Balancing State Sovereignty and Competition: An Analysis of the Impact of Seminole Tribe on the Antitrust State Action Immunity Doctrine

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BALANCING STATE SOVEREIGNTY AND COMPETITION: AN
ANALYSIS OF THE IMPACT OF SEMINOLE TRIBE ON
THE ANTITRUST STATE ACTION
IMMUNITY DOCTRINE

SUSAN BETH FARMER*

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THE greatest impact of the Seminole Tribe v. Florida\(^1\) decision will likely be felt in the range of federal causes of action that have exclusive remedies in federal court.\(^2\) Antitrust cases are among such causes of action.\(^3\) In seeking to avoid antitrust liability, de-

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2. See id. at 1118, 1125-28 (overruling Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), by holding that Eleventh Amendment precludes United States Congress from authorizing suits against states pursuant to federal statutes enacted under Congress's Commerce Clause power). Congress may thus abrogate state sovereign immunity to effectuate the Fourteenth Amendment pursuant to § 5 of that amendment. See id. at 1125 (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 452-56 (1976)). In Seminole Tribe, the United States Supreme Court recalled its earlier decision in Fitzpatrick in noting that "§ 1 of the Fourteenth Amendment contained prohibitions expressly directed at the States and that § 5 of the Amendment expressly provided that 'The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.'" Id. (quoting Fitzpatrick, 427 U.S. at 453). The Seminole Tribe Court went on to explain that "through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore that § 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment." Id.
3. See id. at 1134 n.1 (Stevens, J., dissenting). Other such federal statutory schemes include bankruptcy, trademark and copyright, and environmental laws. Id. (Stevens, J., dissenting). The dissent in Seminole Tribe predicted that the majority's decision would "prevent[ ] Congress from providing a federal forum for a broad range of actions against States." Id. (Stevens, J., dissenting). In fact, some bankruptcy and copyright act cases decided after the Seminole Tribe ruling are consistent with this fear.

In Chavez v. Arte Publico Press, 59 F.3d 539 (5th Cir. 1995), the United States Court of Appeals for the Fifth Circuit held that Congress had abrogated state sovereign immunity under the Lanham and Copyright Acts when it denied immunity
fendants have invoked the protections of the antitrust state action doctrine, which immunizes only that anticompetitive activity imposed and supervised by states. This immunity bars suits against state and private actors alike. After Seminole Tribe, state defendants will escape all antitrust liability, whether or not the traditional requirements of the state action doctrine have been met. Thus, the state action doctrine is likely to be transformed into an antitrust exemption for private party defendants only, while state governmental entities will be completely protected from suit in federal court by constitutional sovereign immunity under the Eleventh Amendment.

The state action doctrine, which provides immunity against antitrust violations, has been incrementally developed by the federal courts over the past fifty-three years. In the wake of the Seminole

from copyright violations to a state university for publishing copies of short stories without the writer's consent. See id. at 546-48 (finding that Congress has and exercised authority to abrogate state sovereign immunity pursuant to its copyright powers), vacated and remanded sub nom. University of Houston v. Chavez, 116 S. Ct. 1667 (1996) (remanding case for further consideration in light of Seminole Tribe decision). Additionally, the United States Court of Appeals for the Seventh Circuit allowed a Chapter 11 trustee to proceed against a state indemnity fund and a state commission to recover funds allegedly transferred in violation of the Bankruptcy Code. Matter of Merchants Grain, Inc., 59 F.3d 630, 634-36 (7th Cir. 1995) (finding that Congress has exercised authority to abrogate state sovereign immunity pursuant to its bankruptcy powers), vacated and remanded sub nom. Ohio Agric. Commodity Depositors Fund v. Mahern, 116 S. Ct. 1411 (1996) (remanding case for further consideration in light of Seminole Tribe decision). Under the broad grant of state sovereign immunity announced in Seminole Tribe, plaintiffs in cases such as these may be precluded from pursuing their federal remedies. See Seminole Tribe, 116 S. Ct. at 1134 (Stevens, J., dissenting) (predicting effects of majority decision).

4. See PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 209.1a, at 105 (1996 Supp.) ("[F]ederal antitrust law allows the states to depart from the ordinary market principles underlying the Sherman Act (1) if the state really wants to displace federal antitrust law and manifests that policy choice through an affirmative and clearly articulated expression and (2) if the resulting private power is actively supervised by public officials."). See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105-06 (1980) (finding California scheme for wine pricing was preempted by Sherman Act because state failed to actively supervise scheme as it "neither established nor review[ed] the reasonableness of the price schedules; nor [did] it regulate the terms of fair trade contracts"); Parker v. Brown, 317 U.S. 341, 352 (1943) (upholding California agricultural prorate program over Sherman Act preemption challenge because state-adopted program was actively supervised in that "the state itself exercise[d] its legislative authority in making the regulation and in prescribing the conditions of its application").

5. The basic substantive antitrust statutes are broad and general. See, e.g., 15 U.S.C. §§ 1-7 (1994) (Sherman Act) (prohibiting, in general, restraints of trade and monopolization); 15 U.S.C. §§ 12-27 (1994) (Clayton Act) (prohibiting restraints of trade and monopolistic mergers). This lack of specificity has required the federal courts to construct and develop how the antitrust laws will be applied. According to Areeda and Turner:
Tribe decision concerning state sovereign immunity, the state action doctrine is likely to undergo significant practical and theoretical changes.

The state action doctrine for antitrust immunity requires courts to balance two fundamental, and sometimes conflicting, policies: (1) competition, which is the rationale of the antitrust laws and (2) state sovereignty, which includes the power to supplant the competitive marketplace by imposing anticompetitive regulations. To balance these two policies, the state action doctrine requires courts to investigate the commitment of a state government to its challenged state regulations and policies, and to determine whether the state is properly advancing its sovereign interests in supplanting competition. If a court finds that a state government meets these requirements, then the state action doctrine provides that state sovereignty triumphs over competition. On the other hand, if a court concludes that the state was not sufficiently committed to its regulatory policy, then application of the antitrust laws would not tread upon state sovereignty. Thus, competitive interests can safely be given precedence. This commitment is shown by a

Just as the courts have created and developed the law of contracts and torts, with, to be sure, occasional or substantial intervention by the legislature, so also the federal courts have created a complex and intricate body of antitrust law based on a few dozen words in the several governing statutes.

Phillip Areeda & Donald F. Turner, I Antitrust Law, ¶ 106, at 15 (1978). As the law of antitrust developed, the Supreme Court announced the existence of the state action doctrine to give deference to state anticompetitive policies over federal antitrust laws. Id. ¶ 209, at 60. See Parker, 317 U.S. at 351 (“There is no suggestion of a purpose to restrain state action in the [Sherman] Act’s legislative history.”).

6. See Parker, 317 U.S. at 350-52 (balancing state sovereignty powers of establishing agricultural prorating program against Sherman Act’s goal of promoting competition); Areeda & Hovenweep, supra note 4, ¶ 209.2, at 114 (“Although the effect [of the statute in Parker] was to displace the competitive market . . . for the benefit of California producers at the expense of consumers throughout the country, the Court held that the Sherman Act was not intended to prevent the States from regulating commerce.”).

7. See, e.g., Parker, 317 U.S. at 350-52 (finding adequate commitment by California in advancing agricultural prorate program).

8. See Areeda & Turner, supra note 5, ¶ 209, at 60 (“[A]ntitrust laws may be impliedly exempt, as ‘state action,’ conduct which is actually regulated by a state under a clear policy to substitute regulation for the strictures of the antitrust laws.”).

9. Cf. id. ¶¶ 213a, 214a, at 73, 80-81 (discussing reasons for requiring active state supervision of state regulatory scheme and clear expression of state intent to supplant antitrust laws in order for state action immunity to be appropriate). Antitrust laws are aimed at promoting competition and market control, while state action immunity allows states to determine “areas inappropriate for market control.” Id. ¶ 213a, at 73. Thus, the adequate supervision requirement ensures that states who pursue an anticompetitive policy will actively watch the area where it
legislative intent to supplant competition and active supervision of the activity by the state. Finally, this balancing process utilized by the courts to analyze the intent of state legislatures and the authenticity of state supervision has historically allowed states, state agencies and state departments to be sued in federal court under the antitrust laws and to be found liable if the state failed to meet the judicial test for state action immunity.

The Seminole Tribe decision views state sovereignty under the Eleventh Amendment as the policy of overriding importance, not subject to being weighed against any other competing interest such as competition. Accordingly, the Eleventh Amendment will trump the antitrust state action doctrine by immunizing states from private antitrust suits in federal court without requiring any inquiry into whether the state was acting as a true sovereign or whether application of the antitrust laws would interfere with governmental interests.

It must be recognized that the actual impact of the Seminole Tribe decision upon states themselves is likely to be felt in relatively few cases, because few antitrust cases have named state entities as defendants and fewer still have awarded relief. The decision, however, will have a potentially important impact upon private firms that claim state action immunity when acting pursuant to state statutes that supplant competition. It will also affect persons injured in their “business or property” by state policies that limit competition. Finally, although Seminole Tribe was not an antitrust case, its decision on state sovereign immunity will alter two types of governmental and private relationships under the antitrust laws: (1) the balance of power between the states and the federal government and (2) the liability of states to persons harmed by state government policies affecting competition.

exists. *Id.* Furthermore, requiring a clear expression of state intent to displace antitrust law helps to limit “errors in the federal perception about state policy.” *Id.* ¶ 214a, at 81.


11. *See id.* at 1131-32 (holding Eleventh Amendment not subject to subversion by other competing interests).

12. For a discussion of the impact of the antitrust state action doctrine upon the states, see *supra* notes 3-4 and accompanying text.

13. *See* 15 U.S.C. § 15(a) (1994) (providing that “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States … without respect to the amount in controversy, and shall recover threefold the damages by him sustained …”).
Part I of this Article briefly examines the development of the law on state sovereign immunity by placing the Seminole Tribe decision in a historical perspective. Part II then specifically examines the Seminole Tribe decision, in which the historical minority judicial interpretation concerning Congress's authority to abrogate state sovereign immunity now becomes the majority view. Part III reviews the antitrust state action doctrine, which has been developed to immunize anticompetitive state and private actions that are actively supervised by a state and undertaken pursuant to a clearly articulated state policy to supplant competition with regulation. Part III concludes that, while the underlying federalism rationale of the state action doctrine is consistent with the Eleventh Amendment, the antitrust doctrine inquires into whether the challenged activity is truly the act of a sovereign, thereby balancing the goals of promoting competition and respecting state sovereignty. Part IV analyzes antitrust actions in which defendant states have sought both antitrust state action immunity and Eleventh Amendment sovereign immunity. Part IV finds that few cases have recognized the distinctions between the two theories of sovereign immunity. Finally, Part V examines the potential effect of the Seminole Tribe decision on antitrust litigation and identifies the following two changes. First, the Eleventh Amendment does not take into consideration the value of competition, whereas the state action immunity defense allows courts to balance the goal of competition against deference to a state acting as a sovereign. Second, the more limited state action defense will now only apply to private actors in antitrust cases while the broader Eleventh Amendment sovereign immunity will apply to states as an absolute bar to any suit for antitrust liability.

I. THE DEVELOPMENT OF THE DOCTRINE OF STATE SOVEREIGN IMMUNITY UNDER THE ELEVENTH AMENDMENT

The power of the federal courts is derived from Article III of the United States Constitution, which extends the federal judicial

14. For a discussion of the development of the doctrine of state sovereign immunity, see infra notes 19-94 and accompanying text.
15. For a discussion of the Seminole Tribe decision, see infra notes 95-166 and accompanying text.
16. For a discussion of the antitrust state action doctrine and its consistency with the Eleventh Amendment, see infra notes 167-259 and accompanying text.
17. For an analysis of the Eleventh Amendment and the state action defenses in antitrust cases, see infra notes 260-340 and accompanying text.
18. For a discussion of the impact of Seminole Tribe on antitrust theory and practice, see infra notes 341-65 and accompanying text.
power to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority" and to controversies "between a State and Citizens of another State," among other things.\textsuperscript{19} While state sovereign immunity might have been an intended concept in the original framing of the Constitution, Article III does not specifically refer to the sovereign immunity of states from suit in federal court.

In defining the extent of sovereign immunity to be afforded to the newly-formed states, the Framers of the Constitution had a variety of options: abrogating any and all sovereign immunity that was possessed by the Colonies before the adoption of the Constitution, recognizing sovereign immunity but authorizing the newly-formed Congress or its successors to abrogate that immunity, or adopting sovereign immunity as an absolute bar to suits against states in federal courts.\textsuperscript{20} The majority in Seminole Tribe found that Congress had chosen the third option of sovereign immunity as an absolute bar, while the dissenters found no consensus among the Framers as to the issue of sovereign immunity.\textsuperscript{21} This historical debate was a critical question in Seminole Tribe, and its resolution will impact cases brought under the antitrust laws and other federal statutes that are enforceable exclusively in federal court.

A. The Chisholm Decision

The development of the principles of state sovereign immunity by the United States Supreme Court has been long and contentious. Initially, the Court held in Chisholm v. Georgia\textsuperscript{22} that states

\textsuperscript{19} U.S. Const. art. III, § 2, cl. 1.

\textsuperscript{20} See Seminole Tribe v. Florida, 116 S. Ct. 1114, 1147 (1996) (Souter, J., dissenting) ("[T]he 1787 Constitution might have addressed state sovereign immunity by eliminating whatever sovereign immunity the states previously had, ... by recognizing an analogue to the old immunity in the new context of federal jurisdiction ... or by enshrining a doctrine of inviolable state sovereign immunity ... ").

\textsuperscript{21} Id. The prevailing post-Seminole Tribe view, therefore, is that an understanding of sovereign immunity existed before the Constitution was adopted and that such an understanding was subsumed, sub silentio, into the Constitution. See generally id. at 1130 (explaining concept of sovereign immunity was preexisting and was adopted by Constitution). The competing view, now the minority, finds no compelling evidence of a common understanding about sovereign immunity or that any understanding was part of the Constitution. Id. at 1147. It is sufficient to note that the documentary evidence is at least equivocal.

\textsuperscript{22} 2 U.S. (2 Dall.) 419 (1793) (assumpsit action brought by South Carolina residents against State of Georgia).
were not immune from suits by noncitizens. Thus, at a minimum, shortly after the ratification of the Constitution, the federal courts had diversity jurisdiction in suits brought by citizens of one state against other states.

The Eleventh Amendment, adopted in 1798, after the *Chisholm* decision, clearly limits the power of the federal courts with respect to states, although the reasons for its adoption have been disputed. The Amendment simply states that: "The Judicial power of the United States shall not be construed to extend to any suit in a State by Citizens of another State."
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." 26

On its face, the Eleventh Amendment applies exclusively to "States." As a threshold matter, then, if the Eleventh Amendment is inapplicable to any entity other than one of the states, federal courts should mechanically review pleadings and dismiss all claims that are brought by noncitizens of a state naming that state as a defendant. Such a narrow reading of the rule, however, would put a premium on clever pleading and could easily frustrate the intent of the Amendment. 27 Indeed, this is not the rule. The Court has recognized that the entities entitled to the protection of the Elev-

26. U.S. Const. amend. XI.

27. See H. Stephen Harris, Jr. & Michael P. Kenny, *Eleventh Amendment Jurisprudence After Atascadero: The Coming Clash with Antitrust, Copyright, and Other Causes of Action over Which the Federal Courts Have Exclusive Jurisdiction*, 37 Emory L.J. 645, 663 (1988) (suggesting technicalities of pleading can be important when plaintiff seeks injunctive relief against state official under *Ex parte Young* doctrine). In *Ex parte Young*, 209 U.S. 123 (1908), the Supreme Court held that a suit naming only a state official, and not the state itself, would not be barred by the Eleventh Amendment. *Id.* at 155-56 ("[I]ndividuals, who, as officers of the State, . . . threaten . . . to enforce against parties affected an unconstitutional act, . . . may be enjoined by a Federal court of equity from such action."). While *Young*, in effect, created a legal fiction, it has been recognized as a necessary tool in vindicating federal rights and holding state officials "to the supreme authority of the United States." Harris & Kenny, supra, at 661-62. Thus, the *Ex parte Young* doctrine works to avoid the frustrations that a narrow reading of the Eleventh Amendment could create in regard to technical pleading limitations. Harris and Kenny noted:

For example, a plaintiff seeking injunctive relief against a state agency must name as the party defendant the state official and not the state agency, because an injunctive action against a state agency is barred by the [*E]leventh [*A]mendment. Such a pleading requirement manifestly exalts form over substance, because any relief granted by a court will obviously operate against a state agency.

*Id.* at 663 (footnotes omitted).
enth Amendment include both states and their agencies. The same rule applies to suits for damages and injunctive relief.

Courts and commentators have described the Eleventh Amendment as having been adopted to explicitly reverse the Chisholm decision. Whether Congress intended the Amendment to be limited solely to diversity cases brought by citizens of one state against a foreign state, as in Chisholm, has been debated by courts and commentators ever since the Chisholm decision was first rendered. Nearly 100 years after the Amendment was adopted, the Supreme Court declared that Chisholm had “created such a shock of surprise throughout the country that, at the first meeting of Con-

28. See Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945) (holding suit against Indiana’s Treasury Department to be barred by Eleventh Amendment). But see Parden v. Terminal Ry. of Ala. State Docks Dep’t Co., 377 U.S. 184, 185 (1964) (holding state immunity may be waived by showing congressional intent to do so), overruled in part by Welch v. Texas Dep’t of Hwy. & Pub. Transp., 483 U.S. 468, 478 (1987) (holding that “to the extent that Parden . . . is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language, it is overruled”). In Parden, the plaintiffs sued the railway, which was owned and operated by a state agency, for violating the Federal Employers’ Liability Act (FELA). Id. at 184 (citing 45 U.S.C. §§ 51-60). The State defended on the Eleventh Amendment ground that the railroad was a state agency, and the State had not consented to be sued. Id. at 185. The Supreme Court found that Congress intended to subject all railroad operators to FELA and that the states had waived some of their own sovereign immunity through the adoption of the Commerce Clause. Id. at 187-92. The Welch decision overruled Parden in part by requiring a clear and unmistakable expression by Congress rather than by showing a mere Congressional intent to waive state immunity. Welch, 483 U.S. at 478; see also Harris & Kenny, supra note 27, at 663 & n.78 (explaining how Eleventh Amendment applies to state agencies and state officials in their official capacities).

29. Ford Motor Co., 323 U.S. at 464 (“[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.”).

30. Alabama v. Pugh, 438 U.S. 781, 782 (1978) (denying injunction on ground that Eleventh Amendment immunized Alabama Board of Correction from suit). In Pugh, both the State and its Board of Corrections sought dismissal of Eighth and Fourteenth Amendment claims for injunctions concerning conditions in the Alabama prisons pursuant to Eleventh Amendment sovereign immunity. Id. at 781. The Supreme Court agreed, stating that “[t]here can be no doubt . . . that suit against the State and its Board of Corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such a suit.” Id. at 782.

31. See, e.g., Principality of Monaco v. Mississippi, 292 U.S. 313, 325-26 (1934) (describing Eleventh Amendment as being adopted to reverse result of Chisholm); Hans v. Louisiana, 134 U.S. 1, 11 (1890) (same). The shock and surprise created by Chisholm prompted an almost immediate reaction, as the Eleventh Amendment was nearly unanimously adopted by Congress and subsequently approved by the state legislatures. Id.

gress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States. Indeed, at least one version of the Amendment was introduced in the second session of Congress, two days after the Supreme Court decided Chisholm in 1793. Congress, however, adjourned without adopting the resolution. It was not until the third session of Congress that several resolutions embodying various versions of what is now the Eleventh Amendment were introduced and, in due course, one was adopted. The version ultimately adopted was passed by both the Senate and the House, and was then sent to the states for ratification in 1794, two years after Chisholm.

On its face, the Eleventh Amendment appears to deal only with the specific issue in Chisholm, which Congress apparently perceived to be a problem—that is, the ability of citizens of one state to bring suit in federal court against another state pursuant to the diversity jurisdiction of the federal courts. Just as clearly, the Amendment does not, on its face, limit federal court jurisdiction over states in federal question cases brought under the Constitution or federal laws. The debatable issue after the adoption of the Eleventh Amendment, therefore, was whether the Amendment merely eliminated federal diversity jurisdiction in cases against states, or whether it went further and eliminated all federal court jurisdiction

33. Hans, 134 U.S. at 11.
34. Gibbons, supra note 25, at 1926-27.
35. Id. at 1927.
36. Id. at 1932-34.
37. Id. at 1933-34.
38. See Vicki C. Jackson, The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity, 98 YALE L.J. 1, 44-46 (1988) (stating that Eleventh Amendment was directed at diversity cases involving state defendants and not at federal question cases). According to Jackson, Chisholm “was a state law claim, presenting no substantive federal issues. Original jurisdiction in the Supreme Court was sustained solely on the basis of the state-citizen clause. Because the perception that the original jurisdiction of the Supreme Court could not be divested by statute, a constitutional amendment was thought necessary to overcome Chisholm’s effect.” Id. at 45. Moreover, “the amendment was widely supported in Congress by federalists and non-federalists alike.” Id. at 46.
39. See Gibbons, supra note 25, at 1927, 1934-38 (asserting that plain language of Eleventh Amendment alters only Article III party status but does not affect Article III subject matter jurisdiction). One commentator has persuasively pointed out that if Congress had intended to strip federal courts of all jurisdiction over states, the last 14 words of the Eleventh Amendment would have been omitted, leaving the Amendment to read simply: “The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States.” Id. at 1927.
over states in actions brought by citizens of foreign states, whether brought under federal question or diversity jurisdiction.40

B. The Hans Decision

A century after the adoption of the Eleventh Amendment, the Supreme Court, in Hans v. Louisiana,41 assumed that the Amendment applied to federal question cases, as well as diversity cases, brought against a state by citizens of a foreign state.42 Accordingly, the Court decided that states must also be immune from federal question suits brought by their own citizens, because a contrary rule would permit the anomalous result of prohibiting suits against states strictly based upon the plaintiff’s citizenship. Thus, suits based upon federal questions brought by noncitizens would be dismissed while the same suits brought by a state’s own citizens would be allowed.43

In so holding, Hans decided a different question from that articulated in Chisholm: “whether a State can be sued in a circuit court of the United States by one of its own citizens upon a suggestion

40. See generally Seminole Tribe v. Florida, 116 S. Ct. 1114, 1150-51 (1996) (Souter, J., dissenting) (discussing debate over scope of Eleventh Amendment). In a dissenting opinion, Justice Souter characterized the majority of scholarly opinion as taking the view that the Eleventh Amendment was adopted to provide immunity in diversity cases. Id. at 1150-51 & n.8 (Souter, J., dissenting). Moreover, the broader reading of the Amendment leaves a loophole—federal question cases brought by citizens against their own states. Id. at 1150-51 (Souter, J., dissenting). Seminole Tribe itself involved a suit by Florida citizens against their own state.

41. 134 U.S. 1 (1890).

42. See id. at 10-21 (allowing Louisiana citizen to sue Louisiana, asserting that state’s default on its bonds, issued during Reconstruction, violated Contract Clause of Constitution).

