Administrative Monopoly:
The State Action Doctrine under U.S. Antitrust Law*

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The State Action Doctrine exempts anticompetitive conduct from the U.S. antitrust laws, if certain conditions are met. This paper discusses the exemption, particularly its limits, from the perspective of its historical and Constitutional background. It demonstrates that this doctrine does not support any exclusion of administrative monopolies from the prohibitions of the Anti-Monopoly Law.

The State Action Doctrine may be distinctive to the U.S., because it is based on the federal system of the U.S. and the residual sovereignty of the 50 states that comprise the United States. It is not "state" as in "nation" (国家), but it is "state" as in "New York State" (纽约州), that is the "state" in the U.S. State Action Doctrine. The Local Government Antitrust Act of 1984 extended this exemption to a limited extent to local governments. Standing alone, the exemption might enable state and local governments to restrict competition broadly and engage in local protectionism.

However, the State Action Doctrine is counterbalanced by other principles in the U.S. Constitution, so that state action is not permitted to enable what in China would be considered to be administrative monopolies. These principles were incorporated in the U.S. Constitution as a result of the lessons learned under the Articles of Confederation which preceded the Constitution. During the time of the Articles of Confederation, local protectionism was common. The experience of the U.S. under the Articles of Confederation in the late 1700s, before the Constitution became effective in 1789, indicates that it is important to have fundamental laws prohibiting local protectionism in order to develop a strong integrated national economy. In fact, in the U.S., prohibitions against local protectionism alone was sufficient for over 100 years, before the Sherman Act was enacted in 1890 to prohibit private monopolies.

Therefore, the incorporation in the AML of prohibitions against administrative monopoly may in fact achieve in China an analog to the prohibition in the U.S. against local protectionism, and may in fact be more important than all the other prohibitions in the AML.

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The Basis of the State Action Doctrine

The basis of the State Action Doctrine is reflected in the name of the country, "The United *States* of America."[1] The U.S. was formed as a federation of sovereign states. Notwithstanding the experience under the Articles of Confederation that made clear the need for a strong central government, the U.S. Constitution was not effective until the Bill of Rights was also adopted. Among the Bill of Rights is the Tenth Amendment, which states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[2]

In recognition of this fundamental aspect of the federal system, the Supreme Court established the State Action Doctrine in *Parker v. Brown*, 317 U.S. 341, 351 (1943). The Sherman Act, the basic U.S. antitrust law, states simply in Section 1 that, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." The Supreme Court applied the 10th Amendment and reasoned that "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.* It noted that the "Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state." *Id.* The principle is that "[t]he governments of the states are sovereign within their territory save only as they are subject to the prohibitions of the Constitution or as their action in some measure conflicts with powers delegated to the National Government, or with Congressional legislation enacted in the exercise of those powers." *Id.* at 359-60.

In *Parker v. Brown*, a California raisin producer and packer challenged the marketing program established and implemented under California law for the 1940 raisin crop, arguing that the program violated the Sherman Act. At the time, almost all the raisins consumed in the U.S., as well as ½ of the world crop, was produced in California. *Id.* at 345. California established an elaborate system to regulate the production and marketing of raisins, after several years in which there was substantial oversupply of raisins and dramatically declining prices. A commission with appointed members was formed, as well a committee with representatives from different sectors of the industry, to implement the system after public hearings and comments. This system established quotas for the sale of different grades of raisins and required specific permission before individual producers may sell raisins. In other words, the "California Agricultural Prorate Act authorizes the establishment, through action of state officials, of programs for

[1] The Articles of Confederation, drafted by the 13 colonies as they rebelled against Great Britain, stated in Article 1 that the confederation shall be called "The United States of America."

[2] In Article 2, the Articles of Confederation state that "[e]ach state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled."

the marketing of agricultural commodities produced in the state, so as to restrict competition among the growers and maintain prices in the distribution of their commodities to packers." *Id*. at 346. Failure to abide by the marketing program was a criminal offense. Brown claimed that the program prevented him from fulfilling contracts to supply raisins that he had entered into before the program became effective.

The Supreme Court assumed that "the California prorate program would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate." *Id*. at 350. It concluded, however, that "[t]he state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." *Id*. at 352. Therefore, the Supreme Court found that the California law was immune from antitrust law.[3]

In *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97, 105 (1980), the Supreme Court provided guidance on how to determine when state action was involved that was immune from the antitrust laws. It explained that private conduct in areas in which a state has acted to limit competition or to enable a lack of competition, and in which the state actively monitors competitive activity, is not subject to antitrust law. The Court in *Midcal* stated that "[f]irst, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *Id*.

Midcal involved a California state statute requiring all wine producers and wholesalers to file with the State contracts setting resale prices or resale price schedules. Wholesalers may not sell at prices other than those set in the contracts or schedules. A wholesaler that was prosecuted for violating the law claimed that the California system violated the federal antitrust laws. Applying the standard that it stated, the Supreme Court found that California's system satisfied the first requirement, of a clearly articulated state policy. However, the Court found that the system did not satisfy the second requirement of active supervision, because

> [t]he State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program.

[3] The Supreme Court also found that California's regulatory regime to sustain its raisin industry did not violate the Commerce Clause of the U.S. Constitution (discussed below), because, "there are many subjects and transactions of local concern not themselves interstate commerce or a part of its operations which are within the regulatory and taxing power of the states, so long as state action serves local ends and does not discriminate against the commerce, even though the exercise of those powers may materially affect it." *Id*. at 360. It found that the California "program was not aimed at nor did it discriminate against interstate commerce, although it undoubtedly affected the commerce by increasing the interstate price of raisins and curtailing interstate shipments to some undetermined extent." *Id*. at 367.

Id. at 105-06 (footnote omitted). Therefore, the Supreme Court found that the California system violated the Sherman Act, and may not be enforced. It explained that the national "policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Id*. at 106.

The Contours of the State Action Doctrine with respect to Local Governments

However, the Supreme Court found that the State Action Doctrine did *not* generally protect actions by governmental entities other than states from the antitrust laws, unless the local governmental action was "pursuant to state policy to displace competition with regulation or monopoly public service,"[4] that is "clearly articulated."[5] Unlike in the case of private parties, there does not need to be "active supervision" by the state of the actions of local governmental entities in order for the State Action Doctrine to apply.[6]

To lessen the potential financial burden to local governments, the Local Government Antitrust Act of 1984[7] was enacted, which provided immunity to local governments from lawsuits for damages, but no immunity from lawsuits for injunctive relief.

In the case of *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40 (1985), the Supreme Court considered Wisconsin state laws that authorized cities to build and operate sewage systems, to determine the geographic areas to be served by the sewage systems, and to refuse to serve areas that are not annexed to the cities. Several neighboring unincorporated townships alleged that the City of Eau Claire had acquired a monopoly over the provision of sewage treatment services, and had tied the provision of those services to the provision of sewage collection and transportation services. As a result, the towns claimed that they were unable to compete with the city in providing sewage collection and transportation services. The Supreme Court found that the Wisconsin state laws

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4 *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978).

5 *Community Communications Co. v. Boulder*, 455 U.S. 40 (1982); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40 (1985).

6 *Id*. at 46-47.

7 15 U.S.C. §§ 34-36. The statute provides in relevant part that "[n]o damages, interest on damages, costs, or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity" (15 U.S.C. §35) and "[n]o damages, interest on damages, costs or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) in any claim against a person based on any official action directed by a local government, or official or employee thereof acting in an official capacity" (15 U.S.C. §36).

> evidence a "clearly articulated and affirmatively expressed" state policy to displace competition with regulation in the area of municipal provision of sewage services. These statutory provisions plainly show that "'the legislature contemplated the kind of action complained of.'"…This is sufficient to satisfy the "clear articulation" requirement of the state action test.

Id. at 44 (citation, footnote omitted). No express statutory requirement that the municipality act in an anticompetitive manner was needed. *Id*. at 45-46. The Court also expressly found "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." *Id*. at 47. It reasoned that "the requirement of active state supervision serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Id*. at 46.

More recently, in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), the Supreme Court clarified that, so long as the local governmental entity was authorized by the state under the standard that the Court confirmed in *Eau Claire*, the local government's actions are immune from the antitrust laws, even if the actions were taken as a result of lobbying by a private entity that gained a competitive advantage from the local government's actions.

In *Omni Outdoor Advertising*, the zoning laws of the State of South Carolina expressly authorized local governments to regulate the size, location, and spacing of billboards. Pursuant to this authority, the City of Columbia issued an ordinance restricting billboard construction that severely hampered the construction of new billboards. This ordinance was adopted after the South Carolina regional planning authority conducted a comprehensive analysis of the local billboard situation and after a series of public hearings and numerous meetings involving city officials and local billboard businesses. It limited the ability of new entrants to compete with the established business which accounted for over 95% of all billboards in the city. One new entrant, Omni Outdoor Advertising, Inc. ("Omni"), claimed that the local ordinance was the result of a conspiracy between the City of Columbia and the established business, Columbia Outdoor Advertising, Inc. ("COA"), to preserve COA's monopoly. Omni claimed that the State Action Doctrine did not apply in such a situation.

