

ANTITRUST EXEMPTION DENIED FOR HEALTH PLANNING REGULATIONS

Antitrust laws¹ serve the public interest by promoting competition² through free trade—a fundamental American economic policy.³ In contrast, federal regulations often seek to correct market inefficiencies by controlling economic activity within specific industries.⁴ To reconcile this conflict, Congress and the courts have created a series of antitrust exemptions.⁵ These exemptions permit a regulated indus-

1. The principal antitrust statutes are the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1976); Clayton Act, 15 U.S.C. §§ 12-27 (1976); Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1976).

Sections 1 and 2 of the Sherman Act contain the relevant operational language. Section 1 provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal.

15 U.S.C. § 1 (1976). Section 2 provides:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony . . .

15 U.S.C. § 2 (1976).

2. The basic purpose of antitrust laws, the promotion of competition, relies on the theory that markets perform most efficiently in a competitive environment. For a detailed description of the economics of antitrust, see P. AREEDA & D. TURNER, *ANTITRUST LAW* §§ 104-13 (1978); L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* §§ 5-8 (1977). See generally R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976). For a critical economic analysis of the impact of antitrust laws on consumer welfare, see generally R. BORK, *THE ANTITRUST PARADOX* (1978).

3. See *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398-99 (1978) (Congress, in creating the Sherman Act, sought to establish a regime of competition as the fundamental principle governing commerce); *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 218 (1966) (the Supreme Court has long recognized that antitrust laws represent a fundamental national economic policy). See cases cited note 25 *infra*.

4. Adams, *Exemptions from Antitrust*, in *PERSPECTIVES ON ANTITRUST POLICY* 274 (A. Phillips ed. 1965) (this article criticizes the economic effectiveness of antitrust laws, and of antitrust exemptions in particular).

5. Congress created particular antitrust exemptions for agricultural and fishermen's cooperatives, 15 U.S.C. § 17 (1976); labor unions, 15 U.S.C. § 17 (1976); export associations, 15 U.S.C. §§ 61-65 (1976); small businesses, 15 U.S.C. § 638

(1976); newspapers, 15 U.S.C. §§ 1801-1804 (1976); banks, 12 U.S.C. § 1828c (1976); and professional sports, 15 U.S.C. § 1291 (1976). These special provisions may alter or entirely replace the normal scope of antitrust laws in each situation, P. AREEDA & D. TURNER, *supra* note 2, at 133-231.

In addition, provisions of Title 15 expressly grant antitrust immunity to certain regulated industries. For example, transactions authorized by the following agencies are exempt from antitrust scrutiny for activities under 15 U.S.C. § 18 (1976): Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, and Securities and Exchange Commission. *See also* note 29 *infra*.

When federal regulatory acts include no specific provisions for immunity, the courts have created particular exemptions on the basis of implied immunity. *See* note 30 and accompanying text *infra*.

Other exemptions apply when antitrust laws conflict with state laws regulating business affairs. The state action exemption, first addressed in *Parker v. Brown*, 317 U.S. 341 (1943), places great weight on state sovereignty where state regulations inhibit competition. The Supreme Court in *Parker* held that the Sherman Act does not apply when the state acts as a sovereign within the traditional limits of the state police power. *See* L. SULLIVAN, *supra* note 2, at 731-35. The courts have narrowed the state action doctrine in a series of recent cases. *See* *City of Lafayette, La. v. Louisiana Power and Light Co.*, 435 U.S. 389 (1978) (municipal utility operators subject to antitrust liability); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (attorney advertising not subject to antitrust laws); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) (state-approved electric utility tariff subject to antitrust laws); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (lawyers' minimum fee schedule subject to antitrust liability).

The court in *Huron Valley Hospital v. City of Pontiac*, 466 F. Supp. 1301 (E.D. Mich. 1979) applied the state action exemption to health planning regulations. For a discussion of *Huron*, see notes 28 and 97 *infra*. For information about the state action exemption applied to the health industry, see Grad, *The Antitrust Laws and Professional Discipline in Medicine*, 1978 DUKE L.J. 443, 445-49; Walbolt & Pankau, *Antitrust, Public Health-Care Institutions, and the Developing Law*, 1980 ARIZ. ST. L.J. 385, 392-98. For general information on the state action doctrine, see Note, *Parker v. Brown Revisited: The State Action Doctrine After Goldfarb, Cantor and Bates*, 77 COLUM. L. REV. 898 (1977); Comment, *State Action Antitrust Exemption as Applied to Public Utility Regulation: Borough of Ellwood City v. Pennsylvania Power Co.*, 20 URBAN L. ANN. 289, 294-99 (1980).

Another exemption, the *Noerr* doctrine, protects actions aimed at influencing public officials from antitrust scrutiny. The doctrine applies to situations in which private parties attempt to persuade government actions against their competitors. L. SULLIVAN, *supra* note 2, at 740-43. The three cases which shaped this doctrine are *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (attempts to prevent competitors from gaining access to agencies and courts came within the *Noerr* "sham" exception and violated antitrust laws); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (union conspiracy to destroy small mining businesses exempt from antitrust laws); *Eastern R.R. Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (railroads releasing publicity harmful to trucking industry exempt from antitrust laws). For a discussion of the *Noerr* doctrine in relation to health planning, see Miller, *Antitrust and Certificate of Need: Health Systems Agencies, the Planning Act, and Regulatory Capture*, 68 GEO. L.J. 873, 900-17 (1980). For

try's economic and policy objectives⁶ to supersede the goals of competition. In the context of the health industry, Congress chose to regulate the maldistribution of new hospital construction.⁷ These medical facilities are often oversupplied to urban areas.⁸ In *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*,⁹ the Supreme Court found that this scheme of health planning regulations provided an insufficient basis for antitrust immunity.¹⁰

National Gerimedical,¹¹ a private hospital, applied for membership in Blue Cross'¹² participating-hospital program while its facility was under construction.¹³ Hospitals in the program receive 100% reimbursement for their patients' Blue Cross insurance benefits.¹⁴ Blue Cross would not admit new hospitals into the program without prior certification of need¹⁵ from the local health planning agency, Mid-

more information on the application of antitrust exemptions to the health industry, see notes 27, 28, and 97 *infra*.