43. Id. at 10, 14-15. The Seminole Tribe dissenters and commentators have criticized the Hans decision as having been decided incorrectly. See Seminole Tribe, 116 S. Ct. at 1153-54 (Souter, J., dissenting) (describing Hans as “creatin[g] its own anomaly in leaving federal courts entirely without jurisdiction to enforce paramount federal law at the behest of a citizen against a State that broke it”). Indeed, commentators discussing the historical setting of the Hans decision have observed that it may have been influenced by other political considerations—enforcing an adverse judgment against an unwilling state. See Gibbons, supra note 25, at 2000-01 (noting that Hans Court was silent as to other political considerations, but lower courts recognized possible difficulty in coercing states to comply with adverse judgments); David L. Shapiro, Wrong Turns: The Eleventh Amendment and the Pennhurst Case, 98 HARV. L. REV. 61, 70 (1984) (recognizing that “efforts to coerce the states to pay their debts would prove unenforceable”). In fact, Justice Souter noted that federal troops were removed from the South pursuant to the Compromise of 1877 in return for Southern concurrence in the 1876 election of President Rutherford B. Hayes. Seminole Tribe, 116 S. Ct. at 1155 (Souter, J., dissenting). Furthermore, he observed that this probably would have left the federal government unable to enforce any court-ordered relief against hostile Southern states, including a judgment on a bond such as Hans sought. Id.
that the case is one that arises under the Constitution or laws of the United States." In *Hans*, a Louisiana citizen sued the State of Louisiana in federal court alleging that the State's failure to pay the principal and interest on state-issued bonds violated Article I, Section 10 of the Constitution, the Contract Clause. Thus, on its face, *Hans* appears to present a different issue from that decided in *Chisholm*—one that would not appear to be controlled by the language of the Eleventh Amendment limitations on federal judicial power for two reasons. First, the *Hans* plaintiff was a citizen of Louisiana suing his own state, and second, the federal court's jurisdiction was based on federal question rather than diversity jurisdiction. In *Hans*, the Court first recognized that the language of the Eleventh Amendment had eliminated federal diversity jurisdiction in cases between states and noncitizens. Justice Bradley, writing for the *Hans* Court, concluded that the Eleventh Amendment also barred federal jurisdiction in cases involving federal question claims against states by noncitizens. Therefore, he felt an "anomalous result" would occur if a citizen could sue his or her own state in federal court on a federal question but a noncitizen could not sue that state in federal court on the same federal question. Justice Bradley agreed with Justice Iredell's dissent in *Chisholm* by holding that the Constitution did not intend to enlarge the power of the federal judiciary or create remedies that had not existed at common law. Citing to *The Federalist Papers* and various debates at the time of the proposed Constitution, Justice Bradley found that under the common law as it existed in the Colonies before the adoption of the Constitution, sovereign states could not be sued without their consent. Thus, Justice Bradley concluded that in

45. *See id.* at 1-3 (explaining facts of case).
46. *Id.*
47. *Id.* Both federal question and diversity jurisdiction are derived from Article III, section 2 of the Constitution. The former is described as "[t]he judicial power [that] shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ." U.S. CONST. art. III, § 2, cl. 1. Diversity jurisdiction includes "[c]ontraversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States . . . ." *Id.*
48. *See Hans*, 134 U.S. at 10 (recognizing that Eleventh Amendment literally only prohibits noncitizen suits against states).
49. *See id.* (finding "that a State cannot be sued by a citizen of another State, . . . on the mere ground that the case is one arising under the Constitution or laws of the United States, is clearly established").
50. *Id.*
51. *Id.* at 12.
52. *Id.* at 12-14.
embodies the common law understanding, the Constitution never authorized suits against sovereign states without their consent.53

This reading lessens the significance of the Eleventh Amendment by transforming it into simply a tool to reverse Chisholm and not an alteration of the original power of the judiciary.54 The Hans decision has been criticized but never reversed.55

53. See id. at 15 ("The supposition that [the Eleventh Amendment would allow states to be sued without their consent] is almost an absurdity on its face."). Relying on Justice Iredell's dissent in Chisholm, Justice Bradley argued that suits against the sovereign were unheard of at common law. Id. at 12-14; see Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 435 (1793) (stating that suits against sovereign did not exist in England or at time of first American settlements). Furthermore, Justice Bradley relied on statements of such founding fathers as Alexander Hamilton, George Mason, Patrick Henry and James Madison to show that suits against the sovereign were not contemplated in the constitutional framework. Hans, 134 U.S. at 13-14.

54. See Amar, supra note 32, at 1475 (criticizing Court's interpretation that Eleventh Amendment's purpose was to secure general immunity for states). In the words of one commentator:

The Court's decision in Chisholm provoked a chorus of calls around the country for a constitutional amendment. The text eventually agreed upon . . . was undeniably designed to repudiate the majority analysis in Chisholm and overrule its holding. From that simple starting point, the Supreme Court has arrived at the following interpretation of the case and the Amendment: The defect of Chisholm was its failure to recognize absolute state sovereign immunity from citizen suits in all circumstances, and this defect was corrected by enshrining such immunity in the Constitution. No individual can sue her own or any other state in federal court unless the defendant's constitutional immunity is in some special way waived or abrogated. Sovereign immunity ousts all federal jurisdiction, whether in law, equity, or admiralty; whether the suit is based on state law, congressional statute, or the Constitution itself; and whether or not state liability would most fully remedy a constitutional wrong perpetrated by the state itself. The state thus enjoys sovereign immunity even when it has violated a limitation on that sovereignty imposed by the ultimate sovereign, the American People.

All of this is, in a word, nonsense. Id. at 1473.

55. See id. at 1473-81 (asserting that Hans achieved general state sovereign immunity "only by mangling the [Eleventh Amendment's text"); Gibbons, supra note 25, at 2003-04 (observing that Hans was "statesmanlike performance" in Eleventh Amendment analysis, which is "in large measure an unflinchingly political one" because decision made pragmatic sense although lower court had little power to enforce any judgment against southern state that had decided to repudiate its bonds in that post-Civil War era); Jackson, supra note 38, at 13 ("These inconsistencies have led many to conclude that the Hans Court was in error in its apparent view that the judicial power of the federal courts did not extend to federal claims against states."); Shapiro, supra note 43, at 70 ("Regardless of its possible political justifications, the rationale of Hans v. Louisiana . . . should be regarded as an unforced error—a choice that was neither required nor fruitful.").
C.  Modern Eleventh Amendment Analysis

After *Hans*, the final issue remaining open was whether Congress could abrogate a state's sovereign immunity. If the *Hans* rationale was based upon constitutional grounds, then Congress lacked the power to abrogate the states' immunity. If the decision was based upon common law, then the Congress had such power. Two cases have implied in dicta that Congress did have that power under the Commerce Clause of the Constitution. In *Parden v. Terminal Railway of Alabama State Docks Department*, the Court held the Federal Employer's Liability Act (FELA) was applicable to a railroad that was operated by a department of the state. The State argued that it was immune from suit because it had not waived its sovereign immunity. The Court found that Congress had in-
tended to apply FELA to every employer, including states,60 and that Congress had the power to do so under the Commerce Clause.61 The Court's holding, however, was explicitly based on its finding that the State had consented to suit.62 Similarly, in Employees of Department of Public Health and Welfare v. Department of Public Health and Welfare,63 the same issue arose in the context of another federal regulatory scheme enacted pursuant to Congress's power

60. See Parden, 377 U.S. at 187 ("We think that Congress, in making the FELA applicable to 'every' common carrier by railroad in interstate commerce, meant what it said.").

61. See id. at 192 ("By empowering Congress to regulate commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation."). The dissent in Parden framed the issue in terms of congressional power to require states to waive their sovereign immunity as part of participating in a federally regulated activity, which must be done unequivocally. Id. at 198-99. Thus, in his dissent, Justice White argued:

It should not be easily inferred that Congress, in legislating pursuant to one article of the Constitution, intended to effect an automatic and compulsory waiver of rights arising under another. Only when Congress has clearly considered the problem and expressly declared that any State which undertakes given regulable conduct will be deemed thereby to have waived its immunity should courts disallow the invocation of this defense.

Id. (White, J., dissenting). The majority, then, was of the view that Congress could abrogate state sovereign immunity pursuant to its power to legislate under the Commerce Clause. Id. at 190-92. The dissent would reach the same result by a different route—recognizing that Congress could legislate in a way that gave the states a choice between waiving their immunity and enjoying federal benefits, or maintaining their immunity at the expense of federal benefits. Id. at 198-99 (White, J., dissenting).

The Court's later decision in Welch v. Texas Department of Highways and Public Transportation partially overruled the Parden decision by requiring that any congressional abrogation of the states' immunity be done by "unequivocal expression," rather than by implication through a mere judicial finding of such congressional intent. See Welch, 483 U.S. 468, 478 (1987) ("Although our later decisions do not expressly overrule Parden, they leave no doubt that Parden's discussion of congressional intent to negate Eleventh Amendment immunity is no longer good law."). Thus, without such an unequivocal expression, congressional legislation enacted pursuant to the Commerce Clause is not enough to abrogate the Eleventh Amendment. See id. (refusing to extend Parden in order to "infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution.") (quoting Employees of Dept' of Pub. Health and Welfare, 411 U.S. at 285).

62. See id. at 192 (holding that Alabama's continued operation of railroad for 20 years after enactment of FELA was consent to suits authorized by FELA). The Court confirmed this interpretation of the Parden holding in Employees of Department of Public Health and Welfare v. Department of Public Health and Welfare, 411 U.S. 279 (1973), where it stated: "[T]here can be no doubt that the Court's holding in Parden was premised on the conclusion that Alabama, by operating the railroad, had consented to suit in the federal courts under FELA." Id. at 280 n.1.

under the Commerce Clause—the Fair Labor Standards Act (FLSA), which Congress also intended to apply to all employers. The Court found, however, that applying FLSA to states as employers would include a vast number of people working for the states in a variety of different jobs. In light of the significant impact of subjecting states to suit in federal court under FLSA, and in the absence of legislative history on the subject, the Court refused to infer that Congress had intended to abrogate the immunity of the states from suit. Thus, in refusing to lift state sovereign immunity in the absence of a clear congressional intent to do so, the Court implicitly recognized that Congress could abrogate state sovereign immunity if it did so clearly and expressly.

In *Fitzpatrick v. Bitzer*, the Court further found that Congress had successfully abrogated state sovereign immunity, albeit pursuant to the Fourteenth Amendment. In *Fitzpatrick*, the plaintiffs

64. See id. at 282-83 (citing sections of FLSA which impose liability on employers who violate provisions of this Act). In the Missouri case, state employees sued for overtime pay as provided for and required by § 16 of FLSA. Id. at 281 (citing 29 U.S.C. § 216(b)). The language of the FLSA includes states as covered employers with respect to certain classes of employees, specifically employees of "a hospital, institution, or [certain] school[s]." Id. at 282-83.

65. See id. at 284-85 (arguing that interpretation would place enormous fiscal burdens on states). The Court found that applying FLSA to states as employers would result in including not only employees of state hospitals, but also "elevator operators, janitors, charwomen, security guards, secretaries, and the like in every office building in a State's governmental hierarchy." Id. at 285.

66. See id. (concluding that states did not forfeit immunity). The Court stated that:

It is not easy to infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution. Thus, we cannot conclude that Congress conditioned the operation of these facilities on the forfeiture of immunity from suit in a federal forum.

Id.

67. See id. (refusing to deprive Missouri of constitutional immunity without some indication by Congress in "clear language that the constitutional immunity was swept away"). But see id. at 289 (Marshall, J., concurring) (concluding that Congress had intended to abrogate state sovereign immunity by enacting FLSA). Although Justice Marshall surmised that states had forfeited their immunity under the FLSA, he noted that Article III of the Constitution precludes suits against states in federal courts. Id. at 282-94 (Marshall, J., concurring). States, however, may consent to private suits against them in federal courts. Id. at 294 (Marshall, J., concurring). In this case, Justice Marshall found that Missouri had not manifested consent to federal suit by continuing to operate public hospitals after enactment of the FLSA. Id. at 296 (Marshall, J., concurring). Justice Marshall noted, however, that absent state consent to federal suit, plaintiffs are permitted to pursue their cause of action in state court. Id. at 297-98 (Marshall, J., concurring).


69. See id. at 452 (finding that congressional intent to abrogate state immunity was present).
sued state officials alleging that the state retirement plan discrimi-
nated against them on the basis of sex, in violation of Title VII of
the Civil Rights Act of 1964.\textsuperscript{70} The plaintiffs sought injunctive relief
and damages in the form of retroactive retirement benefits.\textsuperscript{71} The
case involved a private suit against a state official for money dam-
ages to be paid from the state treasury, and as such was essentially
against the state itself. The Fourteenth Amendment, pursuant to
which Congress enacted Title VII, clearly limits the authority of
states\textsuperscript{72} and authorizes Congress to pass legislation to enforce the
safeguards of due process and equal protection afforded under the
Amendment.\textsuperscript{73} Thus, the Fourteenth Amendment explicitly
changed the balance of power between the states and federal gov-
ernment, limiting some of the authority and immunities enjoyed by
the states.\textsuperscript{74} The Court had little difficulty in finding that the Four-
teenth Amendment clearly limits state sovereignty, and that legisla-
tion enacted pursuant to the congressional power of the
Fourteenth Amendment could and did abrogate state immunity.\textsuperscript{75}

The Court next articulated the requirements for abrogation of
state sovereign immunity. The 5-4 decision in \textit{Atascadero State Hospi-

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\textsuperscript{70} \textit{Id.} at 448. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a to
2000h-6, was enacted pursuant to Congress's power under section 5 of the Four-
teenth Amendment. \textit{Id.} at 447, 453. In \textit{Fitzpatrick}, petitioners sued the State of
Connecticut and state officials on behalf of all present and retired state employees.
\textit{Id.} at 448. The petitioners alleged that the state's statutory retirement benefit plan
discriminated against them on the basis of sex. \textit{Id.}

\textsuperscript{71} \textit{Id.} at 449-50.

\textsuperscript{72} \text{U.S. Const. amend XIV, § 1 (stating that "[n]o State shall make or en-
force any law which shall abridge the privileges or immunities of citizens of the
United States; nor shall any State deprive any person of life, liberty, or property,
without due process of law; nor deny to any person within its jurisdiction the equal
protection of the laws" (emphasis added)).}

\textsuperscript{73} \text{U.S. Const. amend XIV, § 5 (providing that "[t]he Congress shall have
power to enforce, by appropriate legislation, the provisions of this article").}

\textsuperscript{74} \text{\textit{See Ex parte Virginia}, 100 U.S. 339, 346-47 (1880) ("Indeed, every addition
of power to the general government involves a corresponding diminution of the
governmental powers of the States."). In \textit{Ex parte Virginia}, the Court stated that:
The prohibitions of the Fourteenth Amendment are directed to the
States, and they are to a degree restrictions of State power . . . [b]ut the
Constitution now expressly gives authority for congressional interference
and compulsion in the cases embraced within the Fourteenth Amend-
ment. It is but a limited authority, true, extending only to a single class of
cases; but within its limits it is complete. \textit{Id.} at 346-48.

\textsuperscript{75} \text{\textit{See id.} at 346 (reiterating that prohibitions of Fourteenth Amendment are
addressed to states); \textit{see also Fitzpatrick}, 427 U.S. at 456 (Brennan, J., concurring)
(noting that, in adopting Commerce Clause, states gave up their sovereign immu-
nity and thus no state immunity was abrogated). \textit{Id.} at 458 (Brennan, J.,
concurring).}
\end{footnotesize}
tal v. Scanlon has been characterized by commentators as including "vigorous if not vitriolic dissents." In Atascadero, the plaintiff sued a state hospital and the California Department of Mental Health alleging employment discrimination under a federal statute. The state defendants claimed Eleventh Amendment sovereign immunity. In reversing the United States Court of Appeals for the Ninth Circuit by finding that such sovereign immunity had been waived, the Court held that Congress could abrogate state sovereign immunity but must do so clearly in the text of a federal statute. In the absence of such a clear statement, states and their agencies are immune from damages in federal court for violation of that law.

In the plurality opinion of Pennsylvania v. Union Gas Co., the Court appeared to answer the final open issue by holding that Congress could abrogate state immunity in federal question cases based upon statutes enacted pursuant to Congress's power under the Commerce Clause. The Court held that the Hans decision was

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77. See Harris & Kenny, supra note 27, at 647 (stating that bare majority of Atascadero Court held that "unconsenting states and state agencies are immune to suits for money damages in federal court for violations of federal law, unless Congress makes it unmistakably clear in the language of the statute itself that it intends to abrogate the states' immunity").
78. See Atascadero, 473 U.S. at 236 (citing Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794). The plaintiff contended that his denial for employment was based on his physical handicaps. Id.
79. Id.
80. See id. at 238-40 ("As a result, when acting pursuant to § 5 of the Fourteenth Amendment, Congress can abrogate the Eleventh Amendment without the States' consent.").
81. See id. at 238 n.1 (holding that "in absence of clear statement from Congress, States are immune unless there is unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment"); see also Edelman v. Jordan, 415 U.S. 651, 673 (1974) (holding that state may only waive immunity through express language or overwhelming implication that does not allow any other interpretation because "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights").
83. See id. at 23 ("We hold that . . . Congress has the authority to render [States] . . . liable when legislating pursuant to the Commerce Clause."). In Union Gas, the operators of a coal gasification plant had produced and disposed of coal tar, a hazardous substance, near a creek in Pennsylvania. Id. at 5. In the course of a state flood control project, the State of Pennsylvania obtained easements to the land. Id. During the excavation of the creek, state workers struck a coal tar deposit, which then seeped into the creek. Id. at 5-6. After the site was declared the Nation's first emergency Superfund site, the state assisted with the clean-up and was reimbursed by the federal government. Id. The United States then sued Union Gas, the successor company to the original operator, for the clean-up costs.
not based upon a constitutional doctrine but was merely a statutory interpretation of the Judiciary Act of 1875.\textsuperscript{84} This case illuminates the delicacy of achieving a proper balance of power between state and federal levels of government as well as between state sovereign immunity and injured private entities. The majority found, first, that Congress had shown an "unmistakably clear" intent to abrogate state sovereign immunity from damages in enacting the environmental laws at issue in the case.\textsuperscript{85} Similar to the creation of antitrust law, the environmental laws involved in \textit{Union Gas} were enacted pursuant to Congress's power under the Commerce Clause, not under the Fourteenth Amendment.\textsuperscript{86} Justice Brennan,

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\textit{Id.} at 6. \textit{Union Gas} then filed a third party complaint against the state, claiming that Pennsylvania had been an "owner or operator" of a hazardous waste site and thus was liable for part of the clean-up costs. \textit{Id.} The district court dismissed the complaint by holding that the suit against Pennsylvania was barred by the Eleventh Amendment. \textit{Id.} The Third Circuit then affirmed. \textit{Id.} While \textit{Union Gas}'s petition for certiorari was pending, Congress amended the federal environmental laws which "clearly rendered States liable for monetary damages." \textit{Id.} After the Court remanded the case to the United States Court of Appeals for the Third Circuit, the Court held that the amended language used by Congress had abrogated the states' sovereign immunity. \textit{Id.} at 23.

\textsuperscript{84} See \textit{id.} at 19 (refuting Justice Scalia's dissenting argument that \textit{Hans} decision answered question of whether Congress has authority to abrogate state's immunity when legislating pursuant to Constitution). The Judiciary Act of 1875, according to the \textit{Union Gas} majority, was necessary to enable federal question cases because Article III was not self-executing. \textit{Id.} Although Article III did not clearly abrogate state sovereign immunity, the majority apparently believed that it could have done so. \textit{Id.} Similarly, the Judiciary Act could have abrogated state sovereign immunity, but it did not. See generally \textit{id.} (recognizing that "if Article III did not 'automatically eliminate' sovereign immunity, then neither did the Judiciary Act of 1875"). The subsequent decision in \textit{Seminole Tribe} overruled \textit{Union Gas} and adopted precisely the opposite rule by finding that state sovereign immunity in federal question, as well as diversity, cases is part of the Constitution and cannot be abrogated by Congress. \textit{See Seminole Tribe}, 116 S. Ct. at 1128 (reasoning that "both the result in \textit{Union Gas} and the plurality's rationale depart from our established understanding of the Eleventh Amendment").

\textsuperscript{85} See \textit{Union Gas}, 491 U.S. at 10 (finding that "Congress must have intended to override the States' immunity from suit"). The Court held that the "language of \textit{CERCLA} as amended by \textit{SARA} clearly evidences an intent to hold states liable in damages in federal courts." \textit{Id.} at 7, 12-13 (citing The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (\textit{CERCLA}), 42 U.S.C. §§ 9601(21), 9607(a) (1994) (describing "persons" who may be liable under \textit{CERCLA} as including "states"); \textit{Superfund Amendments and Reauthorization Act of 1986} (\textit{SARA}), 42 U.S.C. § 9601(20)(D) (1994) (stating that "State(s) . . . shall be subject to . . . liability under [\textit{CERCLA}] section 9607")). The Court found that "[s]ection 101(20)(D) is an express acknowledgment of Congress' background understanding . . . that States would be liable." \textit{Id.} at 8. The requirement of a clear congressional intent to abrogate sovereign immunity is required under \textit{Atascadero}. \textit{Id.} at 242 (citing \textit{Atascadero State Hosp. v. Scanlon}, 473 U.S. 234 (1985)). For a discussion of \textit{Atascadero}, see \textit{supra} notes 76-78 and accompanying text.

\textsuperscript{86} See \textit{Union Gas}, 491 U.S. at 5 (indicating that Congress was legislating pursuant to Commerce Clause when it enacted \textit{CERCLA} and \textit{SARA}).
writing for the majority, reiterated the statements made in earlier cases suggesting that the states had surrendered some of their sovereignty when they adopted the Constitution and authorized Congress to regulate commerce under the Commerce Clause.\textsuperscript{87} Therefore, Justice Brennan concluded, Congress had the power under the Commerce Clause to abrogate sovereign immunity and subject states to suits in federal court.\textsuperscript{88}

Finally, the Court in \textit{Ex parte Young}\textsuperscript{89} held that federal courts have jurisdiction prospectively to enjoin state officials to comply with federal law, even in situations where the state itself is immune from suit.\textsuperscript{90} If compliance with such federal obligations requires the state to spend money, it must do so.\textsuperscript{91} The \textit{Ex parte Young} doctrine, however, does not authorize the federal court to order money damages.\textsuperscript{92} The doctrine employs a legal fiction of avoiding suit

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\item \textsuperscript{87} See id. at 14 (citing Parden v. Terminal Ry. of Ala. Docks Dep't, 377 U.S. 184, 191 (1964), overruled in part by Welch v. Texas Dep't of Hwys. & Pub. Transp., 483 U.S. 468 (1987); Employees of Dep't of Pub. Health and Welfare v. Department of Pub. Health and Welfare, 411 U.S. 279, 286 (1973)) (concluding that review of prior cases suggests that Congress may permit suits against states due to surrender of portion of state sovereignty through grant of authority to Congress to regulate commerce).
\item \textsuperscript{88} See id. at 19, 23 (holding "Congress has the authority to override States' immunity when legislating pursuant to the Commerce Clause"). This section of Justice Brennan's opinion dealing with the question of whether the Commerce Clause grants Congress the power to abrogate states' immunity was joined only by Justices Marshall, Blackmun and Stevens. \textit{Id.} at 5. In concurrence, Justice White agreed that Congress could abrogate state sovereign immunity if it did so explicitly, but concluded that it had not done so with respect to the federal statutes at issue in the case. \textit{Id.} at 45 (White, J., concurring).
\item \textsuperscript{89} 209 U.S. 123 (1908).
\item \textsuperscript{90} See id. at 158-59. The Court reasoned that a state official lacks any official authority to violate federal law or the Constitution, so the illegal acts challenged are, in effect, not the acts of the state. \textit{Id.} at 159-60. Accordingly, neither the Eleventh Amendment nor any other principle of sovereign immunity are impacted. \textit{Id.} The state officer's actions are "simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional." \textit{Id.} at 159.
\item \textsuperscript{91} See Miliken v. Bradley, 433 U.S. 267, 289 (1977) (holding that federal obligations required money from Michigan treasury to fund desegregation of public education system). The decree to share the future costs of desegregating the public school system was found by the \textit{Miliken} Court to fall within the "prospective-compliance exception . . . which had its genesis in \textit{Ex parte Young}.". \textit{Id.} The Court stated that \textit{Young} permitted "federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct substantial impact on the state treasury." \textit{Id.}
\item \textsuperscript{92} Seminole Tribe v. Florida, 116 S. Ct. 1114, 1182 (1996) (Souter, J., dissenting) ("\textit{Young} does not provide retrospective monetary relief but allows prospective enforcement of federal law that is entitled to prevail under the Supremacy Clause. It requires . . . lawful conduct by a public employee acting in his official capacity."); Edelman v. Jordan, 415 U.S. 651, 666 (1974) ("We do not read \textit{Ex parte Young} . . . to indicate that any form of relief may be awarded against a state officer,


against a state by suing only a state official. The doctrine creates the fiction that no state official has the authority to violate the Constitution or laws of the United States and any official who does so is acting ultra vires and not legitimately on behalf of the state at all.93 Thus, a suit against such an official is not a suit against the state that would be prohibited by the Eleventh Amendment and the Hans doctrine.94

II. THE SEMINOLE TRIBE DECISION—THE ASCENT OF THE MINORITY

Seminole Tribe is about "power," not in the antitrust sense of market power,95 but rather "the power of the Congress of the United States to create a private federal cause of action against a State, or its Governor, for the violation of a federal right."96 In deciding Seminole Tribe,97 the Court did more than determine the obligation of a state to negotiate with an Indian tribe under the Indian Gaming Regulatory Act ("the Act" or "the Indian Gaming Act");98 it

93. See generally Ex parte Young, 209 U.S. at 167 (holding that officer's act under state immunity will not protect officer from personal liability).

