

## Note

### *FTC V. PHOEBE PUTNEY* AND MUNICIPALITIES AS NONGOVERNMENTS

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**ABSTRACT**—American courts have long struggled with categorizing municipalities. They treat municipalities sometimes as private corporations, sometimes as governmental bodies, and sometimes as something in between. This uncertainty provides a shaky foundation for local government law and hampers its development. Local governments are not sure of their powers, and states are unable to create a comprehensive vision of municipal governance. When federal law is involved, the situation is muddled further.

In *FTC v. Phoebe Putney*, the Supreme Court’s application of the state action doctrine unnecessarily injected federal antitrust law into the relationship between states and municipalities. The state action doctrine exempts states from antitrust liability and is only sometimes applicable to municipalities. Though ostensibly applying a “foreseeability” test to determine whether a municipality benefits from the doctrine, the Supreme Court instead pigeonholed municipal power into a narrow conception of municipalities’ role in American governance. This narrowed foreseeability test not only on its face constricts states’ ability to delegate certain functions to municipalities, but also creates constraining uncertainty as to which delegations of state power to municipalities will run afoul of federal antitrust law. Accordingly, this Note analyzes *Phoebe Putney* as an erosion of municipalities’ ability to perform governmental functions—to promote the health, safety, and welfare of the community—and as denying municipalities a vibrant role in the American federal system.

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INTRODUCTION

In *FTC v. Phoebe Putney Health System, Inc.*,<sup>1</sup> the Supreme Court handed local government a defeat and denied municipalities a rightful place in the American federal system. By holding that a Georgia hospital authority could not enjoy immunity from federal antitrust law by virtue of the state action doctrine,<sup>2</sup> the Hospital Authority of Albany–Dougherty County was treated more as a private corporation than as an exerciser of government power, despite Georgia law expressly establishing hospital authorities as governmental entities that provide for the health of their citizens.<sup>3</sup> Several commentators have written about *Phoebe Putney* in terms of its impact on the landscape of antitrust law and as an antitrust victory for the Federal Trade Commission (FTC).<sup>4</sup> However, *Phoebe Putney* should not be viewed so much as a victory for antitrust or a defining antitrust decision,<sup>5</sup> but rather as dealing a blow against local governments.

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<sup>1</sup> 133 S. Ct. 1003 (2013).

<sup>2</sup> *Id.* at 1007.

<sup>3</sup> See GA. CODE ANN. § 31-7-75 (2012).

<sup>4</sup> See, e.g., Richard M. Brunell, *The Roberts Court Turn to the Left?*, ANTITRUST, Summer 2014, at 33, 33 (analyzing *Phoebe Putney* as part of three straight antitrust victories at the Supreme Court following a drought of such antitrust victories at the Supreme Court since 1993); Joanne C. Lewers & Robert A. Skitol, *The Developing Antitrust Legacy of the Roberts Court*, ANTITRUST, Summer 2014, at 7, 12 (analyzing *Phoebe Putney* as a reversal of the Rehnquist Court’s federalism concerns); Thomas B. Nachbar, *The Antitrust Constitution*, 99 IOWA L. REV. 57, 95 & n.148 (2013) (discussing *Phoebe Putney* within the context of the interaction between antitrust law and government regulation).

<sup>5</sup> It should be noted that the FTC’s victory ended up being a pyrrhic one. After the FTC’s success at the Supreme Court, the case ended in a settlement that did not include a force of sale. This was due to

The courts, including the Supreme Court, have struggled with categorizing local government entities. On the one hand, the Supreme Court has clearly pronounced that municipalities are mere creatures of the state, most notably in *Hunter v. City of Pittsburgh*.<sup>6</sup> On the other hand, courts have struggled to apply this view uniformly when confronted with issues such as sovereign immunity,<sup>7</sup> § 1983 litigation,<sup>8</sup> the availability of Congress's powers under Section Five of the Fourteenth Amendment,<sup>9</sup> and perhaps most notably in the context of the federal antitrust laws.

The Court has interpreted federal antitrust laws as including an exception to actions taken by the state (the state action doctrine), reasoning that Congress did not intend to interfere with the states' ability to regulate their own economies.<sup>10</sup> When applied to municipalities, supposed creatures of the state, the exception has made courts uneasy. Their status as instrumentalities of the state would seem to entitle municipalities to the exception.<sup>11</sup> Instead, the Court has developed a test to determine when municipal actions are exempt from antitrust legislation, looking to whether the anticompetitive actions taken by the municipality are undertaken pursuant to a state's own intentions. The underlying reasoning is because only states have immunity, the state's intention is the deciding factor.

*Phoebe Putney* marks a shift in this state action doctrine as applied to local governments that is properly understood not as a strengthening of antitrust law, but rather as an erosion of local governments' ability to perform governmental functions—to promote the health, safety, and welfare of the community. The Supreme Court's most recent application of

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Georgia's certification of need laws. Melissa Lipman, *FTC Settles Phoebe Merger Fight But Can't Force Sale*, LAW360 (Aug. 22, 2013, 4:17 PM), <http://www.law360.com/articles/465927> [<http://perma.cc/2SE7-HATW>]. The fact that state laws muted the impact of the Supreme Court's decision on Phoebe Putney Health Systems itself, though, does not undermine the fact that *Phoebe Putney* marks a shift in the Court's state action doctrine.

<sup>6</sup> 207 U.S. 161, 178–80 (1907).

<sup>7</sup> Compare *Nat'l League of Cities v. Usery*, 426 U.S. 833, 852 (1976) (holding that municipalities enjoy sovereign immunity when exercising traditional governmental functions), with *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985) (overruling *National League of Cities*).

<sup>8</sup> Compare *Monroe v. Pape*, 365 U.S. 167, 191 (1961) (finding that Congress did not intend for municipalities to be subject to liability under § 1983), with *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978) (overruling *Monroe v. Pape*).

<sup>9</sup> Compare *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (finding that Congress's Section Five powers did not abrogate state sovereign immunity absent a pattern of discrimination), with *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004) (finding that Congress's Section Five powers abrogate state sovereign immunity to impose prophylactic measures against discrimination).

<sup>10</sup> *Parker v. Brown*, 317 U.S. 341, 350–51 (1943).

<sup>11</sup> See *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 426–27 (1978) (Stewart, J., dissenting).

the state action doctrine to local government prior to *Phoebe Putney* was *City of Columbia v. Omni Outdoor Advertising, Inc.*<sup>12</sup> In *Omni*, the Court ruled that the city's granting of a virtual monopoly to a billboard company was exempt from the antitrust liability because such a monopoly was a "foreseeable result" of the land use powers granted to the city by the state.<sup>13</sup> Not only did the Court in *Phoebe Putney* greatly narrow the "foreseeable result" test of *Omni*, but it did so in an area that is more explicitly tied to the police power of governments to protect and promote the health, safety, and welfare of the community. It is difficult to understand why a city is free to grant monopolies to billboard companies but not to hospitals. Indeed, Georgia statutes explicitly create a state "objective of providing all residents with access to adequate and affordable health and hospital care,"<sup>14</sup> which Georgia has chosen to effectuate via delegation to municipalities. Accordingly, the narrowing of the state action doctrine as applied to municipalities betrays an unwillingness of the Supreme Court to recognize local governments as valid governmental bodies in the federal system. In doing so, the Court has constrained the states' abilities to craft local government policies such that municipalities can only exercise government functions in areas that conform to the Court's preconceived notions of which powers can be granted to municipalities.

This Note argues that *Phoebe Putney* implicitly circumscribed the powers a state may delegate to its local governments. In doing so, it will analyze *Phoebe Putney* in light of Supreme Court case law regarding local government as well as compare *Phoebe Putney* to the theories of local government that inform those cases. This Note, in Part I, will begin by describing the Court's decision in *Phoebe Putney* and its treatment of the Hospital Authority of Albany–Dougherty County as private or public. Part II will discuss the difficulty of the Court to clearly characterize local governments as private or public, as well as examine the state action doctrine and its interplay with the private–public distinction. Part III will trace the development of contemporary local government law and analyze *Phoebe Putney* as an intrusion by the Court into this area of state law. Finally, Part IV will provide potential solutions to the Court's decision in *Phoebe Putney*.

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<sup>12</sup> 499 U.S. 365 (1991).

<sup>13</sup> *Id.* at 373 (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42 (1985)).

<sup>14</sup> *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1014 (2013) (citing GA. CODE ANN. § 31-7-75(22) (2012)).

I. THE COURT'S DECISION IN *FTC V. PHOEBE PUTNEY*

At issue in *Phoebe Putney* was the purchase of a hospital by a local hospital authority.<sup>15</sup> The Hospital Authority of Albany–Dougherty County—created pursuant to Georgia’s Hospital Authorities Law<sup>16</sup>—bought Phoebe Putney Memorial Hospital in Albany, one of two hospitals in the area.<sup>17</sup> In 1990, the Authority reorganized, creating two nonprofit corporations for the management of the hospital: Phoebe Putney Health System, Inc. (PPHS) and Phoebe Putney Memorial Hospital, Inc. (PPMH). The Authority leased the hospital to PPMH for forty years at \$1 per year, giving PPMH “exclusive authority over the operation” of the hospital.<sup>18</sup> In 2010, PPHS entered into discussions to purchase the other hospital in the area, Palmyra Medical Center.<sup>19</sup> In response to these discussions, the FTC filed an administrative complaint and eventually joined with the State of Georgia in filing suit against the Authority, the hospitals, and the corporations that managed them for violations of the Federal Trade Commission Act and the Clayton Act.<sup>20</sup>

The Eleventh Circuit affirmed the district court’s dismissal of the FTC’s claims for a failure to state a claim due to the state action doctrine.<sup>21</sup> The Eleventh Circuit held that the state action doctrine applied to the Authority because anticompetitive behavior was a foreseeable result of the powers granted to the Authority by the state.<sup>22</sup>

The Supreme Court reversed the Eleventh Circuit, rejecting its expansive reading of the state action doctrine and finding that the doctrine did not protect the Hospital Authority.<sup>23</sup> In reversing the Eleventh Circuit, the Court not only denied a more expansive reading of the state action doctrine, but also impliedly circumscribed the potential powers of municipalities. By analyzing the Authority as more analogous to a private

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<sup>15</sup> *Id.* at 1008.

