

# HARMONIZING ANTITRUST EXEMPTION LAW: A HYBRID APPROACH TO STATE ACTION AND IMPLIED REPEAL

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It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest.<sup>1</sup>

-Adam Smith, *Wealth of Nations*, 1776

It is anathema to our constitutional democracy to allow coercive behavior by individuals claiming to be acting on behalf of a city, state, or even higher, to dictate what the law is without going through a democratic legislative process to formally enact such laws.<sup>2</sup>

-Justice Louis B. Butler, Jr.,  
*Eichenseer v. Madison-Dane County Tavern League*, 2008

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1. Adam Smith, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776).

2. *Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2008 WI 38, ¶ 137, 308 Wis. 2d 684, 748 N.W.2d 154 (Butler, J., dissenting).

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## I. INTRODUCTION

Price-fixing is a per se antitrust violation under both federal<sup>3</sup> and Wisconsin<sup>4</sup> law. Because both jurisdictions favor free market competition in lieu of regulation, a horizontal agreement to set prices is unreasonable on its face.<sup>5</sup> Accordingly, with respect to “per se” rules, a full-blown “rule of reason” inquiry into the scheme’s benefits and harms is unnecessary.<sup>6</sup> As the United States Supreme Court famously declared in *United States v. Socony-Vacuum Oil Co.*, when defendants fix prices, “no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.”<sup>7</sup> To do otherwise, cautioned a younger Court, is to “set sail on a sea of doubt.”<sup>8</sup>

In *Eichenseer v. Madison-Dane County Tavern League, Inc.*, the Wisconsin Supreme Court held twenty-four taverns that collectively banned discount drink specials to be immune from antitrust liability.<sup>9</sup> The plaintiff class consisted of persons who patronized one or more of the defendant-taverns on Friday and/or Saturday nights after 8:00 p.m.<sup>10</sup> The twenty-four

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3. See SHERMAN ACT, 15 U.S.C. § 1 (2006).

4. See WIS. STAT. § 133.03 (2005-06).

5. Non-Party Brief of the American Antitrust Institute at 1-2, *Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2007 WI 61, 300 Wis. 2d 191, 732 N.W.2d 857 (No. 2005AP001063) [hereinafter AAI Brief] (citing *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (per curiam); *State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 255, 261 N.W.2d 147 (1978)).

6. *Waste Mgmt.*, 261 N.W.2d at 156 (citing *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958)).

7. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940).

8. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 284 (6th Cir. 1898), modified & aff’d, 175 U.S. 211 (1899)); see also *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927); *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 340-41 (1897).

9. *Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2008 WI 38, ¶¶ 3, 89, 308 Wis. 2d 684, 748 N.W.2d 154.

10. *Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2006 WI App 226, ¶ 1 n.1, 297 Wis. 2d 495, 498, 725 N.W.2d 274, 275. Before the trial court, the parties had cross-moved for summary judgment and neither claimed that there were any disputed issues of material fact. *Id.* ¶¶ 2-3. Consequently, the trial court adopted a set of undisputed facts and considered the case purely as a matter of law. *Id.* ¶ 3; see *Wiegand v. Gissal*, 28 Wis. 2d

taverns represented nearly one-half of the taverns in the City of Madison,<sup>11</sup> home of the University of Wisconsin-Madison.<sup>12</sup>

Ultimately, the supreme court conferred immunity in large part because an influential member of the twenty-member city council<sup>13</sup> suggested that if the bars failed to ban drink specials<sup>14</sup> on their own, “the City would do it for them.”<sup>15</sup> Alder Tim Bruer was a thirty-year member of the council<sup>16</sup> and the longtime chair of the city’s Alcohol License Review Committee (ALRC).<sup>17</sup> ALRC periodically reported its liquor license recommendations to the council.<sup>18</sup> Its influence was substantial enough that the council not only regularly rubber-stamped ALRC’s recommendations to deny or grant a given license, but also generally adopted—with little or no challenge—whatever conditions were placed upon a license.<sup>19</sup> As the court of appeals put it, “ALRC and its chairman Ald. Bruer functioned as the powerful face and voice of the City’s formal and informal regulation of alcohol sold in the City of Madison.”<sup>20</sup>

The tavern owners heavily emphasized Bruer’s stature in making their case that this was the *city’s* doing, and not that of a twenty-four-member cartel. They contended that Bruer’s words were tantamount to unilateral forcing.<sup>21</sup> Ultimately, the taverns emphasized that they only enacted the drink specials ban because the city forced their hand, and not because they wished to extract greater profits from consumers for their own private gain.

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488, 495, 138 N.W.2d 740, 741 (1966) (indicating that the practical effect of simultaneous summary judgment motions is agreement upon all facts, disputed or otherwise). It granted the taverns’ motion for summary judgment and dismissed the case. *See id.* ¶ 1. The appellate court affirmed. *See id.* The supreme court also affirmed. *See Eichenseer III*, 2008 WI 38, ¶¶ 3, 89.

11. Kate Gerding, Op-Ed, *Bemoaning PACE, Drink-Special Ban*, BADGER HERALD, Feb. 24, 2005, available at [http://badgerherald.com/oped/2005/02/24/bemoaning\\_pace\\_drink.php](http://badgerherald.com/oped/2005/02/24/bemoaning_pace_drink.php).

12. University of Wisconsin-Madison: Location, <http://www.wisc.edu/about/location.php> (last visited April 16, 2009).

13. The City of Madison Common Council has 20 members or “Alders.” City of Madison Common Council, Alders, <http://www.cityofmadison.com/Council/whoAlders.cfm> (last visited April 16, 2009).

14. As the Court of Appeals put it, “‘Drink specials’ appears to be a term of art in this record referring to advertised promotions offering either (1) special, high-potency drinks containing multiple shots of liquor or (2) multiple drinks for the price of one regular drink. *Eichenseer II*, 2006 WI App 66, ¶ 3 n.2.

15. *Id.* ¶ 3 n.5.

16. City of Madison Common Council, Tim Bruer Biography, <http://www.cityofmadison.com/council/district14/biography.cfm> (last visited April 16, 2009).

17. *Eichenseer II*, 2006 WI App 66, ¶ 3 n.5.

18. *Id.*

19. *Id.*

20. *Id.* ¶ 3.

21. *See* Reply to UW Brief, *supra* note 2, at 1.

The plaintiffs argued the exact opposite: namely, that the drink specials ban was a voluntary agreement among taverns to control prices.<sup>22</sup> They asserted that the taverns acted with “the express purpose of increasing prices in order to reduce output (i.e., consumption).”<sup>23</sup> As such, the plaintiffs argued, the taverns’ conduct constituted a naked price-fix, and was thus a per se violation of the antitrust laws.<sup>24</sup> Furthermore, when the taverns publicly announced the agreement, they themselves acknowledged having “reservations about engaging in what could be considered illegal ‘collusion in restraint of trade.’”<sup>25</sup>

This Article analyzes judge-made, government-action-related antitrust exemptions through the lens of the appellate and supreme court opinions in *Eichenseer* (*Eichenseer II* and *Eichenseer III*, respectively). Parts II.A through II.C provide background regarding exemptions under federal law, including the “implied repeal” and “state action” doctrines. Part II.D discusses “Plan A,” a pre-conduct legislative framework for snuffing out potentially-anticompetitive conduct before it is carried out. Part II.E then discusses “Plan B,” a post-conduct backup plan that synthesizes these disparate judicial doctrines into a single, hybrid judicial framework. Part III analyzes the *Eichenseer* appellate and supreme court opinions, weaving in the state law analogs to the federal law doctrines discussed in Part II.

Finally, Part IV.A embraces Plan A: namely, a pre-conduct legislative balancing of the costs and benefits of possible government-action-related restraints by state and local representative government. Failing that, Part IV.B embraces Plan B: namely, a post-conduct judicial application of a single hybrid framework to all government-action-related antitrust exemptions. The judiciary should undertake this Plan B analysis with the principles of Plan A in mind. Both plans should demand a meaningful showing of (1) sufficient state authorization, and (2) active supervision—both of which the *Eichenseer II* and *Eichenseer III* courts failed to do. Such an approach would provide national consistency as well as legal and business certainty. Because mass confusion and costly litigation will abound when different jurisdictions apply different doctrines to identical conduct, we should strive to resolve ambiguities in the law by subjecting proposed immunities to public-interest-minded review. Without before-the-

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22. *Id.* at 4. Additionally, in responding to the Wisconsin Attorney General’s non-party brief (filed on behalf of the UW), the plaintiffs stated, “The charged agreement expressly takes away from each participant the freedom to offer price discounts on drinks on Friday and Saturday after 8 p.m. That is a classic price-fixing agreement.” *Id.*

23. *Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2008 WI 38, ¶ 25, 89, 308 Wis. 2d 684, 748 N.W.2d 154 (quoting plaintiffs’ complaint).

24. *Id.* (citing plaintiffs’ complaint). The plaintiffs estimated that this naked price-fix had caused damages “in the tens of millions of dollars.” *Id.*

25. *Id.* ¶ 20 n.12.

fact analysis of a proposed restraint's costs and benefits, the *Eichenseer* model of "act now, review later" will continue to consume vast private and judicial resources. What's more, it will come at the expense of a coherent rule of law.

## II. BACKGROUND

United States economic policy unequivocally embraces competition.<sup>26</sup> The Sherman Act is the centerpiece of our competition law system; it and the rest of our antitrust laws are "the Magna Carta of free enterprise."<sup>27</sup> By default, and with relatively few exceptions, these laws apply to all commerce. American antitrust courts accept at face value the proposition that competition is our default rule, and that it is not for judges to decide "how much restraint of competition is in the public interest, and how much is not."<sup>28</sup> *Addyston Pipe* resolutely proclaimed that to judge a restraint's reasonableness is to "set sail on a sea of doubt."<sup>29</sup> Consequently, the courts have attempted to construe exceptions to the application of antitrust law narrowly and in defined ways.<sup>30</sup> While they have not always succeeded, an overview of U.S. Supreme Court precedent is instructive in assessing the state of antitrust immunity today.

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26. See, e.g., SHERMAN ACT, 15 U.S.C. § 1 (2006).

27. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

28. ABA SECTION OF ANTITRUST LAW, FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW 372 (2007) (quoting *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 284 (6th Cir. 1898), modified & aff'd, 175 U.S. 211 (1899)).

29. *Id.*; see also *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 340-41 (1897).

30. See, e.g., *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982) ("[O]ur precedents consistently hold that exemptions from the antitrust laws must be construed narrowly.").

Relatedly, prior to *Eichenseer II*, the Wisconsin Supreme Court had a long history of clearly disfavoring implied repeal. See, e.g., *State v. Black*, 188 Wis. 2d 639, 645, 526 N.W.2d 132 (1994) ("Implied repeal of statutes by later enactments is not favored in statutory construction."); *State v. Zawistowski*, 95 Wis. 2d 250, 264, 290 N.W.2d 303 (1980) ("All statutes passed and retained by the legislature should be held valid unless the earlier statute is completely repugnant to the later enactment."); *Jicha v. Karns*, 39 Wis. 2d 676, 680, 159 N.W.2d 691 (1968) ("[R]epeal or amendment by implication is not favored if [conflicting statutes] can be reconciled."); *Union Cemetery v. City of Milwaukee*, 13 Wis. 2d 64, 71, 108 N.W.2d 180 (1961) ("Repeals by implication are not favored in the law. The earlier act will be considered to remain in force unless it so manifestly inconsistent and repugnant to the later act that they cannot reasonably stand together.").

