10-1-1986

Immunity Doctrine, Efficiency Promotion, and the Applicability of Federal Antitrust Law to State-Approved Hospital Acquisitions

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I. INTRODUCTION

The question whether hospitals should be regarded as private businesses, or alternatively as public utilities, in order to maximize productive and allocative efficiency, remains controversial.[1] In recent years, the ability of American hospitals and doctors to provide excellent health care services has been hindered by rising costs and distribution problems. This combination of rising costs and decreased

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1. *See* Havighurst & King, *Private Credentialing of Health Care Personnel: An Antitrust Perspective*, 9 AM. J.L. & MED. 131, 163 (1983).

distribution has prevented medical services from reaching the portion of the American population that has the greatest need for these services.[2]

In response to these problems, Congress in 1974 passed the National Health Planning and Resources Development Act (NHPRDA).[3] The NHPRDA is designed to regulate health care providers as if they were public utilities. The NHPRDA provides for comprehensive regulation of health care on the state level. The NHPRDA does not specifically preempt the application of federal antitrust laws to the health care professions; rather, it professes to make the health care system more competitive and therefore more efficient.[4]

In *North Carolina* ex rel. *Edmisten v. P.I.A. Asheville, Inc. (Asheville II)*,[5] the Fourth Circuit Court of Appeals was presented with the question of whether federal antitrust laws apply to actions undertaken persuant to the NHPRDA. *Asheville II* involved a contention by a defendant hospital corporation, the Psychiatric Institutes of America (PIA), that its monopolization of psychiatric hospital care in western North Carolina enhanced operating efficiencies. The PIA further asserted that its monopolization was immune from antitrust challenges. This assertion was based upon grounds of federal implied immunity and state action immunity. In other words, antitrust regulation and public utility regulation of hospitals pursuant to the NHPRDA were inconsistent and mutually exclusive, and Congress had chosen the latter form of regulation in order to maximize efficiency.[6]

First, this Article presents an overview of the National Health Planning and Resources Development Act (NHPRDA).[7] Second, the Article will discuss the doctrine of implied immunity from antitrust regulation.[8] Third, this Article will examine the state action immunity doctrine.[9] Fourth, the Article will discuss the Fourth Circuit Court of Appeals decision in *Asheville II*.[10] Fifth, this Article will use *Asheville II*, with its analysis of the implied and state action immunity doctrines, as a vehicle to examine the policy choice between federal antitrust and public utility regulatory approaches in the context of the NHPRDA.[11] Sixth, the Article will suggest that the controversial, but increasingly accepted, "Chicago

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Central to the debate regarding forms of hospital regulation is a broader disagreement concerning whether the promotion of economic efficiency incorporates the goals of free market competition or whether efficiency promotion is best suited for a public utilities commission, that will temper the claims of efficiency with the non-economic needs of the public. *Compare* Sullivan, *Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214 (1977) *with* Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

2. *See, e.g., Texas Adopts Stringent Rules on Rights of Poor at Hospitals*, N.Y. Times, Dec. 15, 1985, at 18. The article describes recently enacted Texas legislation designed to impose public welfare restraints upon the activities of private, for-profit hospitals.

3. 42 U.S.C. § 300k-t (1982).

4. 42 U.S.C. § 300k-2.

5. 740 F.2d 274 (4th Cir. 1984) (en banc). For a discussion of this case, see *infra* text accompanying notes 202-55.

6. 740 F.2d at 279-85. More recently the Federal Trade Commission has ruled, in response to a similar contention, that proposed hospital acquisitions in Chattanooga, Tennessee by the nation's largest for-profit hospital chain violate federal antitrust laws. *See* Hospital Corp. of America, [Current] TRADE REG. REP. (CCH) ¶ 22,301, at 23,325 (F.T.C. Oct. 25, 1985).

7. *See infra* text accompanying notes 14-48.

8. *See infra* text accompanying notes 49-138.

9. *See infra* text accompanying notes 139-201.

10. *See infra* text accompanying notes 202-32.

11. *See infra* text accompanying notes 233-55.

school" view of antitrust and free market regulation, which contends that competition necessarily is increased as productive and allocative efficiencies are increased through self-regulation and integration, runs afoul of the long-standing doctrinal analysis of implied and state action immunity from antitrust regulation.[12] Last, the Article will conclude that, despite the appearance that federal antitrust laws presently apply to the health care industry, policymakers in the future may recognize a need to choose more specifically between an "inefficient" free market approach and a traditional public utility regime in the health care field.[13]

II. An Overview of the National Health Planning and Resources Development Act (NHPRDA)

In *North Carolina* ex rel. *Edmisten v. P.I.A. Asheville, Inc. (Asheville II)*,[14] the Fourth Circuit Court of Appeals was confronted with the National Health Planning and Resources Development Act (NHPRDA), a federal regulatory scheme passed in 1974 to remedy perceived market dysfunctions that existed in the area of health care provision.[15] Although the NHPRDA is federal legislation, individual states must enact statutes that set up planning and policing agencies to implement the goals of the NHPRDA.[16] Under the NHPRDA, the governor of each state is required to designate one or more health systems agencies (HSA) in his or her state. The number of agencies is dependent upon the size of the state's population.[17] Each HSA is organized to gather and analyze data concerning the quality of health care that is provided in its region. An HSA must review a variety of factors including the number and location of the area's health care resources, the effects of the health care system on area residents, the patterns of utilization of the area's health care services, and the environmental and occupational exposure factors affecting immediate and long term health conditions.[18]

Among the duties of the state agencies is the administration of a certificate of need (CON) program.[19] The CON program is required to provide for "[r]eview and determination of need under such program for — (A) major medical equipment and institutional health services, and (B) capital expenditures."[20] The federal statute requires that CON review boards consider several factors before granting approval.[21] The effect of "competition upon the supply of health services" is one such factor.[22] As structured, the CON concept bears striking resemblance to

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12. *See infra* text accompanying notes 256-64.
13. *See infra* text accompanying notes 265-71.
14. 740 F.2d 274 (4th Cir. 1984) (en banc).
15. 42 U.S.C. § 300k(a). For articles reviewing the structure and effect of the NHPRDA, see Blumstein & Sloan, *Health Planning and Regulation through Certificate of Need: An Overview*, 1978 Utah L. Rev. 3; Note, *Antitrust and Health Planning Under the NHPRD Act*, 7 J. Corp. L. 311 (1982). *See generally* Schramm & Renn, *Hospital Mergers, Market Concentration, and the Herfindahl-Hirschman Index*, 33 Emory L.J. 869 (1984).
16. The statute requires that each state establish boundaries that form the basis for Health Services Agencies, 42 U.S.C. § 300l (1982). In addition, each state must engage in certain health planning and development activities, 42 U.S.C. § 300m.
17. 42 U.S.C. § 300l(a).
18. 42 U.S.C. § 300l-2(b).
19. 42 U.S.C. § 300m-2(a)(4)(A).
20. 42 U.S.C. § 300m-6(a)(1).
21. 42 U.S.C. § 300n-1(c).
22. 42 U.S.C. § 300n-1(c)(11).

the public interest, convenience, and necessity standard that governs certification proceedings under federal public utility regulatory statutes.[23] While the NHPRDA does not contain a specific requirement for CON approval of hospital mergers, some states, such as North Carolina, have conditioned mergers on the receipt of such approval.[24]

Two primary rationales for the requirement of CON review of proposed mergers have been advanced. Both rationales address characteristics of the medical marketplace which have heretofore prevented the market from achieving efficiencies through competition. One purpose of the CON review boards is to attempt to alleviate the rapid rise in the cost of health care that has existed since World War II.[25] This purpose is served by limiting the expansion and duplication of hospital services to what is objectively necessary.[26] The second rationale for CON review is to remedy the misallocation of health services by distributing medical services in accordance with the needs of the population utilizing those services.[27] The goals of the NHPRDA, therefore, are consistent with traditional public utility regulation.[28]

The CON review boards have evoked mixed reactions. The strongest arguments in favor of such review boards are based on the fact that the nature of the medical establishment in the United States is such that it will never conform independently to a competitive model.[29] The primary reason for this nonconformity is the presence of a middleman, in the form of an insurance company, between the provider and the consumer of medical services.[30] The normal market pressures to achieve or maintain low costs do not exist in the medical area. This indifference to actual costs has existed for many years in hospitals and is illustrated by the fact that in competing for patients and physicians, hospitals often purchase expensive and complicated equipment without regard to the need for such equipment in their service areas.[31] Moreover, many providers of health care are non-profit organizations that may not respond to market forces because they are not motivated by the desire for higher profits.[32]

Critics of the CON review boards focus not on the absence of a problem, but on the inadequacy of the legislative remedy. Certificate of need review boards, they argue, lack the necessary expertise and guidance to evaluate CON applica-

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23. *See, e.g.*, § 214 of the Communications Act of 1934, 47 U.S.C. § 214 (1982).
24. *See* N.C. GEN. STAT. § 131-178(b) (1981).
25. *See* Blumstein & Sloan, *supra* note 15, at 19-23 (authors argue that the medical marketplace fails in several important respects and planning is often suggested as a replacement for the dysfunctional market).
26. Note, *supra* note 15, at 330.
27. Blumstein & Sloan, *supra* note 15, at 17.
28. *See generally* Note, *supra* note 15.
29. *See, e.g.*, Havighurst, *Competition in Health Services: Overview, Issues and Answers*, 34 VAND. L. REV. 1117 (1981).
30. Note, *supra* note 15, at 315-16. The author notes that it will be difficult to change consumer attitudes regarding health insurance. Consumers generally believe that cost is not important when a life is at stake. This belief forms the basis of the argument that health care cannot be subjected to traditional market forces.
31. *Id.* at 315. A closely related argument is that without regulation, health care providers will engage in "cream skimming" or providing only financially profitable services at the expense of existing comprehensive care facilities. Critics of this argument question whether protection of the comprehensive health care centers is economically rational. *Id.* at 318.
32. *Id.* at 315-16.

tions.[33] Furthermore, they point to the malleability of the boards[34] and to the absence of proof that CON review has been or will be able meet its goals.[35] One illustration of the problems that may arise under a CON program is present in *Huron Valley Hospital, Inc. v. City of Pontiac*.[36] In *Huron Valley*, the plaintiff, a corporation organized to build and operate a hospital, brought an action against the southeastern Michigan HSA, asserting that the administrative process was controlled by the only hospital in the city, Pontiac General Hospital.[37] Although the court did not decide that issue, there was evidence that a board member of Pontiac General Hospital was the chairman of a key planning committee of the CON review board,[38] and had used his position to deny the plaintiff a permit to build a hospital.[39]

The NHPRDA also has generated a fair amount of controversy in the field of antitrust. The most significant case to date is *National Gerimedical Hospital v. Blue Cross of Kansas City*.[40] In *National Gerimedical*, the plaintiff brought suit against the defendant insurer for refusing to accept it as a participating member under its health insurance plan.[41] The defendant, who refused to accept the hospital because of its failure to obtain CON approval, claimed that the NHPRDA and the federal antitrust laws were so far at odds as to imply a repeal of the antitrust laws by the NHPRDA.[42] The Supreme Court, reversing both the district court and the court of appeals, stated that because the defendant's response to the plaintiff's failure to obtain CON approval was spontaneous and not required by the Missouri CON statute, no real conflict between the NHPRDA and the antitrust laws was presented by the case.[43] After finding that the antitrust laws were applicable to the defendant's refusal to deal, however, the Court expressed its reservation that in some instances antitrust immunity would exist under the NHPRDA.[44] In citing one such instance, the Court stated: "[W]here . . . an HSA has expressly advocated a form of cost-saving cooperation among providers, it may be that antitrust immunity is 'necessary to make the [NHPRDA] work.'"[45]

Although federal antitrust laws have been held to be applicable to programs under the NHPRDA, planning agencies such as CON review boards have the express purpose to impose entry barriers in some areas of the medical field in order to reduce "wasteful" competition.[46] Moreover, they represent an expression by Congress and the states that free competition does not always produce "efficient"

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33. For instance, one empirical study purported to show that under a CON program, a significant number of new medical facilities had been established in an area that needed a reduction of medical facilities. Two authors reviewing this and other empirical data have suggested that there is no evidence that CONs have had the desired effect. Blumstein & Sloan, *supra* note 15, at 29-30.
34. *Id.*
35. Note, *supra* note 15, at 317.
36. 666 F.2d 1029 (6th Cir. 1981), *on remand*, 585 F. Supp. 1159 (E.D. Mich. 1984).
37. *Huron Valley*, 666 F.2d at 1031.
38. *Id.*
39. *Id.*
40. 452 U.S. 378 (1981).
41. *Id.* at 382.
42. *Id.*
43. *Id.* at 391-93.
44. *Id.* at 393 n.18.
45. *Id.* (quoting Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963)).
46. Note, *supra* note 15, at 317-18.

results in the health care industry.[47] In the areas where the mandates of the NHPRDA programs clash with those of federal antitrust laws, courts must address the legal theories of implied or state action immunity, which in effect require a doctrinal assessment of the legislative policy choice between free market and public utility regulation.[48]

III. Implied Immunity

The doctrine of implied immunity represents a judicial attempt to reconcile free competition, the policy underlying antitrust laws, with various government sanctioned regulatory programs.[49] Some courts and commentators have argued that antitrust and more "direct" forms of government regulation are theoretically complementary and may often coexist in the American economy.[50] Although some regulatory programs are not inherently repugnant to antitrust regulation, practical experience teaches that public utility regulation and free competition are in conflict.[51] In some instances, Congress will provide an express formula for determining the extent that the antitrust laws must give way to congressionally created

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47. *Id.*

48. *Id.*

49. Silver v. New York Stock Exch., 373 U.S. 341, 349 (1963). "The difficult problem here arises from the need to reconcile pursuit of the antitrust aim of eliminating restraints on competition with the effective operation of a public policy contemplating . . . self regulation which may well have anticompetitive effects in general and in specific applications." *Id. See also* Hale & Hale, *Competition or Control I: The Chaos in the Cases*, 106 U. Pa. L. Rev. 641 (1958) (arguing that competition and regulation policies produce irreconcilable conflict in a wide variety of industries); Note, *Antitrust and Regulated Industries: A Critique and Proposal for Reform of the Implied Immunity Doctrine*, 57 Tex. L. Rev. 751, 760 (1979). *Contra* Stokes, *A Few Irreverent Comments About Antitrust, Agency Regulation and Primary Jurisdiction*, 33 Geo. Wash. L. Rev. 529, 531-37 (1965) (arguing that the proper approach is to consider antitrust as a form of regulation and to decide what type of regulation should be applied to a particular field).

