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THE STATE ACTION EXEMPTION FOR
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CONDUCT: HOOVER V. RONWIN

The federal antitrust laws were intended to eliminate the cor-ruptive and injurious practices of conspiracies and monopolies. The purpose of the Sherman Antitrust Act (the Sherman Act), for instance, was to prohibit contracts, combinations, and conspiracies in restraint of trade. Although the broad language of the Sherman Act contains no exceptions to its coverage, the Supreme Court has

1 L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 14 (1977). Typically, trusts and monopolies would lower prices to drive out competition; then, when no competition existed, prices would be increased drastically. See 1 J. von KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 2.02(2)[b] (1979); Letwin, Congress and the Sherman Antitrust Law: 1887-1890, 23 U. Chi. L. Rev. 221, 235 (1956). Watered stock, payroll padding, graft, and bribery among local and national officials were associated with the anticompetitive methods employed by trusts. R. MORRISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 729-33 (1965). The use of predatory and coercive pricing led to a public outcry for a federal remedy. 1 J. von KALINOWSKI, supra, § 2.02(3)[a]; Limbaugh, Historic Origins of Antitrust Litigation, 18 Mo. L. Rev. 215, 246 (1953). The public opposition was so intense that Senator Sherman felt debate on the subject was unnecessary when introducing the bill that later became the Sherman Antitrust Act. 21 CONG. REC. 2456 (1890).


Senator Sherman first brought the antitrust bill to the floor of Congress in 1888. Letwin, supra note 1, at 249. After two years and a number of different bills, see id. at 251-52, Senator Sherman introduced his new bill that would “declare unlawful trusts and combinations in restraint of trade,” 21 CONG. REC. 2456 (1890). Senator Sherman stated that the objective of the bill was to outlaw combinations which can break down competition. Id. at 2457.

The Supreme Court has stated that the purpose of the Sherman Act is “to use constitutional power to make . . . , so far as Congress could under our dual system, a competitive business economy.” United States v. South-Eastern Underwriters Ass’n, 322 U.S. 533, 559 (1944) (footnote omitted); see Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 (1940) (Sherman Act sought to prevent restraints on “free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services . . . .”).

held that it was not meant to apply to the anticompetitive activities of states. Acts of the legislature, and of the state supreme court when acting in a legislative capacity, are considered acts of the state and, therefore, are not subject to antitrust scrutiny.

Among the many recognized partial exemptions that are either expressly legislated, implied from regulation, or judicially created are labor unions, professional baseball, airlines, railroads, and atomic energy licensing. See S. Offenheim, G. Weston & J. McCarthy, Federal Antitrust Laws § 30 n.43 (4th ed. 1981); see also Pogue, Antitrust Exemptions, 33 A.B.A. Antitrust L.J. 1, 2-3 (1967) (listing and rationale of exemptions).

4 See Parker v. Brown, 317 U.S. 341, 351-52 (1943). Although Parker has been called the “genesis” of the state action immunity doctrine, see Antitrust and Local Government 15 (R. Siena ed. 1982), the seeds of Parker were sown in two earlier cases that granted exemptions from antitrust suits, see Handler, Twenty-Fourth Annual Antitrust Review, 72 COLUM. L. REV. 1, 4 (1972). In Lovenstein v. Evans, 69 F. 908 (C.C.D.S.C. 1895), the South Carolina Circuit Court held that state monopolization of liquor trafficking did not violate the Act because the state made no contract, entered into no combination or conspiracy, and was neither a corporation nor a person. 69 F. at 911. Nine years later, a similar issue was decided by the Supreme Court in Olsen v. Smith, 195 U.S. 332 (1904). In Olsen, the Court stated that “no monopoly or combination in a legal sense” could arise under duly authorized state regulatory procedures. 195 U.S. at 345 (dictum).

In Parker v. Brown, the plaintiff sought to enjoin the enforcement of a state agricultural program which restricted the production of raisins in order to stabilize their market price. 317 U.S. at 349-50. The Court held that although section one of the Sherman Act obviously applied to private anticompetitive business actions, the Act did not address state action: “[w]e find nothing in the language of the Sherman Act or in its history which suggest[s] that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.” Id. at 350-51. The Parker Court created a state action exemption premised upon the conception that governmental programs do not “operate by force of individual agreement or combination.” Id. at 350; see Slater, Antitrust and Government Action: A Formula for Narrowing Parker v. Brown, 69 Nw. U.L. Rev. 82 (1974); Note, Of Raisins and Mushrooms: Applying the Parker Antitrust Exemption, 58 Va. L. Rev. 1511, 1514-15 (1972); Comment, State Action and the Sherman Antitrust Act: Should the Antitrust Laws Be Given a Preemptive Effect?, 14 CONN. L. REV. 135, 139-40 (1981).

The state action exemption born in Parker has resulted in a confusing array of cases that make predicting antitrust liability quite risky. See Handler, Antitrust—1978, 78 COLUM. L. REV. 1363, 1378 (1978). The concern over the confusion engendered by the amorphous bounds of the state action doctrine has prompted one commentator to suggest that a congressional response is necessary. Handler, Reforming the Antitrust Laws, 82 COLUM. L. REV. 1287, 1338 (1982) (Congress must “intervene and indicate to what extent it intends antitrust to apply to state action”). In response to such sentiment, the Local Government Antitrust Act of 1984 was enacted to prevent monetary damages from being awarded in antitrust suits based on the official conduct of local governments while, at the same time, preserving injunctive remedies. Local Government Antitrust Act of 1984, Pub. L. No. 98-544.