6. See note 29 and accompanying text *infra*.

7. S. REP. NO. 1285, 93d Cong., 2d Sess. 39, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7842, 7879. In 1974, Congress estimated that by 1975, there would be over 67,000 excess hospital beds in the United States. These unneeded beds contributed to the increasing costs of medical care. *Id.*

8. *Id.*

"Widespread access and distribution problems exist with respect to medical facilities and services. In many urban areas, hospitals, clinics and other medical care institutions and services are crowded into relatively tiny sectors, while large areas go poorly served or completely unserved. Many rural communities are completely without a physician or any other type of health care service, while adjacent urban areas are oversupplied."

Id.

9. 101 S. Ct. 2415 (1981).

10. *Id.* at 2424.

11. National Gerimedical Hospital and Gerontology Center, *Id.*

12. Blue Cross of Kansas City, Missouri, *Id.* at 2416. For the history of Blue Cross and its relationship to health planning, see Payton and Powsner, *Regulation Through the Looking Glass: Hospitals, Blue Cross and Certificate of Need*, 79 MICH. L. REV. 203 (1980).

13. 101 S. Ct. at 2417.

14. National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City, 479 F. Supp. 1012, 1016 (W.D. Mo. 1979). Blue Cross pays only 80% of the covered hospital costs of subscribers in hospitals not participating in this agreement. Blue Cross reimburses the subscriber, and not the hospital. *Id.* See generally S. LAW, BLUE CROSS: WHAT WENT WRONG? (1974).

15. 101 S. Ct. at 2417. Blue Cross issued a policy in 1976, requiring applicants to demonstrate that their hospital met "a clearly evident need for health services in its

America Health Systems Agency, Inc. (MAHSA).¹⁶ Blue Cross rejected the National Gerimedical application because the hospital had not obtained MAHSA approval.¹⁷ National Gerimedical alleged that by conditioning participating-hospital status on prior MAHSA approval, Blue Cross violated Sections 1 and 2 of the Sherman Antitrust Act.¹⁸ Claiming implied antitrust immunity, Blue Cross contended that its policy promoted the congressional intent regarding the MAHSA as embodied in the National Health Planning and Resources Development Act of 1974 (NHPRDA).¹⁹ The Supreme

defined service area." 479 F. Supp. at 1016 (citing plaintiff's complaint, paragraph 18).

The Blue Cross policy considers the following factors:

The hospital must meet a clearly evident need for health care services in its defined service area. Health care institutions and institutional services shall be approved, and/or if required by law, certified as necessary, by the designated planning agency or areawide health planning agency respectively; or, when effective, by the designated State Agency as provided for in Public Law 93-641, the 'National Health Planning and Resources Development Act of 1974,'

101 S. Ct. at 2417 n.3.

16. *Id.* at 2418. The Blue Cross policy required that MAHSA certify the need for the facility. MAHSA is a non-profit private corporation. 479 F. Supp. at 1016 (citing plaintiff's complaint, paragraph 6 and 18(a)). It fulfills the role of a Health Systems Agency (HSA) under the National Health Planning and Resources Development Act (NHPRDA) of 1974, 42 U.S.C. §§ 300k-300t (1976) as amended by Health Planning and Health Services Research and Statistics Act of 1977, Pub. L. No. 95-63, §§ 102, 103, 106, 91 Stat. 383-86; and Act of Dec. 19, 1977, Pub. L. No. 95-215, § 6, 91 Stat. 1507; and Health Planning and Resources Development Amendments of 1979, Pub. L. No. 96-79, §§ 1-129, 93 Stat. 592.

In states adopting the 1974 health planning programs, see note 19 *infra*, all newly proposed hospital facilities, major capital expenditures and major alterations in bed capacity require prior approval of the State Health Planning and Development Agency (SHPDA). The NHPRDA requires the SHPDA to consider the HSA's recommendations on these matters in making its final decision. 42 U.S.C. § 300m-2(a)(4) (Supp. III 1979). See generally CHAYET & SONNENRICH, P.C., CERTIFICATE OF NEED: AN EXPANDING REGULATORY CONCEPT (1978) for a description of health planning regulations in each state.

Blue Cross and any other private third party insurers have no required or implied relationship with the HSA. Private insurers usually have representatives on the HSA governing board, but their involvement in any other manner has no relevance to the designated planning functions. 42 U.S.C. § 300l-1(b)(3)(B) (1976 & Supp. II 1978).

17. 101 S. Ct. at 2418. National Gerimedical could not obtain MAHSA approval. MAHSA announced that it would not approve any more acute-care hospital facilities in the Kansas City area. Therefore, National Gerimedical did not apply for certification of need. *Id.*

18. *Id.*

19. 42 U.S.C. §§ 300k-300t (1976) as amended by Health Planning & Health Services Research and Statistics Act of 1977, Pub. L. No. 95-63, §§ 102, 103, 106, 91 Stat.

