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Altering the Balance between State Sovereignty and Competition: The Impact of Seminole Tribe on the Antitrust State Action Immunity Doctrine

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To paraphrase Justice Stevens' dissent in *Seminole Tribe*, both the *Seminole Tribe* case and the antitrust laws are about power in different senses. *Seminole Tribe* "power" is the power of federal courts to assert jurisdiction over state governments. The antitrust laws are concerned about market power; the power of firms to raise prices, to fix prices, to eliminate competition, and to cause injury in business or property. The State Action Immunity Doctrine in antitrust law, which has been incrementally developed by the federal courts over the past fifty-three years, is likely to undergo a significant change in the wake of the *Seminole Tribe* decision, which bars all suits against states whether or not the traditional requirements of the antitrust doctrine have been met. The State

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2. *Seminole Tribe* "power" is 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." 116 S. Ct. 1114, 1133 (Stevens, J., dissenting).

3. 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, innovation, or services]." Dep't of Justice & Federal Trade Comm'n Horizontal Merger Guidelines 62 Antitrust & Trade Reg. Rep. (BNA) No. 1159, at S-3 (Special Supp. Apr. 2, 1992). It is the power of 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. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 27 (1984); United States v. Grinnell Corp., 384 U.S. 563, 571 (1966); Horizontal Merger Guidelines of the National Association of Attorneys General, 64 Antitrust & Trade Reg. Rep. (BNA) No. 1608, at S-3 n.8 (Special Supp. Apr. 1, 1993).

4. *Parker v. Brown*, 317 U.S. 341 (1943) (the first case announcing the doctrine). The basic substantive antitrust statutes, 15 U.S.C. §§ 1, 2, are broad and general, requiring the federal courts to construct the antitrust laws. "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." 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 103d2 (rev. ed. 1997) [hereinafter AREEDA & HOVENKAMP].

5. "Midcal and Parker make clear that federal 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
Action Doctrine immunizes only that anticompetitive activity imposed and supervised by states. 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.

The antitrust State Action immunity doctrine requires courts to balance two fundamental, and sometimes conflicting, policies: Competition, the rationale of the antitrust laws, and state sovereignty, which includes the power to supplant the competitive market and impose anticompetitive regulations. To balance these two policies, the State Action Doctrine mandates courts to investigate the commitment of state government to challenged regulations and state policies, and to determine whether the state has genuinely exercised its sovereign interests in supplanting competition. If so, then the State Action Doctrine provides that state sovereignty triumphs over competition. If, on the other hand, the state was not sufficiently committed to its regulatory policy to demonstrate its intent in legislation and to actively supervise the activity, then application of the antitrust laws would not trench upon state sovereignty, so competitive interests could safely be given precedence. Thus, the antitrust doctrine evaluates the challenged state activity to assess whether it is truly the act of a sovereign as a method to balance the goals of promoting competition and respecting state sovereignty. That balancing process, which authorized courts to analyze the intent of state legislatures and the authenticity of state supervision of its regulations, necessarily allowed states, state agencies and 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 a 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. It immunizes states from private antitrust suits in federal court without any inquiry into whether the state was acting as a true sovereign or whether application of the antitrust laws would interfere with governmental interests.

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.” AREEDA & HOVENKAMP, supra note 4, ¶ 217.

6. Id. ¶¶ 224-226 (discussing the reasons for requiring active state supervision of a state regulatory scheme and a clear expression of state intent to supplant the antitrust laws in order for state action immunity to be appropriate).
The actual impact 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. However, the decision will have a potentially important impact upon private firms that act pursuant to state statutes that supplant competition and thus claim State Action immunity, and upon 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 governmental and private relationships under the antitrust laws in two ways: First, in the balance of power between the states and the Federal Government and secondly, the liability of states to persons harmed by state government policies affecting competition.

Finally, the Seminole Tribe decision will have an impact on two groups - those private actors that seek antitrust immunity and those persons harmed by conspiracies involving state policies or regulations. In the future, the State Action Doctrine will apply to private parties and broader Eleventh Amendment sovereign immunity to states.

The issue in the Seminole Tribe case was whether Congress had abrogated Florida's Eleventh Amendment immunity so the state could be sued, and whether it had the power to do so. The Court decided that, although the answer to the first issue was in the affirmative, it was irrelevant because Congress lacked any such power. The analysis of the first issue, heretofore, required a clear and unequivocal statement of congressional purpose. Although the majority agreed that there was such a clear statement in the Seminole Tribe case, the antitrust laws are not so clear. The Clayton Act specifically authorizes federal courts to enforce the substantive provisions of the Sherman and Clayton Acts, but does not explicitly contemplate a state, as state, as a party defendant. Thus, the

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9. Id. at 1124.
10. Id. at 1131.
12. Seminole Tribe, 116 S. Ct. at 1124. 25 U.S.C. § 2710(d)(7)(A)(i) authorizes suit 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. Subsection (B)(i) 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.
The antitrust laws do not contain such a clear statement of intent to subject states to federal court jurisdiction and liability.\textsuperscript{14} The second, and critical issue in the \textit{Seminole Tribe} case was whether Congress's abrogation of state sovereign immunity was done "pursuant to a valid exercise of power."\textsuperscript{15} The only issue is whether "the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate?"\textsuperscript{16} This power has been found pursuant to only two Constitutional provisions; the Fourteenth Amendment\textsuperscript{17} and the Commerce Clause.\textsuperscript{18} Since the antitrust laws were enacted pursuant to the Commerce Clause, the issue here, whether Congress could abrogate Eleventh Amendment sovereign immunity pursuant to its power "[t]o regulate Commerce with foreign Nations and among the several States ..."\textsuperscript{19} is important for the future of the State Action Doctrine. Less than a decade ago in \textit{Union Gas}, the Court\textsuperscript{20} held that the power to abrogate sovereign immunity was as crucial to the Commerce Clause as to the Fourteenth Amendment.\textsuperscript{21} However, in \textit{Seminole Tribe} the Court found "no principled distinction" between the Indian Commerce Clause and the Interstate Commerce Clause,"\textsuperscript{22} the Court overruled \textit{Union Gas} and decided that neither section of the Commerce Clause gives Congress the power to abrogate the states' Eleventh Amendment sovereign immunity.\textsuperscript{23}

