marketability of the goods concerned."[35] This defense allows price differences if the demand for the product has decreased significantly due to the perishable nature of the goods, obsolescence of seasonal goods, or discontinuance of the product.[36] Section 2(b) of the Act allows an affirmative defense to Section 2(a) claims if the discriminatory pricing is offered "in good faith to meet an equally low price of a competitor" (also known as the meeting-competition defense).[37] Lastly, courts have also provided an affirmative defense if the advantageous price was practically or functionally available to the disfavored buyer.[38]

Some affirmative defenses are difficult to prove. For example, it is generally recognized as difficult and costly to meet the requirements of the cost-justification defense because the seller must be able to prove actual cost savings equal to or greater than the price difference.[39] On the other hand, courts have become more receptive to the meeting-competition defense over time. In 1983 the Supreme Court held that a seller could meet the generally lower price structure of a competitor in a different geographic market without demonstrating that it was meeting competition on a customer-by-customer basis.[40] Thus, if there were more competition in one area than another, the meeting-competition defense would permit the seller to charge different prices in the two areas.

B. Enforcement of the Robinson-Patman Act

Private parties, the Federal Trade Commission (FTC), and the Antitrust Division of the Department of Justice (DOJ) may enforce the Robinson-Patman Act. The Act is currently enforced primarily through private treble damages actions.[41] As a practical matter, the FTC is the only government enforcer of the Act; the DOJ has left civil enforcement of the Act to the FTC and has not enforced the criminal provisions since the 1960s.[42]

During the first three decades after the Act's passage, the FTC devoted "an overwhelming preponderance" of its antitrust resources to Robinson-Patman Act enforcement.[43] Beginning in 1969, however, the FTC sharply contracted its RP Act enforcement efforts.[44] From 1965 to 1968, the FTC undertook an average of 97 formal investigations and issued an average of 27 complaints annually.[45] By contrast, from 1975 to 1978, the FTC averaged only 4.3 formal investigations and 3 complaints annually.[46] The FTC has issued only one RP Act complaint since 1992.[47]

Private litigation under the Act also has fallen, and plaintiff success has been limited. Of 200 reported cases with Robinson-Patman Act claims filed in federal court in the past ten years, only three jury verdicts in favor of plaintiffs were affirmed on appeal.[48] One of these three was reversed by the Supreme Court.[49] Some observers believe this decline is related to the adoption of more restrictive judicial interpretations of the Act.[50] For example, the Supreme Court has held that an RP Act plaintiff is not entitled to "automatic damages" equal to the amount of the discount it did not receive,[51] but rather "ordinarily must show that it lost customers or profits because the favored customer used the discount either to lower its resale prices or otherwise to solicit business."[52]

3. RECOMMENDATION AND FINDINGS

55. Congress should repeal the Robinson-Patman Act in its entirety.*

By broadly discouraging price discounts, the Robinson-Patman Act potentially harms competition and consumers. The goal of the antitrust laws is to protect *competition* that benefits consumers. The Robinson-Patman Act does not promote competition, however. Instead, the Act protects *competitors*, often at the expense of competition that otherwise would benefit consumers,[53] thereby producing anticompetitive outcomes. The Act prevents or discourages discounting that could enable retailers to lower prices to consumers. "The chief 'evil' condemned by the Act [is] low prices, not discriminatory prices."[54] The Act thus reflects "faulty economic assumptions" and a significant "misunderstanding of the competitive process."[55]

Assuming that either price differences or price discrimination (as defined by economists) always or almost always harms consumers is inconsistent with fundamental economic principles. Price discounting generally benefits consumers. Price discrimination, as defined by economists, that is directed at ultimate consumers can have beneficial or harmful impacts, depending on the circumstances.[56] However, the Robinson-Patman Act is not targeted at harmful price discrimination. Rather, it condemns low prices.[57] Economists point out that "[t]he difficulty is to distinguish in practice between [beneficial] discrimination and systematic discrimination practiced by an entrenched monopolist that may be harmful. Hence, laws against price discrimination are difficult to write and enforce if they are to promote competition."[58]

* Commissioner Shenefield does not join this recommendation in full. He recommends repeal of Section 3 of the Act (the criminal provision) as well as 2(c)—the brokerage provision. He favors amending or reinterpreting the statute to make it clear that plaintiffs in secondary-line cases must prove competitive injury through the existence either of market power or buyer power in order to prevail under 2(a). This would cover 2(f) as well. He would introduce a parallel competitive injury requirement into 2(d) and 2(e) as well. Finally, he would relax the cost-justification standard by permitting a preferential price that was "reasonably related" to cost savings attributable to dealing with the favored buyer. Commissioner Shenefield further explains his position in his separate statement.

Commissioner Yarowsky joins the recommendation with the following qualification: In his view, the question unanswered by the Commission is not whether Robinson-Patman is working well—it clearly is not—but whether any price discrimination provision has a role to play in the generic antitrust laws, not just the tortured language of the current statute. On a number of occasions, Congress has considered, or delegated to various regulatory agencies, the creation of mechanisms to oversee price discrimination activities in various industries. With the disappearance of Robinson-Patman, we may well witness the proliferation of even more industry-specific regimes to combat price discrimination. Based on that experience, he believes Congress should actively reconsider the question of whether a re-sculpted, down-sized generic provision would have utility.

The Act imposes other, more indirect costs as well. Some firms incur costs through efforts to comply with the Act. Compliance efforts—such as differentiating products solely to avoid selling "commodities of like grade and quality" to different purchasers at different prices—can raise prices to consumers. Small businesses can incur greater costs in obtaining supplies when manufacturers sell only to large, not small, retailers to avoid violating the Act. All of these costs are likely to result in higher prices to consumers than would be the case if the Robinson-Patman Act were not on the books.

The economic reality is that price differences and price discrimination typically benefit, not harm, consumers. To the extent that price discrimination (as defined by economists) may harm consumer welfare, other antitrust laws already address such conduct. For all of these reasons, as explained in detail below, the Robinson-Patman Act should be repealed.

A. The Robinson-Patman Act Is Likely to Harm Competition and Consumer Welfare by Prohibiting or Discouraging Price Discrimination that Lowers Prices to Consumers

Wide agreement exists that many forms of price discrimination are procompetitive and beneficial to consumers. As long ago as 1969, the Neal Report pointed out that "most price discrimination is affirmatively beneficial to competition," and the instances in which price discrimination harms competition "are exceptional."[59] A substantial amount of recent economic literature shows that price differences among buyers of the same product are ubiquitous and occur in industries with many competitors and free entry that are generally viewed as operating in a competitive manner.[60]

1. Many legitimate, procompetitive reasons exist for price discrimination

Prices to different purchasers for the same or similar products differ for many legitimate reasons. Manufacturers and distributors negotiate prices based not only on costs of production, but on many other factors as well. One important factor is the relative supply and demand characteristics of the parties. One buyer may value the product more than another buyer and therefore may be willing to pay more for the product. A buyer may have more leverage in price negotiations if it can purchase from another supplier or produce the item itself, if the price is not to its liking. The same would be true for the supplier, if it could sell to other purchasers if it was not satisfied with the price offered by the buyer.

Beyond the supply and demand characteristics of individual firms, price differences can reflect differences in supply and demand in different geographic markets. As the Supreme Court has pointed out, levels of competition may vary in different geographic markets, and the "very purpose of the [meeting-competition] defense is to permit a seller to treat different competitive situations differently."[61] It is not at all clear, however, that the meeting-competition defense would cover all situations in which a manufacturer might wish to differentiate in pricing to reflect different supply and demand conditions in different geographic markets.

Volume discounts further illustrate legitimate reasons for price differences between purchasers. A manufacturer may be willing to accept discounted prices on a large order for its products for a number of reasons. First, a large order may allow the seller to achieve scale economies in manufacturing, which makes the large order less costly to fill. As explained above, scale economies and their relationships to price differences can be very difficult to prove, however.[62] Second, the per-unit cost of delivering a large order may be less than delivering a small order. Third, the large order may reduce the manufacturer's risk of not being able to sell as many products overall. A volume discount also may reflect other means by which a manufacturer wishes to improve its competitiveness. A manufacturer may discount to encourage a new purchaser to try its products in hopes that the first purchase will lead to future purchases. A manufacturer may wish to compensate or provide incentives to a distributor that aggressively promotes the manufacturer's products. The Robinson-Patman Act, however, impedes agreements that afford volume discounts. Indeed, preventing volume discounts was a principal objective of the Act.

Price discrimination can lead to cost-saving distribution practices that are efficient and normally lawful under the Sherman Act.[63] Manufacturers typically prefer that their distribution systems function in a competitive manner because this helps them compete more effectively against other manufacturers. Providing greater discounts—that is, charging lower prices—to a manufacturer's more aggressive distributors is generally procompetitive. It can prevent less aggressive distributors from free riding on the promotional services or quality of service provided by the manufacturer's more aggressive distributors, and, by encouraging competition among the distributors, it also can increase the quality of service they provide.[64] Manufacturers are more likely to use price discrimination among their distributors to increase competition at both the manufacturer and distributor levels than to reduce the competitiveness of the manufacturers' distribution systems.[65]

Whether a buyer may be willing to purchase significant quantities is another factor that can influence price negotiations. Typically, buyers that account for a significant portion of a manufacturer's sales bargain hard to get price discounts from the manufacturer; they can be described as having "bargaining power."[66] The discounts obtained through bargaining power can reduce a buyer/retailer's marginal cost, and thereby allow the buyer/retailer to pass on those cost savings to consumers. In fact, empirical evidence on drugstore and grocery products indicates that the presence of large chains, which typically have bargaining power, lowers prices to consumers.[67] Retailer bargaining power also could be better used to mitigate seller market power, absent the potential for Robinson-Patman Act liability.[68]

The Robinson-Patman Act, however, aims to prevent buyers from using their bargaining power to obtain these discounts, unless certain requirements are met. Some argue that the Supreme Court's interpretation of Section 2(f) has made buyer liability difficult to prove.[69]

Nonetheless, the Act creates some level of uncertainty about whether firms with bargaining power can bargain hard to obtain lower prices than less efficient competitors, and it also may provide an excuse for sellers that do not want to lower their prices for hard-bargaining buyers. Thus, the Act can discourage discounting that otherwise would lead to lower consumer prices.

2. Price differences can increase price competition and can encourage entry

The Robinson-Patman Act inhibits price competition that could lead to lower prices in oligopolies. In oligopolies firms monitor each other and recognize their mutual interdependence. Competition in such industries is enhanced when prices vary across buyers, making it harder to keep track of one's rivals. This increased difficulty of keeping track of one's rivals leads generally to more competitive prices. Differential pricing thus can promote more aggressive pricing. Under the Robinson-Patman Act, however, sellers may not selectively lower prices to gain or to retain an important buyer.[70]

Price discrimination also provides a means for new firms to enter a market, thereby making the market more competitive. To enter a new market successfully, an entrant may need to offer prices lower than those charged by existing firms to win one or more large accounts that will provide the entrant with sufficient scale to produce its products efficiently.[71] To overcome existing commercial relationships, would-be entrants may need to reduce prices selectively to such large accounts. The Robinson-Patman Act can make such entry unprofitable, however, by requiring a potential entrant to lower prices to *all* customers. Thus, the reduced price flexibility imposed by the Act can inhibit entry.

This inhibition on entry can prevent consumers from benefiting from the many types of increased competition that a new entrant may provide. New firms entering a market can benefit consumers by offering lower prices and putting downward pressure on prices. Moreover, even the potential for entry can spur existing firms in the relevant market to lower prices and increase quality. In sum, the Robinson-Patman Act requires price rigidity that imposes costs on consumers through higher prices, lower quality, and less choice than would be the case in its absence.

B. The Robinson-Patman Act Harms Consumer Welfare by Protecting Competitors, Rather than Competition

The purpose of the antitrust laws is to protect competition overall, not individual competitors.[72] Consumer welfare is protected by competition, not necessarily by the presence of a particular competitor in a relevant antitrust market.[73]

The Robinson-Patman Act stands this notion on its head. The language Congress added in 1936 prohibited price discrimination where the effect may be "to injure, destroy, or prevent competition *with any person . . . or with customers of either of them*."[74] Courts have interpreted this language to mean that an injury to an individual competitor through price discrimination is sufficient to prove a violation of the Act.[75] This is inconsistent with the purpose of the antitrust laws as interpreted by the courts.

In 1948 the Supreme Court held that the Robinson-Patman Act "was intended to justify a finding of injury to competition by a showing of *injury to the competitor* victimized by the discrimination."[76] Moreover, the Court held, competitive injury could be inferred (the "*Morton Salt* inference") in secondary-line RP Act cases.[77] Simply showing that some merchants had to pay more than others was "adequate" to conclude that "the competitive opportunities of certain merchants were injured," the Court held.[78] Therefore, to achieve an inference of competitive injury in a secondary-line RP Act case, the *Morton Salt* inference requires that a plaintiff prove only that a "favored competitor received a significant price reduction over a substantial period of time."[79]

Most courts have applied the *Morton Salt* inference broadly, concluding that the statutory language of "competitive injury" in the Robinson-Patman Act refers solely to injury to an individual competitor, not to overall competition in a relevant market.[80] Under this standard, it does not matter if the defendant can show that competition in a relevant market in fact was *not* harmed. As the Ninth Circuit has stated (without any trace of irony), "in a secondary-line Robinson-Patman case, the *Morton Salt* inference that competitive injury to individual buyers harms competition generally may not be overcome by proof of no harm to competition."[81]

Some circuits have applied the *Morton Salt* inference more narrowly, and held that competitive injury for purposes of the Robinson-Patman Act refers not to injury to individual competitors, but rather to competition overall in the relevant market. For example, the Eighth Circuit has held that the "Act refers not to the effect upon competitors, but to the effect upon competition in general[;] . . . analysis of the injury to competition focuses on whether there has been a substantial impairment to the vigor or health of the contest for business, regardless of which competitor wins or loses."[82] Consistent with this interpretation, some circuits have held that the *Morton Salt* inference is rebuttable, provided the defendant can show that there has been no harm to overall competition in the relevant market. Specifically, the D.C. Circuit has held that the *Morton Salt* inference "*can . . . be overcome by evidence showing an absence of competitive injury . . .* [and that although] a sustained and substantial price discrimination raises an inference, . . . it manifestly does not create an irrebuttable presumption of competitive injury."[83] Similarly, in a consent decree enjoining certain conduct by McCormick & Co. found to violate the Robinson-Patman Act, the FTC stated that it was willing "to look past the *Morton Salt* factors" in certain market settings to determine whether there was injury to competition overall.[84]

Most recently, the Supreme Court's opinion in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.* renewed, albeit equivocally, the view that the Robinson-Patman Act protects competitors rather than competition.[85] When defining injury to competition, the Court stated that a "hallmark of the requisite competitive injury . . . is the diversion of sales or profits from a disfavored purchaser to a favored purchaser," and that "a permissible inference of competitive injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time."[86] The Court therefore reaffirmed the *Morton Salt* inference and indicated that a plaintiff must show only injury to a specific competitor, not injury to competition overall. In the final section of the opinion, however, the Court remarked that it resists "interpretation [of the Robinson-Patman Act] geared more to the protection of existing *competitors* than to the stimulation of *competition*."[87]

This very recent Supreme Court case reveals that, seventy years after passage of the Robinson-Patman Act, courts remain unable to reconcile the Act with the basic purpose of antitrust laws to protect competition and consumer welfare. The language in the Act regarding competitive injury has resulted in the protection of competitors, at the expense of competition overall and consumer welfare. There is no point in further efforts to reconcile the Act with the antitrust laws in general; the Robinson-Patman Act instead should be repealed.

C. The Robinson-Patman Act May Even Harm Small Firms in Some Cases

The methods that firms sometimes use to avoid liability under the Robinson-Patman Act can harm precisely the small businesses the Act intends to protect. For example, to avoid liability for price discrimination between larger and smaller retailers, a manufacturer can choose to sell its product exclusively to large retailers.[88] In such cases, small retailers may not be able to purchase the product at all, or may have to settle for second-best substitutes, due to the Robinson-Patman Act.[89] Alternatively, in the absence of an ability to price discriminate, manufacturers may switch to other means of promotion, such as national advertising, which (if subject to economies of scale) may disadvantage smaller competitors more than the prohibited discounts.

D. The Robinson-Patman Act Increases Costs of Doing Business and Likely Raises Prices to Consumers in a Variety of Ways

It is difficult to know the frequency and amounts of price discounts and corresponding savings for consumers that the Robinson-Patman Act has deterred.[90] In general, estimates of the effects of the Act have been based largely on anecdotal evidence and informed judgments about the way in which markets operate, rather than on systematically collected empirical evidence, which appears to be extremely limited.[91] Nonetheless, anecdotal evidence and informed judgment based on economic theory suggests that the additional costs to consumers of seventy years of forgone discounts are likely substantial. The Act's continued existence can discourage firms from taking procompetitive actions because doing so might lead to litigation asserting Robinson-Patman Act claims that, even were the litigation to be resolved in the company's favor, would involve distractions, expenses, and risks that make the procompetitive course of action not worth the cost of pursuing it.

Leaving aside the direct cost of lost discounts to consumers, the Act creates substantial compliance costs that also likely flow to consumers as higher prices. These costs include developing and operating compliance systems, training personnel, and obtaining legal advice.[92] There is typically strong interest in RP Act continuing-legal-education programs and instructional publications.[93] In addition, RP Act cases can be lengthy, complex, and expensive, even if the plaintiff does not ultimately win. These costs, too, are difficult, if not impossible, to quantify. The Commission did not receive any empirical data in response to its request for public comment on the compliance or litigation costs and benefits of the Act's enforcement. Nonetheless, there is no reason to believe that compliance and litigation costs are insignificant.

Putting aside these direct and indirect costs, the inefficient business practices that firms sometimes use to avoid liability under the Robinson-Patman Act impose costs that likely show up as higher consumer prices. For example, firms sometimes resort to inefficient product differentiation to avoid potential liability.[94] One method of avoiding liability under the Act is for a retailer to negotiate with a manufacturer to produce a product that is not "of like grade and quality" to products offered to other, possibly smaller retailers.[95] This enables the manufacturer to charge a much lower price than it legally could if it also provided the same product to smaller retailers. But the practice is wasteful because, but for the Robinson-Patman Act, there would likely be no need to package these products differently. As a result, with proper counsel and certain (albeit costly) techniques, sellers can avoid liability under the Act, but costs are added due to unnecessary product differentiation.

Finally, the existence of the Robinson-Patman Act may encourage foreign countries to adopt similar anticompetitive legislation. With increasing globalization, many foreign countries look to the United States for guidance in enacting new legislation, including antitrust legislation. To the extent that the Robinson-Patman Act is seen as a model for other countries, the continued existence of the Act can contribute to a proliferation of anticompetitive legislation worldwide.

E. The Existing Antitrust Laws Already Protect Consumers from Anticompetitive Price Discrimination

The term "buyer power" is used generally to describe two different concepts: bargaining power and monopsony power. Bargaining power refers to the bargaining power of a buyer and can increase, not decrease, consumer welfare. For example, bargaining power can help buyer/retailers reduce their marginal costs, which enables them to pass those savings on to consumers.[96]

By contrast, monopsony power is market power on the buyer side of a market.[97] In certain circumstances, monopsony power can harm consumers.[98] The main harm resulting from monopsonist conduct is the reduction of output by the seller, which harms consumer welfare by under-allocating resources to the production of the product.[99]

The Sherman Act, however, already provides a remedy against the exercise of monopsony power. Section 1 of the Sherman Act protects against unlawful price discrimination agreements based on monopsony power. Section 2 outlaws the unlawful acquisition or maintenance of monopsony power.[100] By contrast, the Robinson-Patman Act outlaws a much broader range of alleged "buyer power" that can actually benefit consumers by giving them lower prices.[101]

Some supporters of the Robinson-Patman Act argue that the Act prevents large firms from obtaining discounts larger than those offered to smaller rivals, then using those unequal concessions to lower prices to levels that small rivals cannot meet, thus eliminating the small rivals and ultimately raising prices for consumers.[102] As one comment asserted, unjustified price discriminations "may lead to *higher* consumer prices" if used by a firm to "acquire[] market power as a seller."[103] This argument suggests that large buyer/retailers may put their smaller competitors out of business by selling products below the smaller competitors' costs—but above the large buyers' costs—and thus acquire market power in the retail market and ultimately raise prices for consumers.[104]

This theory essentially argues that prices above a manufacturer's costs may be used in a price-predation scenario and should result in liability under the antitrust laws. Yet, the Supreme Court has already rejected this theory: in the context of price-predation allegations, above-cost pricing is legal.[105] To the extent that true price-predation schemes involving below-cost pricing are attempted, they may be challenged under Section 2 of the Sherman Act.

F. The Robinson-Patman Act Is Not the Right Tool Through Which to Achieve "Fairness for Small Businesses" and Other Social Objectives

The main benefits claimed by supporters of the Robinson-Patman Act flow from the Act's aim of protecting small business.[106] Such supporters claim "fairness to small businesses" as a reason to keep the Act. They argue the Act ensures equality of competitive opportunity and preserves small business by preventing power buyers from obtaining non-cost-justified preferences.[107] Supporters maintain that the Act "levels the playing field" for smaller businesses.[108]

In addition, supporters assert that benefits from the Act go beyond protecting competition by small businesses. They argue that preserving small businesses may offer advantages to consumers by expanding available choices, including "convenient locations, distinctive services, [and] superior selection,"[109] and by providing important social benefits, such as "desirable countervailing" political influence.[110] One commenter, discussing alleged price discrimination in discounts to booksellers, expressed the belief that a significant narrowing of the Act would have a "disastrous effect on the dissemination of culture and ideas in America."[111]

Consumers choose the winners and losers in the competitive process, however, through their purchasing decisions. If consumers desire diversity, for example, then they will be willing to pay for it. Indeed, allowing businesses to respond to consumer desires creates incentives for innovation in distribution and other areas that RP Act restrictions unintentionally may stifle. Firms that best meet consumers' desires in the most cost-effective way will succeed, while those that do not may fail. The competitive process can often be seen as unfair to those who lose. Nonetheless, it is competition itself—not the presence of a particular competitor—that best serves consumer welfare.

The Supreme Court has refused to give weight to arguments that harm could arise from vigorous competition in certain contexts, holding that such arguments are "nothing less than a frontal assault on the basic policy of the Sherman Act."[112] The Court has emphasized that the Sherman Act "reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services."[113] "[T]he policy unequivocally laid down by the Act is competition."[114]

To limit price competition is not a sensible way to protect small businesses. As Judge Richard A. Posner has noted, "even if it were deemed desirable to protect small business, to do so by trying to limit price cuts given to competing big businesses would be an oblique, very costly, and probably ineffective method."[115] He argues that there are other, more direct, means of accomplishing this objective.[116] As small businesses have struggled to compete with larger chains over the past several decades, and many have gone out of business, it appears that the Robinson-Patman Act has been ineffective in truly protecting these small businesses.

G. The Potential Complexity of Future Enforcement of State Versions of the Robinson-Patman Act Is Not a Valid Justification for Continued Consumer Harm

Supporters of the Robinson-Patman Act argue that, even if the Act is repealed, state laws prohibiting price discrimination and other sector-specific restrictions will remain on the books.[117] They point out the potential for plaintiffs to respond to any repeal of the Robinson-Patman Act by bringing claims under currently underutilized state price discrimination laws.[118] They also note there could be expansions of such state laws.[119] Currently, state enforcers and state courts look to the case law developed under the Robinson-Patman Act for guidance in interpreting and applying state price discrimination laws. If the federal law is no longer available as an option for plaintiffs and a guidepost for state law, supporters argue, price discrimination will be governed by divergent state laws, thus increasing compliance costs and potentially creating a "mess."[120] Therefore, supporters argue, there could be significant costs to repealing the Robinson-Patman Act.

It is uncertain that the repeal of the Robinson-Patman Act will result in this "mess." It is possible that states will recognize that their anti-price discrimination statutes also harm their consumers and repeal those statutes. Alternatively, state courts could interpret such statutes in a manner that is less inconsistent with the antitrust laws by requiring proof of injury to competition. If states choose to continue to enforce such statutes, Congress could address that issue at that future date, and possibly consider preemption of such state statutes.

Notes

[1] 15 U.S.C. §§ 13–13a.

[2] FTC v. Morton Salt Co., 334 U.S. 37, 43 (1948). The Court declared that "the more immediately important concern is in injury to the competitor victimized by the discrimination," although it also indicated that this would protect competition by "catch[ing] the weed in the seed." *Id.* at 49 n.18 (citing S. Rep. No. 74-1502, at 4 (1936)).