94. See id. at 184 (recognizing that in some cases "the defendant 'is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer'" (quoting Cunningham v. Macon & Brunswick R.R., 109 U.S. 446, 451 (1983))).

95. See Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines, 62 Antitrust & Trade Reg. Rep. (BNA), at S-3 (Apr. 2, 1992) (explaining that unifying theme of Guidelines is "that mergers should not be permitted to create or enhance market power or to facilitate its exercise"). Market power "is the ability [of a seller] profitably to maintain prices above competitive levels for a significant period of time [or to decrease competition in other areas such as quality, service or innovation]." Id. at S-3 & n.6. Thus, market power allows firms to raise or maintain prices above competitive levels, or to prevent already high prices from decreasing to competitive levels, or to restrict output or limit new entry. See Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 27 n.46 (1984) (stating that "market power exists whenever prices can be raised above the levels that would be charged in a competitive market"); United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) (defining "market power" as power to control prices or exclude competition); Horizontal Merger Guidelines of the National Association of Attorneys General, 64 Antitrust & Trade Reg. Rep. (BNA), at S-3 n.8 (Special Supp. Apr. 1, 1993) ("Market power is the ability of one or more firms to maintain prices above a competitive level, or to prevent prices from decreasing to a lower competitive level, or to limit output or entry.").

96. Seminole Tribe, 116 S. Ct. at 1133 (Stevens, J., dissenting).

97. Id. at 1114. Justice Rehnquist wrote the majority opinion and was joined by Justices O'Connor, Scalia, Kennedy and Thomas. Id. at 1119. Justice Stevens filed a dissenting opinion. Id. at 1133 (Stevens, J., dissenting). Justice Souter was joined by Justices Ginsburg and Breyer in filing a separate dissenting opinion. Id. at 1145 (Souter, J., dissenting).

announced a major development in the law of state sovereign immunity, as the minority view of *Union Gas* became the majority view of *Seminole Tribe*.

A. *Factual Background*

The Indian Gaming Act ("Act") was enacted pursuant to the Indian Commerce Clause, which is a section of the Commerce Clause delegating to Congress the power "[t]o regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes."99 The Act pervasively regulates the manner in which gaming can be developed and carried out on Indian lands by dividing the types of gaming into three categories or classes;100 the third class is the most heavily regulated and was the subject of *Seminole Tribe*.101 The Act provides that class III gaming is legal only in limited circumstances and must be "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State."102 The compacts between Indian tribes and states, as described in the Act, are required to be the result of good faith negotiations between the respective state and the Indian tribe.103 Further, the statute specifically authorizes the Indian tribe to sue any state to enforce the provisions of the Act.104 Lastly, the Act creates a federal remedy in federal court for failure of a state to negotiate in good faith.105

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100. 25 U.S.C. § 2703(6)-(18). Class I gaming means "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of or in connection with, tribal ceremonies or celebrations." *Id.* § 2703(6). Class II gaming includes bingo and games similar to bingo, such as "pull-tabs, lotto, punch boards, tip jars, [and] instant bingo." *Id.* § 2703(7). Banking card games, electronic games of choice and slot machines are expressly excluded from class II. *Id.* Finally, the Act defines class III gaming as "all forms of gaming that are not class I gaming or class II gaming." *Id.* § 2703(8).
101. *See Seminole Tribe*, 116 S. Ct. at 1119 (stating that court is concerned with class III gaming which "includes such things as slot machines, casino games, banking card games, dog racing, and lotteries" (citing 25 U.S.C. § 2703(8) (1994))).
102. 25 U.S.C. § 2710(d)(1). Further, to ensure the legality of class III gaming, the governing body of the tribe must adopt a resolution or ordinance authorizing the gambling, gain approval by the National Indian Gaming Commission, comply with all other statutory requirements, and be in a state that permits gambling. *Id.*
103. *See 25 U.S.C. § 2710(d)(3)(A) (requiring state to "negotiate with Indian tribe in good faith to enter into [a Tribal-State] compact")*
104. *See 25 U.S.C. § 2710(d)(7)(A) (stating that Indian tribe may initiate cause of action to enjoin gaming activity conducted in violation of Tribal-State compact entered into pursuant to Act).*
105. *See 25 U.S.C. § 2710(d)(7)(A)-(D)(9) (granting federal jurisdiction over several causes of action relating to Act). The Act provides that: "The United States district courts shall have jurisdiction over - (i) any cause of action initiated by an
The regulatory scheme and statutory remedies of the Indian Gaming Act are significantly more complex and all-encompassing than the federal antitrust laws, which simply declare certain restraints of trade unlawful106 and provide for exclusive federal jurisdiction to enforce such laws.107 Certain sections of the modern antitrust laws, however, spell out detailed procedures and remedies in particular situations, such as pre-merger review by federal enforcement agencies of proposed business acquisitions above a certain size and public notice and comment for settlements of Department of Justice cases.108

The comprehensive statutory scheme of the Indian Gaming Act, contemplating litigation against states in federal courts, put in place the framework for a decision that will affect federal-state relations in a variety of federal questions, including antitrust, bankruptcy, copyright and environmental law. The Seminole Tribe case arose from the failed efforts of the Seminole Tribe to negotiate a compact with the State of Florida. In 1991, the tribe sued the State and its Governor, Lawton Chiles, alleging that they had failed to negotiate a compact for gambling with the tribe, which constituted a violation of the good faith negotiation requirement.109 Florida moved to dismiss the complaint based upon sovereign immunity

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106. Compare 15 U.S.C. § 1 (1994 & Supp. 1995) (declaring "[e]very contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade . . . to be illegal"), and 15 U.S.C. § 2 (defining "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . [to be] deemed guilty of a felony . . . "), with 25 U.S.C. § 2701 (creating pervasive statutory scheme which provides Indian tribes "exclusive right to regulate gaming activity in order to promote tribal economic activity, self sufficiency and self-government").

107. 15 U.S.C. § 4 (mandating that "the several district courts of the United States are invested with jurisdiction to prevent and restrain violations of . . . this [Act]").

108. See, e.g., The Tunney Act, 15 U.S.C. § 16(a) (stating that final judgment rendered in any proceeding initiated by United States under antitrust laws "to the effect that a defendant had violated said laws shall be prima facie evidence" against such defendant in any other proceeding brought under antitrust laws); 15 U.S.C. § 16(b)-(d) (describing procedures for public notice and comment on consent judgments); 15 U.S.C. § 18a (describing procedures for pre-merger notification and waiting period).

because it had not consented to the suit. The District Court denied the State's motion to dismiss. On interlocutory appeal, the United States Court of Appeals for the Eleventh Circuit held that Eleventh Amendment sovereign immunity barred the lawsuit against the State and its governor. Thus, the Eleventh Circuit reversed and remanded the case to be dismissed for lack of subject matter jurisdiction.

B. Supreme Court's Majority Holding and Analysis

The Supreme Court granted certiorari on two issues: (1) whether Congress is prevented from authorizing suits against states for injunctions to enforce federal legislation enacted pursuant to the Indian Commerce Clause and (2) whether the Ex parte Young doctrine authorizes lawsuits against the state governor for injunctive relief to compel the negotiations required by the federal legislation. The majority of the Court answered the first question in the affirmative and the second question in the negative. First, the Court held that the Eleventh Amendment prevents Congress from authorizing suits against states; and second, that the Ex parte Young doctrine does not allow litigation against state officials to enforce the terms of this particular federal legislation.

110. Id. The state argued it had sovereign immunity from suits in federal court. Id.


112. See Seminole Tribe v. Florida, 11 F.3d 1016, 1029 (11th Cir. 1994) ("Unless one of the three exceptions—consent, abrogation, or Ex parte Young—applies, the Eleventh Amendment serves as a jurisdictional bar and precludes federal court adjudication over these suits."). aff'd, 116 S. Ct. 1114 (1996). Further, the Eleventh Circuit held that Ex parte Young did not authorize the plaintiff Indian tribe to compel negotiations between the state and the tribe. Id. at 1028 (citing Ex parte Young, 209 U.S. 123 (1908)). Seminole Tribe was consolidated in the Eleventh Circuit with an Alabama case that reached a different conclusion on whether Congress was authorized by the Constitution to abrogate the states' immunity. Id. at 1018 (consolidating Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550 (S.D. Ala. 1991), aff'd, 11 F.3d 1016 (11th Cir. 1994), aff'd, 116 S. Ct. 1114 (1996)). In Poarch Band, the court granted the state of Alabama's motion to dismiss, holding that the Eleventh Amendment precludes suits against the state. Poarch Band, 776 F. Supp. at 563. Shortly after the court granted the state's motion to dismiss, the governor of Alabama filed his own motion to dismiss, which the court granted in a separate action incorporating its previous order of dismissal. See Poarch Band of Creek Indians v. Alabama, 784 F. Supp. 1549, 1550 (S.D. Ala. 1992) (holding that assertion of jurisdiction over governor would violate Eleventh Amendment), aff'd, 11 F.3d 1016 (11th Cir. 1994), aff'd, 116 S. Ct. 1114 (1996).

113. Seminole Tribe, 116 S. Ct. at 1122.

114. See id. at 1122, 1133 (affirming Eleventh Circuit's dismissal of petitioner's suit).
The petitioner, Seminole Tribe, argued that by enacting the Indian Gaming Act, Congress had abrogated the states' Eleventh Amendment immunity, which thus allowed the State of Florida to be sued. The majority considered "first, whether Congress ha[d] 'unequivocally express[ed] its intent to abrogate the immunity,'... and second, whether Congress ha[d] acted 'pursuant to a valid exercise of power.'" The Court ultimately decided that, although the answer to the first issue was in the affirmative, the issue was irrelevant because Congress lacked any such power.

1. Congressional Purpose to Abrogate State Sovereign Immunity

Heretofore, in order to abrogate state sovereign immunity, Congress was first required to make a clear and unequivocal statement of congressional purpose. In Seminole Tribe, the majority agreed that there was such a requisite clear statement. The antitrust laws, on the other hand, are not as clear. Similar to the Indian Gaming Act, the Clayton Act specifically authorizes federal courts to enforce the substantive provisions of the Sherman and Clayton Antitrust Acts. These antitrust laws do not contain such a clear statement of intent to subject states to federal court jurisdiction and

115. Id. at 1123.
116. Id.
117. See id. at 1123-24 ("[W]e agree with . . . virtually every other court that has confronted the question that Congress has . . . provided an 'unmistakably clear' statement of its intent to abrogate.'").
118. See id. at 1131-32 ("Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting states.").
120. See Seminole Tribe, 116 S. Ct. at 1124 (finding "unmistakably clear" statement of Congress's intent to abrogate). The Indian Gaming Act authorizes suit by an Indian tribe in the United States District Court for any cause of action concerning a failure by a state to negotiate, in good faith or at all, with an Indian tribe on the subject of a gaming compact. 25 U.S.C. § 2710(d)(7)(A)(i) (1994 & Supp. 1995). Subsection (B) describes the procedures and remedies available under the Act, including placing certain burdens of proof on "the State," providing for mediation among parties including states, and contemplating that states would be named as defendants in litigation to enforce the Act. Id. § 2710(d)(7)(B).
liability.122 The Indian Gaming Act, however, does explicitly contemplate a state becoming a party defendant in an action brought by a tribe.123 Thus, the Atascadero "clear statement rule" is easily satisfied in the Seminole Tribe case.

The majority then addressed the second issue of whether Congress had the authority to do what it clearly attempted to do—eliminate state sovereign immunity from suit under the Indian Gaming Act.124 The Court concluded that Congress lacked such power.125 This constitutional analysis, by far the most important discussion in the case, first inquired whether Congress's abrogation of state sovereign immunity was "pursuant to a valid exercise of power."126 The Court found the fact that the petitioner Indian tribe sought only prospective equitable relief in the form of an injunction, rather than money damages, to be irrelevant as to the issue of state sovereign immunity.127 According to the majority, Eleventh Amendment immunity from suit applies to both equitable and legal relief, injunctions as well as monetary damages.128 Thus, the relief sought from a defendant state is not related to the "question [of] whether the State is bound by the Eleventh Amendment."129 The implications of the Court's decision are therefore broad because it

122. See 15 U.S.C. § 15 (making no statement that would clearly indicate Congress intent to abrogate state sovereign immunity). For a further discussion of the requirements of the clear statement rule and the probability that they are not met in the antitrust laws, see supra notes 80-81 and accompanying text. The more important issue, however, is whether Congress has the power, if it chose, to subject states to antitrust liability.

123. See 25 U.S.C. § 2710(d)(7)(A)(i) (stating that Indian tribe may initiate cause of action against state for failure to enter into negotiations with Indian tribe or to conduct negotiations in good faith).

124. See Seminole Tribe, 116 S. Ct. at 1124 (concluding that although Congress clearly intended to abrogate states' immunity in Indian Gaming Act, Court was still faced with question of whether Congress was authorized to do so).

125. See id. at 1133 ("[W]e have found that Congress did not have authority under the Constitution to make the States suable in federal court . . . .").

126. Id. at 1124 (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)).

127. See id. (stating that "we have often made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment").

128. See id. ("'It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought.'" (quoting Cory v. White, 457 U.S. 85, 90 (1982))).

129. Id. (citing Cory, 457 U.S. at 90-91 (holding that Eleventh Amendment bars suits whether or not money judgments are sought)). The justification for the Eleventh Amendment was to protect the states' treasuries from federal court orders to pay money but also to protect states against "the indignity of . . . the coercive process of judicial tribunals at the instance of private parties." Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144-46 (1993) (quoting In re Ayers, 123 U.S. 443, 505 (1887)).
embraces state sovereign immunity both in its holding on injunctive relief and on the issue of damages, which was discussed in dicta.\textsuperscript{130}

Similarly, the majority found it irrelevant that the Indian Gaming Act, which sought to expose states to suit in federal court, may have also granted power to the states that they otherwise lacked under the Constitution.\textsuperscript{131} Thus, the only relevant issue is whether “the Act in question [was] passed pursuant to a constitutional provision granting Congress the power to abrogate?”\textsuperscript{132} This power has previously been found pursuant to only two constitutional provisions: the Fourteenth Amendment\textsuperscript{133} and the Commerce Clause.\textsuperscript{134}

Because the antitrust laws were enacted pursuant to the Commerce Clause, the question of whether Congress could abrogate Eleventh Amendment sovereign immunity under its power “[t]o regulate Commerce with foreign Nations and among the several

\begin{itemize}
\item \textsuperscript{130} See Seminole Tribe, 116 S. Ct. at 1124 (“[W]e have often made clear that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment.”).
\item \textsuperscript{131} See id. at 1125 (“The Eleventh Amendment immunity may not be lifted by Congress unilaterally deciding that it will be replaced by grant of some other authority.”). The Court recognized that the Indian Gaming Act gave authority to the states that they otherwise lacked under the Constitution. Id. at 1124. Specifically, the Act granted power to regulate certain aspects of gambling on Indian lands. Id. Because the state clearly lacked the authority under the Constitution to regulate activity on Indian lands, the Act attempted to grant power to the states and to limit power by abrogating state sovereign immunity. The majority, however, stated that Congress could not avoid the terms of the Eleventh Amendment by simply granting some other power to states. Id. at 1125.
\item \textsuperscript{132} Id. (emphasis added).
\item \textsuperscript{133} See Fitzpatrick v. Bitzer, 427 U.S. 445, 453-56 (1976) (finding that Fourteenth Amendment expanded federal government’s power and effectively changed federal-state balance of power originally reflected in Constitution). By giving Congress the authority to enforce the Fourteenth Amendment, the Court found that the Fourteenth Amendment itself gave Congress the authority to abrogate state sovereign immunity guaranteed by the Eleventh Amendment. Id. at 456. Specifically, the Eleventh Amendment does not bar a judgment against a state for back pay and attorney fees to a private individual. Id. at 456-57. The Fourteenth Amendment states in pertinent part:
\begin{quote}
No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . . Congress shall have power to enforce, by appropriate legislation, the provisions of this article.
\end{quote}
U.S. Const. amend. XIV, §§ 1, 5.
\item \textsuperscript{134} See Pennsylvania v. Union Gas Co., 491 U.S. 1, 19 (1989) (holding “Congress has the authority to override state’s immunity when legislating pursuant to the Commerce Clause”), overruled by Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996). The Commerce Clause states that “Congress shall have the Power To . . . regulate Commerce . . . among the several States.” U.S. Const. art. I, § 8, cl. 3.
\end{itemize}
States" is important for the future of the state action doctrine. Less than a decade ago in Union Gas, the Court held that the power to abrogate state sovereign immunity was as crucial to the Commerce Clause as it was to the Fourteenth Amendment. Accordingly, in Seminole Tribe, the Court first had to decide whether the Interstate Commerce Clause and the Indian Commerce Clause have meaningful differences. The majority "agree[d] with the petitioner Seminole Tribe that the plurality opinion in Union Gas allows no principled distinction in favor of the States to be drawn between the Indian Commerce Clause and the Interstate Commerce Clause." Finding that there were no significant differences between the two constitutional clauses, the Court was forced to determine whether to extend to the Indian Commerce Clause the ability to abrogate state sovereign immunity, or to overturn the holding of Union Gas. The Court chose to overrule Union Gas and decided that neither the Interstate Commerce Clause nor the Indian Commerce Clause gives Congress the power to abrogate the states' Eleventh Amendment sovereign immunity.

135. Id.

136. For a discussion of the future impact of the Seminole Tribe decision, see infra notes 334-56 and accompanying text.

137. 491 U.S. 1, 19-20 (1989) (plurality opinion) (reasoning that absent "the authority to render States liable in damages," Congress's power to regulate commerce under the Commerce Clause would not be complete).

138. Seminole Tribe, 116 S. Ct. at 1125. Arguably, there are differences between the Interstate Commerce Clause and the Indian Commerce Clause. The Court recognized that the states surrendered a portion of their sovereignty in agreeing to the Commerce Clause, which authorizes Congress to regulate interstate commerce. Id. at 1126. The Indian Commerce Clause is both consistent with and indeed broader than the Interstate Commerce Clause, in that the states essentially ceded all authority to regulate Indian tribes and their commerce to the federal government. Id. This grant of broad authority in allowing Congress to regulate all commerce by Indian tribes, even if that commerce is entirely intra-state, is the only arguable difference between the two clauses. Id.

139. Id. at 1127.

140. Id. The Court recognized that the doctrine of stare decisis counsels strongly against overturning a previous decision. Id. Nevertheless, the Court notes that stare decisis is a policy and not a command. Id. Moreover, the Union Gas decision was a plurality and not a majority decision.

141. Id. at 1128. The Court noted that "[o]ur willingness to reconsider our earlier decisions has been 'particularly true in constitutional cases, because in such cases, correction through legislative action is practically impossible.'" Id. at 1127 (citation omitted). The majority found that the principle of stare decisis did not require adherence to Union Gas for four reasons: (1) the decision was of little precedential value because a majority of the Court has expressly disagreed with the plurality's reasoning; (2) the decision was an interpretation of the Constitution; (3) the decision's "rationale depart[s] from our established understanding of the Eleventh Amendment"; and (4) the decision frustrates the purpose of Article III. Id. at 1128 (citation omitted).
2. Congressional Power to Abrogate State Sovereign Immunity

The majority cited with approval the language of Chief Justice Hughes in Principality of Monaco v. Mississippi,¹⁴² where the Court held that a suit by a foreign state against another state was precluded by the Eleventh Amendment:

Thus Clause one [of Article III, section 2 of the United States Constitution] specifically provides that the judicial power shall extend "to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." But, although a case may arise under the Constitution and laws of the United States, the judicial power does not extend to it if the suit is sought to be prosecuted against a State, without her consent, by one of her own citizens . . . .

Manifestly, we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control. There is the essential postulate that the controversies, as contemplated, shall be found to be of a justiciable character. There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a "surrender of this immunity in the plan of the convention."¹⁴⁵

In holding that the Eleventh Amendment merely "reflects" the principle of sovereign immunity, in that states may not be sued without their consent, the majority found that the Eleventh Amendment stood for the constitutional principle that state sovereign immunity limited the federal courts' jurisdiction under Article III.¹⁴⁴ Thus, the Court essentially held that Article III jurisdiction is implicitly limited by principles of state sovereign immunity and has

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¹⁴². 292 U.S. 313 (1934).
been ever since the founding of the Republic and the ratification of the Constitution.\textsuperscript{145} Congress, therefore, lacks authority to expand federal jurisdiction beyond those limitations.\textsuperscript{146}

In summary, the majority held that principles of sovereign immunity reflected in, but not explicitly stated in, Article III and the Eleventh Amendment absolutely preclude Congress from subjecting states to suit, in law or equity,\textsuperscript{147} without their consent.\textsuperscript{148} The effect of this broadly written decision appears to eliminate virtually all private suits against states filed under federal statutes that provide for exclusive jurisdiction in the federal courts. Further, the majority opinion could be read to even allow states to ignore without sanction the gamut of federal laws that are exclusively enforceable in federal court.

The \textit{Seminole Tribe} majority emphasized the existence of three means to force states to comply with federal law: (1) suits against states by the federal government, (2) \textit{Ex parte Young} suits against state officials to enjoin their compliance with federal law and (3) Supreme Court review of state court decisions decided on federal

\textsuperscript{145} See \textit{Seminole Tribe}, 116 S. Ct. at 1128 (stating that, before \textit{Union Gas}, "it had seemed fundamental that Congress could not expand the jurisdiction of the federal courts beyond the bounds of Article III").

\textsuperscript{146} See id. at 1131 (stating that "the background principle of state sovereign immunity embodied in the Eleventh Amendment" applies to all fields, including those exclusively occupied by federal government). The Court found that "[e]ven when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." \textit{Id}.

\textsuperscript{147} See id. at 1131 & n.16 (noting that this bar includes actions under bankruptcy, copyright and antitrust statutes). Despite the explicit language of the Eleventh Amendment that covers both suits for damages and equitable relief, the Amendment has been construed to allow suits against states for injunctive relief. \textit{See Edelman v. Jordan}, 415 U.S. 651, 657 (1974) (holding that action "consistent with the Fourteenth Amendment is necessarily limited to prospective injunctive relief"). In \textit{Fitzpatrick v. Bitzer}, Justice Stevens had "great difficulty with [such] a construction of the Eleventh Amendment" but recognized that \textit{Edelman} had construed the Amendment to allow suits in which the damages are paid directly from state funds. \textit{Id} at 459 (Stevens, J., concurring) (citing \textit{Fitzpatrick v. Bitzer}, 427 U.S. 445 (1976)). The majority in \textit{Seminole Tribe} makes clear that Justice Stevens's conclusion is "exaggerated both in its substance and in its significance." \textit{Seminole Tribe}, 116 S. Ct. at 1131 & n.16.

