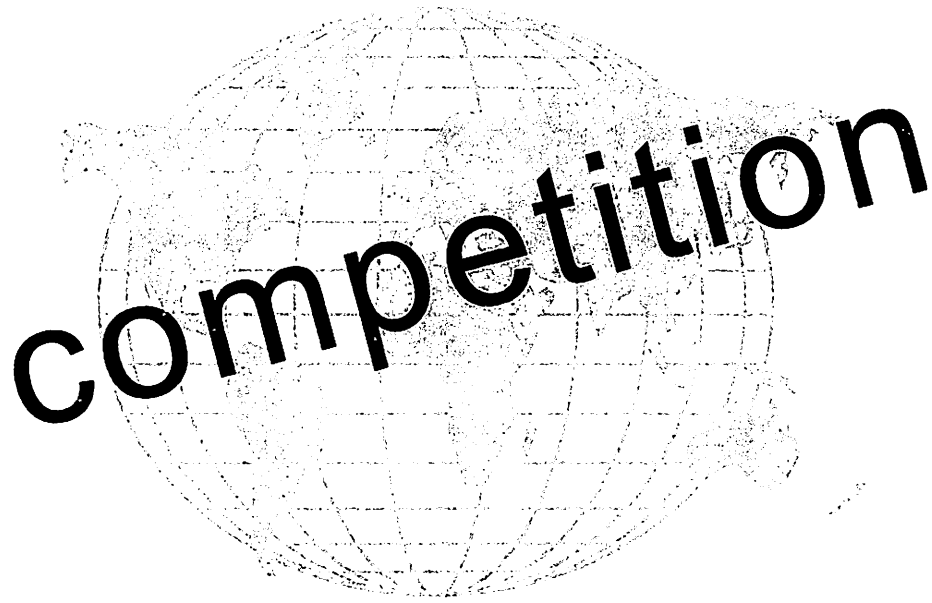

The Journal of the
Antitrust and Unfair Competition Law Section
of the State Bar of California

Recent Developments in Competition and Antitrust Law

Vol. 23, No. 1

Spring 2014

THE MARKET-PARTICIPANT EXCEPTION TO STATE-ACTION IMMUNITY FROM ANTITRUST LIABILITY

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I. INTRODUCTION

"The heart of our national economy has long been faith in the value of competition,"[2] and as the United States Supreme Court put it, those "fundamental national values of free enterprise and economic competition" are embodied in federal antitrust laws.[3] Antitrust enforcers and "private attorneys' general"[4] work within this system to support competition by challenging anticompetitive conduct.

But a significant category of potentially-anticompetitive conduct often escapes antitrust scrutiny: state and local commercial activity. Governmental entities can, and do, enter the marketplace as competitors, and may have even stronger incentives than profit-maximizing firms to harm competition.[5] Indeed, state and local entities have built-in advantages that may allow them to successfully monopolize, or otherwise injure competition. For example, a local entity could utilize a statutory monopoly on certain utilities to tie those monopolistic services to other products or services from a competitive market. Or, a governmental entity could use the power to tax to raise sufficient revenue to offer a product or service below cost for sufficient time to exclude other competitors from a market.

The reason that state and local anticompetitive conduct often avoids antitrust scrutiny is because the courts have applied a state-action immunity since the early 1940s.[6] This doctrine exempts some government conduct—described more fully below—from federal antitrust law. Because monopoly is so profitable, an enterprising government could decide to solve its fiscal woes by entering a market and taking monopoly prices from consumers. And without a commercial-conduct exception to state-action immunity, governmental actors could get away with it.

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2 *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978).

3 *Federal Trade Commission v. Phoebe Putney Health Sys.*, 133 S.Ct. 1003, 1010 (2013).

4 *See generally* Carl W. Hittinger and Jarod M. Bona, *The Diminishing Role of the Private Attorney General in Antitrust and Securities Class Action Cases Aided by the Supreme Court*, 4 J. BUS. & TECH. L. 167 (2009).

5 David E.M. Sappington & J. Gregory Sidak, *Competition Law for State-Owned Enterprises*, 71 ANTITRUST L. J. 479, 480 (2003). *See generally* Eleanor Fox and Deborah Healey, "When the State Harms Competition—The Role for Competition Law" (May 2013). *University of New South Wales Faculty of Law Research Series 2013*, also available at http://ssrn.com/abstract=2248059 (surveying thirty-two jurisdictions and analyzing antitrust and competition laws that condemn governmental anticompetitive-conduct).

6 *Parker v. Brown*, 317 U.S. 341, 351 (1943).

Last term, the U.S. Supreme Court, in *Federal Trade Commission v. Phoebe Putney Health System, Inc.*, addressed the state-action immunity doctrine, but left open the following circuit-splitting question: Is there a market-participant exception to state-action immunity from the antitrust laws?[7] In this article, we contend that state and local entities that engage in commercial conduct should abide by the same antitrust laws as their private-market competitors.[8]

II. What is state-action immunity?

In 1943, the U.S. Supreme Court held in *Parker v. Brown* that the federal antitrust laws do not apply to certain state conduct.[9] This decision developed into what is now referred to as "state-action immunity," even though it is more aptly described as an exemption.[10] The *Parker* Court upheld the obviously-anticompetitive California Agricultural Act, which the Supreme Court later characterized as a "state-supervised" market-sharing scheme.[11] Importantly, the decision was grounded in statutory interpretation, but the doctrine has evolved such that federalism and state-sovereignty rationales control the doctrine's scope and development.[12] Like all antitrust exemptions, the state-action-immunity exemption is disfavored, and only recognized "when it is clear that the challenged anticompetitive conduct is undertaken pursuant to a regulatory scheme that 'is the State's own.'"[13]

To determine whether to apply immunity in a traditional case, the Supreme Court adheres to a form of the test developed in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*[14] First, the party seeking exemption must prove that the challenged restraint is "clearly articulated and affirmatively expressed as state policy," and second,

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7 133 S.Ct. at 1011 n.4.

8 The authors filed an amicus brief in *Federal Trade Commission v. Phoebe Putney Health Systems, Inc.* on behalf of the National Federation of Independent Business urging that the Supreme Court adopt this exception in that case.

9 317 U.S. 341, 351 (1943). For a more complete statement of the state-action immunity doctrine and its development, *see* Jarod M. Bona, *The Antitrust Implications of Licensed Occupations Choosing Their Own Exclusive Jurisdiction*, 5 UST. J.L. & PUB. POL'Y 28, 36-44 (2011).

10 *See South Carolina State Bd. of Dentistry v. Federal Trade Commission*, 455 F.3d 436, 444-46 (4th Cir. 2006).

11 *Federal Trade Comm'n v. Ticor Title Ins. Co.*, 504 U.S. 621, 632 (1992).

12 *See* William J. Martin, *State Action Antitrust Immunity for Municipally Supervised Parties*, 72 U. CHI. L. REV. 1079, 1082 (2005); *see also Ticor Title Ins.*, 504 U.S. at 633 (noting that the *Parker* "decision was grounded in principles of federalism").

13 *Phoebe Putney*, 133 S.Ct. at 1010 (quoting *Ticor Title Ins.*, 504 U.S. at 635).

14 445 U.S. 97, 105 (1980).

the policy must be "actively supervised" by the State itself.[15] Certain parties, like municipalities, need not prove "active supervision."[16]

In the 1985 decision of *Town of Hallie v. City of Eau Claire* the Court lowered the bar for satisfying the first prong—"clear articulation and affirmative expression of state policy"— by holding that that it is satisfied where the governmental actor shows that their anticompetitive conduct is a *foreseeable* result of state legislation.[17] The Court in Phoebe Putney, however, recently restored some teeth to the test when it expanded *Community Communications Company v. Boulder*[18] to hold that grants of general corporate power to government entities is not a sufficient articulation and expression of state-sovereign policy to invoke an exemption from the antitrust laws.[19]

III. STATE-ACTION IMMUNITY SHOULD NOT APPLY TO MARKET-PARTICIPANT CONDUCT BY GOVERNMENTAL ENTITIES.

A. The History of the State-Action Immunity Doctrine Supports Applying the Antitrust Laws to State and Local Commercial Activity.