<sup>16</sup> GA. CODE ANN. §§ 31-7-70 to -96.

<sup>17</sup> *Phoebe Putney*, 133 S. Ct. at 1008.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Specifically, the plaintiffs alleged that the proposed purchase violated section 5 of the Federal Trade Commission Act, 38 Stat. 719, 15 U.S.C. § 45, and section 7 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 18. *Id.* These sections prohibit “[u]nfair methods of competition,” 15 U.S.C. § 45, and acquisitions whose effect “may be substantially to lessen competition, or to tend to create a monopoly,” 15 U.S.C. § 18.

<sup>21</sup> The state action doctrine prevents the application of antitrust law to actions taken by a state. *See infra* Sections II.B–D.

<sup>22</sup> *FTC v. Phoebe Putney Health Sys., Inc.*, 663 F.3d 1369, 1376 (11th Cir. 2011), *rev’d*, 133 S. Ct. 1003 (2013).

<sup>23</sup> *Phoebe Putney*, 133 S. Ct. at 1007–09.

corporation than a public government entity,<sup>24</sup> the Court curtailed municipalities' power to exercise the police power as an instrument of the state and provide for the general welfare of its people.<sup>25</sup>

Thus, while ostensibly an antitrust decision expounding federal antitrust law and the state action doctrine, *Phoebe Putney* actually decided that certain actions cannot be governmental when taken by a municipality regardless of the state law that shapes the municipality's powers. The Court in this way has unnecessarily injected federal law into the relationship between states and municipalities, restricting the ability of states to shape their local governments and to create a vibrant role for local governments in the American federal system.

## II. LOCAL GOVERNMENTS AND THE FEDERAL COURTS

In order to analyze *Phoebe Putney*'s impact on the status of local government law in the American federal system, it is necessary to first discuss the relevant federal law. This Part will first demonstrate the inability of the Court to place municipalities fully within either the private or public spheres in light of the history of American municipalities, and its resultant inability to apply legal doctrines consistently. This Part will then trace the development of the state action doctrine in federal antitrust law, followed by its application to local governments, and, finally, its application in *Phoebe Putney*.

### A. *The Role of Local Governments in the Federal System*

Courts have long struggled to determine the proper place of local governments within the U.S. constitutional system. The reasons for this are both structural and historical. The U.S. constitutional system contemplates only two levels of government: the federal government and the states. Thus, the Constitution does not itself create a role for local governments, and local governments rely on the states for their legal authority and

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<sup>24</sup> The Court described the powers granted the Authority as merely “mirror[ing] general powers routinely conferred by state law upon private corporations.” *Id.* at 1011.

<sup>25</sup> It should be noted that the involvement of the State of Georgia in the litigation should have no impact on the extent of the Authority's powers or the Court's view of the state's intent—the State of Georgia joined as a plaintiff in the original suit, but dropped from the litigation before it reached the Supreme Court. *In the Matter of Phoebe Putney Health System, Inc.*, FED. TRADE COMM'N (Mar. 31, 2015), <https://www.ftc.gov/enforcement/cases-proceedings/111-0067/phoebe-putney-health-system-inc-phoebe-putney-memorial> [<https://perma.cc/V8S4-R54W>]. Akin to the way states disagree with the federal government over the powers reserved to the states by the Federal Constitution, localities can disagree with the states that created them over the limits of their powers. While the Constitution arguably does not create states the way states create localities, it is only natural that different levels of government conflict over where one's powers end and the other's begin.

existence. This was most clearly articulated in *Hunter v. City of Pittsburgh*, when the Court stated:

Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. . . . The number, nature and duration of the powers conferred upon these corporations . . . rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers . . . constitutes a contract with the State within the meaning of the Federal Constitution.<sup>26</sup>

However, this view of municipalities has not prevented the Supreme Court from interfering in the relationship between a state and its local governments.

Further complicating the classification of local governments within the American legal system is their historical origins as corporations under English law. Originally, there was no legal distinction between a private corporation and a public corporation<sup>27</sup> and all corporations were created in the same way: the sovereign would grant a charter to the newly formed corporation, detailing its specific powers.<sup>28</sup> The sovereign originally could also revoke a charter and the powers conferred,<sup>29</sup> though such an interference with municipal powers was not without its political consequences.<sup>30</sup> This conception of municipal corporations carried over from England to the American Colonies and then into the Early Republic.<sup>31</sup>

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<sup>26</sup> 207 U.S. 161, 178 (1907). In *Hunter*, at issue was the merger of the cities of Pittsburgh and Allegheny. *Id.* at 174. The citizens of Allegheny objected to being merged with Pittsburgh and sued to prevent it. *Id.* at 175. The Court held that because cities are state creations, the state can unilaterally modify them at will. *Id.* at 178–79.

<sup>27</sup> Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1082 (1980).

<sup>28</sup> See Robert L. Raymond, *The Genesis of the Corporation*, 19 HARV. L. REV. 350, 356–57 (1906).

<sup>29</sup> See *id.* at 357–58.

<sup>30</sup> For example, Charles II in the late seventeenth century attempted to consolidate his parliamentary power by stripping powers from charters and forcing the surrender of various municipal charters—including that of London—in the wake of the English Civil War. The quo warranto proceedings against these charters—in particular against London’s—helped foment the Glorious Revolution. See Frug, *supra* note 27, at 1092–93; Gary S. De Krey, *Political Radicalism in London After the Glorious Revolution*, 55 J. MOD. HIST. 585, 588–90 (1983); J.H. Sacret, *The Restoration Government and Municipal Corporations*, 45 ENG. HIST. REV. 232, 232–33 (1930).

<sup>31</sup> See Frug, *supra* note 27, at 1095 (“In colonial America . . . most cities were not corporations at all. Nevertheless, the issue of city power was resolved in America as in England in the form of the question of corporate power.”). The origins of municipalities and their status as corporations in the United States are complex. See *id.* at 1095–99; Richard T. Ford, *Law’s Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 882 (1999). For the purposes of this Note, it is not necessary to delve into the details, except to show the origin of municipalities as corporations and the original lack of any distinction between private and public entities.

After the American Revolution, the sovereign power to create corporations passed to the states.<sup>32</sup>

So too did popular disapproval of charter revocation pass to the states' citizens. The Supreme Court also seemed to disapprove of the state having this absolute power over its chartered corporations when it decided *Trustees of Dartmouth College v. Woodward*,<sup>33</sup> though the case failed to give municipal corporations any protection from state legislatures. New Hampshire had attempted to alter Dartmouth College's charter in order to reinstate its ousted president and thereby control its leadership.<sup>34</sup> Relying on the Contract Clause,<sup>35</sup> the Court held that the college's charter was a contract protected by the Constitution.<sup>36</sup> However, this Contract Clause protection was held to apply only to private corporations—not public corporations—and the Court characterized Dartmouth College as just such a private corporation.<sup>37</sup> Though private corporations eventually were freed from the charter system when general incorporation laws were adopted by the states,<sup>38</sup> the vulnerability of corporations in the charter system essentially lives on for the descendants of public corporations—municipalities and local governments. It is upon the background of this private–public distinction that *Hunter v. City of Pittsburgh* was decided. That is, the Commonwealth of Pennsylvania was legally allowed to unilaterally revoke or alter its municipalities with no protection from the Contracts Clause because the municipalities were public entities.

The clear precedent of *Hunter v. City of Pittsburgh* has not always been followed, though, and the courts have treated public municipalities as private entities in varying contexts.<sup>39</sup> Aside from the antitrust context

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<sup>32</sup> See Frug, *supra* note 27, at 1095–99. It is worthwhile to note that while the revocation of the London Charter and the Glorious Revolution that followed resulted in municipal charters gaining some protection from the Crown, *id.* at 1094, no such protection was gained from Parliament since it was united with cities in the struggle against the Crown: “[W]hile the rights of corporations against the King were resolved, their relationship to the legislature remained unsettled; the problem of city power in early America therefore lay in defining that relationship.” *Id.* at 1082.

<sup>33</sup> 17 U.S. 518 (1819); see also MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860*, at 111–14 (1977).

<sup>34</sup> *Dartmouth Coll.*, 17 U.S. at 552–54.

<sup>35</sup> U.S. CONST. art. I, § 10, cl. 1.

<sup>36</sup> *Dartmouth Coll.*, 17 U.S. at 651–54 (opinion of Marshall, C.J.).

<sup>37</sup> *Id.* at 640–41.

<sup>38</sup> See generally Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 AM. U. L. REV. 81 (1999) (exploring the development of state incorporation law).

<sup>39</sup> See GERALD E. FRUG ET AL., *LOCAL GOVERNMENT LAW* 235–38 (6th ed. 2015). Even in *Hunter v. City of Pittsburgh*, the Court left open the possibility of treating a municipality as a private entity in terms of the Contract Clause when it was acting as a proprietary owner. 207 U.S. 161, 179 (1907) (“The distinction between property owned by municipal corporations in their public and governmental



discussed in this Note, the most striking example can be found in the Court's reversal of *National League of Cities v. Usery* nine years later in *Garcia v. San Antonio Metropolitan Transit Authority* on the issue of whether federal minimum wage laws can constitutionally be applied to municipalities. In *National League of Cities v. Usery*,<sup>40</sup> the Court adhered to the characterization of municipalities in *Hunter v. City of Pittsburgh* as exercisers of state governmental power. The Court struck down a federal statute requiring a minimum wage for employees of municipalities, finding that it impinged on the states' sovereignty by affecting an area of traditional governmental power.<sup>41</sup> *National League of Cities* was later overturned in *Garcia v. San Antonio Metropolitan Transit Authority*, which rejected *National League of Cities*'s distinction between governmental and proprietary functions as a basis for determining when a state's, or its subdivisions', sovereignty has been unconstitutionally infringed.<sup>42</sup> In finding that municipalities were subject to federal labor laws, the Court thus diverged from *Hunter v. City of Pittsburgh* and treated the municipality as a private corporation.