### A. Express Exemptions

Congress has the power to immunize anticompetitive behavior from the antitrust laws.<sup>31</sup> It can do so either expressly or impliedly.<sup>32</sup> First, an express exemption generally takes the form of a law specifically immunizing a certain type of activity engaged in by a particular industry.<sup>33</sup> For instance, medical schools can allocate residency positions to medical school graduates in spite of the limitations placed upon graduates' ability to seek out other opportunities.<sup>34</sup> Likewise, farmers can engage in joint selling, even if it means higher prices and total elimination of competition.<sup>35</sup>

But even express exemptions carry some ambiguity.<sup>36</sup> Questions inevitably linger as to the breadth of the exemption, as it is naturally an impossible task to anticipate all variations on the anticipated scenario or scenarios when drafting a statute.<sup>37</sup> Thus, even express statutory exemptions leave room for after-the-fact disagreement as to what behavior was approved versus what was not.<sup>38</sup>

### B. Implied Exemptions

Second, Congress can exempt certain anticompetitive conduct from the antitrust laws by implication.<sup>39</sup> This can happen when Congress creates a pervasive regulatory regime.<sup>40</sup> In such situations, if the regime is sufficiently pervasive, a court may conclude that the legislature intended to exempt certain activity of regulated firms.<sup>41</sup> If antitrust liability would "disrupt the operation of the regulatory plan," a court may find that immunity is implied.<sup>42</sup> Overall, however, the U.S. Supreme Court has

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31. 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 243b (2d ed. 2007).

32. GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 977 (2002).

33. *Id.* at 977; *see generally* ABA SECTION OF ANTITRUST LAW, *supra* note 28, at 31-52 (succinctly describing every statutory exemption in force as of late 2007, and classifying them into three groups based on scope and nature). In other situations, express exemptions can apply to an entire industry. GAVIL ET AL., *supra* note 32, at 977.

34. 1A AREEDA & HOVENKAMP, *supra* note 31, ¶ 243b.

35. *Id.* ¶ 243b (citing CAPPER-VOLSTEAD ACT, 7 U.S.C. §§ 291 *et seq.* (2006)).

36. *Id.* ¶ 243b.

37. *See id.*

38. *Id.*

39. GAVIL ET AL., *supra* note 32, at 977; ABA SECTION OF ANTITRUST LAW, *supra* note 28, at 1-2.

40. GAVIL ET AL., *supra* note 32, at 977 (citing *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975)).

41. *Id.* (citing *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975)).

42. *Id.* (citing *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975)).

asserted that implied repeals are strongly disfavored.<sup>43</sup> Implied repeals are only found where there is a clear repugnancy or incompatibility between antitrust and regulatory provisions.<sup>44</sup>

### C. State Action

Additionally, state governments can restrain competition.<sup>45</sup> They can direct that prices be set, output be limited, or entry into a market be restricted.<sup>46</sup> Because national antitrust policy under the Sherman Act is decidedly pro-competition, a state statute that exempts certain activity from antitrust can be problematic absent a proper balance between national consistency and state sovereignty.<sup>47</sup> Consequently, the U.S. Supreme Court has aimed to achieve a workable federalist framework that pays due deference to both national and state ideals in a line of cases beginning with *Parker v. Brown*, and continuing through *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.* and *FTC v. Ticor Title Insurance Co.*<sup>48</sup>

### D. Plan A: Towards a Legislative Framework

The glaring lack of clarity in the law of implied antitrust exemptions underscores the absolutely critical importance of developing a coherent and straightforward front-end roadmap for legislators. In a perfect world, all policymakers would draw upon a shared set of principles in generating authorizations to behave anticompetitively without the risk of antitrust liability. Such a group would also discuss and debate the contours of what would constitute meaningful active supervision. This would theoretically lead to less litigation. The Antitrust Modernization Commission (AMC), led by Professors Darren Bush, Stephen F. Ross, and economist Gregory K. Leonard, set out to provide a set of such principles for policymakers involved in developing potential antitrust immunities (as well as reviewing existing ones).<sup>49</sup>

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43. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 597 n.37 (1976) (citing *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936)).

44. *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383, 2390 (2007) (citing *Gordon v. New York Stock Exch.*, 422 U.S. 659, 682 (1975); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-351 (1963)).

45. GAVILET AL., *supra* note 32, at 978.

46. *Id.*

47. *Id.*

48. *See FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992); *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Parker v. Brown*, 317 U.S. 341 (1943).

49. *See ABA SECTION OF ANTITRUST LAW*, *supra* note 28, at 367-403.

### 1. *General Goals*

The AMC Report recognized the inherent dangers of subjecting competition policy to legislative development.<sup>50</sup> Naturally, some special interest groups will curry more favor with legislators than others.<sup>51</sup> If a benefit is conferred upon one group of private actors, policymakers must make diligent efforts to ensure that benefit is not outweighed by various negative effects upon the rest of the public.<sup>52</sup> Otherwise, protective legislation may result that helps the few while harming the many.<sup>53</sup>

The AMC Report has three main aims: (1) it advocates a transparent and inclusive process for implementing such safeguards; (2) it suggests that those people seeking the immunity should have the burden of showing its necessity; and (3) it provides that when immunities are conferred, they should feature sunset provisions to control against “unintended consequences.”<sup>54</sup>

First, a transparent and inclusive process entails gathering information from a wide cross-section of people and sources, including public hearings.<sup>55</sup> Once the information is gathered, it should be widely disseminated so that all interested parties are adequately informed and engaged.<sup>56</sup> Second, placing the burden of proof on the proponent of the immunity requires an explanation of (1) why the contemplated conduct is “both prohibited and unduly inhibited” by antitrust, and why the conduct is in the public interest; (2) what the effects of the proposed immunity will be aside from its intended effect; and (3) how the requested immunity is “necessary to achieve the desired policy outcome.”<sup>57</sup> Third, sunset provisions facilitate intelligent and informed periodic review of conferred immunities so that policymakers can fine-tune the ever-changing balance of social benefits and harms.<sup>58</sup>

### 2. *Specific Stages*

The AMC Report breaks its framework down further into five specific stages: (1) initial information gathering, (2) identification and analysis of justifications, (3) balancing costs and benefits, (4) tailoring the immunity to

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50. *Id.* at 372-73.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 374.

55. *Id.*

56. *Id.*

57. *Id.* at 375.

58. *Id.* at 374.

minimize anticompetitive effect, and (5) optional consideration for renewal.<sup>59</sup>

Stage 1 encourages policymakers to gather information “regarding the immunity and its effects” from a broad range of sources, including proponents of the immunity, relevant government entities, opponents, and other interested parties.<sup>60</sup> This serves to make the ultimate decision-making process as thoroughly informed as possible.<sup>61</sup> Whenever parties to the proposed immunity make formal filings, the public should have open access to them.<sup>62</sup> This ensures thorough scrutiny and input from scholars, independent researchers, and the public at large.<sup>63</sup> It also expands the volume of information available and guarantees that a diverse array of viewpoints could be presented in the lead-up to the policymakers’ final decision.<sup>64</sup> Armed with this information, the policymakers are in a better position to make an informed judgment regarding the merits of the proposed immunity.<sup>65</sup> Moreover, it is important that the reviewing powers subject the legislation to a hearing.<sup>66</sup> This additional step has the benefit of clarifying the arguments for and against the immunity.<sup>67</sup>

Stage 2 advocates a focus on how the conduct being considered for antitrust immunity serves the public interest, and why immunity is necessary to facilitate it.<sup>68</sup> Absent any justifications, immunity should be flatly rejected.<sup>69</sup> In identifying and analyzing the justifications, the policymaker must examine “the tradeoff between the social goal achieved by the immunity and other economic or social goals.”<sup>70</sup> Essentially, one should ask if there are less restrictive ways of achieving the desired social goal: namely, ways that do not entail an antitrust immunity.<sup>71</sup>

Stage 3 demands a cost-benefit analysis based on a robust body of information.<sup>72</sup> This helps policymakers make good decisions because it makes it more likely that only immunities that have a net social benefit will be granted.<sup>73</sup> Importantly, the key goal of transparency is served because “[o]utsiders to the decision-making process will be able to understand

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59. *Id.* at 368-71.

60. *Id.* at 376-77.

61. *Id.*

62. *Id.* at 378.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 384.

71. *Id.*

72. *Id.* at 386-87.

73. *Id.*

which benefits and costs were considered and how they were weighed in order to come up with the final determination.”<sup>74</sup>

Stage 4 entails tailoring an immunity so as to minimize anticompetitive effect.<sup>75</sup> Policymakers should consider whether they could achieve the immunity’s asserted benefits by means that are less costly than conferral of antitrust immunity.<sup>76</sup> If some other solution would alleviate the concern for the same cost but with added benefits, then the proposed immunity should not be adopted in its proposed form without embarking upon at least some degree of tailoring.<sup>77</sup>

Finally, Stage 5 advocates sunseting of all immunities, as well as periodic review to ensure they are acting as they were intended to act.<sup>78</sup> This stage takes into account the dynamic nature of the economy.<sup>79</sup> Because an immunity could be socially-beneficial in X year but socially-harmful in Y year, policymakers should provide a built-in guarantee that archaic and outmoded exemptions will not fly under the radar screen.<sup>80</sup> Periodic after-the-fact review is the only reliable way to fine-tune the policy judgments made at the time the immunity was initially granted.<sup>81</sup> Periodic reviews also have the advantage of allowing policymakers to review past legislation with a deeper level of sophistication (presuming that the policymakers track the successes and failures of the exemption during its existence).<sup>82</sup>

Thus, because the law of implied antitrust exemptions is short on clarity, a front-end legislative roadmap could prove extremely prudent. A transparent and inclusive process for implementing safeguards is critical, combined with a burden-of-necessity placed upon the advocate of the potentially-anticompetitive restraint. Ideally, all policymakers would draw upon a shared set of principles in generating authorizations to behave anticompetitively without the risk of antitrust liability. The authorizations could be either express or implied, depending on how the given unit of government’s review process comes out. In sum, the key is simply that an informed group of people get together to collectively decide what procedural requirements are necessary in terms of both authorization and active supervision of the proposed arrangement.

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74. *Id.* at 387.

75. *Id.* at 399.

76. *Id.*

77. *Id.*

78. *Id.* at 401.

79. *Id.*

80. *See id.*

81. *Id.* at 401-02.

82. *Id.* at 402.

## E. Plan B: Towards a Judicial Synthesis

Although some authorities discuss antitrust immunity for states and municipalities as if they were two separate and wholly unrelated doctrines, at least one prominent authority discusses them together.<sup>83</sup> This Article takes the latter, hybrid approach, largely because “state action” (federal-state) and “implied repeal” (state-municipality) are informed by related principles.<sup>84</sup> Furthermore, Wisconsin courts have been known to use federal law state action cases as persuasive precedent.<sup>85</sup> Further still, discussing state law antitrust immunities from a federal perspective fosters greater understanding and clarity across state lines. The doctrines are exceedingly complex as is, and over-reliance on state precedents in discussing issues that are fundamentally similar compromises coherence.

Perhaps most importantly of all, considering either federal or state law in a vacuum subjects businesses to possible antitrust liability under the other. In Wisconsin, for example, a business that only seeks legal guidance on Wisconsin law may later find itself guilty of a federal antitrust violation. That is because as of May 6, 2008, those frameworks are no longer identical in federal and Wisconsin courts. That is, the federal implied repeal framework is now more stringent than the Wisconsin implied repeal framework under *Eichenseer III*. Thus, any right-minded antitrust litigant must consider both federal and state law if it intends to mitigate against the dangerous possibility of liability under the other framework. As such, this Article proceeds under a robust, hybrid framework for government-action-related antitrust exemptions.

1. *Sufficient State Authorization*

As a general rule, when a state authorizing provision is ambiguous, the ambiguities should be construed against authorization.<sup>86</sup> The rationale is simple: competition is the fundamental economic policy of the federal

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83. See AREEDA & HOVENKAMP, *supra* note 31.

84. Some courts claim otherwise, but their explanations of the differences between the two doctrines ultimately overlook the critical point that both federal-state and state-municipality relationships involve power-sharing. It is consequently of little import that the former situation involves two sovereigns while the latter involves one.

85. Brief of Defendants-Respondents Madison-Dane County Tavern League, Inc. at 30, *Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2007 WI 61, 300 Wis. 2d 191, 732 N.W.2d 857 (No. 2005AP001063) [hereinafter *Tavern Brief*] (citing *Am. Med. Transp. of Wis., Inc. v. Curtis-Universal, Inc.*, 154 Wis. 2d 135, 152, 452 N.W.2d 575, 582 (1990)). *American Medical Transport* noted that federal antitrust cases may often be “instructive and persuasive” in determining whether to apply liability or immunity to a municipality’s conduct. 154 Wis. 2d at 152, 452 N.W.2d at 582.