1. *Union Pacific Railroad* and *Parker*.

The Supreme Court issued its *Parker* decision—the genesis of the state-action exemption—in the wake of an important case decided just two years before: In *Union Pacific Railroad Company v. United States*, the Court applied the Elkins Act—a federal competition statute regulating interstate commerce carriers—to certain rebates and concessions by Kansas City, Kansas, in its capacity as a commercial participant.[20] The Court rejected the city's attempt to entangle its market conduct with its "municipal interests," and explained that "the promotion of civic advancement may not be used as a cloak to screen the granting of discriminatory advantages to shippers."[21] In other words, Kansas City had to follow federal competition laws, just like every other market player.

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15 *Id.*

16 *See* Bona, *supra note* 9 at 39-51 (discussing which parties are subject to the "active supervision" requirement); *see also North Carolina State Bd. of Dental Examiners v. Federal Trade Commission*, 717 F.3d 359, 368 (4th Cir. 2013) (holding that "state agencies 'in which a decisive coalition (usually a majority) is made up of participants in the regulated market,' who are chosen by and accountable to their fellow market participants, are private actors and must meet both *Midcal* prongs"), cert. granted March 3, 2014.

17 471 U.S. 34, 41-42 (1985).

18 455 U.S. 40 (1982) (holding that Colorado's Home Rule Amendment, which allowed municipalities to govern their local affairs, did not satisfy the clear-articulation test).

19 *Phoebe Putney*, 133 S.Ct. at 1012-13. The Court explained that "[g]rants of general corporate power that allow substate governmental entities to participate in a competitive marketplace should be, can be, and typically are used in ways that raise no federal antitrust concerns." *Id.* at 1012.

20 313 U.S. 450, 470-71 (1941). The Supreme Court in *City of Lafayette, Louisiana v. Louisiana Power & Light Co.*, 435 U.S. 389 described the Elkins Act as "a statute which essentially is an antitrust provision serving the same purposes as the anti-price-discrimination provisions of the Robinson-Patman Act." 435 U.S. 389, 401 n.19 (1978).

21 313 U.S. at 464-65.

Two years later, when the Court in *Parker* held for the first time that the federal antitrust laws do not—as a matter of statutory interpretation—apply to the state "as sovereign," it expressly distinguished a government entity acting as a market participant: "[W]e have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade."[22] Indeed, many years later, the Court in *City of Columbia v. Omni Outdoor Advertising* acknowledged this limitation by finding that *Parker* distinguished "States in their governmental capacities as sovereign regulators" from their capacity "as a commercial participant in a given market."[23] Thus, from the doctrine's origins, the Court never contemplated that states and municipalities could use state-action immunity as a shield when they were engaged as actual participants in a market.

2. *City of Lafayette.*

Years after *Parker*, in *City of Lafayette*, the Court addressed policy issues related to a market-participant exception to state-action immunity when it rejected a broad antitrust exclusion for local governments.[24] This case involved antitrust counterclaims against Louisiana cities that owned and operated electric-utility systems, both inside and outside city limits.[25] The Court referred back to the case preceding *Parker—Union Pacific*—and explained that "it has not been regarded as anomalous to require compliance by municipalities with the substantive standards of other federal laws which impose such sanctions upon 'persons.'"[26]

Significantly, the Court rejected the argument that the intent of the antitrust laws is to protect the public *only* from private abuses and not from municipal activity.[27] The Court explained that "[e]very business enterprise, public or private, operates its business in furtherance of its own goals."[28] Even though municipally-owned utilities may have public goals, "the economic choices made by public corporations in the conduct of their business affairs . . . are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations . . . ."[29] Indeed, the counterclaim's allegations "illustrate the impact which local governments, acting as providers of services, may have on other individuals and business enterprises with which they inter-relate as purchasers, suppliers, and sometimes, as here, competitors."[30] Finally, the Court expressed worry that when a massive number of local government units—62,437 in 1972—"act as owners and providers of services" without antitrust restrictions, there is the "potential of serious distortion of the rational and efficient allocation of

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22 317 U.S. at 351-52.

23 499 U.S. 365, 374-75 (1991).

24 435 U.S. at 403.

25 *Id.* at 391.

26 *Id.* at 400.

27 *Id.* at 403.

28 *Id.*

29 *Id.*

30 *Id.*

resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender."[31]

Notably, the Court's concern about freeing municipal activity from antitrust scrutiny arose from municipal commercial conduct not local regulatory activity. The Court did not want to exempt public entities that "inter-relate" with a market 'as purchasers, suppliers, and . . . competitors' from the federal competition regime."[32]

Chief Justice Warren E. Burger, concurring, went even further by arguing that the case should simply turn on the fact that the cities were engaging in commercial activity: There is "nothing in *Parker v Brown* . . . or its progeny, which suggests that a proprietary enterprise with the inherent capacity for economically disruptive anticompetitive effects should be exempt from the Sherman Act merely because it is organized under state law as a municipality."[33] The Chief Justice expressed his belief that immunizing municipal commercial activity from the antitrust laws "would inject a wholly arbitrary variable into a 'fundamental national economic policy.'"[34] Moreover, he recognized the crucial distinction in the existing doctrine "between a State's entrepreneurial personality and a sovereign's decision . . . to replace competition with regulation."[35] "[T]he running of a business enterprise is not an integral operation in the area of traditional government functions."[36]

3. *Jefferson County Pharmaceutical Association.*

Five years later—in a case that doesn't receive enough attention in this area—the Court in *Jefferson County Pharmaceutical Association, Inc. v. Abbott Laboratories* held that federal antitrust law applied to "state purchases for the purpose of competing against private enterprise."[37] There, an association of pharmacists and pharmacies sued, among other defendants, public hospitals and medical centers with pharmacies for violating the price-discrimination prohibitions[38] of the Robinson-Patman Act.[39] The public defendants sought dismissal by arguing that their purchases were exempt from the federal antitrust laws.[40]

The facts did not concern state purchases for "traditional government functions"—only "state purchases for the purpose of competing with private enterprise"—so this case was an opportunity for the Supreme Court to specifically address whether federal antitrust law applies to a state actor participating in a commercial market.[41]

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31 *Id.* at 408.

32 *Id.* at 403.

33 *Id.* at 418 (Burger, C.J. concurring).

34 *Id.* at 419.

35 *Id.* at 422.

36 *Id.* at 424.

37 460 U.S. 150, 154 (1983).

38 15 U.S.C. § 13.

39 *Jefferson County*, 460 U.S. at 152.

40 *Id.* at 153.

41 *Id.* at 154.