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\item \textsuperscript{14} As is discussed below, the requirements of the clear statement rule are likely not met in the antitrust laws. \textit{See supra} notes 4-6 and accompanying text. The more important issue, however, is whether Congress has the power, if it chose, to subject states to antitrust liability.
\item \textsuperscript{15} \textit{Seminole Tribe}, 116 S. Ct. at 1124.
\item \textsuperscript{16} \textit{Seminole Tribe}, 116 S. Ct. at 1125 (emphasis added).
\item \textsuperscript{17} Fitzpatrick v. Bitzer, 427 U.S. 445, 453-55 (1976) (finding that the Fourteenth Amendment expanded the federal government's power and effectively changed the federal-state balance of power originally reflected in the 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.).
\item \textsuperscript{18} Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989).
\item \textsuperscript{19} U.S. CONST. art. I, § 8, cl. 3.
\item \textsuperscript{20} Chief Justice Rehnquist noted that the decision was by a plurality, and that Justice White, whose vote made up the plurality, concurred in the judgment but "wrote separately in order to indicate his disagreement with the majority's rationale." \textit{Seminole Tribe}, 116 S. Ct. at 1127.
\item \textsuperscript{21} \textit{Union Gas Co.}, 491 U.S. at 19-20 (absent "the authority to render States liable in damages," Congress's power to regulate commerce under the Commerce Clause would not be complete.).
\item \textsuperscript{22} \textit{Seminole Tribe}, 116 S. Ct. at 1127.
\item \textsuperscript{23} \textit{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." \textit{Id.} at 1127 (citation omitted). The majority found that principles of stare decisis did not require adherence to \textit{Union Gas} for four reasons; first, a numerical majority of that Court disagreed with the plurality's reasoning so the case was of little precedential value, second, it was an interpretation of the Constitution, third, its "rationale depart[s] from our established understanding of the Eleventh Amendment" and finally, it frustrates the purpose of Article III. \textit{Id.} at 1128 (citation omitted).
\end{itemize}
In summary, the majority held that principles of sovereign immunity reflected, but not explicitly stated, in Article III and the Eleventh Amendment preclude Congress from subjecting states to suit, in law or equity,\textsuperscript{24} without their consent.\textsuperscript{25} 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 of the federal courts. The majority opinion could be read to free states to ignore the gamut of federal laws enforceable exclusively in federal court. The majority, however, pointed out three means to force state compliance with federal law: Suits against states by the Federal Government, \textit{Ex parte Young} suits against state officials to enjoin their compliance with federal law, and Supreme Court review of state court decisions decided under federal law against states that consented to be sued in state court.\textsuperscript{26} This last method is clearly 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{27} 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. This Court never has awarded relief against a State under any of those statutory schemes . . . ."\textsuperscript{28} Although it is not clear whether relief in the form of an injunction was awarded, in at least one leading antitrust case, the Supreme Court found that a state entity, the Virginia State Bar, was not immune when it provided for the enforcement of a county bar

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\item 24. Despite its explicit language covering suits for damages and equitable relief, the Eleventh Amendment has been construed to allow suits against states for injunctive relief. \textit{Edelman v. Jordan}, 415 U.S. 651 (1974). Justice Stevens had "great difficulty with [such] a construction of the Eleventh Amendment" but recognized that \textit{Edelman} had construed the Amendment to allow such suits. \textit{Fitzpatrick v. Bitzer}, 427 U.S. 445, 458-59 (Stevens, J., concurring).
\item 25. Except as to effectuate the Fourteenth Amendment. \textit{Seminole Tribe}, 116 S. Ct. at 1128. The majority referred to sovereign immunity as a "background principle . . . embodied in the Eleventh Amendment," \textit{id.} at 1131, and pointed out that "we long have 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 (citation omitted).
\item 26. \textit{Seminole Tribe}, 116 S. Ct. at 1131 nn.14 &16. Justice Souter, dissenting, described these options as "pretty cold comfort" recognizing that federal law enforcement resources are not unlimited, federal appellate review is dependent on state consent to state court litigation (which is not an option in Sherman Act cases in any event), and the \textit{Ex parte Young} injunction could itself be limited by a future Court. Finally, he correctly noted that private litigation to enforce federal laws has been an important part of many federal statutory schemes. \textit{id.} at 1172. The Court has recognized the key role of such "private Attorneys General" in antitrust cases. \textit{California v. American Stores Co.}, 495 U.S. 271, 284 (1990) (Stating that "[p]rivate enforcement of the Act was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition.").
\item 28. \textit{Seminole Tribe}, 116 S. Ct. at 1131 n.16.
\end{itemize}
minimum fee schedule. Moreover, the majority continued, "the antitrust laws have been in force for over a century, there is no established tradition in the lower federal courts of allowing enforcement of those federal statutes against the States." As discussed below, this conclusion is too narrow.

In dissent, Justice Souter, joined by Justices Ginsburg and Breyer, characterized the 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." Tracing the development of the doctrine of state sovereign immunity from the pre-Constitutional era, he argued that "the adoption of the Constitution made them [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." Further, 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 National Government powerless to render the States judicially accountable for violations of federal rights.” The dissenters recognized that Congress has infrequently sought to abrogate state sovereign immunity, particularly in situations other than to enforce the Fourteenth Amendment, but maintained that the power to do so in appropriate cases is critical to the federal system. Moreover, the dissent viewed the historical evidence as showing that the Constitution did not intend to deny Congress the power to create federal rights and to authorize private parties to enforce them, even against states. Criticizing the majority's reliance on "background principles" and "implicit limitations" at odds with the text of the Constitution and intent of the Framers, Justice Souter concluded that the Constitution neither mandates state sovereign immunity in federal question

29. Goldfarb v. Virginia State Bar, 421 U.S. 773, 791-92 (1975). Certainly most antitrust actions involving the state action defense seek treble damages against a private defendant. However, the state action doctrine does not foreclose antitrust actions against state governments, and courts may reject immunity asserted by state defendants. Id. at 791-92 ("The 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.").
30. Seminole Tribe, 116 S. Ct. at 1132 n.16.
31. See infra note 82 and accompanying text.
32. Seminole Tribe, 116 S. Ct. at 1132 n.16.
33. Id. at 1169.
34. Id. at 1171. He concluded that "... of course the Framers did not understand the scheme to leave the government powerless." Id.
35. Id. at 1173-74.
cases nor denies Congress the power to subject states to suits in federal
court to enforce federal causes of action.36

The antitrust laws were enacted pursuant to the Commerce Clause37
and thus the State Action Doctrine, which provides only limited immunity
for states and state entities, is plainly implicated by the language of the
majority. Criticizing the decision as "a sharp break with the past," Justice
Stevens, dissenting, observed 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."38
The regulation Justice Stevens was referring to include, of course, antitrust
and trade regulation. Indeed, he stated that "[a]s federal courts have exclu-
sive 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."39

Two Eleventh Amendment cases decided by the Supreme Court this
term follow the Seminole Tribe majority view of state sovereign immunity.
In Regents of the University of California v. Doe,40 a New York citizen
sued the California university and individuals, claiming that the defendants
breached an employment contract to hire him to work in a laboratory
operated by the University under contract with the federal Department of
Energy. The Ninth Circuit had reversed41 a lower court decision
-dismissing on sovereign immunity grounds. The majority of the Court of
Appeals found that the defendant University, in its role as manager of the
laboratory, was not entitled to sovereign immunity as an arm of the state
because, by contract, the Federal Government was liable for any judgment
against the university in its performance of the contract.42 The Supreme
Court granted certiorari to resolve a conflict among the circuits and

