State Action Antitrust Immunity for Municipally Supervised Parties

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While Congress provided the broad outlines of federal antitrust law in the Sherman Act and other statutes, the federal courts have established the practical contours of antitrust liability. In addition to specifying the elements of various antitrust claims, the Supreme Court has recognized the immunity of certain defendants from the antitrust laws. In particular, the state action doctrine grants immunity from the antitrust laws to any defendant whose allegedly anticompetitive conduct sufficiently relates to state policy.

Established in *Parker v Brown*, this immunity applies most clearly when a plaintiff alleges that a state has violated the antitrust laws. The Court held that the legislative history of the Sherman Act suggests that Congress intended to shield states from federal antitrust suits. Furthermore, this limit on such litigation respects state sovereignty and comports with principles of federalism. For state defendants, these rationales outweigh the national policy favoring competi-


1 See Sherman Act, 15 USC § 1 (2000) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce ... is declared to be illegal."). The Supreme Court has held that § 1 prohibits only unreasonable restraints of trade, despite no explicit statutory language to that effect. The Court concluded that Congress intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.


3 317 US 341, 352 (1943) (noting that "the state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit") (internal citations omitted).

4 Id at 350-51. See also *FTC v Ticor Title Insurance Co*, 504 US 621, 633 (1992) ("While a State may not confer antitrust immunity on private persons by fiat, it may displace competition with active state supervision. ... Immunity is conferred out of respect for ongoing regulation by the State, not out of respect for the economics of price restraint.").

5 See notes 17-25 and accompanying text.
tion that underlies the federal antitrust laws. For other defendants whose conduct is not connected to state policy, the procompetition policy should prevail and the court should deny immunity.

For defendants between these paradigm cases, the Court has struggled to balance the competing legal principles. Municipal defendants must show that the state authorized the conduct challenged by the plaintiff to win immunity. Private parties are presumably even further removed from state policy. For these defendants, the doctrine requires a showing that the challenged conduct has been “clearly articulated and affirmatively expressed as state policy” and that the state actively supervised the private party.

The Court has not addressed a kind of defendant even more removed from state policy: a private party claiming state action immunity for actions taken while supervised by a municipality, not the state itself. Since the Court last spoke on the state action doctrine in 1992, the lower courts have struggled to define their approaches to immunity claims by such defendants. Despite more attenuation between the state policy and the challenged conduct, these approaches inexplicably tend to require relatively little from municipally supervised parties. This Comment argues that courts should be more skeptical of these claims. Specifically, courts should apply the Supreme Court’s rigorous, two-prong approach to claims based on state—rather than municipal—supervision.

This Comment proceeds in three parts. Part I explains the origin, development, and fundamental rationales of the state action doctrine

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6 One possible exception might be when the state acts as a “market participant” that should be subject to the antitrust laws. However, the circuits are divided on whether and under what circumstances this exception should apply. See generally State Action Task Force, Office of Policy Planning, Federal Trade Commission, Report of the State Action Task Force 47–49, 57 (Sept 2003), online at http://www.ftc.gov/os/2003/09/stateactionreport.pdf (visited May 22, 2005) (collecting cases).

7 See Town of Hallie v City of Eau Claire, 471 US 34, 40 (1985) (“[B]efore a municipality will be entitled to the protection of the state action exemption from the antitrust laws, it must demonstrate that it is engaging in the challenged activity pursuant to a clearly expressed state policy.”). The Court treats municipal defendants less deferentially than states because, as political subdivisions, federalism concerns weigh less heavily for municipalities. See City of Columbia v Omni Outdoor Advertising, Inc, 499 US 365, 389 (1991) (Stevens dissenting) (“Unlike States, municipalities do not constitute bedrocks within our system of federalism.”). See also City of Lafayette v Louisiana Power & Light Co, 435 US 389, 412 (1978) (“Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them.”).


9 See Ticor, 504 US at 638 (holding that Wisconsin’s and Montana’s regulatory programs did not supersede federal antitrust laws as there was “no active supervision” of the allegedly anticompetitive conduct).
in Supreme Court case law. Part II focuses on the development of the "active supervision" requirement for state action immunity claims by private defendants. Part III explains and critiques two approaches employed in different circuits deciding immunity claims based on municipal supervision. In addition, Part III considers alternative approaches and concludes that courts should rigorously apply the principles embodied by the state supervision jurisprudence to private parties supervised by municipalities. Doing so would reconcile the divergent approaches to state supervision and municipal supervision, leading to a more coherent application of the state action doctrine in municipal supervision cases.

I. BASIC PRINCIPLES OF THE STATE ACTION DOCTRINE

This Part explains the key Supreme Court decisions that formed the state action doctrine. Although the Court primarily relied on statutory interpretation of the Sherman Act to create this doctrine, concerns about federalism and state sovereignty have largely displaced this original justification. In the process, the Court has required municipal and private parties to show different degrees of state involvement to win immunity.

A. Origin of the Doctrine

The roots of the state action doctrine date to the 1943 decision of Parker v Brown. The plaintiff was a raisin producer who challenged, under the Sherman Act, state regulations that allowed a group of other producers to influence government responses to industry overproduction. Although the producers' collusion to set industry output violated the Act, the Court upheld the regulations because they constituted state action. In the Court's view, the fact that any recommendations made by the committee of producers required the approval of a government-appointed commission to take effect brought the regime sufficiently within the control of the state. The Court concluded

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10 Achieving analytical consistency among the courts on this issue is increasingly important as municipalities privatize various services, including education and social services. See Martha Minow, Public and Private Partnerships: Accounting for the New Religion, 116 Harv L Rev 1229, 1237-42 (2003) (discussing several areas of privatization of municipal services, including public schooling and welfare-to-work programs).
12 Id at 344.
13 See Parker, 317 US at 368 (finding that "the California prorate program for the 1940 raisin crop is a regulation of state industry of local concern which ... does not impair national control over the commerce in a manner or to a degree forbidden by the Constitution").
14 Id at 350-52.
that Congress did not intend to prohibit anticompetitive state action under the Act, so the California regulations survived. However, the Court warned that a state may not simply "give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." Rather, the state itself must be involved in the anticompetitive conduct, although the Court did not specify what degree of state involvement would be sufficient.

The *Parker* Court relied largely on its interpretation of the Sherman Act, but the decision also emphasized federalism and state sovereignty principles. Scholars have since argued that the Court's statutory interpretation was flawed. This critique contends that the sources cited in *Parker* actually yield few reliable inferences about congressional intent regarding state action.

Eventually, federalism and state sovereignty largely displaced statutory interpretation of the Sherman Act as the basis for the state action doctrine. While the antitrust statutes evince a national policy

The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application.

The Court found no such intent in the text of the statute. "The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. There is no suggestion of a purpose to restrain state action in the Act's legislative history." Id at 351.

See id ("In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.")

See, for example, Paul E. Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 Nw U L Rev 71, 83 (1974) ("In truth, a full reading of the legislative history of the Sherman Act is not likely to help answer the Parker question one way or the other.").

See Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J L & Econ 23, 25 (1983) ("[I]t is difficult to find in the statutes any form of 'inverse supremacy' principle under which state and local rules always prevail."). But see Dirk C. Phillips, *Putting Parker v. Brown and its Progeny in Perspective: An Assessment of the Supreme Court's Role in the Development of Antitrust Federalism*, 16 J L & Poli 193 (2000) (providing a historical context of the Court's reading of the Sherman Act's legislative history). Phillips concluded that the *Parker* Court had to "interpret the legislative intent of a law which was passed under a certain set of constitutional assumptions at a time when those assumptions were no longer held." Id at 205. Even though the Supreme Court by 1943 had accepted an expansive interpretation of federal power under the Commerce Clause, the *Parker* Court refused to impose this understanding of constitutional principles on the 1890 Congress that passed the Sherman Act. See id at 206–07 (noting that "[t]he Court was not willing ... to impute knowledge of future developments in constitutional theory to the legislature of the early 1890s").

See, for example, *FTC v Ticor Title Insurance Co*, 504 US 621, 633 (1992) ("The principle of freedom of action for the States, adopted to foster and preserve the federal system, explains the later evolution and application of the *Parker* doctrine.").
favoring competition,\footnote{More precisely, the Court has characterized the national antitrust laws as a “consumer welfare prescription.” Reiter v Sonotone Corp, 442 US 330, 343 (1979), quoting Robert H. Bork, The Antitrust Paradox: A Policy at War with Itself 66 (Basic 1978). But see Thomas J. DiLorenzo, The Origins of Antitrust: An Interest-Group Perspective, 5 Intl Rev L & Econ 73, 75–76 (1985) (arguing that the Sherman Act instead had the policy goal of shifting wealth from large manufacturers to small merchants and farmers).} federalism and the dual sovereignty of the state and national governments are pillars of the Constitution.\footnote{US Const Art VI, § 2.} This difference enables local and state laws to prevail over national antitrust policy despite the Supremacy Clause,\footnote{See Easterbrook, 26 J L & Econ at 25 (cited in note 19) (noting that “it is difficult to find in the statutes any form of ‘inverse supremacy’ principle under which state and local rules always prevail”). However, others have argued that modern elections sufficiently connect Congress and the president to local interests. Under this view, the Supreme Court is on “weakest ground” when it intervenes to protect state interests in the name of federalism. See Herbert Wechsler, Principles, Politics, and Fundamental Law 49–82 (Harvard 1961) (“Federal intervention as against the states is thus primarily a matter for congressional determination in our system as it stands.”). See also Larry D. Kramer, Putting the Politics Back into the Political Safeguards of Federalism, 100 Colum L Rev 215, 278 (2000) (arguing for a similar conclusion on the grounds that the current political system, rather than specific constitutional provisions, encourages federal lawmakers often to “defer to the desires of state officials and state parties”).} a result that Frank Easterbrook characterized as “inverse preemption.”\footnote{See US Const Art I, § 8, cl 3.} If unchecked, the state action doctrine could prevent the antitrust laws from reaching much economic activity within the scope of the Commerce Clause.\footnote{See Committee on Antitrust & Trade Regulation, Association of the Bar of the City of New York, Supplement to the 2002 Milton Handler Annual Antitrust Review Proceedings: Recent Developments in Four Areas of Antitrust Law: Merger Enforcement; Criminal Enforcement and Health Care Initiatives; Exclusionary Conduct; and the Noerr-Pennington Doctrine and State Action Immunity, 2003 Colum Bus L Rev 451, 566–67 (discussing the increasingly fractured state of Supreme Court decisions in this area).} After struggling for forty years since \textit{Parker} to confine the doctrine,\footnote{445 US 97 (1980).} the Court finally settled on its analytical framework for doing so.

B. Evolution of the Two-Tiered Analysis

In the early 1980s, the Court distinguished between state action immunity claims by private defendants and municipal defendants. In \textit{California Retail Liquor Dealers Association v Midcal Aluminum, Inc},\footnote{445 US 97 (1980).} the Supreme Court announced its two-prong test for a private party under state supervision. To win immunity, the party must show that that the allegedly anticompetitive conduct was (1) “clearly articulated
and affirmatively expressed as state policy” and (2) “actively supervised by the state itself.”\textsuperscript{28} However, \textit{Town of Hallie v City of Eau Claire}\textsuperscript{29} rejected the active supervision requirement in evaluating state action immunity claims by municipal defendants.\textsuperscript{30} Rather, a municipality would only need to meet the first prong of the \textit{Midcal} test.\textsuperscript{31} The apparent need for an active supervision requirement—but only for private defendants—renewed attention to such a requirement’s rationales and practical application. The next Part discusses the ongoing debate regarding the active supervision requirement.

\section{The Active Supervision Requirement}

This Part first explains the evidentiary justification for the active supervision requirement and then discusses the lower courts’ attempts to develop further the meaning of the requirement. While the case law leaves much ambiguity in the practical understanding of active supervision, these decisions have provided a relatively coherent framework.

\subsection{An Evidentiary Basis}

The Court’s imposition of an active supervision requirement on private defendants—but not municipal defendants—led some to question the need for such a requirement at all. The \textit{Midcal} opinion offered little explanation, other than its assertion that the “national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.”\textsuperscript{32} In \textit{Hallie}, the Court concluded that the requirement “serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy.”\textsuperscript{33} However, this purpose does not apply to a municipal

\begin{enumerate}
\item Id at 105 (internal quotation marks omitted).
\item 471 US 34 (1985).
\item In \textit{Hallie}, the Court held that the municipal defendant was immune from antitrust laws because its allegedly anticompetitive practices associated with its provision of sewage-related services to nearby towns were a “foreseeable result” of the authorizing state statute. See id at 37, 42. Although the statute did not authorize the precise anticompetitive conduct at issue in the case (tying one set of municipal services to another for town customers), it clearly “contemplate[d] that a city [might] engage in [such] anticompetitive conduct” because it authorized a municipality to refuse to extend service beyond its chosen limits. Id at 42.
\item See id at 46.
\item \textit{Midcal}, 445 US at 106. The Court quoted \textit{Parker}, 317 US at 351, in noting that “a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.” \textit{Midcal}, 445 US at 106. Subsequently, the Court expressed its reluctance to recognize this form of antitrust immunity generally. See \textit{FTC v Ticor Title Insurance Co}, 504 US 621, 636 (1992) ("[W]e have held that state-action immunity is disfavored.").
\item \textit{Hallie}, 471 US at 46 ("[T]he active state supervision requirement was necessary to prevent a State from circumventing the Sherman Act’s proscriptions.").
\end{enumerate}
defendant because "there is little or no danger that it is involved in a private price-fixing arrangement."