50. One court has stated that the philosophical goals of antitrust and government regulation are identical: "The basic goal of direct governmental regulation through administrative bodies and the goal of indirect governmental regulation in the form of the antitrust law is the same—to achieve the most efficient allocation of resources possible." Northern Natural Gas Co. v. F.P.C., 399 F.2d 953, 959 (D.C. Cir. 1968). Professor Handler has taken a more moderate approach, arguing that competition and regulation may coexist and that each plays a role in the effectiveness of the other. Handler stated: "[T]hey [(competition and regulation)] are more often complementary instruments for the social control of business. . . ." But he added: "[T]o be sure, there are times when they are antithetical and in direct conflict." Handler, *Regulation Versus Competition*, 43 Antitrust L.J. 277, 285 (1974). It is easy to see the fundamental philosophical tension between a system that encourages price and entry competition and one that restricts such competition. The two may work together, but only when clear roles have been defined for each in light of policy goals.

51. Soon after the passage of the Sherman Act, the Supreme Court was required to resolve an apparent conflict between regulations imposed by the Commerce Act and the Sherman Act. United States v. Trans Mo. Freight Ass'n, 166 U.S. 290, 314-16 (1896). The Court decided that the Sherman Act was applicable to anticompetitive conduct by railroads, holding the Commerce Act did not justify clearly the action of the defendant railroads who had privately formed an anticompetitive freight association. *See also* L. Sullivan, Handbook of the Law of Antitrust 744 (1977) ("Where federal or state legislation grants to an administrative agency authority to control entry and regulate rates and services, competition cannot be the organizing force which shapes market structure and conduct."); Note, *AT&T and the Antitrust Laws: A Strict Test for Implied Immunity*, 85 Yale L.J. 254, 255 (1975) ("[Antitrust law] is premised on the theory that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources. The theory of regulation, on the other hand, is that the unrestrained interaction of competitive forces in a particular industry will not adequately serve the public interest.").

regulatory schemes.[52] In those cases where Congress has failed to provide a formula, the "court . . . must craft a new particularized accomodation between the goals of the antitrust laws and the goals of regulation. If the court determines that the application of the antitrust laws to the challenged conduct would be contrary to the regulatory goals, then it creates an implied immunity. . . ."[53] Thus, in cases that imply a repeal of the antitrust laws, the basic standard is congressional intent.[54]

Cases and commentary reflect two basic policy considerations that apply to the implied immunity issue. One concern is to avoid subjecting defendants to conflicting commands under different laws. This is essentially a fairness consideration.[55] The second policy, that of regulatory autonomy, militates against interfer-

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52. An example of this express type of formula is found in the Clayton Act, 15 U.S.C. § 18 (1982). The relevant language states: "Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction. . . ." *Id.* Under a separate statute, 47 U.S.C. § 221(a) (1982), the merger of telephone companies is immune from antitrust challenge if approved by the FCC. This type of provision can be a double-edged sword, because courts may hold that an express grant of immunity over a certain area precludes any argument supporting a broader implied immunity.

53. *In re* Wheat Rail Freight Rate Antitrust Litigation, 759 F.2d 1305, 1312 (7th Cir. 1985). This approach has left scholars generally unhappy. One writer has recommended the formation of a study group to make recommendations for a legislative solution to the problem. Handler, *supra* note 50, at 292. Handler states:

> My basic thesis is that our present method of reconciling regulation and antitrust is grossly inadequate. I say this not because I necessarily disagree with the outcome of some of the recent Supreme Court decisions, but for the more fundamental reason that the system itself fails to offer an institutionally acceptable means of deciding difficult policy questions of crucial importance to our national welfare.

Id. Professor Schuman calls the study group a "valuable first step" towards creation of a superagency, with a continuing existence, that would be "charged with examining and monitoring" the interaction of antitrust and regulatory matters and with regulating the interaction between the two regimes. Schuman, *The Application of the Antitrust Laws to Regulated Industries*, 44 TENN. L. REV. 1, 72-7 (1976). One student commentator has criticized the Supreme Court for giving too much attention to the jurisdictional aspects of the problem rather than identifying policies to "develop criteria adaptable for use in concrete cases." Note, *supra* note 49, at 786.

54. A major problem associated with identifying such an intent has been the emergence of the Chicago school theory and its impact upon antitrust jurisprudence. Traditionally the goal of public utility regulation has been to maximize productive and allocative efficiency in markets in which "destructive competition" is harmful to consumers. This goal is based on the notion that fewer providers will achieve reduced costs for essential products. On the other hand, the traditional goals of competition policy, in which free market conduct is regulated by less intrusive antitrust prescriptions, include the promotion of small businesses and deconcentration of economic power. Competition policy does not change even in situations where inefficiencies might result in the short run. The Chicago school theory, which equates "competition" with the promotion of efficiency, obscures the differing assumptions and methods of antitrust and public utility regulation, so that the role of a competitive market is not obviously in conflict with the role of a public utility commission. Thus, under the Chicago school theory, Congress never needs to repeal the antitrust laws and cannot reasonably be said to have done so by implication. *See* Balter & Day, *Implied Antitrust Repeals: Principles for Analysis*, 86 DICK. L. REV. 447 (1982).

55. The fairness consideration involves the problem of applying mutually exclusive standards to participants in a regulated industry. *See, e.g.*, Gordon v. New York Stock Exch., 422 U.S. 659, 689 (1975) ("We agree with the Court of Appeals and with respondents, that to deny antitrust immunity with respect to commission rates would be to subject the exchanges and their members to conflicting standards."). *Id.* Conversely, the idea behind regulatory autonomy is that the antitrust laws were not intended to render certain regulatory schemes nugatory. United States v. National Ass'n

ing with or invalidating congressionally sanctioned regulatory schemes.[56] It is important to note that courts do not weigh these policy arguments outright as they might in other areas of the law. Instead, they use these policy considerations in order to determine whether Congress *intended* to replace competition with some form of regulation.[57]

A. Congressional Intent

When the regulatory statute contains no express grant or denial of immunity, courts are forced to look for indicia of congressional intent.[58] It is a fundamental canon of statutory construction that courts will attempt to avoid finding repeals by implication.[59] However, when the legislative history[60] or the demands of the regulatory structure[61] demonstrate a congressional intent to repeal, the antitrust laws will fall.[62] To find such a repeal of the antitrust laws, the court must conclude that in enacting the regulatory scheme Congress decided that the principles underlying the antitrust laws were inoperative or that they could be better served in some other manner.[63] Such a conclusion is not a statement by the Court that antitrust policy is inappropriate. Rather, it is judicial deference to a perceived, if not expressly stated, policy of the legislature.[64]

When a court is unable to determine congressional intent from the express language of either the federal antitrust laws or the applicable regulatory statute,

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of Sec. Dealers, 422 U.S. 694, 729 (1975). "There can be no reconciliation of [the SEC's] authority . . . to permit . . . restrictive agreements with the Sherman Act's declaration that they are illegal *per se*. In this instance, the antitrust laws must give way if the regulatory scheme established by the Investment Company Act is to work." *Id.*

56. In examining these two policies, commentary has criticized the courts for failing to embrace an outright policy analysis and for looking to both concepts only as guides to some unstated and possibly nonexistent congressional intent. Note, *supra* note 49, at 786-89. One commentator has suggested that the identity of the plaintiff as either government or private party should be an issue, because government suits tend to vindicate national economic policies affecting society in general, rather than narrow areas of self interest. Comegys, *Quo Vadis, Case Selection by the Antitrust Division of the Department of Justice*, 46 ANTITRUST L.J. 563, 573 (1978).

57. *See* National Gerimedical Hosp. v. Blue Cross of Kansas City, 452 U.S. 378, 389 (1981) (congressional intent governs); Phonetele, Inc. v. American Tel. & Tel., 664 F.2d 716, 726 (9th Cir. 1981); M.T. Hood Stages, Inc. v. Greyhound Corp., 555 F.2d 687, 691 (9th Cir. 1977); Balter & Day, *supra* note 54, at 450.

58. *See* Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 729 (1973); Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 218-20, *modified*, 383 U.S. 932 (1966); Maryland & Va. Milk Producers Ass'n, Inc. v. United States, 362 U.S. 458, 466-67 (1960); Note, *SEC Regulation as a Pervasive Regulatory Scheme — Implied Repeal of the Antitrust Laws with Respect to National Securities Exchanges and NASD*, 44 FORDHAM L. REV. 355, 363-64 (1975).

59. *See, e.g.*, Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945). "[It] is elementary that repeals by implication are not favored." *Id.*

60. *See infra* notes 65-69.

61. *See infra* text accompanying notes 74-99.

62. *See, e.g.*, Balter & Day, *supra* note 54, at 450.

63. *See, e.g.*, Schuman, *The Application of the Antitrust Laws to Regulated Industries*, 44 TENN. L. REV. 1, 10 (1979). "Even though the dominant American economic policy favors competition, in some instances, market structure or a desire to implement other policy choices causes competition to be regarded as less than the optimum choice." *Id. See also* C. KAYSEN & D. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 189-90 (1959) (noting that regulation will displace competition where: (1) as a practical matter, competition cannot last long; (2) because of market conditions, competition produces undesirable results; or (3) where other policies are more important than competition).

64. *See, e.g.*, Balter & Day, *supra* note 54, at 451.

the court must examine the legislative history of the regulatory scheme to attempt to discern what Congress intended.[65] Commentators have criticized this approach as being both ineffective and misleading.[66] Indeed, judicial interpretations of legislative history often reflect what the judge reads into the legislation rather than what Congress intended.[67] However, when combined with other criteria, the legislative history may be helpful, even if it is not determinative.[68] Thus, courts continue to review the legislative history of various regulatory schemes in order to determine whether such schemes are immune from antitrust scrutiny.[69]

B. The Repugnancy Test

A more reliable indication of implied repeal is the so-called repugnancy test.[70] The basic inquiries of the repugnancy test are as follows: (1) whether the antitrust

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65. *See* Otter Tail Power Co. v. United States, 410 U.S. 366, 373-74 (1973) (Review of Federal Power Act's legislative history reveals nothing indicating legislative purpose to insulate electric power companies from antitrust laws. Hence, efforts to keep municipal governments from establishing competing power systems was open to attack.).

66. *See, e.g.*, Note, *supra* note 49, at 761 (arguing that: (1) legislative history is often devoid of evidence; (2) Congress may have been purposefully ambiguous; (3) even ascertainable expressions of legislative intent may be rendered useless by time). Congress can grant express antitrust immunity when it so chooses. The fact that in some regulatory schemes Congress has not granted such immunity may mean that nobody considered the issue or that the sponsors of the legislation decided that a case-by-case judicial analysis was the best approach. *Id.*

67. For instance, in *Otter Tail Power*, 410 U.S. at 373-74, Justice Douglas, writing for the majority, found nothing in the legislative history of the Federal Power Act displaying an intent to grant immunity from antitrust laws. However, Justice Stewart, in his dissenting opinion, found in the legislative history "a clear congressional purpose" to allow the challenged conduct. *Id.* at 386 (Stewert, J., dissenting).

68. *See* Linden, *A Reconciliation of Antitrust Law with Securities Regulation: The Judicial Approach*, 45 GEO. WASH. L. REV. 179, 197 (1977) (advocating a balanced approach that attempts to evaluate several considerations including the legislative history). Perhaps an appropriate role for legislative history is as a negative check. If a review of certain factors indicates a congressional intent to repeal, then the legislative history should be examined for evidence of contrary intent. This approach is in line with the judicial reluctance to imply repeal. It may challenge judges to try to reconcile conflicting acts rather than to find that the antitrust laws have been repealed. Additionally, the approach recognizes that failure by Congress to repeal explicitly the antitrust laws may indicate that Congress consciously chose not to repeal.

Certainly, it is disquieting to require the invalidation of such a fundamental economic policy as the antitrust laws based upon a speech by one legislator or a report by a handful of legislators whose opinions may or may not reflect the motives of the entire body. Moreover, sources of legislative history, particularly the Congressional Record, notoriously are open to manipulation. *See* W. KEEFE & M. OGUL, THE AMERICAN LEGISLATIVE PROCESS 257-58 (4th ed. 1977).

69. The Supreme Court frequently has used legislative history to support a conclusion that antitrust immunity is not implied, either by finding positive indicia to the contrary or by failing to find evidence of intent to repeal. *See Otter Tail Power*, 410 U.S. at 373-374 (Court noted that legislative history of power act implied repeal of antitrust laws); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 354 (1963) (Legislative history of Bank Merger Act clearly refuted suggestion that antitrust laws were preempted. Both the House and the Senate reports stated that antitrust laws will not be affected); United States v. Radio Corp. of Am., 358 U.S. 334, 339-46 (1959) (legislative history showed that congressional intent in Federal Communications Act was that antitrust laws should not be preempted).

70. The repugnancy test is an ancient one, apparently imported from England. In Rex v. Cator, 4th Burrow 2026, Lord Mansfield held that a law providing a 100 pound fine for luring craftsmen into foreign service was repealed by a later law on the same subject that provided for a 500 pound fine. Likewise in Rex v. Davis, 1st Leach, Crown Cases, 271, the English court held that a poaching statute that prescribed the death penalty was repealed by one which provided for a fine. In the United States, the Supreme Court decided in United States v. Tynen, 78 U.S. (11 Wall) 88, 92 (1870), that

laws are irreconcilable with the functional operation of the regulatory scheme;[71] or (2) whether the regulatory scheme pervasively occupies the field in which antitrust statutes normally operate so as to imply that Congress meant to hold conduct pursuant to the regulatory statute immune.[72] The repeal will only reach as

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an immigration statute was repealed impliedly by a later statute that widened the scope of a court's discretion in meting out punishment. Justice Field stated that when repugnant provisions like these exist between two acts, the latter act is held, according to all authorities, to operate as a repeal of the first act, for the latter act expresses the will of the government as to the manner in which the offenses subsequently shall be treated.

In the same term, however, the Court limited the repugnancy test, stating: "[I]t must be observed that the doctrine asserts no more than that the former statute is impliedly repealed, so far as the provisions of the subsequent statute are repugnant to it . . . where the powers or directions under several acts are such as may well subsist together, an implication of repeal cannot be allowed." Henderson's Tobacco, 78 U.S. (11 Wall) 652, 657 (1870). An early antitrust case discussing this requirement is United States v. Borden Co., 308 U.S. 188, 199 (1939). For commentary on the repugnancy test, see Balter & Day, *supra* note 54, at 452 (authors argue that the two statutes must "at least produce differing results" before there is a repeal by implication or implied immunity); Note, *The Antitrust Immunity Doctrine and* United States v. National Association of Securities Dealers: *Stepping on* Otter Tail, 28 *Hastings L.J.* 387, 397-98 (1976) (author argues that the given regulation should imply repeal of the antitrust laws if it is so necessary to the regulation scheme's success as to indicate that Congress intended that the antitrust laws would not frustrate the regulatory scheme).

