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## Antitrust Regulation of Land Use: Federalism's Triumph over Competition, The Last Fifty Years

E. Thomas Sullivan  
*University of Arizona*

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# Antitrust Regulation of Land Use: Federalism's Triumph Over Competition, The Last Fifty Years

E. Thomas Sullivan\*

## INTRODUCTION

It is a distinct privilege to write an article in this Festschrift honoring my co-author, friend, and former colleague, Professor Dan Mandelker. For fifty years, Dan Mandelker has been teaching and writing in the fields of land use, urban planning, property, and environmental law. He has no peers in the sweep of his intellectual contributions over the last fifty years to these important areas of law. In all of his scholarship, he has been a champion of a more balanced, comprehensive, and coherent approach by government agencies to land regulation.

This article analyzes antitrust regulation of land use during the last fifty years, the time period Dan Mandelker played such a leading role. It is a story of how federalism as a judicial doctrine achieved ascendancy over the marketplace model of competition in the field of land use regulation.

The past century has seen several generations of developments at the intersection of federal antitrust law and land use issues. In the formative years of federal antitrust policy, the Commerce Clause generally restricted Congress' ability to regulate intrastate affairs. Accordingly, municipalities were considered beyond the reach of the Sherman Act and its progeny.<sup>1</sup> Eventually, restrictions on the

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\* E. Thomas Sullivan, Dean and William S. Pattee Professor of Law, University of Minnesota Law School. From 1984-1989, he was a Professor of Law at Washington University School of Law and also served as Associate Dean. Special appreciation is extended to Herbert Hovenkamp, who reviewed this article, and Tara Norgard for her invaluable research assistance.

1. See Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 IND. L.J. 375, 375 (1983). Commerce Clause jurisprudence continues to evolve. Recently, the Alabama Supreme Court limited the reach of Alabama's state antitrust laws to conduct that affects only intrastate commerce. Reasoning that at the time the Alabama antitrust statute was adopted there was a clear division between interstate and intrastate commerce, until federal expansion in the 1940s,

Commerce Clause diminished, giving rise to the possibility that the federal antitrust laws may in fact permeate state boundaries. The Supreme Court responded in 1943 with *Parker v. Brown*, which held state actors immune to antitrust laws, given the sovereign status of the states in a federal system.<sup>2</sup> Although the *Parker* state action doctrine clearly immunized states from antitrust liability, many questions remained about whether and when the doctrine applied to local governments.

The modern era of antitrust coverage of land use issues began in 1978. The Supreme Court in that year foreclosed the possibility that the state action doctrine directly protects local governments.<sup>3</sup> Immunity must flow from the states, the Court held. This idea was codified by Congress in the Local Government Antitrust Act of 1984.<sup>4</sup> Since then the Court has focused on refining the state action analysis with an eye toward accommodating the dual policies of federalism and free market competition.

The Court's policy of federalism has been pivotal in protecting local governments from antitrust liability. Most notably, federalism has paved the way for an expanded state action doctrine, which now serves as a formidable bulwark against antitrust review of official government conduct. That shield is not immutable, however; it fails to protect entities that act without authority from the state.

The First Amendment, through the *Noerr-Pennington* doctrine, also has proved a powerful force in shielding private actors whose conduct in the local government arena might otherwise be subject to antitrust scrutiny.<sup>5</sup> Here, too, immunity has broadened but not to the point of being absolute. With the power of the federal antitrust laws largely diluted in the local government context, plaintiffs seeking restitution from government actors for economic harms have

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the present court does not wish to reinterpret retroactively the old antitrust statute's understanding of the limits of the Commerce Clause, because the legislature that passed the statute could not have had the expanded extraterritoriality of the clause in mind at the time of enactment, as it later developed. *See Abbott Laboratories v. Durrett*, 746 So.2d 316 (Ala. 1999); *Archer Daniels Midland Co. v. Seven Up Bottling Co. of Jasper*, 746 So.2d 966 (Ala. 1999).

2. 317 U.S. 341 (1943).

3. *See infra* Part I.A.

4. *See infra* Part I.E.

5. *See infra* Part III.

employed alternative legal strategies for relief.

Today, the application of federal antitrust laws in the land use context has come almost full circle. With federalism as the guiding force, the second half of the century has brought the law closer to where it started, albeit with certain exceptions and a refined analytical framework. Although it is clear that federal antitrust laws do have a role in the land use arena, that role is discreet and more narrow than it has been in the past. The Supreme Court's jurisprudence in this area over the last twenty years has been pivotal in shaping that result. This article provides a retrospective look at the most recent generation of legal developments regarding antitrust regulation of land use. It identifies where the law is ripe for further development and how equitable review by the courts is still problematic for land use regulation.

#### I. THE MODERN ERA OF THE STATE ACTION DOCTRINE

Whether a local government entity is liable for a federal antitrust attack largely depends on whether it qualifies for immunity under the state action doctrine. When the Sherman Act was passed, the possibility of municipal antitrust liability was not even considered.<sup>6</sup> At that time, the Supreme Court's interpretation of the Commerce Clause prohibited federal law from encroaching on a state's authority to regulate local matters.<sup>7</sup> When Commerce Clause jurisprudence gave way to the possibility that the federal antitrust laws might permeate state boundaries, the Court began to develop the state action doctrine as a defense against antitrust liability. The trend that emerged in subsequent years has been an expansion of the doctrine. As a result, more entities enjoy its protection in a growing number of circumstances.

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6. See *Parker v. Brown*, 317 U.S. 341, 350-41 (1943) ("Nothing in the language of the Sherman Act or in its history suggests that its purpose was to restrain a state or its officers or agents from the activities directed by its legislature . . . [T]he Sherman Act . . . gives no hint that it was intended to restrain state action or official action directed by a state.").

7. See Hovenkamp, *supra* note 1.

### A. Historical Development

The state action doctrine, which protects state actors from antitrust review, originated in 1943 with *Parker v. Brown*.<sup>8</sup> The doctrine respects the sovereign immunity afforded to the states in a federal system where the states, not Congress, are entitled to regulate matters within their own boundaries.<sup>9</sup> Although the issue in *Parker* addressed immunity in light of conduct at the state level, its language left room for the possibility that local governments that administer state policy might be protected, as well.<sup>10</sup> Thirty years later the Court began to circumscribe the reach of state action immunity in light of the principles of federalism upon which the doctrine was founded.

Federalism centers on the authority of the sovereign states to regulate their “domestic commerce” unless Congress plainly has indicated a contrary result.<sup>11</sup> By contrast, “[c]ities are not themselves sovereign.”<sup>12</sup> Accordingly, “they do not receive all the federal deference of the States that create them,” and are only immune to the extent they act with authority from the state.<sup>13</sup> Beginning with *Goldfarb v. Virginia State Bar*, the Court began to more clearly define the standards that must be met for the state action doctrine to reach non-state actors.<sup>14</sup>

From the beginning of the modern state action doctrine era, it was clear that a local government’s immunity was conditioned on authorization from the state to displace competition. Initially it appeared that a high level of state oversight was required for

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8. 317 U.S. 341 (1943).

9. *See id.* at 351.

10. *See supra* note 6.

11. *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56-57 (1985).

12. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 412 (1978).

13. *Id.* The Court feared that “serious economic dislocation . . . could result if cities were free to place their own parochial interests above the Nation’s economic goals reflected in the antitrust laws,” and was “especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach.” *Id.* at 412-13.

14. *See City of Lafayette*, 435 U.S. at 410 (1977) (requiring a “clearly articulated and affirmatively expressed” state policy for state action immunity at the local government level); *Cantor v. Detroit Edison*, 428 U.S. 579 (1976) (implying that there must be a clear articulation of state policy to displace competition in order for immunity to attach); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (limiting the doctrine’s application to political subdivisions of the state and to private parties regulated or controlled by the state).

immunity to attach. *Goldfarb* suggested that the state must *compel* and actually *supervise* a municipalities' conduct.<sup>15</sup> That suggestion was clarified three years later in *City of Lafayette v. Louisiana Power & Light Co.*, where the Court held that immunity is limited to instances where a municipality acts according to a "clearly articulated and affirmatively expressed" state policy to displace competition.<sup>16</sup> Although *City of Lafayette* explicitly rejected the possibility that the state action doctrine applied directly to local governments, it paved the way for protection to flow through the state to a broad range of municipal activities by setting a low standard for what constitutes sufficient authorization. In the main, the state need not supervise, mandate, or even explicitly authorize a local government's anticompetitive behavior so long as the state "contemplated the kind of action complained of."<sup>17</sup>

After *City of Lafayette* the Court deviated from the widening developmental path of the state action doctrine. In *Community Communications Co. v. City of Boulder*, immunity did not attach despite the city's grant of local autonomy through a home rule charter issued by the state.<sup>18</sup> The Court held that charter did not meet the "clear articulation and affirmative expression criterion," reasoning that a grant of local autonomy, without more, does not indicate a state

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15. See *Goldfarb*, 421 U.S. at 791.

16. See *City of Lafayette*, 435 U.S. at 410. Because *City of Lafayette* involved a private party, some confusion remained as to whether a municipality was required to meet the second "active supervision" prong. The Court later clarified in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985), that municipalities do not need to meet this second prong, although active supervision is still required in the case of private parties that are subject to state legislation. See, e.g., *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). See also *infra* part I.D (discussing the state action doctrine as it applies to non-government actors).

17. *City of Lafayette*, 435 U.S. at 415 (affirming appellate court's conclusion on this point). The Eleventh Circuit has established a three-part inquiry to determine whether an entity satisfies the "clear articulation" test. The entity must show: "(1) that it is a political subdivision of the state; (2) that, through statutes, the state generally authorizes the political subdivision to perform the challenged action; and (3) that, through statutes, the state has clearly articulated a state policy authorizing anticompetitive conduct." *Federal Trade Comm'n v. Hospital Bd. of Dirs. of Lee County*, 38 F.3d 1184, 1187-88 (11th Cir. 1994).

