THE STATE ACTION ANTITRUST IMMUNITY

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In *Parker v. Brown* 1 the Supreme Court formally decided that the Sherman Act did not apply to activity undertaken pursuant to state economic regulation. Subsequent lower federal court decisions have attempted to discern the limits of this antitrust exemption, resulting in a seemingly unreconcilable spate of decisions. 2 After more than thirty years of neglect 3 the Supreme Court has recently decided several important state action antitrust exemption cases. The result has been a circumscription of the breadth of the *Parker* immunity.

Several differing, fundamental issues present themselves in the *Parker* context. On one level, pro-competitive antitrust provisions con-

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1. 317 U.S. 341 (1943).


front state schemes that replace a competitive economic sector with regulation. Thus, the federal commitment to competition embodied in a free market society and expressed in the antitrust laws conflicts with the regulations of parts of the economy by methods that restrain unbridled competition. Furthermore, it is settled that the states must acquiesce to the federal government and to constitutional restraints when state action runs afoul of conduct specifically prescribed by federal law. Where state conduct is not specifically enjoined by federal law, difficult problems are posed in deciding how great a discretionary role the federal government should grant the states. The degree to which antitrust policy should govern the economic decisions of the states, then, involves a determination of Congressional intent in enacting the Sherman Act, to the extent that intent is discernible.

Since the state, a somewhat autonomous governing body, determines the scope and form of economic regulation, policy conflicts with federal antitrust law will necessarily involve issues of federalism. Constitutional considerations and limitations are intertwined with economic purpose. Thus, the problem of applying antitrust

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4. Specifically the supremacy clause and the commerce clause limit state-authorized activity that contradicts express congressional mandates. The Court in Parker took note of the inherent constitutional restrictions on states when it observed:

Occupation of a legislative “field” by Congress in the exercise of a granted power is a familiar example of its constitutional power to suspend state laws. . . . 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. . . .


5. It is doubtful that when Congress adopted the Sherman Act it ever considered the possible effects of the new law on the states. Moreover, the majority of state regulatory activities would have failed to come within the Sherman Act’s jurisdiction because under the judicial interpretations then prevailing they would not have sufficiently affected commerce among the states. See United States v. E.C. Knight Co., 156 U.S. 1 (1895). Although the legislative history of the Sherman Act reveals nothing about including the states within the Act, it does indicate that the senators were fully cognizant of the limited scope of the commerce clause. See 21 Cong. Rec. 2465, 2467, 2598-600 (1890). The Parker Court could “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.” 317 U.S. at 350-51. Compare Cantor v. Detroit Edison Co., 428 U.S. 579, 632-34 (1976) (Stewart, J., dissenting).

6. States are subject to the limitation imposed by the supremacy clause of the Constitution. U.S. Const., art. VI, § 2. See Parker v. Brown: A Pre-emption Analysis, 84 Yale L.J. 1164 (1975). Also, the commerce clause has been judicially expanded so that virtually all state regulatory activities affect interstate commerce and thus are subject to federal intervention. U.S. Const., art. I, § 8, cl. 3. See Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1944), overruling United States v. E.C. Knight Co., 156 U.S. 1 (1895). See also Dowling, Interstate Commerce and State Power, 27 Va. L. Rev. 1 (1940).
law to state action should be approached from an economic viewpoint as well as from a perspective that is sensitive to the values of federalism.

In *Cantor v. Detroit Edison* the Court attempted to delineate the boundaries of the antitrust law with regard to state regulation. The case involved Detroit Edison's distribution of free electric light bulbs to consumers of electricity. Detroit Edison is the sole supplier of electricity to people living in southeastern Michigan. Its activities and rates are regulated by the Michigan Public Service Commission with "complete power and jurisdiction to regulate all utilities in the state." Detroit Edison has supplied "free" light bulbs to its customers since 1886. Beginning in 1916, the Commission had legislative authority to review tariffs filed by Detroit Edison, including those tariffs requesting authority to distribute light bulbs. Although Detroit Edison did not directly charge its customers for the light bulbs, the costs of the program to Detroit Edison were reflected in the rates approved by the Commission.

The plaintiff in *Cantor* was a retail druggist who sold light bulbs. He filed suit claiming that Detroit Edison, by dispensing free bulbs to its customers, was using its monopoly power as the sole distributor of electricity to restrain trade in the sale of light bulbs. Defendant, through its free distribution program, supplied the Detroit area residents with almost 50% of the most frequently used light bulbs. The District Court and the Sixth Circuit both held that the Michigan Public Service Commission's approval of the defendant's light bulb distribution exempted the practice from the federal antitrust laws, citing *Parker v. Brown* as authority. The Supreme Court reversed, holding that the Commission's approval of Detroit Edison's tariff containing the light bulb program was not a sufficient basis for implying an exemption from the antitrust laws.

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8. The service area includes approximately five million people and encompasses the Detroit metropolitan area. 428 U.S. at 582.
10. Plaintiff urged violations of Sections 1 and 2 of the Sherman Act and 3 of the Clayton Act. 428 U.S. at 581 n.3.
11. According to the Court this figure excluded fluorescent light and high intensity discharge lamps, neither of which Detroit Edison distributed. Detroit Edison's share of the market including those types of lamps would be about 23%. 428 U.S. at 582 n.4.
13. 513 F.2d 630 (6th Cir. 1975).
The decision came in the form of a plurality opinion by Justice Stevens. Only parts I and III of the four part opinion obtained a majority vote. A majority of the Court agreed with Justice Stevens' finding that the distribution of light bulbs in Michigan was unregulated, even though the Michigan Public Service Commission had routinely affirmed Detroit Edison's tariffs which included the distribution program. The Court could find no Michigan statute authorizing the regulation of the sale and distribution of light bulbs, and the statute specifying the regulatory powers of the Commission contained no direct reference to the business. This finding led the Court to conclude that Michigan was neutral regarding regulation of the distribution of light bulbs.

The Court's finding of Michigan's neutrality supported its refusal to extend antitrust immunity to the light bulb distribution program. The instigation and continuance of the program was held to be primarily the responsibility of Detroit Edison. Michigan's regulation of electricity did not conflict with federal antitrust policy, and since Michigan was neutral concerning the regulation of light bulb distribution the state's regulatory scheme was not thwarted by subjecting it to federal antitrust scrutiny. Thus, Detroit Edison could not avoid the anticompetitive consequences of its actions under the antitrust laws by resorting to the state action exemption.

The Cantor decision poses important questions for state economic regulation. The deference that the federal courts will give the states when applying the antitrust laws to state-authorized private activity is now uncertain. In some circumstances, private participation in the regulatory adjudicative process itself may come under the antitrust rubric. Thus, the scope of regulatory activity permitted may be sharply circumscribed with the states required to economically justify every regulatory step.

The effects of Cantor will undoubtedly be felt in two important areas of the state action antitrust exemption. Most importantly, Cantor will influence the antitrust exemption developed in Parker for private actions undertaken under the auspices of a state economic

14. In addition to Stevens, the plurality was composed of Justices Brennan, White and Marshall. The Chief Justice filed a concurring opinion and joined Parts I and III of the plurality opinion, thereby effecting a majority for those sections. Justice Blackmun wrote a separate opinion concurring in the judgment. Justice Stewart, joined by Powell and Rehnquist, filed a dissenting opinion.
16. The dissent strongly disagreed with the majority's finding of neutrality. Justice Stewart believed that the broad Michigan statutory language (see note 9 and accompanying text supra) was determinative of the question. He thought it a great burden to require a state to incorporate regulatory details into statutory law to ensure antitrust exemption. Id. at 626 n.11, 638-39 n.26.
17. Id. at 594.
18. Id. at 598.
regulatory scheme. The effects of Cantor may also reach the Noerr-Pennington antitrust exemption for private attempts to influence governmental activity. This article will focus on the probable ramifications of Cantor in these two areas of concern and will consider the effect of Bates v. State Bar of Arizona on the state action exemption. Finally, the fundamental policy considerations of the state action antitrust exemption will be explored to put the issues in proper perspective and to suggest a rational approach to resolution of the problems of state action immunity.

**The Historical Development of the State Action Antitrust Exemption**

The state action exemption was judicially created when it became apparent that some limits on the applicability of the antitrust law to state economic activity were necessary to preserve the principles of state sovereignty. The first cases established a broad immunity not only for state officials functioning under state authority but also for private parties acting under the guise of state regulation. As will become apparent, however, the recent Supreme Court decisions have cast serious doubt on the continuing validity of the exemption and have at the least severely limited the once sweeping antitrust immunity for state related activity.

The first recorded state action case, Lowenstein v. Evans involved a challenge to South Carolina’s monopoly of the sale, consumption, transportation and disposition of alcoholic beverages. The state’s monopoly was the result of an express legislative enactment. Plaintiff, a North Carolina liquor manufacturer and wholesaler, attempted to ship a barrel of whiskey into South Carolina for sale. South Carolina promptly confiscated the alcohol, and Plaintiff brought a treble damage suit under the recently enacted Sherman Act. The court held that South Carolina was not a person or corporation as required for liability under the Sherman Act, and therefore the state’s ability to restrain trade and form monopolies as a sovereign entity was not limited by the antitrust laws. Thus, the first antitrust attack on state action established that the Sherman Act did not proscribe conduct of a state in regulating business because the Act by its terms did not apply to the states.

The Supreme Court first considered the applicability of antitrust law to the actions of a state in Olsen v. Smith in 1904 and concluded

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21. It is problematical whether the same blanket statement would accurately describe the state of the law after the Goldfarb and Cantor decisions. See notes 7-18 supra and 53-58 infra and accompanying text. Those decisions have indicated that state regulation is often subject to antitrust scrutiny.
22. 195 U.S. 332 (1904).
that the antitrust laws did not apply. A group of pilots licensed by the state of Texas to pilot sailing vessels and steamers in and out of the port of Galveston sought to enjoin unlicensed pilots from performing the same services without first obtaining a valid license from the state. The unlicensed pilots challenged the constitutionality of the Texas licensing statute, contending that by virtue of the statute plaintiffs restricted competition and possessed monopoly power in the pilotage business. Neither the state of Texas nor any state officials were joined as parties to the suit. The Supreme Court found that the state had the plenary power to regulate the pilotage business in the absence of Congressional objection. Thus, the Court concluded that these pilotage services could not give rise to a monopoly or combination in restraint of trade.\textsuperscript{23}

In comparison to \textit{Lowenstein}, the \textit{Olen} decision significantly advanced and clarified the powers of the states to regulate without interference from federal antitrust policy. \textit{Lowenstein} held that the Sherman Act did not preempt the authority of the states to regulate and, if necessary, to monopolize sectors of the economy.\textsuperscript{24} \textit{Olsen} went further and granted antitrust immunity to individuals complying with anticompetitive mandates of the state.

In 1943, the Supreme Court decided \textit{Parker v. Brown},\textsuperscript{25} thereby creating a formal state action antitrust immunity doctrine. The plaintiff, a California producer and packer of raisins, brought suit to enjoin the enforcement of a statutory program designed to limit production and maintain prices of raisins in California. Defendants, including Parker, were state officials charged with administering the regulatory program.\textsuperscript{26} The act called for the creation of an Agricultural Prorate Advisory Commission made up of nine members appointed by the governor and confirmed by the state senate. The state director of agriculture served as an ex-officio member. The Commission was authorized to review and grant petitions filed by at least ten producers urging the establishment of a prorate marketing plan for any commodity within a statutorily defined production zone.

