The Supremacy Clause and State Economic Controls: The Antitrust Maze

By MICHAEL CONANT*

Introduction

Three recent cases decided by the United States Supreme Court are the latest in a series of contests concerned with the extent to which state economic controls that restrain competition are preempted by federal antitrust laws. In *New Motor Vehicle Board v. Orrin W. Fox Co.*[1] and *Rice v. Norman Williams Co.*,[2] the Court upheld state statutes which obstructed the antitrust goal of fostering competition. In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*,[3] however, the Court invalidated state legislation which called for wine dealers to engage in resale price maintenance. Each of the three cases involved a state legislative sanction of a horizontal combination of wholesalers or retailers in trade associations. The Supreme Court has, in effect, adopted a public policy that some of these combinations in restraint of trade which receive state legislative sanction will be approved while others will be condemned.

This article attempts to reconcile the almost forty years of inconsistent Supreme Court decisions on one aspect of federal preemption—the relationship between federal antitrust laws and state economic controls.[4] The primary source of confusion is the Supreme Court's deci-

* Professor, University of California, Berkeley, School of Business Administration. B.S., 1945, University of Illinois; A.M., 1946, Ph.D., 1949, University of Chicago; J.D., 1951, University of Chicago Law School.

1. 439 U.S. 96 (1978).

2. 102 S. Ct. 3294 (1982).

3. 445 U.S. 97 (1980).

4. "Economic controls" is used here as a collective term to include both the enforcement of competition through antitrust laws and the direct governmental regulation of prices, output, marketing methods, and entry. Federal preemption, as a general constitutional principle relating national law to state law, applies equally to both of these classes of controls and to instances in which antitrust and regulatory laws conflict. The objective here is to develop a subset of reasoned, constitutional rules to guide application of the principle of federal preemption to state economic controls. The primary quality required of such rules is

sion in *Parker v. Brown*.[5] In *Parker*, the Court held that Congress impliedly created antitrust immunity for some state regulatory statutes which conflict with the Sherman Act,[6] thus establishing the so-called "state action" defense.[7] The thesis of this study is that *Parker* violated an important principle of preemption law under the Supremacy Clause,[8] which mandates that a state law whose substance actually conflicts with national law is unenforceable. Furthermore, the *Parker* opinion was confined to remedies available under the Sherman Act, although the proper issue for determination was the remedies available to enforce the Supremacy Clause. The comprehensive constitutional approach of this study differs from that of most earlier commentators.[9]

The outstanding characteristic of seventy-five years of decisions on the relationship of the antitrust laws to conflicting state regulation is the absence of briefed or oral argument on the meaning and application of the Supremacy Clause. In the Supreme Court cases in which conflict with the Sherman Act was raised, from *Olsen v. Smith*,[10] in

that they be consistent with the particular constitutional clause and with each other. These rules also must transcend the immediate result in the particular case. Consequently, they must be sufficiently definite to avoid being subject either to the personal economic biases of the majority of the judiciary or to that majority's political preferences for or against regulation by national or state government. *See* H. WECHSLER, PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 21 (1961).

5. 317 U.S. 341 (1943).

6. Ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1976 & Supp. V 1981)). For the purposes of this article, the phrase "antitrust laws" refers to the Sherman Act, the Clayton Act, ch. 323, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12-27 (1976 & Supp. V 1981)), and to various acts providing additions or exceptions to the first two Acts. *See* Federal Trade Commission Act, ch. 311, § 4, 38 Stat. 717, 719 (1914) (current version at 15 U.S.C. § 44 (1976 & Supp. V 1981)).

7. Since *Parker*, the "doctrine" of state action defense has been described as "murky confusion" and as "a crazy guilt of disparate rationales and rubrics." Handler, *Antitrust—1978*, 78 COLUM. L. REV. 1363, 1374 (1978), *quoting* Handler, *Twenty-fourth Annual Antitrust Review*, 72 COLUM. L. REV. 1, 18 (1972). Professor Handler notes that the Supreme Court has failed "to provide an analytical framework by which the disposition of future state action cases can be predicted with at least a reasonable degree of certainty." *Antitrust—1978*, *supra* at 1378.

8. U.S. CONST. art. VI, cl. 2.

9. The one earlier study centering on the constitutional issue is Note, Parker v. Brown: *A Preemption Analysis*, 84 YALE L.J. 1164 (1975). For citations of earlier articles, see Handler, *The Current Attack on the* Parker v. Brown *State Action Doctrine*, 76 COLUM. L. REV. 1 & n.3 (1976). The most recent analyses include P. AREEDA, ANTITRUST LAW, ch. 2B (Supp. 1982); 1 P. AREEDA & D. TURNER, ANTITRUST LAW, ch. 2B (1978); Gebhart, *Constitutional Limits on State Regulatory and Protectionist Policies*, 48 ABA ANTITRUST L.J. 1351, 1374-78 (1979); Handler, *Antitrust—1978*, *supra* note 7, at 1374-88; Rogers, *The State Action Antitrust Immunity*, 49 U. COLO. L. REV. 147 (1978); Smith, *Antitrust Immunity for State Action: A Functional Approach*, 31 BAYLOR L. REV. 263 (1979); Note, Parker v. Brown *Revisited: The State Action Doctrine after* Goldfarb, Cantor *and* Bates, 77 COLUM. L. REV. 898 (1977).

10. 195 U.S. 332 (1904).

1904, into this decade, the Supremacy Clause was not discussed. In some other cases of state regulation, even the conflict between state and federal law was overlooked. For example, the constitutional challenges to state resale price maintenance laws—before passage of the congressional exemption in the Miller-Tydings Fair Trade Act of 1937[11]—were based primarily on the Due Process and Equal Protection Clauses.[12] In spite of the Sherman Act proscription expounded in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[13] and bills for exemption debated in almost every session of Congress since 1929,[14] counsel in state action cases failed to raise any issue of conflict with the Sherman Act, let alone brief the applicability of the Supremacy Clause. The issue of conflict between state and federal laws was finally raised in *Schwegmann Bros. v. Calvert Distillers Corp.*[15] The nonexempt part of state law on resale prices, which was found to conflict with the Sherman Act, was held invalid, but even here the Court did not mention the constitutional framework of the Supremacy Clause.[16]

Despite this historical trend, proper analysis demonstrates that the right conclusion to be drawn, based on a large body of established constitutional law, is that there can be no state action defense to alleged federal antitrust violations when state and federal law conflicts. Except in antitrust cases, a federal court injunction against state officers has long been one proper remedy when state statutes conflict with the Con-

11. Ch. 690, 50 Stat. 693 (1937) (codified at 15 U.S.C. § 1; repealed 1975) (exempting resale price maintenance when adopted pursuant to state statute).

12. *See, e.g.*, Old Dearborn Distrib. Co. v. Seagram-Distillers Corp., 299 U.S. 183, 193-94, 197 (1936). The Court in *Old Dearborn* did note the established limitation of the Sherman Act in this area, as exemplified by the *Dr. Miles* case, *infra* note 13, but it noted no constitutional conflict between the state statutes and the Sherman Act. This may be explained in part by the narrow interpretation of the Commerce Clause at the time. *See* Carter v. Carter Coal Co., 298 U.S. 236 (1936). Since the litigation centered on the constitutionality of the intrastate aspects of the state statutes, no issues of possible direct effects on interstate commerce were raised, and thus the possible effect of the Sherman Act was not in question.

13. 220 U.S. 373, 408 (1911) (vertical price fixing held illegal under § 1 of the Sherman Act).

14. *See, e.g.*, *Price Fixing Bill: Hearings on H.R. 11 Before the House Rules Comm.*, 71st Cong., 2d Sess. (1930); H.R. REP. No. 536, 71st Cong., 2d Sess. (1930) (Report to accompany H.R. 11); *Capper-Kelly Fair-Trade Bill: Hearings on S. 97 Before the Senate Comm. On Interstate Commerce*, 72d Cong., 1st Sess. (1932); S. REP. No. 441, 72d Cong., 1st Sess. (1932). For a summary of these attempts to secure legislation, see FEDERAL TRADE COMM'N REPORT ON RESALE PRICE MAINTENANCE, 39-43 (1945).

15. 341 U.S. 384 (1951).

16. In contrast, in the one reported resale price case in the state courts where the Supremacy Clause issue was briefed, the conflicting state law was summarily held invalid. *See* Grayson-Robinson Stores v. Oneida, Ltd., 209 Ga. 613, 75 S.E.2d 161 (1953).

stitution and federal statutes.[17] Consequently, the view expressed herein is that the Supreme Court decision in *Parker*, denying an injunction against state officers, is erroneous under any penetrating interpretation of the language of the Supremacy Clause and of the Sherman Act.[18]

This article begins with an analysis of the Supremacy Clause, followed by a review of the cases confirming the supremacy of the national antitrust laws. This is followed by a description of two broad classes of state economic regulations that do not violate the Supremacy Clause because they are consistent with the federal antitrust laws. The next section presents an analysis of the *Parker* case and its impact in the lower courts. The final section is a review of the recent Supreme Court cases, culminating in the *Norman Williams* case.