Distinguishing traditional state activity—or activity of a sovereign—from state commercial activity, the Court explained that "the retail sale of pharmaceutical drugs is not 'indisputably' an attribute of state sovereignty."[42] And "it is too late in the day to suggest that Congress cannot regulate states under its Commerce Clause powers when they are engaged in proprietary activities."[43]

From a policy perspective, the Court also explained that antitrust review of government market-participant conduct is important because public entities often have certain advantages in the commercial markets.[44] For example, relevant to the Robinson-Patman Act, "retail competition from state agencies can be more invidious than that from chain-stores, the particular targets" of the Act.[45] Even though consumers may benefit from lower costs through economies of scale and volume purchases, "to the extent that lower prices are attributable to lower overhead, resulting from federal grants, state subsidies, free public services, and freedom from taxation, state agencies merely redistribute the burden of costs from the actual consumers to the citizens at large."[46] The Court thus concluded that an "exemption from the Robinson-Patman Act could give state agencies a significant *additional* advantage in certain commercial markets, perhaps enough to eliminate marginal or small private competitors."[47]

Jefferson County addressed whether state commercial conduct is subject to the Robinson-Patman Act, which is statutorily separate from the Sherman Acts. It therefore does not strictly control the question of whether the market-participant exception applies to state-action immunity from Sherman Act claims. But the policy issues underlying their respective applications to state and local entities is the same: Does applying the particular antitrust act implicate federalism concerns because the activity is state-sovereign activity? If the challenged activity is not part of a traditional government—it is instead commercial activity—then "it is too late in the day to suggest that Congress cannot regulate states under its Commerce Clause powers when they are engaging in proprietary activities."[48]

4. *Omni Outdoor Advertising.*

The *Phoebe Putney* Court acknowledged that it left "open the possibility of a market participant exception"[49] in its 1991 decision of *Columbia v. Omni Outdoor Advertising, Inc.*[50] In Omni the lower court held that certain language in *Parker* suggested a conspiracy exception to the general rule of state action immunity.[51] But the Supreme Court disagreed, explaining that the disputed language instead suggested a commercial-

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42 *Id.* at 154 n.6.

43 *Id.*

44 *Id.* at 158 n.17.

45 *Id.*

46 *Id.*

47 *Id.* (emphasis in original).

48 *Id.*

49 133 S.Ct. at 1010 n.4.

50 499 U.S. 365, 374-75, 379 (1991).

51 *Id.* at 374-75.

participant exception to state-action immunity, not a *conspiracy exception.*[52] More specifically, the Court explained that the "rationale of *Parker* was that, in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign *regulators.*"[53]

According to the *Omni* Court, *Parker* was distinguishing a commercial-participant scenario, not a public-private conspiracy when it stated that in its case there is "no question of a state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade[.]"[54] Indeed, the Court in *Omni* supported this conclusion based in part upon *Parker's* citation of *Union Pacific*, which, as noted above, involved a federal competition statute's application to "certain rebates and concessions made by Kansas City, Kansas, in its capacity as the owner and operator of a wholesale produce market that was integrated with railroad facilities."[55]

5. *Phoebe Putney.*

In its 2013 *Phoebe Putney* decision, the Supreme Court had the opportunity to clarify once and for all that state and local entities are subject to antitrust laws when acting as active market-participants.[56] The case arose when a hospital authority, Phoebe Putney, sought to acquire Palmyra Park Hospital—its only competitor in a six-county geographic market in rural Georgia.[57] The two hospitals together, in fact, accounted for over 85 percent of the acute care in the geographic market.[58] The FTC sought to enjoin the transaction, claiming that it would substantially lessen competition.[59] The merging hospitals asserted state-action immunity, which the trial court accepted and the Eleventh Circuit affirmed.[60]

Ultimately, the Supreme Court held that a state's grant of general corporate powers to government entities does not protect them from the antitrust laws.[61] More specifically, to invoke the exemption, the entity must show that the state itself affirmatively contemplated that the entity's conduct would displace competition. While clarifying what must be shown for a governmental entity to invoke *Parker* immunity, the court expressly declined to address the still open question of whether there is, indeed, a

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52 *Id.*

53 *Id.* at 374 (emphasis added).

54 317 U.S. at 351-52.

55 *Id.* at 375.

56 133 S.Ct. 1003. The authors urged to the Supreme Court via amicus brief to apply the market-participant exception to the case. *See* Brief of National Federation of Independent Business as Amicus Curiae in Support of the Petition, *Federal Trade Commission v. Phoebe Putney Health System, Inc. et al.*, No. 11-1160 (2013).

57 133 S.Ct. at 1008-09.

58 *Id.*

59 *Id.*

60 *Id.*

61 *Id.* at 1011-12.

"market-participant" exception to state-action immunity.[62] But the Court did suggest that in most cases the antitrust laws should apply when local or state actors engage in anticompetitive conduct as market-participants in so far as it acknowledged that when a state grants some entity—public or private—the general power to act, "it does so against the backdrop of federal antitrust law."[63]

6. A Circuit Split.

Phoebe Putney did not resolve the current split on the market-participant exception issue among the circuits. Some circuits recognize the exception.[64] Others do not, pending a more affirmative statement from the Supreme Court.[65]

G. Applying the Antitrust Laws to State and Local Commercial Activity Is Consistent with Federal Antitrust Policy and Federalism.

The state-action immunity doctrine attempts to balance the sometimes conflicting principles of federalism and federal antitrust policy.[66] The purpose of the doctrine is "grounded in principles of federalism"[67] to respect "the States in their governmental capacities as sovereign regulators."[68] Market-participant conduct, however, is not an "integral operation in an area of traditional government functions."[69] Thus, this conduct does not fit within the doctrine's purpose to protect state-sovereign activity from federal interference.

By contrast, immunizing state and local market-participant conduct from antitrust scrutiny could negatively affect federal antitrust policy. First, with a free pass from antitrust regulation, state and local entities have a financial incentive to participate in commercial markets in anti-competitive ways because such conduct is very profitable. It may not take an enterprising municipality long to try to solve its fiscal woes by entering a market and

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62 *Id.* at 1010 n.4.

63 *Id.* at 1013.

64 *See, e.g., VIBO Corp. v. Conway*, 669 F.3d 675, 687 (6th Cir. 2012) ("[I]f a state acts as a 'commercial participant in a given market,' action taken in a market capacity is not protected."); *A.D. Bedell Wholesale Co., Inc.*, 263 F.3d 239, 265 n.55 (3d Cir. 2001) (declining to apply market-participant exception to state-action immunity because states did not enter the tobacco market as a buyer or seller); *Genentech, Inc. v. Eli Lilly and Co.*, 998 F.2d 931, 948 (Fed. Cir. 1993) ("To warrant *Parker* immunity the anticompetitive acts must be taken in the state's 'sovereign capacity,' and not as a market participant in competition with commercial enterprise."), *abrogated* on another issue by *Wilton v. Seven Falls Co.*, 515 U.S. 277, 289 (1995).

65 *See, e.g., Paragould Cablevision, Inc. v. City of Paragould, Arkansas*, 930 F.2d 1310, 1312-13 (8th Cir. 1991) (citing *Omni* and remarking that "the market participant exception is merely a suggestion and is not a rule of law"); *Automated Salvage Transport, Inc. v. Wheelabrator Envtl. Sys., Inc.*, 155 F.3d 59, 81 (2d Cir. 1998) (concurring with Eighth Circuit on exception).

66 *See* Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 670 (1991) (explaining that there "is no principled way for courts to reconcile [these] truly conflicting interests").

67 *Ticor Title*, 504 U.S. at 633.

68 *Omni*, 499 U.S. at 374; *Parker*, 317 U.S. at 352.

69 *Lafayette*, 435 U.S. at 424; *see also Jefferson County*, 460 U.S. at 154 n.6 ("The retail sale of pharmaceutical drugs is not 'indisputably' an attribute of state sovereignty.").

taking monopoly fees from consumers. Second, if the government entity's anticompetitive harm extends beyond its electorate, political correction may not occur as the voters are unlikely to care about harm (particularly the diffused harm of anticompetitive conduct) beyond their borders.[70] The costs will fall on those without a vote.

