

PLAIN AMBIGUITIES IN THE CLEAR ARTICULATION REQUIREMENT FOR STATE ACTION ANTITRUST IMMUNITY: THE CASE OF STATE AGENCIES

C. DOUGLAS FLOYD*

Abstract: This Article focuses on the application of the state action antitrust immunity doctrine of *Parker v. Brown* to the regulatory programs of state administrative agencies having statewide jurisdiction. It concludes that state agencies should be subject to significantly different requirements for antitrust immunity than are local governmental units. This Article also addresses unresolved issues that frequently recur in the context of state administrative action, such as the effect of retroactive interpretations of state policy by a state agency, whether the clear articulation and active supervision requirements for antitrust immunity play any separate role in the context of administrative policy making, and whether any distinctions should be drawn among the processes of rulemaking, adjudication, and tariff approval in applying the *Parker* doctrine.

INTRODUCTION

In a series of decisions over the last twenty-five years,¹ the United States Supreme Court has articulated a modern reformulation of the state action antitrust immunity doctrine of *Parker v. Brown*.² The Court has established a three-part test, under which the acts of a state legis-

* Professor of Law, Brigham Young University Law School. B.S., Massachusetts Institute of Technology, 1964; J.D., Stanford, 1967. I wish to thank Professors Jean Wegman Burns and Thomas D. Morgan for their helpful comments on a previous draft of this Article, and Allyson Davidson and Shane Keppner for their invaluable research assistance.

¹ Federal Trade Comm'n v. Ticor Title Ins. Co., 504 U.S. 621 (1992); City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365 (1991); Patrick v. Burget, 486 U.S. 94 (1988); Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985); Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48 (1985); Hoover v. Ronwin, 466 U.S. 558 (1984); Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); Bates v. State Bar, 433 U.S. 350 (1977); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

² 317 U.S. 341 (1943).

lature or a state supreme court acting in its legislative capacity are *ipso facto* immune without further inquiry,³ the acts of municipalities and other subordinate governmental entities are immune only if undertaken pursuant to a clearly articulated state policy,⁴ and the acts of private parties pursuant to a state program of regulation are immune only if they are both pursuant to a clearly articulated state policy and actively supervised by the state.⁵ The Court has explained that because municipalities are not themselves sovereign, the clear articulation requirement is necessary to ensure that their acts truly represent the sovereign policy of the state itself.⁶ The additional active supervision requirement for the conduct of private actors is necessary because, unlike local governmental units, private actors cannot be presumed to act in the public interest.⁷

Unfortunately, the Court's attempt to clearly articulate definitive requirements for state action antitrust immunity has produced more confusion than clarity in the lower federal courts and has engendered substantial and ongoing scholarly criticism.⁸ The criticism itself, however, has hardly been of one voice. One important article has suggested that the Court's attempt to distinguish public and private action is fundamentally misguided; rather, the article maintains that the proper focus is on whether the regulation at issue is inefficient and

³ *Hoover*, 466 U.S. at 568; *Bates*, 433 U.S. at 359.

⁴ *Town of Hallie*, 471 U.S. at 45-46.

⁵ *Midcal*, 445 U.S. at 105 (quoting *Louisiana Power & Light*, 435 U.S. at 410).

⁶ *Community Communications*, 455 U.S. at 53.

⁷ *Patrick*, 486 U.S. at 100-01; *Town of Hallie*, 471 U.S. at 45.

⁸ See generally, e.g., Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. LAW & ECON. 23 (1983); Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667 (1991); Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L.J. 486 (1987); Daniel J. Gifford, *Federalism, Efficiency, The Commerce Clause and the Sherman Act: Why We Should Follow a Consistent Free-Market Policy*, 44 EMORY L.J. 1227 (1995); Herbert Hovenkamp & John A. MacKerron III, *Municipal Regulation and Federal Antitrust Policy*, 32 UCLA L. REV. 719 (1985); 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 (1997); Thomas M. Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 CAL. L. REV. 227 (1987); William H. Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After Midcal Aluminum*, 61 B.U. L. REV. 1099 (1981) [hereinafter Page, *Antitrust*]; William H. Page, *Capture, Clear Articulation, and Legitimacy: A Reply to Professor Wiley*, 61 S. CAL. L. REV. 1343 (1988) [hereinafter Page, *Capture*]; William H. Page, *Interest Groups, Antitrust, and State Regulation: Parker v. Brown in the Economic Theory of Legislation*, 1987 DUKE L.J. 618 (1987) [hereinafter Page, *Interest Groups*]; Matthew L. Spitzer, *Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory*, 61 S. CAL. L. REV. 1293 (1988); John S. Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713 (1986).

whether it was the product of "capture" by private interests.⁹ This capture theory has, in turn, produced critics of its own.¹⁰ Still others have argued variously that the focus should be on whether the regulation in question has extra-jurisdictional spillover effects not subject to meaningful political check¹¹ or whether the regulation was the product of a financially interested decision maker, public or private.¹² A number of commentators proceed on the premise that because the now-accepted objective of the antitrust laws is to achieve allocative efficiency, the contours of the state action doctrine should focus on whether according immunity for the conduct in question is consistent with that efficiency goal.¹³

A strong undercurrent of much of this criticism has been that the Court's current state action immunity doctrine, through its clear articulation and active supervision requirements, imposes a costly system of "command and control" regulation on the states as the price of obtaining antitrust immunity for their regulatory programs.¹⁴ This impairs the very interests of federalism that it was meant to promote. Some critics have gone so far as to suggest that proper respect for state sovereignty means that states should be able to repeal the antitrust laws outright if they wish¹⁵ or, alternatively, to delegate the power to engage in anti-competitive conduct entirely to private parties without any further governmental supervision or constraint.¹⁶

Academic criticism of current state action immunity doctrine has had little discernable impact on the decisions of the Supreme Court. None of the Court's seminal decisions, with their focus on the distinction between private and governmental action, and their requirements for clear articulation of governmental policy and active supervision of private conduct, have shown any inclination to change the focus of their analysis to "agency capture" by private interests, to whether the decision makers at issue are financially interested, or to whether the state's regulatory regime is consistent with the efficiency

⁹ See generally Wiley, *supra* note 8.

¹⁰ See generally, e.g., Elhauge, *supra* note 8; Page, *Interest Groups*, *supra* note 8; Page, *Capture*, *supra* note 8; Spitzer, *supra* note 8.

¹¹ See generally, e.g., Jorde, *supra* note 8.

¹² See generally, e.g., Elhauge, *supra* note 8.

¹³ See generally, e.g., Easterbrook, *supra* note 8; Hovenkamp & MacKerron, *supra* note 8; Spitzer, *supra* note 8.

¹⁴ See generally, e.g., Easterbrook, *supra* note 8; Jorde, *supra* note 8; Page, *Antitrust*, *supra* note 8; Wiley, *supra* note 8.

¹⁵ Easterbrook, *supra* note 8, at 29, 38; Wiley, *supra* note 8, at 729-30.

¹⁶ Wiley, *supra* note 8, at 731.

goals of the antitrust laws. Indeed, the Court's holding in *City of Columbia v. Omni Outdoor Advertising*, that neither allegations that a city council had conspired with regulated private interests nor allegations of bribery or corruption by public officials are sufficient to vitiate state action antitrust immunity, implicitly undercuts the premises of much of the previous criticism of the *Parker* doctrine and calls for a fresh reexamination of the subject.¹⁷

Parker v. Brown was concerned with a system of production restraint for an agricultural commodity imposed by a state administrative agency.¹⁸ Although the Supreme Court's subsequent development and refinement of the *Parker* doctrine frequently has involved the actions of local governmental units,¹⁹ some of its most important decisions, like *Parker* itself, have been concerned with the anticompetitive regulatory programs of state agencies.²⁰ A significant and rapidly increasing body of recent authority in the federal courts of appeals also addresses the application of the *Parker* doctrine in that context.²¹ Ironically, in view of the *Parker* doctrine's origins, and the significance of state-wide agencies in developing state policy through rule making and adjudication, the Supreme Court has devoted little attention to the scope of immunity for statewide regulatory programs developed by state agencies under general delegations of authority by the state legislature.

To the extent that it has inferentially addressed the issue, the Court's pronouncements have been delphic and inconsistent. At times it has suggested that the same clear articulation requirement applicable to subordinate governmental units also should apply to

¹⁷ 499 U.S. at 365. See *infra* notes 175-179 and accompanying text.

¹⁸ *Parker*, 317 U.S. at 344.

¹⁹ See, e.g., *Omni*, 499 U.S. at 365; *Town of Hallie*, 471 U.S. at 34; *Community Communications*, 455 U.S. at 40; *Louisiana Power & Light*, 435 U.S. at 389.

²⁰ *Ticor*, 504 U.S. at 621; *Patrick*, 486 U.S. at 94; *Southern Motor Carriers*, 471 U.S. at 48; *Cantor*, 428 U.S. at 579.

²¹ See generally, e.g., *Neo Gen Screening, Inc. v. New England Newborn Screening Program*, 187 F.3d 24 (1st Cir. 1999); *Automated Salvage Transp., Inc. v. Wheelabrator Env'tl. Sys., Inc.*, 155 F.3d 59 (2d Cir. 1998); *Earles v. State Bd. of Certified Pub. Accountants*, 139 F.3d 1033 (5th Cir. 1998); *Bankers Ins. Co. v. Florida Residential Property & Casualty Joint Underwriting Ass'n*, 137 F.3d 1293 (11th Cir. 1998); *Columbia Steel Casting Co. v. Portland Gen. Elec. Co.*, 111 F.3d 1427 (9th Cir. 1997); *California CNG, Inc. v. Southern Cal. Gas Co.*, 96 F.3d 1193 (9th Cir. 1996); *Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d 609 (11th Cir. 1995); *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260 (3d Cir. 1994); *Charley's Taxi Radio Dispatch Corp. v. SIDA, Inc.*, 810 F.2d 869 (9th Cir. 1987); *Deak-Perera Hawaii, Inc. v. Department of Transp.*, 745 F.2d 1281 (9th Cir. 1984).

state agencies.²² At others, it has suggested that state agencies themselves are empowered to clearly articulate anticompetitive policy for the state.²³ The Court also has declined to resolve whether, or in what circumstances, an active supervision requirement should apply to state agencies.²⁴

The body of academic commentary on the *Parker* doctrine similarly has failed to focus specifically on the uniqueness of state agencies and their programs and whether they possess special attributes that should lead to distinct rules of antitrust immunity. A notable exception is a series of articles by William Page arguing that because agencies are more likely to adopt regulatory programs that serve producer interests than are state legislatures—and because agencies, unlike legislatures, do not represent a wide range of interests and are not subject to direct popular control—only state legislatures should be able to clearly articulate anticompetitive state policy entitled to immunity under the *Parker* doctrine.²⁵

Despite this lack of guidance, lower federal courts frequently and increasingly have been confronted with difficult issues of antitrust immunity in the context of important regulatory programs adopted by administrative agencies of statewide jurisdiction.²⁶ Absent any definitive guidance from the Supreme Court, lower courts generally have assumed that state agencies should be treated like municipalities and other subordinate governmental units and that federal antitrust immunity should be accorded to their programs only if they are adopted pursuant to a clearly articulated policy adopted by the state legislature or the state supreme court acting in a legislative capacity.²⁷

²² See, e.g., *Southern Motor Carriers*, 471 U.S. at 63 (holding actions of the state legislatures and state supreme courts *ipso facto* immune); see also *Hoover*, 466 U.S. at 568; *Goldfarb*, 421 U.S. at 790–91.

²³ See *Southern Motor Carriers*, 471 U.S. at 64 (“Requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness.”).

²⁴ *Town of Hallie*, 471 U.S. at 46 n.10 (“In cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue.”).

²⁵ See generally Page, *Antitrust*, *supra* note 8; Page, *Interest Groups*, *supra* note 8; Page, *Capture*, *supra* note 8.

²⁶ See *supra* note 21.

²⁷ See, e.g., *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989) (concluding that Oregon State Bar was a state agency, but assuming that its requirement that all members of the state bar purchase malpractice insurance from the Bar was subject to the clear articulation requirement); cf. *Cost Management Servs., Inc. v. Washington Natural Gas Co.*, 99 F.3d 937, 942 (9th Cir. 1996) (holding allegation that defendant engaged in off-tariff pric-

Similarly, they have assumed that, like municipalities, state agencies are not subject to the active supervision requirement because, unlike private parties, they may be presumed to act in the public interest.²⁸

These assumptions have not been universal, however. Some courts have concluded that state agencies, like state legislatures, themselves may articulate anticompetitive state policy that is *ipso facto* immune from federal antitrust scrutiny without further inquiry or restraint.²⁹ There also has been a suggestion that the degree of constraint should decrease as proximity to the center of state government decreases, with state agencies subject to less constraint than municipalities and municipalities subject to less constraint than private actors.³⁰

This Article takes as its focus the application of the *Parker* doctrine to the regulatory programs of state administrative agencies having statewide jurisdiction. It concludes that state agencies should be subject to significantly different requirements for antitrust immunity than are local governmental units. Additionally, this Article addresses other unresolved issues that frequently recur in the administrative context, such as the effect of retroactive interpretations or declarations of state policy by a state agency, whether the clear articulation and active supervision requirements—if they apply at all—play any separate role in the context of administrative policy making, and whether any distinction should be drawn between the process of ad-

ing of natural gas not immune despite authority of state utilities commission to police pricing if off-tariff pricing was illegal under state law).

²⁸ See, e.g., *Town of Hallie*, 471 U.S. at 46 n.10 ("In cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue."). See generally *Porter Testing Lab. v. Board of Regents*, 993 F.2d 768 (10th Cir. 1993).

²⁹ See *Neo Gen Screening*, 187 F.3d at 24; *Charley's Taxi*, 810 F.2d at 869; *Deak-Perera*, 745 F.2d at 1281; *Saenz v. University Interscholastic League*, 487 F.2d 1026 (5th Cir. 1973); see also *Automated Salvage*, 155 F.3d at 59 (suggesting, without deciding, that state agency policy determinations are *ipso facto* immune).

³⁰ See *Cine 42nd Street Theatre Corp. v. Nederlander Org., Inc.*, 790 F.2d 1032, 1049 (2d Cir. 1986) (Newman, J., concurring) ("The inquiry as to foreseeability ought to take into account two variables—not only the scope of the statutory authority but also, and perhaps more important, the proximity of the defendant's actions to the sovereign authority of the state."); see also *Southern Motor Carriers*, 471 U.S. at 64 (stating that, where state agencies are involved, "as long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied."); *TEC Cogeneration, Inc. v. Florida Power & Light Co.*, 76 F.3d 1560, 1568 (11th Cir. 1996) (holding that the actions of a state agency are properly considered in determining the specifics of state policy); *Yeager's Fuel*, 22 F.3d at 1268–69 (accord[ing] weight to views of state public utility commission in determining what state policy was).

ministrative rule making and administrative adjudication in applying the *Parker* doctrine.

I suggest that one reason that neither the courts nor commentators have definitively addressed these issues is that the Supreme Court's explication of the norms underlying its development of the state action immunity doctrine has been inadequate. Unlike previous commentary, however, I conclude that the Court's distinction between state and local governmental action, and between private action and public action, are not meaningless or formal, but rather, are fully justified. The ongoing confusion and difficulties that have attended application of the Court's "trifurcated" approach to antitrust immunity, particularly in the context of state agency action, have resulted not from these basic distinctions but from its failure to articulate the implicit assumptions and premises underlying its *Parker* decisions with sufficient clarity and to follow those premises to their logical conclusion. The "laboratory case" of state agencies provides a fruitful field for exploring these issues, not simply to answer the many unresolved questions regarding antitrust immunity in that context, but to clarify the basic premises of the *Parker* doctrine with implications for its application in other settings as well.

I. BASIC PREMISES

A. *State-wide Authoritativeness*

Perhaps the most consistent feature of the Supreme Court's state action immunity decisions has been the Court's insistence that only the actions of entities acting pursuant to the policy of the "state as sovereign" are entitled to *Parker* immunity.³¹ On this ground, the Court freely has accorded antitrust immunity for the actions and policies of state level entities such as the state legislature or state supreme court.³² At the same time, however, the Court has refused to extend a corresponding immunity to the actions and policies of local govern-

³¹ See, e.g., *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 63 (1985) ("*Parker* immunity is available only when the challenged activity is undertaken pursuant to a clearly articulated policy of the State itself, such as a policy approved by a state legislature . . . or a State Supreme Court.").

³² See, e.g., *Hoover v. Ronwin*, 466 U.S. 558, 568 (1984); *Bates v. State Bar*, 433 U.S. 350, 360-62 (1977).

mental entities or private individuals unguided by any overarching state anticompetition norm.³⁵

This central theme of the Court's decisions applying the *Parker* doctrine has engendered widespread criticism in academic commentary on the state action immunity doctrine.³⁴ This criticism has been particularly strong with respect to the Court's decision in *City of Lafayette v. Louisiana Power & Light Co.*, which concluded that cities are not automatically protected by *Parker*.³⁵ The Court has also been criticized for its decision that a broad delegation of "home rule" authority to a municipal government is not a sufficient articulation of state anticompetition policy to support an immunity claim in *Community Communications Co. v. City of Boulder*.³⁶ The critics have argued that the Court's restriction of immunity to governmental institutions authorized to speak for the state as a whole is "formalistic"³⁷ and "mechanical"³⁸ and that sovereign state policy may equally be expressed through delegated and decentralized decisionmakers.³⁹ The limitation also has been challenged on the ground that it is fundamentally contrary to the federalism basis of *Parker* itself because it improperly limits the power of the state to choose the way in which state power should be allocated among governmental units.⁴⁰ Additionally, the critics have argued that the Court's "anti-delegation" approach to *Parker* immunity may frustrate the purposes of the antitrust laws by forcing the states to adopt inefficient forms of "command and control" regulation⁴¹ and by impeding the decentralization of regulatory authority to smaller units of government, which are the most efficient

³⁵ Compare *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 41-43 (1985) (requiring a clear articulation of state policy as a condition of municipal immunity), with *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 103-06 (1980) (requiring both a clear articulation of state policy and active supervision of private conduct as conditions of antitrust immunity for private individuals).

³⁴ See generally, e.g., Easterbrook, *supra* note 8; Elhauge, *supra* note 8; Garland, *supra* note 8; Gifford, *supra* note 8; Hovenkamp & MacKerron, *supra* note 8; Inman & Rubinfeld, *supra* note 8; Jorde, *supra* note 8; Page, *Antitrust*, *supra* note 8; Page, *Capture*, *supra* note 8; Page, *Interest Groups*, *supra* note 8; Spitzer, *supra* note 8; Wiley, *supra* note 8.

³⁵ *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

³⁶ 455 U.S. at 40 (1982).

³⁷ See Hovenkamp & MacKerron, *supra* note 8, at 738-39.

³⁸ See Easterbrook, *supra* note 8, at 36-37.

³⁹ See *id.*; see also Elhauge, *supra* note 8, at 670, 676, 682; Garland, *supra* note 8, at 502; Hovenkamp & MacKerron, *supra* note 8, at 732, 758; Jorde, *supra* note 8, at 237, 241-42; Wiley, *supra* note 8, at 722, 731.

⁴⁰ See *id.*

⁴¹ See Easterbrook, *supra* note 8, at 30-31; Jorde, *supra* note 8, at 249; Page, *Antitrust*, *supra* note 8, at 1101; Spitzer, *supra* note 8, at 1299; Wiley, *supra* note 8, at 732-34.

regulators of the inherently local problems they confront.⁴² Finally, some critics have charged that because smaller units of government generally foster greater political participation, the Court's insistence that *Parker* immunity applies only to policies adopted by a governmental entity exercising statewide authority frustrates the premises of representative democracy.⁴³

In reality, however, the Supreme Court's insistence that only an entity authorized to speak for the state as a whole is empowered to confer immunity from the federal antitrust laws is much more defensible than the critics have assumed. Critics who argue that the Court's current formulation of the *Parker* doctrine may promote "inefficient" forms of regulation improperly conflate the efficiency-based goals of the antitrust laws themselves with those of the *Parker* doctrine. *Parker* immunity was not designed to promote economic efficiency, but rather, to protect the result of the state's political process even if that result is fundamentally at odds with federal antitrust policy.⁴⁴

Similarly, critics who argue that the Court has engaged in "formalistic" line drawing and ignored the tenets of federalism disregard the long established and analogous rule that the interests of federalism undergirding the Eleventh Amendment's protection of the states from suit in federal court do not extend to municipalities and other subordinate governmental units.⁴⁵ Although this distinction has been grounded in part on the Eleventh Amendment's explicit extension of immunity from suit only to "one of the United States,"⁴⁶ the scope of Eleventh Amendment immunity has been extended well beyond its literal terms to prohibit suits against state officers and state agencies

⁴² See Hovenkamp & MacKerron, *supra* note 8, at 774.

⁴³ See Inman & Rubinfeld, *supra* note 8, at 1209, 1233, 1249, 1255, 1284; Jorde, *supra* note 8, at 249-50; Wiley, *supra* note 8, at 734.

⁴⁴ See, e.g., Garland, *supra* note 8; Jorde, *supra* note 8, 251-52; Page, *Interest Groups*, *supra* note 8, at 623.

⁴⁵ See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) ("The bar of the Eleventh Amendment to suit in federal courts extends to States and state officials in appropriate circumstances . . . but does not extend to counties and similar municipal corporations."); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890) ("[W]hile the county is territorially a part of the state, yet politically it is also a corporation created by and with such powers as are given to it by the State. In this respect it is a part of the State only in that remote sense in which any city, town, or other municipal corporation may be said to be a part of the State."); see also *Moor v. Alameda County*, 411 U.S. 693, 720-21 (1973) (pointing out the "independent corporate character" of California counties).

