State Action Immunity, Municipalities, and the Unique Case of Eminent Domain

Joseph L. Motto

I. INTRODUCTION ........................................................................................................ 797
II. BACKGROUND ..................................................................................................................... 799
   A. Initial Development of the State Action Doctrine: Maintaining State Sovereignty ........................................................................................................ 801
   B. Application and Development of Parker: Tailoring the Limits of Sovereignty ... 802
      1. Defining the Parker Analysis ......................................................................... 802
      2. The Process-Oriented Approach of Midcal ................................................... 803
      3. Refining the Midcal Approach ...................................................................... 804
   C. Expansion of Parker: Renewal of Economic Federalism .................................... 805
   D. Improper Motive and Eminent Domain .............................................................. 808
III. ANALYSIS ................................................................................................................ 809
   A. The Conflicting Values of Antitrust and Federalism .......................................... 809
      1. Participation, Politics, and Capture ............................................................. 809
      2. Experimentation, Decentralization, and Regulatory Competition ........ 811
   B. Reassessing the Current State Action Doctrine .................................................. 814
      1. Requiring Active State Supervision ............................................................... 815
      2. Creating a Market Participant Exception ..................................................... 816
      3. Purpose and the Unique Case of Eminent Domain ....................................... 817
IV. CONCLUSION ........................................................................................................... 818

I. INTRODUCTION

In Pennsylvania v. Susquehanna Area Regional Airport Authority (SARAA I), the U.S. District Court for the Middle District of Pennsylvania held that the Susquehanna Area Regional Airport Authority (SARAA or “the airport authority”), a municipal authority operating under a broad enabling act, may exercise its power of eminent domain to condemn a privately owned airport parking service in direct competition with its own parking service without being subject to suit for violations of federal antitrust law.1 The private lot at issue in SARAA I was the airport authority’s sole competitor for parking

services provided to travelers flying in and out of the Harrisburg International Airport (HIA). The condemnation will therefore provide SARAA with a monopoly over parking services at the HIA. Despite acknowledging the flagrantly anticompetitive effect of SARAA’s conduct, the district court found that SARAA was exempt from antitrust liability under the state action doctrine. Responding to the plaintiff’s claim that SARAA was acting with an improper motive—namely, to monopolize the parking services market rather than to serve the public interest—the court suggested that eminent domain proceedings were the appropriate forum for addressing motive.

Eight months later, SARAA was once again in front of the district court, this time for allegedly entering into anticompetitive, exclusive dealings contracts with a taxi service. However, this time the court found that state action immunity did not exempt the airport authority from antitrust liability. In each case, SARAA acted pursuant to the same enabling act, although in SARAA I, the airport authority exercised its grant of eminent domain, and in SARAA II, the airport authority exercised its power to execute contracts convenient for carrying on its business. The court distinguished the two cases on the grounds that the exercise of eminent domain will inevitably result in the displacement of competition, whereas anticompetitive effects are not the logical result of the state grant of freedom to contract. This distinction was dispositive because, in order to receive state action immunity, anticompetitive conduct by a municipality must be the foreseeable result of a clearly articulated state policy.

SARAA I highlights the ease with which a municipal actor may receive state action immunity. Taken alone, SARAA I demands a reassessment of the current state action doctrine. Taken together with SARAA II, SARAA I demonstrates that eminent domain is a particularly problematic issue within the greater discussion regarding municipalities and antitrust exemption. As the SARAA I court noted, the condemnation of land well-suited for a particular purpose, project, or facility obviously has the potential to negatively impact market competition. Because the likelihood of competitive fallout is so obvious, the exercise of eminent domain should presumably meet the foreseeability test every time, absent clear expression of a contrary intent on the part of the legislature. The outcome of SARAA I—the apparent monopolization of a market with little or no

---

2. Id.
3. Id. at 484.
4. The term “state action” as it is used in this Note is not to be confused with the term as it is used in cases interpreting the Fourteenth Amendment. Within the context of antitrust, the “state action” doctrine is an exemption from federal antitrust laws, whereas in Fourteenth Amendment cases, “state action” is a concept encompassing many activities that do not involve antitrust immunity. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY § 20.2 (3d ed. 2005).
5. SARAA I, 423 F. Supp. 2d at 484 n.19.
7. Id. at 475. Nonetheless, the court did not hold SARAA liable because the plaintiffs sought compensatory and punitive damages, which are expressly barred by the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 (2000), rather than an injunction. Id.
8. SARAA I, 423 F. Supp. 2d at 479.
10. Id.
12. SARAA I, 423 F. Supp. 2d at 479.
justification—and the dubious motives underlying the airport authority’s activities in that case raise the question of whether this is a desirable state of affairs.

This Note offers a reassessment of the state action doctrine as it applies to the anticompetitive conduct of municipal actors like the airport authority in the SARAA cases, with particular focus on the exercise of eminent domain. Part II of the Note briefly outlines the fundamentals of federal antitrust law before turning to a discussion of the creation and development of the state action doctrine. Part II.D provides an overview of the law of eminent domain as well, for use in determining whether the principles of that law adequately address the concerns raised by cases like SARAA I. Part III then proceeds to analyze the relative interests served and sacrificed by a lenient exemption doctrine, addressing and comparing various reforms that have been proposed from the time state action began resembling its modern day form. Part IV concludes by suggesting that courts require municipalities to meet additional requirements before granting immunity from federal antitrust.

II. BACKGROUND

The Supreme Court has described the antitrust laws as a “consumer welfare prescription,”13 which is another way of saying that they are intended to promote allocative efficiency.14 The understanding that the maximization of consumer welfare is synonymous with the efficient allocation of society’s resources rests upon the idea that when goods and services are provided under conditions of pure competition, resources will be distributed in accordance with their most valued use.15 As firms compete for business, prices are driven downward toward the cost of supplying a product,16 meaning that ideally no consumer who values a product for more than its cost is denied that product.17 In a perfectly competitive setting, consumer valuation dictates the distribution of resources, and resources are thereby allocated in the most efficient manner.18 Thus, the “principle implicit in the antitrust laws is that a competitive market economy will maximize efficiency or, stated otherwise, maximize the welfare of consumers.”19

If, for whatever reason, a firm is able to suppress competition, alleviating the natural depression of price toward cost, it will have an incentive to reduce its output and raise prices in order to maximize profit.20 This is possible because, where price is set by competition to meet consumer demand, there will normally be consumers willing to pay more than the competitive price.21 Even though demand for a product will decrease as its price rises, a firm will still be able to make sales to some consumers. This means that, if possible, a rational profit-seeking firm will reduce its output and set higher prices to the extent each reduction in output and corresponding increase in price results in a higher revenue.
overall profit. Where price is driven above cost, some consumers who value a product at more than the cost of supplying it will nonetheless be unwilling to purchase it. Consumers are denied products that they could purchase in a competitive market, meaning resources are not allocated efficiently. Efficiency is reduced to the extent consumers value goods that they are unable to purchase more than it costs to supply those goods.