\textsuperscript{23} Certain parts of the Texas statute were found to be contrary to federal law. For example, the Texas law discriminated in favor of Texas vessels by exempting them from the payment of pilotage fees. \textit{Id.} at 340-42. The Court, however, found that the discriminatory provisions were separable from the remaining portions of the statute which still had to survive constitutional and antitrust attacks. \textit{Id.} at 342-45.

\textsuperscript{24} The construction given the commerce clause was much narrower then. As a result, antitrust enforcement was more difficult because the required restraint on interstate commerce was more difficult to establish. See note 5 \textit{supra}.

\textsuperscript{25} 317 U.S. 341 (1943).

\textsuperscript{26} \textit{Id.} at 344.
If the petition were granted, the director, with Commission approval, was required to select a program committee comprised of producers from the relevant zone and other individuals engaged in the industry.27 The program committee's function was the actual formulation of a proration marketing program designed to protect the commodity produced in the zone. The proposed program did not become effective until approved by the Commission, which retained the power to modify the proposal. After Commission approval, the proposed program was submitted to the producers in the zone for adoption. The director was required to institute the program upon a showing of the consent of 65 per cent of the producers owning at least 51 per cent of the total affected acreage devoted to the regulated crop in the zone.28 The program committee then administered the adopted proration program subject to the approval of the director of agriculture. Civil and criminal sanctions were provided for violations of adopted proration programs by any producer or handler of the regulated commodity.

Chief Justice Stone, writing for a unanimous Court, found that the Sherman Act did not extend to the California prorate program, reasoning that the Sherman Act was intended to prohibit individual and not state action.29 The Court found no support in the Sherman Act or its legislative history to suggest that the Act could affect the actions of state officials who were simply following the directives of the legislature.30 Since the program derived its authority and efficacy from the state legislature and would not have existed without the mandate of the state, the Court held that the program was not a product of individual action.31

27. Id. at 346. Before approval could be granted, the producers were required to show that the proposed program would prevent agricultural waste in the state and conserve agricultural wealth without permitting unreasonable profits in accordance with the purposes of the Act.

28. An elaborate marketing system was established to assure a level of marketable raisins at all times in order to stabilize the price. Competition among the California raisin producers was largely eliminated since only about 30% of the total raisin crop could be sold on the open market by individual producers. Id. at 346-48.

29. Id. at 352.

30. Id. at 350-51.

31. Id. at 350. It is interesting to note that the plaintiff initially challenged enforcement of the program on the theory that it was an unconstitutional denial of his right to engage in interstate commerce. While the case was before the Supreme Court, Georgia v. Evans, 316 U.S. 159 (1942), was decided holding that a state is a "person" within the meaning of section 7 of the Sherman Act and therefore entitled to maintain treble damage action. Because of that decision's possible influence on the applicability of the antitrust laws to the states, the Court set Parker for reargument and directed the parties to consider whether the Sherman Act nullified the California statute. The Court also asked the litigants to argue whether the Agricultural Adjustment Act or any other Congressional Act superseded or invalidated the California program. See Justice
Parker v. Brown actually contributed very little substantively to the development of the state action antitrust exemption.\(^{32}\) The state involvement in Olsen v. Smith was considerably less significant than in Parker. Although no state officials were parties to the Olsen litigation, state regulation of the industry was sufficient to exempt the pilots from the antitrust laws. In Parker, however, the suit was not brought against individual raisin producers but against the various officials charged with administering the Prorate Act.\(^{33}\) The Parker Court thus did not have occasion to consider whether individuals complying with the directives of the program subjected themselves to antitrust liability. Instead, Parker merely affirmed the tenet of Olsen that actions taken by a state as sovereign are not included within the prohibitions of the Sherman Act.

Both Olsen and Parker presented situations in which the normal federal interest in promoting and preserving competition had been attenuated by federal statutes promulgating another policy. In Parker, the Agricultural Marketing Agreement\(^{34}\) limited the quantity of specified agricultural products that could be marketed.\(^{35}\) Similarly, in Olsen the Court took notice of a federal statute which prohibited discriminatory state regulation of pilotage but which implicitly permitted non-discriminatory regulation.\(^{36}\) Thus, both decisions reflected a determination that the state regulation at issue was not inconsistent with another federal statute expressly restricting competition.

The relationship between the antitrust law and state action was further articulated in Schwegmann Bros. v. Calvert Distillers Corp.\(^{37}\) The case involved the application of the Miller-Tydings Act\(^{38}\) to a marketing arrangement for the distribution of gin and whiskey in Louisiana. Under the scheme, out-of-state distributors and Louisiana liquor retailers agreed to fix prices so that a minimum retail price was assured. The agreement was valid under the Louisiana fair


32. The Parker opinion was divided into three parts, one of which considered the antitrust implications of the prorate program. The other two parts dealt with the program's validity under the federal Agricultural Marketing Agreement Act and under the commerce clause. Only the commerce clause portion of the opinion caused any initial stir. See Note, 41 Mich. L. Rev. 968 (1943); Note, 27 Minn. L. Rev. 468 (1943).

33. Since raisin producers formed part of the membership of the program committee, however, some individual producers were party defendants to the action, but only in their official capacity.


35. 317 U.S. at 353.

36. 195 U.S. at 343.

37. 314 U.S. 384 (1941).

trade law which also provided that a price fixing arrangement could be enforced against all retailers once any single retailer agreed with a distributor on the resale price. The Miller-Tydings Act, a 1937 amendment to section 1 of the Sherman Act, permitted agreements prescribing minimum resale prices for certain commodities when the agreements were lawful under state law.

Petitioner, a liquor retailer in New Orleans, refused to agree to respondents' price-fixing scheme and sold respondents' products below the fixed price. Respondents, the gin and whiskey distributors relying on the Louisiana fair trade statute, sought to enjoin petitioner, a nonsigner, from selling their products at less than the minimum fixed prices. Respondents further argued that the Miller-Tydings Act prevented the application of the antitrust laws to the price-fixing scheme since the scheme was authorized by state law.

The Court held that the Miller-Tydings Act was intended to permit certain price-fixing agreements but was not intended to allow price-fixing by compulsion. Since the Act exempted only "contracts or agreements prescribing minimum prices for the resale," the Court refused to read a nonsigner provision into the statutory language. Thus, the Court construed the Act in a way which modified federal antitrust policy as little as possible but still recognized Congressional intent to permit some state regulation.

39. The text of the Louisiana law, commonly known as a nonsigner clause, was as follows:
Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of R.S. 51:392, whether the person so advertising, offering for sale or selling is or is not a party to the contract, is unfair competition and is actionable by any person damaged.

40. The amendment was repealed by the Act of December 12, 1975, Pub. L. No. 94-145, 89 Stat. 801. The text of the amendment provided that "nothing [herein] contained . . . shall render illegal, contracts or agreements prescribing minimum prices for the resale" of specified commodities "when contracts or agreements of that description are lawful as applied to intrastate transactions" under local or state law. 15 U.S.C. § 1 (1970).

41. Respondents argued that the Miller-Tydings Act permitted nonsigner price-fixing statutes such as the Louisiana fair trade law. They maintained that the "contracts or agreements" requirement included the Louisiana nonsigner provision which applied to price-fixing agreements between distributors and wholesalers. According to their rationale, the arrangement was within the Sherman Act because the contract was authorized by state law. 341 U.S. at 387.


43. See L. Sullivan, HANDBOOK OF THE LAW OF ANTITRUST 739 (1977). The Schwegmann Court conducted a detailed examination of the legislative history of the Miller-Tydings Act and concluded that the act was intended to
The Court's holding that the Miller-Tydings amendment does not confer antitrust immunity on a price-fixing scheme is not tantamount to concluding that the scheme violates the Sherman Act. The Court, however, determined that the Louisiana statute compelled retailers to follow a parallel price policy and thus demanded private conduct prohibited by the Sherman Act, a finding which seemingly raises the state action immunity question. The Court determined that the Louisiana fair trade statute was inconsistent with the Congressional intent embodied in the Miller-Tydings amendment and that the price-fixing scheme of respondents violated the Sherman Act. Ignoring the precept of Olsen and Parker, however, the Court arrived at the conclusion that the price-fixing authorized by the local fair trade law ran afoul of federal antitrust law without considering whether the state legislature contemplated a legitimate regulatory aim which would exempt the conduct from the Sherman Act. The Court's analysis also overlooked the possibility that the Louisiana fair trade law could be outside the scope of the Miller-Tydings amendment and constitute a violation of the Sherman Act but still be valid because of the protection provided by the antitrust exemption.

Although the reasoning in Schwengmann is enigmatic, the result is defensible. The nonsigner proviso in the Louisiana statute violated the competitive underpinnings of the Sherman Act. Although state control of the anti-competitive practices was not nearly so prevalent as in Parker and Olsen, the fair trade act covered a plethora of businesses in the state. Schwengmann may be broadly interpreted as restricting state circumvention of federal antitrust policy through the adoption of far-reaching legislation. More precisely, Schwengmann accommodated existing state fair trade laws that were not contrary to the "contracts or agreements" requirement embodied in the amendment. The Court inferred that Congress intended the nonsigned aspects of state laws to be governed by pre-existing law. See 341 U.S. 384, 391-95 (1951).

44. For example, in Olsen v. Smith, 195 U.S. 332 (1904), the Court found that Texas had the right to regulate the pilotage business and in Parker v. Brown, 317 U.S. 341 (1943), that California had the power to regulate the sale of raisins. See text accompanying notes 23 and 30 supra. Also, in Lowenstein v. Evans, 69 F. 908 (C.C.D.S.C. 1895), South Carolina's right to monopolize the retail liquor industry was upheld. See text accompanying note 21 supra. But the Schwengmann Court stopped short of inquiring whether Louisiana had exceeded its sovereign bounds in regulating prices through its fair trade law. The Court probably would have concluded that Louisiana did exceed its bounds, but that determination would not have changed the result of the litigation. See text accompanying note 47 infra.

45. See 341 U.S. at 395.

46. See, e.g., Posner, supra note 42, at 701.

47. See L. SULLIVAN, supra note 43, at 732. The Schwengmann decision made enforcement of fair trade price fixing almost impossible, since a nonsigner could not be bound to the established price. Thus, in 1952, Congress attempted to rehabilitate the state fair trade legislation by enacting the McGuire Act, as an amendment to the Federal Trade Commission Act. Act of July 14, 1952, c. 745,
mann holds that a specific congressional exemption to the antitrust law confers immunity only if the state activity meets the criteria established by Congress.

Schwegmann, then, can be seen as a limit on the ability of states to stymie federal antitrust policy. This interpretation of Schwegmann is consistent with Northern Securities Co. v. United States, in which the Court nullified a railroad merger, holding that the merger violated the Sherman Act. The defendant argued that the merger was authorized by the New Jersey incorporation laws. The Court ruled, however, that a state cannot authorize corporations incorporated under its statutes to violate the laws of Congress. Such direct attempts to evade federal law must yield to the Supremacy Clause. Normally, however, when the state enacts laws seeking to further its own prescribed regulatory goals, additional inquiry is necessary to determine whether the state regulation is exempt from federal antitrust law.