86. 1A AREEDA & HOVENKAMP, *supra* note 31, ¶ 225a.

government and most states; accordingly, if a deviation is to be found, the state should have unambiguously stated that it actually desired the deviation.<sup>87</sup> Thus, the presumption is that when a state grants power to a city or any lesser power, it does so “to do the thing contemplated, but not to do so anticompetitively.”<sup>88</sup> State authorization is deemed sufficient when (1) the “state itself” authorized the relevant actor’s pursuit of the challenged activity,<sup>89</sup> and (2) the state did so with the intent of displacing antitrust.<sup>90</sup>

Construal of the “state itself” language implicates important policy issues, particularly with regard to civic engagement and participatory democracy. States and cities are both capable of effecting bad economic policy.<sup>91</sup> On one hand, city policies can sometimes veer toward the parochial to the extent that cities have a vested interest in discriminating against those outside of their borders.<sup>92</sup> On the other hand, while states serve a larger constituency, they are more prone to capture by private firms over whom they preside.<sup>93</sup> On balance, the sometimes overly-zealous brand of democracy practiced by cities can be quite harmful: “Its benefits accrue primarily to a minority of affluent localities, to the detriment of other communities and to the system of local government as a whole.”<sup>94</sup> It is troubling, then, that courts will sometimes afford sweeping deference and autonomy to localities in the name of “home rule”—an expansive and ultimately vague doctrine that directs that state law can sometimes be trumped by cities and suburbs.<sup>95</sup>

Consequently, the ideal scope of the “state itself” should only embrace the most politically-accountable branches of government—which will normally be those that have statewide jurisdiction.<sup>96</sup> It could include a state agency that is known to be free of the risk of capture by special interests.<sup>97</sup>

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87. *Id.*

88. *Id.*

89. *Id.* ¶ 224b; see *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); *Parker v. Brown*, 317 U.S. 341, 352 (1943); see also Alan M. Anderson, *Insurance and Antitrust Law: The McCarran-Ferguson Act and Beyond*, 25 WM. & MARY L. REV. 81, 101-02 (1983) (explaining that *Parker* exemption only applies if state “clearly articulates, actively supervises, and compels adherence to the regulatory regime”).

90. 1A AREEDA & HOVENKAMP, *supra* note 31, ¶ 225a.

91. *Id.* ¶ 224b.

92. *Id.*

93. *Id.*

94. Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 1-2 (1990).

95. See David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2257 (2003). Nonetheless, home rule has its limits. Under *Hallie I*, for instance, Wisconsin cities may not simply ignore state antitrust law by invoking the home rule defense. AAI Brief, *supra* note 5, at 3 (citing *Town of Hallie v. City of Chippewa Falls*, 105 Wis. 2d 533, 540, 314 N.W.2d 321, 326 (1982)).

96. 1A AREEDA & HOVENKAMP, *supra* note 31, ¶ 224b.

97. *Id.*

It could also include the state legislature itself, the state supreme court, or the governor.<sup>98</sup> Entities that the “state itself” would *not* include are counties, school districts, and already-captured or else likely-to-be-captured agencies.<sup>99</sup> Naturally, the “state itself” would never include members of the regulated industry.<sup>100</sup>

Legal certainty militates heavily in favor of eminently clear state authorizations. *Midcal* demanded evidence that the state authorization embraced the “challenged restraint.”<sup>101</sup> When it became clear that the *Midcal* standard almost always led to a finding of no authorization, *Town of Hallie v. City of Eau Claire (Hallie II)* revised the standard to embrace “consequences that were a ‘foreseeable result’ of the legislation in question.”<sup>102</sup> But subsequently, the looser *Hallie II* standard swung the pendulum too far in the other direction.<sup>103</sup> Courts construed broad grants of general corporate power to constitute authorization of anticompetitive behavior.<sup>104</sup> Ultimately, prominent antitrust scholars have voiced a preference for the *Midcal* standard over the *Hallie II* standard:

In retrospect, the *Midcal* articulation seems to do a much better job of identifying the relevant principle of federalism that undergirds the *Parker* doctrine—namely, that while the policy favoring competition is national the states are permitted to establish an alternative regime, but they must declare their intentions clearly rather than falling back on the ambiguity-creating compromises that often characterize the legislative process.<sup>105</sup>

Accordingly, courts cite *Midcal* with far greater frequency. Nevertheless, along with the Local Government Antitrust Act of 1984 (LGAA),<sup>106</sup> *Hallie II* “restored a measure of local antitrust immunity.”<sup>107</sup> Thus, the initial focus on requiring a clear state authorization has been progressively undermined by the Court, especially in the 1970s and 1980s.

Additionally, courts have been lenient regarding express authorization to displace antitrust law—the second subpart of the test for sufficient state

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98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* ¶ 225a (quoting *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 104 (1980)).

102. *Id.* (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42 (1985)).

103. *Id.*

104. *Id.*

105. *Id.*

106. See LOCAL GOVERNMENT ANTITRUST ACT OF 1984, 15 U.S.C. §§ 34-36 (2006).

107. Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 94 (1990). The LGAA was Congress’s response to a prevailing concern that municipalities were overexposed to potential antitrust liability. ABA SECTION OF ANTITRUST LAW, *supra* note 28, at 285. It effectively overruled *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982).

authorization.<sup>108</sup> In *Lafayette v. Louisiana Power & Light Co.*, the U.S. Supreme Court concluded that authorization can be found when “the legislature contemplated the kind of action complained of.”<sup>109</sup> Thus, the practical result is that if a court finds express statutory authorization to displace state law, it may also find implied authorization to displace antitrust law if the anticompetitive restraint “is a necessary consequence of engaging in the authorized activity.”<sup>110</sup> Likewise, the Supreme Court denied a petition for certiorari when the Eighth Circuit held that “[a] state policy to displace competition can be inferred if the challenged restraint is a necessary and reasonable consequence of engaging in an authorized activity.”<sup>111</sup> It follows that in the wake of *Lafayette*, antitrust plaintiffs face an increasingly uphill climb when arguing against implied repeal.

## 2. *Compulsion versus Prompting*

In 1945, *United States v. Alcoa* held that a person or business does not necessarily commit a Sherman Act section two violation when monopoly is effectively “thrust upon it” by market forces that were out of its control.<sup>112</sup> Although Judge Learned Hand’s analysis is of mere rhetorical relevance to this Article, his holding sheds light on a very basic and inescapable reality of antitrust litigation: namely, that there are some situations where the courts will tolerate (and thus confer immunity upon) that which is technically an antitrust violation.

In a Sherman Act section one context, antitrust courts distinguish between anticompetitive conduct that is “compelled” by government versus simply “prompted.”<sup>113</sup> In *Eichenseer*, the defendant-taverns asserted a different brand of compulsion than that in *Alcoa*: that the *city council* forced their collective hand and *compelled* them to agree to the drink specials ban.<sup>114</sup> The plaintiff-students, on the other hand, asserted that merely *one or*

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108. 1A AREEDA & HOVENKAMP, *supra* note 31, ¶ 225b.

109. *Id.* (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978)).

110. *Id.*; *see, e.g.*, *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978) (immunizing enforcement of a state statute that did not expressly displace antitrust but did provide a regulatory framework that effectively displaced unfettered business freedom).

111. *Bloom v. Hennepin County*, 783 F. Supp. 418 (D. Minn. 1992) (citing *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310, 1313 (8th Cir. 1991), *cert. denied*, 502 U.S. 963 (1991)).

112. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 427 (1945).

113. 1A AREEDA & HOVENKAMP, *supra* note 31, ¶ 224c.

114. *See Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2008 WI 38, ¶ 27, 308 Wis. 2d 684, 748 N.W.2d 154 (discussing the circuit court’s finding that ALRC chair Tim Bruer’s verbal threats to ban drink specials amounted to municipal authorization to do so).

two city officials applied any alleged pressure, and that said pressure should be characterized as nothing more than mere *prompting*.<sup>115</sup> Ultimately, it has not always been entirely clear when either compelled or prompted behavior is either sufficient and/or necessary for a finding of authorization.<sup>116</sup> However, it appears that courts have become more lenient over the past several decades, and thus more willing to find authorization. *Eichenseer II* and *Eichenseer III* are just two recent examples that underscore this intriguing and fast-paced trend. The following paragraphs briefly trace this history under federal law.

First, with respect to states, *Goldfarb v. Virginia State Bar* held in 1975 that “[i]t is not enough that . . . anticompetitive conduct is ‘prompted’ by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.”<sup>117</sup> As such, it appeared that compulsion was a necessary but insufficient step on the way to a finding of authorization.<sup>118</sup> In 1976, *Cantor v. Detroit Edison Co.* also appeared to suggest that compulsion was necessary.<sup>119</sup>

Second, and just two years later, *City of Lafayette v. Louisiana Power & Light Co.* reversed course, stating that when a municipality is the actor, compulsion is not necessary.<sup>120</sup> Rather, *Lafayette* simply demanded authority pursuant to a state policy displacing antitrust:

[A] political subdivision [need not] necessarily . . . point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit. While a subordinate governmental unit’s claim to *Parker* immunity is not as readily established as the same claim by a state government sued as such, . . . an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found “from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.”<sup>121</sup>

As such, the *Lafayette* standard tilted the balance decidedly in favor of antitrust defendants.

Given the foregoing history, it is evident that the Court itself has been guilty of a general failure to clearly articulate its jurisprudence.<sup>122</sup> *Goldfarb* and *Cantor* seem to suggest compulsion might be necessary but is not

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115. See *id.* ¶ 27 (indicating that the city action essentially boiled down to the acts of one council member, Alderman Tim Bruer, as opposed to the majoritarian approval by the 19-member city council).

116. 1A AREEDA & HOVENKAMP, *supra* note 31, ¶ 224c.

117. *Id.* (quoting *Goldfarb v. Va. State Bar*, 421 U.S. 773, 791 (1975)).

118. *Id.*

119. *Id.* (citing *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 593 (1976)).

120. *Id.* (citing *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978)).

121. *Id.*

122. See *id.*

sufficient.<sup>123</sup> *Lafayette*, however, suggests something very different: that compulsion is neither necessary nor sufficient.<sup>124</sup> *Lafayette*'s departure is probably owing to the fact that the governmental actor there was a municipality.<sup>125</sup> At any rate, *Hallie II* finally settled the issue with respect to municipalities, expressly stating that city compulsion is neither necessary nor sufficient.<sup>126</sup> Like *Lafayette*, *Hallie II* represented yet another victory for antitrust defendants with respect to implied repeal of antitrust.

As for private actors (as opposed to state or city), *Midcal* framed the *Parker* defense in terms of "supervision and state policy to displace antitrust enforcement."<sup>127</sup> The question of compulsion was thus irrelevant, as *Midcal* involved an *express* exemption (i.e., a California statute that imposed a resale price maintenance scheme for wine sales). Express exemptions do not raise compulsion-versus-prompting issues, as an adopted law is authoritative and binding, and thus must be followed. Ultimately, the Court settled its rule with respect to private actors in *Southern Motor*, when it held that compulsion is relevant, but not necessary.<sup>128</sup> That same day, *Hallie II* held that actions taken by a city pursuant to a clearly articulated state policy to replace competition with regulation exempted the city's actions from federal antitrust law.<sup>129</sup>

### 3. Active Supervision

Finally, regarding the second prong, *Hallie II* expressly provided a lower standard for cities (as compared to private actors). It stated that active state supervision was not a prerequisite for municipal-actor exemption, but was for private-actor exemption.<sup>130</sup> *Hallie II*'s rationale was that when the actor is a municipality, the risk of anticompetitive repercussions is minimized because the municipality is acting pursuant to a clearly articulated state policy (the first prong of the test). The same does not go for private actors; they receive deeper scrutiny under *Midcal* to ensure the government actor does not simply "cast[] . . . a gauzy cloak of state involvement over what is essentially a private price-fixing

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123. *See id.*

124. *Id.*

125. *See id.*

126. *Id.* ¶ 224c3(I) (citing *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985)).

