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Articulating Trade Offs: The Political Economy of State Action Immunity

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I. INTRODUCTION

Antitrust uses economic analysis to assess various trade-offs involving efficiency.[1] Even assuming that a competition matter implicates purely economic matters it can be exceedingly difficult to determine and measure all the relevant factors, assign them proper weights, decide on the appropriate time frames, assess the pertinent interactions, and conduct the trade-off calculations. Not surprisingly, different members of the antitrust community often take vastly differing positions regarding the economic consequences of a particular antitrust doctrine as well as the significance of those consequences. When potentially anticompetitive conduct occurs in the context of state regulation, the challenge to achieving a sensible accommodation is heightened because substantially less agreement exists regarding the appropriate balance between federalism and federal competition policy. Moreover, given that constitutional considerations arguably inform the balance struck, the necessity of achieving the correct balance is even more significant.

One feature of the state action immunity doctrine around which controversy has swirled, a feature with profound practical as well as symbolic importance, is the requirement that the state clearly articulate its intention to displace competition. The central legal issue is federalism; it is not whether federal competition policy would achieve superior outcomes versus a state regulatory scheme. This essay briefly comments on the current debate regarding the "clear articulation" requirement.[2] I first explain the basics of this requirement through synthesizing several key characteristics that the Supreme Court has expressly accepted or rejected as potential hallmarks of state activity warranting antitrust immunity. My presentation underscores a key trade-off regarding clarity of state intent that figures prominently in the Supreme Court's

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[1]*See, e.g.*, Hillary Greene, *The Role of the Competition Community in the Patent Law Discourse*, 69 ANTITRUST L.J. 841 (2001) (discussing the role of antitrust in illuminating consumer welfare trade-offs that patents may impose).

[2]The state action doctrine's "active supervision" requirement, see *infra* notes 8–9 and accompanying text, falls beyond the scope of this Comment. The clear articulation requirement is applicable in *all* state action immunity cases, whereas the active supervision requirement is implicated in only those cases involving allegedly anticompetitive conduct by private actors rather than government entities.

legal standard. I then present several features characterizing the dominant criticism of that standard. This criticism ostensibly focuses on the judiciary's imprecise delineation of its own "clear articulation" requirement. Yet the criticism also seems to reflect dissatisfaction with the underlying value the Supreme Court accorded federalism in its formulation of the state action immunity doctrine. In particular, many antitrust critics advocating restriction of the availability of such immunity seem to employ, albeit oftentimes implicitly, an economic-efficiency based trade-off. Many of the state action doctrine's critics frequently seem reluctant to grapple openly with reassessing the value of federalism in this context. This is particularly unfortunate given the significant competition values at issue. Multiple trade-offs are pertinent to the state action immunity debate; this Comment seeks to illuminate them with the hope that by clarifying costs and benefits—even if they are ultimately unquantifiable or incommensurate—social discourse will have been enriched.[3]

II. UNDERSTANDING STATE ACTION IMMUNITY'S "CLEAR ARTICULATION" REQUIREMENT

State action immunity is a judicially created doctrine originating in the Supreme Court's ruling in *Parker v. Brown* (*Parker*).[4] *Parker* broadly articulated the need to subordinate national competition policy, as embodied in the Sherman Act, to a state's right to assert regulatory autonomy in areas that the federal government had not preempted through antitrust or otherwise.[5] The principle animating *Parker* was and remains clear: federalism.

> In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.
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> The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state . . . .

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[3]This essay is based on my comments regarding Professor Darren Bush's symposium presentation and his subsequently revised working paper, *Mission Creep: Antitrust Exemptions and Immunities as Applied to Regulated Industries*. *See* Darren Bush, *Mission Creep: Antitrust Exemptions and Immunities as Applied to Regulated Industries*, 2006 UTAH L. REV. 761. Professor Bush's symposium contribution relies heavily upon a Federal Trade Commission (FTC) staff report. OFFICE OF POLICY PLANNING, FTC, REPORT OF THE STATE ACTION TASK FORCE (2003), *available at* http://www.ftc.gov/os/2003/09/stateactionreport.pdf [hereinafter FTC STAFF REPORT]. Because of Bush's reliance and the prominence of the FTC in the current state action immunity debate more generally, this Comment also addresses several arguments the FTC and/or its staff have advanced.

[4]317 U.S. 341 (1943).