The Supreme Court reasoned that, so long as the local government had authorization from the state to act and so long as the authorization clearly contemplated the displacement of competition, the action was immune from the federal antitrust laws even if the action was an improper exercise under state law of that authorization. The propriety of the action would be subject to review under state law, not federal antitrust law. *Id*. at 372-73.

> It is enough…if suppression of competition is the "foreseeable result" of what the statute authorizes... That condition is amply met here. The very purpose of zoning regulation is to displace unfettered business freedom in

> a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants. A municipal ordinance restricting the size, location, and spacing of billboards (surely a common form of zoning) necessarily protects existing billboards against some competition from newcomers.

Id. at 373 (citation, footnote omitted). Moreover, the lobbying by COA that may have contributed to the issuance of the ordinance is not ground for any "conspiracy" exception to the State Action Doctrine, because "it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them." *Id*. at 375. Otherwise, "all anticompetitive regulation would be vulnerable to a 'conspiracy' charge" and the State Action Doctrine would have little practical effect. *Id*. Therefore, the City of Columbia's billboard ordinance was not subject to antitrust law attack even though it entrenched COA's monopoly.[8]

Limits on the State Action Doctrine

Without more, it would seem that states and local governments have the ability to implement many anticompetitive regulations and activities that would be considered administrative monopolies. However, there are important limits to the scope of the exemption that make administrative monopolies difficult to achieve in the U.S.

First, the Supreme Court has indicated that the State Action Doctrine "immunity does not necessarily obtain where the State acts not in a regulatory capacity, but as a commercial participant in a given market." *Omni Outdoor Advertising*, 499 U.S. at 374-75. There is a "possible market participant exception" to the State Action Doctrine, so that such actions by a state governmental entity may be fully subject to the antitrust laws. *Id*. at 379.[9] Therefore, the State Action Doctrine might not protect state or local government-owned enterprises.

Moreover, an important fundamental limit on the State Action Doctrine is the counterbalancing prohibition in the U.S. Constitution against states imposing burdens on interstate commerce, or seeking to advantage local businesses at the expense of out-of-state competitors.

The Commerce Clause of the U.S. Constitution provides that "Congress shall have power…to regulate commerce with foreign nations, and among the several states." U.S. Constitution, Art. I, §8. "The very purpose of the Commerce Clause was to create an area of free trade among the several States." *McLeod v. J.E. Dilworth Co.*, 322 U.S.

[8] As for COA's lobbying activities, they are protected by the First Amendment right to petition. *Id*. at 379-80, 383-84. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 140 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657, 670 (1965); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

[9] *See also*, *Reeves, Inc. v. Stake*, 447 U.S. 429, 439 (1980) ("state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants") (footnote omitted).

327, 330 (1944). Because, the Commerce Clause states only what Congress may do, and not what the states may not do, the Supreme Court has interpreted the Commerce Clause and developed the Dormant Commerce Clause to prohibit individual states from regulating commerce with other states, and imposing burdens on non-local undertakings that local undertakings do not have.[10] As the Court explained, there is "the principle that the State may not promote its own economic advantages by curtailment or burdening of interstate commerce." *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 532 (1949). The concern is precisely with "economic protectionism" by a state. *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 395 (1983).

> What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation…Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents.

Baldwin v. G.A.F. Seelig, Inc., 296 U.S. 511, 527 (1935).

In order to be in compliance with the Commerce Clause, a state statute must satisfy the three-pronged test of:

> (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. …the extent of the

[10] *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829); *Cooley v. Board of Wardens of Port of Philadelphia*, 53 U.S. (12 How.) 299, 315-21 (1851); *In re State Freight Tax, Reading Railroad v. Pennsylvania*, 82 U.S. (15 Wall.) 232, 279-82 (1873); *Seaboard Air Line Ry. v. Blackwell*, 244 U.S. 310 (1917); *South Carolina State Highway Dept v. Barnwell Bros.*, 303 U.S. 177, 184-96 (1938) (South Carolina restrictions on dimensions of trucks operating on state highways); *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944) (sales taxes on products purchased elsewhere and shipped into Arkansas); *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525 (1949); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (requirement that cantaloupes be packed in approved containers before being shipped outside Arizona); *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977) (Virginia limits on fishing in its waters by non-residents and non-citizens); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981) (Iowa truck-length limitations required trucks to either detour around the state or transfer cargo into conforming trucks); *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996) (tax on stock of non-North Carolina corporations held by North Carolina residents).

> burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (citation omitted).

Therefore, "[a] state tax upon merchandise brought in from another state or upon its sales…is lawful only when the tax is not discriminating in its incidence against the merchandise because of its origin in another state." *Sonneborn Bros. v. Cureton*, 262 U.S. 506, 516 (1923). Thus, the Supreme Court struck down a New York State requirement that milk imported for resale in the state be purchased outside the state at a price that conformed to price regulations for milk purchased inside the state for resale. *Baldwin v. G.A.F. Seelig*. The express purpose of the New York law was to prevent non-New York milk from under-pricing and thereby competing with New York-produced milk. *Id*. at 519. The Supreme Court explained that the requirement "set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported," and that

> duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of the Congress..."It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business."

Id. at 521-22 (citations omitted). Such a burden on interstate commerce is clearly impermissible when "when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states." *Id*. at 522. "The importer must be free from imposts framed for the very purpose of suppressing competition from without and leading inescapably to the suppression so intended." *Id*. at 527.[11]

[11] *See also, e.g., Dean Milk v. City of Madison*, 340 U.S. 349 (1951) (Wisconsin municipal ordinance prohibited sale of pasteurized milk unless it was pasteurized at a local plant); *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964) (Florida requirement that milk processors purchase all milk only from Florida sources); *Great Atlantic & Pacific Tea Co., Inc. v. Cottrell*, 424 U.S. 366 (1976) (Mississippi regulation prohibited import of milk from non-reciprocating states); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (New Jersey statute prohibited import of waste); *Healy v. The Beer Institute*, 491 U.S. 324 (1989) (Connecticut statute requires beer shippers to certify that prices of beer sold to Connecticut wholesalers are no higher than those in New York, Rhode Island, and Massachusetts); *Wyoming v. Oklahoma*, 502 U.S. 437 (1992) (Oklahoma requirement that utilities obtain at least 10% of coal from Oklahoma mines, resulting in drop in purchases of Wyoming coal and Wyoming tax receipts on coal sales); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 504 U.S. 353 (1992) (Michigan law requiring authorization from county to import waste into county); *Granholm v. Heald*, 544 U.S. 460 (2005) (New York and Michigan prohibited out-of-state wineries from selling directly to consumers, while permitting in-state wineries to make direct sales). Conversely, a state may not prohibit the export of products for sale in another state. *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911) (Oklahoma law restricting construction of pipelines to export gas from Oklahoma to Kansas); *Commonwealth of Pennsylvania v. State of West Virginia*, 262 U.S. 553 (1923) (West Virginia law prohibiting export of natural gas to Pennsylvania and Ohio); *Foster Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928) (Louisiana law restricting export of shrimp caught in its waters); *Johnson v. Haydel*, 278 U.S.

Similarly, the Commerce Clause prohibits a refusal to issue a license to do business "where the grounds of denial are that such limitation upon interstate business will protect and advance local economic interests." *H.P. Hood & Sons v. Du Mond*, 336 U.S. at 526. In *Du Mond*, New York refused to grant a license to construct a new depot at which to purchase milk for transport to Massachusetts, on the ground that the new depot would not satisfy the requirement that it "will not tend to a destructive competition in a market already adequately served, and that the issuance of the license will be in the public interest." *Id*. at 528. Competing milk dealers opposed the new depot. The Court found that "restrictions, imposed for the avowed purpose and with the practical effect of curtailing the volume of interstate commerce to aid local economic interests," violated the Commerce Clause. *Id*. at 530-31.[12]

State laws that did not prohibit, but discriminated against, interstate commerce were also struck down under the Commerce Clause. In *Memphis Steam Laundry v. Stone*, 342 U.S. 389 (1952), the Supreme Court struck Mississippi's "privilege" tax of $50 per truck driven by salespersons who solicited business for out-of-state laundries but $8 per truck driven by salespersons who solicited business for Mississippi laundries.[13]

In *C & A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383 (1994), the Supreme Court found that local government action establishing a local private business as a monopoly violated the Commerce Clause. The Town of Clarkstown issued

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16 (1928) (Louisiana law restricting export of oysters); *Toomer v. Witsell*, 334 U.S. 385 (1948) (South Carolina export tax on shrimp caught in its waters); *Hughes v. Oklahoma* (Oklahoma prohibition on export of minnows caught in its waters); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) (Nebraska permitted transport of ground water to other states on condition of reciprocity from receiving state). The Constitution also states that "no state shall, without the consent of the Congress, lay any imposts or duties on imports or exports…and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress…" Art. I, §10.