Before conferring antitrust immunity on a state regulatory scheme, the Court will normally consider the consistency of the state regu-


48. 193 U.S. 197 (1904).

49. Id. at 344-46. The Court first had found that New Jersey had never intended its incorporation statutes to exempt mergers from the antitrust law. Even so, the Court determined the state immunity question as if New Jersey had intended to except its corporations from federal law. Id. The Parker Court was cognizant of the Northern Securities holding when it stated: "True, 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. . . ." 317 U.S. 341, 351 (1943). Of course, the Schwegmann, Northern Securities, and Parker limitations on the ability of states to forestall federal antitrust policy by legislative enactments have broader implications. The Northern Securities Court expressed the limitation forthrightly:

Whilst every instrumentality of domestic commerce is subject to state control, every instrumentality of interstate commerce may be reached and controlled by national authority, so far as to compel it to respect the rules for such commerce lawfully established by Congress. . . .

We repeat that no State can endow any of its corporations, or any combination of its citizens, with authority to restrain interstate or international commerce, or to disobey the national will as manifested in legal enactments of Congress. 193 U.S. 197, 349-50 (1904) (emphasis in original).
ulatory acts and federal policy. In *Schwegmann* the Court concluded that the state statute was inconsistent with the Miller-Tydings Act, whereas in *Parker* the Court found no inconsistency. If the state regulation is consistent with federal policy, the state action is more likely to be exempted from the antitrust laws. Federal regulation in an area of the economy generally indicates Congressional antipathy toward unfettered competition, resulting in at least some restrictions of the antitrust laws. State regulation in keeping with federal policy

50. Of additional import in *Parker* was the Department of Agriculture's implicit approval of the state program. The Secretary of Agriculture had authorized loans on agricultural commodities through the Commodity Credit Corporation for the benefit of the state of California. The loan, given pursuant to the federal Agricultural Adjustment Act, was conditional upon the adoption by California of a state price-supporting program. 317 U.S. at 356-59.

51. The restriction of antitrust application to federal regulatory acts is sometimes explained by the operation of the doctrine of "primary jurisdiction." If a regulatory agency is deemed to have the sole authority to regulate particular competitive or non-competitive practices, it is said to have primary jurisdiction to the exclusion of antitrust law. Judicial determinations of Congressional intent to preclude or apply antitrust policy to particular regulatory schemes are frequently complex. In each situation the Court must interpret express or implied legislative intent. For example, in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), the Supreme Court was called upon to decide if the antitrust laws applied to the New York Stock Exchange, which was regulated by the Securities Exchange Act of 1934. The Act gave the various securities exchanges the authority to adopt rules governing the relationship between members of the exchanges and non-members. The Court held that Congress, in passing the Act, had sought to insure fair dealing by the exchanges with members and non-members. Thus, Congress could not have intended to immunize the exchanges from the antitrust laws when an exchange failed to provide for procedural due process in its regulatory determinations. *Id.* at 364-65. For other decisions applying antitrust law to federal regulatory acts see *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) (power companies not insulated from antitrust by Federal Power Act); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963) (bank mergers not exempt from antitrust under the Bank Merger Act of 1960); and *United States v. Radio Corp. of America*, 358 U.S. 334 (1959) (approval of exchange of television stations not exclusively within province of F.C.C.). For cases in which primary agency jurisdiction was upheld, see *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) (reasonableness of rates exclusively for I.C.C.); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963) (determination of monopolistic practices by a carrier exclusively for C.A.B.); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973) (approval of acquisition of control of air carrier solely for C.A.B.). Sometimes primary jurisdiction is conferred on an agency with the condition that some consideration of antitrust principles be attempted. See, e.g., *Federal Aviation Act § 408b*, 49 U.S.C. § 1378(b) (1970). This is often the result of a vague statutory directive to regulate "in the public interest." See, e.g., *Interstate Commerce Act § 5, 49 U.S.C. § 5* (1970). Thus, in these instances the courts review the administrative decision-makers application of antitrust policy in light of the particular statutory guidelines. See *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944) (I.C.C. merger approval sustained because Commission had adequately considered antitrust implications); *Rogers, Mergers in Regulated Industries: The Role of the Regulatory Agency*, 7 St. Mary's L. J. 297, 301-303 (1975); see generally M. Handler, H. Blake, R. Petrosky, H. Goldschmidt, *supra* note 47, at 539-41; L. Sullivan, *supra* note 43, at 746-49.
thus provides argument for the restriction of the application of the antitrust laws to the state scheme.52

In Goldfarb v. Virginia State Bar,53 the Supreme Court subsequently restricted the extent of the state action exemption. Goldfarb involved an attack on the minimum fee schedule published by the Fairfax, Virginia, County Bar Association and enforced by the Virginia State Bar. Although the court found that the minimum fee schedule constituted unlawful price fixing, it concluded that the minimum fee schedule did not constitute state action warranting antitrust immunity.54 According to the Court, "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."55 Furthermore, the Court decided that exemption from the Sherman Act would be justified only if the state action were compelled, rather than prompted, by the state acting as sovereign.56 The Court determined that the State of Virginia did not require the maintenance of the minimum fee schedule57 and therefore

52. See Jacobs, State Regulation and the Federal Antitrust Laws, 25 CASE W. RES. L. REV. 221, 237 (1975); Posner, supra note 42, at 709-10; Slater, Antitrust and Government Action: A Formula for Narrowing Parker v. Brown, 69 NW. U.L. REV. 71, 86-87 (1974); Teplin, Antitrust Immunity of State and Local Governmental Action, 48 Tul. L. REV. 273, 287-88 (1974). This line of reasoning should not necessarily be attributed to the Parker Court. In Parker the Supreme Court was responding to a specific challenge that the California Prorate Act was unlawful because it contravened the federal Agricultural Marketing Agreement Act. 317 U.S. at 344. Further, the Court made no reference to the homogeneity of the state and federal acts in the acts in the antitrust portion of the opinion. It would thus appear that antitrust immunity was conferred in Parker without reference to the state's relationship with federal regulatory policy.


54. Id. at 781-82. The Court had no difficulty in finding a nexus between the minimum fee schedule and interstate commerce. The legal representation involved was the representation of home buyers. Since a significant portion of the loan funds for purchasing homes in Fairfax County, Virginia were guaranteed by federal agencies located in the District of Columbia, the purchase of a home was an interstate transaction.


55. 421 U.S. at 790.

56. Id. at 791.

57. Although by law the Virginia State Bar is a state agency, the Court held that the bar's promulgation of a minimum fee schedule does not immunize the
the State Bar could not "create an antitrust shield that allowed it to foster anticompetitive practices for the benefit of its members." 58

THE CANTOR OPINION

Cantor appears to represent a new direction for the state action antitrust exemption. However, not all the ramifications of Cantor are evident. The four separate opinions strikingly illustrate the Court's internal disagreement about what constitutes state action. Yet, overall the Court has limited the immunity of state and private parties acting under the auspices of the state from the operation of the antitrust laws.

Evidence that Cantor represents a new direction is found in the more restrictive criteria for conferring the state action exemption. The Court could have decided Cantor without going past the threshold test of Goldfarb. Goldfarb specifically rejected the claim that the "prompting" of anticompetitive conduct by a state was sufficient to confer antitrust immunity; 59 thus, the mere encouragement, acquiescence, participation or approval by the state does not satisfy the compulsion standard. In concluding that Michigan was neutral toward the approval of the lightbulb distribution program, the Court obviously felt that the activity is not one compelled by the state acting as a sovereign. Yet, the Cantor Court went further in denying antitrust immunity. After Cantor, antitrust immunity is no longer guaranteed even though the state acts as a sovereign in compelling certain conduct. 60

59. 421 U.S. at 791.
60. 428 U.S. at 600. Specifically the plurality stated:
The Court then explained that the question whether the anticompetitive activity had been required by the State acting as sovereign was the "threshold inquiry" in determining whether it was state action of the
Cantor established four post-threshold criteria for a granting of antitrust immunity. First, a state must have a substantial interest in requiring conduct that would otherwise be violative of the antitrust laws. The Court recognized that certain areas of the economy, such as public utilities, may require public control.\(^{61}\) Second, the state’s interest in regulation must be balanced against the federal interest in promoting competition in a particular segment of the economy.\(^{62}\) The Court is apparently formulating a rule of reason analysis.\(^{63}\) Thus, the balance should favor antitrust immunity for the state regulation if federal modification of competition in the area has occurred without preemption by the federal regulation.\(^{64}\) Third, actual regulation can displace the competitive process “only to the minimum extent necessary” to accomplish the desired goal.\(^{65}\) The Court had no difficulty determining that the distribution of light bulbs by Detroit Edison extended state regulation beyond the minimum extent necessary for the regulation of electric utilities. The Court’s conclusion of state neutrality suggests that the regulation was more than the minimum extent necessary. Since the distribution of light bulbs was not essential to the regulation of the electric utility, the Court concluded that Michigan’s regulation of electricity would “be almost entirely unimpaired” by a determination that no immunity extends to the light bulb program.\(^{66}\)
The Court promulgated a fourth criterion—a standard of fairness—to insulate regulated businesses from antitrust liability in appropriate instances. If regulated industries such as Detroit Edison were not afforded antitrust immunity, they would be placed in the rather awkward position of determining which of their regulated activities were compelled by state interests. The stakes are high since the penalty for a wrong guess is possible treble damage liability from suits brought by private litigants. Many state-authorized programs are the product of both public and private decision-making. Under the fairness standard, antitrust liability would attach only if the private party exercised sufficient freedom of choice in the initiation and enforcement of the activity. Thus, in Cantor antitrust liability was appropriate because Detroit Edison had initiated the program of its own accord. Since the Court had earlier found Michigan neutral toward the light bulb program, this result is not surprising.

The problem with the fairness standard adopted in Cantor is that it is not susceptible to generalization; instead, it must be applied on a case-by-case basis. This vagueness defeats the purpose of the standard. If antitrust immunity is parcelled out according to standards that may vary with the predilections of each court, businesses guided by state regulation must still engage in guesswork to determine whether specific anti-competitive activities meet the fairness test. As a result, private parties may be discouraged from participation in state-regulated activities for fear of potential antitrust liability.

At least outwardly, Cantor appears to be a retrenchment of the immunity offered in Parker. Contrary to the implication in Parker, Cantor holds that privately initiated anti-competitive conduct is not beyond the reach of the Sherman Act because of its embodiment in a state regulatory scheme. In both Parker and Cantor the proscribed conduct was initiated by private parties operating within a state regulatory scheme. The Cantor Court, however, undertook a different

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67. 428 U.S. at 593-95.
68. In his lengthy dissent Justice Stewart expressed a concern that state-regulated public utilities will be reduced to playing a guessing game as to which of its regulated activities are compelled by state interests. Id. at 640.
69. See text accompanying note 66 supra. Thus, the finding of state neutrality to a regulatory scheme is dispositive of an assertion of antitrust immunity.
70. 428 U.S. at 603 (plurality opinion). In fact, the Court acknowledges that the entire Cantor framework for decision in state action antitrust litigation is dependent on a case-by-case adjudication. Id.
71. See text accompanying notes 112 and 113 infra.
72. It is interesting to speculate whether the Parker defendants could have defended their participatory actions in the raisin prorate program on the basis of the later developed Noerr-Pennington exception. See text accompanying notes 94-103 infra.
mode of analysis. Unlike the Parker Court, the Cantor Court considered the purpose of the state regulatory scheme and then compared the private activity with the purposes of the state's anti-competitive program.