⁴⁶ U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

that operate as "arms of the state," as well as suits by a states' own citizens—something not literally prohibited by the Amendment itself.⁴⁷ Ultimately, the Court's decisions limiting the scope of the Eleventh Amendment to agencies of statewide authority must be seen as an expression of its conclusion that the core purposes of the Amendment—the protection of the state treasury from federal judgments and the affront to the dignity of the state itself—are not sufficiently implicated by federal suits against municipalities and other subordinate units of state government exercising less than state-wide authority.⁴⁸

Although the purposes of the Eleventh Amendment are distinct from that of *Parker* immunity,⁴⁹ it is no accident that the Supreme Court's decisions refusing to extend *Parker* to the actions of municipalities and other local governmental units have relied explicitly on the limited scope of Eleventh Amendment immunity.⁵⁰ *Parker* was not based on any express Congressional determination to exempt states from overriding federal antitrust policy. Rather, that decision rested on the Court's assumption that Congress would have said so expressly had it intended to subject sovereign states to a competition-based regime focused on private anticompetitive restraints.⁵¹ Like other judicially implied exemptions from the antitrust laws, the Supreme Court has held that the *Parker* doctrine must be narrowly construed.⁵² Given the long-standing distinction under the Eleventh Amendment between the sovereign respect owed to states and state agencies on the one hand, and to municipalities and other subordinate governmental

⁴⁷ See, e.g., *Edelman v. Jordan*, 415 U.S. 651 (1974) (stating that the Eleventh Amendment bars suits against statewide agency); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945) (same); *Hans v. Louisiana*, 134 U.S. 1 (1890) (stating that the Eleventh Amendment bars suits against a state by its own citizens).

⁴⁸ See *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994) (considering the Eleventh Amendment's "twin reasons" in concluding that a bi-state compact agency fell outside the Amendment's protection).

⁴⁹ *Surgical Care Ctr. v. Hospital Serv. Dist. No. 1*, 171 F.3d 231, 234 (5th Cir. 1999) (en banc) (cautioning against conflating the two doctrines).

⁵⁰ See *Louisiana Power & Light*, 435 U.S. at 412-13 (relying on Eleventh Amendment precedent to conclude that cities are not themselves sovereign and that "[in] light of the serious economic dislocation which could result if cities were free to place their own parochial interests about the Nation's economic goals reflected in the antitrust laws . . . we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach").

⁵¹ See, e.g., *Community Communications*, 455 U.S. at 53-54; *Parker*, 317 U.S. at 350-51 ("[A]n unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.").

⁵² See *Federal Trade Comm'n v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992).

units on the other, the Court had substantial justification for its refusal to extend its implied immunity doctrine beyond policies authoritatively adopted for the state as a whole absent any explicit direction by Congress that it should. As the Court has pointed out: states—not cities—enjoy sovereign status in our federal system.⁵³

Surely, the Court was entitled to take account of the fact that the potential for frustration of federal antitrust policy would be greatly magnified if the *Parker* doctrine was extended fully to subordinate governmental units. As Professor Page has pointed out, the adoption of anticompetition policies at the state level requires the reconciliation of a much broader range of competing interests than typically would be the case with smaller units of government more focused on purely parochial concerns or with special purpose governmental entities, which by their very nature screen out competing interests and policies.⁵⁴ The traditional performance by local and special purpose governmental entities of a wide range of functions often performed by private entities also blurs the distinction between government and private action at the local level. This provides an additional reason for requiring that anticompetitive conduct be taken pursuant to the direction of a governmental entity exercising statewide authority if federal antitrust constraints are to be set aside. The Supreme Court had substantial warrant for concluding that, absent further Congressional guidance, only state policies of sufficient importance to command the support of an entity authorized to speak for the state as a whole were of sufficient weight implicitly to displace the overriding federal antitrust norm.

B. *Non-retroactivity*

A largely unremarked but important premise of the Supreme Court's state action immunity decisions has been the assumption that only prospective governmental action is sufficient to invoke the *Parker* doctrine.⁵⁵ In *Parker* itself, the Court emphasized that "a state does not give immunity to those who violate the Sherman Act by authorizing

⁵³ *Community Communications*, 455 U.S. at 53–54.

⁵⁴ See Page, *Interest Groups*, *supra* note 8, at 632–40.

⁵⁵ A notable exception is Einer Elhauge, who stands alone in recognizing that under the Supreme Court's decisions, a restraint is entitled to state action antitrust immunity only if appropriate state actors make a substantive decision in favor of the terms of the challenged restraint *before* it is imposed on the market. See Elhauge, *supra* note 8, at 671.

them to violate it, or by declaring that their action is lawful"—a point it has consistently reiterated in subsequent decisions.⁵⁶

The Supreme Court has assumed that the justification for limiting the state action doctrine to prospectively adopted anticompetitive policies is self-evident, as it has never explained the basis for that requirement. Such a limitation no doubt finds its origins in the same policies that underlie the strong presumption against retrospective policymaking by both legislatures and administrative agencies.⁵⁷ In particular, as Justice Scalia pointed out in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, retrospective policy making may unfairly upset significant private reliance interests incurred with reference to the law in effect at the time the conduct at issue took place.⁵⁸ The Supreme Court rightly has assumed that this general non-retroactivity principle is directly pertinent to fashioning the scope of the implied state action antitrust immunity doctrine. The retrospective ratification of anticompetitive private conduct would have the effect of destroying the justifiable reliance of injured private parties on the prevailing federal free-competition norm in conducting their business activities and making investment decisions.⁵⁹

⁵⁶ Compare *Parker*, 317 U.S. at 351-52 (emphasis added), with *Ticor*, 504 U.S. at 633 (maintaining that a state may not confer immunity on private parties by fiat), and *Town of Hallie*, 471 U.S. at 46-47 (stating that a state may not validate a municipality's anticompetitive conduct by declaring it lawful), and *Midcal*, 445 U.S. at 106 (stating that "the national policy in favor of [free] competition cannot be thwarted by casting a gauzy cloak of state involvement" over private anticompetitive conduct), and *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592-93 (1976) (holding that state authorization, encouragement, or approval of private anticompetitive conduct is insufficient to confer immunity).

⁵⁷ See, e.g., *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) ("[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.") (internal quotation omitted); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (noting, in the context of retrospective administrative policymaking, that "retroactivity is not favored in the law").

⁵⁸ Justice Scalia, in his concurrence, noted: "It is contrary to fundamental notions of justice, and thus contrary to realistic assessment of probable legislative intent. The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal." 494 U.S. 827, 855 (1990) (Scalia, J., concurring). See also *Landgraf*, 511 U.S. at 265-66 ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.") (citations omitted); *Union Pac. R.R. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913) (referring to the reason of "obvious justice" supporting the non-retroactivity principle).

⁵⁹ Elhaage points out that a pre-injury process of disinterested decision making requires financially interested actors to come forward first and provide a realistic assurance that the restraint is in the public interest before market injury is suffered. See Elhaage, *supra* note 8, at 714.

The presumption against legislative retroactivity also is grounded in the concern that particularized, backward-looking legislation may arbitrarily discriminate against certain individuals or groups in favor of powerful private interests, and thus, may be subject to undue influence by special interests.⁶⁰ These concerns are directly pertinent to determining the scope of the implied state action immunity. Some critics of current doctrine have suggested that the Supreme Court should directly focus on the existence of the "capture" of state governmental processes by regulated private interests in defining the scope of *Parker* immunity.⁶¹ Although this view has generated persuasive criticism, even the most severe critics of the capture theory have recognized that the likelihood that a regulatory program reflects the public interest should be relevant to determining the requirements for antitrust immunity.⁶² For example, Page has argued that the structure and constraints governing the processes of a state legislature make the legislature the exclusive source of state anticompetitive policy entitled to *Parker* immunity, excluding the policy determinations of state agencies as well as those of municipalities and other subordinate governmental bodies.⁶³ Although Page justifies this conclusion primarily in terms of what he views as the requirements of political responsiveness inherent in the "Madisonian process of deliberation,"⁶⁴ he also contends that because legislatures have a far greater number of decision makers, virtually unlimited jurisdiction, and are subject to a variety of political checks, they will be less subject to capture by regulated interests than are state agencies.⁶⁵

Although I disagree with Professor Page's central conclusion that only legislative policymaking is entitled to *Parker* immunity, I concur with his conclusion that the contours of the Supreme Court's state

⁶⁰ See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 241-43, 243 n.20 (1995) (Breyer, J., concurring) (recognizing that prospectivity and general applicability provide assurances against legislative "singling out" of particular favored or disfavored groups); *Landgraf*, 511 U.S. at 266-67 (recognizing that a legislature's responsiveness to political pressures may tempt it "to use retroactive legislation as a means of retribution against unpopular groups or individuals").

⁶¹ See Wiley, *supra* note 8; see also Elhauge, *supra* note 8, at 695 (arguing that the scope of immunity should be determined by whether the restraint in question was adopted by a financially disinterested decisionmaker; "state action immunity applies only when a financially disinterested state official controls the terms of the challenged restraint").

⁶² See, e.g., Page, *Capture*, *supra* note 8; Page, *Interest Groups*, *supra* note 8; Spitzer, *supra* note 8.

⁶³ See Page, *Interest Groups*, *supra* note 8.

⁶⁴ *Id.* at 631-32.

⁶⁵ *Id.* at 635-37.

action doctrine contain implicit, process-based safeguards designed to minimize the likelihood that state approval of regulated private conduct will be directed predominantly to the satisfaction of private ends rather than to broader conceptions of the public interest. One of those safeguards is the requirement that anticompetitive private conduct must be undertaken pursuant to a generally applicable and prospective policy adopted by a body possessing authority to establish policy for the state as a whole. The Court's repeated refusal to sanction the retrospective "ratification" of private anticompetitive conduct after it already has occurred reflects its recognition that, in such circumstances, significant practical and political momentum disproportionately may influence the state's political process to approve what amounts to a *fait accompli*. Moreover, because such retrospective ratifications by definition are not addressed to any general question of state policy but only to special circumstances involving particularized private interests already entrenched, the likelihood that the views of all elements of the state's body politic whose interests might be affected by a more general and prospectively applicable state policy will be heard and weighed in the balance is diminished significantly. As a result, the likelihood of a meaningful political check on state approval of anticompetitive private conduct is reduced, and the likelihood that state approval will be obtained correspondingly is increased.

C. General Applicability

A third implicit premise of the Supreme Court's state action immunity decisions is that only a generally applicable state policy is of sufficient weight to warrant implicit "reverse preemption" of federal antitrust prohibitions. In *Parker* itself, the Court made clear that mere state ratification or authorization of private anticompetitive conduct was insufficient to confer immunity⁶⁶—a point that it frequently has reiterated.⁶⁷ Rather, an entity possessing authority to fashion policy for the state as a whole must have affirmatively addressed and generally endorsed the specific type of anticompetitive activity at issue.

This premise is most apparent in the Court's municipal action decisions. By definition, municipalities and other local governmental entities of limited jurisdiction do not exercise legislative policy-making authority for the state as a whole. Thus, their undertaking or endorsement of various types of anticompetitive activities are not in

⁶⁶ *Parker*, 317 U.S. at 351-52.

⁶⁷ See *supra* note 56.

themselves entitled to state action immunity unless they have been authorized by an entity that does. In *City of Lafayette v. Louisiana Power & Light Co.*, for example, the Court held that municipalities that were alleged to have tied the purchase of electricity to their provision of water and gas service, and to have engaged in other anticompetitive activities directed to preventing competition by Louisiana Power & Light ("LP&L"), were not entitled to immunity.⁶⁸ The Court explained that "[w]hen cities, each of the same status under state law, are equally free to approach a policy decision in their own way, the anticompetitive restraints adopted as policy by any one of them, may express its own preference rather than that of the State"⁶⁹

Subsequently, in 1982, in *Community Communications Co. v. City of Boulder*, the Court reiterated that policies adopted by cities, even if authorized by state "home-rule" laws, are not entitled to immunity because they do not establish a generally applicable policy for the state as a whole.⁷⁰ The Court reasoned that granting immunity in such circumstances would permit one city to regulate cable television competition, another to prescribe monopoly service, and yet another to pursue free-market competition. The Court stated: "Acceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that our precedents require."⁷¹ In short, even state-authorized local declarations of *local* policy are not entitled to state action immunity because they are not authoritative state declarations of a policy *generally applicable to the state as a whole*.

Of course, one may disagree, as many have done, on the ground that denial of antitrust immunity to state authorized adoptions of local policies unduly constrains the ability of state governments to allocate governmental decision-making to local governmental units in an efficient and politically responsive way.⁷² But, given the strong national policy established by the federal antitrust laws and the Constitutional supremacy of federal law within its appointed sphere, as well as the absence of any express provision authorizing the "reverse preemption" of federal antitrust law by the states, the Supreme Court was on

⁶⁸ 435 U.S. at 389.

⁶⁹ *Id.* at 414–15.

⁷⁰ See 435 U.S. at 55–56.

⁷¹ *Id.*

⁷² See *supra* notes 40–41.

firm ground when it concluded that only generally applicable anti-competitive policies of statewide authoritativeness are of sufficient weight to justify an assumption that Congress had no intention to subject them to the facially unqualified national pro-competition norm. One could equally argue (as few have done) that general state authorizations to private actors in particular industries to engage in anticompetitive activities should be accorded antitrust immunity on the ground that a state may conclude that certain segments of its economy will operate most efficiently if they are freed from competitive constraints. This argument, however, does not directly address the question of whether an implied inverse preemption based on assumed Congressional intent is appropriate for such general delegations of authority to private actors. As the Court itself repeatedly has emphasized, only states, not private actors, and not local governmental units, are sovereign entities in our federal system. For that reason, only substantive policies explicitly adopted for the state as a whole are entitled to the respect that *Parker's* implied inverse preemption doctrine confers.⁷³

Like the Supreme Court's implicit requirement of prospectivity, the recognition of state action immunity only for a statewide policy of general applicability provides a structural safeguard ensuring that exceptions to the federally prescribed pro-competition norm are sufficiently weighty to attract the support of an entity authorized to prescribe policy for the state as a whole. Unlike particularized ratifications or approvals of specific proposals for private anticompetitive action, generalized policy prescriptions are likely to engender the opposition of all interests affected by such an anticompetitive state policy—and thus, are less likely to be adopted. The requirement that *Parker* immunity may be accorded only to statewide policies of general applicability therefore serves to minimize departures from the federal competitive norm.

D. *Specificity*

The Supreme Court has struggled to define how specifically a state must approve particular anticompetitive conduct if it is to be

⁷³ See, e.g., *Louisiana Power & Light*, 435 U.S. at 412 (stating that under our dual system of government, "states are sovereign, save only as Congress may constitutionally subtract from their authority" (quoting *Parker*, 317 U.S. at 351) and that "[c]ities are not themselves sovereign; they do not receive all the federal deference of the States that create them").

immune from the federal antitrust laws since it first announced the two-pronged clear articulation and active supervision test in *Midcal Aluminum* in 1980. The Court's answers have been both inconsistent with each other and with the stated basis for imposing the requirements at all.

In cases where the state's regulatory program has involved private anticompetitive activities claimed to have been undertaken pursuant to state policy, the Court has insisted not only that an entity authorized to formulate policy for the state as a whole have endorsed the particular type of anticompetitive conduct at issue but also that all of the details of the private arrangement actually have been reviewed and approved by a state actor. For example, in *Patrick v. Burget*,⁷⁴ the Court rejected a claim of antitrust immunity for Oregon's system of medical peer review, finding state statutes that clearly articulated a general state policy in favor of medical peer review insufficient to meet *Midcal's* "rigorous two-pronged test" for attributing private anticompetitive action to the state.⁷⁵ The Court held that the active supervision requirement additionally must be satisfied "to ensure that the state-action doctrine will shelter *only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies.*"⁷⁶ The presence of some state monitoring or involvement was insufficient. Rather, "[s]tate officials [must] have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy."⁷⁷

In *Federal Trade Commission v. Ticor Title Insurance Co.*,⁷⁸ the Court held that state "negative option" schemes for regulating the rates set for title searches and examinations by private rating bureaus were not entitled to immunity because the states had not determined the "specifics" of the rates actually set.⁷⁹ Satisfaction of the clear articulation prong, by itself, was insufficient because "it cannot alone ensure, as required by our precedents, that particular anticompetitive conduct has been approved by the State."⁸⁰ It was not sufficient that the states in question had created a state regulatory program, which was staffed and funded and granted state officials the power and duty to

⁷⁴ 486 U.S. at 94.

⁷⁵ *Id.* at 100.

⁷⁶ *Id.* at 101 (emphasis added).

⁷⁷ *Id.*

⁷⁸ 504 U.S. at 621.

⁷⁹ *Id.* at 629, 638.

⁸⁰ *Id.* at 637.

regulate pursuant to declared general standards of state policy.⁸¹ The Court's more demanding standard ensured that the states would "accept political responsibility for the actions they intend to undertake."⁸²

The Court's decisions with respect to municipal action have taken a markedly different course. Only three years after rejecting a claim of immunity for actions taken by the City of Boulder under a broad grant of "home rule authority,"⁸³ the Court made an abrupt about face in *Town of Hallie v. City of Eau Claire*.⁸⁴ In that case, the Court watered down the clear articulation requirement to the vanishing point and dispensed with the active supervision requirement altogether.⁸⁵ Municipal action was antitrust-immune if it was the "foreseeable result" of state authority to act in a particular area, without any requirement that the details of the city's implementation of state policy receive any supervision at all.⁸⁶ Thus, the City of Eau Claire's policy of tying its sewerage treatment services to the provision of collection and transportation services was immune because it was the "foreseeable result" of state statutes authorizing the city to operate sewage systems and determine the areas to be served.⁸⁷

The Court's newly relaxed clear articulation requirement effectively dispensed with any requirement that state authorization to engage in particular types of anticompetitive conduct actually be "clear" in the case of municipal actors. At the same time, the Court's elimination of the rigorous active supervision requirement applicable to private actors left the "specific details" of anticompetitive municipal action entirely within the discretion of the municipality itself. As the *Hallie* "foreseeability" test has been applied by the courts of appeals, it has proven to have essentially no bite, leading to the conclusion that the broader the delegation of authority to act with respect to a particular subject matter, the more likely that anticompetitive conduct will be held to be the foreseeable result of that delegation.⁸⁸ This re-

⁸¹ *Id.*

⁸² *Id.* at 636.

⁸³ *Community Communications*, 455 U.S. at 55.

⁸⁴ 471 U.S. at 34.

⁸⁵ *See id.* at 45-47.

⁸⁶ *Id.* at 42.

⁸⁷ *Id.* at 42, 47.

⁸⁸ *See, e.g.,* C. DOUGLAS FLOYD & E. THOMAS SULLIVAN, PRIVATE ANTITRUST ACTIONS: THE STRUCTURE AND PROCESS OF CIVIL ANTITRUST LITIGATION § 4.1.7 (1996); Elhauge, *supra* note 8, at 691-92; Garland, *supra* note 8; Gifford, *supra* note 8, at 1244; Jorde, *supra* note 8, at 242, 244.

sult seems utterly inconsistent with the holding of *Community Communications Co. v. City of Boulder* that a general delegation of municipal home rule authority cannot satisfy the clear articulation requirement or *Hallie's* foreseeability test.⁸⁹ The Supreme Court has not explained why, if a clear articulation of sovereign state policy is required to ensure that the actions of non-sovereign units of local government are in accordance with that policy, the requirement should be interpreted in a way that makes it impossible for it to achieve that goal. This weak interpretation of the clear articulation requirement has led to strenuous efforts by both of the antitrust enforcement agencies of the United States government to reformulate the test to impose some meaningful constraint on the ability of non-state actors to engage in anticompetitive activity.⁹⁰

Critics of the Court's ostensibly rigorous two-pronged approach to the state action immunity doctrine have applauded *Hallie's* apparent evisceration of those requirements in the context of anticompetitive municipal action on the ground that those restraints frustrate the goals both of economic efficiency and federalism. Thus, William Page has argued that the active supervision requirement—whether applied to private or municipal conduct—is misguided because it imposes a costly system of centralized “command and control” regulation on the states which may be economically inefficient.⁹¹ He further argues, presumably on the same grounds, that the clear articulation requirement should be satisfied whenever the legislature clearly articulates its intention that the competitive market should not be relied upon to make output and pricing decisions, even though the details of the regulatory regime are left entirely at large.⁹² Judge Easterbrook similarly contends that heavily supervised regulation may not promote allocative efficiency. Instead, he maintains that unsupervised exit competition among local governments will lead to more efficient regulation. He asks why federalism should not require the Court to accept the states' decisions to allocate power to local governments.⁹³ Hovenkamp and MacKerron suggest that a state's decision to delegate broad and unsupervised regulatory power to local governmental units

⁸⁹ See *supra* notes 70–71 and accompanying text.

⁹⁰ See, e.g., *Columbia Steel Casting Co. v. Portland Gen. Elec. Co.*, 111 F.3d 1427, 1442–43 (9th Cir. 1997); *Federal Trade Comm'n v. Hospital Bd. of Dirs.*, 38 F.3d 1184, 1188, 1190 (11th Cir. 1994).

⁹¹ Page, *Antitrust*, *supra* note 8, at 1101, 1129.

⁹² See Page, *Interest Groups*, *supra* note 8, at 643–44.

⁹³ See Easterbrook, *supra* note 8, at 29, 30, 32–33, 36–37, 41.

should be respected in the interests of federalism and economic efficiency unless the local governmental unit is not the "optimal economic regulator" of the particular activity in question (because, for example, it generates spillover effects). In such a case, *both* clear articulation and active supervision of its activities by the state should be required.⁹⁴

Professor Wiley argues that the clear articulation and active supervision requirements represent "a miserable procedural compromise to the substantive problem of antitrust federalism: as applied, it not only insults the value of state and local sovereignty but also fails to advance federal economic policy."⁹⁵ In his view, the Court should either "abandon the clear-statement rule altogether and revive the genuine deference to state sovereignty that *Parker* exhibited or else adopt a review of state and local regulation that focuses more selectively on the problem of regulatory capture" by economically interested private parties.⁹⁶ Thomas Jorde similarly welcomes the Court's relaxation of these requirements in *Hallie*, claiming that *Midcal's* rigorous two-pronged approach was contrary to principles of "economic federalism" because it limited the states' ability to delegate economic decision making to agencies, municipalities, or private individuals.⁹⁷ Einer Elhauge believes that the clear articulation and active supervision requirements should be jettisoned in favor of an approach focused directly on whether the decision in question was made by a "financially interested decision maker" and that both the articulation and supervision requirements are contrary to the interest in local autonomy.⁹⁸

With the exception of Elhauge's suggestion of a focus on whether the restraint in question was the product of a "financially interested decision maker," these arguments fail to explain the Court's distinction between private and municipal action, which requires state approval of the specific details of a private restraint but only the most general authorization of power to deal with a particular subject matter in the case of municipalities.⁹⁹ Rather, they suggest the elimination of the requirements altogether, both for private and municipal action. This is a course that the Court steadfastly has declined to pursue. The

⁹⁴ Hovenkamp & MacKerron, *supra* note 8, at 724, 751, 765, 774-75.