[3] Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and its Practice § 14.6a1 (3d ed. 2005) [hereinafter Hovenkamp, Federal Antitrust Policy].

[4] Dep't of Justice, Report of the Attorney General's National Committee to Study the Antitrust Laws 132 (1955) [hereinafter 1955 Attorney General's Report].

[5] Phil C. Neal et al., *Report of the White House Task Force on Antitrust Policy*, *reprinted in* 2 Antitrust L. & Econ. Rev. 11, 41 (1968–69) [hereinafter Neal Report].

[6] Dep't of Justice, Dep't of Justice Report on the Robinson-Patman Act 260 (1977) [hereinafter 1977 DOJ Report].

[7] Neal Report, at 39–41; 1977 DOJ Report, at 260–63.

[8] 1977 DOJ Report, at 260–63.

[9] *Id.* at 261–62, 272–93.

[10] Andrew I. Gavil et al., Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy 756–57 (2002) [hereinafter Gavil, Antitrust Law in Perspective].

[11] *See* George Van Camp & Sons Co. v. American Can Co., 278 U.S. 245 (1929).

[12] Gavil, Antitrust Law in Perspective, at 757.

[13] *See generally Morton Salt*, 334 U.S. at 43–44 (providing description of the Act's legislative history); Goodyear Tire & Rubber Co. v. FTC, 101 F.2d 620 (6th Cir. 1939).

[14] *See, e.g.*, H.R. Rep. No. 74-2287, at 7 (1936) (stating that the provision of the Clayton Act permitting volume discounts so weakened Section 2 "as to render it inadequate, if not almost a nullity").

[15] Gavil, Antitrust Law, at 757 (emphasis omitted).

[16] Robinson-Patman Act, ch. 592, § 1, 49 Stat. 1526, 1526 (1936) (codified as amended at 15 U.S.C. § 13(a)) (emphasis added).

[17] *Morton Salt*, 334 U.S. at 49.

[18] W. Kip Viscusi et al., Economics of Regulation and Antitrust 284 (3d ed. 2000) [hereinafter Viscusi, Economics of Regulation and Antitrust].

[19] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 220 (1993).

[20] 15 U.S.C. § 13(a). For an overview of the Robinson-Patman Act, *see generally* AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, A PRIMER ON THE FEDERAL PRICE DISCRIMINATION LAWS: A GENERAL REVIEW OF THE ROBINSON-PATMAN ACT FOR BUSINESS MANAGERS (3d ed. 2005) [hereinafter ROBINSON-PATMAN PRIMER].

[21] Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 126 S. Ct. 860, 870 (2006); *see also* 15 U.S.C. § 13(a).

[22] *Volvo*, 126 S. Ct. at 870.

[23] *See* 15 U.S.C. § 13(c); *see also* AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 524–30 (6th ed. 2007) [hereinafter ANTITRUST LAW DEVELOPMENTS]; ROBINSON-PATMAN PRIMER, at 17–18.

[24] *See* 15 U.S.C. § 13(d)–(e); *see also* ANTITRUST LAW DEVELOPMENTS, at 530–34; ROBINSON-PATMAN PRIMER, at 14–15. These prohibitions do not require a showing of competitive injury and do not permit defenses, such as cost-justified price discrimination, which is described below. ANTITRUST LAW DEVELOPMENTS, at 524, 530. Unlike Section 2(a) claims, where competitive injury is required but generally inferred, no inference is required because these types of claims do not require any showing of competitive injury.

[25] 15 U.S.C. § 13(f).

[26] H.R. REP. NO. 94-1738, at 25 (1976) ("This section was aimed at curbing the power which had been utilized by chains and other large buyers to pressure suppliers into granting them unjustified price concessions . . . .").

[27] *See, e.g.*, Robinson-Patman Transcript at 12 (Hovenkamp) (July 28, 2005) (arguing that the Supreme Court's interpretation of Section 2(f) has made buyer liability "almost impossible to prove"); HOVENKAMP, FEDERAL ANTITRUST POLICY, § 14.6e; *see also* American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding the Robinson-Patman Act, at 11 (Apr. 10, 2006) [hereinafter ABA Comments re Robinson-Patman] (supporters of the Act also contend that buyer liability is "virtually impossible to prove").

[28] *See* Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69, 75–76 (1979).

[29] The Act also extends to third- and fourth-line injury, or even beyond. *See, e.g.*, Perkins v. Standard Oil Co., 395 U.S. 642 (1969).

[30] *Brooke Group*, 509 U.S. at 221–22.

[31] *Id.*

[32] 15 U.S.C. § 13a; *see also* ANTITRUST LAW DEVELOPMENTS, at 547–48.

[33] *See, e.g.*, Meredith E. B. Bell & Elena Laskin, *Antitrust Violations*, 36 AM. CRIM. L. REV. 357, 357 n.2 (1999); Terry Calvani & Gilde Breidenbach, *An Introduction to the Robinson-Patman Act and its Enforcement by the Government*, 59 ANTITRUST L.J. 765, 775 (1990).

[34] 15 U.S.C. § 13(a).

[35] *Id.*

[36] *Id.*

[37] *Id.* § 13(b); *see also* Standard Oil Co. v. FTC, 340 U.S. 231, 251 (1951).

[38] *See, e.g.*, Comcoa, Inc. v. NEC Tels., Inc., 931 F.2d 655, 664–65 (10th Cir. 1991); *see also* ROBINSON-PATMAN PRIMER, at 11–12.

[39] *See* ANTITRUST LAW DEVELOPMENTS, at 515; *see also Morton Salt*, 334 U.S. at 48.

[40] Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 447–51 (1983); *see also id.* at 445 (stating that "[t]he very purpose of the defense is to permit a seller to treat different competitive situations differently").

[41] *See* ROBINSON-PATMAN PRIMER, at 19; ANTITRUST LAW DEVELOPMENTS, at 484.

42 Antitrust Law Developments, at 484, 547–48; *see, e.g.*, William Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 Antitrust L.J. 377, 410 n.108 (2003) [hereinafter Kovacic, *Modern Evolution of U.S. Competition Policy Enforcement Norms*].

43 American Bar Association, Section of Antitrust Law, Monograph No. 4, The Robinson-Patman Act: Policy and Law, Volume I, at 3 (1980) [hereinafter ABA Monograph on Robinson-Patman].

44 *Id.* at 41; Business Roundtable, Public Comments Submitted to AMC, at 17–18 (Nov. 4, 2005) [hereinafter Business Roundtable Comments]; ABA Comments re Robinson-Patman, at 12.

45 ABA Monograph on Robinson-Patman, at 41 n.158; *see also* H.R. Rep. No. 94-1738, at 127.

46 ABA Monograph on Robinson-Patman, at 41 n.158; *see also* H.R. Rep. No. 94-1738, at 127.

47 *See* Kovacic, *Modern Evolution of U.S. Competition Policy Enforcement Norms*, at 410, tbl.1 (citing CCH Trade Regulation Reporter looseleaf service and transfer binders on FTC Complaints, Orders, Stipulations for 1961 through 2000).

48 The three jury verdicts affirmed on appeal were *Schwartz v. Sun Co.*, 276 F.3d 900, 905 (6th Cir. 2002), *Chroma Lighting v. GTE Prods. Corp.*, 111 F.3d 653 (9th Cir. 1997), and *Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.*, 374 F.3d 701 (8th Cir. 2004), *rev'd sub. nom. Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 126 S. Ct. 860 (2006). The cases were found through a search for every RP Act court opinion in the Westlaw database for a ten-year period (Sept. 20, 1996–Sept. 20, 2006).

49 *Volvo*, 126 S. Ct. 860.

50 Robinson-Patman Trans. at 11–12 (Hovenkamp).

51 J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 561 (1981).

52 Antitrust Law Developments, at 545.

53 *See, e.g.*, Thomas W. Ross, *The Costs of Regulating Price Differences*, 59 J. Bus. 143 (1986) (prohibitions on discrimination may cause firm to adopt policies that do not minimize costs); John L. Peterman, *The* Morton *and* International Salt *Cases: Discounts on Sales of Table Salt*, 21 Res. L. & Econ. 127 (2004) (studying two leading RP Act cases and questioning the utility of those enforcement actions).

54 ABA Comments re Robinson-Patman, at 4; *see also* Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 Antitrust L.J. 125, 143–44 (2000) [hereinafter Hovenkamp, *Robinson-Patman Act and Competition*]; 1955 Attorney General's Report, at 131–32.

55 *See* 1977 DOJ Report, at 100.

56 Viscusi, Economics of Regulation and Antitrust, at 284–89; Marius Schwartz, *Third-Degree Price Discrimination and Output: Generalizing a Welfare Result*, 80 Am. Econ. Rev. 1259 (1990); Hal R. Varian, *Price Discrimination*, in 1 Handbook of Industrial Organization 617–23 (Richard Schmalensee & Robert D. Willig eds., 1989). However, the application of this analysis is more complex in assessing the impact of price discrimination practices when the discriminations at issue are directed towards intermediate suppliers like the wholesalers and retailers in those special cases where it is likely that, to avoid the discriminations, these intermediate suppliers may inefficiently integrate backward into manufacturing. *See* Michael L. Katz, *The Welfare Effects of Third-Degree Price Discrimination in Intermediate Good Markets*, 77 Am. Econ. Rev. 154 (1987).

57 *See* ABA Comments re Robinson-Patman, at 4; *see also* Hovenkamp, *Robinson-Patman Act and Competition*, at 143–44; 1955 Attorney General's Report, at 131–32.

58 Viscusi, Economics of Regulation and Antitrust, at 290; *see also* Richard A. Posner, The Robinson-Patman Act: Federal Regulation of Price Differences 12–15 (1976) [hereinafter Posner, Robinson-Patman Act] (although the ability persistently to charge discriminatory prices has been taken as a possible sign of market power, sporadic or temporary price discrimination generally has procompetitive benefits; it is often difficult to distinguish between these two forms of price discrimination).

59 Neal Report, at 13; *see also id.* at 17, 39–44.

[60] *See Symposium on Competitive Price Discrimination*, 70 ANTITRUST L.J. 593 (2003); James D. Dana, Jr., *Advance-Purchase Discounts and Price Discrimination in Competitive Markets*, 106 J. POL. ECON. 395 (1998); Mark Armstrong & John Vickers, *Competitive Price Discrimination*, 32 RAND J. ECON. 579 (2001); Severin Borenstein & Nancy L. Rose, *Competition and Price Dispersion in the U.S. Airline Industry*, 102 J. POL. ECON. 653 (1994); Severin Borenstein, *Price Discrimination in Free-Entry Markets*, 16 RAND J. ECON. 380 (1985); James C. Cooper et al., *Does Price Discrimination Intensify Competition? Implications for Antitrust*, 72 ANTITRUST L.J. 327 (2005).

[61] *Vanco Beverage*, 460 U.S. at 445.

[62] *See* Texaco Inc. v. Hasbrouck, 496 U.S. 543, 561 n.18; *Morton Salt*, 334 U.S. at 48. *See generally* ANTITRUST LAW DEVELOPMENTS, at 512–17.

[63] ABA Comments re Robinson-Patman, at 6; Hovenkamp, *Robinson-Patman Act and Competition*, at 126–27; Herbert Hovenkamp, Statement at AMC Robinson-Patman Act Hearing, at 8–9 (July 28, 2005) [hereinafter Hovenkamp Statement].

[64] Hovenkamp, *Robinson-Patman Act and Competition*, at 126–27; Hovenkamp Statement at 8–9.

[65] *See* Hovenkamp, *Robinson-Patman Act and Competition*, at 126–27; Hovenkamp Statement, at 8–9.

[66] *See* Part 3.E of this Section (discussing bargaining power in more detail).

[67] Emek Basker, *Selling a Cheaper Mousetrap: Wal-Mart's Effect on Retail Prices*, 58 J. URBAN ECON. 203 (2005); Jerry Hausman & Ephraim Leibtag, *Consumer Benefits from Increased Competition in Shopping Outlets: Measuring the Effect of Wal-Mart* (Nat'l Bureau of Econ. Research Working Paper No. 11,809, 2005).

[68] *See* Daniel P. O'Brien & Greg Shaffer, *The Welfare Effects of Forbidding Discriminatory Discounts: A Secondary Line Analysis of Robinson-Patman*, 10 J.L. ECON. & ORG. 296 (1994) (finding that "forbidding discriminatory discounts renders retailer bargaining power useless in mitigating manufacturer market power" so that "all retail prices rise" and welfare loses can be "substantial").

[69] *See* Robinson-Patman Trans. at 12 (Hovenkamp); HOVENKAMP, FEDERAL ANTITRUST POLICY, § 14.6e; *see also* ABA Comments re Robinson-Patman, at 11 (supporters of the Act also contend that buyer liability is "virtually impossible to prove").

[70] *See* 1977 DOJ REPORT, at 47–58; ABA Comments re Robinson-Patman, at 7–8.

[71] *See, e.g.*, NEAL REPORT, at 40; ABA MONOGRAPH ON ROBINSON-PATMAN, at 30–31; 1977 DOJ REPORT, at 70–74; ABA Comments re Robinson-Patman, at 8.

[72] *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977).

[73] Indeed, in some circumstances, competitors may wish for their rivals to undertake anticompetitive conduct because they may be able to charge higher prices as a result of rivals' tacit collusion, for example.

[74] Robinson-Patman Act, ch. 592, § 1, 49 Stat. 1526, 1526 (1936) (codified as amended at 15 U.S.C. § 13(a)) (emphasis added).

[75] *See, e.g.*, George Haug Co. v. Rolls Royce Motor Cars Inc., 148 F.3d 136, 140 (2d Cir. 1998) ("It is hornbook law . . . that anti-competitive injury need not be alleged to sustain a claim for violation of the Robinson-Patman Act; a price differential, direct or indirect, between secondary-line competitors is enough.").

[76] *Morton Salt*, 334 U.S. at 49 (emphasis added; citations and quotations omitted).

[77] *Id.* at 49–51.

[78] *Id.* at 46–47.

[79] *Volvo*, 126 S. Ct. at 870. However, the Supreme Court has held that in alleging damages under Section 4 of the Clayton Act, the plaintiff "must make some showing of actual injury attributable to something the antitrust laws were designed to prevent." *J. Truett Payne*, 451 U.S. at 562. Some believe that *J. Truett Payne* has had a major impact on private litigation, because it held that a plaintiff must "prove actual

lost sales, actual injury." Robinson-Patman Trans. at 37–38 (Saferstein). Thus, a Robinson-Patman plaintiff is not entitled to "automatic damages" equal to the amount of the discrimination, but rather "ordinarily must show that it lost customers or profits because the favored customer used the discount either to lower its resale prices or otherwise to solicit business." ANTITRUST LAW DEVELOPMENTS, at 545.

80 For example, the Third Circuit has held that "evidence of injury to a competitor may satisfy the component of competitive injury necessary to show a violation of the Robinson-Patman Act." J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1535 (3d Cir. 1990); *see also* Alan's of Atlanta, Inc. v. Minolta Corp., 903 F.2d 1414, 1418 n.6 (11th Cir. 1990).

81 *Chroma Lighting*, 111 F.3d at 658; *see also George Haug*, 148 F.3d at 143–44; Coastal Fuels of P.R., Inc. v. Caribbean Petroleum Corp., 79 F.3d 182 (1st Cir. 1996).

82 Richard Short Oil Co. v. Texaco, Inc., 799 F.2d 415, 420 (8th Cir. 1986); *see also* Motive Parts Warehouse v. Facet Enters., 774 F.2d 380, 395 (10th Cir. 1985) (holding that "[t]he naked demonstration of injury to a specific competitor without more is not sufficient to show that a price discrimination 'may' substantially lessen competition; the test must always focus on injury to competition") (internal citations omitted).

83 Boise Cascade Corp. v. FTC, 837 F.2d 1127, 1144 (D.C. Cir. 1988).

84 Statement of Chairman Robert Pitofsky & Commissioners Sheila F. Anthony & Mozelle W. Thompson, *In re* McCormick & Co., FTC File No. 961-0050 (Mar. 8, 2000), *available at* http://www.ftc.gov/os/2000/05/mccormickpitofskystmt.htm. The three-Commissioner majority stated that "[t]here may be . . . market settings in which it makes sense for . . . the Commission and Courts, in the process of considering whether there has been a violation, to look past the *Morton Salt* factors to a broader range of market conditions to determine whether there has been real injury to competition." *Id.* Based on such an inquiry, they found McCormick's conduct resulted in injury "not just to the disfavored buyers, but to secondary-line competition generally." *Id.* The majority did not define the "market settings" in which it would look past the *Morton Salt* inference. The dissent complained that, among other things, the majority's analysis still left RP Act violations too easy to prove. Dissenting Statement of Commissioners Orson Swindle & Thomas B. Leary, *In re* McCormick & Co., FTC File No. 961-0050 (Mar. 8, 2000), *available at* http://www.ftc.gov/os/2000/05/mccormickswindlelearystmt.htm.

85 *Volvo*, 126 S. Ct. 860.

86 *Id.* at 870 (citing FTC v. Sun Oil Co., 371 U.S. 505, 518–19 (1963); *Morton Salt*, 334 U.S. at 49–51).

87 *Id.* at 872.

88 ABA Comments re Robinson-Patman, at 8.

89 *Id.*

90 F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 516 (3d ed. 1990) (difficulty of determining what behavior would be in the absence of the Act); 1977 DOJ REPORT, at 37–40 (describing difficulties of measuring Act's impact).

91 Robinson-Patman Trans. at 17–18 (Saferstein) (explaining that he "tends to believe anecdotally" that the Act has negative effects, but wondering "how . . . it really work[s] in practice" and expressing concern that we may not "know enough to take major action"); *id.* at 54 (Spiva) ("We really have no idea what types of costs [the Act] imposes, if any, on sellers."); *Federal Antitrust Policy: Implications for Small Business, Hearing Before the S. Comm. on Small Business*, 97th Cong. 68 (1981) (assessments of the Act "do[] not come from a clear body of empirical evidence—in fact, the true net effects of Robinson-Patman have not, as far as I am aware, been the subject of much solid empirical work") (statement of FTC Chairman James C. Miller III); *see also* 1977 DOJ REPORT, at 37–38 (describing the lack of empirical studies and difficulty of obtaining data to assess the Act's impact).

92 U.S. Chamber of Commerce, Public Comments Submitted to AMC, at 24 (Nov. 8, 2005) (noting "reports that entire departments have been established simply to track and process the information necessary to document compliance with the [meeting-competition] defense"); Business Roundtable Comments, at

17 (the Act results in "substantial costs on businesses as they educate employees in R-P Act compliance").

[93] The Robinson-Patman Act portion of the Practicing Law Institute's major antitrust programs is "typically attended by a high number of in-house counsel," and "interest in [the Robinson-Patman] course is high." Harvey I. Saferstein, Statement at AMC Robinson-Patman Act Hearing, at 4 (July 28, 2005) [hereinafter Saferstein Statement]. Nevertheless, systematic information about RP Act compliance costs is generally lacking, and supporters of the Act further point out that the compliance burdens may be exaggerated. ABA Comments re Robinson-Patman, at 11–12 (observing that some argue that paperwork costs might be incurred in any event, and might be reduced due to the introduction of computers and the Internet).

[94] *See* ABA Monograph on Robinson-Patman, at 32–33; 1977 DOJ Report, at 75–79; ABA Comments re Robinson-Patman, at 8–9. Mr. Saferstein argued that firms change the manner in which they market in order to comply with the Act, for example, using bulk packaging. Robinson-Patman Trans. at 31–32 (Saferstein).

[95] This may be challenging to accomplish, however, due to the fact that courts consistently have held that differences in packaging or warranties alone do not avoid the "of like grade and quality" element of the Robinson-Patman Act. *See* Antitrust Law Developments, at 497–99.

[96] *See* Part 3.A.1 of this Section.

[97] *See* Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 127 S. Ct. 1069, 1075 (2007).

[98] *See* Jonathan M. Jacobson & Gary J. Dorman, *Joint Purchasing, Monopsony, and Antitrust*, 36 Antitrust Bull. 1 (1991); Phillip E. Areeda & Herbert Hovenkamp, XII Antitrust Law ¶ 2011 & nn.1, 17 (2d ed. 2005).

[99] *See* Hovenkamp Federal Antitrust Policy, § 1.2b; Ernest Gellhorn et al., Antitrust Law and Economics 79–80 (5th ed. 2004).

[100] Hovenkamp Statement, at 14 (if price discrimination resulting from buyer power truly resulted in competitive injury, it "would almost certainly fall within the restraint of trade language of §1 of the Sherman Act or, in a few cases, the monopolization language of §2"); Robinson-Patman Trans. at 23–24 (Hovenkamp); ABA Monograph on Robinson-Patman, at 33–35.

[101] *See* Part 3.A.1 of this Section.

[102] *See* 1977 DOJ Report, at 145–48 (collecting authorities).

[103] American Antitrust Institute, Public Comments Regarding the Robinson-Patman Act, at 13–14 (July 1, 2005) [hereinafter AAI Comments re Robinson-Patman Act]; *see also* J.H. Campbell, Jr., Statement at AMC Robinson-Patman Act Hearing, at 4 (July 28, 2005) [hereinafter Campbell Statement].

[104] *See* Robinson-Patman Trans. at 42–46 (Spiva; Campbell).

[105] *See Brooke Group*, 509 U.S. at 222–23.

[106] *See Recent Efforts to Amend or Repeal the Robinson-Patman Act, Pt. 2: Hearings Before the Ad Hoc Subcomm. on Antitrust, the Robinson-Patman Act, and Related Matters of the H. Comm. on Small Business*, 94th Cong. 1 (1975–76) (statement of Chairman Gonzales) (stating that the Robinson-Patman Act "is properly described as the Magna Carta of Small Business").

[107] *See* AAI Comments re Robinson-Patman Act, at 12–13; ABA Comments re Robinson-Patman, at 10; ABA Monograph on Robinson-Patman, at 22–24.

[108] Campbell Statement, at 8, 12 ("The Robinson-Patman Act is the only significant restraint in our antitrust laws on the ability of power buyers to obtain preferential treatment . . . .").

[109] AAI Comments re Robinson-Patman Act, at 13; *see also* Campbell Statement, at 11–12.

[110] ABA Monograph on Robinson-Patman, at 24.

[111] Robinson-Patman Trans. at 22 (Spiva).

112 National Soc. of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978) (defendants argued unsuccessfully that competitive bidding for engineering projects might threaten such things as "public safety and the ethics of [the engineering] profession").

113 *Id.* at 695.

114 Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

115 Posner, Robinson-Patman Act, at 16.

116 *Id.* (suggesting that a lower tax rate on small firms may be a more direct means of achieving this objective).

117 Antitrust Law Developments, at 624 (a number of states have counterparts to the Robinson-Patman Act).

118 At the Robinson-Patman Committee Breakfast during the 2005 American Bar Association, Section of Antitrust Law Spring Meetings, several panelists, including Professor Stephen Ross, raised this concern. Similarly, the 2006 Spring Meeting Robinson-Patman Committee Breakfast featured a panel on state laws, described as "Sleeping Giants." *See also* ABA Comments re Robinson-Patman, at 13 (noting concerns and predicting that Congress would be unlikely to enact preemptive legislation).

119 AAI Comments re Robinson-Patman Act, at 16–17.

120 Robinson-Patman Trans. at 49–50 (Saferstein) (observing that state courts might be "unleashed" by repeal, resulting in "a bigger mess than you counted on"); *see also* Saferstein Statement, at 2; AAI Comments re Robinson-Patman Act, at 16–17 (repeal could "spur a populist backlash").

Chapter IV.B

Immunities and Exemptions, Regulated Industries, and the State Action Doctrine

1. INTRODUCTION

Free-market competition is the fundamental economic policy of the United States.[1] Competition in free markets—that is, markets that operate without either private or governmental anticompetitive restraints—spurs businesses to develop and sell as efficiently as possible the kinds and quality of goods and services that consumers desire.[2] Competitive markets also drive an economy's resources toward their fullest and most efficient uses, thereby providing a basis for economic development.[3] The U.S. economy is an example of how free markets can lead to the creation of wealth, making possible improved living standards and greater prosperity.[4] In recent decades, policymakers in many developing countries also have been persuaded that free-market competition yields productivity and other benefits far superior to the results produced by government control of the economy.[5]

Despite this record of success, a few sectors of the U.S. economy remain subject to government limitations on competition. This Section of the Report discusses three of the ways in which federal law or judicial standards currently prevent or restrain competition. They are: (1) statutory immunities or exemptions from some or all of the antitrust laws; (2) limitations on the full application of antitrust law as a consequence of continued economic regulation of certain industries; and (3) an overly broad interpretation of the state action doctrine that permits private anticompetitive conduct not authorized or supervised by state regulatory programs. Just as private restraints on competition can harm consumer welfare, so can these government restraints on competition.