Government regulation, by its nature, displaces competition. "Displacement is the purpose, indeed the definition, of regulation." Therefore, regulation of markets will presumably injure consumers purely with respect to their interest in competitive pricing, regardless of the public interest purportedly advanced by the regulation, and notwithstanding that the regulation might seek to correct market failure. There is thus a conflict between the stated aim of federal antitrust, namely, competitive markets, and the functions of almost any regulatory body concerned with more than merely competitive markets.

Under the Supremacy Clause, conflicts between state and federal law are resolved in favor of national legislation. Professor John E. Lopatka posits two ways in which municipal regulation can injure consumer welfare in a manner concerning antitrust: (1) by regulating the market so that the price of a product exceeds the cost, thereby enabling a monopoly profit to be earned, or (2) by creating a scenario (by perhaps granting a monopoly) in which a product is supplied by an inefficient firm. In the second scenario, the product may still be supplied at cost, meaning no monopoly profit is earned, but the resulting price is higher than that at which the product could be provided by a more efficient producer. Of course, SARAA may simultaneously injure consumers in both ways by providing itself with a monopoly over HIA parking. Why then, given the Supremacy Clause, was the condemnation not an antitrust violation? As the Court explained in Exxon Corp. v. Governor of Maryland, "[I]f an adverse effect on competition were . . . enough to render [state action] invalid, the states’ power to engage in economic regulation would be destroyed." As the following discussion demonstrates, the judiciary has largely accommodated state law at the expense of federal antitrust.

A. Initial Development of the State Action Doctrine: Maintaining State Sovereignty

Section 1 of the Sherman Act makes unlawful “every contract, combination . . . or

22. HOVENKAMP, supra note 4, § 1.2a.
24. Id. at 55.
25. Id.
27. Id.
28. Id.
29. Id. at 24.
30. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any . . . Laws of any State to the Contrary notwithstanding.”).
32. Id.
34. Easterbrook, supra note 13.
conspiracy, in restraint of trade or commerce among the several States.” Section 2 makes it unlawful to “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.” Prior to \textit{Parker v. Brown}, the Supreme Court had not explicitly recognized immunity for state government activities which violated the Sherman Act or any other federal antitrust provisions.

In \textit{Parker}, a California raisin producer and packager challenged the validity of the California Agricultural Prorate Act (“the Prorate Act”) which authorized the establishment of programs limiting the production, marketing, and sale of domestic agricultural commodities. The Prorate Act restricted competition among California’s raisin growers, regulating times of sale, to whom sales could be made, and purchase prices. Writing for the Court, Chief Justice Stone explained that such a program, if organized and made effective by private entities, was presumably a restraint of trade in violation of the Sherman Act. However, the program derived its authority not through the force of an individual act or agreement but strictly from the legislative command of the state. The Supreme Court found no indication, in either the language of the Sherman Act or in its legislative history, that Congress intended to restrain state action. Chief Justice Stone further explained that in a dual system of government, which provides for state sovereignty in the absence of a clear congressional intent to abrogate that sovereignty, “an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress.”

The Supreme Court noted that state action immunity protects neither individuals authorized by the state to violate the Sherman Act, nor agreements between state and private entities. On the other hand, the Supreme Court acknowledged the findings of the district court, which showed that raisins produced in areas subject to the Prorate Act accounted for nearly all of the raisins consumed in the United States and for one-half of the raisin crop grown in the entire world. Only 5%-10% of the raisins grown in California and subject to the Prorate Act’s restrictions were consumed in-state. The Court’s ruling, therefore, granted immunity to conduct affecting nationwide and even worldwide markets. Thus, an unspoken implication of \textit{Parker} was that the state action exemption from the Sherman Act applied regardless of whether the anticompetitive effects reverberated well beyond the borders of the state in question.

\begin{itemize}
\item 36. \textit{Id.} § 2.
\item 38. \textit{HOVENKAMP, supra} note 4, § 20.2a.
\item 39. \textit{Parker}, 317 U.S. at 345.
\item 40. \textit{Id.}
\item 41. \textit{Id.} at 350.
\item 42. \textit{Id.}
\item 43. \textit{Id.} at 350-51.
\item 44. \textit{Parker}, 317 U.S. at 351.
\item 45. \textit{Id.}
\item 46. \textit{Id.} at 345.
\item 47. \textit{Id.}
\item 48. Congress passed the Sherman Act (as well as all other antitrust laws) pursuant to its power under the Commerce Clause, which gives Congress the authority to regulate interstate commerce. \textit{HOVENKAMP, supra}}
B. Application and Development of Parker: Tailoring the Limits of Sovereignty

1. Defining the Parker Analysis

The Supreme Court did not address the state action immunity doctrine again until 1975. The plaintiffs in Goldfarb v. Virginia State Bar contracted to purchase a home and sought an attorney to conduct a title examination.\(^{49}\) The county bar association published a non-mandatory minimum fee schedule suggesting the lowest allowable charges to clients seeking services, including title examinations, from attorneys within the county.\(^{50}\) The Virginia State Bar Association, in which membership was required to practice law within the state, had issued ethical opinions indicating that the schedules should not be ignored.\(^{51}\) Any lawyer who habitually ignored the schedules was presumptively guilty of misconduct.\(^{52}\) After failing to find an attorney willing to charge less than the amount set forth in the price schedule, the plaintiffs brought a class action suit against both the state and county bar associations, alleging that the operation of the minimum fee schedule constituted price fixing, a per se violation of section 1 of the Sherman Act.\(^{53}\)

Rejecting the county bar’s contention that its actions were immune because they were prompted by the state bar, the Court held that the anticompetitive activities must be “compelled by direction of the State acting as a sovereign.”\(^{54}\) Moreover, the fact that the state bar was a state agency did not create an antitrust shield that allowed it to implement anticompetitive practices for the benefit of its members.\(^{55}\) Therefore, neither bar association was protected by state action immunity.\(^{56}\)

One year later, in 1976, in Cantor v. Detroit Edison Co., the Supreme Court again stressed the importance of having the regulatory activity stem from state policy, but then went so far as to declare that the program at issue was not necessary to execute a utility regulation act underlying the program.\(^{57}\) Although the Court did not pursue an inquiry

---


\(^{50}\) Id. at 777-78.

\(^{51}\) Id. at 776-77.

\(^{52}\) Id. at 777-78.

\(^{53}\) Id. at 778.

\(^{54}\) Goldfarb, 421 U.S. at 791 (emphasis added).