It is critical to an understanding of national preemption under the Supremacy Clause to distinguish it from antitrust defenses based on congressional exemption.[19] The analytical problems are different. Federal preemption of state action is concerned with relations between two governments—the constitutional problem of federalism. In contrast, congressional exemption is concerned with conflicting statutes within a single government. Only the Congress has power to create exemptions to its earlier legislation. Whether the exemption is express or implied, the judicial issue only pertains to one limited sector of statutory interpretation. Unfortunately, some writers have failed to distinguish the state action defense from the issue of congressional exemption.[20] This study is concerned only with the issue of federal preemption of state action—an issue of constitutional interpretation.

17. *See, e.g.*, Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) (upholding a district court injunction against enforcement of Illinois statute held unconstitutional under the Commerce Clause).

18. The argument that *Parker* should be overruled derives from the basic method of constitutional reasoning adopted by the Supreme Court, which centers on constitutional language and contemporary rules of documentary interpretation. *See* 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, bk. III, ch. 5 (1891); Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1899). As Justice Frankfurter stated, "[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." Graves v. New York, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring). *See also* M. CONANT, THE CONSTITUTION AND CAPITALISM, ch. 3 (1974); Blaustein & Field, *"Overruling" Opinions in the Supreme Court*, 57 MICH. L. REV. 151 (1958).

19. *Compare* 1 P. AREEDA & D. TURNER, *supra* note 9, at ¶ 214a *and* Handler, *Antitrust—1978*, *supra* note 7, at 1378 *with* Handler, *The Current Attack on* Parker v. Brown *State Action Doctrine*, *supra* note 9, at 10.

20. *See, e.g.*, Ludington, *Valid Governmental Action as Conferring Immunity or Exemption from Private Liability Under the Federal Antitrust Laws*, 12 ALR FED. 329 (1972).

I. Application of the Supremacy Clause

The doctrine of federal legislative preemption is based on the Supremacy Clause of Article VI of the Constitution.[21] In *McCulloch v. Maryland*,[22] Chief Justice Marshall stated that the consequence of this clause is that "the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."[23] Primacy of federal law is the glue that bonds together a nation of diverse interest groups. It ensures that congressional policies will not be defeated by the states.

The Supremacy Clause is most easily applied to those powers belonging exclusively to the federal government, such as the war power[24] and the power to coin money.[25] The states are clearly precluded from acting within these spheres of responsibility.[26] More difficult problems arise with the common or overlapping powers, such as taxation, and with the shared powers, such as regulation of commerce, in which case congressional action in a certain area excludes inconsistent state action. On these subjects the states have acknowledged power to pass statutes, but such statutes must not interfere or conflict with national laws or treaties. As the Court held in *Gibbons v. Ogden*,[27] "In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it."[28]

The application of the Supremacy Clause was reviewed recently in *Ray v. Atlantic Richfield Co.*[29] In determining whether a federal statute precludes similar state legislation, the first inquiry is whether the Congress has either explicitly or implicitly declared that the federal power is exclusive, and that the states are prohibited from regulating aspects

21. U.S. CONST. art. VI, cl. 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

22. 17 U.S. (4 Wheat.) 316 (1819).

23. *Id.* at 436.

24. U.S. CONST. art. I, § 8, cls. 1, 11-16.

25. *Id.* at cl. 5.

26. *See, e.g.*, Chy Lung v. Freeman, 92 U.S. 275 (1875) (Federal congressional power to regulate commerce with foreign nations under art. I, § 8, cl. 3 is exclusive).

27. 22 U.S. (9 Wheat.) 1 (1824).

28. *Id.* at 211.

29. 435 U.S. 151, 158 (1978) (hereinafter cited as ARCO). *See also* Malone v. White Motor Corp., 435 U.S. 497, 504 (1978). *See generally* Note, Parker v. Brown: *A Preemption Analysis*, *supra* note 9, at 1167-69.

of the same topic. The Court in *ARCO* lists three instances in which the Court will presume Congress intended to preclude state law and in which, consequently, state statutes on the same topic will be totally excluded.[30] The instances pertinent to this study, however, are those in which the federal statute is nonexclusive, since the national antitrust laws do not preclude state economic regulation.[31]

Where the general purposes of both state and federal statutes are the same, the courts often will find that they supplement each other and are not in conflict.[32] The pertinent test was set forth in *ARCO*:

> Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it *actually conflicts* with a valid federal statute. A conflict will be found "where compliance with both federal and state regulations is a physical impossibility" . . . or where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[33]

Where both national and state legislation are validly operative in the same field, the test of preemption is *actual conflict* in the language, purposes, operation or necessary effect of the two statutes.[34] The courts will try, however, to construe state laws so that no conflict with national law is found. General principles of national policy will be interpreted to except state laws that narrowly enforce legal rules which in some minor aspect seem to conflict.[35]

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30. Federal statutes on a topic are exclusive if (1) the regulation is so pervasive that the reasonable inference is that Congress left no room for the states to supplement it, (2) the national interest is so dominant that the federal system will preclude enforcement of state laws on the same subject, or (3) the object of the federal statute or the character of obligations imposed by it may direct exclusivity. 435 U.S. at 157-58 (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

31. *See infra*, Section III, discussing state regulation that is consistent with federal antitrust laws.

32. Thus, the preemptive scope of copyright laws was narrowly construed to allow additional state protection against record piracy. *See* Goldstein v. California, 412 U.S. 546 (1973). *See also* Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975).

33. 435 U.S. at 158 (citing Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963) and Hines v. Davidowitz, 312 U.S. 52, 67 (1941)) (emphasis added).

34. McCray v. United States, 195 U.S. 27, 60 (1904). In *ARCO*, portions of the Washington Tanker Law were held to be in direct conflict with federal law, particularly the Ports and Waterways Safety Act of 1972, and thus preempted thereby. 435 U.S. at 158-68, 173-78.

35. For example, it is a principle of federal patent law that all ideas in general circulation are dedicated to the common good unless they are protected by a valid patent. *See* Lear, Inc. v. Adkins, 395 U.S. 653, 668 (1969). This principle, however, does not preempt state trade secret laws allowing unfair competition actions against employees who violate agreements not to reveal novel processes to others. *See* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974). On the other hand, state unfair competition laws will not be allowed to override the national patent laws and give comprehensive protection against the copying of

The effect of intergovernmental comity is that there are no presumptions against state legislation on the same general subject matter as national legislation. "Our system of government is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency."[36] Congress often does not expressly state in its legislation that it thereby preempts state law because national and state laws on the same subject can complement one another.[37] However, if state law conflicts with national law or would frustrate the federal scheme, it must fall.[38]

II. Supremacy of Federal Antitrust Laws

The quasi-constitutional character of the national antitrust laws has been noted many times.[39] It is most eloquently stated by Mr. Jus-

an article which has been judicially determined to be unpatentable. *See* Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964); Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964).

36. The Minnesota Rate Cases, 230 U.S. 352, 402 (1913).

37. *See, e.g.*, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 143-46 (1963).

38. *See* Jones v. Rath Packing Co., 430 U.S. 519 (1977); City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624 (1973). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 377-84 (1978).

The issue of invalid state law may arise in litigation between private parties or in actions by or against the state. Theoretically, a declaratory judgment of invalid state law should be available regardless of whether the defendant is a private party or the state. When a person subjected to state regulation argues that it is unconstitutional because it is preempted by national legislation, he may violate the state law and defend legal action on the ground of federal preemption. The federal courts, however, do not require a party to subject himself to irreparable damage or to criminal prosecution. The person or firms subject to regulation may sue in federal court to enjoin enforcement of the state statute and the federal courts may enjoin state statutes conflicting with national law. *See* Ray v. Atlantic Richfield Co. (ARCO), 435 U.S. 151, 156 (1978); Jones v. Rath Packing Co., 430 U.S. 519, 523-24 (1977); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 157-58 (1963); Hines v. Davidowitz, 312 U.S. 52 (1941). The suit is not against the state government, but is against state officials to enjoin enforcement of invalid law—a principle derived from cases challenging the constitutionality of state laws. *See* Truax v. Raich, 239 U.S. 33 (1915); *Ex parte* Young, 209 U.S. 123 (1908).

39. *See, e.g.*, Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958), where Justice Black notes: "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained inter-action of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." *See* Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933); H.B. THORELLI, THE FEDERAL ANTITRUST POLICY 608 (1955); W. HAMILTON & I. TILL, ANTITRUST IN ACTION, 119 (TNEC Monograph No. 16, 1940).

tice Marshall, as follows:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.[40]

The public regard for antitrust laws reflected in this conception of their quasi-constitutional status would probably preclude total repeal of these laws.