A similar example can be found in the context of § 1983 actions,<sup>43</sup> in which the Court first held that municipalities could not be liable under 42 U.S.C. § 1983, only to later reverse course. In *Monroe v. Pape*,<sup>44</sup> the Court found that Congress did not intend to allow suits to be brought against municipalities, but only against their officials.<sup>45</sup> While the Court acknowledged legislative history showing the rejection of an amendment to explicitly provide the possibility of collecting a remedy from a "county, city, or parish,"<sup>46</sup> the basis of Congress's decision was its belief that "Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the

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capacity and that owned by them in their private capacity, though difficult to define, has been approved by many of the state courts . . . and it has been held that as to the latter class of property the legislature is not omnipotent." (citation omitted).

<sup>40</sup> 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

<sup>41</sup> *Id.* at 851.

<sup>42</sup> *Garcia*, 469 U.S. 528, 546–47 (1985).

<sup>43</sup> 42 U.S.C. § 1983 (2012) provides a federal cause of action against state officials for the violation of federal rights:

Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects . . . any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

<sup>44</sup> 365 U.S. 167 (1961), *overruled by* *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

<sup>45</sup> *Id.* at 187 ("[W]e are of the opinion that Congress did not undertake to bring municipal corporations within the ambit of [§ 1983].").

<sup>46</sup> *Id.* at 188.

administration of state law.”<sup>47</sup> Thus, the Court held that within the meaning of the statute, “person[s]” who could be held liable under § 1983 did not include municipalities.<sup>48</sup> However, in *Monell v. Department of Social Services*,<sup>49</sup> the Court reversed course and allowed § 1983 litigation to be pursued directly against municipalities.<sup>50</sup> Again, the Court diverged from *Hunter v. City of Pittsburgh* and treated municipalities as both private and public: able to provide the color of law but not able to avail themselves of sovereign immunity.

The Court has also struggled placing municipalities on either side of the public–private divide more generally as to Section Five of the Fourteenth Amendment, but moving in the opposite direction as its § 1983 jurisprudence. To abrogate sovereign immunity in pursuance of the Fourteenth Amendment’s Section Five enforcement powers, remedial statutes must be proportional to the past unconstitutional state conduct.<sup>51</sup> The Court, though, has wavered as to whether conduct by cities constitutes evidence of past unconstitutional conduct in order to abrogate sovereign immunity against the state. In *Board of Trustees of the University of Alabama v. Garrett*, the Court held that it could not.<sup>52</sup> However, in a footnote in *Tennessee v. Lane*, the Court rejected the argument that Congress could only validly exercise its Section Five powers “predicated solely on evidence of constitutional violations by the States themselves” and found municipal violations sufficient.<sup>53</sup> Thus, the Court left it unclear in the Fourteenth Amendment context when it will adhere to the precedent of *Hunter v. City of Pittsburgh*.

From these cases it becomes evident that municipalities have an uncertain role in the American federal system. Without a clear place on either side of the private–public distinction, the application of various federal laws to municipalities remains unpredictable.<sup>54</sup>

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<sup>47</sup> *Id.* at 190 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 804 (1871) (statement of Rep. Poland)). Seemingly, Congress was concerned with issues of sovereign immunity as applied to municipalities.

<sup>48</sup> *Id.* at 191. The Court also explicitly refused to reach the constitutional question raised in the legislative history as to whether Congress could allow § 1983 litigation against municipalities. *Id.*

<sup>49</sup> 436 U.S. 658 (1978).

<sup>50</sup> *Id.* at 690. Interestingly, in a footnote, the Court noted that there was no constitutional sovereign immunity impediment to holding municipalities liable under § 1983, but specifically limited this holding “to local government units which are not considered part of the State for Eleventh Amendment purposes.” *Id.* at 690 n.54.

<sup>51</sup> *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997).

<sup>52</sup> 531 U.S. 356, 368–69 (2001).

<sup>53</sup> 541 U.S. 509, 527 n.16 (2004).

<sup>54</sup> Courts have also struggled to determine which traits are necessary for municipal entities to be considered public or private. *See, e.g., Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 681–85 (1992) (holding that free speech protections do not apply in airports, despite being publicly

*B. Federal Antitrust Law and Development of the State Action Doctrine*

Relevant to *Phoebe Putney* and its impact on the role of local governments in the American federal system, the private–public distinction affects federal antitrust law through the state action doctrine. Though ostensibly an antitrust decision, *Phoebe Putney* turned on whether the anticompetitive behavior in question was a governmental action and thus exempt from antitrust law.

The Sherman and the Clayton Acts<sup>55</sup> constitute the basis of antitrust law in the United States. Both statutes are extremely vague, and it has been suggested that the Sherman Act “may be little more than a legislative command that the judiciary develop a common law of antitrust.”<sup>56</sup> In the development of this common law of antitrust, the Court has established what has become known as the state action doctrine. In *Parker v. Brown*,<sup>57</sup> the Court first articulated the doctrine, stating that it “find[s] nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.”<sup>58</sup> Thus, actions that would be otherwise prohibited by federal antitrust laws are exempt from those laws when taken by the state. Because this exception for state actions was carved out by the Court based on the Court’s understanding of congressional intent, it is not technically an immunity<sup>59</sup> and thus the legal basis for claiming exception to federal antitrust laws cannot be based on the antitrust laws themselves.<sup>60</sup> Indeed, *Parker* itself acknowledges that “[t]he Sherman Act makes no mention of the state as such, and gives no hint that it was intended to

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owned); *Marsh v. Alabama*, 326 U.S. 501, 509–10 (1946) (holding a privately held company town to the same free speech obligations as a municipality because of its physical similarity with a municipality); *Oregon v. City of Rajneeshpuram*, 598 F. Supp. 1217, 1222 (D. Or. 1984) (using a seemingly formalist inquiry and regarding a city as public merely because it incorporated as a municipal, rather than private, corporation); *Council of Orgs. and Others for Educ. About Parochiaid, Inc. v. Engler*, 566 N.W.2d 208, 222 (Mich. 1997) (holding that a modicum of control over charter schools is sufficient to render them public).

<sup>55</sup> 15 U.S.C. §§ 1–7, 12–27 (2012).

<sup>56</sup> PHILLIP AREEDA ET AL., *ANTITRUST ANALYSIS: PROBLEMS, TEXT, AND CASES* 3 (7th ed. 2013).

<sup>57</sup> 317 U.S. 341 (1943).

<sup>58</sup> *Id.* at 350–51.

<sup>59</sup> An immunity is “any exemption from . . . liability.” *BLACK’S LAW DICTIONARY* (10th ed. 2014) (emphasis added). That is, an immunity prevents liability from attaching when there has been a violation. The state action exemption instead says that antitrust laws do not apply at all to state action. That is, when there is state action, there can be no violation.

<sup>60</sup> WILLIAM HOLMES & MELISSA MANGIARACINA, *ANTITRUST LAW HANDBOOK* § 8:7, Westlaw (database updated Oct. 2014).

restrain state action or official action directed by a state,<sup>61</sup> and accordingly sought to cabin the exception explicitly to actions undertaken by the state.<sup>62</sup>

Complicating the doctrine, the determination of what qualifies as a state action is not always clear.<sup>63</sup> When the action in question is taken by a state legislature or court, the determination is easy: absolute exemption. When the state has entrusted duties to a private party, however, the doctrine is at its weakest. In such cases, the Court has developed a two-part test to determine whether the action is exempted. First, the action in question must be “one clearly articulated and affirmatively expressed as state policy.”<sup>64</sup> Second, the private party’s implementation of that “policy must be ‘actively supervised’ by the State itself.”<sup>65</sup> This has become known as the *Midcal* test.<sup>66</sup>

An example of a private entity’s anticompetitive actions being exempt from antitrust legislation can be found in *Southern Motor Carriers Rate Conference, Inc. v. United States*.<sup>67</sup> In *Southern Motor Carriers*, the Public Service Commissions of four states (Georgia, Mississippi, North Carolina, and Tennessee) required common carriers “to submit proposed rates to the relevant Commission for approval.”<sup>68</sup> The defendants in the case were “rate bureaus” that collectively submitted rate proposals to the commissions on behalf of their members.<sup>69</sup> The United States filed suit against the bureaus, alleging price fixing in violation of the Sherman Act.<sup>70</sup>

The second prong of the *Midcal* test was easily fulfilled: the Public Service Commissions (state entities) had full control over whether the rates would be accepted.<sup>71</sup> Next, the court analyzed whether the rate schemes were in pursuance of a “clearly articulated state policy.”<sup>72</sup> While three of the four states’ legislatures explicitly authorized collective ratemaking and were thus exempt from the Sherman Act, Mississippi’s did not.<sup>73</sup> The Court

<sup>61</sup> 317 U.S. at 351.

<sup>62</sup> “[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . .” *Id.*

<sup>63</sup> HOLMES & MANGIARACINA, *supra* note 60, at § 8:7 (“The search for a bright-line test of what qualifies as exempt state action has been a difficult one at best.”).

<sup>64</sup> *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978) (opinion of Brennan, J.)).

<sup>65</sup> *Midcal*, 445 U.S. at 105 (quoting *Lafayette*, 435 U.S. at 410).

<sup>66</sup> HOLMES & MANGIARACINA, *supra* note 60, at § 8:7.

<sup>67</sup> 471 U.S. 48 (1985).

<sup>68</sup> *Id.* at 50.

<sup>69</sup> *Id.* at 50–51.

<sup>70</sup> *Id.* at 52–53.

<sup>71</sup> *Id.* at 62.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 63.

nevertheless held that the scheme in Mississippi was also exempt from the Sherman Act, due to the Mississippi legislature's delegation of discretion to the Commission.<sup>74</sup> Furthermore, the Court held that a "private party acting pursuant to an anticompetitive regulatory program need not 'point to a specific, detailed legislative authorization' for its challenged conduct."<sup>75</sup> Instead, "[a]s long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied."<sup>76</sup>

### C. The State Action Doctrine as Applied to Municipalities

In applying the state action doctrine to municipalities, the characterization of municipalities and their actions as private or public becomes crucial. After *Parker* and the establishment of the state action doctrine, municipal governments felt secure that they, too, were exempt from any antitrust liability.<sup>77</sup> It followed logically from the reasoning of *Hunter v. City of Pittsburgh* that municipal governments would be exempt from antitrust, as they are state governmental bodies.<sup>78</sup> However, in *City of Lafayette v. Louisiana Power & Light Co.*<sup>79</sup> in 1978 and *Community Communications Co. v. City of Boulder*<sup>80</sup> in 1982, the Court held that municipalities were not entitled to the same deference as states in federal antitrust law.<sup>81</sup>

Instead, in *City of Lafayette v. Louisiana Power & Light Co.*, the Court conditioned the exemption of a municipality from federal antitrust liability and cabined the exemption to the extent municipalities reflect state policy.<sup>82</sup> Therefore, the state action doctrine applies to "only

<sup>74</sup> *Id.* at 63–64.