36. Id. at 1177-78 (citations omitted).
37. "That Congress wanted to go to the utmost extent of its Constitutional power in restraining
trust and monopoly agreements ... admits of little, if any, doubt," United States v. South-Eastern
Underwriters Ass'n, 322 U.S. 533, 558 (1944) (citation to legislative history of the Sherman Act omit-
For a discussion of the background of the antitrust laws, see OWEN FISS, 3 HISTORY
OF THE SUPREME
38. Seminole Tribe, 116 U.S. at 1134.
39. Id. at 1134 n.l.
41. Doe v. Lawrence Livermore Nat'l Lab., 65 F.3d 771 (9th Cir. 1995).
42. Id. at 774 (finding that "liability for money judgment is the single most important factor in
determining whether an entity is an arm of the state.").
reversed. The Court first re-stated the settled rule that the Eleventh Amendment is not limited to suits that name a state as defendant, but also prohibits suits against state agencies and other state entities. While a state’s liability to pay judgments entered against its agencies provides important information about the relationship between the entity and the state, such a “formalistic” factor does not determine whether the entity is an arm of the state. Similarly, the real question for Eleventh Amendment immunity is whether the entity is potentially liable, not whether it is indemnified or insured. The policy that underlies Eleventh Amendment sovereign immunity is to “protect[] the State from the risk of adverse judgments even though the State may be indemnified by a third party.”

The other Eleventh Amendment case this term, Idaho v. Coeur d’Alene Tribe was an action by an Indian Tribe against the state of Idaho and a number of state officials claiming ownership of certain submerged lands and seeking declaratory and injunctive relief. In this 5-4 decision, the majority opinion acknowledged criticisms of its Eleventh Amendment jurisprudence that extends sovereign immunity to suits against states brought by their own citizens and to federal question cases. However, the Court adhered to precedent, including last term’s Seminole Tribe decision, and to its “understanding of the Eleventh Amendment as reflecting a broader principle of sovereign immunity.”

The Court stated that, pursuant to the Eleventh Amendment, states are immune from suits brought by foreign sovereigns, including the Tribe. Part of the original action naming the

43. 117 S. Ct. at 902 (the precise question before the Court was “whether the fact that the Federal Government has agreed to indemnify a state instrumentality against the costs of litigation, including adverse judgments, divests the state agency of Eleventh Amendment immunity.”).
44. Poindexter v. Greenhow, 114 U.S. 270 (1885); In re Ayres, 123 U.S. 443 (1887); Smith v. Reeves, 178 U.S. 436 (1900); Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945). Whether or not the state is ultimately responsible for any money judgment against the agency is a relevant factor in the determination of whether an agency is, or is not, an arm of the state. 117 S. Ct. at 904.
45. 117 S. Ct. at 904 (observing that a State is no less a sovereign if it obtains tort liability for slip and fall accidents that may occur on the statehouse steps.).
46. Id. at 905.
47. 117 S. Ct. 2028 (1997).
48. Parts I, II-A and III of Justice Kennedy’s opinion, which were joined by Chief Justice Rehnquist, and Justices O’Connor, Scalia and Thomas, represent the opinion of the Court. Chief Justice Rehnquist joined with respect to parts II-B, II-C, and II-D of the opinion. Justice O’Connor, joined by Justices Scalia and Thomas, filed a separate opinion concurring in the judgment and concurring in part. Justices Souter, Stevens, Ginsburg, and Breyer dissented and joined an opinion by Justice Souter.
49. 117 S. Ct. at 2033.
50. Id. at 2034. The remainder of the opinion discussed whether the doctrine of Ex parte Young, 209 U.S. 123 (1908), permits this action for declaratory and injunctive relief against state officials sued in their individual capacities. The Court held that it does not.
State as defendant had been dismissed on Eleventh Amendment grounds and was not before the Court on certiorari.\textsuperscript{51} The real issue in this case, whether \textit{Ex parte Young} authorizes this suit for injunctive and declaratory relief against state officials, is beyond the scope of this article.

States have been named as defendants in antitrust cases and the State Action Doctrine was developed to allow limited attacks against anticompetitive actions by states and state agencies.\textsuperscript{52} The \textit{Seminole Tribe} decision, however, eliminates that possibility and protects states from all suits in federal court unless they waive their sovereign immunity, are said by the Federal Government or are liable under the \textit{Ex parte Young} doctrine.\textsuperscript{53}

\textbf{THE DEVELOPMENT OF THE ANTITRUST STATE ACTION IMMUNITY DOCTRINE}

The modern State Action Doctrine represents more than 50 years of legal development and refinement.\textsuperscript{54} The 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{55} The breadth and comprehensive language of the antitrust laws demonstrates "a carefully studied attempt to bring within the Act every person engaged in business

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\item \textsuperscript{51} 117 S. Ct. at 2048 n.1 (Souter, J., dissenting).
\item \textsuperscript{52} Parker v. Brown, 317 U.S. 341 (1943).
\item \textsuperscript{53} 209 U.S. 123 (1908).
\item \textsuperscript{54} During the first three quarters of a century of Sherman Act jurisprudence, government antitrust cases were directly appealable from United States District Courts to the United States Supreme Court pursuant to the Expediting Act, 15 U.S.C. § 28. Consequently, the basic antitrust doctrines, including the State Action Doctrine, were developed by the Supreme Court incrementally in successive cases. In 1974, the Clayton Act was amended to allow direct appeals in any antitrust cases certified by the District Court judge to be "of general public importance in the administration of justice. 15 U.S.C. § 29(b) (1997). Thus, the framework of the state action doctrine was essentially in place before the repeal of the Expediting Act in 1984, Pub. L. No. 98-620, 98 Stat. 3358.
\item \textsuperscript{55} H. Stephen Harris & Michael P. Kenny, \textit{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, 651 (1988). In addition, the State Action Doctrine accommodates another balance, that between competition, the goal of the antitrust laws, and federalism, which defers to state sovereignty. The Court discussed this later balance, stating that "[c]ommon to the two implied exclusions [including the State Action exemption] was potential conflict with policies of signal importance in our national traditions and governmental structure of federalism. Even then, however, the recognized exclusions have been unavailing to prevent antitrust enforcement which, though implicating those fundamental policies was not thought severely to impinge upon them." \textit{Lafayette v. Louisiana Power & Light Co.}, 435 U.S. 389, 400 (1978).
\end{itemize}
whose activities might restrain or monopolize commercial intercourse among
the states.\textsuperscript{56}\textsuperscript{56} In enacting the antitrust laws, Congress exercised the full
extent of its power to regulate commerce and "sought to establish a regime
of competition as the fundamental principle governing commerce in this
country."\textsuperscript{57}\textsuperscript{57} Congress also intended to immunize states from antitrust
liability, at least in circumstances in which the state is acting in the role of
the "sovereign" and consciously choosing to supplant competition.\textsuperscript{58} The
State Action Doctrine requires courts to strike a balance between
competition and state sovereignty rather than blindly immunizing state actors
sued under the antitrust laws.