6 See 1 P. Areeda & D. Turner, supra note 2, ¶ 214a; P. Areeda, Antitrust Analysis § 181(c) (3d ed. 1981). In Parker v. Brown, 317 U.S. 341, 351-52 (1943), the state legislature was granted immunity for its actions. See supra note 4 and accompanying text. A state supreme court, when acting in a legislative capacity, also has been granted immunity. See Bates v. State Bar, 433 U.S. 359, 359-63 (1977). Immunity has been denied to state bar associations, see Goldfarb v. Virginia State Bar, 421 U.S. 773, 791-92 (1975), municipalities, see Community Communications Co. v. City of Boulder, 455 U.S. 40, 49-51 (1982); City of
Since 1975, when the Supreme Court narrowed the scope of the state action exemption, immunity has been granted to state agents only when an examination reveals that the activities in question were carried out pursuant to state policy. Recently, however, in Hoover v. Ronwin, the Supreme Court, without such an examination, extended the state action exemption to members of the Arizona Supreme Court’s Committee on Examination and Admissions (Committee), holding that the allegedly anticompetitive grading procedure of the Committee was actually the conduct of the Ari-


See Goldfarb v. Virginia State Bar, 421 U.S. 773, 791-92 (1975); see also infra note 69. Prior to Goldfarb, the state action protection had been freely granted to government entities by the lower federal courts, often with little or no consideration of the policy behind the state action or the relationship between the state action and the federal law. Antitrust and Local Government 15 (R. Siena ed. 1982); see, e.g., Gas Light Co. v. Georgia Power Co., 440 F.2d 1135, 1140 (5th Cir. 1971) (state practices eliminated gas as an energy source competitive with electricity), cert. denied, 404 U.S. 1062 (1972); E.W. Wiggins Airways, Inc. v. Massachusetts Port Auth., 362 F.2d 52 (1st Cir.) (state agency granted monopoly at airport), cert. denied, 385 U.S. 947 (1966). Indeed, this protection was often extended to private parties acting under the guise of state authorization. See Note, Parker v. Brown Revisited: The State Action Doctrine After Goldfarb, Cantor, and Bates, 77 Columbia L. Rev. 898, 900-02 (1977).

In the six state-action cases since Goldfarb, the Supreme Court has focused on whether the anticompetitive conduct was intended by the State. See infra notes 29-32 and accompanying text. In Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), the inquiry concerned an allegedly anticompetitive program approved by a state utility commission. Id. at 581. The examination in Bates v. State Bar, 433 U.S. 350 (1977), involved a state supreme court disciplinary rule. Id. at 354-55. In City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978), the alleged attempts of a city to restrict competition were at issue. Id. at 392 n.6. In New Motor Vehicle Bd. v. Orrin W. Fox, the Court's investigation centered on the California Automobile Franchise Act. See 439 U.S. 96, 109 (1978). A California regulation requiring wine producers to file fair trade contracts was questioned in California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc., 445 U.S. 97, 99 (1980). In Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982), the Court looked at whether the state action exemption was applicable to parties acting under a home-rule provision of the Colorado Constitution. Id. at 43. It is not dispositive of the state action question that the challenged restraints are enforced by a state commission, see, e.g., Parker, 317 U.S. at 344, a state board, see, e.g., Fox, 439 U.S. at 103, or a state department, see, e.g., Midcal, 445 U.S. at 100. Even if there is active state control, supervision, or involvement in the activity, there is no Parker immunity unless the protected activity falls within the scope of the authority delegated to the agency. Comment, The State Action Exemption in Antitrust: From Parker v. Brown to Cantor v. Detroit Edison Co., 1977 Duke L.J. 371, 388.

zona Supreme Court.8

In Ronwin, the plaintiff, Edward Ronwin, took the Arizona State Bar Exam in 1974 and failed.9 After Ronwin’s petition for review to the Arizona Supreme Court was dismissed,10 he initiated an antitrust action in the district court against members of the Committee, alleging that they had conspired to restrain trade in violation of section 1 of the Sherman Act11 by artificially limiting the number of attorneys competing in the State of Arizona.12 The district court dismissed the complaint, holding, inter alia, that Ronwin had failed to state a justiciable claim because the Committee was immune from federal antitrust laws.13 On appeal, the Ninth Circuit reversed the dismissal, holding that for purposes of the antitrust immunity, the challenged grading procedure failed to qualify as state action.14

A divided Supreme Court15 reversed and upheld the state ac-

8 Id. at 1998.
9 Id. at 1993.
10 Id. An applicant who is aggrieved by a decision of the Committee may seek review of the manner in which the exam was conducted and graded. Id. at 1992 n.8. After his petition was denied by the Arizona Supreme Court for the third time, id. at 1933, Ronwin sought review by the United States Supreme Court, which denied certiorari. See Ronwin v. Committee on Examinations and Admissions of the Sup. Ct. of Ariz., 419 U.S. 967 (1974).
11 15 U.S.C. § 1 (1982). In pertinent part, § 1 of the Sherman Act provides: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” Id.
12 104 S. Ct. at 1993-94. Ronwin’s complaint alleged that he was “artificially prevented from entering into competition as an attorney in the State of Arizona and thereby deprived of the right to compete ... for ... legal business ....” Id. at 1994 n.13.
13 See Ronwin v. State Bar, 686 F.2d 692, 695 (9th Cir. 1982). The district court, in an unpublished opinion, dismissed the action for the following reasons: (1) the complaint failed to state a claim upon which relief could be granted; (2) the court lacked jurisdiction over the subject matter; and (3) Ronwin did not have standing to seek the relief he requested. Id.
14 Id. at 698. Judge Hatter, writing for the majority, stated that “absent a clear articulation by the Arizona Supreme Court that it had adopted the alleged grading policy,” Ronwin should have been given the opportunity to prove that the grading policy was anticompetitive. Id.

The Ninth Circuit found that the establishment of the Committee and the selection of its members by the supreme court were not dispositive of the state action question. Id. at 697. In contrast to the requirement enunciated in California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980), that the matter be clearly articulated and affirmatively expressed as a state policy, the Ninth Circuit noted that there was no such expression of state policy advising the Committee to grade the examinations to admit a predetermined number of applicants, 686 F.2d at 697.