18. *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 54-56 (1982). In the wake of *City of Boulder*, some states have attempted to legislate the concept of "acting pursuant to state policy." See, e.g., GA. CODE ANN. § 36-65-1 (1993); ILL. COMP. STAT. 50/35-1 (1993); N.D. CENT. CODE. § 40-01-22 (1983).

policy to displace competition.<sup>19</sup>

The holding in *City of Boulder* sent earthquake shocks through every city, municipality, and political subdivision in the country. Congress was deluged with a flood of complaints and special pleadings.<sup>20</sup> With its narrow reading of the state action doctrine, *City of Boulder* threatened to invalidate countless municipal ordinances and expose local governments to unforeseen litigation and financial liability. Bankruptcy frequently was mentioned as the only remedy for cities and municipalities. The implications of the decision were never fully realized, however, because the Local Government Antitrust Act of 1984 barred antitrust damages against official state actors, limiting the available remedy to injunctive relief.<sup>21</sup> Moreover, subsequent Court decisions returned to a broad interpretation of the standards that must be satisfied for immunity to attach to a local government's activities.<sup>22</sup>

In more recent years the state action doctrine has continued to afford ample latitude to the anticompetitive activities of political subdivisions and private parties that act with sufficient authorization and supervision from the state. The Court's decision in *City of Columbia v. Omni Outdoor Advertising, Inc.* was instrumental in refining the doctrine as it applies to states.<sup>23</sup> Further, *Federal Trade Commission v. Ticor Title* clarified the doctrine's application to private parties.<sup>24</sup>

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19. *City of Boulder*, 455 U.S. at 55 (refusing to find a "clear articulation and affirmative expression" where the "State's position is one of mere neutrality respecting the municipal actions challenged as anticompetitive").

20. *See infra* note 64 and accompanying text.

21. 15 U.S.C. §§ 34-36 (1994).

22. The Court has not retreated from its holding in *City of Boulder* that immunity does not flow from home rule authority, but subsequent decisions have embraced a generous state action standard when evaluating non-home rule legislation. *See, e.g.*, *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985) (finding sufficient state authorization as long as the challenged anticompetitive conduct is a "foreseeable" consequence of the enabling legislation); *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985) (endorsing a broad application of the "authorization" requirement by finding a clear state policy to restrict competition in the existence of a regulatory scheme that established a public service commission through which motor carrier rates were established).

23. 499 U.S. 365 (1991).

24. 504 U.S. 621 (1992).

### *B. Political Subdivisions*

In 1991 the Supreme Court significantly strengthened the antitrust immunity afforded to political subdivisions in land use cases with its broad interpretation of the state action doctrine in *City of Columbia v. Omni Outdoor Advertising, Inc.*<sup>25</sup> First, the Court directed that the proper focus of the state action analysis is limited to whether the state actually authorized the challenged conduct. Whether a political subdivision exceeds the limits of that authority is not germane to the antitrust analysis.<sup>26</sup> Second, by eliminating the co-conspirator exception to state action immunity,<sup>27</sup> *Omni* cleared the way for a broader range of municipal conduct to go unchecked by the federal antitrust laws.

#### 1. Immunity Flows From the States

*Omni* involved a challenge to a municipal ordinance restricting the size, location and spacing of billboards. Omni Outdoor Advertising alleged that the ordinance, which limited the construction of new billboards, gave an unfair competitive advantage to the Columbia Outdoor Advertising company, which already had billboards in place. More specifically, Omni charged that the law was the result of a conspiracy between the city officials and Columbia Outdoor Advertising executives to block competitors from the marketplace.

On the question of the state action doctrine, the Court held that the city was entitled to immunity. It was undisputed that the state legislature had granted the city statutory authority “to regulate the size, location, and spacing of billboards.”<sup>28</sup> That the ordinance may not have technically promoted “health, safety, morals or the general welfare of the community,” as the statute required, was not fatal to the doctrine’s application in this case.<sup>29</sup> The Court found that the purposes of the state action doctrine are served once the state

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25. 499 U.S. 365 (1991).

26. *See id.* at 372.

27. *See id.* at 374 (“There is no such conspiracy exception . . . [to the state action doctrine].”).

28. *Id.* at 371-72.

29. *Id.* at 371.

delegates authority to a municipality by virtue of a clearly articulated policy to displace competition. To impose the further requirement that a municipality exercise its authority in substantive and technical compliance with the law would undermine the foundation of federalism upon which the doctrine is based, the Court reasoned.<sup>30</sup> The Court went on to conclude that the city's unquestioned zoning power was sufficient for immunity to attach, because it was foreseeable that exercise of that power would displace competition.<sup>31</sup>

*Omni* portends broad immunity for local governments in the land use context. Most of the land use regulations and actions that could be challenged under the antitrust laws, such as rezonings and special use decisions, are expressly authorized by the Standard Zoning Act and state zoning legislation.<sup>32</sup> Moreover, the Court recognized that zoning is inherently anticompetitive.<sup>33</sup> In doing so the Court indicated that any "common" form of zoning that limits market entry is entitled to state action immunity. As long it is "foreseeable" that a local government will engage in anticompetitive conduct under the enabling legislation, the local government is not vulnerable to antitrust attack.

## 2. The Former Co-Conspirator Exception

The Court further strengthened the immunity available to local governments in regulating land use interests when it excised the co-conspirator exception from the state action doctrine. Prior to *Omni* several lower courts had refused to grant immunity under the state action doctrine where local government officials conspired with private parties to stifle free market competition.<sup>34</sup> Those courts found

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30. *Id.* at 372 ("We . . . believe that in order to prevent *Parker* from undermining the very interests of federalism it is designed to protect, it is necessary to adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law.").

31. *Omni*, 499 U.S. at 371 (citing *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42 (1985)).

32. *See* U.S. DEPARTMENT OF COMMERCE, STANDARD STATE ZONING ENABLING ACT (1926).

33. *See Omni*, 499 U.S. at 373 ("The very purpose of zoning regulation is 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.").

34. *See, e.g., Omni Outdoor Advertising Inc. v. Columbia Outdoor Advertising*, 891 F.2d

grounds for the exception in *Parker*, which implied that immunity would not attach if a state or municipality participated in a private agreement or combined with others to restrain trade.<sup>35</sup> The *Omni* Court rejected this analysis, holding instead that *Parker* “simply clar[ified] that [state action] immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market.”<sup>36</sup> The Court went on to reason that a conspiracy exception would effectively nullify state action immunity because good government inevitably involves agreements between public officials and their constituency.<sup>37</sup>

While *Omni* left no question about the conspiracy issue, its rationale created new ambiguity about whether a municipality forfeits immunity when it acts as a participant in the commercial market rather than a regulator of it. Since the case did not involve the question of whether the city was acting as a market participant, the Court’s interpretation of this issue is not a rule of law. Courts generally have refused to recognize the market participant exception in the antitrust context,<sup>38</sup> although some scholars think it is inevitable that it will be recognized in the future.<sup>39</sup>

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1127 (4th Cir.), *rev’d*, 499 U.S. 365 (1991); *Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 733 (8th Cir. 1982); *Whitworth v. Perkins*, 559 F.2d 378 (5th Cir.), *vacated* 435 U.S. 992 (1978).

35. *See Parker v. Brown*, 317 U.S. 341, 351-52 (1943) (“[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 . . . . The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish market monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.”).

36. *Omni*, 499 U.S. at 374-75.

37. *See id.* at 375 (reasoning that a conspiracy exception would make “all anticompetitive regulation . . . vulnerable to a ‘conspiracy’ charge”).

38. *See, e.g., Paragould Cablevision, Inc. v. City of Paragould, Ark.*, 930 F.2d 1310, 1313 (8th Cir. 1991) (holding that the exception is not a rule of law), *cert. denied*, 502 U.S. 963 (1991); *Allright Colorado, Inc. v. City & County of Denver*, 937 F.2d 1502, 1510 (10th Cir. 1991) (same), *cert. denied*, 502 U.S. 983 (1993); *Limeco, Inc. v. Division of Lime of Mississippi Dept. of Agric. & Commerce*, 778 F.2d 1086, 1087 (5th Cir. 1985) (finding no commercial exception to the *Parker* doctrine). *But see Genentech, Inc. v. Eli Lilly & Co.*, 998 F.2d 931, 949 (Fed.Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994).

39. *See Susan Beth Farmer, Balancing State Sovereignty and Competition: An Analysis of the Impact of Seminole Tribe on the Antitrust State Action Immunity Doctrine*, 42 VILL. L. REV. 111, 164 (1997).

*C. Political Subdivisions: Beyond the Paradigm*

Municipalities are the paradigm political subdivision. They are the only non-state entity that the Supreme Court has considered in the state action context. Nevertheless, other government bodies are empowered to implement state policy. Accordingly, lower courts have granted political subdivision status to a number of entities, including hospital and transit authorities, state bar organizations, electric cooperatives, and state-created insurance associations.<sup>40</sup> The focus of the inquiry in these cases is whether the entity possesses sufficient government-like attributes, such that it is unlikely to engage in any private anticompetitive conduct.<sup>41</sup> Factors that are considered include whether the entity has open records, is tax exempt, exercises governmental functions, lacks the possibility of private profit, and is composed such that it looks more like a governmental unit than a private body.<sup>42</sup> If an entity possesses sufficient non-private attributes, it need only meet the clear articulation standard of the state action doctrine to be immune from antitrust attack.

The Local Government Antitrust Act of 1984, which codifies the common law state action doctrine, provides some guidance in this area. The act does not cover states or their agencies with state-wide jurisdiction because those entities are immunized directly by the state action doctrine.<sup>43</sup> But a political subdivision of the state, which is established to conduct general or special purpose governmental functions, is included.<sup>44</sup> Examples of special purpose governmental units include “regional planning boards, environmental organizations,

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40. *Bankers Ins. Co. v. Florida Residential Property and Casualty Joint Underwriting Ass'n*, 137 F.3d 1293, 1296 (11th Cir. 1998) (listing cases).

41. *See id.* at 1296.

42. *See id.* at 1296-97 (citations omitted). *See also* *Commuter Transp. Sys., Inc. v. Hillsborough County Aviation Authority*, 801 F.2d 1286, 1290 (11th Cir. 1986) (finding it relevant to the state action inquiry that “[t]he Authority is subject to state ‘sunshine’ laws, has police power jurisdiction, power of eminent domain, zoning authority, bonding authority, rulemaking power and is exempt from taxation”).

43. *See* H.R. REP. NO. 98-965, at 19-20 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4602, 4620-21.

44. *Id.*

or airport or port authorities.”<sup>45</sup> Excluded from that category are “largely private regulatory bodies that operate with the sanction of a local government [such as] . . . a county or a city bar association, dental association, or medical association that regulates entry and enforces professional ethics.”<sup>46</sup> Because the examples provided by Congress are non-exclusive, whether an entity falls within a statutorily protected category depends on the particular facts of the case.<sup>47</sup>

If an entity is not a political subdivision, it may still be protected under the state action doctrine if it acts in concert with a municipality that enjoys immunity. Several circuit and district courts have held that once a local government is determined to be immune from antitrust liability, the same protection should be afforded to private parties acting under its direction.<sup>48</sup> Endorsing this view, the Second Circuit has held that where a private entity is engaged in cooperative conduct with a municipality and the participation of private parties was reasonably contemplated by the state legislature, the state need not supervise the conduct for immunity to attach.<sup>49</sup> “Recognizing that the state action doctrine protects state action, not state actors . . . [,]to

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45. *Id.*

46. *Id.* at 20.

