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STATE ACTION ANTITRUST EXEMPTION COLLIDES WITH DEREGULATION: REHABILITATING THE FORESEEABILITY DOCTRINE

*Elizabeth Trujillo**

INTRODUCTION

A capitalist society with policies established to “regulate” the promotion of competition in traditionally regulated industries such as the electrical market seems counterintuitive. Yet, it is a reality in the United States. In particular, traditionally rate-regulated industries, such as electricity, have been “deregulated.” In this context, deregulation means opening up certain components of the industry to competition. However, regulatory mechanisms in place to prevent abuses of the competitive process are also driving this competition, resulting in a “regulated deregulation.”¹

Specifically, recent initiatives to “deregulate” the electricity markets have highlighted that free markets thrive where competitive

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1. Harry First, *Regulated Deregulation: The New York Experience in Electric Utility Deregulation*, 33 LOY. U. CHI. L.J. 911 (2002) (questioning electricity deregulation so far and encouraging “a more realistic design that can avoid the deficiencies of the traditional regulatory approach”). Professor First focuses on the deregulated New York electricity markets as an example of “regulated deregulation.”

structures in place do not suppress competition. Before Congress passed PURPA (the Public Utilities Regulatory Policy Act) in 1978, electricity in the United States was provided by a vertically integrated firm, which provided transmission, distribution and generation service on a bundled basis.² Since this firm had a legally conferred monopoly, state public utility commissions regulated its consumer rates.³ As a result, the electricity market has consisted of a structural design supporting regulatory entities that supervise and monitor the generation, transmission, and distribution of electricity to end-users. Market monitoring and intrusiveness on the part of state legislatures and regulatory agencies permeate such structures and, therefore, cannot sustain competition without additional policies intended to promote competition.⁴ In essence, such deregulatory measures “re-regulate” an already regulated market.⁵

In a wholly regulated market, an electrical utility, servicing a franchised service territory, would generate its own electricity and then transport and distribute it to end-users, under regulated rate structures for this bundled service.⁶ Federal and state governments regulated pricing and distribution of electricity in order to protect consumers from this market power and any external costs of electricity production such as overproduction and the social costs of pollutants.⁷ Deregulatory

2. See generally Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1353-54 (1998) (citing Richard J. Pierce Jr. & Ernest Gellhorn, *REGULATED INDUSTRIES 1* (3rd ed. 1994)) (discussing how the nation’s approach to regulating common carriers and public utilities has undergone a wide-ranging transformation in the last quarter of the century). See also Jacqueline Lang Weaver, *Can Energy Markets Be Trusted? The Effect of the Rise and Fall of Enron on Energy Markets*, 4 HOUS. BUS. & TAX L.J. 1, 14 (2004), available at <http://www.hbtjlj.org/content/v04/v04Weaverar.pdf> (last visited Mar. 10, 2005).

3. See Kearney & Merrill, *supra* note 2.

4. But see ENERGY, ECONOMICS AND THE ENVIRONMENT: CASES AND MATERIALS 15-20 (Fred Bosselman, et al eds., Foundation Press 2000) (Transportation of natural gas, on the other hand, has been primarily interstate in nature). See also Weaver, *supra* note 2, at 6-8 (describing the pipeline structure in the 1930s through the 1950s as “monopsonist (the sole buyer in a field) and . . . monopolist (the sole seller to a distributing company or end user)”).

5. First, *supra* note 1.

6. See Kearney & Merrill, *supra* note 2.

7. See ENERGY, ECONOMICS AND THE ENVIRONMENT, *supra* note 4, at 41-44 (describing externalities related to energy production). See also Weaver, *supra* note 2,

policies have triggered an unbundling primarily through a separation of transmission from power generation. Transmission remains regulated. The jurisdiction over electricity rates of the Federal Energy Regulatory Commission (FERC) extends, in principle, to wholesale transactions, though the extent of this jurisdiction over retail rate regulation remains unclear.⁸ Twenty-four states and the District of Columbia have legislation in place to “partially” deregulate their retail electricity markets by implementing retail access, even though some states have not moved forward in this.⁹ States’ attempts to “deregulate” the

at 8 (“Because the early pipeline, like railroads, had monopoly power, regulatory agencies were created to limit the rates they could charge so that consumers were protected from this market power.”).

8. 16 U.S.C. §§ 824-824(n) (2005). FERC Order 888, issued in 1996, restructured the interstate electric industry. By requiring companies to allow third parties access to transmission lines through the “wheeling” of electricity, the Order essentially “forbids companies that control transmission facilities from leveraging that monopoly power into the upstream market for generating electricity or the downstream market for delivering electricity to end-users.” In this way, companies transporting electricity through interstate commerce must also serve as “carriers” for other generation power companies. The purpose is “to ensure that customers have the benefits of competitively priced generation.” FERC Order 888, 18 C.F.R. pt. 385 (1996). The Order has affected primarily the electric power wholesale market and the states determine any other unbundling, for example the retail market for end-users that would not reach FERC’s jurisdiction. Kearney & Merrill, *supra* note 2, at 1352-55; *see also* ENERGY, ECONOMICS AND THE ENVIRONMENT, *supra* note 4, at 18-20, 41-44. *But see* New York v. FERC, 535 U.S. 1 (2002) (in deciding whether FERC exceeded its jurisdiction by including retail transmission within the scope of its open access requirements in Order 888, the Court concluded that it was a statutorily permissible policy choice: “FERC chose not to assert such jurisdiction, but it did not hold itself powerless to claim jurisdiction”).

9. Legislation for retail access is in place in the following states: Arizona, Connecticut, Delaware, District of Columbia, Illinois, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, and Virginia. The following states are not actively pursuing restructuring: Alabama, Alaska, Colorado, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. West Virginia has a restructuring plan in place that has not yet been approved by the Legislature or Governor. The following states have delayed their restructuring process or the implementation of retail access: Arkansas, Montana, Nevada, New Mexico, and Oklahoma. In California, direct retail access has been suspended. *See* ENERGY INFORMATION ADMINISTRATION, STATUS OF STATE ELECTRIC INDUSTRY

electrical markets do not transform old paradigms of regulation, in which state governments created artificial barriers for new entrants, into new competitive regimes. Rather, traditional regulatory structures remain in place.

The pervasiveness of regulation in the business of electrical power generation has left utilities little room for antitrust law.¹⁰ One particularly useful tool for potential antitrust defendants is the state action immunity doctrine. The original purpose of state action immunity is to preserve principles of federalism and allow states to displace competition in sectors of their domestic economies so as to compensate for the failures of competition and protect the public welfare of its citizens.¹¹ Essentially, it is a judicially created exemption that limits the potential antitrust liability of private parties, as well as municipalities and government entities.¹² For an entity to successfully allege state action immunity, it must prove that it is advancing the interests of the state rather than its own interests. This is done by showing that the conduct is pursuant to a “clearly-articulated” state policy and that it has

RESTRUCTURING ACTIVITY (2003), available at http://www.eia.doe.gov/cneaf/electricity/chg_str/restructure.pdf. Refer to www.eia.doe.gov for more recent updates of restructuring status nation-wide. See also ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS 17-26 (Nancy B. Rapoport & Bala G. Dharan eds., Foundation Press 2004) (briefly discussing the history of the California’s electrical power generation and delivery system and the energy crisis beginning with deregulation in 1998.); see also Weaver, *supra* note 2, at 6-8 (2004).

10. *But see* Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) (holding that an electric utility used its dominance in the transmission of power to foreclose potential entrants into the retail area and therefore was not immune from antitrust liability).

11. KEITH N. HYLTON, ANTITRUST LAW: ECONOMIC THEORY AND COMMON LAW EVOLUTION 371 (Cambridge 2003) (explaining that “immunity helps secure the benefits of federalism. With immunity, the states have greater freedom to experiment.”); see also Darren Bush and Carrie Mayne, *In (Reluctant) Defense of Enron: Why Bad Regulation is to Blame For California’s Power Woes (Or Why Antitrust Law Fails to Protect Against Market Power When the Market Rules Encourage its Use)*, 83 OR. L. REV. 207, 209 (2004).

12. See Jim Rossi, *The Electric Deregulation Fiasco: Looking to Regulatory Federalism to Promote a Balance Between Markets and the Provision of Public Goods*, 100 MICH. L. REV. 1768, 1787 (2002) (stating that “[u]nlike federal preemption and dormant commerce clause doctrines, which limit public actors, state action immunity relates to limits on the exercise of private decisionmakers in violation of antitrust laws.”).

been “actively supervised” by the state.¹³ Under a regime that promotes competition rather than displaces it, broad application of state action immunity would hinder state efforts to open electrical markets for competing new entrants.

Attempts by states to implement “pro-competition” policies without restructuring traditional regulatory paradigms have been problematic for courts. Furthermore, the tendency of courts to defer to agency rulings has shifted jurisdictional parameters and empowered the state regulatory commissions. This has been particularly apparent in cases dealing with the wholesale natural gas market and the filed rate doctrine.¹⁴ In the context of state action immunity and partial deregulation of electricity, broad deference to regulatory policy in addition to broad application of state action would favor already established companies in the electricity market, essentially empowering the regulatory agencies and in turn, advancing the interests of the dominant companies which they regulate.¹⁵ In this scenario, antitrust law helps to de-concentrate these

13. The *Midcal* test provides that anticompetitive conduct is immune from antitrust liability if the challenged restraint is 1) “one clearly articulated and affirmatively expressed as state policy;” and 2) “the policy [is] ‘actively supervised’ by the State itself.” See *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum*, 445 U.S. 97, 105 (1980) (quoting *City of Lafayette v. La. Power and Light Co.*, 435 U.S. 389, 410 (1978)); see also FTC, OFFICE OF POLICY PLANNING, REPORT OF THE STATE ACTION TASK FORCE (Sept. 2003).

14. See, e.g., *In re: Western States Wholesale Natural Gas Antitrust Litigation*, 368 F. Supp. 2d 1110 (D. Nev. 2005) (dismissing under the filed rate doctrine the plaintiff’s claim that “due to the deregulation of the natural gas market, Defendants never filed the prices at issue with FERC, and therefore the filed rate doctrine does not bar [its] claims.”). This case illustrates the resistance of courts to exerting jurisdiction over FERC with respect to the filed rate doctrine, even when deregulation of the natural gas market may require such jurisdiction in some situations. See also *County of Stanislaus v. Pac. Gas and Elec. Co.*, 114 F.3d 858 (9th Cir. 1997), *Ark. La. Gas Co.*, 453 U.S. 571 (1981), and *Pub. Util. Dist. No. 1 of Grays Harbor County Wash. v. IDASOR*, 379 F.3d 641 (9th Cir. 2004).

15. See John Shepard Wiley, *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 723-29 (1986) (describing conceptions of regulation as a way to subsidize private interests at the expense of public good and serve industry ends, causing producer capture); First, *supra* note 1, at 924 (explaining that deregulation in the U.S. has most often been led by the regulatory agencies and that public choice theorists would not have predicted that “captured” regulatory agencies would push into the marketplace the very companies they supposedly had been protecting). See also ENERGY, ECONOMICS AND THE ENVIRONMENT, *supra* note 4, at 17 (describing externalities related to energy production) (stating that it has been a recurring problem

industry structures and prevent price fixing where regulation cannot. In effect, broad application of state action immunity would continue to preserve old regulatory structures where regulated entities such as utilities would continue to dominate the electrical market, eliminating any possibilities of consumers benefiting from deregulatory measures promoting competition — lower prices and choices.¹⁶

In a deregulatory environment, clarification of this doctrine is necessary to guide the courts in their application of antitrust legislation to private conduct without limiting the states' ability to regulate certain markets while introducing competition into others.¹⁷ If a deregulatory policy is to be implemented, the courts need guidance in answering the following questions: 1) does the clear-articulation requirement of the *Midcal* test incorporate a state agency's declaratory rulings in determining the scope of statutory law? 2) what is the connection between the articulated policy to displace competition in a particular market and the anticompetitive conduct being challenged? 3) will legislatures need to be more specific in clearly articulating policy as to the market and level of competition it is regulating (generation, transmission, distribution)? and 4) how specific does the articulated policy need to be in order to meet the "clarity" requirement of the first

in the energy regulatory sector that "the regulatory process . . . be susceptible to capture by the very interests it is designed to regulate and thus fall short of its public interest objectives"). See generally Richard A. Posner, *The Social Costs of Regulation and Monopoly*, 83 J. POL. ECON. 207 (1975).

16. HYLTON, *supra* note 11, at 374 (stating that "[i]f state regulation provides broad protection from liability under the Sherman Act, then industries in which collusion is sustainable will have an interest in setting up some regulatory program that is capable of providing protection."). See also Robert P. Inman and Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 TEX. L. REV. 1203, 1234-36 (describing the tendency of state legislators to vote, "[u]nder a norm of deference," in favor of interest groups which they represent and who are benefiting from a single regulated industry, at the expense of economic efficiency and without regard for consumers' preference for the advantages of no regulation).

17. See generally Rossi, *supra* note 12, at 1787-89 (explaining that the possibility of interest group capture of regulatory processes "gives rise for narrow construction of state authority, along with an expectation of clear articulation of policies prohibiting competition by state regulators, in such contexts."). See also *id.* at 1788 (stating that "in a deregulatory era, courts should be wary of blanket deference to state regulatory programs and instead should look carefully to the scope and extent of specific regulatory provisions.").

prong of the *Midcal* test and for a foreseeability standard to be effectively applied?

This article seeks to provide possible answers to these questions by exploring inconsistencies in the federal courts' decisions regarding the scope and applicability of state action immunity. It concludes that current application of the *Midcal* test will make it more difficult for new entrants in the electrical markets to compete with already established utilities.¹⁸ For example, in *Trigen-Oklahoma City Energy Corp. v. Oklahoma Gas and Electric Co.*,¹⁹ the Tenth Circuit granted state action immunity to Oklahoma Gas & Electric Co., a state-regulated utility. The Court deferred to Oklahoma's constitution, which set up a regulatory scheme intended to displace competition with respect to electric utilities in all areas related to the sale of electricity.²⁰ The *Trigen* case is the broadest application of state action immunity taken by a circuit court to this day.²¹ However, inconsistency on the scope of the state action immunity doctrine has been evident among the circuit courts for some time.²² Professor Jim Rossi, expressing similar concerns regarding

18. See *supra* note 13 and accompanying text.

19. 244 F.3d 1220 (10th Cir. 2001), *cert. denied*, 534 U.S. 993 (2001).

20. *Trigen*, at 1225 ("Because Oklahoma has clearly articulated a policy to displace competition with the regulation of electric utilities and because Oklahoma actively supervises any allegedly anticompetitive conduct, the state action doctrine immunizes OG&E's regulated electricity sales from the federal antitrust scrutiny."). The court also stated that "because OG&E is acting in accordance with a clearly-articulated state regulatory program and because it is actively supervised by the OCC, we hold that OG&E's conduct falls within the heart of the state action immunity doctrine and the federal antitrust claims must be dismissed." *Id.* at 1228. See also Brief for Petitioner at 2, *Trigen-Okla. City Energy Corp. v. Okla. Gas and Elec. Co.*, (No. 01-178) 2001 WL 34115993, at *2. The requirements for state action immunity are established in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), through a two-prong test presented *infra* Part I.

21. See Kate O'Loughlin, *The Trigen Case: Does This Mean Lights Out for Energy Deregulation?*, 14 LOY. CONSUMER L. REV. 345 (2002) for a list of 24 states passing deregulation laws. See also Bush & Mayne, *supra* note 11, at 214-23 (2004) (for a short history of the deregulatory policies passed at the federal level to allow for competition in the electrical markets).

22. See, e.g., *Nugget Hydroelectric, L.P. v. Pac. Gas and Elec. Co.*, 981 F.2d 429 (9th Cir. 1992) (holding that because defendant failed to show that its actions concerning plaintiff's interconnection plan were the foreseeable result of state policy, they were not immune under the state action doctrine); *Columbia Steel Casting Co., Inc. v. Portland Gen. Elec. Co.*, 111 F.3d 1427 (9th Cir. 1997) (determining that agreement

recent broad application of state action immunity, stated that:

[w]ith federal deregulation and uneven and partial state deregulation, the extent to which state action immunity will immunize anticompetitive conduct from the reach of federal antitrust law in a deregulated electric power market remains unclear, particularly given the traditional extent to which the states have regulated electric utilities.²³

Some direction in resolving the ambiguities arising from recent application of state action immunity in the context of deregulation of the electrical markets may be found in the foreseeability standard established by the Supreme Court in *Town of Hallie v. City of Eau Claire*.²⁴ The controversy regarding whether a foreseeability standard

among competitors to allocate territories was a *per se* violation of the Sherman Act unless there was a clearly articulated and affirmatively expressed state policy displacing competition with regulation; because that policy did not exist, state immunity did not apply in this instance); *Cal. CNG, Inc. v. S. Cal. Gas Co.*, 97 D.A.R. 1103 (9th Cir. 1997) (holding that where the state clearly articulated a state policy to shield utility participation in the market from competition and there was active supervision of such participation, state-action immunity was appropriate); *Snake River Valley Elec. Ass'n v. PacifiCorp.*, 238 F.3d 1189 (9th Cir. 2001), *remanded and amended*, *Snake River Valley Elec. Ass'n v. Pacificorp*, 357 F.3d 1042 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 416 (2004) (finding that state statute did not provide for active supervision of private agreements to divide customers, and appellee's refusal to allow appellant to serve its customers was not shielded by the state action immunity doctrine); *Lease Lights, Inc. v. Pub. Serv. Co. of Okla.*, 849 F.2d 1330 (10th Cir. 1988) (determining that conduct regarding electricity rates undertaken in response to state regulation was immune from antitrust penalties); *Trigen Okla. City Energy Corp. v. Okla. Gas and Elec. Co.*, 244 F.3d 1220 (10th Cir. 2001); *Mun. Utils. Bd. of Albertville v. Ala. Power Co.*, 934 F.2d 1493 (11th Cir. 1991) (applying the *Midcal* two-part test to determine that general provisions of the statute governing the conduct in question were entitled to state-action immunity); *Praxair Inc. v. Fla. Power and Light Co.*, 64 F.3d 609 (11th Cir. 1995) (applying the *Midcal* two-prong test to determine that the defendants' exclusive service territorial agreement qualified for state action immunity); *TEC Cogeneration Inc., Fla. Power and Light Co.*, 76 F.3d 1560 (11th Cir. 1996), *modified by* 86 F.3d 1028 (11th Cir. 1996) (finding defendants' conduct was immune from antitrust liability).