15 See 104 S. Ct. at 2003. Justice Powell delivered the opinion of the Court in which Chief Justice Burger and Justices Brennan and Marshall joined. Justice Stevens dissented in an opinion in which Justices White and Blackmun joined. Justices Rehnquist and O’Connor took no part in the decision. Id.
tion exemption for the Committee. Justice Powell, writing for the majority, determined that the alleged limitations on the number of applicants admitted to the bar fell within the ambit of *Parker v. Brown.* According to the majority, *Parker* was applicable because the activities of the Committee were actually those of the Arizona Supreme Court. The critical factor, the Court observed, was that under Arizona law only the state supreme court had the authority to admit or deny applicants to the state bar. In addition, the majority found *Ronwin* to be analogous to *Bates v. State Bar of Arizona,* in which the Court upheld the state action exemption for a state bar association enforcing anticompetitive disciplinary rules. Justice Powell reasoned that since the Arizona Supreme Court "retained strict supervisory powers and ultimate full authority" over the Committee's actions, *Ronwin* was in fact challenging the conduct of the court.

Dissenting, Justice Stevens contended that the *Parker* exemption was inapplicable because the Arizona Supreme Court was not

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16 Id. at 200-03.
17 Id. at 197.
18 Id. at 198. The majority noted that after grading the examination, "the Committee's authority was limited to making recommendations to the Supreme Court." Id. at 1997-98. Thus, according to the majority, *Ronwin* was denied admission by the Arizona Supreme Court. Id. at 1998. Rather than challenge his denial, however, *Ronwin* challenged the grading policy designed by the Committee, alleging that the "scaled" grading formula was used to restrain competition. See id. at 1996 n.19.
19 See id. at 199. The Committee on Examinations and Admissions was established by the Arizona Supreme Court pursuant to the authority vested in the court to determine who should be admitted to practice law in the state. Id. at 1991. The Arizona Constitution grants the court the power to delegate this responsibility to the Committee. Hunt v. Maricopa County Employees Merit Sys. Comm'n., 127 Ariz. 259, 261, 619 P.2d 1036, 1038-39 (1980); see Ariz. Rev. Stat. Ann. § 32-275 (1976). The Arizona Supreme Court Rules provide for the Committee to examine applicants to the bar and recommend for admission those that are deemed to be qualified. 104 S. Ct. at 1992 (citing Ariz. Sup. Ct. Rule 28(a) (1973)). The rules reserve to the court the ultimate authority to grant or deny admission, but grant the Committee discretion in compiling a grading and scoring system subject to the court's approval. See Ariz. Sup. Ct. Rule 28(c) VII A (1973), amended by, 110 Ariz. xxvii, xxxii (1974). The majority examined the Rules and found the authority of the Arizona Supreme Court to be more clearly defined than the role of the court in *Bates.* 104 S. Ct. at 1999 n.26.
20 433 U.S. 350 (1977). The *Ronwin* Court not only considered the *Bates* decision "directly pertinent," 104 S. Ct. at 1996, but found that the reliance by the federal court of appeals on Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), was "misplaced", 104 S. Ct. at 1996 n.20.
21 See *Bates,* 433 U.S. at 363; see infra notes 40-51 and accompanying text.
22 104 S. Ct. at 1997.
23 Id. at 1998.
the real party in interest.24 The dissent maintained that the exemption should not apply to the Committee because the anticompetitive conduct was not compelled by the state supreme court.25 Justice Stevens emphasized that state authorization of an activity is insufficient to cloak the Committee with the immunity of the sovereign.26 The dissent determined that since the Arizona Supreme Court did not affirmatively decide to limit the number of attorneys in the state, the conduct of the court was not under attack and, thus, the Committee could not qualify for Parker immunity.27

Although the Ronwin Court has extended the applicability of the state action exemption, it is suggested that the holding of the Court results in immunity for state representatives without considering whether their conduct was intended by the state. This Comment will identify the weaknesses in the Court’s reliance on the Bates decision and will suggest that an investigation into the conduct of the party purporting to act on behalf of the state legislature or supreme court should be performed before that party is accorded the protection of the state action exemption.

I. REQUIREMENT TO EXAMINE CONDUCT

A strong tradition of federalism requires that state policy supplant federal statutes only when such action is not unduly burdensome on interstate commerce or offensive to the Constitution.28

24 Id. at 2006 (Stevens, J., dissenting). Justice Stevens noted that Ronwin did not challenge any state policy, rather, he challenged only the alleged attempt to exclude even competent attorneys from the practice of law in Arizona. Id. at 2005 (Stevens, J., dissenting). In addition, the dissent noted that “a federal court may not dismiss a complaint for failure to state a claim unless it appears beyond doubt... that the plaintiff can prove no set of facts which would entitle him to relief.” Id. (Stevens, J., dissenting); see McClain v. Real Estate Bd., 444 U.S. 232, 246-47 (1980); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).
25 104 S. Ct. at 2006-10 (Stevens, J., dissenting).
26 Id. at 2007 (Stevens, J., dissenting). “Here... the [state supreme] court did not require the Committee to grade the bar examination as it did.” Id. The dissent noted that the acts of the Committee did not qualify for Parker immunity because they did not pass the “simple test for antitrust immunity” laid down in Goldfarb v. Virginia State Bar, 421 U.S. 773, 790 (1975). 104 S. Ct. at 2006 (Stevens, J., dissenting).
27 104 S. Ct. at 2007 (Stevens, J., dissenting); see California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) (no immunity when state authorized price established by private parties); see also Parker v. Brown, 317 U.S. 341, 351 (1943) (state cannot provide immunity by authorizing violation of Sherman Act).
28 See generally G. GUNther, CASES AND MATERIALS ON CONSTITUTIONAL LAW 256-342 (10th ed. 1980); J. NOWAK, R. ROTUNDa & J. YOUNG, CONSTITUTIONAL LAW 267-70 (1978). When states have been protective of local business by discriminating against outside compe-
The federal antitrust laws, however, do not apply when the state intends to displace competition with a scheme of regulation pursuant to its legitimate police power. It is the responsibility of the courts to harmonize these conflicting interests.