\(^{55}\) Id.

\(^{56}\) Id.

into the substantive wisdom of the anticompetitive conduct in future cases, this
cOMPONENT of the Cantor opinion was significant because it indicated less willingness on
the part of the judiciary to defer to the economic sovereignty of the state. Instead of
applying substantive review as the Supreme Court indicated it might in Cantor, the Court
began implementing a strict, “process-oriented test for determining whether state or local
anticompetitive regulations qualified for the state action immunity.”

2. The Process-Oriented Approach of Midcal

In California Retail Liquor Dealers Ass’n v. Midcal Aluminum, the Court set forth a
two-prong approach intended to balance state sovereignty against antitrust concerns by
asking the following: (1) whether the challenged restraint was a clearly articulated and
affirmatively expressed state policy, and (2) whether the policy was actively supervised
by the state itself. This test focused on the mechanics that produce anticompetitive
activity rather than on the desirability of the regulation. This approach, made explicit
for the first time by the Supreme Court in Midcal, was implied two years earlier in City of
Lafayette v. Louisiana Power & Light Co. Lafayette was the Court’s first application of
the state action doctrine to municipal activities. Several Louisiana cities allegedly
conspired to engage in sham litigation, long-term supply agreements, and tying
arrangements designed to eliminate the competition of private utilities within the
municipal boundaries. Writing for a plurality, Justice Brennan rejected the
municipalities’ claim of antitrust immunity, stating, “[T]he Parker doctrine exempts only
anticompetitive conduct engaged in as an act of government by the State as sovereign, or,
by its subdivisions, pursuant to state policy to displace competition with regulation or
monopoly [power].” A city’s anticompetitive activities will not be immunized if they
merely reflect the municipality’s own policies or preferences. Rather, successful
invocation of the state action doctrine requires “evidence that the State authorized or
directed a given municipality to act as it did.”

Justice Brennan warned of the “serious economic dislocation” that could result “if
cities were free to place their own parochial interests above the Nation’s economic goals
reflected in the antitrust laws.” However, because “specific, detailed legislative
authorization” for each and every activity might not be available, “an adequate state
mandate for anticompetitive activities . . . exists when it is found ‘from the authority
given a governmental entity to operate in a particular area, that the legislature

58. Jorde, supra note 57, at 236.
60. Jorde, supra note 57, at 236 (internal citation omitted).
62. “We emphasized [in past holdings] . . . the significance . . . of the fact that the state policy requiring
the anticompetitive restraint as part of a comprehensive regulatory system[,] was one clearly articulated and
affirmatively expressed as state policy, and . . . actively supervised by the State[].” Id. at 410.
63. Id. at 392 n.5.
64. Id. at 413.
65. Id. at 414.
67. Id. at 412-13. Of course, this same argument could be made regarding a state acting as a state, rather
than through one of its subdivisions.
contemplated the kind of action complained of."

3. Refining the Midcal Approach

In Community Communications Co. v. City of Boulder, the Supreme Court addressed the first prong of Midcal—whether the challenged restraint was a clearly articulated and affirmatively expressed state policy. In Boulder, the Court struck down a municipal ordinance restricting the expansion of a private cable television company. The Supreme Court explained that although the state of Colorado itself granted a home rule provision to Boulder in an effort to enhance Boulder’s regulatory power, the substance of the provision did not authorize any particular type of ordinance. Rather, the grant of home rule authority merely expressed the state’s neutrality concerning the regulation of cable television. Mere neutrality is not authorization. Therefore, the cable television ordinance was not exempt.

Midcal itself demonstrated the demands of the second prong—that the state actively supervise the policy. California’s resale price maintenance statute required wholesale wine producers to file a price schedule with the state. The statute authorized private producers to establish prices and then enforced the prices once they were set. The state itself did not establish prices, regulate the terms of contracts, nor monitor market conditions. Instead, it merely authorized private actors to create and implement per se illegal resale price maintenance. Although the statute met the clear articulation prong, the state’s failure to engage in any ongoing examination of the program meant the statute did not meet the active supervision prong. The Supreme Court concluded, “The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.”

In both Boulder and Midcal, the state was not actively involved in the anticompetitive activity, leading the Court to view the activity as “essentially private.” However, the fact that the Court in each case applied this similar rationale to a different prong was significant. In Midcal, the defendant was a private wine producer, whereas

---

68. _Id._ at 415 (internal citation omitted).
69. _Id._ at 40.
70. _Id._ at 55.
71. _Id._ at 55.
72. _Id._
73. _Id._
74. _Boulder_, 455 U.S. at 55.
76. _Id._ at 105-06.
77. _Id._
78. _Id._ In support of the proposition that resale price maintenance is a per se violation of antitrust law, see _United States v. Parke, Davis & Co._, 362 U.S. 29, 47 (1960) (“[A] combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.” (quoting _United States v. Socony-Vacuum Oil Co._, 310 U.S. 150, 223 (1940))).
79. _Midcal_, 445 U.S. at 106.
80. _Id._
82. _Midcal_, 445 U.S. at 100.
2008] State Action Immunity, Municipalities, and the Unique Case of Em. Dom. 805

in Boulder, the defendant was a city. In Midcal, the Court found that the clear articulation prong had been met, forcing it to consider and thereby adopt the active supervision prong as applying to private actors attempting to utilize state action immunity. In Boulder, on the other hand, the Court found that the city failed the clear articulation prong, so it declined to consider the active supervision prong. Therefore, the Court never formally adopted the active supervision requirement as a part of the analysis of municipalities seeking antitrust exemption under the state action doctrine.

Before the Supreme Court had another chance to address the requirements for municipal immunity, Congress drastically reduced the incentive to bring suit against a municipality, regardless of what elements must be proved. Passed in 1984, the Local Government Antitrust Act (LGAA) provides that no damages, costs, or attorney’s fees may be recovered in any claim against a local government for antitrust violations. In addition, subsequent Supreme Court decisions broadened municipal immunity. Taken together with the LGAA, these decisions limited both the size and scope of suits arising out of a municipality’s anticompetitive conduct.