71. Irreconcilability was the basis for finding repugnancy in United States v. Tynen, 78 U.S. (11 Wall) at 88 (1870). The Court found that a criminal statute allowed the punishment of imprisonment or fine, but not both. A later act allowed both fine and imprisonment. The Court concluded that the two acts were repugnant to one another because the second act "permits what the first law prohibits." *Id.* at 93. More recently, the Supreme Court has enunciated essentially the same test with the following language: "Repeal is to be regarded as implied only if necessary to make the Securities Exchange Act work. . . ." *Silver*, 373 U.S. at 357. For comment upon this irreconcilability test, see Balter & Day, *supra* note 54, at 465-66.

72. At the same time as the development of the irreconcilability standard, courts were noting that where a second act addresses the whole subject matter of the first act, it would be possible to infer that the legislature intended to repeal the first act. The Supreme Court stated: "[I]f the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act." *Tynen*, 78 U.S. (11 Wall) at 92. This judicially created analysis is the precursor of what now is referred to as the "pervasiveness" standard. The Supreme Court has found implied immunity from the antitrust laws in a case where the Civil Aeronautics Board had been given control over a range of conduct challenged in an antitrust suit. The Court stated: "The acts charged in this civil suit as antitrust violations are precise ingredients of the board's authority in granting, qualifying or denying certificates to air carriers. . . ." Pan Am. World Airlines, Inc. v. United States, 371 U.S. 296, 305 (1962). Thus, the Court found that the new law or set of regulations occupied the entire field formerly held by the antitrust laws, at least with regard to the challenged conduct.

For commentary on the pervasiveness test, see 1 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 224e (1978) (arguing that pervasiveness is relevant though not dispositive); Note, *supra* note 70, at 411 (arguing that three indicia of a pervasive regulatory scheme are: "(1) legislative history indicating a congressional intent to subordinate antitrust to regulatory policy; (2) duty to actively enforce a nondiscretionary antitrust standard of administrative regulation; [and] (3) availability of remedial relief under the regulatory scheme commensurate with that of the antitrust laws") (footnotes omitted).

Although courts and commentators often discuss the irreconcilability and pervasiveness standards as discrete doctrines, they are often so intertwined as to make it uncertain where one ends and the other begins. For instance, a regulatory scheme that mandates a pattern of corporate conduct that is inconsistent with the antitrust laws just as easily could be said to be pervasive as irreconcilable. Two writers have noted, for instance, that the cases of United States v. Radio Corp. of Am. 358 U.S. 334 (1959) and California v. FPC, 369 U.S. 482 (1962) can be explained just as easily under irreconcilability formulation as they can under the pervasiveness test. 1 P. AREEDA & D. TURNER, *supra*, ¶ 224e, at 155.

far as is necessary to remove the repugnancy, because courts prefer to sustain both acts to the extent that they are not contradictory.[73]

1. Irreconcilability of Regulatory Schemes and Antitrust Laws

One common way of satisfying the first inquiry of the repugnancy test is to show that application of the antitrust laws is "necessary to make the . . . act work."[74] An example of this type of inquiry is provided in *Gordon v. New York Stock Exchange*,[75] which involved a conflict between the Sherman Antitrust Acts and rules promulgated by the Securities and Exchange Commission (SEC) pursuant to the Securities Exchange Act of 1934.[76] In *Gordon*, the plaintiff alleged that the Sherman Act was violated by the defendants' policy of fixing commission rates for transactions below a certain dollar level.[77]

The Court in *Gordon* held that applying antitrust laws would expose the defendants to conflicting commands from the same sovereign.[78] The Court stated, "[i]f antitrust courts were to impose different standards or requirements, the exchanges might find themselves unable to proceed without violation of the mandate of the courts or of the SEC."[79] The Court found that the SEC rule amounted to an "affirmative order,"[80] and that applying the Sherman Act would effectively render

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73. Because the legislature could have repealed expressly the earlier antitrust statutes and did not, courts usually imply repeal of only what they believe the legislature must have meant to repeal. If there is any conceivable way for both statutes to stand, then a court will not find an implied repeal. Thus in Henderson's Tobacco, 78 U.S. (11 Wall) 652, 657 (1870), Justice Strong wrote: "Where the powers or directions under several acts are such as may well subsist together, an implication of repeal cannot be allowed." *Id.* Similarly, the Supreme Court stated in *Pennsylvania R.R.*, 324 U.S. at 456-57: "[I]t is elementary that repeals by implication are not favored. Only a clear repugnancy between the old law and the new results in the former giving way and then only *pro tanto* to the extent of the repugnancy." *Id.*

74. This classic formulation of the irreconcilability standard comes from *Silver*, 373 U.S. at 357. For commentary, see 1 P. AREEDA & D. TURNER, *supra* note 72, ¶ 224d, at 148 (discussing whether the "necessary" formula means that the Court was looking to see if repeal was necessary to promote uniformity within the regulated sector or whether the court believed that the challenged conduct was necessary to realize regulatory goals).

75. 422 U.S. 659 (1975). Plaintiff sued individually and as a representative of a class of small investors, claiming that a system of fixed commission rates used by New York Stock Exchange members for transactions less than $500,000 violated Sections 1 and 2 of the Sherman Act.

76. 15 U.S.C. § 78a (1982).

77. The SEC, under 15 U.S.C. § 78s(b), authorized the fixing of commission rates below a certain level. These rates were to apply only to certain transactions and were subject to approval by the SEC. Gordon v. New York Stock Exch., 422 U.S. 659, 682 (1975). The Court found that the SEC had properly scrutinized and approved commission rates. *Id.* at 689-90.

78. Justice Blackmun stated, "[w]e agree with the District Court and the Court of Appeals, and with respondents, that to deny antitrust immunity with respect to commission rates would be to subject the exchanges and their members to conflicting standards." *Gordon*, 422 U.S. at 689.

79. *Id.* The Court went on to explain that this was because antitrust laws are aimed only at vindicating free competition, whereas the SEC also must consider the economic health of investors, the exchanges, and the securities industry. *Id.* at 689.

80. In a footnote, the majority stated: "We believe that this degree of scrutiny and approval by the SEC is not significantly different for our purposes here than an affirmative order to the exchanges to follow fixed rates. . . . We conclude that immunity should not rest on the existence of a formal order by the SEC, but that the actions taken by the SEC . . . are to be viewed as having an effect equivalent to that of a formal order." *Id.* at 689 n. 13.

While accepting the Court's rationale, Areeda and Turner have stated that "*Gordon* thus seemed to weigh more heavily than [some cases] the existence of SEC supervisory powers." P. AREEDA

the regulatory scheme void.[81] Therefore, the Court decided, an implied repeal was necessary.[82]

Courts have not been as willing to find implied repeal in cases where a defendant voluntarily has undertaken a course of action consistent with a regulatory scheme because he thinks it makes good business sense.[83] In such cases, the courts have held that where a defendant is merely using his "business judgment" and is not coerced, he has no right to receive antitrust immunity.[84] Since the defendant is not put to an irreconcilable choice by the regulatory scheme, there is no fundamental unfairness.[85] Moreover, approval by the regulatory agency may simply mean that in some circumstances the conduct will be permitted, but that the regulatory requirement is cumulative and not repugnant.[86]

An example of a cumulative regulation is found in *United States v. Radio Corporation of America*,[87] where an antitrust challenge to the defendant's acquisition of several broadcast outlets was allowed, despite the defendant's plea that the conduct was exempt from antitrust law because it had been approved by the Federal Communications Commission.[88] The federal government challenged

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& D. TURNER, *supra* note 72, ¶ 224d, at 150. "Unfortunately, by emphasizing that supervisory power of the SEC and the exercise of the Court left unclear whether it would find implied immunity when there was unexercised oversight power." *Id.* The Court's rationale also has been criticized as unpersuasive in Note, *supra* note 49, at 764 n.61.

81. *Gordon*, 422 U.S. at 691. "Interposition of the antitrust laws . . . in the face of positive SEC action, would preclude and prevent the operation of the Exchange Act as intended by Congress and as effectuated through SEC regulatory activity." *Id.* This ruling has been criticized for finding congressional intent to repeal from scant legislative history and as factually inaccurate in asserting a long history of SEC supervision. Linden, *supra* note 68, at 203.

82. *Gordon*, 422 U.S. at 691.

83. *See Otter Tail Power*, 410 U.S. at 374. "When . . . relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws." *Id. Radio Corp. of Am.*, 358 U.S. at 350. "Appellants, like unregulated business concerns, made a business judgment as to the desirability of . . . [challenged conduct] with [the] knowledge that the exchange might run afoul of the antitrust laws." *Id.*; Midland Telecasting Co. v. Midessa Television Co., 617 F.2d 1141, 1147-48 (5th Cir. 1980) (where FCC actions did not interfere with broadcaster's business judgment as to what signal to carry, no antitrust immunity was implied).

84. In denying one claim of implied immunity, the Supreme Court stated: "In every sense the question being faced by the parties was solely one of business judgment. . . ." *Radio Corp. of Am.*, 358 U.S. at 351; *Otter Tail Power*, 410 U.S. at 374; *Midland Telecasting*, 617 F.2d at 1147.

85. *Midland Telecasting*, 617 F.2d at 1147. *See also* Balter & Day, *supra* note 54, at 468.

86. Particularly instructive in this regard is the Supreme Court's language in Borden Co. v. United States, 308 U.S. 188 (1937). In *Borden*, the Court stated: "It is not sufficient . . . to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative or auxiliary. There must be a positive repugnancy between the provisions of the new law and those of the old." *Id.*; Sound, Inc. v. American Tel. & Tel. Co., 631 F.2d 1324, 1329 (8th Cir. 1980); United States v. American Tel. & Tel. 427 F. Supp. 57, 61 (D.D.C. 1976); California v. F.P.C., 369 U.S. 482, 485 (1962).

87. 358 U.S. 334 (1959). The issue in this case involved the swap of the defendant's Cleveland television station for one in Philadelphia. *Id.* at 335-36.

88. The FCC was required to approve the transfers under § 310(b) of the Communications Act of 1934, 47 U.S.C. § 310(b). The commission undertook nonadversary proceedings and after extensive investigation, decided it could not reach a conclusion on whether the swap should be allowed. The Commission was guided by the "public interest, convenience and necessity standard," but also inquired into possible antitrust problems before ultimately approving the exchange. *Radio Corp. of Am.*, 358 U.S. at 336-37.

the action as part of a conspiracy to restrain trade.[89] The Supreme Court disagreed with the defendant's assertion that the combination of FCC regulations and approval had impliedly immunized the transaction from antitrust attack. The Court held that the requirement of FCC approval was merely another hurdle the transaction had to clear and was not an affirmative policy statement focused on antitrust laws.[90] It is important to note that, while the antitrust laws might have blocked the defendant's conduct, the Court may have allowed the swap to proceed because there were no violations of antitrust laws.[91]

In some cases, however, authorization of a regulatory agency may serve as the basis for a claim of implied immunity from antitrust prosecution. Where the regulatory scheme authorizes conduct which is per se[92] unlawful under the antitrust laws, there may be implied immunity.[93] Because the antitrust laws will always defeat per se illegal agreements, logically there is no circumstance under which per se illegal conduct could be held lawful absent some form of implied exemption.[94]

In *United States v. National Association of Securities Dealers*,[95] the Supreme Court found implied immunity in a congressionally enacted regulatory scheme that allowed per se illegal conduct.[96] In *National Association*, the statute at issue is

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89. Specifically, the government charged that the National Broadcasting Company, a subsidiary of the defendant, threatened to revoke the network affiliation of television stations in Boston and Philadelphia if Westinghouse did not agree to swap the Philadelphia station for the defendant's Cleveland station. *Radio Corp. of Am.*, 358 U.S. at 335-36.

90. The court reviewed the legislative history and scrutinized the language of the Communications Act. *Id.* at 339-43. Although the Court found that the FCC had authority to consider antitrust concerns, the Court concluded that the FCC had no authority to decide antitrust questions. *Id.* at 351-52. The Court held that the public interest standard did not replace the antitrust laws. *Id.* Additionally, the Court determined that because there was "no pervasive regulatory scheme and no rate structures to throw out of balance, sporadic action by federal courts can work no mischief." *Id.* at 350.

91. In *Radio Corp. of Am.*, the Supreme Court merely reversed the district court's dismissal of the action and did not decide the question as a matter of law. *Id.* at 353. Thus the mandates of the antitrust laws and of the FCC regulations were not found to be repugnant because, if the factfinder were to conclude that no antitrust violation had occurred, the FCC approval or disapproval would become important. In some cases, the two acts may be consistent and therefore, they cannot be said to be repugnant, but merely cumulative. *See* 1 P. AREEDA & D. TURNER, *supra* note 72, ¶ 224e, at 157 (The fact that FCC permits merger does not necessarily express affirmative policy in favor of mergers. Continued application of antitrust laws would not necessarily impair functioning of regulatory scheme.).

92. The *per se* rule is a judicial concept that certain types of conduct necessarily are adverse to competition and therefore, cannot be defended on the grounds that the restraint actually benefits competition. *See, e.g.*, United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927).

93. *See Gordon*, 422 U.S. at 659 (1975) (Price fixing was permitted under federal regulations which were enacted seven years after price fixing had been declared unlawful per se. Therefore, antitrust and securities regulation were irreconcilable.); *National Ass'n of Sec. Dealers*, 422 U.S. at 694. "There can be no reconciliation of (Securities Exchange Commission) authority . . . to permit (terms restricting trading of stocks) with the Sherman Act's declaration that they are illegal *per se*." *Id.*

94. *Id. See also* Balter & Day, *supra* note 54, at 464 (arguing that grants of authority to perform acts illegal per se can be explained only as implying a congressional conclusion that limits on competition are necessary).

95. 422 U.S. 694. *National Ass'n of Sec. Dealers* involved a government challenge to the validity of agreements that restricted the sale and fixed prices in the secondary market of mutual fund shares. Exemption from federal antitrust laws was claimed under the Maloney Act of 1938, 15 U.S.C. §§ 780-3, and the Investment Company Act, 15 U.S.C. § 80a (1982).

96. 15 U.S.C. § 80a-22(d) (1982). The Court rejected a claim that § 22(d) of the Investment

the Investment Company Act which authorizes resale price maintenance and concerted refusals to deal,[97] conduct that would be per se illegal under the Sherman Act.[98] When the conduct was challenged by the federal government, the Court afforded it implied immunity from antitrust attack, stating that even though the SEC had not actually approved the challenged conduct, there was a possible conflict between the SEC regulations and the antitrust laws.[99]

In summary, when an unresolvable conflict exists between the regulatory standards and the antitrust laws, a court will find them irreconcilable. A regulatory scheme that is merely cumulative to the antitrust laws will not justify implied immunity, because courts will read the two as consistent. However, where enforcing the antitrust laws will negate the regulatory scheme, the courts will find that Congress intended to immunize the regulatory scheme from the antitrust laws.