This almost impregnable aspect of antitrust legislation, however, clearly applies only to the set of procompetitive statutes and not to anticompetitive congressional exemptions. The antitrust laws are defined in section 1 of the Clayton Act[41] and in section 4 of the Federal Trade Commission Act[42] to include a few specific statutes designed to enforce competition in the economy. It is essential to an understanding of the application of federal preemption in the antitrust context to comprehend this limitation in the definition of antitrust laws. The only exemption that is included in the statutory definition of the antitrust laws is for labor organizations in section 6 of the Clayton Act.[43] The antitrust laws, for example, do not include the section of the Interstate Commerce Act which exempts from those laws railroad mergers approved by the Interstate Commerce Commission.[44] Nor do the antitrust laws include those federal statutes designed to subsidize agriculture through price supports and marketing quotas which cause certain grain, cotton, tobacco, and peanut prices to be noncompetitive.[45] Even the Miller-Tydings exemption to section 1 of the Sherman Act, which promoted anticompetitive vertical price fixing and which was later re-

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

41. Ch. 323, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 12 (1976)). *See* Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 375-76 (1958).

42. Ch. 311, 38 Stat. 717, 719 (1914) (current version at 15 U.S.C. § 44 (1976)).

43. 15 U.S.C. § 17. This section gives antitrust immunity to labor organizations and their members "lawfully carrying out" their "legitimate objects." *Id.*

44. Interstate Commerce Act, ch. 104, § 5, 24 Stat. 380 (1887) (codified as amended at 49 U.S.C. § 11343 (Supp. V 1981)).

45. *E.g.*, Agricultural Adjustment Act of 1938, ch. 30, §§ 301-56, 52 Stat. 31 (1938) (codified as amended at 7 U.S.C. §§ 1301-59 (1976 & Supp. V 1981)).

pealed,[46] was not included in the definition of antitrust laws. In fact, though Congress has created many exemptions to the antitrust laws, these are narrowly construed and will not be readily implied.[47] One can conclude that under the Supremacy Clause, state statutes must conform to the national antitrust laws in their unqualified form, unless a federal enabling statute expressly permits state legislative exemptions.

The specific criteria of the federal antitrust laws, to which state law must conform, are found in the language of the Sherman and Clayton Acts and in the body of Supreme Court decisions which interpret these statutes. While some minor inconsistencies do arise, especially from the Robinson-Patman Act,[48] the primary goal is the *preservation of competition*.[49] With the entire body of law framed in this goal, the laws can be seen as a definitive indicium of congressional purpose for application of the Supremacy Clause. The discretion of judges is limited. They may not impose their own economic biases in determining which state statutes are valid, as once was done in applying substantive due process analysis to economic regulations.[50] The few instances where the

46. Ch. 690, 50 Stat. 693 (1937), *repealed by* Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, § 2, 89 Stat. 801.

47. *See* Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979). *See also* Carnation Co. v. Pacific Westbound Conf., 383 U.S. 213, 217-18 (1966), *modified*, 383 U.S. 932 (1966); California v. Federal Power Comm'n, 369 U.S. 482, 485 (1962).

48. Ch. 592, § 1, 49 Stat. 1526 (1936) (codified at 15 U.S.C. § 13 (1982)). The Robinson-Patman Act amended § 2 of the Clayton Act, ch. 323, 38 Stat. 730 (1914). This Act prohibits certain forms of price discrimination but has been criticized as conflicting with the basic competition theory of the Sherman Act. *See generally* Adelman, *The Consistency of the Robinson-Patman Act*, 6 STAN. L. REV. 3 (1953); Bowman, *Restraint of Trade by the Supreme Court: The* Utah Pie *Case*, 77 YALE L.J. 70 (1967); Dam, *The Economics and Law of Price Discrimination: Herein of Three Regulatory Schemes*, 31 U. CHI. L. REV. 1 (1963).

49. Key language in sections 1 and 2 of the Sherman Act was based on the contemporary common law. H.B. THORELLI, *supra* note 39, at 571. The essential meaning of restraint of trade in 1890 was impairment of competition. *See* Santa Clara Mill & Lumber Co. v. Hayes, 76 Cal. 387, 392, 18 P. 391, 393 (1888); Craft v. McConoughy, 79 Ill. 346, 350 (1875); Anderson v. Jett, 89 Ky. 375, 380, 12 S.W. 670, 672 (1889); Gibbs v. Smith, 115 Mass. 592, 593 (1874); Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666, 672 (1880); Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173, 183 (1871).

As to the use Congress made of common law terms in drafting the final statutory language, Thorelli concludes: "The records of legislative debates furnish abundant proof that *the direct and specific aim of Congress was to eliminate and prevent restrictions on competition*." H.B. THORELLI, *supra* note 39, at 571 (emphasis in original). *See also*, Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).

50. *See* McCloskey, *Economic Due Process and the Supreme Court: An exhumation and Reburial*, 1962 SUP. CT. REV. 34. Justice Stewart and some commentators characterized the present selective interdiction of some anticompetitive state regulatory statutes under indeterminate standards as analogous to substantive due process. Cantor v. Detroit Edison Co., 428 U.S. 579, 640 (1976) (Stewart, J., dissenting); Verkuil, *State Action, Due Process and Antitrust: Reflections on* Parker v. Brown, 75 COLUM. L. REV. 328, 333 (1975); Note, Parker

Supreme Court has stated inconsistently that the objective of antitrust law is both to protect competition and to protect competitors from competition must be considered aberrations from the general purposes indicated by the statutory language.[51]

The federal antitrust laws are not so exclusive, however, that they preclude all state economic controls. State statutes consistent with the federal antitrust objectives of promoting competitive markets or curtailing monopoly do not violate the Supremacy Clause. States may thus pass and enforce antitrust laws for the enforcement of competition in their intrastate commerce.[52] Furthermore, even though such intrastate commerce affects other states and is also subject to national control, a state antitrust prosecution is not precluded so long as it is not inconsistent with a similar federal prosecution.[53]

III. State Regulation Consistent with Federal Antitrust Laws

There are two large classes of state economic controls that entail direct regulation of entry, price, or marketing policies of businesses, and yet do not conflict with the national antitrust laws. They are (1) state laws whose objective is to promote a competitive market result or at least curtail monopoly power, and (2) state laws designed to protect public health and safety, which may necessarily result in some minor impediment to competition. Most state economic regulation falls in these two categories and thus would not be voided by strict enforcement of the Supremacy Clause.

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51. *See* United States v. Von's Grocery Co., 384 U.S. 270, 274-77 (1966); Brown Shoe Co. v. United States, 370 U.S. 294, 320, 344 (1962). For critiques of the anticompetitive portions of these cases, see *Von's Grocery*, 384 U.S. at 281-304 (Stewart, J., dissenting); Bison, *The* Von's *Merger Case—Antitrust in Reverse*, 55 GEO. L.J. 201 (1966); Peterman, *The* Brown Shoe *Case*, 18 J.L. & ECON. 81 (1975); Turner, *Conglomorate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1326 (1965); Comment, *Criteria for Determining the Legality of Horizontal Mergers:* United States v. Von's Grocery Co., 14 U.C.L.A. L. REV. 653 (1967).

52. *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); Flood v. Kuhn, 443 F.2d 264, 267 (2d Cir. 1971), *aff'd* 407 U.S. 258 (1972). *See also* Mosk, *State Antitrust Enforcement and Coordination with Federal Enforcement*, 21 A.B.A. SEC. ANTITRUST L. PROC. 358 (1962); Note, *The Commerce Clause and State Antitrust Regulation*, 61 COLUM. L. REV. 1469 (1961).

53. *See* Columbia Gas, Inc. v. New York State Elec. & Gas Corp., 28 N.Y.2d 117, 268 N.E.2d 790 (1971); State v. Sterling Theatres Co., 64 Wash. 2d 761, 394 P.2d 226 (1964).

A. State Regulation Promoting Competitive Results

The validity of state regulatory laws must first be judged by their language. As long as the statutory language indicates that the purpose is to preserve competition or to curtail monopoly, such laws are presumptively consistent with the antitrust laws. On the other hand, if the language shows an anticompetitive purpose, it is inconsistent with federal antitrust laws. The second task of the courts is to weigh the operation and effects of state regulatory statutes and determine whether or not the administration of these statutes conflicts with the federal antitrust laws.

There are many instances of state regulation which promote competitive results. One such area is state regulation or operation of structural monopolies. A structural monopoly occurs when economies of scale in a particular market dictate that one large firm can provide more efficient service than a set of smaller competitors.[54] Examples of structural monopolies include public utilities such as water, electric power, gas, and telephone companies. A state may decide to operate these utilities, or it may impose direct price and service regulation on private firms.[55] In either case, a monopoly is granted and competition is prohibited.[56] But by setting rates of return at a level comparable to those in competitive markets, the effects of this state regulation are analogous to the effects of competitive markets.[57] Thus, the objective of allowing structural monopolies to earn only a "competitive" rate of return is consistent with federal antitrust laws.[58]

54. *See* K. HOWE & E. RASMUSSEN, PUBLIC UTILITY ECONOMICS AND FINANCE 14-19 (1982); Stewart, *Plant Size, Plant Factor, and the Shape of the Average Cost Function in Electric Power Generation: A Nonhomogeneous Capital Approach*, 10 BELL J. ECON. 549 (1979).