C. Expansion of Parker: Renewal of Economic Federalism

In Town of Hallie v. City of Eau Claire, the Supreme Court revisited the requirements for state action immunity for municipal actions, ultimately rejecting the applicability of the active supervision requirement while at the same time relaxing the clear articulation requirement. Acting under a state statute granting it authority to construct, alter, and repair sewage systems, the city of Eau Claire had refused to provide sewage treatment services to four adjacent townships while also attempting to tie these services to its sewage collection and transportation services. The townships sued Eau Claire claiming violations of the Sherman Act for improper exercises of monopoly power. In addressing the clear articulation requirement, the Court rejected the townships’ contention that the legislature must expressly state in a statute or legislative history its intention that delegated authority has anticompetitive effects. Justice Powell explained that such a standard would embody “an unrealistic view of how legislatures work and of how statutes are written. No legislature can be expected to catalog all of the anticipated effects of a statute of this kind.” The Supreme Court further rejected the language in Goldfarb and Cantor indicating that the clear articulation prong demanded state legislative compulsion, distinguishing these cases because they involved private

84. Midcal, 445 U.S. at 105.
86. In Lafayette, where the defendants were a group of municipalities, a plurality of the Court indicated that active supervision was required but likewise found that clear articulation of the state policy was not present, meaning the plurality never considered active supervision. City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 413 (1978).
89. Id. at 36-37.
90. Id. at 36.
91. Id. at 43.
92. Id.
parties.\textsuperscript{93} It was enough that the anticompetitive conduct was “a foreseeable result” or that anticompetitive effects “logically would result” from the state granting authority to the city to delineate service areas.\textsuperscript{94} The key factor was whether the legislature had delegated regulatory authority in the general subject area of sewage services, regardless of whether the statute said anything about tying different services.\textsuperscript{95}

Acknowledging that the necessity of applying the active supervision prong had been left in doubt after the somewhat conflicting opinions of \textit{Lafayette} and \textit{Boulder}, the Supreme Court concluded that there was no such requirement for cases involving municipalities.\textsuperscript{96} In attempting to justify why municipalities should be held to a lower standard than private parties acting with state authorization, Justice Powell reasoned:

Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests . . . . Where the actor is a municipality . . . the only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals.\textsuperscript{97}

This danger was minimized by successful satisfaction of the clear articulation requirement, which served to ensure that the municipality was acting pursuant to state policy and not its own.\textsuperscript{98} “Once it is clear that state authorization exists,” the Court explained, “there is no need to require the State to supervise actively the municipality’s execution of what is a properly delegated function.”\textsuperscript{99}

The Supreme Court more recently analyzed the scope of state action immunity for the anticompetitive acts of municipalities in \textit{Columbia v. Omni Outdoor Advertising}.\textsuperscript{100} The plaintiff advertising agency had recently entered the market for advertising services in which an incumbent firm enjoyed a 95% share.\textsuperscript{101} The incumbent firm allegedly attempted to maintain its monopoly position through a number of anticompetitive acts, one of which involved coordination with city officials with whom the firm purportedly had strong ties.\textsuperscript{102} Responding to pressure from the incumbent firm, the city council passed an ordinance restricting the size, location, and spacing of billboards, which had been the entrant firm’s primary means of soliciting its business.\textsuperscript{103} The city acted under a state statute authorizing municipalities to regulate the use of land and the construction of buildings and other structures within their boundaries.\textsuperscript{104} The parties did not dispute that as a matter of state law the statute authorized the city to regulate the size, location, and spacing of billboards.\textsuperscript{105} However, the plaintiff contended that this application of the statute was defective because it was not, as the statute required, adopted for the purpose

\begin{itemize}
  \item \textsuperscript{93} \textit{Hallie}, 471 U.S. at 45.
  \item \textsuperscript{94} \textit{Id.} at 42.
  \item \textsuperscript{95} \textit{Jorde, supra} note 57, at 243-44.
  \item \textsuperscript{96} \textit{Hallie}, 471 U.S. at 46.
  \item \textsuperscript{97} \textit{Id.} at 47.
  \item \textsuperscript{98} \textit{Id.}
  \item \textsuperscript{99} \textit{Id.}
  \item \textsuperscript{100} \textit{Columbia v. Omni Outdoor Adver.}, 499 U.S. 365 (1991).
  \item \textsuperscript{101} \textit{Id.} at 367.
  \item \textsuperscript{102} \textit{Id.} at 368.
  \item \textsuperscript{103} \textit{Id.}
  \item \textsuperscript{104} \textit{Id.} at 370.
  \item \textsuperscript{105} \textit{Columbia}, 499 U.S. at 371.
\end{itemize}
of promoting the health, safety, morals, or general welfare of the community.106

Justice Scalia began the majority opinion by noting that, although “Parker immunity does not apply directly to local governments, [the Court has] recognized . . . that a municipality’s restriction of competition may sometimes be an authorized implementation of state policy, and have accorded Parker immunity where that is the case.”107 The plaintiff suggested that, to qualify as an authorized implementation of state policy, the restriction must meet the substantive and procedural guidelines prescribed by state law, meaning that the restriction was adopted for the purpose of promoting the health, safety, morals, or general welfare of the community.108 Rejecting this argument, Justice Scalia explained, “[I]n order to prevent Parker from undermining the very interests of federalism it is designed to protect, it is necessary to adopt a concept of authority broader than what is applied to determine the legality of the municipality’s action under state law.”109 The authorization requirement did not turn federal antitrust courts into state courts of administrative review.110 To fulfill this requirement, it remained enough that suppression of competition be a foreseeable result of what the statute authorizes, and in this case the purpose of the zoning regulation was “to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants.”111 Because an ordinance restricting the size, location, and spacing of billboards “necessarily protects existing billboards against some competition from newcomers,” such a requirement of foreseeability was easily met.112 In interesting dicta, Justice Scalia concluded:

[I]n 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.113

Some lower courts rejected the market participant exception, while others have treated it as an open question.114 The exception nonetheless appears to be one of very few potential restrictions on the anticompetitive conduct of municipalities under the current status of the law.

106. Id.
107. Id.
108. Id. at 372.
109. Id.
111. Id. at 373.
112. Id.
113. Id. at 374-75. In Lafayette, Chief Justice Burger indicated in his concurrence that he would likewise disqualify municipalities from immunity when they acted in their “proprietary” capacity—when they participated in the market as buyers or sellers, rather than as mere regulators. City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 422 (1978) (Burger, C.J., concurring).
114. Compare Allright Colo., Inc. v. City & County of Denver, 937 F.2d 1502, 1510 (10th Cir. 1991) (“[I]t appears to us that the distinction between proprietary and governmental functions has not been pursued in recent Supreme Court opinions.”), with Paragould Cablevision, Inc. v. City of Paragould, 930 F.2d 1310, 1312-13 (8th Cir. 1991) (“As yet, however, the market participant exception is merely a suggestion and is not a rule of law.”).
D. Improper Motive and Eminent Domain

While the Columbia Court appeared to have left the door open for a market participant exception, it also seemed to slam the door shut on any potential inquiry into the motive underlying the activity. Rejecting the plaintiff’s invitation to question the city’s allegedly selfish motives/bad faith, Justice Scalia reasoned that all regulation tends to benefit certain parties more than others. Whether a regulation is in the public interest is a value judgment best made by elected officials, not judges and juries. The plaintiff in SARAA I had likewise appealed to evidence of self-dealing on the part of the airport authority. Citing Columbia, the district court declined to consider motive as a basis for withholding immunity, noting that SARAA was required to specify its purpose for condemning the property in an eminent domain proceeding.

