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## Annual Survey Of Antitrust Developments 1975-76

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# ANNUAL SURVEY OF ANTITRUST DEVELOPMENTS 1975-76

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Antitrust during the year 1975-76 continued to be the subject of debate and the cause of controversy in courtrooms and legislatures around the country. Candidates for public office spoke enthusiastically of the need for more vigorous enforcement of the antitrust laws to counter inflationary pressures and improve the stagnant performance of the economy. But it was a year more notable for developments on the legislative front than for precedent-making decisions from the courts.

The 1975-76 Term of the Supreme Court produced one antitrust decision of major importance, *Cantor v. Detroit Edison Co.*<sup>1</sup> In that opinion, the Court grappled with the awkward conflict between the federal antitrust laws and regulation at the state level. The Court has apparently once again given voice to the fundamental national policy favoring competition, but has in the process put into doubt the validity of many state regulatory programs hitherto thought immune from the application of the antitrust laws by virtue of the state action doctrine enunciated in *Parker v. Brown*.<sup>2</sup> Not the least of the disquieting questions raised by the decision is the extent of personal liability on the part of state officials and private citizens who are apparently to be subjected to the conflicting demands of two orders of legal authority.

The real action, however, was in the halls of Congress. Legislation to revise, repeal or strengthen the antitrust laws tumbled into the legislative hoppers in an unending stream. In the end, a bill of major importance in the development of the antitrust laws was passed. In addition, a large number of proposals seeking to reestablish the preeminence of competition in regulated industries and moving in the direction of even more vigorous enforcement of the antitrust laws was seriously considered, and may well become law in the next Congress.

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<sup>1</sup> 96 S. Ct. 3110 (1976).

<sup>2</sup> 317 U.S. 341 (1943).

And so the trend this past year, both in the courts and in Congress, has been in the direction of removing the barriers to enforcement of the antitrust laws. Our survey analyzes the inroads *Cantor* has made on the state action immunities conferred by *Parker*. But we pause to examine the year's legislative activities, also ostensibly designed to remove impediments to antitrust enforcement. These congressional efforts may in the long run more directly affect the functioning of this nation's economy than the year's Supreme Court decisions, perhaps more than any other legislative activity in the antitrust area since the enactment in 1950 of the Celler-Kefauver amendments to § 7 of the Clayton Act.

## I.

### ANTITRUST LEGISLATION IN THE NINETY-FOURTH CONGRESS

The 94th Congress came to Washington clearly in the mood to pass some antitrust legislation. It was exposed early in the first session to a wide variety of proposals seeking to vindicate the primacy of competition policy. These proposals ranged from bills seeking to amend the antitrust laws directly in an effort to invigorate antitrust enforcement, to proposals to deregulate major industries, such as surface transportation and aviation.

Of the vast number of proposals considered by the 94th Congress, three important bills became law. The most far-reaching of these was the so-called Hart-Scott-Rodino Antitrust Improvements Act of 1976.<sup>3</sup> In addition, Congress passed a proposal to repeal the Fair Trade Act exemption.<sup>4</sup> Finally, of the many proposals that would have affected regulated industries, Congress adopted a major bill to restructure regulation of the nation's railroads.<sup>5</sup>

#### A. *Some Interesting Near-Misses*

Some of the proposals that failed of enactment in the 94th Congress also deserve attention, because it is predictable that many of them will find their way once again into the legislative process during the 95th Congress. One of the most interesting never actually was

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<sup>3</sup> This legislation adopted a number of procedural proposals that are designed to strengthen antitrust enforcement at both the federal and state levels. Pub. L. No. 94-435, 90 Stat. 1383 (1976).

<sup>4</sup> Pub. L. No. 94-145, 89 Stat. 801 (1975).