Empirical studies of what happened when market forces were unleashed in previously regulated industries provide the best evidence of the harm that governmental restraints on competition can create. During the early part of the twentieth century, a belief that certain industries were either "natural" monopolies (that is, that the most efficient market structure included only one firm) or were at risk for "excessive competition" led to government regulation of prices, costs, and entry in those industries.[6] The industries tended to involve core services, such as electricity, natural gas, telecommunications, and transportation. Beginning in the 1960s and 1970s, however, attitudes changed. In some industries, such as electricity generation, technological progress made competition possible.[7] More generally, significant criticisms of the costs and market distortions that accompanied regulation prompted serious review of regulatory regimes. These two factors in particular combined to persuade policymakers to move toward deregulation in almost all regulated markets.[8]

Numerous studies of sectoral deregulation in the United States show that the unleashing of market forces has greatly increased efficiency and provided substantial benefits to consumer welfare. One comprehensive survey of empirical evidence on the U.S. deregulation experience concluded that the U.S. economy has gained at least $36 to $46 billion *annually* (in 1990 dollars) from deregulation, primarily in the transportation industries.[9] On a more specific level, an econometric analysis of trucking rates in states that continued to regulate trucking found that in the less-than-truckload (LTL) segment, regulation of entry increased rates by more than 20 percent, rate regulation increased those rates by 5 percent, and antitrust immunity for certain conduct increased rates by about 12 percent above what they would be absent regulation.[10]

These data give a sense of the order of magnitude of the costs imposed on U.S. consumers and the U.S. economy by government restraints on competition. By comparison, government restraints of the types discussed in this Section typically benefit only relatively small special interest groups. The Commission therefore makes the following general recommendation, as well as additional recommendations described below.

56. Congress should not displace free-market competition absent extensive, careful analysis and strong evidence that either (1) competition cannot achieve societal goals that outweigh consumer welfare, or (2) a market failure requires the regulation of prices, costs, and entry in place of competition.

A. Statutory Exemptions from the Antitrust Laws

1. Competitive Effects and Claimed Justifications

The antitrust laws stand as a bulwark to protect free-market competition. They prohibit anticompetitive restraints that harm consumer welfare. "[V]igorous competition, protected by the antitrust laws, does the best job of promoting consumer welfare and a vibrant, growing economy."[11]

Through legislation, however, Congress can exempt certain types of conduct by particular actors from some or all of the antitrust laws.[12] Currently, a wide variety of immunities, both partial and whole, exists in federal law. Congress, of course, is entitled to make judgments about the extent to which competition is in the public interest or other substantial and significant societal values trump the goal of consumer welfare.[13]

Nonetheless, antitrust exemptions can impose significant costs, which must be weighed against any benefits of an exemption. To the extent the antitrust laws do not apply, firms may take anticompetitive actions with impunity. As a practical matter, an exemption from all or part of the antitrust laws means firms can avoid the tough discipline of competition, at least to some extent. While the beneficiaries of an exemption likely appreciate reduced market pressures, consumers (as well as non-exempted firms) and the U.S. economy generally bear the harm from the loss of competitive forces.

Typically, antitrust exemptions create economic benefits that flow to small, concentrated interest groups, while the costs of the exemption are widely dispersed, usually passed on to a large population of consumers through higher prices, reduced output, lower quality, and reduced innovation.[14] The concentrated benefits provide incentives for interested parties to seek immunities from Congress, but the diffuse costs often have sufficiently minimal impact on individual consumers that they are unlikely to oppose the creation of immunities. Congress therefore is unlikely to hear from those who would be adversely affected by a proposed antitrust exemption.

The Commission focused on three immunities in particular. It held hearings on the McCarran-Ferguson Act, the Export Trading Company Act, and the Shipping Act. It held hearings on these three immunities because Congress is reexamining the McCarran-Ferguson Act;[15] the European Union recently eliminated its antitrust exemption for ocean carriers, leaving the United States as the only major country that still immunizes fixing shipping rates;[16] and the Commission received extensive comments regarding the Export Trading Company Act, which many observers overseas view as tarnishing the United States' reputation for free markets. The Commission discusses its assessment of the evidence gathered on these immunities and exemptions in Part 2 of this Section.

Antitrust exemptions can harm the U.S. economy and, in the long run, reduce the competitiveness of the industries that have sought antitrust exemptions. As noted above, competition drives firms to find ways to operate more efficiently and compete more effectively. "Few roles of government are more important to the upgrading of an economy than ensuring vigorous domestic rivalry."[17] Statutory exemptions from the antitrust laws undermine, rather than upgrade, the competitiveness and efficiency of the U.S. economy.

2. Summary of Recommendations

For the reasons articulated above and discussed in more detail in Part 2 of this Section, the Commission makes the following recommendations.

57. Statutory immunities from the antitrust laws should be disfavored. They should be granted rarely, and only where, and for so long as, a clear case has been made that the conduct in question would subject the actors to antitrust liability *and* is necessary to satisfy a specific societal goal that trumps the benefit of a free market to consumers and the U.S. economy in general.

A wide variety of statutory antitrust exemptions currently exists, as set forth in Annex A. Rather than performing detailed assessments of each of these individual existing immunities, the Commission concluded it could best contribute to Congress's evaluation of immunities by articulating relevant general principles that Congress may wish to use in considering whether to adopt, renew, or abolish any particular immunity. This work builds off of the analytical framework recommended by the National Commission for the Review of Antitrust Law and Procedures in its 1979 Report to the President and the Attorney General. That commission recommended that exemptions should be made only where "compelling evidence of the unworkability of competition or a clearly paramount social purpose" exists, and any exemptions should use the "least anticompetitive method of achieving the regulatory objective."[18] This Commission agrees, and the general principles that the Commission recommends follow. A more detailed discussion of these recommendations appears in Part 2 of this Section.

58. In evaluating the need for existing or new immunities, Congress should consider the following:

- **Whether the conduct to which the immunity applies, or would apply, could subject actors to antitrust liability;**
- **The likely adverse impact of the existing or proposed immunity on consumer welfare; and**
- **Whether a particular societal goal trumps the goal of consumer welfare, which is achieved through competition.**

59. The following steps are important to assist Congress in its consideration of those factors:

- **Create a full public record on any existing or proposed immunity under consideration by Congress.**
- **Consult with the Federal Trade Commission and the Antitrust Division of the Department of Justice about whether the conduct at issue could subject the actors to antitrust liability and the likely competitive effects of the existing or proposed immunity.**
- **Require proponents of an immunity to submit evidence showing that consumer welfare, achieved through competition, has less value than the goal promoted by the immunity, and the immunity is the least restrictive means to achieve that goal.**

60. **If Congress determines that a particular societal goal may trump the benefit of a free market to consumers and the U.S. economy in general, Congress should take the following steps:**

- **Consider a limited form of immunity—for example, limiting the type of conduct to which the immunity applies and limiting the extent of the immunity (for example, a limit on damages to actual, rather than treble, damages).**
- **Adopt a sunset provision pursuant to which the immunity or exemption would terminate at the end of some period of time, unless specifically renewed.**
- **Adopt a requirement that the Federal Trade Commission, in consultation with the Antitrust Division of the Department of Justice, report to Congress, before any vote on renewal, on whether the conduct at issue could subject the actors to antitrust liability and the likely competitive effects of the immunity proposed for renewal.**

61. **Courts should construe all immunities and exemptions from the antitrust laws narrowly.**

B. Regulated Industries, the Transition to Deregulation, and Antitrust Law

1. The Benefits of Deregulation

For many years, a wide variety of industries was subject to economic regulation—that is, the regulation of prices, costs, and entry. In recent decades, public policy in the United States has moved toward deregulation in most of those industries.[19] Various factors have driven the movement toward deregulation. Technological progress has facilitated the growth of competition in industries previously considered natural monopolies.[20] In addition, critiques of regulation have pointed out that federal regulatory agencies were sometimes "captured" by firms they regulated, to the detriment of the public interest, and that the costs of regulation were significantly more than anticipated.[21] The general conclusion is that, in many instances, "regulation reflects successful rent-seeking by private economic interests and generally reduces consumer welfare by restricting output."[22]

2. Summary of Recommendations

Congress's decision broadly to deregulate has brought substantial benefits to U.S. consumers and the U.S. economy.[23] The trend toward deregulation should be furthered where practicable. Free-market competition generally promotes efficiency and thus benefits consumer welfare, while economic regulation often results in inefficiency that increases prices to consumers. In the vast majority of cases, competition is more likely to benefit consumers than economic regulation. For the reasons set forth above and discussed in more detail of Part 3 of this Section, the Commission makes the following recommendation.

62. Public policy should favor free-market competition over industry-specific regulation of prices, costs, and entry. Such economic regulation should be reserved for the relatively rare cases of market failure, such as the existence of natural monopoly characteristics in certain segments of an industry, or where economic regulation can address an important societal interest that competition cannot address. In general, Congress should be skeptical of claims that economic regulation can achieve an important societal interest that competition cannot achieve.

a. The Application of Antitrust Law in the Context of Regulation and Deregulation

The relationship between antitrust law, regulation, and deregulation warrants careful scrutiny. In general, regulation is a substitute for competition, an alternative means by which policymakers hope to achieve the consumer welfare benefits associated with competition.[24] If competition has been entirely replaced with regulation, then the antitrust laws are generally unnecessary, because there is no competition to protect.

Given the problems arising from regulation, policymakers have searched for circumstances where competition, rather than regulation, can be relied on to benefit consumer welfare. When policymakers decide that regulation can be reduced or eliminated, because competition is feasible in particular markets, then antitrust law becomes necessary to ensure that competition flourishes.[25] In light of this, the Commission makes the following recommendation.

63. When the government decides to adopt economic regulation, antitrust law should continue to apply to the maximum extent possible, consistent with that regulatory scheme. In particular, antitrust should apply wherever regulation relies on the presence of competition or the operation of market forces to achieve competitive goals.

(i) Savings Clauses and Implied Immunities

Antitrust savings clauses appear in legislation to clarify the extent to which Congress intends to preserve the role of antitrust enforcement in a regulatory environment.[26] In legislation involving regulatory regimes, Congress should articulate clearly to what extent it intends the regulatory regime to displace the antitrust laws, if at all. Specific language directed to this issue can eliminate costly litigation about whether an immunity from antitrust law should be implied from the regulatory scheme. In the absence of a savings clause, courts may imply an immunity, resulting in outcomes not intended by Congress. Accordingly, the Commission makes the following recommendations.

64. Statutory regulatory regimes should clearly state whether and to what extent Congress intended to displace the antitrust laws, if at all.*

65. Courts should interpret savings clauses to give deference to the antitrust laws, and ensure that congressional intent is advanced in such cases by giving the antitrust laws full effect.†

In the absence of a savings clause, courts will determine whether the nature of the regulatory scheme necessarily implies that firms subject to that regime should be immune from antitrust law. Courts generally are reluctant to recognize implied immunities to the antitrust laws. For example, as the Supreme Court explained in *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, "implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system."[27] This issue is before the Supreme Court this term in *Billing v. Credit Suisse First Boston Ltd.*[28]

The Commission agrees that *National Gerimedical* provides the proper standard for determining whether the existence of a regulatory regime implies an immunity from antitrust law and therefore makes the following recommendation.

* Commissioner Warden does not join this recommendation.

† Commissioners Garza and Warden do not join this recommendation.

66. Courts should continue to apply current legal standards in determining when an immunity from the antitrust laws should be implied, creating implied immunities only when there is a clear repugnancy between the antitrust law and the regulatory scheme at issue, as stated in cases such as *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*.*

The Supreme Court recently issued an opinion that has raised questions whether the Court gave sufficient deference to the savings clause that Congress adopted when it enacted the Telecommunications Act of 1996 (1996 Act), or whether it in effect implied an immunity from the antitrust laws despite that savings clause. In *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko LLP* Trinko, alleged that Verizon had violated Section 2 of the Sherman Act by breaching certain network interconnection duties under the 1996 Act.[29] After deciding that the plaintiff's claim did not state a cause of action under traditional antitrust principles, the Court concluded that the specific, regulatory duties to deal established under the 1996 Act did not also create a new cause of action under the refusal-to-deal doctrine of Section 2 of the Sherman Act.[30] Based on this, the Commission makes the following recommendation.

67. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko LLP* is best understood only as a limit on refusal-to-deal claims under Section 2 of the Sherman Act; it does not displace the role of the antitrust laws in regulated industries.

(ii) Filed-Rate Doctrine

The filed-rate doctrine, also known as the *Keogh* doctrine, prohibits a private plaintiff from pursuing an antitrust action seeking treble damages where the plaintiff is claiming that a rate submitted to, and approved by, a regulator resulted from an antitrust violation.[31] At the time this doctrine was created, members of a regulated industry were typically required to file their proposed rates with regulators who reviewed the rates to ensure they were "fair and reasonable." In creating the doctrine in *Keogh*, the Supreme Court explained that only the relevant regulatory authority could change these rates, even if the rate was higher than it otherwise would be due to a price-fixing conspiracy.[32]

* Commissioner Delrahim does not join this recommendation.

Since deregulation, however, few industry members must file their rates with regulators, and fewer still have those rates formally reviewed for reasonableness. Nonetheless, courts have continued to apply the filed-rate doctrine to preclude antitrust claims where a tariff has been filed with a regulatory agency, regardless of whether the agency has actually reviewed and approved the rate.[33] In 1986 the Supreme Court reviewed the filed-rate doctrine and explained that a variety of factors "seem[ed] to undermine" the continuing validity of the *Keogh* doctrine.[34] Nonetheless, the Court concluded, it was for Congress to determine whether to abolish the filed-rate doctrine.[35] The Commission believes the time has come for Congress to address that issue and accordingly makes the following recommendation.

68. Congress should evaluate whether the filed-rate doctrine should continue to apply in regulated industries and consider whether to overrule it legislatively where the regulatory agency no longer specifically reviews proposed rates.

b. Merger Review in Regulated Industries

The antitrust agencies examine mergers and acquisitions notified to the agencies pursuant to the Hart-Scott-Rodino Act (HSR Act) to determine whether a proposed transaction may substantially lessen competition in violation of the Clayton Act.[36] The antitrust agencies apply the same merger standards to all industries, including those that formerly were regulated.

Four industries remain, however, in which a regulatory agency also has merger review authority.[37] In those industries the regulatory authority typically reviews a proposed transaction under its statutory "public interest" standard, which varies by industry. The regulatory authority can allow a transaction to proceed if it determines that the "public interest" benefits offered by the proposed transaction outweigh its likely anticompetitive effects.

Merger review by two federal agencies can impose significant and duplicative costs on both the merging parties and the agencies.[38] In addition, it can lead to conflicts between the antitrust agencies and the regulatory agency. The Commission has considered how to structure merger review in industries still subject to some degree of regulation. The Commission makes the following recommendations.

69. Even in industries subject to economic regulation, the antitrust agencies generally should have full merger enforcement authority under the Clayton Act.*

* Commissioner Kempf does not join this recommendation.

70. **For mergers in regulated industries, the relevant antitrust agency should perform the competition analysis. The relevant regulatory authority should not re-do the competition analysis of the antitrust agency.**

71. **The federal antitrust agencies and other regulatory agencies should consult on the effects of regulation on competition.**

72. **The antitrust enforcement agencies and courts should take account of the competitive characteristics of regulated industries, including the effects of regulation.**

73. **Mergers in regulated industries should be subject to the requirements of the Hart-Scott-Rodino Act, if they meet the tests for its applicability, or to an equivalent pre-merger notification and investigation procedure, such as set forth in the banking statutes, so that the relevant antitrust agency can conduct a timely and well-informed review of the proposed merger.***

The Commission is not convinced that the public interest factors the regulatory agencies may take into account cannot be provided by competition, or should ever outweigh the substantial negative impact on consumer welfare that may result from the approval of an anticompetitive merger. If competition can provide the public interest benefits identified in the statute, or if those public interest benefits could never outweigh likely anticompetitive effects, then merger review by a regulatory agency would be unnecessary. Accordingly, the Commission makes the following recommendation.

74. **Congress should periodically review all instances in which a regulatory agency reviews proposed mergers or acquisitions under the agency's "public interest" standard to determine whether in fact such regulatory review is necessary.**

- **In its reevaluation, Congress should consider whether particular, identified interests exist that an antitrust agency's review of the proposed transaction's likely competitive effects under Section 7 of the Clayton Act would not adequately protect. Such "particular, identified interests" would be interests other than those consumers' interests—such as lower prices, higher quality, and desired product choices—served by maintaining competition.**

* Commissioner Kempf does not join this recommendation.

C. The State Action Doctrine

1. The Origin and Contours of the State Action Doctrine

The states, like the federal government, generally rely on competition in the marketplace to produce lower prices, higher quality, and incentive to innovate. Nonetheless, also like the federal government, sovereign states can and do enact economic regulations to displace competition in particular situations. Over sixty years ago, in *Parker v. Brown*, the Supreme Court created the "state action" doctrine to identify circumstances in which a state's decision to displace competition with regulation trumps the general federal policy in favor of free markets and, therefore, overrides the application of federal antitrust law.[39] In upholding the legality of a California regulatory program that limited raisin output and thereby raised raisin prices, the Court concluded that Congress did not intend the Sherman Act expressly to preempt state economic regulation.[40] The Court explained, "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."[41]

Under the state action doctrine, courts can thus immunize from potential federal antitrust liability certain activity undertaken pursuant to a state regulatory regime or other state law.[42] State sovereignty and federalism were, and still are, the underpinnings of Supreme Court state action jurisprudence.[43]

The state action doctrine applies not only to state governmental actors themselves, but also, in certain circumstances, to quasi-governmental entities and private actors. The actions of state governmental actors are generally immune from antitrust liability without further inquiry.[44] This is because "[w]hen the conduct is that of the sovereign itself . . . the danger of unauthorized restraint of trade does not arise."[45] What constitutes the "state," however, has given rise to extensive litigation. For example, cities and other municipalities, public service commissions, and state regulatory boards are not the "state" for purposes of the state action doctrine.[46]

The actions of private economic actors, as well as of governmental or quasi-governmental entities not considered to be the "state," are immune from antitrust liability only if they pass a two-part test. The Supreme Court set forth that test in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*: (1) the challenged restraint must be "'one clearly articulated and affirmatively expressed as state policy,'" and (2) "the policy must be 'actively supervised' by the State itself."[47] The first requirement, "clear articulation," serves to ensure that the state has affirmatively authorized departures from free-market competition.[48] The second requirement, "active supervision," is intended to ensure that state action immunity "will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies."[49] The Supreme Court's state action jurisprudence has thus recognized the importance of not immunizing conduct intended to benefit private, not governmental, purposes.

Critics warn, however, that the lower courts increasingly have applied the *Midcal* test in ways that allow defendants to obtain antitrust immunity in situations where a state did not intend to displace competition. Others question whether courts have properly taken into account the potential for one state's endorsement of anticompetitive conduct to have spillover effects that raise prices or otherwise harm consumers in other states. And there is also a serious question whether the state action doctrine should immunize conduct by state government entities and municipalities when they act as market participants.

The American Bar Association, Section of Antitrust Law (ABA Antitrust Section) believes that "[s]tate action immunity drives a large hole in the framework of the nation's competition laws."[50] In 2003 the Federal Trade Commission (FTC) issued a staff report (FTC State Action Report) recommending "clarification and re-affirmation of the original purposes of the state action doctrine to help ensure that robust competition continues to protect consumers."[51]

2. Summary of Recommendations

The Commission agrees that the federal lower courts in some cases have misinterpreted or misapplied the state action doctrine to override the federal policy in favor of free-market competition in ways inconsistent with Supreme Court rulings. The best method to resolve concerns with the state action doctrine is through the continued development of case law in the courts. The Supreme Court's articulation of core standards for the state action doctrine will lead to its correct application if applied more rigorously by the lower courts. There is no need at this time to codify those standards. Rather, the lower courts need to apply the Supreme Court's precedents with increased precision. The courts should do this with the understanding that failure to do so could result in significant consumer harm from anticompetitive conduct that has been immunized from antitrust scrutiny.

Based on its study, the Commission makes the following recommendations, which are explained more extensively in Part 4 of this Section.

75. Congress should not codify the state action doctrine. Rather, the courts should apply the state action doctrine more precisely and with greater attention to both Supreme Court precedents and possible consumer harm from immunized conduct.

76. The courts should not grant antitrust immunity under the state action doctrine to entities that are not sovereign states unless (1) they are acting pursuant to a clearly articulated state policy deliberately intended to displace competition in the manner at issue, and (2) the state provides supervision sufficient to ensure that the conduct is not the result of private actors pursuing their private interests, rather than state policy.

The lower courts have not always properly implemented Supreme Court precedents outlining what is required to satisfy the clear articulation prong. In *Town of Hallie v. City of Eau Claire* the Supreme Court held the clear articulation standard was satisfied where the allegedly anticompetitive conduct was a "foreseeable result" of a state law.[52] Following *Town of Hallie*, however, some courts have applied a standard of "foreseeability" (and thus immunity) wherever a state authorizes conduct that does not necessarily, but might, have an anticompetitive effect.[53] To say that anticompetitive effects are a possible result of a statute, however, is not the same as finding "a deliberate and intended state policy" to replace competition with regulation, as the Court subsequently required in *FTC v. Ticor Title Insurance Co.*[54]

Another issue that demands rigorous attention is whether the relevant statute reveals a state's intent to displace competition *in the manner at issue* in the case. The Seventh Circuit's reasoning in *Hardy v. City Optical, Inc.* exemplifies the type of careful analysis that courts should use.[55] In that case, a statute required optometrists to provide patients with some, but not all, of the information needed to purchase contact lenses, which left patients unable to purchase their lenses through cheaper, mail-order sources. The court held that "Indiana has not sought to supplant . . . competition *from mail-order houses*," and therefore the clear articulation standard was not met.[56] This approach ensures that the courts do not loosely allow exceptions to competition. The Commission therefore makes the following recommendation.

77. As proposed in the FTC State Action Report, the courts should reaffirm a clear articulation standard that focuses on two questions: (1) whether the conduct at issue has been authorized by the state, and (2) whether the state has deliberately adopted a policy to displace competition in the manner at issue.

The active supervision requirement ensures that "'the [private] actor is engaging in the challenged conduct pursuant to state policy,' rather than in pursuit of private interests."[57] Because the active supervision test applies only when there is a risk that the challenged conduct may be the product of parties' pursuing interests other than state policy, its application turns in part on whether the relevant actor is public or private.[58] The Supreme Court's one opinion in this area, *Ticor*, dealt with a situation in which state supervision of the conduct at issue was virtually nonexistent.[59] Thus, the Court has not yet provided extensive guidance on how to address more complex situations.

To focus the active supervision inquiry, courts should use a flexible, "tiered" approach that requires a different level of active supervision depending on the type of conduct at issue, the entity engaging in that conduct, the industry, the regulatory scheme, and other factors.[60] A flexible analysis would recognize that, to the extent the actor or the challenged conduct suggests an appreciable risk that the challenged conduct results from private actors pursuing their private interests, rather than state policy, courts should require a greater degree of active supervision than if that risk is lower. The Commission therefore makes the following recommendation.

78. The courts should adopt a flexible approach to the active supervision prong, with different requirements based on the situation.*

The state action doctrine has been criticized for its failure to consider interstate spillovers.[61] When one state regulates activities in a manner that overwhelmingly imposes the cost of regulation on citizens of other states, both economic efficiency and the political participation goals of the federal system suffer. State regulations producing spillover costs to consumers in other states do not deserve deference.[62] Out-of-state citizens adversely affected by spillovers typically have no political participation rights and effectively are disenfranchised on whether the conduct at issue should be authorized by the neighboring state.[63] Moreover, economics teaches that where decision-makers reap the benefits without bearing the costs of an activity, they have incentives to engage in more of that activity than is socially desirable.[64] To address the significant consumer harm and political representation concerns, the Commission makes the following recommendation.

79. Where the effects of potentially immunized conduct are not predominantly intrastate, courts should not apply the state action doctrine.†

* Commissioners Garza, Kempf, and Warden do not join this recommendation.

† Commissioners Burchfield, Cannon, Delrahim, Garza, and Kempf do not join this recommendation.