Court decided that Congress did not intend insurance companies to enforce the statute.²⁰ Consequently, Blue Cross enjoyed no antitrust immunity.²¹ In a unanimous decision reversing the district²² and cir-

383-86; and Act of Dec. 19, 1977, Pub. L. No. 95-215, § 6, 91 Stat. 1507; and Health Planning and Resources Development Act of 1979, Pub. L. No. 96-79, §§ 1-129, 93 Stat. 592. NHPRDA focused on the health industry's nationwide problems. Congress' primary objectives for the program included improving health care, containing costs, and preserving competition within the industry. The Act created a complex network of agencies at three levels designed to implement the objectives. Briefly, the Act called for a State Health Coordinating Council (SHCC) in each state, linked directly to the federal agency, the Department of Health and Human Services (then the Department of Health, Education and Welfare). The SHCC reviews and coordinates activities at the state and local levels of the planning network. At the second level, the State Health Planning and Development Agencies (SHPDA) develop the preliminary health strategies for the state and regulate the certificate-of-need program. Finally, at the community level, NHPRDA established the Health Systems Agency (HSA), which has the most direct involvement with the health practitioners and the planning process. In addition, it has the power to review use of federal funds in its area and to make recommendations regarding certificate-of-need applications. Although directly involved in the planning process, HSAs have no independent regulatory authority. For a discussion of the health planning network established by NHPRDA, see Blumstein and Sloan, *Health Planning and Regulation Through Certificate of Need: An Overview*, 1978 UTAH L. REV. 3, 3-14; Cain, *Health Planning in the United States: The 1980s—A Protagonist's View*, 6 J. OF HEALTH POL., POL'Y AND L. 159, 160-62 (1981); Hammer, *The Review of Institutional Health Services: The Role and Liability of the Health Systems Agency Governing Body*, 1978 UTAH L. REV. 59, 59-68; Note, *The National Health Planning and Resources Development Act and State Action: A Reappraisal of the Role of Private Health Care Institutions*, 57 B.U.L. REV. 511, 515-17 (1977) [hereinafter cited as *National Health Planning*].

The certificate-of-need program actually originated in the 1960's. It initially involved state regulation of capital expenditures for new and existing hospital facilities. It attempted to control costs, Lewin, Somers & Somers, *State Health Cost Regulation: Structure and Administration*, 6 U. TOL. L. REV. 647, 654-55 (1975) [hereinafter cited as Lewin], and help solve the severe maldistribution of health services with voluntary cooperation from members of the health field. See Havighurst, *Regulation of Health Facilities and Services by "Certificate of Need"*, 59 VA. L. REV. 1143, 1143-51 (1973). The NHPRDA incorporated the certificate-of-need program into its tri-level system of health planning. See Schonbrun, *Making Certificate of Need Work*, 57 N.C.L. REV. 1259, 1263-66, 1272-74 (1979). See generally C. HAVIGHURST, *REGULATING HEALTH FACILITIES CONSTRUCTION* (1974).

At the time that National Gerimedical applied to Blue Cross, the Missouri SHPDA, which administers the certificate-of-need program, had not been established. Missouri eventually established the program. MO. REV. STAT. § 197. 300 *et. seq.* (Supp. IV 1980). Had these regulations been activated at the time of the suit, this case might never have arisen. 101 S. Ct. at 2422 n.15.

20. 101 S. Ct. at 2422.

21. *Id.* at 2424.

22. *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 479 F. Supp. 1012 (W.D. Mo. 1979).

cuit²³ courts, the Supreme Court ruled in favor of National Gerimedical.²⁴

Courts consistently view the antitrust law as a basic doctrine of economic freedom.²⁵ This philosophy tends to conflict with numerous congressional decisions to regulate entry and competitive conduct generally in particular industries.²⁶ Both Congress and the courts create antitrust exemptions for these industries when they determine that preservation of the regulatory policy²⁷ outweighs a policy favor-

23. National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City, 628 F. 2d 1050 (8th Cir. 1980).

24. 101 S. Ct. at 2424.

25. See *United States v. Topco Assoc.*, 405 U.S. 596, 610 (1972) (antitrust laws as the Magna Carta of free enterprise); *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958) (Sherman Act is the charter of economic liberty).

The history of antitrust legislation reveals an unclear and often conflicting set of underlying priorities and interests throughout the development of the doctrine. Since its inception in 1890, the Sherman Antitrust Act has caused continuous conflicts. Its vague wording does not articulate precise legislative goals. R. SHERMAN, *ANTITRUST POLICIES AND ISSUES* ix (1978). Such uncertainties have compelled the courts to take a major role in shaping the law. See 1 P. AREEDA & D. TURNER, *supra* note 2, at 15. For a concise history of the origins of antitrust law, see A. NEALE & D. GOYDER, *THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA* 14-23 (3d ed. 1980).

26. For examples of Congressional concerns reflected in regulatory legislation, see note 27 *infra*. Examples of regulated industries include: public utilities (Federal Energy Regulatory Commission); communications (Federal Communications Commission); transportation (Federal Maritime Commission; Civil Aeronautics Board); commerce (Interstate Commerce Commission); securities (Securities and Exchange Commission).

27. In the regulation of public utilities, for example, antitrust immunity ensures that the regulations can effectively control prices and profits. Immunity thereby promotes efficiency and innovation—goals not achievable under normal competitive circumstances. In the airline industry, the regulations attempted to promote the industry by setting rates to direct profits from the major markets to smaller markets. In regulating the shipping industry, Congress wanted to prevent the formation of mergers and agreements benefiting only the wealthiest merchants. See P. AREEDA & D. TURNER, *supra* note 2, at 138. See also Shuman, *The Application of the Antitrust Laws to Regulated Industries*, 44 TENN. L. REV. 1, 43-54 (1976).

Federal regulations controlling the health industry involve issues of maldistribution of health services, as well as rising costs of health care. Regulations in the health industry address a number of unique factors. Not only are health care costs rising at four times the rate of inflation, M. THOMPSON, *ANTITRUST AND THE HEALTH CARE PROVIDER* 26 (1979), but the industry's regulations attempt to compensate for the system's inefficiencies rather than correct them. S. HARRIS, *THE ECONOMICS OF HEALTH CARE* 4 (1975). See also M. THOMPSON, *supra*, at 19, citing COOPERS & LYBRAND, *LAYMAN'S GUIDE TO HOSPITALS* (1978), describing the health industry as "the most highly regulated 'unregulated industry' in the country."