2. The Pervasive Regulation Test

The second major criterion for finding antitrust immunity because of repugnancy is the pervasive regulation test.[100] The test is an extension of the idea

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Company Act provided antitrust immunity. The Court rejected the defendant's arguments that § 22(d) was meant to apply to both dealers and brokers, because § 22(d) applies only to dealers, defined in the Act as persons who buy and sell on their own accounts. 15 U.S.C. § 80a-2(a)(11). Accordingly, the Court held that § 22(d) did not give the defendant brokers permission to fix prices. *National Ass'n of Sec. Dealers*, 422 U.S. at 720.

However, the Court proceeded to find that § 22(f) granted the defendants the authority to impose restrictions on the negotiability and transferability of shares in mutual funds. The Court found an implied repeal because the regulatory grant of authority to enter into resale price maintenance agreements and concerted refusals to deal conflicted with the per se illegality test formulated under the Sherman Act. *National Ass'n of Sec. Dealers*, 422 U.S. at 729.

97. 15 U.S.C. § 80a-22(f) (1982).

98. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 381 (1967) (resale restrictions); Albrecht v. Herald Co., 390 U.S. 145, 152-153 (1968) (resale price maintenance scheme); United States v. Sacony-Vacuum Oil Co., 310 U.S. 150, 160 (1940). "[A] combination formed for the purposes and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate commerce is illegal *per se*." *Id.* at 221-23. United States v. Trenton Potteries Co., 273 U.S. 392, 396-401 (1927) (price fixing).

99. *National Ass'n of Sec. Dealers*, 422 U.S. at 729-30. In what actually amounted to a side issue, the Court upheld the trial court's dismissal of a claim that alleged a horizontal conspiracy to "prevent the growth of a secondary dealer market and a brokerage market in the purchase and sale of mutual fund shares." *Id.* at 730. The Court decided that the broad regulatory authority that the SEC held over these transactions justified a finding of antitrust immunity because "maintenance of an antitrust action for activities so directly related to the SEC's responsibilities poses a substantial danger that appellees would be subjected to duplicative and inconsistent standards." *Id.* at 735. For comment on this section of the opinion, see Linden, *supra* note 68, at 208-09.

The result in *National Ass'n of Sec. Dealers* has been criticized widely. For instance, Areeda and Turner argue that immunity was less compelling in this case than other cases. They note that § 22(f) is not by its very terms in conflict with the antitrust laws because it merely prohibits some practices and authorizes the Securities and Exchange Commission to promulgate rules limiting mutual fund restraints. 1 P. AREEDA & D. TURNER, *supra* note 72, ¶ 224d, at 152. *See also* Note, *supra* note 49, at 768 (arguing that invoking the implied immunity doctrine is inappropriate in instances when there is only a potential conflict). This criticism seems especially cogent in light of the fact that the SEC actually was attempting to induce more competition in the market rather than supporting restrictive conduct. *See National Ass'n of Sec. Dealers*, 422 U.S. at 718 n.31. *See also* Note, *supra* note 70, at 415-25. It is interesting to note that upon hearing the private suits in *National Ass'n of Sec. Dealers*, the Court of Appeals for the District of Columbia Circuit limited the exemption to transfers within the fund. Haddad v. Crosby Corp., 533 F.2d 1247, 1250 (D.C. Cir. 1976).

100. This was the test that the Supreme Court used to strike down the horizontal dealing count

that the enactment of a new law which "covers the whole subject," repeals the old law by implication. This idea first was expressed in *United States v. Tynen*.[101] The basic idea in cases such as *Tynen* is that where Congress has created a regulatory scheme with the power and structure for vindicating free competition or addressing the potential evils of anticompetitive behavior, there is no good reason for courts to entertain antitrust actions.[102] When Congress creates such a regulatory agency, courts often infer that Congress intended to transfer to some other branch of government the responsibility of policing competitive behavior or replacing competition in those cases in which competition is regarded as inappropriate.[103] Regardless of the motive, commentators have noted that when Congress has given a regulatory agency the responsibility to address concerns originally covered by the antitrust laws, it impliedly has preempted application of those laws.[104]

One of the seminal pervasive regulation cases is *Pan American Airways, Inc. v. United States*.[105] In *Pan American*, the Supreme Court dismissed an antitrust challenge to an agreement between two airlines not to compete along the same traffic routes. The Court held that the Civil Aeronautics Board (CAB) rather than the federal courts had jurisdiction in such cases.[106] The agreement which divided territories had been approved by the CAB which had authority to enforce antitrust-type rules in regard to market allocation agreements.[107] The Court held that because

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in *National Ass'n of Sec. Dealers*, 422 U.S. at 733. "[T]he investiture of such pervasive supervisory authority in the SEC *suggests that Congress intended* to lift the ban of the Sherman Act from association activities approved by the SEC." *Id.* (emphasis added). For other cases discussing the "pervasive regulation" standard, see *Gordon*, 422 U.S. at 688 (balancing antitrust laws against SEC regulations); *Otter Tail Power Co.*, 410 U.S. at 374-75 (denying that the scheme of Federal Power Commission regulation was pervasive enough to imply immunity); *Philadelphia Nat'l Bank*, 374 U.S. at 334 (finding a substantial area for free play of competition despite government regulation); *Radio Corp. of Am.*, 358 U.S. at 349. For lower court decisions on the pervasiveness standard, see Sound, Inc. v. American Tel. & Tel. Co., 631 F.2d 1324, 1328 (8th Cir. 1980) (pervasive nature of regulatory scheme is important in determining repugnancy or conflict of laws); Mid-Texas Communications Systems, Inc. v. American Tel. & Tel. Co., 615 F.2d 1372, 1378 (5th Cir. 1980) (federal telephone regulation not so pervasive as to justify immunity).

101. *Tynen*, 78 U.S. (11 Wall) at 92.

102. *See Gordon*, 422 U.S. at 481-84. *See also* Essential Communications v. American Tel. & Tel., 610 F.2d 1114, 1117 (3d Cir. 1979) (in some cases the economic desirability of maintaining a natural monopoly in a service industry precludes competition and instead substitutes regulation); MCI Communications Corp. v. American Tel. & Tel. Co., 462 F. Supp. 1072, 1082 (N.D. Ill. 1978) (immunity may be implied when a statute provides that an agency may regulate under standards that substitute for antitrust laws; Congress has provided substitute antitrust regulation and immunity is needed to keep schemes from colliding); United States v. American Tel. & Tel. Co., 427 F. Supp. 57, 61 (D. D.C. 1976) (immunity implied when regulatory scheme was so pervasive that it presented potential conflicts with antitrust laws).

103. *See* Balter & Day, *supra* note 54, at 451.

104. *See* Note, *supra* note 51, at 258 (proposing a five point test to determine when Congress has shifted authority for an agency); Note, *supra* note 49, at 751 (noting argument that comprehensive, pervasive regulatory scheme indicates congressional finding that competition alone is insufficient to vindicate public interest and that regulation should replace competition). *See also Essential Communications*, 610 F.2d at 1117.

105. 371 U.S. 296 (1963). This was an action initiated by the federal government charging that Pan American, W. R. Grace & Co., and Panagra, their jointly owned subsidiary, had agreed when Panagra was formed that Pan American and Panagra would not compete for the same routes. The government alleged violations of Sections 1, 2, and 3 of the Sherman Act.

106. *Pan American*, 371 U.S. at 313. "We think the narrow questions presented by this complaint have been entrusted to the [CAB] and that the complaint should have been dismissed." *Id.*

107. *Id.* at 308-10. The authority was derived from the Federal Aviation Act, 49 U.S.C. §§

the acts challenged were the "precise ingredients" of the CAB's authority to regulate air carriers, antitrust immunity should be implied.[108] The Court also found support for an implication of immunity in the fact that the CAB had authority to stop the challenged conduct and order divestiture by issuing a cease and desist order.[109] Justice Douglas' opinion for the majority of the Court noted that these factors made the two laws repugnant and likely to collide. Justice Douglas stated: "If the courts were to intrude independently with their construction of the antitrust laws, the two regimes might collide."[110]

The mere presence of a thorough regulatory scheme does not mean the regulatory scheme is "pervasive" for the purposes of the antitrust laws. In order for the regulatory scheme to preempt, it must parallel the antitrust laws by providing similar review standards and redress.[111] For example, if the regulatory plan does not actually test the challenged conduct for anticompetitive injury on antitrust grounds, there will be no implied immunity. In *Silver v. New York Stock Exchange*,[112] the plaintiffs alleged that the disconnection of a telephone direct line from the New York Stock Exchange to a broker violated Sections 1 and 2 of the Sherman Act[113] by restraining trade and attempting to monopolize the stock trading industry.[114] The disconnection was pursuant to SEC regulations that required the exchange to engage in self regulation.[115] The SEC had never reviewed the challenged conduct to determine whether it was permissible.[116] The Court stated "[t]here is nothing built into the regulatory scheme which performs the antitrust

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1301, 1381 (1982), which give the board authority over unfair methods of competition. The Court did not discuss 49 U.S.C. § 1382 (1982), which grants the CAB authority to approve or disapprove contracts and agreements between carriers for pooling or apportioning of traffic or eliminating competition. This section seems to shore up the board's authority even more than the vague "unfair" language of 49 U.S.C. § 1381.

108. *Pan American*, 371 U.S. at 305. Two commentators have noted the importance of the CAB's "comprehensive obligations to police competition in the airline industry" and "full panoply of government regulation" as critical factors in distinguishing this case from similar cases. Balter & Day, *supra* note 54, at 459 (footnotes omitted).

109. *Pan American*, 371 U.S. 311-13. For commentary on the importance of the government's power to grant relief, see 6 P. AREEDA & D. TURNER, *supra* note 54, ¶ 1436.

110. *Pan American*, 371 U.S. at 310. Justice Douglas' statement reinforces the concept that the irreconcilability test for immunity and the pervasiveness test are not as discrete as they appear, but are different expressions of the same fundamental concept. Often a regulatory scheme will be found to imply immunity both because it is pervasive and because it is irreconcilable with the antitrust laws.

111. *See Pennsylvania R.R.*, 324 U.S. at 457 (Despite the congressional delegation to the Interstate Commerce Commission of authority to enforce compliance with its provisions and control mergers and consolidations, the Sherman Act is not repealed. Congress gave the ICC no power to remove rate-fixing combinations and hence left the area for antitrust laws); In re *Wheat Rail Freight*, 759 F.2d at 1313-16 (Interstate Commerce Commission's extensive jurisdiction over, and review of, railroad rate agreements, coupled with its authority to grant adequate remedies, supported finding that conduct undertaken pursuant to ICC regulations impliedly was immune from antitrust laws.); *Mid-Texas Communications Systems, Inc.* 615 F.2d at 1378 (federal regulation of telephone industry not so pervasive as to require immunity from antitrust laws). *See also* Linden, *supra* note 68, at 197 (praising courts that look beyond extensive regulation to determine whether a regulatory scheme contains anything that performs the antitrust function).

112. 373 U.S. 341 (1963).

113. *Id. See also* 15 U.S.C. §§ 1-2 (1982).

114. *Silver*, 373 U.S. at 345.

115. *Id.* at 352.

116. The court noted that 15 U.S.C. §§ 78s(b) and 78f(a)(4) do not give the SEC the authority to review particular instances of enforcement of exchange rules. *Silver*, 373 U.S. at 357.

function of insuring that an exchange will not in some cases apply its rules so as to do injury to competition which cannot be justified as furthering legitimate self-regulative ends."[117] The conduct involved in *Silver* was not subject to any government regulation, rather it was a decision made by the exchange.[118]

There are critical differences between *Pan American* and *Silver* that help to explain the differing conclusions reached by the Supreme Court in these cases which were decided in the same term. The most important distinction is in the type of regulatory act. In *Pan American*, the CAB had been given clear authority to engage in comprehensive regulatory review and to grant antitrust-type relief. In *Silver*, the SEC had been given authority only to set up what was essentially a self-regulatory scheme and the SEC could not grant antitrust-type relief or review actual instances in which the exchange exercised its authority.[119] Taken together, the cases indicate that courts will imply immunity only when the regulatory standard: (1) addresses the subject matter that is the object of the suit; and (2) provides similar relief.

Judicial concern over the type of relief available from a regulatory agency is especially great in cases in which the plaintiff requests a type of relief that the agency is unauthorized to grant. For instance, in *Otter Tail Power Co. v. United States*,[120] the Supreme Court held that the Federal Power Act[121] did not immunize the defendants from antitrust challenge, in part because the Federal Power Commission could not grant the full relief desired by the government.[122] Since the Federal Power Commission could not grant the proper relief, the Court found that Congress did not intend for the Commission to replace the antitrust remedy and preempt the federal courts from settling antitrust challenges.[123]

Otter Tail also illustrates the judicial mandate that the standards applied by regulatory agencies must be similar to standards developed in antitrust law.[124] The Court decided that rather than enacting a pervasive scheme of regulation, Congress had relied on voluntary relationships to govern the interstate distribution of power.[125] The Court's opinion states "[w]hen these relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws."[126] Thus, as with the irreconcilability test,[127] if a defendant merely is using his business judgment, courts usually

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117. *Silver*, 373 U.S. at 358. The court previously stated that the issue was the extent to which the duty of exchange self-regulation was incompatible with the maintenance of an antitrust action. *Id.*

118. *Id.* at 359. "Some form of review of exchange self-policing, whether by an administrative agency or by the courts, is therefore, not at all incompatible with the [purposes] of the Securities Exchange Act." *Id.*

119. *Silver*, 373 U.S. at 357. *See also supra* note 108.

120. 410 U.S. 366 (1972).

121. 16 U.S.C. § 824a(b) (1982).

122. *Otter Tail Power*, 410 U.S. at 366.

123. *Id.*

124. The Court noted that the Federal Power Act could not force the defendants to "wheel" or carry power from another company's generator to the substations of the competitor. *Id.* at 375.

125. *Id.* at 374. The Court noted that Congress specifically had rejected suggestions that the Federal Power Commission be empowered to order wheeling and that a "common carrier" provision be enacted, requiring power companies to transmit electricity to any person upon request to preserve the "voluntary action of the utilities." *Id.*

126. *Id.*

127. *See supra* text accompanying notes 74-86.

will not find that antitrust standards are being applied by a regulatory agency. Because there was no delegation of an antitrust standard to another agency in *Otter Tail*, there was no pervasiveness and therefore, no repugnancy between the antitrust laws and the public utility regulation.

Similarly, in *United States v. Radio Corp. of America*,[128] the Supreme Court rejected the defendant's assertion that a merger approved by the FCC should be immune from antitrust challenge.[129] The exchange of television stations between two companies in *Radio Corp. of America* had been approved by the FCC.[130] However, the Court found that the "public interest" standard under which the FCC operated was not sufficiently close to the antitrust standards to imply that it was meant to address and override the free competition policy expressed by the Sherman Act.[131]

Even when there is an express legislative delegation of authority to a regulatory agency to consider anticompetitive conduct, such authority cannot be too discretionary.[132] In *United States v. Philadelphia National Bank*,[133] the Court refused to find implied immunity in a regulatory scheme that required the Comptroller of the Currency to consider the effects of proposed bank mergers upon competition before granting approval.[134] Although the Justice Department, the FDIC, and the Federal Reserve Board advised against allowing the merger because they thought it would weaken competition,[135] the Comptroller approved the merger.[136] The Court found that the Comptroller's review standard fell far short of what is required for an implied repeal based on pervasive regulation, noting that while antitrust concerns were to be reviewed, they were not necessarily to be given any weight.[137] The Court found support for its decision in the fact that while there was extensive regulation of such things as minimum interest rates and chartering, a wide area of unregulated activity still existed.[138]

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128. 358 U.S. 334 (1959).