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29 See California Retail Liquor Dealer’s Ass’n v. Midcal Aluminum, Inc., 445 U.S. 97, 105-06 (1980); New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 109 (1978); see also P. AREEDA, supra note 5, at § 182 (discussing Sherman Act immunity for state action); 6 J. von Kalinowski, supra note 1, § 46.03[2][c], [3] (discussing state-sanctioned private action and regulatory interest of state). State intent will not be lightly inferred. See infra note 53. The legislative power and prerogatives of the states as sovereigns are severely limited by the congressional “policy favoring competition.” Richards, Reconciling the Tension Between Anticompetitive Regulations and the Sherman Act: California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc., 19 Am. Bus. L.J. 539, 559-40 (1982). For example, the Commerce Clause may provide the basis for invalidating state laws that neutralize advantages belonging to other states, see Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527-28 (1935), or that impose an artificial rigidity on the economic pattern of industry, see Toomer v. Witsell, 334 U.S. 385, 403-06 (1948). State laws that restrict competition also may be invalidated under the first amendment. See, e.g., Bates v. State Bar, 433 U.S. 350, 384 (1977) (commercial speech entitled to some first amendment protection); see also P. AREEDA & D. TURNER, supra note 2, at (p) 219-20 (first amendment, Due Process, and Commerce Clause limitations on anticompetitive activity).

30 See Areeda, Antitrust Immunity for “State Action” After Lafayette, 95 Harv. L. Rev. 435, 436 (1981). In Midcal, the Court concluded that, in “appropriate situations, the federal interest will override a conflicting state interest in alcohol regulation.” 445 U.S. at 110. The determination of an appropriate situation would be made after recognizing the burden that a state regulation imposes upon interstate commerce and weighing the interest of the state in imposing that regulation against the federal interest in interstate commerce. See id. at 110-11. One commentator has suggested that this balancing be done on a case-by-case basis. See Note, The Effect of the Twenty-First Amendment on State Authority to Control Intoxicating Liquors, 75 Colum. L. Rev. 1578, 1594 (1975).

In Ronwin, the majority apparently feared that such a case-by-case approach was unwise, and, therefore, dismissed Ronwin’s complaint. 104 S. Ct. at 2002 n.34. According to Justice Stevens, the Ronwin Court was unduly concerned that numerous suits involving lengthy and expensive litigation would overburden the courts. Id. at 2010-11 (Stevens, J., dissenting). There appears to be some potential for an increase in litigation since the particular grading procedure that Ronwin attacked is widely used. See S. Duhl, The Bar Examiner’s Handbook 303-09 (2d ed. 1980). Examination duties similar to those in Ronwin are delegated by every state judiciary. See id. at 15-16. Additionally, a great number of people are expected to fail bar exams every year. For example, in 1981, nearly 20,000 applicants failed bar examinations in American jurisdictions. Smith, 1981 Bar Examination Statistics, 51 Bar Examiner, May 1982, at 1, 27. Although antitrust claims are easily alleged, Areeda, supra, at 451-53, and difficult to resolve before trial, see Poller v. Columbia Broadcasting Sys., 368 U.S. 464, 473 (1962), the Supreme Court has rejected the “clogged courts” justification in a recent state action case, see Community Communications Co. v. City of Boulder,
The state action exemption is applicable only when state policy is being carried out. Thus, the conduct of state representatives must be examined to prevent parties who are motivated by private interests from being cloaked with immunity. Therefore, the nature and extent of the Arizona Supreme Court's approval of the Rules and delegation of authority to the Committee is of primary importance in determining whether the anticompetitive activity of the Committee furthers state policy.

Absent sufficient approval and supervision of the conduct by the sovereign, the inquiry need go no further, for state action would be lacking ab initio. However, the inquiry in Ronwin focused on the relationship between the Arizona Supreme Court and the Committee, as defined by the court's power to admit or deny applicants to the state bar. The majority concluded that there should be no antitrust scrutiny because "the actions of the Committee [could not] be divorced from the Supreme Court's exercise of its sovereign powers." Thus, the Committee was found to be

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455 U.S. 40, 56 (1982) (rejecting argument that denial of exemption will unduly burden courts).

31 See supra note 6.


33 See 1 P. Areeda & D. Turner, supra note 2, ¶ 211; Antitrust Law and Local Government 15-16 (R. Siena ed. 1982); Comment, supra note 6, at 908.

34 See, e.g., Boulder, 455 U.S. at 55-56 (requirement for state action not satisfied when state's position is one of mere neutrality); Midcal, 445 U.S. at 105-06 (no immunity when state simply authorizes and enforces anticompetitive conduct); Lafayette, 435 U.S. at 416 (antitrust laws must be obeyed when state itself has not authorized or directed anticompetitive practice). The Supreme Court has dictated that the state action exemption may not apply absent "extensive official oversight". Midcal, 445 U.S. at 104; see also Euster v. Eagle Downs Racing Ass'n, 677 F.2d 992, 994 (3d Cir. 1982) (conduct must be actively supervised by state for immunity from antitrust liability), cert. denied, 459 U.S. 1022 (1983); Morgan v. Division of Liquor Control, 664 F.2d 353, 356 (2d Cir. 1981) (state-action requirement of active supervision satisfied by detailed mechanism for determining prices).

35 See 104 S. Ct. at 1998-2001. Although the Arizona Supreme Court delegated the administration of the admissions process, the majority focused on the requirement that the recommendations of the Committee ultimately be approved by the state supreme court. Id. at 1997-98.

36 Id. at 1996. Although the Court recognized the standards of clear articulation and active supervision developed and refined throughout the Goldfarb, Bates, Lafayette, Mid-
within the state action exemption because of its status as a closely regulated state agent.37 However, regardless of the relationship with the state, not every act of a state agent qualifies for Parker immunity.38 Unless the Court intended to give the Committee a status equal to that enjoyed by the state supreme court and legislature, it is submitted that the majority erred in granting immunity based on the relationship of the Committee to the Arizona Supreme Court.

II. INAPPLICABILITY OF Bates v. State Bar

Justice Powell observed that dismissal was proper because the reasoning in Bates v. State Bar of Arizona “applies with greater force to the Committee and its actions.”39 It is suggested, however, that closer analysis of the Bates decision reveals that the state action exemption was not intended to be applied to the Committee.