This explanation is vulnerable to at least two objections. The first is that the Court should not have presumed that a municipality is very unlikely to be involved in private anticompetitive conduct. Parochial interests might lead a municipality to facilitate the anticompetitive conduct of a private party. Despite Hallie's assurances to the contrary, municipal defendants sometimes threaten competition as much as private parties. While possibly true, this concern misses the purpose of the state action doctrine. The doctrine shields state actions from antitrust liability out of federalism and state sovereignty concerns, even when those actions are clearly anticompetitive. Indeed, few would argue that the doctrine actually enhances competition.

A second objection is that this requirement unnecessarily burdens the relationship between the government and the private party. Easterbrook has argued that the state should be deemed to have acted for purposes of the state action doctrine when its legislature enacts the statute at issue. Under this view, requiring the state to supervise the private conduct that results from that statute is excessive. Indeed, a

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34 Id at 47 ("The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals. This danger is minimal, however, because of the requirement that the municipality act pursuant to a clearly articulated state policy.").

35 See, for example, Edmund W. Kitch, Marc Isaacson, and Daniel Kasper, The Regulation of Taxicabs in Chicago, 14 J L & Econ 285, 286 (1971):

[A] systematic policy of low level enforcement has been essential to the preservation of the monopoly policy of the ordinance. . . . Whenever effective enforcement of the ordinance would have required a confrontation making [political] forces newsworthy and hence visible to the political community, the city has repeatedly and ingeniously devised policies designed to avoid the confrontation but to preserve the ordinance. . . . [It] is with their approval that the Chicago taxi monopoly has not only survived but achieved seeming permanence.


37 Antitrust scholars Phillip Areeda and Herbert Hovenkamp have argued that applying the "active supervision" prong in these situations "would either make local government largely pointless or require creation of an additional layer of state supervisors." See Phillip E. Areeda and Herbert Hovenkamp, 1 Antitrust Law ¶ 226b at 465 (Aspen 2d ed 2000) ("In this respect, state grants of regulatory authority to government subdivisions would seem to imply a transfer of supervisory power as well.").

38 In developing his argument about the "economics of federalism," Easterbrook argues that the restrictions on the doctrine imposed in Midcal thwart the policy choices of states. As states compete with one another to attract businesses yet face a limited range of policy options, an inefficient allocation of businesses among the states will result. See Easterbrook, 26 J L & Econ at 38-40 (cited in note 19) (internal citations omitted):

The more options a government has, the more it can alter its laws to attract entry, the more choices people have, and thus the more pressure competition places on other jurisdictions
completely unsupervised private defendant might have acted in perfect conformity with state policy, yet it will not win state action immunity. While this situation is possible, the Court likely required a showing of active supervision anyway because courts would be unable to determine reliably when such private conduct sufficiently conforms to state policy. State policies are often written broadly, and a court may be ill-suited to pass judgment on whether specific private conduct fits within the purposes of the legislature. However, the fact that the state actively supervised the private conduct is strong circumstantial evidence that such conduct was sufficiently connected to state policy and thus deserving of state action immunity.  

B. Judicial Attempts to Define Active Supervision

Whatever the objections to the active supervision requirement, the Court continues to impose the requirement on private actors claiming state action immunity. Although the Court has sought to define more fully the meaning of the requirement in subsequent cases, these attempts have left substantial ambiguity. As a result, the lower courts have provided further guidance to future litigants. While all of these decisions involve only state supervision, they provide a workable body of case law that may be applied to municipal supervision cases.

The Midcal Court broadly defined those circumstances in which the relationship at issue may be characterized as active supervision. At a minimum, the state must be directly involved in the private anticompetitive conduct to constitute supervision. The defendants in Midcal failed to satisfy this requirement because the state “neither established nor review[ed] the reasonableness of the [anticompetitive conduct]... and did not monitor market conditions or engage in any ‘pointed reexamination’ of the program.”  

Mere authorization or en-
forcement of privately arranged conduct is clearly insufficient to constitute supervision.41

Even when the state's relationship to the challenged conduct arguably constitutes supervision of the private actor, a court might deny immunity if that supervision is insufficiently active. In particular, active supervision must involve the state having the "power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy."42 In addition, the state must have actually supervised the category of conduct in question.43 In other words, a private party claiming state action immunity must show "active supervision in fact" for the second prong of Midcal to be satisfied.44 These decisions arguably raised the evidentiary bar for private actors claiming state action immunity because such parties thereafter had to demonstrate both the particularity and the actuality of state supervision.45

While these additional factors seem to clarify what constitutes active supervision, they may shed little light on how to apply the requirement to more difficult cases. For example, requiring supervision of the specific category of conduct challenged does not add much to the common understanding of active supervision. If the state did not supervise the conduct relevant to the case, it makes little difference that the state supervised other activity by the private actor. Furthermore, potential supervision is obviously an inadequate substitute for}

41 However, the Court has since rejected the proposed requirement that the state compel the anticompetitive conduct at issue to satisfy the "clear articulation" prong of Midcal. See Southern Motor Carriers Rate Conference, Inc v United States, 471 US 48, 62 (1985) (noting, nonetheless, that "compulsion often is the best evidence that the State has a clearly articulated and affirmatively expressed policy to displace competition").

42 Patrick v Burget, 486 US 94, 101 (1988) ("Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy."). The plaintiff in this case challenged medical peer review proceedings that excluded him from staff privileges at the town's only hospital. Id at 95-97. The defendant physicians claimed state action immunity, but the Court rejected this claim because they had failed to show that the state could review specific proceedings. Id at 100-06 ("To the extent that Congress has declined to exempt medical peer review from the reach of the antitrust laws, peer review is immune from antitrust scrutiny only if the State effectively has made this conduct its own. The State of Oregon has not done so.").

43 Ticor, 504 US at 638 ("The mere potential for state supervision is not an adequate substitute for a decision by the State.").

44 See id.

45 A leading antitrust treatise argues that Ticor imposed three requirements for granting state action immunity to a private actor, at least in the context of price-fixing: (1) the practice at issue must have been brought to the attention of the regulatory agency; (2) the agency must have considered the practice with the requisite degree of attention; and (3) the agency must then have approved it. See Areeda and Hovenkamp, 1 Antitrust Law § 226c at 467-85 (cited in note 37).
active supervision. In sum, the Court has continued to require a showing of active supervision by the state of private parties claiming immunity, but it has not provided much direction to lower courts regarding what this should mean in practice.

As a result, lower courts have developed their own approaches to the active supervision prong of *Midcal* when deciding more difficult cases. In most circuits, the state must have had the authority to regulate—which has been defined as no less than the power to invalidate—the private conduct at issue. In addition, the state must have actually exercised such authority previously to a sufficient degree, even if it did not review the specific conduct presently challenged. Despite the relative clarity of this case law, courts that have confronted similar cases involving municipal supervision tend to impose less demanding approaches to the active supervision requirement. The next Part explains these approaches and proposes instead a harmonization of municipal and state supervision law.