23. Rossi, *supra* note 12, at 1787 (2002); *see also* FTC, REPORT OF THE STATE ACTION TASK FORCE, *supra* note 13, at CH. II (expressing concern about broad application of state action immunity, in particular with respect to the "clear articulation" standard of the *Midcal* test).

24. 471 U.S. 34, 42 (1985) (explaining that in the case of municipalities, the clear articulation requirement of *Midcal* is satisfied if the conduct in question "is the

should be used at all in dealing with state action immunity arises from the idea that just about any conduct could be construed as “foreseeable.”²⁵ In other words, “foreseeability” is in the eye of the beholder. In response, this Article proposes that the “Hallian” foreseeability standard can be a useful tool for determining whether the anticompetitive conduct in question comes within a clearly articulated state policy to displace competition with respect to the specific conduct rather than a natural consequence of regulatory policy.²⁶ To have any real impact, though, the foreseeability standard must be narrowly construed to a specifically articulated state policy and to the anticompetitive conduct in question, and not just to a general delegation of authority by state legislatures to regulatory agencies. Otherwise, the foreseeability standard would lend itself to broad applications of the state action immunity doctrine, as in *Trigen*, and in the future render any deregulatory policies ineffective as to new entrants.

Part I explores the development of state action immunity as a doctrine that attempts to reconcile issues of federalism and state sovereignty, first established by *Parker v. Brown*,²⁷ and later expanded by the *Midcal* test and the implementation of the “Hallian” foreseeability standard. I will demonstrate that, in this context, *Trigen* is a natural result of the courts’ ambiguities regarding application of state action immunity. Part II discusses cases that go beyond the original purpose of *Parker* and the effects of empowering state regulatory agencies. Part III explores the “Hallian” foreseeability standard as a window into the struggle of courts in discerning state policy from regulatory policy. It demonstrates the need for clarity when applying the clear articulation

foreseeable result of empowering the City to refuse to serve unannexed areas.”). See *infra* Part I.d.ii.

25. C. Douglas Floyd, *Plain Ambiguities in the Clear Articulation Requirement for State Action Antitrust Immunity: The Case of State Agencies*, 41 B.C. L. REV. 1059, 1076 (2000) (stating that “[a]s the Hallie ‘foreseeability’ test has been applied by the courts of appeals, it has proven to have essentially no bite, leading to the conclusion that the broader the delegation of authority to act with respect to a particular subject matter, the more likely that anticompetitive conduct will be held to be the foreseeable result of that delegation.”).

26. *Id.* at 1104 (stating that the foreseeability test “may be very much on point in determining whether a state administrative agency or the head of an executive department has acted within the scope of its delegated authority in articulating an anticompetitive policy for the state.”).

27. 317 U.S. 341 (1943).

requirement of the *Midcal* test. Part IV looks at useful ways of applying the “Hallian” foreseeability standard to the *Midcal* test that could help courts identify inconsistencies with the original intent of *Parker* when determining state action and diminish blind deference to regulatory policy. I conclude by suggesting: (1) that the courts have, in fact, been incorporating into the state action immunity analysis a “Hallian” foreseeability standard as the “hidden prong” of the *Midcal* test; (2) that a narrow construction of this standard could help illuminate ambiguities created by the clear-articulation requirement of *Midcal*; and (3) that it is imperative for the Supreme Court to clarify this issue prior to expansive state deregulation.

I. THE BUMPY ROAD TOWARDS *TRIGEN*: FEDERALISM AND STATE ACTION IMMUNITY

In order to understand the broad result in *Trigen*, it is useful to explore the history and original purpose of the doctrine itself. The landmark case, *Parker v. Brown*,²⁸ first established that state action existed in the context of antitrust law. *Parker* held that federal antitrust law was not to intrude upon a state’s sovereign right to regulate markets within its borders.²⁹ There is significant scholarship as to whether *Parker* explicitly created an antitrust exemption for states or whether it just espoused the traditional principles of federalism allowing states to legislatively decide issues of public welfare.³⁰ However, there is no

28. *Id.* at 341.

29. *Id.* at 350-51 (concluding that Congress had not intended “to restrain a state or its officers or agents from activities directed by its legislature.”). See generally PHILLIP AREEDA & DONALD TURNER, *ANTITRUST LAW* § 213a, at 72 (1978) (compulsion is “powerful evidence” of existence of state policy).

30. See generally William 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 (1981); Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667 (1991) (explaining that the antitrust case law distinguishing state from private action fits a simple process view: financially interested actors cannot be trusted to decide which restrictions on competition advance the public interest); Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. L. & ECON. 23 (1983) (discussing the uneasy coexistence between federal antitrust law and state regulatory regimes); Thomas Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 CAL. L. REV. 227, 236-37, 241 (1987) (discussing how the roots of the state action doctrine are found in the values of

question that *Parker* did stand for a state's right "to determine for itself how much competition is desirable, provided that it substitutes adequate public control whenever it has weakened competition."³¹

a. State Sovereignty Through the Eyes of Parker v. Brown

In *Parker*, the California legislature approved a marketing program for agricultural commodities under the California Agricultural Prorate Act,³² which restricted the manner in which raisin producers could market their crops. The purpose of the legislation was not only to restrict competition among raisin growers, but also to control the prices of raisins to packers who, after processing them, placed them in interstate commerce.³³ The Act authorized the creation of an advisory commission to approve, after extensive review, a "proration marketing program" that would carry out the objectives of the Act, which were to protect agricultural wealth, prevent waste and disallow unreasonable profits to raisin producers.³⁴ The appellee, a producer and a packer of raisins, alleged that the proration program violated the Commerce Clause³⁵ and the Sherman Act.³⁶ The Supreme Court, in dealing with the allegation regarding the Sherman Act, concluded that neither the language nor history of the Act demonstrated a federal intent to infringe upon state sovereignty and limit the ability of state agents to act with legislative authority.³⁷ It concluded that the language of the Sherman

economic federalism); *But see contra* Wiley, *supra* note 15. *See also* Inman & Rubinfeld, *supra* note 16, at 1232 (stating that "[t]he task of a well-articulated theory of regulatory federalism — and a reasoned state-action doctrine in particular—is to define the separate domains for federal antitrust rules on the one hand and state business regulations on the other."). Furthermore, the authors note that the Sherman Act is the "appropriate supervisory vehicle" in the case of regulatory policies creating "monopoly spillovers." *See id.* at 1249.

31. AREEDA & TURNER, *ANTITRUST LAW*, *supra* note 29.

32. CAL. AGRIC. CODE § 59881.

33. *Parker v. Brown*, 317 U.S. 341, 345-46 (1943).

34. *Id.* at 346-47 (referring to the state statute that declared the purpose as "'conserv[ing] the agricultural wealth of the State' and 'prevent[ing] economic waste in the marketing of agricultural crops' of the state").

35. U.S. CONST. art. I, § 8, cl. 3.

36. Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (2004).

37. *Parker*, 317 U.S. at 350-51 (giving deference to the principles of federalism in stating that "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their

Act referred to agreements or combinations and conspiracies exercised by individuals and not the actions or programs of the state legislatures, even those that restricted competition.³⁸

It is difficult to determine whether the Court in *Parker* created a direct exemption to the Sherman Act when applied to the states, or whether it just clarified that a federal act involving economic competition would not infringe on a state's inherent authority to provide for the public welfare of its people.³⁹ But it is enough for the purposes of this article to say that *Parker* stood for state sovereignty. The *Parker* immunity served as a compromise between a state's right to regulate intrastate affairs for the welfare of its citizens and the need, as seen by the federal government, to enforce antitrust legislation in order for the U.S. economy to function as an economically efficient capitalist society. After all, the antitrust laws help preserve the economic freedom to compete for the U.S. business sector; they are the "Magna Carta of free enterprise."⁴⁰

b. Status of State Action Immunity after *Parker v. Brown*

The Supreme Court applied the *Parker* decision in various cases that followed, each time adding new wrinkles.⁴¹ Almost forty years after *Parker v. Brown*, the Supreme Court decided the landmark case, *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*,⁴² which clarified some important parameters for state action immunity. The question before the Court was whether a California wine-pricing system

authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.").

38. *Id.* at 352.

39. *See supra* note 30 and accompanying text.

40. *City of Lafayette, La. v. La. Power and Light Co.*, 435 U.S. 389, 398 n.16 (1978) (quoting *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972) in stating that the "[a]ntitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise" and that "[t]hey are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.").

41. *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975), *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977), *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389 (1978), *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978).

42. 445 U.S. 97 (1980).

violated the Sherman Act. Under this system established by a California statute, wine producers and wholesalers had to file fair trade contracts or price schedules with the state. The statute limited wholesale wine prices to retailers and required wholesalers to set prices according to prices in producer fair trade contracts. If there was no fair trade contract, the wholesaler had to post its resale price schedules and file it with the state.⁴³ Fines or license suspension or revocation threatened wholesalers selling below the established prices.⁴⁴ The Supreme Court held that this wine-pricing system violated the Sherman Act.⁴⁵ Even though the Court found that there was a clearly articulated state policy to displace competition with respect to wine-pricing, it also found that the price setting and enforcement in *Midcal* was to be established by private parties rather than by the state, thereby not providing sufficient “active supervision” by the state.⁴⁶ The Supreme Court’s concern in *Midcal* was that permitting the private wine producers to decide wholesale prices would be the equivalent of condoning vertical price restraints.⁴⁷ In no way did the State monitor the market conditions or have a system in place to periodically reexamine the program.⁴⁸ *Parker* did not authorize private parties to violate the Sherman Act, nor did it encourage them to hide behind a “gauzy cloak of state involvement.”⁴⁹ The Supreme Court established what has later been referred to as the “*Midcal* test,” providing two elements that must be met for antitrust immunity under *Parker*. First, the challenged restraint must be “one clearly articulated and affirmatively expressed as state policy,” and second, “the policy

43. *Id.* at 99 (citing CAL. BUS. & PROF. CODE § 24866 (West 1964)).

44. *Midcal*, 445 U.S. at 99-100.

45. *Id.* at 102-03. The Court referred to several prior cases in determining that the California wine pricing system was in violation of the Sherman Act. *See* Schwegmann Bros. v. Calvert Corp., 341 U.S. 384 (1951); Albrecht v. Herald Co., 390 U.S. 145 (1968); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951); Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

46. *Midcal*, 445 U.S. at 103 (explaining that the fact that the wine producer held the power to dictate wholesale prices amounted to vertical restraints). *See also id.* at 105 (describing the “active supervision” requirement for state action).

47. *Id.* at 103.

48. *Id.* at 105.

49. *Id.* at 106 (citing *Parker* in explaining that “[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement”).

must be 'actively supervised' by the State itself."⁵⁰

Some academic scholars have criticized the Supreme Court for the outcome of cases following *Parker* because they not only deviated from the federalist principles espoused in *Parker*, but also encouraged the transfer of power from the state legislatures to administrative agencies.⁵¹ However, the Supreme Court in *Parker* noted that the proration program was a valid state regulatory program which did not violate any federal laws because it was "the state, acting through the Commission, which adopt[ed] the program and which enforce[d] it with penal sanctions, in the execution of a governmental policy."⁵² *Parker*, in its call for state sovereignty, also gave deference to the regulatory agencies while recognizing that state legislatures have the inherent authority to regulate intrastate matters through the regulatory agencies they create. Of course, the *Midcal* case solidified this delegation of power by establishing the "active supervision" prong requiring that conduct by private entities be periodically reviewed by a regulatory agency in order to obtain antitrust immunity.⁵³

50. *Id.* at 105 (quoting *City of Lafayette v. La. Power and Light Co.*, 435 U.S. 389, 410 (1978)).

51. *See supra* note 30; *see also* Page, *supra* note 30 (asserting that the "active supervision" prong of the *Midcal* test should be abandoned because it places too much power in the agencies). *But see* William Page and John E. Lopatka, *State Regulation in the Shadow of Antitrust: FTC v. Ticor Title Ins. Co.*, 3 SUP. CT. ECON. REV. 189, 195, 210-213 (1993) (finding fault with prior scholarship that stated that clear articulation was enough to determine state action immunity. The authors clarify that "this approach appears to leave states free simply to repeal antitrust within their borders — a result Congress could hardly have intended." They propose that the active supervision requirement prevents a "naked repeal" by private parties of federal antitrust law.); John E. Lopatka and William Page, *State Action and the Meaning of the Agreement Under the Sherman Act: An Approach to Hybrid Restraints*, 20 YALE J. ON REG. 269, 277 (2003) (stating that "antitrust should defer to state restraints that are ancillary to some positive regulatory program but not to naked repeals of federal statutory requirements." The authors go on to say that "[a] simple suspension of antitrust structures without adequate state supervision . . . reflects a naked repeal of antitrust."); Inman & Rubinfeld, *supra* note 16, at 1257 (stating that "[a]s an approach for protecting political participation of the citizens of the state in regulatory policymaking, *Midcal*'s two-part test has proven to be an important step forward."). *See also* Elhauge, *supra* note 30; *but see* Wiley, *supra* note 15.

52. *Parker*, 317 U.S. at 352 (1943).

53. *See supra* notes 30, 51. *But see* Wiley, *supra* note 15; FTC, REPORT OF THE STATE ACTION TASK FORCE, *supra* note 13, at 12 (quoting *Hallie* in stating that "the

The problem with the *Midcal* test has been that it does not necessarily advance the interests of the state as *Parker* had originally intended for state action to do. Instead, delegation to regulatory agencies allows for regulated entities such as public utilities with close ties to the same entities regulating them to advance their own interests.⁵⁴ This appears to be what happened in *Trigen* and nothing in the *Midcal* test protects against this. Furthermore, recent court interpretation of *Midcal* increases the likelihood of “*Trigen*-like” results recurring, especially in a deregulatory environment.

c. The “Elusive” Clarifications of the *Midcal* Test

In an effort to clarify the application of *Midcal*, the Supreme Court in later decisions has in fact unveiled intricacies within *Midcal* that are difficult for courts to assess. In *Southern Motors Carriers Rate Conference, Inc. v. United States*,⁵⁵ the Supreme Court applied state action immunity to private entities. Motor common carriers organized “rate bureaus” in order to submit to the Public Service Commission of each state jointly fixed rate proposals.⁵⁶ The United States alleged that this activity violated federal antitrust laws and filed an action to enjoin the rate bureaus.⁵⁷ The Supreme Court reiterated that *Parker v. Brown* was decided on the premise that Congress in enacting the Sherman Act “did not intend to compromise the States’ ability to regulate their domestic commerce.”⁵⁸ Furthermore, it clarified that to interpret the *Parker* immunity doctrine, as limited to actions of public officials, would frustrate the state’s ability to implement programs restraining

requirement of active state supervision serves essentially an evidentiary function: it is one way of ensuring that the [private] actor is engaging in the challenged conduct pursuant to state policy’ rather than in pursuit of private interests.”).

54. See generally Wiley, *supra* note 15; Elhauge, *supra* note 30; Easterbrook, *supra* note 30; Rossi, *supra* note 17. But see Steven Semeraro, *Demystifying Antitrust State Action Doctrine*, 24 HARV. J.L. & PUB. POL’Y 203, 213-218 (2000) (using the “status choice model” to characterize governmental institutions as generally seeking to serve public rather than private interests. This model is premised on the assumption that individuals act selfishly or altruistically based on their status or position rather than on any inherent tendencies.)

55. 471 U.S. 48 (1985).

56. *Id.* at 50.

57. *Id.*

58. *Id.* at 56.

competition among private parties.⁵⁹ The Court in *Southern Motors* explained that 1) the *Midcal* test should not be narrowly construed as applying only to public officials, and that 2) the test did not expressly provide that the actions of a private party must be compelled by the State in order to be immune from antitrust liability.⁶⁰ This case eliminated any perceived "compulsion" requirement in the *Midcal* test.⁶¹

The dissent in *Southern Motors* disagreed with the majority's decision to eliminate any compulsion requirement in finding *Parker* immunity for an anticompetitive act. It stated that such requirement was consistent with prior Supreme Court cases and with *Parker* itself, which argued that the anticompetitive conduct must be "'directed' by the State" for it to be immune.⁶² It also pointed to other cases where the Court did not grant immunity because there was no clearly articulated state policy to displace competition with respect to the challenged conduct.⁶³ On the other hand, the majority opined that if state legislatures were required to give more than "a clear intent to displace competition," the ability of regulatory agencies to implement anticompetitive policies would be frustrated.⁶⁴ It pointed out that prior decisions could not support the degree of specificity that the petitioners insisted would have been necessary.⁶⁵

59. *Id.* at 56-57 (declining to "reduce *Parker's* holding to a formalism that would stand for little more than the proposition that Porter Brown sued the wrong parties.").

60. *Id.* at 58-60 (explaining that "[t]he success of an antitrust action should depend upon the nature of the activity challenged, rather than on the identity of the defendant." Also, the Court emphasized that "federal antitrust laws do not forbid the States to adopt policies that permit, but do not compel, anticompetitive conduct by *regulated* private parties.").

61. *Id.* at 60. However, the Court also states that "compulsion often is the best evidence that the state has a clearly articulated and affirmatively expressed policy to displace competition." *Id.* at 62.

62. *Id.* at 71 (Stevens, J., dissenting) (discussing *Parker* and stating that the Supreme Court "has repeatedly recognized that private entities may not claim the state-action immunity unless their unlawful conduct is compelled by the state.").

63. *Southern Motors*, 471 U.S. at 71-74 (Stevens, J., dissenting).