Additionally, the health care providers wield significant power in shaping health

ing competition.²⁸ These exemptions may arise through explicit statutory language.²⁹ On the other hand, when the regulatory legislation

policies, while the public remains largely unable to influence or change the system. For example, the health industry's concept of "need" changes according to the availability of certain services. Havighurst & Blumstein, *Coping With Quality/Cost Trade-Offs in Medical Care: The Role of PSROs*, 70 Nw. U.L. REV. 6, 28 (1975). This phenomenon has caused the public to demand only the highest quality medical care at any cost. See Lave & Lave, *Medical Care and Its Delivery: An Economic Appraisal*, 35 LAW & CONTEMP. PROB. 252, 259 (1970). All of these factors have provided no encouragement for cost containment in the health industry. Thus analysts have characterized the industry as unresponsive to classic market forces. Lewin, *supra* note 19, at 651.

The health industry has only recently become a subject of antitrust scrutiny. Until 1975, members of the health industry found broad protection in the learned professions exemption. The courts based the exemption on the idea that professional activity should not be treated as "trade or commerce" within the Sherman Act. Grad, *supra* note 5, at 451. The Supreme Court essentially destroyed that exemption in *Goldfarb*, 421 U.S. 773 (1975), by saying that "[t]he nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act. . . ." *Id.* at 787 (1975). See Walbolt and Pankau, *supra* note 5, at 385. For further discussion of the learned professions exemption, see Rosoff, *Antitrust Laws and the Health Care Industry: New Warriors Into an Old Battle*, 23 ST. LOUIS U.L.J. 446, 453-56 (1979).

28. *United States v. National Ass'n of Sec. Dealers*, 422 U.S. 694, 734 (1975). "[W]e have implied immunity in particular and discrete instances to assure that the federal agency entrusted with regulation in the public interest could carry out that responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws." *Id.* *Securities Dealers* relied on *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973) (narrowly defined immunity to antitrust laws permissible if consistent with public interest) and *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963) (when a statute does not provide explicit exceptions to antitrust laws, it may, in certain instances, grant immunity by implication when this would be consistent with the public interest).

The court first dealt with antitrust claims against an HSA in *Huron Valley Hospital v. City of Pontiac*, 466 F. Supp. 1301 (E.D. Mich. 1979). In *Huron* the local HSA refused to grant a certificate-of-need to plaintiff, an organization attempting to build a new hospital. This action involved a question of state action since the conflict concerned Michigan's health planning regulations. 466 F. Supp. at 1304. *Cf.* note 19. Nevertheless, the Court's evaluation of the NHPRDA legislation indicated that Congress intended to confer some antitrust immunity for activities related to state health planning. 466 F. Supp. at 1312. *But see* note 97 *infra*.

29. Examples of specific statutory exemptions include: Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1552 (1976 & Supp. III 1979); Interstate Commerce Act of 1976, 49 U.S.C. §§ 10701-10780 (Supp. III 1979); Communications Act of 1934, 47 U.S.C. §§ 151-757 (1976 & Supp. III 1979); Shipping Act of 1916, 46 U.S.C. §§ 801-842 (1976 & Supp. III 1979). See note 5 *supra*. Although Congress created specific provisions defining an agency's required compliance with antitrust laws, the actual extent of the express immunity only crystallizes when a challenge to that authority occurs. See Shuman, *supra* note 27, at 17-21.

lacks specific language concerning antitrust exemptions, courts consider whether Congress implied antitrust immunity.³⁰

Courts very reluctantly,³¹ and often inconsistently,³² confer implied immunity on regulated industries. Courts undertake a two-step approach in determining if Congress intended antitrust immunity to apply in a particular instance. The courts first look for evidence of a direct conflict between the regulatory statute and antitrust laws.³³

30. This concept, termed the doctrine of implied immunity, surfaced for the first time in *Keogh v. Chicago Northwestern Ry.*, 260 U.S. 156 (1922). Plaintiff challenged railroad rate-fixing as a violation of the Sherman Act. The Court, in denying plaintiff's claim, preserved the congressional intent of the railroad's regulatory agency—the Interstate Commerce Commission (ICC). The Court found that the claim was “barred by implication” because the ICC, acting within the scope of its authority, approved the rates. This case, for the first time, demonstrated the Court's ability to promote these governmental policies through implied immunity. See Note, *Antitrust and Regulated Industries: A Critique and Proposal for Reform of the Implied Immunity Doctrine*, 57 TEX. L. REV. 751, 757-60 (1979) [hereinafter cited as *Antitrust and Regulated Industries*].

31. The cases contain two major propositions reflecting this reluctance to confer implied immunity. The first proposition states that antitrust immunity is not lightly implied. For cases citing this proposition, see *Radzanower v. Touche Ross and Co.*, 426 U.S. 148, 154 (1976); *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976); *United States v. First City Nat'l Bank of Houston*, 386 U.S. 361, 368 (1967); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348 (1963).

The second proposition states that the cardinal principle of construction is that repeals by implication are not favored. For cases citing this proposition, see *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963); *California v. Federal Power Comm'n*, 369 U.S. 482, 485 (1961); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

Based on these antitrust cases, other courts have adopted a similar reluctance to construe federal statutes in a manner which repeals other federal statutes. See *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 189-90 (1978) (*Endangered Species Act of 1973*, 16 U.S.C. §§ 1531-1543 (1976 & Supp. III 1979)); *Morton v. Mancari*, 417 U.S. 535, 550 (1974) (*Indian Reorganization Act of 1934*, 25 U.S.C. §§ 461-495 (1976 & Supp. III 1979)).

32. In situations of antitrust conflict, courts strive to preserve both the antitrust laws and the pertinent statute. *Silver v. New York Stock Exchange*, 373 U.S. 341 at 357. Application of this principle results in inconsistent decisions because the courts base their analyses on different factors. Some courts choose to examine legislative histories. Others put more weight on statutory construction. Still others look to the pattern of previous judicial interpretations in that industry. The courts may utilize one or more of these elements in deciding on implied immunity. See *Antitrust & Regulated Industries*, *supra* note 30, at 761-62, for a detailed critique of the inconsistent use of such factors. See also *Shuman*, *supra* note 27, at 25-28.

33. While this Comment utilizes a 2-step analysis to summarize the courts' treatment of implied antitrust immunity, all courts have not necessarily followed these steps in this particular manner or order. See note 32 *supra* which illustrates the judicial inconsistencies.