There is no basis in the legislative history to conclude, however, that
Congress intended for the courts to create the State Action Doctrine in the
precise terms that have been developed over the century since enactment of
the Sherman Act in 1890. The text of the original governing statutes, the
Sherman and Clayton Acts, is brief and general, no more than a handful of
lines making up two simple sections, one prohibiting monopolization and the
other forbidding restraints of trade, are the crux of the antitrust laws.\textsuperscript{59}

Summarizing the legislative history of the Sherman Act, Professor Areeda
noted that "[o]n most issues, the legislative background simply fails to
communicate more than the statutory language itself."\textsuperscript{60} The substantive
antitrust rules, including the State Action Immunity Doctrine, are, and were
intended by Congress to be, common law rules that have been developed by
federal courts over the past one hundred years.\textsuperscript{61}

The State Action Doctrine protects "states" and private parties from
antitrust liability in some circumstances. The term "state" necessarily

\textsuperscript{56} United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553 (1944) (in finding that
the insurance business was not excluded from the Sherman Act).

\textsuperscript{57} Lafayette, 435 U.S. at 398. See Mandeville Island Farms, Inc. v. American Crystal Sugar

\textsuperscript{58} Parker v. Brown, 317 U.S. 341 (1943). However, the Court has recognized that exemptions
from the antitrust laws should not lightly be implied, reasoning that the antitrust laws "establish
overarching and fundamental policies," which counsel against both "repeal by implication" and "implied

\textsuperscript{59} 15 U.S.C. § 1 prohibits "[e]very contract, combination in the form of a trust or otherwise,
person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person

\textsuperscript{60} AREEDA & HOVENKAMP, supra note 4, at ¶ 103d2.

\textsuperscript{61} Areeda & Hovenkamp further opine that Congress intended the antitrust law to be judge-made
common law, observing that "[n]othing else could reasonably have been expected in the judicial
administration of this 'charter of freedom,' as Chief Justice Hughes said of the Sherman Act, 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)).
indicates the judicial and legislative branches of state government as well as executive departments and agencies. Local governmental entities also may be immune from antitrust liability under a version of the State Action exemption. However, in a critical distinction from Eleventh Amendment analysis, governmental entities are not immune from the antitrust laws simply by virtue of their governmental status.

The State Action Doctrine was first announced in *Parker v. Brown*, a 1943 case brought by a California raisin producer against the 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 the Act. The State itself

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64. E.g., Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 63 (1985) (challenging collective ratemaking by motor carriers pursuant to three state statutes explicitly authorizing joint price setting and administered by state departments of transportation). See AREEDA & HOVENKAMP, supra note 4, ¶ 226.


67. The principle originated much earlier. Standard Oil Co. v. United States, 221 U.S. 1 (1911), held that the Sherman Act "forbids only those trade restraints and monopolizations that are created, or attempted, by acts of individuals or corporations." This was the origin of the doctrine, according to the Supreme Court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), also citing Olsen v. Smith, 195 U.S. 332, 345 (1904). Noerr further 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 Motor Freight, Inc., 365 U.S. at 136. Feldman v. Gardner, 661 F.2d 1295, 1304 n.68 (D.C. Cir. 1981). The progressive development of the State Action Doctrine has been to define more precisely the "valid governmental action" which should be immune from antitrust liability.

68. Parker v. Brown, 317 U.S. 338 (1943). Plaintiff Brown was a California raisin packer. Since the case concerned a California citizen suing California government entities and officials, the language
was not named as a defendant in the case and state sovereign immunity under the *Hans* doctrine was not discussed by the trial or Supreme Court. Had the defendant raised sovereign immunity as a defense, the Court could have applied the *Hans* doctrine to dismiss the action as barred by sovereign immunity, and the State Action Doctrine might never have emerged. Instead, the *Parker* Court recognized the obvious; that 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 or private persons, individual or corporate." What made the *Parker* situation different from a traditional private restraint of trade forbidden by the antitrust laws, however, was the entanglement of the state in the program.

The *Parker* Court decided that the Congressional purpose to impose antitrust liability on states was lacking, but assumed that Congress could have decided otherwise. Finding no explicit Congressional intention 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

of the Eleventh Amendment prohibiting suits against states by non-citizens arguably would not control, but the *Hans* doctrine and subsequent cases, discussed infra notes 83 and accompanying text, make it clear that Eleventh Amendment analysis also applies to actions by citizens against their own states.

69. For the purposes of the Eleventh Amendment, the Supreme Court has not mechanically used 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. *E.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) (plaintiff sued the state hospital and state department of mental health for damages, injunctive and declaratory relief). The Court stated, "[t]his case presents the question whether the State and state agencies are subject to suit in federal court by litigants seeking retroactive monetary relief... or whether such suits are proscribed by the Eleventh Amendment." *Id*. Hess v. Port Authority Transp. Hudson Corp., 513 U.S. 38 (1994); Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979). Generally see the discussion accompanying note 82, infra.


71. *Id*. The action was solely for prospective equitable relief, to enjoin future enforcement of the statute.


73. The regulatory scheme provided for pooling of 70% of all raisins produced in California by all producers, competitors, and payment of set fees based on weight to the raisin producers. Sales of the remainder of the raisins were also restricted. *Id*. Unless some other exemption applied, a naked agreement on prices is *per se* unlawful. *Arizona v. Maricopa Medical Soc'y*, 457 U.S. 332 (1982); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). It is beyond the scope of this article to opine on whether the antitrust exemption for agricultural producers and cooperatives of 15 U.S.C. § 17 and 7 U.S.C. § 291 (the Capper-Volstead Act, would have been applicable to the raisin marketing program in *Parker v. Brown*).

74. *Id*.
in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.\(^\text{75}\)

*Parker* was based only in part on the language of the Sherman Act and legislative history. In addition, the Court noted that the Sherman Act itself refers to "persons" and not to "states."\(^\text{76}\) That statutory analysis can not have been the only reason for the decision\(^\text{77}\) and was not. The Court found that considerations of federalism were also important, and interference with state sovereignty would not be implied without a clear indication of legislative intent to do so.\(^\text{78}\) The Court's conclusion has been recognized by commentators as a practical necessity.\(^\text{79}\)

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 the peculiar local conditions required a different course which a busy national Congress was unlikely to consider.\(^\text{80}\)

The rationale of *Parker* and its progeny is the Court's assumption that Congress did not intend the Sherman Act to reach some actions 'of government entities, that is, Congress did not intend to abrogate all of the states' sovereign immunity and subject states to antitrust injunctions and treble damages in every case.\(^\text{81}\) But, the Court also assumed that Congress intended to abrogate some part of state sovereign immunity and had the power to do so.\(^\text{82}\) Therefore, the Court created a State Action Doctrine

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78. *Parker*, 317 U.S. at 351. Areeda & Hovenkamp, *supra* note 5, ¶ 221 (“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 that a busy national Congress was unlikely to consider.”) (footnote omitted).