<sup>75</sup> *Id.* at 64 (quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 415 (1978) (opinion of Brennan, J.)).

<sup>76</sup> *Id.*

<sup>77</sup> William J. Quinlan, *Do Local Government Lawyers Really Have to Worry About the Antitrust Laws? Part I*, N.Y. St. B.J., Nov. 1985, at 20, 21.

<sup>78</sup> *See supra* Section II.A.

<sup>79</sup> 435 U.S. 389 (1978).

<sup>80</sup> 455 U.S. 40 (1982).

<sup>81</sup> Quinlan, *supra* note 77, at 21. It appears that Congress agreed with the Court in holding municipal governments subject to antitrust liability by passing the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34–36 (2012). The Act prohibited monetary damages in antitrust suits against local governments or their officials, leaving only the possibility of injunctive relief. In limiting the relief permitted against local governments and their officials, Congress implicitly approved the validity of antitrust actions against local governments and their officials.

<sup>82</sup> 435 U.S. at 413 (opinion of Brennan, J.) ("Since '[m]unicipal corporations are instrumentalities of the State for the convenient administration of government within their limits,' the actions of municipalities *may* reflect state policy." (alteration in original) (emphasis added) (quoting *Louisiana ex rel. Folsom v. Mayor of New Orleans*, 109 U.S. 285, 287 (1883))).

anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service.”<sup>83</sup> The Court further defined the need of a locality acting “pursuant to state policy” in *Community Communications Co. v. City of Boulder*.<sup>84</sup> In *Boulder*, the Court explicitly rejected the proposition that the granting of home rule<sup>85</sup> to a locality was sufficient to support the proposition that the locality was acting “pursuant to state policy.”<sup>86</sup>

In *Town of Hallie v. City of Eau Claire*,<sup>87</sup> the scope of the state action doctrine as applied to local governments was further clarified and expanded via the adoption of a “foreseeable result” test.<sup>88</sup> The Court applied a modified form of the *Midcal* test, which had been articulated five years previously. The second prong—whether the state adequately supervises the organization—is always deemed fulfilled,<sup>89</sup> but the first prong—whether the organization is acting in furtherance of a clearly articulated state policy—remains open to inquiry. Instead of the requirement that the state have a policy to displace competition via regulation or monopolistic public services as described in *Lafayette*, a local government need only be acting in a manner that is a “foreseeable result” of the powers granted the local government.<sup>90</sup>

At issue in *Hallie* was the City of Eau Claire’s monopolization of sewage services. Eau Claire built a sewage treatment facility, and being the only such facility in the area, it exercised a monopoly over sewage services in general by tying the provision of sewage treatment to the provision of sewage collection and transportation services.<sup>91</sup> Eau Claire also required that the neighboring towns agree to be annexed in order to use the sewage

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<sup>83</sup> *Id.*

<sup>84</sup> 455 U.S. 40 (1982).

<sup>85</sup> Home rule allows for cities to enjoy a limited measure of autonomy. For a more in-depth discussion of home rule, see *infra* notes 134–40 and accompanying text.

<sup>86</sup> 455 U.S. at 52–53.

<sup>87</sup> 471 U.S. 34 (1985).

<sup>88</sup> See Quinlan, *supra* note 77, at 26; Bradley S. Copeland, Note, *Town of Hallie v. City of Eau Claire: Expanding Antitrust Immunity Under the State Action Exemption*, 17 ENVTL. L. 275, 305–06 (1987).

<sup>89</sup> *Hallie*, 471 U.S. at 47 (“Where the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals. This danger is minimal, however, because of the requirement that the municipality act pursuant to a clearly articulated state policy. Once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality’s execution of what is a properly delegated function.”).

<sup>90</sup> *Id.* at 42.

<sup>91</sup> *Id.* at 36–37.

treatment facility.<sup>92</sup> Even though nothing in the state statute authorizing Eau Claire to construct sewage facilities directly spoke to anticompetitive behavior,<sup>93</sup> the Court held that its anticompetitive behavior was exempt from liability.<sup>94</sup> Thus, no clearly articulated intent on the part of the state to authorize anticompetitive behavior on the part of the local government was necessary. Instead, anticompetitive behavior need only be a foreseeable result of the powers granted to the municipality by the state for the state action doctrine to apply.

The apogee of the “foreseeable result” test as applied to municipal immunity to antitrust law came in *City of Columbia v. Omni Outdoor Advertising, Inc.*<sup>95</sup> from a divided court.<sup>96</sup> At issue in *Omni* was anticompetitive behavior conducted by the City of Columbia, South Carolina that granted a single billboard company—Columbia Outdoor Advertising, Inc. (COA)—a virtual monopoly on billboards in the city.<sup>97</sup> Specifically, city officials used their land use powers to help COA maintain its dominant share of the billboard market in Columbia.<sup>98</sup> After a state court struck down the city’s first attempt to give COA the competitive advantage it wanted as unconstitutional, the city enacted an ordinance that passed constitutional muster, but still heavily favored COA.<sup>99</sup> It introduced spacing requirements between billboards, which restricted the areas where Omni could build new ones in relation to the billboards already installed by COA.<sup>100</sup> In holding the anticompetitive behavior on the part of the city exempt from antitrust liability, the Court found that the behavior was a “foreseeable result” of the zoning powers granted to the city.<sup>101</sup> Justice Scalia, writing for the majority, stated:

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

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<sup>92</sup> *Id.* at 37.

<sup>93</sup> See WIS. STAT. §§ 62.18(1), 66.069(2)(c) (1981–1982).

<sup>94</sup> *Hallie*, 471 U.S. at 47.

<sup>95</sup> 499 U.S. 365 (1991).

<sup>96</sup> The Court was divided 6–3 in favor of immunity for the locality in question. *Id.* at 384–85. In contrast, *Hallie* was decided unanimously. 471 U.S. at 35.

<sup>97</sup> *Omni*, 499 U.S. at 367–68.

<sup>98</sup> *Id.* at 368.

<sup>99</sup> The original ordinance required that every new billboard be approved by the city council. This violated the state and federal constitutions on the grounds that it gave too much discretion to the council. *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 373.

of zoning) necessarily protects existing billboards against some competition from newcomers.<sup>102</sup>

At particular issue in *Omni* was the relevance of corruption in holding a municipality's actions exempt from antitrust liability.<sup>103</sup> Justice Scalia dismissed any concerns of corruption as irrelevant on the basis that "virtually all regulation benefits some segments of the society and harms others" and refused to substitute the Court's judgment for that of the city.<sup>104</sup> Justice Scalia derided *Omni*'s characterization of the new ordinance as a "conspiracy," and instead recast it as an "agreement" that is part of any political decision made by a city.<sup>105</sup>

Justice Stevens (joined by Justices White and Marshall), however, disagreed with the characterization of such agreements.<sup>106</sup> Instead, he sought to draw a line between actions taken that are "advocated by a private lobbyist" and those that "elevate particular private interests over the general good."<sup>107</sup> Justice Stevens would have left to juries the determination of which side of this line a city's actions fell, dismissing the majority's "fear that juries are not capable of recognizing the difference."<sup>108</sup>

#### D. Application of the State Action Doctrine in *Phoebe Putney*

Exploring the case law before *Phoebe Putney*, the history of municipal antitrust shows the difficulty of the Court in characterizing municipalities as either public or private. Holding municipalities liable for antitrust violations in *Lafayette* and *Boulder*, the Court deviated from the "creature of the state" position that has been the basis of the federal-local relationship. It seems as though the Court attempted to return at least partially to the "creature of the state" treatment of localities in *Hallie* by expanding antitrust immunity beyond what was intimated in *Lafayette* and *Boulder*. But, with its application of a modified *Midcal* test—a test designed to analyze the actions of private corporations—the Court betrayed an inability to clearly place municipalities on either side of the private-public divide. The Court still required the demonstration of a state-

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 376.

<sup>104</sup> *Id.* at 377.

<sup>105</sup> *Id.* at 375 ("[F]or purposes of the exception, 'conspiracy' means nothing more than an agreement to impose the regulation in question. Since it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them, such an exception would virtually swallow up the *Parker* rule: All anticompetitive regulation would be vulnerable to a 'conspiracy' charge.")

<sup>106</sup> *Id.* at 394–95 (Stevens, J., dissenting).

<sup>107</sup> *Id.* at 395.

<sup>108</sup> *Id.* at 395–96.



articulated policy—the municipality is not fully public—while eliminating the need of active state supervision—the municipality is not fully private. *Omni* marked a decided step on the part of six members of the Court toward treating the municipality as a fully public entity, applying a rational review-like deference to the local government (as it would to state legislation<sup>109</sup>), though the Court’s adherence to the *Hallie* framework showed that the Court was not completely willing to decisively place municipalities on the public side of the divide.

Despite the clarification regarding the state action doctrine and municipal governments the Court provided in *Hallie* and expanded upon in *Omni*, the circuit courts had difficulty applying the “foreseeable result” test.<sup>110</sup> The tension between the “foreseeability” articulated in *Hallie* and the rejection of broad grants of power (such as home rule charters) as sufficient to shield municipalities from antitrust liability in *Boulder* left the lower courts unable to consistently apply the state action doctrine to municipalities. Against this uncertainty, the Supreme Court granted certiorari to review the Eleventh Circuit’s application of a more liberal foreseeability test in *Phoebe Putney* and ultimately decided to apply a restrictive form of the state action doctrine to municipalities.