[5]*See id.* at 350–52, 358, 367–68 (citing 15 U.S.C. §§ 1, 2, 7, 15 (2000)).

> There is no suggestion of a purpose to restrain state action in the Act's legislative history.[6]

While *Parker* established the general rationale underlying state action immunity, *California Retail Liquor Dealers Assn v. Midcal Aluminum Inc.* (*Midcal*) established a two-part test for determining when state action immunity will shield potentially anticompetitive conduct.[7] "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself."[8] The Supreme Court subsequently ruled that the second prong, active supervision, applies only to private actors and not to municipalities and other government entities.[9]

A. Clear Articulation Defined

Since *Midcal*, the Supreme Court has issued several rulings elaborating upon its "clear articulation" requirement. Two key rulings issued during the 1985 term precluded certain narrow interpretations of "clear articulation."

In *Southern Motor Carriers Rate Conference, Inc. v. United States* (*Southern Motor Carriers*), the Department of Justice (DOJ) instituted a Sherman Act section 1 lawsuit alleging price fixing against two rate bureaus composed of motor common carriers.[10] The rate bureaus contended that the state action doctrine immunized them because they had participated in collective ratemaking activity that the Mississippi State Commission had "actively encourag[ed]."[11] Notwithstanding such "encouragement," the legislature had not "describe[d] the implementation of its policy in detail . . . ."[12] The Court refined its "clear articulation" requirement in negative terms. Namely, the Court identified two factors it would *not* require prior to finding immunity. With regard to the lack of specificity and detail characterizing the legislative authorization in question, the Court ruled that such precision was unnecessary "[a]s long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure."[13] With regard to the fact that the statute had not compelled the private parties' activities at issue, the Court ruled that if "the State clearly articulates its intent to adopt a *permissive* policy" state action immunity might still obtain.[14]

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[6] *Id.* at 351.
[7] 445 U.S. 97 (1980).
[8] *Id.* at 105 (citation omitted).
[9] Town of Hallie v. City of Eau Claire, 471 U.S. 34, 46–47 (1985).
[10] 471 U.S. 48, 48 (1985).
[11] *Id.* at 64.
[12] *Id.* at 64–65.
[13] *Id.* at 64.
[14] *Id.* at 60 (emphasis added).

Town of Hallie v. City of Eau Claire (*Hallie*) was issued concurrently with *Southern Motor Carriers* and further buttressed its central holdings.[15] In *Hallie*, the Court reiterated that compulsion was not a prerequisite to finding that an entity acted pursuant to a "clearly articulated state policy," mere "authorization" of a given practice could be sufficient.[16] Nor, the Court held, was it necessary that an official pronouncement include an "express intent to displace the antitrust laws."[17] Instead, the issue was whether the "statute provided regulatory structure that inherently 'displace[d] unfettered business freedom.'"[18]

The Court, demanding neither an "express intent"[19] nor a "specific, detailed [plan],"[20] introduced "foreseeability" as an alternative standard.[21] Anticompetitive conduct was foreseeable and, therefore, potentially immunized when it "logically would result from [a] broad [grant of] authority."[22] In *Hallie*, the state authorized the city to provide sewage services that included the ability to determine which areas to serve. In light of the city's "broad authority to regulate," the Court ruled that "it [was] clear that anticompetitive effects logically would result."[23] Foreseeability has become the centerpiece of much current criticism of state action immunity.

B. Clearly Articulated Trade-Offs

Successful application of the Supreme Court's state action precedent requires more than merely understanding the precise terminology selected ("foreseeable result"[24]) or rejected ("specific, detailed, legislative authorization"[25]). It requires understanding the underlying trade-offs embodied in these rulings. A central trade-off underlying the Court's state action immunity standard pertains to the balancing of false negatives (erroneous rejections of immunity) and false positives (erroneous findings of immunity). When federalism is involved the Supreme Court has consistently placed a higher priority on protecting against false negatives than it has on preventing false positives. The Court repeatedly has recognized various practical realities that contribute to less-than-explicit statements of legislative intent. More importantly, the Court's method for determining legislative intent involves a

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[15]471 U.S. 34 (1985).

[16]*Id.* at 42, 45.

[17]*Id.* at 42 (citing New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 109 (1978)).

[18]*See id.* (quoting *Fox*, 439 U.S. at 109) (concluding that statutes "clearly contemplate" that the city may engage in anticompetitive conduct because anticompetitive conduct was a "foreseeable result" of the statutes).