⁹⁵ Wiley, *supra* note 8, at 715.

⁹⁶ *Id.*

⁹⁷ Jorde, *supra* note 8, at 236-37, 241.

⁹⁸ Elhauge, *supra* note 8, at 674-76, 692-95.

⁹⁹ Jorde, *supra* note 8, at 244.

general commendation of *Hallie* thus rests less on principle than on the view that "half a loaf" is better than none.

In fact, neither principles of federalism nor those of economic efficiency can justify either the Court's general approach to the *Parker* doctrine or the widely disparate treatment that it has accorded to the anticompetitive conduct of municipal and private actors. As previously discussed, the ideal of federalism does not suggest that the important national policy in favor of free competition should be implicitly overridden by local municipal decisions that have not been endorsed by an authorized policy maker for the state as a whole. And, as others have recognized, the Court's *Parker* decisions are not aimed at achieving economic efficiency, but rather, at allowing the states to adopt demonstrably anticompetitive policies when they have clearly determined to depart from the federal competitive norm.¹⁰⁰

The Court's own explanation for its divergent treatment of municipal and private conduct is just as lacking as those based on concepts of federalism and economic efficiency. In *Hallie*, the Court suggested that the active supervision requirement was intended to ensure that the actor was in fact implementing a general anti-competition policy previously articulated by the state. In the case of private actors, that safeguard was required because "where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State."¹⁰¹ By contrast:

Where the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals. This danger is minimal, however, because of the requirement that the municipality act pursuant to a clearly articulated state policy.¹⁰²

This passage, which has been uncritically accepted by subsequent decisions and commentators, seems to ignore the fact that municipalities, as much as private actors, are "persons" subject to antitrust

¹⁰⁰ See generally Garland, *supra* note 8; Page, *Antitrust*, *supra* note 8; Page, *Capture*, *supra* note 8; Page, *Interest Groups*, *supra* note 8.

¹⁰¹ *Town of Hallie*, 471 U.S. at 47.

¹⁰² *Id.*

laws.¹⁰³ This very fact reflects an implicit Congressional judgment that municipalities, no less than private actors, may have strong incentives to engage in anticompetitive conduct that has the same—or potentially even greater—adverse impact on free market competition than the conduct of private actors. To say that municipalities therefore may be “trusted” more than private actors to further public interests articulated by the state¹⁰⁴ ignores Congress’s determination that municipalities and other local units of government present a significant risk of anticompetitive conduct in their own right.

The Supreme Court recognized this fact in *City of Lafayette v. Louisiana Power & Light Co.*, when it rejected automatic application of the *Parker* doctrine to municipal action.¹⁰⁵ The Court explained that “the economic choices made by public corporations in the conduct of their business affairs, designed . . . to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations”¹⁰⁶ The Court quite correctly recognized that “when these bodies act as owners and providers of services, they are fully capable of aggrandizing other economic units with which they interrelate with the potential of serious distortion of the rational and efficient allocation of resources and the efficiency of free markets which the regime of competition embodied in the anti-trust laws is thought to engender.”¹⁰⁷ This conclusion draws further support from the Court’s Eleventh Amendment decisions which consistently have refused to equate local governmental units with the state in major part because, both in historic origin and in the nature of many activities they undertake, municipalities are similar to private business corporations.¹⁰⁸

The Court’s different treatment of municipal and private actors is better explained by a focus on the locus of state law policy-making with respect to the issue at hand, than by increased “trust” in the good acts and intentions of municipal actors measured on a pro-competition scale. By definition, private actors are not vested with authority to determine state policy, either in general or in its specific

¹⁰³ See *Community Communications*, 455 U.S. at 56; *Louisiana Power & Light Co.*, 435 U.S. at 394–95.

¹⁰⁴ See *Town of Hallie*, 471 U.S. at 47.

¹⁰⁵ See 435 U.S. at 389.

¹⁰⁶ *Id.* at 403.

¹⁰⁷ *Id.* at 408.

¹⁰⁸ See *supra* note 45.

detail. The situation of municipalities and other local governmental bodies is much different. The clear articulation requirement, applied in a meaningful way, assures that particular types of anticompetitive conduct undertaken by municipal bodies reflect the policy of the state as a whole. By necessity, however, a state-wide anticompetitive policy must focus on broad types of anticompetitive conduct and their necessity or desirability to the achievement of the state's regulatory goals, rather than on the details of particular transactions of the authorized kind. Conversely, local governmental bodies have no authority to determine policy for the entire state. They are, however, vested with state law authority to determine the specific details of state policy in its actual implementation in particular transactions within their limited jurisdiction once those transactions have been clearly authorized by a state-wide policy maker in advance. Thus, the dispensation granted to local governmental units from the active supervision requirement of current immunity doctrine simply reflects the scope of their policymaking authority with respect to inherently local matters as a matter of state law.

Consider the terms of an exclusive dealing arrangement entered by a local hospital authority.¹⁰⁹ Provided that a state legislature or other actor authorized to determine policy for the state as a whole has articulated sufficiently a general policy permitting such exclusive arrangements, there is no reason to insist that the state legislature also approve the specific determination of when such authority should be invoked or what the terms of its exercise should be. Such a requirement would be wholly impracticable and would ignore the very reason why the state has chosen to delegate authority to implement the specific details of state policy to local hospital districts.

In short, rather than view municipalities as occupying a special position making them "exempt" from the active supervision requirement, it would be better to view both the clear articulation and active supervision requirements as dual components of a single overarching

¹⁰⁹ See, e.g., *Crosby v. Hospital Auth.*, 93 F.3d 1515 (11th Cir. 1996) (holding statutory authorization for hospital authorities to deny staff privileges on the basis of training, experience, competence, availability and "reasonable objectives, including, but not limited to, the appropriate utilization of hospital facilities," make it foreseeable that staff privileges would be denied based on a determination that the existing staff was sufficient to satisfy demand for the specialty in question); *Martin v. Memorial Hosp.*, 86 F.3d 1391, 1400 (5th Cir. 1996) (holding statute authorizing municipal hospital to contract with any individual to provide services regarding any facet of the operation of the hospital, coupled with state certificate of need law, made entry of exclusive contract for the provision of renal services at the hospital foreseeable).

principle that anticompetitive conduct falls within the state action exemption from the antitrust laws only if it is approved in advance and in specific detail by public authorities having the power to (1) formulate a general policy in favor of such anticompetitive arrangements for the state as a whole and (2) determine that the specific contract or arrangement in question falls within that policy. A single body could in some instances exercise both functions simultaneously. As discussed below, this may be true with respect to tariff approval and other actions commonly undertaken by state public utilities commissions and other state agencies exercising state-wide jurisdiction. In such cases, the two-pronged *Midcal* test becomes irrelevant.

Frequently, however, the combination of both functions in a single body is neither desirable nor, as a practical matter, possible. In that event, provided that a general policy authorizing the kind of anticompetitive conduct at issue previously has been adopted by the state legislature or other body having state law authority to determine policy for the state as a whole, the more limited sphere of authority exercised by municipalities and other local and special purpose governmental bodies is more than sufficient to permit them to determine the specifics of state policy. Thus, if a municipality enters an exclusive dealing or other potentially anticompetitive arrangement pursuant to a general policy previously articulated by a state-wide policymaker, its actions are exempt, not because it can be "trusted" to act in the way the legislature contemplated, but rather, because the municipality itself is the authorized repository of state power to determine the specifics of state policy in its particular applications.

This way of looking at the question also helps to explain why, for example, municipalities and other subordinate governmental bodies consistently have been held to have the authority to perform the active supervision requirement with respect to particular conduct undertaken by private actors pursuant to a policy previously articulated by the state legislature.¹¹⁰ If the state legislature or state supreme court alone could formulate "state policy," the result would be anomalous because the approval of a state agency, municipality, or other

¹¹⁰ See, e.g., *Southern Motor Carriers*, 471 U.S. at 63; *California CNG, Inc. v. Southern Cal. Gas Co.*, 96 F.3d 1193, 1203 (9th Cir. 1996); *Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d 609, 612 (11th Cir. 1995). But see *Riverview Invs., Inc. v. Ottawa Cmty. Improvement Corp.*, 774 F.2d 162, 163 (6th Cir. 1985) (altering earlier order and instructing district court to determine on remand whether the state—as opposed to the city—had actively supervised a private defendant's conduct pursuant to municipal regulation); *City Communications, Inc. v. City of Detroit*, 660 F. Supp. 932 (E.D. Mich. 1987).

subordinate governmental unit would do nothing to ensure that the *specific details* of the private action in question had indeed been approved by the state. By recognizing that state law policy making authority is divided among various units of government and that the intended and legitimate purpose of restricted jurisdiction units of state government is to formulate the specific details of state policy in its actual application, the twin clear articulation and active supervision components of the Supreme Court's *Parker* decisions give ample recognition to practical and political legitimacy of the delegation of state governmental powers.

This analysis suggests that the longstanding and widespread criticism of the Court's *Parker* doctrine on the ground that it fails to recognize the legitimate need for delegation of state powers to subordinate governmental agencies is misguided.¹¹¹ At the same time, it suggests that the Court's general "foreseeability" standard for satisfaction of the clear articulation requirement as it has developed in the lower courts under *Hallie* is subject to substantial criticism and should be reexamined.¹¹² In effect, this approach negates the Court's requirement that a body such as the state legislature possessing policy making authority for the state as a whole have made an affirmative decision to permit a particular type of anticompetitive conduct in the area in question. For this reason, much can be said in the cases involving municipal and private actors for attempts by the Federal Trade Commission and the Department of Justice to introduce a greater degree of rigor to the clear articulation inquiry.¹¹³

As pointed out below, however, the situation of state agencies is much different. Unlike local or special purpose governmental units, state agencies do possess policymaking authority for the state as a whole. For that reason, a more liberal interpretation of the clear articulation requirement to encompass state agency approval of particular types of anticompetitive conduct that are within the scope of a broad delegation of policymaking authority to the agency by the state legislature or state constitution is entirely appropriate.

¹¹¹ See *supra* notes 39-42.

¹¹² In an important recent *en banc* decision, the Court of Appeals for the Fifth Circuit has begun that trend, recognizing that an "overly lax view of the necessity of expressed legislative will" undermines the interests of federalism. *Surgical Care Center of Hammond*, 171 F.3d at 236.

¹¹³ See *supra* note 90.

E. *Visibility and Political Control*

Professor William Page has been the most forceful advocate of the position that, based on principles of "Madisonian democracy," only the policy decisions of a state legislature or state supreme court "count" for the purposes of the *Parker* immunity doctrine.¹¹⁴ He contends—erroneously, in my view—that the Supreme Court's decisions defining the scope of the *Parker* doctrine have focused fundamentally on the "process of representation" and that the Court's decisions are best explained as a reflection of the "Madisonian model of representative government."¹¹⁵ In his view, only the actions of a state legislature matter for *Parker* purposes because "[t]he Madisonian concept of representative government presupposes a reconciliation of interests during an enactment process that involves logrolling and compromise" in the state legislature.¹¹⁶ The delegation of regulatory decisions to state agencies, however, "removes the Madisonian system of electoral checks and balances" from policy development, and thus, deprives those decisions of sufficient legitimacy to support a *Parker* immunity claim.¹¹⁷ "Theory and experience teach that, when the legislature has transferred responsibility for central policy choices to a regulatory agency under a broad delegation of power, the presumption of popular consent to protective regulation is unwarranted."¹¹⁸

In a later article, Page elaborated on this theme, asserting that a state's decision to displace the antitrust laws can be made only after "competing interest groups have survived the traditional Madisonian gauntlet of legislative procedures."¹¹⁹ He further argued that the Supreme Court has required that anticompetitive policy be articulated by the state legislature because of its "increased awareness of the political shortcomings of the regulatory process."¹²⁰ Page contends that "regulators typically are not directly responsive to the chief executive, just as they are not responsible to the electorate." Furthermore, Page opines that legislatures reflect a greater range of interests than regulatory agencies and are less likely to be captured by directly affected economic interests.¹²¹ In this connection, he argues that the Supreme

¹¹⁴ See Page, *Antitrust*, *supra* note 8; Page, *Interest Groups*, *supra* note 8.

¹¹⁵ Page, *Antitrust*, *supra* note 8, at 1101, 1107.

¹¹⁶ *Id.* at 1111 (citations omitted).

¹¹⁷ *Id.* at 1112.

¹¹⁸ *Id.* at 1113.

¹¹⁹ Page, *Interest Groups*, *supra* note 8, at 619.

¹²⁰ *Id.* at 621.

¹²¹ See *id.* at 634-35.

Court's requirement for a clear articulation of state anticompetition policy is not a "proxy for the ultimate issue of legislative intent," but rather, "has the independent function of guaranteeing that legislative intent is expressed in a way that ensures adequate information in the political process."¹²²

Page's attempt to cast the antitrust state action doctrine into a Madisonian model that would have been familiar to the Framers of the Constitution draws little support from the decisions of the Supreme Court and misapprehends the basis and origins of the clear statement requirement.¹²³ The Supreme Court's *Parker* immunity decisions evidence far more concern with the formal locus of state policymaking authority on an issue than with concepts of Madisonian democracy derived from the Federalist Papers. For example, in *Goldfarb v. Virginia State Bar*, the Court denied immunity for the action of the state bar in enforcing locally adopted fee schedules.¹²⁴ Noting that the Court recognized the status of the bar as an administrative agency of the state for limited purposes, Page argues that *Goldfarb* supports his attempted restriction of *Parker* to the actions of the state legislature.¹²⁵ In fact, *Goldfarb* contains no mention of the necessity of direct legislative control of state policy or of concepts of Madisonian democracy as the fount of the *Parker* doctrine. Rather, the Court's opinion, which was issued before its subsequent decisions had crystallized the *Parker* doctrine in its current form and clarified that state compulsion is not a requirement for antitrust immunity, is most fairly read as rejecting the claim of immunity in *Goldfarb* because the Virginia Supreme Court was the entity authorized by state law to regulate the practice of law and, far from compelling the use of binding fee schedules, explicitly had directed lawyers not to be controlled by them.¹²⁶ The Court's opinion was focused on the formal locus of state law authority with respect to fee schedules in the Virginia Supreme Court. It does not hold that a state administrative agency never may adopt *Parker*-immune anticompetition policy for the state.¹²⁷

¹²² *Id.* at 640; see also Inman & Rubinfeld, *supra* note 8 (focusing at various points on the importance of political participation and arguing that the Court now uses a process-oriented approach that enhances political participation by requiring anticompetitive policies to be clearly authorized by the state legislature).

¹²³ See *infra* notes 254-259 and accompanying text.

¹²⁴ 421 U.S. at 773.

¹²⁵ See Page, *Antitrust*, *supra* note 8, at 1116-17.

¹²⁶ 421 U.S. at 789-90.

¹²⁷ See *infra* notes 159-168 and accompanying text.

The Supreme Court's decisions in *Bates v. State Bar*¹²⁸ and *Hoover v. Ronwin*¹²⁹ similarly evidence no concern with the process of direct representation or Madisonian concepts of representative democracy. In those cases, the Supreme Court concluded that the actions of the state supreme court in restricting lawyer advertising and regulating admission to the bar were antitrust immune. In *Bates*, the members of the Arizona Supreme Court were subject to a periodic, non-political "retention" election.¹³⁰ However, the United States Supreme Court placed no emphasis on that fact in holding that the state supreme court's actions were *ipso facto* antitrust immune. Rather, the Court focused on the formal locus of statewide authority with respect to the regulatory matters at issue.¹³¹ Similarly, in *Hoover*, the Supreme Court did not focus on direct political responsiveness or Madisonian concepts of representative self government, but rather, on the fact that under the Arizona Constitution the "Arizona Supreme Court has plenary authority to determine admissions to the bar."¹³² In exercising its legislative power pursuant to that authority, it "occupies the same position as that of a state legislature. Therefore, a decision of a state supreme court, acting legislatively rather than judicially, is exempt from Sherman Act liability as state action."¹³³

For the purpose of *Parker* immunity, there is no persuasive basis for distinguishing state supreme courts acting in their "legislative capacity" with respect to the regulation of the bar from the actions of a state agency acting "legislatively" with respect to matters within its statewide jurisdiction and authority. In either event, each is the authorized policymaker for the state with respect to the matter in question.¹³⁴ Even in states where members of the judiciary are subject

¹²⁸ 433 U.S. at 350.

¹²⁹ 466 U.S. at 558.

¹³⁰ See ARIZ. CONST. art. VI, § 38.

¹³¹ The Court stated: "In the instant case . . . the challenged restraint is the affirmative command of the Arizona Supreme Court under its Rules 27(a) and 29(a) and its Disciplinary Rule 2-101(B). That court is the ultimate body wielding the State's power over the practice of law . . ." *Bates*, 433 U.S. at 359-60 (emphasis added).

¹³² *Hoover*, 466 U.S. at 569.

¹³³ *Id.* at 568.

¹³⁴ Although state supreme courts, unlike most agencies, have independent constitutional authority to regulate the practice of law, they also typically exercise substantial regulatory authority with respect to the practice of law delegated to them by the state legislature. See, e.g., *In re Attorney Discipline System; Requests of the Governor and the State Bar of California*, 967 P.2d 49 (Cal. 1998). Courts have upheld such legislative regulation of the practice of law if it is reasonable and not in material conflict with the supreme court's inherent authority. See *id.* at 60-61; see also Note, *The Inherent Power of the Judiciary to Regulate the Practice of Law—A Proposed Delineation*, 60 MINN. L. REV. 783, 802 (1976). In implement-

to periodic retention or contested elections, those elections are more likely to focus on the justices' performance of their judicial duties, rather than their legislative and administrative duties with respect to the regulation of the bar.¹³⁵ Moreover, recognition of immunity for the legislative policy prescriptions of state supreme courts is inconsistent with the central premise of Page's position—that the actions of state legislatures are to be preferred to those of state agencies in the *Parker* immunity calculus because the state legislature offers a forum for the reconciliation of a much broader range of competing interests and therefore is more likely to reflect the broader public interest. In their regulation of the bar, state supreme courts frequently may reflect a narrower range of interests than many economic, environmental, and social regulatory agencies of the state.

Only a few of the Supreme Court's *Parker* opinions have alluded to considerations of political visibility and representation of the kind discussed by Page. Those references have been both fleeting and ambiguous in their implications.¹³⁶ In *Town of Hallie*, for example, in

ing legislatively prescribed regulation of the bar, state supreme courts exercise a function indistinguishable from that of administrative agencies generally.

¹³⁵ See generally John B. Wetling, *State Supreme Court Justices: Who Are They?*, 32 NEW ENG. L. REV. 49, 71–72 (1997) (concluding that state supreme court justices are selected by appointment in nine states, by partisan election in ten states, by non-partisan election in 16 states, and by a "mixed" process in 15 states); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 776–78 (1995) (concluding that state supreme court justices are subject to contested elections, either partisan or non-partisan, in 29 states at some point in their careers, and that justices in 13 states are at some time subjected to a retention election without an opponent).

¹³⁶ In *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), the Supreme Court, in the course of rejecting a claim of "petitioning" immunity under the *Noerr-Pennington* doctrine for the anticompetitive effect that standards adopted by a private standard setting organization had in the market of their own force, adopted an ambiguous "context and nature" test for determining the scope of *Noerr-Pennington* immunity. *Id.* at 505. In assessing the "context and nature" of the petitioning activities at issue in *Allied Tube*, the Court noted that they had been directed at a private organization rather than a governmental body, and that unlike a governmental body, "no official authority has been conferred on [the association] by any government . . ." *Id.* at 501. The Court went on to state that "where, as here, the restraint is imposed by persons unaccountable to the public and without official authority, many of whom have personal financial interests in restraining competition, we have no difficulty concluding that the restraint has resulted from private action." *Id.* at 502. To the extent that *Noerr* and *Parker* immunities are viewed as "complementary expressions of the principle that the antitrust laws regulate business, not politics," *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 383 (1991), the Court's decision in *Allied Tube* is entirely consistent with a focus on the locus of official policymaking authority in determining the scope of the *Parker* doctrine. Indeed, *Omni's* ultimate rejection of any exception to either *Parker* or *Noerr* immunity for actions taken by governmental officials pursuant to an anticompetitive "conspiracy" with private parties, *id.*

holding that active supervision of municipal action is not required to obtain *Parker* immunity, the Court primarily reasoned that unlike private actors, municipal actors are presumed to act in the public interest and present "little or no danger that [they are] involved in a private price-fixing arrangement."¹³⁷ In a footnote, the Court noted that municipal conduct is more likely to be exposed to public scrutiny than private conduct through the operation of "sunshine" and public disclosure regulations and that "municipal officers, unlike corporate heads, are checked to some degree through the electoral process. Such a position in the public eye may provide some greater protection against antitrust abuses than exists for private parties."¹³⁸

These observations in the context of municipal immunity hardly support the view that only a state legislature that is directly responsible to the electorate can adopt *Parker*-immune antitrust policy for the state. Indeed, the municipal action cases present one of the greatest difficulties for those who would explain the Court's state action doctrine in terms of direct political accountability because the Court has never extended absolute immunity to the policy determinations of local governmental bodies despite substantial arguments that smaller units of local government are more representative and responsible to the electorate than larger units of government.¹³⁹

One of the most frequent refrains among critics of the Court's elaboration of the *Parker* doctrine has been that its failure to extend immunity to the actions of local governmental units free from the requirement of a prior clear articulation of policy at the state level improperly impairs the values of federalism that the doctrine was in-

at 374-75, 382-83, is inconsistent with a view of *Parker* immunity as turning essentially on direct political responsiveness to the electorate.

¹³⁷ 471 U.S. at 45, 47.

¹³⁸ *Id.* at 45 n.9 (emphasis added).