129. *Id.* at 350. The Court found no pervasive regulatory scheme and thus saw no harm in applying antitrust laws.

130. *Id.* at 338. The defendants argued that the FCC could have taken antitrust implications into account. *Id.*

131. Similar to *Otter Tail Power*, the Court in *Radio Corp. of Am.* held that business judgment, rather than a regulatory scheme, was the basis for defendant's conduct. Since the defendant still exercised unfettered business judgment, the Court found that Congress had not intended to replace free competition with regulation in this area. *Radio Corp. of Am.*, 358 U.S. at 350. *See Otter Tail Power*, 410 U.S. at 374.

132. *See* Note, *supra* note 70, at 410-11.

133. 374 U.S. 321 (1963).

134. *Id.* at 350-52. The Bank Merger Act of 1960, 12 U.S.C. §§ 215-18 (1982), prevented the approval of any mergers before the Comptroller had reports from the Justice Department, the Federal Deposit Insurance Corp., and the Federal Reserve Board.

135. *Philadelphia Nat'l Bank*, 374 U.S. at 332-33. The banks involved in the merger were the Philadelphia National Bank and the Girard Trust Corn Exchange Bank. Philadelphia National was the second largest bank in the Philadelphia market and Girard the third largest in the market. Had the merger been allowed, the resulting bank would have been the largest in the four-county area with 36% of the area's total banking assets, 34% of the loans, and 36% of the deposits. *Id.* at 330-31.

136. The comptroller stated: "[S]ince there will remain an adequate number of alternative sources of banking service in Philadelphia, and in view of the beneficial effects of this consolidation upon international and national competition, it is concluded that the overall effect upon competition would not be unfavorable." *Id.* at 333.

137. *Id.* at 351.

138. *Id.* at 352.

The above discussed cases provide three primary indicia of a regulatory scheme which is so pervasive that it requires an implication that Congress intended for the regulatory scheme to replace the antitrust laws. First, the scheme must provide for relief which is similar to antitrust relief. Second, the program must contain a standard for policing competition which is similar to the antitrust standard. Finally, the discretion afforded the agency must not be so great as to allow decision makers to ignore or downplay the anticompetitive effects of their actions.

IV. State Action Immunity Doctrine

The doctrine of state action immunity is in many ways the mirror image of the federal implied immunity doctrine.[139] Both doctrines are based upon a judicial interpretation of unstated congressional intent.[140] Federal implied immunity represents a judicial determination that Congress intended a *pro tanto* repeal of the Sherman Act.[141] By finding congressional intent to repeal, the courts allow a regulatory system to override the command of the Sherman Act. In contrast, state action immunity is a judicial declaration that the antitrust laws simply never reached the challenged conduct, because the conduct represents state action, and Congress never intended for the antitrust laws to govern action by states as sovereignties.[142] Because there is no congressional intent to reach state action, courts may allow state regulatory systems to exist unchallenged by federal antitrust laws. Thus, while the purpose of both doctrines is to resolve inconsistencies between federal antitrust laws and various regulatory schemes,[143] the federal implied im-

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139. For an interesting comparison of the two doctrines, see Note, Parker v. Brown—*Gone to* Hecht: *A New Test for State Action Exemptions*, 24 Hastings L. J. 287 (1973). The author argues that the same analysis used by the District of Columbia Court of Appeals in Hecht v. Pro-Football, Inc., 444 F.2d 931 (D.C. Cir. 1971), could be applied to state action immunity cases. The state action immunity analysis involves a review of the following factors: (1) specific statutory language; (2) legislative history; (3) importance of the governmental action; (4) consideration of anticompetitive effects; (5) extent of agency's regulatory powers; and (6) extent of meaningful review of the agency's actions. *See e.g., Hecht*, 444 F.2d at 931-47.

140. *See, e.g.*, L. Sullivan, *supra* note 51, at 733 (the state action immunity doctrine is a product of the judiciary, for "Congress, in enacting [the] Sherman [Act], did not intend to invalidate state action regulating economic activity"). *Cf.* Balter & Day, *supra* note 54, at 450 (antitrust immunity is always a question of congressional intent).

For an excellent comparison of the intent question in the two doctrines, see Slater, *Antitrust and Governmental Action: A Formula for Narrowing* Parker v. Brown, 49 Nw. U.L. Rev. 71, 79 n.35 (1974) (Federal implied immunity involves the question of whether Congress intended to repeal the Sherman Act *pro tanto*. The state action immunity doctrine is concerned with whether Congress intended for the antitrust laws to negate state regulatory systems. Congress may repeal the Sherman Act *pro tanto* by passing legislation, whereas states, under the supremacy clause of the Constitution, may not repeal the Sherman Act.).

141. *See* Balter & Day, *supra* note 54, at 450.

142. 1 P. Areeda & D. Turner, *supra* note 72, ¶ 211; Werden & Balmer, *Conflicts Between State Law and the Sherman Act*, 44 U. Pitt. L. Rev. 1, 6 (1982). It is worth noting that the Sherman Act does not contain any express exemption for states. Rather, the courts have decided that the principles of federalism dictate a prudential limitation on the scope of the Sherman Act. Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After* Midcal Aluminum, 61 B.U.L. Rev. 1099, 1105 (1981).

143. One of the important initial criteria in determining whether there is a state action exemption is repugnancy. One student commentator has argued that:

> Presumably the purpose of the statutory exemption discovered in *Parker* was not to recognize a congressional desire to allow states to nullify the antitrust laws across the board, but to allow states to experiment with alternative terms of regulation. Accord-

munity doctrine resolves a conflict after it has emerged by circumscribing the reach of the antitrust laws, whereas the state action immunity doctrine declares that the antitrust laws never reached far enough to create a conflict.[144]

There are pragmatic considerations that compel these theoretical gymnastics. First, the courts believe that Congress intended that it is sometimes wise to allow states to experiment with different types of regulation.[145] When market forces are ineffective or inefficient, the policy is to allow the states to take discrete measures even if these measures may be at odds with general competitive standards.[146] When such measures violate federal antitrust laws, the state system could be voided and its statutory purpose destroyed if the courts allowed an antitrust challenge.[147] Moreover, when a private business person acts pursuant to state regulation the business person cannot obey both the antitrust laws and diametrically opposed state statutes. Therefore, fairness considerations dictate that either the antitrust laws or the state scheme must fall. If the statutory scheme is to be allowed, as the courts profess to believe Congress intended, it is imperative that the antitrust laws be held in abeyance.[148]

Despite arguments favoring state action immunity, the doctrine has drawn a considerable amount of criticism from commentators. Some writers have noted that federal antitrust laws reflect a basic economic policy of the United States and have argued that the interests of the nation should not be sacrificed to the interests of a few.[149] A closely related criticism of the state action immunity doc-

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> ingly, unless the application of antitrust law would conflict with some positive regulatory action of the state, granting a state action exemption is unnecessary. . . .

Note, *Of Raisins and Mushrooms: Applying the* Parker *Antitrust Exemption*, 58 VA. L. REV. 1511, 1520 (1972). For a more recent analysis, see Werden & Balmer, *supra* note 142, at 25.

144. *Compare supra* text accompanying notes 49-138 *with infra* text accompanying notes 139-201.

145. *See* Page, *supra* note 142, at 1107 (the state action exemption is based on deference to state economic choices); Note, *supra* note 143, at 1514 (state action doctrine is hinged on a practical determination that Congress had reserved to the states the power to regulate their own economic activities).

146. State regulation has not been given a completely free ride. Clearly, a state may not simply authorize private individuals to break the antitrust laws under the guise of state action. L. SULLIVAN, *supra* note 140, at 733. Moreover, in recent years the courts have applied strict standards to the quality of the state's involvement in the challenged conduct. Areeda, *Antitrust Immunity for "State Action" After* Lafayette, 95 HARV. L. REV. 435, 436-38 (1981) (noting that state regulations that obstruct competition without substituting direct state supervision are preempted).

Some commentary has suggested that the Court is approaching a balancing test that may transform the ironclad state action exemption into a rule of reason analysis. Under this approach, if the state action is found to be designed predominantly to obstruct competition, the state system should be struck down. However, if the Court can find a state purpose to correct a failure in the marketplace, the law should be upheld. Werden & Balmer, *supra* note 142, at 61.

147. *See* Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. REV. 693, 694-95 (1974) (suggesting that the state action doctrine is designed to prevent antitrust laws from negating state regulatory systems).

148. *See* Areeda, *supra* note 146, at 437-40 (commenting on the development of the state action doctrine as it applies to private parties); Posner, *supra* note 147, at 694-95.

149. Posner has argued that in other areas of the law the Supreme Court has not hesitated to invalidate state regulation that conflicts with the underlying policy rationale of federal statutes. An example is Perez v. Campbell, 402 U.S. 637 (1971), in which the Supreme Court invalidated part of Arizona's Motor Vehicle Safety Responsibility Act because it conflicted with the policy embodied in the Federal Bankruptcy Act. The argument continues that the policy of free competition underlying the Sherman and Clayton Acts should be sufficient to override competing state regulatory systems at least in the absence of congressional exemption. Posner, *supra* note 147, at 702-03.

trine is that consumers who are not voters in the state creating the regulation may be affected by the restriction and yet have no recourse to protect their own interests. It is argued that such consumers should be entitled to the protection of the antitrust laws.[150] In addition, commentary has noted that the state action immunity doctrine has shielded a significant amount of regulation that is aimed at stifling free enterprise and maintaining artificially high price levels rather than correcting market failure.[151]

To understand the interplay of these criticisms and defenses of the state action immunity doctrine and to determine its proper scope, a review of the doctrine's development will be helpful. The case of *Parker v. Brown*[152] is most widely associated with the state action immunity doctrine.[153] Although *Parker* was not the first case dealing with state action immunity,[154] it "opened the eyes of antitrust counsel to the potential of antitrust immunity when state action is a cause of the restraint."[155] The Court in *Parker* held that Congress never intended for the antitrust laws to be applied to action by states[156] and therefore, the antitrust

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150. One of the strongest criticisms of the state action immunity doctrine in this regard comes from Professor Laurence Tribe in his discussion of the "troublesome" case of Parker v. Brown, 317 U.S. 341 (1943), which is the case that is most often identified with the state action immunity doctrine. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 380-81 (1978). The *Parker* decision upheld a California price maintenance scheme that affected the price of almost all of the raisins consumed in the United States and half those consumed in the world. *Id.* at 347. Obviously, a consumer of raisins in Iowa or New York City had no recourse against California producers and therefore could look only to the antitrust laws to vindicate his interests.

151. Commentary has suggested that state professional licensing requirements, while necessary to protect the public from incompetence, sometimes have been drawn artificially so that they protect practitioners in certain fields from open competition by restricting entry. Other state regulatory programs also may deter competition unnecessarily. Examples include zoning laws, state tax schemes that discriminate between competitors, building and construction regulations, and branch banking restrictions. While arguments against such regulatory programs have been criticized on the grounds that many of these activities lack the conspiracy requirement of § 1 of the Sherman Act, in reality, absent the empowering state regulations, many of these systems could not function without conspiracy. Slater, *supra* note 140, at 77-78.

152. 317 U.S. 341 (1943) (*Parker* involved a challenge to the State of California's raisin proration program. The program was administered by the state's agriculture department, but initiated by private growers. The proration system was designed to keep the price of raisins high. The system effectively prohibited a producer from selling more than 30% of his crop.).

153. White, *Participant Governmental Action Immunity from the Antitrust Laws: Fact or Fiction?*, 50 TEX. L. REV. 474, 476-77 (1972).

154. Many commentators mistakenly assert that *Parker* is the first enunciation of the doctrine of state action antitrust immunity. Comment, *State Action Immunity and the Compulsion Requirement: Joint Ratemaking in Intrastate Trucking*, 71 CALIF. L. REV. 1557, 1559 (1983). "The Supreme Court's first articulation of the relationship between the state's command and federal antitrust immunity came in 1943. In *Parker v. Brown*. . . ." *Id.*

Actually, both Olsen v. Smith, 195 U.S. 332 (1904) and Lowenstien v. Evans, 69 F. 908 (C.C.D.S.C. 1895), preceded *Parker*. *Olsen* involved a challenge to a Texas program of regulating and licensing harbor pilots. The Court in *Olsen* upheld the state program. For a discussion of this case, see White, *supra* note 153, at 476. *Lowenstien* involved the the transportation and sale of liquor by the State of South Carolina. For a discussion of *Lowenstien* as well as *Olsen*, see Note, *State Action and the Sherman Antitrust Act: Should the Antitrust Laws be Given a Preemptive Effect?*, 14 CONN. L. REV. 135, 137 (1981).

155. White, *supra* note 153, at 476.

156. The holding was based upon three grounds: (1) as a matter of legislative history, the court could not find that Congress intended to restrain state action, but only "business combinations"; (2) the act's language was applicable to persons and the Court held that a state was not a person; and (3) acts compelled by the state did not seem to fit the "contract, combination or conspiracy"

laws were not in conflict with a California plan to fix the price of raisins. Thus, the raisin program was allowed to continue.[157] Although *Parker* has been widely criticized, it remains the basis for the state action immunity doctrine.[158]

In order to decide that the Sherman Act did not reach state action, the Supreme Court in *Parker* considered three constitutional issues.[159] The Court first decided that the dormant power of the commerce clause did not invalidate the state regulatory system.[160] In addition, the Court determined that Congress had not intended to occupy the entire field of raisin or agricultural regulation.[161] Finally, the Court found that the supremacy clause was not implicated because of a lack

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language of the statute. *Parker*, 317 U.S. at 341-68. *See* 1 P. AREEDA & D. TURNER, *supra* note 72, ¶ 212a, at 68.

An alternative rationale for the holding has been suggested by Professor Tribe. He has suggested that a more plausible explanation is that the Court recognized that Congress may have implied an antitrust exemption by establishing a federal policy with effects similar to the California program and that the state had replaced market forces with a system of direct regulation. L. TRIBE, *supra* note 150, at 382. *See also,* P. AREEDA, *Antitrust Analysis* 57 (2d ed. 1974); Verkuil, *State Action, Due Process and Antitrust: Reflections on* Parker v. Brown, 75 COLUM. L. REV. 328, 337-39 (1975).

157. *Parker*, 317 U.S. at 352.