Finding this element requires a showing of clear repugnancy³⁴ between the statute and antitrust laws.³⁵ The court must also demonstrate that in order to achieve its stated purpose, the statute requires a construction conferring immunity.³⁶ Under the second step,³⁷ courts examine the nature and pervasiveness of the regulatory power delegated to the agency.³⁸ The existence of agency authority to merely consider antitrust consequences does not provide a sufficient basis for immunity.³⁹ The courts will analyze the specific authority delegated and its exercise in the particular instance.⁴⁰

The Supreme Court established these two elements of the implied immunity analysis in *Silver v. New York Stock Exchange*.⁴¹ Plaintiff,

34. A repugnancy between the antitrust laws and the relevant statute occurs when application of the antitrust laws would "render nugatory" the provisions of the statute relevant to the alleged violation. *Gordon v. New York Stock Exchange*, 422 U.S. 659, 691 (1975). See also *United States v. Borden Co.*, 308 U.S. 188, 198-99 (1939) (citing *Posadas v. National City Bank*, 296 U.S. 497, 504 (1936)).

35. *Id.*

36. See *United States v. National Ass'n of Sec. Dealers*, 422 U.S. 694 (1975). For a discussion of this case, see notes 72-77 and accompanying text *infra*. In *Federal Maritime Comm'n (FMC) v. Seatrain Lines, Inc.*, 411 U.S. 726 (1973), the Supreme Court denied antitrust immunity for agreements made between shipping merchants, even though the FMC has the power under the Shipping Act of 1916, 46 U.S.C. §§ 801-842 (1976 & Supp. III 1979) to exempt certain shipping agreements from antitrust scrutiny. The Court found this particular agreement beyond the scope of the FMC's regulatory power and did not grant immunity. *Id.* at 733.

In *United States v. Radio Corp. of America*, 358 U.S. 334 (1959), the Court withheld implied immunity because the application of the antitrust laws posed no barrier to accomplishing the Federal Communications Commission's (FCC) mandate. *Id.* at 347-52.

See also *Gordon v. New York Stock Exchange*, 422 U.S. 659, 683 (1975). For a discussion of *Gordon*, see notes 60-71 and accompanying text *infra*.

37. See note 33 and accompanying text *supra*.

38. For cases citing this proposition, see *Otter Tail Power Co. v. United States* 410 U.S. 366, 374 (1973); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 346-48 (1963); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 304-05 (1963).

39. For cases citing this proposition see *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 352 (1963); *California v. Federal Power Comm'n*, 369 U.S. 482, 486 (1962); *United States v. Radio Corp. of America*, 358 U.S. 334, 346 (1959).

40. *United States v. A.T. & T.*, 461 F. Supp. 1314, 1323 (D.D.C. 1978) (existence of FCC regulations alone will not immunize telecommunications corporation from antitrust scrutiny). See *Antitrust & Regulated Industries*, *supra* note 30, at 775-76. See also *United States v. National Ass'n of Sec. Dealers*, 422 U.S. 694 (1975). For a discussion of this case, see notes 72-77 and accompanying text *infra*.

41. 373 U.S. 341 (1963).

a registered non-member of the New York Stock Exchange (NYSE)⁴² alleged that defendants, Exchange members, prevented him from competing with registered members⁴³ in violation of the Sherman Act.⁴⁴ Silver contended that by disconnecting his wire service to the Exchange, defendants caused his business to suffer.⁴⁵ The Exchange and its members replied, claiming immunity from the antitrust laws because of the pervasive regulatory scheme administered over the NYSE by the Securities and Exchange Commission (SEC).⁴⁶ In finding for Silver, the Supreme Court first held that implied immunity can result only where the statute would otherwise create repugnancy to the antitrust laws.⁴⁷ Second, the Court ruled that the proper administration of the statute must require this construction.⁴⁸ Although the Court failed to state explicitly how this rule should apply in other contexts, it found the SEC could accomplish its general regulatory purposes without a finding of immunity.⁴⁹ The Court also found that while the SEC has broad regulatory power over securities transactions, the statute failed to authorize the agency to deal with a group boycott as alleged in *Silver*.⁵⁰ The Court, therefore, would not sustain implied immunity under the aegis of SEC authority.

Ten years later, the Supreme Court applied *Silver's* two-part analysis in *Otter Tail Power Co. v. United States*.⁵¹ The Court relied on *Silver* in finding direct conflict between antitrust laws and the regulatory statute.⁵² *Otter Tail* departed significantly, however, from *Silver's* analysis of regulatory power. *Otter Tail*, a local power company, had the sole ability to transmit power throughout a region

42. *Id.* at 343. Plaintiff had the status of a registered securities broker even though he sold securities as an independent dealer (not a NYSE member). *Id.*

43. *Id.* at 343-45. Plaintiff's profitable business depended upon constant contact through his wire service with major NYSE member firms, non-member firms and banks. When plaintiff no longer had the ability to make these rapid contacts, he could not compete with other securities dealers. *Id.*

44. *Id.* at 345. Plaintiff alleged that the group-denial of his wire service by the NYSE member firms constituted a *per se* violation of the Sherman Act. *Id.*

45. *Id.* at 345.

46. *Id.* at 347.

47. *Id.* at 358.

48. *Id.* at 357.

49. *Id.* at 358.

50. *Id.* at 357, 360.

51. 410 U.S. 366 (1973).

52. *Id.* at 372.

of the midwestern United States.⁵³ The Federal Power Act (FPA)⁵⁴ encouraged, but did not require, voluntary interconnections between neighboring power facilities.⁵⁵ Nevertheless, Otter Tail refused to sell electricity to its potential competitors.⁵⁶ The Government alleged that Otter Tail violated the Sherman Act by monopolizing the sale of electricity in the area.⁵⁷ In light of the FPA statute, the Court denied antitrust immunity because Otter Tail's exclusion of the neighboring municipalities arose from a business judgment rather than from regulatory coercion.⁵⁸ The Court found such independent decision-making entirely beyond the scope of the regulatory scheme.⁵⁹

The Supreme Court clarified the original *Silver* principles in *Gordon v. New York Stock Exchange*.⁶⁰ Plaintiff asserted that the defendant-Exchange⁶¹ violated the antitrust laws⁶² by fixing commission rates.⁶³ Analysis of the legislative history revealed a direct con-

53. *Id.* at 370.