127. *Id.* ¶ 224c3(II).

128. *Id.* (citing *S. Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 61-62 (1985)).

129. *Hallie II*, 471 U.S. at 47.

130. *Id.* ("We further hold that active state supervision is not a prerequisite to exemption from the antitrust laws where the actor is a municipality rather than a private party.").

arrangement.”<sup>131</sup> But *Hallie II* and the Supreme Court cases since then have left a separate question unanswered: namely, whether a municipality’s failure to actively supervise a private actor can extinguish the antitrust liability of both the municipality and private actor.<sup>132</sup> This question is a rough approximation of the question that *Eichenseer* sought to resolve.

Confronted with a similar situation, the Second Circuit abstained from conferring state action immunity upon a municipality that failed to actively supervise the allegedly anticompetitive conduct of private actors.<sup>133</sup> Similarly, the Seventh Circuit has expressly stated that a private actor can only escape liability if the state has “made [the] conduct its own.”<sup>134</sup> Accordingly, some lower federal courts have distilled the “active supervision” requirement down to a single, straightforward inquiry as to which party served as the “effective decision maker.”<sup>135</sup> For instance, if a private actor is the effective decision maker, “due to corruption of the decision-making process or delegation of decision-making authority,” then it is subject to liability unless it can demonstrate active government supervision.<sup>136</sup>

### III. *EICHENSEER*

#### A. Facts

*Eichenseer*’s origins can be traced to the actions of a non-party, the University of Wisconsin-Madison (the UW). In 1999, the UW sought to curtail a longtime problem that had plagued its campus: namely, “high-risk, high-volume drinking.”<sup>137</sup> Such drinking created health and safety issues for those directly involved in the drinking, as well as those around them.<sup>138</sup>

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131. Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc., 445 U.S. 97, 106 (1980).

132. Elec. Inspectors, Inc. v. Vill. of E. Hills, 320 F.3d 110, 122 (2d Cir. 2003).

133. AAI Brief, *supra* note 5, at 9 (citing Elec. Inspectors, Inc. v. Vill. of E. Hills, 320 F.3d 110, 129 (2d Cir. 2003)).

134. Hardy v. City Optical, Inc., 39 F.3d 765 (7th Cir. 1994) (citing Patrick v. Burget, 486 U.S. 94, 105-06 (1988)).

135. For example, a Michigan federal court held that “once it is determined that the municipality is entitled to immunity from the antitrust laws, the private parties who are regulated by the municipality are also entitled to immunity as long as the ‘effective decision maker’ is the municipality rather than the private parties.”). *Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2006 WI App 66, ¶ 21, 297 Wis. 2d 495, 514, 725 N.W.2d 274, 284 (citing *City Commc’ns, Inc. v. City of Detroit*, 660 F. Supp. 932, 935 (E.D. Mich. 1987)).

136. *Michigan Paytel Joint Venture v. City of Detroit*, 287 F.3d 527, 538 (6th Cir. 2002).

137. *Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2006 WI App 66, ¶ 3, 300 Wis. 2d 191, 732 N.W.2d 857.

138. *Id.*

Specifically, the UW wished to snuff out the rise in “life-threatening conveyances to detoxification facilities and the great consumption of expensive police response services.”<sup>139</sup> Accordingly, the UW pressed the city to curtail the granting of new liquor licenses around campus.<sup>140</sup> Backed by a multi-year grant aimed at funding “research, political action and monitoring,” the UW set out to turn a historically wet campus into a dry one.<sup>141</sup>

Purportedly in response to increasingly intensified pressure by the UW, the city began to impose what came to be known as the “Luther’s Blues conditions,” named for the first tavern to have its liquor license significantly restricted by the city.<sup>142</sup> As a result, when new taverns applied for licenses—or when existing taverns relocated—the city would place numerous limitations upon the new license.<sup>143</sup> Pertinent restrictions imposed by the city included the following:

Not to increase the volume contained in a serving without increasing proportionately the price charged for such a serving.

Not to give away any drink or sell at a price that is different from the usual price for the drink for any period of time less than one full week.

Not to give away any drink or reduce the price of any drink conditioned upon the purchase of any drink or number of drinks.

Not to sell or give away an unlimited number of drinks during a set period of time for a fixed price.<sup>144</sup>

Thus, the city used the Luther’s Blues conditions to place added controls upon certain taverns. Those taverns whose licenses were subject to the Luther’s Blues conditions were effectively prohibited from using price reduction specials to compete against one another. For instance, the first provision plainly states that tavern owners cannot circumvent the scheme by simply adding more liquor to their drinks.<sup>145</sup> By placing price and volume in lock-step, the city guaranteed a fixed price for the price per unit of alcohol in drink specials.

Although the city-imposed Luther’s Blues conditions preceded and were independent of the drink specials ban that would become the subject of the dispute in *Eichenseer*, the voluntary agreement that the defendant-taverns ultimately adopted closely resembled them. Consequently, absent some kind of government-action-related exemption, the taverns’ conduct

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139. *Id.*

140. *Id.*

141. *See id.*

142. *Id.*

143. *Id.*

144. *Id.* ¶ 3 n.3.

145. *Id.*

would have subjected them to antitrust liability.<sup>146</sup> Specifically, a per se illegal horizontal pricing agreement exists when competitors act together to “raise prices above the level that would otherwise exist in a competitive market.”<sup>147</sup>

The drink specials ban was thus a private agreement to abstain from reducing prices after 8 p.m. on Friday and Saturday nights.<sup>148</sup> The taverns also tied in an agreement to control the volume of alcohol that could be included in mixed drinks—an important feature of the scheme which mitigated the risk of cheating by members of the twenty-four-tavern cartel.<sup>149</sup> Accordingly, it was not a direct price-fix (e.g., “raise your price for a vodka-tonic to \$4.25, and I’ll do so the next day”). Rather, it was an indirect price-fix. Nevertheless, indirect pricing agreements among competitors have historically been adjudged to fall within the ambit of per se violations of antitrust law. The United States Supreme Court, for instance, has invalidated indirect price-fixing agreements on numerous occasions in response to factors that bore indirect relationships to price.<sup>150</sup>

Given the foregoing, it is surprising that the UW considered inducing additional tavern owners to sign onto the Tavern League’s plan by emphasizing the additional revenue those establishments could receive by embracing the drink specials ban.<sup>151</sup> Draft notes for a UW press release suggest that the organizers knew the drink specials ban would yield increased revenues for the taverns.<sup>152</sup> Specifically, the UW took the position that the Tavern League should place more emphasis on the margin-generating aspect of the ban.<sup>153</sup> “[W]e could make a lot more of the additional revenue, if we could prove it, or even get a quote from a tavern owner to that effect.”<sup>154</sup> While this point was ultimately left out of the final press release,<sup>155</sup> it indicates that the participants had at least contemplated

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146. See, e.g., *State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 261 N.W.2d 147 (1978) (declaring price fixing and market allocation to be per se illegal).

147. AAI Brief, *supra* note 5, at 1 (citing *Catalano v. Target Sales*, 446 U.S. 643 (1980) (per curiam) (holding beer distributors’ agreement to eliminate discounts to be per se illegal); *Waste Mgmt.*, 81 Wis. 2d 255, 261 N.W.2d 147)).

148. *Eichenseer II*, 2006 WI App 66, ¶ 3 n.3.

149. See *id.* (listing the Luther’s Blues conditions, upon which the taverns’ voluntary agreement was ultimately modeled).

150. See, e.g., *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647-50 (1980) (per curiam) (collecting cases and then holding per se illegal an agreement among private beer wholesalers to abstain from extending credit for beer sales to beer retailers).

151. Brief of Plaintiffs-Appellants-Petitioners at 19, *Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2007 WI 61, 300 Wis. 2d 191, 732 N.W.2d 857 (No. 2005AP001063) [hereinafter Principal Brief].

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

the idea that the pricing agreement would yield greater profits for the taverns. Taken together with the taverns' insistence that the ban would not curtail alcohol-related disorderly conduct, this tacit admission suggests the possibility of at least some degree of bad faith on the part of the taverns.

## B. *Eichenseer II*

### 1. *No Law*

*Eichenseer* is problematic because it broadens the realm of conduct that can be deemed an authorization for anticompetitive restraints. Whereas *Fisher v. City of Berkeley* turned on whether the city acted unilaterally versus in concert with the landlords,<sup>156</sup> *Eichenseer* blurred that distinction by conferring an antitrust exemption upon a voluntary private agreement.<sup>157</sup> That agreement did not have the benefit of city approval.<sup>158</sup> It was not an ordinance, and was not subject to any type of substantive review or public oversight in the way that ordinances typically are.<sup>159</sup> Nor was it subject to continued monitoring by an uninterested regulator who could ensure that the private actors would not abuse the newfound exemption for their own gain, and to the detriment of consumers.<sup>160</sup> In a word, there was no clear and express authorization for the drink specials ban, nor was there the required "irreconcilable conflict between the commands of antitrust and the regulatory goals of the Legislature."<sup>161</sup>

Instead, the court of appeals should have required an actual law. This would have served as explicit approval of the private agreement.<sup>162</sup> Moreover, it would have saved the parties the time and expense of litigating the issue of whether a voluntary private agreement among competitors to ban drink specials has the same anticompetitive force as a similar scheme unilaterally adopted by a municipality. Without an actual law, confusion abounded. If *Eichenseer* has taught one lesson, it is that a front-end litmus test for clear authorization is not simply well-advised, but *necessary*. In Wisconsin, competition is the state's "fundamental economic policy."<sup>163</sup>

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156. See *Fisher v. City of Berkeley*, 475 U.S. 260, 266 (1986).

157. See Reply Brief of Plaintiffs-Appellants-Petitioners at 9, *Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2007 WI 61, 300 Wis. 2d 191, 732 N.W.2d 857 (No. 2005AP001063) [hereinafter Reply Brief] (emphasis in original).

158. AAI Brief, *supra* note 5, at 11-12.

159. See *id.*

160. See *id.*

161. See *id.*

162. *Id.* at 7.

163. WIS. STAT. § 133.01 (2005-06); see Peter C. Carstensen, *The Transformation of Economic Regulation: Market Dynamics and Legal Lag Comments on Professor Bush's Mission Creep*, 2006 UTAH L. REV. 811, 821 ("Congress could adopt a statutory rule of

Furthermore, the legislature has expressly stated by way of statute that state regulatory agencies “shall regard the public interest as requiring the preservation and promotion of the *maximum level* of competition in any regulated industry,”<sup>164</sup> provided that this jibes with the legislature’s other public interest goals.<sup>165</sup> Consequently, it is abundantly clear that Wisconsin does not take antitrust exemptions lightly. It follows that a private agreement that restricts competition should not merit exemption by simple agreement among the private firms. Rather, the statute—tellingly titled “Legislative intent”—should require state-led review of the agreement to ascertain whether it comports with the goals of the legislature, executive agencies, and the public interest.<sup>166</sup>

Not only did the city council and ALRC fail to formally approve this private agreement, but any claimed informal approval lacked substantive standards to assess the scheme going forward.<sup>167</sup> In this way, *Eichenseer* substantially lowered the threshold for private agreements that restrain trade. The city’s omission is doubly troublesome because it undercuts the meaningfulness of traditional participatory government.<sup>168</sup> By skipping the step of requiring a clear authorization from the state—whether express or implied—the taverns guaranteed less public oversight and accountability.<sup>169</sup> Furthermore, the case raises the inference that all that is required for an antitrust exemption is the blessing of one or two members of a twenty-member city council.<sup>170</sup> Naturally, this flies in the face of democratic notions of majority rule.<sup>171</sup>

The *Eichenseer* approach shakes the credibility of the council as a whole and opens up the increased possibility for suspicious backroom deals and political bartering.<sup>172</sup> As the plaintiffs put it, in such an atmosphere, “[T]he law is not what the law books say it is, such as that price fixing is illegal. Rather, the law is what Alderperson Bruer . . . says it is. If Bruer says that the bars should fix prices, then it is ok [sic] for the bars to fix prices. If Bruer says that he wants a law regulating drink specials, then presto, there is such a law.”<sup>173</sup> Fighting words aside, the fact remains that

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construction similar to that adopted in Wisconsin or Connecticut. . . . The Wisconsin Supreme Court has relied on [its] provision to impose strict limits on expansive claims to preempt competition.”).