### III. Approaches to Municipal Supervision of Private Actors

This Comment focuses on those situations in which an intermediary—the municipality—implements the state policy and supervises the private conduct in question. Despite a substantial body of case law reflecting rigorous scrutiny of private conduct under state supervision, some courts have begun to develop a less rigorous version of the ac-

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46 The Federal Trade Commission has characterized the facts of *Ticor* as an “extreme situation” in which the conduct at issue easily failed the “active supervision” prong of *Midcal*. State Action Task Force, *Report of the State Action Task Force* at 53 (cited in note 6) (noting that the “Ticor Court assumed that the state supervision at issue was virtually non-existent”).

47 See, for example, *TFWS, Inc v Schaefer*, 242 F3d 198, 211 (4th Cir 2001) (rejecting a private defendant’s claim of state action immunity because the state comptroller had no authority to review for reasonableness prices set through the state’s “post-and-hold” system for liquor products). See also *Freedom Holdings, Inc v Spitzer*, 357 F3d 205, 231 (2d Cir 2004) (rejecting a claim of state action immunity where there was “no mechanism . . . whereby New York may review the reasonableness of the pricing decisions of tobacco manufacturers”) (internal quotation marks omitted); *A.D. Bedell Wholesale Company, Inc v Philip Morris Inc*, 263 F3d 239, 264–65 (3d Cir 2001) (rejecting a claim of state action immunity despite active involvement in the maintenance of the scheme because “[the States] lack[ed] oversight or authority over the tobacco manufacturers’ prices and production levels,” and nothing in the scheme gave the states “authority to object if the tobacco companies raise[d] their prices”).

48 See, for example, *TEC Cogeneration Inc v Florida Power & Light Co*, 86 F3d 1028, 1029 (11th Cir 1996) (en banc) (replacing language from an earlier decision that deemed the “active supervision” prong of *Midcal* satisfied by the potential for state supervision with language finding the second *Midcal* prong satisfied by “a history of active regulation”). See also *North Star Steel Co v MidAmerican Energy Holdings Co*, 184 F3d 732, 739 (8th Cir 1999) (considering examples of the state exercising not only its authority to regulate rates, but also its authority to assign new customers to exclusive service providers, in evaluating whether the defendant utility satisfied the requirements of the “active supervision” prong).
tive supervision prong of *Midcal* when the supervising level of government is a municipality rather than a state. This divergence in the treatment of state and municipal supervision is inconsistent and unexplained. Private parties that anticipate possible antitrust litigation due to their relationship with a supervising municipality have little coherent case law to inform their potential claim of state action immunity.

Moreover, the courts that have developed less demanding standards for municipal supervision have offered little justification for such permissive treatment, and indeed the nature of municipal supervision suggests that their claims of state action immunity deserve more scrutiny. Municipal governments may be more subject to interest group capture than state governments, so it may be more likely that their supervision of private anticompetitive conduct is impermissibly lax.  

This Part evaluates the approaches employed by the lower courts and developed in the academic literature on private claims of state action immunity based on municipal supervision. While the Tenth Circuit has required only the “clear articulation” of state policy to warrant immunity for private defendants under municipal supervision, the Sixth Circuit has required that the municipality be the “effective decision maker” in order to extend immunity to the private party. Another approach would deny immunity to all private actors when these claims rely on municipal supervision. The Federal Trade Commission (FTC) has recommended that courts focus largely on procedural factors in assessing immunity claims. However, the best approach builds on that articulated by the Second Circuit and applies the state supervision case law to municipal supervision situations.

49 See *City of Lafayette v Louisiana Power & Light Co*, 435 US 389, 408 (1978) (“If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established.”).

50 See *Zimomra v Alamo Rent-A-Car, Inc*, 111 F3d 1495, 1499 (10th Cir 1997) (applying the *Hallie* test to private defendants).


52 See Mark A. Perry, *Comment, Municipal Supervision and State Action Antitrust Immunity*, 57 U Chi L Rev 1413, 1430–36 (1990) (arguing that only state, and not municipal, supervision warrants immunity from the antitrust laws).

53 See State Action Task Force, *Report of the State Action Task Force* at 51 (cited in note 6) (“An appropriate clear articulation standard, therefore, would ask both: (i) whether the conduct at issue has been authorized by the state, and (ii) whether the state has deliberately adopted a policy to displace competition in the manner at issue.”).

54 See *Electrical Inspectors, Inc v Village of East Hills*, 320 F3d 110, 123–27 (2d Cir 2002) (holding that a private actor is immune from antitrust liability if the municipality actively supervised the anticompetitive conduct).
A. Apply the Hallie Test

The first approach to a private claim of state action immunity based on municipal supervision simply applies the test articulated in Hallie for claims by municipalities. In Zimomra v Alamo Rent-A-Car, Inc, the Tenth Circuit followed this approach, even though other circuits have applied the Hallie test only to municipal defendants. The court reasoned that an active supervision requirement was necessary only "where private defendants are empowered with some type of discretionary authority in connection with the anticompetitive acts." However, when the municipality left little discretion for private parties, the Tenth Circuit considered the active supervision prong of Midcal to be "of little value." In Zimomra, the private conduct and the municipal conduct were essentially the same because there was "little, if any, risk of defendant [car rental companies] doing anything other than complying with the City and County's mandate." Therefore, the Tenth Circuit granted immunity to the private defendants by focusing—like the Hallie Court—only on state authorization for the challenged conduct.

The Tenth Circuit's approach raises several practical problems. Generally, it seems unwise to carve out exceptions from the otherwise simple rule that private actors must satisfy both prongs of the Midcal test to justify state action immunity. The Supreme Court established—and has consistently maintained—the two-prong test of Midcal to de-

55 See text accompanying note 29-31.
56 111 F3d 1495 (10th Cir 1997).
57 See William C. Holmes, Antitrust Law Handbook § 8:8 at 798 n 16 (West 2005 ed) (collecting cases). Zimomra alleged that defendant car rental companies had colluded in charging a uniform daily usage fee at the Denver airport. See Zimomra, 111 F3d at 1496-98.
58 Zimomra, 111 F3d at 1499. In reaching this conclusion, the court cited a district court opinion for the proposition that the "active supervision" prong of Midcal need not be applied to a private actor after the court has determined that the municipality was the "effective decision maker." Id, citing City Communications, Inc v City of Detroit, 660 F Supp 932, 934-35 (ED Mich 1987), affd, 888 F2d 1081 (6th Cir 1989). However, this decision is arguably no longer controlling precedent in the Sixth Circuit. By accounting for the Supreme Court's intervening decision in FTC v Ticor Title Insurance Co, 504 US 621 (1992), the more recent decision of Michigan Paytel appears to displace the reasoning of City Communications.
59 Zimomra, 111 F3d at 1500. Specifically, the court concluded that the municipality was "the 'effective decision-maker' with respect to both the amount of the daily usage fee and imposition of the fee." Id at 1499 (internal citations omitted).
60 Id at 1500.
61 See id at 1501-03. It is worth noting that the other circuit court cases that the Tenth Circuit cited in support of its decision to apply Hallie instead of Midcal all preceded Ticor. See id at 1500-01.
termine whether a sufficiently close relationship existed between the official state policy and the challenged private conduct.\footnote{But see notes 32–38 and accompanying text (questioning the need for an “active supervision” requirement at all).}