158. The criticism in some instances has reached the point of ridicule. Tribe termed the case "among the most troublesome illustrations of this relatively tolerant posture toward 'supplementary' state regulation" and noted that it left the majority of the consumers of California raisins at the mercy of local raisin producers. L. TRIBE, *supra* note 150, at 380-82.

In response to the argument that legislative history evidenced congressional intent to restrain only "business combinations," one commentator has noted:

> The Court's interpretation of congressional intent and legislative history does not seem to be completely satisfactory. The Court's contention that Senator Sherman declared the bill to prevent only "business combinations" is a quotation taken out of context.
>
> It seems apparent that Senator Sherman was distinguishing associations which carry on lobbying and public relations activities from those which actually make sales contracts and reach agreements as to the manner of carrying on commerce. . . . Certainly the California prorate program would be within the meaning of the term "business."

Slater, *supra* note 140, at 83.

Moreover, the Supreme Court undercut its holding that a state is not a person for antitrust purposes when it allowed states to sue for antitrust violations. *See* 1 P. AREEDA & D. TURNER, *supra* note 72, ¶ 212a, at 168 n.8. As for the lack of conspiracy argument, Professor Slater has noted that although the argument is internally consistent, it "[m]isses the larger issue. The state action facilitates an anticompetitive effect which could not otherwise have taken place in the private sector without an actual conspiracy." Slater, *supra* note 140, at 78.

159. *Parker*, 317 U.S. at 341-58. For a general discussion of the constitutional issues involved, see L. TRIBE, *supra* note 150, at 380-84; Verkuil, *supra* note 156, at 332-40; Werden & Balmer, *supra* note 142, at 27-45.

160. *Parker*, 317 U.S. at 359-68. An important consideration was the fact that there were already similar federal policies in existence and therefore, the state regulation did not counteract federal policy. Also the system did not regulate against interstate commerce. Werden & Balmer, *supra* note 142, at 33. The so-called "dormant" power of the commerce clause dictates that state regulation shall be preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). However, the Court likely will approve state regulations that enter an area already regulated by the federal government, so long as the state regulations merely supplement federal law. L. TRIBE, *supra* note 150, at 379. In *Parker*, the Court found that the California program merely supplemented federal regulations and was not in conflict with the federal regulatory scheme.

161. Although similar to the concerns involved in the dormant power of the commerce clause, this "pervasive regulation" theory arises in situations in which Congress implicitly intended to reserve to itself all regulation in the area even though the state regulatory scheme may not conflict with the expressly stated congressional intent. In those situations in which such an implicit reservation has been made, the state regulation is preempted regardless of whether Congress determines that a

of conflict between the federal and state laws.[162] After considering the constitutional aspects of the case, the Court concluded that federal antitrust laws were not intended to encompass state regulatory schemes.[163]

Two historical notes both explain and call into question the Court's decision. The first is that the *Parker* decision came just after the Supreme Court abandoned its attempts to regulate the American economy in the so-called Lochner era.[164] It has been suggested that the Court may have realized that by applying the policies of free competition inherent in the antitrust laws to state economic regulation, it would be interfering with such regulation in much the same way as it had during the Lochner era:[165]

> One senses that the Court realized it was about to walk through a swinging door: emerging from substantive economic review as a constitutional matter, only to enter it as a statutory matter. To avoid this, a unanimous Court noted California's substantial involvement in the regulatory scheme and held that the Sherman Act was not intended to reach such state action.[166]

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conflict exists. *See supra* text accompanying notes 100-38. *See also*, Werden & Balmer, *supra* note 142, at 36-37. An illustration of this principle is Campbell v. Hussey, 368 U.S. 297 (1961). In *Campbell*, the Court invalidated a state system that supplanted, but was consistent with, federal tobacco labeling requirements. The Court held that the federal expressions of need for a "uniform" standard of tobacco classification indicated that Congress intended to exclude local regulation. *Id.* at 302.

Compare Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) (the challenge to the California ripeness test conflicted with the test used for Florida avocados). The Court in *Florida Lime* found that there was no need to hold that Congress intended to set up a uniform standard when it approved federal marketing regulations for Florida avocados. Thus, arguably, there was no reason for holding that federal law occupied the field. *Id.* For a discussion of this case, see L. TRIBE, *supra* note 150, at 383-84. Tribe noted that the federal standards for Florida avocado growers were not the product of an impartial bureaucratic decision with nationwide applicability. Rather they were the result of decisions of self-interested south Florida avocado growers that had no nationwide impact. The lack of nationwide applicability of the ripeness test as well as the evidence of the allowance of self-interested conduct by south Florida growers indicated that Congress had not intended to occupy the entire field and thus preempt a California state program that set its own standards for avocado ripeness. *Id.*

162. *Parker*, 317 U.S. at 352. At the time that *Parker* was decided, the Court was taking a solicitous view of state regulation by holding that when there was repugnancy so clear that the acts could not stand together, the supremacy clause would be implicated. The Court in *Parker* held that there was no basis for assuming that the Sherman Act was intended to cover state action. Werden & Balmer, *supra* note 142, at 40-50. To some extent, these three considerations may have merged into a general statement by the Court that the state system neither conflicted with any congressional power to regulate commerce nor intruded into a field that Congress had intended to regulate exclusively. Therefore, the system did not need to be preempted.

163. *Parker*, 317 U.S. at 348.

164. The Lochner era, named for the landmark case of Lochner v. New York, 198 U.S. 45 (1904), was a period in which the Supreme Court applied the due process clause of the constitution to free enterprise, often holding that the legislature could not constitutionally restrict free enterprise. The substantive due process doctrine was responsible for the invalidation of a significant amount of social legislation, but the analysis had fallen from use by 1940. For a discussion of substantive due process during the Lochner era, see J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW, 431-43 (2d ed. 1983).

165. *See* Verkuil, *supra* note 156, at 331 & n.19. *See also* Werden & Balmer, *supra* note 142, at 70 (suggesting that *Parker* was a product of the unprecedented hardship of the Depression and a judicial notion that extraordinary economic measures were justified).

166. Verkuil, *supra* note 156, at 332-33 (footnote omitted). The author noted that given the "broad and vague mandate, the Sherman Act becomes the alter ego of the (economic) due process clause." *Id.* at 333.

Thus, the Supreme Court's sensitivity to the problems of the Lochner era and substantive due process may have brought about a narrow reading of the Sherman Act.

The Supreme Court also has been criticized for failing to consider the emerging nature of the Sherman Act.[167] When the Act was passed in 1890, the Supreme Court was giving the commerce clause a very narrow reading that did not support attacks on state legislation, because most state regulatory programs did not involve the traditional concept of interstate commerce.[168] It would have made little sense to declare explicitly that the Sherman Act applied to state regulatory schemes, because most state schemes had a direct effect only within the state enacting the regulation.[169] However, as the years passed, the Supreme Court broadened its definition of interstate commerce to include activity that had only an indirect effect on commerce.[170] As the Court expanded its interpretation of the commerce clause, it also extended the reach of the antitrust laws.[171] While there may not have been sufficient basis for applying the Sherman Act to state conduct when the act was passed, a sufficient basis existed by the time of the *Parker* decision. However, the Court chose not to rely on that basis.[172]

For nearly thirty years after the *Parker* decision the Supreme Court did not decide any other state action antitrust cases. In the past ten years, a series of cases have developed the state action immunity doctrine. These cases imply some limits on the doctrine and make broader inquiries into whether state involvement in anticompetitive activity justifies such conduct.[173] Although these recent

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167. Werden & Balmer, *supra* note 142, at 57.

168. *Id.* Beginning in the 1880s and continuing through the turn of the century, the Court held that activity which took place within a single state was not within the reach of the commerce clause. Thus, a state could enact minimum price levels without implicating the commerce clause or any legislation enacted pursuant to the commerce clause as long as the regulated conduct occurred only in one state. An example of this type of state regulation is found in United States v. E. C. Knight & Co., 156 U.S. 1 (1895), where the Court held that the monopoly acquisition of sugar refineries could not be challenged under the Sherman Act because regulation of manufacture was preserved for the states and also because the regulation lacked a *direct* impact on interstate commerce. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 164, at 141.

169. *See* Werden & Balmer, *supra* note 142.

170. The first major breakthrough occured in Swift & Co. v. United States, 196 U.S. 375 (1905). In *Swift*, Justice Holmes introduced the "current of commerce" theory. The Court held that the Sherman Act applied to agreements on bidding practices that were entered into in a single state, because the location was only a temporary stopover in a system of interstate cattle marketing that would ultimately affect interstate commerce. For discussion of this and subsequent developments, see J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 164, at 153-57.

171. *See* United States v. South Eastern Underwriters Ass'n, 322 U.S. 533 (1944) (the Supreme Court held that insurance, which was not defined as commerce in 1890, fit within the proscriptions of the Sherman Act). *See also* Werden & Balmer, *supra* note 142, at 57. "[W]e have been shown not one piece of reliable evidence that the Congress of 1890 intended to freeze the proscription of the Sherman Act within the mold of then current judicial decisions. . . . On the contrary all acceptable evidence points the other way." *Id.* (quoting United States v. South Eastern Underwriters Ass'n, 322 U.S. 533, 557 (1944)).

172. Werden & Balmer, *supra* note 142, at 57.

173. Burling, Lee & Quarles, *"State Action" Antitrust Immunity—A Doctrine in Search of Definition*, 1982 B.Y.U. L. REV. 809. The authors argue that subsequent to the *Parker* decision, the Supreme Court has broadened the scope of its inquiry for determining whether a state is sufficiently involved in the challenged conduct to justify exempting the challenged conduct from the antitrust laws. The authors contend that some state activities should render conduct wholly immune, but other state activities should merely play a role in determining whether a substantial antitrust violation has occurred.

decisions[174] require courts to consider the extent and nature of state involvement in deciding the question of antitrust immunity,[175] two 1985 decisions appear to have slowed the tendency to narrow the state action doctrine by requiring a less stringent examination of the state's involvement in the regulatory scheme.[176]

In *Parker*, the question of what constituted state action was not a difficult one for the Court because the defendant was a state agent[177] acting within the scope of his authority in carrying out state law.[178] Later cases focused on private defendants acting pursuant to state law. In this context the Court has narrowed the scope of antitrust immunity.[179] In cases such as *Cantor v. Detroit Edison Co.*,[180] the Court broadened its inquiry from the identity of the defendant to the nature of the challenged act. The *Cantor* plurality opinion which was written by Justice Stevens focused on the fact that the challenged conduct was not official action undertaken by state officials.[181] Justice Blackmun's concurrence employed an analysis that resembled a rule of reason analysis, weighing the state's regulatory interest against the anticompetitive effect of the regulated conduct.[182]

In *California Retail Liquor Dealers Association v. Midcal Aluminum Inc.*,[183] the Court developed a method of examining the relationship between the defendant's conduct and state regulatory policy. The criteria for qualification for state action immunity announced in *Midcal* are as follows: (1) the challenged action must be taken pursuant to a clearly articulated state policy; and (2) the conduct must be actively supervised by the state.[184]

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174. The most important state action decisions of the past decade are Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (minimum price standard announced and enforced by local bar association held *not* immune from antitrust challenge because the system was not compelled by any authorized state agency); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) (power company's program of giving away free light bulbs held subject to challenge as a tying arrangement); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (challenge to state bar's ban on lawyer advertising held immune from antitrust attack because the challenged conduct was required by rules of the Arizona Supreme Court, a state agency and therefore, was a command of a sovereign); and California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) (holding that a California alcoholic beverage price fixing scheme was open to antitrust attack).

175. Professor Areeda has noted that increased state involvement in regulatory schemes is not sufficient for antitrust immunity. The state must intend to replace competition with a bona fide regulatory system. In addition, the state must supervise actively the system to protect the public from the abuses of anticompetitive behavior. Areeda, *supra* note 146, at 438. Other commentators have noted that in *Midcal*, where the two-pronged supervision test was announced, the Court engaged in a balancing of the state's proferred goals for adopting its price maintenance scheme: the promotion of moderation in alcohol consumption and the preservation of small, independent merchants. Burling, Lee & Quarles, *supra* note 173, at 827.

176. *See* Southern Motor Carriers Rate Conference, Inc. v. United States, 105 S. Ct. 1721 (1985); Town of Hallie v. City of Eau Claire, 105 S. Ct. 1713 (1985).

177. The defendant in *Parker* was W.B. Parker, the Director of Agriculture for the State of California. 317 U.S. at 341.

178. *Id.* at 352-58. The statute in question was CAL. AGRIC. CODE §§ 59501-694 (West 1973).

179. Areeda, *supra* note 146, at 438.

180. 428 U.S. 579 (1976).

181. *Id.* at 591.

182. *Id.* at 605-14. For further discussion of the *Cantor* case, see Burling, Lee & Quarles, *supra* note 173, at 816-23.

183. 445 U.S. 97 (1980).

184. *Id.* at 105. For an in-depth discussion of the Court's development of the state action immunity doctrine, see Burling, Lee & Quarles, *supra* note 173.