So the federalism concerns are minimal, but the negative effect of immunizing state commercial conduct is substantial. This balance must be considered in the context of the Commerce Clause and interstate commerce.[71]

1. Federalism and Antitrust Policy.

In wrestling with the interplay between principles of federalism and the goals of antitrust law, the *Parker* Court explained that the Sherman Act "makes no mention of the state . . . and gives no hint that it was intended to restrain state action or official action directed by a state."[72] Thus, the decision implicitly invoked a form of the cannon of avoidance in narrowly construing the Sherman Act to foreclose potential federalism concerns, or at least in seeking to preserve a presumption against displacing traditional state powers.[73] Such a presumption is consistent with the principle underpinnings of our federalist system, which holds that—while granting the federal government power to regulate the national economy under the Commerce Clause—the states are generally allowed to maintain their traditional police powers to regulate matters of health, morals and the public good under the Tenth Amendment.[74]

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70 *See* F.T.C. Office of Policy Planning, *Report of the State Action Task Force*, September 2003, p.41-42 (expressing concern that "out-of-state citizens adversely affected by spillovers typically have no participation rights and effectively are disenfranchised on the issue.").

71 *United States v. California*, 297 U.S. 175, 184 (1936) ("The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution.").

72 317 U.S. 341, 351 (1943).

73 Christopher Madsen, *Unfettered Federalism: The State of State Action Immunity to Federal Antitrust Actions in the Eighth Circuit After Paragould Cablevision v. City of Paragould.*, 37 S.D. L. Rev. 155, 158-59 (1992) ("Parker advocated federalism, concluding that the sovereign power of the individual states to act on their own behalf is of higher import than requiring states to serve the will of the federal government.").

74 317 U.S. at 351 ("In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."); *see also* Casey L. Westover, *Structural Interpretation and the New Federalism: Finding the Proper Balance Between State Sovereignty and Federal Supremacy*, 88 MARQ. L. REV. 693, 696-97, 705 (2005) (explaining that "[t]he principles or themes derived from the Constitution can help give meaning to ambiguous constitutional texts or answer questions not directly addressed by the text[,]" and explaining "Structural analysis is commonplace in the Supreme Court's separation of powers jurisprudence.").

Congress, of course, has the power to regulate anticompetitive conduct in the same manner that it regulates other forms of economic conduct.[75] For that matter, federal law unremarkably governs state and local government actors in many contexts—from environmental regulations imposed on municipalities, to federal wage and hour laws applicable to state and local governments when acting in the capacity of an employer.[76] Indeed, it is clear that Congress maintains the power to apply federal-statutory schemes indiscriminately to state and local governments in the same manner it regulates private citizens engaged in such conduct.[77] This is because the Supremacy Clause

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75 The Commerce Clause provides simply that the federal government maintains the power to regulate "commerce among the several states." U.S. CONST. Art. I, Sec. 8, Cl. 3. While there is tremendous support for the proposition that this grant of authority was originally intended to authorize only limited economic regulation—*i.e.* regulation of economic conduct where goods or services actually cross state lines—the New Deal era courts radically expanded the federal commerce power in *Wickard v. Filburn*. 317 U.S. 111 (1942); Craig L. Jackson, *The Limiting Principle Strategy and Challenges to the New Deal Commerce Clause*, 15 U. Pa. J. Const. L. 11, 15 (2012) ("The new-New Deal Commerce Clause interpretation essentially expanded the close and substantial relation test used in some of the earlier cases by broadly allowing regulation of all activity having a substantial effect on interstate commerce."). Following *Wickard* the federal courts interpreted the commerce power so broadly that many questioned whether there were *any* limits on federal power until *United States v. Lopez* in 1995, and *United States v. Morrison* in 2000, when the Court—for the first time since the New Deal era—struck down federal laws regulating purely intrastate conduct. *See e.g., The Right Results All the Wrong Reasons: An Historical and Functional Analysis of the Commerce Clause*, 53 Vand. L. Rev. 271, 283-84 (2000) (noting that until Lopez, there was no "case law prevent[ing] the expansive nationalization of criminal law."). *Lopez* and *Morrison* made clear that the conduct must actually impact interstate commerce in some non-attenuated way in order to fall within the purview of the federal commerce power. *United States v. Morrison*, 529 U.S. 598, 608 (2000). But for whatever halting step the Supreme Court might have taken toward restraining federal powers in *Lopez* and *Morrison*, the Court's decision in *Gonzales v. Raich* made clear that federal regulation will be upheld so long as there is some rational connection to interstate commerce. 545 U.S. 1 (2005). As recently demonstrated in *Nat'l Fed'n of Indep. Bus. v. Sibelius*, some federal enactments reach too far to be upheld under the Commerce Power. 132 S. Ct. 2566, 2587, 183 L. Ed. 2d 450 (2012). Nonetheless, the *Raich* standard has been understood as an exceedingly low bar for the federal government to meet. *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1177 (9th Cir. 2011) *cert. denied*, 132 S. Ct. 498, 181 L. Ed. 2d 388 (U.S. 2011) (emphasizing that *Raich* requires courts to uphold federal regulation of local conduct where the restriction is part of a "comprehensive regulatory scheme" having a "substantial relation to commerce.").

76 *E.g., Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.*, 133 S. Ct. 710, 184 L. Ed. 2d 547 (2013) (noting that "the Clean Water Act (CWA) and its implementing regulations require certain [municipal actors] ... to obtain a National Pollutant Discharge Elimination System (NPDES) permit before discharging storm water into navigable waters."); *Christensen v. Harris Cnty.*, 529 U.S. 576 (2000) (concerning application of the Fair Labor Standards Act to local government employees).

77 *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554, 105 S. Ct. 1005, 1019, 83 L. Ed. 2d 1016 (1985) (noting that under the FSLA local government "faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers[,]" and explaining that "the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy.").

enables Congress to govern over the states with the understanding that states retain the prerogative to act freely, consistent with the dictates of the Tenth and Fourteenth Amendments.[78]

Nonetheless, the Tenth Amendment still imposes meaningful limitations on federal regulatory powers when it comes to enactments that infringe on state sovereignty.[79] For example, in *New York v. United States* and *Printz v. United States*, the Supreme Court held that the federal government could not affirmatively compel states to set-up or enforce regulatory programs.[80] Likewise, in *NFIB*, the Court held that the federal government could not coercively condition the continued receipt of federal funds on a requirement to radically expand Medicaid coverage, or to enact new regulatory programs—at least where the states were already reliant upon such funds.[81]

The Supremacy Clause does, however, provide that federal law trumps state law to the extent they stand in conflict.[82] This is why states cannot nullify federal enactments.[83] But the general rule is that states are presumed to retain the sovereign prerogative to adopt regulatory restrictions in the absence of clear congressional intent to displace state regulatory powers.[84] This presumption against preemption is intended to preserve traditional sovereign powers, except to the extent federal law conflicts.[85] Thus, the federal preemption doctrine is premised in the same foundational principle upon which *Parker* stands—*i.e.* the idea that Congress should not be presumed to have abrogated the prerogative of state and local officials to adopt regulatory enactments pursuant to their traditional police powers.

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78 *Garcia* abandoned the notion that the Court can or should seek to determine whether the federal statute invades upon the traditional sovereign powers, rejecting the very notion that courts may "employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause." *Id.* at 550; *see also* Walter Wheeler Cook, *What is the Police Power?*, 7 Colum. L. Rev. 322 (1907) (defining the police power as "the unclassified, residuary power of government vested by the United States Constitution in the respective states[,]" and positing that the state retains all powers unless the power has been exclusively vested with the national government, or denied by a constitutional provision protecting "individual liberty, e.g. due process of law.").

79 *Printz v. United States*, 521 U.S. 898, 919-20 (1997) ("[T]he Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority...").

80 *New York v. United States*, 505 U.S. 144 (1992); *Printz*, 521 U.S. 898.