¹³⁹ Page recognizes that municipalities pose a problem for his theory, but attempts to justify their treatment on the ground that they do not reflect as wide a range of interests as the state legislature. Page, *Interest Groups*, *supra* note 8, at 639. Inman and Rubinfeld similarly argue that immunity should turn significantly on the federalism value of political participation, but recognize that this approach creates problems in explaining the restrictive treatment of municipal action in view of the fact that small units of government are presumptively more politically responsive to the electorate than larger units. *See* Inman & Rubinfeld, *supra* note 8, at 1214-15, 1223, 1232, 1255-56. Their attempted reconciliation turns on the argument that the requirement for clear articulation by a state legislature ensures that unrepresented interests affected by economic spill-overs will be represented in the "original agreement" to permit anticompetitive actions. *See id.* at 1257. This fails to explain, however, why supervision of municipal action is not required to ensure that the bargain is kept. *See id.*

tended to promote.¹⁴⁰ As previously discussed, I regard this criticism as misplaced. It does illustrate, though, that the Supreme Court has not seen visibility and direct political accountability as the hinge on which *Parker* immunity should turn.¹⁴¹

In *City of Lafayette v. Louisiana Power & Light Co.*, the Court rejected the contention that direct responsiveness to the electorate provides the key to unlocking the *Parker* doctrine.¹⁴² The Court rejected a claim of immunity in that case because of the lack of a clear articulation of statewide policy on the matter in question and dismissed the argument that municipal action should be immune "because the government is subject to political control, [and] the welfare of its citizens is assured through the political process"¹⁴³ The presence of economic spillovers relied on by some commentators to explain the requirement for clear articulation of anticompetition policy by the state in that case¹⁴⁴ fails to capture the essential thrust of the Court's reasoning, which was that the direct accountability of municipal actors to the electorate was not a sufficient foundation for *Parker* immunity for anticompetitive municipal action, whether or not that conduct involved spillovers on unrepresented consumers.¹⁴⁵

¹⁴⁰ See, e.g., Hovenkamp & MacKerron, *supra* note 8, at 774-75; see also Jorde, *supra* note 8, 236-37, 248; Wiley, *supra* note 8, 715.

¹⁴¹ Jorde also argues that the scope of *Parker* immunity should turn in significant degree on the "citizen participation value" of federalism. See Jorde, *supra* note 8, at 229. He does not argue, however, that this value requires the *direct* political representation characteristic of the state legislature as a condition of immunity. See *id.* To the contrary, he argues that the federalism basis of *Parker* suggests that immunity should extend more broadly to the decisions both of municipalities and state agencies than a strict interpretation of the clear articulation requirement would permit, and that the "value of citizen participation is served by opportunities for affected interests to participate in the regulatory process and supervision of agencies by the state legislature in the process of budget review. See *id.* at 227-28, 242-43, 249-50. Elhaage argues that the Court's current *Parker* doctrine is "poorly tailored to promoting citizen participation" and contends that the question instead should turn on whether the restraint at issue was imposed by a financially interested decision maker. See Elhaage, *supra* note 8, at 671, 678. Although he leaves the question whether the financially disinterested decision maker also must be "politically accountable" unresolved, his discussion of state agencies makes clear that he does not believe that the direct political accountability characteristic of a state legislature is required. See *id.* at 689-90, 703-04, 738-46.

¹⁴² 435 U.S. at 389.

¹⁴³ *Id.* at 405-06.

¹⁴⁴ Hovenkamp & MacKerron, *supra* note 8, at 775-76 & n.92.

¹⁴⁵ As Inman and Rubinfeld recognize, their emphasis on the political participation value of federalism in explaining the contours of the *Parker* doctrine implies that local regulations that affect only local residents must be approved only locally. See Inman & Rubinfeld, *supra* note 8, at 1266. This position has consistently been rejected by the Supreme Court.

Moreover, recent scholarship calls into question the simplified premises on which the Madisonian model of direct representative democracy rests. The implicit premises of the Madisonian model are that legislatures represent a broader range of interests, are less subject to influence by special interests, and are more politically accountable than unelected "bureaucrats."¹⁴⁶ Today, none of these premises may be true. While admittedly much work remains to be done regarding the characteristics of state administrative and legislative processes,¹⁴⁷ studies of both federal and state agencies and legislatures suggest that legislatures may be equally or more subject to special interest influence and narrow focus than are agencies themselves.¹⁴⁸ This may result from the prevalent phenomenon of "logrolling" in the legislative process¹⁴⁹ and from the common practice of delegating key legislative decisions to committees or subcommittees subject to the domination of one or several powerful chairs or committee members. These committees and subcommittees may be more susceptible than the legislature as a whole to special interest domination.¹⁵⁰ Moreover, agencies frequently may be influenced to reach decisions that serve a wide range of interests—including consumer interests—not just those of the regulated industry.¹⁵¹ This result is promoted by the expansion

¹⁴⁶ Page, *Antitrust*, *supra* note 8; Page, *Interest Groups*, *supra* note 8, at 630-33.

¹⁴⁷ Ira Sharkansky, *State Administrators in the Political Process*, in *POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS* 238, 240 (Herbert Jacob & Kenneth N. Vines eds., 1971) (noting that we have only superficial knowledge about the functioning of state administrative agencies in the policymaking process).

¹⁴⁸ Wiley, *supra* note 8, 724-25 (arguing that legislatures are equally likely to be captured by special interests as are agencies).

¹⁴⁹ Inman & Rubinfeld, *supra* note 8, at 1234.

¹⁵⁰ See GLENN ABNEY & THOMAS P. LAUTH, *THE POLITICS OF STATE AND CITY GOVERNMENT* 82 (1986); WILLIAM L. CARY, *POLITICS AND THE REGULATORY AGENCIES* 57 (1967) (observing that at the legislative committee level, industry pressure can be overwhelming); Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1379 (1977); Richard A. Posner, *Taxation by Regulation*, BELL J. ECON. & MGMT. SCI. 22, 43-44 (Spring 1971); Abraham D. Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293, 1306 (1972) (commenting that the arguments that agencies are subject to pressure by special interest groups are overstated, "especially if that leads to the proposition that the legislative branch is any better in these respects"); Richard B. Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335, 341 (1990); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1695-1696 (1975).

¹⁵¹ See, e.g., Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 244 (1984) [hereinafter Bruff, *Legislative Formality*] (stating: "Long-held theories that agencies become the captives of their regulated industries no longer seem true, if they ever were, in light of such developments as expanded agency jurisdictions that cover many industries, the rise of 'public interest' groups, and widespread participation in the administrative process"); William Gormley, *Policy Dilemmas in a Political Context*, in *STATE POLITICS*

of direct and indirect interest representation in agency proceedings and by judicial review.¹⁵² In addition, agencies are subject to the safeguards of public hearings, in both their adjudicatory and rulemaking activities.¹⁵³ Moreover, considerable evidence refutes the conclusion that agencies are not politically accountable for their policy making decisions. Not only are a number of agencies subject to direct popular election,¹⁵⁴ but those that are not are subject to substantial influence and control by popularly elected governors and legislators.¹⁵⁵

Finally, a return to the non-delegation doctrine in the sphere of the *Parker* doctrine would run counter to the very reasons of practicality that led to its demise in the first place. As others have recognized,¹⁵⁶ it simply is impractical to require that all state policy decisions to displace the federal pro-competition norms be made by the state legislature, unless nothing more than a general legislative decla-

AND THE NEW FEDERALISM: READINGS AND COMMENTARY 386, 395-97 (Marilyn Gittell ed., 1986) [hereinafter Gormley, *Policy Dilemmas*] (noting that state social regulatory agencies regulate so many industries that they are not easily dominated by one and that it is easy to exaggerate the impact of regulated industries on economic regulatory agencies).

¹⁵² See Bruff & Gellhorn, *supra* note 150, at 1412 (noting that a vital aspect of agency rulemaking is the opportunity for participation of all interested parties through notice and comment procedures); Gormley, *Policy Dilemmas*, *supra* note 151, at 398 (noting that citizen groups are become increasingly active in state administrative processes and the advent of public advocacy offices); William T. Gormley, Jr., *Statewide Remedies for Public Underrepresentation in Regulatory Proceedings*, in PUBLIC ADMINISTRATION, POLITICS, AND THE PEOPLE: SELECTED READINGS FOR MANAGERS, EMPLOYEES, AND CITIZENS 399, 400-01 (Dean L. Yarwood ed., 1987) [hereinafter Gormley, *Statewide*] (tracing the increase in direct and indirect public participation in state administrative proceedings).

¹⁵³ See, e.g., Harold H. Bruff, *Separation of Powers Under the Texas Constitution*, 68 TEX. L. REV. 1337, 1344-45 (1990) [hereinafter Bruff, *Texas Constitution*] (pointing out that state agencies are subject to procedural safeguards and judicial review, as well as to legislative and executive oversight and control through the lawmaking, appointments, and appropriations processes); Bruff & Gellhorn, *supra* note 150, at 1377-78, 1443 (1977); Gormley, *Policy Dilemmas*, *supra* note 151, at 389-90; Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games and Accountability*, LAW & CONTEMP. PROBS. 185, 251 (Spring 1994).

¹⁵⁴ See, e.g., Gormley, *Policy Dilemmas*, *supra* note 151, at 392 (noting that eleven states' public utilities commissions are popularly elected).

¹⁵⁵ See ABNEY & LAUTH, *supra* note 150, at 82 (noting that state agencies report the influence of the legislature and the governor to be much higher than that of interest groups); CARY, *supra* note 150, at 59 (concluding that federal agencies are responsible to Congress, particularly its committees, through budget review and oversight hearings); Bruff, *Texas Constitution*, *supra* note 153, at 1344-45 (1990); Bruff & Gellhorn, *supra* note 150, at 1420 (noting congressional control of federal agencies through the oversight and appropriations processes); Mashaw, *supra* note 153, at 185, 187, 200, 242, 248.

¹⁵⁶ See Bruff, *Texas Constitution*, *supra* note 153, at 1345 ("To insist that only the legislature make law, only the executive implement statutes, and only the courts adjudicate controversies would destroy modern government."); Elhauge, *supra* note 8, at 691-92.

ration of intent to allow the agency to adopt whatever anticompetition policies that it wants will suffice. If this is indeed the case, the purported "clear legislative statement" requirement would serve no purpose at all. Page responds to this criticism by arguing that his attempt to limit *Parker*-immune policies to those articulated by the state legislature is not a return to the anti-delegation past because it requires a legislative "second look" only in cases where the agency's actions have anticompetitive effects, leaving the legislature's delegation of policymaking authority to the agency otherwise unimpaired.¹⁵⁷ This, however, overlooks the immense potential for anticompetitive effects that is inherent in the powers of both economic and other regulatory agencies. The position that only policymaking authority that has no potential anticompetitive impact may be delegated to state agencies would represent an enormous and unwarranted interference with the processes of state government.

II. IMPLICATIONS FOR UNRESOLVED ISSUES OF ANTITRUST IMMUNITY FOR STATE AGENCY ACTION

A. *Clear Articulation*

1. The Ambiguous Treatment of State Agency Policymaking

The Supreme Court never has decided whether the same clear articulation requirement applicable to municipalities and private actors should be applied to anticompetitive regulations and programs adopted by agencies of statewide jurisdiction. Its opinions look both ways. In *Parker* itself, the Court rested its decision on the conclusion that nothing in the language or history of the Sherman Act suggested that Congress intended to "restrain a state or its officers or agents from activities *directed by its legislature*," suggesting that only legislative action could establish state policy for purposes of the *Parker* doctrine.¹⁵⁸

This inference was reinforced in subsequent immunity cases dealing with the actions of state agencies. In *Goldfarb v. Virginia State Bar*, the Court rejected a claim of *Parker* immunity for a minimum fee schedule for title examination services published by a county bar association and enforced by the Virginia State Bar.¹⁵⁹ The state bar was

¹⁵⁷ See Page, *Interest Groups*, *supra* note 8, at 628-29.

¹⁵⁸ *Parker v. Brown*, 317 U.S. 341, 350-51 (1943).

¹⁵⁹ 421 U.S. 773 (1975).

an "administrative agency" of the state for the purpose of investigating and reporting violations of rules and regulations adopted by the state supreme court.¹⁶⁰ The state legislature had authorized the Virginia Supreme Court to regulate the practice of law.¹⁶¹ The court had adopted ethical codes which explicitly directed lawyers not to be controlled by fee schedules.¹⁶² In rejecting the claim of immunity, the United States Supreme Court stated that the inquiry was whether the activity in question was "required by the State acting as sovereign."¹⁶³ In *Goldfarb*, the Virginia Supreme Court had not required price fixing and "the fact that the state bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anti-competitive practices for the benefit of its members."¹⁶⁴ The state bar, by enforcing the minimum fee schedules of the county bar association, had "voluntarily joined in what is essentially a private anticompetitive activity"¹⁶⁵

The Court's opinion could be read to imply that the state bar, although a state agency for some purposes, could not adopt an anti-competitive policy for the state that would be entitled to *Parker* immunity. Fairly read, however, *Goldfarb* does not support the conclusion that state agencies never may articulate *Parker*-immune anticompetitive policies for the state. *Goldfarb* came before the Court's modern rearticulation of the *Parker* doctrine and turned fundamentally on the conclusion that the state had not compelled lawyers to adopt binding fee schedules.¹⁶⁶ Moreover, the fee schedules enforced by the state bar in *Goldfarb* had been adopted by local bar associations, with the state bar simply playing an enforcement role.¹⁶⁷ There was no indication that the state bar had focused on the specifics of the fees at issue or determined that they should be adopted as a matter of state policy. Of equal importance, nothing in *Goldfarb* suggested that the state bar had authority under state law to promulgate binding fee schedules for attorneys. To the contrary, ultimate authority for regulation of the bar was vested in the Virginia Supreme Court, whose guidelines directed lawyers not to be controlled by binding fee schedules.¹⁶⁸ *Goldfarb* does

¹⁶⁰ *Id.* at 776 n.2.

¹⁶¹ *Id.* at 789.

¹⁶² *Id.*

¹⁶³ *Id.* at 790.

¹⁶⁴ 421 U.S. at 791.

¹⁶⁵ *Id.* at 792.

¹⁶⁶ See *supra* notes 124-127 and accompanying text.

¹⁶⁷ 421 U.S. at 791 n.21.

¹⁶⁸ *Id.* at 785-90.

not support the conclusion that a state agency, acting within the scope of its delegated policymaking authority under state law, never may adopt *Parker*-immune policy for the state.

The Supreme Court's next occasion to address the scope of *Parker* immunity in the context of state agency action came in *Cantor v. Detroit Edison Co.*¹⁶⁹ The issue in *Cantor* was whether antitrust immunity should be accorded to a provision of Detroit Edison's tariff providing that light bulbs would be provided to customers of Edison's electric service at no additional charge. The Court acknowledged that "respondent's rates, including the omission of any separate charge for bulbs, have been approved by the Michigan Public Service Commission, and may not be changed without the Commission's approval."¹⁷⁰ Nevertheless, it denied immunity to Edison.¹⁷¹ The Supreme Court reasoned that even though Edison's adherence to the light bulb program was compelled by state law, "there can be no doubt that the option to have, or not to have such a program is primarily respondent's, not the Commission's. Indeed, respondent initiated the program years before the regulatory agency was even created."¹⁷²

This language is subject to substantial criticism. It implies that the existence of state action immunity for conduct explicitly compelled by a state agency turns on whether the state or a benefited private party is later determined "really" to have been responsible to the policy at issue.¹⁷³ That inquiry not only would be wholly intractable in the or-

¹⁶⁹ 428 U.S. 579 (1976).

¹⁷⁰ *Id.* at 582.

¹⁷¹ The Court's plurality opinion focused on the fact that the defendant was a private entity, rather than a public official. *See id.* at 591. Although the Court since has repudiated this distinction, and it is now clear that the question of immunity turns on the nature of the conduct at issue rather than the identity of the defendant, *Cantor* has been interpreted by some as suggesting that only the state legislature could have adopted a *Parker*-immune anticompetitive policy. *See Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 58-59 (1985); Page, *Antitrust*, *supra* note 8, at 1118; Page, *Interest Groups*, *supra* note 8, at 621-22.

¹⁷² *See Cantor*, 428 U.S. at 591.

¹⁷³ As the Court stated:

In each of these cases the initiation and enforcement of the program under attack involved a mixture of private and public decision making. In each case, notwithstanding the state participation in the decision, the private party exercised sufficient freedom of choice to enable the Court to conclude that he should be held responsible for the consequences of his decision. . . . There is nothing unjust in a conclusion that respondent's participation in the decision is sufficiently significant to require that its conduct implementing the decision, like comparable conduct by unregulated businesses, conform to applicable federal law. Accordingly, even though there may be cases in which the

dinary case but is, in terms of the theoretical foundations for state action immunity, essentially meaningless. Implied antitrust immunity has been accorded to the actions of state because they are authoritative expressions of the state's sovereign policy. Those expressions of state policy do not become less entitled to respect merely because they were adopted at the instance of benefited private actors. The entire line of cases according *Noerr-Pennington* immunity for private petitioning activities seeking to induce governmental action rests on the foundation that the ability of private actors to petition the government for the adoption of public policies having private benefits is essential to the proper functioning of our democratic process.¹⁷⁴

In *City of Columbia v. Omni Outdoor Advertising*,¹⁷⁵ the Supreme Court rejected any exception to either *Parker* or *Noerr* immunity based on allegations that governmental actors had conspired with private parties to adopt the anticompetitive regulations at issue. The Court recognized that *Parker* and *Noerr* "generally present two faces of the same coin."¹⁷⁶ With specific reference to *Parker* immunity, the Court rejected the contention that governmental regulatory action "may be deemed private—and therefore subject to antitrust liability—when it is taken pursuant to a conspiracy with private parties."¹⁷⁷ This conclusion followed from the "impracticability of such a principle Since it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them, such an exception would virtually swallow up the *Parker* rule."¹⁷⁸

These passages in *Omni* might be read to have overruled *Cantor* insofar as it relied on the alleged "dominant" role of Edison in the Commission's approval of its light bulb policy. This, however, would misread both *Omni* and *Cantor*. The essential predicate of the Supreme Court's rejection of state action immunity for the state-approved light bulb tariff in *Cantor* was not that private actors had proposed the particular tariff that the Commission adopted. Rather, it was that, under the circumstances of that case, the Commission's ap-

State's participation in a decision is so dominant that it would be unfair to hold a private party responsible for his conduct in implementing it, this record discloses no such unfairness.

Id. at 593-95.

¹⁷⁴ *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136-38 (1961).

¹⁷⁵ 499 U.S. 365 (1991).

¹⁷⁶ *Id.* at 383.

¹⁷⁷ *Id.* at 375.

¹⁷⁸ *Id.*

proval of the challenged provision of Edison's tariff did not represent the implementation of any authoritatively adopted and generally applicable state policy at all.¹⁷⁹ Not only had the Michigan Public Utilities Commission failed to adopt any generally applicable state policy regarding the provision of light bulbs, but the tariff provision in question was contrary to the tariffs of other utilities that the Commission had approved.¹⁸⁰ The case thus fell well within *Parker's* admonition that a state may not immunize private anticompetitive conduct by generally authorizing it in advance or ratifying it after it has occurred.

Just as it is mistaken to view *Cantor* as grounding antitrust immunity on an attempt to "deconstruct" the governmental process to ascertain whether public or private actors "really" are responsible for the governmental action at issue, so it would be mistaken to read that decision as holding that state agencies never may promulgate an authoritative and generally applicable state policy that will be antitrust immune. Page has made that suggestion, reading *Cantor* as a holding that, to effectuate the Madisonian model of representative government "only a state's legislature or rulings of its highest court [are] authoritative sources of state regulatory policy."¹⁸¹ In his view, *Cantor* "makes the regulatory statute, and not the regulatory agency, the controlling source of state policy."¹⁸² In a later article, Page reiterated his view of *Cantor* as establishing that policies originating in "subordinate" bodies such as regulatory agencies are never entitled to *Parker* immunity.¹⁸³ He argues that this conclusion ensures that "state regulatory policies in conflict with antitrust will be made in representative bodies

¹⁷⁹ As the Supreme Court explained at the very outset of its opinion:

The distribution of electric light bulbs in Michigan is unregulated. [N]either the Michigan Legislature, nor the Commission, has ever made any specific investigation of the desirability of a lamp-exchange program or of its possible effect on competition in the light bulb market. Other utilities regulated by the Michigan Public Service Commission do not follow the practice of providing bulbs to their customers at no additional charge. The Commission's approval of respondent's decision to maintain such a program does not, therefore, implement any statewide policy relating to light bulbs. We infer that the State's policy is neutral on the question whether a utility should, or should not, have such a program.

Cantor, 428 U.S. at 584-85 (emphasis added).

¹⁸⁰ See *id.*

¹⁸¹ See Page, *Antitrust*, *supra* note 8, at 1115.

¹⁸² *Id.* at 1118.

¹⁸³ Page, *Interest Groups*, *supra* note 8, at 621.

after a full Madisonian reconciliation of conflicting interests, rather than in administrative bureaucracies."¹⁸⁴

The assumption that the Supreme Court has dictated a particular view of the dictates of "representative Madisonian democracy" to the states in fashioning the scope of state action antitrust immunity is unjustified.¹⁸⁵ To say, as the Court did in *Cantor*, that private action is not entitled to *Parker* immunity where the concerned agency never has adopted a policy of statewide authoritativeness and applicability endorsing the conduct in question hardly implies that no immunity should obtain where the agency has done just that. Indeed, far from focusing on the absence of any legislative policy in favor of the light bulb program in *Cantor*, the Court noted that its denial of *Parker* immunity in that case was based on the fact that "neither the Michigan Legislature, nor the Commission, has ever made any specific investigation of the desirability of a lamp-exchange program or of its possible effects on competition in the light-bulb market."¹⁸⁶ The fact that the Commission had not adopted a policy entitled to immunity hardly implies that it could not have done so.¹⁸⁷

The Court's next *Parker* decision involving the activities of state agencies was *Bates v. State Bar of Arizona*.¹⁸⁸ *Bates* held that the action of the Arizona Supreme Court in suspending two attorneys for violating a rule prohibiting lawyer advertising was protected by *Parker*.¹⁸⁹ Although the suspension had been imposed on recommendation of the state bar, "the appellee acts as the agent of the [Arizona Supreme Court] under its continuous supervision."¹⁹⁰ The alleged restraint was the result of the affirmative command of the Arizona Supreme Court, which was the "ultimate body wielding the State's power over the practice of law."¹⁹¹ *Cantor*'s light bulb program was distinguishable because it was "instigated by the utility with only the acquiescence of the state regulatory commission."¹⁹² Here, the disciplinary rules "reflect a clear articulation of the State's policy with regard to professional behavior. Moreover, as the instant case shows, the rules are subject to

¹⁸⁴ *Id.* at 621.

¹⁸⁵ See *supra* notes 123-145 and accompanying text.

¹⁸⁶ *Cantor*, 428 U.S. at 584 (emphasis added).

¹⁸⁷ As discussed below, the Court's subsequent decision in *Southern Motor Carriers v. United States* looks just the other way. See 471 U.S. at 48.

¹⁸⁸ 433 U.S. 350 (1977).