79. AREEDA & HOVENKAMP, *supra* note 4, ¶ 221.

80. *Id.*


82. The Supreme Court has not discussed state sovereign immunity in an antitrust apart from the
which potentially subjects states to suit exposure to liability in some situations. The rationale of Parker, therefore, must not be confused with the rationale of Seminole Tribe. The latter case is broader and, according to the majority, is constitutionally based. Indeed, it essentially invalidates the underlying reasoning of Parker, which is based on concerns of federalism, but which balances the competing policy of competition and theoretically subjects states to suit and liability in some situations. The Parker 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 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. The State Action Doctrine inquires whether the challenged governmental action is sufficiently the act of a sovereign state to be entitled to the deference demanded by federalism. No such searching analysis was done, or even contemplated, in Seminole Tribe, where the case simply announced the blanket Constitutional rule that states are sovereign immune and are not subject to suit in federal court. Seminole Tribe implies that Congress can not abrogate state sovereign immunity in federal statutes enacted pursuant to the Commerce Clause and subject states to antitrust suit. Thus, the Doctrine is

State Action Doctrine. Major U. S. Supreme Court State Action cases decided between 1985 and 1996 include FTC v. Ticor Title Ins. Co., 112 S. Ct. 2169 (1992); City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344, 1359 n.4 (1991) (Justice Stevens, joined by Justices White and Marshall, dissenting, in pointing out that a municipality could claim the benefit of the State Action Doctrine only if the decision to supplant competition by regulation was made by the State itself, noted other distinctions between states and local governments, including that local governments are not protected by the Eleventh Amendment); Patrick v. Burget, 486 U.S. 94 (1988); 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987); Town of Hallie v. Eau Claire, 471 U.S. 34 (1985); Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985).

83. Parker, 317 U.S. 341. That is, circumstances where the state has not met the two-part test requiring a clear articulation of a state policy to displace competition and active supervision of private parties acting pursuant to the state policy. See supra note 54 and accompanying text.


86. Id. at 352. The Court stated that “[w]e 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.” Id. at 350.

87. Id.

88. This distinction was suggested nearly two decades before Seminole Tribe by the D.C. Circuit, noting that “this 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 investigation of that sort when the action plainly is taken in a sovereign capacity.” Feldman v. District of Columbia Court of Appeals, 661 F.2d 1295, 1305 (D.C. Cir. 1981).

89. Seminole Tribe, 116 S. Ct. 1114.
likely to be limited to private parties acting pursuant to state regulation of markets. 90

The *Parker* decision did not announce a precise rule to give direction to courts, states engaged in economic regulation, and private actors complying with state regulatory schemes, to determine when state immunity from the antitrust laws should be accorded. The Court did, however, set out some basic principles. First, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it or by declaring that their action is lawful," 91 second, the state may not become "a participant in a private agreement or combination by others for restraint of trade," 92 and third, the "state itself [must] exercise[] its legislative authority in making the regulation and in prescribing the conditions of its application." 93 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," and the state program supplanting competition must be the will of the state "not the imposition by them [the private parties] of their will upon the minority by force of agreement or combination which the Sherman Act prohibits." 94 To be immune, the state, acting as a sovereign, must deliberately adopt and enforce the restraint of trade. 95

*Parker v. Brown* dealt with the potential antitrust liability of state government entities. The private parties that benefited under the raisin regulation were not named as defendants in the original case, 96 so the Court did not have to decide whether the newly created State Action Doctrine applied to protect private firms as well as states, and, if so, under what circumstances private parties would be immune from antitrust liability. As late as 1976, a plurality of the Court suggested that *Parker* immunized

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90. As was discussed above, the majority in *Seminole Tribe* held that Congress lacks the power to abrogate state sovereign immunity pursuant to the Commerce Clause. Therefore, with respect to state defendants themselves, state antitrust immunity is not, according to the *Seminole Tribe* Court, based on an implicit Congressional purpose not to impose antitrust liability on some state actions. Instead, sovereign immunity is mandated by the Constitution itself, and Congress lacked and lacks the authority to come to a different conclusion as to the government entities. *Seminole Tribe*, 116 S. Ct. 1114 (1996).

91. *Parker*, 317 U.S. at 351.
92. *Id.* at 351-52.
93. *Id.* at 352.
94. *Id.*
95. *Id.* Compare *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951) (no immunity where the state did not supervise the prices set by private firms). *See* AREEDA & HOVENKAMP, *supra* note 4, ¶ 226 ("The juxtaposition of *Parker* and *Schwegman*, 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.").
states only, and not private parties.\textsuperscript{97} Recent cases have confirmed that the State Action Doctrine protects private parties as well as government entities.\textsuperscript{98} This is clearly the correct result and promotes the two policies that the State Action Doctrine was crafted to accommodate: Federalism and competition. “If 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.”\textsuperscript{99}

The modern standard emerged in \textit{California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.},\textsuperscript{100} an antitrust action by a private wine distributor challenging California’s regulation of wine sales.\textsuperscript{101} The Court adopted a two-part test to determine whether states and private parties acting pursuant to state regulation would be immune from or subject to antitrust liability: “First, the challenged restraint must be ‘one clearly articulated and affirmatively expressed as state policy’; second, the policy must be ‘actively supervised by the State itself.’”\textsuperscript{102} The \textit{Midcal} two-prong test applies to private parties acting pursuant to an anticompetitive state policy as well as to the state government itself.\textsuperscript{103}

The first \textit{Midcal} prong, is clearly satisfied by state legislation affirmatively mandating the anticompetitive regulations and declaring that regulation, rather than competition, is in the public interest and is the choice of the state. State legislation must show a sufficiently clear policy to supplant competition in order to meet the \textit{Midcal} clear articulation standard.\textsuperscript{104} A state agency that adopts anticompetitive regulations must

\textsuperscript{97} Cantor v. Detroit Edison Co., 428 U.S. 579 (1976). The majority of the Court, however, thought otherwise. 428 U.S. at 603 (opinion of Burger, C.J., concurring in part); 428 U.S. at 614-15 (opinion of Stewart, Potter and Rehnquist, JJ., dissenting). The plurality was correct in that the \textit{Parker} Court did not concern, and had no reason to address, the liability of private parties acting pursuant to anticompetitive state regulations.


\textsuperscript{99} \textit{AREEDA \\& HOVENKAMP}, \textit{supra} note 4, ¶ 221c.

\textsuperscript{100} 445 U.S. 97 (1980).

\textsuperscript{101} The state had established fair trade regulations, requiring wine producers and wholesalers to post their prices and not deviate from them. Wholesalers thus were prohibited from selling at discount prices to liquor retailers. Such a system of resale price maintenance, if adopted by private businesses, has consistently been held to be \textit{per se} illegal since the rule was announced in \textit{Dr. Miles Medical Co. v. John D. Park \\& Sons Co.}, 220 U.S. 373 (1911).

\textsuperscript{102} 445 U.S. at 105 (citations omitted).


\textsuperscript{104} The federal courts, therefore, must determine the intent of state legislation and may have to interpret the legislative policy. \textit{AREEDA \\& HOVENKAMP}, \textit{supra} note 4, ¶¶ 224-225. Professors Areeda
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 the regulation is anticompetitive. 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 it authorizes because the immunity appropriately should "shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." The rationale of this requirement is to promote competition, even at the expense of deference to state sovereignty. Private parties may not claim state action immunity for their anticompetitive actions unless a state policy is also furthered. This requires that the

and Hovenkamp view the ability of a state legislature to correct any errors in federal court interpretation of the state policy by enacting later state legislation as a "safety valve." Id.