[12] *See also, e.g.*, *Buck v. Kuykendall*, 267 U.S. 307, 315 (1925) (Washington state law prohibiting common carriers to operate on certain state highways without a certificate of public convenience and necessity violated Commerce Clause because "its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition.").

[13] *See also, e.g.*, *Welton v. Missouri*, 91 U.S. 275 (1875) (license required to peddle non-Missouri goods but not required to peddle Missouri products); *New Energy Company of Indiana v. Limbach*, 486 U.S. 269 (1988) (Ohio tax credit available only to fuel ethanol produced in Ohio or a state with tax reciprocity); *Oregon Waste Systems, Inc. v. Department of Environmental Quality of the State of Oregon*, 511 U.S. 93 (1994) (Oregon surcharge on solid waste disposal for out-of-state waste almost 3 times the surcharge for waste generated in Oregon); *Associated Indus. of Missouri v. Lohman*, 511 U.S. 641 (1994) (use tax on imported goods higher than sales tax on goods sold in state); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) (assessment on milk sold to Massachusetts retailers, most of which was produced outside the state, with receipts distributed to Massachusetts farmers); *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564 (1997) (tax exemption for not-for-profit organizations not equally available to such organizations serving primarily non-residents of Maine); *South Central Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999) (differential Alabama franchise taxes imposed on domestic and out-of-state corporations doing business in the state).

a town ordinance that established a private solid waste transfer station as a monopoly, by requiring all non-hazardous solid waste within the town to be deposited at the transfer station, with the exception of recyclers that sort and remove recyclable non-hazardous solid waste. All haulers of waste to the transfer station were required to pay a "tipping" fee to the transfer station that exceeded the fee for this service elsewhere, and recyclers were required to pay the fee also on the recyclable waste that they removed and did not deposit at the station. As a result, non-recyclable, non-hazardous waste may not be directly shipped out of state. And recyclers that accepted out-of-town waste may not process that waste without going through the transfer station, while out-of-state transfer stations were prevented from processing the town's waste. The town justified this arrangement on the ground that it was necessary to enable the private transfer station to recover its costs of construction and operation. The town agreed to buy the station after five years for $1.

The Supreme Court found that the town ordinance discriminated against interstate commerce. *Id*. at 390-92. The fact that the town established this private local monopoly in order to address environmental concerns was insufficient justification for the ordinance, when there are other means to address those environmental concerns that did not discriminate against interstate commerce. *Id*. at 392-93. The ordinance was primarily intended to ensure the profitability of the transfer station. However, "revenue generation is not a local interest that can justify discrimination against interstate commerce… having elected to use the open market to earn revenues for its project, the town may not employ discriminatory regulation to give that project an advantage over rival businesses from out of State." *Id*. at 393-94 (citation omitted).

Other clauses of the Constitution have also been invoked to prohibit state action that fostered anti-competitive activities or effects. For example, the First Amendment[14] right of free speech has been held to prohibit certain types of regulations that inhibited competition. Therefore, even if conduct was immune to the antitrust laws as a result of the State Action Doctrine, it may still be prohibited by the First Amendment. In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Supreme Court found that the Arizona State Supreme Court's disciplinary rule, which prohibits attorneys from advertising, is immune from the Sherman Act under the State Action Doctrine, but is nonetheless impermissible because it violates the First Amendment.[15] Similarly, the Due Process and Equal Protection clauses of the Fourteenth Amendment[16] have been applied to limit state

[14] "Congress shall make no law…abridging the freedom of speech, or of the press; or the right of the people…to petition the government for a redress of grievances." U.S. Constitution, 1st Amendment.

[15] *See also, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 412 U.S. 748 (1976) (a Virginia statute declaring it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs violated the First Amendment).

[16] "No state shall…deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." U.S. Constitution, 14th Amendment.

action that was anticompetitive.[17] This was the case in *Gibson v. Berryhill*, 411 U.S. 564 (1973), which involved a prosecution by the Alabama Board of Optometry of licensed optometrists who worked as employees rather than independently. Only independent optometrists were eligible to serve on the Board. The Board claimed that the employees and the employing company violated an Alabama law regulating the practice of optometry, on the grounds that the law required licensed optometrists to work independently. The Supreme Court found that the Board's actions violated Due Process, because it was clearly biased. All the Board members had an interest in finding that the optometry company and its optometrist employees violated the law, since such a finding would result in the elimination of many competitors to the Board members, who were all independent optometrists. *Id*. at 578-79.

Therefore, even though states, and local authorities under express permission from the states, may limit competition in the U.S. if they actively monitor the activity, they cannot engage in local protectionism.[18] Nonetheless, U.S. history indicates that there are powerful forces in favor of local protectionism, and the Supreme Court constantly must rule on attempts by states and local governments to engage in local protectionism, most recently on April 30, 2007.[19]

Historical Roots of the Limits on the State Action Doctrine

The experience of the U.S. under the Articles of Confederation in the late 1700s indicates that it is important to have fundamental laws prohibiting local protectionism in order to develop a strong integrated national economy. The Constitutional limitations against local protectionism were specifically established because of the rampant local protectionism that proliferated among the original 13 states under the Articles of Confederation that preceded the Constitution, to ensure the development of an integrated national economy. "[A] chief occasion of the commerce clauses was 'the mutual jealousies and aggressions of the States, taking form in customs barriers and other

[17] Furthermore, the Constitution provides that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Art. IV, §2.

[18] It might be noted that, in a recent decision, *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, ___ U.S. ___, No. 05-1345 (April 30, 2007) http://www.supremecourtus.gov/opinions/06pdf/05-1345.pdf , the Supreme Court found that the Commerce Clause might not prohibit states from granting and protecting monopolies to state-own enterprises. While it is early days to fully appreciate its implications, this decision does not appear to affect the rule against favoring in-state private businesses over out-of-state businesses, which may be the most common form of local protectionism. As to state-owned enterprises, the issue appears to be more theoretical than real in the U.S., because state governments relatively rarely act as market participants instead of as sovereigns. Moreover, as noted above, the State Action Doctrine may not protect a state acting as a market participant. *Omni Outdoor Advertising*, 499 U.S. at 374-75; *Reeves, Inc. v. Stake*, 447 U.S. at 439. In all events, Congress may, under the Commerce Clause, expressly regulate state-owned enterprises that engage in activities that affect interstate commerce.

[19] *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, ___ U.S. ___, No. 05-1345 (April 30, 2007). See also discussion below.

economic retaliation.'" *Baldwin v. G.A.F. Seelig*, 296 U.S. at 522 (citations omitted).[20]

During the period following independence from Great Britain, before the Constitution became effective, the 13 original states were united and governed under the Articles of Confederation. The Articles of Confederation provided for a very weak central government without taxing authority, and did not significantly limit the sovereignty of the states. As a result, individual states established their own currencies and tariffs, and generally acted to protect their local interests with little regard for the interests of the country. The economy of the United States did not thrive, and the central government, along with those of several states, was on the brink of bankruptcy. The Constitutional Convention was held to discuss amendments to the Articles of Confederation to remedy these problems. The result was the Constitution which superseded the Articles of Confederation in 1789 and created a strong central government, including the Commerce Clause.

This history was summarized by the Supreme Court in *H.P. Hood & Sons v. Du Mond*, 336 U.S. at 533-34, where it stated:

> When victory relieved the Colonies from the pressure for solidarity that war had exerted, a drift toward anarchy and commercial warfare between states began. "* * * each state would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view." This came "to threaten at once the peace and safety of the Union." Story, The Constitution, 259, 260. See Fiske, The Critical Period of American History, 144; Warren, The Making of the Constitution, 567. The sole purpose for which Virginia initiated the movement which ultimately produced the Constitution was "to take into consideration the trade of the United States; to examine the relative situations and trade of the said states; to consider how far a uniform system in their commercial regulation may be necessary to their common interest and their permanent harmony" and for that purpose the General Assembly of Virginia in January of 1786 named commissioners and proposed their meeting with those from other states. Documents, Formation of the Union, 12 H.Docs., 69th Cong., 1st Sess., p. 38.
>
> The desire of the Forefathers to federalize regulation of foreign and interstate commerce stands in sharp contrast to their jealous preservation of power over their internal affairs. No other federal power was so universally assumed to be necessary, no other state power was so readily relinquished. There was no desire to authorize federal interference with social conditions or legal institutions of the states. Even the Bill of Rights

[20] *See also, e.g., Gibbons v. Ogden*, 22 U.S. (Wheat.) 1, 231 (1824) ("If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints.") (Johnson, J., concurring).