The extent of private participation and state compulsion in the regulatory process in Cantor and Parker are roughly equivalent. In Parker, private raisin producers could decide whether to participate in the state regulatory program. Their initial participation could not realistically be said to have been compelled by the state. Once the prorate program was established, however, the state had the power to force compliance by the private participants. Similarly, in Cantor the Michigan Public Service Commission was vested with the authority to enforce the tariffs of the public utilities. Moreover, once a tariff was approved it was binding until a new tariff was filed. As in Parker, once Detroit Edison voluntarily initiated the light bulb program, it was required to participate in the program, at least until a new tariff was approved. Thus, Parker and Cantor cannot be distinguished by any difference in the amount of private participation or state compulsion.

Cantor can be distinguished from Parker, however, by the nature of the private participation in the regulatory scheme. In Parker, the private participation furthered the regulatory goal of the statutory scheme. Private participation helped maintain prices and stabilize the production of California raisins. The private action subject to potential antitrust liability in Parker, therefore, was essential to the effectuation of the regulatory scheme. In Cantor, however, the private action subject to potential antitrust liability was incidental to the regulatory purpose of the Michigan Public Service Commission.

The difference between Cantor and Parker can also be described in economic terms. In Parker California intended to restrict competition in a market that was formerly competitive, whereas the light bulb dispersal plan in Cantor caused the entry of a regulated industry into an unregulated, free-market sphere of the economy. Detroit Edison's program caused the regulatory influence of the state to intrude into an economic sector that the state had no expressed desire or power to regulate. Michigan, through its Michigan Public Service Corpora-

74. 428 U.S. at 585.
75. The adoption of a raisin prorate program in Parker precisely fulfilled the state's regulatory goal. In contrast, the light bulb dispersal plan in Cantor can be characterized as an almost ultra vires extension of the intended state regulatory scheme. See also Hecht v. Pro-Football, Inc., 444 F.2d 931 (D.C. Cir. 1971), cert. denied, 404 U.S. 1047 (1972); Duke & Co. v. Foerster, 521 F.2d 1277 (3rd Cir. 1975). In Reid v. University of Minnesota, 107 F. Supp. 439 (N.D. Ohio 1952), the court indicated in dicta that it was unlikely that the Parker exemption would cover a state agency acting as a commercial enter-
tion, intended to regulate competition in the distribution of electricity rather than light bulbs. Thus, the private action subject to attack in *Parker* was considerably more significant to the state regulatory scheme than in *Cantor*.

*Parker* also conflicts with *Cantor* and *Goldfarb* in another aspect of the state's relationship to the private participation. *Cantor* and *Goldfarb* appear to require more significant state participation than *Parker*. They require actual state compulsion to confer antitrust immunity to private activity. In contrast, the *Parker* Court speaks only of the "legislative command of the state" and the "state command to the Commission and to the program committee of the California Prorate Act." The state's presence in the California raisin prorate program was no greater than the Virginia State Bar's minimum fee schedule in *Goldfarb*. Yet, the *Parker* Court provided antitrust immunity and the *Goldfarb* Court did not. Thus, it is doubtful that the "command" of *Parker* can be equated with the compulsion requirements of *Goldfarb* and *Cantor*.

prise and competing with other private businesses in the production, sale and distribution of books in interstate commerce. *But see* E.W. Wiggins Airways, Inc. v. Massachusetts Port Authority, 362 F.2d 52 (1st Cir.), cert. denied, 385 U.S. 947 (1966) and State of New Mexico v. American Petrofina, Inc., 501 F.2d 363 (9th Cir. 1974). In both cases antitrust immunity was upheld although the state activity in question went beyond the regulatory power given to the agency by the state and there had been no legislative determination that regulation was appropriate. *See generally* Note, *Government Action and Antitrust Immunity*, 119 U. Pa. L. Rev. 521, 522-23 (1971); Note, 88 Harv. L. Rev. 1021, 1023-1027 (1975); Note, 53 Tex. L. Rev. 566, 571 (1975).

76. It is interesting to consider how *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951) (see text accompanying notes 37-52 *supra*) fits into this type of analysis. Leaving aside the fact that in *Schwegmann* the state fair trade act did not conform to the congressional intent expressed in the Miller-Tydings Act, the scope of the state regulation is consequential. The fair trade laws essentially gave private business the discretion to restrict competition by the establishment of binding minimum price guidelines. In particular, the state of Louisiana gave individuals the option, although it did not require the regulation of prices. Thus, *Schwegmann* represents a middle ground. The state consciously decided to permit regulation in a section of the economy without retaining the control necessary to affect antitrust immunity.

As noted with regard to *Schwegmann*, this marketplace analysis is distinct from a determination of state regulatory compatibility with federal law. Rather, it focuses on state intent to regulate and control the restriction of competition in a competitive sector of the economy.

77. 421 U.S. at 791.
78. 317 U.S. at 350.
79. Id. at 352.
80. Many of the pre-*Cantor* lower court interpretations of *Parker* support this reading of *Parker*. For example in *Washington Gas Light Co. v. Virginia Electric & Power Co.*, 438 F.2d 248 (4th Cir. 1971), the *Parker* defense was upheld in questionable circumstances. There, the plaintiff gas company and the defendant electric company were the sole suppliers of natural gas and electricity, respectively, to northern Virginia. The defendant offered a plan that gave credit for the installation of underground power lines to home builders.
Further evidence of an attempted retrenchment of *Parker* by the *Cantor* Court is found in the plurality's characterization of the *Parker* holding. In a portion of the opinion not joined in by a majority, Justice Stevens asserts that *Parker* recognized an antitrust exemption only for official action taken by state officials. Since *Parker* was a suit attacking the actions of California officials rather than private parties, it is plausible to limit its effect on that basis. As the dissent points out, however, subsequent Supreme Court decisions did not so restrict *Parker*’s meaning and the lower federal courts have almost uniformly held that *Parker* extends to some types of private action. Further, Justice Stevens completely ignores the precedent established by *Olsen v. Smith*. In *Olsen*, the parties were licensed and unlicensed agreeing to build all electric homes. The credit was usually sufficient to cover the entire cost of installation. The promotion program enabled the electric company to intrude successfully into utility markets previously dominated by natural gas. The State Corporation Commission had statutory authority to investigate the promotional plan and to act in the public interest. The Commission had not investigated the challenged practices, however, and had not issued a ruling approving or disapproving them. The Fourth Circuit, in reversing the trial court, upheld the plan under *Parker*. The court applied the exemption since the state regulatory body had the power to prohibit the electric company’s plan. Thus, even though the Commission did not exercise its delegated authority, anticompetitive private behavior was held to be immune from antitrust scrutiny.

Although *Washington Gas* was a controversial decision in 1971, see, e.g., Note, 85 Harv. L. Rev. 670, 674 (1972), the *Cantor* decision certainly mandates a different result today. If the state was regarded as neutral in *Cantor* where the state regulatory agency approved the anticompetitive conduct, neutrality surely exists in *Washington Gas* where the state agency had failed to become involved in sanctioning or even investigating the suspect conduct. The lack of state involvement presupposes a lack of state compulsion as required by *Goldfarb*. Thus, the argument for antitrust immunity put forth in *Washington Gas* would not get past the threshold criteria under present law. See also *Business Aides, Inc. v. Chesapeake & Potomac Tel. Co.*, 339 F. Supp. 1391 (E.D. Va. 1972), aff’d, 480 F.2d 754 (4th Cir. 1973); *Marnell v. United Parcel Post of America*, Inc., 260 F. Supp. 391 (N.D. Cal. 1966); compare *Gas Light Co. of Columbus v. Georgia Power Co.*, 440 F.2d 1135 (5th Cir. 1971), cert. denied, 404 U.S. 1062 (1972); *Alabama Power Co. v. Alabama Elec. Cooperative, Inc.*, 394 F.2d 672 (5th Cir.), cert. denied, 393 U.S. 1000 (1968).

81. 428 U.S. at 585-92.


83. 195 U.S. 332 (1904). See text accompanying note 22 *supra*.
pilots in the port of Galveston. The Court refused to apply the antitrust laws to the actions of the licensed parties. Since *Parker* cites *Olsen* with approval, the narrow reading given *Parker* by the plurality is untenable.

One way to determine the extent to which *Cantor* departs from *Parker* is to apply *Cantor*'s four post-threshold criteria to the facts of *Parker*. Since *Parker* held that the California raisin prorate program was exempt from the antitrust laws, the four *Cantor* criteria should be met if the cases are to be considered consistent.  

The first requirement in *Cantor* is that Congress' articulation of the "federal interest" in promoting competition or regulating competition has not preempted state regulation. This criterion is in accord with the *Parker* test. As noted, the *Parker* Court examined federal acts and found that the state regulation involved did not conflict with the policies and intentions of the Congressional enactment.

The second *Cantor* criterion, that the state interest in regulating the private activity be substantial and central to a recognized regulatory goal, is not antipathetic to *Parker*. This requirement may actually be derived from *Parker*'s determination that a state could not confer immunity on violators of the Sherman Act by authorizing their transgressions. Thus, more is necessary than the passage of a statute permitting anti-competitive conduct to confer the immunity; the state must have a valid regulatory purpose to restrict competition.

The third of the *Cantor* criteria, that the regulation must be limited to the minimum amount necessary to achieve the goal desired, is consistent with *Parker* as well. The minimum amount necessary test, however, does not flow from *Parker* but, rather, has its origins in situations involving a conflict between federal regulatory policy and the antitrust laws. *Cantor* represents the first attempt to transpose this standard to conflicts between state regulation and federal antitrust policy. Even so, a hindsight application of this third requirement to *Parker* would not produce a different result. The raisin pro-

84. The difficulties of applying the threshold compulsion criterion to *Parker* have been discussed. See text accompanying notes 77-80 *supra*. The other *Goldfarb* threshold requirement, that the state act as sovereign, presents little problem when applied to the *Parker* facts. The act of the California legislature in controlling the distribution and sale of agricultural production of the state, in a manner consistent with federal guidelines, was certainly the act of a sovereign.

85. 428 U.S. at 595.