105. 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 doctrine of Ex parte Young, 209 U.S. 123 (1908). See also Areeda & Hovenkamp, supra note 4, ¶¶ 224-225.

106. New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96, 109 (1978) (legislation requiring notice by auto manufacturers if plans to locate new dealerships into existing dealers' territories, right of incumbent dealers to protest, and hearings, did not contain any legislative expression of explicit intent to supplant competition). The regulatory scheme implicitly "displace[d] unfettered business freedom" and was thus immune. Id.

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

108. Id. See City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 373 (1991) (Justice Scalia stated that "[i]t is enough, we have held, if suppression of competition is the 'foreseeable result' of what the statute authorizes," where the issue was whether state zoning laws represented a sufficiently clear articulation of a state policy authorizing suppression of competition by a municipality).

109. See generally Areeda & Hovenkamp, supra note 4, ¶¶ 224-225.

110. Patrick v. Burget, 486 U.S. 94, 101 (1988). The plaintiff surgeon, who was competing with a local clinic, lost his privileges at a hospital in a peer review action initiated by and participated in by his competitors. The competitors defended the surgeon's antitrust action on the ground that peer review activities were undertaken pursuant to state regulations creating the peer review system, which included the possibility of judicial review of peer review decisions, and were thus state action immune.

111. 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. Areeda & Hovenkamp, supra note 4, ¶ 226. The basis for the requirement is, again, federalism.

The existence of a state action immunity enables states, . . . to define areas inappropriate for market control. Moreover, the adequate supervision 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,
supervision by the state be significant, genuine, and not mere oversight, monitoring, or acquiescence in restraints of trade made by and for the benefit of private parties.\footnote{112} State officials must have the authority to review, approve, and disapprove the particular anticompetitive acts of those they supervise.\footnote{113} But the mere existence of governmental power to supervise is not sufficient. The "state officials [must] have and exercise [the] power . . . [and] disapprove those that fail to accord with state policy."\footnote{114} The mere potential or statutory ability of state officials to supervise regulatory programs does not constitute active supervision.\footnote{115} The state officials must exercise a deliberative function, regulating and not merely acquiescing in private conduct.\footnote{116} The critical inquiry into active supervision "is to determine 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, . . . ."\footnote{117}

The State Action Doctrine has additional limitations, which 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, it is immune and confers state action immunity on the private parties that it regulates and actively supervises. However, if the state entity acts as a market participant rather than as the sovereign, antitrust immunity may not be available. Such a distinction to promote competition would be irrelevant under the \textit{Seminole Tribe} rationale, where identification of the defendant as a state is the sole determinative factor. 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

\footnote{112} See 324 Liquor Corp. v. Duffy, 479 U.S. 335, 345 n.7 (1987) (State failure to exert "significant control over" the private parties is not active supervision).

\footnote{113} \textit{Patrick}, 486 U.S. at 101. A state agency or official that was not acting pursuant to a clearly prospectively articulated state policy would be acting \textit{ultra vires}, would not be immune, and could be enjoined. \textit{Ex parte Young}, 209 U.S. 123 (1908).

\footnote{114} \textit{Patrick}, 486 U.S. at 101. The ultimate ability of the state courts to review terminations of medical privileges decisions made pursuant to the peer review regulations was not sufficient "active supervision." \textit{Id.} at 104.


\footnote{116} Direct supervision by the state Legislature or state Supreme Court is clearly sufficient but not necessary. Active supervision by an authorized state agency is sufficient to confer immunity. \textit{AREEDA \& HOVENKAMP}, supra note 4, ¶ 226.

\footnote{117} \textit{Id.}
damages and injunctive relief. In *City of Columbia v. Omni Outdoor Advertising*,\(^{118}\) the Court made it clear that:

The rationale of *Parker* was that, in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators. . . . [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.\(^{119}\)

The Court went on to contrast the "commercial participant" situation, where the state is arguably 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. The existence of a conspiracy between a state and private party, while anticompetitive, does not transform sovereign action entitled to immunity into unprotected private action. 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 to immunize only the actions of the government acting as a sovereign from antitrust liability.

After *Seminole Tribe* the scope of sovereign immunity of states, state departments, and agencies will not be limited by the State Action Doctrine. 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. Broad Eleventh Amendment sovereign immunity will immunize states from suit under the antitrust laws in federal courts. Private parties acting pursuant to state authorization, indeed, at state directive or mandate, however, are not sovereigns and therefore do not share in sovereign immunity.

*Parker v. Brown* was based on the recognition that states have a legitimate interest in regulating some markets and businesses, for example, the business of insurance, common carriers, lawyers or other professionals, and zoning. State governments may choose to by-pass competition and adopt a regulatory scheme, even one that is anti-competitive, to protect the public interest in these markets. Thus, the State Action Doctrine has the potential to injure consumers by denying them the ability to recover against states for antitrust injury caused by violations involving states acting in their sovereign capacity. Unlike Eleventh Amendment state sovereign immunity, the State Action Doctrine balances the possible injury to consumers against

\(^{118}\) 499 U.S. 365 (1991) (rejecting conspiracy exception to state action immunity).

\(^{119}\) *Id.* at 374-75.
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 protect the interests of injured persons and promote antitrust enforcement by creating a treble damages remedy for private plaintiffs injured by antitrust violations. "The legislative history and case law indicate that compensation is a goal, perhaps even the dominant goal, of antitrust's damages remedy." The Eleventh Amendment bar to the exercise of federal jurisdiction over states denies federal antitrust jurisdiction over states in all cases, thus tipping balance between competition and sovereignty directed by the State Action Doctrine against the interests of consumers and other plaintiffs injured by restraints of trade.

The availability of injunctive relief against state entities was affirmed by the Supreme Court in Goldfarb, resolving in the affirmative the issue of whether states could be subject to any antitrust liability. A majority of the Supreme Court has not decided whether treble damages may be awarded against a state government entity, and the few decisions by

120. "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." Harris & Kenny, supra note 55, at 651.


122. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). The defendant Virginia State Bar, a state agency, and a county bar association were held to lack antitrust immunity in a case seeking injunctive relief. Professors Areeda and Hovenkamp argue that the bar officials were not government employees or officials, but rather private individuals so "the Court was concerned with 'essentially a private anticompetitive activity' being conducted by those partially garbed as a state agency." AREEDA & HOVENKAMP, supra note 4, ¶ 228 (citation omitted). They conclude that government entities and officials should never be subject to treble damages liability but only to equitable remedies. Id.


124. City of Lafayette v. Louisiana Power & Light, 532 F.2d 431 (5th Cir. 1976), aff'd 435 U.S. 389 (1978) (5-4 decision). The antitrust counterclaim against two cities concerning their operation of electric power utilities sought $540 million in treble damages. The precise issue before the Court was the legal standard for antitrust liability of a municipality, because the District Court had granted the cities' motion to dismiss and therefore 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. Writing for the plurality, Justice Brennan disagreed, and 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
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" and because injunctive relief would be sufficient to make plaintiffs whole. Further, commentators have argued that if it is not possible to construe the Sherman Act to bar legal relief but allow equitable relief against government entities and officials, they should be entirely immune. However, nothing in the language of the Sherman Act limits the type of relief that may be ordered against governmental entities in appropriate cases.