81 *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2602-03.

82 U.S. CONST. Art. VI Cl. 2.

83 Timothy Sandefur, *State Standing to Challenge Ultra Vires Federal Action: The Health Care Cases and Beyond*, 23 U. Fla. J.L. & Pub. Pol'y 311, 322-24 (2012) (repudiating the notion that states may nullify federal enactments because the Constitution vested supreme sovereignty in the federal government under the theory that "the nation constituted the aggregate of the people as a single community...").

84 In the absence of express preemption, courts look to see whether Congress has implicitly preempted state action "with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

85 *Santa Fe Elevator Corp.*, 331 U.S. at 230.

2. Federalism, State-Sovereignty, and the Proper Role of Government.

The federalist system seeks to protect individual rights by disseminating political power between competing sovereign entities.[86] The fear was that a centralized government might grow despotic if vested with too many powers.[87] Indeed, Madison envisioned the federalist system as preserving the state's traditional sovereign powers, subject only to the few narrowly-defined "enumerated powers" granted to the federal government.[88] Of course, during the New Deal era, the Roosevelt Administration radically expanded federal power at the same time that state and local governments were increasing traditional conceptions of the police power.[89] In a matter of decades the judicial mindset reset from a preoccupation with protecting the natural rights of individuals to a reflexively-statist presumption that favored regulations impinging upon individual liberties.[90]

In any event, the bedrock principles of the federalist system—both as originally conceived and as applied in practice today—have everything to do with controlling

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86 *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) ("The federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.' The Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived.") (citing *Alden v. Maine*, 527 U.S. 706, 758 (1999); *New York v. United States*, 505 U.S. 144, 181 (1992) ("State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.") (internal quotation marks omitted); *see also* Patrick M. Garry, *A One-Sided Federalism Revolution: The Unaddressed Constitutional Compromise on Federalism and Individual Rights*, 36 Seton Hall L. Rev. 851, 852 (2006) ("[W]hereas the Bill of Rights protections were limited to its identified freedoms, federalism had a much broader scope: built into the very structure of America's constitutional democracy, federalism would protect individual liberty as a whole, in every aspect in which it could be threatened by a distant central government.").

87 James Madison argued that federalism would prevent the United States government from growing too powerful "to allay concerns that the United States Constitution created a centralized government." Mark Tushnet, *Federalism and Liberalism*, 4 Cardozo J. Int'l & Comp. L. 329, 335 (1996) (explaining that federalism is an institutional mechanism designed to "retard the drift toward centralization.").

88 The Federalist No. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961).

89 Norman Redlich & David R. Lurie, *Federalism: A Surrogate for What Really Matters*, 23 Ohio N.U. L. Rev. 1273, 1274 (1997) ("The 'New Deal Constitutional Revolution' had a fairly precise starting point- the Spring of 1937 when the Supreme Court, in a dramatic turnabout (the 'switch in time that saved nine'), retreated from its 'Lochner-era' rejection of governmental regulation and upheld broad-based federal, as well as state, regulation of economic activity, thereby averting the constitutional crisis that developed as the nation attempted to cope with the Great Depression and that came to a head when President Roosevelt launched his court-packing plan."). *See generally* David E. Bernstein, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (University of Chicago Press 2011).

90 Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 FORDHAM L. REV. 459, 462-63 (2001) (noting that "[t]he New Deal justices appointed by Roosevelt brought to the Court a simple mandate--they were to put an end to the 'tortured construction' of the Constitution that prevented the enactment of New Deal legislation[,]" and explaining that the Court accomplished this end by "declar[ing] that judicial interference with the political process henceforth required... some clear textual justification.").

and diffusing political power.[91] Political power might be defined as the (presumptively legitimate) capacity to use force to control the actions of others.[92] Indeed, the debate between the Federalists and the Anti-Federalists was largely focused on what system would best restrain the federal government from abrogating, or infringing upon, the right of individuals to exercise their natural liberties and to control their properties.[93]

The exercise of sovereign political power, however, is different from other actions government might take.[94] When the government engages in economic conduct, it is acting as an independent actor in the same manner that ordinary individuals might.[95] For example, when operating as an employer, or engaged in a business enterprise, the government is carrying out activities that normal citizens might pursue. Thus, in these circumstances, the State, or her political subdivisions, is not acting in a traditional-sovereign capacity.[96] This conduct is different in kind from when the State invokes its sovereign prerogative to use force to control the actions of others. Strictly speaking, these

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91 Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on A National Neurosis*, 41 UCLA L. REV. 903, 911 (1994) (explaining that federalism is not so much about decentralization, as it is about structuring our national political order in a manner that preserves areas of jurisdiction for the states).

92 "Power is one of the key concepts in the great Western tradition of thought about political phenomena. It is at the same time a concept at which, in spite of its long history, there is, on analytical levels, a notable lack of agreement both about its specific definition, and about many features of the conceptual context in which it should be placed. There is however, a core complex of its meanings, having to do with the capacity of persons or collectivities 'to get things done' effectively, in particular when their goals are obstructed by some kind of human resistance or opposition. The problem of coping with resistance then leads into the question of the role of coercive measures, including the use of physical force, and the relation of coercion to the voluntary and consensual aspects of political systems." Talcott Parsons, *On the Concept of Political Power*, PROCEEDINGS OF THE AMERICAN PHILOSOPHICAL SOCIETY, VOL. 107, No. 3, 232 (Nov. 8, 1963).

93 "One of the central themes in the Antifederalists' arguments was resort to a putative rule of construction providing that all rights not expressly reserved by the people to themselves in forming a government were deemed surrendered to the control of that government. Federalists quickly cohered around two related defenses of the omission of a bill of rights. First, they argued that a bill of rights would be unnecessary because rights would be sufficiently protected by the enumerated federal powers scheme envisioned by the proposed Constitution. Second, they argued that inclusion of a bill of rights could be affirmatively dangerous because it might provide a basis for inferring the existence of additional federal powers beyond those specifically enumerated in the Constitution." Ryan C. Williams, *The Ninth Amendment As A Rule of Construction*, 111 COLUM. L. REV. 498, 511 (2011).

94 *See* Johnny Hutchinson, *What A Difference A Contract Makes: Protecting Taxpayers from Changes in the Tax Code*, 57 Case W. Res. L. Rev. 483, 492-93 (2007) (observing that government may not craft regulation to "'eliminate an obligation that arose under one of the Government's contractual relationships,'" but explaining that when government acts "'as a sovereign'" it may not be held liable for nullifying a contract with a regulatory enactment).

95 *See e.g., United States v. Winstar Corp.*, 518 U.S. 839, 896 (1996) ("The sovereign acts doctrine thus balances the Government's need for freedom to legislate with its obligation to honor its contracts by asking whether the sovereign act is properly attributable to the Government as contractor. If the answer is no, the Government's defense to liability depends on the answer to the further question, whether that act would otherwise release the Government from liability under ordinary principles of contract law.").

96 *See e.g., Conner Bros. Const. Co., Inc. v. Geren*, 550 F.3d 1368, 1371 (Fed. Cir. 2008) (explaining that courts must distinguish between actions undertaken in the state's role as a sovereign—i.e. those "resulting from its public and general acts as a sovereign"—and actions on equal footing with other private actors).

traditional sovereign powers were understood as the State's exclusive prerogative to use force to control others.[97]

As such, the State does not act within its sovereign prerogative when engaged in economic conduct.[98] It cannot be that the government is truly exercising sovereign powers when acting in the same manner as its private citizens. Thus, restricting the prerogative of state and local governments to engage in economic conduct does not abrogate sovereign power. Therefore, the federalism concerns underpinning the *Parker* immunity doctrine are not in play when the State acts as an ordinary market-participant on equal-footing with private citizens.[99]

Moreover, to the extent the State acts to advance its own pecuniary interests to the detriment of its citizens, it may exceed its natural charter to govern in the public interest.[100] Indeed, the revolutionary generation believed that the State owed fiduciary-like duties to her citizens on the theory that the citizens had vested political power in the government for the limited purpose of protecting natural rights.[101] Thus the contemplated market-participant exception to the *Parker* immunity doctrine is both consistent with the principles of federalism and the classical liberal conception of the proper role of government.