54. Ch. 687, § 202(b), 49 Stat. 848 (1920) (current version at 16 U.S.C. § 824(a)(b) (1976)).

55. 410 U.S. 366, 375-76 n.7 (1973). *Cf.* *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976). *Cantor* involved the voluntary activity of a local power company regulated by state laws. The power company, Detroit Edison, distributed free, new light bulbs in exchange for used light bulbs. Retail sellers claimed that this distribution damaged their business. The state regulations incorporated this practice into the power company's rate tariff. The Court denied the power company's antitrust exemption. The Court held that although the power company's voluntary activity fell within a regulatory agency's jurisdiction, and that although a regulatory agency with clear regulatory authority specifically approved, encouraged or authorized the act, these facts did not automatically relieve the power company of antitrust liability. *Id.* at 598.

56. 410 U.S. 366, 371 (1973).

57. *Id.* at 368.

58. *Id.* at 374.

59. *Id.* The presence of regulatory pressure to perform the challenged activities may protect an otherwise *per se* violation of the antitrust laws from antitrust scrutiny. However, an agency's general jurisdiction alone will not support a finding of immunity. *Id.* at 372-73.

60. 422 U.S. 659 (1975).

61. *Id.* Plaintiffs, a class of small investors, filed this suit against the New York Stock Exchange, the American Stock Exchange and two member firms. *Id.* at 660-61.

62. *Id.* at 661.

63. *Id.* at 666. The Court indicated that fixed-commission rates have existed in the New York Stock Exchange since 1792. *Id.* at 663. The rates provide that Stock Exchange members will not sell stock below a certain percentage of commission. The Court's analysis relied, in part, on a history of the SEC's activity concerning fixed commission rates. It found that although the SEC's specific rate regulatory power

flict between the SEC's statutory duty to approve commission rates⁶⁴ and the concept of competition.⁶⁵ The statute protected securities investors from paying unfair commission rates to brokers.⁶⁶ Absent statutory approval, the SEC rate-fixing practices constituted antitrust violations.⁶⁷ The Court, applying *Silver*, found that the antitrust laws prevented the statute from achieving its goal.⁶⁸ Premised on *Silver*'s recognition of pervasive SEC authority,⁶⁹ the *Gordon* Court also held that the SEC could not exercise its delegated power without protection from antitrust scrutiny.⁷⁰ The statute's explicit rate-fixing provision not only protected the NYSE, but also distinguished this case from *Silver*, allowing the Court to grant immunity.⁷¹

The Supreme Court immediately applied the *Gordon* analysis in evaluating the quality and pervasiveness of agency power. In *United States v. National Association of Securities Dealers*,⁷² plaintiff challenged the validity of certain restrictive mutual fund agreements⁷³ with respect to antitrust laws.⁷⁴ Finding no way to reconcile the statute's authority with antitrust laws, the Court looked to the SEC's

changed over the past 40 years, the SEC still retained its oversight responsibility in the particular area. *Id.* at 666-82.

64. *Id.* at 690.

65. *Id.* See also S. REP. NO. 75, 94th Cong., 1st Sess. 71-72, 98, reprinted in [1975] U.S. CODE CONG. & AD. NEWS 179, 249-50 & 276.

66. 422 U.S. at 666-67. The SEC approves commission rates set by the stock exchanges. Securities Exchange Act of 1934, ch. 404, § 19(b), 48 Stat. 898 (current version at 15 U.S.C. § 78s (b) (1976)).

67. 422 U.S. at 683.

68. *Id.* at 691.

69. *Id.* at 684.

70. *Id.* at 691.

71. *Id.* In practice the SEC never exercised this power to abolish or approve the commission rates. In fact, the SEC relinquished its power to fix rates to the stock exchanges before the *Gordon* case. See *Antitrust and Regulated Industries*, *supra* note 30, at 764-65. Numerous writers have criticized *Gordon* for this reason. See e.g. Shuman, *supra* note 27, at 27.

72. 422 U.S. 694 (1975) (decided the same day as *Gordon*).

73. *Id.* at 701-04. The agreements, subject to SEC regulatory control pursuant to the Investment Company Act of 1940, Ch. 686, §§ 1-53, 54 Stat. 789 (current version at 15 U.S.C. §§ 80a-1 to 80a-52 (1976)), required dealers to sell mutual fund shares to certain buyers at specific price levels. The agreements also permitted dealers to attach restrictions to the shares they sold, as long as those restrictions did not conflict with SEC regulations. 422 U.S. at 722-30.

74. *Id.* at 701-04.

broad regulatory authority.⁷⁵ The Court also considered the past cases construing SEC statutes in light of the legislative history.⁷⁶ The Court held that although the statute contained no expression of immunity, Congress intended to imply the exemption; no other interpretation would accommodate both the SEC mandate and antitrust laws.⁷⁷

Following the principles developed in the previous regulated industries cases,⁷⁸ the Supreme Court applied the two-part analysis in *National Gerimedical*. The Court determined that the statute, NHPRDA,⁷⁹ implies no antitrust immunity for Blue Cross' voluntary enforcement of its provisions.⁸⁰ The Court did not find direct conflict between NHPRDA and antitrust laws.⁸¹ Rather, the Court's legislative analysis indicated that NHPRDA's overall purpose, as amended in 1979, included special emphasis on competition.⁸² Blue Cross' unsolicited conduct enforcing the NHPRDA fell entirely beyond the

75. Although the SEC had the authority to prohibit the mutual fund agreements, it never exercised that privilege. The Court's finding of conflict therefore relied on the assumption that conflict would arise in this situation if the SEC exercised its power. P. AREEDA & D. TURNER, *supra* note 2, at 152.