47. Compare *Daniel v. American Bd. of Emergency Med.*, 988 F. Supp. 127, 194-95 (W.D.N.Y. 1997) (relying on a narrow interpretation of the act to deny protection to a group of state university-related hospitals and medical centers on grounds that the act is limited to those entities charged with providing essentially local or regional, as opposed to state-wide, public services that are funded directly or indirectly by locally generated revenues) with *Bloom v. Hennepin County*, 783 F. Supp. 418 (D. Minn. 1992) (finding that the Local Government Antitrust Act immunized county and private physicians where county gave the physicians an exclusive contract to service the county-owned hospital).

48. See, e.g., *Charley’s Taxi Radio Dispatch Corp. v. SIDA of Hawaii*, 810 F.2d 869, 878 (9th Cir. 1987) (rejecting antitrust liability for association of individual taxi owner-operators that possessed exclusive franchise to provide taxi service where state department of transportation had been granted state action immunity to grant franchise); *Cine 42nd Street Theater Corp. v. Nederlander Org.*, 790 F.2d 1032, 1048 (2d Cir. 1986) (holding private parties immune where they acted in concert with urban development corporation that was protected under the state action doctrine; the court did not conduct a separate state action analysis for private parties); *City Communications, Inc. v. City of Detroit*, 660 F. Supp. 932, 935 (E.D. Mich. 1987) (“Once it is determined that the municipality is entitled to immunity from the antitrust laws, the private parties who are regulated by the municipality are also entitled to immunity as long as the ‘effective decision maker’ is the municipality rather than the private parties.”).

49. See *Cine 42nd Street Theatre Corp.*, 790 F.2d at 1047-48.

allow suits against private parties for actions immunized as to municipalities would allow plaintiffs to circumvent the state action doctrine and challenge protected municipal decisions through artful pleading.”<sup>50</sup>

If an entity does not qualify as a political subdivision in its own right and does not act in concert with a municipality that is protected under the state action doctrine, immunity is not foreclosed. State action immunity is available to private parties whose conduct is authorized and also closely supervised by the state.

#### *D. Private Parties*

Although the state action doctrine was conceived in the context of traditional state actors, it soon became evident that immunity extends to qualified private parties who are authorized to implement a state’s clearly expressed policy to displace competition.<sup>51</sup> Because private parties are not politically accountable in the same manner as traditional political subdivisions, however, an additional requirement of “active supervision” is imposed where the challenged conduct exclusively involves private parties.<sup>52</sup> What satisfies the “active supervision” requirement was most recently addressed in *Federal Trade Commission v. Ticor Title*.<sup>53</sup>

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50. *Bloom*, 783 F. Supp. at 427 (extending state action immunity from state governmental unit to private party).

51. The Court’s decisions in *Goldfarb*, *Cantor*, and *Bates*, when read together, hold that state action immunity may apply to private parties when their action is pursuant to a clearly authorized state policy to displace competition and is supervised by state entities. “If *Parker* immunity were limited to the actions of public officials . . . a state would be unable to implement programs that restrain competition among private parties. A plaintiff could frustrate any such program merely by filing suit against the regulated private parties, rather than the state officials who implement the plan.” *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56-57 (1985).

52. The Court first articulated the two-prong standard in *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), but denied immunity in that case because the challenged conduct was not supervised by the state. Five years later the Court for the first time conferred state action immunity on private parties who met the two-pronged standard. See *Southern Motor Carriers Rate Conference*, 471 U.S. at 64. The test is designed to determine whether a private party is acting as an instrument of the state, or whether that individual or entity is hiding behind a “gauzy cloak” of state involvement to pursue anticompetitive private interests antithetical to the antitrust laws. See *Midcal*, 445 U.S. at 106.

53. 504 U.S. 621 (1992).

*Ticor Title* was handed down in the wake of *City of Columbia v. Omni Outdoor Advertising, Inc.*, a decision that reflected the Court's growing reluctance to impose federal antitrust laws in areas that are regulated by the states.<sup>54</sup> *Ticor Title* did not deviate from this trend, but it did signal that states must carefully scrutinize the conduct of private parties before immunity will extend to non-governmental bodies. Such scrutiny is warranted to ensure that private anticompetitive behavior does not go unchecked "under the auspices of state law."<sup>55</sup>

At issue in *Ticor Title* was the "negative option" system where fees for title examinations and searches were set by private companies and approved by the state.<sup>56</sup> Under this system private insurance companies would submit rate filings to state rate bureaus, which in turn had the option to reject the rates within a thirty-day period. If the state bureau did not object, the rates became effective. The Federal Trade Commission (FTC) alleged that the process amounted to private horizontal price fixing by the insurance companies. The insurance companies claimed state action immunity on grounds that the states authorized and supervised the challenged conduct by virtue of regulatory programs that were staffed, funded, and empowered by state law.<sup>57</sup>

Rejecting the state action defense in this context, the Court distinguished between a system that meets the two-pronged standard in theory and one that does so in fact. In short, the mere potential for state oversight is inadequate. For a private party to avail itself of the state action doctrine, the challenged conduct must be subject to comprehensive, independent control by the state.<sup>58</sup> Such a rigorous standard is warranted because of the "real danger" that private parties will act to further their own economic objectives, in lieu of the state's broader governmental interests.<sup>59</sup> The "active supervision" requirement serves to accommodate states' sovereign right to regulate

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54. See 499 U.S. 365 (1991). See also *supra* Part I.B (discussing *Omni*'s impact on state action analysis).

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

56. See *id.* at 629.

57. See *id.* at 636.

58. See *id.* at 633.

59. See *id.* at 634 (citing *Patrick v. Burget*, 486 U.S. 100-01 (1988)).

their own affairs while ensuring political accountability where private parties are authorized to implement a state policy to displace competition.<sup>60</sup>

### *E. Local Government Antitrust Act of 1984*

The Local Government Antitrust Act of 1984 was enacted in the wake of *City of Lafayette v. Louisiana Power & Light Co.*<sup>61</sup> and *Community Communications Co. v. City of Boulder*,<sup>62</sup> which established that local governments could be sued for anticompetitive conduct. In *City of Boulder* the Court opined that since the legislative history of the Sherman Act was silent on whether Congress intended local governments to be subject to the law's anticompetitive mandate, Congress' "long-standing . . . commitment to the policy of free markets and open competition embodied in the antitrust laws" should prevail.<sup>63</sup> The result threatened financial ruin to municipalities, which until that point had not anticipated antitrust litigation either in shaping their conduct or planning their budgets.<sup>64</sup>

Congress' response to this crisis is embodied in the Local Government Antitrust Act, which serves to simultaneously eliminate the threat of financial ruin and preserve the competitive objectives of the federal antitrust laws.<sup>65</sup> In the act Congress for the first time

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60. *Ticor Title*, 504 U.S. at 635.

61. 435 U.S. 389 (1978).

62. 455 U.S. 40 (1982).

63. *Id.* at 56.

64. See Carol F. Lee, *The Political Safeguards of Federalism? Congressional Responses to Supreme Court Decisions on State and Local Liability*, 20 URB. LAW. 309-10 (1988). Within two years of *Boulder* the threat became a reality, with two to three hundred antitrust lawsuits pending against municipalities. *Id.* (citing *The Local Government Antitrust Act of 1983, Hearings Before the Senate Comm. on the Judiciary on S. 578*, 98th Cong. 61 (1984) (statement of Mayor Althaus of York, Pennsylvania, on behalf of U.S. Conference of Mayors)). In one suit a jury in federal district court in Illinois awarded a private developer \$28.5 million in treble damages against Lake County, the Village of Grayslake, and three local officials for alleged anticompetitive conduct in a dispute over sewer connections. *Id.* The damages amounted to sixty times the total property tax collected in the previous year by the Village of Grayslake and one and a half times the amount collected by Lake County. *Id.* (citing 130 CONG. REC. H5037 (daily ed. May 31, 1984) (remarks of Rep. Fish)).

65. The Senate Report concluded that legislation was necessary to "allow local governments to go about their daily functions without the paralyzing fear of antitrust lawsuits." S. REP. NO. 98-593, at 3 (1984). Both the House and the Senate, however, were careful to note that the immunity provided in the act was immunity from suits for damages and not immunity

confirmed that local governments do come within the jurisdiction of the federal antitrust laws, both civil and criminal, and that the Federal Trade Commission has authority to sue.<sup>66</sup> The act also codifies the judicially created state action doctrine, immunizing from monetary damage suits “any official action directed by a local government, or official or employee thereof acting in an official capacity.”<sup>67</sup> Under the act remedies are limited to injunctive relief.<sup>68</sup>

Throughout the act, Congress facilitated a compromise between the competing policies behind federalism and the federal antitrust laws. By providing federal antitrust jurisdiction for injunctive relief over local government activities, Congress came down on the side of free and open market competition. At the same time, federalism was served by respecting the decision-making functions of state and local governments. In practice, however, it appears that the goals of federalism have prevailed. The formidable defenses available to government defendants, coupled with the burden of stating a claim for equitable relief, has proven almost insurmountable for antitrust plaintiffs in the local government arena.<sup>69</sup>

Congress intended that the plaintiff’s burden in bringing an injunctive suit “readjust the litigation advantages and disadvantages more equitably for local government defendants” and deter frivolous actions.<sup>70</sup> Accordingly, injunction actions under the antitrust laws are to be treated in the federal courts in the same way as other equitable actions within the district court’s jurisdiction.<sup>71</sup> Under the Federal Rules of Civil Procedure, the plaintiff must show (1) immediate or irreparable harm and (2) probable success on the merits.<sup>72</sup> In a suit for

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from suits seeking injunctive relief. *Id.* at 5-6; H.R. REP. NO. 98-965, at 2, *reprinted in* 1984 U.S.C.C.A.N. 4602, 4603.

66. 15 U.S.C. § 34.

67. 15 U.S.C. § 36(a). Importantly, state action immunity trumps the protection afforded by the act. If there is overlap, the state action doctrine precludes both damage and injunctive suits.

68. *See id.* For a discussion of whether the strict statutory requirements of section 4 of the Clayton Act and its case law apply to private parties seeking injunctive relief under section 16, see DANIEL R. MANDELKER ET AL., FEDERAL LAND USE LAW § 13.04[4] (1998).

69. *See infra* Part V.

70. *See* H.R. REP. NO. 98-965, at 18-19 (1984).

71. *See* S. REP. NO. 98-593, at 6 (1984).