The State’s power of eminent domain is indeed subject to several important constitutional limits, one of which is that the property acquired must be taken for a “public use.” The public use requirement is, however, exceptionally lenient, even within the context of a state action discussion. In Hawaii Housing Authority v. Midkiff, the Supreme Court held that the public use requirement is met where the exercise of the eminent domain power is rationally related to a conceivable public purpose. Moreover, the Court “will not substitute its judgment for a legislature’s judgment as to what constitutes a public use ‘unless the use be palpably without reasonable foundation.’” Most recently, the Court endorsed the idea that economic development, without proof of a substantial likelihood of public benefit, could suffice.

In its declaration of taking, SARAA claimed that it intended to use the property for the construction of facilities that will promote and improve the services provided by the airport. Without a doubt, improving the practices of the HIA is sufficient to establish a conceivable public purpose, and the creation of new facilities is a means rationally related to this purpose. Never mind the fact that the plaintiff in SARAA I alleged that not only did SARAA have no actual plans to improve the property, but also that such plans were worthless absent agreements from Amtrak and Norfolk Southern to move a set of railroad tracks and provide a means of access between the property and the airport. Therefore, it is doubtful that eminent domain proceedings truly check the ambitions of an aggressive municipal authority any more than the foreseeability requirement of the state action doctrine. In neither case is a court likely to seriously consider the SARAA I plaintiff’s complaint that the airport authority was abusing its power to monopolize a market.

116. Id. at 377.
117. Id.
119. Id. at 484 n.19.
122. Id. (quoting Gettysburg, 160 U.S. at 680).
124. SARAA I, 423 F. Supp. 2d at 476.
125. Id.
III. ANALYSIS

Federal antitrust law presumes that free market competition produces the best allocation of economic resources, the lowest prices, the highest quality products, and the greatest material progress for society.\textsuperscript{126} State regulation often affects competition and free markets in ways that produce inefficient results.\textsuperscript{127} Whatever conflicts result from the opposition between contradictory policies advanced by federal and state governments are an inevitable result of the federal constitution, which contemplates that both levels of government will simultaneously regulate the economy.\textsuperscript{128}

Any argument suggesting that the Sherman Act should displace all state regulation or vice versa would be inconsistent with our federal structure.\textsuperscript{129} The judiciary therefore developed the state action doctrine as a recognition that federal antitrust should not excessively invade state regulatory authority.\textsuperscript{130} Given this tension, it becomes a question of degree as to the extent the interests of each policy should be advanced at the expense of the other. This Part examines the most frequently advanced arguments in favor of a broad state action doctrine, the economic sacrifice incurred as a result of lenient supervision of anticompetitive state regulation, and some of the proposals for altering the doctrine.

A. The Conflicting Values of Antitrust and Federalism

The values intrinsic to federalism ultimately underlie most if not all arguments advancing deference to state regulation.\textsuperscript{131} These values include increased citizen participation, government efficiency, opportunities for creative experimentation, and diffusion of power.\textsuperscript{132} It is open to debate not only to what extent these interests are offset by decreased consumer welfare, but also to what extent these interests are in fact realized or achievable in the glowing terms in which they are described by proponents of broad state deference.\textsuperscript{133}

1. Participation, Politics, and Capture

Any time federal law preempts state or local law, there is a risk that generalized national policy overrides geographically specific initiatives responsive to and tailored toward an individual community. Small-scale policymaking provides citizens with a sense of self-governance, which encourages active participation among the citizenry.\textsuperscript{134} Participation in turn promotes a perception that government officials and institutions are legitimate, responsive, and accountable conduits through which the people can bring

\textsuperscript{126} Jorde, supra note 57, at 227 (quoting N. Pac. Ry. v. United States, 356 U.S. 1, 4 (1958)); see also supra Part II.
\textsuperscript{127} Jorde, supra note 57, at 227.
\textsuperscript{128} HOVENKAMP, supra note 4, § 20.2a.
\textsuperscript{129} Id.
\textsuperscript{130} Id.
\textsuperscript{131} See, e.g., Jorde, supra note 57, at 230-31 ("By anchoring the state action doctrine to federalism, the Court affirmed the values of federalism.").
\textsuperscript{132} Id. at 231-34.
\textsuperscript{133} See, e.g., Id. (advocating the merits of basing the state action doctrine on the principles of federalism).
\textsuperscript{134} Id. at 231.
about changes they desire. The other side of this coin is greater governmental efficiency. Small political units composed of citizens and governments within close proximity to each other can coordinate effectively to implement popular demand. Administration from a national level operates on a less manageable scale and lacks both the knowledge of local conditions and the flexibility required to respond to them. Needless to say, a scenario in which easily accessible regulatory bodies can readily respond to influential and active lobbying by local constituents is not without its drawbacks.

There is a frequently discussed concern that regulation does not serve the general interest that the government perceives from a widely active and vocal public. Rather, regulation serves the private interests of groups that have either controlled or “captured” regulatory bodies through successful lobbying efforts. Regulation viewed as a legitimate attempt to correct market defects might, in reality, represent a conscious effort to create such defects in order to favor politically adept special interests. To competing producers, for example, government regulation in the form of price supports, entry-barrier limitations, etc., represents an opportunity to greatly reduce costs inherent to open market competition. Producers are therefore willing to support such measures through unified, intense lobbying efforts, perhaps opposed only by vague, unorganized, and widely dispersed consumer opposition. As a result, the government responds with regulation that reduces competition in the market, allowing producers to reduce output and raise prices without fear of being undercut by new entrants. Ultimately, wealth is shifted away from consumers, protected businesses have less incentive to innovate, and resources are allocated inefficiently.

In response to these concerns, Professor John Wiley proposed a test to replace the Midcal two-pronged approach. Professor Wiley’s test would have federal antitrust regulation preempt state or local regulation that restrains market competition and originates from lobbying efforts of producers who stand to profit from the restraint, without responding directly to a substantial market inefficiency. Though this analysis appears to compensate for the inefficiencies noted immediately above, it raises constitutional as well as pragmatic concerns.