[19]*Id.* (citing *Fox*, 439 U.S. at 109).

[20]*Id.* at 39 (quoting City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 415 (1978)).

[21]*Id.* at 42.

[22]*Id.*

[23]*Id.*

[24]*Id.*

[25]*Id.* at 39.

"clarity trade-off" between the benefit of clarity regarding state legislative intent and the cost of requiring such clarity. The cost of clarity manifests itself indirectly through reduced state regulatory prerogatives. This section highlights the clarity trade-off within Supreme Court precedent, a trade-off that Part III argues many state action immunity critics fail to appreciate adequately.

Southern Motor Carriers balanced the need for certainty about the legislature's "intent to displace competition" against a possible burden that would make it "difficult [for states] to implement through regulatory agencies their anticompetitive policies."[26] The Court observed rather dramatically, that "[r]equiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, [the state agency's] usefulness."[27]

Hallie further illuminated the clarity trade-off between the federal government's ability to effect antitrust policy and the ability of states to effectuate anticompetitive regulatory policies. The Court stated the notion that one could impose a strict articulation requirement on the states reflected "an unrealistic view of how legislatures work and of how statutes are written. No legislature can be expected to catalog all of the anticipated effects of a statute of this kind."[28] Moreover, "requiring such explicit authorization by the State might have deleterious and unnecessary consequences . . . [including] detrimental side effects upon municipalities' local autonomy and authority to govern themselves."[29]

In addition to recognizing the potential costs to federalism resulting from excessive articulation requirements, *Hallie* also recognized the corresponding judicial burden of such a requirement.

> Requiring such a close examination of a state legislature's intent to determine whether the federal antitrust laws apply would be undesirable also because it would embroil the federal courts in the unnecessary interpretation of state statutes. Besides burdening the courts, it would undercut the fundamental policy of *Parker* and the state action doctrine of immunizing state action from federal antitrust scrutiny.[30]

The state action immunity case law regarding "clear articulation" is about navigating uncertainty regarding a state's intent to control—and therefore immunize—an aspect of its commercial life. It is not about the wisdom of any

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[26]S. Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 64 (1985).

[27]*Id.* (citing *Hallie*, 471 U.S. at 44).

[28]*Hallie*, 471 U.S. at 43.

[29]*Id.* at 44 (citing City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 434–35 (1978) (Stewart, J., dissenting)).

[30]*Id.* at 44 n.7 (citing 1 PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 212.3(b) (Supp. 1982)).

anticompetitive regulation per se. If, for example, a state enacted an anticompetitive regulatory regime that clearly pandered to narrow private interests and satisfied the *Midcal* requirements, state action immunity would obtain. Social scrutiny of such legislative conduct and the resulting statute would fall to regimes other than antitrust (with responses covering a wide range of possibilities including, for example, possible bribery actions).[31] As Professor Hovenkamp explained, the Supreme Court's process-oriented test reflects the fact that the purpose of state action immunity "is not to protect federal regulatory or competition goals, but to give appropriate recognition to state regulatory power . . . . [W]hen a court applies the state action doctrine it must try to avoid making substantive judgments about whether the state regulation at issue is a good idea."[32]

III. CLARIFYING THE CRITICISM OF "CLEAR ARTICULATION"

The key to understanding much antitrust criticism of the state action immunity doctrine lies in the extent critics have, or have not, adequately recognized the clarity trade-off that Part II highlighted. I argue that the critics have frequently failed to grapple adequately with that trade-off. I speculate that the critics' stance on the clarity trade-off reflects a more fundamental disagreement with the value the Supreme Court accorded federalism when determining how to assess state action immunity. Though the critics have not framed their inquiry in this manner, it is worth considering the extent to which their approach to the state action immunity doctrine includes consideration of the doctrine's effect on overall social welfare. More specifically, to what extent do the critics' state action assessments include an "economic efficiency trade-off" that balances economic efficiency with the value accorded federalism?

My comments address the current debate regarding state action immunity and focus primarily on the criticisms and reforms suggested in the 2003 *Report of the State Action Task Force* (*FTC Staff Report*).[33] The FTC staff's efforts have been vital in framing the current debate and arguably capture much of the overall tenor of the current antitrust criticism of the state action doctrine.[34] State action immunity, both its functioning and its reform, continues to garner substantial attention owing, in large part, to the Antitrust Modernization

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[31] *See* Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, 2004 COLUM. BUS. L. REV. 335, 348.