In defending itself from the FTC’s antitrust claims, the Hospital Authority of Albany–Dougherty County did not point merely to the broad delegations of the power from the state to support its claim of acting pursuant to a clearly articulated state policy.<sup>111</sup> It also pointed to the state constitutional amendment that authorized the creation of hospital authorities.<sup>112</sup> The amendment was interpreted by Supreme Court of Georgia as being enacted for “[t]he purpose of . . . authoriz[ing] counties and municipalities to create an organization which could carry out and

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<sup>109</sup> See, e.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955).

<sup>110</sup> Compare *Bankers Ins. Co. v. Fla. Residential Prop. & Cas. Joint Underwriting Ass’n*, 137 F.3d 1293, 1298 (11th Cir. 1998) (holding that the mere ability to enter into contracts creates the foreseeable result of using that contract power in anticompetitive ways), with *Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1*, 171 F.3d 231, 236 (5th Cir. 1999) (refusing to hold the “foreseeable result” standard fulfilled merely via the granting of power to contract and enter joint ventures). See also TODD J. ZYWICKI ET AL., FTC, OFFICE OF POLICY PLANNING, REPORT OF THE STATE ACTION TASK FORCE 25–34 (2003), [http://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/report-state-action-task-force/stateactionreport.pdf](http://www.ftc.gov/sites/default/files/documents/advocacy_documents/report-state-action-task-force/stateactionreport.pdf) [<http://perma.cc/4JQM-YTCD>] (summarizing various circuit cases and the inconsistencies between them).

<sup>111</sup> See GA. CODE ANN. § 31-7-75(4) (2015) (granting the power to purchase “projects,” which are defined by § 31-7-71(5) to include hospitals); *id.* § 31-7-75(7) (granting the power “[t]o lease . . . for operation by others any project”); *id.* § 31-7-75(10) (granting the power “[t]o establish rates and charges for the services and use of the facilities of the authority”).

<sup>112</sup> *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1007–08 (2013).

make more workable the duty which the State owed to its indigent sick.”<sup>113</sup> To that end, the Hospital Authorities Law specified that hospital authorities are “deemed to exercise public and essential governmental functions.”<sup>114</sup>

The Eleventh Circuit, in affirming the district court’s dismissal of the FTC’s claims for a failure to state a claim due to the state action doctrine, found that anticompetitive behavior was a foreseeable result of the powers granted the Authority due to the “impressive breadth” of those powers.<sup>115</sup> The court relied on more than the mere grant of power to purchase and operate hospitals and to enter into contracts to support immunity for the Authority, noting that the Authority was granted the powers to establish rates of service, sue or be sued, own property as a proprietary owner, borrow money, and exercise eminent domain.<sup>116</sup> Because of these myriad powers, the court stated:

[T]he Georgia legislature must have anticipated anticompetitive harm when it authorized hospital acquisitions by the authorities. It defies imagination to suppose the legislature could have believed that every geographic market in Georgia was so replete with hospitals that authorizing acquisitions by the authorities could have no serious anticompetitive consequences.<sup>117</sup>

Thus, the court held that the Authority was acting in pursuance of a clearly articulated state policy and exempt from antitrust liability.<sup>118</sup>

The Supreme Court granted certiorari to review the Eleventh Circuit’s application of a more liberal foreseeability test in *Phoebe Putney* in light of lower courts’ inability to consistently apply the state action doctrine to municipalities. While the Eleventh Circuit had developed a broad conception of the state action doctrine as applied to municipalities, other courts adopted stricter standards. Some had injected federalism concerns, refusing to recognize municipalities as true state institutions, with some arguing that a strict foreseeability test would require states’ grants of authority to actively disclaim antitrust immunity.<sup>119</sup>

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<sup>113</sup> DeJarnette v. Hosp. Auth. of Albany, 23 S.E.2d 716, 723 (Ga. 1942).

<sup>114</sup> Ga. Code Ann. § 31-7-75.

<sup>115</sup> FTC v. Phoebe Putney Health Sys., Inc., 663 F.3d 1369, 1376 (11th Cir. 2011), *rev’d*, 133 S. Ct. 1003 (2013).

<sup>116</sup> *Id.* at 1376–77.

<sup>117</sup> *Id.* at 1377.

<sup>118</sup> *Id.*

<sup>119</sup> *See, e.g.*, Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1, 171 F.3d 231, 236 (5th Cir. 1999) (“To infer a policy to displace competition from, for example, authority to enter into joint ventures or other business forms would stand federalism on its head. A state would henceforth be required to disclaim affirmatively antitrust immunity, at the peril of creating an instrument of local government with power the state did not intend to grant.”).

The Supreme Court reversed the Eleventh Circuit, rejecting its expansive reading of the state action doctrine and finding that the Hospital Authority was not protected by the state action doctrine.<sup>120</sup> In reversing the Eleventh Circuit, the Court did not only limit the more expansive readings of the state action doctrine (i.e., readings that applied the state action doctrine solely on the basis of a municipality being granted the power to contract or enter a particular market), but circumscribed the availability of immunity to municipalities even further. The Court compared the powers granted to the Authority to merely “mirror general powers routinely conferred by state law upon private corporations,” rejecting the Eleventh Circuit’s characterization of them.<sup>121</sup> Instead, the Court characterized the ability to purchase hospitals as “only a relatively small subset of the conduct permitted” by Georgia’s Hospital Authorities Law.<sup>122</sup> In doing so, the Court ignored the special powers granted to the Authority that are unavailable to public corporations as irrelevant to whether the Authority could “exercise [its] general corporate powers, including their acquisition power, without regard to negative effects on competition.”<sup>123</sup> Thus, the Court analyzed the Hospital Authority as more analogous to a private corporation than a public government entity, and greatly circumscribed municipalities’ ability to exercise police power to provide for the general welfare of its people.

### III. THE IMPACT OF *PHOEBE PUTNEY* ON THE ABILITY OF STATES TO EXERCISE THEIR GOVERNMENTAL POWERS THROUGH MUNICIPALITIES

Part II showed that the real debate in the application of the state action doctrine to municipalities is better understood as an analysis of whether the municipality is considered a private or public entity. In *Phoebe Putney*, the Court decided that a municipality providing healthcare by purchasing hospitals was not an exerciser of governmental power, but more akin to a private corporation. Thus, the Supreme Court impeded the ability of states to exercise their governmental powers through municipalities by limiting how states can delegate powers to them.

The basis of all state power is the so-called police power, which is generally stated to be the power to provide for the health, safety, and

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<sup>120</sup> *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013).

<sup>121</sup> *Id.* at 1011.

<sup>122</sup> *Id.* at 1014.

<sup>123</sup> *Id.* at 1014–15. In contrast, the Court distinguished *Omni*—which held that the exercise of zoning powers was exempt from antitrust liability even when anticompetitive effects result—by describing “displace[ment of] unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition” as inherent to zoning. *Id.* at 1013 (quoting *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 373 (1991)).

morals of a state's residents or citizens.<sup>124</sup> The police power is, however, reserved to the states, without regard to the existence of local governments.<sup>125</sup> In theory, the states should be able to delegate that power to subdivisions of itself, such as to municipalities, which exist solely as part of state law, having no existence in the federal system. Through over one hundred years of lawmaking, states have shaped the boundaries of local government power and those boundaries have not always remained the same. However, with *Phoebe Putney*, the Court has impeded the process of determining the rightful powers of municipalities and instead forced upon the states its own conception of which powers are properly local and which must be retained by the states qua states. Part III will first trace the broad developments of local government law in the United States and then discuss *Phoebe Putney* as an intrusion by the federal government into this area of purely state law that limits the ability of states to determine the correct division of power between state and local governments.

#### A. *The Development of Contemporary Municipal Law*

The most significant development in municipal law is the shift from Dillon's Rule to home rule, which is also the clearest example to demonstrate the proposition that the division of power between state and local governments has not remained constant. In the mid-nineteenth century, John F. Dillon articulated the theory of local government expressed in *Hunter v. City of Pittsburgh* in what came to be known as Dillon's Rule.<sup>126</sup> Not only did it espouse the conception of the local government as merely a creature of the state that created it by declaring local governments only have the powers granted them expressly by the state, but it also sought to limit local government power even further, requiring that the powers expressly granted to municipal corporations be

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<sup>124</sup> Various formulas of what the police power entails can be found in various sources. See, e.g., *Police Power*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "police power" as "[t]he inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice"); Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 375 (1921) (defining "police powers" as those that broadly "relate to the safety, health, morals and general welfare of the public").

<sup>125</sup> See U.S. CONST. amend. X ("The 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." (emphasis added)). While perhaps an argument that the Tenth Amendment also provides that these powers are reserved "to the people" and thus to some division of government smaller than the states, the amendment has never been interpreted that way. For a discussion of this interpretation of the Tenth Amendment, see Jake Sullivan, *The Tenth Amendment and Local Government*, 112 YALE L.J. 1935 (2003).

<sup>126</sup> Frug, *supra* note 27, at 1109.

construed narrowly.<sup>127</sup> While Dillon's Rule was originally articulated as a description of contemporary municipal law, it became the law.<sup>128</sup> In fact, Dillon's Rule became the default rule of local government law in the United States, affecting even the treatment of local governments in states where it has been expressly rejected.<sup>129</sup>

Those unsatisfied by the limitations placed on local governments due to Dillon's Rule have formulated two major means to counteract the rule and create more opportunity for self-determination and self-governance at the local level. The first attempt was the prohibition against local or special legislation.<sup>130</sup> Laws preventing local or special legislation prevent states from passing legislation specifically targeted at particular municipalities.<sup>131</sup> In this way, it seeks to reduce the state's ability to interfere with local governments. This prohibition, however, has become almost completely ineffective and instead merely survives as a drafting guide for state legislatures.<sup>132</sup> So long as laws are written in general terms, they are seen as not violating the prohibition, even if only one locality would ever be affected by the legislation.<sup>133</sup> Thus, the prohibition on local or special legislation, while in theory running contrary to Dillon's Rule, in fact meshes quite neatly with it. It does nothing to expand the power or autonomy of local governments, and it does not challenge the basic

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<sup>127</sup> JOHN F. DILLON, 1 COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS, § 237 (5th ed. 1911); see also Frug, *supra* note 27, at 1109–12; Note, *Dillon's Rule: The Case for Reform*, 68 VA. L. REV. 693, 693–94 (1982).