64. *Id.* at 64 (stating "[i]f more detail than a clear intent to displace competition were required of the legislature, States would find it difficult to implement through regulatory agencies their anticompetitive policies."). The Court looked to *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389, 415 (1978) in stating that "[a] private party acting pursuant to an anticompetitive regulatory program need not 'point to a specific, detailed legislative authorization' for its challenged conduct." *Id.*

65. *Southern Motors*, 471 U.S. at 64. See, e.g., *City of Lafayette v. La. Power and*

The disagreement between the majority opinion and the dissent illuminates an unresolved jurisdictional issue in *Midcal*. Requiring that the stated policy be compelled by the state shifts judicial deference to the state legislatures and imposes on the courts the burden of considering legislative intent. However, eliminating such a requirement shifts the responsibility of determining whether or not an alleged anticompetitive conduct comes under the aegis of state action immunity solely onto the courts and away from the state legislatures. This is not so difficult for courts when such conduct is an action of the state or of a state supreme court. In these cases, courts have found state action immunity.⁶⁶ However, for example in *Goldfarb v. Virginia State Bar*,⁶⁷ the Virginia State Bar, a state agency, required lawyers in Fairfax County to adhere to a minimum-fee schedule published by the Fairfax County Bar Association.⁶⁸ The Court denied immunity to the state bar despite its status as a state entity.⁶⁹ The Supreme Court focused on the entity authorizing the anticompetitive policy and emphasized that “private parties were entitled to *Parker* immunity only if the State ‘acting as sovereign’ intended to displace competition.”⁷⁰ In *Goldfarb*,

Light Co., 435 U.S. 389, 394 (1978) (stating that “it is not necessary to point to an express statutory mandate for each act which is alleged to violate the antitrust laws”).

66. “When the conduct is that of the sovereign itself,” the courts have no need to defer to the supervision of the regulatory agencies. FTC, REPORT OF THE STATE ACTION TASK FORCE, *supra* note 13, at 6-7 (contrasting cases dealing with actions directly flowing from the state acting as sovereign and those resulting from non-sovereign entities to which state legislatures have delegated power). See also *Parker*, 317 U.S. at 350-52 (explaining that the program was established by the California legislature in order to displace competition in this market); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (finding state action immunity for Arizona Bar disciplinary rules restricting advertising by lawyers because they were subject to re-examination and enforcement by the Arizona Supreme Court); *Hoover v. Ronwin*, 466 U.S. 558 (1984) (recognizing that the Arizona Constitution gave the Arizona Supreme Court the authority to deal with matters related to bar admissions and therefore there was state action immunity).

67. 421 U.S. 773 (1975).

68. *Id.* at 776.

69. *Id.* at 791 (stating that “[t]he fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members”).

70. *Id.* See also *Southern Motors*, 471 U.S. at 60 (discussing *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975)). But see *Bates v. State Bar*, 433 U.S. 350 (1977) (citing *Goldfarb* at 791, and distinguishing it from the alleged restraint that was immune because it was “compelled by direction of the state acting as sovereign.”); *Hoover v.*

the state bar, in requiring County Bar minimum fees, was engaging in private conduct that was not necessarily immune from antitrust liability.⁷¹ While the Supreme Court has made it clear that “*Parker* immunity is available only when the challenged activity is undertaken pursuant to a clearly articulated policy of the State itself, such as a policy approved by a state legislature, or a State Supreme Court,”⁷² it is not as clear whether the *Parker* immunity applies to acts authorized by state agencies as a result of legislative delegation of authority.⁷³ Without a requirement of legislative intent, the tendency of courts is to defer to regulatory decisions regarding alleged anticompetitive conduct, though the courts are consistent in holding that such entities lack any sovereign status.⁷⁴ It is from this two-tiered analysis that the disjointedness in the courts’ application of the *Midcal* test arises.

The majority in *Southern Motors* clearly recognized the role of state agencies as the *implementers* of legislatively authorized anticompetitive conduct and emphasized that as such, the agencies could not wait for

Ronwin, 466 U.S. 558 (1984) (holding that the Arizona Supreme Court had the final authority in determining admissions to the state bar and therefore its related actions, including delegating administrative authority to the Committee on Examinations and Admissions, were immune from antitrust liability).

71. *Goldfarb*, 421 U.S. at 792.

72. *Southern Motors*, 471 U.S. at 63. See also *supra* note 69.

73. See William Page, *Interest Groups, Antitrust, and State Regulation: Parker v. Brown in the Economic Theory of Legislation*, 1987 DUKE L.J. 618, 621 (1987) (stating that *Parker’s* restricting immunity to acts clearly articulated by the state as sovereign is necessary because “it ensures that state regulatory policies in conflict with antitrust will be made in representative bodies after a full Madisonian reconciliation of conflicting interests, rather than in administrative bureaucracies.”); Wiley, *supra* note 15, at 715, 765-69 (attempting to reconcile “antitrust imperialism” with a set of criteria that focus the courts’ attention on identifying and containing the effects of capture).

74. See FTC, REPORT OF THE STATE ACTION TASK FORCE, *supra* note 13, at 6-7 (stating that “[t]he courts have been similarly consistent in holding that special purpose instrumentalities lack independent sovereign status. A state Public Service Commission, for example, is not sovereign and may not articulate state policy. The same is true of state regulatory boards.”). But see *Otter Tail Power Co. v. United States*, 410 U.S. 366, 386 (1973) (Stewart, J., dissenting) (disagreeing with the majority opinion that *Otter Tail’s* actions were beyond state policy. The dissent explained that there was a “clear congressional purpose to allow electric utilities to decide for themselves whether to wheel or sell at wholesale as they see fit. This freedom is qualified by a grant of authority to the Commission to order interconnection (but for wheeling) in certain circumstances.”).

express authorization from the state legislature in order to effectuate state policy.⁷⁵ As long as there existed a clearly articulated “anticompetitive regulatory program” (an interesting choice of words used in *Southern Motors* and later similarly expressed in *Trigen*) no more detail regarding the implementation of the relevant state policy was required from the state legislature.⁷⁶ Furthermore, *Southern Motors* recognized that “permissive” state regulatory policies would not necessarily conflict with federal antitrust laws.⁷⁷ However, the Court never explained how “clear” legislatures must be in asserting a state policy to displace competition in order to meet the *Midcal* requirement of “clarity.” Herein began the ambiguity of the applicability of the first prong of the *Midcal* test and the first indications of the Court’s sanctioning a broader application of the state action immunity with respect to regulated companies.

d. The Establishment of the “Hallian” Foreseeability Standard

The same day as the Supreme Court eliminated any perceived compulsion requirement from the *Midcal* test in *Southern Motors*, it decided *Town of Hallie v. City of Eau Claire*,⁷⁸ which both reconciled some of the concerns raised by the dissent in *Southern Motors* and also provided some guidance to the courts in applying the *Midcal* test without a compulsion requirement. It incorporated a foreseeability standard into the state action immunity analysis when the actor involved was a municipality.

The facts involved unincorporated Wisconsin townships, located adjacent to the City of Eau Claire, which filed a lawsuit alleging that the City had violated the Sherman Act in two ways: 1) by monopolizing the provision of sewage treatment services in the area; and 2) by tying the

75. *Southern Motors*, 471 U.S. at 63 (stating that agencies “are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature.”).

76. *Id.* at 65 (stating that “if the State’s intent to establish an anticompetitive regulatory program is clear, . . . the State’s failure to describe the implementation of its policy in detail will not subject the program to the restraints of the federal antitrust laws.”).

77. *Id.* at 76 (stating that “state regulatory policies are permissive rather than mandatory, there is no necessary conflict between the antitrust laws and the regulatory systems; the regulated entity may comply with the edicts of each sovereign”).

78. 471 U.S. at 34.

provision of sewage treatment services to sewage collection and transportation services.⁷⁹ The City refused to supply sewage treatment services to the petitioners. However, it did supply these services, including sewage collection and transportation services, to individual landowners in the area of the townships which were annexed by the City through a referendum.⁸⁰ The Court of Appeals affirmed the district court's conclusion that such conduct was protected by state action immunity because the relevant statutes expressed "a clear state policy" to regulate the municipal provision of these services and to displace competition in sewage services.⁸¹

Relevant Wisconsin statutes granted authority to local city governments for construction activities related to sewage systems.⁸² They also provided ordinances for a city operating a public utility to limit the provision of such service in unincorporated areas. In addition, the municipal utility had no obligation to serve beyond the area delineated by ordinance.⁸³ The Wisconsin statutes provided that the State's Department of Natural Resources could order that a city's sewage system be connected to other areas. However, they also required that if such a territory refused to become annexed to the city, these orders to connect unincorporated territories to a city system would be void.⁸⁴ The Supreme Court concluded that the statutes clearly contemplated that a city could engage in anticompetitive conduct in the provisions of sewage services and that such conduct was "a foreseeable result of empowering the City to refuse to serve unannexed areas."⁸⁵

79. *Id.* at 36-37.

80. *Id.* at 37.

81. *Id.* at 37-38.

82. *Id.* at 41.

83. *Id.* (citing WIS. STAT. § 66.069(2)(c) (1981-1982)).

84. *Town of Hallie*, 471 U.S. at 41 (stating that no such order of the Department of Natural Resources was at issue in this case).

85. *Id.* at 42 (applying the analysis of *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389 (1978), in concluding that state action immunity is satisfied because "it is sufficient that the statutes authorized the City to provide sewage services and also to determine the areas to be served." The Court continued to state that "it is clear that anticompetitive effects logically would result from this broad authority to regulate."); cf. *Comty. Commc'ns Co. v. Boulder*, 455 U.S. 40 (1982) (holding that the Home Rule Amendment to the Colorado Constitution allocated only "the most general authority to municipalities to govern local affairs" and the Court states that such amendment was neutral, allowing the municipality the freedom to decide every aspect

With *Hallie*, at least with respect to municipalities, courts no longer needed to directly point to the “clearly-articulated” policy displacing competition as long as the conduct was the “foreseeable result” of state express authority.⁸⁶

In *Hallie*, the Court distinguished its earlier decision in *Community Communications Co. v. Boulder*.⁸⁷ The Court in *Boulder* concluded that the Home Rule Amendment to the Colorado Constitution delegated to municipalities a general authority to govern cable television regulation.⁸⁸ Whereas the Supreme Court in *Boulder* concluded that such delegation of authority was too general and neutral to satisfy the clear articulation prong of the *Midcal* test, the Court in *Hallie* held that the State had “specifically authorized Wisconsin cities to provide sewage services” and had “delegated to the cities the express authority to take action that foreseeably [would] result in anticompetitive effects.”⁸⁹ *Hallie* carefully distinguished *Boulder* and established that for the foreseeable conduct to be protected under the aegis of state action, it must flow from clearly expressed state policy that is specific. However, cases subsequent to *Hallie* as applied by the courts have interpreted *Hallie* more broadly.⁹⁰

While some scholars who are critical of the *Midcal* test think of the “Hallian” foreseeability standard as a refreshing change from the *Midcal* test,⁹¹ there has been much confusion among courts on the manner in

of cable television regulation as well as policy relating to any other field of regulation of local concern.).

86. *Hallie*, 471 U.S. at 42-44.

87. 455 U.S. 40 (1982).

88. *Id.* at 55-56.

89. *Hallie*, 471 U.S. at 43.

90. See *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 381-82 (1991). See also Floyd, *supra* note 25 at 1076 (concluding that the way the *Hallie* foreseeability test has been applied by the courts of appeals, “it has proven to have essentially no bite, leading to the conclusion that the broader the delegation of authority to act with respect to a particular subject matter, the more likely that anticompetitive conduct will be held to be the foreseeable result of that delegation.”).

91. See Page, *supra* note 30, at 1077 (expressing concern that the *Midcal* test compromised the *Parker* principles because delegated too much control of regulatory policy to the agencies). See also Wiley, *supra* note 15, at 715, 765-69 (1986) (stating that the *Midcal* test is a “miserable procedural compromise,” “fails to advance federal economic policy,” and that the clear-statement approach is ineffective and costly); Inman & Rubinfeld, *supra* note 16 at 1258 (stating that *Hallie*, in moving away from assessing legislative intent, “undermine[d] the principal of political participation that state immunity was supposed to serve.”); cf. Jorde, *supra* note 30, at 236-37, 241 (1987)

which to apply this test.⁹² Perhaps the confusion has stemmed from the Supreme Court itself. On the one hand, *Hallie* warned against requiring explicit authorization by the State to displace competition. On the other hand, the Supreme Court eliminated any compulsion requirements in *Southern Motors*.⁹³ In a prior case, *City of Lafayette, Louisiana v. Louisiana Power and Light Co.*,⁹⁴ the Supreme Court explained that in deciding whether state action immunity applied to anticompetitive acts by governmental bodies, a court did not necessarily need to find an "express statutory mandate for each act."⁹⁵ It only needed to determine whether the conduct was within legislative intent.⁹⁶ *City of Lafayette* went further than *Hallie* in that it expected the judiciary to look into legislative intent, a rather high burden to place on the courts. Luckily, it also recognized that this is not always an accurate determination because of a possible, and likely, "tenuous" connection between legislative authority and an agency's execution of that authority. Such determinations must be made on a case-by-case basis.⁹⁷ The Hallian foreseeability standard could be a useful tool in solidifying any tenuous nexus between legislative intent and regulatory determinations as long as courts tie the "foreseeability" of anticompetitive activity not with an agency's delegated authority but instead tightly with the original legislative express authority to displace competition in a market directly related to the activity.⁹⁸ To some extent, this would require courts to

(welcoming the Hallian foreseeability standard and criticizing the *Midcal* test as being inconsistent with the principles of "economic federalism" because it limited the states' ability to delegate economic decision making to agencies, municipalities, or private individuals"). See also generally Floyd, *supra* note 25, at 1077-84 (citing Jorde).

92. See the discussion of how different circuits have applied the Hallian foreseeability test, *infra* Part III.

93. See the discussion of *Southern Motors*, *infra* Part I.d.

94. 435 U.S. 389 (1978).

95. *Id.* at 393-94.

96. *Id.* at 394.

97. *Id.* at 394 (stating that "the connection between a legislative grant of power and the subordinate entity's asserted use of that power may be too tenuous to permit the conclusion that the entity's intended scope of activity encompassed such conduct. Whether a governmental body's actions are comprehended within the powers granted to it by the legislature is, of course, a determination which can be made only under the specific facts in each case").

98. See *Otter Tail Power Co. v. United States*, 410 U.S. 366, 387 (1973) (Stewart, J., dissenting) (stating that if the congressional scheme was to leave decisions of wholesale dealings up to the power companies "in the absence of a contrary

first look at legislative intent and then to the foreseeability of such activity flowing from such intent.

However, in a more recent case, *City of Columbia v. Omni Outdoor Advertising*,⁹⁹ the Supreme Court, while taking some pressure off the legislatures, also muddied the waters for the clear articulation analysis. In deciding whether city zoning ordinances restricting billboard construction and supporting the monopoly of the billboard business by one private company were protected by state action immunity,¹⁰⁰ it stated that the clear articulation prong of the *Midcal* test did not require a “delegating statute” to “explicitly permit[] the displacement of competition. It [was] enough . . . if the suppression of competition [was] the ‘foreseeable result’ of what the statute authorize[d].”¹⁰¹ In *Omni Outdoor Advertising*, the Court concluded first, that the purpose of the zoning regulation was to displace competition in the specific market; and second, that a municipal ordinance limiting the size, location, and spacing of the billboard had the foreseeable result of preventing newcomers from entering the market.¹⁰² However, given the scope of the legislative grant of zoning authority, such an ordinance was not only foreseeable but substantially certain. The question that the Supreme Court did not want to answer and reasoned was beyond the purpose of state action immunity was whether, considering the timing of the enactment of such ordinances, such regulatory measures were enacted *with the sole purpose* of eliminating incoming competitors.¹⁰³ A similar

requirement imposed by the Commission,” then Otter Tail’s refusal “was foreseeably within the zone of freedom specifically created by the statutory scheme”). Interestingly, in using the foreseeability standard, the dissent revealed its deference to the regulatory agency.

99. 499 U.S. 365 (1991).

100. *Id.* at 369.

101. *Id.* at 372 (citing *Hallie*, 471 U.S. at 41-42).

102. *Omni Outdoor Adver.*, 499 U.S. at 373 (concluding that the purpose of the zoning regulation was “to displace unfettered business freedom in a manner that regularly ha[d] the effect of preventing normal acts of competition, particularly on the part of new entrants”).

103. *See id.* at 374-84 (rejecting the possibility of a conspiracy exception to the *Parker* doctrine, stating that the principle of the antitrust laws is to regulate business and not politics, and rejecting the “conspiracy exception” to the *Noerr* immunity which would be applied “when government officials conspire with a private party to employ government action as a means of stifling competition”). *See generally* *Eastern R.R. Presidents Conference v. Noerr*, 365 U.S. 127 (1961).

argument was made by the petitioners in *Trigen*.¹⁰⁴

II. SIDESTEPPING *PARKER*

a. The "Almighty" State Action Immunity Doctrine: Trigen-Oklahoma City Energy Corp. v. Oklahoma Gas and Electric Co.

Oklahoma Gas & Electric Co. ("OG&E"), a regulated electric utility that served communities in Oklahoma and Arkansas, and Trigen-Oklahoma Energy Corp., a wholly owned subsidiary of Trigen Energy Corporation ("Trigen"), which operated industrial heating and cooling systems around the country, competed indirectly for customers in Oklahoma City. OG&E's retail electricity sales were regulated by the Oklahoma Corporation Commission ("OCC") and the Arkansas Public Service Commission.¹⁰⁵ Trigen began producing steam and chilled water for the Oklahoma City market in 1989.¹⁰⁶ It pumped the water to Trigen's customers from a central station through an underground pipeline owned by Trigen which required that buildings using this system needed access to Trigen's underground pipeline.¹⁰⁷ It is important to point out that the state did not regulate Trigen's Oklahoma City sales.¹⁰⁸ In its lawsuit against OG&E, Trigen alleged that OG&E interfered with its business in trying to persuade Trigen's customers to purchase cooling equipment, electric chillers, from a third party.¹⁰⁹

104. Brief for the Petitioner, *Trigen*, at 14-20 (No. 01-178). If this indeed was true, *Trigen* serves also as an example of "capture" by strong parochial interest groups — a phenomenon that a broad application of state action immunity seems to encourage. See Rossi, *supra* note 17. *But cf.* *City of Lafayette*, 435 U.S. at 415-16 (stating that the "*Parker* doctrine . . . preserves to the States their freedom under our dual system of federalism to use their municipalities to administer state regulatory policies free of the inhibitions of the federal antitrust laws without at the same time permitting purely parochial interests to disrupt the Nation's free-market goals").