55. *See* Cantor v. Detroit Edison Co., 428 U.S. 579, 595-96 (1976). *See also* E. TROXEL, ECONOMICS OF PUBLIC UTILITIES 32-37 (1947); C. KAYSEN & D. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 191-93 (1959).

56. Recently, some states have questioned whether economies of scale in certain utilities markets still exist. California, for instance, has begun to encourage competition among utility districts. *See* Advisory Committee Reports, District Reorganization Act, CAL. GOVT. CODE §§ 56000–550 (West 1983).

57. Even though economists have questioned the efficiency of maximum rate regulation, the policy objective is procompetitive. *See* Demsetz, *Why Regulate Utilities?*, 11 J.L. & ECON. 55 (1968); Stigler & Friedland, WHAT CAN REGULATORS REGULATE? THE CASE OF ELECTRICITY, 5 J.L. & ECON. 1 (1962). *See generally* Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

58. Similar statutes, promulgated to limit market power in certain markets characterized by the presence of only a few sellers, were the bases of the public utility concept. While some laws only required sellers to serve all who wished to buy their services without undue price discrimination, *see, e.g.*, the original Interstate Commerce Act of Feb. 4, 1887, ch. 104, 24 Stat. 379, § 2, others subjected sellers to maximum price or rate regulation. *See, e.g.*, Munn v. Illinois, 94 U.S. 113 (1877), noting that: "It has been customary in England from

There are other areas of state regulation, such as certain minimum price regulations,[59] that do not promote the aims of federal antitrust laws. The failure to raise issues of facial or operational conflict in early constitutional contests dealing with these regulations[60] has left us with many anticompetitive state laws.[61]

B. Health and Safety Regulations

Some state economic regulation, the clear purpose of which is to protect public health and safety, also will be found to be consistent with federal antitrust laws. Thus, a state monopoly in the sale of alcoholic beverages could be rationalized as a health measure to control consumption.[62] State pure food laws, though they limit the supply of (impure) food, are not primarily anticompetitive.[63] State licensing of doctors and other professionals, though a limit on entry, has as its primary objective the protection of the quality of services and presumably will not violate the antitrust laws so long as large numbers of professionals are licensed and they do not conspire to restrain trade.[64]

The leading case on this topic for many years was *Olsen v. Smith*.[65] A Texas statute licensed ship pilots and created a Board of Commissioners to fix maximum charges for pilotage, examine pilots' qualifications, regulate their performance, hear complaints against them, and suspend them. The lower court held that "[t]he object of such laws is to protect life and property from the perils incident to navigation."[66] The

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time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a *maximum* of charge to be made for services rendered, accommodations furnished, and articles sold." *Id.* at 125 (emphasis added).

59. *See, e.g.*, California Agricultural Prorate Act, 1933 Cal. Stat., ch. 754 (current version at CAL. AGRIC. CODE §§ 59641-662 (West 1968)); California Stabilization and Marketing of Market Milk Act, CAL. FOOD & AGRIC. CODE §§ 61801-812 (West Supp. 1983).

60. *See supra* note 12 and accompanying text.

61. *See, e.g.*, Nebbia v. New York, 291 U.S. 502 (1934). *See generally* Gray, *The Passing of the Public Utility Concept*, 16 J. LAND & PUB. UTIL. ECON. 8 (1940).

62. *See, e.g.*, Lowenstein v. Evans, 69 F. 908 (C.C.D.S.C. 1895).

63. *See, e.g.*, CAL. HEALTH & SAFETY CODE §§ 26520-537 (West Supp. 1983).

64. *See* Horowitz, *The Economic Foundations of Self Regulation in Professions*, in REGULATING THE PROFESSIONS 3 (R. Blair & S. Rubin eds. 1980).

This rationale should not be generalized to all licensing statutes. Some may have little or no value in controlling the quality of work and instead have monopoly profits for the licensees as their primary aim. *See* M. FRIEDMAN, CAPITALISM AND FREEDOM, ch. 9 (1962); W. GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENT RESTRAINT (1956); Donnem, *Federal Antitrust Law Versus Anticompetitive State Regulation*, 39 ANTITRUST L.J. 950, 953-55 (1970); Moore, *The Purpose of Licensing*, 4 J.L. & ECON. 93 (1961).

65. 195 U.S. 332 (1904).

66. Olsen v. Smith, 68 S.W. 320, 322 (Tex. Civ. App. 1902) (citing Steamship Co. v. Joliffe, 69 U.S. (2 Wall.) 450 (1864)).

Supreme Court upheld this statute on the general basis of a state action defense against enforcement of the Sherman Act. The statute was held to be within "the class of powers which may be exercised by the states until Congress has seen fit to act upon the subject."[67] The monopoly which was created was held legal as, in effect, it was a direct outgrowth of the state's power to regulate in this instance.[68]

IV. State Regulation in Conflict with Federal Antitrust Laws

Contrary to some Supreme Court rulings discussed below,[69] the language and logic of the Supremacy Clause dictate that there can be no general state action defense to enforcement of the federal antitrust laws. Under the general principle stated in *ARCO*,[70] all state laws affecting interstate commerce[71] whose purpose or effect is anticompetitive will conflict with the federal antitrust laws and, in effect, violate the Supremacy Clause. It is obvious that under the preemption doctrine, federal courts would be obliged to strike down any state statute declaring that the federal antitrust laws were inapplicable in that state. Yet state statutes negating federal antitrust laws and state statutes mandating anticompetitive behavior have essentially the same purposes and effects. It follows from this that any state statute administering, compelling, or approving cartel behavior, such as price fixing by private firms whose commerce affects other states, should be held to violate the Supremacy Clause.[72]

Schwegmann Bros. v. Calvert Distillers Corp.[73] is the leading authority condemning state statutes that in effect compel unwilling firms to become members of state-approved, private price-fixing cartels. In *Schwegmann*, the members of the cartel who had voluntarily signed contracts to fix resale prices were exempt from the antitrust laws under

67. 195 U.S. at 341 (citing Wilson v. McNamee, 102 U.S. 572 (1881); *Ex parte* McNeil, 80 U.S. (13 Wall.) 236 (1872); Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299 (1852)).

68. *See* 195 U.S. at 344-45.

69. *See infra* text accompanying notes 82-114.

70. 435 U.S. 151 (1978); *see supra* note 33 and accompanying text.

71. As to the scope of the application of the Commerce Clause, see Hospital Bldg. Co. v. Rex Hosp. Trustees, 425 U.S. 738, 743 (1976).

72. Courts should thus deny enforcement of state laws conflicting with national antitrust laws against persons and firms involved in interstate commerce. A corollary of this rule is that persons or firms about to engage in competition in violation of a state anticompetitive law should have a good cause of action for injunction against the state or its officers. *See supra* note 38.

73. 341 U.S. 384 (1951).

the Miller-Tydings amendment to section 1 of the Sherman Act.[74] Requiring the nonsigning retailers to adopt the cartel price, however, had the same market effect as would a horizontal agreement of nonsigners to adopt the price.[75] As the Supreme Court noted, "when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids."[76] Though obviously based on the Supremacy Clause, there was no mention of the clause in this key preemption decision.

If state *compulsion* of anticompetitive behavior is preempted by federal antitrust laws, mere state *approval* of such behavior is surely also forbidden. As Justice Stone said, "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."[77]

It is only a short step from state compulsion to join or follow a cartel, as in *Schwegmann*, to state administration of cartels. As a matter of logic, there is no reason for the courts to treat state administration of what are essentially private cartels any differently from state approved cartels. Regardless of public or private administration, the monopolistic exploitation of consumers occurs and the principles of the federal antitrust laws are violated. As will be seen below, however, this logic was rejected by the Supreme Court.[78]

V. State Action Defenses

As a preliminary to a critique of *Parker v. Brown*,[79] it is essential to note that there is a valid state action defense to the antitrust laws for states and their officials when acting in their governmental capacities as regulators. This arises out of intergovernmental comity. The national and state governments are coordinate regulators of private behavior. When state law approves, commands, or directs supervision of behavior that, standing alone, would violate the antitrust laws, the state and state officials are not parties to the illegal combination. As regulators,

74. Ch. 690, 50 Stat. 693 (1937) (codified at 15 U.S.C. § 1), *repealed by* Consumer Goods Pricing Act of 1975, Pub. L. 94-145, § 2, 89 Stat. 801. During its existence, the Act created an antitrust exemption for "contracts or agreements prescribing minimum prices for the resale" of specified commodities when such contracts were legal under state law.