72. *See* FED. R. CIV. P. 65. *See also* H.R. REP. NO. 98-965, at 18-19 (1984) (stating that injunction actions under the antitrust laws are to be treated in the federal courts in the same way

equitable relief, the focus of remedy changes from compensating for past damages to preventing future injury. The prospective nature of behavioral remedies places a substantial burden on the plaintiff at the outset of the action since, “[l]ogically, ‘a prospective remedy will provide no relief for an injury that is, and likely will remain, entirely in the past.’”<sup>73</sup>

By changing the remedial nature of the antitrust laws in the local government context, the act has given rise to new trends in antitrust litigation strategies. First, certain defenses available to local governments have taken on heightened importance, while the efficacy of other defenses has been brought into question.<sup>74</sup> Second, although plaintiffs are foreclosed from monetary relief under the antitrust laws, they are not precluded from bringing alternative claims that might afford financial restitution for economic harm suffered.<sup>75</sup> As a result, plaintiffs who seek economic restitution for anticompetitive harms must employ alternative legal theories to achieve that end.<sup>76</sup>

## II. BEYOND STATE ACTION IMMUNITY: OTHER DEFENSES AGAINST MUNICIPAL ANTITRUST LIABILITY

Although state action immunity is the primary defense with which a political subdivision or qualified private party is likely to shield its anticompetitive conduct, those parties also may avail themselves of other defenses against antitrust claims.

### *A. Eleventh Amendment Immunity*

The Eleventh Amendment presumes states are immune from suit brought by private parties unless the state consents or Congress “unequivocally expresse[d] its intent to abrogate the immunity” and

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as other equitable actions within the district court’s jurisdiction).

73. *Church v. City of Huntsville*, 30 F.3d 1332, 1337 (11th Cir. 1994) (quoting *American Postal Workers Union v. Frank*, 968 F.2d 1373, 1376 (1st Cir. 1992)).

74. *See infra* Part IV (discussing defenses).

75. H.R. REP. NO. 98965, at 19 (1984).

76. *See infra* Part IV (discussing RICO as an alternative theory).

has acted “pursuant to a valid exercise of power.”<sup>77</sup> In addition to protecting states, Eleventh Amendment immunity also extends to entities created by state governments that operate as instrumentalities of the state.<sup>78</sup> Notably, this immunity does not extend to protect the activities of municipalities.<sup>79</sup> Nevertheless, “[b]etween arms of the state and local municipalities . . . lies a wide range of unconventional government-chartered entities that possess attributes of both political subdivisions and state agencies.”<sup>80</sup> This creates fertile ground for the Eleventh Amendment to emerge as a shield against antitrust immunity where state action immunity is not available.

The formidable strength of Eleventh Amendment immunity is a relatively recent phenomenon that began with the Supreme Court’s decision in *Seminole Tribe of Florida v. Florida*.<sup>81</sup> *Seminole Tribe* held that the Commerce Clause does not serve as a source for Congress to validly abrogate states’ sovereign immunity under the Eleventh Amendment. Accordingly, Congress’ ability to trump Eleventh Amendment immunity is severely limited to where it acts under section five of the Fourteenth Amendment to ensure states’ compliance with the Federal Constitution.<sup>82</sup>

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77. See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). The Eleventh Amendment provides that “[t]he 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.” U.S. CONST. amend. XI.

78. See *State Highway Comm’n v. Utah Constr. Co.*, 278 U.S. 194, 199 (1929) (noting that the Eleventh Amendment immunizes state agency that was “but the arm or alter ego of the State”). The rationale extending Eleventh Amendment immunity is that when a state entity is sued, the state is the “real, substantial party in interest.” *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945). Accordingly, a plaintiff who successfully sued an arm of the state would have a judgment with “the same effect as if it were rendered against the State for the amount specified in the complaint.” *Smith v. Reeves*, 178 U.S. 436, 439 (1900).

79. See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999) (holding that constitutional sovereign immunity does not protect municipalities and other local entities that are not arms of the state); *Lincoln County v. Luning*, 133 U.S. 529 (1890) (holding that the Eleventh Amendment does not protect counties from suit in federal court).

80. See Alex E. Rogers, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 COLUM. L. REV. 1243 (1992).

81. 517 U.S. 44 (1997).

82. See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (stating that the proper inquiry is whether Congress was acting to remedy or prevent Fourteenth Amendment (constitutional) violations).

During the 1998-99 term, the Court continued to expand the immunity afforded to states under the Eleventh Amendment. In what has been dubbed the “federalism trilogy” the Court held that states are immune from suits by private individuals in state court except in rare situations where the state has expressly waived its immunity.<sup>83</sup> In federal court citizens are precluded from suing states unless Congress has enacted a valid law to enforce the provisions of the 14th Amendment.<sup>84</sup> The Court will decide at least three more Eleventh Amendment cases in its current term, which are likely to provide further guidance on whether and when federal antitrust laws permeate state boundaries to reach subdivisions of the state.<sup>85</sup>

### B. Rule of Reason

The rule of reason is an analytical approach to antitrust problems, not a defense to an antitrust claim. Nevertheless, it provides defendants with the opportunity to justify their anticompetitive

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83. See *Alden v. Maine*, 527 U.S. 706 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999).

84. See *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 627 (invalidating 35 U.S.C. § 271(h), which provided that “[a]ny State, and any such instrumentality, officer, or employee, shall be subject [in federal court] to the provisions of [the Patent Act] in the same manner and to the same extent as any nongovernmental entity”); *College Savings Bank*, 527 U.S. 666 (1999) (invalidating a similar provision in the Trademark Act).

85. See *United States v. Vermont Agency of Natural Resources*, 162 F.3d 195 (2d Cir. 1998), *cert. granted*, 119 S. Ct. 2391 (1999) (presenting the issue of whether a private citizen is precluded by the Eleventh Amendment from bringing a federal qui tam suit in federal court against a state agency under the federal False Claims Act); *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1753 (1999) (posing the issue of whether Congress exceeded its authority in enacting the Drivers Privacy Protection Act, which regulates the dissemination and use of information contained in state motor vehicle records); *Kimel v. Florida Board of Regents*, 139 F.3d 1426 (11th Cir. 1998), *cert. granted*, 119 S. Ct. 901 (1999) (asking the Court to decide whether Congress properly exercised its Fourteenth Amendment, section 5 power when it made the Age Discrimination in Employment Act applicable to the states). Although none of these cases addresses the federal antitrust laws applicability to the states, at least two lower courts have questioned the distinction between state action immunity and the immunity afforded by the Eleventh Amendment. See *Neo Gen. Screening Inc. v. New England Newborn Screening Program*, 187 F.3d 24 (1st Cir. 1999) (holding that the Eleventh Amendment protected the University of Massachusetts and its affiliated programs from antitrust suits); *Walker v. Michigan Pub. Serv. Comm’n*, 24 F. Supp. 2d 803, 806 (W.D. Mich. 1998) (holding that as an “integral state agency,” the Michigan Public Service Commission, charged with operating a monopoly, is immune from suit under the Eleventh Amendment).

conduct in light of the particular facts and circumstances of the challenged conduct. The Court has indicated that a special rule of reason analysis might apply to municipalities. *Community Communications Co. v. City of Boulder* suggested that “certain activities, which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government.”<sup>86</sup> The Court noted that forcing a municipality to rigidly comply with the pro-competitive policies of the Sherman Act would all but destroy innovative social programs at the local level.<sup>87</sup> *City of Boulder* did not decide whether a special rule of reason should apply in the local government context, but its reasoning is supported by a long history of antitrust jurisprudence. Prior to the 1970s the Supreme Court’s definition of competition focused on distributive questions, including fairness and equality, not whether there was efficient distribution of resources.<sup>88</sup>

The analytical framework according to which the court proceeds is particularly relevant to zoning, since zoning regulations are inherently anticompetitive.<sup>89</sup> If state action immunity fails and the antitrust analysis is narrowly confined to determining the economic consequence of the land use regulation,<sup>90</sup> then most zoning ordinances may be struck down under the antitrust laws. If, however, the antitrust analysis allows a broad examination of the public policies served by the ordinance, then zoning ordinances that produce a net community benefit will likely survive the antitrust challenge.<sup>91</sup>

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86. 455 U.S. 40, 55-56 n.20 (1982) (citing *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 398, 417 n.48 (1978)).

87. *See id.* at 67.

88. *See* MANDELKER, *supra* note 68, § 10.2.

89. *See City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 373 (1991) (“The very purpose of zoning regulation is 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.”).

90. *See generally National Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 696 (1978) (limiting rule of reason analysis to economic considerations).

91. *See* MANDELKER, *supra* note 68, § 10.2.

*C. Equal Fault Doctrines: In Pari Delicto and Unclean Hands*

By substituting injunctive relief for treble damages, the Local Government Antitrust Act renewed the possibility of other defenses that were previously considered to be foreclosed in the antitrust context. *In pari delicto*, or “of equal fault,” is a common law defense that bars a plaintiff from recovering damages where she has participated in the challenged practice.<sup>92</sup> In *Perma Life Mufflers, Inc. v. International Parts Corp.*, the Court held that *in pari delicto* was not a viable defense to an action for treble damages under the antitrust laws.<sup>93</sup> Five justices, writing separately, agreed that although the concept of equal fault is narrowly applied under federal regulatory statutes, the defense should be recognized in antitrust litigation where a plaintiff truly bears at least substantially equal responsibility for the violation.<sup>94</sup>

Because there was no clear majority holding in *Perma Life*, whether the *in pari delicto* defense is appropriate in an antitrust action for equitable relief is an open question. The issue illustrates the tension between the federalism underpinnings of the state action doctrine and Local Government Antitrust Act, on one hand, and the federal antitrust policy of deterrence on the other. Allowing the defense would strengthen government actors’ immunity to the antitrust laws and dilute the federal policy of deterring anticompetitive conduct. Disallowing the defense would promote deterrence and promote equitable suits where allowed under the Local Government Antitrust Act.

Unclean hands, or the “innocent party” requirement, is the

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92. See Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 306-07 (1985) (explaining history of the doctrine and its present-day application); Milton Handler & Ira S. Saks, *The Continued Vitality of In Pari Delicto as an Antitrust Defense*, 70 GEO. L.J. 1123, 1130 (1982) (same).

93. According to the Court, “[t]here is nothing in the language of the antitrust acts which indicates that Congress wanted to make the common-law *in pari delicto* doctrine a defense to treble-damage actions.” *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138 (1968).