105. *Trigen*, 244 F.3d at 1223.

106. *Id.*

107. *Id.*

108. *Id.*

109. See *id.* (explaining that buildings using "electric chillers consume[d] more electricity for cooling than buildings served by Trigen," and that Trigen would not need to serve buildings that had electric chillers for cooling, possibly explaining why OG&E was concerned about competition by Trigen). It is also important to point out that OG&E did not manufacture or sell chillers; it only sold electricity. Furthermore, the

Trigen sued OG&E for twenty years of lost profits. First, Trigen alleged that OG&E encouraged the County to install on-site electric chillers and as a result, in renewing its contract with Trigen, the County also convinced Trigen to reduce its capacity charge.¹¹⁰ Second, Trigen alleged that in order to obtain the contract with City's Myriad Convention Center, OG&E misrepresented to the City the rates for an experimental "Real Time Pricing tariff" which the OCC had recently approved.¹¹¹ Third, Trigen accused OG&E of eliminating the competition by persuading Corporate Tower, which had a ten-year contract (including renewal periods) with Trigen which was about to expire, to install an on-site cooling system, in anticipation of the expiration of a first renewal period of a contract. Corporate Tower then decided not to renew its contract with Trigen.¹¹²

Though arguably a concrete antitrust violation may be difficult to find in this case, the Tenth Circuit proceeded to conclude that state action immunity shielded OG&E's conduct from federal antitrust scrutiny because 1) the state regulated OG&E's electricity sales; 2) the OCC expressly approved the RTP tariff program; and 3) state action protected the decisions of the City and the County regarding a contract with Trigen and, as a consequence, this immunity extended to the actions of OG&E.¹¹³ The Court determined that because the RTP program in which OG&E offered to enroll the City was just another state-regulated electricity sale, all of OG&E's electricity sales and for that matter, all related sales, were protected by state action immunity.¹¹⁴ In these ways, the Court concluded that the clear articulation and active supervision requirements of the *Midcal* test were met.

OCC set the retail electricity rates of OG&E. *Id.*

110. *Id.* at 1223-24.

111. *Id.* at 1224. The case points out that, at that time, OG&E and Trigen were competing for the contract serving the City's Myriad Convention Center. Also, the RTP tariff was structured to give the customer more flexibility in using electricity and it gave OG&E complete discretion in selecting its customers.

112. *Id.* at 1224-1225. OG&E and Trigen also competed for the Corporate Tower contract. On a different note, the Court found that the state antitrust and tort claims were within the exclusive jurisdiction of the OCC; therefore, there was no need to reach the Noerr-Pennington and filed rate doctrine defenses. In addition the petitioner was sued for tortious interference with contract and prospective business advantage.

113. *Id.* at 1225.

114. *Id.* (arguing that "[t]his argument, standing alone, is enough to mandate dismissal of the federal antitrust claims.").

The Tenth Circuit's application of state action immunity in *Trigen* was a broad one. The Court relied primarily on the Oklahoma Constitution's delegation of authority to the state legislatures to regulate utilities.¹¹⁵ The State's delegation of such authority to the OCC was enough to protect from antitrust liability all anticompetitive conduct in the context of the sale of electricity.¹¹⁶ In other words, the state constitution was the source of blanket immunity.¹¹⁷ The Court stated: "[b]ecause Oklahoma has clearly articulated a policy to displace competition with the regulation of electric utilities and because Oklahoma actively supervises any allegedly anticompetitive conduct, the state action doctrine immunizes OG&E's regulated electricity sales from the federal antitrust scrutiny."¹¹⁸ In this way, the Court reasoned that the clear articulation requirement of *Midcal* was met. With respect to "active supervision," the Court looked at several factors. The OCC generally supervised OG&E in its tasks of setting electricity rates and promulgating rules and regulations affecting OG&E's services and operations.¹¹⁹ Furthermore, the OCC had the power to visit and examine the public utilities and it had jurisdiction over claims.¹²⁰ In finding active supervision, the Court focused on OCC's "power" to supervise rather than on the question of whether the OCC actually supervised the particular activities in question.¹²¹

115. See *id.* at 1226. See also OKLA. CONST. art. IX, §§ 15, 18.

116. *Trigen*, 244 F.3d at 1226. This state policy was therefore sufficiently "articulated" to satisfy the first prong of the *Midcal* test which requires that a challenged restraint be "clearly articulated and affirmatively expressed as state policy." The *Midcal* test provides that anticompetitive conduct is immune from antitrust liability if the challenged restraint is 1) "one clearly articulated and affirmatively expressed as state policy;" and 2) "actively supervised" by the State itself." *Id.* at 1226. See the discussion of the *Midcal* test, *infra* Part I.b. & c.

117. *Trigen*, 244 F.3d at 1226 (citing the Oklahoma Constitution which provides that the OCC "shall have the power and authority and be charged with the duty of supervising, regulating and controlling all . . . transmission companies doing business in this State, [and] in all matters relating to the performance of their public duties and their charges therefore" OKLA. CONST. art. IX, § 18.).

118. *Trigen*, 244 F.3d at 1225.

119. *Id.* at 1226.

120. *Id.*

121. See Jim Rossi, *Political Bargaining and Judicial Intervention in Constitutional and Antitrust Federalism*, 83 WASH. U. L.Q. 521, 565 (2005) (emphasizing that "[i]n most cases, potential supervision of conduct alone has been sufficient to trigger state action immunity from enforcement of the antitrust laws").

Professor William Page has expressed concern that the *Midcal* test transferred too much power to the regulatory agencies. He stated:

Theory and experience teach that, when the legislature has transferred responsibility for central policy choices to a regulatory agency under a broad delegation of power, the presumption of popular consent to protective regulation is unwarranted. Although agencies perform political functions, they do not necessarily make the same economic choices as would the legislature if it were presented with the same issues.¹²²

On the other hand, Professor Page also recognized that federalism presumed that states would establish regulatory programs applicable within their own borders.¹²³ The exact balance of power between state legislatures and the agencies to which they delegate regulatory authority is difficult to achieve. In its expansive deference to the OCC decision regulating the rates of the RTF tariff program, *Trigen* confirmed some of Professor Page's concerns regarding agency authority.¹²⁴ Ironically, though, the Court did not focus as much attention on the fact that, presumably, the OCC actively supervised the rates. Rather, the Court's justification for immunity was broader. It granted immunity based on the mere existence of a regulatory program established by the legislature through the Oklahoma Constitution, ignoring the question of whether the specific conduct in question was expressly authorized or "clearly articulated" by the legislature.¹²⁵ The focus of the Court was not on the challenged conduct itself but on the regulatory scheme that ultimately had jurisdiction over questions related to the sale of electricity. Was the

122. Page, *supra* note 30, at 1113 (asserting that the "active supervision" prong of the *Midcal* test should be abandoned because it places too much power in the agencies). Cf. Page, *supra* note 51 (clarifying Professor Page's more recent views on the active supervision prong); Elhauge, *supra* note 30; Inman & Rubinfeld, *supra* note 16.

123. *Id.* at 1099 ("Federalism considerations suggest that states should presumptively enjoy the freedom to establish regulatory programs that are applicable within their own borders without prior resort to Congress for approval by parties not directly affected.").

124. *Id.* at 1099, 1113-15.

125. See generally Brief for Petitioner, *Trigen*, (No. 01-178) 2001 WL 34115993, at *12, *16 (asserting that the Tenth Circuit held that because of OG&E's status as a state-regulated electric utility, OG&E had clearly met the *Midcal* two-prong test for state action immunity without further analysis into whether OG&E's specific conduct was clearly authorized by the state).

extent of the Court's broad deference to state agency authority such that any transaction by OG&E related to the sale of electricity could be construed as being regulated by the state? Yes, making any future attempts for private companies to compete even in a market related to electricity sales subject to monopolization by already established public utilities, particularly those with designated exclusive service territories or substantial regulation.¹²⁶

Even though the outcome in *Trigen* may possibly be purely an anomaly, the case raises important issues for the relationship of state action and broad judicial deference to delegated agency authority, particularly in a deregulatory environment. Broad judicial deference to agency authority, an authority that legislatures have delegated to agencies within traditional regulatory structures, could render future pro-competition policies virtually ineffective. In such an environment, new entrants into the electricity market would run the risk of not being able to compete in territories already exclusively serviced by public utilities, even investor-owned utilities.¹²⁷ Under the guise of state action, courts may be unwittingly protecting anticompetitive conduct that significantly affects the ability of new entrants to compete in markets explicitly intertwined and perhaps dependent on the sale of electricity.

126. See *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377 (1973) (holding that an electric utility's refusals to wheel power or grant access to wholesale power to municipal systems was not immune from antitrust liability under state action. The Court agreed with the district court's conclusion "that Otter Tail ha[d] 'strategic dominance in the transmission of power in most of its service area' and that it used this dominance to foreclose potential entrants into the retail area from obtaining electric power from outside sources of supply."). See also Oklahoma's Electric Restructuring Act, S.B. 500, 1997 Leg., Reg. Sess. (Okla. 1997), which has been delayed indefinitely by S.B. 440, 2001 Leg., Reg. Sess. (Okla. 2001). Under the Electric Restructuring Act, retail access would have begun on July 1, 2002. See ENERGY INFORMATION ADMINISTRATION, STATUS OF STATE ELECTRIC INDUSTRY RESTRUCTURING ACTIVITY (2003), available at http://www.eia.doe.gov/cneaf/electricity/chg_str/restructure.pdf.

127. See *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (concluding that Verizon's "alleged insufficient assistance in the provision of service to rivals" was not a recognized antitrust claim). The Court explained that the Telecommunications Act of 1996 sought to promote competition by requiring that local exchange carriers share their network with competitors. "New entrants, so-called competitive LEC's, resell these unbundled network elements . . . recombined with each other or with elements belonging to the LECs." *Id.* at 402.

b. The Effects of General Delegation of Authority to Regulatory Agencies

In contrasting the facts of *Trigen* with those of another Supreme Court case, *Cantor v. Detroit Edison Co.*,¹²⁸ the petitioners in *Trigen* argued that the Tenth Circuit erred in its decision because, as in *Cantor*, the state never intended to regulate a related market, cooling and heating systems in the case of *Trigen*, but only the sale of electricity. In *Cantor*, an electric utility, Detroit Edison Company, distributed light bulbs to its electricity customers and incorporated the cost of the light bulbs into its electricity rate.¹²⁹ The state agency that regulated the distribution of electricity at the time, the Michigan Public Service Commission, approved the electricity price which included the cost of the light bulbs.¹³⁰ When the plaintiff sued the electric utility for restricting competition in the unregulated light bulb market, Detroit Edison argued that its actions were pursuant to Commission approval. The Supreme Court held that a private party would be immune from antitrust liability if its conduct were pursuant to the direction of the sovereign state, since the purpose of the federal antitrust laws was not to superimpose additional regulation in areas already regulated by the state.¹³¹ *Cantor* narrowed the scope of state action immunity and clarified that immunity would be granted only for conduct within a market that was explicitly regulated by the state as per state policy. At the time, there were no Michigan statutes articulating state intent to displace competition in the light bulb market.¹³²

Interestingly, contrasting *Cantor* and *Trigen* raises another very important question of whether a state's delegation of authority to regulate a specific market such as the electricity market may extend to other related markets such as light bulbs as in *Cantor* or cooling and

128. 428 U.S. 579 (1976).

129. *Id.* at 582-83.

130. *Id.* (noting that in the relevant market, Detroit Edison was the only electricity supplier).

131. *Id.* at 594-98 (discussing the Court's resistance to finding an "implied antitrust exemption" where there is state regulation. More specifically, the Court stated that even under the assumption that Congress intended the antitrust laws not apply to all state regulated industries, "that assumption would not foreclose the enforcement of the antitrust laws in an essentially unregulated area such as the market for electric light bulbs.").

132. *Id.* at 584.

heating systems as in *Trigen*. The difference in the two cases is that in *Cantor*, the Michigan Public Service Commission collapsed the two markets under the aegis of the “sale of electricity” when it approved the electricity price which included the cost of the light bulbs.¹³³ The Supreme Court was clear in distinguishing the two markets and only granting immunity to conduct within the market explicitly regulated by the state, the electricity market and not the light bulb market. On the other hand, in *Trigen*, a regulated utility, OG&E, executed activities significantly affecting the competitiveness of a new entrant in a market that could have dramatically affected OG&E’s sale of electricity. Here we see state action immunity being used to preserve the anticompetitive nature of the sale of electricity at the expense of another, somewhat related market such as cooling and heating systems. If we apply the Hallian foreseeability standard, the legislative intent was to displace competition in the sale of electricity and it was not foreseeable that, in order to achieve this, the state would be condoning that OG&E, an investor-owned utility, would also monopolize the Oklahoma City market of cooling and heating systems in the area.

c. Hallie sheds some light on Delegated Agency Authority

Arguably, when a court chooses to focus on state delegation of authority to a regulatory agency rather than on the specific conduct in question, all activities remotely connected to such delegation of authority can be considered foreseeable and there is no need to use a Hallian analysis.¹³⁴ Furthermore, improperly using the foreseeability standard endangers the integrity of *Parker* because of the tendency of courts to defer to the delegated authority of regulatory agencies. Conduct that is the foreseeable result of agency decisions in principle is different from conduct that is the foreseeable result of legislative authority. *Hallie* and *Southern Motors* gave the legislatures more flexibility in enacting regulatory policy but, at the same time, blurred the

133. *Id.* (stating that Respondent’s arguments turn on the fact that the Michigan Public Service Commission regulated the ‘furnishing . . . [of] electricity for the production of light, heat or power”).

134. See discussion *infra* Part I.d. See also *Hallie*, 471 U.S. at 42 (discussing the foreseeable result); Page, *supra* note 30. This is an example of the problem with applying the state action too broadly: the broader the articulated policy, the greater the probability of finding foreseeable anticompetitive conduct.

clear articulation requirement by not clarifying the degree of specificity required for the state policy and by not articulating the need for establishing some “nexus” between such articulation and the specific conduct in question.

In *Trigen*, the Tenth Circuit did not explicitly use a foreseeability standard as used by other circuit courts to immunize OG&E’s anticompetitive conduct.¹³⁵ Rather, it simply argued that because OG&E’s conduct involved the sale of electricity, which was generally regulated by the state through the Oklahoma Constitution, OG&E’s conduct was then protected.¹³⁶ The problem with the *Trigen* court’s analysis was that it did not focus on the conduct in question and in turn never identified a nexus between such conduct and a clearly articulated state policy. The Court simply concluded that “because OG&E [was] acting in accordance with a clearly-articulated state regulatory program and because it [was] actively supervised by the OCC, . . . OG&E’s conduct [fell] within the heart of the state action doctrine and . . . the federal antitrust claims must be dismissed.”¹³⁷ The Court assumed that as a consequence of the OCC’s general authority to regulate utilities such as OG&E in the sale of electricity that OG&E would naturally come under this regime. As we have already seen, however, this conclusion is inconsistent with Supreme Court decisions, in particular *Hallie*, *Boulder*, and *City of Lafayette*.¹³⁸ OG&E was an investor-owned

135. See discussion *infra* Part I.d.

136. *Trigen*, 244 F.3d at 1226. See also Brief for Petitioner at 5, *Trigen*, (No. 01-178). It is also interesting to note that the Tenth Circuit analyzed the second prong of *Midcal* just as broadly as the first. It reasoned that because the Oklahoma constitution prescribes that the OCC has “‘general supervision’ over OG&E” and its power to fix rates for electricity and promulgate rules and regulations to this effect as well as ‘full visitorial and inquisitorial power to examine such public utilities,’ the active supervision prong has been satisfied. See *Trigen*, 244 F.3d at 1226 (discussing the Oklahoma Constitution, OKLA. CONST. art. IX, § 18 and OKLA. STAT. tit. 17, § 152(A), (C) (2004)).

137. *Id.* at 1228.

138. In *City of Lafayette*, for example, the Supreme Court explicitly stated that “[a] subordinate state governmental body is not ipso facto exempt from the operation of the antitrust laws.” *City of Lafayette*, 435 U.S. at 393. Furthermore, the Supreme Court already established under *Boulder* that a general delegation of authority would not satisfy the first prong of the *Midcal* test. *Boulder*, 455 U.S. at 51-56 (discussing that the articulated state policy must be specific and not a general delegation of authority for the *Midcal* test to be satisfied).

electric utility regulated by the state but not a state governmental body as was the OCC. Even if it were a state governmental body, *City of Lafayette* confirmed that there would be no automatic exemption because a court would still be required to determine whether the state legislature “contemplated” the type of anticompetitive conduct being challenged.¹³⁹

In essence, to expand the scope of the *Midcal* clear-articulation requirement to include a “clearly-articulated state regulatory program” essentially shifts all state power to regulate domestic markets from the state legislatures to the regulatory agencies, and effectively renders all regulatory policy “foreseeable.” This interpretation assumes automatic deference to administrative rulings as state policy rather than to statutory rules. Courts would have no need to examine the specific conduct in question; as long as it flows from a state regulated program, it would be foreseeable conduct and therefore protected by state action immunity. This would be inconsistent with the original intent of *Parker*.¹⁴⁰

III. STATE LAW OR REGULATORY POLICY? WHICH CARRIES MORE WEIGHT FOR COURTS WITH RESPECT TO STATE ACTION?

Courts are inconsistent in both their applications of state action immunity and their assessments regarding the scope of the doctrine. In particular, they differ in the interpretation of the clear-articulation requirement of the *Midcal* test. Some courts tend to construe this requirement more narrowly, while others construe it more broadly, concluding that a mere state policy implementing a regulatory scheme provides enough “clarity” to evidence an articulated state policy. *Trigen* is an example of this type of assessment. A look at various decisions, particularly from the circuits most active in state action litigation, will help illuminate the ambiguities permeating the doctrine.

a. The Eleventh Circuit: Tipping the Balance of the Midcal Test.