75. The Miller-Tydings Act expressly continued the prohibitions of the Sherman Act against horizontal price fixing by firms at any functional level. 15 U.S.C. § 1 (1937) (repealed 1975).

76. 341 U.S. at 389.

77. Parker v. Brown, 317 U.S. 341, 351 (1943) (citing Northern Secs. Co. v. United States, 193 U.S. 197, 322, 344-47 (1904)).

78. *See infra* notes 89-92 and accompanying text.

79. 317 U.S. 341 (1943).

the state and its officials may not be indicted under the criminal sections of the antitrust laws,[80] and they may not be enjoined or sued for treble damages under the civil sections of those laws.[81] For this critique, the distinction between an action for injunction under the Sherman Act and an action for injunction under the Rules of Civil Procedure to enforce the Supremacy Clause is important.

A. Critique of *Parker v. Brown*

Parker v. Brown[82] is the modern foundation of the state action defense to the federal antitrust laws. It is also the classic case of a state-administered cartel established at the urging of the regulated sellers.[83]

In *Parker*, the Court tested the validity of the California Agricultural Prorate Act,[84] a state-established price maintenance program for agricultural commodities.[85] The Prorate Act created an Agricultural Prorate Commission which, upon petition of ten producers, appointed a committee of producers to formulate a proration program. If approved by the commission and sixty-five percent of the producers, who controlled at least fifty-one percent of the acreage in a crop, the program would become law with criminal penalties for violation. Under the program, producers were required to deliver seventy percent of their output to the state Department of Agriculture, which disposed of the goods in such manner as would stabilize prices.

Brown, a raisin producer, brought an action against the Prorate Commission and the committee of producers to enjoin enforcement of the raisin program. The complaint assailed the validity of the program under the Commerce Clause, and the three-judge district court en-

80. Sherman Act §§ 1-2, 15 U.S.C. §§ 1-2 (1976).

81. Injunction is issued pursuant to Sherman Act § 4, 15 U.S.C. § 4 (1976). The treble damage remedy was in Sherman Act § 7, ch. 647, 26 Stat. 210 (1890), *superseded by* Clayton Act § 4, ch. 323, 38 Stat. 731 (1914) (codified at 15 U.S.C. § 15 (1976)). *See* Lowenstein v. Evans, 69 F. 908 (C.C.D.S.C. 1895). The purpose of treble damages, in addition to deterrence, is to deprive violators of the antitrust laws of the fruits of their illegality, and to compensate victims of antitrust violations for their injuries. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 748 (1977) (Brennan, J. dissenting).

82. 317 U.S. 341 (1943).

83. *See id.* at 364.

84. 1933 Cal. Stat., ch. 754, *amended by* 1935 Cal. Stat., chs. 471, 743; 1938 Extra Sess., ch. 6; 1939 Cal. Stat., chs. 363, 548, 894; 1941 Cal. Stat., chs. 603, 1150, 1186 (current version at CAL. AGRIC. CODE §§ 59641-662 (West 1968)).

85. Other acts maintained resale prices. *See, e.g.*, California Fair Trade Act, 1931 Cal. Stat., ch. 278; 1933 Cal. Stat., ch. 260; Cal. Gen. Laws Ann., act 8782, ch. 843 (Deering 1937) (as amended); 1941 Cal. Stat., ch. 526 (codified as amended at CAL. BUS. & PROF. CODE §§ 16900-905 (West 1964)), *repealed by* 1975 Cal. Stat., chs. 402, 429. All these were Depression statutes designed to install noncompetitive prices. *See* Sunbeam Corp. v. Wentling, 185 F.2d 903, 905 (3d Cir. 1950), *vacated on other grounds*, 341 U.S. 944 (1951).

joined it as a "direct and illegal interference with interstate commerce."[86] The Sherman Act had been noted in the amended complaint, but antitrust issues were first briefed and heard on reargument in the Supreme Court.[87] The Justice Department filed a brief *amicus curiae* arguing that the Sherman Act preempted the conflicting state raisin program.[88] Nevertheless, the Supreme Court reversed, holding that the raisin program: (1) was not an impermissible burden on interstate commerce,[89] (2) was not preempted by the Agricultural Marketing Act of 1937,[90] and (3) did not violate the Sherman Act.[91]

As to the Sherman Act, the bulk of Justice Stone's opinion was devoted to the rule that state officers acting in a governmental regulatory capacity were immune from injunction under section 4. As noted above, this is indisputable. Stone's explanation—that in part this derives from an unexpressed legislative intent to immunize state officers[92]—was unnecessary, since their immunity is based on intergovernmental comity. His other basis of decision was state sovereignty,[93] and there he ignored the paramount position of the Supremacy Clause in issues of federalism.

As to the substance of the state Act, the Court stated, "We may assume for present purposes that the California prorate program would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate."[94] If the Court had used preemption analysis, the opinion would have drawn to a quick conclusion. The California statute was in actual conflict with the Sherman Act. Injunction against state officials to enforce the Supremacy Clause was the appropriate remedy.[95]

While the Court admitted that a state cannot give immunity to "those who violate the Sherman Act by authorizing them to violate

86. Brown v. Parker, 39 F. Supp. 895, 901 (S.D. Cal. 1941).

87. *See* Order for Reargument, 62 S. Ct. 1266 (1941).

88. *See* summary 87 L. Ed. 315, 321-22 (1943).

89. Parker v. Brown, 317 U.S. at 368.

90. *Id.* at 358.

91. *Id.* at 352.

92. "We find 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." *Id.* at 350-51.

93. "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.* at 351.

94. *Id.* at 350.

95. *See supra* note 38.

it,"[96] it held that command and supervision by the state creates an antitrust exemption. However, the Sherman Act contained no express exemption for persons and firms violating its provisions under state compulsion and supervision, and its language does not imply one.[97] Sections 1 and 2 of the Sherman Act begin with the unambiguous word "Every."[98] Section 1 has been interpreted consistently with the word "every" to hold all horizontal combinations to fix prices and other private cartels illegal per se.[99] No reasonable user of English would interpret the statutory language to imply an antitrust exemption for violators of the Sherman Act because their cartel was state imposed and administered. On the basis of mere legislative omission, the Supreme Court had no power to create one. Furthermore, the presumptions of our legal system are just the opposite. The Supremacy Clause controls the relationship between federal and state law, not unexpressed statutory intent. National statutes generally do not have supplementary clauses prohibiting conflicting state statutes because they are unnecessary. The Constitution obviates this task.

In *Parker*, there was no discussion by the Court of the language and scope of the Supremacy Clause. The state action defense was approved with full knowledge that the state law was inconsistent with, and contrary to, the mandate of competition in the Sherman Act.[100] The Court noted that there were similar federal statutes protecting agricultural prices in derogation of the Sherman Act. But this was not relevant. Congress may create such exemptions to the antitrust laws as required by political expediency. The states have no power to create exemptions to federal statutes. That is the essence of the Supremacy Clause.

96. Parker v. Brown, 317 U.S. at 351.

97. On the presumptions against antitrust exemptions, see *supra* notes 41-47 and accompanying text.

98. "Sec. 1. 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 hereby declared to be illegal." 15 U.S.C. § 1 (1976).

"Sec. 2. 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).

99. *See, e.g.*, Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980); United States v. Topco Assocs., Inc., 405 U.S. 596 (1972); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927). In light of the unswerving application of the per se illegality rule in price fixing cases both before and after Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933), that case must be considered a Depression aberration and without value as precedent.

100. *See* Parker v. Brown, 317 U.S. at 367-68.

The *Parker* opinion also created confusion by incorrectly applying its own standard for determining what level of state involvement would trigger antitrust immunity. Writing for a unanimous Court, Justice Stone emphasized that state action immunity applied only to programs actually administered by the state.[101] Justice Stone also noted in dictum that the state could not insulate persons and corporations from the Sherman Act merely by authorizing them to engage in anticompetitive behavior.[102] A leading constitutional scholar has commented, however, that in *Parker*

> [t]he central role played by private producers in both triggering and approving the organization of a marketing scheme under the California program makes it difficult to distinguish the case from one in which the state has merely attempted to authorize private conduct violative of the Sherman Act, something a state clearly cannot do.[103]

Thus, while Justice Stone emphasized state control, in fact the state control under the Prorate Act was, and is to this day, a facade.[104] The industry was governed by the producers to the detriment of consumers.

While the *Parker* opinion ruled only on the raisin program, the effect of the decision was to create standing law on antitrust immunity that is now known as the "*Parker* doctrine."[105] Following *Parker v. Brown*, a broad spectrum of decisions was issued by lower courts re-

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101. *See id.* at 352.

102. *See id.* at 351-52; *supra* text accompanying note 96.