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97 "The concept that a monopoly on legitimate force is necessary for government to function may sound heretical in a country steeped in stories of our own revolutionary founding, but it is the fundamental organizing principle of any political entity, including a democracy like the United States. Max Weber's famous definition states: 'A compulsory political association with continuous organization . . . will be called a 'state' if and in so far as its administrative staff successfully upholds a claim to the monopoly of the legitimate use of physical force in the enforcement of its order.'" Joshua Horwitz & Casey Anderson, *Taking Gun Rights Seriously: The Insurrectionist Idea and Its Consequences*, 1 Alb. Gov't L. Rev. 496, 504 (2008) (citing Max Weber, *The Theory of Social and Economic Organization* 154 (Talcot Parsons ed., A.M. Henderson & Talcott Parsons, trans., The Free Press 1968) (1947)).

98 *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 277 (1988) (explaining that the market participant doctrine, to the Dormant Commerce Clause, "differentiates between a State's acting in its distinctive governmental capacity, and a State's acting in more general capacity of market-participant; only the former is subject to the limitations of the negative commerce clause.") (citing *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806-10 (1976)).

99 *See California State Bd. of Optometry v. F.T.C.*, 910 F.2d 976, 980 (D.C. Cir. 1990) ("Although a State may be a "person" for purposes of the antitrust laws, it is equally clear, under the 'state action' doctrine enunciated in *Parker v. Brown*, ... that when a State acts in a sovereign rather than a *proprietary capacity*, it is exempt from the antitrust laws even though those actions may restrain trade. ... Thus, properly framed, the question before us is not simply whether a State is a person under section 5(a)(2) of the Act, but whether a State acting in its sovereign capacity is subject to the Act.") (emphasis added).

100 *See* Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 Harv. J.L. & Pub. Pol'y 283 (2012) ("In *Politics*, Aristotle distinguished between governments aimed for the benefit of the ruled and those that aim at the ruler's benefit.").

101 *See Chisolm v. Georgia*, 2 U.S. 419 (2 Dall.), 468 (1793) ("The rights of individuals and the justice due to them, are as dear and precious as those of States. Indeed the latter are founded upon the former; and the great end and object of them must be to secure and support the rights of individuals, or else vain is Government."); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("[I]n our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people by whom and for whom all government exists and acts."); *see also* Evan Fox-Decent, *The Fiduciary Nature of State Legal Authority*, 31 Queen's L.J. 259, 260-61 (2005).

Without the shield of state-sovereignty and federalism, the federal policy of applying antitrust law to commercial conduct throughout the economy should control. As the Supreme Court in *United States v. Topco Associates* explained, the federal antitrust laws are the "Magna Carta of free enterprise," and "are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[102] Thus, anticompetitive state and local commercial conduct, like private conduct, must, absent constitutional protection, yield to the federal policy of free competition—as embodied in our federal antitrust laws.

C. The Market-Participant Exception Is Within the Expertise of the Federal Courts to Administer.

1. Any Exception to the *Parker* Immunity Rule Must Be Principled and Manageable.

Laws do not enforce themselves. Federal courts translate the federal antitrust laws to specific factual scenarios. The translation is not always perfect and antitrust—with its often complex economic foundation—is among the more difficult subjects to apply.[103] Indeed, with respect to antitrust actions against governmental entities, the Supreme Court has expressed caution about federal courts becoming arbiters of state administrative law.[104]

That fear does not present itself with the market-participant exception because it does not require federal courts to make substantive determinations of state-agency law. In fact, federal courts need not analyze what state law permits; they need only determine what the state or its subdivision is doing. The significant question is whether the government entity is competing in a market. This is an evidence-analyzing role that is well within the purview of the federal courts, and does not encroach on the state's ability to develop its own administrative law as it sees fit.

But there is another—coincidental—factor that will substantially ease the administrability of the market-participant exception: Under the Dormant Commerce Clause doctrine, there is already a developed standard for distinguishing between when the state is acting in a truly sovereign capacity and when it is acting as an ordinary commercial actor. Courts applying a market-participant exception to state-action immunity can look to this jurisprudence for guidance. These cases recognize a "market-participant exception" to the Dormant Commerce Clause on the theory that the constitutional prohibition against state-enacted protectionist regimes has no application when the state is acting as a private commercial actor.

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102 405 U.S. 596, 610 (1972).

103 *See generally* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984).

104 *See Omni*, 499 U.S. at 372; *Town of Hallie*, 471 U.S. at 44 n.7.

2. The Market-Participant Exception to the Dormant-Commerce-Clause.

The Commerce Clause authorizes the federal government to "regulate Commerce . . . among the several States."[105] "This affirmative grant of power does not explicitly control the states, but it 'has long been understood to have a 'negative' implication that denies the States the power to unjustifiably discriminate against, or burden, the flow of interstate of commerce."[106] Thus, the so-called "Dormant Commerce Clause" is rooted in the idea that the Commerce Clause made the United States a single economic union by vesting Congress with the exclusive power to regulate the national economy.[107]

Of course, the Dormant Commerce Clause is understood to leave room for the states to address local issues.[108] But when a state, or its political subdivisions, regulates in a manner that facially discriminates against out-of-state business, or seeks to regulate out-of-state conduct, the restriction is virtually always a violation. In other cases—where the regulation merely has a discriminatory effect—reviewing courts will uphold the challenged regulation "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."[109] But a governmental entity can defend against a Dormant Commerce Clause challenge by invoking a categorical defense: the market-participant exception.[110] To do so, the local or state government must demonstrate that the challenged discriminatory measure is undertaken to further an essentially private-economic function.[111]

In other words, the constitutional restrictions, implicit in the Dormant Commerce Clause, apply only against the State when it acts in a regulatory capacity.[112] By contrast, when a governmental unit acts like an ordinary economic actor—for example, as a speculator or purchaser of commodities, or as an employer—the constitutional

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105 U.S. Const., art. I, Sec. 8, cl. 3.

106 *Rocky Mnt. Farmers Union*, 12-15131, 2013 WL 5227091 (citing *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 98, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994)).

107 *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537-38 (1949).

108 *Grant-Hall v. Cavalry Portfolio Servs., LLC*, 856 F. Supp. 2d 929, 937 (N.D. Ill. 2012) ("The law has had to respect a cross-purpose as well, for the Framers' distrust of economic Balkanization was limited by their federalism favoring a degree of local autonomy.").

109 *Pike*, 397 U.S. at 142.

110 *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 510 (2d Cir. 1995) ("At the threshold of its Commerce Clause analysis, the Supreme Court has drawn an important distinction between "regulation" of, and 'participation' in, a market.").

111 *Id.* (explaining that when acting as a market participant, the State "enters the open market as a buyer or seller on the same footing as private parties...")