\textsuperscript{148} \textit{Seminole Tribe}, 116 S. Ct. at 1131 ("Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States"). The majority referred to sovereign immunity as a "background principle .... embodied in the Eleventh Amendment," and emphasized that the Court has "long [] recognized that blind reliance upon the text of the Eleventh Amendment is 'to strain the Constitution and the law to a construction never imagined or dreamed of.'" \textit{Id} at 1130-31 (citations omitted).
grounds involving states that consented to suit.\textsuperscript{149} This last method clearly is not an option under the antitrust laws, because the United States District Courts have exclusive jurisdiction over all cases brought under the Sherman and Clayton Antitrust Acts.\textsuperscript{150}

Recognizing the likely impact of the \textit{Seminole Tribe} decision on federal statutory schemes including antitrust, bankruptcy and copyright laws, the majority stated that the best remedy, even with respect to statutes which grant federal courts exclusive jurisdiction, is the \textit{Ex parte Young} injunction.\textsuperscript{151} Specifically referring to antitrust cases against states, the majority observed that “it has not been widely thought that the federal antitrust . . . statutes abrogated the States’ sovereign immunity.”\textsuperscript{152} The Court further noted that it had never awarded relief against a State under any of the statutory schemes listed above.\textsuperscript{153} In at least one leading antitrust case, however, the Court found that a state bar association was not immune when it provided for the enforcement of a minimum fee sched-

\begin{itemize}
\item \textsuperscript{149} \textit{Id.} at 1131 nn.14 & 16. In his dissent of \textit{Seminole Tribe}, Justice Souter described these options as “pretty cold comfort.” \textit{Id.} at 1172 (Souter, J., dissenting). Justice Souter recognized that federal law enforcement resources are not unlimited, federal appellate review is dependent on state consent to state court litigation (which is not even an option in Sherman Act cases in any event), and the \textit{Ex parte Young} injunction could itself be limited by a future Court. \textit{Id.} at 1172 & n.52 (Souter, J., dissenting). Finally, he correctly noted that private litigation to enforce federal laws has been an important part of many federal statutory schemes. \textit{Id.} (Souter, J., dissenting). He specifically recognized the key role of such “private Attorneys General” in civil rights, environmental law and antitrust cases. \textit{Id.} (Souter, J., dissenting). See, e.g., California v. American Stores Co., 495 U.S. 271, 284 (1990) (stating that “[p]rivate enforcement of the [Clayton] Act was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition”).


\item \textsuperscript{151} See \textit{Seminole Tribe}, 116 S. Ct. at 1131 n.16 (“[A]n individual may obtain injunctive relief under \textit{Ex parte Young} in order to remedy a state officer’s ongoing violation of federal law.”). Such a remedy would be in the form of injunctive relief and not damages. The antitrust laws provide for treble damages and injunctive relief for all persons injured in their “business or property by reason of anything forbidden in the antitrust laws . . . .” 15 U.S.C. §§ 4, 15. Indeed, the treble damages remedy has been described as designed in part to promote enforcement of the antitrust laws by private parties. See, e.g., Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 331 n.1 (1990) (describing § 4 as a “remedial provision”); California v. ARC America Corp., 490 U.S. 93, 102 n.6 (1989) (stating that “[i]n a previous case] the Court was concerned not merely that direct purchasers have sufficient incentive to bring suit under the antitrust laws . . . but rather that at least some party have sufficient incentive to bring suit”).

\item \textsuperscript{152} \textit{Seminole Tribe}, 116 S. Ct. at 1131 n.16.

\item \textsuperscript{153} \textit{Id.}
ule, \textsuperscript{154} although it is not clear whether relief in the form of an injunction was actually awarded. Moreover, the majority in \textit{Seminole Tribe} found that, “antitrust laws have been in force for over a century, [and] there is no established tradition in the lower federal courts of allowing enforcement of those federal statutes against the States.” \textsuperscript{155} As discussed below, this view both misses the point and appears to be inappropriately narrow.

C. \textit{Dissenting Opinions to Majority’s Holding}

In his dissent, Justice Souter, joined by Justices Ginsburg and Breyer, characterized the majority’s decision as “hold[ing] for the first time since the founding of the Republic that Congress has no authority to subject a state to the jurisdiction of a federal court at the behest of an individual asserting a federal right.” \textsuperscript{156} Tracing the development of the doctrine of state sovereign immunity from the pre-constitutional era, Justice Souter argued that “the adoption of the Constitution made [the States] members of a novel federal system that sought to balance the States’ exercise of some sovereign prerogatives delegated from their own people with the principle of a limited but centralizing federal supremacy.” \textsuperscript{157} The dissent argued that “[g]iven the Framers’ general concern with curbing abuses by state governments, it would be amazing if the scheme of delegated powers embodied in the Constitution had left the Na-

\textsuperscript{154} See \textit{Goldfarb v. Virginia State Bar}, 421 U.S. 773, 791-92 (1975) (enjoining enforcement of minimum fee schedules by county and state bar association as violative of Sherman Antitrust Act). In \textit{Goldfarb}, prospective home buyers brought a class action suit alleging antitrust violations against the state and county bar associations. \textit{Id.} at 775-78. The county bar prescribed a minimum fee schedule for legal services offered by attorneys in the State of Virginia. \textit{Id.} The state bar then threatened sanctions for an ethical violation if an attorney charged below the minimum fee. \textit{Id.} The Supreme Court found the use of the minimum fee schedule to be a violation of the Sherman Act. \textit{Id.} at 791-92. The Court noted that “[t]he fact the State Bar is a state agency for some limited purpose does not create an antitrust shield.” \textit{Id.}

Certainly most antitrust actions involving the state action defense seek treble damages against a private defendant. The state action doctrine, however, does not foreclose antitrust actions against state governments, and courts have denied immunity asserted by state defendants. \textit{See id.} (finding “State Bar[, a named defendant,] . . . has voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act”). For a further discussion of the \textit{Goldfarb} case and the state action doctrine, see \textit{infra} notes 175, 217 and accompanying text.

\textsuperscript{155} \textit{Seminole Tribe}, 116 S. Ct. at 1192 n.16.

\textsuperscript{156} \textit{See id.} at 1145 (Souter, J., dissenting) (noting that majority “invokes the Eleventh Amendment as authority for this proposition”).

\textsuperscript{157} \textit{See id.} at 1169 (Souter, J., dissenting) (noting that “the act of ratification affected [the States’] sovereignty in a way different from any previous political event in America or anywhere else”).
tional Government powerless to render the States judicially accountable for violations of federal rights.”  

The dissent recognized that Congress has infrequently sought to abrogate state sovereign immunity, particularly in situations other than to enforce the Fourteenth Amendment, but maintaining that the power to do so in appropriate cases is critical to the federal system.

Moreover, the dissent argued that the historical evidence supported Congress's power to create federal rights and to authorize private parties to enforce these rights, even against a state. Justice Souter criticized the majority's reliance on "background principles" and "implicit limitations," arguing that these are at odds with the text of the Constitution and the intent of the Framers. He concluded that the Constitution neither mandates state sovereign immunity in federal question cases nor denies Congress the power to subject states to suits in federal court to enforce federal causes of action.

Faulting the decision as "a sharp break with the past," Justice Stevens also dissented by observing that the majority "prevents Congress from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy." The regulation to which Justice Stevens referred was, of course, antitrust and trade regulation. Indeed, he stated that "[a]s federal courts have exclusive jurisdiction over cases arising under these federal laws [including the antitrust laws], the majority's conclusion that the Eleventh Amendment shields States from being sued under them in federal court suggests that persons harmed by state violations of federal . . . antitrust laws have no remedy."

As a response to states and their agencies being named as defendants in antitrust cases, the state action doctrine developed to

158. See id. at 1171 (Souter, J., dissenting) (concluding that "of course the Framers did not understand the scheme to leave the government powerless")
159. See id. at 1173 (Souter, J., dissenting) (contending that it is unreasonable to believe that Framers meant to "leave the National Government without any way to render individuals capable of enforcing their federal rights directly against an intransigent state")
160. Id. at 1173-74 (Souter, J., dissenting).
161. See id. at 1177-78 (Souter, J., dissenting) (explaining that both Constitution's text and Framers' intent was clear, thus majority overstepped its authority when it looked to "background principles" and "implicit limitation[s]").
162. Id. at 1134 (Stevens, J., dissenting).
163. See id. at 1134 n.1 (Stevens, J., dissenting) (arguing that "Congress has the power to ensure that such a cause of action may be brought by a citizen of the State being sued").
allow only limited attacks against the anticompetitive actions of these state actors.\textsuperscript{164} Because both the antitrust laws and the Indian Gaming Act were enacted pursuant to the Commerce Clause,\textsuperscript{165} the state action doctrine, which provides only limited immunity for states and state entities, is plainly implicated by the language of the majority.\textsuperscript{166} The \textit{Seminole Tribe} decision now eliminates the possibility of any such attacks by protecting states from all suits in federal court.

III. THE DEVELOPMENT OF THE ANTITRUST STATE ACTION IMMUNITY DOCTRINE

A. \textit{Lack of Congressional Intent to Create Immunity}

The modern state action doctrine represents more than fifty years of legal development and refinement.\textsuperscript{167} This doctrine of limited immunity in antitrust actions essentially represents a "workable balance between the interest of a state in carrying out legitimate regulation of commerce and the interest of a citizen in obtaining redress for injuries sustained as a result of unauthorized anticompetitive conduct of state agencies."\textsuperscript{168} The broad and generalized lan-

\textsuperscript{164} For a discussion of the development of the antitrust state action doctrine, see infra notes 169-270 and accompanying text.


\textsuperscript{166} For a discussion of the state action doctrine, see infra notes 182-270 and accompanying text.

\textsuperscript{167} For a discussion of the judicial development of the state action doctrine, see infra notes 182-215 and accompanying text. During the first three quarters of a century following the passage of the Sherman Antitrust Act in 1890, government antitrust cases were directly appealable from United States District Courts to the United States Supreme Court pursuant to an amendment to the Expediting Act in 1974. \textit{See} 15 U.S.C. § 28 (repealed 1984). Consequently, the basic antitrust doctrines, including the state action doctrine, were incrementally developed by the Supreme Court in successive cases. In 1974, the Clayton Antitrust Act was amended to allow direct appeals in any antitrust cases certified by the district court judge that is deemed to be "of general public importance in the administration of justice." 15 U.S.C. § 29(b) (1994 & Supp. 1995). Thus, the framework of the state action doctrine was essentially in place before the repeal of the Expediting Act of 1984, Pub. L. No. 98-620, 98 Stat. 3358.

\textsuperscript{168} Harris & Kenny, supra note 27, at 651. In \textit{City of Lafayette v. Louisiana Power & Light Co.}, 435 U.S. 889 (1978), the Court discussed this balance, by stating that "\textit{[c]ommon to the two implied [antitrust] exclusions was potential conflict}
guage of the antitrust laws demonstrates "a carefully studied attempt to bring within the [Sherman] Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states." 169 In enacting the antitrust laws, Congress exercised "the full extent of its constitutional power [to regulate commerce by seeking] to establish a regime of competition as the fundamental principle governing commerce in this country." 170 Arguably, Congress also implicitly intended to supplant competition and immunize states from antitrust liability, at least in circumstances in which the state is acting in the role of the "sovereign." 171 The state action doctrine, however, requires courts to strike a balance between competition and state sovereignty rather than to blindly immunize state actors sued under the antitrust laws.

There is no basis, however, in the legislative history of the antitrust laws to conclude that Congress intended for the courts to create the state action doctrine in the precise terms that have been developed over the past century, since the enactment of the Sherman Act in 1890. The text of the original antitrust statutes, the Sherman and Clayton Acts, are brief and general, with only a few lines comprising the two simple sections that are the crux of the antitrust laws: one section forbids restraints of trade and the other prohibits monopolization. 172 Summarizing the legislative history of

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169. South-Eastern Underwriters Ass'n, 322 U.S. at 553 (finding that insurance business was not excluded from Sherman Act). The Court found the language of the Sherman Act to be comprehensive and held that application of the Act to "all combinations of business" was consistent with the intent of its drafters. Id.


171. See Parker v. Brown, 317 U.S. 338, 368 (1943) (holding that "in view of the [Sherman Act's] words and history, it must be taken to be a prohibition of individual and not state action"). The Court, however, has also recognized that exemptions from the antitrust laws should not freely be implied, reasoning that the antitrust laws "establish overarching and fundamental policies," which counsel against both "repeal by implication" and "implied exclusions." Lafayette, 435 U.S. at 398.

172. See 15 U.S.C. §§ 1, 2 (referencing basic federal antitrust statutes). Section 1 prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade." Id. § 1. Section 2 provides that "[e]very per-
the Sherman Act, Professor Philip Areeda noted that "[o]n most
issues, the legislative background simply fails to communicate more
than the statutory language itself."173 Thus, the substantive an-
trust rules, including the state action doctrine, were intended by
Congress to be common law rules, and as such, these rules have
been developed by federal courts over the past 100 years.174

The state action doctrine is not limited to protecting “states”
but may also shield private parties from antitrust liability in certain
circumstances. Further, the term “state” encompasses both the ju-
dicial175 and legislative176 branches of state government, as well as
executive departments and agencies.177 Local governmental enti-
ties may also enjoy limited antitrust immunity under the state ac-
tion doctrine.178 In a critical distinction from Eleventh
Amendment analysis, however, governmental entities are not im-
son who shall monopolize, or attempt to monopolize, or combine or conspire with
any other person or persons, to monopolize . . . shall be deemed guilty of a felony.”
Id. § 2.

173. See AREEDA & TURNER, supra note 5, § 106, at 15 (stating that, other than
finding some evidence that Congress "sought to achieve the social and economic
benefits of a free market, . . . we find the legislative history of the antitrust laws
deserving little weight”).

174. Id. Professors Areeda and Turner opine that Congress intended the an-
titrust law to be judge-made common law, by noting that “[n]othing else could
reasonably have been expected in the judicial administration of [those laws].” Id.
Chief Justice Hughes referred to the Sherman Act as a “charter of freedom” that
was written with a "generality and adaptability comparable to that found to be
desirable in constitutional provisions." Id. (citing Appalachian Coals v. United
States, 228 U.S. 344, 359-60 (1933)).

supreme court wields power over practice of law and may therefore be immune
from antitrust liability under state action doctrine); Goldfarb v. Virginia State Bar,
421 U.S. 773, 791-92 (1975) (finding local and state bar associations may be pro-
tected by state action doctrine but holding use of “minimum-fee schedules” was
unenforceable because it was “essentially a private anticompetitive activity”). For a
discussion of the factual background of Goldfarb, see supra note 154 and accompa-
nying text.

176. See, e.g., California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.,
445 U.S. 97, 105-06 (1980) (applying state action doctrine to determine whether to
protect legislative act but finding resale price maintenance system for liquor pric-
ing was not protected under state action doctrine, even though California Legisla-
ture authorized such price setting).

177. See, e.g., Southern Motor Carriers Rate Conference, Inc. v. United States,
471 U.S. 48, 63-64 (1985) (declaring agency alone could not immunize collective
private action unless “state” authorized activity). In Southern Motor, the Court
found sufficient authority as the state legislature established a regulatory agency.
Id.

(plurality opinion) (finding that municipalities are shielded under state action
decision only if they are acting pursuant to state policy). For a further discussion
of the Lafayette decision, see infra notes 266-69 and accompanying text.
mune from the antitrust laws simply because of their governmental status.\textsuperscript{179}

After Atascadero and Union Gas, it should have been clear that the antitrust liability of states under the state action doctrine might not survive a constitutional challenge because there is no "clear statement" of congressional intent to abrogate state sovereign immunity in the antitrust laws. After examining the legislative history of the Sherman Act, the Court, in Parker v. Brown,\textsuperscript{180} found congressional intent to immunize states from antitrust suits in federal court, even though there is no such explicit statement in the text of the Sherman Act.\textsuperscript{181}

B. Judicial Development of State Action Doctrine

The state action doctrine was first recognized in Parker v. Brown.\textsuperscript{182} In 1943, a California raisin producer brought an action

\begin{quote}
\textsuperscript{179} See City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 390 n.4 (1991) (Stevens, J., dissenting) (noting that, unlike states, municipalities will not receive protection under Eleventh Amendment); Lafayette, 435 U.S. at 408 (stating that "[i]f municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious link in the armor of antitrust protection would be introduced at odds with the comprehensive natural policy Congress established" (emphasis added)). In Lafayette, Justice Brennan, joined by Chief Justice Burger, Justices Marshall, Powell and Stevens comprised the majority with respect to Part I of the opinion. Justices Marshall, Powell, and Stevens also joined Parts II and III of Justice Brennan's opinion. Separate opinions were filed by: (1) Justice Marshall, concurring; (2) Chief Justice Burger, concurring in the judgment and concurring in Part I; (3) Justice Stewart, dissenting, joined by Justices White and Rehnquist and in part by Justice Blackmun; and (4) Justice Blackmun, dissenting. The fragmented plurality opinion in Lafayette reflects the difficulty the Court has had in determining the limits of antitrust liability of governmental entities.

\textsuperscript{180} 317 U.S. 341 (1943).

\textsuperscript{181} Id. at 350-52 (noting that "there is no suggestion of a purpose to restrain state action in the [Sherman] Act's legislative history"); see Harris & Kenny, supra note 27, at 708, 715 (predicting this result but arguing that state agency which is not immune under state action doctrine is not "a state").

\textsuperscript{182} Id. at 392 (holding that California regulatory scheme was not violative of Sherman Act because Sherman Act is "prohibition of individual not state action"). The principle of state action immunity originated much earlier. See Eastern R.R. Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135-36 (1961) (finding no antitrust violation "where a restraint of trade or monopolization is the result of valid governmental action, as opposed to private action"); Standard Oil Co. v. United States, 221 U.S. 1, 49-59 (1911) (finding that Sherman Act forbids only those trade restraints and monopolizations created by or attempted by the acts of "individuals or corporations"); Olsen v. Smith, 195 U.S. 332, 345 (1904) (finding that "no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the State are alone allowed to perform the duties devolving upon them by law"). In Noerr, the Court stated that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out." Noerr, 365 U.S. at 136 (citing Parker, 317 U.S. at 341; United States v. Rock Royal Co-op, 307 U.S. 583
against California Director of Agriculture W.B. Parker, the Agricultural Prorate Advisory Commissioners, the Raisin Proration Zone Number 1 and its members, and other defendants responsible for administering a prorate marketing program established under a California state statute.\textsuperscript{183} The state itself was not named as a defendant in the case\textsuperscript{184} and state sovereign immunity under the \textit{Hans} doctrine was not discussed by the trial court or the Supreme Court. Moreover, neither opinion discussed the \textit{Ex parte Young} doctrine, although the complaint was brought against state officials,\textsuperscript{185} among other defendants, to enjoin enforcement of a statute alleged to be unconstitutional as a burden on interstate commerce.\textsuperscript{186} Under the rationale of \textit{Ex parte Young}, such an injunction would have been appropriate.\textsuperscript{187} Indeed, if the defendant state officials

\textsuperscript{183} Brown v. Parker, 39 F. Supp. 895, 895-96 (S.D. Cal. 1941), rev'd, 317 U.S. 341 (1943). Plaintiff Brown was a California raisin packer. \textit{Id.} Because the case concerned a California citizen suing California government entities and officials, the language of the Eleventh Amendment prohibiting suits against states by noncitizens arguably would not control. The \textit{Hans} doctrine and subsequent cases, however, make it clear that Eleventh Amendment analysis also applies to actions by citizens against their own states. For a discussion of the \textit{Hans} doctrine, see supra notes 41-55 and accompanying text.

\textsuperscript{184} Parker, 39 F. Supp. at 895-96. The Supreme Court does not mechanically use the identity of parties named in the pleadings as dispositive of whether or not the "state" is the real party in interest in the suit. \textit{See, e.g.}, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 236, 246-47 (1985) (finding that state was real party in interest when plaintiff sued state hospital and state department of mental health for damages and equitable relief). For a further discussion of the \textit{Atascadero} case, see supra notes 76-81 and accompanying text.

\textsuperscript{185} \textit{See} Parker, 317 U.S. at 344 (noting that defendants included State Director of Agriculture). This seems contrary to the Court's recent mandate that "[s]uits against state officials in their official capacity . . . should be treated as suits against the State," Hafer v. Melo, 502 U.S. 21, 25 (1991) (citing Kentucky v. Graham, 472 U.S. 159, 166 (1985)).

\textsuperscript{186} Parker, 317 U.S. at 344 (stating question before Court was whether marketing program was violative of Commerce Clause). The trial court enjoined California's raisin marketing program, holding that it impermissibly interfered with interstate commerce. \textit{Parker}, 39 F. Supp. at 902. California had argued that the state's police power allowed it to enact regulations to protect the public welfare, even though the regulations affect interstate commerce. \textit{Id.} at 899. The State's argument, however, failed and the trial court granted an injunction prohibiting enforcement of the marketing program. \textit{Id.} at 895.

\textsuperscript{187} \textit{See} \textit{Ex parte Young}, 209 U.S. 123, 159-60 (1908) (allowing injunctive relief against state official by claiming that official is acting ultra vires). The Court explained that:
had raised sovereign immunity as a defense, the Court could have applied the *Hans* doctrine to dismiss the action, and the state action doctrine might never have emerged. Instead, the *Parker* Court recognized the obvious; California's raisin marketing program would be an illegal restraint of trade if it had been planned and effectuated entirely by a "contract, combination or conspiracy of private persons, individual or corporate." What made the *Parker* situation different from the traditional private restraint of trade forbidden by antitrust law was the entanglement of the state in the challenged program.

The *Parker* Court found unconvincing the assertion of a congressional intent to impose antitrust liability on states, but the Court assumed that Congress could have decided otherwise. Finding no explicit congressional intent to abrogate state sovereign immunity, the Court said:

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. 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

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189. *Id.* at 345-46. The regulatory scheme provided for pooling of 70% of all raisins produced in California by all producers and payment of set fees based on weight for this produce. *Id.* at 347-48. The sale of the remainder of the raisins was also restricted. *Id.* at 348. Unless some other exemption applied, a naked agreement on prices is per se unlawful. See, e.g., *Arizona v. Maricopa Med. Soc'y*, 457 U.S. 332, 342 (1982) (holding that "price-fixing agreements are unlawful on their face"); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 217-18 (1940) (holding that "price-fixing agreements are unlawful *per se*"). It is beyond the scope of this Article to opine on whether the antitrust exemption for agricultural producers and cooperatives under the Capper-Volstead Act would have been applicable to the raisin marketing program in *Parker*. See Capper-Volstead Agricultural Producers' Associations Act, 7 U.S.C. § 291 (1994 & Supp. 1995) (authorizing certain associations of persons engaged in production of agricultural products); 15 U.S.C. § 17 (1994 & Supp. 1995) (providing antitrust exemption for certain labor, agricultural and horticultural organizations).
over its officers and agents is not lightly to be attributed to Congress.\(^\text{190}\)

The \textit{Parker} decision was based only in part on the language of the Sherman Act and its legislative history. The Court did note that the Sherman Act itself refers only to "persons" and not to "states."\(^\text{191}\) Such statutory analysis, however, was not the only reason for the decision. The Court found that considerations of federalism were also significant and that interference with state sovereignty would not be implied without a clear indication of legislative intent.\(^\text{192}\) The Court's conclusion has been recognized by commentators as a practical necessity:

To have held the Sherman Act applicable to the states could have removed the authority of the states to create such traditional monopolies as common carriers, to regulate for the protection of the public, or to adopt other than a regime of competition even though peculiar local conditions required a different course which a busy national Congress was unlikely to consider.\(^\text{193}\)

The rationale expressed in \textit{Parker} and its progeny is based upon the Court's assumption that Congress did not intend the Sherman Act to reach certain actions of government entities. The

\(^{190}\) \textit{Parker}, 317 U.S. at 350-51.

\(^{191}\) See id. at 351 ("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."). See, e.g., Clayton Act § 4, 15 U.S.C. § 15 (providing that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue" therefore and recover treble damages); Clayton Act § 16, 15 U.S.C. § 26 (authorizing injunctive relief for "[a]ny person, firm, corporation or association"); Restraint of Trade Act § 7, 15 U.S.C. § 7 (defining "person" to include "corporations and associations" but does not include states in definition).

While a state's action may not be restrained by the Sherman Act, "[a] state may maintain a suit for damages under it." \textit{Parker}, 317 U.S. at 351. See, e.g., California v. American Stores Co., 495 U.S. 271, 295 (1990) (holding that state's remedy for corporation's antitrust violations under Clayton Act may be divestiture); Hawaii v. Standard Oil Co., 405 U.S. 251, 257-60 (1972) (holding that states can sue for injuries to commercial interests but may not recover for damages to general economy); Georgia v. Pennsylvania R.R., 324 U.S. 439, 447 (1945) (holding that Georgia as "person" may sue for injuries from violations of antitrust laws); Georgia v. Evans, 316 U.S. 159, 162-63 (1942) (holding states are entitled to treble damages under Sherman Act).