In Bates, the plaintiff challenged a disciplinary rule adopted by the Arizona Supreme Court and enforced by the state bar, which prohibited commercial advertising by attorneys.40 The plaintiffs argued that the mere adoption by the court of the restriction against lawyer advertising was insufficient to qualify as state ac-

cal, and Boulder decisions, the majority stated that the tests did not apply if the conduct in question was that of the state legislature or supreme court. Id. at 2000-01. The Court observed that when the anticompetitive conduct is that of a nonsovereign state representative, the conduct must be “pursuant to a ‘clearly articulated and affirmatively expressed state policy’ to replace competition with regulation.” Id. at 1995; see Boulder, 455 U.S. at 52; Bates, 433 U.S. at 382. The Court also found the degree of “active supervision” by the state legislature or supreme court to be relevant in inquiries concerning the activities of state representatives. 104 S. Ct. at 1995; see Midcal, 445 U.S. at 105; Bates, 433 U.S. at 362; Goldfarb, 421 U.S. at 791. It is submitted that the majority did not consider these tests because their holding was based upon the premise that the conduct of the Committee was that of the Arizona Supreme Court. See 104 S. Ct. at 1996.

37 See 104 S. Ct. at 1997-98. By not examining the conduct of the Committee, the Ronwin Court has contradicted an earlier holding that “state agencies . . . are [not], simply by reason of their status as such, exempt from the antitrust laws.” Lafayette, 435 U.S. at 408. Affording the Committee automatic exemption simply because of its relationship to the Arizona Supreme Court “wholly eviscerate[s] the concepts of clear articulation and affirmative expression that the [Supreme Court’s] precedents require.” Boulder, 455 U.S. at 56; see Lafayette, 435 U.S. at 411-12 (extending automatic exemption to municipalities would be inconsistent with limitations set forth in Bates and Goldfarb).

38 See Boulder, 455 U.S. at 54; Lafayette, 435 U.S. at 412; Bates, 433 U.S. at 361-62.


40 433 U.S. at 354-56; see 17A ARIZ. REV. STAT. ANN. R. 29(a) (Supp. 1982-83) (original version at ARIZ. REV. STAT. ANN. R. 29(a) (Supp. 1976), incorporating MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1976)).
The Bates Court disagreed, finding that the disciplinary rule reflected the policy of the state regarding professional behavior. The majority concluded that the anticompetitive rules were subject to "pointed re-examination" by the Arizona Supreme Court. The Court realized that "[a]lthough the state bar play[ed] a part in the enforcement of the rules, its role is completely defined by the court, [and is] . . . under its continuous supervision." Thus, the Court concluded, the Arizona Supreme Court was the real party in interest and, therefore, the state action exemption, established in Parker should apply to the state bar.

In Bates, the state supreme court not only adopted and approved the anticompetitive conduct, but also embodied it explicitly in the Arizona Supreme Court Rules. In Ronwin, by contrast, the state supreme court gave the members of the Committee discretion in compiling and grading the bar examination, precisely the conduct Ronwin claimed was anticompetitive. Unlike Bates, where the anticompetitive conduct was "completely defined" and adopted by the court itself but carried out by its agent, the state supreme court in Ronwin merely authorized the Committee to develop and administer the bar examinations. The anticompetitive

41 433 U.S. at 359.
42 Id. at 362. The Bates Court distinguished the situation in Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), where the anticompetitive practice was instigated by a utility company with only the acquiescence of the state regulatory commission. See Bates, 433 U.S. at 362.
43 433 U.S. at 362. The active supervision by the Arizona Court of the implementation of the rules in the course of judicial enforcement proceedings was a significant factor in allaying the apprehension of the Bates Court that federal policy was being disregarded. Id.; see also Areeda, supra note 30, at 438 (dispositive factor in Bates was that highest court of state circumscribed authority and actively supervised conduct). The extensive supervision of the anticompetitive activity was essential for immunity because such supervision lessened the concern of the Court that "federal policy [was] being unnecessarily and inappropriately subordinated to state policy." 433 U.S. at 362.
44 433 U.S. at 361 (emphasis added).
45 Id.
46 Id. at 363.
47 Id. at 359-60. The state supreme court's adoption of the rule was the critical distinction that resulted in immunity in Bates since it signified that the conduct was required by the sovereign. See id. at 360; Goldfarb, 421 U.S. at 791. When the conduct is required by the sovereign, it is clear that the state contemplated and approved the anticompetitive activity. See Lafayette, 435 U.S. at 415; Goldfarb, 421 U.S. at 791-93.
48 104 S. Ct. at 1997. The Court conceded that the rule "authorized the Committee to determine an appropriate 'grading or scoring system.'" Id.
49 Id. at 1994; see supra note 12 and accompanying text.
50 104 S. Ct. at 1997; see supra note 19 and accompanying text.
conduct of grading the exam on a curve, unlike the authority to develop a grading formula, was not embodied in any Arizona Supreme Court Rule.\textsuperscript{51}

Mere approval of an agent’s conduct is insufficient to express the intent of the state to restrain competition.\textsuperscript{52} Thus, the analysis of the Ronwin Court is defective in that there is no indication that the Arizona Supreme Court intended that the Committee engage in anticompetitive activity.\textsuperscript{53} Since the activity at issue clearly was not mandated, nor even suggested, by the state supreme court, the Committee could not be said to have acted pursuant to state policy.\textsuperscript{54} To assume that the court intended the Committee to displace federal antitrust laws would result in boundless Parker immunity.\textsuperscript{55} Indeed, the implication of Ronwin is that immunity will be granted to a state agent solely because of its status, regardless of

\begin{footnotes}
\textsuperscript{51} See 104 S. Ct. at 1997.

\textsuperscript{52} See Boulder, 455 U.S. at 55; Midcal, 445 U.S. at 105-06; Lafayette, 435 U.S. at 413-17. Since the Supreme Court has already stressed that mere neutrality toward the anticompetitive conduct of a state subdivision is insufficient for immunity, Boulder, 455 U.S. at 55, it is submitted that conduct that is not even suggested by the state supreme court should not entitle the agent to immunity. The Committee’s anticompetitive conduct, scaled grading of the exam, was not expressed in the Arizona Supreme Court Rules. See supra note 19. It is questionable that the state even authorized the Committee to employ an anticompetitive grading policy, though such authorization would be insufficient for Parker immunity. See Midcal, 445 U.S. at 105.