<sup>5</sup> Railroad Revitalization and Regulatory Reform Act, 45 U.S.C. § 801 *et seq.* (Pub. L. No. 94-210) (1976).

introduced as proposed legislation. Instead, the suggestions of amendment or repeal of the Robinson-Patman Act<sup>6</sup> were considered and debated on Capitol Hill in a series of hearings by the Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act and Related Matters, created by the House Committee on Small Business, and in the Executive Branch at the other end of Pennsylvania Avenue. Beginning at least with the publication of the Report of the Attorney General's National Committee to Study the Antitrust Laws in 1955,<sup>7</sup> the Robinson-Patman Act had been subjected to considerable criticism by those who regard some incidents of price discrimination as forms of desirable price competition. The authors of the Report pointed out that price discrimination might well, depending on the particular circumstances, either stimulate effective competition or be evidence of effective monopoly. The Report refused to regard all price discrimination as evil and sought instead an evaluation of each instance of price discrimination to determine whether it had pro- or anti-competitive consequences.

A rising crescendo of criticism<sup>8</sup> of the Act resulted for the first time in proposals for revision being considered by this session of Congress. In 1975, lawyers from the Justice Department, including the then-Assistant Attorney General in charge of the Antitrust Division, Thomas E. Kauper, began delivering addresses criticizing the Robinson-Patman Act and suggesting various reforms. In a report "Reform of the Robinson-Patman Act,"<sup>9</sup> from the Antitrust Division, three possible options for change in the law of price discrimination were discussed. The first proposal was outright repeal. The second option called for the enactment of the Predatory Practices Act in

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<sup>6</sup> 15 U.S.C. §§ 13-13b, 21a (1970).

<sup>7</sup> *Report of the Attorney General's National Committee to Study the Antitrust Laws*, (March 31, 1955) [hereinafter cited as "Attorney General's Report"].

<sup>8</sup> Among the many commentaries that have taken issue with the philosophy of the Robinson-Patman Act or its administration are the following representative samples: Levi, *The Robinson-Patman Act — Is It in the Public Interest?*, 1 ABA ANTITRUST SECTION REPORT 60 (1952); Elman, *The Robinson-Patman Act and Antitrust Policy: A Time for Reappraisal*, 42 WASH. L. REV. 1 (1966); Rowe, *The Federal Trade Commission's Administration of the Anti-Price Discrimination Law*, 64 COLUM. L. REV. 415 (1964); Anonymous, *Eine Kleine Juristische Schlummergeschichte*, 79 HARV. L. REV. 921 (1966); Austern, *Presumption and Percipience About Competitive Effect Under Section 2 of the Clayton Act*, 81 HARV. L. REV. 733 (1968).

Both the Neal Report and the Stigler Report recommended substantial revision of the Robinson-Patman Act. See Report of the White House Task Force on Antitrust Policy and Report of the Task Force on Productivity and Competition, both reprinted in 1 J. OF REPRINTS FOR ANTITRUST L. & ECON. (Winter 1969).

<sup>9</sup> Noted at 13 HARV. J. LEGIS. 125, 126 (1975).

substitution for the Robinson-Patman Act. That Act<sup>10</sup> would have focused on the primary line offenses under existing price discrimination law, and in particular on predatory geographic pricing and sales below cost. The new legislation, however, would have made new entry, meeting competition and absence of anticompetitive effect defenses to allegations of unlawful predatory pricing.

The third option was the enactment of the Robinson-Patman Act Reform Statute.<sup>11</sup> This proposal included much of the Predatory Practices Act but in addition contained sections governing customer-level competition. The proposal differs from the Robinson-Patman Act in that the discrimination must be significant in amount and part of a pattern of systematically favoring larger recipients, with the clear effect of threatening the elimination of competitors.

In late 1975, the Domestic Council Review Group held hearings which were largely inconclusive. At this point, the proponents of the Robinson-Patman Act in Congress began to hold hearings of their own, particularly in the House, and it was evident that any proposal for full-scale reform of the Robinson-Patman Act was in for rough weather. No bill was ever introduced. But the clash between those whose primary concern was vigorous price competition, and those who are concerned lest small business be disfavored in competition with larger concerns is one that may be expected to continue into the next Congress.