[32] *Id.* at 347. In the decades since *Southern Motor Carriers*, the Supreme Court has continued to recognize a similarly limited role for judicial review of state action. City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 377 (1991) ("*Parker* was not written in ignorance of the reality that determination of 'the public interest' in the manifold areas of government regulation entails not merely economic and mathematical analysis but value judgment, and it was not meant to shift that judgment from elected officials to judges and juries.").

[33] FTC STAFF REPORT, *supra* note 3, at 25–59.

[34] *See supra* note 3 (explaining the scope of this essay).

Commission's inclusion of this issue on its agenda.[35] I also discuss other important strands of the debate advocated by Professor Darren Bush.[36] Throughout this Comment, my reference to the "critics" is primarily to the positions held by the FTC and/or Professor Bush.

A. Interpreting Judicial Interpretations of Trade-Offs

Part II briefly discussed two key Supreme Court rulings. Unfortunately, the current debate (and particularly prominent reform advocates) fails to adequately address precisely those portions of the Supreme Court's rulings that are most critical. Consideration of the value judgments underlying these rulings, as expressed through the clarity trade-off, is essential to their proper application. Moreover, given the extent to which many critics have characterized their position as more faithful to Supreme Court rulings than the positions of those with which they disagree, the critics' treatment of key precedent warrants particular scrutiny.

Among the most intriguing aspects of the current criticism of state action immunity is its relatively measured nature. While critics routinely decry many lower court decisions as shielding anticompetitive conduct to an extent unwarranted by federalism principles, they also suggest that fidelity to *existing* Supreme Court precedent could largely remedy such perceived misinterpretations. Thus, the *FTC Staff Report* "recommend[ed] clarification and re-affirmation of the original purposes of the state action doctrine."[37] Similarly, the American Antitrust Institute ("AAI") observed that "issues have arisen with lower court implementation of the doctrine that have thwarted the main goal of the state action doctrine" as articulated by the Supreme Court.[38]

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[35]The Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, §§ 11051–60, 116 Stat. 1856 (to be codified at 15 U.S.C. § 1 note), created the Antitrust Modernization Commission (AMC) with the charge of examining "whether the need exists to modernize the antitrust laws and to identify and study related issues," *id.* § 11053(1). After soliciting public input, the Antitrust Modernization Commission adopted the issue, "Should the state action doctrine be clarified or otherwise changed?" for study. Memorandum from the Immunities and Exemptions Study Group to the Antitrust Modernization Comm'n (May 6, 2005), *available at* http://www.amc.gov/pdf/meetings/ImmunitiesExemptionsStudyPlan.pdf.

[36]*See generally* Bush, *supra* note 3.

[37]FTC STAFF REPORT, *supra* note 3, at 1. In a written submission to the AMC, the American Bar Association ("ABA") noted with ostensible approval that "[s]ome commentators have criticized the decisions in the lower courts for interpreting the State Action doctrine to exempt conduct that does not meet the *Midcal* criteria." Comments from the Section of Antitrust Law of the Am. Bar Ass'n to the Antitrust Modernization Comm'n 14 (Sept. 30, 2004), *available at* http://www.amc.gov/comments/abaantitrustsec.pdf. The ABA, therefore, recommended the AMC study whether "any clarification of the [state action] doctrine" is warranted. *Id.* The ABA then noted that the 2003 *FTC Staff Report* would be of "considerable assistance" if the AMC elected to pursue this issue. *Id.*

[38]Comments from the Am. Antitrust Inst. Working Group on Immunities and Exemptions to the Antitrust Modernization Comm'n 6 (July 15, 2005), *available at* http://www.antitrustinstitute.org/recent2/433.pdf.

My review of the critics' primary writings revealed virtually no substantive treatment or reference to the clarity trade-off contained in the Supreme Court cases discussed previously.[39] Rather, the critics support their apparent desire to restrict the availability of state action immunity through what can be interpreted as either an unduly cramped notion of the value and purposes of the state action doctrine or a policy-oriented belief that federal competition policy is generally superior to the state regulatory schemes. This section considers the broader ramifications of this interpretative posture through a discussion of two circuit court cases some critics have singled out as problematic.