¹⁸⁹ See *id.*

¹⁹⁰ See *id.* at 361.

¹⁹¹ *Id.* at 360.

¹⁹² *Id.* at 362.

pointed re-examination by the policymaker the Arizona Supreme Court in enforcement proceedings."¹⁹³

Similarly, in *Hoover v. Ronwin*, the Court held that the conduct of the Arizona Supreme Court in rejecting, on recommendation of a committee of the state bar, the plaintiff's application for admission to the bar was *ipso facto* immune from the antitrust laws without further inquiry.¹⁹⁴ The Court explained that "when a state legislature adopts legislation, its actions constitute those of the State and *ipso facto* are exempt from the operation of the antitrust laws."¹⁹⁵ The Court concluded that a state supreme court, acting in its legislative capacity, "occupies the same position as that of a state legislature. Therefore, a decision of a state supreme court, acting legislatively rather than judicially, is exempt from Sherman Act liability as state action"¹⁹⁶ without inquiry into the clear articulation and active supervision restrictions placed on private actors and political subdivisions of the state. Although the action had been brought against the members of the state bar committee, the action in question was not that of the committee, but that of the Arizona Supreme Court.¹⁹⁷ The members of the committee were state officers. However, they did not act independently, but merely made recommendations to the state supreme court, which made the final decision to grant or deny admission to the bar.¹⁹⁸ By contrast:

[I]f the replacing of entirely free competition with some form of regulation or restraint was not authorized or approved by the State then the rationale of *Parker* is inapposite. As a result, in cases involving the anticompetitive conduct of a *nonsovereign state representative* the Court has required a showing that the conduct is pursuant to a "clearly articulated and affirmatively expressed state policy" [to ensure that the anticompetitive conduct of the state's representative was contemplated by the state].¹⁹⁹

These decisions are susceptible to the interpretation that agencies exercising statewide jurisdiction are subject to the same clear ar-

¹⁹³ *Bates*, 433 U.S. at 362.

¹⁹⁴ 466 U.S. 558 (1984).

¹⁹⁵ *Id.* at 567-68.

¹⁹⁶ *Id.* at 568.

¹⁹⁷ *Id.* at 570-72.

¹⁹⁸ *Id.*

¹⁹⁹ *Hoover*, 466 U.S. at 568-69 (emphasis added).

tication and active supervision requirements as municipalities and private actors, but they hardly compel that conclusion. In holding in *Bates* and *Hoover* that actions by a state supreme court were antitrust immune, the Court did not foreclose the possibility that the actions of a state agency empowered by state law to articulate policy for the state as a whole could, under some circumstances, be accorded *Parker* immunity.

The ambiguities of the Supreme Court's opinions on this important issue again surfaced in *Southern Motor Carriers Rate Conference v. United States*.²⁰⁰ In that case, the Court held that the *Parker* doctrine barred a suit against private carriers challenging collective ratemaking that was authorized but not compelled by state law.²⁰¹ Because the conduct at issue was that of private parties, the Court applied the two-pronged *Midcal* test—clear articulation and active supervision.²⁰² Statutes in three of the four states at issue expressly authorized collective ratemaking.²⁰³ In holding that the clear articulation requirement was satisfied in these states, the Court noted that although the public service commissions in those states permitted collective ratemaking, those state agencies "acting alone" could not immunize anticompetitive conduct.²⁰⁴ Relying on *Goldfarb*, the Court stated that "*Parker* immunity is available only when the challenged activity is undertaken pursuant to a clearly articulated policy of the State itself, such as a policy approved by a state legislature . . . or a State Supreme Court."²⁰⁵

However, the statutes of Mississippi, the fourth state at issue, simply provided that the public service commission was to establish just and reasonable rates.²⁰⁶ The details of regulation were left to the agency.²⁰⁷ In according antitrust immunity to collective rate making authorized by the state commission, the Supreme Court emphasized that if more detail had been required in the commission's authorizing legislation, states would find it difficult to implement their policies through regulatory agencies.²⁰⁸ This more realistic view of the limited

²⁰⁰ 471 U.S. at 48.

²⁰¹ See *id.*

²⁰² *Id.* at 58–59.

²⁰³ *Id.* at 62.

²⁰⁴ *Id.* at 62–63.

²⁰⁵ *Southern Motor Carriers*, 471 U.S. at 63 (emphasis added).

²⁰⁶ *Id.* at 63–64.

²⁰⁷ *Id.*

²⁰⁸ The *Southern Motor Carriers* Court stated: "Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of the legislature.

capacity of state legislatures and the important role played by state agencies in the formulation and articulation of state policy underscores the significant encroachment on state policy that would attend a rigid limitation of *Parker* immunity only to anticompetitive policies formulated by the ultimate legislative authority of the state.

2. The Emerging Trend of Lower Court Decisions Upholding the Power of State Administrative Agencies to Articulate *Parker*-Immune Policy for the State

Although many lower federal courts have assumed without analysis that the same clear articulation requirement applicable to the actions of private actors and municipalities also applies to state agencies exercising statewide jurisdiction,²⁰⁹ a number of important decisions have rejected that view.²¹⁰ Instead, they have endorsed the application of *Parker* immunity to anticompetitive state policies adopted by state agencies within the scope of the powers delegated to them by state law.

For example, *Deak-Perera Hawaii, Inc. v. Department of Transportation* involved a claim that the Hawaii Department of Transportation ("DOT") had violated the antitrust laws by rejecting plaintiff's bid for an airport concession lease.²¹¹ The Court of Appeals for the Ninth Circuit stated that "we see no reason why a state executive branch, when operating within its constitutional and statutory authority, should be deemed any less sovereign than a state legislature, or less entitled to deference under principles of federalism."²¹² Subsequently, in *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, the same court applied *Deak-Perrera* to hold that the Hawaii DOT's award of an exclusive franchise for taxi service to pick up passengers at the Hawaii International Airport was antitrust immune.²¹³ Under *Deak-Perrera*, the actions of the DOT were immune so long as it was acting within its constitutional and statutory authority.²¹⁴ Hawaii statutes broadly authorized DOT to enter contracts for the supply of goods and services to the airport. That was sufficient to confer *Parker* immunity with-

Requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness." *Id.* at 64.

²⁰⁹ See *supra* note 27.

²¹⁰ See *infra* notes 211-233 and accompanying text.

²¹¹ 745 F.2d 1281 (9th Cir. 1984).

²¹² *Id.* at 1283.

²¹³ 810 F.2d 869 (9th Cir. 1987).

²¹⁴ *Id.* at 875-76.

out more.²¹⁵ The clear articulation and active supervision requirements constraining municipal and private action were simply inapplicable. The court drew support for its conclusion from *Hoover* and *Bates*, which required no evidence of "legislative contemplation" in holding that state supreme courts were immune for their actions in adopting and enforcing disciplinary rules to govern the state bar.²¹⁶

In *California CNG, Inc. v. Southern California Gas Co.*, the Court of Appeals for the Ninth Circuit considered a California statute authorizing the California Public Utilities Commission (the "CPUC") to permit utilities to construct and maintain natural gas refueling stations for motor vehicles at ratepayer expense.²¹⁷ The statute also provided that the commission should ensure that public utilities should not compete unfairly with private non-utility enterprises.²¹⁸ The plaintiff complained that Southern California Gas had unfairly competed with it by providing refueling stations to fleet operators for free.²¹⁹ The court concluded that "the legislature's clearly articulated policy is to have the CPUC balance the need for utility participation in the development of the NGV-infrastructure market and the need for that market to develop into a competitive one."²²⁰ The court looked to the CPUC's position to determine "whether SoCalGas's conduct is part of a 'clearly articulated and affirmatively expressed . . . state policy.'"²²¹ The court held that the defendant's conduct was undertaken pursuant to a clearly articulated state policy for an initial period, during which the CPUC expressly had authorized ratepayer subsidization, but was not immune during subsequent periods in which the CPUC first generally had prohibited unfair competition with non-utility enterprises, and then specifically had prohibited ratepayer subsidization.²²²

Similarly, in *Automated Salvage Transport, Inc. v. Wheelabrator Environmental Systems, Inc.*, the Court of Appeals for the Second Circuit suggested that state agencies may in some circumstances articulate *Parker*-immune anti-competition policy for the state as a whole.²²³ In that case, the Connecticut Resources Recovery Agency had entered a settlement agreement under which it and a private waste-to-energy

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ 96 F.3d 1193 (9th Cir. 1996).

²¹⁸ See CAL. PUB. UTIL. CODE § 745.5(e) (West 2000).

²¹⁹ *California CNG*, 96 F.3d at 1195.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.* at 1197-1200.

²²³ 155 F.3d 59 (2d Cir. 1998).

facility agreed that each would turn away waste contractually committed to the other.²²⁴ Waste haulers who had engaged in "cross hauling" of contractually committed waste to take advantage of more favorable spot rates brought an antitrust action challenging the agreement.²²⁵ The Court of Appeals, although ultimately concluding that the agreement was protected by the clearly articulated policy of the state legislature,²²⁶ strongly suggested that the CRRA itself should be treated as an authorized state policymaker for *Parker* immunity purposes.²²⁷ The court concluded that "the degree of control exercised by the State is a critical factor in determining whether the conduct of a state agency is that of 'the state itself' for the purposes of the *Parker* doctrine."²²⁸ The CRRA was "not simply a statewide agency making policy on its own" but was a "creature of the General Assembly" and was subject to supervision by the state's Commissioner of Environmental Protection.²²⁹

Although *Automated Salvage* was on firm ground in recognizing that state agencies acting within the sphere of their statutory authority may, in some circumstances, establish *Parker*-immune state policy free from the constraints of the clear articulation requirement, its focus on the "control" of the CRRA by another state agency was misplaced. Far from cutting against a claim of immunity, the relative independence of a state agency from detailed or routine supervision by other executive branch agencies or the legislature simply underscores the authority of the agency to establish *Parker*-immune anticompetitive policy for the state as a whole—subject always to the possibility of political check by the Governor, the state legislature, or, ultimately, the electorate.

Most recently, in *Neo Gen Screening, Inc. v. New England Newborn Screening Program*, the Court of Appeals for the First Circuit strongly endorsed the view that the authoritative policy declarations of state

²²⁴ See *id.* at 68–70.

²²⁵ See *id.*

²²⁶ *Id.* at 72.

²²⁷ The court stated that "there are compelling reasons for concluding that CRRA should be treated as the State itself rather than as a municipality . . . CRRA was created to implement a uniform statewide waste disposal policy . . . CRRA is not only a statewide entity that 'undertakes state functions,' it is 'politically accountable to the State, and by extension to the electorate.'" *Id.* at 70–71. The court noted that CRRA's board included the Commissioners of Transportation and Economic Development, the Secretary of the Office of Policy and Management, four gubernatorial appointees, and six legislative appointees. The chairman served at the pleasure of the Governor and any member of the board could be removed by the Governor for neglect or misconduct. See *id.*

²²⁸ *Automated Salvage*, 155 F.3d at 70.

²²⁹ *Id.* at 71.

agencies are *ipso facto* antitrust immune.²³⁰ The action involved a decision by the Massachusetts Department of Public Health to enter an exclusive arrangement for the medical screening of newborn children with the University of Massachusetts medical school.²³¹ A competitor challenged the arrangement, arguing that *Parker* was inapposite because no clear legislative authorization for the exclusive arrangement existed.²³² Noting that the Supreme Court had reserved decision as to whether state-level executive branch departments or agencies are entitled to *Parker* immunity as broad as that accorded to state legislatures and supreme courts, the Court of Appeals for the First Circuit concluded that they were.²³³

Decisions such as *Deak-Perera*, *Charley's Radio Dispatch*, and *Neo Gen Screening* rest on the view that, so long as state administrative agencies act within the sphere of their delegated state law authority in developing anticompetitive regulatory policies for the state as a whole, actions taken pursuant to those policies should be antitrust immune.²³⁴ This position is preferable to the suggestion that only state legislatures are capable of articulating policy entitled to *Parker* immunity—a conclusion that reflects a wholly unrealistic view of the limited capabilities of state legislatures and is inconsistent with the underlying reasons for the creation of administrative agencies, i.e., to formulate and administer state policy in areas requiring sustained attention and technical expertise.²³⁵

²³⁰ 187 F.3d 24 (1st Cir. 1999).

²³¹ *Id.* at 27.

²³² *Id.* at 28.

²³³ The court stated:

Broadly speaking, the *Parker* doctrine represents a judgment by the Supreme Court that, in regulating anticompetitive business conduct, Congress was not seeking to regulate the states themselves; and "the states" include their executive branches quite as much as their legislatures and their courts. The municipalities have been given less protection under *Parker* on the stated ground that technically speaking, they are not "the state". . . .

Id. at 29.

²³⁴ See *infra* notes 221–241 and accompanying text.

²³⁵ Compare *Page*, *Antitrust*, *supra* note 8, with *Southern Motor Carriers*, 471 U.S. at 65, and *Elhauge*, *supra* note 8, at 692, and *Wiley*, *supra* note 8, at 731–32. As the Supreme Court recognized in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984):

In these cases, the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconcil-

Of equal importance, application of the federal antitrust laws to circumscribe the ability of the states to develop anticompetitive state policy through the administrative process would be starkly inconsistent with the federalism basis of *Parker* itself. *Parker* contains no hint that the Court intended to prescribe the forms of state government, or to pick and choose among anticompetitive policies validly adopted for the state as a whole by an authorized representative of state government. *Southern Motor Carriers* implicitly adopts the view that anticompetitive policies adopted by state agencies for the state as a whole within the sphere of their state law authority are entitled to *Parker* immunity.²³⁶ Similarly, the Supreme Court's decisions in *Hoover* and *Bates*—recognizing the power of state supreme courts to adopt *Parker*-immune policies with respect to the governance of the state bar—are inconsistent with any attempt to confine *Parker* solely to policies clearly articulated by the state legislature itself.²³⁷ The conclusion that state agencies acting within the scope of their state law policy making authority may articulate *Parker*-immune anticompetitive policy for the states does not imply that they may repeal the antitrust laws free of any meaningful constraint. Like state legislatures, state agencies should be subject to the norms of prospectivity, general applicability, and specificity in their articulation of antitrust immune state policy.²³⁸

Ironically, despite the inadequacy of the Supreme Court's current "foreseeability" test for determining whether the activities of local governmental units and private parties have been undertaken pursuant to a clearly articulated state policy,²³⁹ that test may be very much on point in determining whether a state administrative agency or the head of an executive department has acted within the scope of its delegated authority in articulating an anticompetitive policy for the state. That is because the scope of an agency's policymaking authority

ing conflicting policies. Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Chevron, 467 U.S. at 866–67 (citations omitted).

²³⁶ See *supra* notes 200–208 and accompanying text.

²³⁷ See *supra* notes 188–199 and accompanying text.

²³⁸ See *supra* notes 56–121 and accompanying text.

²³⁹ See *supra* notes 89–90, 111–113 and accompanying text.

as a matter of state law frequently may turn on whether its action was a "reasonable" interpretation of its enabling statute.²⁴⁰ Whether it was reasonable in turn presents essentially the same question as the Supreme Court's requirement in *Hallie*²⁴¹ that municipal action be "foreseeable" in the sense that it "logically would result" from the powers granted if it is to be antitrust immune.²⁴² Page reinforces this view by arguing that although only the legislature may "clearly articulate" *Parker* immune policy for the state, it may satisfy this obligation with only the most general expression of an intention to displace competition with regulation in a particular market sector.²⁴³ Thus, in his view the *Southern Motor Carriers* result was correct—even for Mississippi, in which there had been no legislative approval of collective ratemaking—because, as the Supreme Court recognized, the state legislature generally had authorized the agency to implement an "inherently anticompetitive rate-setting process."²⁴⁴

In practical reality, this expansive view refutes the premise that only a state legislature may articulate *Parker* immune policy for the state. The Supreme Court consistently has adhered to the view that a state may not immunize private anticompetitive conduct, such as that at issue in *Southern Motor Carriers*, by a general advance authorization without any specification of the particular type of anticompetitive conduct that it intends to permit.²⁴⁵ Where nothing more than a general authorization to regulate a particular industry in an anticompetitive manner constrains a state agency, the agency is left to its own devices in determining what the state's competition policy is. As Judge Posner has pointed out, competition may co-exist with regulation in a variety of settings, and a general authorization to regulate a market

²⁴⁰ See *Chevron U.S.A.*, 467 U.S. at 844 (stating that an agency's construction of its statutory authorization will be upheld if it is reasonable). For state decisions following *Chevron*, see generally *Ahern v. Thomas*, 733 A.2d 756 (Conn. 1999); *Washington Metro. Area Transit Auth. v. District of Columbia Dept. of Employment Servs.*, 731 A.2d 845, 848 (D.C. 1999); *Granite City Div. of Nat'l Steel Co. v. Illinois Pollution Control Bd.*, 613 N.E.2d 719, 733 (Ill. 1993); *Dept. of Transp. v. Armacost*, 532 A.2d 1056, 1061 (Md. 1987); *State ex rel. Comm. of Ins. v. North Carolina Rate Bureau*, 269 S.E.2d 547, 562 (N.C. 1980); *Appalachian Power Co. v. State Tax Dept.*, 466 S.E.2d 424, 441 (W. Va. 1995); *Alexander v. Anderson*, 973 P.2d 884, 889 (N.M. Ct. App. 1999).

²⁴¹ *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985).

²⁴² *Id.* at 43.

²⁴³ Page, *Interest Groups*, *supra* note 8, at 643 ("If it is apparent to all participants in the legislative process that the legislation displaces competition in the market affected, then the political process has worked and exemption should follow.").

²⁴⁴ *Southern Motor Carriers*, 471 U.S. at 64.

²⁴⁵ See *Parker*, 317 U.S. at 351.

sector provides little guidance on the extent to which competition should be displaced.²⁴⁶ By the same token, a general legislative authorization to displace competition with respect to a particular industry or activity does nothing to determine the extent to which competition should be displaced. Where that decision is left to the unguided discretion of a state agency, it is illusory to view the state legislature as the "politically accountable" source of a state policy that in fact has been adopted by the agency itself.

3. The Weight to Be Accorded to State Agency Rules and Interpretations in Determining State Policy

The previous discussion also sheds light on the recurring question of the weight that state agency rules, regulations, and interpretations should receive in determining what the state's clearly articulated competitive policy is. If one were to proceed on the erroneous view that state policy may be accorded antitrust immunity only if it has been clearly articulated by the legislature itself, it would follow that state agency rules and regulations implementing broad declarations of state policy or interpreting ambiguous state statutes would be entitled to no special deference or weight in resolving the immunity question. However, most lower courts have accorded considerable deference to state agency declarations of state policy under broad or ambiguous statutory mandates in determining what state competition policy is.²⁴⁷ For the reasons previously discussed, failure to accord weight to the rules and regulations of state agencies in assessing whether the state clearly has articulated a state policy to displace

²⁴⁶ Specifically, Judge Posner stated:

[O]ften it is difficult to determine whether the state has a regulatory program designed to supplant the operation of the free market. It may have a regulatory program but one that can coexist happily with the full enforcement of federal antitrust principles because the program does not require the supplanting of competition . . .

Hardy v. City Optical Inc., 39 F.3d 765, 768 (7th Cir. 1994).

²⁴⁷ See, e.g., *Columbia Steel Casting Co. v. Portland Gen. Elec. Co.*, 111 F.3d 1427 (9th Cir. 1997); *California CNG*, 96 F.3d at 1196-97; *Yeager's Fuel*, 22 F.3d at 1268-69 (district court properly gave weight to report of Bureau of Conservation, Economic and Energy Planning of state Public Utilities Commission in determining what state energy conservation policy was); *Nugget Hydroelectric v. Pacific Gas & Elec. Co.*, 981 F.2d 429 (9th Cir. 1992); *Metro Mobil CTS, Inc. v. New Vector Communications, Inc.*, 661 F. Supp. 1504, 1512 (D. Ariz. 1987), *aff'd on other grounds*, 892 F.2d 62 (9th Cir. 1989); *Health Care Equalization Comm. of Iowa Chiropractic Soc'y. v. Iowa Med. Soc'y.*, 501 F. Supp. 970, 991 (S.D. Iowa 1980), *aff'd*, 851 F.2d 1020 (8th Cir. 1988).

competition with regulation could be justified only if the court concludes that the legislature has delegated no authority in the agency to determine either the general policy of the state with respect to the matter in question or the details of the policy's application in particular cases. Where such authority has validly been delegated to the agency as a matter of state law, however, the agency's determinations should not simply be entitled to weight but should be viewed as conclusive expressions of state policy, provided that the agency has acted within the scope of its delegated authority under state law.²⁴⁸ As discussed below, this does not mean that the agency will be able retroactively to immunize private anticompetitive conduct after it has already occurred. Nor does it mean that the agency may accord immunity by contravening express limitations on its authority or express declarations of legislative policy.

4. The Consistency of Agency Policymaking with the Origins of the Clear Articulation Requirement

Those who seek to ground the *Parker* doctrine in the direct responsiveness of the state policymaker to the electorate have attempted to find support for their position in the clear articulation requirement.²⁴⁹ This view is difficult to reconcile with the extremely lenient interpretation of the clear articulation requirement advocated by its proponents. Thus, Page suggests that it is sufficient to ensure the direct political responsiveness he advocates that the state legislature generally declare that it "intends to displace competition with governmental regulation in a particular market" and that "if it is apparent to all participants in the legislative process that the legislation displaces competition in the market affected, then the political process

²⁴⁸ In *Chevron*, the Supreme Court held with respect to the analogous question in the context of federal administrative agencies that where Congress has not spoken directly to an issue, "the court does not simply impose its own construction on the statute Rather, . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843 (citations omitted). Furthermore, "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given *controlling weight* unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843-44 (citations omitted) (emphasis added).

²⁴⁹ Page, *Interest Groups*, *supra* note 8, at 619 (arguing that the clear articulation requirement "reinforces representative political processes"); see also Inman & Rubinfeld, *supra* note 8, 1250, 1260-62 (arguing that the clear articulation requirement was developed to "maximize citizen participation").

has worked and exemption should follow."²⁵⁰ Although this broad view of the clear articulation is compelled by the Supreme Court's decision in *Southern Motor Carriers*, it is at odds with *Parker's* clear holding that simple state authorization of anticompetitive conduct—or ratification of that conduct after it has occurred—is insufficient to confer antitrust immunity.²⁵¹ If the legislature cannot immunize private anticompetitive conduct simply by authorizing it in general terms, there is, under the view that only the actions of the state legislature "count" for *Parker* immunity purposes, no more warrant for the view that the legislature can confer immunity by generally authorizing a state agency to approve anticompetitive private arrangements in advance.