The Eleventh Circuit has not been shy in granting immunity to the anticompetitive conduct of utilities; however, the scope of the

139. *Id.* Arguably, “contemplation” is just another form of the foreseeability standard.

140. See generally Page, *supra* notes 30 & 51. See *Parker* discussion, *supra* Part I.a.

application has not been as broad as in the *Trigen* case. In addition, the cases in the Eleventh Circuit dealing with state action for the most part have arisen in the context of exclusive service territories under a traditionally regulated electricity market. *Praxair, Inc. v. Florida Power & Light Co.*,¹⁴¹ for example, concluded that the state action immunity doctrine protected regulated electric utilities' division of service territories in the county in which the customer was located from potential illegal restraints of trade.¹⁴² Florida Power and Light ("FPL"), an investor-owned public electric utility engaged in the generation, transmission, distribution and sale of electricity, had refused to negotiate a lower rate for Praxair, Inc.; therefore, Praxair requested service from Florida Power Corp. ("FPC"), which had better rates. FPC refused to provide the service to Praxair arguing that a 1965 territorial agreement with FPL that divided the territory between FPC and FPL authorized it to refuse service to a third party.¹⁴³ FPL historically served the area of Brevard County where Praxair was located.¹⁴⁴ The utilities and Praxair disagreed on whether the 1965 territorial agreement specifically allocated this area to FPL.¹⁴⁵ It asked the Court to consider whether "sufficient 'state action' by the . . . Commission" immunized the division of the county into service territories by FPL and FPC from possible antitrust liability.¹⁴⁶

The Eleventh Circuit, in deciding whether state action immunity protected the utilities, attempted to determine the circumstances surrounding the Commission's approval of the territorial agreements that resulted in Order No. 3799 in 1965 (the "1965 Order"). It considered the parties' actions since the 1965 Order, which resulted in the Commission's 1989 declaratory statement.¹⁴⁷ The Court stated that the

141. 64 F.3d 609 (11th Cir. 1995).

142. *Id.* at 611. See Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (2004).

143. *Praxair*, 64 F.3d at 611. See also *id.* at 612-13 (describing the contents of the territorial agreement).

144. *Id.* at 611.

145. *Id.* Praxair contended that the Florida Public Service Commission approved the territorial agreement without a specific allocation of Brevard County to FPL or FPC. *Id.*

146. *Id.* Petitioner appeals the district court's denial of its motion for summary judgment in which the utilities should have been granted state action immunity. See also 15 U.S.C. § 3 (stating that it is a federal antitrust violation to allocate territories).

147. *Id.* at 612 (stating that the parties' actions subsequent to the 1965 Order "culminated in the Commission's 1989 declaratory statement interpreting that order.").

solution turned on whether the Commission approved that the area in question, Brevard County, be given to FPL.¹⁴⁸ If the conclusion was in the affirmative, then the utilities would be accorded state action immunity and summary judgment under these circumstances would be appropriate.¹⁴⁹

It was unclear whether Brevard County (and therefore Praxair) was in the FPC or FPL service areas. The Court looked at the purpose of the agreement, which was “to avoid duplication of service in [certain] areas of the state.”¹⁵⁰ The Commission had to approve any deviations from the 1965 Order.¹⁵¹ In this way, the second prong of the *Midcal* test, the “active supervision” requirement, was met. While not ignoring the “active supervision” requirement, the Court’s focus was on whether there was clear and express articulation to displace competition through the allocation of service territories. It considered whether the Commission, in light of that articulation, reasonably interpreted the 1965 Order as allocating the territories as above-mentioned. In order to determine the intent of the agreement, the Court also looked at old maps, revisited Commission hearings and testimony of witnesses, and considered the consistent conduct of the Commission of treating Brevard County as being serviced by FPL.¹⁵² The Court finally determined that Brevard County was indeed serviced by FPL and that the Commission had correctly denied FPL the permission to wheel power to Praxair because it would be in contravention of the approved 1965 territorial agreement.¹⁵³ Therefore, FPL’s specific conduct, refusing to wheel power to Praxair because of the 1965 territorial agreement, would be

148. *Id.* at 612-13 (describing the court’s review of the relevant territorial agreements and surrounding circumstances).

149. *Id.* at 612. In the 1965 Order, the Commission had approved several FPL and FPC territorial agreements, including the current agreement. *Id.*

150. *Id.* (stating that “[t]he purpose of the agreement was to avoid duplication of service in areas of the state where there was significant population growth and where the utilities’ service areas were converging.”).

151. *Id.*

152. *Id.* at 612-14. *See* Page, *supra* note 30, at 1122-26 (discussing the dangers of looking to the intent of the legislature). *See also* Floyd, *supra* note 25, at 1119-20 (expressing concern with retrospective agency clarification of state policy because such review would “frustrate the core purpose of the clear articulation requirement” which is to ensure that anticompetitive policy be authorized by the state decision-makers).

153. *Praxair*, 64 F.3d at 614 (concluding that “the Commission reasonably interpreted the prior agreement to allocate Brevard County to Florida Power & Light.”).

protected by state action immunity.

Like *Trigen*, the Court in *Praxair* gave much deference to the Commission and its approval of the territorial agreements as well as the resulting 1965 Order which allocated the territories. However, it differed from *Trigen* in that it focused on the specific conduct in question, the wheeling of power to a territory not within the original service territory, and on whether there was clear and express articulation to displace competition as to wheeling power in these territories. It did not, as in *Trigen*, determine that because the legislature had delegated to the Florida Commission the power to approve such agreements, then as a consequence, this conduct would be protected by state action immunity.¹⁵⁴ Though the distinction is close, it is an important one because the Court in *Praxair*, in finding state action immunity, did not rely solely on the regulatory scheme as the Tenth Circuit did in *Trigen*. It focused on the activity in question and then looked to the Commission's decisions regarding this activity in deciding to shield such activity from antitrust liability. The Court, however, did look to the Commission's own interpretation of its own regulations as a determining factor in finding state action immunity, therefore placing much evidentiary weight on the actions taken by the regulatory agency itself.¹⁵⁵ In this way, the Court collapsed the clear articulation and active supervision prongs of the *Midcal* test. However, it also recognized the legislative power to delegate its regulatory authority to a state agency when it pointed to a 1986 Eleventh Circuit case stating that a "clearly

154. The Court points out, though, that the district court concluded that the first prong of the *Midcal* test had been satisfied because Florida's case law and statutory and regulatory provisions had "effectively displaced competition between electric utilities in the retail market." *Id.* at 611 (quoting the Order at 9-11).

155. *Id.* at 613. ("An agency's interpretation of its own regulations must be given controlling weight unless that interpretation is plainly erroneous or inconsistent with the regulation."). Also, FPL asked the Commission to issue a declaratory statement to determine whether the utilities would violate the 1965 Order if they complied with Praxair's request for Florida Power to sell Praxair electricity and for FPL to wheel the FPC-generated electricity to Praxair's plant. The Commission concluded the actions would have been contrary to the Order. *Id.*

Hallie and *Southern Motors* gave the legislatures more flexibility in enacting regulatory policy but, at the same time, blurred the clear articulation requirement by not clarifying the degree of specificity required for the state policy and by not articulating the need for establishing some "nexus" between such articulation and the specific conduct in question. See *supra* Part II.c.

articulated policy can be established if a state statute authorizes an agency to regulate the area and 'provides' for a regulatory scheme that inherently displaces unfettered business freedom."¹⁵⁶

Despite its deference to the delegated authority of the Florida Commission, the Eleventh Circuit in *Praxair* gives us some insight into applying *Midcal*. First, the focus of the court must be on the specific conduct in question. Second, a court must determine the conduct's relevance to state policy to displace competition with respect to the conduct in question. Finally, a court must look into the active supervision of the regulatory agency over such conduct. However, *Praxair* also illustrates that more likely than not, courts will collapse the two prongs in determining state action.

Another Eleventh Circuit case, *TEC Cogeneration Inc., RRD v. Florida Power & Light Co.*,¹⁵⁷ also found that state action rendered a public utility immune from antitrust liability for its allegedly anti-competitive conduct.¹⁵⁸ Specifically, FPL declined to wheel the cogenerators' surplus power to other Dade County facilities arguing that this would violate the Commission's self-service wheeling rules.¹⁵⁹ As in *Praxair*, the Court in *TEC Cogeneration* applied a less broad interpretation of state action immunity than in *Trigen*. The Court took into consideration the fact that the Florida legislature had given the Commission "broad authority" in regulating FPL which in turn, had monopoly power within its service area both as to the purchase of wholesale power and the sale of retail power.¹⁶⁰ Also, the Court recognized that the state had consistently regulated the relationship between Florida utilities and cogenerators.¹⁶¹ In *TEC Cogeneration*, the

156. *Id.* at 611 (citing *Executive Town & Country Servs., Inc. v. City of Atlanta*, 789 F.2d 1523, 1529 (11th Cir. 1986)). *But see* Page, *supra* notes 30 & 51 (discussing the dangers of delegating legislative power to state agencies).

157. 76 F.3d 1560 (11th Cir. 1996).

158. *Id.* at 1563-64.

159. *Id.* at 1566.

160. *Id.* at 1568 (stating that the "Florida legislature gave the PSC broad authority to regulate FPL.").

161. *Id.* (also stating that "the relationship between Florida utilities and cogenerators has been subject to pervasive state regulation through statute and regulatory rules A myriad of agency proceedings have transpired. The field has not been left to the parties' unfettered business discretion. In addition, the Florida Supreme Court has been active in its role of judicial review."). The Commission sought to balance the competing interests of encouraging cost-effective cogeneration on the one hand and

Court found that the Florida legislature had intended to displace competition with regard to electrical utilities, satisfying the first prong of the *Midcal* test.¹⁶² As in *Trigen*, the Court also emphasized the fact that the legislature had approved the establishment of a regulatory structure. However, the focus of the Court in *TEC Cogeneration* was on the second prong of the *Midcal* test. The ongoing relationship between the regulatory structure and the FPL, the Commission's capacity to actively supervise FPL, and the other evidence indicated sufficient active supervision of the agency over the conduct of FPL.¹⁶³ Although the Court did give deference to the state agency as a regulatory scheme with the authority to displace competition in the electrical market, it did not, as in *Trigen*, conclude that because of such regulatory structure, there automatically was a clearly articulated and affirmatively expressed state policy authorizing FPL's conduct. Rather, the Court found solace in the fact that the Commission had the power to regularly supervise FPL's conduct through periodic reports and approvals.¹⁶⁴

Arguably, the Court did not give an accurate analysis of the clear articulation requirement of the *Midcal* test, as it never addressed whether the policy itself was clearly articulated by the state. Rather, its focus was once again on the obvious active supervision by the regulatory agency, collapsing the two prongs of the *Midcal* test. Although this kind of analysis is not uncommon in cases of broad state delegation of power

avoiding its subsidization by utility ratepayers on the other. *Id.* See generally, Rohit C. Sharma, *Niagara Mohawk Power Corp. v. FERC*, 23 ENERGY L. J. 157, n. 108 (2002) (stating that FERC regulations were designed to encourage cogeneration).

162. *TEC Cogeneration*, 76 F.3d at 1568-69.

163. *Id.* at 1569-70. It is important to note that the Eleventh Circuit here emphasized that the Commission's power to actively supervise FPL determined whether there was sufficient active supervision notwithstanding whether the Commission actually exercised this power. The Court clarified that this "power [was] insulated." *Id.* at 1570.

164. *Id.* at 1569-70 (generally discussing the active supervision prong of the *Midcal* test and finding that "the State of Florida, through its state regulatory agency . . . , actively supervised FPL in the areas of wheeling, rates and interconnection"). For example, in 1987, the Commission denied the petition by Metropolitan Dade County Florida to allow TEC Cogeneration, Inc. to wheel power to Jackson Memorial Hospital because they could not satisfy the Commission's self-service wheeling rules. *Id.* at 1569. See Page, *supra* notes 30 & 51 (discussing the dangers of delegating legislative power to state agencies). See also Rossi, *supra* note 121, at 565 (stating that "many appellate courts remain astonishingly deferential to regulators in applying the active-supervision prong of the *Midcal* test.").

to an agency, the Court in *TEC Cogeneration* failed to take into account any level of specificity in determining whether the conduct itself was consistent with clearly articulated state policy to displace competition.¹⁶⁵ In this respect, *Praxair* was one step ahead of *TEC Cogeneration* — it began the analysis with the specific conduct in question and not with whether a regulatory scheme was in place and actively doing its job.

In deregulating statutes, the state legislatures delegate to agencies the task of implementing competitive policy by establishing regulation that encourages the development of workable wholesale markets. However, with excessive deference to the agencies, if there is questionable anticompetitive conduct, will those pro-competition rules include processes for active supervision of the conduct in question? Most likely not since the idea itself seems counterintuitive; however, it would be for the agency to decide, empowering the agency even more. In a deregulatory environment, broad application of the *Midcal* test would lead to much confusion and arbitrary empowerment of state agencies. Furthermore, new entrants to the deregulated electrical market and even other related markets would run the risk of agencies determining whether or not to allow their entrance into a newly created market. This is contradictory to the promotion of competition and not within the original intention of *Parker*. Furthermore, it would further the effects of capture arguably already existing in the traditional regulatory structures and in the dominant investor-owned suppliers which they regulate.¹⁶⁶

The Eleventh Circuit once again upheld state action immunity in *Municipal Utilities Board of Albertville v. Alabama Power Co.*¹⁶⁷ In this case, various municipal utilities (the “Cities”) brought an antitrust violation suit against the defendants, a combination of electric cooperatives and the Alabama Power Company, for allegedly entering into illegal horizontal territorial agreements.¹⁶⁸ An Alabama statute,

165. *TEC Cogeneration*, 76 F.3d at 1568 (concluding that it was “clear that Florida intended to displace competition in the utility industry with a regulatory structure”). Note that Florida has no deregulation legislation in place. ENERGY INFORMATION ADMINISTRATION, STATUS OF STATE ELECTRIC INDUSTRY RESTRUCTURING ACTIVITY, *supra* note 26.

166. *See infra* note 262 (discussing various scholars’ views on the delegation of too much power to the regulatory agencies as furthering the effects of capture).

167. 934 F.2d 1493 (11th Cir. 1991).

168. *Id.* at 1497-98. In addition, the plaintiffs alleged that the defendants had

which limited competition for customers among utilities by granting exclusive service areas, included a series of private agreements dividing service territories.¹⁶⁹ The Court decided that this statute demonstrated a “clearly articulated [state] policy to displace competition in the retail electric market except for large industrial customers” in order to prevent duplicating electric facilities.¹⁷⁰ However, it had to revisit the case in 1994 to decide whether the active supervision requirement of the *Midcal* test had been met.¹⁷¹ It decided that the private agreements at issue were actually approved by the Alabama Legislature and were incorporated into the statute at issue, therefore providing the required explicit approval of any territorial exchanges to which the private utilities agreed.¹⁷²

Interestingly, though, unlike *TEC Cogeneration* and more like *Praxair, Municipal Utilities Board of Albertville* focused its analysis of the *Midcal* clear-articulation requirement on the fact that a regulatory structure displacing competition was in place. The Court found that the Alabama legislature had clearly articulated a policy to displace competition in the retail electric market, except in the case of large industrial customers, by providing for a regulatory scheme that clearly displaced competition.¹⁷³ It stated that “the Supreme Court ha[d] never stated that the regulations adopted to displace competition must be

conspired with state officials in codifying these agreements into statutes so that they would be immune from antitrust liability. *See id.*

169. *Id.* at 1502 (stating that the sections of statute dealing with private agreements actually state that they are “consistent with the general purpose of the Acts to avoid line duplication.”). *See also generally id.* at 1496-97 (describing the history of the relevant Alabama statutes).

170. *Id.* at 1502.

171. *Id.* at 1504-05 (explaining that in *City of Columbia v. Omni Outdoor Advertising, Inc.* the Supreme Court “reiterated the principle that states may not immunize private anti-competitive conduct merely by authorizing it.”). More specifically, the Court emphasized that the terms of the private agreements were not in the record of the case as to the Alabama statute and therefore it was unable “to determine whether they comply with the active state supervision prong of the *Midcal* test.” *Id.* at 1504.

172. *See Mun. Utils. Bd. of Albertville v. Ala. Power Co.*, 21 F.3d 384, 386-88 (11th Cir. 1994) (explaining that “[u]nder the 1985 Act . . . the Alabama legislature must explicitly approve any customer allocations the parties might wish to make” and concluding that the private agreements therefore qualified as being actively supervised and immune from antitrust liability).

173. *See supra* note 169 and accompanying text.

perfectly consistent with the articulated policy reasons supporting those regulations.”¹⁷⁴ The inquiry was whether there was a clearly articulated state policy to displace competition and “not whether the adopted regulations [were] the best means to accomplish that policy.”¹⁷⁵ The Eleventh Circuit correctly stated that the Supreme Court had never required that regulations implementing the displacement of competition be perfectly consistent with articulated policy reasons for supporting those regulations; however, this is at best a “loose” understanding of the elimination of the compulsion requirement under *Southern Motors*.¹⁷⁶

The Eleventh Circuit in *Municipal Utilities Board of Albertville* broadly interpreted the clear-articulation requirement and it was not unlike *Trigen* in its reasoning that the establishment of a regulatory scheme would be sufficient to satisfy this prong of the *Midcal* test. Interestingly, unlike *Trigen*, the Court’s active supervision analysis focused on the legislature’s approval of the private agreements and not on any decisions by the regulatory agency.

b. The Ninth Circuit Reveals the Usefulness of the “Hidden Prong” of Midcal

In contrast to the Eleventh and Tenth Circuits where the Courts have more readily granted immunity to utilities conducting anticompetitive conduct, the Ninth Circuit has been more hesitant in finding state action immunity for similar conduct. However, the Ninth Circuit seems to apply the “Hallian” foreseeability standard more often than other circuits.¹⁷⁷ Furthermore, its narrow construction of the foreseeability standard exemplifies that this “hidden prong,” if used correctly, could serve as an effective tool for clarifying ambiguities arising from the recent application of the clear-articulation component of the *Midcal* test.