The *FTC Staff Report* identified two cases as "illustrat[ing] the problem" of lower courts treating "the presence of a general regulatory regime in an industry" as the basis for "automatically . . . find[ing] displacement of all aspects of competition in that industry."[40] These cases, according to the staff report, interpreted the clear articulation standard too broadly and resulted in an approach that "both contravenes Supreme Court precedent and undermines the purpose of the clear articulation standard."[41]

One "problem" case, *Sandy River Nursing Care v. Aetna Casualty*, involved a statute regulating workers' compensation insurance rates.[42] The statute at issue "authorized joint rate filings but stipulated that the approved rates were *upper limits* on permissible charges."[43] When insurers charged the same rate, the rate approved by Maine's Superintendent of Insurance, their actions were challenged as price-fixing.[44] The district court found state action immunity available to the defendants and the First Circuit affirmed.[45]

The First Circuit held that the legislation in question "must be construed as implicitly condoning an agreement among insurers to charge the rates they jointly propose" notwithstanding that individual insurers "*may* charge less than the approved rate."[46] The court found that "the expectation clearly is that the Superintendent's rates are the ones that generally will be appropriate for, and thus used by, all insurers."[47] The court's conclusion reflected, among other circumstances, the fact that a previous provision that had prohibited insurers from "agreeing 'to adhere to or use a rate or rating plan'" had been repealed.[48] The First Circuit relied heavily on *Southern Motor Carriers*'s clarity trade-off, noting that requiring the statute to compel pricing at the maximum authorized

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[39]*See supra* Part II (discussing Supreme Court's clear articulation requirement in state action immunity cases).

[40]FTC STAFF REPORT, *supra* note 3, at 34.

[41]*Id.* at 2.

[42]985 F.2d 1138, 1146–47 (1st Cir. 1993).

[43]FTC STAFF REPORT, *supra* note 3, at 34.

[44]*Sandy River*, 985 F.2d at 1141.

[45]*Id.* at 1139.

[46]*Id.* at 1146.

[47]*Id.*

[48]*Id.* (quoting ME. REV. STAT. ANN. tit. 24-A, § 2347(2) (1985) (repealed 1987)).

rate as a prerequisite for antitrust immunity would "negatively affect[] principles of federalism."[49] The critics really appear to be responding not to the court's failure to assess legislative intent, but rather the court's willingness, because of the value attached to federalism, to immunize behavior that the statute does not explicitly compel.

The *FTC Staff Report* identified *Earles v. State Board of Certified Public Accountants*[50] as another "problem" case.[51] The plaintiff, Kenneth Don Earles, was a licensed certified public accountant (CPA) in Louisiana.[52] Louisiana's CPA Board filed a complaint against Earles alleging that his concurrent practice as a CPA and as a securities broker violated the Board's rules prohibiting the practice of "incompatible occupations" and the "receipt of commissions."[53] The Fifth Circuit affirmed the trial court's ruling that the Board members were entitled to state action immunity.[54]

The Fifth Circuit found, notwithstanding the statute's permissive nature and the absence of an express intent to displace competition, that the statute constituted a "broad grant of authority [to the Board] which includes the power to adopt rules that may have anticompetitive effects."[55] The statute was self-consciously expansive and empowered the Louisiana CPA Board to "[a]dopt and enforce all rules and regulations, bylaws, and rules of professional conduct as the board may deem necessary and proper to regulate the practice of public accounting in the state of Louisiana."[56] The court relied heavily on *Southern Motor Carriers*'s trade-off rationale, quoting its language that "[a]gencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature."[57] The court applied the controlling Supreme Court precedent to balance its need to assess "reasonable foreseeability" without unduly impairing federalism.[58] While critics may claim fidelity to Supreme Court precedent, it appears that their dissatisfaction with a

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[49] *Id.* at 1147.

[50] 139 F.3d 1033 (5th Cir. 1998).

[51] FTC STAFF REPORT, *supra* note 3, at 34–35.

[52] *Earles*, 139 F.3d at 1034–35.

[53] *Id.* at 1035.

[54] *Id.* at 1044.

[55] *Id.* at 1043.

[56] *Id.* at 1042 (quoting LA. REV. STAT. ANN. § 37:75(B)(2) (1988 & Supp. 1998)).