First, Professor Wiley’s criteria may punish the free exercise of perfectly legal and legitimate rights, such as “the right to debate public issues, to petition the government,
and to attempt to influence the outcome of the political process." Far from merely compensating for the economic drawbacks of effective lobbying leading to inefficient regulation, this test would completely eliminate such regulation if it is, in fact, inefficient and in the interests of certain producers. Second, this standard leaves to federal courts the question of what regulation is efficient and what regulation is socially harmful. People with different ideologies may have drastically differing viewpoints on not only whether regulation is efficient but also on what constitutes a market inefficiency. Deciphering precisely when the regulation results from some particular lobbying effort represents a final practical difficulty. In a political atmosphere dominated by special interest groups, “capture” may simply be another word for political success, “and a committed interest group theorist is likely to have little trouble viewing virtually any political result as the product of capture by special interests.”

The problem of deciphering which regulatory acts are legitimate and which are the result of capture speaks to the more fundamental problem of the capture test: in effect, federal antitrust would become a regulator of the state political process. This would be a serious invasion into state policymaking and would probably produce results similar to a test that simply examined whether regulation produced unwanted anticompetitive effects, and where the regulation did produce unwanted anticompetitive effects, it would be struck down as an antitrust violation. Generally speaking, governments implement regulatory regimes that roughly attempt to remedy market imperfections and result in varying benefits for both consumers and producers. The ability of local governments to devise an innumerable variety of possible regulatory schemes is another asset of federalism and may actually deter regulation detrimental to consumer welfare.

2. Experimentation, Decentralization, and Regulatory Competition

Also at the core of federalism is the idea that diffusion of power among many political bodies produces a variety of economic, social, and political innovations. Decentralization of power among state and local governments allows effective and rapid response to regulatory demands unique to each individual population throughout the country. At the same time, recognition of the states as independent and viable governing bodies counterbalances the power of the federal government, attracting loyalty of the citizens to their respective states. The association between the activities of local government and the participation of the surrounding population may serve as a

147. HOVENKAMP, supra note 4, § 20.2b.
148. Id.
149. Garland, supra note 138, at 516.
150. HOVENKAMP, supra note 4, § 20.2b.
151. Id.
152. Id.
153. Easterbrook, supra note 13, at 50 ("One need not think of the states as laboratories . . . to know that the pressures of exit and voice cause governments to search for laws that strike an adequate balance between favors to interest groups and benefits to other residents.").
155. Id. at 233.
156. Id. at 233-34.
justification for treating delegations of regulatory authority to municipal units more leniently than delegations to private parties.\textsuperscript{157} Focusing on people’s responses to regulation rather than their participation in the government, Judge Easterbrook suggests that as a government attempts to attract people to its area, it will actively compete with other governments to develop consumer friendly policies.\textsuperscript{158}

Underlying the requirements that must be met to enjoy antitrust immunity is the obvious notion that different methods of regulation have different effects on the local population.\textsuperscript{159} If a government creates a regulatory climate unfavorable to consumers, businesses, or both, it will encourage movement to areas where the regulation is preferable: a firm may change its place of incorporation, export its product, or transfer its facilities, and consumers may move.\textsuperscript{160} The threat of movement puts pressure on governments to establish policies that attract rather than repel people and firms.\textsuperscript{161} Governments thus compete for consumers as sellers of laws just as sellers of a commodity in an open market.\textsuperscript{162} Competition among governments will therefore produce legal rules that maximize the welfare of each state’s residents.\textsuperscript{163}

Competition will be maximized in the arena of government regulation by mirroring, to the largest extent possible, the conditions of perfect competition in the market.\textsuperscript{164} Competitive markets feature many competing firms, easy consumer transitions from one firm to another, and freedom to innovate. Effective competition among regulatory schemes therefore requires an increasing number of jurisdictions, mobile persons and resources, and freedom of jurisdictions to regulate.\textsuperscript{165} In addition, the consequences of a jurisdiction’s regulations must be felt within its borders so that consumers are able to make choices accurately reflecting the jurisdiction’s policies.\textsuperscript{166}

Antitrust can achieve its own goal of efficiency and consumer welfare by facilitating these conditions, with the caveat that it prohibit the export of monopoly overcharges.\textsuperscript{167} Otherwise, governments would be able to promote movement into their areas with policies which favor their own populaces but whose negative effects are spread across multiple jurisdictions. Easterbrook explains this phenomenon as a form of taxation: when one state enjoys a monopoly over a particular resource, it may establish regulation, such as the creation of a cartel, that produces monopoly pricing.\textsuperscript{168} In doing so, it effectively taxes all purchasers of the resource, many of whom presumably live outside the

\begin{itemize}
\item \textsuperscript{157} Id. In Hallie, the Court did not offer this as a justification for not requiring active supervision of municipal acts while still requiring it of private acts. Instead, it focused entirely on maintaining the sovereignty of the state itself, arguing that the clear articulation requirement assured that municipalities pursued state goals. Town of Hallie v. City of Eau Claire, 471 U.S. 34, 47 (1985).
\item \textsuperscript{158} Easterbrook, \emph{supra} note 13, at 28.
\item \textsuperscript{159} Id. at 29.
\item \textsuperscript{160} Id. at 33-34.
\item \textsuperscript{161} Id. at 34.
\item \textsuperscript{162} Id. at 28, 34.
\item \textsuperscript{163} Easterbrook, \emph{supra} note 13, at 34-35.
\item \textsuperscript{164} Id. at 34.
\item \textsuperscript{165} Id.
\item \textsuperscript{166} Id.
\item \textsuperscript{167} Id. at 39.
\item \textsuperscript{168} Easterbrook, \emph{supra} note 13, at 39.
\end{itemize}
monopolist state, to bring in increased revenue from the taxation of monopoly profits.\textsuperscript{169} Residents of the state will bear the burden of monopoly prices, but they will also enjoy whatever benefits result from taxation of the cartel.\textsuperscript{170}

Judge Easterbrook therefore concludes that “[c]ompetition among the states to create attractive systems of economic regulation is greatest if [a state] may adopt any regulation [it] choose[s], at any level of government [it] choose[s], so long as the residents of the state that adopts the regulation also bear the whole [of any] monopoly overcharge.”\textsuperscript{171} He suggests that this approach to the tension between state regulation and federal antitrust is attractive because it maximizes competition to produce schemes conducive to the welfare of each state’s residents and also promotes the autonomy of the states in maintaining their traditional regulatory roles.\textsuperscript{172} According to Easterbrook, “It is a happy coincidence that respect for the independence of states as regulators and concern for the competitive conditions animating the Sherman Act lead to the same result.”\textsuperscript{173}

Certainly a compelling state sovereignty argument is that, if local regulation of a market has no harmful effects outside the state in which it was enacted, federal antitrust should not interfere. This approach not only prevents the federal government from attempting to micromanage entirely localized regulation, but it also preserves the status of the states as laboratories for economic experiments.\textsuperscript{174} However, it seems rare that the effects of a monopolized market will be contained entirely within the borders of a particular state. Even seemingly benign regulation governing land use or taxicab rates can have substantial interstate spillover.\textsuperscript{175}

Another concern with the economic federalism approach is its failure to address the problem of regulatory capture.\textsuperscript{176} If regulation is consistently the product of special interest lobbying and not regulatory competition between jurisdictions, consumers could be left in a terrible position: not only will they face the normal drawbacks of anticompetitive regulation, but unless the effects are broad enough to reverberate across interstate markets, consumers will have no remedy whatsoever. So long as interest groups are clever enough to craft intrastate regulations, and if interest group politics is as widespread as some believe, consumers are completely out of luck. On the other hand, if government regulation tends to reflect genuine attempts to attract people and firms, consumers may indeed shop around to find a locale they prefer, but that is not the most desirable proposition either.