<sup>128</sup> Dillon's Rule has also been interpreted as a reflection of contemporary distrust of local politics and the corruption of local government. Frug, *supra* note 27, at 1109–10.

<sup>129</sup> FRUG ET AL., *supra* note 39, at 148–49.

<sup>130</sup> See David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2286–87 (2003).

<sup>131</sup> See *id.*

<sup>132</sup> See *id.* at 2288.

<sup>133</sup> See 1 JOHN MARTINEZ, LOCAL GOVERNMENT LAW § 3:31, Westlaw (database updated Oct. 2015). For example, in Pennsylvania, the legislature has divided its cities into classes based on population. 53 PA. CONS. STAT. ANN. § 101 (2015). First-class cities are defined as having more than one million residents. *Id.* Second-class cities are defined as having between 250,000 and one million residents. *Id.* The effect of this tier system is to make Philadelphia the only first-class city and Pittsburgh the only second-class city. See PA. LOCAL GOV'T COMM'N, PENNSYLVANIA LEGISLATOR'S MUNICIPAL DESKBOOK 16–17 (4th ed. 2014), [http://www.lgc.state.pa.us/Reports/deskbook14/complete\\_fourth\\_edition.pdf](http://www.lgc.state.pa.us/Reports/deskbook14/complete_fourth_edition.pdf) [<https://perma.cc/F6W5-A949>]. Thus, if the state legislature wants to target either of those two cities with a specific piece of legislation, it need only write the legislation to affect all first- or second-class cities. See MARTINEZ, *supra*, at § 3:31. Less complicated schemes are also effective. See, e.g., *Chi. Nat'l League Ball Club, Inc. v. Thompson*, 483 N.E.2d 1245, 1252 (Ill. 1985) (holding that because the legislation at issue was drafted in general terms, there was no violation of Illinois's prohibition on special legislation despite the legislation at issue being clearly tailored to, and only affecting, Wrigley Field); *Morial v. Smith & Wesson Corp.*, 785 So. 2d 1, 19 (La. 2001) (holding that there was no violation of Louisiana's prohibition on local or special legislation when the legislation at issue could only ever affect New Orleans's suit against firearm manufacturers, which was contemporaneously working its way through the courts, because it was drafted in general terms).

principle of Dillon's Rule that localities are completely subservient to the state.

In contrast, the home rule initiative is a fundamental rejection of Dillon's Rule and has been moderately successful at creating local autonomy.<sup>134</sup> Home rule has two components: initiative and immunity.<sup>135</sup> Initiative is the essential feature of home rule. Instead of requiring a specific grant of power the way Dillon's Rule dictates, localities are granted power to create legislation in broader fields. Immunity goes further than mere initiative, preventing the state from overriding decisions made by localities. In this way, immunity is the only real source of true autonomy in American municipal law.<sup>136</sup>

However, as with all local government in the federal system as construed along the lines of *Hunter v. City of Pittsburgh*, home rule initiatives must be enacted by the states in order for a local government to benefit from them. Some states have created home rule via statute,<sup>137</sup> while others have written it into their constitutions,<sup>138</sup> giving greater protection to home rule powers and more closely mirroring the position of the states within the federal system. But in both the federal–state relationship and the state–locality relationship, the state is the source of the general police power.<sup>139</sup> Thus, the federal government only has the powers granted to it by the Constitution, and home rule localities only have the powers given to them by the state's home rule law, whether it is by statute or constitution.<sup>140</sup>

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<sup>134</sup> See Frug, *supra* note 27, at 1062–63.

<sup>135</sup> For a discussion of varying conceptions of these two powers, see generally Barron, *supra* note 130.

<sup>136</sup> See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 10–11 (1990).

<sup>137</sup> E.g., KY. REV. STAT. ANN. § 82.082 (West 2015); Home Rule Act of 1917, ch. 152, 1917 N.J. LAWS 319 (codified as amended at N.J. STAT. ANN. §§ 40:42 to :62 (West 2015)).

<sup>138</sup> E.g., CAL. CONST. art. XI, § 5; MINN. CONST. art. XII, § 4; MO. CONST. art. VI, § 19.

<sup>139</sup> See *supra* notes 124–25 and accompanying text.

<sup>140</sup> However, even within the context of home rule, there are various restrictions on local government power. First, with regard to initiative power, localities have to show that their initiatives fall within the contours of the home rule powers given them. See Barron, *supra* note 130, at 2347–48. There are also various general exceptions to home rule initiative that can greatly limit the power of localities, depending on how the exceptions are construed. See *id.* at 2347. These exceptions include anything preempted by the state (i.e., the locality cannot act where the state already has), anything of statewide concern, and private law. All of these exceptions do not have clear borders, and judges can have a large impact on the extent of a locality's home rule power merely by characterizing challenged legislation one way or another. Second, not all states that have home rule grant immunity to their localities, and as with the initiative power, immunity powers must still fall within the contours of the home rule powers given to localities. Also, as with initiative, there is a general exception for issues of statewide concern. See Frug, *supra* note 27, at 1117. The border between issues of statewide and local concern is again an ill-defined one, leaving the true extent of the home rule powers enjoyed by localities with immunity subject to judges' characterizations of their actions.

The progression from Dillon’s Rule to home rule shows a progression in states’ attempts to shape local government law and the ways in which the state police power is exercised through its municipalities. The realm of powers given to local governments has not remained constant and is not consistent among the states.

*B. Phoebe Putney as an Intrusion into State-Made Local Government Law*

Despite the history of American local government law and the attempts by states to shape the contours of local government power, in *Phoebe Putney* and its application of the state action doctrine, the Court implicitly denied the ability of states to delegate certain powers to municipalities even if the power in question gets to the heart of the state’s police power to provide for the health, safety, and welfare of its citizens. This Section analyzes the ways in which the Court’s approach to the state action doctrine in *Phoebe Putney* affects local government law.

*1. Limiting the Powers Municipalities Can Exercise.*—The most direct implication of the Court’s approach to the state action doctrine in *Phoebe Putney* is a limitation on the powers municipalities can exercise. The Court disregarded the governmental character of services provided by the local government-created corporation at issue. The court painted the Hospital Authority of Albany–Dougherty County broadly, treating it as an ordinary corporation and focusing on its “general corporate powers.”<sup>141</sup> The closest the court got to analyzing the governmental nature of the Hospital Authority was an analysis of the *powers* granted to hospital authorities that have a governmental character, rather than the *goals* of the state legislature in authorizing its creation.<sup>142</sup> Acknowledging the Hospital Authority’s argument that it was “granted unique powers and responsibilities to fulfill the State’s objective of providing all residents with access to adequate and affordable health and hospital care,”<sup>143</sup> the Court declined to seriously consider the clear goal of the Georgia Legislature to empower local governments to provide for the healthcare of their residents. Instead, the

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<sup>141</sup> *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1015 (2013) (“We have no doubt that Georgia’s hospital authorities differ materially from private corporations that offer hospital services. But nothing in the Law or any other provision of Georgia law clearly articulates a state policy to allow authorities to exercise their general corporate powers, including their acquisition power, without regard to negative effects on competition.”).

<sup>142</sup> *See id.* To be sure, the Court acknowledged the legislative objectives of the Hospital Authorities Law, but failed to use these objectives to inform the governmental character of the Authority. The legislative objectives were used only to determine whether the Authority’s actions were a foreseeable result from those objectives. *See id.*

<sup>143</sup> *See id.* at 1014.

Court focused exclusively on the grants (e.g., eminent domain) and limitations (e.g., nonprofit status) of power given to hospital authorities.<sup>144</sup>

As discussed at the beginning of this Part, in theory, states should be able to delegate the police power to subdivisions of itself, and in the case of *Phoebe Putney*, the Georgia Constitution provides that “the General Assembly may . . . authorize local governments . . . to exercise police powers which do not conflict with general laws.”<sup>145</sup> While the Hospital Authorities Law does not explicitly state that it is conferring any general police power to hospital authorities, the hospital authorities created pursuant to the law must necessarily be exercising some portion of the state’s retained police power. At issue is merely the scope of that power. Given that health is a traditional concern of a state’s police powers, that hospital authorities by definition are concerned with health, and that the Hospital Authorities Law was enacted specifically to serve the purpose of improving the health of Georgia’s citizens, it would be hard to imagine the Court’s decision in *Phoebe Putney* as anything other than federal antitrust law impinging on a state’s power to regulate its own economy.

While the Court cast its argument in terms of the foreseeability of hospital authorities to use their powers to pursue anticompetitive behaviors, it did not convincingly distinguish the supposed unforeseeability of *Phoebe Putney* with the supposed foreseeability of *Hallie* or *Omni*. Perhaps in *Hallie* a genuine foreseeability argument can be made to justify the application of the state action doctrine.<sup>146</sup> But in *Omni*, it seems no more feasible that the state foresaw and thus intended a broad grant of zoning powers to local governments be used to enable a private company to establish a billboard monopoly. Instead, the most logical distinction between *Phoebe Putney* on one hand and *Hallie* and *Omni* on the other is not the foreseeability of the anticompetitive behavior, as the Court claimed, but rather the nature of the government services provided in each instance.

It seems as though the Court is uncomfortable with the allocation to local governments of anything other than those powers traditionally seen as the purview of local governments. Sewage systems (*Hallie*) have been traditionally controlled by local governments and seen as a purely local

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<sup>144</sup> See *id.* at 1015.

<sup>145</sup> GA. CONST. art. III, § VI, ¶ 4(a).