[57] *Id.* at 1044 (quoting S. Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 64 (1985)). The Fifth Circuit also relied on *Hallie*'s recognition that requiring a higher level of articulation would reflect an "'unrealistic view of how legislatures work.'" *Id.* at 1043 (quoting Town of Hallie v. City of Eau Claire, 471 U.S. 34, 43 (1985)). Along similar lines, it also quoted Areeda & Hovenkamp's treatise: "'Unfortunately, state statutes seldom speak with clarity on [the elements of the 'clear articulation' requirement], for the federal antitrust consequences of state legislation—especially of state delegations to subordinate units—was hardly significant in the legislators' minds.'" *Id.* at 1043 (quoting PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 212.3a (Supp. 1997)).

[58] *Id.* at 1043–44.

lower court's reasonable interpretation of Supreme Court rulings also reflects disagreement with the Supreme Court itself.

My purpose in discussing these cases is not to defend the specific outcomes. Instead, it is to underscore the importance of recognizing that a cost to federalism adheres in increasing the articulation requirements necessary to qualify for immunity. Supreme Court precedent, including *Southern Motor Carriers* and *Hallie*, mandates resolution of the clarity trade-off in a manner that is relatively favorable to state action. Taking the Supreme Court cases as our touchstone, these appellate decisions do not seem to be manifestly incorrect.

B. Assessing Reform Proposals Based on Trade-Offs

The consequences of the antitrust critics' general interpretative stance regarding the overall social welfare trade-offs between federalism and competition policy become most apparent in their proposed reforms. Most proposals do not appear to reflect much concern, and certainly no sustained concern, with the potential costs of increasing the burdens attendant to acquiring immunity. This section briefly surveys two proposed reforms, one advocated by the FTC in the course of litigation and one advocated by Professor Bush.

Much of the FTC's reform efforts within this context have occurred through either lawsuits or competition advocacy more broadly defined. Toward that end, it is worth considering the case of *FTC v. Hospital Board of Directors of Lee County* (*Lee County*).[59] This case involved an allegedly anticompetitive acquisition of a competition hospital that, despite an FTC challenge, was allowed by the Eleventh Circuit on state action grounds because the Florida legislature gave the hospital's Board the power to acquire other medical facilities.[60] The *FTC Staff Report* presented this case as "highlight[ing] th[e] concern" that judicial "consideration of state competition policies" was not as meaningful in practice as it was in principle.[61] The *FTC Staff Report* asserted "[a]lthough the court nominally recognized that clear articulation requires not just authorization of the challenged activity but also a state policy authorizing anticompetitive conduct, its actual analysis conflated the inquiries. . . . [N]o true inquiry into intention to displace competition was made."[62] The *FTC Staff Report* further stated, "[a]ssigning a probability to the events is . . . the key to deciding whether the 'foreseeability' defense is properly available."[63] This statement, while beguiling, is inapposite. The issue is not whether to assess

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[59]38 F.3d 1184 (11th Cir. 1994).
[60]*Id.* at 1192.
[61]FTC STAFF REPORT, *supra* note 3, at 32.
[62]*Id.* at 32–33 (citation omitted).
[63]*Id.* at 34.

probabilities but rather the degree of probability required to qualify as foreseeable.

In fact, crucial to *Lee County* was the court's rejection of the FTC's proposed standard of foreseeability. The FTC argued, "a foreseeable anticompetitive effect is one that ordinarily occurs, routinely occurs, or is inherently likely to occur as a result of the empowering legislation."[64] The court rejected the FTC's position and held that:

> By attempting to impose a narrow definition on the term "foreseeable," the Commission essentially seeks a bright line test which turns the test of foreseeability into a test of inevitability, falling just short of requiring the state to expressly indicate its intention to displace competition . . . .
> . . . No such bright line definition or condition has ever been embraced by the Supreme Court or by this Circuit.[65]

A priority for the Eleventh Circuit in *Lee County* was ensuring adequate protection of the "concepts of federalism and state sovereignty,"[66] concepts the court deemed particularly salient given that "the Florida Legislature implicitly gave the Board the power to acquire other hospitals in an effort to provide low-cost healthcare primarily to indigent citizens of Lee County."[67] The nature of the court's inquiry was also influenced by *Hallie*'s caution "against overly intrusive investigations into legislative intent."[68] The court clearly deemed the FTC's proposed standard to be a substantial revision of Supreme Court precedent rather than the uncontroversial interpretation the FTC claimed. Whether or not in light of precedent regarding the clarity trade-off the Eleventh Circuit fairly interpreted the FTC's proposed standard, the normative question whether to revisit the economic efficiency trade-off remains.