Despite this clear precedent, the Tenth Circuit expressed its concern that applying the different tests could result in holding the private defendant liable and exonerating the municipal defendant, even though the same conduct (in the court’s view) was at issue.\footnote{See \textit{Zimomra}}, 111 F3d at 1500 (“We therefore find it inconsistent, when the same conduct is at issue . . . , to apply one test to the City and County of Denver (the \textit{Town of Hallie} test), and apply a different, more stringent test (the \textit{Midcal} test), to the private defendants.”). The Second Circuit echoed these concerns when it contemplated the possibility that the denial of state action immunity to the private defendant in the case might necessitate the denial of immunity to the municipal defendant as well. See \textit{Electrical Inspectors}, 320 F3d at 129 (“If the district court determines on remand that supervision is lacking, . . . it may consider for the first time whether the \textit{Parker} antitrust immunity doctrine would allow an injunction to issue against the Village even though the Village’s actions were authorized by the state.”).\footnote{See \textit{Electrical Inspectors}, 320 F3d at 129 (“We note that the Supreme Court has never held that a state’s failure to supervise a regulated private party can deprive the state of immunity under \textit{Parker}, even though such a failure can result in liability for the private party.”).}

An additional flaw with \textit{Zimomra} is that the Tenth Circuit neglected to examine any evidence of the municipality monitoring the
private conduct at issue. Indeed, the Tenth Circuit applied the *Hallie* test because it concluded that there is nothing for a municipality to supervise when it compels the private conduct.6 This is dubious reasoning. The simple fact that any level of government has mandated certain private action does not mean it will happen. Rather, the government must enforce its mandate in some manner.6 One relevant question ignored by the Tenth Circuit was whether the municipality ever monitored the private defendants and addressed the instances, if any, of a car rental company failing to charge a daily usage fee or overcharging such a fee.6 However, if the municipality was effectively a "rubber stamp" on privately managed price-fixing, then no state action immunity should attach.63

Even if one accepts the Tenth Circuit's reasoning, *Zimomra* likely has little practical import beyond situations of municipally compelled anticompetitive conduct. The conclusion that a municipality compelled the private conduct at issue is another way of concluding that the private conduct essentially is municipal conduct, and thus *Hallie* should apply. However, most private claims of state action immunity involve conduct that arises from a relationship with a municipality in which the government has less direct control. The other approaches discussed in this Part appear more relevant to these situations.

B. Identify the "Effective Decision Maker"

The Sixth Circuit's decision in *Michigan Paytel Joint Venture v City of Detroit*64 applied the approach articulated in *Zimomra* in a very different context. Instead of private conduct pursuant to a municipal ordinance, *Michigan Paytel* involved the rebidding of a city contract. In considering the "active supervision" prong of *Midcal*, the Sixth Circuit asked whether the municipality or the private actor was the "effective decision maker" for the anticompetitive conduct in question.65

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67 See *Zimomra*, 111 F3d at 1499 ("[T]he named defendants have no such discretionary authority. Rather, . . . [the municipality] is the 'effective decision maker' with respect to both the amount of the daily usage fee and imposition of the fee.").
68 For example, it might be sufficient for the municipality to institute a complaint mechanism to monitor deviations from state policy.
69 However, the paucity of such instances should not necessarily be dispositive. After all, the daily usage fee was less than a year old when the complaint in *Zimomra* was filed. See *Zimomra*, 111 F3d at 1496, 1497–98.
70 See *Midcal*, 445 US at 105–06. See also *Tri-State Rubbish v Waste Management, Inc*, 998 F2d 1073, 1079–80 (1st Cir 1993) (rejecting the argument that the existence of a contract between a municipality and a private party conclusively demonstrates active supervision of any anticompetitive conduct).
71 287 F3d 527 (6th Cir 2002).
72 Id at 537–38.
Under this approach, if the municipality made the "effective decision" to initiate a second round of bids, then the court should hold that the municipality had actively supervised the private actor for purposes of *Midcal*. The Sixth Circuit concluded that the municipality had made the effective decision. Thus, the court held that the municipality had actively supervised the private defendant and that the private defendant was immune under the state action doctrine. 7

Although the "effective decision" inquiry appears demanding, this case illustrates the extent to which courts can misapply the test and mischaracterize the facts to reach a desired outcome. When the Tenth Circuit concluded that Denver had made the "effective decision" to impose the challenged car rental fee, it was referring to the municipal ordinance that apparently mandated such activity. In other words, the "effective decision" inquiry originally pertained to the extent to which the municipality compelled the private conduct in question. In contrast, Michigan Paytel alleged that the municipality initiated a second round of bids for a city contract because of the undue influence of the winning bidder. 6 The Sixth Circuit recast the inquiry as one to gauge whether the private defendant corrupted the municipality's decision to engage in the challenged conduct.

Recasting the supervision inquiry in this way mischaracterizes the role of the private actor in contexts other than municipal compulsion. At least some of the private conduct at issue in *Michigan Paytel* consisted of the winning bidder’s efforts to maintain its monopoly over the pay telephone market in Detroit by influencing the city to implement a new round of bidding. The bidder—not the city—engaged in that advocacy, so a conclusion that the decision to rebid the contract

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73 Id at 538 ("If the private actor was the effective decision maker, due to corruption of the decision-making process or delegation of decision-making authority, then it is not immune, unless it can show that it was actively supervised by the state.").

74 Id at 539.

75 See Gary Young, *State Action Immunity*, 24 Natl L J B5 (May 13, 2002) ("The 6th Circuit, on the other hand, imposes a more exacting standard: The private actor will not receive the exemption if it was an independent decision maker and was only tenuously supervised by a municipality.").

76 Under the authority of Michigan’s Home Rule City Act, Detroit solicited bids for a project to install telephones in its jail cells. See *Michigan Paytel*, 287 F3d at 532. After the city government informed plaintiff Michigan Paytel that it had won the contract, the police department rejected all bids and initiated a new bidding round. Id at 532-33. While Michigan Paytel submitted essentially the same information in its second bid, defendant Ameritech substantially revised its bid and won the contract. Id at 533. Michigan Paytel brought suit, claiming that the city and Ameritech had conspired to rig the bidding process in violation of federal and state antitrust laws. Specifically, Michigan Paytel argued that Ameritech violated § 2 of the Sherman Act, 15 USC § 2 (2000) (banning monopoly and monopolization), by trying to maintain its dominance of pay telephone services in the Detroit market, as well as violating § 1 (banning contracts and conspiracies in restraint of trade), by contracting with the city to that end. 287 F3d at 534.
remained with the city is inapposite to the question of whether that advocacy had been actively supervised." Surely the city neither compelled nor made the "effective decision" that the bidder should engage in that conduct. Although the effective decisionmaker test purports to be a more demanding standard for the active supervision prong of Midcal, this case illustrates its unpersuasive application beyond municipally compelled conduct.