> amendments were framed only as a limitation upon the powers of Congress. The states were quite content with their several and diverse controls over most matters but, as Madison has indicated, "want of a general power over Commerce led to an exercise of this power separately, by the States, which not only proved abortive, but engendered rival, conflicting and angry regulations." 3 Farrand, Records of the Federal Convention, 547.[21]

The continuing necessity for the Constitution in this area is clear from recurring efforts by states to engage in local protectionism. Thus, in *Toomer v. Witsell*, 334 U.S. 385, 388 (1948), involving South Carolina statutes that affected the shrimp fishing business from North Carolina to Florida,

> Restrictions on non-resident fishing in the marginal sea, and even prohibitions against it, have now invited retaliation to the point that the fishery is effectively partitioned at the state lines; bilateral bargaining on an official level has come to be the only method whereby any one of the States can obtain for its citizens the right to shrimp in waters adjacent to the other States.

Similarly, in *Baldwin*, 296 U.S. at 522, the Supreme Court noted that "[i]f New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation."

Otherwise, as the Court pointed out,

> We need only consider the consequences if each of the few states that produce copper, lead, high-grade iron ore, timber, cotton, oil or gas should decree that industries located in that state shall have priority. What fantastic rivalries and dislocations and reprisals would ensue if such practices were begun! Or suppose that the field of discrimination and retaliation be industry. May Michigan provide that automobiles cannot be taken out of that State until local dealers' demands are fully met? Would she not have every argument in the favor of such a statute that can be offered in support of New York's limiting sales of milk for out-of-state shipment to protect the economic interests of her competing dealers and local consumers? Could Ohio then pounce upon the rubber-tire industry,

[21] *See also, e.g., Gibbons v. Ogden*, 22 U.S. (Wheat.) at 224 ("…finding themselves in the unlimited possession of those powers over their own commerce,…that selfish principle…began to show itself in iniquitous laws and impolitic measures, from which grew up a conflict of commercial regulations, destructive to the harmony of the States, and fatal to their commercial interests abroad. This was the immediate cause, that led to the forming of a convention") (Johnson, J., concurring).

> on which she has a substantial grip, to retaliate for Michigan's auto monopoly?
>
> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

H.P. Hood & Sons v. Du Mond, 336 U.S. at 538-39.

Potential Relevance to the AML

The State Action Doctrine is distinctive to the U.S. because of its federal system. The People's Republic of China is not a union of sovereign states. Therefore, there is no comparable basis for such an exemption in the AML, and the State Action Doctrine cannot be adopted into the AML. In any event, in the U.S., there are counterbalancing principles to the State Action Doctrine that deter the creation of what would be called administrative monopolies in China. It would not make sense to adopt the principle of the State Action Doctrine without also adopting the limiting principles.

In short, the State Action Doctrine is not a basis to exclude administrative monopolies from the prohibitions of the AML. The AML should prohibit administrative monopolies. Such a prohibition would play a role similar to that played by the Commerce Clause in the U.S., and would serve the same salutary purpose as the U.S. Constitution does in the U.S., of promoting an integrated national economy under China's unitary political system.[22] Otherwise, in the context of China, an AML without a prohibition against administrative monopolies will be a competition law that will not lead to a fully competitive national economy for China.

In the U.S., the prohibition against administrative monopolies was imposed by the Constitution in 1789, over 100 years before the Sherman Act was enacted in 1890. The

[22] Eleanor Fox, "An Anti-Monopoly Law for China – Scaling the Walls of Protectionist Government Restraints," __ Antitrust L.J. ___ (forthcoming). *See also*, Antitrust Modernization Commission, "Report and Recommendations," April 2007, at ix, 23-24, 343-47, 366-77, http://www.amc.gov/report_recommendation/toc.htm; Blanca Rodriguez Galindo, Head, International Relations Unit, Directorate-General for Competition, European Commission, "Review of Anti-Monopoly Law," at 10-11, International Seminar, Hangzhou, China (May 19-21, 2006), http://ec.europa.eu/comm/competition/speeches/text/sp2006_009_en.pdf; Thomas G. Krattenmaker, "Antitrust Enforcement in Regulated Sectors Working Group, Subgroup 1: Limits and constraints facing antitrust authorities intervening in regulated sectors," at 9-10, 12-14, 15-18, Report to the Third ICN Annual Conference, Seoul, Korea (April 2004), http://www.internationalcompetitionnetwork.org/index.php/en/search?keywords=krattenmaker&type=e.

lesson in the U.S. is that it is more fundamental to prohibit public restraints against competition than to prohibit private restraints to competition. This is true even though government in the U.S. historically had a relatively low level of involvement in the economy.

Government in China has a much greater economic role. Therefore it is even more important for China to prohibit administrative monopoly, and certainly to prohibit it no later than private monopolistic conduct is prohibited. An AML without a prohibition against administrative monopoly would be an incomplete law, insufficient to reach its fundamental goal of a competitive market economy.[23] A comprehensive, modern law must take into account public restraints on competition.[24] Moreover, this prohibition should be superior to other laws or regulations that may address the same conduct, just as the U.S. Constitution's Dormant Commerce Clause has greater force than the State Action Doctrine.

At the least, a statement of principle against local protectionism and administrative monopolies should be retained in the AML, so that there is the potential that the principle will take root and lead to development of a body of law and, perhaps more important, a culture that curtail local protectionism. In order to realize this potential, it is essential to develop the enforcement infrastructure fully and appropriately, with an enforcement authority that has a strong mandate to advocate competition throughout all sectors of China. Competition advocacy, perhaps even more than straightforward enforcement of the letter of the law, may foster the culture of competition that is essential before administrative monopolies may be rooted out.[25] A toolkit such as that developed by the OECD[26] may be a very helpful tool for any competition law enforcement authority in fulfilling the role of competition advocate.

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[23] Shiying Xu, "Adminstrative Monopoly under the Draft Chinese AML," **The 5th International Symposium on Competition Law and Policy (CASS)** (Beijing, China, March 11-12, 2007) (*Chinese*).

[24] Eleanor Fox, "An Anti-Monopoly Law for China – Scaling the Walls of Protectionist Government Restraints," __ Antitrust L.J. ___ (forthcoming).

[25] Fox; Xu.

[26] OECD Competition Division, Competition Assessment Tookit (2007) (*Chinese*).

行政垄断：美国反托拉斯法的州行为论 †

陈懿华 *

在美国，如果满足一定条件，州行为理论可以使反竞争行为豁免适用反托拉斯法。本文拟就这一豁免，尤其是豁免限制，从其历史及宪法背景角度进行探讨，意在阐明州行为理论并不支持将行政垄断排除于反垄断法的适用。

美国的州行为理论(the State Action Doctrine)颇具特色，它是以美国联邦体制和组成美利坚合众国的50个州残馀的地方主权为基础。美国州行为理论中的“state”不是一般意义上的“国家(nation)”，而是美国各州，如“纽约州”的“州”。美国1984年《地方政府反托拉斯法》把州行为理论的豁免有限延伸至州政府之下的一定级别的地方政府。孤立地看，这种豁免有可能使州政府和地方政府(美国的州具有主权地位，不在地方政府范畴之内。美国的地方政府主要包括：城市、县、乡镇等。参见美国 1984年《地方政府反托拉斯法》—译者注)限制竞争和实施地方保护。

然而，州行为理论的作用受到宪法其他原则的制约，因此这一理论并不允许产生中国所说的行政垄断。这些原则之所以成为宪法原则是汲取宪法之前的《邦联条款》教训的结果。在《邦联条款》实施期间，美国地方保护主义盛行。18世纪后期，美国1789年宪法生效之前《邦联条款》制约下的事实表明，为了发展强大的统一的国民经济必须以基本法律禁止地方保护主义。事实上，1890年《谢尔曼法》立法禁止私人垄断之前，美国一百多年只禁止地方保护主义就够了。

因此，中国反垄断法纳入禁止行政垄断的内容实际上与美国制止地方保护主义相似，并且这样的规定事实上要比反垄断法的其他规定更重要。

一、州行为理论的基础

州行为理论的基础首先反映在“美利坚合众国(The United States of America)”[1]的名称上。美国是由享有主权的州(states)组成的联合体。尽管《邦联条款》的事实说明了建立一个强大的中央政府的必要性，但美国宪法直到通过对联邦权力进行限制的《权利法案》后才生效。作为《权利法案》内容之一的第十修正案规定：“宪法未授予

†反垄断立法热点问题，主编 王晓晔，第127－140页，社会科学文献出版社 (2007) ISBN 978-7-80230-930-2.
*陈懿华 (Yee -Wah, Chin), Ingram Yuzek Gainen Carroll & Bertolotti 律师事务所,纽约。
[1] 由13个反抗英国殖民地的州起草的《邦联条款》第1条规定，本邦联的名称为“美利坚合众国”。

