

1. Nature of state action immunity

Doctrine flows from **statutory interpretation**, not directly from any constitutional **limit** on congressional power.

Federalism notions introduced because **Congress did not intend the Sherman Act to preclude legitimate state regulation.**

Parker and the 11th amendment declare that “**the state itself**” is not subject to private suits in federal court.

But **the doctrine of *Parker v. Brown* is much broader** than that, potentially immunizing not only subordinate state agencies but also private parties exercising state-granted powers.

Immunity flows from reading the statute to **leave room for states to regulate responsibly in the interest of consumers**, but not to regulate irresponsibly by empowering private interests to harm competition.

This reading supports the view that **the stringency of the clear-articulation and active-supervision requirements should vary expressly with circumstances** affecting the ability of private interests to curb competition.

2. The McCarran-Ferguson parallel

The McCarran Act **limits the reach of the Sherman Act in the insurance industry** insofar as it is regulated by a state.

The **statutory test in McCarran is very close to the *Midcal* doctrine**, which the Supreme Court subsequently adopted as the general rule to govern other situations in which a state has substituted regulation for competition.

Because McCarran was enacted well before the Supreme Court devised the *Midcal* test, the fact that its test is embodied in explicit legislation is **no reason to read it any more broadly than the state action doctrine**.

Instead, McCarran can be viewed as **legislative precedent** for ascribing to Congress an intent not to displace responsible state regulation.

3. Comity

In international law, the principle of comity dictates a degree of **deference by one sovereign to the policies and concerns of other sovereigns**.

The **state action doctrine presumes comparable deference** by Congress to states' legislative policies and provides reasonable **principles to define the extent of that deference** in particular cases.

In ***Hartford Fire***, the Supreme Court gave far **less deference to a foreign government's policies** governing its reinsurance industry than it gives to comparable state policies under the McCarran Act and the state action doctrine.

Hartford Fire Insurance Co. v. California, 509 U.S. 764 (1993) (holding private **reinsurers in UK were not immunized by UK approval** of their anticompetitive actions as long as they were able to comply with both UK law and US antitrust law).

But **Justice Scalia**, dissenting, **read the Sherman Act to incorporate notions of international comity** -- just as the state action doctrine presumes congressional respect for federalism values.

4. The lenient treatment accorded municipalities

The Supreme **Court has been generous** in providing antitrust immunity to municipalities.

--by **treating the mere foreseeability** of anticompetitive regulation under general municipal powers **as sufficient to meet the first prong** of the *Midcal* test and

--by **relaxing the active-supervision requirement** where municipalities are involved.

This **leniency should be linked** more explicitly than it generally is **to the accountability of municipalities** to public opinion, the media, and the voters in municipal elections.

Together, these provide **a kind of “active supervision.”**

Few analysts have recognized how fundamentally the direct political accountability of municipalities **distinguishes them from state agencies and boards**, especially those that are accountable in significant measure to the interests they regulate.

5. ***Earles v. State Bd. of CPAs*, 193 F.3d 1033 (5th Cir. 1998)**

Fifth Circuit **extends the *Hallie* reading** of the state action doctrine from municipalities **to state boards**,

overruling *U.S. v. Texas State Board of Accountancy*, 464 F.Supp. 400 (W.D. Tex. 1978), modified and aff'd, 592 F.2d 919 (5th Cir. 1979) (state board under effective control of regulated accountants found to violate Sherman Act in restricting competitive bidding).

Error came from **borrowing from the Supreme Court's lenient treatment of restraints imposed by municipalities.**

It makes **no sense to equate state licensing and regulatory boards** controlled by representatives of the regulated profession **with municipalities** in deciding how explicit the legislature must be in empowering them to curtail competition.

In cases such as these, the **clear articulation requirement should be enforced** with special rigor.

6. The possible utility of the Supremacy Clause in some cases

It may sometimes be acceptable to assert that a specific state law or regulation is simply **invalid (unconstitutional) under the Supremacy Clause** because congressional policy preempts the field.

For example, the Sherman Act might be invoked in preemptive terms when a state creates **a regulatory board that is so dominated by the regulated interests** that it amounts to **a self-regulating cartel**.

The Supreme Court has made clear that **states cannot authorize dangerous combinations of competitors** or cast a “gauzy cloak” over a cartel.

7. Why lower courts have misused state action immunity

Many lower courts use state action immunity as a way **to avoid addressing antitrust issues they prefer not to confront.**

In some cases, they may simply be looking for an **easy way to grant summary judgment**, thus avoiding having to try a time-consuming case.

In other cases, they may sense (possibly incorrectly) that the law would **require them to condemn an arrangement that they regard as innocuous** or of trivial importance.

In part, misuse of the state action doctrine may reflect lower courts' **confusion over antitrust doctrine**

8. Hospital staff privileges

A. In public hospitals:

The risk here is that the medical staff will administer privileges **in the interest of its members** rather than the interest of the hospital.