The idea that a general legislative authorization of "anticompetitive activity" in a particular market is sufficient to satisfy the clear articulation requirement also is inconsistent with Page's central idea that only legislative determinations of state anticompetition policy matter because only the legislature can ensure the democratic reconciliation of competing interests and the direct political accountability on which the legitimacy of that reconciliation depends. If nothing is decided by the legislature other than the fact that a subordinate entity of state government may, in its discretion, approve unspecified anticompetitive conduct, no competing interests will have been resolved by the legislature, and the voters will have no basis—other than a sweeping determination that regulation is utterly unjustified in the market in question—for calling those legislators to account. Indeed, as Page elsewhere acknowledges, the very reason for broad legislative delegations of authority to state agencies may be to avoid the visibility and direct political accountability that a more detailed specification of anticompetition policy might entail.²⁵²

The origins and rationale of the clear articulation requirement are to be found in a quite different direction than proponents of the "Madisonian democracy" view of *Parker* immunity suggest. Rather than being primarily focused on the direct responsiveness of the decision maker to the electorate, the clear articulation requirement is directed

²⁵⁰ Page, *Interest Groups*, *supra* note 8, at 643.

²⁵¹ Compare *Southern Motor Carriers*, 471 U.S. at 48, with *Parker*, 317 U.S. at 351-52.

²⁵² See Page, *Antitrust*, *supra* note 8, at 1111-12 ("Elected representatives, however, have great incentives to defuse public controversies, which naturally arise under such a system, and often do so by transferring responsibility for actual resolution of important policy issues to administrative agencies under statutory commands to regulate 'in the public interest.'").

primarily to the decision-maker itself. It is designed to ensure that even an authorized state decision-maker does not repeal the fundamental national policy of the antitrust laws without clear recognition of what is it doing and a deliberate decision to act in that way. As the Supreme Court explained in *Federal Trade Commission v. Ticor Title Insurance Co.*, both the clear articulation and active supervision requirements "are directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy."²⁵³

The Court's focus in *Ticor* on the goal of the clear statement rule—ensuring that state approval of conduct falling outside the prevailing federal pro-competition norm is deliberately intended by the authorized state policymaker—is consistent with a long line of Supreme Court decisions adopting a similar clear statement requirements for actions that threaten to upset the customary allocation of powers between the federal and state governments.²⁵⁴ As the Court explained in *United States v. Bass*, in narrowly construing a federal statute to avoid intruding on the criminal jurisdiction traditionally reserved to the states, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance."²⁵⁵ "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."²⁵⁶

In a series of subsequent decisions, the Court has applied the same clear statement rule in cases involving claims that Congress had abrogated, or that the states had waived, their Eleventh Amendment

²⁵³ 504 U.S. 621, 636 (1992). The Court stated:

States must accept political responsibility for actions they intend to undertake. It is quite a different matter, however, for federal law to compel a result that the States do not intend but for which they are held to account. Federalism serves to assign political accountability, not to obscure it. Neither federalism nor political responsibility is well served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends. 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.

Id.

²⁵⁴ See *infra* notes 268–272.

²⁵⁵ *Ticor*, 504 U.S. at 349.

²⁵⁶ *Id.*

immunity from suit in federal court and in other contexts that implicated "the usual constitutional balance of federal and state powers."²⁵⁷ In each instance, the Court's stated purpose was not to ensure visibility to the electorate or direct political responsiveness *per se*, but rather, to ensure that the federal or state decision-maker had deliberately confronted and resolved the fundamental alteration of the federal state balance that its actions would entail.²⁵⁸

As the Court explicitly recognized in *Ticor*, this "sober reflection" rationale for the clear statement rule in situations involving alterations in the customary federal-state balance is very much on point in the context of the judicially implied inverse preemption doctrine created by *Parker v. Brown*. Just as the Court has required that Congress's intent to preempt matters falling within the historic police powers of the states be "clear and manifest,"²⁵⁹ so it is appropriate that a state's intention to supersede the otherwise exclusive federal statutory jurisdiction over antitrust matters be unmistakably expressed. A rule of clear statement as a condition of *Parker* preemption in this otherwise presumptively federal sphere also serves to reinforce the fundamental premise of non-retroactivity by ensuring that decisions to displace the federally mandated pro-competition norm be made by an authorized state policymaker in advance rather than as the result of an *ex post facto* judicial ratification of private anticompetitive initiative under an ambiguous declaration of state policy.

This justification of the clear statement principle does not imply that only a state legislature's declarations of state policy may support a *Parker* immunity claim. To the extent that the clear statement rule is intended to ensure that state policy contrary to the federal antitrust norm is adopted only as a result of careful reflection and deliberate intention, it fully serves that purpose whether the policymaker in question is the state legislature or a state agency acting within the

²⁵⁷ See *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44, 55 (1996); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *Deilmuth v. Muth*, 491 U.S. 223, 227-28 (1989); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242-43 (1985).

²⁵⁸ See also *Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 110 (1998) (holding Congress must make its intent to allow state taxation of Indian lands "unmistakably clear"); *Lindh v. Murphy*, 521 U.S. 320, 325 (1997) (stating requirement for clear statement to authorize retroactive application of legislation assures that Congress has affirmatively considered the potential unfairness involved); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (stating that federal preemption of areas traditionally subject to state police powers will not be found unless that is the clear and manifest purpose of Congress).

²⁵⁹ *Cipollone*, 505 U.S. at 516.

scope of its state policymaking authority. To the extent that the clear statement rule additionally serves the values of federalism by ensuring that the source of responsibility for the anticompetitive policy at issue is clear, that purpose is equally served no matter what authorized policymaker clearly articulates the policy of the state.²⁶⁰

Of course, the clear statement rule does in some sense ensure that a state's decisions to depart from the federal pro-competition norm are both visible and subject to ultimate political check. Nothing in any of the Supreme Court's *Parker* decisions, however, supports the conclusion that the possibility of an after the fact political check is sufficient in itself to support a claim of antitrust immunity²⁶¹ or that only the *direct* political accountability of the legislature to the electorate may be taken into account. One of the most prominent grounds for criticism of the Supreme Court's *Parker* doctrine has been the claim that it unduly interferes with the states' ability to delegate policymaking authority to municipalities and other local governmental units. While I disagree with this criticism on the ground that the interests of federalism justify a distinction between policies authoritatively adopted for the state as a whole and those variously and inconsistently adopted by local units of government, the impairment of the values of federalism entailed by the Court's municipal action decisions pales in comparison with the impairment that would arise from an attempt to prescribe the instruments of statewide policymaking authority that will be recognized under the *Parker* doctrine.

B. Active Supervision

State agencies occupy a dual role with respect to the articulation and implementation of state policy. Unlike municipalities, they may, within the scope of their delegated state law authority, adopt anticompetitive regulatory policies for the state as a whole. Because those actions by definition constitute state policy, they should be entitled to antitrust immunity under the *Parker* doctrine without any further requirement for clear articulation or active supervision by the state legislature.

But state agencies do not always prescribe state policy. Some agencies and officials may lack the power to make broad policy de-

²⁶⁰ Cf. *Michigan v. Long*, 463 U.S. 1032 (1983) (imposing a clear statement rule on the highest court of the state to insulate its decisions from judicial review on the basis of an adequate and independent state ground).

²⁶¹ See *supra* notes 142-145.

terminations as a matter of state law. Others may possess state-wide policymaking authority with respect to certain matters but be constrained by specific limitations prescribed by the state legislature in other respects. In such cases, implementations of state policy by the agency should not be entitled to antitrust immunity unless they are pursuant to an anticompetitive policy previously articulated by an authorized state policymaker such as the state legislature.

For the same reason that municipalities are exempt from the active supervision requirement, however, the *Parker* doctrine should in such cases impose no requirement that the actions of state agencies in approving particular transactions, tariffs, or activities be subject to the active supervision of the state legislature. That is not simply because such supervision would be impracticable (which it would) or because it would intrude unduly on the processes of state government. Nor is it because state agencies are not likely to promote private interests or be subject to capture by regulated parties. Rather, it is because as a matter of state law the agency possesses authority to determine the specifics of state policy by approving particular transactions of the kind previously endorsed by the state legislature.

Although state agencies therefore should not be subjected to the active supervision requirement either with respect to their own prescriptions of state regulatory policy, or for their determinations that particular transactions or activities accord with state policy elsewhere prescribed, they play an important role in supervising the anticompetitive conduct of private parties undertaken pursuant to state regulatory programs.²⁶² For example, in *Southern Motor Carriers*, the Court held without discussion, as the government had conceded, that active supervision of private conduct by state agencies fulfilled the requirements of the *Parker* doctrine.²⁶³

Recognition of the multiple roles that state agencies play in the articulation and supervision of state policy does little to explain the underlying basis of the Supreme Court's two-pronged approach to the state action immunity question in this context. The Supreme Court

²⁶² See *Hybud Equip. Corp. v. City of Akron*, 742 F.2d 949, 963 (6th Cir. 1984) (stating that "it would be extremely impractical to limit 'active state supervision' to the oversight by [the state legislature or Supreme Court]").

²⁶³ *Southern Motor Carriers*, 471 U.S. at 65; see also *California CNG*, 96 F.3d at 1193 (stating that agency supervision of utility's application to spend ratepayer funds on competitive activity satisfied active supervision requirement); *Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d 609 (11th Cir. 1995) (holding that Public Service Commission approval of territorial allocation by utilities satisfied requirement).

has determined that states may not immunize private anticompetitive conduct merely by authorizing private parties to violate the antitrust laws or by ratifying their conduct after it has occurred.²⁶⁴ Rather, the state itself must first clearly articulate its intention to authorize the type of anticompetitive conduct at issue in advance, and second, "have and exercise" the power to approve the details of the particular private conduct undertaken pursuant to that policy before immunity will obtain.²⁶⁵

The Supreme Court has never explained just why this two-stage process of review should be required as a condition for invoking *Parker* immunity. In fact, the Court has stated that the two levels of review both are aimed at achieving precisely the same goal—to assure that private anticompetitive conduct in fact reflects state policy.²⁶⁶ This has led some commentators to suggest that the active supervision requirement performs no separate role, and should be jettisoned as an undue restriction on the ability of state governments to structure their own operations.²⁶⁷ Moreover, if governmental approval of the details of private anticompetitive arrangements is required, and if such approval is required to operate only prospectively as the Supreme Court has assumed,²⁶⁸ the Court has never explained why active supervision of particular private arrangements after they have been entered or proposed by regulated private parties should not, standing alone, be sufficient to support a claim of *Parker* immunity, even absent any antecedent clear articulation of anticompetitive policy by an authorized policymaker for the state.

The Court's two-stage analysis becomes more understandable, however, when viewed with reference to the locus of state authority to adopt anticompetitive policy for the state as a whole. Frequently the locus of state law authority to establish a generally applicable, state-wide policy favoring certain types of governmental or private anticompetitive conduct will differ from the locus of authority to approve particular private or public anticompetitive arrangements as falling within that policy. For example, only the state legislature may have the

²⁶⁴ See *supra* note 56 and accompanying text.

²⁶⁵ *Patrick v. Burget*, 486 U.S. 94, 101 (1988) (citing *Southern Motor Carriers*, 471 U.S. at 51).

²⁶⁶ See, e.g., *Ticor*, 504 U.S. at 636 (stating that *Midecal*'s two elements both are directed to ensuring that anticompetitive conduct operates because of a deliberate state policy); *Town of Hallie*, 471 U.S. at 46–47 (stating that the active supervision requirement serves the "evidentiary function" of ensuring that private conduct is pursuant to state policy).

²⁶⁷ See, e.g., *Jorde*, *supra* note 8, 248–49; Page, *Antitrust*, *supra* note 8, at 1125–29.

²⁶⁸ See *supra* notes 55–65 and accompanying text.

authority to adopt a state-wide policy allowing municipalities or other local governmental units to enter exclusive contracts for the provision of cable television or other services. For that reason, even if, as the courts overwhelmingly have assumed, the active supervision requirement may be satisfied by approval of particular private arrangements by municipalities without further involvement of the state legislature,²⁶⁹ dispensing with the requirement for a clear articulation of state policy by the state legislature in advance would omit the most important component of *Parker* immunity doctrine—the requirement that the anticompetitive policy at issue be adopted by a state policymaker authorized to establish regulatory policy for the state as a whole. No amount of active supervision of the particulars of a private anticompetitive arrangement by a municipality or other local governmental body could satisfy this requirement because those institutions of local government are not authorized to establish policy for the state as a whole. By contrast, where an authorized state actor has adopted an anticompetitive policy for the entire state, approval of the details of private action taken pursuant to that policy is appropriately vested in the state or local agency whose particular geographic or subject matter responsibilities include the activities in question.²⁷⁰

In short, the Court's two-pronged approach to *Parker* immunity stems from the frequent divergence, as a matter of state law, of the authority and occasion to establish state-wide policy on the one hand and to police the details of the implementation of state policy already declared on the other. Where state agencies are themselves authorized to establish state-wide anticompetitive policy with respect to particular matters, however, that divergence does not exist. It follows that a two-stage process of approval should not be required, and that an agency should be able to articulate *Parker* immune state policy in the course of its prospective approval of particular private anticompetitive tariffs or arrangements.

Of course, state agencies that are authorized to adopt anticompetitive state-wide regulatory policies may frequently do so through a

²⁶⁹ See *Tom Hudson & Assocs. v. City of Chula Vista*, 746 F.2d 1370, 1374 (9th Cir. 1984); see also *Tri-State Rubbish, Inc. v. Waste Management, Inc.*, 998 F.2d 1073, 1079 (1st Cir. 1993). But see *Riverview Invs., Inc. v. Ottawa Cmty. Improvement Corp.*, 774 F.2d 162, 163 (6th Cir. 1985) (altering earlier order and instructing district court to determine on remand whether the state—as opposed to the city—had actively supervised a private defendant's conduct pursuant to municipal regulation).

²⁷⁰ See *supra* notes 109–110 and accompanying text.

process of general rulemaking.²⁷¹ In such cases, a second stage of focus and approval of particular private arrangements undertaken pursuant to that policy must be required.²⁷² In many instances, however, the regulatory process proceeds initially by the proposal of a particular anticompetitive tariff for agency approval by a regulated private entity. In such cases, the active supervision and approval of that tariff by the agency should suffice to confer antitrust immunity for future conduct pursuant to the tariff without any requirement that the agency have clearly articulated anticompetitive state policy in a separate previous rulemaking proceeding. In such cases, where the locus of state-side policymaking and supervisory authority are the same, any requirement for a two-stage process of approval is meaningless.²⁷³

In *Metro Mobil CTS, Inc. v. New Vector Communications, Inc.*, the District Court for the District of Arizona recognized this reality of the regulatory process.²⁷⁴ *Metro Mobil* involved an alleged price squeeze between wholesale and retail cellular rates.²⁷⁵ The Arizona Corporation Commission had considered the price squeeze allegations in the course of approving the wholesale rates.²⁷⁶ The court upheld a claim of *Parker* immunity, concluding that it was not necessary that Arizona statutes specifically articulate a policy in favor of price squeezes. Rather, the agency could satisfy the clear articulation requirement in the course of implementing its broad delegation of regulatory authority.²⁷⁷ Moreover, the agency could meet the clear articulation requirement by approving a specific tariff rather than by separate rulemaking.²⁷⁸ The court concluded that "the distinction between an agency establishing an encompassing policy of price fixing, as in *Southern Motor Carriers*, and an agency expressly determining that a

²⁷¹ See, e.g., *California CNG*, 96 F.3d at 1199-1200 (finding clear articulation of state policy in general CPUC guidelines); *Nugget Hydroelectric*, 981 F.2d at 434-35 (same); see also *TEC Cogeneration, Inc. v. Florida Power & Light Co.*, 76 F.3d 1560, 1567 (11th Cir. 1996); *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260, 1268 (3d Cir. 1994).

²⁷² See *Nugget Hydroelectric*, 981 F.2d at 435.

²⁷³ *California CNG*, 96 F.3d at 1197-99, 1202 (finding both clear articulation and active supervision requirements satisfied by CPUC approval of specific ratepayer applications).

²⁷⁴ 661 F. Supp. at 1504.

²⁷⁵ *Id.* at 1510-11.

²⁷⁶ *Id.* at 1511.

²⁷⁷ *Id.* at 1510.

²⁷⁸ Cf. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1967) (holding that the NLRB may announce new policies in adjudicatory proceedings); *SEC v. Chenery Corp.*, 318 U.S. 80 (1943) (same); see also 1 KENNETH C. DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 6.8 (3d ed. 1994).

specific tariff is just and reasonable . . . is a distinction without substance for purposes of state action immunity analysis."²⁷⁹

The merging of the clear articulation and active supervision requirements for state action antitrust immunity in the context of the activities of state regulatory agencies also was apparent in the Ninth Circuit decision in *Columbia Steel Casting Co. v. Portland General Electric Co.*²⁸⁰ The Court of Appeals for the Ninth Circuit rejected the claim that because state statutes authorized the public utility commission to approve agreements between utilities allocating exclusive service territories, the state had satisfied the clear articulation requirement, and the action of the utility commission in approving particular agreements was relevant only to whether the state had "actively supervised" their creation.²⁸¹ The court rejected a claim of immunity based on a 1992 Commission order declaring that the Public Utility Commission's intent in issuing a 1972 order approving the exchange of facilities between two utilities in specified areas had been to create exclusive service territories.²⁸² The court reasoned that although a clear statement of the Commission's intent in 1972 to create exclusive service territories could have satisfied the clear articulation requirement, the Commission's attempt to clarify retroactively its order twenty years later was insufficient.²⁸³ The question of immunity was a legal question which turned on the objective question of whether the state's policy to create exclusive service territories had been stated with sufficient clarity in 1972 rather than on the unexpressed subjective intent of the Commission.²⁸⁴

Columbia Steel Casting nicely illustrates the necessity for particularized agency approval in establishing state policy with respect to specific private anticompetitive arrangements. To ask whether the Commission's approval of the exchange of facilities in that case was more appropriately viewed as part of the clear articulation require-

²⁷⁹ *Metro Mobil*, 661 F. Supp. at 1512.

²⁸⁰ 111 F.3d at 1427.

²⁸¹ The court stated:

[S]ince the Oregon statute speaks solely of authorizing the OPUC to approve exclusive service territories, the state's clearly articulated policy is to have the OPUC decide whether to sanction anticompetitive conduct. It follows, therefore, that we must look to the decisions of the OPUC to determine whether PGE's conduct was part of a clearly articulated state policy.

Id. at 1437 n.8 (emphasis added).

²⁸² *Id.* at 1441-12.

²⁸³ *Id.*

²⁸⁴ See *id.*

ment or the active supervision requirement was a meaningless inquiry because both prongs of the *Midcal* test are directed to the same end—that is, to ensure that the specific details of private anticompetitive arrangements have been examined and approved in advance by an institution of state government having state law authority to establish state policy with respect to the matter in question. In *Columbia Steel Casting*, the state legislature generally had authorized the Commission to approve exclusive service territories, and thus, no issue of the utility commission's authority to establish state policy in this respect was presented. However, such broad declarations of state policy are insufficient under the Court's immunity doctrine to delegate the power to restrain trade to private parties. In addition, an authorized state policymaker must prospectively approve the details of the particular private anticompetitive arrangement at issue. Whether this is viewed as active supervision of private conduct or as the agency's clear articulation of the details of state regulatory policy has no significance provided that the state or its official delegate deliberately has approved the specific private arrangement in advance.

C. Retroactive Statements of Agency Policy

The statutory mandate of an agency may be ambiguous on whether the agency's delegated authority was intended to permit the authorization of particular types of anticompetitive conduct. Even where the agency's delegated authority is clear, its regulations and guidelines may not be. Under general administrative law principles, an agency's interpretation of an ambiguous statutory authorization is entitled to considerable deference if it represents a reasonable view of legislative intent.²⁸⁵ Moreover, an agency's interpretation of its own regulations is normally controlling unless it is "plainly erroneous or inconsistent with the regulation."²⁸⁶ On their face, these principles potentially conflict with the Supreme Court's requirement that state authorization of anticompetitive conduct must be clear for *Parker* immunity to apply. This tension has produced a conflict of authority in the federal courts of appeals on whether an agency's subsequent clarification of state policy may satisfy either the clear authorization or active supervision components of the *Midcal* test.

In *Praxair, Inc. v. Florida Power & Light Co.*, for example, the Court of Appeals for the Eleventh Circuit held that a territorial allocation

²⁸⁵ *Chevron*, 467 U.S. at 843–45.

²⁸⁶ *Praxair*, 64 F.3d at 613.

among utilities was entitled to antitrust immunity because it was a "logical interpretation" of the Commission's 1965 order of approval.²⁸⁷ Additionally, the court held that even if the 1965 order did not clearly include the area in question, the conduct of the parties and the Commission since that time was consistent with the conclusion that it had been included.²⁸⁸ The court relied on a 1989 declaration by the Commission that the territory had been allocated to one of the utilities by the 1965 order, and on the administrative law principle that an agency's interpretation of its own regulation normally is entitled to controlling weight.²⁸⁹

The Court of Appeals for the Ninth Circuit reached a diametrically opposed conclusion in *Columbia Steel Casting Co. v. Portland General Electric Co.*²⁹⁰ Portland General Electric ("PGE") and Pacific Power and Light ("PPL") long had competed for electric customers in the City of Portland. In 1972 they unsuccessfully sought city approval for the allocation of exclusive service territories.²⁹¹ The city approved an exchange of facilities between the utilities for the purpose of eliminating duplication.²⁹² However, it explicitly rejected the request for an allocation of exclusive service territories. Instead, the city specified that both companies would continue to have non-exclusive franchises and be obligated to supply power throughout the city.²⁹³ The utilities entered an agreement for the exchange of plant and property in the city and obtained approval of the agreement from the state public utilities commission.²⁹⁴ The order of approval did not mention exclusive service territories.²⁹⁵ After approval was obtained, the utilities exchanged facilities and customers in the designated territories and stopped competing with each other.²⁹⁶

In 1989, fifteen years after the order of approval was obtained, Columbia unsuccessfully attempted to obtain lower priced power from PPL rather than from PGE. PGE refused to wheel the power on

²⁸⁷ *Id.* at 613.