More broadly, critics often link their proposed state action immunity reforms to the changing nature of regulated industries. In essence, that change reflects the fact that the government typically controls far fewer aspects of "regulated" industries today than was the case in the past. As Professor Darren Bush observed, "'[r]egulated' industries today are typically regulated only in the parameters under which competition takes place."[69] While changes in the nature and extent of government regulation of industry are clearly substantial developments, the practical consequences of those changes are less clear.

On their face, such changes in regulatory climate help explain the renewed interest in this area of law. Critics argue that the lower courts have not

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[64]*Lee County*, 38 F.3d at 1188.
[65]*Id.* at 1190–91.
[66]*Id.* at 1191.
[67]*Id.*
[68]*Id.*
[69]Bush, *supra* note 3, at 762 (citation omitted).

applied the clear articulation standard in a sufficiently discerning manner. As a result, immunity is conferred within contexts where the legislatures have not sufficiently signaled their intent to displace competition.

If the state governments rely increasingly on hybrid regulatory schemes (in the sense that only portions of a given industry are regulated or are regulated more sparingly), the need for a judiciary that can make more subtle evaluations of state pronouncements is greater. The critics seem to argue that the courts do not apply the current state action tests in a way that adequately adjusts to this new regulatory climate. However, the evidence for this proposition is as yet somewhat thin and it is unclear whether there is any inherent reason why the courts could not make such adjustments if, in fact, they are warranted. Moreover, Professor Hovenkamp observed, "it is not clear . . . that antitrust tribunals need to respond in any programmatic way to changes in regulatory attitude. Repairing imperfections in political processes is not antitrust's purpose."[70]

These arguments notwithstanding, if the changes in the regulatory climate warrant some response, what should be done? Professor Darren Bush authored a provocative proposal calling for identification of competition as the "default rule in any industry."[71] If particular areas of the economy, while still regulated by the state, are less heavily regulated than previously, then would that not argue in favor of a more tailored view of what constitutes the relevant industry rather than changing the underlying balance? More importantly, even if one accepts that society should or does put qualitatively more weight on competition than it had in the past, it would be a logical leap of faith to go from accepting that—as a qualitative matter—the courts should accord greater weight to competition than to the more extreme position that competition should be the default.

As a corollary to competition as the default assumption, Bush advocates that when conflict arises between the default rule and state legislative initiative, the cost should be placed on the state legislatures because they are the "least cost avoider."[72] Bush's application of a "least cost avoider" ("LCA") rule as a metric by which to evaluate state action immunity claims crystallizes key value judgments that many critics of state action immunity ostensibly share but do not articulate.[73] If, however, increasing the clarity of articulation required imposes a cost on the state, and if that cost is substantial or even non-trivial, then the value of realigning this burden is debatable. Again, meaningful consideration of the LCA rule, or any other reform, requires discussion of the underlying trade-offs between federalism and competition. In addition, because this particular argument is explicitly framed in terms of "least cost avoider," it

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[70]Herbert Hovenkamp, *Federalism and Antitrust Reform* 7–8 (Univ. of Iowa Legal Studies, Research Paper No. 05-24, 2005), *available at* http://ssrn.com/abstract=819386.

[71]Bush, *supra* note 3, at 801.

[72]*Id.* at 806.

[73]*See id.*

is reasonable to expect its advocates to identify the different costs if not assign them relative values.

Southern Motor Carriers and other Supreme Court cases highlight the problems—costs—that states would incur if the clear articulation threshold necessary for immunity were increased. The judiciary's concern reflects the well-known difficulties involved in the legislative process. Imposing additional requirements on legislators would likely alter the content of, and possibly the likelihood of enacting, legislation. Thus, the cost of imposing the LCA rule depends on the extent legislation is negatively altered or not enacted at all. Admittedly, discerning the extent of these costs is a tough empirical question. Nonetheless, society cannot meaningfully assess either the proposed reforms or the status quo without greater insight into this issue. Similarly, it is worth considering the relative cost to the states of revising legislation in response to judicial missteps regarding immunity. More specifically, I have not found—nor does it appear that any critics have identified—instances in which a court "erroneously" conferred immunity as reflected in subsequent legislative reform.[74] This certainly raises questions about whether the lower courts have misinterpreted legislative intent as severely as many critics seem to suggest.