C. Always Deny Immunity for Municipal Supervision

In contrast to the arguably lax approaches discussed above, another perspective argues that municipal supervision can never be an adequate substitute for active state supervision. This view contends that those Supreme Court decisions interpreting the "active supervision" prong of Midcal have suggested that only supervision by a state qualifies for immunity. Indeed, both Hallie and Patrick v Burget mention only states as the level of government actively engaged in supervising the private actor. However, it is dubious to conclude that only state supervision is therefore permissible, because those cases involved only state supervision, so the Court did not reach issues pertaining to municipal supervision.

In addition, the Sixth Circuit decision described as the "leading case" for this proposition is now questionable. In Riverview Investments, Inc v Ottawa Community Improvement Corp, the Sixth Circuit denied immunity to a private defendant arguably under municipal supervision.

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77 Even if the Sixth Circuit had denied immunity to Ameritech under the state action doctrine, the private actor could still have relied on Noerr-Pennington immunity. See Eastern Railroad Presidents Conference v Noerr Motor Freight, Inc, 365 US 127, 136–37 (1961) (shielding lobbying activities from the Sherman Act); United Mine Workers v Pennington, 381 US 657, 670 (1965) (explaining that "Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose"). The court did not reach this question because it held the defendant immune under the state action doctrine. See Michigan Paytel, 287 F3d at 538–39.

78 See Perry, Comment, 57 U Chi L Rev at 1430–31 (cited in note 52). Although Perry's comment preceded Ticor, it is unlikely that the decision would have significantly affected the analysis. While Ticor involved state supervision of a private actor, the comment focused primarily on municipal supervision. However, both the Supreme Court and Perry emphasized the importance of the "active supervision" prong of the Midcal test.

79 486 US 94 (1988) (holding that the state action doctrine did not protect physicians from antitrust liability because the state was not actively involved in the peer review process).

80 See Perry, Comment, 57 U Chi L Rev at 1422 (cited in note 52), quoting Patrick, 486 US at 100–01 and Hallie, 471 US at 46 n 10, to show that the Supreme Court only intended to extend immunity to activities supervised by states and not merely municipalities.

81 Specifically, Hallie involved a municipal defendant, and Patrick involved state regulations with no municipal involvement whatsoever.

82 899 F2d 474 (6th Cir 1990).
supervision because there was no state supervision. But the Sixth Circuit in *Michigan Paytel* extended immunity to a private defendant after determining that the municipality "made the effective decision that resulted in the challenged anticompetitive conduct." This private defendant did not need to show any state supervision in order to win immunity, thus implicitly overruling any such requirement imposed in *Riverview*.

Lacking support in the case law, the argument that municipal supervision is always inadequate is reduced to one about public policy: consumer welfare will increase if courts insist on state supervision.

However, although the state action doctrine may conflict with the welfare gains associated with well-enforced antitrust laws, this immunity rests on concerns about state sovereignty and federalism, not consumer welfare or efficiency. Indeed, the Supreme Court has emphasized this point:

> Our decisions make clear that the purpose of the active supervision inquiry is not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices. Its purpose is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties.

As a result, the critical inquiry in defining any approach to municipal supervision should not be the circumstances in which such supervision will enhance consumer welfare. Rather, a court should evaluate whether the level of government has sufficiently supervised the private action to ensure that it comports with state policy. There is little

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83 In this opinion, the Sixth Circuit did not directly reject the argument that municipal supervision could satisfy *Midcal*. However, in an earlier stage of this litigation, the Sixth Circuit had suggested that such an argument might not have not been "a completely accurate statement of the law" after *Hallie* and *Southern Motor Carriers*. See *Riverview Investments, Inc v Ottawa Community Improvement Corp*, 774 F2d 162 (6th Cir 1985) (holding that a private actor was immune if the state actively supervised its decision, but not directly asking whether municipal supervision sufficed). A district court in the Sixth Circuit later interpreted this holding to mean that "private parties seeking state action immunity must demonstrate that they have been supervised by the state, not [merely] by the municipality." *City Communications*, 660 F Supp at 935.

84 287 F3d at 537–38. See also Part II.B.

85 See Perry, Comment, 57 U Chi L Rev at 1425–30 (cited in note 52). But see Easterbrook, 26 J L & Econ at 33 (cited in note 19) (arguing that the "active supervision" prong of *Midcal* leaves states with an "unpalatable all-or-nothing choice").

86 Indeed, any attempt to evaluate the state action doctrine through the lens of economic welfare is problematic. It seems impossible to compare the social costs imposed by such antitrust violations with the benefits of exempting state policy from the federal antitrust laws.

87 *Ticor*, 504 US at 634–35.
D. Rely on Procedural Requirements

The FTC has advocated a procedure-based approach, even though the Supreme Court seems to have already rejected this approach in *FTC v Ticor Title Insurance Co.*88 The Court emphasized that its decision should not be read to “imply that some particular form of state or local regulation is required to achieve ends other than the establishment of uniform prices.”90 In other words, the Court apparently intended to provide the states flexibility to develop procedures adequate to achieve the substantive goals of “active supervision.”90

Despite this Supreme Court reluctance and academic skepticism, the FTC has proposed specific standards to assess the procedural adequacy of state supervision of private anticompetitive conduct. In particular, the FTC recommends that courts examine three elements for the active supervision prong of *Midcal*, regardless of whether the supervising government was a state or municipality:

1. The development of an adequate factual record, including notice and an opportunity for critics of the policy to be heard;

2. A written decision on the merits; and

3. A specific assessment—both qualitative and quantitative—of how the private action comports with the substantive standards established by the state.91

The FTC adopted this approach in a recent rate-setting case adjudicated before an FTC administrative law judge.92

One obvious critique of this approach is that such procedural requirements seem inflexible in addressing the myriad factual situations of anticompetitive conduct. Indeed, the state action immunity cases discussed thus far illustrate the wide range of applicable situations.

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89 Id at 639.
90 The Court had earlier indicated its aversion to procedural formalism in *Patrick*. See Areeda and Hovenkamp, 1 *Antitrust Law* ¶ 226c at 467–84 (cited in note 37) ("*Patrick* . . . requires 'active supervision' in the sense of government review of specific decisions of private parties on their substantive merits, not merely on their procedural adequacy.").
92 See *Indiana Household Movers and Warehousemen, Inc* 5 (Apr 5, 2003) (Analysis to Aid Public Comment), online at http://www.ftc.gov/os/2003/03/indianahouseholdmoversanalysis.pdf (visited May 22, 2005). Although this informal adjudication has less persuasive value than notice-and-comment rulemaking, it suggests how the FTC now approaches municipal supervision cases.
Perhaps such procedural standards are useful in the rate-setting context, but they appear unhelpful elsewhere, such as in the situation of a municipality contracting with a private actor.