The first prong of the *Midcal* test was developed as a result of cases such as *Goldfarb v. Virginia State Bar*,[185] *Cantor v. Detroit Edison Co.*,[186] and *Bates v. State Bar of Arizona*.[187] In those cases, the threshold consideration in examining the relationship between a private defendant's conduct and a state's regulatory scheme was the presence or absence of state compulsion.[188] In evaluating a state action immunity defense, it was not enough that the state merely failed to object to the challenged conduct, or even that the state tacitly approved of the conduct. Rather, the state had to require explicitly the anticompetitive conduct.[189] In some cases, compulsion alone has been held to be insufficient to create state action immunity.[190]

The two 1985 cases that considered the state action immunity doctrine seem to have steered away from the compulsion requirement. In *Town of Hallie v. City of Eau Claire*[191] and *Southern Motor Carriers Rate Conference v. United States*,[192] the Court considered the state action immunity defenses of defendants who acted pursuant to clearly articulated state policies, but who were not compelled by the states to act as they did. In *Town of Hallie*, the plaintiff municipalities claimed that in order to satisfy the clear articulation requirement of the *Midcal* test, the state legislature must have stated expressly in either the statute or in the legislative history that it intended for the delegated action to have anticompetitive effects.[193] The Court rejected this interpretation of the *Midcal* criterion, recognizing that a requirement of such explicit authority may have adverse effects on a state's ability to enact flexible regulatory schemes.[194] Moreover, the Court found no requirement of state compulsion of the challenged conduct when the defendant is a municipality, reasoning that a municipality is an arm of the state and can be presumed to act in the public interest.[195] The Court rejected the active state supervision requirement when the defendant is a municipality for the same reasons.[196]

After *Town of Hallie*, all that remains of the *Midcal* test for municipalities is the "clearly articulated state policy" requirement. However, the test remains very much alive for private defendants. In *Southern Motor Carriers*, the Court

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185. 421 U.S. 773 (1975).
186. 428 U.S. 579 (1976).
187. 433 U.S. 350 (1977).
188. 16E J. VON KALINOWSKI, BUSINESS ORGANIZATIONS: ANTITRUST LAWS AND TRADE REGULATION § 46.03 (1986); Note, Parker v. Brown *Revisited: The State Action Doctrine After* Goldfarb, Cantor, *and* Bates, 77 COLUM. L. REV. 898, 913 (1977).
189. Note, *supra* note 188, at 913. *But see* 1 P. AREEDA & D. TURNER, *supra* note 72, ¶ 215b, at 95-97. The authors argue that compulsion should not be deemed a necessary or threshold requirement. Rather, compulsion should be viewed as evidence of state intent to replace competition with regulation—a consideration that the authors see as central to the application of the state action immunity doctrine.
190. This notion is demonstrated most clearly in the *Cantor* case where three dissenters argued that compulsion alone should have been sufficient to create state action immunity. 428 U.S. at 614-40. Other commentary note that if compulsion alone was sufficient, the state simply might order its citizens to disobey the law. 1 P. AREEDA & D. TURNER, *supra* note 72, ¶ 215b, at 94.
191. 105 S. Ct. 1713 (1985).
192. 105 S. Ct. 1721 (1985).
193. *Town of Hallie*, 105 S. Ct. at 1719.
194. *Id.*
195. *Id.* at 1720-21.
196. *Id.*

held that *Midcal* applies to private defendants because the success of an antitrust action should depend on the behavior, not the identity, of the defendant.[197] The Court went on to refine its interpretation of *Goldfarb*, stating that while a private party may not immunize its own anticompetitive conduct, state compulsion is not a *sine qua non* of state action immunity.[198] According to the Court in *Southern Motor Carriers*, the compulsion requirement is inconsistent with *Parker v. Brown*, because it reduces the range of regulatory alternatives to the states and may cause greater restraints on trade by forcing states to require, rather than merely permit, anticompetitive conduct.[199] In finding the ratemaking activities of the motor carriers immune from the antitrust laws, the Court held that when evidence conclusively shows that a state intends to adopt a permissive policy of regulation, the absence of compulsion is not fatal to a private party's antitrust defense.[200] However, the Court made it clear that such a permissive policy will only be found immune where the program provides for active state supervision.[201]

Thus, in *Town of Hallie* and *Southern Motor Carriers*, the Court avoided applying a strict test to either public or private defendants. Instead, the Court chose to balance the state's interest in the regulatory scheme against the scheme's anticompetitive effects. In both cases the Court gave deference to the state's judgment and upheld the state created regulatory scheme.

V. The *Asheville II* Decision

In *North Carolina* ex rel. *Edmisten v. P.I.A. Asheville (Ashville II)*,[202] the Fourth Circuit sitting en banc considered both the implied immunity and state action immunity defenses to North Carolina's antitrust challenge.[203] Reversing the district court and the earlier Court of Appeals panel, the court found that neither justification was sufficient to bar the antitrust challenge.[204]

A. State Action Immunity

The court first considered the state action immunity defense. Noting that the defendant was a private party, the court applied the two-pronged *Midcal* test.[205] After examining the North Carolina CON program, the court found that the state "was sufficiently interested in the regulation of health care provision to legislate extensively in the area."[206] The court assumed, without deciding, that the CON

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197. *Southern Motor Carriers*, 105 S. Ct. at 1728. In a dissenting opinion, Justice Stevens reaffirmed the compulsion requirement of the state action immunity doctrine. *Id.* at 185-90 (Stevens, J., dissenting). *See also supra* text accompanying notes 178-83 (stating that the state action immunity doctrine is available to private defendants only when the state has compelled the challenged behavior).

198. *Southern Motor Carriers*, 105 S. Ct. at 1729.

199. *Id.*

200. *Id.* at 1729-30.

201. *Id.*

202. 740 F.2d 274 (4th Cir. 1984).

203. *Id.* The previous panel decision considered only the implied immunity question because the judges found implied immunity sufficient to block the state's antitrust challenge. North Carolina *ex rel.* Edmisten v. P.I.A. Asheville, Inc., 722 F.2d 59 (4th Cir. 1983) (Asheville I).

204. *Asheville II*, 740 F.2d at 276-85.

205. *Id.* at 277. *See supra* text accompanying notes 183-90.

206. *Asheville II*, 740 F.2d at 278.

program represented a clearly articulated policy of the state of North Carolina.[207] Despite this assumption the court stated that even if the program could satisfy the first prong of the *Midcal* test, it failed to satisfy the second prong, which requires continuing state supervision of authorized acquisitions.[208] The court found that once a CON was granted to a health care provider, the state made no attempt to actively supervise the use of the acquisition.[209] This failure to supervise caused the North Carolina CON program to fail the *Midcal* test for state action immunity.[210]

B. Implied Federal Immunity

After concluding that the North Carolina CON program did not qualify for state action immunity, the court addressed the issue of implied federal immunity. The court split its inquiry into two parts, examining both the statutory language and the legislative history of the NHPRDA. The court initially looked for an affirmative demonstration of legislative intent to repeal.[211] Second, the court inquired into the degree of irreconcilability between the two statutes, considering both the plain repugnancy and pervasiveness standards.[212] After concluding the two-part analysis, the court found no federal implied immunity.[213]

1. The Court's Review of Legislative Intent

The court in *Asheville II* reviewed the language of the NHPRDA and found evidence that the NHPRDA was designed to promote rather than replace competition. This evidence was found in the section of the act entitled "National Health Priorities: Strengthening Competition in the Supply of Services."[214] After reviewing the express language of the act, the court focused on the legislative history of the NHPRDA. The court noted that although the act is silent on the question of implied repeal of the antitrust laws, the 1979 amendments to the act "provide for competition merely to be *supplemented* by regulation, at least as long as regulation allocates supply in accordance with planning goals. . . ."[215]

The court also examined the policy considerations underlying the North Carolina CON statute and the antitrust laws. The court found that the antitrust laws represent "fundamental national economic policy" that is vital to the free enterprise system.[216] After examining the goals of the NHPRDA, the court found that the goals of the act are consistent with the goals of the antitrust laws.[217]

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207. *Id.*
208. *Id.* at 278-79.
209. *Id.*
210. *Id.* at 279.
211. *Id.* at 280-84.
212. *Id.* at 284-85.
213. *Id.* at 285.
214. *Id.* at 280. The section that the court was referring to is 42 U.S.C. § 300k-2(b)(1). While candidly admitting that the competitive system was wanting when the act was passed, the court noted that the act seemed to be aimed at "buttressing competition" and concluded that there was no evidence "that Congress intended to bar the use of the most powerful pro-competitive laws. . . ." *Asheville II*, 740 F.2d at 280.
215. *Asheville II*, 740 F.2d at 281 (emphasis in original).
216. *Id.* The court stated that since the goal of the NHPRDA is to improve the availability of health care, "it is hard to understand why the Sherman Act should not be applied to cases involving regulatory restraints on competition. . . ." *Id.*
217. *Id.*

Continuing its comparison of the antitrust laws with the NHPRDA, the court next considered the remedies available under each scheme.[218] The court found that the $20,000 fine available under North Carolina law was inferior to the treble damages provided for in the Sherman Act.[219] In addition, the court found that the CON review board established by the North Carolina legislature did not have the authority to monitor postacquisition activities of health providers in a manner similar to antitrust review.[220]

2. *The Pervasiveness Standard*

Because no explicit declaration of a congressional intent to repeal the antitrust laws was found, the court in *Asheville II* turned to the pervasiveness standard.[221] The court noted that the United States Supreme Court had already reviewed the NHPRDA in *National Gerimedical Hospital v. Blue Cross of Kansas City*[222] and held that the regulatory structure of the CON program was insufficiently pervasive to imply a *pro tanto* repeal of the Sherman Act.[223] In *Asheville II*, the court applied two separate standards to determine whether pervasiveness existed. One standard which was enunciated in *Oahu Gas Service, Inc. v. Pacific Resources, Inc.*,[224] required: (1) legislative history indicating an intent to subordinate antitrust laws to regulatory policy; (2) a duty on the part of the state to actively enforce a nondiscretionary antitrust standard; and (3) the availability of remedial relief similar to that found in the antitrust laws.[225] The second standard which was outlined in *Phonetele, Inc. v. American Telephone & Telegraph Co.*,[226] required: (1) explicit congressional approval of the ultimate anticompetitive effect; (2) explicit congressional authorization to order the challenged anticompetitive effect; and (3) no inconsistency between the challenged conduct and the agency's express policy.[227] The *Asheville II* court decided that the North Carolina CON statute failed to meet either the *Oahu Gas Services* or the *Phonetele* test.[228] The court's decision was based upon the fact that the statute contained no legislative history showing intent to repeal, failed to provide sufficient remedial relief, and did not "impose a duty on anyone to enforce an antitrust standard."[229]

After concluding that the North Carolina CON program failed the pervasiveness test the court looked for a plain repugnancy between the NHPRDA and the antitrust laws. Noting the judicial preference for finding statutes compatible rather than irreconcilable,[230] the court held that the NHPRDA and the antitrust laws are not repugnant.[231] The court's conclusion was based on the no-

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218. *Id.*
219. *Id.* at 282.
220. *Id.* The court noted that these considerations were important in one case where immunity was implied. Pan Am. World Airways v. United States, 371 U.S. 296, 304 (1963). *See supra* text accompanying notes 105-10.
221. *Asheville II*, 740 F.2d at 282-83.
222. 452 U.S. 378 (1981). *See supra* text accompanying notes 40-45.
223. *Asheville II*, 740 F.2d at 283.
224. 460 F. Supp. 1359 (D. Hawaii 1978).
225. *Id.* at 1374.
226. 664 F.2d 716 (9th Cir. 1981).
227. *Id.* at 731-32.
228. *Asheville II*, 740 F.2d at 283-84.
229. *Id.* at 282.
230. *Id.* at 284.
231. *Id.*

tion that CON review and antitrust review should be considered two steps which must be undertaken before any acquisition may be authorized.[232]

VI. Analysis of the Court's Decision in *Asheville II*

The Fourth Circuit Court of Appeals reached the correct legal decision in *North Carolina* ex rel. *Edmisten v. P.I.A. Asheville, Inc. (Asheville II)*. The court found that the state's involvement in approving the hospital merger was not so great as to make the merger state action.[233] In addition, the court concluded that the NHPRDA was not sufficiently repugnant to the antitrust laws and did not occupy pervasively the field of health care so as to justify the implication that Congress intended to repeal the antitrust laws by passing the act.[234] In considering the state action immunity defense, the Court correctly applied the *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.* test, which was designed to distinguish action that is undertaken by a state from essentially private conduct cloaked with the title and appearances of state action.[235] While the North Carolina CON program is sufficiently detailed and extensive to meet the clearly articulated state policy prong of *Midcal*, it cannot meet the continuing state supervision requirement.[236] The state did not compel anticompetitive behavior, and the court was unable to find any other evidence of a state intent to replace competition with regulation.[237]

The result in *Asheville II* arguably would be the same even after *Southern Motor Carriers Rate Conference v. United States*. In *Southern Motor Carriers*, the Supreme Court relaxed the requirements for the first prong of the *Midcal* test by holding that state compulsion is not necessary and that a state may adopt a permissive policy that allows competitors to replace competition with regulation.[238] The Court in *Southern Motor Carriers*, however, did not relax the continuing state supervision requirement; in *Southern Motor Carriers* the Government conceded that the second prong of *Midcal* was satisfied.[239]

In *Asheville II*, the Fourth Circuit assumed that the first prong of *Midcal* had been satisfied, because North Carolina had expressed sufficient interest in health care to enact extensive regulation in that area.[240] Even if the *Asheville II* court had been required to decide the issue, the *Southern Motor Carriers* decision would dictate that the court find the first prong satisfied. Similar to the collective ratemaking activity in *Southern Motor Carriers*, the CON program in *Asheville II* evidenced a state intent to adopt a regulatory program that to some extent might displace competition.

The defendants in *Asheville II* could not use the *Southern Motor Carriers* decision to satisfy the second prong of the *Midcal* test, because *Southern Motor Carriers* did not address the continuing state supervision requirement. The contin-

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232. *Id.* at 284-85.
233. *Id.* at 277-79.
234. *Id.* at 283-85.
235. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).
236. *See supra* text accompanying notes 207-10.
237. North Carolina *ex rel* Edmisten v. P.I.A. Asheville, Inc. (Asheville II), 740 F.2d 274, 279 (4th Cir. 1984.)
238. *See supra* text accpompanying notes 197-201.
239. Southern Motor Carriers Rate Conference v. United States, 105 S. Ct. 1721, 1730 (1985).
240. *Asheville II*, 740 F.2d at 278.

uing state supervision requirement was the requirement that proved fatal to the defendants in *Asheville II*.[241] The *Town of Hallie v. City of Eau Claire*[242] decision reinforced the active state supervision requirement for private parties, stating that "(w)here a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State."[243] Thus, when a private party is involved, the state must actively supervise anticompetitive activity regardless of its intent to replace competition with regulation. The North Carolina CON program set forth no mechanism for continuing review of the hospital's economic practices to ensure that they conformed to the goals of the NHPRDA.[244]

The court's conclusion that the NHPRDA does not contain an implied repeal of the antitrust laws in the area of regulation covered by the NHPRDA was also justified. As is often the case, the legislative history of the NHPRDA failed to provide the Court with any conclusive evidence of congressional intent pertaining to the interaction of the health care act and the antitrust laws.[245] In the earlier Fourth Circuit decision of *Ashville I*,[246] the three judge panel purported to find intent to repeal in the following remarks made by Representative Paul Rogers:

> Congress sanctioned actions which might otherwise be in violation of our antitrust laws. The intent of Congress was that HSA's and providers who voluntarily work with them in carrying out the HSA's statutory mandate should not be subject to the antitrust laws. If they were, [the NHPRDA] simply could not be implemented.[247]

However, the Fourth Circuit took Representative Rogers' comments out of context. The full text of his remarks shows that Representative Rogers was referring to instances in which a health systems agency specifically has requested or ordered one hospital to eliminate some underused and expensive service as part of an overall allocation plan for health service delivery.[248] The Supreme Court considered Representative Rogers comments in *National Gerimedical Hospital v. Blue Cross of Kansas City*.[249] According to the Court, these remarks require a repeal of the antitrust laws only when application of those laws might block necessary or desired cooperation among health care providers.[250]

The Fourth Circuit was correct in its refusal to hold that a pervasive regulatory scheme existed that would imply repeal.[251] The most prominent problem with the NHPRDA is the lack of a system of regulation that parallels the regulatory provisions of the antitrust laws.[252] Without antitrust-like regulatory standards, the

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241. *See supra* text accompanying notes 208-10.
242. 105 S. Ct. 1713 (1985).
243. *Town of Hallie*, 105 S. Ct. at 1720.
244. *See supra* text accompanying notes 218-20.
245. *Asheville II*, 740 F.2d at 280. For a discussion of implied immunity and methods of determining congressional intent, including legislative history, see *supra* text accompanying notes 49-138.
246. 722 F.2d 59 (4th Cir. 1983).
247. *Id.* at 66 (quoting 124 CONG. REC. H11 963 (daily ed. Oct. 10, 1978) (remarks of Rep. Rogers)).
248. 124 CONG. REC. H34932 (daily ed. Oct. 10, 1978) (remarks of Rep. Rogers).
249. 452 U.S. 378 (1981).
250. *Id.* at 393 n.18.
251. For a discussion of what constitutes pervasiveness, see *supra* text accompanying notes 100-38.
252. *Ashevelle II*, 740 F.2d at 283.