94. See *id.* at 145 (White, J., concurring); *id.* at 147-48 (Fortas, J., concurring in result); *id.* at 148-149 (Marshall, J., concurring in result); *id.* at 154-55 (Harlan, J., joined by Stewart, J., concurring in part and dissenting in part).

equitable counterpart to the doctrine of *in pari delicto*.<sup>95</sup> Unclean hands is distinct, however, because it is only a defense in equity.<sup>96</sup> Moreover, it can be raised where the plaintiff's misconduct is only generally related to the suit, as opposed to *in pari delicto*, which only applies where the defendant has equal involvement in the precise illegality that is the subject of the plaintiff's suit.<sup>97</sup> In *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, the Court held that the plaintiff's unclean hands did not relieve the defendant of liability for price-fixing in violation of the antitrust laws.<sup>98</sup> But *Kiefer-Stewart*, like *Perma-Life*, was a treble damage action and thus did not resolve whether the defense remains viable in a claim for equitable relief. The viability of the unclean hands defense also brings competing policies of federalism and antitrust to bear.

#### *D. First Amendment: Overbroad Remedial Orders*

The regulation of conduct, which is the focus of injunctive suits, triggers a heightened awareness of the intersection between injunctive orders and the First Amendment. At bottom, the Supreme Court's opinions in the commercial speech arena teach that antitrust orders may regulate economic conduct that facilitates an antitrust violation, but such orders may not run afoul of protections afforded to such speech by the First Amendment.<sup>99</sup> Accordingly, antitrust counsel must consider new developments in commercial speech law to determine (1) whether and under what circumstances a remedial order can restrict economic conduct which arguably comes within the commercial speech doctrine, (2) whether any principles delimit the "illegal conduct" exception to the commercial speech defense, and

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95. See Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53, 82 (1993).

96. See Handler & Saks, *supra* note 92 (explaining the distinctions between the two defenses).

97. See *id.*

98. See 340 U.S. 211, 214 (1951) ("If [plaintiff] and others were guilty of infractions of the antitrust laws, they could be held responsible in appropriate proceedings brought against them by the Government or by injured private persons. The alleged illegal conduct of [plaintiff], however, could not legalize the unlawful combination by respondents nor immunize them against liability to those they injured.").

99. See generally E. THOMAS SULLIVAN & H. HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE ch. 3 (4th ed. 1999).

(3) whether traditional standards of overbreadth analysis and vagueness are applicable.<sup>100</sup>

Whether a judicial or regulatory order is constitutionally overbroad is decided by the standard set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.<sup>101</sup> The *Central Hudson* test states that the government may regulate commercial speech that is acceptable and unrelated to legal conduct<sup>102</sup> if it concerns a substantial government interest, if the regulation advances directly the stated governmental interest, and if the restriction is no broader than necessary to serve the governmental interest.<sup>103</sup> The requirement that the restriction be no broader than necessary has been the focus of the Supreme Court's recent jurisprudence in this area.

The Court first elaborated on the "no broader than necessary" requirement in *Board of Trustees of State University of New York v. Fox*.<sup>104</sup> Rejecting that the government regulation be the least restrictive means to the desired objective, the Court instead embraced the requirement that there be a reasonable "fit" between the stated goal and the regulation designed to achieve it.<sup>105</sup> More recently, the viability of the *Central Hudson* test was brought into question with *44 Liquormart v. Rhode Island*, which suggested the Court would consider a new, and stricter, rule protecting commercial speech.<sup>106</sup> In its most recent term, the Court in *New Orleans Broadcasting Association v. United States*, acknowledged criticism of the *Central Hudson* test, but went on to reaffirm its primacy.<sup>107</sup> For now it appears that the *Central Hudson* test remains the standard by which remedial orders affecting commercial speech will be judged.

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100. *See id.* at 162.

101. 447 U.S. 557 (1980).

102. Speech that is inaccurate or related to illegal conduct is entitled to little constitutional protection. *See* E. Thomas Sullivan, *First Amendment Defenses in Antitrust Litigation*, 46 MO. L. REV. 517, 538-39 (1981).

103. *See id.*

104. 492 U.S. 469, 480 (1989).

105. *See id.*

106. 517 U.S. 484 (1996).

107. *See* 119 S. Ct. 1923 (1999) (Justice Thomas declined to reaffirm the test.).

### III. NOERR-PENNINGTON DOCTRINE

Private parties have an important role in the development and enactment of municipal regulations. As a result, private parties may be implicated when such regulations yield anticompetitive results that, for example, exclude competitors. The judicially created *Noerr-Pennington* doctrine is premised on the constitutional theory that the activities of those who petition their local government for changes in laws and regulations constitute protected free speech.<sup>108</sup> Like the state action doctrine, *Noerr-Pennington* recognizes that the antitrust laws, “tailored as they are for the business world, are not at all appropriate for application in the political arena.”<sup>109</sup> Accordingly, the doctrine immunizes private petitioners from antitrust liability, even where their political actions are motivated by anticompetitive intent.<sup>110</sup>

Until recently the extent of that protection was limited by a number of exceptions. The Supreme Court’s opinion in *City of Columbia v. Omni Outdoor Advertising, Inc.* eliminated a major exception and brought the efficacy of others into question.<sup>111</sup> With the exception of sham proceedings, it now appears that individuals have a virtually unfettered right to petition their local governments for a particular political outcome, even when their objective is anticompetitive, without coming within the scope of the federal antitrust laws.

#### A. *The Former Co-Conspirator Exception*

Prior to 1991 *Noerr-Pennington* immunity was jeopardized when private parties conspired with government officials to thwart

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108. The genesis of *Noerr-Pennington* immunity is found in *Eastern Railroad President’s Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (finding that antitrust laws are directed only to private trade restraints not conduct undertaken as a result of valid government action) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (“Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition.”).

109. *Noerr*, 365 U.S. at 141.

110. See *Pennington*, 381 U.S. at 670 (“*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.”).

111. 499 U.S. 365 (1991).

competition in the open market.<sup>112</sup> Courts that recognized the exception reasoned that conspiratorial activity between a local government and members of its constituency should not enjoy constitutional protection.<sup>113</sup> The primacy of the First Amendment right to petition, coupled with the policy of federalism that protects states' right to govern, ultimately led to the demise of the co-conspirator exception to *Noerr-Pennington*.

In *Omni* the Court rejected the conspiracy exception to *Noerr-Pennington* on the same grounds that it rejected the exception to the state action doctrine. Reasoning that the two doctrines "are complementary expressions of the principle that the antitrust laws regulate business, not politics," the Court found it would be incongruous to bar the conspiracy exception from one but not the other.<sup>114</sup> Essentially, a conspiracy exception would bar First Amendment protections whenever a private party was successful in petitioning a local government to a particular end.<sup>115</sup> Even if unlawfulness is a factor in such an exchange, the Court concluded that other laws are better suited to regulate such conduct.<sup>116</sup>

### *B. Illegal or Fraudulent Acts Exception*

*Omni* also indirectly questions the continuing viability of the illegal or fraudulent acts exception to *Noerr-Pennington* immunity. That exception, which has been embraced by the Eighth Circuit, holds that where conduct exceeds the scope of "traditional political activity," *Noerr-Pennington* protection is not available.<sup>117</sup> Other courts are less inclined to embrace the exception and hold that immunity applies to "any petitioning activity designed to influence

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112. See, e.g., *Whitworth v. Perkins*, 559 F.2d 378 (5th Cir. 1977), *vacated*, 435 U.S. 992 (1978), *aff'd on rehearing*, 576 F.2d 696 (1978), *cert. denied*, 440 U.S. 911 (1979).

113. See *id.*

114. See *Omni*, 499 U.S. at 383.

115. See *supra* Part I.B.2 (explaining *Omni*'s rejection of the conspirator exception to the state action doctrine).

116. See *Omni*, 499 U.S. at 378-79 (suggesting the Hobbs Act as one example of a law better suited to deal with illegal petitioning activity).

117. See *Westborough Mall v. City of Cape Girardeau*, 693 F.2d 733 (8th Cir. 1982), *cert. denied sub nom.*, *Drury v. Westborough Mall, Inc.*, 461 U.S. 945 (1983).

legislative bodies or governmental agencies.”<sup>118</sup> The issue may now be moot if the same logic used by the *Omni* Court to reject the conspiracy exception applies with equal force here. Conceding that unlawful acts may violate the principles of good government, the Court was unwilling to apply the antitrust laws to condemn such behavior.<sup>119</sup> Nevertheless, when the Court was presented with an opportunity to directly eliminate the illegal acts exception two years later, it declined to do so in favor of analyzing the alleged anticompetitive behavior as a “sham.”<sup>120</sup>

### C. Sham Exception

Activity that constitutes “a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor” is not protected under the *Noerr-Pennington* doctrine.<sup>121</sup> The sham exception has been accepted widely in land use cases. It is likely to be found where private defendants abuse the petitioning process to create access barriers for other competitors before public agencies or courts.<sup>122</sup> In its broadest application the sham exception can preclude immunity any time a party is successful at blocking “fair and impartial consideration” of a competitor’s request for action by a city.<sup>123</sup> This might include (1) secretly funding a massive publicity campaign to arouse citizens’ opposition to a shopping center development, (2) soliciting and

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118. See *North Carolina Elec. Membership Corp. v. Carolina Power & Light Co.*, 666 F.2d 50, 52 (4th Cir. 1981). See also *Lockary v. Kayfetz*, 587 F. Supp. 631 (N.D. Cal. 1984) (upholding immunity where petitioning activity was designed to influence government zoning decision-making).

119. See *Omni*, 499 U.S. at 78-79.

120. See *Professional Real Estate Investors, Inc., v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 61 n.6 (1993) (“We need not decide here whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant’s fraud or other misrepresentations.”).

121. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961).

122. See, e.g., *Miracle Mile Assoc. v. City of Rochester*, 617 F.2d 18 (2d Cir. 1980) (“[A]ccess-barring is the cornerstone to the sham exception.”). See also *Kottle v. Northwest Kidney Ctrs.*, 146 F.3d 1056 (9th Cir. 1998) (finding a higher tolerance for sham activity in the legislative than judicial arena).

123. See *Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555, 1567-68 (5th Cir. 1984), *cert. denied sub nom.*, *Gulf Coast Cable Television Co. v. Affiliated Capital Corp.*, 474 U.S. 1053 (1986).

subsidizing opposition before public agencies, (3) filing appeals without standing, and (4) requesting delays for the purpose of protracting the proceedings.<sup>124</sup>

Although it remains a viable exception to *Noerr-Pennington* immunity, the sham exception did not escape *Omni*'s narrowing analytical sweep. In addressing the extent to which the sham activity exception pierced *Noerr-Pennington* immunity, the Court limited the exception to those activities that are designed solely to thwart the political *process* with no genuine expectation of success.<sup>125</sup> Activities designed to effectuate a particular *outcome* remain protected under *Noerr-Pennington*.<sup>126</sup> In making this distinction, the Court implied that whether *Noerr-Pennington* immunity applies depends on the defendant's ultimate intent in undertaking the allegedly anticompetitive activity. However, the Court failed to direct whether objective or subjective motivation was the standard.