A government entity's participation in a market as a competitor is likely to have market-distorting effects if that entity is not subject to the same rules of competition as private competitors. A "market participant" exception to the state action doctrine would require application of both prongs of the *Midcal* test to a government entity participating in the market. This would ensure that the government entity's behavior is consistent with state policy and the state action doctrine is applied consonant with its original purposes and goals. The possibility of such an exception was recognized by the Supreme Court in *City of Columbia v. Omni Outdoor Advertising, Inc.*, where the majority stated in dictum that the *Parker* doctrine "does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market."[65] The Commission therefore makes the following recommendation.

80. When government entities act as market participants, the courts should apply the same test for application of the state action doctrine to them as the courts apply to private parties seeking immunity under the state action doctrine.*

2. STATUTORY EXEMPTIONS FROM THE ANTITRUST LAWS

A. Introduction

As discussed in Part 1.A, above, statutory antitrust exemptions should be disfavored as likely to harm both U.S. consumers and the U.S. economy.[66] A wide variety of antitrust exemptions, both partial and whole, currently exists in federal law, as listed in Annex A. Rather than examine each antitrust exemption individually, the Commission concluded that articulating relevant general principles that Congress may wish to use in determining whether to abolish, renew, or adopt particular antitrust exemptions would be its best contribution. The Commission's recommendations are discussed in more detail below.

* Commissioners Burchfield, Garza, and Kempf do not join this recommendation.

B. Background

1. History of and Justifications for Antitrust Exemptions

"[V]igorous competition, protected by the antitrust laws, does the best job of promoting consumer welfare and a vibrant, growing economy."[67] Nonetheless, in response to concerns about particular societal values, Congress has at times exempted certain groups or activities from the full or partial application of the antitrust laws.[68] Exemptions from the antitrust laws have existed since the passage of the Clayton Act in 1914.[69] Most recently, Congress passed the medical resident matching program exemption in 2004, which immunizes sponsoring, conducting, or participating in a graduate medical education residency matching program.[70] Congress, of course, is entitled to make judgments about the extent to which competition is in the public interest and when other societal values trump the aims of antitrust law.[71]

The creation of antitrust exemptions is made easier by the disparity in the nature of the benefits they create and the costs they impose.[72] While the benefits of exemptions generally flow to small, concentrated interest groups, the costs are typically passed on to a large population of consumers through higher prices, reduced output, lower quality, and reduced innovation.[73] The concentrated benefits provide incentives for interested parties to seek immunities from Congress, while the diffuse costs often have sufficiently minimal impact on individual consumers that those consumers are unlikely to oppose the creation of immunities.[74]

2. Examples of Different Kinds of Antitrust Exemptions

Congress has adopted varying types of antitrust exemptions; most are unique. Among other things, these exemptions differ in terms of the scope of conduct exempted from antitrust law and whether some degree of potential antitrust liability remains (for example, single damages or the possibility of injunctive relief). Attempts at categorizing them are difficult and often unhelpful. Indeed, regardless of their nature, exemptions are harmful. Nonetheless, to describe the problem of exemptions without a description of specific immunities would fail to convey their pernicious nature.

Some exemptions provide a limited immunity for specific conduct. Examples include the Health Care Quality Improvement Act, which provides limited immunity from antitrust damages (but not from equitable relief) for physicians participating in professional peer review bodies in which they review other physicians' conduct;[75] and the Standards Development Organization Advancement Act, which provides for rule of reason assessment and limits antitrust damages to actual damages for certain kinds of standards development organizations that form joint ventures or engage in standards development activities.[76] Another example is Title III of the Export Trading Company Act of 1982, which allows any person engaged in export trade to request a Certificate of Review from the Department of Commerce, conferring immunity from criminal antitrust actions as well as treble damages in civil antitrust actions for activities specified in the Certificate, so long as the applicant establishes that its export trade and methods of operation will not adversely affect competition in the United States.[77] The Webb-Pomerene Act similarly provides an exemption to Sherman Act provisions for associations formed solely to engage in export trade, on the condition that the association is not adversely affecting competition in the United States.[78]

Other exemptions apply to narrow areas but provide a broader immunity—often complete immunity from the antitrust laws. Examples include antitrust immunity for marketing alliances between domestic and foreign airlines that are approved by the Department of Transportation;[79] the Charitable Donation Antitrust Immunity Act, which gives antitrust immunity to charitable institutions that set the annuity rate for gift annuities or charitable remainder trust agreements;[80] the Defense Production Act, which provides antitrust immunity for conduct undertaken in developing or carrying out a voluntary agreement or plan of action for the President that is necessary for the defense of the United States;[81] the Need-Based Educational Aid Act, which provides an antitrust exemption to certain joint actions taken by institutions of higher education regarding awards of financial aid to students;[82] and the Soft Drink Interbrand Competition Act, which provides an antitrust exemption for the grant of exclusive territories to soft-drink bottlers by soft-drink trademark holders in trademark licensing agreements.[83]

Exemptions may instead apply broadly, but provide only limited immunity (from multiple damages, for example). Examples include the Local Government Antitrust Act (LGAA), which precludes treble damages actions against local governments, their officers and employees acting in an official capacity, or private persons whose conduct is directed by a local government;[84] and the National Cooperative Research and Production Act (NCRPA), which provides for rule of reason assessment and limits antitrust damages to actual damages for joint ventures for the purpose(s) of research, development, or production (except for certain specified conduct), if the joint venture has first been notified to the Antitrust Division of the Department of Justice (DOJ) and the FTC.[85]

Finally, some exemptions create a broad immunity for entire areas or types of commerce. For example, the Capper-Volstead Act provides antitrust immunity for persons engaged in the production of agricultural products acting together in associations to process, prepare, handle, or market such products, unless the conduct would violate Section 2 of the Sherman Act or "unduly enhance" prices of agricultural products.[86] The McCarran-Ferguson Act grants an exemption to "the business of insurance" to the extent it is regulated by state law, unless the conduct involves an agreement or act to "boycott, coerce, [or] intimidat[e]."[87] The statutory labor exemption "enables workers to organize to eliminate competition among themselves, and to pursue their legitimate labor interests, so long as they do not combine with a nonlabor group."[88] The Shipping Act exempts a wide variety of agreements filed with the Federal Maritime Commission, including those in which shipping "conferences"—that is, groups of competing ocean liner shipping companies—formally agree to specific terms of service, including fixing rates.[89]

C. Recommendations and Findings

57. Statutory immunities from the antitrust laws should be disfavored. They should be granted rarely, and only where, and for so long as, a clear case has been made that the conduct in question would subject the actors to antitrust liability *and* is necessary to satisfy a specific societal goal that trumps the benefit of a free market to consumers and the U.S. economy in general.

58. In evaluating the need for existing or new immunities, Congress should consider the following:

- **Whether the conduct to which the immunity applies, or would apply, could subject actors to antitrust liability;**
- **The likely adverse impact of the existing or proposed immunity on consumer welfare; and**
- **Whether a particular societal goal trumps the goal of consumer welfare, which is achieved through competition.**

Congress should first determine whether the conduct covered, or to be covered, by an antitrust exemption could in fact violate the antitrust laws. If not, immunity from the antitrust laws is unnecessary. This step is especially important given the changes in the antitrust laws over the past thirty to forty years. As discussed in Chapter I.A, the substantive application of the antitrust laws has become more economically sophisticated and flexible. Conduct that may have been at risk for the application of per se rules of automatic illegality at the time an antitrust exemption was adopted may now be far more likely to be evaluated under the rule of reason, which examines likely procompetitive, as well as anticompetitive, effects.

Congress should also carefully weigh the harms of an antitrust exemption to consumer welfare.[90] Any decision to allow an exemption should "be made reluctantly and only after thorough consideration of each particular situation."[91] A proposed exemption should be recognized as a decision to sacrifice competition and consumer welfare, and should be allowed only if Congress determines that a substantial and significant countervailing societal value outweighs the presumption in favor of competition and the widespread benefits it provides.[92]

Congress, of course, is entitled to make judgments regarding what societal values may trump the goals of antitrust law. The Commission finds two arguments in favor of antitrust exemptions particularly unpersuasive, however. First, no immunity should be granted to create increased certainty in the form of freedom from antitrust compliance and litigation risk.[93] Antitrust compliance and litigation risks are costs of doing business that hundreds of thousands of American businesses manage every day. No particular companies or industries should be specially entitled to avoid those costs; if these costs are unreasonable, broader reform applicable to all businesses is the proper remedy.* Second, no immunity should be granted to stabilize prices in order to provide an industry with certainty and predictability for purposes of investment or solvency.[94] This too is a benefit that all industries would appreciate, but that none should be singled out to receive. The costs of price "stability" typically flow to consumers and result in inflexibility that undermines economic growth. Indeed, these were two of the justifications offered in support of the three exemptions on which the Commission held hearings.

For example, some proponents of the McCarran-Ferguson Act's antitrust exemption for the business of insurance maintain the exemption is necessary to allow insurers, among other things, to collect, aggregate, and review data on losses (both historical and projected) so they can better set their rates to cover their likely costs.[95] They argue that the sharing of such historical and trending data is needed especially by smaller insurers that otherwise would be unable reasonably to assess risk and compete effectively.[96] Like all potentially beneficial competitor collaboration generally, however, such data sharing would be assessed by antitrust enforcers and the courts under a rule of reason analysis that would fully consider the potential procompetitive effects of such conduct and condemn it only if, on balance, it was anticompetitive.[97] Insurance companies would bear no greater risk than companies in other industries engaged in data sharing and other collaborative undertakings. To the extent that insurance companies engage in anticompetitive collusion, however, then they appropriately would be subject to antitrust liability.

A related and equally questionable justification appears in support of the antitrust exemption under the Shipping Act. Although Congress substantially modified the Shipping Act in 1998 to allow individually negotiated rates, which has sharply reduced ocean carriers' use of jointly set "conference rates,"[98] proponents assert that an antitrust exemption remains necessary for other purposes. They maintain that carriers need an antitrust exemption to adopt more efficient practices jointly, such as agreements that allow ocean carriers to share certain equipment at ports in order to reduce congestion.[99] Acknowledging the possibility that such agreements could withstand antitrust scrutiny, one witness maintained that the ocean carriers nevertheless would not attempt them absent the certainty that no antitrust liability would result.[100] The witness emphasized the enormous investments of ocean carriers and the need to eliminate even the potential for antitrust liability.[101]

However, this reasoning reduces to an argument that ocean carriers should not be subject to the same costs of doing business as other industries. These costs of doing business

* Although Commissioner Burchfield agrees that increased certainty and freedom from litigation risk are not justifications for antitrust immunity, he believes that programs by federal and state governments to review business practices in advance of their implementation to confirm the legality of those practices under existing antitrust standards are useful, but currently underused, and should be encouraged.

include managing firms' conduct to comply with antitrust, and many other, laws. All kinds of businesses across the United States—including firms that make investments comparable to or greater than those of ocean carriers—comply with the antitrust laws as they plan their activities, including joint activities with competitors. This is not hypothetical economic theory;[102] it is how hundreds of thousands of firms do business every day. Because they must comply with the antitrust laws, these firms structure their activities to avoid anticompetitive effects.[103] This promotes consumer welfare. There does not appear to be anything unique about ocean carriers that would merit holding them to a lesser standard.

Indeed, contrary to the asserted need for an immunity, ocean shipping provides a good example of an industry that now operates more efficiently with competition than without. An exhaustive survey of ocean shipping has found that:

> [t]he steepest declines in observed freight rates have coincided with a generalised decrease in conference power in the face of competition from strong independent operators and the implementation of competition-enhancing legislation in the United States trades . . . . Carriers have delivered better quality and more shipper-responsive services in recent years. This improvement in shipping services has not come about because of price fixing, but, rather, has accompanied a decline in conference power and an increase in competition.[104]

These justifications are similarly wanting with respect to the Export Trading Company Act (ETC Act).[105] Title III of the ETC Act creates a limited antitrust exemption for U.S. companies that jointly export goods or services, provided there is no substantial lessening of competition within the United States. Such joint export-oriented activities are not subject to criminal antitrust liability or treble damages.[106] The ETC Act creates a rebuttable presumption that U.S. antitrust laws are not violated by a covered company's joint conduct to export with other firms as long as it complies with an Export Trade Certificate of Review issued by the Commerce Department (and reviewed by the DOJ).[107]

Proponents of the ETC Act claim that it promotes exports, especially by small and medium-sized companies that "would not be able to export, or not be able to export on a sustained basis" without an antitrust exemption for their joint conduct.[108] Small and medium-sized enterprises constitute the vast majority of companies covered by Certificates of Review.[109] Proponents argue that the ETC Act exemption is necessary for these companies because it provides assurance that specified conduct does not violate the U.S. antitrust laws and will not result in a government antitrust action against the exporters.[110]

The Commission sees no reason, however, why these companies should be held to a lesser standard of antitrust compliance than any other companies doing business. The Department of Commerce explained that the ETC Act does not actually exempt conduct from the antitrust laws because a Certificate would not issue covering conduct that would violate those laws.[111] In that case no antitrust exemption should be necessary.

The ETC Act raises a particularly acute concern insofar as it can be characterized as granting a limited immunity to U.S. companies engaging in cartel behavior in foreign markets. It is inconsistent for U.S. antitrust enforcers to emphasize to foreign antitrust enforcers the importance of cartel enforcement at the same time that U.S. law immunizes what some consider to constitute overseas cartel behavior by American firms.*

These are only three of more than thirty antitrust exemptions. The Commission does not mean to imply that these three are the only antitrust exemptions that warrant scrutiny, however. Although the Commission was not in a position to study all antitrust exemptions in depth, it heard no compelling justification for any of the exemptions on which it held hearings.[112] Such justifications, as discussed above, seemed to overestimate the potential for antitrust liability for the immunized conduct or seek a special exception from the same costs of legal compliance as are borne by other firms in the United States. Claimed justifications for antitrust exemptions require careful scrutiny and testing against legal and marketplace realities.

59. The following steps are important to assist Congress in its consideration of those factors:

- **Create a full public record on any existing or proposed immunity under consideration by Congress.**
- **Consult with the Federal Trade Commission and the Antitrust Division of the Department of Justice about whether the conduct at issue could subject the actors to antitrust liability and the likely competitive effects of the existing or proposed immunity.**
- **Require proponents of an immunity to submit evidence showing that consumer welfare, achieved through competition, has less value than the goal promoted by the immunity, and the immunity is the least restrictive means to achieve that goal.**

* Commissioners Burchfield and Garza do not join the Commission's conclusions with respect to the ETC Act.

Commissioner Burchfield believes that the certainty provided to small exporters by the ETC Act is worthwhile. Furthermore, he would not suggest that the ETC Act is deserving of special criticism among all the other exemptions.

In Commissioner Garza's view, the ETC Act has not been shown to have had anticompetitive effects. It is also consistent with a proposal she favors to limit treble damage exposure for overt conduct subject to the rule of reason. It is also erroneous, in her view, to equate joint export activity by small and medium-sized companies with criminal "cartels," especially given that a Certificate of Review will not be issued over the objection of the Justice Department.

Congress should develop a complete public record when it considers whether to abolish, renew, or enact antitrust exemptions.[113] Gathering information from a broad range of sources and through various means, including public hearings, is vital for sound policy and well-reasoned decision-making.[114] Ensuring that the information gathered is available to all interested persons enables identification of any errors or omissions in the record, facilitates more input to Congress, and provides context regarding the purpose and scope of the immunity at issue.[115] Moreover, providing a substantial legislative history that explains the reasons for a particular exemption can provide a baseline against which to compare assumptions and conditions at the time of passage with data obtained at a later time when the immunity may once again be under consideration.[116]

Congress should consult with the antitrust agencies on whether the conduct at issue could subject the actors to antitrust liability and the competitive effects of the immunity.[117] The agencies already informally provide their views on proposed immunities and do so formally when called upon.[118]

Further, Congress should require proponents of an immunity to submit evidence demonstrating that the benefits of competition are less important than the societal value promoted by the immunity under consideration, and that the proposed immunity is the least restrictive means to achieve that value.[119] The proponent of an antitrust exemption should explain why conduct within the scope of a proposed immunity is both in the public interest and unlawful under the antitrust laws; estimate the ancillary effects of the proposed immunity; and demonstrate that the immunity is essential to achieve the desired policy outcome.[120] This would require the proponent to show there is no less restrictive alternative to achieve the benefits of the exemption.[121]

The burden of justifying any immunity should fall on the proponents of that immunity, because they "are in an inherently unique position to provide that information as to the relative merits of the immunity."[122] Exemptions from the antitrust laws should require ongoing proof of their justification and necessity.[123]

60. If Congress determines that a particular societal goal may trump the benefit of a free market to consumers and the U.S. economy in general, Congress should take the following steps:

- **Consider a limited form of immunity—for example, limiting the type of conduct to which the immunity applies and limiting the extent of the immunity (for example, a limit on damages to actual, rather than treble, damages).**

- **Adopt a sunset provision pursuant to which the immunity or exemption would terminate at the end of some period of time, unless specifically renewed.**

- **Adopt a requirement that the Federal Trade Commission, in consultation with the Antitrust Division of the Department of Justice, report to Congress, before any vote on renewal, on whether the conduct at issue could subject the actors to antitrust liability and the likely competitive effects of the immunity proposed for renewal.**

Limited Form of Immunity. If Congress decides an antitrust exemption may be an appropriate course of action, it first should consider precisely what conduct may require an antitrust exemption. The scope of conduct to be immunized should be as limited as possible. In addition, Congress should consider whether full immunity from antitrust liability is necessary to achieve the societal value at issue. It may be sufficient instead to limit potential civil antitrust remedies.[124] An antitrust exemption that reduces treble damages to single damages is preferable to a broader exemption that would more significantly restrict the ability of the antitrust laws to combat anticompetitive behavior.[125] Two examples of such an approach are the NCRPA and the Standards Development Organization Advancement Act, both of which restrict monetary remedies to actual damages for conduct taken in accordance with the acts' terms.[126]

Sunset Provision. Congress also should consider a "sunset" provision for any antitrust exemption it adopts or reconsiders. Sunset provisions would allow Congress to take into account changed circumstances that may make an immunity socially harmful.[127] They help ensure that immunity-granting legislation is interpreted in accordance with congressional intent.[128] Sunset provisions allow Congress to restudy an issue regularly, leading to more frequent input from interested groups.[129] To date, sunset provisions have been used only very rarely for antitrust exemptions.[130] Once an exemption is adopted, it is rarely revisited. Especially when vested interests are at stake, it is often difficult to get renewed consideration of the need for an antitrust exemption, even if it proves ineffective or harmful.

Periodic consideration of exemptions is important. Statutory exemptions can cement the economic understanding of market circumstances at a particular point in time. The justifications claimed for statutory exemptions from the antitrust laws warrant a great deal of skepticism, particularly if the exemption was originally created decades ago. Changes in technology, competitive forces, or economic learning can render an exemption completely obsolete.[131] Many were enacted at a time when the U.S. economy was very different from today. Moreover, revolutions in communications, transportation, and business methods have lowered transactions costs and substantially changed the ways in which firms and industries operate.[132] International competition now affects many more industries than previously was the case. Antitrust analysis itself has changed substantially in recent decades. Thus, even if one assumes there may have been valid economic justifications for specific industry exemptions in the past, it is highly questionable whether those justifications remain valid.[133]

To prevent the retention of antitrust exemptions for decades after their reasons for being have disappeared, Congress should impose a sunset provision on all immunities it enacts.[134] The Commission does not intend this recommendation to encourage the adoption of antitrust exemptions on the rationale that they can be reconsidered at a later time.[135] Rather, if Congress goes so far as to adopt or renew an antitrust exemption, it is important to ensure it does not become set in stone, but rather must be justified on a recurring basis. Existing immunities also should be amended to include sunset provisions and should be reviewed using the framework proposed by this Commission.

The mechanics of this approach would require all statutorily created antitrust immunities to terminate after a set period of time, unless specifically renewed by an affirmative act of Congress after thorough reconsideration of the justification for and the evaluation of the actual operation of the exemption.[136] Congress can then determine whether to initiate a renewal process. Prior to the expiration of the sunset period, policymakers should hold public hearings regarding possible renewal of the immunity.[137] In addition to examining the historical record of an immunity, policymakers should collect new information that was not available previously but could be relevant to their current analysis of that immunity. Key issues would include: (1) whether economic or legal conditions have changed such that an immunity no longer is necessary; (2) whether alternatives could remedy the alleged problem with less impact on competition; and (3) what effects the immunity has had since its passage or last renewal.[138]

Report from FTC. Congress should require that, before any vote on renewal of an exemption, the FTC, in consultation with the DOJ, report to Congress on whether the conduct at issue could subject the actors to antitrust liability, and the competitive effects of the immunity proposed for renewal. FTC Chairman Deborah Platt Majoras testified that such studies of competitive effects are very resource-intensive, but that the FTC would consider undertaking such studies if given sufficient resources.[139] Another way to implement this recommendation could be to direct the FTC to sponsor studies undertaken by academics or others as appropriate.

61. Courts should construe all immunities and exemptions from the antitrust laws narrowly.

Congress should grant only those immunities that are narrowly drafted, so that competition is reduced only to the minimum extent necessary to achieve the intended goal.[140] Congress commonly puts limits on its exemptions,[141] and has at least once explicitly directed that a statutory exemption be construed narrowly.[142]

Further, courts should construe all immunities narrowly and against the beneficiary.[143] Doing so would restrict their more expansive interpretation and emphasize the importance of Congress's enacting clear statutory language.[144]

3. REGULATED INDUSTRIES, THE TRANSITION TO DEREGULATION, AND ANTITRUST LAW

A. Introduction

During the early part of the twentieth century, a variety of industries were considered subject to market failures, such as natural monopoly or an inability to survive "excessive competition." In such industries, Congress typically created administrative agencies to oversee economic functioning, particularly prices, costs, and entry (known as "economic regulation").[145] Regulation was intended to limit the exercise of monopoly power and advance the objective of reliable service, provided on non-discriminatory terms, through rate and service regulation.[146] Under such regulation, there is only a limited role for antitrust law.[147] Indeed, economic regulation ultimately can be the "antithesis" of competition, tending to preserve monopolies and other non-competitive market structures by restricting entry, controlling price, skewing investment, and limiting or delaying innovation.[148]

A movement toward deregulation, however, now has taken place in almost all regulated industries.[149] Various factors have moved public policy in the United States toward deregulation of formerly regulated industries.[150] Technological progress has facilitated the growth of competition in industries previously considered natural monopolies.[151] In addition, critiques of regulation began to emerge as early as 1960, when a significant report concluded that "most federal regulatory agencies ha[ve] taken sides with the regulated firms at the expense of the public interest," and that the costs of regulation were significantly more than anticipated.[152] Others expanded on these critiques, pointing out that regulation often distorts firms' incentives and rewards inefficiency rather than reduced costs and innovation.[153] Some conclude that, in many instances, "regulation reflects successful rent-seeking by private economic interests and generally reduces consumer welfare by restricting output."[154]

B. Recommendations and Findings

Congress's decision broadly to deregulate has brought substantial benefits to U.S. consumers and the U.S. economy.[155] The trend toward deregulation should be furthered where practicable. Free-market competition generally promotes efficiency and thus benefits consumer welfare, while economic regulation often results in inefficiency that increases prices to consumers. In the vast majority of cases, competition is more likely to benefit consumers than is economic regulation. The Commission therefore makes the following general recommendation, and several others set forth below.

62. Public policy should favor free-market competition over industry-specific regulation of prices, costs, and entry. Such economic regulation should be reserved for the relatively rare cases of market failure, such as the existence of natural monopoly characteristics in certain segments of an industry, or where economic regulation can address an important societal interest that competition cannot address. In general, Congress should be skeptical of claims that economic regulation can achieve an important societal interest that competition cannot achieve.

1. The Application of Antitrust Law in Regulated and Deregulated Industries

When and how to apply antitrust law in the context of regulated industries and industries undergoing deregulation has prompted confusion from time to time. Even in industries governed predominantly by regulation, antitrust can still play a limited role.[156] At the other end of the spectrum, once deregulation has been completed and the public relies solely on competition and market forces, the antitrust laws should apply fully to deter or challenge anticompetitive conduct.

63. When the government decides to adopt economic regulation, antitrust law should continue to apply to the maximum extent possible, consistent with that regulatory scheme. In particular, antitrust should apply wherever regulation relies on the presence of competition or the operation of market forces to achieve competitive goals.

The precise point at which an industry passes from regulation to competition requiring antitrust enforcement typically is not easy to discern. The deregulation of entire industries cannot always be instantaneous, of course, so transition mechanisms may be necessary.[157] In addition, certain segments of industries may require ongoing regulation if natural monopoly characteristics remain that hinder effective competition there.[158] Thus, questions have arisen about whether antitrust law should apply to regulated industries, particularly those undergoing transition from regulation to deregulation.