112 "Because the power conferred by the Constitution is the power to 'regulate,' the strictures of the dormant Commerce Clause are not activated unless a state action may be characterized as a 'regulation.'" *Id.*

restrictions don't apply.[113] Thus, our Dormant Commerce Clause jurisprudence endeavors to distinguish between sovereign action and economic conduct.[114]

The distinction comes down to the question of whether the challenged conduct is undertaken in the government's role as an arbitrator over the local economy, or as an active participant in the economy.[115] State government is only subject to constitutional scrutiny to the extent it is utilizing its sovereign powers to stack the deck to favor local economic interests.[116] This understanding of the Dormant Commerce Clause recognizes that government acts in a sovereign capacity whenever it acts as a referee—*i.e.* as an arbitrator setting the rules of the game for competing economic actors.[117]

Dormant Commerce Clause jurisprudence says that state and local governments must act in an even-handed manner when setting the ground rules for in-state and out-of-state economic actors.[118] State and local governments can regulate economic conduct, but only in so far as they act as geographically-impartial referees.[119] But when the government steps out of its role as a referee and into the game as an economic actor in its own right, it is no longer acting in a sovereign capacity.[120] Courts recognize that governmental units (or quasi-governmental entities) sometimes act as independent economic actors.[121]

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113 *See e.g., Reeves, Inc. v. Stake*, 447 U.S. 429, 440 (1980) ("South Dakota, as a seller of cement, unquestionably fits the "market participant" label..."); *White v. Massachusetts Council of Const. Employers, Inc.*, 460 U.S. 204, 214-15 (1983) ("Insofar as the city expended only its own funds in entering into construction contracts for public projects, it was a market participant and entitled to be treated as such...").

114 *Reeves, Inc.*, 447 U.S. 429, 436 (1980) (affirming the fundamental importance of this "basic distinction.").

115 Lawrence Tribe, American Constitutional Law 336 (1978) ("the commerce clause was directed, as an historical matter, only at regulatory and taxing actions taken by states in their sovereign capacity").

116 *Reeves, Inc.*, 447 U.S. at 436.

117 *See S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 95 (1984) (refusing to apply the market participant exception because the State of Alaska was not merely entering the market for timber, but was further imposing a condition on the right of other economic actors to participate in the market).

118 *E.g., W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 196 (1994) (holding unconstitutional a local regulation that had the effect of "neutraliz[ing] advantages belonging to the place of origin" of a commercial good) (citing *Baldwin v. G.A.F. Seeing, Inc.*, 249 U.S. 511, 527 (1935)); *Hunt v. Washington State Apple Advertising Com'n*, 423 U.S. 333 (1977) (invalidating a North Carolina statute that operated to strip market advantages from Washington apple-growers).

119 "Following this logic, the Supreme Court has consistently recognized facial discrimination where a statute or regulation distinguished between in-state and out-of-state products and no nondiscriminatory reason for the distinction was shown." *Rocky Mountain Farmers Union*, 730 F.3d 1070, 1089.

120 *See S.-Cent. Timber Dev., Inc.*, 467 U.S. 82, 97 (1984) ("The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further.").

121 *See e.g., White*, 460 U.S. at 208 (affirming the principle that state and local governments are exempt from Dormant Commerce Clause review when acting as market participants).

Indeed, when government begins providing services, or trading in articles of commerce, it is an active participant in the market rather than a pure sovereign.[122]

A philosophical complication is the fact that government might advance public interest when providing products or services in a market. This does not, however, change the reality that when acting as a market participant the government is also advancing its selfish interests.[123] The government's own interests, admittedly, are often coextensive with the public interest that it seeks to advance in endeavoring to provide products or services.[124] In this light, the line between government's role as an arbitrating-referee and a market-participant is somewhat blurred. Nonetheless, Dormant Commerce Clause jurisprudence distinguishes between conduct undertaken in the state's sovereign capacity and conduct undertaken in its capacity as a market-participant because only the sovereign is setting rules—backed by force—governing the conduct of other economic actors.[125] This is significant for constitutional purposes because the Commerce Clause speaks directly only to the power of the federal government to regulate economic conduct, and thus its negative implication can only be understood as a constraint on the power of state government to regulate economic conduct.[126]

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122 *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976) ("The common thread of all [dormant Commerce Clause] cases is that the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation. By contrast, Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur. Instead, it has entered into the market itself to bid up their price.").

123 As Francis Fukuyama explains, liberal governmental institutions, and constitutional regimes, aim to control the interests of individual political actors by guarding against despotism and cronyism; however, he explains that governmental institutions have a tendency to advance their own interests, which may be coextensive with select interest groups in a democratic system. Francis Fukuyama, THE ORIGINS OF POLITICAL ORDER, 403, 457 (Farrar, Straus and Giroux, 2011).

124 It is important to recognize that the government's institutional interests may somewhat diverge from the interests of civil society. For example, an administrative agency might be created to administer a program, or to enforce a regulatory regime. In a sense the agency is advancing the public interest, at least the interests of that portion of the electorate who stand to benefit from that program or regime. But, in reality, the agency will respond to shifting external political pressures, and inevitable internal forces. Although the agency might owe a fiduciary-like duty to serve the public interest in administering or enforcing this statute, the reality is that the agency develops its own institutional interests that will often direct the actions of the agency in practice. An enforcement officer, for example, has incentives to bring enforcement actions—not necessarily because they are in the public interest, but because the enforcement officer must demonstrate productivity, or must satisfy top-down orders. *See* Nathan A. Sales & Jonathan H. Adler, *The Rest is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. REV. 1497, 1504 (2009) (discussing the phenomena of agencies taking self-aggrandizing positions, and noting that "[a]gencies might focus on matters that advance their own institutional interests, as distinct from the interests Congress tasked them with serving."); *see also* Damien M. Schiff, Luke A. Wake, *Leveling the Playing Field in David v. Goliath: Remedies to Agency Overreach*, 17 TEX. REV. L. & POL. 97, 102 (2012) (discussing perverse incentives for agencies to take aggressive positions).

125 "The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further. The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside that particular market." *S-Cent. Timber Dev., Inc.*, 467 U.S. at 97.

126 "Our cases make clear that if a State is acting as a market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities." *Id.* at 93 (holding that Alaska was acting in a regulatory capacity in imposing conditions down-stream on timber processors).

3. Courts Should Tailor the Market-Participant Test to Antitrust Law.

It is a luxury of a market-participant exception to state-action immunity that the Dormant Commerce Clause jurisprudence has already established a principled framework for distinguishing between sovereign-state action and ordinary economic conduct. Of course, courts can customize the test to fit more precisely within the antitrust framework, such that it might develop its own nuances for antitrust law, distinct from Dormant Commerce Clause rules.[127]

Along these lines, courts might look to Professor Joseph Sax' proposed test from the takings doctrine to delineate "the distinction between the role of government as [a] participant and the government as [a] mediator in the process of competition among economic claims."[128] Sax sought to distinguish between an appropriate exercise of police powers and a self-interested abuse of power requiring compensation under the Takings Clause. Observing that government often plays two functions—one as a "mediator in the process of competition among economic claims" and the other as an "enterprise[] operat[or]"—he noted that, in its capacity as an enterprise operator, "government must acquire economic resources, which by one means or another must be obtained from the citizenry."[129] And further, "in the performance of this enterprise capacity, government is very much like those who function in the private sector of the economy, and indeed is in its resource-acquiring job a competitor with private enterprises: it is a consumer of land, machines, clothing, and the like."[130] Thus, he suggested that government effects a taking when it wields its regulatory powers in a manner that disadvantages private economic actors for the purpose of advancing a public enterprise.[131]

While the federal courts have never explicitly embraced the notion that government incurs a duty to compensate landowners when using its police powers to advance a public enterprise, some state courts have invoked Sax's theory with regard state constitutional claims.[132] For example, the Minnesota Supreme Court held that a local government had to compensate landowners when it enacted zoning restrictions to inhibit property development near a public airport—reasoning that the restrictions operated to further

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127 The Court noted in *S-Cent. Timber*, "[t]he precise contours of the market-participant doctrine have yet to be established... [considering that] the doctrine [had previously] been applied in only in three cases" in the Supreme Court. 467 U.S. at 93. So even in the Commerce Clause context, there is still room for fleshing out the contours of the test.