Two years later in *Professional Real Estate Investor's, Inc. (PRE) v. Columbia Pictures Industries, Inc.* the Court picked up where it left off in *Omni* and addressed the issue of "intent" for purposes of the sham exception.<sup>127</sup> *PRE* eschewed a subjective construction of sham conduct and instead devised an objective reasonableness test for assessing sham activity. "If an objective participant could conclude that [a government petition] is reasonably calculated to elicit a favorable outcome," *Noerr-Pennington* immunity is available.<sup>128</sup> But if the activity is baseless and merely constitutes "an attempt to interfere directly with the business relationships of a competitor . . . through the use [of] the governmental process – as opposed to the outcome of that process," then immunity fails.<sup>129</sup>

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124. See *Landmarks Holding Corp. v. Bermant*, 664 F.2d 91 (2d Cir. 1981).

125. See *Omni*, 499 U.S. at 380. Purely process-oriented behavior includes when the petitioning party acts merely to inconvenience its competitor. An example is when a party engages in litigation not to win the suit, but merely to force its competitor to waste resources in defending itself. See *Video Intern. Prod., Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075, 1082 (5th Cir. 1988) (explaining this hypothetical).

126. See *Omni*, 499 U.S. at 380.

127. 508 U.S. 49 (1993).

128. *Id.* at 60.

129. *Id.*

#### D. Commercial Dealing Exception

While political activity enjoys wide latitude under the *Noerr-Pennington* doctrine, those who transact with a municipality that acts “as a commercial participant in a given market” may not be protected.<sup>130</sup> Here, *Omni* suggested—but did not confirm—a market participant exception to the state action doctrine.<sup>131</sup> If this reasoning extends to private parties who deal with the municipality in its market capacity, the *Noerr-Pennington* doctrine may fail to provide protection.

The viability of the commercial dealing exception remains unclear for a number of reasons. First, *Noerr-Pennington* and state action are distinct doctrines that do not necessarily warrant parallel reasoning. Second, a circuit split on the issue remains unresolved. The First Circuit originally endorsed the exception thirty years ago, reasoning that when a municipality acts as a commercial proprietor it is acting outside of the political sphere and therefore, the parties with whom it transacts are not eligible for *Noerr-Pennington* protection.<sup>132</sup> Other circuits reject the exception, reasoning that municipalities acting in the commercial marketplace are merely implementing government policy, and therefore the rationale for *Noerr-Pennington* immunity applies.<sup>133</sup> Finally, the Supreme Court’s free speech jurisprudence has broadened the protection of commercial speech, which also may weaken the reasoning underlying the commercial exception.<sup>134</sup>

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130. *Omni*, 499 U.S. at 374-75.

131. The Court in *Omni* twice mentioned the possibility of a market participant exception to state action immunity: “[T]his immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market . . . . We reiterate that, with the possible market participant exception, any action that qualifies as state action is ‘ipso facto’ . . . ‘exempt from the operation of the antitrust laws.’” *Omni*, 499 U.S. at 374-75.

132. *See* *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir. 1970), *cert. denied*, 400 U.S. 850 (1970).

133. *See, e.g., In re Airport Car Rental Antitrust Litigation*, 693 F.2d 84 (9th Cir. 1982), *cert. denied sub. nom., Budget Rent-A-Car, Inc., v. Hertz Corp.* 462 U.S. 1133 (1983) (concluding that “[t]here is no commercial exception to *Noerr-Pennington*,” but acknowledging that the nature of government activity is one factor in determining the type of public input acceptable to the particular decision-making process at issue).

134. *See supra* Part II.C (discussing First Amendment protections of commercial speech).

### *E. Private Standard Setting*

Private standard setting arises where industry standards are set by a trade association or similar group comprised of non-governmental actors. Because state and local governments routinely adopt these standards with little or no change, the question arises whether *Noerr-Pennington* serves to protect the private group's activities or third parties who petition the group for a particular outcome in the standard setting process. In response to this issue, the Court in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, distinguished "anticompetitive political activity that is immunized despite its commercial impact from anticompetitive commercial activity that is unprotected despite its political impact."<sup>135</sup>

The Court in *Allied Tube* was concerned that there was no official authority conferred on the trade association at issue and no political safeguards to prevent private interests from manipulating the process to anticompetitive ends.<sup>136</sup> Concluding that the trade association was not a "quasi-legislative" body with the political safeguards of a government body, the Court found that *Noerr-Pennington* did not protect those private parties who acted to influence the association's standard setting process.<sup>137</sup> In arriving at this conclusion, the Court cautioned that immunity "depends on the context and nature of the activity."<sup>138</sup> Ultimately, for *Noerr-Pennington* to apply in the private standard setting context, the government must delegate official duties to the group and those exercising decision making authority must not have economic motivations or bias in the outcome of the process.<sup>139</sup>

Even where the government has not sanctioned the standard setting group, *Noerr-Pennington* immunity may still be available if the government adopts the group's recommendations. Here,

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135. 486 U.S. 492, 507-08 n.10 (1988). The case arose when members of the steel industry packed an annual meeting of the National Fire Protection Association with new members solely to vote against a new type of electrical conduit that posed an economic threat to steel conduit. *See id.* at 495-97.

136. *See Allied Tube*, 486 U.S. at 509.

137. *See id.* at 501. The Court, in holding that petitioners were not immune under *Noerr-Pennington*, stated that "this is itself a case close to the line" between anticompetitive political activity and anticompetitive commercial activity. *See id.*

138. *Id.* at 508 n.10.

139. *See* MANDELKER, *supra* note 68, at § 13.06[1][e].

resourceful defendants may argue successfully that the plaintiff's damages or injuries arise from or were caused by direct governmental action, not the private standard-setting process.<sup>140</sup> Once the claim challenges governmental conduct, the state action doctrine protects the government unit and the *Noerr-Pennington* doctrine shields the private standard setting group that acted to influence the government's decisions.

### *F. Means/Objective Test*

Traditionally, *Noerr-Pennington* serves to protect defendants who use political means, such as lobbying, to achieve political ends. Until the Supreme Court's decision in *Federal Trade Commission v. Superior Trial Lawyers Association*,<sup>141</sup> it was unclear whether immunity was available where defendants use economic means, such as an economic boycott, to influence the political process.<sup>142</sup> At issue in *Superior Trial Lawyers* was whether a group of public defenders violated the antitrust laws when they organized and participated in a boycott aimed at achieving increased compensation from the municipal government of Washington, D.C.

The Court rejected a First Amendment exception to the rule that economic boycotts are per se illegal.<sup>143</sup> Although it acknowledged that "[e]very concerted refusal to do business . . . has an expressive

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140. See *Massachusetts School of Law v. American Bar Ass'n*, 107 F.3d 1026 (3d Cir. 1997). The Massachusetts School of Law (MSL) claimed that the American Bar Association (ABA) and related organizations violated the Sherman Act by combining and conspiring to organize and enforce a group boycott and by conspiring to monopolize legal education, law school accreditation, and the licensing of lawyers. *See id.* To the extent that MSL's alleged antitrust injury arose from the inability of its graduates to take state bar examinations, the court found such injury to be the result of state action not private conduct by the ABA. *See id.* at 1036. The court noted that in the state bar admission requirements the states do adopt and give effect to the ABA's accreditation process results. *See id.* Nevertheless, the court held that the states are sovereign in imposing such requirements and accordingly are protected by the state action doctrine. *See id.* *See also* *Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc.*, 17 F.3d 295 (9th Cir. 1994) (finding that although defendant convinced trade association to enact restrictive trade standards, the plaintiff's ultimate injury flowed from the government's enforcement of the standards, where application of *Noerr-Pennington* is proper).

141. 493 U.S. 411 (1990).

142. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Missouri v. National Org. for Women, Inc.*, 620 F.2d 1301 (8th Cir. 1980).

143. *See* 493 U.S. at 428-32.

component,” the Court concluded that to allow a First Amendment exception for restraints of trade “would create a gaping hole in the fabric of [the antitrust laws].”<sup>144</sup> According to the Court, the public defenders’ economic boycott did not warrant First Amendment protection because their boycott was the means by which they petitioned the government, rather than the end goal of their petitioning activities.<sup>145</sup> By contrast, in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, the petitioning activities were protected because they were designed to influence the legislature to impose competitive restraints.<sup>146</sup> The Court went on to distinguish the public defenders’ conduct from the boycotters in *NAACP v. Claiborne Hardware Co.*, where the boycotters “sought no special advantage for themselves.”<sup>147</sup> The objective of the public defenders’ boycott, by contrast, was an economic advantage driven by economic means.<sup>148</sup>

#### IV. RICO

In enacting the Local Government Antitrust Act of 1984, Congress encouraged plaintiffs to seek economic redress under alternate legal theories.<sup>149</sup> The Racketeering Influenced and Corruption Organizations Act (RICO)<sup>150</sup> offers plaintiffs the opportunity to bypass the challenges posed by the strengthened state action and *Noerr-Pennington* doctrines and recover monetary relief for anticompetitive harms. Although the statute was originally conceived to fight organized crime, it has proven useful in combating anticompetitive activities in other arenas, as well.

RICO prohibits any “person” from conducting the affairs of any “enterprise” through a “pattern of racketeering activity.”<sup>151</sup> Racketeering activity, otherwise known as predicate acts, range from

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144. *Id.* at 431.

145. *Id.* at 424-25.

146. 493 U.S. at 424-45.

147. *See id.* at 426.

148. *See id.* *See also* E.T. SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 69 (3d ed. 1998).

149. *See* H.R. REP. NO. 965, 98th Cong. 19 (1984).

150. 18 U.S.C. §§ 1961-1968 (1994).

151. *Id.* §§ 1961, 1962.

traditional racketeering offenses<sup>152</sup> to bribery,<sup>153</sup> mail and wire fraud,<sup>154</sup> and extortion.<sup>155</sup> Two or more related predicate acts that occur within ten years of each other are required to establish the requisite “pattern.”<sup>156</sup> Where a plaintiff establishes that it was harmed by the defendant’s conduct in this manner, civil remedies may include treble damages and attorneys fees.<sup>157</sup>

RICO presents major advantages to antitrust plaintiffs that pursue economic relief. Significant issues of standing, proof, and local government immunity that are problematic for plaintiffs under the federal antitrust laws are eliminated under RICO. Municipalities are not left defenseless against a RICO claim, however, and formidable challenges have arisen that may preclude RICO from reaching the activities of local governments.