JUDICIAL ANALYSIS OF ELEVENTH AMENDMENT AND STATE ACTION DEFENSES IN ANTITRUST CASES

The Supreme Court has not focused on the interplay between the State Action Doctrine and the Eleventh Amendment and the inherent conflicts between these two doctrines in any antitrust cases naming as defendants state actors. Goldfarb applied Parker State Action immunity, but also noted that the State Bar had argued that it was immune under the Eleventh Amendment. However, since the District Court had not based its decision on that issue, the Supreme Court had no opportunity to consider the

to engender," stating that this would be a "serious chink in the armor of antitrust protection..." Id. at 408. Justice Stewart, dissenting, believed 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 440-41.

125. Duke & Co. v. Foerster, 521 F.2d 1277 (3d Cir. 1975) (reversing dismissal of treble damages claim against municipalities and local officials); Hecht v. Pro-Football, Inc., 444 F.2d 931 (D.C. Cir. 1971) (deciding that governmental action is not necessarily immune from the antitrust laws, and citing the Parker line of cases). But see Ajax Aluminum v. Goodwill Indus., 564 F. Supp. 628, 631 (W.D. Mich. 1983) (finding that the State Department actively supervised the program in question, that legislative authorization was not necessary because the defendant was not a private party but the state itself, and deciding that a state, acting in its sovereign capacity, is immune from antitrust suit); 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" and disagreeing with the Hecht reasoning.) (footnote omitted). But cf. Unity Ventures v. County of Lake, 631 F. Supp. 181 (N.D. Ill. 1986) (granting judgment n.o.v., finding state action immunity, and overturning $28 million treble damage jury award against defendant county, village and local officials), aff'd 841 F.2d 770 (7th Cir. 1988).

126. AREEDA & HOVENKAMP, supra note 4, ¶ 228. However, at the time the treatise was published, 1978, after Parden and Fitzpatrick, the Supreme Court had held that Congress had the power to abrogate state sovereign immunity. See supra notes 4 & 6 and accompanying text. Areeda and Hovenkamp also recognize that the Eleventh Amendment may be a significant bar to the award of damages against states and state officials.

127. AREEDA & HOVENKAMP, supra note 4, ¶ 228.

Eleventh Amendment argument. Justice Stevens, dissenting in Omni, mentioned the Eleventh Amendment in a footnote as part of a general discussion distinguishing municipalities, which are not protected by the Eleventh Amendment, from states are, which are. Similarly, in City of Lafayette v. Louisiana Power & Light Co., the plurality simply observed that the State Action Doctrine was based on deference to state sovereignty, which could be limited only by Congress, and that such a Congressional purpose would not lightly be implied. However, Justice Stewart, joined by Justices White, Blackmun and Rehnquist, dissenting, preciently observed the distinction between the two doctrines, stating:

The plurality today advances two reasons for holding nonetheless that the 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 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.

IMPACT OF SEMINOLE TRIBE ON ANTITRUST THEORY AND PRACTICE

The relationship between Eleventh Amendment sovereign immunity and antitrust State Action immunity illuminates theoretical issues of the appropriate limitations of state sovereignty in a federal system. The distinctions between the two doctrines as applied will have an impact on future antitrust cases that is more than purely theoretical, although it should not be overstated. State governmental entities named as defendants in antitrust actions have generally been found to have met the requirements of the State Action Doctrine, and thus have been entitled to immunity.

129. Id.
132. The plurality stated that municipalities are shielded under the State Action Doctrine only if they are acting pursuant to a State policy. Id. at 409-13. 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. Id. at 412 (citing Lincoln County v. Lunning, 133 U.S. 529 (1890)).
133. 435 U.S. at 430 (citations omitted).
134. Private parties have not been so successful. For example, the State Action Doctrine did not immunize the private defendants in other cases. See Cantor v. Detroit Edison Co., 428 U.S. 579 (1976).
ALTERING THE BALANCE

However, some important antitrust cases might have been decided differently if state sovereign immunity had been understood as an absolute bar to suits against states in federal court.135 In these cases, the relief sought was injunctive, but nothing in the text of the antitrust laws prohibits the award of treble damages in appropriate cases.136 The Eleventh Amendment, as defined by the majority in *Seminole Tribe*, has rendered moot the possibility of state antitrust liability for damages, essentially swamping the State Action Immunity Doctrine with respect to suits against states, state departments and state agencies.137 Private firms are not sovereigns entitled to Eleventh Amendment immunity, therefore, the only immunity that remains available to private defendants in antitrust actions challenging anticompetitive actions taken pursuant to state law or policy is the State Action Doctrine.

There is no reason to doubt the continued availability of State Action immunity to private defendants in antitrust actions if all the requirements of the doctrine have been met.138 The State Action Doctrine was developed on the theory that Congress intended the antitrust laws to reach activity regulated by the states only in limited circumstances, because competition was an important value but that the ability of state governments to supplant competition and regulate commerce was an equally important, but sometimes conflicting value. Congress wrote the antitrust laws in broad constitution-like language with the expectation that the federal courts would develop a body of antitrust law by accretion as common law has

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135. E.g. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987) (New York's liquor price regulations were not State Action immune because the state did not actively supervise the prices). Injunctive relief could have been sought against state officials under the doctrine of *Ex parte Young* see supra note 26 and accompanying text.

136. Commentators Areeda and Hovenkamp argue that treble damages should not be available against government entities and public officials, even if the officials and public entities had participated in antitrust violations with private parties. *AREEDA & HOVENKAMP, supra* note 4, ¶228. The text of the antitrust laws, however, does not appear to be permissive or to give courts discretion to deny damages to a prevailing plaintiff, regardless of the identity of the defendant: "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . and shall recover threefold the damages by him sustained . . ." 15 U.S.C. § 15(a) (1994).