²⁸⁸ *Id.* at 613-14. The order in question approved several territorial agreements between the utilities as shown on maps attached to the agreements. A map of the county in question was not included, but the companies' approved application to the Commission included a composite map showing a boundary that included the county. *Id.*

²⁸⁹ *Id.*

²⁹⁰ 111 F.3d at 1427.

²⁹¹ *Id.* at 1433.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.* at 1434.

²⁹⁵ *Columbia Steel Casting*, 111 F.3d at 1434.

²⁹⁶ *Id.* at 1435.

the ground that the 1972 order had created exclusive service territories.²⁹⁷ The Court of Appeals for the Ninth Circuit rejected PGE's claim of *Parker* immunity based on the 1972 order, which it held had not clearly authorized the creation of exclusive service territories.²⁹⁸ The court accorded no weight to post-1972 orders of the Commission that appeared to have recognized that exclusive service territories had been created in 1972, nor to an order of the Commission issued after the litigation was commenced reciting that the Commission had intended to create exclusive service territories in 1972 and amending the 1972 order *nunc pro tunc*.²⁹⁹ The court held that the question was not whether the Commission subjectively had intended to create exclusive service territories in 1972 but whether it had clearly articulated a policy to do so at that time.³⁰⁰ Reversing its own earlier opinion that had reached precisely the opposite result,³⁰¹ the court concluded that the 1972 order had not been sufficiently "clear" even though the allocation of exclusive territories arguably had been a foreseeable consequence of the 1972 order.³⁰²

The general approach to agency interpretations of broadly worded statutes or clarifications of ambiguous agency orders and regulations taken by the Ninth Circuit in *Columbia Steel Casting* clearly is more consistent with the Supreme Court's *Parker* decisions than that of the Eleventh Circuit in *Praxair*. The ultimate question for *Parker* immunity purposes is not simply whether state law authority in fact exists for the conduct in question but whether that policy was articulated by an authoritative state policy maker clearly and in advance of the particular anticompetitive conduct at issue.³⁰³ To permit an agency retrospectively to immunize private anticompetitive conduct by "clarifying" state policy after the conduct at issue had occurred would frustrate the core purpose of the clear articulation requirement—to assure that departures from the federal pro-competition norm are the result of the deliberate decision of an authorized state policymaker. It would also obscure the visibility of agency approvals of

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 1437.

²⁹⁹ *Id.* at 1440, 1441–42.

³⁰⁰ *Columbia Steel Casting*, 111 F.3d at 1442.

³⁰¹ See *Columbia Steel Casting Co. v. Portland Gen. Elec. Co.*, 60 F.3d 1390 (9th Cir. 1995), *withdrawn*, 103 F.3d 1446 (9th Cir. 1996), *reh'g denied*, 111 F.3d 1427 (9th Cir. 1996), *cert. denied*, 523 U.S. 1112 (1998).

³⁰² *Columbia Steel Casting*, 111 F.3d at 1442–44. See also *California CNG*, 96 F.3d at 1193, discussed *supra* notes 217–222 and accompanying text.

³⁰³ See *supra* note 199 and accompanying text.

private anticompetitive conduct and threaten the norms of prospectivity and specificity that undergird the Court's *Parker* immunity doctrine. To accord private immunity on the basis of such retrospective declarations of state policy would disrupt justifiable private reliance on the presumptive norm of free competition and conflict with the Supreme Court's repeated admonitions that a state may not confer immunity, either by generally authorizing private parties to engage in anticompetitive conduct or by ratifying such conduct after it has occurred.

That being said, however, it would be erroneous to conclude, as the Court of Appeals for the Ninth Circuit suggested in *Columbia Steel Casting*, that no *Parker* immunity ever can result from sequential clarifications of agency orders and rules. It also would be incorrect to conclude that an agency must clearly articulate the specifics of its anticompetitive policy once and for all at the outset rather than on the basis of accumulated experience and enhanced expertise. The entire range of an agency's policy declarations and actions must be considered in determining whether it has clearly expressed an intent to authorize particular anticompetitive conduct at any given moment in time. Thus, the key factor in *Columbia Steel Casting* should not have been whether the state public utility commission's 1972 order in itself clearly expressed the Commission's intent to authorize exclusive service territories but whether that order, together with its subsequent interpretations and applications by the Commission, clearly evidenced that intent *at some time before the particular anticompetitive conduct at issue—namely, the refusal of PGE to wheel power purchased from PPL by the plaintiff—took place*. In this respect, the Court of Appeals for the Ninth Circuit placed too little weight on subsequent commission orders that appeared to recognize the existence of exclusive service territories, the emergence of which arguably had been the clearly foreseeable result of the exchange of facilities authorized by the 1972 order.³⁰⁴ By contrast, the court's refusal to accord weight to the Commission's post-litigation *nunc pro tunc* amendment of its 1972 order was justified because that order was issued after all of the events that gave rise to the litigation had occurred.³⁰⁵

To say that the Commission's post-litigation amendment of its 1972 order was ineffective to confer immunity on PGE's refusal to wheel power from PPL obviously does not mean that the order was

³⁰⁴ See *Columbia Steel Casting*, 111 F.3d at 1440.

³⁰⁵ *Id.* at 1441-42.

void or of no effect. With respect to all conduct occurring after the date of the order, the creation of exclusive service territories in the City of Portland was an established, clearly articulated, and actively supervised state policy, fully entitled to the benefit of the *Parker* immunity doctrine.

D. Rulemaking, Adjudication, and Tariff Approval

State agencies may act through rulemakings, adjudications, or hybrid proceedings such as tariff approvals, which may be conducted "on the record" using quasi-adjudicatory procedures, but which are treated as "legislative" proceedings for some purposes.³⁰⁶ The role that each of these types of proceedings should have in the application of the *Parker* doctrine has not to date received the focused attention that it deserves.

Where a state agency proceeds in a truly adjudicatory fashion for the purpose of determining whether previous anticompetitive conduct by a private actor should be sanctioned because it was contrary to established norms,³⁰⁷ the agency's ultimate determination that the conduct in question was consistent with state law should not provide a basis for antitrust immunity. That result would be contrary to the norms of general applicability and prospectivity that underlie the *Parker* doctrine.³⁰⁸ In effect, in such cases, the agency has merely ratified private anticompetitive conduct after it has occurred. This is contrary to the Supreme Court's repeated decisions that only private anticompetitive conduct that is specifically and clearly approved in advance as an authorized implementation of a general state policy is exempt from the antitrust laws.

That is not to say that the results of state administrative adjudications may never be significant in determining whether state action antitrust immunity exists. Although they do not customarily do so, federal and state agencies occasionally may exercise their discretion to articulate broad propositions of policy, applicable not only to the present but to future cases, in the course of their adjudication of a particular dispute.³⁰⁹ While those broad declarations of state policy cannot provide a basis for *Parker* immunity with respect to private conduct

³⁰⁶ See generally, e.g., *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908).

³⁰⁷ See, e.g., *DAVIS & PIERCE*, *supra* note 278, at § 6.1.

³⁰⁸ See *supra* notes 55-73 and accompanying text.

³⁰⁹ See, e.g., *DAVIS & PIERCE*, *supra* note 278, at § 6.8; see also *California CNG*, 96 F.3d at 1197-1200.

that already has occurred, they should provide a sufficient clear articulation of state policy to support a claim of immunity for the future, provided that particular anticompetitive arrangements entered pursuant to that policy receive active state review and approval before they take effect.

By contrast to administrative adjudications, state administrative rulemaking proceedings and policy declarations are the paradigm example of administrative action that may constitute a sufficient clear articulation of state policy to support a claim of *Parker* immunity. This is so for either private or local governmental conduct taken pursuant to those policies, limited only by the scope of the agency's policymaking authority as a matter of state law.³¹⁰ In the case of private action, however, such broad administrative determinations of state policy cannot, standing alone, establish that particular private transactions or arrangements are immune. The Supreme Court has established that private anticompetitive conduct is entitled to *Parker* immunity only if its particular details are approved in advance by a state actor possessing state law authority to grant such approval.³¹¹ Thus, a further round of agency approval of the particular transaction or tariff must be obtained before it is entered or implemented if a claim of *Parker* immunity is to be upheld.³¹²

The most difficult questions in this area arise not from the effects of broad administrative rulemakings or specific administrative adjudicatory proceedings, but rather, from the pervasive actions of state agencies in dealing with tariffs governing the rates and practices of regulated industries. Because a tariff is the product of purely private action, it is clear that it provides no basis for a claim of immunity sim-

³¹⁰ See *supra* notes 209-238 and accompanying text.

³¹¹ See *supra* notes 74-113 and accompanying text.

³¹² In some settings, declarations of statewide policy by a state agency might be implemented in particular transactions by municipalities or other local governmental units. Cf. *Lender's Serv., Inc. v. Dayton Bar Ass'n*, 758 F. Supp. 429 (S.D. Ohio 1991) (holding that local bar association's implementation of policy on unauthorized practice of law adopted by Ohio Supreme Court immune). As the Supreme Court has indicated in its municipal action decisions, those local implementations of state policy should themselves be antitrust immune without any further requirement of active supervision by the state agency. The Supreme Court's rationale for this result, however, is unsatisfactory. State-wide supervision is unnecessary in such cases, not because local governmental units are more likely to act in the "public interest" than private actors so far as their anticompetitive commercial arrangements are concerned, but because those local units of state government possess the authority, as a matter of state law, to determine the particulars of previously articulated state policy as it is locally applied.

ply because it is filed with a state agency.³¹⁵ And where the agency ultimately fails to approve the tariff, of course, there would be no basis in state policy for a claim of immunity with respect to such purely private conduct.³¹⁴

Some litigants have attempted to finesse this difficulty by arguing that such filed tariffs should be covered by the immunity accorded to private petitioning activities under the *Noerr-Pennington* doctrine, which the Supreme Court extended to petitioning directed at judicial and administrative action in *California Motor Transport Co. v. Trucking Unlimited*.³¹⁵ As the Supreme Court has pointed out, however, the *Noerr* doctrine is a corollary of *Parker*, designed to protect the immunity accorded to completed governmental action that results from private petitioning.³¹⁶ Accordingly, courts have rejected claims of *Noerr* immunity for filed tariffs where no valid claim of *Parker* immunity for the anticompetitive impact of the tariff itself could be sustained. Antitrust liability in such cases is not imposed on the act of petitioning but on a private actor's marketplace implementation of the anticompetitive and non-immune tariff provision itself.

For example, in *Litton Systems, Inc. v. American Telephone & Telegraph Co.*,³¹⁷ AT&T claimed that its tariff filed with the ICC requiring competitors to use an uneconomical protective device to connect to AT&T's network was a protected "request for governmental action."³¹⁸ The Court of Appeals for the Second Circuit rejected that claim because the requirement had been imposed by AT&T, not the FCC.³¹⁹ More recently, in the context of state agency action, the Court of Appeals for the Ninth Circuit, in *California CNG*, rejected a claim that a filed tariff adequately evidenced state policy in favor of utility ratepayer subsidization of natural gas refueling stations both because the tariff did not clearly show that it was non-compensatory and because the record did not show that the state public utilities commission had

³¹⁵ See, e.g., *Litton Systems, Inc. v. American Tel. & Tel. Co.*, 700 F.2d 785, 807 (2d Cir. 1983); *Capital Freight Serv., Inc. v. Trailer Marine Transp. Corp.*, 704 F. Supp. 1190, 1193 (S.D.N.Y. 1988).

³¹⁴ Even where the tariff is ultimately approved by the agency, claims of antitrust immunity for implementation of the tariff or arrangement before it has been approved should be rejected. This result is compelled by the norm of prospectivity underlying *Parker* immunity doctrine and by the Supreme Court's clear holdings that state ratification of anticompetitive private conduct cannot provide a basis for immunity.

³¹⁵ 404 U.S. 508 (1972).

³¹⁶ *Omni*, 499 U.S. at 383.

³¹⁷ 700 F.2d at 785.

³¹⁸ *Id.* at 808-09.

³¹⁹ *Id.* at 807.

approved it.³²⁰ In *Columbia Steel Casting*, the same court held that applying to an administrative agency for approval of an anticompetitive contract is not protected by *Noerr*.³²¹

The same principle—that *Noerr* immunity for the proposal of a tariff to a state agency does not support a claim of *Parker* immunity for its marketplace implementation—no doubt underlies a series of decisions refusing to recognize either *Noerr* or *Parker* immunity for “price squeezes” alleged to have resulted from approval of a utility’s retail rates by a state utilities commission and its wholesale rates by the Federal Energy Regulatory Commission.³²² The rationale for these decisions has been that because neither agency has jurisdiction over both ends of the price squeeze, neither the clear articulation nor the active supervision requirement is satisfied. This result is open to question, however, where the state agency can be shown actually to have considered the relationship of wholesale and retail rates in its approval of the retail tariff over which it did have jurisdiction.³²³ In such cases, the state agency has approved the tariff at issue and the only question is whether that approval reflects a clearly articulated state policy.

The most difficult issue of state action immunity for conduct regulated by state administrative agencies remains—namely, whether

³²⁰ *California CNG*, 96 F.3d at 1201.

³²¹ 111 F.3d at 1446 (“PGE is not being held liable for filing the application that resulted in the 1972 Order. PGE is being held liable for agreeing with PP & L to replace competition with area monopolies in the Portland market.”).

³²² See *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1179–80 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *City of Mishawaka v. American Elec. Power Co.*, 616 F.2d 976, 985 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981); *City of Mishawaka v. Indiana & Mich. Elec. Co.*, 560 F.2d 1314, 1318–21 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978). *But see* *Norcen Energy Resource Ltd. v. Pacific Gas & Elec. Co.*, 1994–2 Trade Cas. (CCH) ¶ 70, 851 (N.D. Cal. 1994). In *Norcen*, the court declined to recognize a “price squeeze” exception to *Noerr* immunity. The court further held that *Parker* protected the defendant’s activities, because both the “postage stamp rates” and “crossover ban” for intrastate gas transportation at issue in that case were within the regulatory jurisdiction of the CPUC. This is unlike the situation in *City of Kirkwood*, where defendants were alleged to have been able to manipulate the regulatory structure to impose a price squeeze by virtue of the fact that the wholesale rates at issue were within the regulatory jurisdiction of FERC, whereas the retail rates were within the jurisdiction of the state.

³²³ Cf. *Cine 42nd Street Theatre Corp. v. Nederlander Org., Inc.*, 790 F.2d 1032, 1046–47 (2d Cir. 1986) (stating that immunity extends to impact of state-approved conduct in unregulated markets where those effects were clearly foreseeable); *Metro Mobil*, 661 F. Supp. at 1504 (stating that *Parker* immunity extends to price squeeze effects of regulated wholesale rates even though retail rates not regulated where the state commission took account of those effects in approving wholesale rates); *Sonitrol of Fresno, Inc. v. American Tel. & Telegraph Co.*, 629 F. Supp. 1089, 1096 (D.D.C. 1986) (stating that immunity extends to impact of state-approved conduct in unregulated markets where those effects were clearly foreseeable).

immunity should be accorded to anticompetitive actions pursuant to a privately proposed tariff that has become effective under state law. The Supreme Court has twice rejected immunity in such circumstances, despite the fact that the approval at issue was specific and prospective and that the utility not only was permitted but was required by state law to comply with the tariff it had filed.

The Court's first important decision rejecting immunity for private actions pursuant to an approved filed tariff that had gone into effect was issued before the Court's final re-articulation of the state action doctrine in *Midcal*. In *Cantor v. Detroit Edison Co.*, the Court rejected a claim of immunity for Detroit Edison's program providing "free" light bulbs as part of its tariffed electric service.³²⁴ A majority of the Court rejected the utility's claim of immunity on the ground that, even though it had approved the tariff, the Michigan Public Service Commission had given no focused attention to the light bulb program, which "[did] not, therefore, implement any statewide policy relating to light bulbs."³²⁵ Following *Midcal*, the Court again rejected a claim of *Parker* immunity for rates established by a filed tariff in *Ticor*.³²⁶ The Court did so on the ground that, under the "negative option" system of regulation followed by two of the states, the rates at issue had become effective when the concerned state agencies had failed to disapprove them within a certain time after they were filed, despite the failure of the rating bureaus to provide the agencies with additional information that they had requested. In the Court's view, the states had not satisfied the second prong of the *Midcal* test because they had not "actively supervised" the particular rates at issue before they became effective.³²⁷ To meet this requirement, the state must exercise "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.*"³²⁸

Broadly read, these decisions suggest *Parker* immunity arises only if the state agency has affirmatively considered and deliberately adopted a policy of statewide application in favor of private anticompetitive conduct of the type at issue. Furthermore, they suggest that immunity obtains only if the state agency has affirmatively approved the specifics of each private anticompetitive arrangement entered

³²⁴ 428 U.S. at 579.

³²⁵ *Id.* at 585 (emphasis added).

³²⁶ 504 U.S. at 621.

³²⁷ *Id.* at 639-40.

³²⁸ *Id.* at 634-35 (emphasis added).

pursuant to that policy. But other readings also are possible. *Ticor* did not present any issue of broad state policy because state laws in that case clearly authorized collective ratemaking.³²⁹ Nor did it involve any affirmative approval of the particular rates at issue because the "negative option" systems of regulation at issue permitted privately proposed rates to go into effect automatically without any requirement for affirmative agency consideration or approval.³³⁰ Thus, one can argue that *Ticor* supports the conclusion that any rates or practices that are affirmatively approved by a state agency—even if only summarily and with no indication of reasons—are immune. Additionally, although *Cantor* clearly did require more than simple approval of a private tariff to support a *Parker* immunity claim, that decision was issued when the mode of analysis of *Parker* claims was still in flux. After the Court later settled on the two-pronged clear articulation and active supervision test in *Midcal*, it can be argued that affirmative agency approval of a tariff's specific terms should alone be held to satisfy both prongs of the *Parker* immunity test and that it would be unfair to subject a private party to antitrust liability for its state-required compliance with the terms of its filed tariff.

The norms of *Parker* immunity suggest that this "tariff approval equals antitrust immunity" approach should continue to be rejected by the Court as it was in *Cantor*. A fundamental premise of the Supreme Court's *Parker* decisions has been that only a deliberately adopted and generally applicable state policy sanctioning a particular type of anticompetitive conduct can support a claim of *Parker* immunity. Where, as in *Cantor*, neither the state legislature nor the agency acting within the scope of its delegated authority has articulated such a policy with respect to the type of anticompetitive conduct at issue, the agency's unelaborated approval of a specific tariff proposed by a private party cannot support a *Parker* immunity claim because no such deliberate and generally applicable policy has ever existed.³³¹

That does not imply, however, that a state agency's approval of a specific tariff never may support a *Parker* immunity claim. In instances where the state legislature has itself articulated a generally applicable and prospective state policy sanctioning a particular type of anticompetitive conduct, the agency's only role is to supervise the implemen-

³²⁹ *Id.* at 629.

³³⁰ *Id.* at 638.

³³¹ See *Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716, 733 (9th Cir. 1981) ("The FCC does not expressly approve or adopt as agency policy the content of every tariff it permits to become effective.").

tation of that policy by approving particular private anticompetitive arrangements or tariffs. For example, in *Southern Motor Carriers*, legislatures in three of the states in question specifically had approved the practice of collective ratemaking.³³² That being the case, state agency approval of a particular jointly proposed rate, even if that approval was given without articulation of reasons, was sufficient to confer immunity because the agency's only function was to supervise the particular tariffs that had been jointly proposed. Similarly, in *Ticor*, state statutes clearly authorized the operation of private rating bureaus for the purpose of fixing rates for title search and examination services.³³³ The state agencies' specific consideration and approval of particular rates proposed by the bureaus therefore would have been antitrust immune had the agencies affirmatively considered and approved those particular rates.

By contrast, the legislature of the fourth state in *Southern Motor Carriers* had not affirmatively approved collective ratemaking.³³⁴ As a result, any state policy permitting such anticompetitive conduct was articulated by the agency itself. Absent the agency's explicit and clear articulation of a generally applicable policy sanctioning such conduct, even its affirmative approval of a privately proposed collective tariff should have been insufficient to confer immunity. Just as in *Cantor*, the agency's bare approval of the terms of a particular tariff in such cases in itself provides insufficient evidence that the agency has adopted a considered state policy generally permitting collective ratemaking by private parties.

The rejection of *Parker* immunity based on an agency's tariff approval standing alone in cases in which neither the agency nor the state legislature has prospectively and clearly articulated a generally applicable policy sanctioning the type of anticompetitive conduct at issue does not imply that a state agency's process of tariff approval may never support an antitrust immunity claim. If, in the course of its approval of a particular tariff, a state agency, acting within the scope of its delegated authority under state law, articulates a generally applicable and prospective policy in favor of the type of anticompetitive conduct at issue, that general declaration of policy should suffice to support the application of the *Parker* doctrine. This is the case not only with respect to the future conduct of the tariff proponent in ac-

³³² *Southern Motor Carriers*, 471 U.S. at 63.

³³³ *Ticor*, 504 U.S. at 629.

³³⁴ *Southern Motor Carriers*, 471 U.S. at 63-65.

cordance with its terms but with respect to the agency's approval of similar tariffs subsequently proposed by others as well.

E. *The Effect of Illegality Under State Law*

Whether the state law illegality of the regulations or activities at issue should affect the availability of *Parker* immunity has proved a vexing question. Because *Parker* immunity rests on the idea that Congress did not intend to subject the acts of states as sovereigns to the proscriptions of the antitrust laws, it is logical to think that private or municipal conduct that exceeds the scope of state law authorization should not be entitled to immunity.³³⁵ By the same token, if the conduct at issue has not been authorized by the state, one might conclude that it cannot have been taken pursuant to a clearly articulated state policy as *Midcal* requires.

Just as the concept of official authority has proved elusive in areas as diverse as the scope of a state's Eleventh Amendment immunity from suit in federal court,³³⁶ the state action component of the Fourteenth Amendment,³³⁷ the availability of a civil rights cause of action against municipalities under section 1983,³³⁸ and the scope of officer immunity from personal damages liability for official conduct,³³⁹ so it has eluded clear definition in the development of the *Parker* doctrine. Leading commentators have argued that to subject the availability of *Parker* immunity to an assessment of the legality of conduct under state law would turn federal rather than state courts into routine reviewers of the legality of state governmental conduct.³⁴⁰ Thus, they have suggested that "ordinary" or routine errors of judgment in the application of state law should not defeat *Parker* immunity, implicitly leaving open the possibility that "obvious" or "extreme" departures from state substantive or procedural requirements might have that

³³⁵ See, e.g., *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983); *Corey v. Look*, 641 F.2d 32 (1st Cir. 1981); *Feminist Women's Health Ctr., Inc. v. Mohammad*, 586 F.2d 530 (5th Cir. 1978).