#### *A. Advantages to Plaintiffs*

Plaintiffs claiming indirect injury from price-fixing schemes do not state a claim for relief under the federal antitrust laws,<sup>158</sup> but the so-called direct injury requirement does not apply to RICO plaintiffs.<sup>159</sup> Under RICO the traditional proximate cause analysis applies such that either direct or indirect injury by predicate acts gives rise to standing.<sup>160</sup> Nevertheless, limitations remain. For instance, “harm flowing merely from the misfortunes visited upon a third party by the defendant’s acts is too remote” to state a claim.<sup>161</sup> Moreover, some circuits refuse to apply the more liberal proximate cause analysis to the entire statute. The Second Circuit has held that section 1962 of the act, which forbids a person who has received

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152. *Id.* § 1961(1)(A).

153. *Id.* § 201 (1994 & 1996 Supp.).

154. *Id.* §§ 1341, 1343 (1994).

155. 18 U.S.C. § 1951.

156. *Id.* § 1961(5).

157. *Id.* § 1962. Although a majority of courts do not allow for injunctive relief under RICO, there is not unanimity on the matter. *See, e.g.,* Chambers Dev. Co., Inc. v. Browning-Ferris Indus., 590 F. Supp. 1528, 1540-41 (W.D. Pa. 1984).

158. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

159. *See* Sedima S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479 (1985); American Nat’l Bank and Trust Co. v. Haroco, Inc., 473 U.S. 606 (1985).

160. *Sedima*, 473 U.S. at 497.

161. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992).

income derived from a pattern of racketeering activity “to use or invest . . . any part of such income” and requires the injury to result from the defendant’s investment of racketeering income.<sup>162</sup> The Fourth Circuit, on the other hand, takes a more liberal stance and merely requires the plaintiff to allege a pattern of racketeering activity along with the investment of the income derived from that activity.<sup>163</sup> The injury need not result from the investment.<sup>164</sup> Unless the Supreme Court rules otherwise, the Second Circuit’s reasoning should not prove to be an insurmountable barrier to stating a RICO claim.

A second advantage is RICO’s more inclusive definition of conspirators. Under the antitrust laws a corporation and its wholly owned subsidiary are incapable of conspiring within the meaning of section 1 of the Sherman Act.<sup>165</sup> That restriction may not be present under RICO, where two circuits have held that a corporation and its wholly owned subsidiary can act in concert to violate RICO.<sup>166</sup> Accordingly, a municipal corporation and its governing body could be charged with concerted activity in violation of RICO, thus circumventing the intra-corporate conspiracy problem encountered in traditional antitrust pleading.

Further alleviating any proof problems that might arise under the antitrust laws is the recent Supreme Court decision in *Salinas v. United States*, which clarified that a conspiracy claim under section 1962(d) does not require proof that the defendant himself or herself committed or agreed to commit a pattern of racketeering.<sup>167</sup> Rather, the RICO conspiracy provision covers the mere intent to further or facilitate a criminal endeavor, whether the conspirator actually

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162. *Ouakinine v. MacFarlane*, 897 F.2d 75 (2d Cir. 1990). *See also* *O’Malley v. O’Neill*, 887 F.2d 1557 (11th Cir. 1989) (requiring predicate acts to be the direct cause of plaintiff’s injury to state a claim).

163. *Busby v. Crown Supply, Inc.*, 896 F.2d 833 (4th Cir. 1990).

164. *See id.*

165. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

166. *See Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386 (11th Cir. 1994), *cert. denied*, 513 U.S. 1110 (1995); *Haroco, Inc. v. American Nat’l Bank & Trust Co.*, 747 F.2d 384 (7th Cir. 1984), *aff’d on other grounds*, 473 U.S. 606 (1985); *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982), *cert. denied sub nom.*, *Treasure Isle, Inc., v. United States*, 459 U.S. 1183 (1983).

167. 522 U.S. 52 (1997).

participated in the offense and whether or not the offense actually occurred.<sup>168</sup> In this sense, conspiracy under RICO is even more comprehensive than the general conspiracy offense, which requires a conspirator to have acted to effect the substantive crime.<sup>169</sup>

In addition to these specific advantages, RICO also eliminates other impediments that might prevent a plaintiff from recovering under the antitrust laws. First, unlike the Sherman Act in certain cases, RICO does not require a showing of the defendant's market power. Second, courts that apply rule of reason analysis to challenged conduct under the antitrust laws rely on an intensive dissection of the facts to determine whether restraints of trade are illegal.<sup>170</sup> By contrast, as long as a RICO plaintiff can prove the elements of a claim, it need not set forth facts to prove the unreasonableness of the defendant's activities. Finally, neither Congress nor the courts have recognized a defense akin to the state action doctrine under RICO. For these reasons, RICO offers an attractive alternative to plaintiffs who are barred from recovering under the antitrust laws.

### *B. Municipalities' Defenses to RICO Claims*

Despite the advantages presented by RICO, major questions, still undecided by the Supreme Court, threaten to diminish its applicability in the local government arena. Although a municipal entity qualifies as a "person" under RICO, there is a growing concession among the lower courts that a municipality cannot form the criminal intent necessary for the commission of predicate acts. The basis for this conclusion was developed in *Massey v. City of Oklahoma City*, which held that a municipal corporation is an "artificial person" that cannot act in its own right but only through its officers.<sup>171</sup> Accordingly, a city is "incapable of forming the mens rea

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168. *Id.*

169. *See* 18 U.S.C. § 371 (1994).

170. *See* National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978) (finding that under the rule of reason, liability for anticompetitive acts depends on "the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed"). Even if the Supreme Court were to adopt a special rule of reason for local government activities, the particular facts of the challenged conduct would remain critical to the analysis. *See supra* Part II.B.

171. 643 F. Supp. 81, 85 (W.D. Okla. 1986).

or criminal intent necessary to perform an act of racketeering as defined by § 1961(1) of the RICO statute.”<sup>172</sup> Subsequent courts that have considered the issue are in agreement.<sup>173</sup>

The Third Circuit has avoided the issue of intent and instead rejected the viability of a RICO claim on grounds that the treble damages it affords are punitive, which precludes their application to local governments.<sup>174</sup> The court in *Gentry v. Resolution Trust Corp.* relied on the “overwhelming mass of historical and legal precedent” for its conclusion that in enacting RICO, Congress did not intend to impose punitive damages upon innocent taxpayers.<sup>175</sup> Despite the Third Circuit’s conclusion, civil RICO has been described as a “square peg . . . [that] will never comfortably fit in the round holes of the remedy/penalty dichotomy.”<sup>176</sup> Moreover, the Supreme Court has acknowledged that the primary purpose of RICO is remedial.<sup>177</sup> Some lower courts have held that even the treble damages afforded in section 1964(c) are remedial in nature.<sup>178</sup> Like the Sherman Act neither the text nor the legislative history of RICO addresses its application to local government entities. With the divergence on the issue that has developed in the lower courts, the question is ripe for

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172. *Id.*

173. *See, e.g.,* *Pedrina v. Chun*, 97 F.3d 1296, 1300 (9th Cir. 1996), *cert. denied*, 520 U.S. 1268 (1997) (rejecting RICO claim as a matter of law on grounds that municipalities are incapable of forming malicious intent); *Frooks v. Town of Cortlandt*, 997 F. Supp. 438, 456 (S.D.N.Y. 1998) (“[E]very court in this Circuit that has considered the issue has held that a municipality cannot form the requisite criminal intent to establish a predicate act” under RICO.). *See also* *Rini v. Zwirn*, 886 F. Supp. 270, 294 (E.D.N.Y. 1995) (foreclosing the possibility that municipal agents’ mens rea may be imputed to the municipality through the doctrine of respondeat superior, and therefore, municipal officials may not be held liable in their official capacities under RICO).

174. *See* *Gentry v. Resolution Trust Corp.*, 937 F.2d 899 (3d Cir. 1991).

175. *See id.* at 899-913.

176. *See* *Faircloth v. Finesod*, 938 F.2d 513, 518 (4th Cir. 1991).

177. *See* *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 240-42 (1987) (collecting legislative history that the “emphasis” of RICO treble damages is “remedial”). *See also* *First American Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1122 (D.C. 1996) (“[T]he overriding purpose of RICO is to provide a remedy to persons injured as a result of racketeering activity.”).

178. *See, e.g.,* *County of Oakland v. City of Detroit*, 784 F. Supp. 1275, 1285 (E.D. Mich. 1992) (citing dictum in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 240-42 (1987)); *State Farm Fire and Cas. Co. v. Estate of Caton*, 540 F. Supp. 673, 682 (N.D. Ind. 1982), *overruled on other grounds sub. nom.*, *Ashland Oil, Inc. v. Arnett*, 656 F. Supp. 950 (N.D. Ind. 1987). *But see* *Washburn v. Brown*, 1988 WL 130021 (N.D. Ill. 1988) (concluding that the treble damage provision in RICO is punitive).

Supreme Court review.

Finally, a handful of lower courts have summarily concluded that antitrust violations are not predicate acts for the purposes of a RICO violation.<sup>179</sup> Those courts rely on a literal reading of the statute and reason that because antitrust violations are not enumerated in the statutory definition of what constitutes a “predicate act”—a defendant’s violation of the antitrust laws does not give rise to a claim under RICO.<sup>180</sup> The import of these decisions could be limited, however, to where the plaintiff states her claim in terms of the antitrust violation rather than the racketeering conduct that gave rise to the violation. As long as the conduct can be stated in terms outlined by the statute, the fact that it also may constitute an antitrust violation should not be an impediment to analysis under RICO.

#### V. FUTURE DIRECTIONS

At the turn of the last century, it generally was assumed that the anticompetitive mandate of the federal antitrust laws did not apply to states or their subdivisions. As we enter the next century, those entities still largely are immune from antitrust attacks. Today, however, the assumption has been replaced by generations of precedent over the last fifty years that articulate the policy rationale for excepting government entities from antitrust review. Today it is also clear that state boundaries are not impervious to federal antitrust policy.

The principles of federalism are the foundation and core values underlying the state action doctrine and its statutory offspring—the Local Government Antitrust Act of 1984. The recent resurgence of Eleventh Amendment immunity also reflects federalist goals. Nevertheless, federalism is not a *carte blanche* or an absolute for state actors to engage in anticompetitive activity. Rather, the immunity afforded by these doctrines is only available where certain standards are met.