合众国，也未由各州禁止合众国行使的权力，由各州各自保留，或由人民保留。”[2]

基于美国联邦体制的基本特点，美国最高法院在 *Parker v. Brown* 一案中确立了州行为理论[*Parker v. Brown*, 317 U.S. 341, 351 (1943)。本文注释与原文保持一致，除采用脚注外，也采用文中注的形式－译者注]美国反托拉斯法的基本法《谢尔曼法》第 1 条简略地规定：“任何契约、以托拉斯形式或其它形式的联合、共谋，用来限制州际间或与外国之间的贸易或商业，是非法的。”最高法院适用宪法第十修正案，推理认为“在二元政府体制下，各州享有宪法保障的主权，仅有国会可依据宪法削减其权力。一个未曾明确表示的、取消一州对其官员或代理人进行控制的意图不应随意归于国会。”（同上）。最高法院注意“谢尔曼法并未提及州，它也没有限制州的行为和州支配下的官员行为的意图。”（同上）。原则是“除宪法禁止，或者是其行为与已经授予给联邦政府的权力或者是为行使这些权力而颁布的国会立法相抵触之外，各州政府在其管辖范围内享有主权。”（同上，第 359－360 页）。

在 *Parker v. Brown* 一案中，加利福尼亚的一名葡萄的种植者反对依据 1940 年葡萄干收成的加州立法建立和实施销售计划，并认为该计划违反了谢尔曼法。当时，美国市场消费的几乎所有的葡萄干以及世界产量中的 1/2，都产自加州。经历了几年因供大于求而导致价格急剧下降之后，加州建立了一个详尽的制度来管理葡萄干的生产和销售。来自该行业不同部门的代表经过任命组成了一个专门委员会，该委员会在经过公开听证和讨论后实施这一管制制度。该制度确立不同等级葡萄干的配额，个体种植者在销售葡萄干之前必须得到特别许可。换句话说，“通过州官员的行为，《加州农业分配法》批准在该州生产的农产品的销售计划，目的在于限制种植者之间的竞争，维持供应商的行销价格。”（同上，第 346 页 。违反这一计划将构成犯罪。布朗声称这一计划将使其不能履行葡萄干的供货合同，尽管这些合同是在计划生效前就已经签订的。

最高法院假设，“如果加州分配计划是由私人、个体或公司的契约、联合或共谋来组织实施的，这个计划就是违反了谢尔曼法 ”（同上，第 350 页 。然而，最高法院的结论是“州采纳和施行这一分配计划并未订立契约、协议，也没有共谋来限制贸易或者形成垄断，而是基于其主权以一种谢尔曼法并不禁止的政府行为而施加的限制。”（同上，第 352 页 。因此，最高法院判定加州这一法律免于反托拉斯法的适用。[3]

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[2] 《邦联条款》第 2 条规定：“各州保留其主权、自由与独立，凡未经本条明示授给合众国之各项权力，司法权及权利，均由各州保留之。”

[3] 最高法院判定加州管理葡萄干产业的制度不违反美国宪法的贸易条款，因为“地方关注的许多项目和交易不属于州际贸易的范围，而是各州的管理和征税权力范围内的一部分。只要它们服务于地方利益，而非贸易歧视，即便这些属各州的管理和征税权力范围内的权力行使实质性地影响了州际贸易，也不违反贸易条款”。最高法院认为，加州

在 *California Liquor Dealers v. Midcal Aluminum* 一案中[*California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97, 105 (1980)]，最高法院对如何决定涉案的州行为免于反托拉斯法的适用提供指导。最高法院阐明，对于在州实施的限制竞争和削弱竞争行为范围内的私人行为，如果 该行为处于州的主动监督之下，则可不适用反托拉斯法。在本案中，最高法院明确了州行为理论适用的两个条件："第一，对竞争的限制必须是'作为州的政策而被清晰地陈述和肯定地表达出来'；第二 ，该政策必须是由州本身进行'主动的监督'。"（同上）。

Midcal 案涉及的加州成文法要求所有的酒类生产商和批发商都必须向州申报确定转售价格的合同和转售价格的目录，不允许批发商以不同的价格进行销售。一个批发商因违反加州法而受到起诉，他声称该定价机制违反了联邦反托拉斯法。最高法院适用由其确立的上述标准，判定加州定价机制满足了第一项要求，即州政策的清晰表达，但是认为该定价机制未能满足第二项主动监督的要求，因为"该州只是授权私方当事人固定价格并且自身实施该价格，其自身并未确定价格和审查价格方案的合理性，也未规制公平交易合同条款，而且该州也没有监督市场状况或就该计划进行任何'针对性复查'。"（同上，第 105－106 页，脚注被省去）。因此，最高法院判定加州定价机制因违反谢尔曼法而禁止实施。最高法院还解释说，维护竞争的联邦国家政策不能被事实上的私人固定价格协议披上州行为的外衣所扭曲（同上，第 106 页 。

二、与地方政府相关的州行为理论的概述

最高法院认为，州以外的政府机构的行为不能豁免于反托拉斯法，除非 这些地方政府的行为与"以管制或垄断公共服务取代竞争的州政策相关"[4]，并且是"清晰表达"的[5]。与私人当事人的案件适用州行为的理论不同，这些地方政府的行为不要求被州"主动监督"[6]。

为了减轻地方政府可能出现的财政困难，1984 年通过的《地方政府反托拉斯法》[7]规定，地方政府虽不能豁免于禁令救济诉讼，但可以豁免于损害赔偿诉讼。

的规定提高了葡萄干的跨州价格，并在一定程度上影响跨州运输，尽管这毫无疑问地会影响州际贸易，但其目的并非是限制或歧视州际贸易。

[4] *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978).

[5] *Community Communications Co. v. Boulder*, 455 U.S. 40 (1982); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40 (1985).

[6] *Id*. at 46-47.

[7] 15 U.S.C. §§ 34-36. 该法规定，"对任何地方政府，或者其官员、雇员的职务行为，不能依据《克莱顿法》第 4 章 4A、4C 的规定获得损害赔偿、损害利息、费用或律师费的补偿"，"任何对个人基于地方政府指示下的官方行为，或者其官员、雇员的职务行为所产生的权利主张都不得依据《克莱顿法》第 4 章 4A、4C 的规定获得损害赔偿、损害利息、费用或律师费的补偿"。

在 *Town of Hallie v. City of Eau Clair* 一案中[*Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40 (1985)]，最高法院查明威斯康星州的法律授权城市自行决定本市排污系统的建设和运转，决定排污系统服务的区域以及拒绝不附属于本市的区域接入本系统的请求。几个邻近的未被纳入排污系统的乡镇声称，*Eau Claire* 市在提供污水处理服务方面已经取得了垄断地位，并把这种垄断力与提供污水的收集与运输的服务进行了捆绑。这些镇认为，这导致他们在污水的收集与运输服务方面不能与该市从事竞争。最高法院判定威斯康星州的法律“在市政污水服务的范围内‘以清晰陈述和肯定表达’的管制代替了竞争。这些成文法的规定清楚地表明‘“立法机关已经仔细考虑了对这种做法。”’这足以满足判断州行为的‘清晰表达’的要求。”（同上，第 44 页，引证,脚注被省去）而并不需要明确地规定，市政府的行为是反竞争的（同上，第 45－46 页 。法院还明确指出，“行为主体是一个城市而非私人当事人的情形下，州的主动监督不是豁免反托拉斯法的一个必要前提”。（同上，第 47 页 。法院进一步推理，“州的主动监督实际是要发挥这样一个功能：确保行为人从事的行为与州的政策相一致”。（同上，第 46 页）

在近来的 *City of Columbia v. Omni Outdoor Advertising, Inc* 一案中（*City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991)），最高法院阐明，只要州依据最高法院在 *Eau Claire* 案确立的标准授权给地方政府，地方政府的行为即使是因私人主体为从中获取竞争优势而进行游说的结果，也同样可以豁免于反托拉斯法。

在 *Omni Outdoor Advertising* 案中，南卡罗来纳州的城市规划法授权地方政府管制广告牌的大小、位置和间距。基于此授权，哥伦比亚市颁布了限制广告牌的法令，该法令严重阻碍了新广告牌的设立。在南卡罗来纳地区规划部门综合分析了地方广告牌的状况，城市官员和广告牌经营者进行了一系列的听证和多次讨论后，该法令获得通过。它限制其他公司与在该市广告牌市场上占到了 95%市场份额的哥伦比亚户外广告公司开展竞争。作为新进入者的欧姆尼户外广告公司认为，该地方法令是哥伦比亚市与哥伦比亚户外广告公司为保持该公司垄断地位而进行共谋的结果。欧姆尼公司还认为，在此情形下不能适用州行为理论。