In many industries that have undergone deregulation, policymakers have found particular circumstances in which monopolistic market structures and residual areas of potential monopoly power, often called "bottlenecks," continue to require some form of regulation.[159] In these circumstances, it is crucial to apply sound economic principles so that regulated and unregulated portions of industry do not work at cross-purposes and thereby harm consumer welfare.[160] One authority on deregulation stated:

> Where competition is not feasible throughout an industry or market, as in the traditional public utilities, entry of unregulated competition can introduce distortions so severe as to make the mixed system the worst of both possible worlds. The preferable remedy is not to suppress the competition, but to make the residual regulation as consistent as possible with it.[161]

As Congress continues to assess ongoing regulation and deregulation in particular industries, it is important to keep in mind that the application of antitrust law is a necessary component of a reliance on competition. Antitrust law generally has a more significant role to play as an industry moves toward less direct regulation.[162] "In essence, [the antitrust laws] promote competition so that competition itself can bring us its economic benefits."[163]

This general principle has a number of applications, two of which are explained below.

a. Savings Clauses and Implied Immunities

64. Statutory regulatory regimes should clearly state whether and to what extent Congress intended to displace the antitrust laws, if at all.*

65. Courts should interpret savings clauses to give deference to the antitrust laws, and ensure that congressional intent is advanced in such cases by giving the antitrust laws full effect.†

Congress can specify the extent to which antitrust law should apply to regulated industries by including savings clauses in legislation involving those industries. Antitrust savings clauses clarify the extent to which Congress intends to preserve the role of antitrust enforcement in a regulatory environment.[164] They make clear that Congress did not intend the courts to imply immunity from the antitrust laws for conduct covered by a regulatory regime.[165] Where a savings clause does not exist, the courts must "discern the intent behind complex statutes and regulatory schemes, and fill in the gaps" of such legislation.[166] This may result in outcomes not intended by Congress.

Congress should articulate clearly the extent to which it intends a regulatory regime to displace the antitrust laws, if at all. A savings clause that addresses this issue can help courts determine whether an immunity from antitrust law should be implied from the regulatory scheme, which can reduce uncertainty and litigation costs. The use of savings claus-

* Commissioner Warden does not join this recommendation. In his view, this and the following recommendation do not recognize the myriad of conflicts between regulatory and antitrust regimes that arise in the real world and are unforeseen when regulatory statutes are enacted.

† Commissioners Garza and Warden do not join this recommendation.

Commissioner Warden does not join this recommendation for the reason stated in the previous note.

es can help avoid results that conflict with Congress's intent in creating the regulatory scheme.

66. Courts should continue to apply current legal standards in determining when an immunity from the antitrust laws should be implied, creating implied immunities only when there is a clear repugnancy between the antitrust law and the regulatory scheme at issue, as stated in cases such as *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*.*[*]

In the absence of a savings clause, courts will determine whether the regulatory scheme is so pervasive that Congress is "assumed to have foresworn the paradigm of competition."[167] The analysis of implied immunities begins with the "cardinal principle of construction that repeals by implication are not favored."[168] This principle reflects a presumption that Congress does not intend to limit the scope of the antitrust laws except where it expressly says so.

As the Supreme Court explained in *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, "[i]mplied antitrust immunity . . . can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system."[169] The Court further stated that "[r]epeal is to be regarded as implied only if necessary to make the [subsequent regulatory scheme] work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the [antitrust and regulatory] statutory schemes."[170] In fact, "[e]ven when an industry is regulated substantially, this does not necessarily evidence an intent to repeal the antitrust laws with respect to every action taken within the industry."[171] An implied immunity is limited to the particular activity challenged and does not extend to other conduct regulated by the same agency."[172] Although the Supreme Court is likely to address this standard in *Billing v. Credit Suisse First Boston Ltd.* this term,[173] the Commission agrees that *National Gerimedical* provides the proper standard for determining whether to imply an immunity from antitrust law.

67. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko LLP* is best understood only as a limit on refusal-to-deal claims under Section 2 of the Sherman Act; it does not displace the role of the antitrust laws in regulated industries.

[*] Commissioner Delrahim does not join this recommendation.

The appropriate application of antitrust savings clauses and when to imply an immunity from the antitrust laws was most recently raised by the Supreme Court's decision in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko LLP*, involving the Telecommunications Act of 1996 (1996 Act).[174] In that case Trinko alleged that Verizon violated Section 2 of the Sherman Act by breaching certain interconnection duties under the 1996 Act.[175] Trinko was a customer of AT&T's local telephone service and allegedly suffered antitrust injury when he received "poor local phone service" due to Verizon's failure to fulfill its statutory duty to provide certain services to AT&T.[176]

When Congress enacted the 1996 Act, it permitted companies providing local telephone service to provide long-distance service as well, if they fulfilled certain duties to enable competitors to enter the local telephone service market.[177] To facilitate this new competition in the local telephone service market, local telephone companies (such as Verizon) were required to provide competitors (such as long-distance companies like AT&T) non-discriminatory access to certain network elements necessary to provide local telecommunication service.[178] Verizon agreed to abide by these new duties in order to enter the long-distance telephone service market.[179] When Verizon allegedly did not comply with its statutory duties under the 1996 Act, federal and state regulators penalized Verizon.[180] The New York state regulator issued orders requiring Verizon to pay $10 million to its injured competitors, and pursuant to a Federal Communications Commission (FCC) consent decree, Verizon agreed to pay $3 million to the U.S. Treasury.[181]

The question before the Supreme Court was "whether a complaint alleging breach of the incumbent's duty under the 1996 Act to share its network with competitors states a claim under § 2 of the Sherman Act."[182] The Court held that the Act's antitrust savings clause precluded the courts from implying immunity from the antitrust laws.[183] In applying the antitrust laws, however, the Court concluded that Verizon's alleged violations of the 1996 Act did not constitute a violation of the Sherman Act.[184] The Court concluded that "traditional antitrust principles" do not justify adding "insufficient assistance in the provision of service to rivals" under the 1996 Act to "the few existing exceptions from the proposition that there is no duty to aid competitors."[185] Thus, the Court's statements indicate that its holding simply confirms the limits on the circumstances that can give rise to a duty to deal under Section 2.

To be sure, there is language in the case that some have construed as suggesting that the Court failed to apply the antitrust laws fully because the alleged refusal to deal arose in the context of the regulatory regime established by the 1996 Act. Thus, they suggest, despite the savings clause, the Court created an implied immunity. For example, in part four of its decision, the Court opined that it must consider the importance of the "existence of a regulatory structure designed to deter and remedy anticompetitive harm" when evaluating antitrust claims.[186] This language must be read in the proper context, however. After deciding that Trinko's claim did not state a cause of action under traditional antitrust law, the Court then examined whether the regulatory regime established by the 1996 Act provided a reason to *expand* the contours of antitrust doctrine beyond the usual limits. The Court concluded it did not. The Court simply held that the specific, regulatory duties to deal established under the 1996 Act did not also create a new cause of action under the refusal-to-deal doctrine of Section 2 of the Sherman Act.[187] *Trinko* is thus best understood only as a limit on refusal-to-deal claims under Section 2 of the Sherman Act. It should not be read to displace the role of the antitrust laws in regulated industries as an implied immunity, nor should it be taken as a judicial rejection of a savings clause.

*b. Filed-Rate Doctrine (*Keogh *Doctrine)*

The filed-rate doctrine, also known as the *Keogh* doctrine,[188] prohibits a private plaintiff from pursuing an antitrust action seeking treble damages where the plaintiff is claiming that a rate submitted to, and approved by, a regulator resulted from an antitrust violation.[189] At the time this doctrine was created, members of a regulated industry were typically required to file their proposed rates with regulators who reviewed the rates to ensure they were "fair and reasonable." In creating the "filed rate" doctrine in *Keogh v. Chicago & Northwestern Railway*, the Supreme Court explained that only the relevant regulatory authority could change these rates, even if the rate was higher than it otherwise would be due to a price-fixing conspiracy.[190]

Since deregulation, however, many industry members are no longer required to file their rates with regulators. For example, rail and motor carriers are generally no longer required to file rates with the Surface Transportation Board (STB).[191] Similarly, in the electricity industry many rates are market-based and, although filed with a regulatory agency after they go into effect, are not reviewed for reasonableness.[192] Nonetheless, courts have continued to apply the filed-rate doctrine to preclude antitrust claims where a tariff has been filed with a regulatory agency, regardless of whether the agency has actually reviewed and approved the rate.[193]

68. Congress should evaluate whether the filed-rate doctrine should continue to apply in regulated industries and consider whether to overrule it legislatively where the regulatory agency no longer specifically reviews proposed rates.

Some commentators have questioned in recent years whether courts should continue to apply the filed-rate doctrine to market-based rates that are merely submitted to regulatory agencies as a formality and are not substantively reviewed.[194] In 1986 the Supreme Court reviewed the filed-rate doctrine and conceded that a variety of developments had cast the original reasoning for the *Keogh* doctrine "in a different light."[195] Nonetheless, the Court concluded, it was for Congress, not the Court, to determine whether to abolish the filed-rate doctrine.[196] The Commission believes the time has come for Congress to address the issue, especially since the movement to deregulation has continued, and even grown, since the Court's 1986 decision.

2. Merger Review in Regulated Industries

As discussed in Chapter I.B, the antitrust agencies examine mergers and acquisitions notified to the agencies pursuant to the HSR Act to determine whether a proposed transaction may substantially lessen competition.[197] The antitrust agencies apply the same merger analysis to all industries, including those that formerly were regulated.

Four industries remain in which a regulatory agency also has merger review authority: certain aspects of electricity (regulated by the Federal Energy Regulatory Commission (FERC)); telecommunications/media (regulated by the FCC); banking (regulated by various banking agencies); and railroads (regulated by the STB).[198] In those industries the regulatory authority typically reviews a proposed transaction under its statutory public interest standard. The "public interest" standard, which varies by industry, usually requires the agency to review both likely competitive effects and likely public interest effects. For example, in reviewing a proposed transaction, the FCC takes into account possible effects on the diversity of views available and the obligation to provide universal service, as well as likely effects on competition.[199] Thus, the regulatory authority could allow a transaction if it determines that the public interest benefits offered by the proposed transaction outweigh its likely anticompetitive effects.

In the first two of those four industries—electricity and telecommunications—the DOJ has full enforcement authority to investigate and challenge a proposed merger under the Clayton Act, regardless of the regulatory agency's authority pursuant to its regulatory statute.[200] In both instances, the regulatory agencies also consider competition as one part of their broader public interest review.[201]

A slightly different approach controls in the area of banking. There, the federal banking agency considers likely competitive effects, along with financial soundness and other banking-specific concerns.[202] The DOJ provides its competitive analysis to the banking agency, and, in practice, the banking agency and the DOJ usually work closely together to agree on the proposed transaction's likely competitive effects.[203] The banking agency has authority to depart from the DOJ's competition-based recommendations, however, and this has occurred a few times, although not in the recent past.[204] If the banking agency approves the merger over the DOJ's objections, the DOJ has full independent authority to challenge the banking agency's decision in court.[205] Pursuant to the Bank Merger Act, the court applies a standard that differs slightly from Section 7 of the Clayton Act: a merger can overcome an otherwise successful challenge on competition grounds if the merging parties demonstrate the anticompetitive effects are "clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served."[206]

The fourth industry is railroads, where Congress, in abolishing the Interstate Commerce Commission (ICC) in 1995, transferred the ICC's historical railroad merger review authority to the STB.[207] The STB reviews mergers under a public interest standard that incorporates several considerations, including whether the proposed transaction would have an "adverse effect on competition."[208] By statute, the STB must give "substantial weight" to the DOJ's views on whether the transaction will adversely affect competition, but the STB makes the final decision on whether to allow the merger.[209] In 1996 the STB approved the merger between Union Pacific and Southern Pacific, despite the DOJ's objections that the merger was anticompetitive.[210] Unlike under the Bank Merger Act, the DOJ does not have independent authority to challenge a transaction in this industry.[211]

a. Statutory Authority to Review Mergers in Regulated Industries

69. Even in industries subject to economic regulation, the antitrust agencies generally should have full merger enforcement authority under the Clayton Act.*

70. For mergers in regulated industries, the relevant antitrust agency should perform the competition analysis. The relevant regulatory authority should not re-do the competition analysis of the antitrust agency.

71. The federal antitrust agencies and other regulatory agencies should consult on the effects of regulation on competition.

72. The antitrust enforcement agencies and courts should take account of the competitive characteristics of regulated industries, including the effects of regulation.

73. Mergers in regulated industries should be subject to the requirements of the Hart-Scott-Rodino Act, if they meet the tests for its applicability, or to an equivalent pre-merger notification and investigation procedure, such as set forth in the banking statutes, so that the relevant antitrust agency can conduct a timely and well-informed review of the proposed merger.

Merger review in industries still subject to some degree of regulation should place responsibility for the analysis of particular issues with the agency with the relevant expertise and should aim to make this dual review as efficient as possible. Merger review by two federal agencies can impose significant and duplicative costs on both the merging parties

* Commissioner Kempf does not join this recommendation.

While joining this recommendation, Commissioner Warden sees no reason to alter the present regime for review of bank mergers.

and the agencies. In addition, conflicts have sometimes arisen, for example as explained above when the STB approved a railroad merger despite a conclusion by the DOJ that it would substantially lessen competition.

The antitrust agencies have unique expertise in evaluating the likely competitive effects of mergers. Therefore, the antitrust agencies should be responsible for analysis of the likely competitive effects of mergers in regulated industries. The regulatory agencies have expert understanding of the regulated industry, as well as knowledge of the particular "public interest" factors important to the regulated industry, which can be valuable to the analysis. The antitrust agencies would draw on the expertise of the industry regulator in conducting its competition analysis, much as they do today in defense industry mergers and others. The recommended approach would ensure competition policy and enforcement consistency, limit inefficiencies and delays associated with overlapping enforcement, align competition policy assessments across industries regardless of the existence of different regulatory agencies, facilitate transparency in decision-making, and allow the antitrust agencies to act where they have a comparative advantage.[212] It would also limit duplicative expenditure of resources and an inefficient allocation of scarce government resources, particularly where an industry regulator disregards the antitrust agency's analysis.[213] Moreover, because the continued transition to deregulation may result in additional proposals to consolidate firms in regulated industries, it is important to conduct proper competitive analyses to ensure such industries continue to become, or remain, competitive.[214]

This recommendation is consistent with recommendations reached by other organizations studying the interrelationship between regulatory and antitrust review of mergers. The International Competition Policy Advisory Committee (ICPAC), which reviewed this issue in 2000, recommended giving federal antitrust agencies exclusive jurisdiction to review mergers in regulated industries, as well as further study of issues relating to overlapping agency review.[215] In offering this recommendation, the ICPAC majority explained that overlapping sectoral and generalized agency authority threatens (1) efficient review; (2) substantive international convergence; (3) case-by-case cooperation; and (4) consistency and transparency.[216] The Organisation for Economic Co-operation and Development (OECD) has also addressed the issue of the relationship between antitrust and sectoral agencies, most recently during its February 2005 Global Forum on Competition. The OECD concluded that competition agencies are best suited for competition oversight and that sectoral agencies are best suited for technical regulation.[217] This view was also supported by the Business and Industry Advisory Committee to the OECD.[218]

Finally, to ensure the ability of the antitrust agencies to perform proper competitive analyses, regulated industries should be subject to HSR Act requirements. This will ensure that the antitrust agency reviewing the transaction has appropriate information with which to perform its competitive analysis. Where there is an equivalent mechanism by which the antitrust agencies are provided with information, as is the case with banking mergers, such that requiring pre-merger notification under the HSR Act would be redundant, the Commission sees no need for duplicative filing requirements.

b. Ongoing Evaluation of the Need for Regulatory Review of Mergers

74. Congress should periodically review all instances in which a regulatory agency reviews proposed mergers or acquisitions under the agency's "public interest" standard to determine whether in fact such regulatory review is necessary.

- **In its reevaluation, Congress should consider whether particular, identified interests exist that an antitrust agency's review of the proposed transaction's likely competitive effects under Section 7 of the Clayton Act would not adequately protect. Such "particular, identified interests" would be interests other than those consumers interests—such as lower prices, higher quality, and desired product choices—served by maintaining competition.**

Congress should periodically revisit statutes providing for merger review by regulatory agencies to determine whether such review remains necessary. Economic theory and recent experience have shown that free-market competition will protect consumer interests such as price, quality, and choice of products. The Commission believes that competition can in many cases provide the same benefits to consumers that regulatory agencies' public interest review also seeks to ensure. Furthermore, the Commission is not convinced that an anticompetitive merger can ever be in the "public interest." Because of this, merger review by regulatory agencies may not be beneficial to consumer welfare.

4. THE STATE ACTION DOCTRINE

A. Introduction

The states, like the federal government, generally rely on competition in the marketplace to produce lower prices, higher quality, and innovation. Nonetheless, also like the federal government, sovereign states can enact economic regulations to replace competition in particular situations, and individual states have done so. Courts developed the "state action" doctrine to identify situations in which a state's decision to displace competition with regulation trumps the general federal policy in favor of free markets and, therefore, overrides the application of federal antitrust law. Under the state action doctrine, courts can immunize from potential federal antitrust liability certain activity undertaken pursuant to a state regulatory regime or other state law.[219]

The Supreme Court created the state action doctrine more than sixty years ago in *Parker v. Brown*.[220] There, the Supreme Court upheld the legality of a California program regulating the marketing of raisins, concluding that Congress did not intend the Sherman Act expressly to preempt state economic regulation.[221] Absent such an express statement, the Court was reluctant to assume Congress had implicitly preempted state law. The Court explained, "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."[222] State sovereignty and federalism were, and still are, the underpinnings of Supreme Court state action jurisprudence.[223]

The state action doctrine applies not only to state governmental actors themselves, but also, in certain circumstances, to quasi-governmental entities and private actors. The actions of state governmental actors are generally immune from antitrust liability without further inquiry.[224] This is because "[w]hen the conduct is that of the sovereign itself . . . the danger of unauthorized restraint of trade does not arise."[225] What constitutes the state, however, has given rise to extensive litigation. For example, cities and other municipalities, public service commissions, and state regulatory boards are not the "state" for purposes of the state action doctrine.[226]

The actions of private economic actors, as well as of governmental or quasi-governmental entities not considered to be the "state," are immune from antitrust liability only if they pass the two-part test set forth in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*: (1) the challenged restraint must be "'one clearly articulated and affirmatively expressed as state policy,'" and (2) "the policy must be 'actively supervised' by the State itself."[227] The first requirement, that of clear articulation, serves to ensure that the state has affirmatively authorized departures from free-market competition.[228] The second requirement, that of active supervision, is intended to ensure that state action immunity "will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies."[229] In its most recent ruling on the state action doctrine, *FTC v. Ticor Title Insurance Co.*, the Supreme Court further explained the purpose of the active supervision inquiry is "not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices," but rather "to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties."[230] Local governments can obtain full or partial antitrust immunity. To obtain full state action immunity, conduct by local governments must meet the "clear articulation," but not the "active supervision," portion of the *Midcal* test.[231]

The Supreme Court's state action jurisprudence has demonstrated a desire to avoid immunizing conduct intended to benefit private, not governmental, purposes. Critics warn, however, that the lower courts increasingly have applied the *Midcal* test in ways that allow defendants to obtain antitrust immunity and thereby trump competition in situations where a state did not intend to displace competition. The ABA Antitrust Section believes that "[s]tate action immunity drives a large hole in the framework of the nation's competition laws."[232] In 2003 the FTC staff issued a report (the FTC State Action Report) recommending "clarification and re-affirmation of the original purposes of the state action doctrine to help ensure that robust competition continues to protect consumers."[233]

Critics raise other troubling issues as well. Some question whether courts have properly taken into account the potential for one state's endorsement of anticompetitive conduct to have spillover effects that raise prices or otherwise harm consumers in other states. Questions also have arisen about whether the state action doctrine should immunize conduct by state government entities and municipalities when they act as market participants. The Commission's recommendations are discussed below.

B. Background

1. The Midcal *Test for Activities of Non-Sovereign State Entities*

a. Clear Articulation

The clear articulation requirement is "directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy."[234] As one leading treatise explains:

> Adoption of a policy requiring a state to make a clear statement of its intention to supplant competition reconciles the interests of the states in adopting noncompetitive policies with the strong national policy favoring competition . . . . [I]t ensures that the strong federal policy embodied in the antitrust laws will not be set aside where not intended by the state, and yet also guarantees that the state will not be prevented by the antitrust laws alone from supplanting those laws as long as it makes its purpose clear.[235]

The Supreme Court has established certain parameters for the "clear articulation" test. On one end of the spectrum, "clear articulation" does not require that the state *compel* the anticompetitive conduct at issue.[236] The state also need not explicitly authorize specific conduct to satisfy this prong, as long as the state legislature's intent to establish a regulatory program displacing competition is "clear."[237] At the other end, a general grant of authority that is competition-neutral, such as the authority to operate a hospital or contract for taxi service, does not suffice to show "clear articulation."[238] In *Community Communications Co. v. City of Boulder* the Supreme Court declined to accept the argument that "the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances" because to do so "would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that our precedents require."[239]

The question is whether "the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure."[240] In *Southern Motor Carriers Rate Conference, Inc. v. United States* the Supreme Court reasoned that a state legislature's decision to set rates through a public service commission, rather than through market forces, clearly demonstrated its intention to displace competition in motor carrier ratemaking and thus satisfied the clear articulation requirement.[241] The Court also has used a "foreseeability" analysis to evaluate whether a state clearly intended to replace competition with a regulatory structure.[242] In *Town of Hallie v. City of Eau Claire*, where the relevant statutes gave cities the authority to decide where to provide sewage services, the Court reasoned that potentially anticompetitive conduct—refusing to serve or imposing conditions on agreeing to serve—was a foreseeable result of allowing the cities to determine the areas to be served.[243] Accordingly, the Court concluded the statutes evidenced "a state policy to displace competition."[244]

b. Active Supervision

(i) The Purpose of the Active Supervision Requirement

The active supervision prong of the state action doctrine requires that the state has and exercises independent power to review the challenged conduct, and exercises ultimate control.[245] The state must supervise both the general regulatory scheme and the particular conduct at issue.[246] As the Supreme Court stated in *Town of Hallie*, the active supervision prong serves to ensure that the actor is engaging in the challenged conduct pursuant to state policy.[247] It applies to private actors because when they engage in anticompetitive behavior there is "a real danger" that they are acting to further their own interests, rather than those of the state.[248] The "active supervision" requirement addresses the "practical problems inherent in delegating regulatory power: a private party could carry out an initially authorized scheme in a manner inconsistent with state policy."[249]

The active supervision requirement serves other purposes as well, ensuring that the state's regulatory program "actually implements a positive regulatory policy."[250] As the Court explained in *Midcal*, a state may not circumvent the Sherman Act's proscriptions "by casting . . . a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement."[251] In addition, the active supervision requirement assigns political responsibility for actions:

> States must accept political responsibility for actions they intend to undertake . . . . For States which do choose to displace the free market with regulation, our insistence on real compliance with both parts of the *Midcal* test will serve to make clear that the State is responsible for the price-fixing it has sanctioned and undertaken to control.[252]

Finally, the "active supervision" requirement promotes the "citizen participation" value of federalism.[253] Private parties on their own might not offer the public an opportunity to participate in the decision-making process, but the governmental authority that supervises them can ensure that the public has a voice in the regulatory activity.

(ii) Entities to Which the Active Supervision Requirement Applies

The active supervision test applies only when there is a risk that the challenged conduct may be the product of the parties' pursuit of interests other than state policy, and thus its application turns on whether the relevant actor is public or private.[254] Purely private actors are subject to the active supervision test;[255] cities are not. When an entity has a combination of public and private attributes, courts ask "whether the nexus between the State and the [entity in question] is sufficiently strong that there is little real danger that the [entity] is involved in a *private* . . . arrangement."[256]

(iii) Evidence of Active Supervision

To satisfy the active supervision requirement, a defendant must show the state exercises "sufficient independent judgment and control," and that "the details of the [restraint] have been established as a product of deliberate state intervention, not simply by agreement among private parties."[257] Active supervision requires the actual involvement of the state, not just a state's authority to exercise supervisory power. A "negative option" form of supervision (state authority to veto) is not sufficient unless the state has informed itself of the details of the proposed action.[258] For example, in *Midcal* active supervision sufficient to invoke the immunity did not exist because the state authorized and enforced prices established by private parties but did not review the reasonableness of the price schedules or review the terms of fair trade contracts.[259] Active supervision also is not present where the defendants' actions preclude meaningful review. In *Ticor* active supervision was not found where rate filings became effective despite the failure of the rate bureau to provide additional requested information.[260]

C. Recommendations and Findings

75. Congress should not codify the state action doctrine. Rather, the courts should apply the state action doctrine more precisely and with greater attention to both Supreme Court precedents and possible consumer harm from immunized conduct.