174. *Mun. Utils.*, 934 F.2d at 1502.

175. *Id.*

176. *Id.* See also *Southern Motors*, 471 U.S. 48, 61-62 (1985) (stating that “a state policy that expressly *permits*, but does not compel, anticompetitive conduct may be ‘clearly articulated’ within the meaning of *Midcal*.”) (quoting *Midcal*, 445 U.S. at 106).

177. See, e.g., *Medic Air Corp. v. Air Ambulance Auth.*, 843 F.2d 1187 (9th Cir. 1988); *Nugget Hydroelectric, L.P. v. Pac. Gas and Elec. Co.*, 981 F. 2d 429, 434 (9th Cir. 1992); *Snake River Valley Elec. Ass’n v. Pacificorp*, 238 F.3d 1189 (9th Cir. 2001); *Columbia Steel Casting Co. v. Portland Gen. Elec. Co.*, 111 F.3d 1427 (9th Cir. 1997), *cert. denied*, 523 U.S. 1112 (1998).

(i) “Wheeling” Too Much Power to the Agencies: Snake River Valley Electric Association v. PacifiCorp

The Ninth Circuit case, *Snake River Valley Electric Ass’n v. PacifiCorp*,¹⁷⁸ was brought by Snake River Valley Electric Association (SRVEA), a non-profit cooperative organized to buy electric power at wholesale rate for its members who primarily purchased power from PacifiCorp and Utah Power and Light Company, a subsidiary of PacifiCorp.¹⁷⁹ SRVEA argued that PacifiCorp violated sections 1 and 2 of the Sherman Antitrust Act when it refused to allow SRVEA to “wheel” and supply power to PacifiCorp’s customers through PacifiCorp’s electric transmission facilities.¹⁸⁰ PacifiCorp, alleging state action immunity, argued that the Electric Supplier Stabilization Act (“ESSA”), which allowed for regulation of the electric service providers in Idaho, forbade a utility from supplying electric service to customers connected to other electric suppliers without the consent of the other supplier.¹⁸¹ In this way, ESSA in essence “authorized” PacifiCorp’s refusal. The Ninth Circuit concluded that state action immunity did not protect this conduct because there was no state supervision of such refusal, despite ESSA’s *permissive* policy allowing PacifiCorp to refuse the wheeling and the supply of power by SRVEA.¹⁸² The effect of

178. 238 F.3d 1189 (9th Cir. 2001) [hereinafter *Snake River I*], *remanded and amended*, Snake River Valley Elec. Ass’n v. Pacificorp, 357 F.3d 1042 (9th Cir. 2004) [hereinafter *Snake River II*], *cert. denied*, 125 S. Ct. 416 (2004).

179. *Snake River I*, 238 F.3d at 1191.

180. *Id.* The Court also noted that PacifiCorp owned the majority of electric transmission facilities in the surrounding areas and controlled over 90% of the electrical market in the Idaho Falls area. *Id.*

181. *Id.* (citing IDAHO CODE § 61-332B (1999)).

182. *Snake River I*, 238 F.3d at 1193 (stating that “Pacificorp’s refusal to grant SRVEA consent to serve PacifiCorp customers is a foreseeable result of the ESSA.”). *See also id.* at 1194 (in discussing “active supervision” distinguishing itself from *Liquor Corp. v. Duffy*, 479 U.S. 335 (1987)). *See also Duffy* (stating in dicta that a state statute might be written such that a state need not actually review individual price-setting decisions). ESSA in *Snake River I* was not “self-policing” as was allowed in the Supreme Court case *Liquor Corp. v. Duffy*. In *Duffy*, the Court acknowledged that certain state acts that did not need active supervision because some statutes may be so comprehensive or their applications so mechanical that actual state review would be pointless. The Court in *Duffy* also suggested that a statute that specifies the price margin between wholesale and retail prices may amount to active supervision, despite the lack of actual state supervision over individual price-setting decisions. *See also* FTC

granting state action immunity under these circumstances would have been to allow private parties, such as PacifiCorp, the power to determine when competition would be allowed. This would have violated the Sherman Act and the “active supervision” prong of the *Midcal* test.¹⁸³ In essence, ESSA unwittingly delegated approval authority to supply power not to the regulatory agency but to the regulated investor-owned utility. Not unlike the Eleventh Circuit, the Ninth Circuit’s focus on the active supervision prong of the *Midcal* test demonstrates again the tendency of courts to defer to the administrative power of the regulatory agency. However, it would not go as far as deferring to delegated authority of the regulated private entity.¹⁸⁴

In response to this decision, the Idaho legislature amended ESSA to comply with the “active supervision” component of the *Midcal* test. These amendments allowed an electrical supplier to refuse to wheel under particular circumstances and if there was such refusal, that supplier was required “to petition the Public Utilities Commission for a review of whether the conduct was consistent with ESSA.”¹⁸⁵ Also, if a proposed supplier petitioned the Idaho Public Utility Commission and it issued an order allowing service, then an electrical supplier such as SRVEA could serve customers of another electrical supplier such as PacifiCorp.¹⁸⁶ More recently, the Ninth Circuit revisited the case, in *Snake River II*, and determined that these amendments did incorporate

v. Tigor Title Ins. Co., 504 U.S. 621, 640 (1992) (citing *Duffy* dicta with approval).

183. In *Snake River I*, however, PacifiCorp had the power to grant written consent for another utility to serve its customers. The Ninth Circuit did not agree that this was sufficient active supervision and that in fact, it was the type of behavior that the *Midcal* test was trying to prevent. *Snake River I*, 238 F.3d at 1194 (“By providing an option for competition and then an ‘opt out’ that is wholly within the utility’s control and without state supervision, the state has, in effect, given the utility partial control over the no competition policy. This is the type of private power that the active supervision prong of *Midcal* is supposed to prevent.”). Cf. *Hallie*, 471 U.S. 34, where, unlike *Midcal*, the actor involved was a municipality and not a private entity. In fact, the purpose of the second prong of the *Midcal* test has been to determine whether the State has exercised sufficient “independent judgment and control” in determining the rates or prices “established as a product of deliberate state intervention, not simply by agreement among private parties.” See *FTC v. Tigor Title Ins. Co.*, 504 U.S. 621, 634-35 (1992).

184. See Page, *supra* note 30.

185. *Snake River II*, 357 F.3d at 1048. See also IDAHO CODE §§ 61-332D(1), (2) (Michie 2004).

186. *Snake River II*, 357 F.3d at 1048. See also IDAHO CODE § 61-334B.

the requisite “active supervision” and therefore reversed its prior decision and concluded that in fact PacifiCorp’s refusal to wheel and supply electricity was protected by state action immunity. Once again, a court demonstrated its willingness to defer to the delegated authority of a regulatory agency, a much more comfortable approach for the court than relying on an approval to supply electricity from a private entity.¹⁸⁷

Turning to the issue of foreseeability, a closer look at *Snake River I*’s analysis of the first prong of the *Midcal* test reveals an interesting use of the foreseeability standard. This “modern test for clear articulation” incorporated the idea that in order “to meet the ‘clearly articulated’ requirement it was not necessary for the State to expressly permit the displacement of competition. Instead it was only required that ‘suppression of competition [be] the foreseeable result of what the statute authorizes’.”¹⁸⁸ In determining satisfaction of the first prong of *Midcal*, the Court in *Snake River I* found it necessary to decide whether PacifiCorp’s refusal to allow SRVEA to service PacifiCorp customers was the foreseeable result of the state statute, ESSA. It concluded in the affirmative. For this reason, the legislature amended the statute so that such refusal authority remained with the regulatory agency and not the private, regulated entity. Even though the timing of the amendment was obviously in response to the initial sloppiness in the law, the legislature did “clarify” the legislative purpose of the statute. Rather than interpreting legislative intent, the Court in this case essentially “required” the legislature to address the lack of clarity in the statute. This seems more in line with the federalist principles of *Parker*.

In light of the courts’ confidence in agencies to properly implement regulatory policy, this “modern test” raises another question regarding the clear-articulation requirement of *Midcal*: how clearly or specifically

187. However, the Ninth Circuit failed to address the issue that the amendments to ESSA were passed subsequently to PacifiCorp’s decision to refuse service. But since this was a retroactive delegation of power by the state legislature and not the regulatory agency itself, perhaps the Court did not see the need to address it. See Floyd, *supra* note 25, at 1119-20. Interestingly, in *Trigen*, the Court did not distinguish between the legislative delegation of power to a regulatory agency from that given to a regulated private entity such as OG&E. In the eyes of the Tenth Circuit, all delegations of authority came under the entire authorized regulatory scheme.

188. *Snake River I*, 238 F.3d at 1192 (referring to *A-1 Ambulance Serv. Inc. v. County of Monterey*, 90 F.3d 333 (9th Cir. 1996) quoting *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 372-73 (1991)).

must a state policy be articulated in order for a court to conclude that the conduct is in fact the foreseeable result of such policy?¹⁸⁹ Interestingly, *Snake River I* narrowly construed the foreseeability standard, tying it to the specific conduct in question; that is, whether PacifiCorp's refusal was the foreseeable result of ESSA. The "hidden prong" of the *Midcal* test has begun to reveal its usefulness.

(ii) Another Window into State Authority: Columbia Steel Casting Co. v. Portland General Electric Co.¹⁹⁰

In *Columbia Steel Casting*, the Ninth Circuit, in using a "Hallian" foreseeability standard, somewhat narrowed the scope of state action immunity. In its final analysis, the Court clarified its use of the foreseeability standard, vacating its prior decision,¹⁹¹ and distinguished two other Ninth Circuit cases that also applied a foreseeability standard.¹⁹²

Columbia Steel Casting Co., a consumer of electric power in

189. A similar question was asked in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). See *infra* Part I.d.ii.

190. 111 F.3d at 1427 (9th Cir. 1997), *cert. denied*, 523 U.S. 1112 (1998).

191. 1993 WL 312703 (D. Or. Aug 11, 1993) (No. Civ. 90-524-FR, Civ. 90-592-FR), *vacated by* 111 F.3d 1427 (9th Cir. 1996).

192. *Nugget Hydroelectric, L.P. v. Pac. Gas and Elec. Co.*, 981 F.2d 429, 434 (9th Cir. 1992). *Columbia Casting* used *Nugget Hydroelectric* as precedent for its analysis of the foreseeability test in the context of state action immunity. The Court granted state action immunity to Pacific Gas and Electric Company (PG&E), a California public utility company regulated by the California Public Utility Commission, in the business of buying and distributing electricity, despite its refusal to grant a private power supplier's force majeure claim for an extension of the contract period and its request for conditioned deferral of the delivery deadline on unreasonable price concessions by the private supplier. The California Public Utility Code and relevant regulations authorized the Commission to specify the prices and the terms and conditions for the sale of power by a private power producer such as Nugget to utilities. The Court concluded that Nugget's decision to grant certain concessions was a "foreseeable result" of this state policy and therefore the clear articulation requirement of *Midcal* was satisfied. The Court also concluded that the alleged bad faith of PG&E was of no consequence in deciding whether there was state action immunity. The active supervision prong was satisfied as well. *Id.* at 434-35. See also *Medic Air Corp. v. Air Ambulance Auth.*, 843 F.2d 1187 (9th Cir. 1988) (where the Ninth Circuit found that the monopoly of dispatching services enjoyed state action immunity because it was both pursuant to a state policy of granting such exclusive franchises and actively supervised. But it also held that the use of the monopoly to injure a competing service was not immune.).

Portland, Oregon, sued Portland General Electric (PG&E) and Pacific Power and Light (PP&L), two electric utilities, for allegedly violating the Sherman Act by dividing the city of Portland into exclusive service territories.¹⁹³ PG&E defended on the basis that a 1972 Oregon Public Utility Commission (“OPUC”) approving the division of Portland market into exclusive service territories rendered its actions immune under the state action immunity doctrine.¹⁹⁴ After receiving the City Council’s approval of the exchange of the utility properties, PG&E and PP&L entered into a 1972 Agreement which they submitted for OPUC approval. The Agreement said nothing as to exclusive service territories in Portland.¹⁹⁵ They agreed to exchange facilities, including electric distribution plants and all easements related to the operation of these facilities.¹⁹⁶ By an Order issued in December 1972, the OPUC approved the 1972 Agreement. The 1972 Order provided that the transfer of the electric distribution plants would be pursuant to the 1972 Agreement between the parties and that this exchange may include the transfer of customers from one party to the other.¹⁹⁷

Columbia Steel Casting Co. operated a steel casting plant in the area served exclusively by PG&E subsequent to the 1972 Order.¹⁹⁸ When Columbia Casting Co. asked PG&E to wheel electricity generated

193. *Columbia Casting*, 111 F.3d at 1432.

194. *Id.* PG&E and PP&L competed for customers in the Portland area which resulted in the duplication of transmission lines, poles, substations, and transformers in the area. For many years they had unsuccessfully sought regulatory approval for dividing the Portland market into exclusive service territories. The Portland City Charter prohibited exclusive franchises and had a long-standing policy of encouraging competition among the utilities. *Id.* at 1433. The City disapproved the division of the service territories but approved only the “sale, transfer and exchange of plant and property between [PG&E] and [PP&L].” *Id.* (citing Portland, OR., Ordinance 134416 (Apr. 26, 1972)).

195. *Columbia Casting*, 111 F.3d at 1433-34 (discussing the specific facts of the case). The 1972 Agreement did refer back to a city ordinance which had approved the exchange of facilities but had disapproved the establishment of exclusive service territories.

196. *Id.* at 1434 (quoting language from the 1972 Agreement).

197. *Id.* at 1434-35 (discussing the specifics of the 1972 Order). After the issuance of the 1972 Order, PG&E and PP&L stopped competing with one another in the Portland area and they effectively served customers exclusively by only serving those customers located “in the parcels in which they had acquired the electric distribution facilities of the other.” *Id.* at 1435.

198. *Id.* at 1435.

by PP&L to its casting plant so that it could benefit from PP&L's lower rates, PG&E refused, claiming its exclusive right to service Columbia Steel Casting Co.'s plant pursuant to the 1972 Order.¹⁹⁹ Columbia Casting Co. filed the antitrust action against PG&E, PP&L, and OPUC.²⁰⁰ The defendants contended that "the division of the Portland market was cloaked with antitrust immunity by the 1972 Order of the OPUC approving the 1972 Agreement."²⁰¹ The Ninth Circuit affirmed the decision of the district court denying state action immunity.²⁰² OPUC and PG&E argued that their conduct of essentially dividing the territory into exclusive service territories was a foreseeable result of the 1972 Order because the 1972 Agreement, in reallocating established service territories into exclusive zones, had the effect of transferring customers.²⁰³ In the original opinion,²⁰⁴ which was later withdrawn, the Ninth Circuit agreed with PG&E and OPUC's arguments.²⁰⁵ After consideration of Columbia Steel's petition for rehearing and an amicus curiae brief by the Antitrust Division of the Department of Justice, the Ninth Circuit withdrew its original decision.²⁰⁶ It explained that it had misapplied the foreseeability test because it essentially substituted the "clear articulation" prong of the *Midcal* test with a foreseeability

199. *Id.*

200. *Id.* at 1435-36 (explaining the cause of action). Columbia Steel Casting Co. later dismissed all its claims against PP&L. *Id.* at 1436.

201. *Id.* at 1436.

202. *Id.* It agreed with the district court that the 1972 Order decided by the City Council "did not articulate a state policy to allocate exclusive service territories in Portland." Rather, the Order approved a "one-time exchange of property" and of customers which did not amount to the allocation of exclusive service territories. *Id.*

203. *Columbia Casting*, 111 F.3d at 1438 (quoting the Opening Brief of the Public Utility Commission of Oregon at 9-10). Columbia Casting Co. counter-argued that a one-time exchange of customers was the natural result of an exchange of facilities, "an incident of the transfer of utility property," but not one that would result in the permanent establishment of exclusive service territories. *Id.*

204. *Columbia Steel Casting Co. v. Portland Gen. Elec. Co.*, 60 F.3d 1390, 1399 (9th Cir. 1995).

205. The Court stated that although "the 1972 Order [was] not particularly clear regarding the [O]PUC's intention to permit a permanent division of the Portland market, as opposed to a one-time exchange of facilities and customer accounts . . . the elimination of competition between PG&E and PP&L was a natural and foreseeable result of the 1972 Order." *Id.*

206. *Columbia Steel Casting Co., Inc. v. Portland Gen. Elec. Co.*, 103 F.3d 1446 (9th Cir. 1996).

standard.²⁰⁷

The Ninth Circuit's correction of its "faulty" analysis was an important step for understanding the applicability of the foreseeability standard with respect to the *Midcal* test. Like other courts, the Ninth Circuit looked to the decisions of the Commission, OPUC, in determining the validity of the 1972 Agreement and the meaning of its provisions. The Court recognized that the Oregon statutes did authorize OPUC to approve contracts among public utilities allocating service territories and that this reflected a state policy to remove market competition in the provision of electricity in Oregon.²⁰⁸ However, it was also clear to the Court that the 1972 Order did not explicitly establish permanent exclusive service territories and that it authorized only the exchange of facilities, and not necessarily customers, within certain areas.²⁰⁹ The Court did not look necessarily to the behavior of PG&E and PP&L, two private entities regulated by OPUC, as to each other. It emphasized that "mere 'state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity.'"²¹⁰ However, in applying the foreseeability standard, the Ninth Circuit clarified that its deference would not extend to alleged foreseeable outcomes flowing from those same regulatory decisions.

The issue being decided in *Columbia Casting* was whether PG&E's refusal to wheel power to Columbia Casting was inconsistent with a 1972 Order issued by a state agency. The question the Ninth Circuit originally asked was whether this conduct was a foreseeable result of the 1972 Order, a state agency decision, and not whether it was the foreseeable result of a state policy (issued by the state legislature) to

207. *Columbia Casting*, 111 F.3d at 1444.