Among the other pieces of proposed legislation that did not pass were a large variety of proposals for deregulation. For some time, the regulated industries have been subjected to heavy criticism. Legal and economic critics<sup>12</sup> have argued that regulation is inefficient and results in higher prices for the consumer. Nothing in recent years has done much to lessen the force of these arguments, and, in particular, the combination of rapid inflation and resource shortages has added fuel to the fire. Congress thus considered a wide variety of major proposals to alter or eliminate traditional regulatory mechanisms. Many of these proposals took the form of mandating complete repeal

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<sup>10</sup> Hearings, Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act and Related Matters, Nov. 19, 1975, Part I, pp. 590-91.

<sup>11</sup> *Id.* at 591-93.

<sup>12</sup> See, e.g., Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548 (1969); Adams, *The Role of Competition in the Regulated Industries*, American Econ. Assoc. Proc. 1958 at 527; Stigler & Friedland, *What Can Regulators Regulate? The Case of Electricity*, 5 J. L. & ECON. 1 (1962); Peck, *Competitive Policy for Transportation?*, reprinted in P. MACAVOY, *THE CRISIS OF THE REGULATORY COMMISSIONS* (1970); A. PHILLIPS (ed.), *PROMOTING COMPETITION IN REGULATED MARKETS* (1975).

of the regulatory scheme or substantial revision of the procedures involved in regulatory decision-making.

Among the most interesting of these was the Competition Improvements Act of 1976,<sup>13</sup> which sought to force regulatory agencies to emphasize much more strongly the competitive impact of agency action in the decision-making process. Although considerably revised from its original and quite extreme form, the bill that was eventually approved by the Senate Judiciary Committee prohibited any agency action that would have the effect of creating or maintaining "a situation involving a significant burden on competition,"<sup>14</sup> unless it was found that the action was necessary to accomplish a fundamental and overriding statutory purpose, the anticompetitive effects were clearly outweighed in the public interest by demonstrable benefits, and the objectives of the agency action could not be accomplished by less anticompetitive means. If the standards of the Act were not met, the Attorney General had the power to force a hearing in which the agency would have the burden of establishing that the requirements had been satisfied. This effort to highlight competitive policies at the expense of all others was predictably much criticized, although it made its way through several layers of the committee structure without sacrificing its basic premise. The chances are good that similar proposals will reappear in the next session.

### B. *Regulatory Reform*

Proposals for outright regulatory reform focused on particular industries. The Administration and proponents of regulatory reform in Congress suggested substantial revision of the regulatory schemes affecting commercial airlines,<sup>15</sup> the motor carrier industry,<sup>16</sup> the financial community,<sup>17</sup> and the petroleum industry.<sup>18</sup>

Because the proposals for the railroad industry were enacted and because they are typical of many of the proposals for deregulation,

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<sup>13</sup> S. 2028, 94th Cong., 1st Sess. (1975).

<sup>14</sup> *Id.*, § 3(a).

<sup>15</sup> The Aviation Act, S. 2551, 94th Cong. *See also* H.R. 10261, 94th Cong., 2d Sess. (1976).

<sup>16</sup> The Motor Carrier Reform Act, S. 2929 and H.R. 10909, 94th Cong. 1st Sess. (1975).

<sup>17</sup> The Financial Institutions Act of 1975, S. 1267, 94th Cong. (1975).