³³⁶ Compare *Ex parte Young*, 209 U.S. 123 (1908), with *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984).

³³⁷ See generally *Home Tel. & Telegraph, Co. v. City of Los Angeles*, 227 U.S. 278 (1913).

³³⁸ See generally, e.g., *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978); *Monroe v. Pape*, 365 U.S. 167 (1961).

³³⁹ Compare *Pierson v. Ray*, 386 U.S. 547 (1967), with *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

³⁴⁰ See 1 PHILLIP AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* 424 (rev. ed. 1997).

effect.³⁴¹ This view quickly was accepted by federal antitrust courts, which, quite understandably, were reluctant to thrust themselves into the maw of difficult questions of abuse of state authority.³⁴²

In *Omni Outdoor Advertising*, the Supreme Court strongly endorsed this trend, holding that allegations that members of the City Council had conspired with a billboard company to enact a zoning ordinance that protected the company from competition by the plaintiff, rather than to promote the public interest as required by state law, were insufficient to defeat a claim of *Parker* immunity.³⁴³ It was sufficient that state law conferred power on the city to enact zoning ordinances, the very purpose of which was "to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants."³⁴⁴ The Court also rejected as impractical and beyond the purpose of the antitrust laws any exceptions to *Parker* based on the alleged existence of a "conspiracy" with private parties, the "corruption" of public officials, or where, in connection with the governmental action in question, "bribery or some other violation of state or federal law has been established." This might vindicate principles of good government, but it was beyond the purposes of the antitrust laws. As applied in subsequent decisions, *Omni* has had the effect of immunizing municipal conduct so long as the state has provided the city with a "general grant of authority to take actions of the sort in question," even though the manner of their exercise was substantively or procedurally improper.³⁴⁵

There is a certain irony to this view. The central purpose and effect of *Midcal's* clear articulation requirement was to limit the availability of *Parker* immunity to a narrower subset of the universe of all authorized state action. To be entitled to immunity, private or municipal conduct must not merely have been authorized by the state, but clearly authorized. The effect of the view that federal courts should not ordinarily review the state law legality of private or municipal conduct in determining whether it is antitrust immune is to

³⁴¹ *Id.* at 429, 437, 465-66.

³⁴² See, e.g., *Nugget Hydroelectric*, 981 F.2d at 434-35; *Traweck v. City & County of San Francisco*, 920 F.2d 589, 592 (9th Cir. 1990); *Oberndorf v. City & County of Denver*, 900 F.2d 1434 (10th Cir. 1990); *Boone v. Redevelopment Agency*, 841 F.2d 886, 891 (9th Cir. 1988); *Kern-Tulare Water Dist. v. City of Bakersfield*, 828 F.2d 514 (9th Cir. 1987); *Hancock Indus. v. Schaeffer*, 811 F.2d 225 (3d Cir. 1987).

³⁴³ 499 U.S. at 365.

³⁴⁴ *Id.* at 373.

³⁴⁵ *Fischelli v. Town of Methuen*, 956 F.2d 12, 14 (1st Cir. 1992).

broaden the scope of state action antitrust immunity to conduct that was never properly authorized by the state at all, and thus, to remove it from the mooring of state sovereign authority that provides the essential underpinning of *Parker*.

That being said, the Supreme Court was correct in concluding that the concept of state law authority is sufficiently malleable to exclude ordinary errors of judgment in applying state law, and that the purposes of the *Parker* doctrine do not require such review. If the state as sovereign has clearly authorized municipalities or private parties to engage in certain types of anticompetitive conduct provided that certain legal or factual conditions are present, it has made a considered decision to displace competitive norms to that extent. Both practicality and respect for the competence of state institutions suggest that once that basic policy determination has been made, the existence of the subordinate conditions of state authorization be entrusted to state institutions.

Moreover, given the general recognition that private parties are not properly held liable for damages for their justifiable reliance on apparently valid authorizations of their conduct,³⁴⁶ and the sweeping protection of municipalities and state agencies from damages liability under the Local Government Antitrust Act of 1984³⁴⁷ and the Eleventh Amendment, respectively, the only issue at stake in such cases is whether a prospective injunction should issue based on alleged violations of state law. In such circumstances, there is a strong argument that a stay of the federal action would be appropriate based on primary jurisdiction³⁴⁸ or abstention³⁴⁹ principles to permit state agencies and courts to resolve subordinate issues of state law within their primary areas of competence and expertise.

Nevertheless, it is much too easy to read *Omni* as holding that any sort of federal judicial review for consistency with state law is inappropriate in determining questions of state action antitrust immunity.

³⁴⁶ See, e.g., *Yeager's Fuel*, 22 F.3d at 1269 (holding that fact that state PUC later prohibited parts of energy conservation program that utility reasonably had concluded were proper at the time that it acted does not negate *Parker* immunity); *Lease Lights, Inc. v. Public Serv. Co.*, 849 F.2d 1330 (10th Cir. 1988) (recognizing defense where party reasonably relies on exercise of state authority later determined to be unauthorized).

³⁴⁷ 15 U.S.C. §§ 34-36 (1994).

³⁴⁸ See, e.g., *Litton Sys., Inc. v. Southwestern Bell Tel. Co.*, 539 F.2d 418, 423-24 (5th Cir. 1976). But see *Industrial Communications Sys., Inc. v. Pacific Tel. & Telegraph Co.*, 505 F.2d 152 (9th Cir. 1974) (ordering primary jurisdiction reference to state PUC). See generally FLOYD & SULLIVAN, *supra* note 88, at § 3.4.11.

³⁴⁹ See generally FLOYD & SULLIVAN, *supra* note 88, at § 2.6.

This truly would stand *Parker* on its head. Even the strongest advocates of federal deference to state processes of review have contended only that "ordinary" errors in the application of state law should be placed off limits.³⁵⁰ Whether an authorized state actor has adopted a generally applicable state policy with respect to the type of anticompetitive conduct at issue is central to the application of *Parker* and must be open to federal judicial review in every case involving a *Parker* immunity claim. If it has not, then obviously the actions of municipalities and private parties allegedly pursuant to that policy exceed the scope of their state law authority, and even more obviously, have not been taken pursuant to a clearly articulated policy of the state.³⁵¹

Thus, in applying *Omni's* disclaimer of federal authority to review questions of illegality under state law, a distinction must be drawn between the fundamental questions of: (1) whether a state policymaker acting within the sphere of its state law authority has articulated a generally applicable anticompetition policy with respect to certain types of private or municipal conduct and has approved the application of that policy in advance and in specific detail; (2) the correctness of its determinations of the subordinate questions of fact or judgment that bring that policy into play;³⁵² and (3) questions of inconsistency with other provisions of state law that are not addressed to the state's competition policy *per se*.³⁵³ *Omni* should be read to preclude federal review only of questions falling into the last two categories, not those in the first, which go to the heart of the *Parker* immunity doctrine. If, however, authorized state policymakers have made the requisite "clear statement" and provided the necessary prospective and specific approval, the purposes of the *Parker* doctrine have been served, even if they may have erred in exercising their authority as a matter of state law.

³⁵⁰ See *supra* note 341.

³⁵¹ Cf. Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 991 (1999) (arguing that *Chevron* deference should not be accorded to agency interpretations of their jurisdictional authority).

³⁵² See, e.g., *Nugget Hydroelectric*, 981 F.2d at 434-35; *Traweck*, 920 F.2d at 592; *Oberndorf*, 900 F.2d at 1434; *Boone*, 841 F.2d at 891; *Kern-Tulare*, 828 F.2d at 514; *Hancock Indus.*, 811 F.2d at 225.

³⁵³ See, e.g., *Kern-Tulare*, 828 F.2d at 514; *Falls Chase Special Taxing Dist. v. City of Tallahassee*, 788 F.2d 711, 713 (11th Cir. 1986).

Clearly, for example, where state law fails to authorize³⁵⁴ or prohibits³⁵⁵ certain types of anticompetitive activities, such as exclusive trash hauling arrangements, a municipality's determination to engage in such activities or to authorize private parties to do so is not entitled to *Parker* immunity because it is not authorized by state law. By contrast, if the state has authorized municipalities to approve exclusive trash hauling arrangements where the public health requires, claims that a municipality's determination that the public health required a particular arrangement was erroneous, violated state law "open meeting" requirements, was procedurally defective, or was arbitrary and capricious should be insulated from federal judicial review. That is because those questions are not addressed to the fundamental issue of state policy that gives rise to *Parker* immunity and because it would be impractical and inappropriate for federal courts to step into the shoes of state institutions in determining such subordinate questions of state law.

This analysis suggests that federal antitrust review of the state law legality of the anticompetitive actions of state administrative agencies should differ significantly depending upon the scope of the agency's policymaking authority under state law. Where an agency simply implements an anticompetition policy adopted by the state legislature, its subordinate factual and judgmental determinations leading it to adopt certain rules or to approve particular private anticompetitive tariffs or arrangements as consistent with that legislative policy should be insulated from federal judicial review under the *Parker* doctrine. By contrast, where, as is commonly the case, the agency itself is the state policymaker with respect to the matter in question, the underlying

³⁵⁴ *American Tel. & Telegraph Co. v. North Am. Indus.*, 772 F. Supp. 777 (S.D.N.Y. 1991) (finding that New York legislature had not expressed policy to displace competition with regulation in the provision of pay phone service where it had only imposed minimum service requirements and otherwise left pay phones unregulated), *amended*, 783 F. Supp. 810 (S.D.N.Y. 1991) (pervasive state regulation of interconnection does not authorize discriminatory denial of interconnection); *Laidlaw Waste Sys., Inc. v. City of Fort Smith*, 742 F. Supp. 540 (W.D. Ark. 1990) (holding that even though city had authority to enter waste disposal business and grant exclusive franchises, it exceeded authority in a way not contemplated by the legislature when it chose to compete with a private company and charge it higher landfill rates than it charged itself; the legislature did not intend to authorize unfair competition).

³⁵⁵ See, e.g., *Cost Management Servs., Inc. v. Washington Natural Gas Co.*, 99 F.3d 937, 942 (9th Cir. 1996) (stating that defendant utility's off-tariff pricing of natural gas was not immune if, as plaintiff alleged, it was prohibited by state law); *Pine Ridge Recycling, Inc. v. Butts County*, 855 F. Supp. 1264 (M.D. Ga. 1994) (holding that state law did not allow local governments to exclude all competition in waste disposal market).

question of the scope of its state law policymaking authority should be fully open to federal review—no matter how difficult that determination may be. It would be a contradiction in terms to accord *Parker* immunity to state agency policy that it lacked authority to adopt or to private anticompetitive activity that it lacked the power to approve. This view may help to explain the result in *Goldfarb*, where the Supreme Court declined to recognize immunity for the state bar's enforcement of minimum fee schedules adopted by local bar associations.³⁵⁶ Although the bar was a state agency, it had acted in direct contradiction of the opinions of the Virginia Supreme Court, which exercised the ultimate regulatory authority of the state over the practice of law, stating that lawyers should not be controlled by fee schedules.³⁵⁷

Of course, in many cases, private parties will have relied on ostensibly valid state agency authorizations of private anticompetitive arrangements. The courts have resolved this dilemma by holding that private parties who justifiably rely on ostensibly valid regulatory authority approving their anticompetitive activities should be insulated from damages liability.³⁵⁸

III. CATEGORIZING DEFENDANTS

The approach advocated here necessarily involves the federal antitrust court in determining the locus and scope of policymaking authority as a matter of state law. Most importantly, because the scope of *Parker* immunity for the actions of state governmental entities would turn on whether they exercise policymaking authority with respect to the state as a whole, the suggested approach requires the antitrust court to distinguish agencies exercising statewide authority from municipalities, counties, and special purpose governmental units exercising only local authority.

In most instances, the answer to this question will be obvious from express geographic restrictions on a governmental entity's

³⁵⁶ *Goldfarb*, 421 U.S. at 773.

³⁵⁷ *Id.* at 776, 789–90.

³⁵⁸ See *Yeager's Fuel*, 22 F.3d at 1269 (holding that fact that state public utilities commission later prohibited parts of energy conservation program that utility had reasonably concluded were proper at the time that it acted does not negate *Parker* immunity); *Ticor Title Ins. Co. v. Federal Trade Comm'n*, 922 F.2d 1122 (3rd Cir. 1990) (stating that even if regulation of attorney fees related to title insurance transactions not authorized, private defendants should be immune from damages liability because they reasonably relied on apparently lawful assertion of regulatory authority), *rev'd*, 504 U.S. 621 (1992).

authority. In others, the question may be more difficult. For example, a state airport or port authority may appear to operate only in the particular area of the major port or airport that it supervises, but those areas may involve policy determinations that have a statewide impact and are of statewide concern. In such instances, other factors, such as the appointment of the agency's members by the governor, legislature, or other statewide officials and statewide funding and supervision of the agency's operations, may prove decisive. Eleventh Amendment authority also may provide useful guidance in the *Parker* context³⁵⁹ because it utilizes a similar distinction between state agencies and local governmental units, which has only occasionally caused difficulty.³⁶⁰ Additional guidance may be drawn from decisions under the Local Government Antitrust Act of 1984 (the "Act"), which extends its protection from antitrust damages liability to "any local government, or official or employee thereof acting in an official capacity."³⁶¹ The legislative history of the Act indicates that such local governmental entities "would have a geographic jurisdiction that is not contiguous with, and is generally substantially smaller than, that of the state that established it."³⁶²

The suggested approach also will require the antitrust court to distinguish between public state agencies, which would be subject to neither the clear articulation nor the active supervision requirements when acting within the scope of their state law policymaking authority, and private actors, who would continue to be subject to both requirements. In view of the frequency with which parties having continuing private interests are called upon to serve on state agencies, boards, and commissions, this is a potentially much more difficult question than the distinction between state and local governmental units.³⁶³ This question, however, is inherent in the Supreme Court's

³⁵⁹ See, e.g., *Vartan v. City of Harrisburg*, 661 F. Supp. 596, 602 (M.D. Penn. 1987) (relying on Eleventh Amendment precedents in determining that a redevelopment authority was a municipal rather than a state agency).

³⁶⁰ See *supra* note 45.

³⁶¹ 15 U.S.C. § 35(a) (1994).

³⁶² H.R. REP. NO. 965, reprinted in 1984 U.S.C.C.A.N. 4602, 4620-21. See, e.g., *IT&E Overseas, Inc. v. RCA Global Communications, Inc.*, 747 F. Supp. 6, 13-14 (D.D.C. 1990) (concluding that the Guam Telephone Authority was not protected by the Act because it exercised statewide jurisdiction). See generally *FLOYD & SULLIVAN*, *supra* note 88, at § 4.2.

³⁶³ See, e.g., *Earles v. State Bd. of Certified Pub. Accountants*, 139 F.3d 1033 (5th Cir. 1998) (treating the board as a state agency for both Eleventh Amendment and *Parker* purposes even though its membership was composed entirely of competing members of the profession); *Bankers Ins. Co. v. Florida Residential Property & Casualty Joint Underwriting Ass'n*, 137 F.3d 1293 (11th Cir. 1998) (treating association as a public entity despite its

consistent view that *Parker* immunity obtains only where the specific anticompetitive conduct at issue has been prospectively approved by a public rather than a private actor. Indeed, the distinction between public and private action will often be more difficult to draw in the case of municipal and other local and special purpose governmental units than it is in the case of agencies exercising statewide jurisdiction and policymaking authority, which almost invariably will be subject to public appointment, supervision, and funding.³⁶⁴ Certainly the difficulties of classification created by the focus on the official locus of state law policymaking authority suggested here pale by comparison with the difficulties—as well as the drastic intrusion on state sovereignty—posed by alternative approaches that would not respect the policy choices of state agencies if they were determined to have been “captured” by private interests³⁶⁵ or to have been “financially interested” in the result.³⁶⁶ In any event, the Supreme Court now appears to have rejected these approaches in *Omni*.³⁶⁷

private membership); *Washington State Elec. Contractors Ass'n v. Forrest*, 930 F.2d 736 (9th Cir. 1991) (expressing doubt about whether council that enforced minimum wages for apprentices in the performance of electrical contracts and had both public and private members was a state agency).

³⁶⁴ See, e.g., *Tri-State Rubbish, Inc. v. Waste Mgt., Inc.*, 998 F.2d 1073 (1st Cir. 1993) (treating a nonprofit, nonstock corporation formed by twelve municipalities to assist in waste disposal as a public actor where its officers, by statute, were declared to be municipal officers); *Riverview Inv., Inc. v. Ottawa Cmty. Improvement Corp.*, 899 F.2d 474 (6th Cir. 1990) (treating local community improvement corporation having private members and not subject to municipal control as a private entity). See generally FLOYD & SULLIVAN, *supra* note 88, at § 4.1.7 (suggesting that the focus should be on whether the actions in question “are the actions of a body or entity created by the state that exercises policymaking or administrative authority officially conferred by the state and that is officially accountable for its actions to the state,” and that in making this determination the court should consider “(1) whether the entity in question has been publicly or privately created, (2) whether its members are publicly or privately appointed, (3) whether they are subject to the constraints and regulations that apply to public employees generally, (4) the extent to which the entity exercises functions specifically delegated to it by state law, and (5) the extent to which its actions, even though not actively supervised, are subject to ultimate review and control by the state”).

³⁶⁵ See *supra* note 9; see also AREEDA & HOVENKAMP, *supra* note 340, at 410–11 (suggesting that the “state itself” designation for agencies entitled to *ipso facto* immunity should be reserved for “government agencies that are both statewide in their jurisdiction and have no particular susceptibility to capture by a particular business group” and denied to “agencies that are dominated by members of the regulated industry”).

³⁶⁶ See Elhauge, *supra* note 8, at 703–05 (suggesting that *Parker* immunity may be denied to the actions of a state board consisting of affected producer, consumer, or labor interests on the ground that they are financially interested in the result).

³⁶⁷ See *supra* notes 343–345 and accompanying text.

CONCLUSION

In applying the *Parker* doctrine, the actions of state administrative agencies should be treated differently than those of local and special purpose units of state governments. The basic premises underlying the Supreme Court's *Parker* decisions require that anticompetitive conduct be undertaken pursuant to a statewide policy of general applicability, and that it be approved in advance and in specific detail if it is to be accorded an implied exemption from the facially unqualified national pro-competition norm. Because municipalities, counties and other local and special purpose governmental units do not possess state law authority to adopt policies generally applicable to the state as a whole, their actions must be taken pursuant to a generally applicable policy adopted by an authorized state policymaker such as a state legislature or state agency if they are to be antitrust immune. By contrast, state agencies frequently do possess authority, as a matter of state law, to prescribe competition policy for the state as a whole under general delegations of authority from the state legislature. Accordingly, the agency's clear articulation of state policy within the scope of its delegated authority should suffice in itself to satisfy the clear articulation component of the *Parker* doctrine. This theory has been recognized by an emerging trend of authority in the courts of appeals.

The Supreme Court's decisions do not support the conclusion that it has incorporated a rigid view of direct "Madisonian democracy" into the *Parker* doctrine or that only the state legislature is entitled to articulate *Parker*-immune anticompetition policy for the state. Such a rule would represent an unwarranted intrusion on the states' ability to structure and implement their policymaking processes as they wish. It also would be wholly impracticable and would disregard the very reasons that compel state legislatures to create state agencies and vest them with substantial delegated policymaking authority. The clear articulation requirement serves an important purpose in the application of the *Parker* doctrine by ensuring that departures from the presumptive federal competitive norm are authorized only as the result of a carefully considered, deliberately adopted, and visible state policy. That purpose, however, does not imply that only the state legislature is entitled to make such deliberate and carefully considered policy choices for the state. To insist that only the state legislature is entitled to articulate state competition policy ignores the infinite gradations of specification and degrees of articulation that typify the legislative-

administrative relationship and insists on drawing a line that defies meaningful definition and serves no useful purpose.

Conversely, there is no warrant for extending the same degree of protection to local and special purpose units of state government that do not possess state-wide policymaking authority. The Supreme Court's decisions dealing with the important issues of federalism posed by the Eleventh Amendment long have distinguished between the respect owed to local governmental units, on the one hand, and those owed to arms of the state government, such as state agencies, on the other. Although the specific issues posed by the *Parker* doctrine differ from those posed by the Eleventh Amendment, the underlying premise that only the actions of an institution of statewide competence are of sufficient weight to justify an exemption from the supremacy of federal law and institutions applies equally to both. Such a presumption is especially appropriate in the context of the *Parker* doctrine, which rests, not on any express declaration of Congressional will, but on an implied inverse preemption of a facially unqualified national pro-competition norm. The equation of state agencies with local units of government would be doubly unfortunate. First, it inevitably would lead to a watering down of the clear articulation requirement to the vanishing point in the case of the actions of local units of government and private actors, resulting in an undue impairment of federal antitrust policy. Second, it would lead to the imposition of an unjustifiably stringent legislative clear articulation requirement on state agencies, resulting in unwarranted federal interference with the structure and processes of state government.

An approach to the *Parker* doctrine that focuses on the state law locus of authority to prescribe generally applicable competition policy for the state and on the additional requirement that anticompetitive private actions receive prospective approval in their specific detail before a *Parker* immunity claim will be sustained is more explanatory of the actual course of Supreme Court and lower decisions dealing with both state agency and municipal conduct than are approaches based on agency "capture," on whether the conduct at issue has been approved by a financially disinterested decision-maker, or on whether the recognition of immunity would be consistent with allocative efficiency or principles of direct "Madisonian" democracy. It also sheds light on a number of troublesome issues, such as the reason why no active supervision of the actions of municipalities and state agencies is required, what weight should be given to administrative interpretations of statutes and rules, whether retrospective clarifications of agency policy may provide a basis for immunity, and why two stages of

initial policy declaration and subsequent specific approval of particular private arrangements may be required where municipal supervision of private conduct is at issue but not for all actions of state agencies. A focus on these norms and a clear recognition of the uniqueness of the antitrust immunity issues presented by state agencies—a trend that has already begun in decisions recognizing the independent policymaking authority of state administrative agencies in applying the *Parker* doctrine—also will contribute to more careful consideration of the widely varying immunity issues presented by the multifaceted tasks performed by state administrative agencies and lead to much needed clarification and development of this important area of antitrust law.