164. WIS. STAT. § 133.01 (emphasis added).

165. *Id.*

166. *See* AAI Brief, *supra* note 5, at 7.

167. *See id.* at 7-8.

168. *Id.*

169. *See id.* at 7-8.

170. *See id.*; City of Madison Common Council, Alders, <http://www.cityofmadison.com/Council/whoAlders.cfm> (last visited April 16, 2009).

171. AAI Brief, *supra* note 5, at 7-8.

172. *Id.* at 8.

173. Principal Brief, *supra* note 151, at 40.

the city council did not debate, vote on, or pass an ordinance that would regulate drink specials in Madison.<sup>174</sup> Nor did the city attorney review drafts of a possible ordinance.<sup>175</sup> Thus, once the private taverns received the benefit of Bruer's sympathetic ear, they needed little else. The city's efforts—however well-intentioned—ultimately gave the taverns the benefit of substantial cooperation and support without the requisite checks and balances from both the people and their elected representatives.<sup>176</sup>

Even barring the abovementioned tacit admission that the drink specials ban extracted greater profits from tavern patrons, the *Eichenseer* agreement remains highly problematic. In *Fisher v. City of Berkeley*, the United States Supreme Court considered whether a rent control ordinance enacted by a municipality was preempted by the Sherman Act, and thus unconstitutional.<sup>177</sup> The ordinance imposed limitations upon the ability of landlords to increase tenants' rents.<sup>178</sup> The Court assessed whether the ordinance was facially inconsistent with the Sherman Act.<sup>179</sup> It concluded it was not because section one of the Sherman Act required *concerted* action.<sup>180</sup> Because Berkeley *unilaterally* imposed the restraint, there was no concerted action, and the ordinance was consequently immune from section one liability.<sup>181</sup> *Berkeley* acknowledged that when the city unilaterally imposed this restraint upon landlords, the nature of the regulator-regulated relationship dictated that the landlords would have little choice but to follow those regulatory commands.<sup>182</sup> That is, the regulator and the regulated shared a coercive relationship.

Ultimately, the Court found there was no “meeting of the minds,”<sup>183</sup> as the landlords had “no more freedom to resist the city's rent controls than they [did] to violate any other local ordinance enforced by substantial sanctions.”<sup>184</sup> Importantly, *Berkeley* acknowledged that if the plaintiff-landlords had—out of the goodness of their hearts—“voluntarily banded together to stabilize rents in the city,” the result would have been different: such conduct would have constituted concerted action.<sup>185</sup> As such, section

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174. *Id.* at 15 (record citations omitted).

175. *Id.* (record citations omitted).

176. AAI Brief, *supra* note 5, at 8.

177. *Fisher v. City of Berkeley*, 475 U.S. 260, 261 (1986).

178. *Id.* at 261-63.

179. *Id.* at 266-67.

180. *Id.*

181. *See id.* at 266.

182. *Id.* at 267.

183. *Id.* (citing *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)).

184. *Id.* at 267.

185. *Id.* at 266.

one liability would have attached if the landlords created the agreement instead of the city.<sup>186</sup>

In contrast to *Berkeley*, there was no ordinance in *Eichenseer*; the City of Madison did not enact anything. As indicated above, *Berkeley* expressly stated that its result turned on the fact that the government—and not a group of private actors—unilaterally imposed the rent restraint. Thus, under *Berkeley*, the drink specials ban in *Eichenseer* is highly vulnerable to antitrust challenge.<sup>187</sup> That is, a voluntary agreement among private actors would be “subject to antitrust attack under the antitrust laws.”<sup>188</sup>

In the end, *Eichenseer II* is flawed to the extent that it creates a less certain regulatory environment for the very tavern owners it purports to protect. As a result, the members of the Tavern League are left wondering whether the immunity applies if they fix prices in complete secrecy, or only if they first recruit an elected official to provide them with ‘legal cover’ as Bruer did in Madison.<sup>189</sup>

## 2. No Express Exemption

Wisconsin law does not expressly exempt the tavern industry from the antitrust laws.<sup>190</sup> There is no provision in the Wisconsin Statutes conferring an antitrust exemption for private entities like the tavern owners in *Eichenseer*.<sup>191</sup> In both their briefs<sup>192</sup> as well as at oral argument,<sup>193</sup> the taverns failed to turn up statutory support for the proposition that taverns should be able to get around the antitrust laws’ prohibition on horizontal price-fixing. At bottom, the taverns’ briefs simply demonstrated that the tavern lobby is “subject to various state regulations”<sup>194</sup>—a fact that

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186. *Id.* (“Had the owners of residential rental property in Berkeley voluntarily banded together to stabilize rents in the city, their activities would not be saved from antitrust attack by claims that they had set reasonable prices out of solicitude for the welfare of their tenants.”). It has been long-established that litigants cannot defend price-fixing allegations on the basis that the prices they set were reasonable. *See, e.g., Nat’l Society of Prof. Eng’rs v. United States*, 435 U.S. 679, 695 (1978); *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290 (1897).

187. *See* Reply Brief, *supra* note 157, at 8 (citing *Fisher*, 475 U.S. at 266).

188. *Id.*

189. Principal Brief, *supra* note 151, at 30.

190. *Id.* at 34.

191. *Id.*

192. Reply Brief, *supra* note 157, at 5-6.

193. *Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2008 WI 38, ¶ 130, 308 Wis. 2d 684, 748 N.W.2d 154.

194. Reply Brief, *supra* note 157, at 5-6; *see also* Peter C. Carstensen & Richard F. Dahlson, *Vertical Restraints in Beer Distribution: A Study of the Business Justifications for and Legal Analysis of Restricting Competition*, 1986 WIS. L. REV. 1, 3-4, 9 (discussing lobbying efforts by beer wholesalers for antitrust immunity from federal antitrust laws).

ultimately makes them no different than various other industries.<sup>195</sup> Indeed, the plaintiffs suggested that the difference between the tavern industry and others is simply that the taverns have had great success in securing “protective legislation.”<sup>196</sup> The plaintiffs maintained that currying special favor with state entities does not amount to a conferral of an antitrust exemption.<sup>197</sup> As they put the issue, “there is nothing remarkable about the nature or extent of the regulation of the tavern industry as compared to the various other industries.”<sup>198</sup>

### 3. No Implied Repeal

*Eichenseer II* concluded that the taverns’ agreement was entitled to the same antitrust exemption that would have applied had the city formally enacted an ordinance.<sup>199</sup> It placed great emphasis on the influence of Bruer and his threats that he would take matters into his own hands if the taverns did not adopt an agreement on their own.<sup>200</sup> In analyzing the plaintiffs’ claims against the taverns under Wisconsin antitrust law, the court sought guidance from non-binding but persuasive federal precedent.<sup>201</sup>

As discussed in Part II, state action and implied repeal are distinct but related doctrines. State action<sup>202</sup> is a federalism-minded doctrine that examines whether two sovereigns, the federal and state governments, have enacted inconsistent laws.<sup>203</sup> Implied repeal<sup>204</sup> instead examines whether a single sovereign has enacted inconsistent laws.<sup>205</sup> Since cities derive their power from the state, the two entities are effectively one sovereign.<sup>206</sup> The

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195. Reply Brief, *supra* note 157, at 5-6 (citing WIS. STAT. § 454.08 (regulating barbers); WIS. Sup. Ct. Rules chs. 10-13, 20-22 (regulating attorneys); WIS. STAT. § 445 (regulating funeral directors)).

196. Reply Brief, *supra* note 157, at 5-6.

197. Principal Brief, *supra* note 151, at 34; *see* Reply Brief, *supra* note 157, at 5-6.

198. Reply Brief, *supra* note 157, at 5-6.

199. *Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2006 WI App 66, ¶ 19, 297 Wis. 2d 495, 512, 725 N.W.2d 274, 282-83.

200. *Id.* ¶ 3.

201. *Id.* ¶ 19 n.9 (citing *Am. Med. Transp. of Wis., Inc. v. Curtis-Universal, Inc.*, 154 Wis. 2d 135, 152, 452 N.W.2d 575 (1990)).

202. *See Parker v. Brown*, 317 U.S. 341 (1943).

203. *Eichenseer II*, 2006 WI App 66, ¶ 19 n.9 (citing *Town of Hallie v. City of Chippewa Falls*, 105 Wis. 2d 533, 537, 314 N.W.2d 321 (1982)).

204. *See Am. Med. Transp.*, 154 Wis. 2d at 148, 452 N.W.2d 575; *Hallie I*, 105 Wis. 2d at 539, 314 N.W.2d 321.

205. *Eichenseer II*, 2006 WI App 66, ¶ 19 n.9 (citing *Hallie I*, 105 Wis. 2d at 537-38, 314 N.W.2d 321).

206. *See Tavern Brief, supra* note 85, at 30 (citing *Hallie I*, 105 Wis. 2d at 537, 314 N.W.2d 321). Nevertheless, Wisconsin courts deem the two doctrines to be similar in rationale, and thus will consider precedent regarding both doctrines when deciding a case

implied repeal defense seeks to determine whether the legislature would have intended to apply its antitrust laws to arguably anticompetitive conduct, “or whether it instead intends the activity to be regulated even though anticompetitive effects will result.”<sup>207</sup>

The taverns claimed Wisconsin Statutes chapter 125 (titled “Alcohol beverages”) indicates a legislative intent that the antitrust laws in chapter 133 should be effectively repealed—whether expressly or impliedly—when conduct such as that of the tavern owners takes place.<sup>208</sup> Arguing that the legislature devoted over 30 pages to a regulatory structure for alcohol replete with “numerous restrictive and overtly anticompetitive provisions,” the taverns contended that the antitrust laws<sup>209</sup> are rendered a dead letter when municipalities restrict competition relating to the sale of alcoholic beverages.<sup>210</sup> As such, on appeal, the Wisconsin Supreme Court was essentially charged with deciding two issues: (1) whether chapter 125 “implicitly includes the right to regulate pricing policies for bars and (2) whether an agreement among bars to implement such a policy is both within the scope of any authority to regulate prices and can trigger an exemption from antitrust law when approved only informally.”<sup>211</sup>

The American Antitrust Institute (AAI), a non-party participant in the appeal, stressed the critical importance of providing a rule of law that gives concrete, substantive content to implied exemptions from antitrust law.<sup>212</sup> The court of appeals’ rendering of implied immunity was far broader than existing case law allowed, as it severed conferral of said immunity from the requirement that it come from the regulator rather than the regulated.<sup>213</sup> The AAI put the matter as follows:

If the regulator lacks the authority to regulate prices, it can not exempt from antitrust law an agreement among bars to do the same thing. The issue here is not whether the Legislature has a goal of reducing the harms from excessive drinking; rather the question is whether it has authorized a specific means, an agreement among competitors to restrict competition, to accomplish that goal. The provisions of ch. 125 do not support such a conclusion.<sup>214</sup>

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under either of the two doctrines. Tavern Brief, *supra* note 85, at 30 (citing *Am. Med. Transp.*, 154 Wis. 2d at 152, 452 N.W.2d 575).

207. *Eichenseer II*, 2006 WI App 66, ¶ 19 n.9 (citing *Hallie I*, 105 Wis. 2d at 537-38, 314 N.W.2d 321).

208. Tavern Brief, *supra* note 85, at 31.

209. *See* WIS. STAT. § 133 (2005-06).