\textsuperscript{53} See Areeda, supra note 30, at 438. Not only must the state actively supervise the anticompetitive activity, it must also intend to replace the antitrust laws with a regulatory scheme. Id. It has been noted that Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), implies that state approval, even if deliberate, is insufficient to displace antitrust laws. See Areeda, supra note 30, at 439 n.19. State action immunity does not require compulsion of the challenged conduct, however, the state must intend the anticompetitive effect. See Lafayette, 435 U.S. at 413, 414-15. Indeed, even the Parker Court realized the exemption was not intended to be so freely applied. See Parker, 317 U.S. at 350-52. In Parker, the Court noted that “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.” Id. at 351; see also Northern Sec. Co. v. United States, 193 U.S. 197, 333, 344-47 (1904) (by virtue of authority vested in Congress by Constitution to regulate commerce, its action “must be respected”).

\textsuperscript{54} It is submitted that simply because the court gave the Committee discretion in the grading of bar examinations does not mean that the Committee also had the discretion to impose restraints on competition. The Arizona Rules state no subjective criteria, other than competence to practice law and good moral character, that are necessary for admission to the bar. See Ariz. Sup. Ct. R. 28(c) (1973).

\textsuperscript{55} Some courts have incorrectly granted immunity to private parties upon the finding of any state regulatory activity. See, e.g., Washington Gas & Light Co. v. Virginia Electric & Power Co., 438 F.2d 248, 252 (4th Cir. 1971); Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341, 342 (9th Cir. 1961). Assuming intent from bare state regulation or supervision would permit private parties to circumvent the federal antitrust laws even if the conduct is not reasonably related to state motives. See Areeda, supra note 30, at 447-48.
\end{footnotes}
whether the agent engaged in anticompetitive activity of a private nature.\textsuperscript{66} Granting immunity without determining whether the conduct was intended is contrary to the basis for exempting state action in the first instance.\textsuperscript{67}

III. WHICH STATE AGENTS ARE IMMUNE?

The Supreme Court has declared that only two bodies are \textit{ipso facto} exempt from the Sherman Act, the state legislature when adopting legislation,\textsuperscript{68} and the state supreme court when acting in a legislative capacity.\textsuperscript{69} Justice Powell conceded that a "[c]loser analysis is required when the activity at issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization."\textsuperscript{70} This "closer analysis" is necessary to determine whether the anticompetitive conduct is undertaken pursuant to state policy or is merely the product of a private anticompetitive scheme.\textsuperscript{71}

While the Court noted the criteria for determining whether state action exists,\textsuperscript{62} it is submitted that the reluctance of the Court to isolate the conduct of the Committee resulted in an unavailing opinion that contradicts the serviceable framework for analysis of state action issues already in existence. The activities of a state representative, such as the Committee, must be presumed

\textsuperscript{66} See supra note 37. Parties have been granted the exemption in instances when state policy was general and vague, but only because it was clear that the state contemplated an anticompetitive effect. See Princeton Community Phone Book, Inc. v. Bate, 582 F.2d 706, 717 (3d Cir.), cert. denied, 439 U.S. 966 (1978). Conferring immunity based upon status is erroneous because it would result in exemption regardless of whether the state contemplated the activity. See Boulder, 455 U.S. at 55.

\textsuperscript{67} See supra note 29 and accompanying text.

\textsuperscript{68} See Parker, 317 U.S. at 350-51.

\textsuperscript{69} See Bates, 433 U.S. at 359-63.

\textsuperscript{70} Ronwin, 104 S. Ct. at 1995.

\textsuperscript{71} See Midcal, 445 U.S. at 103-05; Fox, 439 U.S. at 109. \textit{Midcal} and \textit{Fox} identify two factors as prerequisites to receiving an exemption under the \textit{Parker} doctrine: (1) a "clearly articulated and affirmatively expressed" intention of the state to replace competition with regulation, and (2) the assumption by the state of an active supervisory role over the anticompetitive conduct. 445 U.S. at 105; 439 U.S. at 109. The two-step test for application of the state action exemption reflects the \textit{Bates} test, see \textit{Bates}, 433 U.S. at 361, but does not consider the regulatory interest of the state in the activity. Such a restatement of the state action standard originally articulated in \textit{Lafayette} appears to sanction a more responsible approach by reducing the ability of the Court to scrutinize the wisdom or desirability of state legislation. See Page, \textit{Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After Midcal Aluminum}, 61 B.U.L. Rev. 1099, 1124-25 (1981); see also 1 P. Areeda & D. Turner, supra note 2, ¶ 215c.

\textsuperscript{62} 104 S. Ct. at 1995-96; see supra note 36.
independent of the supreme court or legislature for the purpose of
determining whether a particular act qualifies for Parker immu-
nity. Although the acts of the state supreme court and legislature
are exempted automatically, a party delegated authority by the
state is subject to the antitrust laws unless its conduct was pursu-
ant to a clearly articulated state policy and was actively supervised
by the state.

The initial requirement for granting immunity is that the state
representative is acting in a manner contemplated by the state leg-
sislature or supreme court. While the determination of whether
the state has intended the anticompetitive activity may require
some introspection, the Court has already outlined an approach
to this inquiry. In Goldfarb v. Virginia State Bar, the Court
stated that the threshold inquiry is whether the anticompetitive

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63 It is submitted that the legislature and supreme court should not be fictionally ex-
tended since this is the only realistic way to determine whether it is the conduct of the state
or a state agent that is at issue. Obviously, the focus of the inquiry must be on the nature of
the action intended. J. von Kalinowski, supra note 1, § 48.03(2). Isolation of the anticom-
petitive conduct is relevant when determining whether the conduct is within the agent's
authority. See, e.g., Feminist Women's Center v. Mohammad, 586 F.2d 530, 536 (5th Cir.
1978), cert. denied, 444 U.S. 924 (1979); Hennessey v. National Collegiate Athletic Ass'n,
564 F.2d 1136, 1149 (5th Cir. 1977); Duke & Co. v. Foerster, 521 F.2d 1277, 1280 (3rd Cir.
1975).