<sup>146</sup> See *Town of Hallie v. City of Chippewa Falls*, 314 N.W.2d 321, 324–25 (Wis. 1982) (finding a broad ability of local governments to only provide sewage services to areas within their municipal boundaries and to condition the provision of such services to outlying areas upon annexation).



government function,<sup>147</sup> and there is no more paradigmatic local government power than zoning (*Omni*), aside from perhaps education.<sup>148</sup>

Such a reading of *Phoebe Putney* becomes even more plausible in light of the current national attitude towards healthcare. If there is no more paradigmatic local government concern than zoning, healthcare is quickly becoming viewed as a paradigmatically “big” problem.<sup>149</sup> Indeed, healthcare has gained such prominence on the national stage that the Obama Administration’s biggest impact on the legislative landscape of the United States will likely be the Affordable Care Act (ACA),<sup>150</sup> which deals with healthcare concerns on a national level.<sup>151</sup> At the very least, by providing that states may set up their own health insurance exchanges instead of participating in a national exchange,<sup>152</sup> the ACA shows that healthcare is at least a state-level, if not a national-level, concern. In *Phoebe Putney*, the Court seems to have fully embraced this view of healthcare by overriding Georgia’s valid policy choice of delegating power over healthcare to its localities.<sup>153</sup>

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<sup>147</sup> Briffault, *supra* note 136, at 15 (noting the role of local governments in the development of sewage services in the eighteenth and nineteenth centuries). Indeed, the Seventh Circuit’s ruling in *Hallie* reasoned that the state supervision prong of the *Midcal* test did not apply in this case in part because sewage is a “traditional municipal function.” *Town of Hallie v. City of Eau Claire*, 700 F.2d 376, 384 (7th Cir. 1983) (reasoning that state supervision over traditional municipal functions “would erode the concept of local autonomy”).

<sup>148</sup> Briffault, *supra* note 136, at 3 (“[E]ducation and zoning are the principal operations of local governments.”); *see also* *Scott v. City of Sioux City*, 736 F.2d 1207, 1214 (8th Cir. 1984) (refusing to decide whether the state supervision prong of the *Midcal* test applied when a local government exercised powers outside of traditional municipal functions since the power at issue—zoning—“is a traditional governmental function designed to protect public health and safety”).

<sup>149</sup> *See, e.g.*, Wasif Ali Khan, *Accountable Care Organizations: A Response to Critical Voices*, 14 DEPAUL J. HEALTH CARE L. 309, 338 (2012) (“It is unequivocally true that subpar healthcare quality is a national issue.”); Alan G. Williams, *The Cure for What Ails: A Realistic Remedy for the Medical Malpractice “Crisis”*, 23 STAN. L. & POL’Y REV. 477, 491 (2012) (“[H]ealthcare and its associated costs have become national issues . . .”).

<sup>150</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

<sup>151</sup> *See* J.J. Feinauer, *What Will Obama’s Legacy Be?*, DESERET NEWS (Oct. 30 2014), <http://www.deseretnews.com/article/865614302/What-will-Obamas-legacy-be.html> [<http://perma.cc/3UDZ-EQXJ>] (“[The Affordable Care Act is] largely considered to be Obama’s signature legislation.”).

<sup>152</sup> 42 U.S.C. § 18041(c)(1) (2012); *see also* *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2665 (2012).

<sup>153</sup> In light of the antitrust setting of *Phoebe Putney*, it is also interesting to note that much of the scheme of the Affordable Care Act is couched in promoting competition in the healthcare market. *See* Megan Slack, *Affordable Care Act Increases Insurance Choices*, WHITE HOUSE BLOG (May 30, 2013, 12:46 PM), <http://www.whitehouse.gov/blog/2013/05/30/affordable-care-act-increases-insurance-choices> [<http://perma.cc/KBL8-CFRX>]. While the focus of the Act is increasing competition between insurance providers (not hospitals), the general emphasis on competition could perhaps explain the application of antitrust laws in *Phoebe Putney* in spite of the state action doctrine.

If *Phoebe Putney* is properly understood as pigeonholing local government antitrust immunity into only areas of traditional local government concern, the Court is denying local governments a rightful place in the American federal system. Since the state action doctrine is based on the power of a state to regulate its own economy, which is an inherent part of the police power enjoyed by the states, such an interpretation of the antitrust exemption would be an implicit denial of a general local governmental role in economic regulation, regardless of the powers granted to localities by the state. Localities cannot be given broad autonomy via home rule due to *Boulder*, and can only act in pursuance of narrowly circumscribed state-articulated policies due to *Phoebe Putney*.

2. *Stifling Local Government Innovation*.—Local government innovation will be stifled if local governments are only allowed to exercise governmental functions in areas of traditional local concern. While it has been argued that states themselves have stifled local government innovation,<sup>154</sup> Supreme Court jurisprudence that limits the governmental character of municipalities will only further stifle such innovation. Ironically, this historical-based approach to which powers local governments can truly exercise ignores the history of innovation by local governments. As Professor Richard Briffault has noted, local governments have provided myriad innovations in public services, despite legal restrictions on their power:

Even during the late nineteenth and early twentieth centuries—the heyday of Dillon’s Rule, the era of plenary state power and the unsteady beginnings of home rule—American city governments pioneered in public health, education, parks, libraries, water supply, sanitation and sewage removal, street paving and lighting and mass transit, building the infrastructure that still serves modern urban centers.<sup>155</sup>

It seems odd, therefore, to rely on a preconception of valid local government power to determine the application of antitrust laws. Such a distinction becomes even more puzzling considering the history of hospitals as institutions themselves. Public hospitals have been present in the United States since at least the 1730s and were of local concern since their inception.<sup>156</sup> Originally intended to provide medical care for only the poor and indigent, they eventually became providers of medical care to the

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<sup>154</sup> See, e.g., GERALD FRUG & DAVID J. BARRON, *CITY BOUND: HOW STATES STIFLE URBAN INNOVATION* (2008).

<sup>155</sup> Briffault, *supra* note 136, at 15.

<sup>156</sup> Lewis R. Goldfrank, *The Public Hospital*, 24 *FORDHAM URB. L.J.* 703, 708 (1997).

entire community.<sup>157</sup> Thus, hospitals and healthcare have traditionally been of local concern. Accordingly, it seems incongruous to strip local governments of the power to provide healthcare for its residents merely because of the increasing focus on healthcare as a national concern.

3. *The Unanimity of Phoebe Putney*.—Also striking in *Phoebe Putney* is the unanimity of the decision. No prior Supreme Court decision holding that a local government violated federal antitrust law had ever been decided unanimously. *Lafayette*, which was the initial case to find that local governments are subject to federal antitrust laws, was decided only by a plurality decision, and four Justices dissented.<sup>158</sup> Justice Rehnquist, joined by Chief Justice Burger and Justice O’Connor, dissented in *Boulder*.<sup>159</sup> In both cases, the dissenting Justices expressed concern for the erosion of municipalities’ status as governmental bodies.<sup>160</sup> Perhaps even more striking is that Justice Scalia, who wrote the majority opinion in *Omni*, joined with the rest of the court in finding the Hospital Authority of Albany–Dougherty County subject to federal antitrust law. In *Omni*, Justice Scalia rejected the idea that local government actions should be subjected to any more scrutiny than actions taken directly by the state.<sup>161</sup> It is true that both *Omni* and *Phoebe Putney* were supposedly decided on the question of foreseeability and did not explicitly rely on any sort of inquiry into the nature of the actions taken by the local governments, and thus are reconcilable. However, as noted above, the standard of foreseeability seems to be much more narrowly construed than in *Omni*, and it is difficult to explain this narrowness on grounds other than the character of the local government’s actions.<sup>162</sup>

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<sup>157</sup> See *id.* at 708.

<sup>158</sup> *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 390 (1978).

<sup>159</sup> *Cnty. Comm’ns Co. v. City of Boulder*, 455 U.S. 40, 41 (1982).

<sup>160</sup> *Lafayette*, 435 U.S. at 426 (Stewart, J., dissenting) (“The petitioners are governmental bodies, not private persons, and their actions are ‘act[s] of government’ which . . . are not subject to the Sherman Act.”); *Boulder*, 455 U.S. at 60 (Rehnquist, J., dissenting) (“[T]he Court treats a political subdivision of a State as an entity indistinguishable from any privately owned business.”).

<sup>161</sup> 499 U.S. 365, 374–75 (1991) (rejecting the suggestion that there be a “conspiracy exception” to the state action doctrine).

<sup>162</sup> Despite the unanimity of the decision and the unclear application of the foreseeability test, it is conceivable that *Phoebe Putney* does not signal a notable shift in the Court’s view of local government. While the Court explicitly declined to characterize the Hospital Authority’s actions as proprietary and not governmental, *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 n.4, 1011 n.5 (2013) (refusing to consider the creation of a “market participant” exception to the state action doctrine because the issue was not raised by the parties as well as refusing to consider whether the Hospital Authority is properly a governmental subdivision or a private corporation), it is conceivable that the means used by the Hospital Authority influenced the Court’s characterization of its actions as unforeseeable by the state. The Hospital Authority created private nonprofit corporations to manage the hospitals, *id.* at 1008, which makes the anticompetitive behavior challenged by the FTC seem much less

4. *Resulting Lack of Clarity.*—The uneven application of the foreseeability test seen in the divergence between *Phoebe Putney* and *Omni* and the seeming reliance on character of the action at issue will create a lack of clarity as to exactly when the state action doctrine applies to municipalities. Within state law, local governments already suffer from a sort of paralysis: unsure of whether they have been empowered by the state to take a certain action, they often opt for the safer path of not acting.<sup>163</sup> Adding uncertainty surrounding the application of federal law to local governments, it is only natural that additional paralysis will result. Given the lack of clarity of the foreseeability test in the application of the state action doctrine to local governments, local governments will be unsure of whether their actions will violate federal antitrust laws and thus will tend closer towards simply choosing not to act. Even more uncertainty is created by pigeonholing the analysis into the foreseeability test and declining to clarify whether the nature of the governmental subdivision in question or the nature of its actions impacts the state action doctrine analysis.