210. Tavern Brief, *supra* note 85, at 33 (citing WIS. STAT. § 125 (2005-06)).

211. AAI Brief, *supra* note 5, at 2.

212. *See id.*

213. *See id.*

214. *Id.* at 6-7 (citing *Hardy v. City Optical, Inc.*, 39 F.3d 765 (7th Cir. 1994); *First Am. Title Co. v. Devaugh*, 480 F.3d 438 (6th Cir. 2007)).

Thus, *Eichenseer* points up a troubling slippery slope not only for purposes of antitrust immunity law, but also for implied repeal law more generally.

Not surprisingly, the plaintiffs and taverns framed the central issue before the Court quite differently from one another. Naturally, the plaintiffs sought to define the question narrowly, contending that chapter 125 did not endorse horizontal price-fixing by liquor industry participants. The taverns, on the other hand, contended that the question was broader than that: namely, whether the statutes governing the sale of alcoholic beverages granted municipalities “unfettered authority” to regulate such sale.<sup>215</sup> In their own words—liberally extrapolating from actual language in the Wisconsin Statutes—the taverns asserted a litany of claims in an effort to characterize chapter 125 as a sweeping regulatory framework.<sup>216</sup> They claimed that chapter 125 (1) “[p]rohibits the sale or manufacture of alcoholic beverages without a license,”<sup>217</sup> (2) “[a]uthorizes municipalities to impose conditions on licenses and to revoke licenses for violation of any such conditions,”<sup>218</sup> (3) “[e]stablishes minimum criteria for all alcoholic beverage licensees and permittees,”<sup>219</sup> (4) “[a]uthorizes intrusive monitoring by state and local law enforcement personnel<sup>220</sup> . . . and by municipal residents,”<sup>221</sup> (5) “[e]stablishes procedures and penalties relating to service of underage and intoxicated persons,”<sup>222</sup> (6) “[l]imits the hours of operation, locations and numbers of licenses for Class B (on premises consumption) licensees,”<sup>223</sup> and (7) “[a]uthorizes individual municipalities to hold referenda in which residents can vote to prohibit the local authorities from authorizing any licenses, thereby eliminating all competition in the sale of alcoholic beverages within any community that so chooses.”<sup>224</sup>

As a preliminary matter, under Wisconsin law, the burden for impliedly repealing a past statutory enactment with a new one is high.<sup>225</sup> As set forth in *State v. Black*, “when two provisions are similar . . . we must make every attempt to give effect to both by construing them together so as to be consistent with one another.”<sup>226</sup> Competition is the fundamental economic policy of Wisconsin,<sup>227</sup> which suggests that courts “should not

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215. Tavern Brief, *supra* note 85, at 33-35.

216. *See id.* at 33-34.

217. *Id.* at 33 (citing WIS. STAT. §§ 125.04(1), 125.09(1) (2005-06)).

218. *Id.* (citing WIS. STAT. § 125.26(3) (2005-06)).

219. *Id.* (citing WIS. STAT. § 125.04(5) (2005-06)).

220. *Id.* at 33-34 (citing WIS. STAT. §§ 139.08(4), 125.14, 125.12(4)-(5) (2005-06)).

221. *Id.* at 34 (citing WIS. STAT. § 125.12(2) (2005-06)).

222. *Id.* at 33 (citing WIS. STAT. § 125.07 (2005-06)).

223. *Id.* at 34 (citing WIS. STAT. §§ 125.32, 125.68, 125.51(4) (2005-06)).

224. *Id.* (citing WIS. STAT. § 125.05 (2005-06)).

225. Principal Brief, *supra* note 151, at 33.

226. *State v. Black*, 188 Wis. 2d 639, 645, 526 N.W.2d 132, 134 (1994).

227. *See* WIS. STAT. § 133.01 (2005-06).

lightly reach the conclusion that monopoly or restraint of trade is authorized by extraneous statutes that do not quite clearly indicate that intent.”<sup>228</sup>

Before *Eichenseer*, Wisconsin courts consistently relied on this statutory command to protect competition by strictly construing the bounds of preemption.<sup>229</sup> Because state policy is to preserve and promote the maximum level of competition in all regulated industries, courts will not simply eschew the state’s overarching goal of achieving a competitive alcoholic beverages market when confronted with potentially anticompetitive restraints that effectively undercut that fundamental policy.<sup>230</sup> On the contrary, Wisconsin—while regulating its liquor industry in certain enumerated ways—has ultimately let the free market determine the price of alcoholic beverages.<sup>231</sup> That is, while the state does exert some control over the industry, it does not control the sale or price.<sup>232</sup> As the AAI put the issue, “[t]he Wisconsin Legislature has explicitly balanced the public interests in regulation and competition. Courts should not impute any exemption except when essential to implement a clear legislative goal of another regulatory system.”<sup>233</sup> Accordingly, contrary to the court of appeals’ conclusions, this general grant of authority to regulate liquor licenses does not rise to the level of implying legislative authorization for competitors to agree to restrict competition—regardless of any alleged public interest justifications.<sup>234</sup>

Recently, in *County of Milwaukee v. Williams*, the Wisconsin Supreme Court held that section 133.01 requires that private agreements that are subject to potential attack under antitrust law be scrutinized to ensure they are “no more anticompetitive than necessary to accomplish the Legislature’s goals.”<sup>235</sup> Thus, it is worth noting that in *Eichenseer*, the restraint’s purported public interest justification—namely, to curtail high-risk, high-volume binge drinking—was not even attained.<sup>236</sup> One year after the drink specials ban’s implementation, the University issued a press release acknowledging that “police calls for disorderly conduct in the downtown

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228. Principal Brief, *supra* note 151, at 33 (quoting *Am. Med. Transp. v. Curtis-Universal, Inc.*, 154 Wis. 2d 135, 151-52, 452 N.W.2d 575, 582 (1990)).

229. Carstensen, *supra* note 163, at 821.

230. See Principal Brief, *supra* note 151, at 38.

231. *Id.*

232. *Id.*

233. AAI Brief, *supra* note 5, at 3.

234. *Id.* at 4.

235. *Id.* at 5 (citing *County of Milwaukee v. Williams*, 2007 WI 69, ¶¶ 46-52, 301 Wis. 2d 134, 157-60, 732 N.W.2d 770, 782-84 (“[T]he section applies in circumstances in which parties assert violations of antitrust law.”)); see also Andy DeClercq, Note, *Fisticuffs in Free Markets: Municipal Exemptions to Wisconsin Antitrust Law After County of Milwaukee v. Williams*, 2007 WIS. L. REV. 1355 (discussing the history of Wisconsin’s antitrust statute).

236. See Principal Brief, *supra* note 151, at 19 (record citations omitted).

area increased 38% on Friday nights and 38.4% on Saturday nights.”<sup>237</sup> Critically, not only did the ban fail to decrease alcohol-related problems, but the situation actually became worse.<sup>238</sup>

Ultimately, the taverns’ arguments overlooked the fact that all regulations place some limitations on free competition.<sup>239</sup> Indeed, that is what makes a regulation a regulation.<sup>240</sup> Regrettably, *Eichenseer II* ignores this very basic premise and “implies that the presence of any anticompetitive legislation renders the regulated industry completely immune from antitrust scrutiny . . . .”<sup>241</sup> Additionally, other statutes signal that the legislature has *not* impliedly repealed antitrust laws with respect to the actions of the tavern industry:

For example, chapter 125.07(2), Stats., prohibits taverns from serving alcohol to intoxicated persons. As another example, the state imposes an excise tax on the sale of beer and alcohol. If the state desired to further reduce alcohol consumption, the excise tax could be increased. The legislature has considered the problem of excess alcohol consumption and has determined to address the problem through a regulatory scheme that preserves price competition between and among licensed establishments.<sup>242</sup>

In other words, competition has been and remains the fundamental economic policy of Wisconsin.<sup>243</sup>

#### 4. *No State Action*

*Eichenseer II*’s implied exemption analysis was also inconsistent with state action analysis under federal antitrust law.<sup>244</sup> The federal state action doctrine exempts governmental entities from the antitrust laws for actions that would be deemed antitrust violations if performed by private firms.<sup>245</sup> It is a two-part standard that examines (1) whether a clearly articulated state

237. *Id.* (record citations omitted).

238. *Id.* (record citations omitted).

239. *Id.* at 37-38 (emphasis in original).

240. *See id.* (emphasis in original).

241. *Id.*

242. *Id.* at 38-39.

243. Competition is the fundamental economic policy of the federal government as well. As stated by the Court in *Topco*, “Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They 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.” *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

244. AAI Brief, *supra* note 5, at 10 (citing *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum*, 445 U.S. 97 (1980)).

245. *GAVIL ET AL.*, *supra* note 32, at 977.

policy preempts competition, and (2) whether there is active supervision of the anticompetitive behavior involving private firms.<sup>246</sup>

*Eichenseer II* represented a broadening of state action immunity. The court of appeals seemed to suggest that “a significant amount of regulation . . . combined with any informal approval” constitutes immunity from state antitrust law regardless of the anticompetitive nature of the agreement.<sup>247</sup> As the AAI concluded in its non-party brief, “This method of imputing legislative intent to preempt competition does not satisfy the first requirement of state action immunity.”<sup>248</sup> Likewise, it does not satisfy the second requirement that the agreement be supervised.<sup>249</sup> The city failed to formally oversee and enforce the agreement.<sup>250</sup>

When a government entity grants an antitrust exemption to a group of private firms, it is required to provide active supervision.<sup>251</sup> But here, once the private agreement was in place, the city provided no monitoring.<sup>252</sup> It did not attempt to ascertain the change in the quantity of alcohol sold, nor did it examine whether the taverns were realizing unreasonably high margins.<sup>253</sup>

In any event, policymakers must ensure that all exemptions have “a substantive content.”<sup>254</sup> The city could have put together a stronger experiment that could have tracked its success or failure with greater accuracy and precision.<sup>255</sup> It could have settled on ways to monitor the bars, gather margin- and revenue-related data, and resolve agreement-related disputes amongst the taverns.<sup>256</sup> Ultimately, the city failed to take any of these measures.<sup>257</sup> Regardless, on one view, the city did not have any enforcement power over this agreement in the first place.<sup>258</sup>

### C. *Eichenseer III*

In *Eichenseer III*, the Wisconsin Supreme Court affirmed the court of appeals, holding the taverns’ actions immune from state antitrust law under

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246. AAI Brief, *supra* note 5, at 10 (citing *Midcal*, 445 U.S. 97).

247. *Id.* (citing *Hardy v. City Optical, Inc.*, 39 F.3d 765 (7th Cir. 1994); *First Am. Title Co. v. Devaugh*, 480 F.3d 438 (6th Cir. 2007)).

248. *Id.* (citing *Hardy*, 39 F.3d 765; *Devaugh*, 480 F.3d 438).

249. *Id.* at 11.

250. *Id.*

251. *Id.* at 9 (citing *Patrick v. Burget*, 486 U.S. 94 (1988)).

252. Principal Brief, *supra* note 151, at 15-16 (record citations omitted).

253. *Id.* (record citations omitted).

254. AAI Brief, *supra* note 5, at 9.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

*Hallie I.*<sup>259</sup> Like the court of appeals, the supreme court conferred the immunity on state implied repeal grounds, and analyzed federal cases construing federal state action in doing so.<sup>260</sup> Both courts deemed these federal precedents instructive and persuasive for purposes of interpreting and applying Wisconsin's implied repeal doctrine.<sup>261</sup> The *Eichenseer III* dissent sharply rebuked this approach.<sup>262</sup>

The majority's analysis began by stating that government regulation of alcohol has a long and contentious history in America.<sup>263</sup> Section two of the Twenty-First Amendment conferred broad authority upon the states to control the importation and sale of alcohol.<sup>264</sup> Consequently, a tension arises whenever states use that power anticompetitively.<sup>265</sup> *Eichenseer III* embodied "a variation on that tension: an alleged dispute between local authorities and tavern keepers, on the one hand, and Wisconsin antitrust law, on the other."<sup>266</sup> Writing for a three-Justice majority,<sup>267</sup> Justice David Prosser found that the former were immune from the latter.<sup>268</sup> As such, he extended *Hallie I* implied repeal immunity to the defendants' actions in spite of the absence of an actual and official drink-specials-ban ordinance from the City of Madison:<sup>269</sup>

[W]e conclude that *Hallie I* should be extended to recognize that the actions of the defendants, under the intense pressure of the City, were intended by the legislature to be immune from antitrust liability when the legislature granted municipalities broad authority to regulate the sale and consumption of alcohol beverages. To conclude otherwise would enshrine theory over practical reality.<sup>270</sup>

Thus, the court's decision to expand the scope of *Hallie I*'s exemption turned on the tightness of the link between the city's goals and the taverns'

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259. *Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2008 WI 38, ¶ 3, 89, 308 Wis. 2d 684, 748 N.W.2d 154.