76. The courts should not grant antitrust immunity under the state action doctrine to entities that are not sovereign states unless (1) they are acting pursuant to a clearly articulated state policy deliberately intended to displace competition in the manner at issue, and (2) the state provides supervision sufficient to ensure that the conduct is not the result of private actors pursuing their private interests, rather than state policy.

Concerns with the state action doctrine should be addressed through continued development of case law in the courts. The Supreme Court's articulation of core state action doctrine standards will, if applied more rigorously, lead to the correct application of the doctrine. There is no need at this time to cement those standards into a statute. Instead, the lower courts ought to apply the Supreme Court's standards with greater precision and to recognize that immunizing anticompetitive conduct through the state action doctrine can cause significant consumer harm. Such harm should not be permitted absent authorization and supervision from the state, as required under Supreme Court precedents. Specific recommendations for how courts can best apply the Supreme Court's teachings and how the doctrine should be refined to address additional issues follow.

1. Clear Articulation

77. As proposed in the FTC State Action Report, the courts should reaffirm a clear articulation standard that focuses on two questions: (1) whether the conduct at issue has been authorized by the state, and (2) whether the state has deliberately adopted a policy to displace competition in the manner at issue.

The FTC State Action Report concluded that "[s]ome lower courts have implemented the clear articulation standard in a manner not consistent with its underlying goal."[261] To address this concern, that report recommended that courts ask two questions to flesh out the clear articulation requirement: (1) whether the conduct at issue has been authorized by the state, and (2) whether the state has deliberately adopted a policy to displace competition in the manner at issue. Together, these requirements would refocus the inquiry on the existence of deliberate and intended state policies to displace competition that can justify setting aside national competition goals. The Commission agrees. The lower courts have not always properly implemented Supreme Court teachings on what is required to show a clearly articulated state policy to displace competition.

In *Town of Hallie* the Supreme Court held that the clear articulation standard was met where the alleged anticompetitive conduct—refusing to provide, or imposing conditions on agreeing to provide, sewage service outside the areas a city had chosen to serve—was a foreseeable result of a state law authorizing cities to determine which areas to serve.[262] Following *Town of Hallie*, some courts have applied a low standard for "foreseeability," reasoning that once a state authorizes certain conduct, anticompetitive forms of that conduct may occur and therefore are "foreseeable."[263]

To say that anticompetitive types of conduct are "foreseeable" in this way, however, is not the same as finding "a deliberate and intended state policy" to replace competition with regulation.[264] In *City of Boulder* the Supreme Court emphasized that a general grant of authority does not equate with authority to engage in specific anticompetitive conduct.[265] In *City of Columbia v. Omni Outdoor Advertising Inc.* the Court explained that the relevant statutory authority must include the authority to suppress competition, not just to regulate.[266]

A more appropriate foreseeability analysis appears in *Surgical Care Center of Hammond v. Hospital Service District No. 1*. In that case the Court of Appeals for the Fifth Circuit, sitting en banc, distinguished "a statute that in empowering a municipality *necessarily contemplates the anticompetitive activity* from [a statute] that *merely allows* a municipality to do what other businesses can do."[267] It explained that to infer a policy to displace competition from the mere authority to enter joint ventures would "stand federalism on its head."[268]

As the FTC State Action Report pointed out, "'foreseeability' is a matter of degree."[269] The foreseeability test can work well if "the displacement of competition is inherent in the nature of the legislation itself."[270] If the grant of authority is "competition-neutral," however, the mere possibility of anticompetitive conduct is not sufficient to support a finding of a clearly articulated state policy to displace competition.[271]

Another issue that demands rigorous attention is whether the relevant statute reveals a state's intent to displace competition *in the manner at issue* in the case. The Seventh Circuit's reasoning in *Hardy v. City Optical, Inc.* exemplifies the type of careful analysis that courts should use. In that case, a statute required optometrists to provide patients with some, but not all, of the information needed to purchase contact lenses. An optometry chain denied its patients access to the complete prescriptions, leaving them unable to purchase their lenses through cheaper, mail-order sources. The court held that "Indiana has not sought to supplant the form of competition—competition from mail-order houses . . . that the complaint charges the defendants with attempting to suppress."[272] Therefore, the clear articulation standard was not met. Other courts should apply the state action doctrine with similar rigor.

To be sure, a state does not need to articulate a policy displacing competition in the *precise* manner at issue. Nonetheless, courts should carefully examine the relevant statute, any clear legislative history, and the nature of the authorized conduct to determine whether a state has clearly articulated a deliberate and intended state policy to immunize the particular conduct at issue.[273]

2. Active Supervision

78. The courts should adopt a flexible approach to the active supervision prong, with different requirements based on different situations.*

The active supervision requirement ensures that "'the [private] actor is engaging in the challenged conduct pursuant to state policy,' rather than in pursuit of private interests."[274] Because the active supervision test applies only when there is a risk that the challenged conduct may be the product of parties' pursuing interests other than state policy, its application turns in part on whether the relevant actor is public or private.[275]

As discussed in the FTC State Action Report, the Supreme Court has not yet "provided much specific guidance on the kind of state review of private actions that would constitute 'active' supervision."[276] The Supreme Court's main opinion in this area, *Ticor*, dealt with a situation in which state supervision of the conduct at issue was virtually nonexistent.[277] Especially because the potential antitrust violation was horizontal price-fixing, a violation most "pernicious," the Court was reluctant to formulate a rule that would too easily find active supervision.[278] These factual circumstances did not afford the Court an opportunity to explain how lower courts should address more complex situations.

To focus the active supervision inquiry, courts should use a flexible, "tiered" approach that requires a different level of active supervision depending on the type of conduct at issue, the entity engaging in that conduct, the industry, the regulatory scheme, and other factors.[279] "[W]hat is sufficiently 'active' for active supervision will vary based on the conduct, industry, regulatory scheme, as well as other factors."[280]

For example, if the conduct at issue were price-fixing, the affirmatively articulated state policy would need to be more detailed and specific than if the conduct entailed less clearly anticompetitive activity.[281] Similarly, whether an entity is more or less governmental in nature should influence the degree of active supervision that courts require. This case-by-case analysis of the entity should consider factors such as the entity's structure, membership, decision-making apparatus, and openness to the public.[282] As one leading treatise points out in discussing whether to apply the active supervision requirement, "[w]ithout reasonable assurance that the [entity undertaking the challenged conduct] is far more broadly based than the very persons who are to be regulated, outside supervision seems required."[283] Similarly, such circumstances should require more active supervision than if the entity were constituted substantially of government, not private, actors. The analysis also

* Commissioners Garza, Kempf, and Warden do not join this recommendation. They believe that the proposed "flexible approach" provides no guidance to those subject to the law and invites the courts to decide each case based on its facts alone rather than legal norms.

should examine the degree of discretion private actors had to undertake the challenged conduct,[284] with greater active supervision required to the extent that private actors had a larger degree of discretion. In sum, a flexible analysis would recognize that, to the extent the actor or the challenged conduct suggests an appreciable risk that the challenged conduct results from private actors' pursuing their private interests, rather than state policy, courts should require a greater degree of active supervision than if that risk is lower.

3. Other Refinements to the State Action Doctrine

79. Where the effects of potentially immunized conduct are not predominantly intrastate, courts should not apply the state action doctrine.*

The state action doctrine has been criticized for its failure to consider interstate spillovers.[285] A state's regulation of activities in a manner that overwhelmingly imposes the cost of regulation on citizens of other states impairs both economic efficiency and the political participation goal of the federal system. Accordingly, when the effects of potentially immunized conduct are not predominantly intrastate, the state action doctrine should not create immunity. Those effects can be measured by determining where the costs and benefits of the regulation are borne.

Parker v. Brown, the case that was the genesis of the state action doctrine, is a prime example of the courts' failure to consider interstate spillovers. *Parker* involved a California agricultural marketing program with mechanisms to prorate raisin production within California and thus limit the amount offered for sale. By reducing output, the program raised raisin prices. The vast majority of consumers that paid higher prices for raisins because of California's regulatory scheme were outside the state: between 90 and 95 percent of the California raisins were shipped out of state.[286] Thus, the benefits of the program (more money to the raisin producers) were largely concentrated in California, but the costs (higher prices for consumers) spilled largely into other states.

Such state regulations producing spillover costs to consumers in other states do not deserve deference.[287] Out-of-state citizens adversely affected by spillovers typically have no political participation rights and effectively are disenfranchised on whether the conduct at

* Commissioners Burchfield, Cannon, Delrahim, Garza, and Kempf do not join this recommendation.

Commissioners Burchfield and Garza believe that, so long as a state acts in a way that does not offend the "dormant Commerce Clause," the state action doctrine should cover actions taken by private actors pursuant to that state mandate. Private companies and individuals should, in virtually every instance, be able to comply with the mandate of a state without assessing whether its effect is "predominantly" intrastate, but if the state operates in violation of the United States Constitution by improperly trying to extend its power beyond its own borders, the action would be void and the state action doctrine should not apply.

issue should be authorized by the neighboring state.[288] This is directly contrary to the principles of federalism that form the basis for state action doctrine.

Moreover, economics teaches that where decision-makers reap the benefits without bearing the costs of an activity, they have incentives to engage in more of that activity than is socially desirable.[289] Therefore, when anticompetitive state regulations tend to produce in-state benefits but out-of-state harms, states have incentives to over-regulate. As a consequence, "[t]he resulting economic inefficiencies go unameliorated" and "nonresidents . . . remain exposed to any resulting monopoly spillovers."[290]

The Supreme Court has shown awareness of possible spillover concerns,[291] but has not yet considered whether to reject application of the state action doctrine if the effects of the conduct at issue are not primarily intrastate.[292] To address the significant consumer harm and political representation concerns discussed above, the Supreme Court and lower courts should not apply the state action doctrine when the effects of a regulation are not predominantly intrastate.

80. When government entities act as market participants, the courts should apply the same test for application of the state action doctrine to them as the courts apply to private parties seeking immunity under the state action doctrine.*

A government entity's participation in a market as a competitor is likely to have market-distorting effects if that entity is not subject to the same rules of competition as private competitors. A "market participant" exception to the state action doctrine that would require application of both prongs of the *Midcal* test would ensure that the government entity's behavior is consistent with state policy, and the state action doctrine is applied consonant with its original purposes and goals.[293]

The possibility of such an exception was recognized by the Supreme Court in *Omni* and was urged by Chief Justice Burger's concurrence in *City of Lafayette v. Louisiana Power & Light*

* Commissioners Burchfield, Garza, and Kempf do not join this recommendation.

Commissioners Burchfield and Garza believe that creating an exclusion from the state action doctrine when the state entity acts as a market participant would raise at least the following serious issues. First, when the plaintiff is not a resident of the state, a federal court may well lack jurisdiction over an antitrust action against a state entity under the Eleventh Amendment. Second, such an exclusion would require states in the first instance, and eventually courts, to determine when the action is sovereign and regulatory as opposed to commercial, an extremely difficult determination that will likely lead to inconsistencies, and imposition of liability eventually on taxpayers. *See* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 433–34 (1978) (Stewart, J., dissenting) (referring to distinction between governmental and proprietary functions as a "quagmire"). Finally, the Commission heard no evidence that states are engaging in an amount of anticompetitive behavior in clearly commercial (as opposed to sovereign) functions that would make such an exclusion necessary or appropriate.

Co. In *Omni* the majority stated in dictum that the *Parker* doctrine "does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market."[294] The Court in *Omni* stated that "with the possible market participant exception, *any* action that qualifies as state action is '*ipso facto* . . . exempt from the operation of the antitrust laws.'"[295]

Chief Justice Burger's concurrence in *City of Lafayette* also suggested a market participant exception.[296] The Chief Justice would have limited the Court's holding in that case to cities acting in a proprietary capacity, and he would have imposed a stricter standard to qualify for the state action defense. He reasoned that the same Congress that "meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade" would not have intended the courts to allow local governments to engage in such anticompetitive conduct without being subject to the Sherman Act.[297] As Burger argued, the case should turn on the conclusion that the plaintiff cities are engaging in "business activit[ies]; activit[ies] in which a profit is realized."[298] He found nothing in the state action jurisprudence to suggest that "a proprietary enterprise with the inherent capacity for economically disruptive anticompetitive effects should be exempt from the Sherman Act merely because it is organized under state law as a municipality."[299]

The Federal Circuit, Third Circuit, and Ninth Circuit have appeared willing to entertain the possibility of a market participant exception.[300] For example, the Third Circuit, in dictum, wrote that there may be a market participant exception to *Parker* immunity.[301] The court relied on *Omni* to note that the state does not forfeit immunity by acting with a private party, but rather "[i]mmunity does not *necessarily* obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market."[302] It pointed out, however, that there is little guidance as to what constitutes acting as a market participant.[303] The Ninth Circuit noted that a market participant exception did not apply in the case at issue because the state entity was not "in competition with" the plaintiffs,[304] but observed that guidance in the state action doctrine jurisprudence is extremely limited. The Eighth Circuit has declined to take the lead in adopting such an exception,[305] and the Tenth and Eleventh Circuits have been hostile to the idea.[306] Those courts noted that the distinction between "governmental" and "proprietary" functions has been abandoned in other contexts.[307]

There is not always a clear distinction between a government entity's activities as a regulator and a market participant,[308] but this hurdle is not insurmountable. Horizontal situations where the government competes with private firms are clear examples of circumstances in which a market participant exception would be warranted.[309] In addition, courts might reason by analogy to the market participant exception to the dormant Commerce Clause. There, the market participant exception is appropriate where the state action "constituted direct state participation in the market."[310] In the case law, this includes a state program to pay people who remove abandoned cars from streets and junkyards, because the payment was interpreted as entry into the market for abandoned cars,[311] and a program to sell output from a state-owned-and-operated cement plant.[312] Clearer guidance regarding closer cases could be provided through case-by-case adjudication. This type of incremental line-drawing is a task to which the federal common law system is both well-accustomed and well-suited.

ANNEX A

Exemptions from the Antitrust Laws

Statutory Exemptions from the Antitrust Laws

Agricultural Marketing Agreement Act, 7 U.S.C. §§ 608b–608c
Anti-Hog-Cholera Serum and Hog-Cholera Virus Act, 7 U.S.C. § 852
Capper-Volstead Act, 7 U.S.C. §§ 291–92
Charitable Donation Antitrust Immunity Act, 15 U.S.C. §§ 37–37a
Defense Production Act exemption, 50 U.S.C. app. § 2158
Export Trading Company Act, 15 U.S.C. §§ 4001–21
Fishermen's Collective Marketing Act, 15 U.S.C. §§ 521–22
Health Care Quality Improvement Act, 42 U.S.C. §§ 11101–52
Labor exemptions (statutory and non-statutory), 15 U.S.C. § 17; 29 U.S.C. §§ 52, 101–15, 151–69; (and common law)
Local Government Antitrust Act, 15 U.S.C. §§ 34–36
Medical resident matching program exemption, 15 U.S.C. § 37b
National Cooperative Research and Production Act, 15 U.S.C. §§ 4301–06
Need-Based Educational Aid Act, 15 U.S.C. § 1 note
Newspaper Preservation Act, 15 U.S.C. §§ 1801–04
Non-profit agricultural cooperatives exemption, 15 U.S.C. § 17
Small Business Act exemption, 15 U.S.C. §§ 638(d), 640
Soft Drink Interbrand Competition Act, 15 U.S.C. §§ 3501–03
Sports Broadcasting Act, 15 U.S.C. §§ 1291–95
Standard Setting Development Organization Advancement Act, 15 U.S.C. §§ 4301–05, 4301 note
Webb-Pomerene Export Act, 15 U.S.C. §§ 61–66

Statutory Exemptions Created as Part of a Regulatory Regime

Air transportation exemption, 49 U.S.C. §§ 41308–09, 42111
McCarran-Ferguson Act, 15 U.S.C. §§ 1011–15
Motor transportation exemption, 49 U.S.C. §§ 13703, 14302–03
Natural Gas Policy Act exemption, 15 U.S.C. § 3364(e)
Railroad transportation exemption, 49 U.S.C. §§ 10706, 11321(a)
Shipping Act, 46 U.S.C. app. §§ 1701–19

Judicially Created Exemptions

Baseball exemption
Filed-rate/*Keogh* doctrine
Noerr-Pennington Immunity
State Action Doctrine
Various implied immunities created in specific regulatory settings

Notes

[1] *See* NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL 177 (1979) [hereinafter SHENEFIELD REPORT] ("[F]ree market competition, protected by the antitrust laws, should continue to be the general organizing principle of our economy.").

[2] *See, e.g.*, Terry Calvani, *What Is the Objective of Antitrust? in* ECONOMIC ANALYSIS AND ANTITRUST LAW 12 (Terry Calvani & John Siegfried eds., 2d ed. 1988) ("In a competitive equilibrium, each firm is forced to sell at the lowest possible production cost because it otherwise faces losing customers to competitors who undercut its prices.").

[3] WILLIAM W. LEWIS, THE POWER OF PRODUCTIVITY, WEALTH, POVERTY, AND THE THREAT TO GLOBAL STABILITY 91 (2004).

[4] Alan Greenspan, Chairman, Fed. Reserve, Economic Flexibility, Remarks Before HM Treasury Enterprise Conference, at 2 (Jan. 26, 2004).

[5] *Id.*

[6] *See* Stephen G. Breyer, *Antitrust, Deregulation, and the Newly Liberated Marketplace*, 75 CAL. L. REV. 1005, 1008–09 (1987) [hereinafter Breyer, *Antitrust, Deregulation*]. Then-Judge Breyer explains that concerns about "excessive competition" prompted regulation in the airline industry, for example. *Id.* at 1007–08.

[7] *See, e.g.*, Alfred E. Kahn, *Deregulation: Looking Backward and Looking Forward*, 7 YALE J. ON REG. 325, 327 (1990) [hereinafter Kahn, *Deregulation: Looking Backward and Looking Forward*]; Michael O. Wise, *Overview: Deregulation and Antitrust in the Electric Power Industry*, 64 ANTITRUST L.J. 267, 267–68 (1996).

[8] HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 237–38 (2005) [hereinafter HOVENKAMP, ANTITRUST ENTERPRISE].

[9] Clifford Winston, *Economic Deregulation: Days of Reckoning for Microeconomists*, 31 J. ECON. LIT. 1263, 1284 (1993); *see also* Clifford Winston, *U.S. Industry Adjustment to Economic Deregulation*, 12 J. ECON. PERSP. 89, 98–102 (1998) (each industry studied—airlines, trucking, railroads, banking, and natural gas—substantially improved its productivity and achieved real operating cost reductions ranging from 25 percent to 75 percent, and consumers have been the principal beneficiaries); Elizabeth E. Bailey, *Price and Productivity Change Following Deregulation: The U.S. Experience*, 96 ECON. J. 1, 15 (1986).

[10] Dennis W. Carlton & Randal C. Picker, *Antitrust and Regulation*, at 38–39 (John M. Olin Law & Economics Working Paper No. 312, Oct. 2006), *available at* http://ssrn.com/abstract_id=937020 [hereinafter Carlton & Picker, *Antitrust and Regulation*] (citing Timothy P. Daniel & Andrew N. Kleit, *Disentangling Regulatory Policy: The Effects of State Regulations on Trucking Rates*, 8 J. REG. ECON. 267 (1995)).

[11] Alden F. Abbott, Statement at AMC Statutory Immunities and Exemptions Hearing, at 1–2 (Dec. 1, 2005) [hereinafter Abbott Statement]. *See generally* Richard A. Posner, *The Effects of Deregulation on Competition: The Experience of the United States*, 23 FORDHAM INT'L L.J. 7 (2000) [hereinafter Posner, *Effects of Deregulation on Competition*]; Statutory Immunities and Exemptions Transcript at 80 (Abbott) (Dec. 1, 2005).

[12] *See* GELLHORN ET AL., ANTITRUST LAW AND ECONOMICS 568–69 (5th ed. 2004) [hereinafter GELLHORN, ANTITRUST LAW AND ECONOMICS] (only Congress can expressly exempt conduct from antitrust law).

[13] *See* Paul G. Cassell, *Exemption of International Shipping Conferences from American Antitrust Laws: An Economic Analysis*, 20 NEW ENG. L. REV. 1, 11–16 (1984) [hereinafter Cassell, *Exemption of International Shipping Conferences*]; AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 1273 (6th ed. 2007) [hereinafter ANTITRUST LAW DEVELOPMENTS]; *see also* American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding Immunities and Exemptions, at 10 (Nov. 30, 2005) [hereinafter ABA Comments re Immunities and Exemptions]; Darren Bush, Gregory K. Leonard & Stephen F. Ross, A Framework for Policymakers to Analyze Proposed and Existing Antitrust Immunities and Exemptions, at 8–15 (Oct. 24, 2005) [hereinafter Bush, Leonard & Ross, Framework for Antitrust Immunities].

[14] *See* ABA Comments re Immunities and Exemptions, at 4–6.

[15] H.R. 1081, 110th Cong. (2007); S. 618, 110th Cong. (2007).

[16] Council Regulation (EC) No. 1419/2006 (Sept. 25, 2006) (repealing Regulation (EEC) No. 4056/86, laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and putting an end to the possibility for liner carriers to meet in conferences, fix prices, and regulate capacities on trade to and from the European Union).

[17] Michael Porter, The Competitive Advantage of Nations 662–63 (1990). Porter also observes that industries sheltered from international competition are less vigorous and successful than industries subject to such competition. *Id.* at 117–20, 225–38, 416, 708.

[18] Shenefield Report, at 177.

[19] Hovenkamp, Antitrust Enterprise, at 237–38; *see also* Kahn, *Deregulation: Looking Backward and Looking Forward*, at 325–30; Breyer, *Antitrust, Deregulation*, at 1007–11.

[20] See Hovenkamp, Antitrust Enterprise, at 238.

[21] *Id.* at 239 (citing James M. Landis, The Administrative Process (1938); James M. Landis, Report on Regulatory Agencies to the President-Elect (1960)). Landis was a member of the Federal Trade Commission from 1933 to 1934, Chair of the Securities and Exchange Commission from 1935 to 1937, and Dean of Harvard Law School from 1937 to 1946. *See* Hovenkamp, Antitrust Enterprise, at 349–50 n.24.

[22] Gellhorn, Antitrust Law and Economics, at 567; *see also* Hovenkamp, Antitrust Enterprise, at 239 ("[I]t often turned out that the principal beneficiaries of industry regulation were the regulated firms themselves, who were shielded from competition and guaranteed profit margins.") (footnote omitted); Carlton & Picker, *Antitrust and Regulation*, at 39 (after deregulation of various industries, "[c]onsumers benefit, [while] special interests are harmed").

[23] *See, e.g.*, Posner, *Effects of Deregulation on Competition*, at 15–19.

[24] See Breyer, *Antitrust, Deregulation*, at 1006–07.

[25] *See id.*

[26] *See* J. Bruce McDonald, Statement at AMC Regulated Industries Hearing, at 9 (Dec. 5, 2005) [hereinafter McDonald Statement]; American Antitrust Institute, Public Comments Submitted to AMC Regarding Regulated Industries, at 20 (July 15, 2005) [hereinafter AAI Comments re Regulated Industries].

[27] National Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kan. City, 452 U.S. 378, 388 (1981) (quoting United States v. National Ass'n of Secs. Dealers, Inc. 422 U.S. 694, 719–20 (1975)).

[28] Billing v. Credit Suisse First Boston Ltd., 426 F.3d 130 (2d Cir. 2005), *cert. granted*, 127 S. Ct. 762 (2006).

[29] Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko LLP, 540 U.S. 398, 401–03 (2004).

[21] *Trinko*, 540 U.S. at 415–16.

[31] The doctrine originated in *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922); *see also* Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 422 (1986); Rob McKenna, Statement at AMC Regulated Industries Hearing, at 8 (Dec. 5, 2005) [hereinafter McKenna Statement]; Western Coal Traffic League, Public Comments Submitted to AMC, at 7 (July 15, 2005) [hereinafter Western Coal Comments].

[32] *See Keogh*, 260 U.S. at 162; *see also Square D*, 476 U.S. at 422.