64 See supra note 32. At least one court has reasoned that the public need not be so
cautiously protected from antitrust violations of governmental bodies because the people
have direct recourse through voting. See Deak Perera Hawaii v. Department of Transp., 553
F. Supp. 976, 980-81 (D. Hawaii 1983), aff'd, 745 F.2d 1281 (9th Cir. 1984). The Lafayette
Court also noted that public welfare could be protected through the electoral control of
government. See 435 U.S. at 406. Nevertheless, this rationale provides no remedy for parties
injured by state agents, such as the Committee, who are appointed rather than elected. See,
e.g., Ariz. Sup. Ct. R. 28(a).

65 See 1 P. Areeda & D. Turner, supra note 2, ¶ 213f. The Midcal test has been used
by lower courts to determine whether the state has, by statute or judicial decision, contem-
plated the anticompetitive activity. See, e.g., Golden State Transit Corp. v. City of Los An-
geles, 726 F.2d 1430, 1433-34 (9th Cir. 1984); United States v. Southern Motor Carriers Rate
Conference, 702 F.2d 532, 538-39 (5th Cir. 1983), rev'd, 53 U.S.L.W. 4422 (U.S. Mar. 27,
1985) (No. 82-1922); Pueblo Aircraft Serv. v. City of Pueblo, 679 F.2d 805, 808 (10th Cir.

66 See Slater, supra note 4, at 91; see also Richards, supra note 29, at 541-42 (court
needs to examine national policy favoring competition in relation to sovereignty of states).

67 See Midcal, 445 U.S. at 105. The simple two-step test developed in Midcal, requiring
that (1) the conduct be pursuant to clearly articulated and affirmatively expressed state
policy, and (2) the policy be actively supervised by the state itself, was also adopted by
Justice Stevens in the Ronwin dissent. 104 S. Ct. at 2004 (Stevens, J., dissenting). According
to Justice Stevens, the Midcal test would minimize the risk that public power would be
exercised for private benefit. Id. (Stevens, J., dissenting).

activity is required by the state acting as sovereign.\textsuperscript{69} Compulsion of the challenged conduct, though not necessary,\textsuperscript{70} is forceful evidence of state action.\textsuperscript{71}

In the absence of compulsion, the challenged conduct must be pursuant to a "clearly articulated" state policy intending to replace the federal antitrust scheme with state regulation.\textsuperscript{72} Examination

\textsuperscript{69} Id. at 790. The \textit{Goldfarb} Court refused to grant immunity to a county bar association that published minimum fee schedules that constituted price-fixing in violation of the Sherman Act. \textit{Id.} at 788, 791-92. The county bar, a voluntary association, not a state agency, claimed that it was prompted by the state bar to issue the fee schedules. \textit{Id.} at 790. The Court held that the state action exemption did not apply because neither the Virginia Supreme Court nor the state legislature mandated the price floors. \textit{Id.} Furthermore, the Court implied a requirement that the state exhibit an active interest in an anticompetitive scheme before \textit{Parker} immunity is granted, stating that there was "no indication . . . that the Virginia Supreme Court approves the opinions." \textit{Id.} at 791.

\textsuperscript{70} See \textit{Areeda}, supra note 30, at 438 n.19, 445 n.49; 1 P. \textit{AREEDA} & D. \textit{TURNER}, supra note 2, \S 215b2. State action immunity does not require that the sovereign compel the anticompetitive conduct, however, it does require that there be "state supervision of private acts in furtherance of a state effort to displace the market competition protected by federal antitrust laws." 1 P. \textit{AREEDA} & D. \textit{TURNER}, supra note 2, \S 215b2. The requirements of state supervision and intention protect the interest of the state in being granted immunity while preventing the injury the antitrust laws were intended to prevent. \textit{Id.}

\textsuperscript{71} See Note, supra note 6, at 913-20.

\textsuperscript{72} \textit{Boulder}, 455 U.S. at 54; see 1 P. \textit{AREEDA} & D. \textit{TURNER}, supra note 2, \S 214(e). The compulsion test was designed to prevent the federal interest in competition from being inadvertently subordinated to the interest of the state in regulation. See \textit{Cantor v. Detroit Edison Co.}, 428 U.S. 579, 595 (1976). In \textit{Bates}, however, the Court rejected this requirement, stating that the Sherman Act does not necessarily "prevail over the state interest in regulating the bar . . . because the [state action] is not tailored so as to intrude upon the federal interest to the minimum extent necessary." 433 U.S. at 360-61. The \textit{Bates} Court required only that the state or its agent intend by its action to confer antitrust immunity and that the state clearly expresses this intention. \textit{Id.} at 362; see Note, supra note 6, at 907-08.

The Supreme Court has stressed the importance of a clearly-articulated policy in two state-action cases decided since \textit{Ronwin}. In \textit{Town of Hallie v. City of Eau Claire}, 53 U.S.L.W. 4418 (U.S. Mar. 27, 1985) (No. 82-1922), a unanimous Court held that municipalities need not satisfy the active supervision requirement of \textit{Midcal}, \textit{id.} at 4421. Although state supervision is required due to the "real danger" presented by action by private parties, \textit{id.} at 4422, municipalities need only demonstrate that "the statutes clearly contemplate that a city may engage in anticompetitive conduct," \textit{id.} at 4420. In \textit{Southern Motor Carriers Rate Conference, Inc. v. United States}, 53 U.S.L.W. 4422 (U.S. Mar. 27, 1985) (No. 82-1922), the Court held that the two-prong test of \textit{Midcal} must be satisfied by private parties claiming immunity. \textit{Id.} at 4425. The majority found that the clearly-articulated policy requirement was satisfied only if the anticompetitive conduct—in this case, collective ratemaking by common carriers—was "clearly sanctioned by the legislatures of the . . . [states]." \textit{Id.} at 4426. The Court held the activities to be exempt because the state legislature had, in each case, either "expressly permitted" the anticompetitive conduct, or, "articulated clearly [an] intent to displace price competition among common carriers with a regulatory structure." \textit{Id.} at 4426-27. It is suggested that both \textit{Town of Hallie} and \textit{Southern Motor Carriers} indicate that the anticompetitive conduct must be contemplated by the
of the relationship between the state and the anticompetitive conduct, not that between the state and its representative, must reveal an affirmatively expressed state policy.\(^7\) Requiring clear articulation of the policy behind the anticompetitive activity ensures that the conduct is that of the state and not the design of a private party.\(^7\) Additionally, to qualify for exemption, the anticompetitive conduct must be actively supervised by the state.\(^7\) Only when the state has substituted its own supervision for the economic constraints of the competitive market will the state agent be granted immunity.\(^7\) The degree of sovereign regulation was noted in *Bates*, state for the exemption to apply.