\(^{192}\) See \textit{Parker}, 317 U.S. at 351 (stating that "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress"); \textsc{Areeda} \& \textsc{Turner}, supra note 5, ¶ 212a, at 69 (finding Supreme Court concerned with implications of federalism in \textit{Parker} decision).

\(^{193}\) \textsc{Areeda} \& \textsc{Turner}, supra note 5, ¶ 212, at 69 (discussing authority of states to regulate commerce as long as regulation complies with Constitution).
Court found that Congress did not intend to abrogate all of the states' sovereign immunity, which might thus subject states to antitrust injunctions and treble damages in every case involving a state defendant. The Court assumed instead that Congress intended to abrogate some part of state sovereign immunity and had the power to do so. The *Parker* Court sought to balance the competing policies of favoring competition in the marketplace and allowing states to act in their sovereign capacity without threat of liability. In *Parker*, the Court concluded that the state "as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." Thus, the Court created a limited immunity under the state action doctrine. This doctrine may thus shield state and private actors in certain situations, however, it may also leave these actors subject to suit and liability if the conditions for immunity are not met. The *Parker* Court concluded that states should be immune or exempt from the antitrust laws when, but only when, they consciously acted in their sovereign capacity to supplant competition.

In developing the state action doctrine, courts have been engaged in creating standards to discern whether governmental actions rise to the level of conscious decisions of a sovereign state, which are entitled to antitrust immunity. The state action doctrine looks behind the governmental action and inquires whether it is

194. *See Parker*, 317 U.S. at 351 (expressing concerns of federalism by recognizing importance of state sovereignty "in a dual system of government"). The Court further recognized that there was "no hint that [the Sherman Act] intended to restrain state action or official action directed by a state." *Id.*

195. *See id.* at 350 ("We may assume also, without deciding, that Congress could, in the exercise of its commerce power, prohibit a state from maintaining a stabilization program like the present because of its effect on interstate commerce.").

196. *See id.* at 351 (noting concerns of federalism "in a dual system of government").

197. *Id.* at 352.

198. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-06 (1980) (adopting *Midcal* two-prong test for state action immunity based upon reasoning of *Parker*). For a further discussion of the two-prong *Midcal* test, see *infra* notes 226-50 and accompanying text. Thus, a state or private actor could be subject to liability in situations where the state had not complied with the two-prong test, which requires a clear articulation of a state policy to displace competition and active supervision of private parties acting pursuant to that state policy. *Id.* But see *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 & n.10 (1986) (finding that municipalities and state agencies may not have to prove "active supervision" requirement). For a discussion of municipalities and state agencies under the *Midcal* test, see *infra* notes 230-32, 235.

199. *See Parker*, 317 U.S. at 350-51 (finding states to be sovereigns "in a dual system of government" and that Sherman Act is devoid of purpose "to restrain a state or its officers or agents from activities directed by its legislature").
sufficiently the act of a sovereign state so as to be entitled to the
deerence demanded by federalism. This analysis was never per-
formed or even contemplated in Seminole Tribe. Instead, the Semi-
ole Tribe Court simply announced the blanket constitutional rule
that states are immune as sovereigns and thus are not subject to suit
in federal court. The rationale of Parker, therefore, must not be
confused with the rationale of Seminole Tribe. The latter holding is
broader and, according to the majority, is constitutionally based.
Indeed, Seminole Tribe essentially invalidates the underlying reason-
ing of Parker, which balances state sovereignty with the competing
goal of competition.

The Parker analysis went no further than declaring that a state
program may be violative of the antitrust laws if “it [was] organized
and made effective solely by virtue of a contract, combination or
conspiracy with private persons, individual or corporate.” The
Parker Court did not announce the precise limits of state antitrust
immunity to guide future courts when determining if antitrust im-
unity should be granted to a state engaged in economic regula-
tion or to private actors complying with state regulatory schemes.
The Parker Court did, however, establish certain basic principles:
(1) “a state does not give immunity to those who violate the Sher-
man Act by authorizing them to violate it, or by declaring that their
action is lawful”; (2) the state may not become “a participant in
a private agreement or combination by others for restraint of
trade”; and (3) the “state itself [must] exercise[ ] its legislative
authority in making the regulation and in prescribing the condi-

describing test used in determining whether there is clear state policy with re-
site state supervision), vacated and remanded on other grounds sub nom. Feldman v.
District of Columbia Court of Appeals, 460 U.S. 462, 474 n.11 (1983) (denying
certiorari from disposition of antitrust claims by D.C. Circuit). In Feldman, this
distinction was clearly made by the D.C. Circuit, which noted that “[t]his inquiry
[into whether the state action test is satisfied] becomes necessary when an act by a
subordinate government agency is at stake, for it is well settled that not everything
it does is an act of the state as sovereign. There obviously is no need for any inves-
tigation of that sort when the action plainly is taken in a sovereign capacity.” Id.

“Eleventh Amendment prohibits Congress from making the State of Florida capa-
ble of being sued in federal court”). Therefore, the Supreme Court had no juris-
diction to consider the Seminole Tribe’s suit against Florida under the Indian
Gaming Act. Id. For a discussion of the holding in Seminole Tribe, see supra notes
113-55 and accompanying text.

202. See Seminole Tribe, 116 S. Ct. at 1133 (holding that decision is based upon
Eleventh Amendment).


204. Id. at 351 (citation omitted).

205. Id. at 351-52 (citation omitted).
tions of its application.\textsuperscript{206} The Court implied that the state must "create[ ] the machinery" for the regulatory program, "adopt[ ] the program" and "enforce[ ] it with penal sanctions [ ], in the execution of a governmental policy."\textsuperscript{207} The state program supplanting competition must also be the will of the state—"not the imposition by [the private parties] of their will upon the minority by force of agreement or combination which the Sherman Act prohibits."\textsuperscript{208} In summary, a state, acting as a sovereign, which deliberately adopts and enforces a desired restraint of trade will be immune from liability under the antitrust laws.\textsuperscript{209}

The \textit{Parker} case addressed the potential antitrust liability of state governmental entities. The private parties that benefitted under the raisin regulation in \textit{Parker} were not even named as defendants in the original case.\textsuperscript{210} Thus, the Court did not have to decide whether the newly-created state action doctrine applied protection to private firms as well as states, and under what circumstances private parties might be immune from antitrust liability.

After \textit{Parker}, the Court was not immediately confronted with the issue of whether a private firm, acting at the direction of a state or pursuant to a state regulatory policy, shared the immunity of states under the state action doctrine. As late as 1976, a plurality of the Court suggested that \textit{Parker} immunized only states, and not private parties.\textsuperscript{211} Recent cases, however, have confirmed that the

\begin{itemize}
\item \textsuperscript{206} \textit{Id.} at 352.
\item \textsuperscript{207} \textit{Id.}
\item \textsuperscript{208} \textit{Id.}
\item \textsuperscript{209} \textit{Id.; cf.} \textit{Schwegmann Bros. v. Calvert Distillers Corp.}, 341 U.S. 384, 386-89 (1951) (denying immunity where state had provision that enforced price-fixing not only against parties to private, unsupervised contracts but also against nonsigners). \textit{See generally Areeda \\& Turner, supra note 5, \S 219a, at 72 (citation omitted) ("The juxtaposition of \textit{Parker} and \textit{Schwegmann}, therefore, suggests that a state may be free to determine for itself how much competition is desirable, provided that it substitutes adequate public control wherever it has substantially weakened competition.").
\item \textsuperscript{211} \textit{See Cantor v. Detroit Edison Co.}, 428 U.S. 579, 598 (1976) (plurality opinion) (holding that state's sole electric supplier's tariff setting forth lightbulb exchange program is not exempted from federal antitrust laws because state approved tariff). In \textit{Cantor}, Detroit Edison Co. established a lightbulb exchange program for its customers. \textit{Id.} at 583. The Michigan Public Service Commission had approved tariffs setting forth the program. \textit{Id.} Detroit Edison Co. stated that the program's purpose was to increase the consumption of electricity. \textit{Id.} at 584. Cantor asserted that the program's effect was to foreclose competition in a substantial segment of the lightbulb market. \textit{Id.} The plurality relied on a narrow interpretation of \textit{Parker}'s holding that "even though comparable programs organized by \textit{private} persons would be illegal, the action taken by state officials pursuant to express legislative command did not violate the Sherman Act. \textit{Id.} at 589. The plurality
state action doctrine protects private parties acting pursuant to state regulation, as well as government entities.212 This is clearly the correct result and promotes the two policies of the state action doctrine: federalism and competition. Commentators of the law have rationalized this extension by explaining that "[i]f the federal government or a private litigant could have enforced the antitrust laws against [private firms,] . . . effectuation of state policy would have been thwarted just as if the State Action exclusion were never created. To avoid such a result, immunity must be granted to private parties as well."213

Following the Parker decision, the issue of state antitrust liability under the Eleventh Amendment was apparently not brought before the Court until the recent Seminole Tribe decision. Between the Atascadero decision in 1985 and the Seminole Tribe decision in 1996, the Supreme Court decided a number of major state action cases but did not have the occasion to discuss state sovereign immunity apart from the state action doctrine.214 The undiscussed issue

Further emphasized the inapplicability of Parker to the Cantor case because Parker only applied to "official action taken by state officials." Id. at 590. The majority of the Court, however, disagreed with the plurality on this point. See id. at 603-04 (Burger, C.J., concurring in part) (stating that Parker cannot "logically be limited to suits against state officials" but concluding that Parker does not address precise issue in Cantor); id. at 616-17 (Stewart, J., dissenting) (arguing that plurality limiting Parker to state, acting as sovereign, "trivializes" Parker and is inconsistent with subsequent decisions applying Parker). The plurality was correct in that the Parker Court did not concern or even have reason to address the liability of private parties acting pursuant to anticompetitive state regulations because such parties were never sued in the Parker case. See Brown, 39 F. Supp. at 895 (stating that antitrust action only brought against state parties).


213. See Areeda & Turner, supra note 5, ¶ 212b, at 69-70 (contending that, notwithstanding plurality's opinion, majority of Cantor Court was correct in extending state action immunity to private individuals based on Parker Court's federalism rationale). For a further discussion of the Cantor decision, see supra note 211 and accompanying text.

214. See, e.g., FTC v. Ticor Title Ins. Co., 504 U.S. 621, 639-40 (1992) (denying state action immunity to title insurance companies who violated unfair competition statute because state did not supervise rate-setting scheme); City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 368, 384 (1991) (ruling that City of Columbia and billboard company were immune from antitrust laws for zoning ordinances that restricted new billboard construction); Patrick v. Burget, 486 U.S. 94, 105-06 (1988) (holding that state action immunity does not apply to physician peer review committees where there is no showing that state has active supervision over committee decisions); 324 Liquor Corp. v. Duffy, 479 U.S. 335, 352 (1987) (holding state liquor pricing system invalid notwithstanding state action exemption because state failed to supervise); Southern Motor Carriers Rate Conference, 471 U.S. at 65-66 (holding that state action immunity applied to rate-making activities of pri-
remaining before Seminole Tribe was whether Congress could abrogate state sovereign immunity in federal statutes enacted pursuant to the Commerce Clause and thus subject states to an antitrust suit. Seminole Tribe finally answered this question in the negative, thereby limiting the state action doctrine to private parties acting pursuant to state regulation of markets and thus rendering the doctrine superfluous for states and state governmental entities.215

C. Modern State Action Doctrine

1. Initial Formulations

The modern state action doctrine was developed in a progression of cases that considered alternative formulations of a standard that would implement the Parker rule. Federalism and the promotion of competition are the real bases for state action immunity, not economic efficiency.216 Initially, the Court articulated a two part
test: first, the state must be acting as a sovereign and second, the state must compel, not merely "prompt," the anticompetitive conduct. If the state met this early formulation of the state action test, the defendant state or private party would be immune from antitrust liability. State compulsion appeared to have been required in two early cases, but later cases have rejected any requirement of "compulsion" as a factor that is essential for antitrust immunity. Thus, even if only endorsed by the state, private anticompetitive actions, may be exempt. A state promulgated and enforced regulation, however, immunizes both the private firms acting pursuant to the regulation and the government agency itself. In rejecting a compulsion requirement, the Court recognized again that the state action doctrine represents a balance between potentially conflicting principles: the national interest in competition represented by the antitrust laws, and concerns of federal protection by state action immunity under the Midcal test. For a further discussion of the Midcal test, see infra notes 226-50 and accompanying text.

217. See Goldfarb v. Virginia State Bar, 421 U.S. 773, 791 (1975) (concluding that "its not enough that... anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the state acting as sovereign"). For a discussion of the factual background of Goldfarb, see supra note 154 and accompanying text. The Court did not clearly define the phrase "the State acting as sovereign" but did note that states have a compelling interest in regulating lawyers "as part of their power to protect the public health, safety, and other valid interests." Goldfarb, 421 U.S. at 792. This suggests that the Court recognized a difference between states acting as regulators and states participating in markets. This further suggests that if a state chooses to participate in a market, for example, selling a particular product, it loses immunity and must act competitively.

218. Goldfarb, 421 U.S. at 791-92 (holding that minimum-fee schedule for lawyer services published by county bar association was not immune from Sherman Act claim because conduct was considered private anticompetitive activity and not state action).

219. See id. (stating that anticompetitive activities must be compelled by state acting as sovereign in order to warrant immunity under Sherman Act); see also Cantor v. Detroit Edison Co., 428 U.S. 579, 593 n.28 (1976) (stating that actions merely complementing objectives in state ethical code but not compelled by state are not immune from claims under Sherman Act).

220. See Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48, 59 (1985) (rejecting court of appeals's assumption "that if anticompetitive activity is not compelled, the state can have no interest in whether private parties engage in that conduct").

221. See id. at 59-60 (stating that "federal antitrust laws do not forbid the States to adopt policies that permit, but do not compel, anticompetitive conduct by regulated private parties" (emphasis added)).

222. See, e.g., Bates v. State Bar of Ariz., 433 U.S. 350, 359-63 (1977) (holding that state bar association's actions were immune under Parker exemption to Sherman Act because state policy was active "supervision" and not mere acquiescence).

223. Although compulsion is not necessary to provide immunity, it is clearly probative as to the state's intent to supersede competition. See Areeda & Turner, supra note 5, ¶ 124b1, at 85 (noting that state may not be deemed to intend antitrust immunity when it merely responds to entity's initiative).
eralism that require deference to state sovereignty and the states' power to impose economic regulations.\textsuperscript{224}

Although the Supreme Court has, in some cases, tried to distinguish between core areas where states have a legitimate interest in regulation and other areas that are less crucial to the exercise of states' police power, this distinction did not become a part of the modern test.\textsuperscript{225}

2. *The Two-Prong Midcal Analysis*

The modern two-prong test rationally and practically balances the interests of competition and state sovereignty.\textsuperscript{226} The modern standard emerged in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*,\textsuperscript{227} where a private wine distributor challenged California's regulation of wine sales as an antitrust violation.\textsuperscript{228} The Court adopted a two-prong test to determine whether states and

\textsuperscript{224} See FTC v. Ticor Title Ins. Co., 504 U.S. 621, 632-33 (1992) (noting that "[i]mmunity is conferred out of respect for ongoing regulation by the State, not out of respect for the economics of price restraint").

\textsuperscript{225} See Bates, 433 U.S. at 361-62 (distinguishing state's interest in regulating practice of law from state's lack of interest in lightbulb market).

\textsuperscript{226} Clearly, even when a state follows the "rules" constructed by the Supreme Court in order to achieve immunity for itself and private entities under the state action doctrine, there is the potential that a state may frustrate the balance between marketplace competition and state sovereignty by imposing unnecessary regulations in a market that is working efficiently. On the other hand, state regulation has been viewed as appropriate in markets of traditional concern to states where competition fails: zoning, public transportation and natural monopolies, which historically include telecommunications and cable television. Whether state regulation, on balance or in specific cases, is preferable to competition depends upon one's willingness to trust the skill and impartiality of state government regulators to effectuate the public interest. The alternative would require the federal courts to evaluate individual state regulatory schemes and strike those that impermissibly interfere with competition. See AREEDA & HOVENKAMP, supra note 4, \S 212.1f, at 145-47 (arguing that "Court's view of federalism has left enormous discretion to the states to displace competition"). Such debates over state regulation are indeed academic after *Seminole Tribe*, because the Supreme Court has effectively declared that concerns of federalism and sovereignty trump other considerations such as competition. *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1130-32 (1996). For a discussion of the holding of *Seminole Tribe*, see supra notes 113-55 and accompanying text.

\textsuperscript{227} 445 U.S. 97 (1980).

\textsuperscript{228} See id. at 99-100 (challenging California's "resale price maintenance and price posting statutes"). After being subjected to revocation of its state business license for violating state regulatory law regarding resale of wine, a wine wholesaler sued to enjoin the state's wine resale pricing system. Id. The state had established fair trade regulations by statute requiring wine producers and wholesalers to post their prices and not deviate from them. Id. Wholesalers were thus prohibited from selling wine at discount prices to liquor retailers. Id. at 100. Such a system of resale price maintenance, if adopted by private businesses, has consistently been held to be per se illegal since the Court's decision in *Dr. Miles*. Id. at 102 (finding such resale arrangements are "designed to maintain prices . . . , and to prevent
private parties acting pursuant to state regulation would be immune from antitrust liability: "[f]irst, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy;' [and] second, the policy must be 'actively supervised' by the State itself." The *Midcal* two-prong test applies to private parties acting pursuant to an anticompetitive state policy, as well as to the state government itself. It does not apply in full to local government entities, nor are these entities subject to treble damages even if they are found to be liable. To obtain antitrust immunity, local governments and private parties, acting pursuant to local regulations, must prove only that the anticompetitive regulations were authorized by a state policy, however, the state is not required to actively supervise the implementation of the regulations.

competition among those who trade in [competing goods]" (quoting Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 405 (1911)).

229. *Id.* at 105 (quoting City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978) (plurality opinion)).

230. See Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48, 61 (1985) (finding "*Midcal*'s two-prong test applicable to private parties' claims of state action immunity"); see also Town of Hallie v. City of Eau Claire, 471 U.S. 94, 45-46 & 46 n.10 (1986) (holding *Midcal* test applicable to municipalities seeking immunity under state action doctrine). In *Hallie*, the Court found that a municipality differs from a private party "because a municipality is an arm of the state." *Hallie*, 471 U.S. at 45. The Court then held that the *Midcal* test applicable to municipalities is not the same as that for private parties. *Id.* at 45-46. According to the Court, while a municipality must still show that it "act[ed] pursuant to clearly articulated state policy . . . the active state supervision requirement should not be imposed." *Id.* Moreover, the municipality need only show that the anticompetitive practice was adopted at the state's "direction or authorization." *Id.* at 45. The *Hallie* Court noted in dicta that "in cases where the actor is a state agency, it is likely that active state supervision would also not be required, although we do not decide that issue." *Id.* at 46 n.10.


232. See *Hallie*, 471 U.S. at 38-40 (distinguishing cases involving antitrust actions against municipalities from those involving private parties). "[A] supervision requirement would tend to make local government superfluous. To insist that local government be supervised by the state . . . would either make local government largely pointless or require creation of an additional layer of state supervisors," Areeda & Hovenkamp, supra note 4, ¶ 212.7a, at 203. Because neither result would promote competition or aid the concerns of federalism, a requirement of state supervision in this context is counterproductive. The state authorization need not be explicit. It is sufficient if a local regulation limiting competition is the "foreseeable result" of the state statute. See City of Columbia v. Omni Outdoor Adver., Inc.,
The first Midcal prong, requiring a clearly articulated state policy to replace competition with regulation, is clearly satisfied if state legislation: (a) affirmatively mandates the anticompetitive regulations and (b) declares that regulation, rather than competition, is in the public interest and is the choice of the state. This "clear articulation" prong may also be satisfied by a state policy that "permits" anticompetitive regulation. The requisite state legislation must show a sufficiently clear policy to supplant competition in order to meet the Midcal clear articulation standard. Any state agency that adopts such anticompetitive regulations must have been authorized to do so by the state. A pervasive regulatory scheme created by the state legislature, which itself displaces free competition, is "clearly articulated and affirmatively expressed," because the natural result of such regulation is anticompetitive.

499 U.S. 365, 372-73 (1991) (stating that suppression of competition does not have to be explicitly permitted by statute if suppression is "foreseeable result").

233. See Parker v. Brown, 317 U.S. 341, 352 (1943) (explaining that California marketing program was adopted by statute and then enforced through penal sanctions for violations).

234. See Southern Motor Carriers Rate Conference, 471 U.S. at 61-62 (noting that compulsion is relevant but not prerequisite to finding state has clearly articulated policy). Self-executing statutes may express state policy sufficiently clear but may or may not be sufficient to confer antitrust immunity depending upon whether supervision is necessary to implement the requirements of the statute. See Areeda & Turner, supra note 5, ¶ 213d, at 76-77 (noting that statutory provisions requiring no state supervision may satisfy supervision element of Parker). For example, a statute that prohibits auto dealerships from being open on Sunday or in the evenings meets the requirements for state action immunity if the policy is clearly articulated because there is nothing for the state to supervise. Such an agreement by a group of auto dealerships, however, would be an unlawful conspiracy in restraint of trade. See Detroit Auto Dealers Ass'n v. FTC, 955 F.2d 457, 472 (6th Cir. 1993) (concluding that hours of operation would form basis of restraint of trade violation).

235. See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) (finding policy to be "forthrightly stated and clear in its purpose"). The federal courts, therefore, must determine the intent of state legislation and may have to interpret the legislative policy. See Areeda & Turner, supra note 5, ¶ 214a, at 81-83 (discussing requirements needed to prove intent). Intent may be shown by: "(1) that the state or its agent intend by its action to confer antitrust immunity, (2) that if immunity is intended by an agent of the state, the agent must have authority to make the grant, and (3) that for immunity to apply, the state must make a clear statement of its intent to grant it").

236. See Parker, 317 U.S. at 351 (stating that the Sherman Act "gives no hint that it was intended to restrain state action or official action directed by a state"). Agency action that is not authorized is not immune from the Sherman Act and is ultra vires. Thus, unauthorized agency actions can be enjoined under the Ex parte Young doctrine. For a discussion of the Ex parte Young doctrine, see supra notes 89-94 and accompanying text. See Areeda & Turner, supra note 5, ¶ 214a, at 80 (noting that unauthorized administrative action can be enjoined).

237. See New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 109 (1978) (concluding regulation valid under Sherman Act after rejecting argument that leg-
The critical inquiry is whether the anticompetitive regulations were the "logical" or "foreseeable" result of the legislation authorizing the regulations. The second prong of the *Midcal* test requires that the state actively supervise the private anticompetitive conduct that it authorizes. Antitrust immunity granted should "shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." Clearly, the rationale of this requirement is to promote competition, even at the expense of deference to state sovereignty. Thus, private parties may not claim state action immunity for their anticompetitive actions unless a state policy is also furthered. This isolation requiring (1) notice by auto manufacturers if plans to locate new dealerships into existing dealers' territories; (2) guaranteeing right of incumbent dealers to protest; and (3) right to hearings did not contain any legislative expression of explicit intent to supplant competition). In *New Motor Vehicle Bd.*, the regulatory scheme implicitly "displace[d] unfettered business freedom" and was thus immune from challenge under the Sherman Act. *Id.*

238. See *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42 (1985) (stating that "it is clear that anticompetitive effects logically would result from this broad [state] authority to regulate").

239. See *id.* (finding that anticompetitive conduct was foreseeable result of statute allowing municipality to refuse service in some areas); see also *City of Columbia v. Omni Outdoor Adver.*, Inc., 499 U.S. 965, 373 (1991) (stating that "[i]t is enough, we have held, if suppression of competition is the 'foreseeable result' of what the statute authorizes," where issue was whether state zoning laws represented sufficiently clear articulation of state policy authorizing suppression of competition by municipality (citation omitted)).

240. See generally AREEDA & HOVENKAMP, supra note 4, ¶ 212.3a, at 159-75 (discussing state authorization of anticompetitive activity and whether such authorization must be express to convey state action immunity).