Moreover, the FTC in explaining its approach appeared to assume that the maximization of consumer welfare is the default state policy under the third element.\textsuperscript{93} Yet, given the wide range of activities in which states collaborate with private actors, it seems unrealistic to assume that the promotion of competition should be the default state policy.\textsuperscript{94} Even a state policy that caters to interest groups and stifles competition deserves judicial respect under principles of federalism and state sovereignty.

Another problem with this approach is that it might encourage invasive judicial scrutiny of municipal government decisionmaking.\textsuperscript{95} Indeed, the FTC approach resembles the “hard look” review of informal adjudication by federal agencies.\textsuperscript{96} Although the Administrative Procedure Act requires invalidation of only those adjudications that are “arbitrary and capricious,”\textsuperscript{97} courts have arguably applied less deferential standards in practice.\textsuperscript{98} Scholars have criticized this trend as

\textsuperscript{93} The FTC suggested this point in the informal adjudication discussed in note 92:

\textit{[I]f a State does not disavow (either expressly or through the promulgation of wholly contrary regulatory criteria) that consumer welfare is state regulatory policy, it must address consumer welfare in its regulatory analysis. In claiming state action immunity, a Respondent would need to demonstrate that the state board, in evaluating arguably anticompetitive conduct, had carefully considered and expressly quantified the likely impact of that conduct on consumers as a central element of deciding whether to approve that conduct.}

\textit{Id at 9.}

\textsuperscript{94} See note 22 and accompanying text.

\textsuperscript{95} Such a result arguably conflicts with the deference inherent in the state action doctrine. See Phillips, Note, 16 J L & Poli at 220 (cited in note 19) (“The implicit message behind such a theory [of ex ante articulation and ex post implementation] is that, provided ‘the state demonstrates the requisite commitment,’ federal courts enforcing federal antitrust laws will not question the correctness of the state’s decision.”).


\textsuperscript{97} 5 USC § 706 (2000) (“The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”).

\textsuperscript{98} The Supreme Court articulated an interpretation of “arbitrary and capricious” that provides several grounds for lower courts to invalidate agency action:

\textit{[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.}

\textit{Motor Vehicle Manufacturers Association v State Farm Mutual Automobile Insurance Co, 463 US 29, 43 (1983). See also D.C. Federation of Civic Associations v Volpe, 459 F2d 1231, 1246 (DC Cir
judicial encroachment on the policy decisions made by agencies.\textsuperscript{99} The FTC approach raises analogous concerns about the institutional capacity of federal courts to determine accurately what constitutes an "adequate factual record" or a "specific assessment" by the municipality. Courts that adopt the FTC approach could also improperly second-guess the policy decisions made by municipalities. Like the position that only state supervision should constitute active supervision, this approach exceeds the degree of judicial skepticism necessary to enforce \textit{Midcal}'s mandate.

E. Proposed Approach: Apply State Supervision Jurisprudence to Municipal Supervision Claims

The guiding principles established by the Supreme Court in its state supervision decisions should apply with equal force to those involving municipal supervision. The \textit{Midcal} Court specified two requirements for private actors under state supervision: these parties must demonstrate a "clear articulation" of state policy authorizing the conduct, and the state's "active supervision" of that conduct. Subsequent decisions held that the state as supervisor must have had the power to review and disapprove of "particular anticompetitive acts of private parties"\textsuperscript{100} and that the state must have actually done so with regard to the category of conduct in question.\textsuperscript{101} While these principles arguably define "active supervision" insufficiently,\textsuperscript{102} they provide a more workable framework for evaluating the municipal supervision cases than the other approaches discussed in this Part.\textsuperscript{103}

The Second Circuit approximated this approach in \textit{Electrical Inspectors, Inc v Village of East Hills}.\textsuperscript{104} Even though the court found the municipal defendant immune under the state action doctrine,\textsuperscript{105} it refused to relieve the private defendant of the "active supervision" prong of \textit{Midcal} simply because the municipal defendant had won


\textsuperscript{100} \textit{Patrick}, 486 US at 101.

\textsuperscript{101} \textit{Ticor}, 504 US at 638.

\textsuperscript{102} See Part II for discussion of the remaining ambiguity in the phrase "active supervision."

\textsuperscript{103} For a plausible way to apply the \textit{Ticor} decision, at least in the context of price-fixing, see Areeda and Hovenkamp, \textit{1 Antitrust Law} § 226c at 467–84 (cited in note 37).

\textsuperscript{104} 320 F3d 110 (2d Cir 2002) (holding that a private actor is immune only if the municipality actively supervised the allegedly anticompetitive conduct). In that case, the village passed an ordinance pursuant to state law granting a monopoly to a nonprofit corporation to conduct electrical inspections. Id at 115. The plaintiff was an inspection company excluded by the ordinance. Id at 122.

\textsuperscript{105} Id at 129.
immunity under Hallie. Instead, the Second Circuit refused to decide "this heavily factual issue in the first instance" and thus remanded the case to the district court.\textsuperscript{106} However, the court suggested in dicta that the only evidence offered in support of adequate supervision—an affidavit by the mayor—would alone likely fail to meet the active supervision requirement.\textsuperscript{107} Such a holding comports with the Supreme Court's direction in Patrick and Ticor that the "active supervision" requirement of Midcal cannot merely be asserted or presumed, but rather must be proven.

Yet, this approach contrasts with those taken by other circuits. For example, the Tenth Circuit in Zimomra feared the disparate outcome in which a municipality is able to establish but the private actor fails to establish state action immunity, despite their mutual involvement as defendants in the same suit.\textsuperscript{108} However, the Supreme Court implicitly contemplated this possibility in developing different tests for state action immunity for municipal and private defendants.\textsuperscript{109} The more appropriate approach in Zimomra would have been to apply both of Midcal's prongs to the private conduct at issue and remand the case to the district court if no evidence had yet been provided with regard to "active supervision."\textsuperscript{110} Furthermore, doing so would not necessarily have led to the disparate outcomes—immunity for the municipality but not for the private party—the court feared.\textsuperscript{111}

Extending these principles to municipal supervision cases would yield several benefits to future litigants affected by the state action doctrine. First, this approach would introduce more consistency in the judicial treatment of state action immunity claims by private parties. Such claims would face the same Midcal test, regardless of which level of government—state or municipal—supervised the allegedly anti-competitive conduct. Second, private actors that are considering en-

\textsuperscript{106} Id.

\textsuperscript{107} Specifically, the mayor asserted in his affidavit that the municipality "maintained strict price controls over the inspections" and that the municipality could have replaced the private actor at any time if the municipality became dissatisfied. See id at 128–29. The first claim appears too general to satisfy the particularity requirement of Patrick, and the second claim resembles the "potential supervision" argument rejected in Ticor.

\textsuperscript{108} See Part III.A for a discussion of Zimomra.

\textsuperscript{109} See note 64 and accompanying text.

\textsuperscript{110} The Second Circuit took this step in Electrical Inspectors, 320 F3d at 129.