NHPRDA cannot properly replace competition with regulation and cannot prevent the evils associated with anticompetitive conduct.

The court's conclusion that the North Carolina CON statute is not repugnant to the antitrust laws also was correct. The Supreme Court's standard of irreconcilability was not met[253] because the NHPRDA and the Sherman Act may both operate without serious conflict.[254] Moreover, the situation presented in *Asheville II*, a professional group acquiring a monopoly over psychiatric care in one region, does not involve the "cost-saving cooperation among providers" that the Supreme Court has stated may confer antitrust immunity.[255] Rather, the defendants' behavior in *Asheville II* amounts to no more than pure monopolistic conduct, disguised as state-compelled action.

VII. A Proposal to Eliminate the Conflict Between Public Utility and Free Market Regulation of Hospitals

The heart of the NHPRDA is the various CON programs that serve as a traditional public utility licensing requirement designed to limit entry and expansion in hospital and related medical services markets. Through the enactment of the NHPRDA, legislatures intended to promote the public benefits supposedly attainable through entry limiting public utility regulation, while retaining the basic free market principles and protections of a competitive system.

The skyrocketing hospital and related public welfare costs that have occured since the advent of NHPRDA have proven that the legislative intention was misplaced. Policymakers should choose either a public utility or free market regime, rather than the existing hybrid approach to regulation. After choosing the appropriate scheme, the policymakers should concentrate efforts upon promoting the chosen alternative through comprehensive public utility or antitrust rulemaking and enforcement. A review of the advantages and disadvantages of the alternative schemes suggests that if ideology and other impediments to the policing of free markets are eliminated, the free market approach (with welfare safeguards) is preferable.[256]

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253. *See* Radzanower v. Touche Ross & Co., 426 U.S. 148, 155 (1976).

254. *Ashevelle II*, 740 F.2d at 284.

255. National Gerimedical Hospital v. Blue Cross of Kansas City, 452 U.S. 378, at 393 n.18 (1981). Such cost-saving cooperation is consistent with the NHPRDA's stated goal of improving health care and holding down costs. *See* 42 U.S.C. § 300k(b)(1) (1982).

256. An example of the judicial ambivalence to the creation of a policed free market in health care, is contained in a recent seventh circuit decision, Ball Memorial Hospital, Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325 (7th Cir. 1986). The court in *Ball Memorial* demonstrated undue deference to the claims of an institutional defendant whose goals were only ambiguously consistent with the interests of consumers. In *Ball Memorial*, a hospital challenged and sought to enjoin two proposed actions by Blue Cross/Blue Shield of Indiana. The defendant, the dominant health insurance provider and thus dominant "customer" of health care, first sought to offer a preferred-provider-organization (PPO) health care plan to hospitals on behalf of its policy-holders. The defendant also sought to merge existing services and units to further increase its market power in health care financing. The Seventh Circuit Court of Appeals affirmed a ruling in favor of the legality of both actions.

The creation of PPO's is an action that could foster health care consumer price sensitivity and the dissemination of price information. A PPO alternatively may be a device to foster price-fixing. *See infra* text accompanying note 262. Moreover, the increased concentration in the health insurance market resulting from mergers ultimately will institutionalize that market and create incentives for the functional equivalent of maximum price fixing and public utility rate regulation.

Traditionally, government imposed entry restrictions such as CON have been justified by use of one of the "four common reasons" that follow: "(1) to protect consumers from firms that may provide low quality services; (2) to continue the advantages of natural monopoly; (3) to allocate inherently scarce resources; and (4) to sustain a system of minimum rate regulation and thereby avoid 'destructive competition.'"[257] The government imposed entry restrictions presented by CON programs have never been justified through the use of any of the above mentioned reasons. The CON program has not been directly defended on the ground that excluded health care providers had been offering or would have offered low quality care to patients; indeed, the medical profession is separately regulated for the protection of patients through other methods.[258] Neither hospitals nor related health care services have been said to comprise a "natural monopoly" with scalar economy characteristics.[259] Hospital services are not "inherently scarce" by virtue of their technical or physical character.[260] Last, although the "destructive competition" that exists between public and private hospitals and "cream-skimming" of wealthy patients by private hospitals are legitimate problems that warrant government intervention for the ultimate protection of patients, the CON program has not been accompanied by the full panoply of public utility protection, including minimum rate regulation.[261]

In summary, none of the four recognized reasons for government limitations of entry into a market can justify the CON program as it presently exists. In fact, a recent speech by the then acting Chairman of the Federal Trade Commission emphasized that CON has solved fewer problems than it has created. The speech presented an illuminating overview of specific FTC concerns in the health care industry. The overview included the following areas of concern: (1) bad faith

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257. *See* GELLHORN & PIERCE, REGULATED INDUSTRIES 254-62 (West Nutshell Series, 1982). Because the fourth alternative for limiting entry is the only rational one with respect to health care markets, the following excerpt from Gellhorn and Pierce is provided:

> Destructive competition also is used in a more narrow sense, however, to describe the unfavorable potential results of competition among firms with particular cost characteristics. In a competitive market, firms sell at a price equal to marginal cost. If competitive firms have high fixed costs and excess capacity, and they sell all their products at marginal cost, they will not earn revenues sufficient to cover all their fixed costs. *See generally* 2 A. Kahn, The Economics of Regulation 172-178 (1971). With excess capacity, the marginal cost of a product is below its fully allocated cost because marginal cost does not include the cost of capacity when a firm already has excess capacity. The cost of the excess capacity is a sunk cost that is ignored for pricing purposes. Eventually, the financial condition of firms in this circumstance deteriorates; they are not able to maintain their assets in good condition; the quality of products and services they provide declines; and their customers may suffer as a result.

Id. at 255.

258. *See* Havighurst & King, *supra* note 1.

259. *See generally* Idaho Power & Light Co. v. Blomquist, 26 Idaho 222, 141 P. 1083 (1914). For an early explanation of the natural monopoly rationale, see Smith, *The Federal Power Commission and Pipeline Markets: How Much Competition?* 68 COLUM. L. REV. 664 (1968).

260. *But see* Federal Communications Comm'n v. Sanders Bros. Radio Station, 309 U.S. 470 (1940). Some Societies, including rural American communities, may need to allocate and preserve health care services because of the current scarcity of trained medical personnel. Unfortunately, limiting the expansion and entry of hospitals into those areas will only increase the practical scarcity of personnel. Obviously, hospitals cannot expand or grow unless they have satisfied the scarcity problem.

261. *Compare* the majority and dissenting opinions in Planters Bank v. T.M. Garrott, 239 Miss. 248, 122 So. 2d 256 (1960). *See also* Gellhorn & Pierce, *supra* note 257, at 254-67.

opposition to CON proceedings filed by competitors to avoid competition; (2) restrictive membership rules in private professional and accrediting associations that inhibit competition; (3) state board advertising restrictions on price and services, that impede necessary information flow to consumers; (4) medical groups' organization to deny hospital privileges to competitors; (5) boycotts by doctors and others aimed at increasing insurance reimbursement or reducing review of the need for services; and (6) the abuse of Preferred Provider Organizations as conduits to fix prices, particularly where those organizations are linked to the providers.[262] Each of these criticisms of the status quo in health care is on point, either because NHRPDA and CON have not gone far enough to regulate price and service more intrusively, as in a traditional public utility (or government controlled) regulatory regime, or because CON, together with the ideologically skewed antitrust enforcement agencies and courts (which fail to recognize that free markets must be policed to remain free), have interfered with the anticipated benefits of true competition.

Free market antitrust regulation of health care markets has not worked for several reasons. First, customers of health care are not price-sensitive because, until recently, third parties (insurance companies and the government) have been subsidizing on a full or proportionate basis. Second, customers have insufficient information about the price, service, and quality of health care providers because professional ethics and tradition discourage the collection, promotion, and circulation of such information, and because no government, self-regulatory, or public interest agency has filled the vacuum. Third, the quasi-public utility legislation that is currently in force prevents new entry or expansion and thus interferes with competitive pressures that would otherwise control price increases. Last, health care is deemed essential to a humane society and thus necessarily implicates welfare policy, as opposed to free market policy; therefore publicly owned providers, like other government agencies, do not have the profit incentives necessary to maximize efficiency.

On the other hand, unlike traditional public utility regimes, public utility regulation (through CON programs) has not been effective. First, the regulation, while limiting new entry, does not contain a price control mechanism. Second, the regulation, while requiring certification of some cost factors—for example expansion, major equipment, and acquisitions—contains no provision for regulatory review of most investment, cost, and labor decisions. Third, the health care markets existing prior to CON regulation were particularly noncompetitive and inefficient, and the regulation effectively "grandfathered" the status quo, requiring few changes to preexisting organizational design. Last, although health care markets possess some scalar economy characteristics, those markets are not defined properly as "natural monopolies" requiring intensive and ultimately inefficient government regulation.

In a recent op-ed piece identifying problems in health care markets, former H.E.W. Secretary Joseph Califano expressed the view that corporate America, which is bearing an increasing burden to pay for health care as an employee fringe benefit, can take steps to cure many of the ills that exist in the regulation of

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262. *See* TRADE REG. REP. (CCH) ¶ 50,479, at 56,275.

health care in America.[263] Notwithstanding the obvious merit of Califano's editorial, a crucial distinction should be maintained between well-intentioned but short-sighted efforts to increase efficiency by approving private mergers or government-ordained reductions in capacity, and the long term efficiencies that result, unilaterally and naturally, from the continuing spur of free market competition.

The CON program's direct limitations on competition are incentives to monopolize. Because it can serve no recognized regulatory function, the CON program and other professionally created impediments to competition should be reconsidered by Congress and eliminated. In a similar manner, private integration in health care markets that increase market concentration and conflict with basic Clayton Act policy should be prohibited. The deleterious effect of unchecked integration in health care markets is a perfect example of why the recently announced Reagan Administration proposal to relax antimerger laws is misguided. The Government should adopt a free market approach, with antitrust policing. Such an approach will allow the private market in the long term to allocate services more efficiently and reduce the costs of health care in America.[264]

VIII. Conclusion

The NHPRDA is a legislative attempt to cure the effects of market dysfunction in the health care industry.[265] There have been suggestions, by those affected by the act and by commentators, that the act was intended to impose a public

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263. *A Revolution Looms in American Health*, N.Y. Times, Mar. 25, 1986, at A31, col. 2. Califano argues, among other things, that:

> Half the hospital beds can be closed down in less than 10 years. The number of doctors, particularly specialists, can be sharply curtailed. Their monopoly over the practice of medicine can be eased to allow paraprofessionals to provide many medical services just as competently and far less expensively. Government and private insurance programs can cover more care in the home and the doctor's office.
>
> Instead of paying doctors a fee for each service to treat us after we are sick, corporate and government purchasers can pay doctors an annual fee to keep us healthy or a pre-set fee-for-illness if we do get sick. Individuals can be given financial incentives to pursue health life styles. Those who smoke, don't keep their weight and cholesterol levels in acceptable ranges, and miss periodic medical or dental checkups, can be charged more.

The medical malpractice system can limit recovery to a modest amount for pain and suffering, and to the amounts necessary to pay medical bills, replace lost income or compensate for the inability to function because of disability. Lawyers' contingent fees can be sharply cut. For doctors, malpractice reform can begin at home with strengthened disciplinary systems that clean out incompetents.

Lots more information can be given to purchasers of health care: how much hospitals and doctors charge, how often they treat different ailments and perform various medical and surgical procedures, what their drug-dispensing practices are, how often doctors put patients in hospitals and how long they keep them there.

Id.

264. As traditional antitrust immunity doctrine suggests, hospital mergers likely will increase short term operating efficiency, but reduce competition. The existing mix of regulatory approaches to hospital markets does not provide any means for an informed review of such mergers. Policy makers should choose between competition and public utility regulation of those markets and work to eliminate the impediments to the chosen alternative. *See generally* Ponsoldt, *Antitrust 'Reform' Isn't the Answer*, Nat'l L.J., Apr. 7, 1986, at 13.

265. *See supra* text accompanying notes 15-45.

utility regime on the health care industry, replacing competition with regulation.[266] In some cases, such as *North Carolina* ex rel. *Edmisten v. P.I.A. Asheville Inc. (Asheville II)*,[267] this claim has been made by practitioners who see pecuniary benefits in the diminution or elimination of competition in the health care industry.[268] If the courts are unwilling to accept the public utility theory, these practitioners are just as ready to assert that the state programs enacted pursuant to the NHPRDA are subject to state action immunity and thus not subject to the federal antitrust laws.[269] As the Fourth Circuit found in *Asheville II*, neither of the two theories asserted portrays the intended role of the NHPRDA as presently enacted. The federal implied immunity doctrine requires a showing of congressional intent to repeal either through the statutory language or legislative history, or through a finding of pervasive regulation or repugnancy.[270] Clearly these tests are not met by the NHPRDA in the context of the *Asheville II* decision.

The state action immunity doctrine requires a showing that the challenged conduct, if not authorized or compelled by the state, is at least tacitly approved by the state. In addition, it must be proven that the state actively supervises the conduct on a continuing basis.[271] While it is conceivable that a state could create a CON program that would meet the requirements for state action immunity, the North Carolina legislature has not created such a program.

Asheville II illustrates some of the difficulties inherent in the present NHPRDA. Although the NHPRDA recognizes and enumerates many problems that exist in the American health care industry, it does not provide any obvious solutions. In providing for regulation, the act does not pervade the field of health care so as to preclude the application of the antitrust laws. Conversely, the legislation fails to specify how the antitrust laws are to be enforced in conjunction with the resolutions of the act. In the end, it may be the courts who must fashion the solution. It is perhaps ironic that the short-sighted and selective view advanced by Chicago school adherents, (*i.e.*, that the sole goal of antitrust is to promote economic efficiency and that competition means efficiency) has resulted in the breakdown of traditionally recognized distinctions between public utility and free market regulation, by evoking the conclusion that antitrust regulation no longer needs to be implicitly preempted by public utility regimes.

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266. *Id.*
267. 740 F.2d 274 (4th Cir. 1984).
268. For a discussion of *Asheville I and II*, see *supra* text accompanying notes 202-55.
269. *Id.*
270. *See supra* text accompanying notes 49-138.
271. *See supra* notes 139-201.