[33] *See, e.g.*, California *ex rel.* Lockyer v. Dynegy, Inc., 375 F.3d 831, 852–53 (9th Cir. 2004) (state law claims of unfair competition in electric power industry barred by filed-rate doctrine); Utilimax.com, Inc. v. PPL Energy Plus, LLC, 378 F.3d 303, 306 (3d Cir. 2004) ("Under the filed rate doctrine, a plaintiff may not sue the supplier of electricity based on rates that, though alleged to be the result of anticompetitive conduct, were filed with the federal agency responsible for overseeing such rates.").

[34] *Square D*, 476 U.S. at 423.

[35] *Id.* at 423–24.

[36] *See* Chapters I.B and II.B of this Report regarding substantive merger law and the Hart-Scott-Rodino Act pre-merger review process.

[37] Those industries are banking (regulated by various banking agencies); certain aspects of electricity (regulated by the Federal Energy Regulatory Commission); telecommunications/media (regulated by the Federal Communications Commission); and railroads (regulated by the Surface Transportation Board). Industries in which regulatory agencies previously had, but not longer have, authority to review mergers include trucking and airlines.

[38] *See, e.g.*, Milton A. Marquis, *DOJ, FTC and FERC Electric Power Merger Enforcement: Are There Too Many Cooks in the Merger Review Kitchen?*, 33 Loy. U. Chi. L.J. 783, 783–84 (2002).

[39] Parker v. Brown, 317 U.S. 341 (1943).

[40] *Id.* at 350–52.

[41] *Id.* at 351.

[42] *See* Antitrust Law Developments, at 1273.

[43] *See, e.g.*, FTC v. Ticor Title Ins. Co., 504 U.S. 621, 633 (1992); *see also* Carlton A. Varner, Statement at AMC State Action Doctrine Hearing, at 2, 5 (Sept. 29, 2005) [hereinafter Varner Statement]; Federal Trade Commission Staff, Report of the State Action Task Force 5 (Sept. 2003) [hereinafter FTC State Action Report].

[44] *See Parker*, 317 U.S. at 350–52; Bates v. State Bar of Ariz., 433 U.S. 350 (1977); FTC State Action Report, at 6.

[45] Hoover v. Ronwin, 466 U.S. 558, 569 (1984).

[46] *See* Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 412 (1978); FTC State Action Report, at 7. Local governments may obtain partial antitrust immunity under the Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. 2750 (codified as amended at 15 U.S.C. §§ 34–36).

[47] California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

[48] *See* Antitrust Law Developments, at 1274; Varner Statement, at 18; FTC State Action Report, at 8, 52.

[49] Patrick v. Burget, 486 U.S. 94, 100–01 (1988).

[50] American Bar Association, Section of Antitrust Law, *The State of Antitrust Enforcement—2001*, at 42 (2001), *available at* http://www.abanet.org/antitrust/pdf_docs/antitrustenforcement.pdf.

[51] FTC State Action Report, at 1.

[52] *See* Town of Hallie v. City of Eau Claire, 471 U.S. 34, 41–42 (1985).

[53] *See, e.g.*, Martin v. Memorial Hosp. at Gulfport, 86 F.3d 1391 (5th Cir. 1996).

[54] *Ticor*, 504 U.S. at 636; *see also* Varner Statement, at 13–14 (discussing cases misusing the foreseeability test).

[55] Hardy v. City Optical Inc., 39 F.3d 765 (7th Cir. 1994) (Posner, J.).

[56] *Id.* at 770 (emphasis added).

[57] FTC State Action Report, at 12 (citing *Town of Hallie*, 471 U.S. at 46).

[58] Phillip E. Areeda & Herbert Hovenkamp, IA Antitrust Law ¶ 227a (3d ed. 2006) [hereinafter Areeda & Hovenkamp, Antitrust Law].

[59] *See Ticor*, 504 U.S. at 639–40.

[60] *See* Comments of the American Bar Association, Section of Antitrust Law on FTC Report Re State Action Doctrine, at 17–18 (May 6, 2005), *available at* http://www.abanet.org/antitrust/at-comments/2005/05-05/at-state-action-05.pdf [hereinafter ABA Comments re FTC Report]; FTC State Action Report, at 12.

[61] *See, e.g.*, Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 TEX. L. REV. 1203, 1271 (1997) [hereinafter Inman & Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine*]; Herbert Hovenkamp & John A. Mackerron III, *Municipal Regulation and Federal Antitrust Policy*, 32 UCLA L. REV. 719, 767 (1985) [hereinafter Hovenkamp & Mackerron, *Municipal Regulation and Federal Antitrust Policy*]; *see also* ABA Comments re FTC Report, at 2, 20; FTC STATE ACTION REPORT, at 40; Varner Statement, at 4, 19; *E-Commerce: The Case of Online Wine Sales and Direct Shipment: Hearing Before Subcomm. on Commerce, Trade, & Consumer Protection of the H. Comm. on Energy & Commerce*, 108th Cong. 12 (2003) (statement of Todd Zywicki, Director, FTC Office of Policy Planning); FEDERAL TRADE COMMISSION STAFF, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: CONTACT LENSES (Mar. 2004) [hereinafter FTC STAFF, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: CONTACT LENSES].

[62] Thomas M. Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 CAL. L. REV. 227, 256 (1987) [hereinafter Jorde, *Antitrust and the New State Action Doctrine*].

[63] *See* Jorde, *Antitrust and the New State Action Doctrine*, at 253; Varner Statement, at 19; State Action Doctrine Transcript at 25–26 (Varner) (Sept. 29, 2005).

[64] *See, e.g.*, EDWIN MANSFIELD, MICROECONOMICS, THEORY AND APPLICATIONS 458 (3d ed. 1979).

[65] City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 374–75 (1991).

[66] This conclusion is not novel. In its 1979 Report, the National Commission for the Review of Antitrust Laws and Procedures expressed a skeptical attitude toward exemptions and immunities in general, notwithstanding the fact that, of its twenty-two members, fully ten were sitting members of Congress. *See generally* SHENEFIELD REPORT, at 177–89.

[67] Abbott Statement, at 1–2. *See generally* Posner, *Effects of Deregulation on Competition*, at 7; Statutory Immunities and Exemptions Trans. at 72 (Abbott).

[68] This Section uses the terms "exemption" and "immunity" interchangeably to mean any statutory provision that makes liability or damages under the antitrust laws less than fully applicable.

This Section considers only statutory immunities, not those created by courts. The state action doctrine, a judicially created immunity, is discussed in Part 4 of this Section. Part 3 of this Section discusses judicially created "implied" immunities in regulated industries.

[69] *See* 15 U.S.C. § 17 (creating statutory labor exemption and non-profit agricultural cooperatives exemption).

[70] *See* 15 U.S.C. § 37b.

[71] *See* Cassell, *Exemption of International Shipping Conferences*, at 11–16; *see also* ABA Comments re Immunities and Exemptions, at 10; Bush, Leonard & Ross, Framework for Antitrust Immunities, at 8–15; ANTITRUST LAW DEVELOPMENTS, at 1273.

[72] *See, e.g.*, ABA Comments re Immunities and Exemptions, at 4–6.

[73] *See id.* at 4.

[74] Some scholars have contended that antitrust immunities are typically the byproduct of special interest regulations spawned by well-organized groups. *See, e.g.*, Frank H. Easterbrook, *The Court and the Economic System*, 98 HARV. L. REV. 4, 15 (1984) ("One of the implications of modern economic thought is that many laws are designed to serve private rather than public interests."). "Public choice" theory seeks to explain, among other things, how such laws can arise. *See, e.g.*, William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 285, 285–89 (1988); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987); *see also* ABA Comments re Immunities and Exemptions, at 5–6; American Antitrust Institute, Public Comments Submitted Regarding Immunities and Exemptions, at 3 (July 15, 2005).

[75] 42 U.S.C. §§ 11101–52.

[76] 15 U.S.C. §§ 4301–05, 4301 note.

[77] *See generally* ANTITRUST LAW DEVELOPMENTS, at 1213–15.

[78] *See generally id.* at 1211–13.

[79] 49 U.S.C. §§ 41308–09, 42111. This immunity coves a variety of agreements, including those between foreign and domestic airlines that allow individual airlines to provide tickets that include legs served only by other airlines.

[80] 15 U.S.C. §§ 37–37a.

[81] 50 U.S.C. app. § 2158.

[82] 15 U.S.C. § 1 note.

[83] 15 U.S.C. §§ 3501–03.

[84] 15 U.S.C. §§ 34–36.

[85] 15 U.S.C. §§ 4301–06.

[86] 7 U.S.C. § 291. *See generally* ANTITRUST LAW DEVELOPMENTS, at 1306–10.

[87] 15 U.S.C. §§ 1012(b), 1013(b). *See generally* ANTITRUST LAW DEVELOPMENTS, at 1438–44.

[88] ANTITRUST LAW DEVELOPMENTS, at 1445–47.

[89] *See generally id.* at 1497–1500. This Act was amended in 1998 to provide, among other things, the opportunity for individual shipping companies to compete with conferences. *See* Ocean Shipping Reform Act of 1998, Pub. L. No. 105-258, 112 Stat. 1902 (1998).

[90] *See* ABA Comments re Immunities and Exemptions, at 7–10.

[91] *See id.* at 1.

[92] *See id.* at 1–2. Antitrust exemptions can limit price competition, restrict entry, produce an economically inefficient level of output, or foster cartels—all of which are contrary to the antitrust system. *See, e.g.*, Abbott Statement, at 3; ABA Comments re Immunities and Exemptions, at 2–3.

[93] For arguments that this reason justifies an immunity, see John J. Sullivan, Statement at AMC Statutory Immunities and Exemption Hearing, at 1, 3 (Dec. 5, 2005) [hereinafter Sullivan Statement]; American Natural Soda Ash Corp., Public Comments Submitted to AMC, at 3 (June 28, 2005); Statutory Immunities and Exemptions Trans. at 43 (Sullivan).

[94] For arguments that this reason justifies an immunity, see McCarran-Ferguson Act Transcript at 9–10, 51, 59 (McRaith) (Oct. 18, 2006); *id.* at 19, 78–79 (Gackenbach); *id.* at 25–26, 33, 73 (Zielezienski); Julie L. Gackenbach, Statement at AMC McCarran-Ferguson Hearing, at 4–5 (Oct. 18, 2006) [hereinafter Gackenbach Statement]; Stephen Zielezienski, Statement at AMC McCarran-Ferguson Hearing, at 3–4 (Oct. 18, 2006) [hereinafter Zielezienski Statement].

[95] *See, e.g.*, Gackenbach Statement, at 1–3 (McCarran-Ferguson Act protects collection of loss data that would not be permitted under antitrust law); Michael T. McRaith, Statement at AMC McCarran-Ferguson Hearing, at 3, 9 (Oct. 18, 2006) [hereinafter McRaith Statement]; Zielezienski Statement, at 6–9.

[96] Gackenbach Statement, at 1; McCarran-Ferguson Act Trans. at 15–17, 45–46 (Gackenbach); *see also id.* at 91 (McRaith) (allows small and medium-size insurers to participate).

[97] Joint conduct to collect and use loss data might be immune from federal antitrust challenge under the state action doctrine in any case, if the state regulates such conduct. *See* McRaith Statement, at 12–14.

[98] *See* Ocean Shipping Reform Act of 1998, Pub. L. No. 105-258, 112 Stat. 1902 (1998); Stanley Sher, Statement at AMC Shipping Act Hearing, at 2–3 (Oct. 18, 2006) [hereinafter Sher Statement]; American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding Shipping Act, at 101–02 (Mar. 17, 2006, revised Oct. 24, 2006). Sher stated that almost 95 percent of ocean liner traffic occurs pursuant to individually negotiated rates, not conference rates. Sher Statement, at 2.

[99] Sher Statement, at 3–4, 12–19; Jean Godwin, Statement at AMC Shipping Act Hearing, at 6 (Oct. 18, 2006).

[100] Sher Statement, at 13–14.

[101] *Id.*

[102] *Cf. id.* at 4–5 (stating that those who oppose Shipping Act exemption should ask whether it is worth jeopardizing current benefits from the exemption merely on the basis of academic theories).

[103] The DOJ offers "business review letters" and the FTC offers "advisory opinions," which allow firms to learn the present enforcement intentions of the agencies with respect to planned conduct that may raise antitrust issues. *See* 28 C.F.R. § 50.6 (2006) (outlining DOJ business review procedure); 16 C.F.R. § 1.1–1.4 (2006) (outlining FTC advisory opinion procedure).

[104] Organisation for Economic Co-Operation and Development, Competition Policy in Liner Shipping Final Report 50, 69 (April 16, 2002), *available at* http://www.oecd.org/dataoecd/13/46/2553902.pdf.

[105] 15 U.S.C. §§ 4001–21. The Webb-Pomerene Act, 15 U.S.C. §§ 61–65, is similar to the ETC Act, although more limited in scope (it covers goods, not services) and application (only six companies are registered under Webb-Pomerene, in contrast with more than eighty registered Export Trade Certificate of Review Holders). The discussion of the Export Trading Company Act applies as well to the Webb-Pomerene Act.

[106] 15 U.S.C. § 4016(a); *id.* at § 4016(b)(1).

[107] *Id.* § 4016(b)(3).

[108] Sullivan Statement, at 1. The Commission received thirty-five comments supportive of the Export Trading Act or the Webb-Pomerene Act. *See* Appendix C to this Report (listing comments received).

[109] There are approximately eighty Certificates of Review currently in effect, covering thousands of companies that export over $10 billion per year. Sullivan Statement, at 1; Statutory Immunities and Exemption Trans. at 12 (Sullivan). $10 billion represents approximately 1.3 percent of total U.S. exports. *See* John J. Sullivan, Supplemental Statement at AMC Statutory Immunities and Exemption Hearing, at enclosure 2 (Mar. 13, 2006) [hereinafter Sullivan Supplemental Statement]; Sullivan Supplemental Statement, at enclosure 3.

[110] Sullivan Statement, at 7.

[111] Statutory Immunities and Exemptions Trans. at 14 (Sullivan).

[112] This Commission identified thirty exemptions created by statute or judicial rulings, which are listed in Annex A to this Section.

[113] *See* Bush, Leonard & Ross, Framework for Antitrust Immunities, at 6–8.

[114] Congress has routinely required transparency in the promotion of sound decision-making. *See* 5 U.S.C. § 553 (notice and comment rulemaking); *see also* Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry 113–14 (1971) (arguing that public scrutiny protects against arbitrary decision-making by administrative agencies). In the realm of antitrust law, Congress has provided mechanisms to ensure sound decision-making and openness. *See* 15 U.S.C. § 16(b)–(h) (The Tunney Act provides for public comment and public interest review by a court regarding consent decrees.); *see also* Bush, Leonard & Ross, Framework for Antitrust Immunities, at 4, 6–7.

[115] *See* Bush, Leonard & Ross, Framework for Antitrust Immunities, at 4; ABA Comments re Immunities and Exemptions, at 3–4; Statutory Immunities and Exemptions Trans. at 101–02 (Ross); *id.* at 103 (Miller); *id.* at 103 (Abbott); *id.* at 104 (Carstensen).

[116] *See* Bush, Leonard & Ross, Framework for Antitrust Immunities, at 6.

[117] *See* ABA Comments re Immunities and Exemptions, at 11; Bush, Leonard & Ross, Framework for Antitrust Immunities, at 6.

[118] *See* Barnett/Majoras Transcript at 64 (Majoras) (Mar. 21, 2006) (discussing both agencies).

[119] *See* ABA Comments re Immunities and Exemptions, at 8–11.

[120] *See* Bush, Leonard & Ross, Framework for Antitrust Immunities, at 4–5, 32; Cassell, *Exemption of International Shipping Conferences*, at 13; ABA Comments re Immunities and Exemptions, at 8–11.

[121] *See* Bush, Leonard & Ross, Framework for Antitrust Immunities, at 5; Statutory Immunities and Exemptions Trans. at 101 (Ross); *id.* at 103 (Miller); *id.* at 103 (Abbott); *id.* at 104 (Carstensen); ABA Comments re Immunities and Exemptions, at 8–10; Cassell, *Exemption of International Shipping Conferences*, at 13.

[122] Statutory Immunities and Exemptions Trans. at 63 (Bush); *see also* Bush, Leonard & Ross, Framework for Antitrust Immunities Hearing, at 4–5; Prof. Peter C. Carstensen, Statement at AMC Statutory Immunities and Exemptions, at 2 (Dec. 1, 2005) [hereinafter Carstensen Statement]; Abbott Statement, at 6; Statutory Immunities and Exemptions Trans. at 85, 104 (Carstensen); id. at 101 (Ross); *id.* at 103 (Miller); *id.* at 103 (Abbott); Vehicle Information Service, Inc., Public Comments Submitted to AMC, at 1 (July 13, 2005) [hereinafter VIS Comments]; ABA Comments re Immunities and Exemptions, at 11, 15–17.

[123] In other countries, such a burden of proof is imposed as a matter of law. *See* Treaty Establishing the European Economic Community, Art. 85(3) 298 U.N.T.S. 11 (Mar. 25, 1957) (laying out four quite restrictive conditions any exemption must meet, on a continuing basis, in order to derogate from the basic principle of free competition); European Commission, White Paper on the Review of Regulation 4056/86, Applying the EC Competition Rules to Maritime Transport ¶ 14 (Comm. Prog. 2003/COMP/18, Oct. 13, 2004) (noting than an exemption's "justification" must remain "valid in light of . . . present market circumstances. If not, there would no longer be a legal justification for the . . . exemption, which consequently would have to be either abolished or revised.").

[124] *See* ABA Comments re Immunities and Exemptions, at 9–10.

[125] *See id.* A generally less desirable alternative would be to allow only declaratory judgments and government injunctive challenges to the conduct in question. *See id.* Because the conduct at issue would remain subject to antitrust scrutiny, however, this approach would be preferable to entirely eliminating the potential for antitrust liability.

[126] 15 U.S.C. §§ 4301–06; *id.* § 4301 note.

[127] *See* Bush, Leonard & Ross, Framework for Antitrust Immunities, at 35–38; Statutory Immunities and Exemptions Trans. at 69–70 (Bush); ABA Comments Re Immunities and Exemptions, at 14–15; *see also* Abbott Statement, at 6; Statutory Immunities and Exemptions Trans. at 92 (Miller).

[128] *See* Bush, Leonard & Ross, Framework for Antitrust Immunities, at 36.

[129] *See* Statutory Immunities and Exemptions Trans. at 107 (Ross).

[130] The Need-Based Educational Aid Act, which permits some collaboration among some universities as to financial aid policies, was adopted with a sunset. Congress has extended the expiration date twice, and the statute is currently set to expire in 2008. Pub. L. No. 103-382, 108 Stat. 4060 (1994), *amended by* Pub. L. No. 105-43, 111 Stat. 1140 (1997); Pub. L. No. 107-72, 115 Stat. 648 (2001).

[131] *See* ABA Comments Re Immunities and Exemptions, at 14–15; Abbott Statement, at 6.

[132] For example, one study finds that technological advances in transportation and storage have changed the nature of competition in the dairy industry and "bolstered the market power enhancing effects of regulation." *See* David L. Baumer & Robert T. Masson, *Curdling the Competition: An Economic and Legal Analysis of the Antitrust Exemption for Agriculture*, 31 VILL. L. REV. 183, 210 (1986).

[133] *See* James C. Miller III, Statement at AMC Statutory Immunities and Exemptions Hearing, at 3–4 (Dec. 1, 2005); Abbott Statement, at 6.

[134] *See* Bush, Leonard & Ross, Framework for Antitrust Immunities, at 5, 36; Carstensen Statement, at 10; Statutory Immunities and Exemptions Trans. at 101 (Ross); *id.* at 103 (Miller); *id.* at 103 (Abbott); *id.* at 104 (Carstensen); VIS Comments, at 1; Office of the Attorney General of New York State, Public Comments Submitted to AMC, at 4 (July 15, 2005); ABA Comments re Immunities and Exemptions, at 14–15.

[135] *See* Carstensen Statement, at 10 (explaining counterarguments).

[136] *See* Bush, Leonard & Ross, Framework for Antitrust Immunities, at 5–6, 35–38; ABA Comments re Immunities and Exemptions, at 14–15.

[137] *See* Bush, Leonard & Ross, Framework for Antitrust Immunities, at 36–38.

[138] *See id.* at 37.

[139] *See* Barnett/Majoras Trans. at 64 (Majoras).

[140] *See* ABA Comments re Immunities and Exemptions, at 8–10.

[141] *See, e.g.*, 15 U.S.C. § 1803(c) (provision of Newspaper Preservation Act providing that antitrust exemption does not reach "any . . . conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity"); 15 U.S.C. § 35(a) (barring money damages in antitrust actions against local governments or against their officials or employees, but only when such defendants act in their "official capacity").

[142] Specifically, Congress did so in Section 5(d) of the Year 2000 Information and Readiness Disclosure Act, Pub. L. No. 105-271, 112 Stat. 2386 (1998), *amended by* Pub. L. 107-273, Div. C, Title IV, § 14102(e), 116 Stat. 1922 (2002) (codified as amended at 15 U.S.C. § 1 note).

[143] Courts generally construe antitrust immunities narrowly and in favor of application of the antitrust laws. *See* Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 126 (1982); United States v. Gosselin World Wide Moving, N.V., 411 F.3d 502, 508 (4th Cir. 2005); Shaw v. Dallas Cowboys Football Club, Ltd., 172 F.3d 299, 301 (3d Cir. 1999).

[144] *See* Carstensen Statement, at 13; ABA Comments re Immunities and Exemptions, at 8.

[145] *See* Areeda & Hovenkamp, Antitrust Law, ¶ 240a; *see also* Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, 2004 Colum. Bus. L. Rev. 335, 339 (2004) [hereinafter Hovenkamp, *Antitrust and the Regulatory Enterprise*].

[146] Hovenkamp, *Antitrust and the Regulatory Enterprise*, at 338–40.

[147] *Id.* at 341 ("When the government makes rules about price or output, market forces no longer govern. To that extent antitrust is shoved aside.").

[148] *See* John Thorne, Statement at AMC Regulated Industries Hearing, at 4 (Dec. 5, 2005); Shenefield Report, at 180–81.

[149] Hovenkamp, Antitrust Enterprise, at 337–38; *see also* Kahn, *Deregulation: Looking Backward and Looking Forward*, at 325–30; Stephen Breyer, *Antitrust, Deregulation*, at 1005 (discussing deregulation in telecommunication and airline industries).

[150] *See* Hovenkamp, Antitrust Enterprise, at 238.

[151] *See id.*

[152] *Id.* at 239 (citing James M. Landis, The Administrative Process (1938); James M. Landis, Report on Regulatory Agencies to the President-Elect (1960)).

[153] Hovenkamp, Antitrust Enterprise, at 241 (citing W. Viscusi, J. Vernon, & J. Harrington, Economics of Regulation and Antitrust, chs. 10–12 (4th ed. 2005)).

[154] Gellhorn, Antitrust Law and Economics, at 567; *see also* Hovenkamp, Antitrust Enterprise, at 239 ("[I]t often turned out that the principal beneficiaries of industry regulation were the regulated firms themselves, who were shielded from competition and guaranteed profit margins.") (footnote omitted); Carlton & Picker, *Antitrust and Regulation*, at 39 (after deregulation of various industries, "[c]onsumers benefit [while] special interests are harmed").

[155] *See, e.g.*, Posner, *Effects of Deregulation on Competition*, at 18.

[156] *See, e.g.*, Town of Concord v. Boston Edison Co., 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, J.) ("In so holding, we are not saying either that the antitrust laws do not apply in this regulatory context, or that they somehow apply less stringently here than elsewhere.").

157 AAI Comments re Regulated Industries, at 1–3.

158 An example is the regulation of access to transmission lines for electricity, which continue to have natural monopoly characteristics. American Bar Association, Section of Antitrust Law, Energy Antitrust Handbook: A Guide to the Electric and Gas Industries 36 (2002) [hereinafter ABA, Energy Antitrust Handbook] ("[T]ransmission facilities are still generally considered essential, monopoly-owned facilities.").

159 *See generally* Breyer, *Antitrust, Deregulation*, at 1006–07; Lee A. Rau, *Open Access in the Power Industry: Competition, Cooperation, and Policy Dilemmas*, 64 Antitrust L.J. 279, 286–87 (1996); Kahn, *Deregulation: Looking Backward and Looking Forward*, at 327–30.

160 *See generally* Breyer, *Antitrust, Deregulation*, at 1006–07, 1032–44.