86. See text accompanying notes 34-36 *supra*.

87. 317 U.S. at 351 (citing *Northern Securities Co. v. United States*, 193 U.S. 197, 332, 344-47 (1904)).

rate plan was the direct consequence of California's intention to "prevent economic waste in the marketing of agricultural products [by]
restricting competition among the growers and maintaining prices." 89

The remaining post-threshold criterion, the nebulous "fairness" doctrine, is solely a creation of the Cantor Court.90 The refusal to grant antitrust immunity to Detroit Edison forced the Court to find some rationale for its apparently paradoxical conclusion that an individual must conform to anti-competitive state regulation as well as the federal antitrust laws. As noted by the Court, the application of the fairness doctrine is not inconsistent with the result in Parker,91 but it is just as apparent that the Parker Court had no occasion to consider fairness in its deliberations. The fairness criterion arose because Cantor produced a result that varied with Parker's grant of antitrust immunity. The fairness of exempting antitrust coverage in some instances was set forth to affirm, at least marginally, the doctrine emanating from Parker. This reading of Cantor reflects a narrow or restricted view of Parker since fairness is used to limit the instances in which immunity is given.

Cantor and Goldfarb, then, severely restrict the possible scope of the Parker state action exemption.92 Furthermore, the threshold re-

89. 317 U.S. at 346. Also, the raisin producers themselves performed in accordance with the regulatory scheme in initiating and complying with the prorate program.

90. The Court did refer to Jackson v. Metropolitan Edison, 419 U.S. 345, 357 (1974), where it was recognized that approval by a state utility commission of a proposal urged by a utility does not automatically transform the approval activity into state action for fourteenth amendment purposes. 428 U.S. at 594 n. 31.

91. Nevertheless, the Court's characterization of Parker is questionable. The Court stated that "California required every raisin producer in the State to comply with the proration program, whereas Michigan never required any utility to adopt a lamp exchange program." 428 U.S. at 594 n. 32. The Court, however, fails to take into account the apparent voluntary nature of the initiation of programs by the raisin producers. The voluntary application for approval of light bulb distribution in Cantor was similar. Yet, in both cases, once approval was obtained, compliance was mandatory under the regulatory scheme until the involved individuals petitioned for change through the regulatory body.

92. In City of Lafayette v. La. Power & Light Co., 46 U.S.L.W. 4265 (1978), a case decided while the article was in press, the Supreme Court affirmed the Fifth Circuit's reversal of a trial court ruling that municipalities were automatically exempt from the antitrust laws. However, as in Cantor, the Court could not agree on the reach of the Parker exemption. Justice Brennan's opinion, stating that the immunity of municipalities from antitrust liability extended only so far as consonant with expressed state policy to displace competition, received only a plurality vote. Nevertheless, the result signifies the continued disposition of the Court to sharply restrict the scope of the Parker exemption.

The Seventh Circuit also recently stated that activities of municipalities have a narrower state action exemption than do the activities of state government units themselves. Kurek v. Pleasure Driveway & Park District of Peoria, Ill., 557 F.2d 580, 590 (7th Cir. 1977). See also City of Fairfax, Va. v. Fairfax Hospital Ass'n, 562 F.2d 280 (4th Cir. 1977); City of Mishawaka, Ind. v.
quirement of state compulsion and the fairness doctrine in particular, evince new Court standards which work to restrict *Parker* to limited situations involving state regulation.93

Indiana & Michigan Electric Co., 560 F.2d 1314 (7th Cir. 1977). The *Kurek* Court relied on the *Lafayette* 5th Circuit decision and *Duke & Co. Inc. v. Foerster*, 521 F.2d 1277 (3d Cir. 1975), as authority for the proposition that municipalities have a heavier burden to meet the *Goldfarb* and *Cantor* standards. 557 F.2d at 590. For a pre-*Goldfarb* case which intimates that a different standard may be applicable for local government units, see *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969). See generally *State of New Mexico v. American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974).

*Jeffrey v. Southwestern Bell*, 518 F.2d 1129 (5th Cir. 1975), further illustrates the impact of *Goldfarb* on state delegated regulatory power. The case involved an antitrust suit by residential telephone subscribers against the telephone company and two subsidiaries. Although no governmental bodies were sued, one of plaintiff’s allegations directly implicated the rate-making authority of Texas municipal governments. Because of the influence of *Goldfarb*, the court sustained the antitrust exemption after investigating the right of the municipalities to approve rates under the state regulatory scheme. Specific legislative authority was found that delegated the regulation of intra-city telephone rates to the municipalities.

The emphasis on the specific legislative delegation of authority poses two related difficulties for state regulatory programs. First, the question arises as to the specificity required in the actual delegation of regulatory authority. The grant of power by the legislature to a local government unit under vague regulatory statutes is curtailed. *Cantor* itself demonstrates that implied regulatory authority will not suffice. 428 U.S. at 584-85. Second, the actions of government officials acting in a regulatory capacity will be closely scrutinized. This should decrease the amount of discretion officials have in their regulatory functions. And, conversely, reviewing courts will have an expanded ability to curtail the possible anticompetitive effects of state regulatory decisions through increased opportunity for the use of the federal antitrust laws.

93. Prior to the *Goldfarb* decision, the lower courts applied a doctrine of *per se* immunity to situations where the state was acting as an entrepreneur or proprietor. See, e.g., *Padgett v. Louisville & Jefferson County Air Board*, 492 F.2d 1258 (6th Cir. 1974); *State of New Mexico v. American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974); *Ladue Local Lines Inc. v. Bi-State Development Agency*, 433 F.2d 131 (8th Cir. 1970); *E.W. Wiggins Airways, Inc. v. Mass. Port Authority*, 362 F.2d 52 (1st Cir.). *cert. denied*, 385 U.S. 947 (1966); *Miley v. John Hancock Mut. Life Ins. Co.*, 148 F. Supp. 299 (D. Mass. 1957), aff’d mem., 242 F.2d 758 (1st Cir.). *cert. denied*, 355 U.S. 828 (1957). Cf. *Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir. 1970), *cert. denied*, 400 U.S. 850 (1970); see generally, *Reid v. University of Minnesota*, 107 F. Supp. 439 (N.D. Ohio 1952) (dicta). The implications of *Goldfarb* and *Cantor* to these types of quasi-governmental activities are illustrated by *Duke and Company v. Foerster*, 521 F.2d 1277 (3rd Cir. 1975). In *Foerster*, an interstate brewer brought suit against several municipal bodies of the city of Pittsburgh for conspiring to boycott plaintiff’s products at certain municipally owned public facilities in violation of section 1 of the Sherman Act. The district court found the defendants immune from antitrust attack pursuant to *Parker*. The Third Circuit reversed on the basis of *Goldfarb*, which had been decided in the interim. The court interpreted *Goldfarb* as requiring state authority which “demonstrates that it is the intent of the state to restrain competition in a given area” to qualify for an antitrust exemption. 521 F.2d at 1250. Defendants could point to no implicit or explicit statutory authority for the alleged boycott that would negate their exposure to the antitrust law.
PRIVATE ATTEMPTS TO INFLUENCE THE GOVERNMENTAL PROCESS

The Noerr-Pennington doctrine articulates an antitrust exemption with respect to private parties who are attempting to influence public officials. The Court has forged a broad exemption for private parties engaged in legitimate activity. The Cantor opinion may affect this antitrust exemption as well.

In Eastern Railroad Presidents Conference v. Noerr Motor Freight Co., Inc.\(^{94}\) the Supreme Court ruled that the Sherman Act does not prohibit private attempts to persuade the legislative and executive branches of state government to enact laws and regulations that would foster monopolies or restraints of trade.\(^{95}\) The case involved a concerted publicity campaign by the defendant railroads to influence the passage of laws unfavorable to the trucking industry. One of the trucking firms alleged that the defendants had prevailed upon the Governor of Pennsylvania to veto a "Fair Truck Bill" which would have permitted trucks to transport heavier shipments in Pennsylvania.\(^{96}\) The Court characterized defendant's action as politically-oriented and therefore beyond the scope of the Sherman Act. A contrary interpretation of the Sherman Act, the Court reasoned, would interfere with the free flow of information necessary for the proper functioning of the government.\(^{97}\) The use of unethical tactics\(^{98}\) did not affect this antitrust immunity because the Sherman Act was designed to prohibit trade restraints rather than political activity.\(^{99}\)

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\(^{95}\) Id. at 136.

\(^{96}\) Id. at 130.

\(^{97}\) The Court further noted that to limit the individual's access to the government would also raise constitutional issues, such as the right of petition guaranteed by the first amendment. Id. at 137-38.

\(^{98}\) The third party technique can be generally defined as the false attribution of views, opinions and statements of interested parties to disinterested parties. See L. Sullivan, supra note 43, at 741. In Noerr the campaign against legislation favorable to the trucking industry allegedly included spontaneously expressed opinions of civic organizations and non-interested individuals when in fact the statements were prepared by a public relations firm hired by the railroad association. 365 U.S. at 129-30.

\(^{99}\) Id. at 141-42.
The Noerr doctrine was subsequently expanded in United Mine Workers v. Pennington. Pennington involved the defendant union’s conspiracy with large mine owners to induce the Secretary of Labor to set a high minimum wage for coal miners employed by firms supplying coal to the Tennessee Valley Authority. The Mine Workers also sought to persuade the TVA to refrain from purchasing coal from any supplier not paying the minimum wage, thereby freezing out small, low-efficiency mines that depended heavily on the purchases of TVA. Although defendant’s purpose had been to put small coal companies out of business, the Court held that a concerted effort to influence public officials was shielded from antitrust liability regardless of its intent or purpose. Pennington thus extended the Noerr antitrust immunity beyond traditional lobbying activities to a broad range of attempts to influence government action.

The Noerr Court recognized that situations might arise in which the actions of private parties, ostensibly to influence governmental performance, might really be direct attempts to obstruct the business relationships of a competitor. The Court indicated that such sham activities would not be beyond the reach of the antitrust law. The sham exception was articulated more fully in California Motor Transport Co. v. Trucking Unlimited. The parties were competing motor carriers involved in the intrastate and interstate transportation of goods

100. 381 U.S. 657 (1965).
102. 381 U.S. at 670.


104. The sham exception did not apply in Noerr, because the railroads had made a genuine effort to influence legislation. That goal, which was successful, was valid and did not amount to an interference with business relationships in a manner proscribed by the Sherman Act. 365 U.S. at 141.

in California. The respondents alleged that the petitioners had effectively prevented their access to the tribunals responsible for granting operation licenses by instituting unfounded judicial and administrative actions. The Supreme Court held that the complaint sufficiently alleged conduct which, if proved, would come within the sham exception alluded to in *Noerr* and would thus be actionable under the Sherman Act. The Court found that "a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused." If the abuse has the result of "effectively barring [respondents] from access to the agencies and courts," the conduct ceases to be political activity and becomes subject to antitrust scrutiny. Petitioners, by engaging in concerted activity designed to restrict competitors' access to agencies and courts, were directly interfering with the business relationships of rival firms. Thus, except in circumstances invoking the sham exception, the courts have exempted political activity from antitrust consequences even though it is designed to restrict competition.

*The significance of Cantor to private attempts to influence government activity*

The Cantor state action standards also suggest important ramifications for the *Noerr-Pennington* antitrust exemption and the *California Motor Transport* limitation to that exemption. Under *Noerr-Pennington* standards, Detroit Edison had the right to include their light bulb

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106. The complaint alleged that the defendants had all contributed to a trust fund to finance concerted opposition to attempts by plaintiffs to obtain operating rights before the California Public Utilities Commission and the Interstate Commerce Commission. *Id.* at 509. As a result, it was alleged, the process of securing operating licenses was made prohibitively expensive and time-consuming, thereby severely restricting the ability of plaintiffs to exercise their fundamental right of access to administrative agencies. *Id.* at 511, 515. This denial of access effectively eliminated any substantial competition. See *Note, The Brakes Fail on the Noerr Doctrine—Trucking Unlimited v. California Motor Transport Co.*, 57 CALIF. L. REV. 518, 523 (1969); *Note, 86 HARV. L. REV. 715, 720 (1973).