128 Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 62 (1964).

129 Sax, *Takings and the Police Power*, 74 Yale L.J. at 62.

130 *Id.* at 62.

131 However, it should be noted that Sax later repudiated this line of analysis in a subsequent article, on the ground that it was too generous to property owners. R.S. Radford, Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in Penn Central*, 38 Ecology L.Q. 731, 748 (2011); *see* Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 Yale L.J. 149, 150, n.5 (1971).

132 *See* Radford & Wake, 38 Ecology L.Q. 731, 746-48 (discussing application Sax' theory in the context of state takings claims).

the economic interests of the airport authority to the disadvantage of near-by private property owners.[133]

Similarly, an antitrust market-participant exception might distinguish between government acting in the role of a disinterested mediator of economic life, and government adopting regulatory measures in its capacity as a self-interested economic actor. On this view, one could invoke the antitrust market-participant exception in a case alleging that a public authority has violated antitrust law by seeking to use regulatory powers, or the power of eminent domain, to affirmatively displace competition. For example, one might invoke the exception to challenge a municipal redevelopment plan that eliminates all private parking garages near a new public arena where the displacement was initiated—at least in part—to undermine competition with a new public parking garage.[134] Thus, the market-participant exception could apply even to regulatory conduct that doubles as anticompetitive commercial conduct. Should the antitrust market-participant test develop in this manner, it could conceivably cover a wider range of governmental conduct than the Dormant Commerce Clause test does.

4. Applying the Market-Participant Exception in Practice.

Although the market-participant test might sound conceptually difficult, it is typically straightforward in practice.[135] In most instances, the question of whether the government is acting in its regulatory-capacity, or as a commercial participant is not controversial. The more difficult issue is how far does the market-participant exception reach with regard to anticompetitive regulatory conduct designed to help a public enterprise gain or maintain monopoly power in the market.[136]

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133 *McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980); *DeCook v. Rochestor Int'l Airport Joint Zoning Bd.*, 796 N.W.2d 299 (Minn. 2011) (finding airport authority effected a taking in zoning restrictions that furthered the economic interests of the airport authority).

134 A similar claim was raised in *Commonwealth v. Susquehanna Area Reg'l Airport Auth.*, 423 F.Supp. 472 (M.D. Pa. 2006), wherein a property owner challenged an airport authority's use of eminent domain on the ground that the authority sought to use "eminent domain for an improper purpose, to wit: to eliminate its only competitor for airport parking services and to gain leverage in an ongoing dispute with a local school district." The defendant succeeded in this case in convincing the Court that it should still be entitled to *Parker* immunity because the exercise of eminent domain powers is inherently governmental—as opposed to a market action. This district court decision did not contemplate the argument raised in this article that an exercise of governmental powers might still be within the scope of the market-participant exception in so far as it advances the pecuniary interests of the public actor. *See* Elhauge, *supra* note 66, *The Scope of Antitrust Process*, 104 Harv. L. Rev. at 696 (*Parker* immunity should only apply where "a financially disinterested and politically accountable actor controls and makes a substantive decision in favor of the terms of the restraint.").

135 *See e.g., Koontz v. St. Johns River Mgmt. Dist.*, 133 S. Ct. 2586 (2013) (noting that in some cases "teasing out" a doctrinal test is "more difficult in theory than in practice.").

136 The Supreme Court has stated that the market participant exception must be defined narrowly for the purposes of the dormant Commerce Clause because otherwise the exception would "swallow[] up the rule that States may not impose substantial burdens on interstate commerce..." *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. at 98. This is because the market participant doctrine serves an exception to a general rule in the dormant Commerce Clause context. By contrast, in the context of antitrust law, a market participant rule would serve as a limiting principle to the *Parker* immunity doctrine, which is itself disfavored. *Phoebe Putney*, 133 S.Ct. at 1010. Thus, to promote the goals of antitrust law—i.e. discouraging anticompetitive conduct.—there is good reason to define "market participant" more broadly than under the dormant Commerce Clause.

The straight-forward case would be one in which the alleged antitrust violation arises from simple administration of some public program—as opposed to a regulatory regime. For example, in *Union Pacific*, the Court held that Kansas City breached the Elkins Act because the City conspired to offer businesses incentives to relocate their operations to a new development owned and operated by the City.[137] Had the program been challenged under the Dormant Commerce Clause, the City may have invoked the market-participant defense because it was not regulating anything—only encouraging merchants to voluntarily move into a the City's new development.[138] Although the project served some public goals—new tax revenue for the City—a Court would most likely recognize that the City was acting as a market-participant because it was promoting its own enterprise.[139]

The more difficult applications would arise where a plaintiff challenges anticompetitive government actions that both promote a public enterprise and regulate private conduct in some way. Suppose, for example, that a regional transit agreement among municipalities required each to enact ordinances requiring taxi-cab drivers, or other pay-as-you-go transportation vendors, to set up fixed rates for their services above a set rate.[140] At that point, the municipalities would be regulating private conduct, and would therefore no longer enjoy the benefit of a market-participant exception to the Dormant Commerce Clause.[141] But the municipalities, although their actions are regulatory, are also fixing prices in markets in which they compete—local transportation. Thus, the market-participant exception should apply, even though the challenged conduct has a regulatory component.[142]

IV. CONCLUSION

The Supreme Court in *Phoebe Putney* officially left open the question whether the market-participant exception applies to the state-action exemption from antitrust

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137 313 U.S. 450, 470-471.

138 To be sure, the court recognized that the city was acting legitimately in a proprietary capacity, before going on to question whether in doing so it violated the Elkins Act. *Id.*

139 The Supreme Court noted that the plan was pursued because the City saw legitimate public benefits. *Id.* at 452-61.

140 There is currently a split in authority between the Federal Circuits on the issue of whether economic protectionism is in itself sufficient to satisfy rational basis scrutiny. Compare *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008) ("economic protectionism for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate governmental interest") with *Powers v. Harris*, 379 F.3d 1208, 1218, (10th Cir. 2004) (upholding a regulation under rational basis review because it advanced the state's interest in "protecting the intrastate funeral industry"). This raises a corollary question as to whether government can satisfy rational basis review where the regulation is designed solely to insulate a public enterprise from private competition. Moreover, there may be ground to invoke a heightened form of scrutiny where there is a substantial likelihood that the regulation was adopted to advance the pecuniary interests of the local or state government—to the determinant of its citizens. Intermediate scrutiny might be more appropriate in order to deter self-interested regulatory conduct, on the assumption that such conduct cannot enjoy the same presumption of legitimacy. Indeed, if government is allowed to enact regulation to protect its economic interests from competition, there is great potential for abuse of the sovereign powers for which it has been entrusted for the benefit of the citizens.

141 *S-Cent. Timber Dev., Inc.*, 467 U.S. at 97.

142 *See* Elhauge, *supra* note 66, *The Scope of Antitrust Process*, 104 Harv. L. Rev. at 696.

liability.[143] And two federal circuits want to wait for the Supreme Court to officially rule that it does before making that the law in their territories.[144] But the federalism foundations behind the exemption, combined with federal antitrust policy, the ability of the federal courts to actually administer the exception, and the ready-made body of doctrine gifted from the Dormant Commerce Clause strongly support the market-participant exception. Thus, courts and litigants should continue to seek to apply it until the Supreme Court is ready to bless it.

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143 133 S.Ct. at 1011 n.4.

144 *See, e.g., Paragould Cablevision*, 930 F.2d at 1312-13 (Eighth Circuit); *Automated Salvage*, 155 F.3d at 81 (Second Circuit).