208. *Id.* at 1436 (quoting *Pacificorp v. Portland Gen. Elec. Co.*, 770 F. Supp. 562, 570 (D. Or. 1991) in stating that the Oregon statutes "articulate the policy of the State of Oregon to remove market competition as the basis for determining the customers of the providers of electricity."). See also OR. REV. STAT. §§ 758.400 – 758.475 (2004).

209. *Columbia Casting*, 111 F.3d at 1437 (stating that "the state did not approve the displacement of competition with territorial monopolies in the Portland market with the clarity required by *Midcal*"). See also *id.* at 1438 n.8 (PG&E arguing that "the clear articulation prong of the *Midcal* [was] satisfied because [the Oregon statutes] 'encourage exactly the kind of division that [PG&E] and [PP&L] carried out,' and that whether or not the OPUC clearly authorized [PG&E's] challenged conduct is relevant only to the active supervision prong of *Midcal*.").

210. *Id.* at 1440 (quoting *Phonetele, Inc. v. Am. Tel. & Tel. Co.*, 664 F.2d 716, 736 (9th Cir. 1981) and *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592-93 (1976)).

displace competition in this particular way.²¹¹ The difference seems semantic but it is an important one, for in the former scenario, authority to regulate would have been shifted by the Courts from the state legislature to the state agency, and in the latter, the authority would remain within the state legislature and therefore be more consistent with the original intent of *Parker v. Brown*.²¹²

The foreseeability standard, if it is to be used as part of the *Midcal* test, should be aligned with the clear-articulation requirement of *Midcal*. In other words, it should be aligned with explicit state policy to displace competition and not with state delegation of power to a regulatory agency.²¹³ The kind of faulty analysis of the original Ninth Circuit decision could result in granting to states antitrust immunities that they did not intend to provide. Interestingly, despite important strides in revealing the more accurate use of the hidden “foreseeability” prong, (which is no longer so “hidden”) the Ninth Circuit, like other courts, did not discuss the extent of “clarity” actually required by the clear-articulation requirement of *Midcal*. Although, it did point out that the 1972 Order had failed “to speak with sufficient clarity to satisfy the *Midcal* test.”²¹⁴ The Ninth Circuit also stated that state action immunity “turns on the clarity of a state’s expression of its policy, not the subjective intent of its policymakers.”²¹⁵ The importance of “clarity” becomes more obvious when applying the *Midcal* test in cases arising from partially deregulated electrical markets, as we will see in the next section.²¹⁶

211. *Id.* at 1442-43 (explaining that it erred in its original conclusion that “private conduct is immunized if it [is] a foreseeable result of state agency action and if circumstances justify an inference that the agency intended to authorize the conduct,” quoting *Columbia Steel Casting Co. v. Portland Gen. Elec. Co.*, 60 F.3d 1390, 1399 (9th Cir. 1995)). See also *Nugget*, *infra* note 158; *Medic Air Corp. v. Air Ambulance Auth.*, 843 F.2d 1187 (9th Cir. 1988) (in which the Ninth Circuit also used the foreseeability test).

212. See *Parker*, 317 U.S. at 359-63 (discussing federalist principles). See also *Page*, *supra* note 30 and 51.

213. *Columbia Casting*, 111 F. 3d at 1444 (agreeing with and quoting the Antitrust Division’s Amicus Brief in stating that “express authorization [is] the necessary predicate for the Supreme Court’s foreseeability test”).

214. *Id.* at 1437 (also stating that neither the 1972 Order nor the 1972 Agreement addressed the issue of exclusive territories in the city of Portland).

215. *Id.* at 1442.

216. Interestingly, the Court in *Columbia Casting* alluded to the need for precision

c. The Importance of Finding “Clarity” in State Policy

(i) Agency Declaratory Rulings Should Not Be the Solution

The Eighth Circuit case, *North Star Steel Co. v. MidAmerican Energy Holdings Co.*,²¹⁷ in granting immunity, raised important questions concerning state action immunity in the context of the restructuring of electrical markets. In this case, North Star Steel Company, a steel mill operator, sued MidAmerican, the largest electric utility in Iowa, for alleged antitrust violations when MidAmerican refused to allow access over its transmission lines to alternate generators of electricity and therefore prevented North Star from purchasing competitively-priced electricity for its steel mill plant.²¹⁸ MidAmerican at the time owned the only transmission lines supplying the North Star plant.²¹⁹ The district court, in granting MidAmerican summary judgment, agreed with a declaratory ruling from the Iowa Utilities Board that stated that the Iowa legislature had in fact passed legislation designating exclusive service territories for the provision of electricity²²⁰ and that such provision of electricity did not distinguish between generation, distribution, and transmission of electricity.²²¹ Furthermore, the district court deferred to the Board’s conclusions that there was no “substantive difference” between customers directly buying the

in applying the foreseeability standard particularly in the context of deregulation when it stated that the fact that “[PG&E’s] advantage [the transfer of customers to its territory] proved to be transitory is not surprising given the competitive pressures that technology and deregulation have been exerting on utility markets where monopolies have traditionally reigned.” *Id.* at 1439.

217. 184 F.3d 732 (1999).

218. *Id.* at 734.

219. *Id.*

220. *Id.* (explaining the relevant IOWA CODE § 476.25 (1997) which authorized the Iowa Utilities Board to establish exclusive territories so as to encourage “coordinated statewide service at retail” and discourage “duplication of electric utility facilities.”).

221. *Id.* at 735. The Iowa Utilities Board was the state administrative agency implementing regulatory policy. When MidAmerican requested a declaratory ruling from the Board regarding its rights concerning the supply of retail electric services, the Board concluded that MidAmerican had “a statutory duty to provide electric service to customers in its exclusive service area.” The Board also found that the relevant statutes, which dealt with the supply of *retail* electric service, made no distinctions between the generation, transmission, and distribution of electricity. *Id.*

electricity generated from third party suppliers or from MidAmerican which would in turn distribute the electricity to end-users as well.²²² In this way, the Court collapsed the retail distribution of electricity which clearly was regulated with the more open wholesale market for the generation of electricity.

Not only did the district court defer to the rulings of the Iowa Board, but also these rulings amounted to a statutory interpretation of state legislation by a regulatory agency.²²³ This was clearly beyond the jurisdictional scope of a regulatory agency and at a minimum should have not been considered a conclusive interpretation. The Eighth Circuit did not choose to address the Board's rulings since the district court had already made a determination.²²⁴ Instead, it proceeded to determine whether or not there was state action immunity under the premise that the exclusive service territory provisions of the Iowa statutes included the generation of electricity for retail sales.²²⁵ The Eighth Circuit agreed with the district court's finding of state action immunity for MidAmerican's actions.²²⁶

The Eighth Circuit's decision not to address North Star's argument that MidAmerican was protected from antitrust liabilities by the regulations pertaining only to the distribution of electricity, but not to the generation thereof, was a significant omission despite its justification under the theory of collateral estoppel.²²⁷ North Star was arguing that

222. *Id.* (stating that "there was no substantive difference between a customer directly buying the electricity generated by a third party or making MidAmerican buy the electricity and then distributing it to the customer. Thus, the Board decided that both means of retail wheeling would violate MidAmerican's rights under the exclusive service territory state law and regulations.").

223. *Id.* *Cf. Praxair, Inc. v. Flower Power & Light Co.*, 64 F.3d 609, 613 (1995) (stating that an "agency's interpretation of its own regulations must be given controlling weight unless that interpretation is plainly erroneous or inconsistent with the regulation.").

224. *North Star*, 184 F. 3d. at 735 (stating that the district court, in deferring to the Board's declaratory ruling on the relevant Iowa statute, found that the state "ha[d] clearly articulated a state policy to prevent electricity suppliers from competing for retail customers.").

225. *Id.* at 736-38. The Court decided that because of the prior determination by a state court that "the Board's assignment of exclusive service areas includes the generation of electricity," it was "collaterally estop[ped] . . . from re-examining that same issue." *Id.* at 737.

226. *Id.* at 739-40.

227. *See supra* note 223.

the generation, transmission, and distribution of electricity each had a different level of competition.²²⁸ The utilities did not necessarily generate all the electricity they distributed.²²⁹ In determining state action immunity, the Court should have recognized that the state court should have determined whether the generation of electricity came under the state policy to displace competition before deciding whether MidAmerican's particular anticompetitive conduct in this case was pursuant to a "clearly-articulated state policy."²³⁰ MidAmerican's alleged anticompetitive conduct was intrinsically tied to this determination of state policy.

The Hallian foreseeability standard may have been of some help in this case. First, the Court would have had to identify the state policy, as it did. But a more accurate understanding of state policy demanded a determination of whether generation of electricity was part of the exclusive service territory especially in light of the fact that 25% of MidAmerican's supply of electricity came from third party generators. Second, the Court would have had to decide if in light of such legislation, it was foreseeable that an investor-owned electric utility such as MidAmerican would have the authority to deny another private entity access over its transmissions lines to alternate generators. After all, this was the conduct in question. Thirdly, the Court would have had to determine whether there was sufficient active supervision over such refusal. Using this analysis, it is easy to see a difficult gap to overcome: nothing in the legislation cited by the Eighth Circuit said anything as to a private entity's ability to refuse transmission access. Furthermore, there was not a tight enough nexus between MidAmerican's refusal and the legislation granting MidAmerican an exclusive service territory.

However, with regard to private entities and exclusive service territories, other courts, namely the Ninth and the Eleventh circuits, have been more careful in ensuring that regulatory agencies actively supervise

228. *North Star*, 184 F.3d at 736.

229. The Court did not discuss this question, stating that this was an issue already decided at the state district court level and under Iowa law, and that the circuit court was collaterally estopped from re-examining the same issue. *See supra* note 223.

230. The state policy amounted to state legislation allowing for regulations that would provide for exclusive service territories for utilities in order to "encourage the development of coordinated statewide electric service at retail, to eliminate or avoid unnecessary duplication of electric utility facilities, and to promote economical, efficient, and adequate electric service to the public." *North Star*, 184 F.3d at 735.

and that state policy directly authorize refusals by private entities to wheel power.²³¹ In *North Star*, though, the decision of whether to allow for retail wheeling was up to a private entity, the investor-owned utility, MidAmerican. MidAmerican could take advantage of lower generation rates by purchasing from third party suppliers, but no other customer coming under MidAmerican's "exclusive territory" could. Arguably, this broad application of the clear-statement requirement favored MidAmerican and eliminated competitors. Petitioners in *Trigen* also expressed concern for this type of anticompetitive behavior.²³²

With respect to deregulation, the present facts of *North Star* state that MidAmerican generated 75% of the electricity it sold in the designated exclusive territory and purchased the rest from third party generators. If it was the state's intention not to displace competition in the generation of electricity, then any conduct pertaining to the 25% electricity purchased from third parties would presumably not come under the legislation establishing exclusive service territories.²³³ But according to the *North Star* opinion, the state policy made no distinction between generation, transmission, and distribution of electricity, so any conduct related to the 25% supply of electricity would "slip in" as

231. For example, *Municipal Utilities* found that the clear-statement prong was satisfied based on the fact that the legislature had created a regulatory scheme, and then concluded that the private agreements had been statutorily approved, thereby being actively supervised not necessarily by the regulatory agency but by the legislature. See general discussion of Eleventh and Ninth Circuit rulings *infra* Part III.a. & b., respectively. In *Praxair*, though the Court with respect to the clear articulation requirement did not give quite as much deference to the fact that a regulatory scheme had been established, it also found that private agreements had been part of the clearly articulated state policy and were actively supervised by the Commission. In *TEC Co-Generation*, the Court again emphasized that the local Commission actively supervised permissive decisions by the utility. See discussion of *Praxair* *infra* Part III.a.

232. Petitioner's Brief at 12, 16, *Trigen*, (No. 01-178). See also Appellee's Brief, Columbia Steel Casting Co., Inc., *Columbia Casting*, 1994 WL 16012180 at 17-24 (explaining that where state agencies are unwilling to authorize anticompetitive conduct, the panel's standard may even encourage private parties to hide their anticompetitive designs when seeking state acts, hoping to convince a court later that the agency intended to do what it was unwilling to do. Thus the panel's standard not only departed from the Supreme Court's standard, but also frustrated the policies on which that standard rested.).

233. *North Star*, 184 F.3d at 736-37. *North Star's* argument turns on whether the Board's regulation of retail rates and distribution of electricity implies that the Board also regulates the generation of power. *Id.*

protected under state action immunity. Most likely neither the district court nor the Eighth Circuit considered it necessary to explore the issue further, since all of the electric energy was sold under the brand name of “MidAmerican” and it was only a small percentage that was bought from third party suppliers.²³⁴ However, the failure of the Eighth Circuit to clarify these distinctions and its reliance on the Board’s statutory interpretation sets a disturbing precedent for courts in the future. These distinctions will have to be made in order to understand which conduct falls under a regulatory regime structured to displace competition and which falls under a newer regime that promotes competition.

(ii) Getting Back to Federalist Principles

One recent case, *United States v. Rochester Gas and Electric Corp.*,²³⁵ took important strides for state action immunity in the context of deregulation. It also exemplifies the manner in which the Hallian foreseeability standard could be a useful tool for determining whether the conduct in question comes under state policy as long as the state policy relevant to the specific conduct is clearly articulated.

The United States Department of Justice brought an action against the New York electric utility, Rochester Gas & Electric Corp. (“RG&E”), for an alleged *per se* violation under Section 1 of the Sherman Act.²³⁶ The United States alleged that a contract between the utility and the University of Rochester, in which RG&E promised to provide electricity to the university at a reduced rate in return for the university’s promise not to compete against RG&E in the sale of electricity to consumers, was anticompetitive conduct in violation of federal antitrust law.²³⁷ The University was planning to construct a cogeneration plant in order to more efficiently meet its heating and cooling needs and was going to sell the excess electricity to customers in the area.²³⁸ The U.S. argued that RG&E entered into a “non-compete agreement” with the University in order to prevent it from constructing a

234. *Id.* at 734.

235. 4 F. Supp. 2d 172 (W.D.N.Y. 1998).

236. *Id.* at 173, 175.

237. *See id.* at 174 for more details on the parties’ “Memorandum of Understanding.”

238. *Id.* at 173-74.

producing facility that could compete with it in the sale of electricity.²³⁹ RG&E argued that state action immunity shielded its conduct; however, the district court disagreed, denying defendant's motion for summary judgment.²⁴⁰

Not unlike *Trigen*, this is another example of a private regulated entity such as RG&E attempting to manipulate a related market, the cogeneration facility market, in order to maximize the competitiveness of its own electricity sales. Luckily, the Court saw through this and took a specific look into the conduct in question rather than focusing on the regulatory scheme in place. The Court also focused on the specific state policy in question and even looked into the legislative intent of the law.²⁴¹ In fact, New York, at the time of this case, had already implemented a flexible rate program which allowed regulated utilities to compete with cogenerators by offering lower rates.²⁴² The state policy in question in this case was a New York Public Service Law allowing the Public Service Commission to authorize utilities to offer incentive rates to customers who were capable of obtaining electricity from other courses. The Commission actively supervised these discounted rates through approval mechanisms, though it is unclear from the evidence presented that the Commission actually approved RG&E's service contract or tariff filings.²⁴³ However, after considering the language of

239. See *id.* at 175 (noting the United States' argument that "RG&E went too far in negotiating the discounted rate by imposing a condition in the agreement the provision that the University not compete with RG&E, nor solicit or join with RG&E customers to generate electricity.").

240. *Id.* at 176. With respect to the alleged *per se* antitrust violation, the court stated that there was a fact issue concerning whether the university was a bona fide potential competitor of the utility.

241. *Id.* at 175 (quoting 1983 N.Y. Laws 626 in stating that the "legislative history of this Section indicates that the New York legislature was concerned with the loss of business and industry in New York state, and the 'severe economic hardship and dislocation' that occurred as a result of that loss. The legislature 'determined that the cost of utility services can be a significant factor in retaining and attracting healthy businesses and employment opportunities'").

242. See Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment at 8, *Rochester Gas* (No. 97-CV-6294T).

243. *Rochester Gas*, 4 F. Supp. 2d at 175. See also New York Public Service Law § 66 (12-b)(a) (providing that the Public Service Commission authorize "incentive" rates that utilities may offer customers "in order to prevent loss of such customers"). The Court goes on to explain the purpose of the state policy of offering lower utility rates. By offering these incentives, the State is reducing utility costs to consumers and

the relevant New York statute as well as its legislative history, the Court concluded that neither it nor subsequent regulation authorized non-compete agreements among utilities and cogenerators such as the one in this case.²⁴⁴

In contrast to prior state action immunity cases, the Court did not defer to the decisions of the Commission nor to its active supervision over state policy. RG&E needed to demonstrate that the state clearly articulated a policy to displace competition among utilities and cogenerators.²⁴⁵ In embracing federalism over delegated agency authority, the Court stated that “[t]he fact that the New York Public Service Commission ha[d] approved the contract at issue [did] not mean that the State ha[d] authorized, and shielded from federal law, allegedly anticompetitive behavior.”²⁴⁶ In effect, the Court in *Rochester Gas and Electric Corp.* deconstructed the two prongs of the *Midcal* test and found that the RG&E’s use of the foreseeability standard did not reveal that the non-compete agreement was the “foreseeable result of the State’s policy of allowing discounted rates.”²⁴⁷ This decision brings us back to the days prior to *Southern Motors* and *Hallie* where courts tended to look into legislative intent even if it was not an explicit requirement of

retaining or attracting other businesses based on those price levels. Cogenerators are generally exempt from the State rate regulations imposed on utility companies; therefore, cogenerators may at times sell their excess electricity directly to consumers for a lower price. In this way, consumers are allowed to choose between electricity providers. See *id.* at 176. However, there is not sufficient evidence that the Commission actively supervised RG&E’s tariff filing and initial service agreement after they were filed with the Commission. See Plaintiff’s Memorandum of Law at 17, *Rochester Gas* (No. 97-CV-6294T).