241. Patrick v. Burget, 486 U.S. 94, 101 (1988). In *Patrick*, a surgeon sued surgeons at a competing clinic after he lost his privileges at a hospital based on a peer review action. *Id.* at 96-97. This peer review was initiated and conducted by the competing surgeons. *Id.* The competitors claimed state action immunity by contending that the peer review activities were undertaken pursuant to state regulations creating the peer review system, which included the possibility of judicial review of any peer review decisions. *Id.* at 101. In fact, the state regulations gave neither the state judiciary nor the administrative agencies review power over private peer review decisions. *Id.* at 101-04. Therefore, the Court held that the competitors were not immune from antitrust liability because the state regulations did not satisfy the active supervision prong of the *Midcal* test. *Id.* at 100.

242. See AREEDA & HOVENKAMP, supra note 4, ¶ 212.7, at 217-18 (referencing FTC v. Ticor Title Ins. Co., 504 U.S. 621, 635 (1992)) (finding that "powerful refutation" to use federalism rationale in extending state action to private actors when doing so "would not serve State's best interests"). The requirement that the state actively supervise the private conduct serves to show that state policy, not private interests, is being furthered and that the state is making the decisions rather than acquiescing in an anticompetitive private conspiracy. *Id.* at 218. The basis for this requirement is federalism. *Id.* According to Professors Areeda and Turner:

The existence of a state action immunity enables states... to define areas inappropriate for market control. Moreover, the adequate supervision
requires that the supervision by the state be significant and genuine; mere oversight, monitoring or acquiescence in restraints of trade made by and for the benefit of private parties is insufficient. 243

State officials must have the authority to review, approve and disapprove the particular anticompetitive acts of the supervisees. 244 The mere existence of governmental power to supervise, however, is not enough. The "state officials [must] have and exercise [the] power" and "disapprove those [acts] that fail to accord with state policy." 245 Moreover, the mere potential or statutory authority of state officials to supervise regulatory programs does not constitute active supervision. 246 State officials must exercise a deliberative function in regulating and may not merely acquiesce to private conduct. 247 In FTC v. Ticor Title Insurance Co., 248 the Supreme Court's most recent state action doctrine decision, the Court rejected the

criterion ensures that state-federal conflict will be avoided in those areas in which the state has demonstrated its commitment to a program through its exercise of regulatory oversight. At the same time, it guarantees that when the Sherman Act is set aside, private firms are not left to their own devices. Rather, immunity will be granted only when the state has substituted its own supervision for the economic constraints of the competitive market.

AREEDA & TURNER, supra note 5, ¶ 213a, at 73.

243. See, e.g., 324 Liquor Corp. v. Duffy, 479 U.S. 335, 345 n.7 (1987) (finding state's failure to exert "significant control over" private parties is not active supervision).

244. See Patrick, 486 U.S. at 101 (recognizing that state must "exercise ultimate control over the challenged anticompetitive conduct"). A state agency or official that was not acting pursuant to a clearly articulated state policy would be acting ultra vires, would not be immune and could be enjoined. Ex parte Young, 209 U.S. 123, 155-56 (1908).

245. See Patrick, 486 U.S. at 101 (concluding Midcal active supervision requirement not satisfied where statutory scheme provides no authority to review or overturn private actor decisions). The ultimate ability of the state courts to review decisions terminating a surgeon's medical privileges pursuant to peer review regulations was not sufficient "active supervision." Id. at 102.

246. See, e.g., Ticor Title Ins. Co., 504 U.S. at 638 (denying state action immunity because state did not exercise ultimate and active control of price-fixing or rate setting scheme of private parties). The Court found that because the prices were only subject to "a veto if the state chooses to exercise it," it is not sufficient to constitute active supervision. Id. This mere potential of supervision will not satisfy the requirement of active state supervision. Id.

247. See AREEDA & HOVENKAMP, supra note 4, ¶ 212.7c, at 222-26 (noting that direct approval in form of state legislation is always sufficient to show state control). Direct supervision by the state legislature or state supreme court is clearly sufficient but not necessary. See id. ¶ 212.7c, at 222-23 (noting situations in which implementation of state policy may not require supervision). Active supervision by an authorized state agency is sufficient to confer immunity. See id. (discussing situations in which supervision by municipalities is also sufficient to confer immunity).

248. 504 U.S. 621 (1992)
use of "some normative standard, such as efficiency," in determining if there was sufficient supervision.\textsuperscript{249} Rather, the critical inquiry into active supervision must be "whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices [or other aspects of the state regulatory scheme] have been established as a product of deliberate state intervention."\textsuperscript{250}

3. \textit{Limitations and Scope of State Sovereign Immunity}

The state action doctrine has additional judicially-created limitations that distinguish it from broader Eleventh Amendment state sovereign immunity. First, it is clear that when a state acts as a sovereign engaged in regulating private business, the state is immune from antitrust liability. This state action confers antitrust immunity on the private parties that the state regulates and actively supervises. If, however, the state entity acts as a market participant rather than as the sovereign, antitrust immunity may not be available. This distinction, which promotes competition by imposing antitrust liability, would be irrelevant under \textit{Seminole Tribe}. Under the Eleventh Amendment, identification of the defendant as a state is the sole determinative factor.\textsuperscript{251} Similarly, under the state action doctrine, in the absence of any state policy superseding competition, a state entity that entered into a conspiracy with private actors would be exposed to the full sanctions of the antitrust laws, including treble damages and injunctive relief.\textsuperscript{259}

In \textit{City of Columbia v. Omni Outdoor Advertising},\textsuperscript{253} the Court opined that:

\textsuperscript{249} See id. at 634 (concluding "purpose of the active supervision inquiry is not to determine whether the state has met some normative standard, such as efficiency, in its regulatory practices").

\textsuperscript{250} Id.

\textsuperscript{251} For a discussion of the \textit{Seminole Tribe} decision and the dispositive identification of the defendant as a state, see supra notes 113-55 and accompanying text.

\textsuperscript{252} See, e.g., Greenwood Util. Comm'n v. Mississippi Power Co., 751 F.2d 1484, 1498 (5th Cir. 1985) (suggesting that conspiracy should be considered as sham exception to state action doctrine); Englert v. City of McKeesport, 637 F. Supp. 930, 934 (W.D. Pa. 1986) (stating that state action immunity "does not apply where a governmental entity has been named as co-conspirator with a private party trying to influence it"); Health Care Equalization Comm. v. Iowa Med. Soc'y, 501 F. Supp. 970, 991-93 (S.D. Iowa 1980) (refusing to dismiss antitrust suit against state public health commissioner, who allegedly engaged in "boycott" conspiracy with physicians against chiropractors).

\textsuperscript{253} 499 U.S. 365 (1991). In \textit{Omni}, Omni Outdoor Advertising, Inc. (Omni), an erector of billboards, filed an antitrust suit against the City of Columbia and its competitor, Columbia Outdoor Advertising, Inc. ("COA"), alleging that the two parties were part of a longstanding "secret anticompetitive agreement." Id. at 367.
The rationale of *Parker* was that, in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators . . . . [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.\(^2\)

The *Omni* Court went on to contrast the "commercial participant" situation, where the state resembles a private actor, with the situation where the state is acting as a sovereign in a purely regulatory capacity, albeit as a co-conspirator with one or more of the firms regulated.\(^2\) The existence of a conspiracy between a state and private party, while anticompetitive, and indeed reprehensible, does not transform sovereign action entitled to immunity into unprotected private action.\(^2\) Therefore, a "market participant" exception to the state action doctrine may be recognized in a future case, although it was not adopted in *Omni*. Such a market participant exception would be consistent with the theory and policy of the state action doctrine of immunizing from antitrust liability only the actions of the state government when acting as a sovereign.\(^2\)

In order to limit immunity to sovereign acts of state governments, reviewing courts must evaluate the nature and quality of the states' acts, a task that clearly renders the state action doctrine narrower than the scope of Eleventh Amendment sovereign immunity. Under the state action doctrine, the proper role of federal courts is solely to verify that the defendant state is exercising its sovereign authority in order to find or deny state action immunity.\(^2\)

COA had responded to Omni's growing business by requesting that the city council pass zoning ordinances restricting the use of billboards. *Id.* at 368. In 1982, the city council passed an ordinance requiring the council's approval for every billboard constructed in Columbia. *Id.* In addition, the council passed an ordinance restricting the size, location and spacing of billboards. *Id.* Omni asserted that these ordinances severely hampered their ability to compete. *Id.* at 368.

\(^2\) See *id.* at 374-75 (acknowledging market participant exception but rejecting conspiracy exception to state action immunity). The Court rejected the court of appeals decisions which misconstrued *Parker* and adopted a conspiracy exception to state action immunity. *Id.* at 374 (citation omitted).

\(^2\) *Id.* at 374-79.


\(^2\) See *Omni*, 499 U.S. at 371-72 ("It suffices . . . to conclude that here no more is needed to establish, for *Parker* purposes, the city's authority to regulate than its unquestioned zoning power over the site, location and spacing of bill-
fore, as the Court stated, "with the possible market participant exception, any action that qualifies as state action is 'ipso facto . . . exempt from the operation of the antitrust laws.'" Clearly, however, the reverse is also true; any state action that does not qualify as state action is not immune from antitrust attack in federal court.

The scope of sovereign immunity for states, state departments and state agencies after Seminole Tribe will rely on the protections of the Eleventh Amendment and not be limited by the state action doctrine, which previously immunized both states and private parties for anticompetitive activities undertaken pursuant to an affirmatively expressed state policy and which were actively supervised by the state. Under the Eleventh Amendment, it is not relevant whether the state has a policy to supplant competition or supervises the markets subject to state regulation. Hereafter, broader Eleventh Amendment sovereign immunity will immunize states from suit under the antitrust laws in federal courts. Conversely, private parties acting pursuant to state authorization, indeed, at state directive or mandate, are not sovereigns and therefore do not share in sovereign immunity. These private actors must then continue to seek state action immunity as their only immunity defense to allegations of antitrust violations.

4. Remedies Under State Sovereign Immunity

Is there any justification based upon marketplace competition for abandoning the fifty-year old state action doctrine in favor of the Seminole Tribe Eleventh Amendment rule that immunizes all actions by states and their agencies? In the seminal case of Parker v. Brown, the Court recognized that states have a legitimate interest in regulating some markets and businesses, for example, the business of insurance, common carriers, zoning and lawyers or other boards.

The Omni Court considered and specifically rejected the argument that the existence of the state action defense should depend upon whether the government regulator was acting in the public interest, in which case state action immunity would apply, or corruptly, in which case there would be no immunity. Id. at 376-77. Recognizing that regulation is frequently a zero-sum game, benefitting some and disadvantaging others, the Court declined to base the state action doctrine on whether the regulation was, objectively or subjectively, in the public interest. Id. at 377. Indeed, the Court said, "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." Id.

259. Id. at 379 (quoting Hoover v. Ronwin, 466 U.S. 558, 568 (1984)).
professionals. State governments may thus choose to bypass competition and adopt a regulatory scheme that protects the public interest in these markets, even if that scheme is anticompetitive. Thus, the state action doctrine has the potential to injure consumers and competitors by denying them the ability to recover for antitrust injuries caused by states acting in their sovereign capacity as regulators of markets.

Unlike Eleventh Amendment state sovereign immunity, the state action doctrine balances the possible antitrust injury to consumers against the competing interest of allowing states to regulate business. Indeed, if anything can be inferred from the text and legislative history of the Sherman and Clayton Acts, it is that Congress sought to promote antitrust enforcement by creating a treble damages remedy for private plaintiffs injured by antitrust violations. In addition, "[t]he legislative history and case law indicate that compensation [for victims of anticompetitive conspiracies] is a goal, perhaps even the dominant goal, of antitrust's damages remedy." Thus, the state action doctrine requires a balancing of two competing considerations: competition and state sovereignty. The interests of consumers and other plaintiffs injured by restraints of trade can only be outweighed by a considered state governmental decision to substitute regulation for competition. The Eleventh Amendment, by contrast, is an absolute bar to the exercise of fed-

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261. For a discussion of the Parker decision, see supra notes 180-215 and accompanying text.

262. See Harris & Kenny, supra note 27, at 651 (discussing how state action doctrine "immunizes activities that may restrain competition necessary for the carrying out of bono fide state-related activities, but it does not immunize unauthorized anticompetitive conduct by state agencies and officials"). Harris and Kenny further contend that:

No legitimate state interest would be served, however, by immunizing state conduct violative of the antitrust laws which is not otherwise shielded by the state action doctrine. The application of Eleventh Amendment immunity to private federal antitrust actions would erase forty years of case law that has developed a proper balance between the interests of states and private citizens and would deprive those citizens of any forum in which to pursue the private right of action conferred on them by Congress.

Id. For a contrasting discussion of the Eleventh Amendment, see supra notes 19-94 and accompanying text.


eral jurisdiction over states and engages in no weighing of these competing interests.

The issue of a state's antitrust liability is not purely academic. If liability on the part of a state actor is found, the extent and form of relief may be substantially limited. While the availability of injunctive relief against state entities for antitrust violations has been upheld by the Supreme Court, a majority of the Supreme Court has not decided whether treble damages may be awarded against a state government entity. Moreover, the few decisions by lower courts on this issue are conflicting.

265. See Goldfarb v. Virginia State Bar, 421 U.S. 773, 778 (1975) (referencing state bar as state actor and county bar as private actor then imposing injunctive measures against state and county bar association for violation of antitrust laws). But see Town of Hallie v. City of Eau Claire, 471 U.S. 34, 45 (1985) (characterizing Goldfarb as concerning only private parties that were claiming state action immunity). For a discussion of the factual background of Goldfarb, see supra note 153 and accompanying text. Professors Areeda and Turner have argued that the bar officials in Goldfarb were not government employees or officials, but rather private individuals. Areeda & Turner, supra note 5, at 1217a, at 107-08. Thus, "the Court was concerned with 'essentially a private anticompetitive activity' being conducted by those partially garbed as a state agency." Id. (footnote omitted). Areeda and Turner further opined that government entities and officials should only be potentially subject to equitable remedies but never treble damages liability. Id. at 102. If the defendants in Goldfarb were really not state actors, then a precedent for holding a state liable for injunctive relief may not even exist.

266. See City of Lafayette v. Louisiana Power & Light, 435 U.S. 389, 401-02 (1978) (5-4 decision) (finding previous decisions do not "necessarily require the conclusion that remedies appropriate to redress violations by private corporations would be equally appropriate for municipalities, nor do we decide any question of remedy in this case"), affg 532 F.2d 431 (5th Cir. 1976). In his dissent, Justice Stewart recognized "the staggering costs" that municipalities will be paying due to alleged antitrust violations. Id. at 440 (Stewart, J., dissenting). The precise issue before the Court was the legal standard for antitrust liability of a municipality. Because the district court had granted the defendant cities' motion to dismiss, no decision on the merits or damage award against the cities was at issue. The cities argued, however, that the antitrust laws did not allow civil damages or criminal liability to be imposed upon government entities. Id. at 394. Writing for the plurality, Justice Brennan disagreed, stating that municipalities had the potential to "distort[ ] . . . the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender" and that this would be a "serious chink in the armor of antitrust protection." Id. at 408. Conversely, Justice Stewart argued that damages would be improper, because municipalities and their citizens could be exposed to massive treble damage awards that they could ill afford. Id. at 440-43 (Stewart, J., dissenting).

267. See Duke & Co. v. Foerster, 521 F.2d 1277, 1282 (3d Cir. 1975) (reversing dismissal of treble damages claim against municipalities and local officials); Hecht v. Pro-Football, Inc., 444 F.2d 931, 937-38 (D.C. Cir. 1971) (citing Parker line of cases in deciding that governmental action is not necessarily immune from antitrust laws); Ajax Aluminum v. Goodwill Indus. of Muskegon County, 564 F. Supp. 628, 631 (W.D. Mich. 1983) (finding that state department actively supervised program in question, that legislative authorization was not necessary because defendant was not private party but state itself, and deciding that state, acting in its
Commentators have argued that neither government entities nor officials should be subject to criminal liability or antitrust civil damages because "[i]t is hard to believe that Congress meant to transfer treble damages from the citizenry to those business enterprises which claim antitrust injury as a result of a government agency's economic policies." Moreover, it is argued that injunctive relief would be sufficient to make plaintiffs whole. Commentators have also argued that if it is not possible to construe the antitrust laws to bar damages as a remedy against the acts of government entities and officials, yet still allow equitable remedies, then these entities and officials should be entirely immune from any remedy sought by a plaintiff. Nothing in the language of the Sherman Act limits the type of relief that may be ordered against governmental entities.

IV. Judicial Analysis of Eleventh Amendment and State Action Defenses in Antitrust Cases

Since its adoption, the Eleventh Amendment has been a potential defense for defendant states and state entities in antitrust cases. Indeed, a number of federal antitrust cases against states have been dismissed, in whole or in part, on Eleventh Amendment grounds. In addition, a number of state defendants have based motions to dismiss federal antitrust claims against them upon the immunity of both the Eleventh Amendment and the state action doctrine. A sovereign capacity, is immune from antitrust suit). But see New Mexico v. American Petrofina, 501 F.2d 363, 367-71 (9th Cir. 1974) (holding that "sections 1 and 2 of the Sherman Act do not apply to the activities of a state" (footnote omitted)); cf. Unity Ventures v. County of Lake, 631 F. Supp. 181, 207 (N.D. Ill. 1986) (overturning $28 million treble damage jury award against county, village and local officials based on finding of state action immunity), aff'd, 841 F.2d 770 (7th Cir. 1988).

268. AREEDA & TURNER, supra note 5, ¶ 217, at 102 (citation omitted). By the time that the Areeda and Turner treatise was published in 1978, the Supreme Court had already held that Congress had the power to abrogate state sovereign immunity when it decided Parden and Fitzpatrick. For a discussion of the Parden and Fitzpatrick decisions, see supra notes 56-62, 68-75 and accompanying text, respectively. Areeda and Turner recognized that the Eleventh Amendment may be a significant bar to the award of damages against states and state officials. See AREEDA & TURNER, supra note 5, ¶ 217, at 102 (emphasizing that punitive sanctions against state officials should be barred).

269. See AREEDA & TURNER, supra note 5, ¶ 217a2, at 105 (noting that, regardless of which interpretation of Sherman Act is followed, state agencies or employees would be immune from treble damages).

270. But see id. ¶ 217a1, at 103 (concluding, in defiance of statute’s language, “the inappropriateness of the Sherman [Antitrust] Act’s criminal and monetary penalties for state defendants meant that the Act was never meant to apply at all.” (citing American Petrofina, 501 F.2d at 363)). For a further discussion of American Petrofina, see infra notes 314-17 and accompanying text.
survey of such cases over the past decade, however, demonstrates that the courts that ruled on these motions based their decisions on either or both grounds without a discernable pattern of analysis.\textsuperscript{271} Although state entities have had the option of pleading both the Eleventh Amendment and state action immunity, the number of antitrust decisions that discuss both doctrines is surprisingly, relatively small, and generally, these decisions do not discuss the relationship between the two doctrines of state sovereign immunity.

A. Analysis of Supreme Court Decisions

The Supreme Court has not focused on either the interplay between the state action doctrine and the Eleventh Amendment or the inherent conflicts between the two doctrines in antitrust cases with state actor defendants. In \textit{Goldfarb v. Virginia State Bar},\textsuperscript{272} a state bar association argued to the district court that it was immune from antitrust liability under the Eleventh Amendment.\textsuperscript{273} The District Court, however, based its decision denying such immunity under the \textit{Parker} state action doctrine.\textsuperscript{274} The Supreme Court, therefore, had no opportunity to consider the Eleventh Amendment argument and left that analysis to the district court on remand.\textsuperscript{275} In \textit{City of Lafayette v. Louisiana Power & Light Co.},\textsuperscript{276} the plurality correctly observed that the state action doctrine was based on deference to state sovereignty.\textsuperscript{277} The plurality stated that this sovereignty could be limited only by Congress, and that such a con-

\begin{itemize}
\item \textsuperscript{271} Even if the state actor failed to satisfy the state action doctrine requiring that it act pursuant to a clearly articulated state policy and actively supervise, the Eleventh Amendment may require dismissal or summary judgment for the state.
\item \textsuperscript{272} 421 U.S. 773 (1975).
\item \textsuperscript{273} \textit{Goldfarb v. Virginia State Bar}, 355 F. Supp. 491, 496 (1973) (noting stipulation that “Virginia State Bar is an administrative agency of the Supreme Court of Virginia” and that “such an agency was surely never intended to be included among those liable for damages under [the Clayton Act]”), \textit{aff’d in part and rev’d in part}, 497 F.2d 1 (4th Cir. 1974), \textit{rev’d}, 421 U.S. 773 (1975).
\item \textsuperscript{274} \textit{Id.} (finding that in state bar’s minor role, it had engaged in “state action”). For a discussion of the factual background of \textit{Goldfarb}, see \textit{supra} note 153 and accompanying text.
\item \textsuperscript{275} \textit{See Goldfarb}, 421 U.S. at 792 n.22 (recognizing that state bar believes it has Eleventh Amendment immunity under \textit{Edelman v. Johnson}, 415 U.S. 651 (1974)).
\item \textsuperscript{276} 435 U.S. 389 (1978).
\item \textsuperscript{277} \textit{See id.} at 411-13 (recognizing importance of state sovereignty dual system of government). The \textit{Lafayette} Court explained that “[m]unicipal corporations are instrumentalities of the State for the convenient administration of government within their limits.” \textit{Id.} at 415 (quoting \textit{Louisiana ex rel. Folsom v. Mayor of New Orleans}, 109 U.S. 285 (1883)). The Court then concluded that “the actions of municipalities may reflect state policy.” \textit{Id.}
gressional purpose would not lightly be implied.\textsuperscript{278} The dissent, however, presciently observed the distinction between the two doctrines, by stating:

The plurality today advances two reasons for holding nonetheless that the \textit{Parker} doctrine is inapplicable to municipal governments. First, the plurality notes that municipalities cannot claim the State’s sovereign immunity under the Eleventh Amendment. But this is hardly relevant to the question of whether they are within the reach of the Sherman Act. That question must be answered by reference to congressional intent, and not constitutional principles that apply in entirely different situations. And if constitutional analogies are to be looked to, a decision much more directly related to this case than the Eleventh Amendment is \textit{National League of Cities v. Usery} . . . . That case, like this one, involved an exercise of Congress’ power under the Commerce Clause, and held that States and their political subdivisions must be given equal deference.\textsuperscript{279}

Most recently, in a dissenting opinion to \textit{City of Columbia v. Omni Outdoor Advertising, Inc.},\textsuperscript{280} Justice Stevens briefly mentioned the Eleventh Amendment by noting that, while states are protected from suit, municipalities do not share a similar protection.\textsuperscript{281}

\textbf{B. Analysis of Circuit Court Decisions}

The United States Courts of Appeals for the Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and Federal Circuits have ruled upon antitrust cases in which both the Eleventh Amendment and state action doctrine were raised as defenses. A review of these decisions reveals that no pattern or theoretical analysis in the reasoning. The decisions may be based on either or both grounds, but

\textsuperscript{278} Id. at 398-400. Defendant was not a state entity, but a municipality that had set up an allegedly anticompetitive system for the sale of lightbulbs to customers of a regulated utility. \textit{Id.} at 392. The plurality stated that municipalities are shielded under the state action doctrine only if they are acting pursuant to a state policy. \textit{Id.} at 393-94. The majority rejected any relationship to the Eleventh Amendment, pointing out that cities are not sovereign, and therefore, are not entitled to Eleventh Amendment protection. \textit{Id.} at 412 (citing Lincoln County v. Lunning, 133 U.S. 529 (1890)).

\textsuperscript{279} Id. at 430 (footnote and citations omitted).


\textsuperscript{281} See \textit{id.} at 390 n.4 (Stevens, J., dissenting) ("States are protected by the Eleventh Amendment while municipalities are not . . . ." (quoting \textit{Will v. Michigan Dep’t of State Police}, 491 U.S. 58, 70 (1989))).
in general, these courts do not discuss the relationship between the two doctrines.

The two reported antitrust cases from the Third Circuit, involving allegedly anticompetitive activity prompted by state action, did not directly confront the interplay between the state action doctrine and the Eleventh Amendment. In the case giving the fullest treatment of the two doctrines, Euster v. Eagle Downs Racing Ass'n, the Third Circuit decided that the requirements for state action immunity were satisfied and thus declined to reach the Eleventh Amendment immunity argument that had been raised by the defendants.