It does not seem realistic to envision individuals and families migrating around the country in search of a beneficial economic climate. People choose to live and work where they do for a variety of reasons, and many of these reasons have nothing to do with economics. It seems far more likely that state and local governments will continue to cater to producers rather than to consumers and that they will be able to do so without suffering significant consumer exit. Governments can anticipate that consumers, more so

\textsuperscript{169} Id.
\textsuperscript{170} Id.
\textsuperscript{171} Id. at 45 (emphasis omitted).
\textsuperscript{172} Id.
\textsuperscript{173} Easterbrook, supra note 13, at 45.
\textsuperscript{174} HOVENKAMP, supra note 4, § 20.2b.
\textsuperscript{175} Id.
\textsuperscript{176} Easterbrook, supra note 13, at 50.
than producers, will simply cope with detrimental market regulation without picking up and leaving, meaning that maximizing competition according to the economic federalism model will actually maximize wealth transfer from consumers to producers.

Finally, supposing that economic federalism accurately models how both local governments and consumers function, it nonetheless remains a rather unappealing paradigm. Jurisdictions that maintain anticompetitive regulation will ultimately lose investment to those that do not, but how long will it take for all parties to adjust their behavior as the model predicts so as to eventually bring about increased consumer welfare? One would think that dispersion of settled populations around the nation on the basis of regulatory economics would prove itself to be a very long-term phenomenon, once again calling into question the viability of this theory. Monopoly profits are immediately enjoyable, and when created via government regulation, they may spring up virtually overnight. Why would rational actors, especially those operating in a very localized setting and who stand to benefit immediately from monopoly profits, concern themselves with long-term migratory fall-out? This concern is alleviated as the scope of the governmental unit expands, because as a jurisdiction expands, short-term monopoly profits represent a decreasing share of revenue and long-term economic planning should attain greater significance as a part of policymaking.

**B. Reassessing the Current State Action Doctrine**

Current law requires only that anticompetitive municipal conduct be the foreseeable result of a clearly articulated state policy. Where the state policy involves a grant of power to a private actor, the state must also actively supervise the anticompetitive conduct. In *Hallie*, the Court justified this distinction by arguing that if a local government acts pursuant to a clearly articulated state policy, it acts within the restraints imposed by the state within its delegation of authority. Therefore, “there is no need to require the State to supervise actively the municipality’s execution of what is a properly delegated function.” The Court more or less equates the purpose of clear articulation with active supervision, but this seems to confuse the role of the two prongs. The clear articulation requirement serves to delineate authority to subordinate actors, preventing exemption of anticompetitive conduct “out of deference to a state that would have prohibited the activity had it contemplated the conduct.” The supervision requirement not only reinforces this purpose, but it also “hastens corrective action when a state has misperceived the consequences of conduct it authorized or when a party exceeds the limits of its authorization.”

---

177. HOVENKAMP, *supra* note 4, § 20.2b.
178. See *Columbia v. Omni Outdoor Adver.*, 499 U.S. 365, 373 (1991) (“It is enough, we have held, if suppression of competition is the ‘foreseeable result’ of what the statute authorizes.”).
179. See *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum*, 445 U.S. 97, 105 (1980) (“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.”) (citing *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978)).
181. *Id.*
183. *Id.*
The *Hallie* Court apparently felt that a municipality, because of its public character, was less likely than a private party to exceed its authority. But why should this necessarily be the case, especially if the municipality is participating in the market? Moreover, why would a state be any more likely to miscalculate the effects of specifically authorized private conduct than the consequences of specifically authorized municipal activities?\footnote{184}{Id.}

### 1. Requiring Active State Supervision

The action against the municipal airport authority in *SARAA I* was initiated not by the private competitor being eliminated by eminent domain but by the Attorney General of the Commonwealth of Pennsylvania.\footnote{185}{Pennsylvania v. Susquehanna Area Reg’l Airport Auth. (*SARAA I*), 423 F. Supp. 2d 472, 475 (D. Pa. 2006).} The airport authority had been created pursuant to the Pennsylvania Municipal Authorities Act (PMAA). Noting that the PMAA granted the power of eminent domain, the court concluded that anticompetitive effects were a foreseeable result of a clearly articulated state policy: the exercise of eminent domain power could certainly result in the displacement of competitive facilities.\footnote{186}{Id. at 479.} However, there was ambiguous language in the PMAA which seemed designed to prevent interference with existing commercial enterprises.\footnote{187}{Id. at 480.} The attorney general asserted that this language constituted a waiver of state action immunity, but the court rejected this assertion on the grounds that it was bound by an interpretation of the PMAA by the Pennsylvania Supreme Court.\footnote{188}{Id. at 480-81.}

*SARAA I* thus presents a compelling case for requiring active state supervision of anticompetitive municipal conduct, even if that conduct is the logically foreseeable result of state policy. The opinion demonstrates how incredibly low the current standard for immunity is: although there were provisions within the enabling act that suggested the state legislature may have intended to explicitly prohibit the exact conduct in question, and although the conduct was under attack by a state official, the airport authority was immune from antitrust liability. Clearly, it takes a rather extreme case to find liability under *Columbia*. Active supervision assures that municipal conduct subsequent to a grant of authority does not exceed the boundaries originally contemplated by the legislature. In cases like *SARAA I*, this requirement could clear up the confusion as to whether the authority was acting well within, or well without, its authorization. The only obvious drawback is increased administrative costs, but a state should prefer to incur such costs rather than continue to allow its delegations of power to be used in ways it did not intend. Furthermore, the values of federalism are not seriously damaged by instituting this additional requirement. Power will in some sense become less diffuse, but hardly more than is envisioned by a system that creates two sovereign entities, the states and the federal government, not the states, the federal government, and however many more entities the states wish to create.
2. Creating a Market Participant Exception

After concluding that the municipal airport authority acted pursuant to a clearly articulated state policy, the district court in SARAA I addressed the question of whether a “market participant” exception to the state action doctrine existed. For purposes of its analysis, the court assumed that some type of market participant exception from state action immunity exists when a municipal authority acts simply as another competitor in the market place.\(^{189}\) However, it concluded that even if such an exception to state action immunity existed, it was inapplicable because the challenged action of the municipality was the exercise of eminent domain, a power unique to government.\(^{190}\)

SARAA I demonstrates that a market participant exception to state action immunity should exist and that, when it is applied, the outcome of the case should certainly not hinge on whether the municipal actor exercised some function that only governments may exercise. It stands to reason that had the airport authority undertaken some non-governmental anticompetitive means for driving the competition out of the market, it would have had a far more difficult time in succeeding. It is not clear what kind of market power the authority had at the time both competitors were in the market. But it is nearly impossible to conceive of any type of pricing or tying scheme that could so swiftly and effectively drive a lone, established competitor out of the market. It is precisely because governments have such massive regulatory power that a market participant exception is needed to protect the interests of private business and, derivatively, consumers.