107. 404 U.S. at 513.

108. *Id.* at 512. The Court concluded, however, that the *Noerr-Pennington* exemption applies to the right of individuals to petition the judicial and administrative branches of the government as well as legislatures. *Id.* at 510-11. See note 103 supra.

109. See also United States v. Otter Tail Power Co., 360 F. Supp. 451 (D. Minn. 1973), *aff'd per curiam, 417 U.S. 901 (1974)*, where an electric utility company had sponsored litigation against a number of municipal electric systems, partially to hamper the marketing of bonds necessary to finance the municipal systems. The district court found that Otter Tail's repetitive litigation was designed to prevent the establishment of competitive utilities. Otter Tail's activities thus fell within the sham exception and were subject to antitrust scrutiny.
distribution plan in a tariff without incurring liability under the Sherman Act. Since Detroit Edison did not engage in any practices which would restrict access of other light bulb retailers to the Michigan Public Service Commission, its conduct was not within the sham exception.\textsuperscript{110} Cantor would limit \textit{Noerr-Pennington} immunity to private actions taken for the purpose of influencing governmental decision-making, distinguishing those situations from cases involving "questions of either liability or exemption for private action in compliance with state law."\textsuperscript{111}

Justice Stewart argued in his dissenting opinion that the \textit{Cantor} plurality decision effectively overruled \textit{Noerr}. Stewart noted that Detroit Edison's participation in the state regulatory process by including the light bulb distribution program in its tariff subjected it to federal antitrust law.\textsuperscript{112} By making the extent of a private party's participation in the state decision-making process a substantive criterion in determining the "fairness" of applying the antitrust laws to the individual's conduct, Justice Stewart felt the Court ignored the dichotomy of influencing decision-making and complying with state law into which \textit{Noerr} and \textit{Parker} logically separate.\textsuperscript{113}

Perhaps the most obvious answer to Justice Stewart is that it is necessary to distinguish between the right of private parties to petition for government-authorized action that would violate the antitrust laws if effectuated and the right of private parties to immunity from the fruits of that petition. \textit{Cantor} focused on the anticompetitive activity resulting from agency approval of the light bulb program instead of Detroit Edison's attempt to gain approval of that program. Detroit Edison's right to petition the agency remained unimpaired. Thus, the

\textsuperscript{110} The argument could be made that Detroit Edison's activity came within the sham exception since it petitioned the Michigan Public Service Commission for approval in an area not regulated by the commission—the distribution of light bulbs. Accordingly, since Detroit Edison voluntarily chose to approach the commission with the light bulb proposal, it should not be exempt from the antitrust laws under \textit{Noerr-Pennington}. This reasoning is similar to that of the \textit{Cantor} Court in weighing the degree of private participation in determining whether to grant antitrust immunity.

\textsuperscript{111} 428 U.S. at 601. The plurality would also limit the antitrust immunity of \textit{Parker} to official actions taken by state officials, excluding coverage of private activity performed under the auspices of the state. \textit{Id.} at 590-92. \textit{But see Olsen v. Smith}, 195 U.S. 332 (1904), holding individuals performing pilotage services pursuant to state regulations exempt from the Sherman Act. See text accompanying notes 22 and 23 \textit{supra}. The \textit{Parker} Court's reliance on \textit{Olsen} is unmistakable. 319 U.S. at 352. \textit{See also Handler, The Current Attack on the Parker v. Brown State Action Doctrine}, 76 COLUM. L. REV. 1, 8 (1976).

\textsuperscript{112} 428 U.S. at 625-26.

\textsuperscript{113} Justice Stewart wrote: "This attempt to distinguish between exemptive force of mandatory state rules adopted at the behest of private parties and those adopted pursuant to the states' unilateral decision is flatly inconsistent with the rationale of \textit{Noerr}." 428 U.S. at 626.
Noerr-Pennington immunity does not extend to post-approval private activity.\(^114\)

This analysis of the limitations of Noerr-Pennington is also consistent with the holding of Parker that a state could not confer antitrust immunity by authorizing private parties to violate the Sherman Act.\(^115\) Private parties must look instead to the Goldfarb and Cantor criteria to determine if their activity is protected state action.

One unavoidable consequence of Cantor is that private participation in certain state regulatory activities may be diluted.\(^116\) The right of the governmental access, however, should not automatically act to condone all private activity undertaken pursuant to governmental approval, particularly in view of our federalist system of government. The system provides for state as well as federal sovereignty but makes clear that federal policy takes precedence if the two sovereigns conflict. Thus, the right to petition a state regulatory body for permission to conduct anti-competitive activity must remain unimpaired, but a state cannot grant an exemption from a recognized federal law without federal approval.\(^117\) Cantor, therefore, provides little definitive guidance for the lower federal courts faced with the problem of applying Noerr-Pennington in the different contexts in which questions of state-authorized private conduct can arise.

THE Bates DECISION

The recent case of Bates v. State Bar of Arizona,\(^119\) however, casts some doubt on the continuing validity of the Cantor tests for granting state action antitrust immunity. Bates could be interpreted as an attempted resurrection of the Goldfarb test. Two Phoenix attorneys challenged the state disciplinary rules prohibiting advertising by publishing a newspaper advertisement setting forth fees for common legal services.\(^120\)

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114. Neither the Noerr, Pennigton, nor the California Motor Transport Courts had an opportunity to examine post-approval private activity since in each case the attack centered on activities involving the access to governmental authority for the purpose of securing a desired anti-competitive result.

115. 317 U.S. at 351.

116. Justice Stewart stated that the Court's holding "may very well strike a crippling blow at state utility regulation." Id. at 627. Such regulation is heavily dependent on active participation by the regulated parties, who generally must propose tariffs and schedules for agency approval. Diminution of that participation will curtail regulatory efficiency and effectiveness. Id.

117. The Court recognized this proposition in Parker: "True, 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 ..." 317 U.S. at 351 (citing Northern Securities Co. v. United States, 193 U.S. 197, 332, 344-47 (1904)).

118. Interestingly, the majority portion of the Cantor opinion made no mention of Noerr or its progeny; only in Justice Stevens' plurality opinion and Justice Stewart's dissent was the issue addressed. See 428 U.S. at 601-02 (Stevens, J.) and 428 U.S. at 623-26 (Stewart, J., dissenting).

services. The state bar association brought a disciplinary proceeding against the two lawyers and the case went to the Supreme Court after the Arizona Supreme Court upheld the rule banning advertising by lawyers. 120 Although the Court struck down Arizona’s disciplinary rules prohibiting advertising by lawyers on first amendment grounds, the Court also considered the antitrust ramifications involved. The Court, in effect, granted state action antitrust immunity for the first time since Parker. The Court found that the rule prohibiting lawyer advertising was the “affirmative command of the Arizona Supreme Court.” 121 Since that court derived its authority for governing the practice of law from the state constitution, the restraint on lawyer advertising was “compelled by direction of the State acting as sovereign.” 122

The Bates Court’s characterization of Cantor is not entirely convincing. The Court concluded that reliance on Cantor was inapposite for three reasons. First, the Court considered it profoundly significant that Cantor involved a private rather than a public defendant. 123 Secondly, the balancing of state and federal interests weighed much more heavily in favor of the application of the antitrust laws in Cantor than in Bates. 124 Whereas the regulation of the legal profession went to the state’s obligation to protect the public, there was no independent state regulatory interest in the marketing of light bulbs. Finally, the nature of the actual regulation was distinguishable. The light bulb program in Cantor evinced only state acquiescence, but in Bates the regulation of the legal profession through disciplinary rules promulgated by the Arizona Supreme Court was an affirmative articulation of state policy. 125

The Bates Court, nevertheless, failed to address adequately the “minimum extent necessary” criterion. According to the Cantor analysis, if the advertising prohibition had intruded upon the federal interest in promoting competition more than was minimally necessary to achieve the state’s goal, the rule should have been subject to the antitrust law. 126 Because Bates involved direct state action while

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120. 113 Ariz. 394, 555 P.2d 640 (1976).
121. 97 S. Ct. at 2697.
122. Id. See also Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). The facts in Goldfarb were distinguished because the price fixing which resulted from the adoption of minimum fee schedules was not required by the state of Virginia. 97 S. Ct. at 2696. The Court also pointed to its statement in Goldfarb that the result there was not intended to diminish the authority of the states to regulate their professions. Id. at 2697 n.11.
123. Id. at 2697.
124. Id. at 2697-98. Defendants argued that the federal interest embodied in the Sherman Act is stronger than the state interest in the regulation of the legal profession. Id. at 2697.
125. Id. at 2698.
126. See Cantor v. Detroit Edison, 428 U.S. 579, 596-97 (1976). This was precisely what the Court held in its first amendment discussion. The Court
Cantor involved a private party, the Bates Court felt that the Cantor "minimum extent necessary" test was inapplicable. Justice Stevens, however, could not obtain a majority in Cantor when attempting to distinguish Parker on the same grounds. Justice Blackmun's attempt to make this same distinction in Bates is no more valid.

The Bates decision, then, indicates a judicial deference to state regulation advancing a legitimate state regulatory purpose. It provides added credence to the argument that tangential applications of Parker will be struck down while the core of state regulatory activities will remain free from antitrust surveillance. The application of the Cantor post-threshold criteria remains in doubt as Bates may indicate a judicial disposition to overlook the Cantor tests when the Goldfarb requirements have been squarely met.

POLICY CONSIDERATIONS

Pre-Cantor commentators on the Parker doctrine expressed widely disparate views about judicial grants of antitrust immunity for state authorized activity. On one level, the discussion has focused on the right of the states to manage their own economic affairs in contravention of federal policy. On another level, the inquiry has been whether government intervention into varied sectors of our capitalistic economy is undermining the competitive process and fostering unneeded monopsonies. A strong states' rights position may have the effect of shielding unwarranted governmental anti-competitive activity from federal antitrust policy. Thus, the Parker antitrust exemption may provide judicial sanction for government-authorized anticompetitive conduct which is harmful to the economy.

State action immunity raises fundamental policy questions concerning the freedom of states to govern their own affairs without interference. Advocates of a broad Parker exemption consider the immunity essential to the preservation of the federalist system. Professor Handler, a proponent of Parker and of state economic autonomy, believes that the application of federal antitrust law to state regulatory practices would cause "a revolutionary restructuring of our..."
entire economic and legal system." In his view, Parker is an essential component of the federalist system. States should be the masters of their own economies, within broadly defined parameters. Handler points out that states have the same mechanisms for decision, review and repeal that are found in the federal system. State agency decisions are subject to review by state courts. State legislatures and executives exist to make law and pronounce policy. Thus, the federalist system does not necessitate a ubiquitous intrusion of federal antitrust policy into state business.