最高法院认为，只要地方政府的行为是因为州的授权，而且该授权很明确就是要取代竞争，该行为就可以豁免于联邦反托拉斯法，即使相对于授权法来说，地方政府的行为是不恰当的。最高法院还指出，地方政府的行为是否恰当，这要依据州法而不是依据

联邦反托拉斯法进行判断（同上，第 372－373 页 。

最高法院还指出，“如果限制竞争是法律授权时‘可以预见的结果’，适用州行为理论的条件就得到了充分的满足。城市规划法一个的特别目的就是制止竞争行为，特别是通过制止新进入者的方式来取代无约束的商业自由。限制广告牌的大小、位置和间距的城市法令必然保护现存广告牌而阻止新进入者的竞争”（同上，第 373 页,引证,脚注被省去）。尽管存在共谋是适用州行为理论的例外，但是法院指出，哥伦比亚户外广告公司的游说行为也许会有助于城市规划法的出台，但这不能作为认定共谋的根据，因为“公共部门官员经常会同意做这一方或那一方私人主体督促他们所做的事情，这是难免的，也是令人期待的”（同上，第 375 页）。否则，“所有具有限制竞争影响的管制行为将会易受‘共谋的指控’”，而州行为理论也将毫无效果。（同上）因此，尽管哥伦比亚市发布的关于广告牌的法令可以巩固哥伦比亚户外广告公司的垄断地位，但它依然免于适用反托拉斯法。[8]

三、州行为理论所受的限制

州行为理论使得州和地方政府似乎有能力实施一些构成行政垄断的反竞争的管制和活动。然而，由于这个豁免规则受到了诸多限制，这使得在美国难以形成行政垄断。

首先，最高法院指出，“如果州不是以管理者的身份，而是以一个特定市场的商业参与者从事行为，则不能获得豁免。”（*Omni Outdoor Advertising*, 499 U.S. at 374-75）。因为州行为理论可能存在这样的市场参与者的例外，如果州政府从事了市场活动，则会需要完全服从反托拉斯法[9]。因此，州行为理论不大可能对州的或地方政府的企业提供保护。

其次，对州行为理论的一个重要限制是美国宪法禁止各州对州际贸易强加负担，禁止以牺牲州外竞争者的利益而谋取本地企业的竞争优势。

美国宪法的贸易条款规定，“国会有权...管理与外国的以及州与州之间的贸易”。（U.S. Constitution, Art. I, §8.）。 “贸易条款的宗旨是建立跨州的自由贸易区。”[*McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944)]。贸易条款只是简单规定国会可以做什么，没规定各州不可以做什么，所以，最高法院通过解释贸易条

[8] 哥伦比亚户外广告公司的游说活动，受宪法第一修正案中请愿权的保护。*Id.* at 379-80, 383-84. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 140 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657, 670 (1965); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

[9] *See also*, *Reeves, Inc. v. Stake*, 447 U.S. 429, 439 (1980)（适当的州行为可能是，并且常常是向私人市场主体施加相同的限制）。

款发展了“休眠中的贸易条款”（Dormant Commerce Clause），以禁止各州管制与其他州的贸易以及对外地企业强加给本地企业无需承受的负担[10]。正如法院所解释的，这里的“原则是，各州不能通过减损州际贸易或增加州际贸易负担来获取自身的经济优势”[*H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 532 (1949)]。所以，这里的核心问题就是州的“经济保护主义”（*Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 395 (1983)），

“这一原则的核心内容是，一个州处理州际事务时不能把自己置身于经济隔离的位置...无论是税收还是治安权的行使，其目的和效果都不能成为抵制州外的商品或劳动力竞争的经济障碍”[*Baldwin v. G.A.F. Seelig, Inc.*, 296 U.S. 511, 527 (1935)]。

为了与贸易条款保持一致，州的成文法必须经受以下三方面的检验：“(1)该法规是否公正地监管贸易，即对 州际贸易仅有微不足道的影响，还是在文字上和实践中对州际贸易都存在着歧视；(2)该法规是否服务于一个合法的目的；如果存在， (3)是否还存在其他既不会对州际贸易造成歧视，又能促进地方利益的其他方式”（*Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)）。

“如果一个法规对贸易的管制是公正的以及是为了实现地方政府合法的公共利益，而它对州际贸易的影响微不足道，这样的法规就可以得到认可；除非它对贸易施加的负担相对于公认的地方利益而言过重。...可以允许的负担程度当然取决于所涉地方利益的性质，以及是否存在对州际贸易影响更小的其他方式来促进这种利益”[*Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)(引证被省去)]。

因此，“一个州对来自他州的商品及销售征税，仅当这种税收不构成歧视时，才是合法的”[*Sonneborn Bros. v. Cureton*, 262 U.S. 506, 516 (1923)]。为此，最高法院驳回了纽约州的要求转售进口牛奶的州外购买价格应遵守为转售在本州购买牛奶的价格（*Baldwin v. G.A.F. Seelig*）。纽约州法的这一目的显然是阻止外州低价牛奶与本州牛奶相竞争（同上，第 519 页）。最高法院指出，纽约州的这一要求“就像关税一

[10] *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829); *Cooley v. Board of Wardens of Port of Philadelphia*, 53 U.S. (12 How.) 299, 315-21 (1851); *In re State Freight Tax, Reading Railroad v. Pennsylvania*, 82 U.S. (15 Wall.) 232, 279-82 (1873); *Seaboard Air Line Ry. v. Blackwell*, 244 U.S. 310 (1917); *South Carolina State Highway Dept v. Barnwell Bros.*, 303 U.S. 177, 184-96 (1938) (南卡罗来纳州对在本州公路行驶的卡车吨位进行限制); *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944) (阿肯色州对从外地购买的运抵本州的商品征收营业税); *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525 (1949); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (亚利桑那州对运出本州的皱皮瓜的包装要求); *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977) (弗吉尼亚州对本州以外居民在本州水域从事捕鱼作业的限制); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981) (艾奥瓦州卡车长度限制规定卡车或者绕行或者由合乎要求的卡车转运); *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996) (北卡罗来纳州对本州居民持有的非本州公司的股票进行征税)。

样设置了价格级差，在州与州之间运输的产品设置了贸易障碍。”法院还指出，“对州际贸易进行征税，这超越了州的权力，除非有特殊规定，这个权限是属于国会。..‘这是本法院确立的原则，即不允许任何州以任何形式或者伪装直接对州际贸易设置负担’”（同上，第 521－522 页，引证被省去）。纽约州的规定“明显是对州际贸易设置障碍，其目的和后果显然是限制或者妨碍州际间的竞争，”因此是不允许的（同上，第 522 页）。“进口商必须得免于承担为抑制竞争而从外部施加的关税，因为这种关税必达到限制竞争的目标”（同上，第 527 页）[11]。

同样，贸易条款也禁止各州拒绝发放经营许可证，“尽管各州提出的理由是，对州际贸易的限制可以保护和促进地方经济利益”（*H.P. Hood & Sons v. Du Mond*, 336 U.S. at 526）。在Du Mond一案中，纽约州拒绝许可建造一座新的牛奶收购站以收购运往马萨诸塞的牛奶，其理由是，这座新收购站不合要求“不会领到一个供应足够的市场发生破坏的竞争，而许可基于公共利益的需要”（同上，第 528 页）。处于竞争关系的牛奶商反对建造新的收购站。法院指出，“这个限制的公开宣布的目的和实际后果是通过削减州际贸易量而提高地方的经济利益”，从而违反了贸易条款（同上，第 530－531 页）[12]。

根据贸易条款，州的法律即便不禁止州际贸易，但是如果它构成对州际贸易的歧视，这也会构成违反贸易条款而被推翻。在*Memphis Steam Laundry v. Stone*一案中[*Memphis Steam Laundry v. Stone*, 342 U.S. 389 (1952)]，最高法院否决了密西西比的“特权”税，因为这个税种规定，为州外洗衣店运送衣物的卡车是每卡车 50 美元，而州内则是

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[11] *See also, e.g., Dean Milk v. City of Madison*, 340 U.S. 349 (1951) (威斯康星市令只允许销售经本地工厂消毒的牛奶); *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964) (佛罗里达州要求牛奶加工企业只能购买本州的牛奶); *Great Atlantic & Pacific Tea Co., Inc. v. Cottrell*, 424 U.S. 366 (1976) (密西西比州禁止从与其无互惠关系的州进口牛奶); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (新泽西州禁止废物进口); *Healy v. The Beer Institute*, 491 U.S. 324 (1989) (康涅狄格州成文法要求啤酒发货人以书面形式证明，销售给康涅狄格批发商的啤酒价格不高于纽约、罗得岛及马塞诸塞州的价格); *Wyoming v. Oklahoma*, 502 U.S. 437 (1992) (俄克拉何马州要求公用事业单位消耗的煤至少有 10%产自本州，这导致怀俄明州的煤销量及其税收的减少); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 504 U.S. 353 (1992) (密歇根州法要求县与县之间的废弃物销售协议得到批准); *Granholm v. Heald*, 544 U.S. 460 (2005) (纽约州和密歇根州禁止州外的葡萄酒厂直接销售产品给消费者，而本州企业则不受这一限制). *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911) (俄克拉何马州法限制从该州到堪萨斯州的输气管线的建设); *Commonwealth of Pennsylvania v. State of West Virginia*, 262 U.S. 553 (1923) (西弗吉尼亚州法禁止向宾夕法尼亚和俄亥俄出口天然气); *Foster Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928) (路易斯安那州法限制捕捞于本州水域的虾出口); *Johnson v. Haydel*, 278 U.S. 16 (1928) (路易斯安那州法限制牡蛎出口); *Toomer v. Witsell*, 334 U.S. 385 (1948) (南卡罗来纳对州水域的虾征收出口税); *Hughes v. Oklahoma* (俄克拉何马州禁止本州的米诺鱼出口); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) (内布拉斯加州只允许向有互惠关系的州输送地表水). 美国宪法规定，“任何一州，未经国会同意，不得对进出口货物征收任何进口税或关税，任何一州对进出口货物所征全部关税和进口税的纯收益均应充作合众国国库之用；所有这类法律得由国会加以修正和监督。” Art. I, §10.