260. *See id.* ¶¶ 3, 28.

261. *Id.*; *see Am. Med. Transp. of Wis., Inc. v. Curtis-Universal, Inc.*, 154 Wis. 2d 135, 152, 452 N.W.2d 575, 582 (1990) (indicating that Wisconsin courts deem federal state action precedents as instructive and persuasive in determining whether to apply liability or else immunity to a municipality's conduct).

262. *See Eichenseer III*, 2008 WI 38, ¶¶ 141-48 (Butler, J., dissenting).

263. *Id.* ¶ 31 (majority).

264. *Id.* ¶ 31 (citing *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 346 (1987) (quoting *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980))).

265. *Id.* ¶ 31.

266. *Id.* ¶ 32.

267. Justices Ann Walsh Bradley and N. Patrick Crooks did not participate in either the oral argument or the decision itself. *See id.* ¶ 102. Chief Justice Shirley Abrahamson participated in the oral argument, but withdrew from participation thereafter. *See id.* ¶ 103. Justice Louis Butler dissented. *Id.* ¶ 104.

268. *Id.* ¶¶ 3, 89.

269. *Id.* ¶¶ 86-89.

270. *Id.* ¶ 89.

actions.<sup>271</sup> Prosser concluded that the city was the effective decision-maker—not the taverns.<sup>272</sup> Because the taverns entered the agreement as a direct response to city pressure, the city’s actions were the but-for cause of the ban.<sup>273</sup> As such, Prosser’s analysis was quite similar to that in *Eichenseer II*.

In a strongly-worded dissent, Justice Louis Butler took the majority to task for manipulating the facts of the case and the law on the books to reach a politically-acceptable result.<sup>274</sup> Specifically, Butler accused the majority of enshrining a sympathetic policy goal (i.e., limiting binge-drinking) over the most important policy goal of all: namely, “the rule of law itself.”<sup>275</sup> For his part, Prosser suggested that Butler was guilty of “enshrin[ing] theory over practical reality.”<sup>276</sup> In turn, Butler responded with a stern rebuke of his own: “This rejection of the rule of law as mere technicality and theory does a grave injustice to our legal system.”<sup>277</sup> Ultimately, Butler emphasized that the court’s prior precedents had never allowed a private party to completely escape antitrust liability without express statutory authorization.<sup>278</sup>

The war of words between the majority and dissent reveals a significant disagreement over which precedents should apply, and what those precedents were intended to mean.<sup>279</sup> For instance, although the majority and dissent agreed that implied repeal was a relevant issue that merited resolution, they reached diametrically-opposed results as to whether antitrust was in fact impliedly repealed in this instance.<sup>280</sup> Furthermore, they relied on different cases for the so-called “implied repeal” doctrine.<sup>281</sup> This is because they could not even agree as to whether *Hallie I* could be characterized as an “implied repeal” case—the label that the appellate court

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271. *Id.* ¶ 88.

272. *Id.* ¶ 82.

273. *Id.*

274. *Id.* ¶ 157 (Butler, J., dissenting).

275. *Id.*

276. *Id.* ¶ 89 (majority).

277. *Id.* ¶ 156 (Butler, J., dissenting).

278. *Id.* ¶ 153 (Butler, J., dissenting).

279. *Compare id.* ¶¶ 37-38 n.17 (majority) (“The court of appeals adopted the label ‘implied repeal doctrine,’ which was used by the parties throughout their briefs, to describe the antitrust immunity doctrine of [*Hallie I*]. . . . We also adopt this label.”), and ¶ 40 (“The leading case in Wisconsin for the implied repeal doctrine is *Hallie I* . . . .”), with *id.* ¶ 119 (Butler, J., dissenting) (“[*Hallie I*] does not speak in such terms or employ an implied repeal framework. Were *Hallie I* an implied repeal case, it would have mentioned ‘implied repeal’ by name . . . .”).

280. *Supra* note 279.

281. *Compare Eichenseer III*, 2008 WI 38, ¶¶ 39-40 (embracing *Hallie I*), with *id.* ¶ 118 n.4 (Butler, J., dissenting) (embracing *State v. Black*).

and the parties embraced.<sup>282</sup> Moreover, Butler insisted that even assuming *arguendo* that the *Hallie I* test was identical for municipal and private parties, Prosser's analysis was still incorrect.<sup>283</sup> Ultimately, this disagreement sends them down divergent analytical paths.

### 1. *Insufficient State Authorization*

First, *Eichenseer III*'s greatest weakness lies in its expansion of the scope of sufficient government authorization to carry out the contemplated conduct. Prosser takes advantage of the ambiguities first created by *American Medical Transport*, where the Wisconsin Supreme Court tacitly construed *Hallie I* to be an implied repeal case. In *AMT*, the court framed the issue in terms of whether the Wisconsin legislature had "impliedly authorized an exception from the antitrust laws" in the face of a city's broad home-rule powers.<sup>284</sup> It stated that this home-rule power was statutory,<sup>285</sup> and that the statute was "subordinate[d]" by section 133.03 and its surrounding provisions.<sup>286</sup> Nonetheless, *AMT* did not explicitly refer to *Hallie I* as an implied repeal case. Seventeen years in its wake, *Eichenseer II* took this ambiguity and gave it the force of law by explicitly calling *Hallie I* an implied repeal case. In turn, *Eichenseer III* embraced this labeling, acknowledging that it was simply following the parties' and *Eichenseer II*'s lead.<sup>287</sup>

Having concluded that *Hallie I* was in fact an implied repeal case, Prosser then applied the more lenient test for municipalities instead of the stricter test for private actors. It is this move that infuriates the dissent.<sup>288</sup> Critically, it guts the fundamental policy rationale behind both the *Hallie I* (state) and *Hallie II* (federal) standards. As Justice Butler rightly noted, *Hallie I* explicitly stated that private entities are required to demonstrate that their conduct is "within the express provisions of the conflicting statute and . . . in furtherance of the conflicting statute's legislatively stated purpose."<sup>289</sup> Municipalities, on the other hand, are merely required to show that the

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282. *Supra* note 279.

283. *Eichenseer III*, 2008 WI 38, ¶ 130.

284. *Am. Med. Transp. of Wis., Inc. v. Curtis-Universal, Inc.*, 154 Wis. 2d 135, 148, 452 N.W.2d 575, 581 (1990).

285. *See* WIS. STAT. § 62.11(5) (2003-04).

286. *Am. Med. Transp.*, 154 Wis. 2d at 148, 452 N.W.2d at 580.

287. *Eichenseer III*, 2008 WI 38, ¶¶ 37-38 n.17 ("The court of appeals adopted the label 'implied repeal doctrine,' which was used by the parties throughout their briefs, to describe the antitrust immunity doctrine of [*Hallie I*]. . . . We also adopt this label.').

288. *See id.* ¶¶ 125-28 (Butler, J., dissenting).

289. *Town of Hallie v. City of Chippewa Falls*, 105 Wis. 2d 533, 538, 314 N.W.2d 321, 324 (1982) (citing *Reese v. Associated Hosp. Serv.*, 45 Wis. 2d 526, 173 N.W.2d 661 (1970); *Grams v. Boss*, 97 Wis. 2d 332, 294 N.W.2d 473 (1980)).

legislature intended to allow them to undertake the actions at issue.<sup>290</sup> Finally, Prosser fails to identify a specific statute that conflicts with section 133.03. Instead, he relies on the broad claim that chapter 125 evidences a pervasive regulatory framework related to alcohol that must, because of its general pervasiveness, displace antitrust law.<sup>291</sup> Thus, the taverns gain the benefit of the city's lower standard even though the conduct itself was a voluntary private agreement (as opposed to a formally-adopted public ordinance).

Notably, in carrying out this substantial expansion of antitrust immunity, Prosser deviates from both binding federal constitutional law and persuasive federal antitrust precedents. Although the Twenty-First Amendment allows states to regulate the importation and sale of alcohol, the Commerce Clause dictates that the state must still abide by the federal Sherman Act's prohibition of contracts, combinations, and conspiracies in restraint of trade.<sup>292</sup> Under the Supremacy Clause, the state has no power to regulate alcohol when the state's laws conflict with federal law.<sup>293</sup> Accordingly, the state certainly cannot authorize its municipalities to circumvent federal antitrust law when the state itself is prohibited from doing so.<sup>294</sup>

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290. *Hallie I*, 105 Wis. 2d at 539, 314 N.W.2d at 324.

291. Justice Butler stressed that at oral argument, the taverns relied heavily upon Wisconsin Statutes section 125.10(1) as their most relevant statute for arguing the proposition that the Wisconsin legislature intended to displace antitrust law, *see* WIS. STAT. 133.03 (2003-04), when it wrote its alcohol laws. *Eichenseer III*, 2008 WI 38, ¶ 130 (Butler, J., dissenting). But as Butler put it, this section "only serves to underscore the fact that regulation of alcohol by the City requires formalization through statutorily established democratic procedures." *Id.* ¶ 130. The statute provides:

Authorization. Any municipality may enact *regulations* incorporating any part of this chapter and may prescribe additional regulations for the sale of alcohol beverages, not in conflict with this chapter. The municipality may prescribe forfeitures or license suspension or revocation for violations of any such regulations. Regulations providing forfeitures or license suspension or revocation must be adopted *by ordinance*.

*Id.* ¶ 130 n.6 (citing WIS. STAT. 125.10(1) (2003-04)) (emphasis added by Butler, J., dissent). Thus, Justice Butler stressed that even the defendant-taverns' most relevant statute for arguing implied repeal of section 133.03 actually *harmed* their case. This is because section 125.10(1) is couched in terms of regulations and ordinances—not immunities. *See id.* ¶ 130.

292. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 108-09 (1980); *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 901-02 (9th Cir. 2008).

293. *Midcal*, 445 U.S. at 108-09; *United States v. Palumbo Bros., Inc.*, 145 F.3d 850, 861-62 n.6 (7th Cir. 1998).

294. *Flying J, Inc. v. Van Hollen*, No. 08-C-110, 2009 WL 330034, \*5 (E.D. Wis. Feb. 11, 2009) ("Put simply, when federal and state laws conflict, the doctrine of preemption is applied, and it resolves the conflict in favor of the federal statute.").

Indeed, the core lesson of *Parker* (1943), *Midcal* (1980), and *324 Liquor* (1987)—all of which struck down alcohol-related restraints—is that “state statutes or local ordinances creating unsupervised private power in derogation of competition are subject to preemption.”<sup>295</sup> Nonetheless, in *Eichenseer*, a local *non*-ordinance was creatively construed to give private parties the power to regulate their own anticompetitive conduct—a per se antitrust violation. Under these circumstances, the state was powerless to grant the municipality the contemplated alcohol-regulatory power because the state’s own alcohol-regulatory power exists only to the extent that it does not conflict with federal law.<sup>296</sup> Consequently, even if the two council members who informally favored the ban had taken the steps necessary to enact the restraints into law, federal law would have preempted them—thus mooted Prosser’s state authorization analysis entirely.