A similar position favoring broad application of Parker to state activity is taken by Professor Verkuil. He views Parker as central to a concept of federalism and judicial neutrality on economic policy, both of which argue against federal intervention in state regulatory processes. This concept of federalism mandates an automatic grant of antitrust immunity for state public utilities irrespective of the "actual involvement" of the utility in the challenged activity. According to Verkuil, the "actual involvement" criterion should be reserved for areas of state regulation where the free market is plausible although not historically favored. Yet Verkuil recognizes that some traditional forms of state regulation are of doubtful value to the economy and to the public. He suggests a procedural due process approach to deal with the varied situations arising under the state regulatory rubric. That is, if the state regulation were constitutional, the federal

131. Handler, supra note 111, at 18-20. It is conceivable that Handler would have decided Cantor by referring the plaintiff to its state administrative remedies, which apparently were not exhausted. See Business Aides Inc. v. Chesapeake Tel. Co. of Virginia, 480 F.2d 754 (4th Cir. 1973) and Washington Gas Light Co. v. Virginia Electric & Power Co., 438 F.2d 248 (4th Cir. 1971).
133. Id. at 334.
134. Id. at 339-40. Verkuil pointed out that Parker failed to articulate the quantum of state involvement necessary to insulate state activity from the antitrust laws. Rather the Parker Court stopped after finding the requisite state involvement in the prorate program for exclusion. 317 U.S. at 352.
135. Verkuil, supra note 132, at 340. Accord Gas Light Co. of Columbus v. Georgia Power Co., 440 F.2d 1135, 1140 (5th Cir. 1971), cert. denied, 404 U.S. 1062 (1972) (antitrust suit dismissed because state regulatory commission had exercised its regulatory powers in holding adversary proceedings and subsequently approving the challenged practices). Cf. Woods Exploration and Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (1972) (action taken by Texas Railroad Commission did not confer antitrust immunity to private participants because Commission action was premised on false information received from defendants).
136. Verkuil, supra note 132, at 341. Typical of these are enterprises that have long been subject to government restraints although present justification may be economically impossible. But investment decisions of industry participants mitigate against the lessening of regulatory barriers. See note 137 infra.
court would defer to state remedies. Application of the primary jurisdiction doctrine would therefore confer upon the state the exclusive responsibility for determining antitrust issues. Thus, Verkuil also favors state autonomy in economic affairs but, like Handler, he would place broad federal constitutional constraints on state regulatory activity.

The majority of legal writers, however, have articulated a different conception of federalism. Many would resolve conflicts between state regulation and federal antitrust law in favor of the federal government under the supremacy clause or the commerce clause. Therefore, state regulatory activity would be permissible only when it was consistent with existing, articulated federal policy. These writers generally favor the preservation of competition as a necessary corollary to the advancement of the economy. As will be seen, this traditional economic conviction is consistent with the view that increasing governmental intrusion into free markets is detrimental to capitalistic ideals.

Professor Slater, in what can be described as a vigorous pro-antitrust position, proposes a balancing test whereby the anticompetitive effects of state regulation are weighed against the state interest in restricting competition. State activity would be granted immunity only when the interest promoted by regulation is greater than the preservation of competition and the regulated activity conforms to federal antitrust policy. Thus, state regulation that breached the competitive spirit of the Sherman Act without committing technical violations would be struck down, unless a contrary federal policy could be exhibited.

137. Verkuil, supra note 132, at 349-50. The cases of Gibson v. Berryhill, 411 U.S. 564 (1973), and Silver v. New York Stock Exchange, 373 U.S. 341 (1963), were adopted to support the proposition that procedural due process should be a necessary indicia of state autonomy from antitrust surveillance. Id. at 344-49. The satisfaction of procedural due process standards by a state agency guaranteed the "actual involvement" of the state in the regulatory decision-making process. Id. at 345.


140. See, e.g., Slater, supra note 52, at 86, 87, 91; Jacobs, supra note 52, at 737.

141. Slater, supra note 52, at 104, 106.

142. Slater believes that the supremacy clause voids any state act that conflicts with the policy embodied in a federal act. Id. at 78. Thus, violations of the Sherman Act which would support a treble damage action are not necessary to halt state regulatory activities. Id. at 78 n. 34. In order to regulate, states would have to demonstrate a "valid reason" for regulating and an interest in regulating that is greater than the preservation of competition. Id. at 104.
The Slater balancing test resembles the rule of reason approach proposed by Justice Blackmun in his concurring opinion in Cantor.\(^{143}\) Blackmun stated that the Constitution requires resolution of substantial conflicts between state and federal interest in favor of the federal interest.\(^{144}\) Although Blackmun recognized the right of the state to displace the competitive market, in his view the state has the burden of justifying economic regulation to escape the purview of the antitrust law.\(^{145}\) Although Blackmun’s approach appears to retain more deference to state’s rights than does Slater’s, it is apparent that any balancing test or rule of reason gives sparse recognition to the concept of state sovereignty and consistently results in the submission of state economic policy to federal law.\(^{146}\) The question remains whether capitalistic economic principles compel such a restrictive view of state’s rights.

Professor Paul Posner has also taken a dim view of attempted state usurpation of competition.\(^{147}\) Although Posner, too, would limit the parameters of Parker to public utilities and other economic regulation coinciding with recognized federal policy, he arrives at this conclusion by another approach. Posner suggests that antitrust law as now embodied in federal policy goes beyond the confines of the express prohibitions of the Sherman and Clayton Acts. This extension acts to circumscribe the operation of state regulations that retard the free market system envisioned by the antitrust law.\(^{148}\) Thus, he

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143. 428 U. S. at 605-14.
144. Id. at 611.
145. In applying his rule of reason test to the facts of Cantor, Justice Blackmun found that the restriction of competition in the light bulb market must fall absent evidence of an adequate state objective. Because there was no evidence that competition in the retail sales of light bulbs was inefficient, the state regulation had to succumb to the federal antitrust policy of promoting competition. Id. at 613-14.
146. The balancing test is thought of as a primary way in which to curb state regulatory abuses such as the questionable activity of licensing trades and professions. Slater, supra note 52, at 105. The balancing test presumes that the federal government is accountable for correcting state problems under our federalist system of government. A balancing test, however, fails to consider that states have their own autonomous but politically responsible courts, legislatures and executives to make policy decisions according to the needs of the state. See Handler, supra note 111, at 18-19. See also text accompanying note 131 supra. It can be argued that state legislators and state officials possess a degree of expertise in meeting the particular problems of their states that cannot be matched by federal bureaucrats and officials, much as federal regulatory agencies are said to have unique skills in regulating industries which have served to insulate them to some extent from congressional control. On the latter point, see Cutler and Johnson, Regulation and the Political Process, 84 Yale L. J. 1395 (1975).
147. Posner, supra note 42.
148. Id. at 699. Here, Posner is in accord with the view taken by Slater. See note 142 and accompanying text supra. However, Posner would not permit the states as great a latitude as Slater’s balancing test since he would proscribe state market interference unless supported by express federal legislation. See text accompanying note 150 infra. Slater’s balancing test would permit state inter-
would permit the antitrust law to limit state regulatory action even when a technical antitrust violation is not present. In sum, Posner would allow state economic regulation only where Congress has provided an express exception to free market policy by legislation outside the antitrust statutes and in the public utilities where the need for market restriction is universally recognized.

It is evident that the plurality in Cantor aligns itself with those favoring vigorous enforcement of antitrust policy, even at the expense of state regulatory activity. For instance, a pre-Cantor commentator advocating limited state action antitrust immunity proposed an approach strikingly similar to that of the Cantor plurality, perceiving that the adjudication of state regulatory activities necessarily involves factual questions requiring a case by case determination. Further, that author, like the Cantor Court, recommended that a distinction should be made between state-compelled activity and state-approved activity to resolve state regulatory suits.

Cantor, then, demonstrates the Court's continuing zeal for the promotion of free competition in accordance with antitrust policy but...
falls short of completely subordinating state economic controls to federal economic controls. The Court, for the first time, specifically applied the “minimum extent necessary” test to state regulatory activity. Although the Court found state neutrality in the regulation of light bulbs and emphasized private participation in the distribution program, the four Cantor threshold requirements evidence a willingness to invoke antitrust dominion over unnecessary or misdirected state regulation.

Cantor and Goldfarb, however, do not reach the limitations advocated by the majority of pre-Cantor writers. To date the Court has not required state regulatory measures to coincide with federally permitted activity. Cantor and Goldfarb represent a retreat from Parker as interpreted by the lower federal courts but in recognizing the right of states to regulate their economies independently of federal law, the Court has preserved the integrity of state sovereignty. The Court has eliminated tangential regulation, but the right of the state to make purposeful economic decisions and to require private conduct that may not promote competition remains unimpaired.

Concluding that Cantor and Goldfarb have at least obliquely preserved state sovereignty in the regulatory sphere does not answer the policy question of whether state regulation is economically harmful. That issue, however, cannot be resolved in general terms. Certainly not all regulation is desirable. State and local regulation is often the direct result of effective political pressure supplied by special interest lobbies.

153. 428 U.S. at 597-98.
154. The Goldfarb threshold criteria requiring regulation compelled by the state acting as sovereign to gain antitrust immunity had previously restricted the breadth of state regulatory autonomy. For example, state functionaries sued for antitrust violations derived from entrepreneurial or quasi-governmental activities could no longer avail themselves of the Parker immunity.
155. See Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. & Mgmt. Sc. 3 (1971). One pair of commentators, although speaking to federal regulatory abuses, has advocated more direct political responsibility for regulatory bodies. Their view is that since agencies originate from political action by the legislative or executive branches, the founding politicians should assume continuing responsibility for the actions of regulators. The traditional independence of agencies because of singular expertise does not justify the degree of agency autonomy that has developed. The continued political accountability of regulatory bodies would, it is argued, result in fewer administrative sinecures and curb uneconomic regulatory practices. Cutler and Johnson, Regulation and the Political Process, 84 Yale L. J. 1395 (1975). Compare W. Cary, Politics and the Regulatory Agencies 139 (1967). There is no apparent reason why increased political accountability for regulation is not a practical alternative on the state level. And the hypothesis has another attraction which inures to the benefit of state regulation. The forced and continued political accountability of state legislators should reduce their susceptibility to the pressures of special interest groups, thereby eliminating unwarranted regulation at the outset. For example, if state legislators were more directly responsible for some of the frivolous occupational licensing requirements, occupational licensing would probably decrease.
regulation have been criticized as protecting and extending political interests contrary to the broad consumer interest in the efficient supply of services.\textsuperscript{156} Occupational licensing typically reduces competition by raising entry barriers, often barring entry for reasons wholly unrelated to the regulated trade.\textsuperscript{157} Many regulatory practices also involve state approval of rates, resulting in price fixing cartels.\textsuperscript{158} Rate regulation actually assures more effective cartel pricing than can be accomplished by private agreement because the threat of competitors attracted by large profits is limited by artificial entry barriers.\textsuperscript{159} One economist has even contended that the perpetuation of monopolistic practices by government intervention may constitute the greatest threat to the competitive principles of the economy.\textsuperscript{160}

The proliferation of state and local regulation is legion.\textsuperscript{161} As technology increases and society advances, regulation inevitably increases.\textsuperscript{162} Even though local regulation may be concomitant to

\textsuperscript{156} See M. Friedman, \textit{Capitalism and Freedom} 143 (1962); Maurizi, \textit{Occupational Licensing and the Public Interest}, 82 J. Pol. Econ. 399 (1974). Thus, "there is no presumption that regulation is always or even often designed to protect the broad consumer interest in the efficient supply of the regulated services." R. Posner, \textit{Economic Analysis of Law} 153 (1972).