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In sum, the Court seems to be ensuring that municipalities' relationship with the private–public distinction always gives municipalities the short end of the stick. As seen in *Phoebe Putney*, treating municipalities as private in character can have severe limits on the ability of municipalities to exercise their state-given powers. Nonetheless, some commentators have advocated shaping municipalities more along the lines of ordinary corporations to increase city power.<sup>164</sup> Similarly, some reformers who helped implement the concept of home rule reject the “creature of the state” concept of local government in favor of a return to its private corporate origins.<sup>165</sup> Indeed, if municipalities were private

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governmental in character. Furthermore, the Court suggested that Georgia merely granted the Hospital Authority “simple permission to play in [the] market.” *Id.* at 1013 (quoting *Kay Elec. Coop. v. Newkirk*, 647 F.3d 1039, 1043 (10th Cir. 2011)). If the Hospital Authority was only given “simple permission to play in [the] market,” it would be difficult to describe the Authority as anything other than a proprietary actor. Even taking a narrow view of the holding in *Phoebe Putney*, however, does not completely mitigate the negative impact on local government powers. As discussed above in Section III.A, state law has often been unclear as to the contours of local government power, with the legality of a local ordinance sometimes turning on a judge’s characterization of the ordinance as of local or statewide concern.

<sup>163</sup> See David J. Barron et al., *Dispelling the Myth of Home Rule: Local Power in Greater Boston* 9–12 (2004), <http://www.celfd.org/downloads/Mass.%20-%20Dispelling%20the%20Myth%20of%20Home%20Rule%20in%20Mass.pdf> [<http://perma.cc/SZUS-9NHB>].

<sup>164</sup> See, e.g., Frug, *supra* note 27, at 1141–49.

<sup>165</sup> See Barron, *supra* note 130, at 2300.

corporations instead of creatures of the state, constitutional due process protections would protect them from uncompensated takings by the state. Instead, municipalities suffer the worst of both worlds. Municipalities have retained the vulnerability of the corporation from the charter system, but are still unable to fully act as government entities. States can abolish municipalities at will as “creatures of the state,” yet municipalities do not always enjoy the immunities and powers of the state, being subject to general federal law as if they were private corporations.

#### IV. POSSIBLE SOLUTIONS TO *PHOEBE PUTNEY*

The best solution to the paralyzing effects of uncertainty in the application of the state action doctrine to local governments would be for the Court to overturn *Boulder*. Overturning *Boulder* and allowing broader grants of power—such as the granting of a home rule charter—to allow municipalities to enjoy the benefits of the state action doctrine would recognize a valid role of local governments in the American federal system. Additionally, any potential danger of local governments exercising more power than intended by the state would be mitigated by the full recognition of local governments as creatures of the state, existing and exercising any power merely at the whim of the state.

It could be argued that purely legislative control over the contours of local government power would be too unwieldy to be effective, especially given the near universal bans on special legislation that targets specific localities, and that states need to be able to police those contours via litigation the way that Georgia did in *Phoebe Putney*. This is incorrect, however, for two fundamental reasons. First, as discussed in Part III,<sup>166</sup> bans on special legislation are largely ineffective, and any barriers they create are easily overcome by carefully drafting a piece of “general” legislation. Second, analogizing to the relationship between the federal government and states should mitigate any concerns. While not always without friction or disputes over the contours of each other’s powers, the federal–state relationship shows that multiple tiers of government can function together and successfully govern.<sup>167</sup>

Also, one might argue that if *Boulder* were overturned, a different kind of *Midcal* test would have to be applied when analyzing the state action doctrine as applied to local governments. Instead of only applying the clearly articulated state policy prong, perhaps courts should instead apply a modified version of the state supervision prong. This prong was set

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<sup>166</sup> See *supra* Section III.A.

<sup>167</sup> See *supra* note 25.

aside in applying the state action doctrine to local governments due to the public nature of municipalities.<sup>168</sup> Thus, should *Boulder* be overturned, the Court's inquiry might shift to the nature of municipality at issue and whether it is suitably public.

This inquiry would become equally fraught and unclear as the current application of the state action doctrine to localities.<sup>169</sup> Additionally, because there is no federal law of what constitutes a valid local government, any such analysis of a municipality would have to turn on state law. If not, then the evil demonstrated in *Phoebe Putney* would again rear its head: the Supreme Court would be the arbiter of what powers can “validly” be delegated to local governments, and the ability of states to experiment and develop local government law will be stifled and unreasonably boxed into areas that have been thought of traditionally as of local concern.<sup>170</sup> Indeed, the Court would be going even further than the evil demonstrated in *Phoebe Putney*. Any attempt by the Court to define what is and is not a city (or any other form of municipality) would even more broadly stifle the states' ability to shape the structure of its municipalities.

Illinois has gone down the path of explicitly delegating its state action immunity to its home rule municipalities and has provided what might be a somewhat viable stopgap solution to *Phoebe Putney*.<sup>171</sup> The Illinois Municipal Code explicitly states that “[i]t is the intention of the General Assembly that the ‘State action exemption’ to the application of federal antitrust statutes be fully available to all municipalities.”<sup>172</sup> Enacted in 1983,<sup>173</sup> it has been rarely invoked, and its status, therefore, is unclear given the developments of *Omni* and *Phoebe Putney*. In fact, it could be argued

<sup>168</sup> See *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985) (“Where the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement.”).

<sup>169</sup> Further analogizing to the federal-state relationship, should courts change tack and take a fully consistent view of localities as creatures of the state, they might be hesitant to delve into what constitutes a sufficiently public institution to be considered truly governmental in the way that courts have refused to evaluate state governments, despite the Guarantee Clause. See, e.g., *Baker v. Carr*, 369 U.S. 186, 223 (1962) (“The Court has . . . refused to resort to the Guarantee Clause . . . as the source of a constitutional standard for invalidating state action.”). Especially given the general weakness of the nondelegation doctrine and the creation of local governments by exercise of a state's sovereignty, it would seem improbable that a court would find within its power the ability to invalidate any such delegations.

<sup>170</sup> See *Hallie*, 471 U.S. at 47 (implying that antitrust immunity can be applied to municipalities when acting in “execution of what is a properly delegated function”).

<sup>171</sup> Such a stopgap solution might be the best practical solution available since the unanimity of the decision in *Phoebe Putney* seemingly indicates that any overturning of *Boulder* is, at best, remote for the foreseeable future.

<sup>172</sup> 65 ILL. COMP. STAT. § 5/1-1-10 (2014).

<sup>173</sup> See Pub. Act. 83-929, § 9, 1983 ILL. LAWS 6061-62; see also Pub. Act. 84-1050, §§ 1-2, 1985 ILL. LAWS 6949-52 (amending the 1983 act).

that its status was unclear even in light of *Hallie* and *Boulder*, which seem to be the impetus for the statute's original enactment.<sup>174</sup>

A search of published cases reveals only five that give any treatment to the antitrust provisions of the statute.<sup>175</sup> None of these cases, however, directly address the reach of this general extension of the state action doctrine to municipalities, but merely use the statute to buttress the application of the doctrine to the case at hand.<sup>176</sup> For example, in *Campbell v. City of Chicago*, the Seventh Circuit applied the foreseeability test from *Hallie*, and then only briefly mentioned Illinois's express extension of the state action doctrine as "support[ing]" the foreseeability of the anticompetitive activity in question.<sup>177</sup>

Accordingly, it is unclear whether such a provision would have protected the Hospital Authority of Albany–Dougherty County in *Phoebe Putney* had Georgia pursued the same path as Illinois. If local governments are truly creatures of the state, presumably the reasoning of *Parker* that "nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state"<sup>178</sup> would permit the state to fully immunize its municipalities. At the same time, given the Supremacy Clause,<sup>179</sup> it seems odd that a state would be able to modify the reach of federal antitrust laws.<sup>180</sup> While unclear as to whether such a statute would survive a direct review by the Supreme Court, it seems as though such state legislation is the easiest way for local governments to create a stopgap solution to *Phoebe Putney* and enjoy immunity from antitrust interference in the exercise of their governmental powers.

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<sup>174</sup> See Thomas W. Kelty, *Anti-Trust Immunity Expanded: The Impact of House Bill 521*, ILL. MUN. REV., Nov. 1985, at 13–14.

<sup>175</sup> These five cases are: *Campbell v. City of Chicago*, 823 F.2d 1182, 1185 (7th Cir. 1987); *Lathrop v. Juneau & Assocs.*, 220 F.R.D. 330, 336 (S.D. Ill. 2004); *Charles Fiore Nurseries, Inc. v. Village of Long Grove*, No. 86 C 2339, 1986 WL 10372, at \*4 (N.D. Ill. Sept. 16, 1986); *Wellwoods Dev. Co. v. City of Aurora*, 631 F. Supp. 221, 226–27 (N.D. Ill. 1986); and *Richard Hoffman Corp. v. Integrated Bldg. Sys., Inc.*, 581 F. Supp. 367, 372 (1984).

<sup>176</sup> See, e.g., *Lathrop*, 220 F.R.D. at 336.

<sup>177</sup> *Campbell*, 823 F.2d at 1185 ("Therefore, the Illinois General Assembly's passage of ¶ 1–1–10 supports the proposition that the state legislature intended reasonably foreseeable anticompetitive acts from its grant of power to municipalities.").

<sup>178</sup> 317 U.S. 341, 350–51 (1943).

<sup>179</sup> U.S. CONST. art. VI, cl. 2.

<sup>180</sup> It should also be noted that Justice Rehnquist's view of the state action doctrine as applied to municipalities—that it should be properly analyzed under the Supremacy Clause to determine whether a municipality's actions are preempted by federal antitrust law, rather than as an exemption to federal antitrust law—was rejected by the court in *Boulder*. See *Cnty. Commc'ns Co. v. City of Boulder*, 455 U.S. 40, 60 (1982) (Rehnquist, J., dissenting).

## CONCLUSION

In refusing to apply the state action doctrine to the Hospital Authority of Albany–Dougherty County in *Phoebe Putney*, the Supreme Court once again failed to consistently treat local governments in the American federal system as true creatures of the state, despite its forceful pronouncement in *Hunter v. City of Pittsburgh*. Though conceivably limited in scope, the unanimity of the decision seems to signal a strong shift toward treating local governments less like public governmental entities and more like private corporations. The Court should have overturned *Boulder*, which would have created greater clarity for municipal governments and recognized their role as governmental bodies. As creatures of the state, the contours of their power should be determined by state law without the interference of federal law. As a stopgap solution, the best way for local governments to create clarity in the field and provide greater space for them to carry out their functions is to lobby their states to pass legislation along the lines of Illinois’s explicit extension of the state action doctrine to municipalities.