161 Kahn, *Deregulation: Looking Backward and Looking Forward*, at 329.

162 *See* AAI Comments re Regulated Industries, at 2–3; Hovenkamp, *Antitrust and the Regulatory Enterprise*, at 341; Regulated Industries Transcript at 5 (McKenna) (Dec. 5, 2005).

163 Breyer, *Antitrust, Deregulation*, at 1006.

164 *See* McDonald Statement, at 9; AAI Comments re Regulated Industries, at 20.

165 Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko LLP, 540 U.S. 398, 406 (2004) (explaining that antitrust-specific savings clause "bars a finding of implied immunity").

166 *See* McKenna Statement, at 3 (arguing that "antitrust enforcers and regulators should have complementary, seamless enforcement authority").

167 *In re* Stock Exchanges Options Trading Antitrust Litig., 317 F.3d 134, 147 (2d Cir. 2003) (quoting Northeastern Tel. Co. v. AT&T, 651 F.2d 76, 82 (2d Cir. 1981)); *see also* Gordon v. New York Stock Exch., 422 U.S. 659, 682–84 (1975).

168 Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963) (quoting United States v. Borden Co., 308 U.S. 188, 198 (1939)).

169 National Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kan. City, 452 U.S. 378, 388 (1981) (quoting United States v. National Ass'n of Secs. Dealers, 422 U.S. 694, 719–20 (1975)).

170 *Id.* at 389 (quoting *Silver*, 373 U.S. at 357).

171 *Id.* (explaining that "[i]ntent to repeal the antitrust laws is much clearer when a regulatory agency has been empowered to authorize or require the type of conduct under antitrust challenge") (citing, *e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366, 372–75 (1973); United States v. Radio Corp. of Am., 358 U.S. 334, 346 (1959)).

172 *See* Antitrust Law Developments, at 1239; *National Gerimedical*, 452 U.S. at 389.

173 Billing v. Credit Suisse First Boston Ltd., 426 F.3d 130 (2d Cir. 2005), *cert. granted*, 127 S. Ct. 762 (2006) (granting certiorari to determine "[w]hether, in a private [antitrust] action . . . challenging conduct that occurs in a highly regulated securities offering, the standard for implying antitrust immunity is the potential for conflict with the securities laws or, as the Second Circuit held, a specific expression of congressional intent to immunize such conduct and a showing that the SEC has power to compel the specific practices at issue."); *see also* Brief for the United States as Amicus Curiae Supporting Vacatur, 2007 WL 173649 (Jan. 22, 2007) (supporting *National Gerimedical* as the appropriate test for implied immunity, but arguing that it was misapplied by the Second Circuit).

174 *Trinko*, 540 U.S. at 401–03; Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended throughout Title 47).

175 *Trinko*, 540 U.S. at 401–05.

176 Law Offices of Curtis V. Trinko v. Bell Atl. Corp., 305 F.3d 89, 95 (2d Cir. 2002), *rev'd*, 540 U.S. 398 (2004); *see also Trinko*, 540 U.S. at 403–05.

177 *Trinko*, 540 U.S. at 402–03.

178 *Id.*

[179] *Id.*

[180] *Id.* at 403–04.

[181] *Id.*

[182] *Id.* at 401.

[183] *Id.* at 406 (stating that "the enforcement scheme set up by the 1996 Act is a good candidate for implication of antitrust immunity, to avoid the real possibility of judgments conflicting with the agency's regulatory scheme that might be voiced by courts exercising jurisdiction under the antitrust laws . . . . Congress, however, precluded this interpretation") (internal quotations and citations omitted); *see also* United States Telecom Association, Public Comments Submitted to AMC, at 4–5 (July 15, 2005) [hereinafter USTA Comments].

[184] *Trinko*, 540 U.S. at 410.

[185] *Id.* at 411.

[186] *Id.* at 412.

[187] *Id.* at 415–16.

[188] The doctrine originated in *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922).

[189] *See* Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 422 (1986); *see also Keogh*, 260 U.S. at 162; McKenna Statement, at 8; Western Coal Comments, at 7.

[190] *See Keogh*, 260 U.S. at 163–64.

[191] *See* 49 U.S.C. §§ 10709(a)–(c), 13710(a)(1). There are, however, specific statutory immunities for certain agreements between rail carriers and between motor carriers. 49 U.S.C. §§ 10706(a)(2)(A), 13501, 13702, 14302(f).

[192] *See, e.g.*, Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorization, FTC Staff Comment (Jan. 7, 2002), *available at* http://www.ftc.gov/be/v020005.htm.

[193] *See, e.g.*, California *ex rel.* Lockyer v. Dynegy, Inc., 375 F.3d 831, 852–53 (9th Cir. 2003) (state law claims of unfair competition in electric power industry barred by filed-rate doctrine); Utilimax.com, Inc. v. PPL Energy Plus, LLC, 378 F.3d 303, 306 (3d Cir. 2004) ("Under the filed rate doctrine, a plaintiff may not sue the supplier of electricity based on rates that, though alleged to be the result of anticompetitive conduct, were filed with the federal agency responsible for overseeing such rates.") (citing Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 251–52 (1951)).

[194] *See, e.g.*, AAI Comments re Regulated Industries, at 14–15; McKenna Statement, at 7–9. *See generally* Gregory J. Werden, Open Access Revisited, Remarks Before American Antitrust Institute Fifth Annual Energy Roundtable Workshop, at 7–9 (Jan. 11, 2005).

[195] *See Square D*, 476 U.S. at 423.

[196] *See id.* at 423–24.

[197] *See* Chapters I.B and II.B of this Report.

[198] Industries in which regulatory agencies previously had, but not longer have, authority to review mergers include trucking and airlines. FERC also has concurrent jurisdiction with the antitrust agencies to review asset acquisitions of natural gas companies. ABA, ENERGY ANTITRUST HANDBOOK, at 77 n.263; 15 U.S.C. § 717(c).

[199] *See, e.g.*, *In re* Application of General Motors Corp., Hughes Elec. Corp. & News Corp. Ltd., 19 F.C.C.R. 473, 483 (2004) (stating that "the public interest evaluation . . . includes, among other things, preserving and enhancing competition in relevant markets, ensuring that a diversity of voices is made available to the public, and accelerating private sector deployment of advanced services"). *See generally* AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, TELECOM ANTITRUST HANDBOOK 70–80 (2005) [hereinafter ABA, TELECOM ANTITRUST HANDBOOK].

[200] ABA, TELECOM ANTITRUST HANDBOOK, at 58–70; ABA, ENERGY ANTITRUST HANDBOOK, at 84.

[201] ABA, Telecom Antitrust Handbook, at 70–80; ABA, Energy Antitrust Handbook, at 84–90.

[202] *See, e.g.*, 12 U.S.C. § 1828(c)(5).

[203] *See* Scott G. Alvarez, Statement at AMC Regulated Industries Hearing, at 14–15 (Dec. 5, 2005).

[204] *Id.* at 15.

[205] *See* 18 U.S.C. § 1828(c)(6)–(7).

[206] 12 U.S.C. § 1828(c); *see* United States v. First City Nat'l Bank of Houston, 386 U.S. 361, 366 (1967). It appears that no court has ever found that a bank merger challenged by the DOJ was anticompetitive under Section 7 of the Clayton Act, but permissible nonetheless on the basis of the convenience and needs defense—although in *United States v. First National Bank of Jackson*, 301 F. Supp. 1161 (S.D. Miss. 1969), the court found the merger did not violate Section 7 of the Clayton Act, but that even if it had, the defendants had met the convenience and needs defense.

[207] *See* Interstate Commerce Commission Termination Act of 1995, Public Law No. 104-88, 109 Stat. 803, 838–41 (codified as amended at 49 U.S.C. §§ 11321–24).

[208] 49 U.S.C. § 11324(b).

[209] *See id.* § 11324(d); *see also* Regulated Industries Trans. at 11 (McDonald).

[210] *See, e.g.*, Raymond Atkins, Statement at AMC Regulated Industries Hearing, at 9–10 (Dec. 5, 2005) (describing disagreements that arose between the STB and the DOJ during the STB's review of the Union Pacific/Southern Pacific merger).

[211] It remains unclear whether the DOJ could petition for review of an STB decision based on an argument that the STB failed to give "substantial weight" to DOJ's competitive analysis of the proposed merger.

[212] *See* Diana L. Moss, Statement at AMC Regulated Industries Hearing, at 9 (Dec. 5, 2005) ("[R]egulatory agencies should play a role in merger review, but their function should be limited to the analysis of non-competitive issues while the antitrust agency evaluates the effect of the merger on competition."); International Competition Policy Advisory Committee, Final Report to the Attorney General and Assistant Attorney General for Antitrust 143, 150–51 (2000) [hereinafter ICPAC Report]; *see also* USTA Comments, at 10 ("The antitrust agencies have for more than 100 years demonstrated both experience and sound judgment in enforcement of the antitrust laws. No comparable record supports the intrusion of the regulatory agencies into the field of competition law.").

[213] *See* ICPAC Report, at 145; Rachel E. Barkow & Peter W. Huber, *A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers*, 2000 U. Chi. Legal F. 29, 31 (2000).

[214] *See* Prof. Peter C. Carstensen, Public Comments Submitted to AMC, at 3 (July 15, 2005).

[215] *See* ICPAC Report, at 143, 153–54. The majority of ICPAC members recommended removing the competition policy oversight duty from the sectoral regulators and vesting such power exclusively in the federal antitrust agencies. *See id.* at 143. The ICPAC Report also contains an explanation of the relationship between the antitrust agencies' authority and the regulatory agencies' authority. *Id.* at 145–48. Finally, it contains a list of examples in which the antitrust agencies and the regulatory agencies reached different conclusions regarding the likely competitive effects of proposed mergers. *Id.* at 149–50.

[216] *Id.* at 145–47.

[217] Competition Committee of the OECD Directorate for Financial and Enterprise Affairs, The Relationship Between Competition Authorities and Sectoral Regulators Issues Paper, at 5–6 (Feb. 2, 2005) *available at* http://www.oecd.org/dataoecd/58/7/34375749.pdf.

[218] *See* Summary of Discussion Points Presented by the Business and Industry Advisory Committee to the OECD Global Forum on Competition, Session 2: Relationship Between Competition Authorities and Sectoral Regulators, at 3–6 (Feb. 17, 2005), *available at* http://www.biac.org/statements/comp/Fin_BIAC_CLP_GR_05_Session2.pdf.

[219] *See* Antitrust Law Developments, at 1273.

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

221 *Id.* at 350–52 (states are sovereign save only as Congress may constitutionally subtract from their authority); *see* Town of Hallie v. City of Eau Claire, 471 U.S. 34, 38 (1985); Cantor v. Detroit Edison Co., 428 U.S. 579, 632 (1976); FTC v. Ticor Title Ins. Co., 504 U.S. 621, 633 (1992) ("Our decision [in *Parker*] was grounded in principles of federalism.").

222 *Parker*, 317 U.S. at 351.

223 *See, e.g.*, *Ticor*, 504 U.S. 621, 633; *see also* Varner Statement, at 2, 5; FTC State Action Report, at 5.

224 *See Parker*, 317 U.S. at 350–52; Bates v. State Bar of Ariz., 433 U.S. 350 (1977); FTC State Action Report, at 6.

225 Hoover v. Ronwin, 466 U.S. 558, 569 (1984).

226 *See* Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985) (decisions by state executive departments, agencies, or special authorities do not automatically qualify as state action); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 412 (1978) ("Cities are not themselves sovereign."); FTC State Action Report, at 7.

227 California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

228 *See* Antitrust Law Developments, at 1274; Varner Statement, at 18; FTC State Action Report, at 8, 52.

229 Patrick v. Burget, 486 U.S. 94, 100–01 (1988).

230 *Ticor*, 504 U.S. at 634–35.

231 *City of Lafayette*, 435 U.S. at 414. To obtain immunity from antitrust damages (but not from injunctive relief), local governments can rely on the Local Government Antitrust Act of 1984 (LGAA). Local Government Antitrust Act of 1984, Pub. L. No. 98-544, § 2, 98 Stat. 2750 (codified as amended at 15 U.S.C. §§ 34–36). The Act defines local governments as "a city, county, parish, town, township, village, or any other general function governmental unit established by State law or . . . a school district, sanitary district, or any other special function governmental unit established by State law in one or more States." 15 U.S.C. § 34(1). The LGAA bars antitrust damage actions against a local government and precludes the recovery of antitrust damages from any local government official or employee "acting in an official capacity," *id.* § 35(a), and from any private party "based on any official action directed by a local government." *Id.* § 36(a).

The LGAA does not require the actions of a local government to meet either of the prongs of the *Midcal* test. Congress enacted this statute in response to *Community Communications Co. v. City of Boulder*, in which the Supreme Court held that certain conduct by the city of Boulder, Colorado, did not qualify for state action immunity. Community Commc'ns Co. v. City of Boulder, 455 U.S. 40 (1982).

232 American Bar Association, Section of Antitrust Law, *The State of Antitrust Enforcement—2001*, at 42 (2001).

233 FTC State Action Report, at 1.

234 *Ticor*, 504 U.S. at 636; *see also* Antitrust Law Developments, at 1278; Varner Statement, at 2, 16–18; FTC State Action Report, at 8, 50, 52.

235 Areeda & Hovenkamp, Antitrust Law, ¶ 221d8; *see also* Jorde, *Antitrust and the New State Action Doctrine*, at 248; C. Douglas Floyd, *Plain Ambiguities in the Clear Articulation Requirement for State Action Antitrust Immunity: The Case of State Agencies*, 41 B.C. L. Rev. 1059, 1109 (2000).

236 *Southern Motor Carriers*, 471 U.S. at 60; *Town of Hallie*, 471 U.S. at 41–44, 64–65.

237 *Southern Motor Carriers*, 471 U.S. at 61.

238 *See, e.g.*, *City of Boulder*, 455 U.S. at 56.

239 *Id.*

240 *Southern Motor Carriers*, 471 U.S. at 64.

[241] *See id.* at 65 n.25.

[242] *Town of Hallie*, 471 U.S. at 42–43.

[243] *See id.* at 41–42.

[244] *Id.* at 41.

[245] *See* FTC State Action Report, at 20; *Patrick*, 486 U.S. at 100–01; *Ticor*, 504 U.S. at 634–35.

[246] *See* FTC State Action Report, at 20–21.

[247] *Town of Hallie*, 471 U.S. at 46.

[248] *Id.* at 47.

[249] Mark A. Perry, *Municipal Supervision and State Action Antitrust Immunity*, 57 U. Chi. L. Rev. 1413, 1417–18 (1990).

[250] William H. Page & John E. Lopatka, *State Regulation in the Shadow of Antitrust:* FTC v. Ticor Title Insurance Co., 3 Sup. Ct. Econ. Rev. 189, 210 (1993); *see also Patrick*, 486 U.S. at 100–01.

[251] *Midcal*, 445 U.S. at 106 (1980); *see also Town of Hallie*, 471 U.S. at 46–47 (quoting *Midcal*).

[252] *Ticor*, 504 U.S. at 636.

[253] Inman & Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine*, at 1271; Jorde, *Antitrust and the New State Action Doctrine*, at 249.

[254] Areeda & Hovenkamp, Antitrust Law, ¶ 227a.

[255] *See Town of Hallie*, 471 U.S. at 46–47; *see also* Hillary Greene, *Articulating Trade-offs: The Political Economy of State Action Immunity*, 2006 Utah L. Rev. 815, 817 (2006).

[256] Crosby v. Hospital Auth. of Valdosta & Lowndes County, 93 F.3d 1515, 1524 (11th Cir. 1996).

[257] *Ticor*, 504 U.S. at 634–35.

[258] *Id.* at 638.

[259] *Midcal*, 445 U.S. at 105–06.

[260] *Ticor*, 504 U.S. at 638.

[261] FTC State Action Report, at 25.

[262] *See Town of Hallie*, 471 U.S. at 41–42.

[263] *See, e.g.*, Martin v. Memorial Hosp. at Gulfport, 86 F.3d 1391 (5th Cir. 1996). There, a physician challenged a hospital's contract with a physician exclusively to operate the hospital's kidney dialysis facilities. The court reasoned the alleged anticompetitive conduct—the exclusive contract—was foreseeable, because the legislature had authorized the hospital to contract (and terminate contracts) with any individual for the provision of services. *Id.* at 1400. The court also relied on a statute requiring a certificate of need to establish, expand, or relocate kidney dialysis facilities, but the exclusive contract did not raise any issue relating to the establishment of those facilities. *See id.*

[264] *Ticor*, 504 U.S. at 636; *see also* Varner Statement, at 13–14 (discussing cases misusing the foreseeability test).

[265] *City of Boulder*, 455 U.S. at 56.

[266] City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 372 (1991).

[267] Surgical Care Ctr. of Hammond v. Hospital Serv. Dist. No. 1, 171 F.3d 231, 235 (1999) (emphasis added).

[268] *Id.* at 235–36 (holding that statutes authorizing a hospital district to enter contracts and to participate in joint ventures failed to evidence an intent to displace competition by shielding exclusive contracts that prohibited managed care plans from using a competitor for outpatient surgical care).

[269] FTC State Action Report, at 33.

[270] ABA Comments re FTC Report, at 9.

[271] *See id.*

[272] Hardy v. City Optical Inc., 39 F.3d 765, 770 (7th Cir. 1994) (Posner, J.).

[273] *See* Varner Statement, at 6, 16–17.

[274] FTC State Action Report, at 12 (citing *Town of Hallie*, 471 U.S. at 46).

[275] Areeda & Hovenkamp, Antitrust Law, ¶ 227a.

[276] FTC State Action Report, at 52–53.

[277] *See Ticor*, 504 U.S. at 639–40; FTC State Action Report, at 53.

[278] *See Ticor*, 504 U.S. at 639.

[279] *See* ABA Comments re FTC Report, at 17–18; FTC State Action Report, at 12.

[280] ABA Comments re FTC Report, at 17.

[281] *See* FTC State Action Report, at 12.

[282] *See id.* at 37.

[283] Areeda & Hovenkamp, Antitrust Law, ¶ 227a.

[284] *See* FTC State Action Report, at 56; *see also* Areeda & Hovenkamp, Antitrust Law, ¶ 227a.

[285] *See, e.g.*, Inman & Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine*, at 1271; Hovenkamp & Mackerron, *Municipal Regulation and Federal Antitrust Policy*, at 767; *see also* FTC State Action Report, at 40; Varner Statement, at 4, 19; *E-Commerce: The Case of Online Wine Sales and Direct Shipment: Hearing Before Subcomm. on Commerce, Trade, & Consumer Protection of the H. Comm. on Energy & Commerce*, 108th Cong. 12 (2003) (statement of Todd Zywicki, Director, Office of Policy Planning, Federal Trade Commission); FTC Staff, Possible Anticompetitive Barriers to E-Commerce: Contact Lenses.

[286] *Parker*, 317 U.S. at 345.

[287] Jorde, *Antitrust and the New State Action Doctrine*, at 256. It is counter to the legislative process in general, and specifically as it is applied in the antitrust context. *See, e.g.*, Northern Sec. Co. v. United States, 193 U.S. 197, 343–47 (1904); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 231–33 (1899).

[288] *See* Jorde, *Antitrust and the New State Action Doctrine*, at 253; Varner Statement, at 19; State Action Doctrine Trans. at 25–26 (Varner).

[289] *See, e.g.*, Edwin Mansfield, Microeconomics, Theory and Applications 458 (3d ed. 1979).

[290] Inman & Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine*, at 1271, 1276.

[291] The Court recognized intrastate spillovers in *City of Lafayette*, noting that decisions of a municipal electric utility may favor the municipality at the expense of "extraterritorial impact and regional efficiency" and could burden consumers living outside the municipality without providing them "meaningful" political recourse. *City of Lafayette*, 435 U.S. at 404–06.

[292] None of the Court's recent cases involved fact patterns that would have raised interstate spillover issues. Ticor affected transactions on in-state property. *Ticor*, 504 U.S. at 627–28. *Omni* involved zoning within a single city. *Omni*, 499 U.S. at 367–69. *Patrick* involved peer review proceedings at a single hospital. *Patrick*, 486 U.S. at 97–99. *324 Liquor* involved mechanisms for raising in-state retail liquor prices. 324 Liquor Corp. v. Duffy, 479 U.S. 335, 340 (1987). *Southern Motor Carriers* involved regulation of intrastate trucking rates. *Southern Motor Carriers*, 471 U.S. at 50–53. *Town of Hallie* involved sewage treatment for areas surrounding a single city within a single state. *Town of Hallie*, 471 U.S. at 36–37. *Hoover* involved admission to the practice of law in Arizona. *Hoover*, 466 U.S. at 560–65. *City of Boulder* involved cable television regulation governing a single city. *City of Boulder*, 455 U.S. at 45–47. *Midcal* involved mechanisms for raising in-state retail wine prices. *Midcal*, 445 U.S. at 99–100.

[293] The Supreme Court has expressly rejected a market participant exception to the Eleventh Amendment's divestiture of federal courts of jurisdiction to hear certain claims against states. College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999). However, some commentators have argued that the Court's reasoning is not readily transferable to the antitrust context. *See, e.g.*, Robert M. Langer & Peter A. Barile III, *Can the King's Physician (Also) Do No Wrong?: Health Care Providers and a Market Participant Exception to the State Action Immunity Doctrine*, *in* MATTHEW BENDER'S ANTITRUST REPORT 26 (1999); *see also* Robert M. Langer, Statement at AMC State Action Doctrine Hearing, at 3 (Sept. 29, 2005).

[294] *Omni*, 499 U.S. at 374–75. The Court explained that the language from *Parker* suggested only that the state action doctrine might not apply when a state acts in a commercial capacity rather than as a sovereign. *Id.*

[295] *Id.* at 379.

[296] *City of Lafayette*, 435 U.S. at 419 (Burger, C.J., concurring). Justice Stewart (joined by Justices White, Blackmun, and Rehnquist), dissenting in *Lafayette*, disagreed with the Chief Justice, arguing that the Sherman Act simply was not intended to cover the acts of governmental bodies and that "it is senseless to require a showing of state compulsion when the State itself acts through one of its governmental subdivisions." *Id.* at 428, 432. Justice Stewart also noted that the distinction between "proprietary" and "governmental" activities has been described as a "quagmire" and that a proprietary activity of government is nonetheless governmental. *Id.* at 433–34.

[297] *City of Lafayette*, 435 U.S. at 419 (Burger, C.J., concurring).

[298] *Id.*

[299] *Id.* at 418.

[300] *See* Genentech, Inc. v. Eli Lilly & 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."); A.D. Bedell Wholesale Co. v. Philip Morris Inc., 263 F.3d 239, 265 n.55 (3d Cir. 2001) ("There is also a market participant exception to actions which might otherwise be entitled to *Parker* immunity"); Hedgecock v. Blackwell Land Co., 1995 WL 161649, at *2 (9th Cir., Apr. 7, 1995) (No. 93-16604) ("While a commercial participant exception to *Parker* might be appropriate in circumstances where an arm of the state enters a market in competition with private actors . . . such is not the case here.").

[301] *See A.D. Bedell*, 263 F.3d at 265 n.55.

[302] *Id.* (quoting Parker, 317 U.S. at 352) (emphasis added).

[303] *Id.*

[304] *Hedgecock*, 1995 WL 161649, at *2.

[305] *See* Paragould Cablevision v. City of Paragould, 930 F.2d 1310, 1313 (8th Cir. 1991) ("[T]he market participant exception is merely a suggestion [in *Omni*] and is not a rule of law.").

[306] *See* Allright Colo., Inc. v. City of Denver, 937 F.2d 1502, 1510 n.11 (10th Cir. 1991); McCallum v. City of Athens, 976 F.2d 649, 653 n.7 (11th Cir. 1992).

[307] *Allright*, 937 F.2d at 1510 n.11; McCallum, 976 F.2d at 653 n.7.

[308] *See* Varner Statement, at 4, 19, 21; ABA Comments re FTC Report, at 20–22; FTC STATE ACTION REPORT, at 49; State Action Doctrine Trans. at 46–47 (Varner). Professors Areeda and Hovenkamp likewise note that Chief Justice Burger's proposed distinction between proprietary and non-proprietary municipal activities "is widely thought to have proved unworkable in identifying appropriate areas of municipal tort liability." AREEDA & HOVENKAMP, ANTITRUST LAW, ¶ 224e3. *See generally* 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 (1995).

[309] *See, e.g.*, AREEDA & HOVENKAMP, ANTITRUST LAW, ¶ 224e3.

[310] Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 593 (1997).

[311] Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976).

[312] Reeves, Inc. v. Stake, 447 U.S. 429, 431–32 (1980).