[12] *See also, e.g., Buck v. Kuykendall*, 267 U.S. 307, 315 (1925) (华盛顿州禁止未取得某种许可证而在本州公路上从事公共运输的立法是违反了贸易条款，因为“这个立法的主要目的不是为了安全或公路养护，而是禁止竞争”。).

每卡车 8 美元[13]。

在 *C & A Carbone, Inc. v. Town of Clarkstown* 一案中[*C & A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383 (1994)]，最高法院认定，组建地方私人垄断企业的地方政府的行为违反贸易条款。克拉斯通镇通过法令，建立一个具有垄断性的回收固体废弃物的私人中转站，要求镇里所有的无害固体废物都必须储存于该中转站，除非他们自己也分拣搬运可回收性的无害固体废弃物。向中转站运输废物的所有人都需要向中转站支付超过别处正常标准的倾倒费，而且其他的废物回收者也要对他们搬运的但不是在中转站存储的可回收废物支付费用。未经过该回收站的不可回收的无害固体废弃物不能直接装船运输，接受镇外废物的回收利用者不通过该中转站也不能处理废物，同时镇外的中转站也不能处置该镇的废物。克拉斯通镇之所以作出这样的规定，是为了保证这个私人中转站能够弥补其建造和运营成本，以便该镇 5 年后可以 1 美元的价格取得该中转站。

最高法院认为，这个镇上的规定构成对州际贸易的歧视（同上，第 390－392 页）。而且，该镇基于环境问题的考虑而建立的地方私人垄断的事实不能够使这个歧视州际贸易的法令合法化，当有其他不歧视州际贸易而针对环境问题的方法（同上，第 392－393 页）。这个法令目的是确保中转站的盈利，但是“确保地方收益的地方利益不能使对州际贸易的歧视合法化。..这个地方政府据然决定通过开放市场而使该工程获取收益，就不能通过歧视性的规定赋予这个中转站比州外的经营者更多的优势地位”（同上，第 393－394 页，引证被省去）。

宪法的其他条款也禁止具有反竞争目的或者效果的州行为。比如，第一修正案所赋予的言论自由权可使一些特定的限制竞争的规章条例归于无效[14]。因此，即使一些依据州行为理论可以豁免适用反托拉斯法的行为，仍有可能被第一修正案所禁止。在*Bates v. State Bar of Arizona*一案中[*Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)]，最高法院认为亚利桑那州最高法院禁止律师做广告的规则可以依据州行为理

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[13] *See also, e.g., Welton v. Missouri*, 91 U.S. 275 (1875) (沿街叫卖非密苏里州商品需要许可证，但如果是本州的商品则不需要许可证); *New Energy Company of Indiana v. Limbach*, 486 U.S. 269 (1988) (俄亥俄州的税收优惠只给本州以及与本州有税收互惠关系的州所生产的燃料乙醇); *Oregon Waste Systems, Inc. v. Department of Environmental Quality of the State of Oregon*, 511 U.S. 93 (1994) (俄勒冈州对州外固体废弃物处理的额外收费是本州废品收费的 3 倍); *Associated Indus. of Missouri v. Lohman*, 511 U.S. 641 (1994) (对进口商品征收的使用税高于本州商品的营业税); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) (对绝大多数产自马塞诸塞州以外的销给本州零售商的牛奶进行估价，分售给本州农民的则需收据); *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564 (1997) (缅因州给予非营利性组织税收减免，但服务于非本州居民的同类组织却得不到此优惠); *South Central Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999) (亚拉巴马州对在本州内从事经营的公司和在州外从事经营的公司征收不同的特许经营税)。

[14] 美国宪法第 1 修正案规定，“国会不得制定关于下列事项的法律：…剥夺言论自由或出版自由；剥夺人民向政府伸冤请愿的权利”。

论豁免适用反托拉斯法，但是，因其违反了第一修正案从而无效[15]。同样，涉及正当程序和平等保护的第十四修正案[16]也对反竞争的州行为进行了限制[17]。这体现在*Gibson v. Berryhill*一案[*Gibson v. Berryhill*, 411 U.S. 564 (1973)]，该案的原告是亚拉巴马州验光配镜委员会。被告是有些是作为雇员而没有独立营业执照的配镜师。根据亚拉巴马州的法律，只有独立营业的配镜师才有资格加入该委员会。委员会声称，这些受雇的配镜师以及雇佣他们的公司违反了亚拉巴马州验光配镜行业的监管法，因为法律要求配镜师必须是独立地从事经营。然而，最高法院认为，亚拉巴马州验光配镜委员会显明有偏向的行为，违反了正当程序的原则。因为这些配镜公司及其配镜师雇员是否违反了州法，这个问题与委员会所有成员的利益密切相关。然而，委员会的决定将导致无独立营业执照的那一部分配镜师被排挤出市场而不能与有独立营业执照的配镜师竞争，其结果就是只留下有独立营业执照的配镜师（同上，第578－579页）。

所以，即使各州以及得到州明确许可的地方当局因为能够主动实施监督从而可以限制竞争，它们也不能从事地方保护主义[18]。然而，美国的历史告诉我们，即使在美国，各地实施地方保护主义的力量也是很强大的，因此最高法院必须不停遏制州及其地方政府的地方保护主义意图，这方面最新的案例是在2007年4月30日[19]。

四、对州行为理论进行限制的历史根源

美国在18世纪后期关于《邦联条款》的经验教训说明，必须要有基本的法律禁止地方保护主义，才发展统一的国民经济。在邦联制条款优先适用于宪法的时期，美国最初13个州的地方保护主义剧增。为了保障统一的国民经济的发展，限制地方保护主义的宪法得到了确认。“宪法中的贸易条款主要是针对‘各州相互妒忌和侵犯，特别是采取关税壁垒以及其他经济报复性措施的情形’”[*Baldwin v. G.A.F. Seelig*, 296 U.S.

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[15] 参见 *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 412 U.S. 748 (1976)（弗吉尼亚法宣称，药剂师的处方药品广告中如果有药品价格，这个广告违反第一修正案）。

[16]美国宪法第十四修正案规定，“不管任何州如果未经正当法律程序，不得剥夺任何人的生命、自由或财产；亦不得拒绝给予其管辖下的任何人以同等的法律保护”。

[17] 宪法第4条第2款规定，“每个州的公民享有各州公民的一切特权和豁免权”。

[18] 近来判例可以看到相关记录，*United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, No. 05-1345 (April 30, 2007)http://www.supremecourtus.gov/opinions/06pdf/05-1345.pdf
最高法院认为，贸易条款不能禁止各州对州属企业垄断地位的授予和保护。尽管全面理解该条款的含义还为时尚早，本案判决并未显示对这一规则的影响，即反对单方面对州内企业的保护，这是地方保护主义的最常见形式。对于州属企业，分歧主要体现于理论上而非现实中，因为相对而言，州政府通常是作为主权者，很少作为市场参与者从事行为。并且，如前述所言，州行为理论对作为市场参与者的州并不提供保护。*Omni Outdoor Advertising*, 499 U.S. at 374-75; *Reeves, Inc. v. Stake*, 447 U.S. at 439.　在任何情况下，国会有权依据贸易条款，管制从事影响州际贸易的州属企业。

[19] *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, No. 05-1345 (April 30, 2007). 下文还会讨论本案。

at 522(引证被省去)][20]。

在脱离大英帝国的独立时期，在宪法生效之前最初的 13 个州依据《邦联条款》组成了联盟。《邦联条款》下的中央政府孱弱无力，没有税收权，对各州主权也无实质性限制。结果，各州从维护地方利益出发，建立了各自的货币和关税，而不考虑国家的利益。美国整体经济萧条，中央政府和一些州政府处于崩溃的边缘。为此，美国召开了制宪会议，讨论对《邦联条款》的修改，以解决现实中的问题。其结果是，含有上述贸易条款的宪法于 1789 年取代了《邦联条款》，一个强大的中央政府由此产生。