137. As has been discussed above, *supra* note 26 and accompanying text, *Ex parte Young* and its progeny authorize prospective injunctive relief against government officials.

evolved. Since *Parker*, it has been clear that federal courts believed they had the power to strike a balance between competition and state sovereignty. The Supreme Court has now declared that the balance always tips in favor of state sovereignty and states are immune from suit in federal court. Thus, under *Seminole Tribe*, the Eleventh Amendment protects states and state entities from damages liability under the antitrust laws even if their regulation is not "affirmatively authorized" or "actively supervised." But it is important to note that *Seminole Tribe* did not preclude, explicitly or by necessary implication, the validity of the State Action analysis that balances interests of state sovereignty and competition with respect to private defendants acting pursuant to state regulation. Therefore, private parties acting pursuant to state policies should continue to be subject to the State Action Doctrine, immunized only when the state has affirmatively expressed an intention to supplant competition and actively supervises firms acting pursuant thereto. However, the symmetry that had characterized the State Action Doctrine, in that the immunity protected both the state entities and the private firms acting under state direction, has now been unbalanced. The legal analysis for immunity from antitrust damages will diverge into different standards for states and private firms. Formerly, states and private parties were subject to the same legal standard for antitrust immunity and were exposed to the same risk of injunctive relief and, possibly, treble damages. Thus, state governments had a strong incentive to articulate the public interest that they sought to advance when supplanting the competitive marketplace. States were required to consider carefully whether competition could achieve the state's goals or whether the state should foreclose competition, because only a clear articulation of state policy would satisfy the first prong of *Midcal*. Then, state agencies and departments had a similar incentive to actually and actively supervise the private parties acting pursuant to the state policy, necessary to satisfy the second prong of *Midcal*. Thus, states had two incentives: To promote their vision of the public interest, including by foreclosing competition in appropriate circumstances, and to protect the state from liability by following the requirements of the State Action Doctrine for antitrust immunity. The best

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139. "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." United States v. Topco Ass'n, 405 U.S. 596, 610 (1972).


141. See AREEDA & HOVENKAMP, supra note 4, ¶¶ 221, 223 observing that opinions of observers are mixed concerning the ability of states to decide when regulation should replace competition, to impose the best regulatory scheme, and to decide based upon the public interest rather than special interests.
evidence of the care with which the states acted is the high success rate of State Action defenses. *Seminole Tribe*’s holding that Eleventh Amendment sovereign immunity precludes suits against states in federal court\(^\text{142}\) and the state immunity may not be abrogated by Congress eliminates the latter incentive. Although the primary incentive still exists and conscientious state legislators should continue to limit competition only when necessary. However, the risk of damages exposure is eliminated. States should continue to follow the requirements of the State Action Doctrine necessary to provide antitrust immunity for private parties, however, as the only way to make the states’ own regulatory policies effective.\(^\text{143}\)

Broad Eleventh Amendment sovereign immunity for states means that the State Action Doctrine is most necessary for private actors, increasing their responsibility to monitor the actions of state legislatures and agencies. In order to be the beneficiaries of State Action immunity, private firms have an incentive to police government activity to ensure that the state has satisfied the requirements of the State Action immunity Doctrine, e.g. that the state’s legislative expression of intent to supplant competition is adequate and that the state agency charged with enforcing the policy has the authority to supervise private action and actually does so. Such monitoring and lobbying will likely be difficult, expensive, and have unpredictable results because it is difficult for private firms know in advance what legislation is being considered by state legislatures and the justifications for the legislation. Private actors are privileged to lobby the legislative\(^\text{144}\) and


\(^\text{143}\) 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 the question in their decisions on defendants’ motions to dismiss based on State Action immunity arguments. If states continue to adhere to the strict requirements of the Doctrine, the 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, we would expect to see the denial of more motions to dismiss on State Action immunity grounds and a corresponding increase in liability of private defendants.

\(^\text{144}\) Generally, activities that constitute petitioning to the government are immune from antitrust liability, even if the result sought is to restrict competition. The doctrine originated with *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), which concerned a public campaign by an association of railroads to obtain legislation that would limit competition from the trucking industry. The campaign was directly aimed at destroying the trucking industry as a competitive force. *Id.* Nevertheless, the Supreme Court held that the antitrust laws did not apply to the activity. *Id.* at 145. Although the opinion does not specify whether the basis for decision was the First Amendment right to petition the government or the court’s determination that the legislative intent of Congress in enacting the Sherman Act was not enacted to reach political activity, it is clear that most concerted lobbying activities will be immune from antitrust condemnation. *Noerr* cautioned, however, that “sham” petitioning was not immune from antitrust scrutiny. *Id.* at 144.
executive\textsuperscript{145} branches,\textsuperscript{146} and self protection may make such lobbying activities a necessity. Equally important is the second Midcal prong, requiring the state entity actively to supervise the private firms. However, the risks of agency capture may be increased by the need for private parties to be more vigilant to ensure that any state regulatory legislation contains the necessary affirmative expressions and to encourage regulators to actively supervise.\textsuperscript{147} Finally, the practical difficulties of forcing a reluctant state regulator to regulate are apparent.

A final issue is the practical: Plaintiffs will no longer have the option to join the private and the governmental actor in an antitrust case. Moreover, if the private defendant(s) are beyond the jurisdiction of the court or are judgment-proof, the private plaintiff has no treble damages remedy.\textsuperscript{148} State officials, however, may be sued under the \textit{Ex parte Young} doctrine for injunctive relief.

\begin{itemize}
  \item \textsuperscript{145} In a case involving efforts by coal mine operators and unions to influence the U.S. Secretary of Labor to increase certain minimum wages, the Supreme Court held that \textit{Noerr} rule also applies to efforts to influence administrative governmental decisions. \textit{Id.} Like legislative lobbying, the goal sought by the concerted action may be to eliminate competition. United Mine Workers v. Pennington, 381 U.S. 657 (1965).
  \item Sham petitioning is not protected. \textit{Professional Real Estate Investors Inc. v. Columbia Pictures Industries, Inc.}, 508 U.S. 49 (1993), the most recent decision of the Supreme Court on the \textit{Noerr} doctrine, clarifies the test for sham petitioning in the judicial context. Justice Thomas, writing for the Court, stated:
    First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. . . . Only if the 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 directly with the business relationships of a competitor. . . ." through the "use [of] the governmental process - as opposed to the outcome of that process - as an anti-competitive weapon."
  \item The treble damages remedy and other antitrust 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." 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, 317 (1965) (it is plain that in section 5(b) Congress meant to assist private litigants in utilizing any benefits they might cull from government antitrust actions).
\end{itemize}
The State Action Doctrine required federal courts to balance competing factors: deference to state sovereignty in the interest of federalism and protection of competition mandated by the antitrust laws. 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.

**CONCLUSION**

In the post-*Seminole Tribe* world, the legal analysis in situations where states have chosen regulation over competition, supplanting the free functioning of markets, will diverge depending upon the identity of the defendant. If a state, its agencies, or departments are the named defendants, the broader Eleventh Amendment analysis controls and claims for damages against government entities must be dismissed on the ground of sovereign immunity. If the defendant is a private firm, the narrower State Action Doctrine, which has been crafted to balance true exercise of state sovereignty against the goal of competition, provides immunity for private defendants. As a policy matter, the State Action Doctrine should continue to protect private parties operating pursuant to a state regulatory scheme because immunity for those regulated is essential for the success of any state regulatory program, although the risk of agency capture may be increased. Finally, the more limited State Action immunity available to private firms will force them to monitor the state regulators to ensure that the balancing process between sovereign exercise and competition contemplated by the State Action Doctrine is performed.149

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149. In the year since the *Seminole Tribe* decision, no reported antitrust decision in which a state or state agency was named as a defendant has been found. Cases against private firms continue to apply the State Action Doctrine. Columbia Steel Casting Co. v. Portland General Elec. Co., 111 F.3d 1427 (9th Cir. 1997).