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179. *See* *Jennings v. Emry*, 910 F.2d 1434, 1438 (7th Cir. 1990); *Mount v. Ormond*, 1991 WL 191228, at \*2 (S.D.N.Y. Sept. 18, 1991); *United States v. Bonanno Organized Crime Family*, 683 F. Supp. 1411, 1432 (E.D.N.Y. 1988), *aff’d*, 879 F.2d 20 (1989). *See generally* KATHLEEN F. BRICKEY, *CORPORATE CRIMINAL LIABILITY* (1991).

180. *See id.*

Eleventh Amendment immunity, although inapplicable to municipalities, provides broad protection to state actors against a federal antitrust attack. Once it is established that the actor is a state or an “arm of the state,” immunity is absolute; neither treble damages nor injunctive relief is available.<sup>181</sup> Unlike the state action doctrine, Eleventh Amendment protection is not conditioned on a “clearly articulated” policy to displace competition or “active state supervision.” Moreover, recent Supreme Court jurisprudence dramatically has circumscribed the instances in which Congress may abrogate states’ immunity from suit.<sup>182</sup> To displace the protection afforded to states under the Eleventh Amendment, Congress is narrowly limited to ensuring compliance with the federal constitution under section five of the Fourteenth Amendment.

The state action doctrine is both broader and narrower than Eleventh Amendment immunity. State action immunity extends further than the Eleventh Amendment because it encompasses political subdivisions, including municipalities and private actors. At the same time, immunity under the state action doctrine is more difficult to achieve because it only attaches where the state has articulated a clearly expressed policy to displace competition. In the case of private parties, the state must also actively *supervise* the challenged conduct. Although the Supreme Court has directed that these standards are to be interpreted liberally, it has not gone so far as to create an automatic “status” exemption for political

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181. The Ninth Circuit has identified five factors to consider in determining whether an entity is an arm of the state entitled to immunity:

[1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has the power to take property in its own name or only the name of the state, and [5] the corporate status of the entity.

Mitchell v. Los Angeles Community College Dist., 861 F.2d 198, 201 (9th Cir. 1988), *cert. denied*, 490 U.S. 1081 (1989). Of these, the most crucial factor is whether a judgement would impact the state treasury. *See* Rutledge v. Arizona Board of Regents, 660 F.2d 1345, 1349 (9th Cir. 1981). Other courts state the test in different terms. *See, e.g.*, Daniel v. American Bd. of Emergency Med., 988 F. Supp. 127 (W.D.N.Y. 1997) (evaluating “degree of control and supervision over entity, including state’s power of appointment and removal of officers or directors, any authority to approve or disapprove actions of entity, whether entity is financially independent from state, whether state is responsible for entity’s obligations and liabilities, and character of entity’s functions”).

182. *See infra* Part II.B.

subdivisions.<sup>183</sup> Accordingly, courts have refused to turn a blind eye to anticompetitive activity that does not meet the criteria of the state action exemption.<sup>184</sup>

Finally, where an actor is not eligible for protection under either the Eleventh Amendment or the state action doctrine, the Local Government Antitrust Act of 1984 covers local governments, local government, officials and certain private parties who deal with local governments.<sup>185</sup> The legislative history indicates that Congress intended the state action doctrine to apply, by analogy, to the conduct of a local government in directing the actions of non-governmental parties, as if the local government were a state.<sup>186</sup> A local government's activities thus need not be authorized by the state for immunity to apply under the act. In this sense, it is easier for local governments to achieve immunity under the act than under the state action doctrine. However, unlike the absolute immunity afforded by the state action doctrine, immunity under the act is only from damages. Conduct remedies may still be imposed.

Despite the Local Government Antitrust Act's provision for

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183. See *Cowboy Book, Ltd. v. Board of Regents for Agriculture and Mechanical Colleges*, 728 F. Supp. 1518 (W.D. Okla. 1989) (acknowledging that "some acts of state agencies are not acts of government by the state as sovereign").

184. See, e.g., *Surgical Care Ctr. of Hammond v. Hospital Serv. Dist. No. 1 of Tangipahoa Parish*, 171 F.3d 231, 235 (5th Cir. 1999), cert. *dism'd*, 120 S. Ct. 37 (1999) (finding that a Louisiana statute expanding a hospital's powers to allow joint ventures and closed meetings did not authorize anticompetitive conduct); *Halleco Envtl., Inc. v. Comanche County Bd. of Comm'rs*, 1998-1 Trade Case. (CCH) ¶ 72,175 (10th Cir. June 10, 1998) (finding that a state law allowing the city to engage in the business of garbage reduction did not include the right to regulate landfill sites); *American Tel. & Tel. Co. v. IMR Capital Corp.*, 888 F. Supp. 221 (D. Mass. 1995) (denying state action immunity because telephone carriers' refusal to provide certain services to owners of consumer-owned coin operated telephones was actually contrary to state policy). See also *Exemptions: Texas Governor Signs Measure Letting Doctors Bargain with HMOs*, 76 ANTITRUST & TRADE REG. REP. 700 (1999) (noting that the "static supervision" in Texas legislation providing an antitrust exemption for doctors who engage in collective bargaining likely falls short of the "active supervision" requirement for state action immunity).

These recent cases retreat in some measure from the extreme federalism adopted by some of the cases following a strict interpretation of *Parker v. Brown*. The courts seem to observe that they will not blindly infer from a simple authorization to engage in a particular type of conduct that anticompetitive consequence will follow. For instance, a simple land use enabling act or grant of authority to zone might not be interpreted to imply the power to zone in an anticompetitive manner.

185. 15 U.S.C. §§ 35-36.

186. H.R. CONF. REP. NO. 98-1158, at 3, reprinted in 1984 U.S.C.C.A.N. 4602, 4626-27.

injunctive relief, the courts largely have avoided it. In many cases, state action immunity bars suit altogether, precluding further analysis under the act.<sup>187</sup> Some courts have acknowledged the possibility of injunctive relief under the act without actually imposing a behavioral remedy.<sup>188</sup> In other cases the issue is settled before trial. For instance, in *United States v. City of Stilwell*, the Department of Justice brought suit, alleging that the city unlawfully tied its water and sewer services.<sup>189</sup> The court entered a final judgment approving a settlement between the parties, which enjoined the city from requiring any customer to purchase city-supplied electric service as a condition of receiving water or sewer service.<sup>190</sup> Finally, in *Pine Ridge Recycling v. Butts County*, the court issued an injunction against the Butts County Solid Waste Authority for unlawfully blocking Pine Ridge from establishing a new solid waste landfill.<sup>191</sup> Although Georgia law clearly articulated its policy to allow municipalities to engage in the challenged conduct, state action immunity did not attach. The court reasoned that interpreting the statute in this manner would violate the Commerce Clause by restricting the movement of solid waste out of the state. Finding that the Local Government Antitrust Act only precluded damages against a local government entity, the court granted a preliminary injunction to the plaintiffs on the merits of the case.<sup>192</sup>

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187. See, e.g., *American Int'l Sec. Specialists, Inc. v. Roberts*, 161 F.3d 1 (4th Cir. 1998) (concluding that appellees were entitled to immunity under state action, which rendered it unnecessary to consider whether they might also be immune under the Local Government Antitrust Act); *Martin v. Memorial Hosp.*, 86 F.3d 1389, 1398-1400 (5th Cir. 1996) (holding that appellants were immune under the state action doctrine and reversing the lower court's conclusion that injunctive relief, attorney's fees, and court costs were available under the act).

188. See, e.g., *Martin v. Stites*, 31 F. Supp.2d 926 (D. Kan. 1998) (denying defendant's motion for summary judgement where plaintiffs stated a claim for injunctive relief under the antitrust laws); *Northeast Jet Center, Ltd. v. LeHigh-Northampton Airport Auth.*, 767 F. Supp. 672, 682 (E.D. Pa. 1991) (granting plaintiff leave to amend its complaint to seek injunctive relief).

189. See *United States v. City of Stilwell*, No. 96-196B (E.D. Okla. filed Apr. 25, 1996) cited in ANTITRUST & TRADE REG. REP. 479 (1996).

190. See *United States v. City of Stillwell*, No. 96-196B, final judgement (E.D. Okla. Nov. 5, 1998).

191. 855 F. Supp. 1264 (M.D. Ga. 1994).

192. See *Pine Ridge Recycling, Inc. v. Butts County*, 864 F. Supp. 1338 (M.D. Ga. 1994). The court also denied defendants' subsequent motions to stay the injunction. See *Pine Ridge Recycling, Inc. v. Butts County*, 874 F. Supp. 1383 (M.D. Ga. 1995).

When taken together it is clear that the multifaceted protections afforded to local government actors leave little room for the federal antitrust laws to affect land use issues. In addition, Chief Justice Rehnquist has suggested that the application of traditional antitrust standards to local government activity is wholly inappropriate.<sup>193</sup> In his dissent in *Community Communications Co. v. City of Boulder*, then-Justice Rehnquist foreshadowed the Court's distaste for imposing the antitrust laws on local government entities. Rehnquist asserted that even if the rule of reason were applied, municipalities would be subject to "wide-ranging, essentially standardless inquir[ies] into the reasonableness of local regulation."<sup>194</sup> Moreover, free competition, he concluded, may not always be a reasonable or expedient means of meeting the public's needs in the social welfare arena.<sup>195</sup> In the years since that dissent, the courts effectively have circumvented antitrust analysis in the local government context by finding immunity in the great majority of cases.<sup>196</sup> Although neither Congress nor the Court has disavowed completely the federal antitrust laws application to local governments, the protective doctrines virtually have achieved that end.

In short, the ideology of federalism has displaced a national model of competition for one favoring state-based resolutions. The resulting state law primacy leaves "more room for a state's action when the primary harm, if any, is felt by its own citizens."<sup>197</sup> The Supreme Court has attempted to harmonize substantial state interests in regulating local conduct with the need for a federal, united competition policy.<sup>198</sup> It has struck that balance in favor of state political interest when it considers the federal antitrust application too burdensome. This approach is consistent with the Court's recent

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193. See *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982) (Rehnquist, J., dissenting).

194. See *id.* at 67.

195. *Id.* at 66.

196. Of the 116 cases reported in Westlaw where the courts have considered or discussed application of the Local Government Antitrust Act, only two have granted injunctions. See *Pine Ridge Recycling, Inc. v. Butts County*, 864 F. Supp. 1338 (M.D. Ga. 1994); *Oberndorf v. City and County of Denver*, 653 F. Supp. 304 (D. Colo. 1986).

197. 1 PHILLIP AREEDA & DONALD TURNER, AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, ¶ 220 (1978).

198. *Id.* at 130.

Eleventh Amendment jurisprudence, which is taking the ideology of federalism to new extremes. At the turn of the new century, federalism has achieved its greatest ascendancy since the 1930s. Its triumph over competition is nearly complete in the field of land use regulation as well.