<sup>18</sup> A large number of proposals were introduced to alter the structure of the oil industry with the intended objective of making the industry more competitive. Among these were the Petroleum Industry Competition Act, S. 2387, 94th Cong., 1st Sess. (1975); The Interfuel Competition Act of 1975, S. 489, 94th Cong., 1st Sess. (1975); and The Oil Pricing Act of 1975, H.R. 9777, 94th Cong., 1st Sess. (1975).

the Railroad Revitalization and Regulatory Reform Act of 1976 merits scrutiny.<sup>19</sup> The 1976 Act was an omnibus bill intended to assist in the rehabilitation of the railroads' physical facilities, to improve the efficiency of the operations of the nation's rail lines and to restore the financial stability of the railroad system. But the most dramatic aspects of the legislation are the provisions for regulatory reform and deregulation. The highlight is the provision enabling the railroads to enjoy greater freedom to raise or lower rates for rail services in competitive markets. As long as rates contribute to the "going concern value," a phrase not defined in the Act, the rate is held to be lawful, and any rate equaling or exceeding "variable cost" is to be presumed to satisfy the standard. Most importantly, § 205 of the Act provides that no rate is to be held up to a particular level to protect "the traffic of any other carrier or mode of transportation."

Maximum rates may not be disallowed unless the Interstate Commerce Commission first finds that the carrier has "market dominance" over the relevant service. And perhaps most dramatically, the ICC's power to suspend operation of newer rates is to be held in abeyance for the next two years so long as the proposed new rates do not vary more than 7 percent annually. Innovative ratemaking is encouraged by a section of the Act ordering the ICC to establish standards for rates based on seasonal, regional or peak-period demand, and the railroads are permitted to file separate rates for distinct rail services to promote competitive pricing.<sup>20</sup>

The effect is to relax rate regulation, and to permit a band of reasonableness within which individual firms are permitted the freedom to raise or lower rates without government control. The protectionist philosophy of rate review that had been attributed to the ICC in recent decades is obviously to be replaced by an emphasis on competition, so long as rates are compensatory.

Whether the other segments of the transportation industry will get in the next Congress the same treatment railroads received in the 94th Congress remains to be seen. But if the entire transportation deregulation package becomes law, the transportation industries of this country will be subjected to the rigors of competition in a new and promising way. Given the performance of these industries in recent years, and the regulatory anomalies associated with their gov-

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<sup>19</sup> 45 U.S.C. § 801 *et seq.*, Pub. L. No. 94-210 (1976).

<sup>20</sup> Other provisions of the Act provide for reform of the ICC and its procedures and a comprehensive study of the railway system to examine such questions as its financial health and stability, the benefits of electrification for high-density rail lines and the benefits to be expected from mergers and other forms of coordination.

ernance by regulatory commissions in Washington, the new era of increased competition is very much welcome.

### C. *Repeal of Fair Trade*

In yet another area, the 94th Congress opened the doors to competition. For many years, state-enacted fair trade laws created an exception to the rule that agreements between manufacturers and independent distributors specifying prices at which goods could be resold violated the federal antitrust laws. Generally, these laws prohibited loss leaders, outlawed price wars and permitted trademark owners to protect the reputation of their products by holding resale prices to a premium level. Federal sanction for these laws, which ran counter to the Sherman Act, was provided by Congress in the Miller-Tydings Act<sup>21</sup> in 1937, and after that legislation ran into antitrust headwinds,<sup>22</sup> the McGuire Act.<sup>23</sup>

The combination of constitutional difficulty and the problems and expense involved for manufacturers who attempted to enforce a fair trade program gradually led to a reassessment of the value of fair trade laws. The Attorney General's Committee to Study the Antitrust Laws, while acknowledging that the fair trade legislation reflected "legitimate commercial aims," generally disapproved of fair trade pricing to achieve protection for trademark owners.<sup>24</sup> The Committee saw the fair trade scheme as preventing desirable promotional price cutting, and leading in some circumstances to the extinguishment of price competition altogether. The Committee thus advocated repeal of both the Miller-Tydings and the McGuire Acts.