Whatever interests of federalism or state sovereignty that are sacrificed by recognition of a market participant exception would be comparatively meager. To begin with, municipalities are not sovereign entities; they derive their regulatory authority entirely from state grants. Furthermore, there is little worry that creativity is being stifled by prohibiting governments from simply using regulation to achieve monopolies. There is little chance of any unforeseen economic, political, or social innovation developing out of the naked abuse of legal rulemaking to eliminate private businesses from the market.

Finally, this is a scenario where the fear of exit just does not represent a realistic deterrent to anticompetitive conduct. The airport authority will experience immediate increases in profits, even if it does not abuse its power by raising prices or scaling back service, because it had been operating with excess capacity\(^{191}\) and will now have more consumers. It services a major airport in the capital city of one of the more populous states in the country; it is hard to imagine that consumers in the Harrisburg area will be able, or would even want, to somehow circumvent this regulation by moving some place else. Therefore, people who utilize parking services will more than likely just pay higher prices, if need be, and do little else about the situation.

3. Purpose and the Unique Case of Eminent Domain

The problems that a market participant exception seeks to address are particularly poignant in cases of eminent domain. In situations where effective competition requires

\(^{189}\) Id. at 482.

\(^{190}\) SARAA I, 423 F. Supp. 2d at 483.

\(^{191}\) See id. at 476 (reciting the plaintiff’s allegation that SARAA operated both of its parking lots well below capacity).
proximity to a consumer base, eminent domain may allow a government body to completely eliminate a competitor from the market. For example, in SARAA I, the airport authority achieved a monopoly by condemning the property of its lone competitor in the parking services market. Regardle不论 of whether the private lot owners had the resources available to transition their business to another location, they will be foreclosed from the market unless that location is sufficiently near to the airport. One can only assume that most, if not all, businesses attempt to situate themselves in an area particularly suitable toward the service or product they provide and that a forced move would inevitably hamper their ability to perform as effectively as possible. Eminent domain therefore provides government bodies with a particularly devastating weapon with which to defeat private competitors in a given market.

The extent to which a market participant exception would encompass exercises of eminent domain is nonetheless unclear. Suppose, for example, that SARAA was able to show that it really did need the competing lot in order to construct facilities essential to the development of the airport as a means for expansion and improvement in response to growing consumer demand for the airport’s services. In such a case, there is a good argument to be made that SARAA is acting entirely within its capacity as a regulatory body and not as a participant in the market. This is essentially the argument that the SARAA I court felt was best addressed in eminent domain proceedings, but there is considerable room for doubt as to whether the authority’s true purpose will actually be discussed in that context. Of course, if SARAA was acting with perfectly legitimate reasons, that is to say, with the public interest in mind, the anticompetitive effects may be merely incidental, and it is far less certain whether antitrust should interfere.

The purpose underlying the use of eminent domain to condemn the property of a government’s competitor is thus a crucial factor in deciding whether or not a court should impose liability on the government. In Columbia, the Court cautioned that all regulations could be subject to a claim that they are not in the public interest, but its rejection of an inquiry into purpose was within the context of possible conspiracies with private actors. In those situations, not only would proof of intent to benefit certain members of the public be difficult to prove, but also cases of clear bad faith are governed by criminal laws prohibiting certain types of official misconduct, such as accepting bribes. However, where a municipal authority condemns the property of a market competitor, there is no speculation as to who will immediately benefit from or be harmed by the condemnation: the municipal authority will benefit and its competition will potentially be destroyed. Moreover, proof (or a lack thereof) of bad faith should not be difficult to determine.

Suppose, for example, that the district court in SARAA I imposed upon the plaintiff the burden of establishing that SARAA had an improper motive when it decided to condemn the competing lot. The plaintiff could offer evidence that alternative properties were available for airport expansion, that demand was insufficient to support expansion of the airport’s facilities, that SARAA had not been in contact with Amtrak or Norfolk Southern, or that SARAA had no actual plans to utilize the property. If the court

---

192. *Id.* at 482.
194. *Id.* at 378-79.
determined that the plaintiff had met its burden, SARAA would be forced to present contrary evidence. Such an examination would aid in understanding whether the challenged condemnation is relevant to antitrust liability and whether a potential market participant exception should apply. If objective considerations indicate that SARAA abused its authority to gain an unfair advantage in the market, antitrust should impose liability. If, on the other hand, the evidence suggests that SARAA was pursuing legitimate ends and that its resulting monopoly position in the parking services market was merely incidental to these ends, the condemnation is probably not something with which antitrust should interfere. The point is that the condemnation by itself tells the court nothing about what interests it should protect. As discussed above, eminent domain, by its nature, should almost always meet the foreseeability test. That test sheds little light on whether antitrust should enjoin the use of eminent domain.

IV. CONCLUSION

Requiring active supervision of anticompetitive municipal conduct logically resulting from a clearly articulated state policy and opening up a market participant exception will not eviscerate the federalist underpinnings of Parker. These additions simply compensate for an extremely lax state action doctrine that overly accommodates the prerogatives of government entities not entitled to independent sovereignty of their own under the Constitution. The LGAA guarantees that municipal actors will not be subject to a barrage of illegitimate antitrust suits, even if asked to meet a higher standard before receiving immunity. Under Hallie and Columbia, state actors of any kind are immune from antitrust liability under only the slightest showing of having acted within state legislative contemplation.

Additionally, where municipal bodies participate in a market and take action—such as condemnation through eminent domain—which directly contravenes the ability of a private entity to compete in that market, courts should examine the government’s regulatory purpose in order to ascertain whether the regulation is the proper subject of antitrust. The category of activities in which courts examine the underlying purpose should be limited to cases comparable to the condemnation of a competitor’s property, i.e., cases where the purpose of the regulation determines whether the governing body acted as a market participant and where the act naturally impacts competition.