## 2. *No Active Supervision*

Second, *Eichenseer III*’s other major weakness lies in its lax standard for active supervision. While not an express requirement in an implied repeal analysis, any meaningful standard for conferring antitrust immunities naturally should not allow private actors to oversee their own potentially-anticompetitive activity. (Indeed, such a paradigm would misguidedly render government-action-related antitrust immunities a nullity.) At bottom, the majority erred when it improperly equated the power to annually review liquor licenses with active city supervision of the private taverns.<sup>297</sup> Likely realizing that this alone would not be enough, Prosser then added that (1) the ALRC conducts a triennial review of liquor licenses, and (2) the University “submits periodic reports to the ALRC with the results of its own monitoring of the campus bar scene.”<sup>298</sup> A momentary consideration of this explanation quickly reveals that it constitutes a remarkably expansive and hollow rendering of active supervision. What’s more, these purported monitoring efforts were not implemented in response to the taverns’ agreement. On the contrary, they are measures that the city *already engaged in* before the agreement came into existence.

Perhaps most problematic from an antitrust perspective is that this purported active supervision does not even pretend to review the *economic* (i.e., anticompetitive) aspects of the taverns’ conduct. Rather, it simply evaluates whether a given tavern should be allowed to retain its liquor license.<sup>299</sup> Consequently, Prosser’s version of active supervision seems to

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295. *Costco*, 522 F.3d at 889.

296. *Id.*

297. *See Eichenseer III*, 2008 WI 38, ¶ 84 (majority).

298. *Id.* ¶ 85.

299. *See id.* ¶¶ 84-85.

amount to a mere routine review of whether X tavern is in good standing with the city vis-à-vis noise violations, frequency of late-night police calls, and the like. While those concerns are not trivial, Prosser has ultimately missed the crucial point that active supervision in an antitrust case should involve inquiries into margins and revenues.<sup>300</sup> Absent some sort of economic review, a healthy-and-safety oriented construal of active supervision is of little value in a case like *Eichenseer*. As the Seventh Circuit stated in *Hardy v. City Optical, Inc.*, “Permission is not policy unless the [government] has a definite intention as to how the permission will be exercised and takes measures to see that it is exercised in the intended fashion.”<sup>301</sup> The *Eichenseer III* majority’s expansive reading of the active supervision requirement falls short in this regard.

Incredibly, Prosser approved the restraints even though they failed at their core mission of curbing excess drinking. This places Prosser’s active-supervision analysis in extreme tension with binding federal Twenty-First Amendment analysis. Under *Midcal*, reviewing courts must analyze (1) the expressed state interest and its closeness to those interests protected by the Amendment; (2) the extent to which the regulatory scheme serves its stated purpose in promoting temperance (i.e., whether the scheme is effective); and (3) the strength of the state’s identified interest as compared to the established federal interest in promoting competition under the Sherman Act.<sup>302</sup>

In *Eichenseer*, the drink specials ban’s specific goal was to curtail high-risk, high-volume drinking<sup>303</sup> that created health and safety issues for drinkers and those around them.<sup>304</sup> The impetus for the arrangement was the frequency of “life-threatening conveyances to detoxification facilities and the great consumption of expensive police response services.”<sup>305</sup> Nevertheless, post-ban empirical studies demonstrated that these alcohol-related transgressions actually *increased* rather than decreased.<sup>306</sup> As a result, the state failed to meet its burden of providing “persuasive . . . empirical evidence documenting the relationship between such pricing schemes and consumption.”<sup>307</sup> Although the ban’s purpose certainly fit with

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300. It is worth noting that Prosser himself begins *Eichenseer III* with the following affirmative statement: “This is an antitrust case.” *Id.* ¶ 1. As such, it is curious that he would discuss active supervision as if it should only be concerned with health and safety issues.

301. *Hardy v. City Optical, Inc.*, 39 F.3d 765, 768 (7th Cir. 1994).

302. *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 902 (9th Cir. 2008) (citing *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 213 (4th Cir. 2001)).

303. *Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2006 WI App 66, ¶ 3, 300 Wis. 2d 191, 732 N.W.2d 857.

304. *Id.*

305. *Id.*

306. Principal Brief, *supra* note 151, at 19 (record citations omitted).

307. *Costco*, 522 F.3d at 902-03.

the interests the Twenty-First Amendment aims to protect, the ban roundly failed with respect to the second and third prongs of the inquiry: it failed to achieve its stated goal of reducing binge drinking, and it did not merit the formation of an anticompetitive twenty-four member cartel armed with an unsupervised price-fixing power. As in *Midcal*, the state failed to demonstrate that the restraints actually inhibited alcohol consumption.<sup>308</sup> Thus, like his state-authorization analysis, Prosser's active-supervision analysis conflicts with both federal constitutional law and persuasive federal antitrust precedents.

#### IV. LESSONS LEARNED

##### A. Plan A

*Eichenseer* is, for the most part, the model of what *not* to do. To the extent that the parties failed to follow Plan A,<sup>309</sup> or at least something remotely akin to it, all parties involved paid a heavy price. Because the City of Madison and the Tavern League skipped the step of allowing the former to pass an official ordinance, the drink specials ban was essentially a private agreement that never received the benefit of public review. Not passing an official law meant that the city attorney never reviewed drafts of a possible ordinance.<sup>310</sup> The city council should have debated the draft ordinance language further and voted on a final proposal.<sup>311</sup> That proposal would have become law, and it would have mooted the litigation entirely. An officially-proposed law could have brought together concerned citizens, tavern owners, undergraduate students, university administrators, and civic organizations to discuss and debate the advantages and disadvantages of the proposed approach to fixing UW-Madison's decades-old binge-drinking problem. Instead, because the city failed to pass a law, *these very same parties* found themselves seeking a post-hoc resolution in a court of law. The cost: \$700,000 in legal fees in the first four years of litigation alone.<sup>312</sup> This is a high price to pay for the city's and the taverns' front-end imprudence. Had the parties (and non-parties) followed Plan A, they all could have been better off.

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308. Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 113 (1980))

309. See *supra* Part II.D (titled "Plan A: Towards a Legislative Framework").

310. Principal Brief, *supra* note 151, at 15 (record citations omitted).

311. See *id.* (record citations omitted).

312. CBS News, *Wisconsin Court: Drink-Special Bans Acceptable*, available at <http://www.cbsnews.com/stories/2008/05/07/politics/uwire/main4078900.shtml> (last visited April 16, 2009).

But reducing this oversight down to a single, quantitative price-tag would do a grave disservice to the future of Wisconsin law. That is because the more significant costs of *Eichenseer* are (1) an expanded government-action-related antitrust exemption, (2) a significantly broader reading of implied repeal, and (3) a local government process that gives the “threats” of a single, powerful city council member the force of law. As such, the parties and courts are not the only ones who have paid a high price. Had the parties taken the Plan A approach, Wisconsin law would be clearer in all three of these decidedly-major ways.

#### B. Plan B

Although *Eichenseer* technically embraced the Plan B model of synthesizing implied repeal and state action,<sup>313</sup> it ultimately ignored more analogous precedents and principles than it incorporated. The U.S. Supreme Court’s seminal state action cases require far more than the highly-dubious brand of “active supervision” purportedly undertaken in *Eichenseer*. These cases also shed light on *Eichenseer*’s misapplication of *Hallie II*’s higher standard for express authorization for private actors. Perhaps most importantly, the high court’s state action cases all dealt specifically with antitrust immunity analysis in an alcohol-regulation context. *Eichenseer III*’s selective review of these cases caused it to improperly confer a power upon the state to grant municipalities an alcohol pricing power. But the state was powerless to make such a grant because its laws were in conflict with federal law, and were thus preempted.

Ultimately, the Plan B hybrid approach is preferable because it disposes of the formality of pretending that national-state power-sharing and state-local power-sharing have nothing in common. This robustness is good judicial policy because it takes persuasive federal precedent into account in ruling on a plaintiff’s state law claims. Accordingly, had *Eichenseer III* taken a robust, bird’s-eye, Plan-B view, it could have given future antitrust litigants a fuller view of their potential liabilities under both federal and state law. Unfortunately, the majority opinion merely embraced Plan B in name. As a practical matter, it ignored the most critical analogous precedents—thus leading it to reach a result that is unsupportable under binding constitutional law and persuasive federal antitrust law.

Ordinarily, the Western District of Wisconsin might have examined Justice Prosser’s federal law analysis in the federal analog of the case, which had been stayed since March 2007 pending resolution of the state litigation. But in October 2008, the parties stipulated to dismissal with prejudice, leaving *Eichenseer III*’s errant analysis untouched and

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313. See *supra* Part II.E (titled “Plan B: Towards a Judicial Synthesis”).

unreviewed. As a result, this expanded take on antitrust immunity remains on the books, without any judicial critique to date.

Finally, a recent antitrust immunity decision by the Eastern District of Wisconsin confirms that *Eichenseer III* is an extreme outlier with respect to active supervision. In 2009, *Flying J, Inc. v. Van Hollen* deemed a state minimum mark-up statute unconstitutional because it conflicted with section one of the Sherman Act.<sup>314</sup> In *Flying J*, a gasoline retailer sought to enjoin the Wisconsin Attorney General from enforcing a statute requiring retailers to mark-up their gasoline by the greater of 6% above certain actual costs, or 9.18% above wholesale.<sup>315</sup> The statute's purpose was to "cover a proportionate part of the cost of doing business."<sup>316</sup> The court voided the statute and refused to confer antitrust immunity because the state undertook "no program or effort" to police its authorization of price-setting by private actors.<sup>317</sup> Rather, the state merely "enforce[d] the prices established by private parties."<sup>318</sup> It was not enough that the state "engage[d] in analysis at the administrative and legislative level."<sup>319</sup> Furthermore, "[m]ere debate or discussion without the undertaking of any action" could not satisfy the active supervision requirement.<sup>320</sup> As such, the state improperly "displaced competition among liquor retailers without substituting an adequate system of regulation."<sup>321</sup> *Flying J* resolutely concluded that the state could never do this, "no matter the rationale."<sup>322</sup>

## V. CONCLUSION

The policymakers who purportedly goaded the drink specials ban into existence in 2002 have given states, municipalities, courts, and litigators a lot to think about in 2010. This Article has demonstrated that next time around, a pre-conduct legislative approach would be far preferable to a post-conduct judicial approach. Any arguably-anticompetitive restraints should be subject to a front-end cost-benefit analysis that weighs the benefits of the restraint against its harms. All the parties that would normally convene in a

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314. *Flying J, Inc. v. Van Hollen*, No. 08-C-110, 2009 WL 330034, \*9 (E.D. Wis. Feb. 11, 2009).

315. *Id.* at \*1.

316. WIS. STAT. § 100.30(2)(am)(1m)(c).

317. *Flying J*, 2009 WL 330034, at \*8.

318. *Id.* (quoting *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980)).

319. *Flying J*, 2009 WL 330034, at \*9.

320. *Id.* (quoting *Lotus Bus. Group LLC v. Flying J Inc.*, 532 F. Supp. 1011, 1024 (E.D. Wis. 2007)).

321. *Id.* (quoting *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345 (1987)).

322. *Id.*

courtroom could instead convene at a city council meeting. This would save all parties involved substantial time, money, and confusion.

If, on the other hand, the parties fail to undertake a pre-conduct legislative approach, thus leading to litigation, courts should apply a sound post-conduct approach that synthesizes federal and state implied repeal and state action precedents. The result would be a single, hybrid analysis that could provide national consistency as well as legal and business certainty. Potential government-action-related antitrust exemption claims would be subject to the rigors and insights of a broader cross-section of precedents. Because would-be antitrust defendants will know at the counseling stage that this will be the case, they will have the benefit of a fuller picture of their potential liabilities in both state and federal court. In the end, this could lead to shrewder front-end conduct than that espoused by the defendant-taverns in *Eichenseer*. And ideally, the application of the hybrid approach will be done with more precision than was the case in Prosser's majority opinion.

Ultimately, states, cities, courts, lawyers, and the businesses that they represent are all in the same boat. If they embrace the Plan A approach, they will all be better off. But if they instead embrace the "act now, review later" mentality, they will likely suffer a fate akin to that which Justice Peckham railed against in 1899. That is, they will all—collectively, as a group, and aboard the same ship—set sail on a sea of doubt.<sup>323</sup>

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323. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 284 (6th Cir. 1898), modified & aff'd, 175 U.S. 211 (1899)).