美国最高法院在其 *H.P. Hood & Sons v. Du Mond* 一案判决中对美国的这段历史进行了总结（*H.P. Hood & Sons v. Du Mond*, 336 U.S. at 533-34）。它说，胜利一旦使殖民地摆脱了战争所施加的团结压力，各州就开始走向无序和贸易战。各州的立法纯粹是出于自身利益、自身产品的重要性及其政治或商业地位的优势或劣势之估计。这将直接威胁整个联邦的和平与安全（Story, The Constitution, 259, 260. See Fiske, The Critical Period of American History, 144; Warren, The Making of the Constitution, 567.）。弗吉尼亚发起的并最终导致美国宪法出台的运动的唯一目的是“充分考虑美利坚合众国的贸易；考察各州的具体情况和贸易；思考距各州的共同利益和永久协调所必需的统一贸易管理体制还有多远”。为了这个目的，1786 年 1 月的弗吉尼亚国民大会任命了代表，并提议来自其他各州的代表也参加大会（Documents, Formation of the Union, 12 H.Docs., 69th Cong., 1st Sess., p. 38.）。

当然，这些先辈们希望各州保留治理内部事务的权力；但与此形成鲜明对比的是，他们也希望对国际与州际贸易的调控实行联邦化。这即是说，再没有比这更为重要的联邦权力被如此普遍地得到承认；也没有比各州的其他权力被如此轻易地遭到放弃。先辈们无意授权联邦干预各州的社会条件和司法机构。即使是权力法案修正案也只是作为对国会权力的限制而出台。各州也都满意他们能够对绝大多数事务的各种各类的控制。正如麦迪生指出的：“如果对贸易缺乏统一调控，各州就将单独行使这项权力；这不仅被证明是失败的，而且会产生敌对、冲突和报复性的管制”（Farrand, Records of the Federal Convention, 547）[21]。

从各州重现地方保护主义的努力看，继续宪法进行限制是很有必要的。在 *Toomer v.*

[20] 也可参见 *Gibbons v. Ogden*, 22 U.S. (Wheat.) 1, 231 (1824). J. Johnson 指出，“在所通过的宪法中最有价值的内容就是在各州之间摆脱了嫉妒和偏袒，保持各州间自由的贸易交往。”

[21] 参见 *Gibbons v. Ogden*, 22 U.S. (Wheat.) 1, 244. J. Johnson, J.指出，“…发现他们自己对本州的贸易拥有无限权力，…自利原则…开始在不公正的法律和不正当的措施中显现出来，由此产生了贸易管制冲突，州际和谐关系的破坏，并且丧失了州外贸易利益。其结果就是他们之间需要一个公约。

Witsel 一案中[*Toomer v. Witsell*, 334 U.S. 385, 388 (1948)]，南卡罗来纳州的法律影响了从北卡罗来纳到佛罗里达沿岸的捕虾贸易，“该法限制甚至禁止非本州居民在本州邻海从事捕捞作业，从而导致其他州的针对性报复，捕捞作业沿各州边界被进行的分割，官方谈判成为各州为本州居民在其他州的邻近水域取得捕捞权的唯一途径。”

同样，在 *Baldwin* 一案中（*Baldwin*, 296 U.S. at 522），最高法院的判决书指出，“如果纽约州为促进本州农民的经济福利而可以保护他们免受佛蒙特州的低价竞争，那么意图以国家授权管理州与州之间的贸易避免敌对的与报复的大门就会被打开。”

法院还指出，否则“如果生产铜、铅、富铁矿、木材、棉花、石油或天然气的每个州都发布命令，限制这些产业只能限于本州以保持本州的竞争优势，我们不难想象会出现什么样的结果。如果采取了这样的行为，混乱的报复必然产生，各州之间必然处于敌对状态。我们也可以想象出现怎样的产业报复和产业歧视。密歇根州可能规定只有在完全满足本州销售者的需求时才允许汽车出口，纽约州可能在没有依据的情况下限制州外牛奶的销售以保护本州销售者和消费者的经济利益，俄亥俄州则可能凭借其在橡胶轮胎产业上的优势来报复密歇根州的汽车垄断。”

法院还指出，“在宪法贸易条款所推动形成的体制下，每个农民和工匠都受到鼓励进行生产，因为他有权自由进入全国的每个市场；没有任何本州的禁运可以扣留他的产品出口，也没有任何外州可以用关税或规章将其拒之门外。同时，消费者也都期望各个制造业领域的自由竞争，因为竞争可以保护他不受剥削。这就是美国缔造者的远见，也是本院（指最高法院）使之付诸实践的理论。”(*H.P. Hood & Sons v. Du Mond*, 336 U.S. at 538-39.)

五、与反垄断法的潜在关联

州行为理论因为是美国联邦体制的产物而十分独特。中华人民共和国不是由主权主体组成的联邦，因此，依据州行为理论的豁免在中国反垄断法中不具有可比性，中国的立法不能采纳这个理论。然而，在美国还存在足可与州行为理论相抗衡的一些原则来抑制中国所说的行政垄断。单独采纳州行为理论而忽略对州行为理论的限制，这绝对是不明智的。

简言之，州行为理论不能成为行政垄断排除反垄断法适用的基础。反垄断法应当禁止行政垄断，这种禁止将与美国宪法中的贸易条款发挥同样的作用，在中国单一政治体

制下服务于与美国宪法相同的目标，即促进统一的国民经济[22]。否则，在中国现有条件下，没有规定行政垄断的反垄断法将不可能产生一个富于竞争力的国民经济。

美国禁止行政垄断的规定是在 1789 年的宪法中所确认的，这比谢尔曼法早了 100 百年。美国的经验认为，禁止政府机构对竞争进行限制，这比禁止私人部门的限制更具重要性和基础性。即使从历史上看，美国政府参与经济的程度相对是较低的，但是这个经验仍然是非常可靠的。

中国政府在经济运行中发挥着更大的作用。因此，对中国而言，禁止行政垄断更为重要。对行政垄断的禁止起码不能滞后于对私人垄断的禁止。缺乏禁止行政垄断规定的反垄断法将是不完整的，也不可能达到竞争性市场经济的基本目标[23]。一部完整、现代化的法律必须要考虑政府机构对竞争的限制[24]。而且，反垄断法对行政垄断的禁止应当优于其他法律或条例对相同行为的规范，就像美国宪法中休眠的贸易条款比州行为理论更具效力一样。

至少反对地方保护主义和反对行政垄断的原则应当在反垄断法中得到体现，这有助于发展这个理论并进而成为法律的主要内容。或更为重要的是，这有利于形成一种反对地方保护主义的文化。为了实现这些目标，建立一个全面和适合的基础设施及拥有重任使命在全国各界倡导竞争的执法机构是必要的。因为，倡导竞争可以促成一种竞争文化，而竞争文化是根除行政垄断所必须具有的条件，这甚至比直接地执行法律文本更重要。[25]例如经合组织发布的从竞争政策的角度评估政府经济政策的工具，[26]可能非常有助于竞争执法机构完成倡导竞争的任务。

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[22] Eleanor Fox, “An Anti-Monopoly Law for China – Scaling the Walls of Protectionist Government Restraints,” Antitrust L.J. (forthcoming). 还可参见, Antitrust Modernization Commission, “Report and Recommendations,” April 2007, at ix, 23-24, 343-47, 366-77, http://www.amc.gov/report_recommendation/toc.htm; Blanca Rodriguez Galindo, Head, International Relations Unit, Directorate-General for Competition, European Commission, “Review of Anti-Monopoly Law,” at 10-11, International Seminar, Hangzhou, China (May 19-21, 2006), http://ec.europa.eu/comm/competition/speeches/text/sp2006_009_en.pdf; Thomas G. Krattenmaker, “Antitrust Enforcement in Regulated Sectors Working Group, Subgroup 1: Limits and constraints facing antitrust authorities intervening in regulated sectors,” at 9-10, 12-18, Report to the Third ICN Annual Conference, Seoul, Korea (April 2004), http://www.internationalcompetitionnetwork.org/index.php/en/search?keywords=krattenmaker&type=e.

[23] 徐士英，《中国反垄断法草案中的行政垄断》，中国社会科学院第 5 届竞争法与竞争政策国际研讨会论文。

[24] Eleanor Fox, “An Anti-Monopoly Law for China – Scaling the Walls of Protectionist Government Restraints,” Antitrust L.J. (forthcoming)。

[25] 同注 23、24。

[26] OECD 竞争处，竞争评估工具（2007）。