In the most recent Fifth Circuit antitrust case, Green v. State Bar of Texas, the court found that the defendant state entity and individual state officials were immune under both the state action doctrine and the Eleventh Amendment. The court, however, did not discuss any differences or potential conflict between the two theories of sovereign immunity. In Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories, the Fifth Circuit did affirm a lower court finding that protected the defendant state board on both an-

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282. See In re Real Estate Title & Settlement Servs. Antitrust Litig., 869 F.2d 760, 765 n.3 (3d Cir. 1989) (finding school boards do not enjoy Eleventh Amendment immunity like states); Euster v. Eagle Downs Racing Ass'n, 677 F.2d 992, 993 n.3, 995-97 (3d Cir. 1982) (finding state action immunity based on satisfaction of Midcal test, thus court did not reach Eleventh Amendment argument). In In re Real Estate Title & Settlement Services, 869 F.2d at 760, the Third Circuit briefly discussed the Eleventh Amendment when it found that school boards lack the protections that states enjoy under the Eleventh Amendment. Id. at 765 n.3 (citing Mount Healthy Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280-82 (1977)). The court concluded that "although school districts are related to the state, the Supreme Court has declared that they are not the alter ego of the state, and thus the Constitution can apply to them differently." Id. (citation omitted).

283. 677 F.2d 992 (3d Cir. 1982).

284. See id. at 995-97 (declining to reach Eleventh Amendment issue after holding state racing commission rules setting jockey fees are protected by state action immunity).

285. 27 F.3d 1083 (5th Cir. 1994).

286. See id. at 1087-88 (determining that state committees and its officials were immune under state action doctrine and Eleventh Amendment because parties acted under state authority).

287. In Green, an insurance adjuster sued the state bar association's unauthorized practice committee, its chair and the bar counsel, among others, for antitrust violation. Id. at 1085-86. The court held that the state committee was not liable for the antitrust claims because it was authorized to pursue the questioned action. Id. at 1087. The plaintiff could not prevail against the committee's counsel for the antitrust claims because he was acting in his official capacity. Id. Finally, the court held that the defendant state officials were immune under the Eleventh Amendment because they were "deemed [not to be] 'persons' subject to suit . . . ." Id. at 1087-88 (citation omitted).

A trade association of pharmacies had sued government entities and drug producers alleging violation of the Robinson-Patman Act, based upon price discrimination in sales to certain pharmacies. The Fifth Circuit affirmed, per curiam, the lower court's dismissal on the ground that the state board was immune from suit for damages under the Eleventh Amendment, but was not immune from a claim for prospective injunctive relief. In dicta, the Fifth Circuit adopted the district court's decision that the Robinson-Patman Act was inapplicable to sales made to governmental institutions, including the university hospital in this case. The Supreme Court reversed the Fifth Circuit on the merits of the antitrust issue without considering the Eleventh Amendment.

The Sixth Circuit has applied the state action doctrine to immunize state defendants from antitrust liability in two cases and the Eleventh Amendment in a third antitrust case, without discussing in any decision the different theories underlying the two sovereign immunity doctrines. In *Allied Artists v. Rhodes*, the court held that the state action doctrine protected the State of Ohio from an antitrust suit, but the Eleventh Amendment did not protect the Ohio governor from an injunction. The court opined that the state's

289. *Id.* at 98, 99, 103 n.10.

290. See *id.* at 98 (claiming that hospitals ran "favored" pharmacies in violation of Robinson-Patman Act, 15 U.S.C. §§ 13(b), 21(a) (1994 & Supp. 1995)).

291. *Id.* at 98-99. The court held that the defendant state entity was the equivalent of the state and thus was immune under the Eleventh Amendment. See *id.* at 99 ("The claims against the Board must therefore be treated as equivalent to claims against the State itself."). Additionally, the Fifth Circuit determined that the state neither waived the immunity nor consented to suit. *Id.* As the court noted, however, the immunity was limited to the plaintiff's suit for damages against the state university. *See id.* (stating that immunity does not extend to prospective injunctive relief).

292. The Court distinguished its immunity decision based upon the Robinson-Patman Act from the state action doctrine, which it described as dealing only with "'state policy to displace competition with regulation or monopoly public service.'" *Id.* at 103 n.10 (quoting City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 413 (1978)). The Court observed that the rationale of the state action doctrine was not inconsistent with its decision because the state was seeking to promote competition. *Id.*

293. *See Jefferson County Pharm. Ass'n Inc. v. Abbott Laboratories*, 460 U.S. at 170-71 (finding no exemption from antitrust laws).

294. 679 F.2d 656 (6th Cir. 1982).

295. See *id.* at 662 (determining that state's motion picture licensing act was within state action doctrine because first prong of *Midcal*, clearly articulated policy, was present and that second prong was not necessary because regulation was self-executing). In *Allied Artists*, the Governor of Ohio was sued to enjoin enforcement of a law prohibiting blind bidding in the marketing of movies, alleging that the statute violated antitrust laws, among other things. *Id.* at 658-59. The trial court found no antitrust violation. *Id.* at 659.
immunity was found because the state policy to replace competition was clearly articulated in the statute and the statute was self-executing, making active state supervision unnecessary. The court stated, however, that the governor was involved with the enforcement of the statute. Thus, he could be sued for injunctive relief under the *Ex parte Young* doctrine. The court failed to explain why it applied the state action doctrine analysis to one defendant and the Eleventh Amendment analysis to the other defendant. In *Gross v. University of Tennessee*, the court affirmed dismissal of the defendant state university hospital pursuant to the Eleventh Amendment without discussing the possibility of state action immunity, even though both sovereign immunity claims had been argued by the government defendants. Finally, in *Hybud Equipment Corp. v. City of Akron*, the court decided that the defendant city was exempt from antitrust liability under the state action doctrine.

Several years earlier, in a previous decision of this case, the Sixth

296. Id. at 662.
297. See id. at 665 n.5 (determining that governor had sufficient connection with enforcement of law such that he falls outside of Eleventh Amendment protection and may be sued for declaratory and injunctive relief).
298. See id. (finding that governor is outside scope of Eleventh Amendment immunity and eligible for declaratory and injunctive relief under *Ex parte Young*).
299. 620 F.2d 109 (6th Cir. 1980) (per curiam).
300. See id. at 110 (deciding to dismiss claims without reaching Eleventh Amendment or state action arguments). In *Gross*, two medical school professors sued the university in challenging their dismissals on antitrust and civil rights grounds. Id. At the time of their hiring, the professors signed "medical practice agreements." Id. Later in their employment, the professors refused to resign the agreements. Id. Thereafter, the university terminated them. Id.
301. 742 F.2d 949 (6th Cir. 1984). In *Hybud*, the Sixth Circuit upheld the City of Akron's ordinance that created a monopoly for garbage collection and eliminated competition. Id. at 964. The City took these actions in order to ensure the viability of its own $55 million recycling plant. Id. at 951-53. The ousted competitors then sued under constitutional and antitrust grounds. Id. at 953. After the Sixth Circuit upheld these actions by finding that the City operated under the state action doctrine, the Supreme Court vacated and remanded the decision to be considered in light of the recent decision in *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982). See *Hybud Equipment Corp. v. City of Akron*, 455 U.S. 931, 931 (1982) (citing *City of Boulder*, 455 U.S. at 40). The *City of Boulder* decision cautioned against finding that a city was engaged in state action "unless [the action] constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy." *City of Boulder*, 455 U.S. at 52 (emphasis added). On remand, the district court again upheld the City's action as protected under the state action doctrine. *Hybud Equipment Corp. v. City of Akron*, No. CIV.A.78-1733A, 1983 WL 1814 (N.D. Ohio Apr. 6, 1983), aff'd, 742 F.2d 949 (6th Cir. 1984). The district court's decision was then affirmed for the second time by the Sixth Circuit, notwithstanding the *City of Boulder* decision. *Hybud Equipment Corp.*, 742 F.2d at 964.
302. See *Hybud Equipment Corp.*, 742 F.2d at 964 (upholding City's ordinance creating monopoly for garbage collection).
Circuit upheld these same actions taken by the City.\textsuperscript{303} At that time, the Sixth Circuit also found state action to exist but noted that the Eleventh Amendment did not apply.\textsuperscript{304} After remand of this case, the City's actions were affirmed in the decision above.\textsuperscript{305}

In the only reported Seventh Circuit case discussing both the antitrust immunity and constitutional sovereign immunity doctrines, \textit{Crosetto v. State Bar of Wisconsin},\textsuperscript{306} the court noted that state bar associations have been recognized as arms of the state for Eleventh Amendment purposes.\textsuperscript{307} The court also discussed the status of state bar associations under the antitrust state action doctrine, recognizing that bar associations had been held to be entities of the state entitled to immunity under this antitrust doctrine.\textsuperscript{308} Whether this association was entitled to immunity was a question of fact for the trial court, so the immunity issue was remanded to the district court.\textsuperscript{309} Significantly, the Seventh Circuit raised the Eleventh Amendment issue sua sponte because the power of the federal courts to exercise power over parties is jurisdictional.\textsuperscript{310}

\begin{footnotesize}
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\item \textsuperscript{303} See \textit{Hybud Equipment Corp. v. City of Akron}, 654 F.2d 1187, 1195-97 (1981) (determining that City's acts were protected under state action doctrine because garbage collection is traditional local government function), \textit{vacated}, 455 U.S. 931 (1982).
\item \textsuperscript{304} See \textit{id.} at 1196 (discussing Tenth and Eleventh Amendments).
\item \textsuperscript{305} \textit{Hybud}, 742 F.2d at 964 (upholding City's ordinance creating monopoly for garbage collection).
\item \textsuperscript{306} 12 F.3d 1396 (7th Cir. 1993).
\item \textsuperscript{307} See \textit{id.} at 1401 (recognizing that "suit against a state bar association, as a general matter, may constitute a suit against the state for sovereign immunity purposes"). In \textit{Crosetto}, a lawyer sued the state bar, its director and the members of the state supreme court challenging the compulsory membership requirement and dues under the antitrust laws and First Amendment. \textit{id.} at 1397. On this issue, the Seventh Circuit found the status of the state bar to be a question of fact. \textit{id.} at 1402. Therefore, the Seventh Circuit vacated and remanded the case against the state bar to the district court. \textit{id.}
\item \textsuperscript{308} See \textit{id.} at 1401 (quoting \textit{Hoover v. Ronwin}, 466 U.S. 558, 569 n.18 (1989)) (finding that "the regulation of the activities of the bar is at the core of the State's power to protect the public"). The Third Circuit further explained that: "Few other professions are as close to the core of the State's power to protect the public. Nor is any trade or other profession as essential to the primary governmental function of administering justice." \textit{id.} (quoting \textit{Hoover}, 466 U.S. at 569 n.18).
\item \textsuperscript{309} See \textit{id.} at 1402 (remanding for district court to determine whether "the suit against Wisconsin State Bar Association is properly considered a suit against the state qua state"). The Seventh Circuit listed several factors for the district court to consider: (1) whether the state supreme court had ultimate control; (2) whether the bar association acted as an agent of the state supreme court; and (3) whether a judgment against the state bar would be paid by the state treasury. \textit{id.}
\item \textsuperscript{310} See \textit{id.} at 1401 (stating that "when a state citizen sues an entity that happens to be an arm of that citizen's home state, then a federal court, under \textit{Hans} and its progeny, ordinarily lacks subject matter jurisdiction" (footnote omitted)).
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The only Eighth Circuit decision, *O'Connor v. Jones*, was decided upon Eleventh Amendment immunity and not on the basis of antitrust state action immunity. The court, however, failed to discuss the relationship between the two doctrines.

The Ninth Circuit has decided the largest number of cases that discuss both immunity doctrines. The most searching analysis came more than twenty years ago in *State of New Mexico v. American Petrofina, Inc.* In deciding that *Parker* conferred absolute immunity on states under the antitrust laws, the *American Petrofina* court stated that "we have no basis for concluding that Congress intended sections 1 and 2 of the Sherman Act to apply to some acts of states but not to others." The court noted that "the Eleventh Amendment would cause serious difficulties for such a suit against a state. Without a clear indication from Congress, we are reluctant to impute to Congress an intent that would raise such substantial constitutional problems." Thus, the Ninth Circuit was suggesting that

311. 946 F.2d 1395 (8th Cir. 1991).

312. *See id.* at 1397-98 (deciding state attorney general was entitled to Eleventh Amendment immunity and thus claim of antitrust violations never reached). In *O'Connor*, a state prisoner challenged the appointment of his court-appointed lawyer in a separate suit alleging inadequate medical treatment in a state-run prison. *Id.* at 1396. The prisoner challenged the legal appointment because members of the lawyer's firm had been previously appointed as "special assistant attorneys general" for the state in other cases representing state employees. *Id.* at 1396-97. The district court found that the state attorney general had violated state law in making such legal appointments. *Id.* In reversing the district court's decision to deny the prisoner's request to dismiss his attorney, the Eighth Circuit bypassed the prisoner's claims that such hirings resulted in violations of the antitrust laws. *Id.* at 1397. Instead, the court found that the plaintiff's motion would be sustained on other grounds so that the court did not decide the issue relating to antitrust laws and state action. *Id.* at 1397 & n.1. The Third Circuit found that the Missouri Attorney General was entitled to Eleventh Amendment immunity. *Id.* at 1399 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984) (concluding that "a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment").

313. Not all of these cases were decided on the merits of the immunity doctrines. *See Ferguson v. Greater Pocatello Chamber of Commerce*, 848 F.2d 976 (9th Cir. 1988) (dismissing claims because plaintiff failed to present "any material issue of fact on the merits of their antitrust claims"). In *Ferguson*, an unsuccessful bidder for the rights to hold a trade show sued the winning bidder and the state university for violations of the Sherman Act. *Id.* at 978-79. The Ninth Circuit affirmed dismissal of the complaint and noted that because the plaintiffs had failed to present any evidence, it did not have to consider Eleventh Amendment immunity, the *Noerr-Pennington* doctrine or state action immunity. *Id.* at 984 n.5.

314. 501 F.2d 363 (9th Cir. 1974).

315. *Id.* at 372.

316. *Id.* at 366 (footnote omitted). In *American Petrofina*, the state sued Shell Oil Co. and five other firms for price-fixing and bid rigging in the sale of asphalt to the state and its political subdivisions. *Id.* at 364. Defendants counterclaimed, al-
the scope of the state action doctrine should be as broad, if not identical to the Eleventh Amendment immunity. In later decisions, the Supreme Court failed to adopt this expansive view of the state action doctrine. However, the Ninth Circuit correctly recognized that there are differences between Eleventh Amendment immunity and antitrust state action immunity that can affect the outcome of cases. In a more recent case, Miller v. Oregon Liquor Control Commission, the Ninth Circuit held that the defendant state failed to satisfy the requirements for state action immunity because it did not actively supervise its regulatory program. The court did not address Eleventh Amendment state sovereign immunity because the state had raised that issue for the first time on appeal. In later decisions, the court applied the state action doctrine or the Eleventh Amendment, or both, with little analysis of the complexities of and differences between the two immunity doctrines. In one case the court based its decision on the Eleventh Amendment and therefore found that consideration of the state action defense was unnecessary. In other cases, however, the court based its decision on

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318. 688 F.2d 1222 (9th Cir. 1982).
319. See id. at 1224-27 (determining that state supervision requirement was not satisfied because state neither established nor reviewed reasonableness of price schedules). Analyzing the two-prong Midcal test for state action immunity, the court reviewed the state regulations requiring that all liquor prices be publicly posted and not subject to discount. Id. at 1225, 1226-27. The state simply required that prices be posted but did not review those prices to determine whether they were reasonable. The Ninth Circuit found that the state did not adequately supervise the price regulation. Id. at 1227. Thus, the regulation failed the second prong of the Midcal test. Id. (citing Midcal, 445 U.S. at 97).
320. See id. at 1227 n.4 (remanding Eleventh Amendment argument). The Ninth Circuit noted that the Eleventh Amendment does not bar suits against the private defendants and remanded this constitutional issue to the district court. Id. State action immunity against private parties does not bar an action like the plaintiff's. Id.
321. See Alaska Cargo Transp., Inc. v. Alaska R.R. Corp., 5 F.3d 378, 379-83 (9th Cir. 1993) (determining that because Congress did not abrogate constitutional immunity in federal law and railroad was an "arm of the state," corporation was entitled to Eleventh Amendment immunity). In Alaska Cargo, a company that services rail cars sued a railroad corporation for alleged antitrust violations, defamations and breach of contract. Id. at 378-79. Affirming the lower court's decision, the Ninth Circuit held that because the defendant satisfied the most critical factor—"whether a judgment would impact the state treasury"—the defendant was
both doctrines.\textsuperscript{322} In no instance did the court discuss the differences between the two doctrines.

In the only reported Tenth Circuit case where both immunity doctrines were raised, \textit{Howard v. State Department of Highways of Colorado,}\textsuperscript{323} the court based its decision with respect to the antitrust issues solely upon the state action doctrine and found that the state defendants were immune.\textsuperscript{324}

The Eleventh Circuit has decided two antitrust cases on the basis of the state action doctrine after declining to consider the issue of Eleventh Amendment sovereign immunity. In \textit{Askew v. DCH Regional Health Care Authority,}\textsuperscript{325} the court decided that the authority was a governmental entity that was immune under the state action doctrine and thus the court did not discuss the Eleventh

an “arm of the state” and thus entitled to Eleventh Amendment immunity. \textit{Id.} at 380, 382. Because the case was decided under the Eleventh Amendment, the Ninth Circuit found it unnecessary to discuss the state action issue. \textit{Id.} at 383 n.4.

\textsuperscript{322} In \textit{Boulware v. State of Nevada, Department of Human Resources}, 960 F.2d 793 (9th Cir. 1992), a doctor sued the state and a hospital for antitrust violations surrounding the doctor’s alleged failure to obtain a certificate of need regulating the purchase of a magnetic resonance imaging (MRI) unit. \textit{Id.} at 795. The doctor went bankrupt and brought this federal action. \textit{Id.} The district court dismissed the state department pursuant to the Eleventh Amendment and the other defendants based on the \textit{Noerr-Pennington} immunity. \textit{Id.} at 796. On appeal, the Ninth Circuit affirmed the dismissal of the private defendants because its monopolistic activities were protected under the \textit{Noerr-Pennington} doctrine. \textit{See id.} at 799-800 (determining that even though defendant took part in monopolistic activities, that does not “place it” beyond \textit{Noerr-Pennington}’s protection).

In \textit{Charley’s Radio Taxi Dispatch Corp. v. SIDA of Hawaii}, 810 F.2d 869 (9th Cir. 1987), a taxi fleet operator sued the state, a taxi association and individual taxi owners challenging the appointment of the association as the exclusive provider of service at the airport. \textit{Id.} at 872. The court held that the state and the state’s department of transportation were immune under the Eleventh Amendment because the state did not waive its immunity. \textit{Id.} at 873-74. It affirmed the lower court’s dismissal of the action against the state director under the state action doctrine. \textit{Id.} at 876. The court determined that because the director acted according to lawful authority, his acts were that of the state and protected under the state action doctrine. \textit{Id.} Finally, like the state director, the private taxi company was protected under the state action doctrine because it was granted an exclusive monopoly by the state. \textit{Id.}

\textsuperscript{323} 478 F.2d 581 (10th Cir. 1973).

\textsuperscript{324} \textit{See id.} at 585 (holding that “[w]hen a monopoly or restraint of trade is a result of valid state action, there is no antitrust violation”). In \textit{Howard}, the owner of a resort sued the state for antitrust and other claims, including the First Amendment, challenging the Colorado Outdoor Advertising Act, which prohibited him from erecting roadside signs. \textit{Id.} at 582. The federal district court abstained from exercising jurisdiction while proceedings were pending in state court and did not rule on the state defendant’s motion to dismiss under the Eleventh Amendment. \textit{Id.} Affirming the district court’s dismissal for want of jurisdiction, the court determined that, under \textit{Parker}, a monopoly or restraint of trade is not a violation of antitrust laws if the action was the “result of valid state action.” \textit{Id.} at 585.

\textsuperscript{325} 995 F.2d 1033 (11th Cir. 1993).
Amendment.\textsuperscript{326} In \textit{Abramson v. Gonzalez},\textsuperscript{327} several unlicensed psychologists sued a state official for interfering with their commercial speech in challenging the state licensing scheme and regulation by the state board.\textsuperscript{328} The psychologists then sought to amend the complaint to re-allege the antitrust count.\textsuperscript{329} On appeal, the Eleventh Circuit, on its own motion, refused to consider the defense of Eleventh Amendment immunity because the defense had not been previously raised and denied.\textsuperscript{330}

The Federal Circuit, in \textit{Genentech, Inc. v. Eli Lilly & Co.},\textsuperscript{331} held that the state university in the case was not immune under the Eleventh Amendment for alleged patent violations.\textsuperscript{332} The court dismissed the plaintiff's antitrust claim because the plaintiff failed to plead facts which could have been found to be a violation of antitrust law.\textsuperscript{333}

\textsuperscript{326} See id. at 1037-41 (holding that state hospital authority was political subdivision of state and that it acted, when purchasing hospital in question, according to clearly expressed state policy; thus, it was entitled to state action immunity under \textit{Town of Hattie}).

In \textit{Askew}, the plaintiff sought to enjoin a state authority from acquiring a health care facility. \textit{Id.} at 1035. Noting that neither the Supreme Court nor another "Eleventh Circuit case had held that a political subdivision that is not a municipality...is subject to the two-prong test of \textit{Midcal}," the court determined that the proper test was that articulated in \textit{Town of Hattie}. \textit{Id.} at 1037-38. The court determined that the state authority was a political subdivision. \textit{Id.} at 1039. It then found that the state authority acted pursuant to an affirmative state policy because the legislature had stated that "publicly-owned hospitals played a very significant role in providing health care to the poor." \textit{Id.} at 1040. Thus, the court held that the authority was immune from antitrust liability. \textit{Id.} at 1041.

\textsuperscript{327} 949 F.2d 1567 (11th Cir. 1992).
\textsuperscript{328} \textit{Id.} at 1570-72.
\textsuperscript{329} \textit{Id.}
\textsuperscript{330} \textit{Id.} at 1570 n.1.
\textsuperscript{331} 998 F.2d 931 (Fed. Cir. 1993).

\textsuperscript{332} See \textit{id.} at 948-49 (holding that Congress specifically intended to abrogate state immunity for violations to federal laws regarding patent owned by states). In \textit{Genentech}, the plaintiff sued the state university and Lilly for declaratory judgment over licensing arrangements concerning a patent held by the university. \textit{Id.} at 935. The complaint was based on antitrust, contract and tort claims. \textit{Id.} The district court determined that the university was an arm of the state and entitled to Eleventh Amendment immunity. \textit{Id.} at 939. The Federal Circuit, however, determined that Congress explicitly abrogated state immunity for violations under a specific patent law. \textit{Id.} at 942.