103. L. TRIBE, *supra* note 38, at 381.

104. *See* French, *Fruit and Vegetable Marketing Orders: A Critique of the Issues and State of Analysis*, 64 AM. J. AGR. ECON. 916, 917 (1982); Jamison, *Marketing Orders and Public Policy for the Fruit and Vegetable Industries*, 10 STAN. FOOD RES. INST. STUD. 229, 233-34 (1971); NAT'L COMM'N ON FOOD MARKETING, ORGANIZATION AND COMPETITION IN THE FRUIT AND VEGETABLE INDUSTRY, ch. 12 (Tech. Study No. 4, 1966); D. MINAMI, B. FRENCH, G. KING, AN ECONOMETRIC ANALYSIS OF MARKET CONTROL IN THE CALIFORNIA CLING PEACH INDUSTRY (Univ. of Cal. Div. of Agric. Sci., Giannini Found. Monograph No. 39, 1979).

In spite of the fact that the primary effect of the law is to enable California growers to exploit American consumers, a 1976 amendment requires that the advisory boards that make the policy be made up of producers and handlers, and disingenuously asserts that their interest is the public interest. The statutory language states: "It is hereby declared as a matter of legislative determination, that the producers, or handlers, or both producers and handlers, appointed to any advisory board pursuant to this article are intended to represent and further the interest of a particular agricultural industry concerned, and that such representation and furtherance is intended to serve the public interest. Accordingly, the Legislature finds that, with respect to persons who are appointed to such advisory boards, the particular agricultural industry concerned is tantamount to, and constitutes, the public generally within the meaning of Section 87103 of the Government Code." 1976 Cal. Stat., ch. 1428, CAL. FOOD & AGRIC. CODE § 58852 (West Supp. 1983).

105. *See, e.g.*, Handler, *Current Attack*, *supra* note 9; Slater, *Antitrust and Government Action: A Formula for Narrowing* Parker v. Brown, 69 NW. U.L. REV. 71, 81 (1974).

garding the state action defense to the Sherman Act. Some have ignored the limiting dictum of *Parker* and have held that express regulation by state public utility commissions mandating, in effect, private antitrust violations creates Sherman Act immunity.[106] One court went so far as to hold that mere failure of a state regulatory agency to consider practices alleged to be antitrust violations was implied consent, and therefore the anticompetitive acts were considered to be state action.[107] A district court even held a *municipal* ordinance granting a monopoly of taxicab stands on the public streets to be immune from Sherman Act attack.[108] These cases were additionally distinguishable from *Parker* in that neither states nor state officers were defendants therein.

Other lower courts have taken an opposite approach. They have read *Parker v. Brown* in its narrowest import to give state action an exemption only when the state has substantially administered the anticompetitive program. When a North Carolina statute authorized tobacco warehousemen to form local tobacco boards of trade, and one board adopted a rule allocating selling time among warehouses, the state action defense was denied.[109] Without state supervision, this was merely private action masquerading as that of the state.[110] When a state insurance department had the power to set insurance premiums and rates, but no power to approve anticompetitive means, preferential rates received by one insurer from hospitals were not directed by the state and not immune from antitrust laws.[111] When one equipment company persuaded the public engineer to specify standards for public swimming pools which were met only by that firm's patented equipment, antitrust immunity was denied because the state had failed to make a determination that competition was not the legal goal for that field.[112] When a state commission had full regulatory power over

106. *See, e.g.*, Jeffrey v. Southwestern Bell, 518 F.2d 1129 (5th Cir. 1975); Business Aides, Inc. v. Chesapeake & Potomac Tel. Co., 480 F.2d 754 (4th Cir. 1973); Gas Light Co. v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972).

107. *See* Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248, 252 (4th Cir. 1971).

108. *See* Independent Taxicab Operators Ass'n v. Yellow Cab Co., 278 F. Supp. 979 (N.D. Cal. 1968).

109. *See* Asheville Bd. of Trade, Inc. v. F.T.C., 263 F.2d 502 (4th Cir. 1959). An action under the Federal Trade Commission Act is not within the technical definition of antitrust laws. *See* Federal Trade Commission Act § 44, 15 U.S.C. §§ 41-58 (1976 & Supp. V 1981).

110. *See Asheville Bd. of Trade*, 263 F.2d at 509. *See also* Bale v. Glasgow Bd. of Trade, Inc., 339 F.2d 281 (6th Cir. 1964).

111. *See* Travelers Ins. Co. v. Blue Cross, 298 F. Supp. 1109 (W.D. Pa. 1969).

112. *See* George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir. 1970), *cert. denied*, 400 U.S. 850 (1970).

trucking, a charge of monopolization of certificated delivery to stores was held to be merely approved by the state, and not state action immune from operation of antitrust law.[113] The mere filing of telephone tariffs with the state commission and compliance therewith was not sufficient state action to create antitrust immunity.[114]

B. Critique of Recent Cases

With the decisions reviewed above and other conflicting lower court decisions accumulating on the state action defense,[115] the Supreme Court finally agreed to review the state action doctrine of *Parker*. In *Goldfarb v. Virginia State Bar*,[116] a minimum-fee schedule for lawyers published by the Fairfax County Bar Association and enforced by the Virginia State Bar was held to violate section 1 of the Sherman Act.[117] The County Bar was a private group, while the Virginia State Bar was a state administrative agency. Without mention of the Supremacy Clause and its control over statutes and statutory interpretation, the Court felt bound to follow *Parker*: "The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign."[118] The Court found that neither the Virginia Supreme Court nor the state legislature had compelled, or even approved, the price fixing behavior. The fact that the State Bar was a state agency for some purposes did not create an antitrust shield which would allow it to initiate a scheme to foster anticompetitive practices for the benefit of its members.

From the viewpoint of the Supremacy Clause, the key distinction propounded in *Goldfarb* is irrelevant. Even if the Virginia legislature or the Virginia Supreme Court had commanded private price fixing, the action of the Bar Association would still be in direct conflict with the Sherman Act's per se rule against price fixing.[119] An injunction against the state's compulsion of anticompetitive behavior would have

113. *See* Marnell v. United Parcel Service, Inc., 260 F. Supp. 391 (N.D. Cal. 1966).

114. *See* Macom Products Corp. v. American Tel. & Tel. Co., 359 F. Supp. 973 (C.D. Cal. 1973).

115. *See, e.g.*, Wainright v. Nat'l Dairy Prods. Corp., 304 F. Supp. 567 (D.C. Ga. 1969); Schenley Indus., Inc. v. N.J. Wine & Spirit Wholesalers Ass'n, 272 F. Supp. 872 (D.C. N.J. 1967).

116. 421 U.S. 773 (1975), *reh'g denied*, 423 U.S. 886 (1975).

117. 421 U.S. at 781-83.

118. *Id.* at 790 (citing Parker v. Brown, 317 U.S. at 350-52; Continental Co. v. Union Carbide, 370 U.S. 690, 706-07 (1962)).

119. *See supra* note 99 and accompanying text.

been appropriate. Instead, in *Goldfarb*, a general state action defense to antitrust enforcement was perpetuated.

Cantor v. Detroit Edison Co.[120] provided the Supreme Court with its first opportunity to review a state action defense to antitrust enforcement in which the defendants were not state officers since the *Olsen v. Smith* case of 1904.[121] *Cantor* involved an action by a retail druggist for injunction and treble damages against a regulated electric utility, charging the utility with monopolization in the retailing of light bulbs. In an attempt to promote the sale of electricity, defendant supplied fifty percent of the standard size light bulbs sold in its area. Its rates, omitting any separate charge for bulbs (free bulb exchange), were approved by the Michigan Public Service Commission and could be changed only after the filing of a new tariff. The legal issue was "whether the *Parker* rationale immunize[d] private action which ha[d] been approved by a State and which must be continued while the state approval remain[ed] effective."[122] Reversing the district and circuit courts, the Supreme Court, by a vote of six to three, answered in the negative.

Justice Stevens, in an opinion for a plurality of four Justices, narrowly limited the defense in *Parker* to suits against state officials.[123] The price fixing administered by state officials in *Parker* was distinguished from the state regulatory approval of alleged monopolization in *Cantor*. The dissent noted, however, that the effect of limiting *Parker* to nonliability of state officials executing state actions "would trivialize that case to the point of overruling it."[124]

Two concurring and three dissenting Justices rejected the view that *Parker* was limited to the nonliability of state officials executing state actions.[125] They viewed the immunity in *Parker* as centering on the anticompetitive activity rather than on the identity of the defendants.[126] Thus, a majority found *Cantor* not to be governed by *Parker*. A majority of five held that *Parker* and other earlier decisions had "already decided that state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity."[127]

120. 428 U.S. 579 (1976).

121. 195 U.S. 332 (1904). *See supra* text accompanying notes 65-68.

122. *Cantor*, 428 U.S. at 581.

123. *Id.* at 591.

124. *Id.* at 616 (Stewart, J., dissenting).