76. 422 U.S. at 704-11. The pertinent legislative history is included in H.R. Doc. No. 279, 76th Cong. 1st Sess. (1940) (Part III of the Investment Trust Study).

77. *Id.* at 720-30.

78. *See* notes 41-77 and accompanying text *supra*.

79. *See* note 19 and accompanying text *supra*.

80. 101 S. Ct. at 2424.

81. *Id.* at 2422-23.

82. *Id.* at 2420-21. The Court found little express evidence of congressional concern for competition (and therefore for application of antitrust laws) in the original NHPRDA legislative history. S. REP. NO. 1285, 93d Cong., 2d Sess. 39, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7842, 7878-79. Congress established in the 1979 Amendments that retention of competition within the health care industry was a high priority of the legislation. One of the revised national priorities set out in the amended version states:

(a)(17) The strengthening of competitive forces in the health services industry wherever competition and consumer choice can constructively serve, . . . to advance the purposes of quality assurance, cost effectiveness, and access.

. . .

(b)(2) For health services, . . . for which competition does not or will not appropriately allocate supply consistent with health systems plans, . . . health systems agencies . . . should . . . allocate the supply of such services.

[b](3) For the health services for which competition appropriately allocates supply consistent with health systems plans, . . . health systems agencies . . . should . . . give priority . . . to actions which would strengthen the effect of competition

. . . .

realm and purpose of the statute.⁸³ The Court easily distinguished *National Gerimedical* from *National Association of Securities Dealers*.⁸⁴ In *National Association of Securities Dealers*, construction of the statute required a finding of immunity. In *National Gerimedical*, on the other hand, implying immunity would misinterpret the statute. The Court in *National Gerimedical* also distinguished *Gordon* because the SEC statute in *Gordon* included specific authority to regulate the action in question.⁸⁵

The Court's analysis of Blue Cross' relationship to the statute bears a distinct similarity to *Silver*. The local/state health planning agencies⁸⁶ established by NHRDA recommend or require specific health industry members to perform certain activities.⁸⁷ Blue Cross, because of its status as a private commercial insurer was not directly within the scope of NHRDA regulation.⁸⁸ Blue Cross' position outside the statute resembles that of the non-NYSE member broker in *Silver*.⁸⁹ Although the Court denied immunity in both *National Gerimedical* and *Silver*,⁹⁰ it found a more compelling basis for denial

Health Planning and Resources Development Amendments of 1979, 42 U.S.C. § 300 k-2(a)(17), (b)(2) & (3) (Supp. III 1979) (amending 42 U.S.C. § 300 k-2 (1974)).

The NHRDA encourages HSAs to utilize private members of the health industry in implementing the health plans. 42 U.S.C. § 3001-2(c)(1) (1976). However, the Act never directs or even authorizes private, third-party payors to include HSA recommendations in their reimbursement schemes. Furthermore, the statute never suggests that HSAs and private insurers must cooperate in order to carry out the purpose of the Act. Miller, *supra* note 5, at 890-91.

83. 101 S. Ct. at 2422-23. See also notes 16 & 19 *supra*.

84. *Id.* at 2421-22.

85. *Id.* at 2421-22.

86. 42 U.S.C. §§ 3001-2, 300m-2(a) (1976). For a description of the state and local health planning agencies, see note 19 *supra*.

87. 42 U.S.C. § 3001-1(b)(3) (1976). The members of the health industry include: 1) providers of health care; 2) health care institutions; 3) health care insurers; 4) health professional schools; and 5) allied health professionals. 42 U.S.C. § 3001-1(b)(3)(c)(ii) (Supp III 1979).

88. 101 S. Ct. at 2422 n.14. Each scheme of government regulation reaches only selected portions of the industry. This phenomenon has resulted in a fragmented scheme of regulations throughout the industry. Weiner, *Health Care Policy and Politics: Does the Past Tell Us Anything About the Future?*, 5 AM. J.L. & MED. 331, 335 (1980). The health planning legislation, NHRDA, does not have any direct or implied regulatory impact on private health insurers such as Blue Cross. Miller, *supra* note 5, at 890-91.

89. Brief for Petitioner at 35, *National Gerimedical Hospital & Gerontology Center v. Blue Cross of Kansas City*, 101 S. Ct. 2415 (1981).

90. See note 42 *supra*.

in *National Gerimedical*. Blue Cross, unlike the plaintiff in *Silver*,⁹¹ fell beyond even the broadest class of industry-members regulated by the statute.

In considering the voluntary nature of Blue Cross' actions, the *National Gerimedical* Court relied on *Otter Tail*.⁹² The Court examined Blue Cross' distant link to the health planning regulatory scheme.⁹³ Based on this tenuous connection, as well as a finding of no relevant congressional intent, the Court concluded that the Blue Cross policy resulted solely from a voluntary business decision subject to antitrust scrutiny.⁹⁴ Consistent with *Otter Tail*, the unilateral and non-mandatory enforcement of the statute did not provide convincing justification for granting immunity.⁹⁵

The Supreme Court's reversal of the lower court decisions upheld the purpose of antitrust laws by preserving the narrow application of the implied immunity doctrine.⁹⁶ Not only would the lower court opinions have provided no guidance for the health industry,⁹⁷ but all

91. See notes 41-50 and accompanying text *supra*.

92. 101 S. Ct. at 2422.

93. *Id.*

94. *Id.* But see *id.* at 2423-24 n.18. Had this case involved a regulated party voluntarily cooperating with a specific HSA plan under NHRDA, the Court might have found immunity. *Id.*

95. *Id.* at 2422.

96. *Id.* at 2424. The lower court decisions implied that NHRDA and antitrust laws were so incompatible that all health planning actions should be immune from antitrust scrutiny. *Id.* Although no antitrust violation may exist in the case of cooperation between an HSA and a private insurer, "to foreclose the inquiry conflicts with the Supreme Court's restrictive approach to implied repeal." Miller, *supra* note 5, at 891.