\(^{73}\) See *Boulder*, 455 U.S. at 54; *supra* notes 36-38 and accompanying text. Where there is no other indication of the limits of a state officer's duty or of the extent of state approval, the requirement that a state policy be clearly expressed is the most responsible approach, because it ensures that the federal policy embodied in the antitrust laws is not unintentionally displaced by the state. This requirement also guarantees that the state will not be prevented by the antitrust laws from engaging in anticompetitive conduct pursuant to legitimate state policy, as long as the purpose of the state is clear. See *Areeda*, *supra* note 30, at 447-48.

\(^{74}\) See *Midcal*, 445 U.S. at 105 (challenged activity must be expressed as state policy). The national policy in favor of competition is not displaced when the state merely authorizes and enforces conduct by private parties. *Id.* at 105-06. Clear articulation of state policy designed to displace antitrust law was present in the statute in *Midcal*. *Id.* at 105; see CAL. BUS. & PROF. CODE § 24,866 (West 1964) (repealed 1980). Similarly, the decisive factor in *Parker* was that the state legislature had articulated a clear "intent to restrict competition among . . . growers and maintain prices" when it passed the Agricultural Prorate Act and required adherence to any marketing plan the commission adopted. 317 U.S. at 346-47.

\(^{75}\) *Midcal*, 445 U.S. at 105. The lack of active supervision, as evidenced by the failure of the state to "monitor market conditions or engage in any 'pointed re-examination' of the [anticompetitive] program," was cited by the majority in *Midcal*. *Id.* at 106. The Court found that the California system for wine pricing met the clearly articulated standard because the "legislative policy [was] forthrightly stated and clear in its purpose to permit resale price maintenance." *Id.* at 105. Nevertheless, the *Midcal* Court held that the state action exemption was inapplicable because the program did not meet the second requirement for *Parker* immunity; thus, although the resale price-maintenance and price-posting statute of California was clearly articulated, the *Parker* exemption was denied because of inadequate state supervision. *Id.* "[T]he State simply authorize[d] price setting and enforce[d] the prices established" but did not review "the reasonableness of the price schedules; nor [did] it regulate the terms of the fair trade contracts." *Id.* at 105-06.

\(^{76}\) See *id.* at 105-06; *Corey v. Look*, 641 F.2d 32, 36-37 (1st Cir. 1981); *Stauffer v. Town of Grand Lake*, 1981-1 Trade Cas. (CCH) ¶ 64,029, at 76,328 (D. Colo. Oct. 9, 1980), *order modified*, No. 80-A-752 (D. Colo. Dec. 15, 1980). There cannot be immunity when a state statute or rule creates a continuing, unsupervised power that will act anticompetitively. 1 P. AREEDA & D. TURNER, *supra* note 2, ¶ 213. Unless the statute itself provides for active supervision, *Parker* immunity will not be granted. See, e.g., *Ratino v. Medical Serv.*, 718 F.2d 1260, 1268 (4th Cir. 1983); *Morgan v. Division of Liquor Control*, 664 F.2d 353, 356 (2d Cir. 1981). Some courts, however, have declined to require active state supervision of the activities of municipalities and state agencies. See, e.g., *Town of Hallie v. City of Eau Claire*, 53 U.S.L.W. 4418, 4421 (U.S. Mar. 27, 1985) (No. 82-1832) (active state supervision require-
in which the Court viewed the active supervision of an anticompetitive activity by the state as essential for application of the exemption doctrine. The requirement that the activity be adequately supervised affords protection against unwarranted antitrust immunity, while providing exemption for those activities that the Sherman Act was not intended to proscribe.

CONCLUSION

Undoubtedly, the state action exemption is required when the state supreme court or legislature acts through its representative to effectuate state policy. Nevertheless, the justification for displacing federal antitrust law requires that the conduct be evaluated with respect to the intent of the state to replace competition with regulation. The Ronwin Court's failure to examine the challenged conduct in light of state policy ignores the safeguards designed to protect competitive themes.

It appears that the blanket exemption granted to the Committee in Ronwin could result in frustration of federal policy without concern for whether the activity represents legitimate state policy or is merely private action. By declining to recognize that the challenged conduct must be the focus of the inquiry to ensure that it is not private activity, it is submitted that the Supreme Court has misapplied the "clearly articulated" and "actively supervised" standards. Only if the relevant conduct is examined will considera-

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77 See Bates, 433 U.S. at 361-62. "[P]ointed re-examination" of the conduct by the state is essential to prevent federal interests from being unnecessarily subordinated to private interests. Id. at 361; see P. Areeda & D. Turner, supra note 2, ¶ 211; Antitrust Law and Local Government 15-16 (R. Siena ed. 1982). The Bates Court apparently believed that even if the state showed independent interest in promulgating the disciplinary regulation, unless the regulation expressed a vital state policy, the state bar association would still be subject to liability under the Sherman Act. 433 U.S. at 361-62; see Areeda, supra note 30, at 438; Note, The State Action Exemption and Antitrust Enforcement Under the Federal Trade Commission Act, 89 Harv. L. Rev. 715, 722-24 (1976).

78 See 1 P. Areeda & D. Turner, supra note 2, at ¶ 213a.

79 See Fox, 439 U.S. at 109. In the situation in which a competitive market will not adequately meet the public need for services—for example, the provision of garbage collection, public transportation, airport facilities, or water—a state may find it useful to monopolize the supply of such services. See, e.g., E.W. Wiggins Airways v. Massachusetts Port Auth., 362 F.2d 52, 55 (1st Cir.), cert. denied, 385 U.S. 947 (1966).
tion of these criteria provide adequate protection for both state and federal interests.

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