125. *See id.* at 604 (Burger, C.J., concurring), 609-10 (Blackmun, J., concurring), 616-17 (Stewart, J., joined by Powell and Rehnquist, JJ., dissenting).

126. *See id.* at 604 (Burger, C.J., concurring), 610-12 (Blackmun, J., concurring), 619-21 (Stewart, J., joined by Powell and Rehnquist, JJ., dissenting).

127. *Cantor*, 428 U.S. at 592-93.

In *Cantor*, mere approval by the regulatory commission of electricity rates which included "free" light bulbs was insufficient to confer antitrust immunity.

The majority in *Cantor* were of the opinion that commission approval and the inability to change prices until the filing of a new tariff, might have created immunity only if one of two additional facts were proven. First, immunity would be proper if the utility had done *nothing more* than obey the command of the state sovereign, for it would be "unjust to conclude that . . . [it had] thereby offended federal law."[128] Second, an exemption might exist if it could be shown that Congress did not intend to superimpose antitrust laws upon a state-regulated industry "as an additional, and perhaps conflicting, regulatory mechanism."[129]

The utility in *Cantor* participated in creating the bulb exchange program, and hence, had done more than merely obey state command.[130] As to the second possible ground for immunity, the Court found that the state's regulatory scheme for electricity was distinguishable from the essentially unregulated program of light bulb marketing. Michigan's regulation of its electric utilities was not in conflict with federal antitrust laws, and furthermore, to hold the bulb exchange program violative of those laws would not impair the state's ability to effectively continue such regulation.[131] Thus, neither of the excusing facts was present. But if the Court had decided this case under the Supremacy Clause, neither of these two grounds *could* excuse behavior directly conflicting with the Sherman Act.

If the light bulb exchange program was ultimately found to be an act of monopolizing, the remedy of injunction would be appropriate. But, as Justice Stewart wrote for the dissenters, award of treble damages against a regulated utility whose rates have been approved by a regulatory commission seems inequitable.[132] The alleged violation of the antitrust laws by monopolizing is not illegal per se, but is subject to defenses under the rule of reason. Detroit Edison acted in good faith that its free bulb exchange practice was a reasonable restraint of trade because it was approved by the Michigan Public Service Commission. This should have rebutted any allegation of intent to illegally monopolize. In fact, upon remand, the case was settled and damages were

128. *Id.* at 592.
129. *Id.*
130. *See id.* at 594.
131. *See id.* at 598.
132. *See id.* at 615, 624-28 (Stewart, J., joined by Powell and Rehnquist, JJ., dissenting).

paid.[133]

In *Bates v. State Bar*,[134] the state action defense of *Parker* was reaffirmed by a unanimous Supreme Court. Two Arizona lawyers were suspended from practice for advertising their services in violation of a disciplinary rule of the Arizona Supreme Court. While the Arizona rule was held to violate the First Amendment,[135] it was held not to violate the Sherman Act.[136]

State action immunity was upheld because the rule prohibiting advertising was commanded by the state. The Court found that the real party in interest was the Arizona Supreme Court, since it adopted and enforced the disciplinary rules at issue; the bar association was viewed as an "agent of the court under its continuous supervision."[137] *Goldfarb* and *Cantor* were distinguished, since the anticompetitive behavior in those cases had not been compelled by the state. In *Goldfarb*, the minimum fees were set by the local and state bars acting independent of either the state legislature or supreme court. In *Cantor*, no state officials were defendants since the bulb exchange was initiated by the privately owned utility and merely approved, not compelled, by the state regulatory commission. In contrast, the Court in *Bates* noted that "[t]he disciplinary rules reflect a clear articulation of the State's policy with regard to professional behavior."[138]

In *Bates*, as in the earlier cases, the state action issue was not framed in terms of the Supremacy Clause. A blatantly anticompetitive rule, promulgated by the state, was held immune from antitrust action merely because of its official status.

City of Lafayette v. Louisiana Power & Light Co.[139] was the first of two recent state action cases that did not have to reach the issue of the *Parker* doctrine because agencies created by the state, as distinct from the state itself, were held not entitled to the defense. *City of Lafayette* concerned the private treble damage liability of cities acting as proprietors and not as sovereign regulators. The city-owned utilities had sued a private utility under the antitrust laws and the private utility counterclaimed, charging predatory practices by plaintiffs. The cities asserted

133. Cantor v. Detroit Edison Co., 86 F.R.D. 752, 756 (E.D. Mich. 1980).

134. 433 U.S. 350 (1977).

135. *See id.* at 363-64.

136. *See id.* at 359-63. The action, like *Parker*, was not initially argued under the antitrust laws, and it was only upon review of the attorneys' suspensions in the Arizona Supreme Court that the antitrust issue was raised.

137. *Id.* at 361.

138. *Id.* at 362.

139. 435 U.S. 389 (1978).

the state action defense to the counterclaim and the Supreme Court, in a five-to-four decision, held it not applicable in this case. First, the Court held that the acts of the cities were proprietary and not governmental.[140] The economic objectives of a municipal utility, designed for their own community, might not comport with the national economic well-being incorporated in the antitrust laws.[141]

Second, the Court held that the state action immunity applies only to states qua states and not necessarily to their political subdivisions. In *City of Lafayette*, the predatory acts of the cities had not been directed by the state, nor were they the result of an express, narrowly defined agency authority granted to the cities by the state.[142] The Court concluded that "the *Parker* doctrine exempts only 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."[143] This rule was reiterated in *Community Communications Co. v. City of Boulder*.[144]

The first issue in *City of Lafayette*, upholding the liability of governments as proprietors, was correctly based on statutory interpretation of the Sherman Act. The second issue would not have been material if the Court had rejected *Parker* and followed the constitutional approach suggested here.

In *New Motor Vehicle Board v. Orrin W. Fox Co.*,[145] an anticompetitive state statute enacted at the behest of a combination of retailers was approved under the rule of *Parker*. The California Automobile Franchise Act required auto manufacturers to secure approval of the state New Motor Vehicle Board before franchising a new dealer or relocating an old one, if any existing dealer in that line and make of car within a ten mile radius protested the new competition.[146] The manufacturer would be notified of the protest and barred from franchising

140. *Id.* at 403-04. The precedents established that cities and states had been held to be persons under the treble damage sections of the Sherman and Clayton Acts and allowed to sue as plaintiffs. Georgia v. Evans, 316 U.S. 159 (1942); Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906). If they could sue as plaintiff purchasers, it was only reasonable that in turn they could be sued as defendant proprietors.

141. *City of Lafayette*, 435 U.S. at 403.

142. *See id.* at 414.

143. *Id.* at 413.

144. 455 U.S. 40 (1982) (holding a municipal ordinance prohibiting expansion of a cable television company under a city's home rule power not to be either action of the state in its sovereign capacity or municipal action implementing clearly articulated and affirmatively expressed state policy).

145. 439 U.S. 96 (1978).

146. CAL. VEH. CODE §§ 3062, 3063 (West Supp. 1982).

the new dealer until after a hearing and a finding of no good cause to bar it. Since there was no time limit on the duration of the hearing and subsequent handing down of a determination, a protest could bar entry of a new dealer for months. Since over ninety-nine percent of the protests were ultimately denied,[147] the key operative feature of the statute was the unilateral power of existing dealers to delay entry of rivals. This case centered on General Motors' charge that the delay was a form of temporary injunction in violation of the Due Process Clause.[148]

The Supreme Court upheld the validity of the statute on all counts, including a charge of conflict with the Sherman Act. The Supreme Court held that, in spite of a conflict between the Automobile Franchise Act and the Sherman Act, there was state immunity under the rules of *Parker* and *Bates*.[149] The Court stated that the "Act's regulatory scheme is a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships. The regulation is therefore outside the reach of the antitrust laws under the 'state action' exemption."[150]

The state action immunity was operative because the scheme of regulation was mandated by state legislation and supervised by state officers. The Supremacy Clause and its significance to federal-state conflict was not mentioned.

With this series of decisions as a background, the Court in 1980 decided *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*[151] The California Code provided for filing of resale contracts or price schedules for wine with a state agency. If producers did not set prices through resale price contracts, wholesalers were required to post price schedules.[152] Midcal was charged with reselling twenty-seven cases of wine for prices below those set by the Gallo winery. Midcal stipulated that the allegations were true and filed a writ of mandate in the California Court of Appeal to enjoin the state's wine pricing system. The appellate court held for Midcal[153] and the California

147. *See New Motor Vehicle Bd.*, 439 U.S. at 110 n.14.

148. *See id.* at 104-09.

149. *See id.* at 109. If the horizontal combination effected in this case had been executed without state legislative sanction, it would have been illegal per se under section 1 of the Sherman Act. *See* United States v. General Motors Corp., 384 U.S. 127, 145 (1966).

150. *New Motor Vehicle Bd.*, 439 U.S. at 109.

151. 445 U.S. 97 (1980).