States have a range of regulatory and antitrust tools at their disposal with which to address actual or perceived market failures. Although state regulatory schemes that displace federal antitrust policy are frequently criticized as motivated by parochial interests, reliance on such schemes may also merely reflect different normative assessments for public policy questions that defy easy resolution.[75] Moreover, it is important to remember, as one court aptly stated, that "the purpose and result of much political activity is to reduce competition and to favor politically influential groups," and it is also true that "regulation may serve private interests as well as the public interest. In politics, a successful conspiracy is called a majority."[76]

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[74]While I know of no attempt in which a state altered a statute to *remove* immunity "erroneously" found by a court, in at least one instance FTC-initiated litigation appears to have prompted a legislature to confirm its intent to confer immunity. In *FTC v. City of New Orleans*, 105 F.T.C. 1 (1985), the FTC challenged the municipal regulation of taxicabs in New Orleans as anticompetitive. FTC STAFF REPORT, *supra* note 3, at 59. In response, the Louisiana State Legislature passed a "supplemental statute" that explicitly authorized municipalities to regulate taxicabs and specifying that they "should be exempt from federal antitrust liability while doing so." *Id.* This case also illustrates that the cost of writing an explicit exemption need not be prohibitive.

[75]*See generally* Jean Wegman Burns, *Embracing Both Faces of Antitrust Federalism:* Parker *and* ARC America Corp., 68 ANTITRUST L.J. 29, 30 (2000) (describing the value of federalism as "encourag[ing] diversity of thought, experimentation, and innovation" by giving states "latitude").

[76]Sandy River Nursing Care Ctr. v. Nat'l Council on Comp. Ins., 798 F. Supp. 810, 815 (D. Me. 1992), *aff'd sub nom.* Sandy River Nursing Care v. Aetna Cas., 985 F.2d 1138 (1st Cir. 1993); *see also* City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 377 (1991) ("The fact is that virtually all regulation benefits some segments of the society and harms others . . . ."); Hovenkamp, *supra* note 31, at 348 ("[While immunizing anticompetitive] special interest

IV. CONCLUSION

A primary difference between the standard for state action immunity doctrine in its current form and alternatives critics often propose lies in the requisite showing of legislative intent to displace competition necessary to confer immunity. Decades after the Supreme Court first articulated this doctrine, but decades before the current debate, then-Chief Justice Burger observed: "Our conceptions of the limits imposed by federalism are bound to evolve . . . . [As such], we should not treat the *result* in the *Parker* case as cast in bronze; rather, the scope of the Sherman Act's power should parallel the developing concepts of American federalism."[77] In its most extreme, and perhaps most candid, form, some critics have essentially proposed that when ambiguity exists regarding legislative intent, the default position should be to reject immunity. Such a position, even in its more attenuated forms, should be recognized as a call to reconsider—whether at the jurisprudential level or by Congress[78]—the underlying value of federalism. Once debated openly in this manner, the antitrust community will have to content itself with the fact that not all of the relevant considerations will necessarily fall within an economic efficiency framework. Part of the obligation of the antitrust community in the state action immunity debate then lies in illuminating the insights to be gleaned from its unique trade-off analysis while not losing sight of the limitations to that analysis.

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regulations . . . is disconcerting as a matter of policy, the more important principle is that correcting flaws in political processes is not an antitrust task.").

[77]City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 421 n.2 (Burger, C.J., concurring).

[78]*See, e.g.*, Thomas M. Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 CAL. L. REV. 227, 252–53 (1987) ("Congress is the branch of government that should amend the antitrust laws to reach state activities or enact new federal laws to regulate portions of the economy on a national basis." (footnote omitted)). Some have questioned the "[c]ontinued [v]itality of the *Parker* [f]ramework" in light of the Supreme Court's ruling in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). ANDREW I. GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 987 (2002). Gavil et al. noted that the *Parker* Court, "in observing that the commerce power was adequate to reach the activities of the state, . . . left the impression that Congress could, if it wanted to, alter the [Sherman Act] to extend to anticompetitive state action." *Id.* However, the authors contend that "Congress's authority to alter state action immunity as it developed under *Parker* probably has been limited by *Seminole Tribe*." *Id.* at 988. Though to date, "[t]he Court [has] had no occasion to evaluate the implications of Congress authorizing public versus private rights of action for a broader Sherman Act." *Id.* at 987.