97. *National Gerimedical* provides the first *meaningful* guidance for dealing with conflict in the context of health planning. *Huron Valley Hospital v. City of Pontiac*, 466 F. Supp. 1301 (E.D. Mich. 1979) discussed at note 28 *supra*, considered the issue of antitrust immunity as applied to health planning. *Huron* carries little weight because NHRDA (1974 version) expresses nothing about antitrust implications. See note 82 *supra*. Furthermore, Congress enacted the 1979 Amendments two months after *Huron*. See Miller, *supra* note 5, at 889-90. The lower courts in *National Gerimedical* relied on *Huron* and thereby extended blanket immunity for all actions taken to implement NHRDA. Walbolt & Pankau, *supra* note 5, at 391-92.

Cf. *City of Fairfax v. Fairfax Hospital Association*, 562 F.2d 280 (4th Cir. 1977), *vacated and remanded* 435 U.S. 992, (1978). Plaintiff, City of Fairfax, sued a county hospital association that attempted to lease a hospital and thereby create a monopoly of the city's only two hospitals. Plaintiff filed the suit based on the fact that defendant never received the county's approval for the hospital. The county possessed responsibility over reviewing new hospital plans, but lacked authority to veto plans it did not favor. The court held that "the mere fact that a body is 'a state agency for some

regulated industries could have justified implied immunity claims on significantly less appropriate grounds.⁹⁸ Finally, *National Gerimedical* represents no major change in the scope of immunity for regulated industries. In an era of rampant deregulation,⁹⁹ however, it

limited purposes' does not make it an 'antitrust shield that allows it to foster anticompetitive practices.'" 562 F.2d at 284-85 (emphasis in original). Although this case involves a state action exemption, an analogy to *National Gerimedical* can be useful. *Fairfax* dealt with an informal local health planning body under loose state supervision. Neither federal nor state law required the particular conduct in question. At the same time, lack of the health planning action would not create a repugnancy to the state and federal health planning programs. M. THOMPSON, *supra* note 27, at 61-63.

98. Conferring implied immunity in this instance would relax the standards established in the case law, allowing the doctrine to apply on a broad basis without considering whether immunity is essential in the particular instance. While NHPDA does not constitute the same type of all-pervasive regulatory scheme that controls the utilities or securities transactions, it represents one of the most comprehensive programs in the health industry. See *National Health Planning*, *supra* note 86, at 511.

In other industrial contexts the courts have specifically avoided conferring blanket antitrust immunity. See *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973) (shipping); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 373-74 (1973) (electric power industry); *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 217-19 (1966) (shipping); *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 305 (1963) (airlines); *California v. Federal Power Comm'n.*, 369 U.S. 482, 489 (1961) (natural gas industry); *MCI Communications v. American Tel. & Tel. Co.*, 462 F. Supp. 1072, 1081 (N.D. Ill. 1978) (telecommunications industry).

99. The Reagan Administration intends to phase out health planning under NHPDA over a two year period. At the same time, the Administration has proposed legislation which over a two year period would phase in a pro-competition program. A new bill, S.139, 97th Cong., 1st Sess. (1981), attempts to increase competition in the health care industry and, as a result, prevent costs from rising. The Administration hopes the new program accomplishes these objectives by instituting measures to discourage the unnecessary use of health services. CONG. Q. WEEKLY REP., Sept. 5, 1981, at 1672; CONG. Q. WEEKLY REP., March 7, 1981, at 415-19.

The debate between advocates of health industry regulation and supporters of free competition has existed since the early seventies. After the passage of NHPDA, the industry seemed destined for increasing regulatory pressure. See Rosoff, *supra* note 27, at 446; Comment, *Health Care Regulation in California: CONstitutional?*, 11 PAC. L.J. 845, 845-46 (1980). More recently, regulation in all industries has come under general attack as a barrier to free competition, thus inspiring the recent trends toward deregulation. See *Antitrust and Regulated Industries*, *supra* note 30, at 755. See generally *Statement of Joe Sims*, 48 A.B.A. ANTITRUST L.J. 943 (1979) (criticizing regulation as an ineffective substitute for competition; evaluating role of antitrust immunities). As deregulation becomes more widespread, the private sector will become more involved in decision-making. The role played by antitrust law must be adjusted to suit this new environment. See Sullivan, *Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships*, 68 CALIF. L. REV. 1, 2 (1980).

Professor Clark C. Havighurst and others have also criticized health planning and regulation as an ineffective means of solving the problems of the health industry. See Havighurst & Hackbarth, *Competition and Health Care, Planning for Deregulation*,

provides timely advice for defining a balance between regulatory authority and voluntary public decision-making.

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REGULATION, 39 (May/June 1980); D. SALKEVER & T. BICE, HOSPITAL CERTIFICATE-OF-NEED CONTROLS, 82-83 (1979); Havighurst, *Health Maintenance Organizations and the Market for Health Services*, 35 L. & CONTEMP. PROB. 716, 717 (1970); Horan & Nord, *Application of Antitrust Law to the Health Care Delivery System*, 9 CUM. L. REV. 685, 719 (1979); See also Canarie, *Maldistributed Health Care Services: Restructuring the Current Regulatory System*, 6 AM. J.L. & MED. 407, 411-13 (1980).

While Havighurst favors competitive deregulatory means of dealing with the health industry, other experts in the field favor health planning in the context of a new regulatory scheme. The latter approach fashions an active role for consumers, hospitals and insurers within a new regulatory philosophy which strives to encourage participation from both public and private sectors. See Weiner, *Governmental Regulation of Health Care: A Response to Some Criticisms Voiced by Proponents of a "Free Market"*, 4 AM. J.L. & MED. 15, 26-30 (1978); Weiner, *Health Care Policy & Politics: Does the Past Tell Us Anything About the Future?*, 5 AM. J.L. & MED. 331, 338-41 (1980).