\textsuperscript{333} See \textit{id.} at 941-44 (finding that plaintiff failed to provide facts "which if proved [would have] constitute[d] violation of the antitrust laws"). After describing the state action doctrine, the court determined that the antitrust challenges to the university's exclusive licenses of its patents were insufficient as a matter of law. \textit{Id.} at 949. Thus, the court did not discuss the state action doctrine's applicability to the case. \textit{Id.}
C. Analysis of District Court Decisions

The district courts in the pre-Seminole Tribe era have employed similarly inconsistent analyses in antitrust cases where both Eleventh Amendment sovereign immunity and the state action doctrine were, or could have been, pleaded as defenses. In cases involving multiple causes of action, many courts have applied an Eleventh Amendment analysis to the nonantitrust claims and a state action analysis to the antitrust claims, without explaining why the Eleventh Amendment analysis was not used in connection with the antitrust counts of the complaint.334 These courts did not indicate whether there would have been a different result under the two methods of analysis. One district court, however, has reached both the Eleventh Amendment and state action issues in an antitrust case.335 This court decided that the defendant was a state agency for antitrust immunity purposes but was not a state agency for the purposes of the Eleventh Amendment.336 Other courts have determined an-

334. See, e.g., Crefasi v. Louisiana Motor Vehicle Comm’n, No. CIV.A.94-0653, 1994 WL 548205, at *1-5 (E.D. La. Oct. 6, 1994) (dismissing § 1983 claims against state commission and officials pursuant to Eleventh Amendment immunity and granting summary judgment based on state action immunity for antitrust claims); McFarlane v. Folsom, 854 F. Supp. 862, 872-73, 878-79 (1994) (dismissing claims against state’s legislature, supreme court and board of examiners, among others, by plaintiff who failed state bar exam several times under state action doctrine for antitrust claims and under Eleventh Amendment for civil rights claim); Ralph Rosenberg Court Reporters, Inc. v. Fazio, 811 F. Supp. 1432, 1439-40 (D. Haw. 1993) (denying antitrust claims under state action doctrine where state supreme court promulgated certification rules for court reporters and discussing Eleventh Amendment in context of freedom of speech claims); California Int’l Chem. Co. v. Neptune Pool Serv., Inc., 770 F. Supp. 1530, 1532-34 (M.D. Fla. 1991) (denying motion to dismiss for racketeering count because factual record was not clear whether actions of chairperson of state board were within Eleventh Amendment immunity and denying motion to dismiss antitrust claims because there was reasonable inference that lobbying efforts of defendant chairperson were within sham exception of Noerr-Pennington doctrine); Board of Governors v. Helpingstine, 714 F. Supp. 167, 174-76 (M.D.N.C. 1989) (dismissing counterclaim against state university officials under Eleventh Amendment immunity for alleged state unfair competition violations and under state action doctrine for federal antitrust claim); Pope v. Mississippi Real Estate Comm’n, 695 F. Supp. 253, 279-80, 282-86 (N.D. Miss. 1988) (dismissing claims challenging trade association’s provision of multiple listings only to members, price-fixing and governmental retaliation against state real estate commission and its officers under Eleventh Amendment for illegal due process, equal protection and First Amendment violations and under state action doctrine for alleged antitrust violations).

335. See Pennsylvania Coach Lines v. Port Auth. of Allegheny County, 874 F. Supp. 666, 669 n.1, 670-71 (W.D. Pa. 1994) (holding that defendant agency was not state agency under Eleventh Amendment but was state agency under state action doctrine).

336. Id. In Pennsylvania Coach Lines, a private bus company alleged antitrust violations against defendant port authority because the authority appointed a competitor as the exclusive carrier between an airport and the downtown area. Id. at
titrust claims based on the antitrust state action defense and declined to reach the constitutional immunity question.\textsuperscript{337} A smaller number of courts have dismissed the antitrust claims on the alternative grounds of antitrust immunity or constitutional sovereign immunity.\textsuperscript{338} At least one court has used the state action doctrine to

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668. The court denied the port authority's motion for summary judgment under the Eleventh Amendment based on the Third Circuit's holding that a regional authority was not the "state" for the purposes of the Eleventh Amendment. \textit{Id.} at 669 n.1 (citing \textit{Bolden v. Southeastern Pa. Transp. Auth.}, 953 F.2d 807, 812-21 (3d Cir. 1991)). The court, however, then held that the port authority was a state entity for the purposes of the antitrust laws and was entitled to state action immunity, determining that:

The fact that this Court has held that defendant is not a state agency for purposes of the Eleventh Amendment does not preclude a determination that defendant is a state agency for purposes of the state action exemption in light of the particularized factors that courts consider when determining whether an entity is a state agency under the Eleventh Amendment. Because the state action exemption is founded on principles of federalism and state sovereignty, this Court... holds that defendant is a state agency for purposes of the state action exemption. \textit{Id.} at 670-71 (citations omitted). Conversely, in \textit{Vartan v. Harristown Development Corp.}, 661 F. Supp. 596 (M.D. Pa. 1987), another district court used the opposite reasoning by deciding that it was appropriate to use federal Eleventh Amendment precedent to determine whether the defendant was the "state" for purposes of antitrust immunity because antitrust laws are federal statutes. \textit{See id.} at 602 (noting that although state court decisions determining whether state agency is political organization of state is important, court stated that for antitrust law it would follow circuit court test).

\textsuperscript{337} See, \textit{e.g.}, \textit{Berger v. Cuyahoga County Bar Ass'n}, 775 F. Supp. 1096, 1101 (N.D. Ohio 1991) (finding discussion of Eleventh Amendment immunity unnecessary because bar disciplinary proceedings were based on articulated policy of state supreme court and adequately supervised by state supreme court, thus satisfying two-prong test of \textit{Midcal}); \textit{Cowboy Book, Ltd. v. Board of Regents for Agric. & Mechanical College}, 728 F. Supp. 1518, 1520-24 (W.D. Okla. 1989) (granting state university's motion to dismiss against private bookstore's claim of unfair competition under state action doctrine and determining consideration of Eleventh Amendment unnecessary); \textit{Midwest Constr. Co. v. Illinois Dep't of Labor}, 684 F. Supp. 991, 993-96 (N.D. Ill. 1988) (determining that state entities were immune from antitrust claims under state action doctrine and thus did not reach Eleventh Amendment defense). It should be noted that the above mentioned cases were decided prior to the Supreme Court's decision in \textit{Seminole Tribe}, which centered its decision on the importance of the Eleventh Amendment. \textit{See Seminole Tribe v. Florida}, 116 S. Ct. \ 1114, 1123-32 (1996) (determining that Eleventh Amendment forbids Congress from allowing suits by private parties against unconsenting states).

\textsuperscript{338} See, \textit{e.g.}, \textit{Pharmaceutical and Diagnostic Servs., Inc. v. University of Utah}, 801 F. Supp. 508, 510-14 (D. Utah 1990) (dismissing claim of unfair competition brought by private health care firm against state university and state officials based on both Eleventh Amendment and state action immunities); \textit{H.E. Duncan & Sons, Inc. v. Finance Exch. Co. of Pa.}, No. CIV.A.86-1107, 1986 WL 9258, at *1, 4-5 (E.D. Pa. Aug. 21, 1986) (dismissing all claims by grocery store against state for alleged violation of food stamp regulations and antitrust laws under Eleventh Amendment immunity and dismissing antitrust claims against state entities and private parties under state action doctrine).
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supplement the Eleventh Amendment and bar the possibility of injunctive relief, as well as damages against states and their officials. Finally, in at least one antitrust case, a court has applied the Eleventh Amendment rather than the antitrust state action defense.

V. IMPACT OF SEMINOLE TRIBE ON ANTITRUST THEORY AND PRACTICE

A. Distinguishing Policy Justifications Between Eleventh Amendment and State Acting Doctrine

The differences between Eleventh Amendment sovereign immunity and antitrust state action immunity illuminate the important role of the antitrust laws and the goal of competition that the Sherman and Clayton Acts were written to effectuate—the Eleventh Amendment is an absolute bar for suits against states in federal court, while the state action doctrine immunizes states from suit only where the state has acted as a sovereign and made a conscious decision to supplant competition. The state action doctrine then seeks to balance the sometimes inconsistent goals of competition and state sovereignty.

The judiciary developed the state action doctrine on the theory that Congress intended the antitrust laws to reach activities regulated by the states, but only in limited circumstances. While the courts recognized that competition was an important concern, the

339. See Pharmaceutical and Diagnostic Serv., Inc., 801 F. Supp. at 513-14 (determining that even though Eleventh Amendment is not bar to injunctive relief by plaintiff, state may be protected under state action doctrine). Citing the Ex parte Young doctrine, the court held that the Eleventh Amendment did not bar claims against the state for prospective injunctive relief. Id. at 513. The court found, however, that the university defendants were entitled to state action immunity and were not subject to injunctive relief under the antitrust law. Id. The court determined that because the defendants "constitute[d] the state acting in its sovereign capacity . . . they . . . [were] entitled to Parker antitrust immunity." Id.

340. See Mizlou Television Network, Inc. v. National Broad. Co., 603 F. Supp. 677, 680-81 (D.D.C. 1984) (holding that because state commission was subunit of state government, it is protected from suit under Eleventh Amendment). In Mizlou, a television network brought an antitrust action against the Florida Citrus Commission and others related to the awarding of television rights to broadcast the Florida Citrus Bowl football game. Id. at 678-80. The court dismissed the action on a variety of grounds including the Eleventh Amendment, but not the state action doctrine. Id. at 680-81. The court found that the Commission was a "subunit of the State" and was entitled to Eleventh Amendment immunity. Id. at 681. Supporting its decision, the court relied solely on the Supreme Court's decision in Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984), for the proposition that a state and its agencies are immune from federal suits brought by citizens and noncitizens unless the governmental entity had consented to suit. Mizlou, 603 F. Supp. at 680-81 (citing Pennhurst, 465 U.S. at 100).
ability of state governments to supplant competition and regulate commerce was of equally important, but sometimes conflicting, value. The text of the antitrust laws contain broad Constitution-like language, written with the expectation that the federal courts would develop a body of antitrust law by accretion in the same way that the common law evolves. Since the Supreme Court's decision in *Parker v. Brown,* it is clear that federal courts believed they had the power to strike a balance between competition and state sovereignty. The Supreme Court, however, has now declared that this balance always tips in favor of state sovereignty, with the result that states are now immune from suit in federal court. Under the *Seminole Tribe* rationale, the Eleventh Amendment will protect state entities from liability for damages under the antitrust laws, even if their regulation is not "affirmatively authorized" or "actively supervised."

B. *Impact of Seminole Tribe Decision on Antitrust Cases*

The actual impact of the *Seminole Tribe* decision on future antitrust cases will be real, although this should not be overstated. As was discussed above, state governmental entities that are named as defendants in antitrust actions have generally been found to be entitled to immunity because they met the requirements of the state action doctrine. Some important antitrust cases, however, might

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341. *See United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.").


343. For a discussion of *Parker v. Brown*, see *supra* notes 180-213 and accompanying text.

344. For a discussion of the majority's opinion in *Seminole Tribe v. Florida*, see *supra* notes 113-55 and accompanying text.

345. *See Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1131 (1996) ("Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting states.").

346. For a discussion of the federal courts' use and analysis of the state action doctrine, see *supra* notes 259-328 and accompanying text. Private parties have not been so successful; in many cases, the state action doctrine has not immunized the private defendants. *See, e.g.*, Patrick v. Burget, 486 U.S. 94, 105 (1988) (determining that hospital peer review system was not actively supervised by state so defendant doctors were not immune); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 102-06 (1980) (holding California wine producers not immune to antitrust liability because state wine pricing system was controlled by growers and state's minimal involvement was insufficient); Cantor v. Detroit Edison Co., 428 U.S. 579, 592-95 (1976) (holding that although state commission
have been decided differently had state sovereign immunity been understood to be an absolute bar to suits against states in federal court.\footnote{347. See, e.g., 324 Liquor Corp. v. Duffy, 479 U.S. 335, 343-45 (1987) (holding that New York’s liquor price regulations were not state action immune because state did not actively supervise prices); Goldfarb v. Virginia State Bar, 421 U.S. 773, 788-92 (1975) (determining that state bar was not immune to antitrust suit because state through its supreme court did not authorize minimum fee schedule used). Injunctive relief could have been sought against state officials under the \textit{Ex parte Young} doctrine. See \textit{Seminole Tribe}, 116 S. Ct. at 1131 n.16 (stating that “an individual may obtain injunctive relief under \textit{Ex parte Young} in order to remedy a state officer’s ongoing violation of federal law). For a discussion of the \textit{Ex parte Young} decision and its impact upon bringing suit against state officials, see \textit{supra} notes 89-94 and accompanying text.} The Eleventh Amendment, as defined by the majority in \textit{Seminole Tribe}, has rendered moot the possibility of antitrust liability for damages against a state and its entities.\footnote{348. For a discussion of the majority’s opinion in \textit{Seminole Tribe v. Florida}, see \textit{supra} notes 113-55 and accompanying text.} This decision essentially eliminates the need for state action immunity with respect to suits against states, state departments and state agencies.\footnote{349. For a discussion of the possible impact of \textit{Ex parte Young} and its progeny, see \textit{supra} note 89-94 and accompanying text.} Private firms, however, are not sovereigns entitled to Eleventh Amendment immunity.\footnote{350. For a discussion of the Eleventh Amendment, see \textit{supra} notes 56-94 and accompanying text.} Therefore, the state action doctrine is the only kind of immunity that is potentially available to private defendants charged with antitrust violations for actions taken pursuant to state law or policy. This necessary state action immunity should continue to be available to those private antitrust defendants who meet the requirements of the doctrine.

1. \textit{Impact on Private Actors Regulated by States}

   It is important to note that \textit{Seminole Tribe} did not preclude, explicitly or by necessary implication, the continued application of the state action analysis, balancing interests of state sovereignty and competition with respect to private defendants acting pursuant to state regulation. Therefore, private parties acting pursuant to state law or policy should continue to be covered by the state action doctrine and be immunized only when the state both has affirmatively expressed an intention to supplant competition and has actively supervised firms acting pursuant to that express intention. The symmetry, however, that had characterized the state action doctrine, in that the immunity protected alike state entities and private firms

participated in free lightbulb program, individual lightbulb companies were subject to suit because companies exercised adequate freedom of choice).
acting under state direction, has now been unbalanced and the legal analysis for immunity from antitrust damages will likely diverge into different standards for states and state entities as opposed to private firms.

2. Predicted Response by States

The state action doctrine subjected states and private parties to the same legal standard for antitrust immunity and exposed them to the same risk of injunctive relief and possible treble damages. Therefore, state governments had a strong incentive to articulate the public interest that they sought to advance in supplanting the competitive marketplace. This incentive extended to a careful consideration of whether competition could achieve the state’s goals or whether the state should foreclose competition, for only a clear articulation of state policy would satisfy the first prong of the *Midcal* analysis. In satisfying the second prong of the *Midcal* analysis, state agencies and departments had a similar incentive to actually and actively supervise private parties that acted pursuant to a state law or policy.

Thus, states had two incentives: (1) to promote their vision of the public interest, including the foreclosure of competition in appropriate circumstances and (2) to protect the state from liability by following the requirements of the state action doctrine for antitrust immunity. The *Seminole Tribe* decision effectively eliminates the latter incentive by holding that Eleventh Amendment sovereign immunity precludes suits against states and their entities in federal court. Moreover, Congress is unable to abrogate such state immunity. The primary incentive of promoting a thoughtful vision for regulating the private sector still exists. Thus, conscientious state legislators should continue to limit competition only when necessary, even though the exposure to antitrust liability has been

351. For a discussion of the two-prong *Midcal* test, see *supra* notes 226-50 and accompanying text.

352. For a discussion of the two-prong *Midcal* test, see *supra* notes 226-50 and accompanying text.

353. See Areeda & Hovenkamp, *supra* note 4, ¶ 212.1f, at 145-47 (noting that opinions of legal commentators are mixed concerning the ability of states: to decide when regulation should replace competition, to impose best regulatory scheme and to make these decisions based upon public interest rather than special interests).


355. For a discussion of the majority’s opinion in *Seminole Tribe v. Florida*, see *supra* notes 113-55 and accompanying text.

356. For a discussion of the majority’s opinion in *Seminole Tribe v. Florida*, see *supra* notes 113-55 and accompanying text.
eliminated. States have another powerful incentive to continue to follow the requirements of the state action doctrine—the wish to provide antitrust immunity for the private parties that the state regulates. Allowing these private parties to function without threat of antitrust liability is a necessary concession that states must provide in order to ensure that the state's own regulatory policies will be effectuated.357

3. **Future of the Antitrust State Action Doctrine**

The existence of broad Eleventh Amendment sovereign immunity for both states and state entities means that the relevance and need for the state action doctrine is now basically limited to private actors. In seeking this immunity, private firms will be required to take responsibility in monitoring the actions of state legislatures and agencies. Private firms must, therefore, police government activity to ensure that the state has satisfied the requirements of state action immunity in order for these private firms to be the beneficiaries of such immunity. This monitoring must satisfy the two-prong *Midcal* test by ensuring: that the state's legislative expression of intent to supplant competition is adequate, and that the state agency charged with enforcing the policy possesses and exercises the authority to supervise private action. Aside from being difficult and expensive, these tasks may have unpredictable results. It is difficult for private firms to have advance knowledge of legislation under consideration by state legislatures and of the justifications for such legislation. Fortunately, private actors are privileged to lobby

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357. Empirical evidence on whether states will strictly follow the requirements of the state action doctrine necessary to provide immunity to private firms is, of course, lacking at this time. The courts will answer this query in their decisions on defendants' motions to dismiss based on state action immunity grounds. If states continue to adhere to the strict requirements of the state action doctrine, then such motions should continue to be granted at about the same rate as before *Seminole Tribe*. If, however, states lack the incentives to protect private parties because they are not themselves exposed to antitrust liability, then it is foreseeable that the denial of motions to dismiss on state action immunity grounds will decrease while there will be an increase in liability for private defendants.
the legislative\textsuperscript{358} and executive\textsuperscript{359} branches.\textsuperscript{360} Self-protection may make such lobbying activities an actual necessity.

The second \textit{Midcal} prong, requiring a state entity to actively supervise private firms, is equally important.\textsuperscript{361} Increasing the states' involvement and relationship with private actors may raise

\textsuperscript{358} See \textit{Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.}, 365 U.S. 127, 135-38 (1961) (stating that Sherman Act is not violated either when there is attempt to influence legislation or when two or more persons associate in attempting to persuade legislators to pass legislation that would create monopoly or restraint on trade). In \textit{Noerr}, multiple railroads and their associates commenced a campaign that was directly aimed at destroying the trucking industry as a competitive force. \textit{Id.} at 129. The Supreme Court held that the antitrust laws did not apply because activities that constitute petitioning to the government are generally immune from antitrust liability, even if the result sought is to restrict competition. \textit{Id.} at 135-38. Although the Court did not specify whether its decision was based on either the First Amendment right to petition the government or Congress's intent that the Sherman Act not reach political activity, it is certain that most concerted lobbying activities will be immune from antitrust condemnation. \textit{Id.} at 137-38. The Court cautioned, however, that "sham" petitioning was not immune from antitrust scrutiny. \textit{See id.} at 144 (commenting that where publicity campaign is "ostensibly directed toward influencing governmental action, [then there] is a mere sham to cover what is actually nothing more than an attempt to interfere directly \ldots\ and the application of the Sherman Act would be justified"). For a discussion of sham petitioning, see infra note 360 and accompanying text.

\textsuperscript{359} See \textit{United Mine Workers v. Pennington}, 381 U.S. 657, 669-72 (1965) (reaffirming \textit{Noerr} and stating that Sherman Act may not be used against those seeking passage or influence of laws regardless of intent or purpose). In \textit{Pennington}, trustees of a coal mining company challenged the efforts of coal mine operators and unions to influence the U.S. Secretary of Labor to increase certain minimum wages. \textit{Id.} at 659-60. The Court held that the \textit{Noerr} rule allowing anticompetitive lobbying efforts also applies to efforts to influence administrative governmental decisions. \textit{Id.} at 669-70. These administrative lobbying efforts, like legislative lobbying, may lawfully have the goal of seeking a decision that effectively eliminates competition. \textit{Id.} at 670.

\textsuperscript{360} See \textit{Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc. ("PRE"), 113 S. Ct. 1920, 1926-28 (1993}) (reiterating \textit{Noerr} rule that sham activities are subject to application of Sherman Act). In \textit{PRE}, the Court clarified the \textit{Noerr} test for sham petitioning in the judicial context. \textit{See id.} at 1928-29 (describing two-part definition of sham litigation). Justice Thomas, writing for the Court, stated:

\begin{quote}
First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. \ldots Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals "an attempt to interfere \textit{directly} with the business relationships of a competitor" \ldots through the "use [of] the governmental \textit{process}—as opposed to the \textit{outcome} of that process—as an anticompetitive weapon."
\end{quote}

\textit{Id.} at 1928 (citations omitted). Thus, a plaintiff must negate the "legal viability" of the alleged sham lawsuit. \textit{Id.}

\textsuperscript{361} For a discussion of the second prong of the \textit{Midcal}, see supra notes 241-50 and accompanying text.
the risk of agency capture.362 This risk of capture may even be augmented by the need for private parties to be more vigilant in ensuring that the state regulators actively supervise them.363 Conversely, the practical difficulties of forcing a reluctant, overworked or underfunded state regulator to actually regulate are also apparent. Last, but perhaps most practical, there is a difficulty in that plaintiffs will no longer have the option to join private and governmental actors in an antitrust case because the governmental actors will be protected by the absolute immunity of the Eleventh Amendment.364 Moreover, if a private defendant is beyond the jurisdiction of the court or is judgment-proof, the private plaintiff has no treble damages remedy as the government is never liable for treble damages.365

362. See John Shepard Wiley Jr., A Capture Theory of Antitrust Federalism, 99 Harv. L. Rev. 713, 723 (1986) (contending that Court decisions have been influenced by recognition that "[r]egulation, formally conceived of as a method of advancing public interest over private advantage, in many instances came to be conceived of as a method of subsidizing private interests at the expense of public good"). Commentators of the law, such as Professor Wiley, argued that changes in the Court's philosophy have led an evolving outlook on state regulatory policy. Id. The concern arises from a finding that:

Government at virtually every level offers enormously lucrative potential benefits . . . to competing producers. Typically these government benefits are temptingly available. A relatively small number of incumbent competitors support such measures with intensity, while consumer opposition is diluted and widely distributed. Producers are thus able to act as an effective group far more frequently than their opposition. Government market intervention is therefore very often an anticonsumer effort to enlarge producers' share of social wealth.

Id. Professor Wiley views state regulation in a normative context. Instead of approaching state regulation with unwarranted suspicion, he urges the courts to address state anticompetitive conduct by using a selective test for federal preemption that would identify conduct deserving of facing liability under the antitrust laws. Id. at 788-89.

363. See id. at 729-35 (discussing necessity of state regulatory interaction with private actors for immunity to extend to private actors in wake of Midcal); see also William H. Page, Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After Midcal Aluminum, 61 B.U. L. Rev. 1099, 1134-36 (1981) (discussing Court's shift from public interest view of governmental immunity after Parker to restrictive view after Midcal).

364. For a discussion of the majority's opinion in Seminole Tribe v. Florida, see supra notes 113-55 and accompanying text.

365. See California v. American Stores Co., 495 U.S. 271, 284 (1990) ("Private enforcement of the Act was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition."); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-31 (1969) ("Moreover, the purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws."); Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318-19 (1965) (noting that purposes of antitrust laws included "use of self-interest as a means of enforcement" and "help[ing] persons of small means who are injured" (citations omitted)). The treble damages remedy and other antitrust
VI. Conclusion

In the post-Seminole Tribe era, the legal analysis in situations where states have chosen regulation over competition by supplanting the free functioning of markets, will depend solely upon the identity of the defendant. If a state or one of its agencies or departments is a named defendant, the broader Eleventh Amendment analysis will control. Claims for damages against such a governmental entity will be dismissed as mandated by the constitutional doctrine of state sovereign immunity. If a private firm is a named defendant, the narrower state action doctrine, which has been crafted to balance true exercises of state sovereignty against the goal of competition, will apply to provide immunity for such a private defendant. As a policy matter, the state action doctrine will continue to protect private parties operating pursuant to a state regulatory scheme. Although the risk of agency capture may be increased, immunity for those regulated by the state is essential for the success of any state regulatory program. Further, the more limited state action immunity available to private firms will force them to monitor state regulators to ensure that the requisite balancing process between exercising sovereign immunity and maintaining competition is properly performed, as contemplated by the state action doctrine. Finally, the state action doctrine has required federal courts to balance competing factors: deference to state sovereignty and protection of competition. The principles of Eleventh Amendment state sovereign immunity, as adopted in Seminole Tribe, render the protection of the narrower state action doctrine unnecessary for state entities and eliminate competition as a consideration.

rules such as the prohibition of suits by indirect purchasers were adopted, in part, to promote private enforcement of the antitrust laws. Private plaintiffs are so important to the promotion of competition, in bringing actions for injunctions and treble damages, that they have been described as "private attorneys general." See Rebel Oil Co. v. Atlanta Richfield Co., 133 F.R.D. 41, 43 (D. Nev. 1990) (observing that 15 U.S.C. § 15(a) "provides for treble damages and attorney's fees, creating incentives for private attorneys general" (citation omitted)); Harris & Kenny, supra note 27, at 651 (arguing that state action doctrine is preferable to Eleventh Amendment immunity because it balances interest of regulating state against interests of injured consumers in obtaining redress).