244. *Rochester Gas & Elec. Corp.*, 4 F. Supp. 2d at 176 (stating that “[b]ased on the language of the statute, and the legislative history, it is clear that New York Law does not expressly authorize utility companies to offer discounted rates to consumers who are also potential competitors for the purpose of inducing them not to compete against the utility.”).

245. See Plaintiff’s Memorandum of Law at 7, *Rochester Gas*, No. 97-CV-6294T.

246. *Rochester Gas*, 4 F. Supp. 2d at 176. The Court also emphasized that the Public Service Commission was “not charged with enforcing federal antitrust law, and did not review the contract to determine whether or not it violates that law.” *Id.*

247. *Id.* The Court instead found that the purpose of the state policy in place was to “reduce utility costs and retain or attract businesses based on those lower utility costs” and that competition from co-generators was a foreseeable result of that goal. *Id.* Please note that the Court did not use the word “foreseeable” in this context; it instead explained that such competition was “consistent” with the goal of state policy.

Midcal.

The Court in *Rochester Gas* took a much narrower view of the scope of state action immunity and an even narrower interpretation of the clearly-articulated requirement of the *Midcal* test. Unlike *Trigen*, where the Court found a “clearly articulated” policy in the mere fact that the state chose to regulate the sale of electricity in the first place without considering the specific conduct at issue, *Rochester Gas* made an “objective assessment” of the relevant state statutes and regulation related to displacement of competition among utilities and cogenerators.²⁴⁸ The Court found that in fact there was a clear articulated policy to “promote” competition between utilities and cogenerators and that the authorization of non-compete agreements was not contemplated as a part of this state policy.²⁴⁹ Interestingly, RG&E argued that its conduct satisfied the clear-articulation requirement because it was the “foreseeable result” of the State’s policy of allowing discounted electricity rates.²⁵⁰ This Court responded to the “foreseeability” argument with a literal reading of the state statute authorizing discounted rates and by focusing on legislative intent. Furthermore, it found that nowhere in the statute did it authorize the kind of conduct in question; that is, permitting a utility to offer discounts to a potential competitor in return for a promise to not compete.²⁵¹

In not addressing the foreseeability argument, the Court was not necessarily rejecting the Hallian foreseeability standard. On the contrary, it found no use for it in this context.²⁵² However, the Court

248. See Plaintiff’s Memorandum of Law at 14, *Rochester Gas*, No. 97-CV-6294T (explaining that to determine whether “a state has ‘clearly articulated’ a policy of displacing competition requires an objective assessment of the state’s statutes and regulations.”).

249. *Rochester Gas*, 4 F. Supp. 2d at 176 (concluding that the “State’s policy of allowing discounted rates does not implicitly authorize anticompetitive actions on the part of Utilities seeking to prevent potential competitors from entering the market.”).

250. *Id.*

251. *Id.* See also *supra* note 239.

252. *But see* Yeager’s Fuel, Inc. v. Pa. Power & Light Co., 22 F.3d 1260 (3d Cir. 1994). In this case, oil dealers and suppliers of heating equipment brought a lawsuit for antitrust violations against Pennsylvania Power & Light Co. (“PP&L”), an electric utility company servicing Allentown, Pennsylvania and competing with the plaintiffs for customers in the residential heating market. *Id.* at 1263. The Court applied a foreseeability standard to the authorized conduct and argued that it was “reasonably foreseeable that rebates, loans and other load management programs . . . could have

could have clarified that the problem in RG&E's argument was that it did not focus on the conduct in question. One analysis in accordance with *Midcal* could have been as follows: 1) the state policy was permitting utilities to offer discounted rates to customers who could then choose different suppliers, and the purpose of this policy was not to eliminate potential competitors but to attract more competition and offer consumers the choice of lower rates; 2) a non-compete provision in a service contract between a utility and a cogenerator (a potential competitor, though the Court did not go so far as to define RG&E as such), that makes these state authorized discounted rates available on the condition of non-competition by the potential competitor, is not a foreseeable result of such state policy; and 3) it is not clear from the evidence presented that the Commission actively supervised the conduct in question. In this way, the foreseeability standard would be intrinsically linked to statutory authorization of the conduct in question and not to an implicit assumption in the statute.²⁵³

IV. REVEALING INACCURACIES: *MIDCAL* WITH A "HALLIAN" TWIST

While the 1992 Supreme Court decision, *FTC v. Ticor Title Insurance Co.*,²⁵⁴ clarified and restricted the kind of state behavior that constitutes "actively supervised" behavior,²⁵⁵ recent decisions among the circuits reveal disparities in the definition of conduct that is "articulated

anticompetitive effects." *Id.* at 1268 (discussing the use of the foreseeability standard as used in *Omni Outdoor Advertising, Inc.*).

253. See Plaintiff's Memorandum of Law at 14 n.16, *Rochester Gas & Elec. Corp.*, No.97-CV-6294T (explaining that the defendant misstates the law in asserting that the illegal conduct meets the clear articulation requirement if it can be shown that it was the "'foreseeable result' of some state policy."). *Id.* It adds that the foreseeability test set forth by the Supreme Court is "whether the anticompetitive effects are a foreseeable result of the authorized conduct RG&E's reading would dispense with the requirement of finding an express authorization for the conduct, which is the necessary predicate for the Supreme Court's foreseeability test." *Id.*

254. 504 U.S. 621 (1992).

255. According to *Ticor Title*, "actively supervised" state policy is one in which the state has exercised "sufficient independent judgment and control." *Id.* at 634-35. *But see* HYLTON, *supra* note 11, at 374 (explaining that *Ticor Title* empowers regulatory agencies because "[i]f state action immunity is granted liberally, as is implied by a weak active supervision requirement, then every decision by the state to regulate prices or quantities immediately displaces federal antitrust law.").

and affirmatively expressed as state policy.”²⁵⁶ The Supreme Court denied a writ of certiorari submitted by the Petitioners in *Trigen* in which the petitioners expressed to the Court the importance of clarifying the scope of the state action immunity doctrine especially in light of imminent state reforms to deregulate the electrical markets.²⁵⁷

Case law has shown that the foreseeability standard has in fact been applied as the “hidden prong” or, at a very minimum, as a supplement to the *Midcal* test. In fact, the effect of the final decision of *Columbia Casting* is that the “Hallian” foreseeability standard should be considered as part of a court’s application of the *Midcal* test in determining state action immunity.²⁵⁸ However, for it to have any real impact, it must be linked to the specific conduct in question and to the specific state policy authorizing the conduct and not to a regulatory policy *per se*. Cases have shown, though, that the foreseeability standard has had less importance on the status of state action immunity where there has been obvious active supervision by the agencies because of the tendency of the courts to defer to administrative rulings.²⁵⁹

At a very minimum, the Hallian foreseeability standard serves as a magnifying glass into a court’s accuracy in applying the *Midcal* test. It can illuminate the lack of an established nexus between the specific conduct in question and the state policy in place. It brings to light whether a court is simply deferring to delegated authority of regulatory agencies or is looking to actual state policy. If state policy is ambiguous as to the specific conduct at hand, then courts should not automatically grant immunity. Rather, they should defer to the legislatures for

256. See *supra* note 13, first defining the “clear articulation” prong of the *Midcal* test.

257. Petitioner’s Brief at 6-8, *Trigen*, 2001 WL 34115993 (emphasizing the danger of a broad application of the state action immunity doctrine to the deregulatory process in the electrical industry).

258. See the discussion of the Hallian foreseeability standard as used in *Snake River I*, *supra* Part III.b.i., and in *Columbia Casting*, *supra* Part III.b.ii.

259. See *supra* Part II.b. See also Floyd, *supra* note 25, at 1076 (stating that “[a]s the Hallie ‘foreseeability’ test has been applied by the courts of appeals, it has proven to have essentially no bite, leading to the conclusion that the broader the delegation of authority to act with respect to a particular subject matter, the more likely that anticompetitive conduct will be held to be the foreseeable result of that delegation.”). Cf. *Commc’ns Co. v. City of Boulder*, 455 U.S. 40 (1982) (concluding that general delegation to municipality cannot satisfy the clear articulation requirement or Hallie’s foreseeability test).

clarification, as was done in *Snake River*. If the state policy available to the courts is one that delegates general authority to a regulatory scheme in displacing competition, such as in *Trigen*, *Boulder* provides an answer — that the general delegation of authority is not specific enough to invoke state action immunity. In the spirit of *Rochester Gas & Electric Corp.*,²⁶⁰ in applying the Hallian foreseeability standard to a case like *Trigen*, a few necessary questions unanswered by the Tenth Circuit come to light in dealing with the *Midcal* test: 1) was there a specific state policy other than the delegated authority to a regulatory program, that addressed the issue of OG&E's specific anticompetitive conduct? 2) if so, then was it foreseeable from this clearly articulated policy that an investor-owned utility such as OG&E would steer away *Trigen*'s established customers in the manner it did, virtually eliminating a potential competitor? and 3) did the OCC actively supervise OG&E's conduct? The answers turn on the determination of clear articulated state policy not just as it relates to the regulation of electricity markets but also as it relates to the authorization of conduct intended to eliminate potential competitors even in markets ancillary to the electricity market.

Another use for the Hallian foreseeability standard could be in the context of the establishment of a presumption against state action, particularly in states which have deregulatory or pro-competition policies already in place. The harder issue is in rebutting this presumption in cases of ambiguous state policy. One approach could turn on the presumption that state legislatures do not foresee specific anticompetitive conduct as being actively supervised by a state public utility commission unless the defendant presents evidence to the contrary.²⁶¹ More specifically, courts could create a general presumption against active supervision, forcing litigants to rebut the presumption by presenting evidence of continuous regulatory activity.²⁶²

Whereas these approaches are certainly valid, they do not resolve the judicial deference to regulatory agencies, encouraging the possibility

260. See *supra* note 248 and accompanying text.

261. Special thanks to Professor Harry First for his insights on the presumption analysis.

262. Rossi, *Political Bargaining and Judicial Intervention*, *supra* note 121, at 59 (stating that “rather than implying active supervision from the historical fact of delegation, as most courts do, a general presumption against active supervision would force litigants to present evidence of a pattern or regulatory activity and would elicit more explicit future lobbying of regulators by monopolies”).

for capture of economic interests within already established regulatory structures. Furthermore, they encourage courts to continue to collapse the two prongs of the *Midcal* test under a primarily “active supervision” burden of proof. This kind of analysis does not seem to be in line with *Parker* and would be difficult to reconcile with deregulatory policy. Rather, such a presumption should be aligned with the clear articulation prong of the *Midcal* test as should the Hallian foreseeability standard. In other words, courts could establish a presumption against state action immunity (particularly in states with deregulatory policies in place) when state policy as to the specific anticompetitive conduct in question is ambiguous. Then the “Hallian” foreseeability standard could be used to rebut this presumption in showing that the conduct does foreseeably flow from the clearly articulated state policy. If the courts determine that there is not sufficient “clarity” to make this determination, then the presumption can not be rebutted until the legislature “clarifies” state policy as to the specific conduct in question. In this way, the emphasis of courts is on the “clearly articulated” state policy intended by the legislature and not on regulatory rulings. That seems more in line with *Parker*. This approach does not eliminate the possibility of also placing the burden on the defendant to prove that the conduct has been actively supervised, but only after a true determination of “clearly articulated policy.” This approach would require courts to not rely solely on regulatory policies to justify anticompetitive conduct that perhaps was never intended by the state legislature in the first place. The two prongs of the *Midcal* test remain distinct and it is less likely that a broad general grant of authority by the state legislature to the regulatory agency will interfere with the free market mechanism. It is true that courts would inevitably look into legislative intent to some degree; however, through the use of the Hallian foreseeability standard and a rebuttable presumption, clarification of state policy would be left up to the state legislatures.²⁶³

263. See Inman & Rubinfeld, *supra* note 16, at 1232 (explaining that “political participation is likely to increase as policy responsibilities are decentralized to state and local governments.”). Furthermore, Inman and Rubinfeld emphasize that decentralization of regulatory authority is also important so that the state and local legislatures may retain the primary responsibility for regulatory policy and thereby increase the possibility of citizen participation for reforms through the electoral process. See *id.* at 1233. However, they also recognize that state legislatures have a propensity to vote the majority rule, be indecisive, and vote for policies favoring the interests of

In *Snake River I*, the courts could not find state action until they determined whether the foreseeable result of the state statute was the refusal by a private regulated entity to allow another supplier to wheel power in its service territory. For this reason, the legislature had to amend the statute in question and clarify this point (despite the fact that the timing of the amendment may have seemed like a “quick fix” to sloppy legislative drafting). Once the “clear-articulation” requirement was met, then the court could consider the “active supervision” requirement as it did in *Snake River II*. In this case, it was the role of the state legislature to clarify state policy, not that of the courts and much less that of the regulatory agencies. After all, this is the essence of federalism in a democratic society — to make the legislators accountable to the general public for policies they put in place, rather than solely relying on the expertise of the regulatory agencies to which they delegate authority.²⁶⁴ The “Hallian” foreseeability standard can serve as the “nexus” between the alleged anticompetitive conduct and specific state policy and help courts defer questions of state policy back to the state legislatures.

CONCLUSION

State action immunity protects private and public entities engaging in seemingly anticompetitive conduct from antitrust liability when it falls under clearly-articulated state policy to displace competition in a particular industry and is actively supervised by a regulatory agency. The Supreme Court in *Parker v. Brown* established state action immunity in order to reconcile issues of federalism and state sovereignty with federal antitrust policies.²⁶⁵ Relying on principles of federalism and

their constituents, even if it is economically inefficient. *See id.* at 1234-35. *See also* Jorde, *supra* note 91 (commenting that one of the goals of the state-action was political participation).

264. *See* Inman & Rubinfeld, *supra* note 16, at 1233 (stating that the antitrust state-action doctrine may encourage political participation through decentralization of state and local governments and the strengthening of legislative control over regulatory policy-making. *See also* Rossi, *supra* note 17 (describing the possibility of interest group capture of regulatory processes); Wiley, *supra* note 15 (describing generally the effects of capture on regulatory agencies and demonstrating that the Midcal test is a “bad procedural compromise” that does not address the effects of capture nor state sovereignty).

265. *See generally* *Parker*, 317 U.S. 341.

state sovereignty, the Court reasoned that Congress, in passing the Sherman Act, did not intend to invalidate state authority to regulate intrastate commerce.

Since *Parker*, several Supreme Court cases redefined the applicability of state action immunity as it pertains to: 1) state government; 2) extensions of state governance through administrative agencies, municipalities and local authorities; and 3) private entities.²⁶⁶ *California Retail Liquor Dealers Ass'n v. Midcal Aluminum* established a test to guide courts in finding state action immunity. However, lower courts, in using the *Midcal* test to determine whether a particular conduct adequately furthers state policy to displace competition in a regulated area, have reshaped the scope of the *Midcal* clear articulation requirement. Later Supreme Court cases attempted to clarify the application of the *Midcal* test. Most importantly, *Town of Hallie v. City of Eau Claire* established a foreseeability standard in which certain anticompetitive conduct was protected from antitrust liability because it was the "foreseeable result" of clearly articulated state policy.²⁶⁷ On the other hand, *Southern Motors Carriers Rate Conference, Inc. v. United States* eliminated any perceived requirement that the anticompetitive conduct in question needed to be compelled by state legislatures in order to be protected under state action immunity.²⁶⁸

Since these landmark Supreme Court cases, inconsistencies in applying state action immunity have revealed a two-tiered level of authority when determining state policy. On the one hand, courts look to state legislation in deciding whether anticompetitive conduct is authorized by state policy. On the other hand, they focus on the state delegation of authority to regulatory agencies in determining the legality of such conduct. In this struggle, the tendency has been to defer to regulatory policy whenever possible. The misapplications of the Hallian

266. See *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *City of Lafayette v. La. Power and Light Co.*, 435 U.S. 389 (1978); *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Hoover v. Ronwin*, 466 U.S. 558 (1984); *Hallie v. Eau Claire*, 471 U.S. 34 (1985); *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985); *Patrick v. Burget*, 487 U.S. 1243 (1988); *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992).

267. *Hallie*, 471 U.S. at 41. See also *supra* Part I.d.i.

268. *Southern Motors*, 471 U.S. at 58. See also *supra* Part I.c.

foreseeability standard have explicitly illuminated this conflict. *Columbia Casting* demonstrated that immunity granted to foreseeable conduct flowing from regulatory policy compromises the integrity of the clear articulation requirement. For anticompetitive conduct to be shielded from antitrust liability, it must be the foreseeable result of authorized state policy. In a closer analysis of the *Midcal* clear articulation requirement, the foreseeability test is useless, unless 1) the court determines specific state policy authorizing the specific anticompetitive conduct in question; and 2) the court focuses on the conduct in question and not on the regulatory scheme in place supervising such conduct.

Many courts used the *Midcal* clear articulation requirement to expand the scope of state action immunity. In *Trigen-Oklahoma City Energy Corp. v. Oklahoma Gas and Electric Co.*, the broadest application of the *Midcal* test yet in the electricity context, the Tenth Circuit concluded that the establishment of a regulatory scheme administering the electrical market was sufficient “clear-articulation” to satisfy the first prong of the *Midcal* test. Such an expansive interpretation of *Midcal* could lead to difficulties for private investors in the electrical market, particularly in light of future deregulation. Currently, potential competitors run the risk of not being able to compete because regulated investor-owned utilities, under the protection of state action immunity, dominate not only the electrical market itself but also the ancillary markets that can significantly affect their electricity sales.²⁶⁹

The Hallian foreseeability standard is not an answer to the struggle between regulatory policy and state legislation. However, it is an important window to understanding the problem. It can be a helpful tool in refocusing the courts’ attention back onto state policy and away from a misplaced deference to the regulatory agencies. Indeed, the challenge is in determining whether the policy’s objective is to displace competition or to promote it. In this context, the regulatory scheme is secondary to the state policy it implements. Excessive judicial deference to traditional regulatory structures may burden states with unintended immunities and empower regulated industries at the expense of potential competitors, new entrants, and ultimately consumers.

269. See discussion of *Trigen*, *supra* Part I; *Cantor*, *supra* Part II.a.; *Rochester*, *supra* Part III.c.ii.

Notes & Observations