\textsuperscript{157} Occupations that have long been subject to state regulation may have developed significant economic entry barriers. Monopolistic profits secured as a result of limited entry continues to mitigate against free market entry. But deregulation means that new entrants lose their initial investment while profits fall, though the consumer benefits. Verkuil, \textit{supra} note 132, at 341. Perhaps the regulation of the taxicab industry in some of our large metropolitan areas serves as the best illustration of this type of abuse. See Kitch, Isaacson & Kasper, \textit{The Regulation of Taxicabs in Chicago}, 14 J. Law & Econ. 285 (1971); Verkuil, \textit{Economic Regulation of Taxicabs}, 24 Rutgers L. Rev. 672 (1970). See generally M. Friedman, \textit{supra} note 156, at 143 (1962); Barron, \textit{Business and Professional Licensing—California, A Representative Example}, 18 Stan. L. Rev. 640 (1966); Gellhorn, \textit{The Abuse of Occupational Licensing}, 44 U. Chi. L. Rev. 6, 13-19 (1976); Maurizi, \textit{supra} note 156. Recently the Senate Select Committee on Small Business held hearings on the licensing of nonprofessional occupations. N.Y. Times, June 8, 1977, at D 14, col. 3.


\textsuperscript{159} R. Posner, \textit{supra} note 157.


\textsuperscript{161} For example, the number of occupations licensed has steadily increased in spite of mounting criticism. In 1952 about eighty separate occupations were licensed by state law. W. Gellhorn, \textit{Individual Freedom and Governmental Restraints} 106 (1956). Today there are 2,800 state laws requiring licensing for ten million people in nonprofessional occupations. N.Y. Times, June 8, 1977, at D14, col. 3. See also B. Shimberg, B. Esser and D. Kruger, \textit{Occupational Licensing: Practices and Policies} (1973); Wallace, \textit{Occupational Licensing and Certification: Remedies for Denial}, 14 WM & Mary L. Rev. 46 (1972).

\textsuperscript{162} For example, a whole new state regulatory field is developing with the growth of Electronic Funds Transfer System. A common regulatory feature of
federal standards, local governments often impose more stringent regulatory requirements. Without the safeguard provided by the antitrust law, regulation may produce monopoly profits and inefficiency rather than needed services at low cost. The antitrust laws provide an adequate method of limiting government regulation, as illustrated by the Cantor decision, by restricting overzealous legislatures and regulatory bodies.

the new state laws is a compulsory sharing provision. Under such a provision any financial institution deploying an EFT system must agree to make the system available to other institutions and their customers for a reasonable fee. Some states require availability of EFT systems to all other financial institutions while other states categorize financial institutions and only require availability to other institutions in the same category. The Justice Department is already on record as questioning the applicability of the Parker v. Brown antitrust immunity to these new regulatory schemes. Address by Jonathan C. Rose, Deputy Assistant Attorney General, Antitrust Division, United States Department of Justice, Conference on Developing Legal Issues Concerning EFT systems, Washington, D.C., March 4, 1976. The Justice Department believes that the antitrust laws should be employed to control anticompetitive aspects of state regulation of EFT systems. Department of Justice, Antitrust Division, Policy Statement on Sharing for the National Commission on Electronic Fund Transfers, January 13, 1977, quoted in 5 Trade Reg. Rep. para. 50,308 (1977). See also Brandel & Gresham, Electronic Funds Transfer: The Role of the Federal Government, 25 CATHOLIC U.L. REV. 705 (1976); Bernard, Some Antitrust Issues Raised by Large Electronic Funds Transfer System, 25 CATHOLIC U. L. REV. 749 (1976).

163. But see note 92 supra. The recent controversy over Columbia University’s application before the federal Nuclear Regulatory Commission (NRC) to operate a nuclear reactor on campus provides an incisive illustration of the difficulties that can befall one subject to dual regulation. The university obtained NRC approval but was then denied permission to operate by the New York City Health Department. Columbia Daily Spectator, April 26, 1977, at 1, col. 1. The city’s denial rested on radiological grounds. As a result, the NRC, as well as Columbia, contemplated a suit against New York City which would allege that the city had gone beyond its jurisdictional regulatory limits in refusing the permit for the nuclear reactor. Columbia Daily Spectator, April 27, 1977, at 1, col. 4. Columbia filed an appeal with the New York City Board of Health while waiting to learn if the NRC would join them in an injunction against the city. Columbia Daily Spectator, April 28, 1977, at 1, col. 4.

The classic dual regulatory system is that which controls the banking industry. Fifty state banking laws co-exist with three separate federal regulatory jurisdictions, the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Comptroller of the Currency. The system is such that bankers can choose the set of laws and regulatory authority to operate under at any time. Prospective bankers may apply to the Comptroller for a national bank charter or to a state bank charter. An existing bank can convert itself from one system to the other subject only to approval of the system it desires to enter. The abandoned regulatory authority is without power to block such a change. Thus, a bank is free to choose the regulatory system most favorable to it at any given time and can switch systems if circumstances change. See W. Brown, The Dual Banking System in the United States 49, 64-65 (1968); see also Scott, The Dual Banking System: A Model of Competition in Regulation, 30 STAN. L. REV. 1 (1977); Wille, State Banking: A Study in Dual Regulation, 31 LAW & CONTEMP. PROB. 733 (1966).


165. For example, antitrust intervention in state occupational licensing would seem to protect not only the competitive process but also fundamental individual
Thus, state and local regulation affect the structure and the functioning of open markets, often altering them without proper economic or social justification. The expansive application of the Sherman and Clayton Acts to state and local regulatory activities may cause severe problems. Verkuil has observed that the "ultimate consequence of heedless application of the antitrust laws to state regulatory schemes could well be a crisis in federalism not dissimilar to that created by the Supreme Court in the 1930's." Moreover, inordinate antitrust scrutiny of state regulation imposes a judicial activism reminiscent of the disavowed substantive due process. A policy of judicial self-restraint, then, may be one way to limit undesirable substitution of the judicial will for that of the legislature.

As noted, many writers who favor aggressive antitrust surveillance over state regulation believe that such federal interference is constitutionally mandated. The flaw in this narrow view of federalism, however, is that the supposed constitutional issue is in reality a fundamental policy question. Only express congressional edicts automatically supersede antagonistic state laws. The legislative history of the Sherman Act does not support the contention

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rights. Gellhorn, supra note 157, at 13-19. It is often easy for regulation to expand beyond the parameters first thought necessary. Often expansion occurs for reasons unrelated to the original regulatory decision. The market conditions that initially produced the need for regulation may change also. C. Kayser & D. Turner, supra note 158, at 190.

The traditional independence of regulatory bodies limits any check by non-partisan factions. If the initial legislative grants of authority are not sufficient to control the extent of regulation in practice, nothing short of legislative repeal can effectively curb excessive regulation.

166. Some regulation which may actually produce adverse economic effects has strong social justification. Health and safety regulation is the prime example. It has been traditionally defended as an exercise of the state's police power. Such regulation, however, cannot be unreasonable or arbitrary and must have a rational relation to the evil purported to be remedied. See Lawton v. Steele, 152 U.S. 133 (1894); Hennington v. Georgia, 163 U.S. 299 (1896). Even though such regulation may inhibit competition, market restrictions are not the purpose of the regulation. The social reasons for the regulatory activity outweigh any tangential anticompetitive results. For a quantitative view that public regulation is a greater source of social costs than private monopoly, see Posner, The Social Costs of Monopoly and Regulation, 83 J. Pol. Econ. 807 (1975).

167. Verkuil, supra note 132, at 330. See also Handler, supra note 111, at 20.

168. The use of the due process clause of the Constitution to appraise the propriety of state regulation economically was disavowed in Nebbia v. New York, 291 U.S. 502 (1934) and West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). Professor Verkuil, however, argues that judicial review of state regulatory activity for antitrust purposes is markedly similar to substantive due process review. Verkuil, supra note 132, at 330, 334-40, 358.

169. Professor Gellhorn, an ardent and formidable critic of state occupational licensing abuses, does not believe judicial activism is the proper solution for the problem. Rather he believes legislatures must themselves carry the burden of responding to ill-considered legislation. W. Gellhorn, supra note 161, at 120-21.

170. See text accompanying notes 139 and 140 supra.

171. See text accompanying note 4 supra.
that the antitrust laws were intended to abrogate contrary state law.\textsuperscript{172} The federal issue to be resolved, then, is the amount of discretion to be afforded the states in their formulation of economic regulatory policy.

The paucity of economic knowledge concerning the relationship between actual competition and optimum competitive efficiency\textsuperscript{173} counsels against overzealous antitrust intervention in state and local regulation. A perfect competitive market may not produce the greatest efficiency.\textsuperscript{174} Limitation of government regulation because of its interference with a perfect competitive market is therefore difficult to justify. In addition, federalism may require deference to the state regulatory scheme if the social benefits of strict adherence to antitrust principles are in doubt.

**CONCLUSION**

Although economic theory may not yet provide answers concerning optimum levels of competition and regulation in the various economic sectors, a large amount of what now passes under the rubric of state regulation is poorly conceived and subject to avaricious manipulation. The inherent right of states to regulate economic activity remains; the recent Supreme Court decisions, however, point to increased use of federal antitrust principles to restrict the diffuse and spurious nature of much of the existing state regulation. Enforcement of the antitrust laws should not significantly impair the right of each state to make economic regulatory decisions. Only the periphery of state regulatory activities should lose immunity from antitrust laws. The courts should construe the directives of *Goldfarb* and *Cantor* to eliminate unjust practices such as anticompetitive conduct by states acting in a proprietary fashion and illegal restraints of trade perpetuated by individuals using state regulation solely as a diversion. Hopefully, the courts will recognize that a balance must be struck and will proceed cautiously.

\textsuperscript{172} See note 4 supra.
\textsuperscript{173} Demsetz, *Economics as a Guide to Antitrust Regulation*, 19 J. LAW & ECON. 371, 382 (1976). The difficulty arises in determining the degree of competition which is optimal for an industry rather than in deciding whether competition or monopoly is appropriate for a particular situation. *Id.* at 372.
\textsuperscript{174} *Id.* at 374. Three general goals are typically ascribed to antitrust policy: (1) the preservation of competition in order to maintain allocative efficiency; (2) the preservation of competition in order to protect consumers by insuring adequate quality at a fair price; and (3) the preservation of small competitors, both as a noneconomic social goal and as a means of approximating the “perfect market.” See Note, *Parker v. Brown: A Preemptive Analysis*, 84 YALE L. J. 1164, 1170 (1975). See also Bork, Bowmann, Blake and Jones, *Goals of Antitrust—A Dialogue on Policy*, 65 COLUM. L. REV. 363 (1965).