Denials of privileges may be expressly **contemplated in a public hospital's authorizing legislation**.

This **should not be enough, however, to immunize the hospital** from suit, since not all denials of privileges are necessarily suspect under the antitrust laws.

In selecting physicians for its staff, a hospital is **simply a purchaser/supplier** that should be free to refuse to deal for commercial reasons of its own.

A fortiori, the hospital's **statutory authority** to deny privileges **should not immunize anticompetitive actions by its medical staff**, which comprises private parties with commercial interests of their own.

I suggest that, under **the active-supervision requirement**, the hospital's governing body should be expected to **oversee the staff's actions**.

Without that **assurance that public (i.e., the hospital's) goals are being furthered**, the hospital should be liable for any antitrust violations committed by the medical staff (its agent).

The **staff should be immune** from suit, however, **if the hospital has taken adequate steps** to prevent its doctors from abusing their powers.

8. Hospital staff privileges

B. In private hospitals:

Patrick v. Burget, 486 U.S. 94 (1988), is interesting in a respect that deserves mention in the staff report.

The Court **skipped to the second prong** of the *Midcal* test in finding no immunity for the private hospital's actions in curtailing the plaintiff's privileges, thus **leaving the impression that the first prong test was satisfied**.

The **Oregon law** invoked by the hospital, however, **in no way contemplated that competition might be limited** in contravention of federal antitrust policy, properly understood.

Indeed, the Oregon legislature expressly **gave the responsibility for screening physicians to *hospitals***, not to physicians acting independently, thus providing no predicate for the exemption argument.

The Court's handling of the case seemed to **suggest that all privileges denials are somehow at odds with antitrust policy.**

It would have been **better if the Court had observed**

(1) that **physician domination** of the privileges process was the likely problem in *Patrick*,

(2) that **state law did not exempt that domination** from antitrust scrutiny, and

(3) that **antitrust law is appropriately invoked when (and only when) an aspirant's competitors**, rather than a potential supplier or customer (i.e., the hospital itself), **collectively sit in judgment on him.**

9. Provider cooperation laws

The staff report should make some reference to the spate of provider-cooperation laws that have been **enacted in recent years to enable health care providers (mostly hospitals) to merge or otherwise collaborate** without being subject to federal antitrust law.

These laws seek to escape federal preemption by **satisfying the two requirements of the *Midcal* doctrine,**

first, by expressing the **legislature's desire to override federal competition policy** and

second, by providing **some form of state oversight** (usually by the state attorney general) of any anticompetitive actions providers may take pursuant to the state's authority.

These **laws have not been much used**, perhaps because hospitals have not found the option of being “actively supervised” by the state AG to be as attractive as going to the federal authorities.

Query, however, **whether the parties' opportunity to go to the state** if the merger is not approved **induces approval of some borderline mergers.**

The report should also discuss **legislation in a few states that seeks to give physicians protection against federal antitrust restrictions on their collective bargaining** with health plans.

Typically, these statutes **stop short of authorizing physician strikes** (that is, group boycotts of health plans).

If physicians lack both the right to strike and the protections of federal labor law, it is **unlikely that payers will actually negotiate over physicians' grievances**.

But the **Commission has been right to oppose these laws**.

10. Educational accrediting

I hope that the staff report will reveal some concern about **the ability of private interests to limit, and raise the cost of, entry** into numerous licensed occupations **by controlling the accrediting of educational programs**.

In the typical case, the state makes successful **completion of privately accredited training a prerequisite for licensure** in the field.

No one has ever doubted that **the state action doctrine permits state regulatory boards to delegate control** over educational programs to private interests.

Moreover, **current law seems to privilege the sponsors of accrediting programs under the *Noerr-Pennington* doctrine** by treating their collaboration as exempt “petitioning” activity.

As **an example** of the abuses that can occur, the pharmacy “profession” has recently succeeded in **raising the minimum training for pharmacists from 5 to 6 years** without any public debate or affirmative government approval.

The current substantial **shortage of pharmacists** has raised costs and contributed to overwork and burn-outs harmful to the quality of service.

I regard this experience as **an object lesson demonstrating the need for antitrust law to impose some limit** on the ability of private interests collectively to control education and training in their respective fields.

Doctrinal solutions may be available.

First, I would **question whether the state action doctrine permits** a state to delegate accrediting authority to a private body that is **not actively supervised** by a state agency independent of the licensed occupation.

Second, I would **question whether the *Noerr-Pennington* doctrine protects narrowly-based joint ventures** that monopolize accrediting in a particular field.

Petitioning government is one thing.

Domination of the supply of information and opinion concerning educational programs **is something else.**

Antitrust law should be available to **challenge dominant joint ventures in educational accrediting** that exclude from participation all interests other than supply-side ones.