152. CAL. BUS. & PROF. CODE § 24866(a)-(b) (West 1964) (repealed 1980).

153. Midcal Aluminum, Inc. v. Rice, 90 Cal. App. 3d 979, 153 Cal. Rptr. 757 (1979).

Supreme Court declined to review the case.[154] The U.S. Supreme Court granted certiorari and subsequently affirmed the California Court of Appeal.

It was clear that the California resale price maintenance for wine violated the Sherman Act.[155] The issue was whether there was immunity under *Parker*.[156] The Court reviewed these decisions and noted that they established two requirements for antitrust immunity.[157] The first, a clearly articulated and affirmatively expressed state policy of setting prices, was found in this case. The second requirement, that a price fixing program be actively supervised by a state agency, was lacking. The state neither set the prices nor reviewed the reasonableness of the price schedules. Furthermore, the state did not regulate the terms of the resale price contracts. Finally, the state did not monitor market conditions or engage in any pointed reexamination of the program. Consequently, antitrust immunity was denied. The California Court of Appeal had taken this same approach, following the 1978 decision of the California Supreme Court in *Rice v. Alcoholic Beverage Control Appeals Board*,[158] which had challenged the resale price statutes for distilled liquors.

It could be argued that the governance of the industry by the producers was essentially the same in *California Retail Liquors* as it was in *Parker*. The difference was that in *California Retail Liquors* the statute did not provide for state supervision of the prices. But again, the issue

154. 2 CAL. SUP. CT. SERV. (AM. INST. OF CONTINUING LEGAL EDUC., INC.) No. 22 at 1147 (June 1, 1979).

155. *California Retail Liquor Dealers Ass'n*, 445 U.S. at 102-03. The Miller-Tydings Act and the McGuire Act were repealed by the Consumer Goods Pricing Act of 1975, Pub. L. 94-145, § 2, 89 Stat. 801. As to the per se illegality of vertical price fixing with material horizontal impact, see United States v. Parke, Davis & Co., 362 U.S. 29 (1960); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

156. 445 U.S. at 103. The other contention of the state was that the Twenty-First Amendment barred application of the Sherman Act. *See* Comment, California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.: *Federal Power Under the Twenty-First Amendment*, 38 WASH. AND LEE L. REV. 302 (1981). The second section of the amendment protected the state's power to regulate the transportation or importation of intoxicating liquors. Under this power, states could regulate internal distribution of alcoholic beverages. But the issue here was a purported conflict between national antitrust laws promulgated under the Commerce Clause on the one hand, and state laws enacted pursuant to the amendment, on the other. The Court noted the findings of the California Supreme Court in the case of Rice v. Alcoholic Beverage Control Appeals Bd., 21 Cal. 3d 431, 457, 579 P.2d 476, 494, 146 Cal. Rptr. 585, 602 (1978)—that alleged protection of small retailers was not effective and was less substantial than the national policy in favor of competition. 445 U.S. at 113. Hence the amendment provided no shelter for violation of the Sherman Act. *Id.* at 114.

157. 445 U.S. at 105.

158. 21 Cal. 3d 431, 579 P.2d 476, 146 Cal. Rptr. 585 (1978).

of the Supremacy Clause was not before the courts. The questionable decision in *Parker* remains the standard.

The most recent case on state-sponsored private cartels did not reach the issue of the state action defense under *Parker* because the Supreme Court reversed the lower court ruling that the activities violated the Sherman Act. *Rice v. Norman Williams Co.*[159] concerned the marketing of distilled spirits in California. After the decision in *Rice v. Alcoholic Beverage Control Appeals Board*[160]—that state resale price maintenance for distilled spirits violated the Sherman Act—organized wholesalers and retailers had searched for alternative techniques to limit competition. Those liquor wholesalers who wished to engage in price competition could buy branded liquors from Oklahoma wholesalers (whose local law promoted price competition), and resell them to California retailers at below the suggested wholesale prices of the distillers. In order to stop this price competition, the California legislature amended the Business and Professions Code so that a California importer could not import any brand of distilled spirits from any source unless the brand owner designated him an authorized importer.[161] The effect of the law was to create a barrier to entry into liquor marketing by allowing a brand owner who had passed title in liquor to wholesalers to prevent them from reselling to persons not designated as authorized importers in California.

Upon petition by certain nondesignated importers, the California court issued a writ of mandate holding that the designation statute violated the Sherman Antitrust Act.[162] While the distiller's statutory power to forbid others to sell to a nondesignated importer did not fit any of the traditional categories of per se illegality,[163] the California court ruled that it was nevertheless invalid: "A more clear power to restrain interstate trade is difficult to imagine."[164] The Supreme Court

159. 102 S. Ct. 3294 (1982).

160. 21 Cal. 3d 431, 579 P.2d 476, 146 Cal. Rptr. 585 (1978).

161. CAL. BUS. & PROF. CODE § 23672 (West Supp. 1983), as amended, reads as follows: "A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent. Such distilled spirits imported into California shall come to rest at the warehouse of the licensed importer or an authorized warehouse for the account of such licensed importer, before sale and delivery to a retail licensee."

162. Norman Williams Co. v. Rice, 108 Cal. App. 3d 348, 362, 166 Cal. Rptr. 563, 573 (1980).

163. *See id.* at 356, 166 Cal. Rptr. at 569.

164. *Id.* This control by the owner of a trademark of entry into the market by parties not in privity of contract with him is analogous to the enforcement of resale price maintenance against nonsigners. *See* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) *and* text accompanying notes 73-76.

reversed the decision, but did not reach the issue of whether the statute was immune from federal antitrust laws under *Parker*. It cited the Supremacy Clause and held that the test was whether there existed an irreconcilable conflict between the federal and state regulatory schemes.[165]

The Supreme Court held that the designation statute was not illegal on its face, but was subject to the rule of reason under *Continental T.V., Inc. v. GTE Sylvania, Inc.*[166] The rule in that case was extended here to a vertical control on entry into the market. The designation statute was not illegal on its face because it did not require any distiller to utilize it in a manner that would exclude any wholesaler as a California importer.[167] On the other hand, plaintiff may still prove at trial either: (1) that a horizontal combination in the Wine Spirits Wholesalers of California provoked passage of the designation statute and has a part in its administration, or (2) that the statute is used as a tool for illegal price fixing. In either case, the operation of the statute would be found to be an indirect method of horizontal combination and hence would be held illegal per se under the Sherman Act.

Since the case was remanded to determine if the application of the statute was an unreasonable restraint of trade, the Court did not have to consider whether the statute might be saved from invalidation under *Parker*.[168] The case is nevertheless significant, as it is the first state action opinion in the Supreme Court to note explicitly that the issues arise under the Supremacy Clause. On a subsequent appeal, *Norman Williams* could be the case that gives full treatment to the issue of national preemption.

Conclusion

Every conflict between the purpose of promoting competition embodied in the national antitrust laws and state efforts to implement an-

165. *See Norman Williams Co.*, 102 S. Ct. 3294, 3299 (1982). An injunction against enforcement will be entered only if the statute on its face irreconcilably conflicts with federal antitrust policy.

166. 433 U.S. 36 (1977). *GTE Sylvania* held that vertical territorial restrictions were not illegal per se and thus were subject to the rule of reason analysis under § 1 of the Sherman Act. *Id.* at 47-59.

167. The Court contrasted the statute in California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), which on its face required illegal resale price maintenance. *See Norman Williams Co.*, 102 S. Ct. at 3299.

168. The Court denied additional defenses not pertinent to this study. The statute was held not to be preempted by § 5A of the Federal Alcohol Administration Act, not to deny plaintiffs due process of law, and not to violate the Equal Protection Clause. *See Norman Williams Co.*, 102 S. Ct. at 3301-02.

ticompetitive economic regulation can be framed as a constitutional issue under the Supremacy Clause of the Constitution. Legal argument would then center on application of the language in Article VI—comparing the mandate of the Sherman Act to that of the state law in question. The constitutional language bans conflicting state law. The Sherman Act, like most federal laws, did not expressly treat the issue of conflicting state law. Since the Constitution mandates the supremacy of federal law, such exclusionary clauses are unnecessary. Under this reasoning, the classic state action decision of *Parker v. Brown* is wrong. The Supreme Court's questionable finding of an unexpressed congressional intent in the Sherman Act not to preempt all conflicting state regulatory law, violated the Supremacy Clause. The Court's decision to give statutory interpretation priority over constitutional interpretation offended the essential character of constitutional government. In our legal system, federal supremacy is not an option to be chosen by the courts.

The only way out of the antitrust maze created by the Supreme Court in the state action defense is to return to the logic of higher law, the mandate of the Supremacy Clause. The first step is for the Court to acknowledge its error in *Parker* and overrule it. The second step would be automatic, for every trial court which met the state action defense would require full briefs on application of the Supremacy Clause. If counsel have neglected the fundamental aspect of the state action defense, the courts should not.