\textsuperscript{111} The Tenth Circuit suggested that it would not have achieved the same result under Midcal that it reached under the Hallie test. See Zimomra, 111 F3d at 1500 (speculating that, if the plaintiff had sued the municipality as well, "the result could be that the City and County of Denver would be entitled to immunity but the private defendants would not"). But see Julian O. von Kalinowski, Peter Sullivan, and Maureen McGuirl, Antitrust Laws and Trade Regulation § 49.02[2][d] at 49-33 (Matthew Bender 2d ed 2002) (disputing this conclusion). See also note 69 (discussing means by which active supervision could have been established in Zimomra).
deavors under state or municipal supervision will better predict whether their conduct will be immune from antitrust laws. Finally, this approach addresses the risk of interest group capture of local government regulators by employing a meaningful active supervision requirement, but it does not adopt the extreme position that all cases of municipal supervision deserve no protection whatsoever under the state action doctrine. This is a sensible middle ground that reflects the Supreme Court's efforts to balance concerns about federalism and state sovereignty with the national policy favoring competition that underlies federal antitrust laws.

Despite these benefits, one might object that this approach will prolong litigation: application of the active supervision prong will usually present a genuine issue of material fact and thus preclude summary judgment. Currently, municipal supervision cases rarely reach trial, and more demanding inquiries about the degree of supervision might raise factual questions that cannot be resolved by a pretrial motion. One might argue that such a result undermines the state action doctrine because it is supposed to provide immunity from suit, not just an affirmative defense. However, this concern is diminished in the context of private defendants. The Fifth Circuit has expressed this view in rejecting such defendants' requests for immediate appeal of a district court's denial of state action immunity. While state action immunity is intended to "spare state officials the burdens and uncertainties" of defending themselves in court, this interest is less important for private defendants that are only working according to state

112 See note 49 and accompanying text (discussing the possibility of capture in local government).

113 The leading antitrust treatise appears to endorse the approach of this Comment, albeit in general terms. See Areeda and Hovenkamp, 1 Antitrust Law ¶ 226d at 485–86 (cited in note 37) ("Where a body such as a municipality regulates pursuant to state authorization, active supervision by that body is all that is required.").

114 Indeed, none of the cases discussed in this Part involved a trial on the factual questions presented by the claim for state action immunity. While the district court resolved Electrical Inspectors on summary judgment, 145 F Supp 2d 271, 279 (ED NY 2001), vacd, 320 F3d 110, the other courts resolved these claims in motions to dismiss. See, for example, Michigan Paytel Joint Venture v City of Detroit, 2000 US Dist LEXIS 21929, *11 (ED Mich) (dismissing the plaintiffs' claims), affd, 287 F3d 527; Zimomra, 111 F3d at 1498; Tri-State Rubbish, Inc v Waste Management, Inc, 803 F Supp 451, 464 (D Me 1992) (dismissing the plaintiffs' complaint).

115 Specifically, the private actor claiming state action immunity likely would seek testimony from municipal employees regarding the nature of their supervision, and affidavits by such witnesses alone likely would be insufficient to justify summary judgment. See notes 104–07 and accompanying text.

116 This argument is most persuasive in the context of official immunity. See Martin v Memorial Hospital at Gulfport, 86 F3d 1391, 1396 (5th Cir 1996).

117 See Acoustic Systems, Inc v Wenger Corporation, 207 F3d 287, 293–94 (5th Cir 2000) (holding that state officials—but not private actors—may appeal the rejection of this defense under the collateral order doctrine).
policy. As a result, private defendants in the Fifth Circuit can invoke the state action doctrine only as an affirmative defense, not as an immunity from suit.

Furthermore, one could argue that courts are ill-equipped to determine what constitutes sufficiently "active supervision" by a municipality. Indeed, this prong of the *Midcal* test is often a complex and factually intensive inquiry, and courts should recognize that the sufficiency of municipal supervision often depends on the relationship between the government agency and its private partner.

While important, these arguments apply to the "active supervision" requirement generally, not to municipal supervision cases in particular. Despite the inherent difficulties of the requirement, the Supreme Court has insisted repeatedly on its continued importance. In other words, the Court has implicitly weighed the burdens imposed by engaging in an inquiry that "serves essentially an evidentiary function" against the benefits of limiting the scope of the state action doctrine. If anything, courts should recognize that such benefits are probably even greater in the context of municipal supervision due to the greater likelihood of interest group "capture" and the fact that an additional layer of government—the municipality—stands between the state policy and its implementation. Furthermore, the state supervision case law suggests that courts can often apply the "active supervision" prong of *Midcal* without prolonged litigation.

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118 Id at 294 ("These concerns are not raised by a suit against a private party.").

119 In a similar vein, Justice Scalia had predicted that *Ticor* would become a "fertile source of uncertainty and (hence) litigation, and will produce total abandonment of some state programs because private individuals will not take the chance of participating in them." *Ticor*, 504 US at 640–41 (Scalia concurring). However, "the flood of litigation that Justice Scalia . . . feared has not yet materialized." Areeda and Hovenkamp, 1 Antitrust Law ¶ 226c at 480 (cited in note 37).

120 For example, a contract arrangement might specify the terms of the private party's conduct and the consequences for deviating from those terms. However, a clause that simply required the private party to "obey the law" would alone be insufficient to constitute state action immunity. See *Tri-State Rubbish*, 998 F2d at 1079 (reversing the district court's holding that such "contractual authority provided sufficient municipal supervision to cast the garment of *Parker* protection over" the private defendant).

121 See *Patrick*, 486 US at 101 (requiring active government supervision of a private defendant for antitrust immunity); *Ticor*, 504 US at 638 (same).

122 *Hallie*, 471 US at 46.

123 See notes 49 and 112 and accompanying text. It is important to note that states can always overcome this problem by supervising private defendants themselves. See, for example, *Alphin Aircraft, Inc v Henson*, 1984 US Dist LEXIS 15205, *31 (D Md) (suggesting in dicta that "the state [had] actively supervised the administration, development and oversight of the [municipal] airport," thus probably warranting the extension of state action immunity to the private defendants).

124 Courts resolve most state supervision cases on a motion to dismiss or on summary judgment. See note 114. But see *Cost Management Services, Inc v Washington Natural Gas Co*, 99 F3d
CONCLUSION

There is a growing divergence in the lower courts' application of the "active supervision" prong of *Midcal* to private defendants claiming immunity from the antitrust laws under the state action doctrine. While the circuits seem to engage in rigorous evidentiary inquiries for state supervision, they generally apply a lower standard to those under municipal supervision. Lower courts—and eventually the Supreme Court—should introduce more consistency to this area of the law and reconcile the two lines of case law by always applying both prongs of *Midcal* to private defendants, whatever the source of government supervision may be. Doing so would not necessarily lead to different outcomes in a particular case, but it would provide a more coherent application of the state action doctrine.

937, 943 (9th Cir 1996) ("[T]he question of whether a state has 'actively supervised' a state regulatory policy is a factual one which is inappropriately resolved in the context of a motion to dismiss.").