The criticism of the fair trade laws that had built over the years resulted during the 94th Congress in the outright repeal of the exemption. Introduced by Senator Brooke as the Consumer Goods Pricing Act,<sup>25</sup> the legislation removed the exemptions and thus invalidated all fair trade programs prospectively. Testimony before the Subcommittee on Antitrust and Monopolies estimated that the abolition of the fair trade laws would benefit consumers by an estimated \$2 billion annually.

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<sup>21</sup> 15 U.S.C. § 1 (1970), 50 Stat. 693 (1937).

<sup>22</sup> See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).

<sup>23</sup> 15 U.S.C. § 45 (1970), 66 Stat. 632 (1952).

<sup>24</sup> *Attorney General's Report*, *supra* note 7, at 153-54.

<sup>25</sup> Pub. L. No. 94-145, 89 Stat. 801 (1975).



D. *The Antitrust Improvements Act of 1976*

By far the most significant step taken by the 94th Congress to increase the influence of antitrust on the nation's economy was the enactment of the Antitrust Improvements Act of 1976.<sup>26</sup> Known as the Hart-Scott-Rodino bill because a number of different proposals were combined to give it its ultimate form, the original bill was introduced on March 21, 1975, by Senators Hart and Scott in the Senate as S. 1284.<sup>27</sup> A similar bill was introduced by Congressman Rodino in the House as H.R. 8532. Eventually, after a vigorous lobbying effort from many different sources including private industry, and a period of consideration filled with innovative and, to the casual observer, oft-times hilarious parliamentary maneuverings, the House bill was substituted for the Senate version and became law when the President approved it on September 30, 1976.<sup>28</sup>

The legislation increases the effectiveness of antitrust enforcement procedures, rather than altering substantive antitrust law.<sup>29</sup> By increasing the powers of the Department of Justice both to investigate alleged antitrust violations and to review in advance plans for large mergers, the Act recognizes past limitations on the Antitrust Division imposed by sometimes meager resources and out-of-date investigatory mechanisms. However, the Act also permits state attorneys general to sue for federal antitrust violations on behalf of the natural persons in a state. It thus opens the door to a kind of class action without any of the procedural safeguards that have kept the class action from becoming totally unwieldy and unfair.

Title I of the Act significantly improved the investigatory mechanisms available to the Department of Justice. The Antitrust Civil

<sup>26</sup> Pub. L. No. 94-435, 90 Stat. 1383 (1976).

<sup>27</sup> S. 1284, 94th Cong., 1st Sess. (1975).

<sup>28</sup> The legislative history is amusing. H.R. 8532, originally only a *parens patriae* bill, was first passed by the House. The Senate amended the House bill by substituting a Senate version that went far beyond the original *parens patriae* provisions of the House proposal and called for premerger review and a variety of other miscellaneous antitrust revisions. But the House countered by passing two more bills that dealt with some of the issues addressed by the Senate version, and then substituted the entire House package for the Senate version when it was returned to the House. Instead of responding to the House's invitation to name conferees to work out conflicts, in order to avoid additional filibusters (there had already been three), the Senate took up the House bill without conference, made several amendments, passed it and sent it back to the House, which concurred in the amendments and passed the legislation on to the President.

<sup>29</sup> Interestingly, the original bills sought to change the substantive requirements of the Sherman and Clayton Acts, but these provisions were eliminated from the final version.

Process Act of 1962<sup>30</sup> permitted precomplaint civil investigative demands to be served only for documents to determine whether the respondent was in violation of the antitrust laws. That law was found deficient by antitrust prosecutors in several important respects. First, to the extent that mergers constituted future antitrust violations, the law apparently did not permit the issuance of a CID.<sup>31</sup> In addition, the CID power being limited to documents, no person could be called upon to testify. Perhaps most importantly, CID's could only be issued to those legal entities thought to be in violation of the antitrust laws, and not to third parties whose evidence with respect to any possible violation might be illuminating.

The 1976 amendments remedied these defects. Section 3(a) of the Act permits CID's to be issued to "any person" who may be "in possession, custody, or control of any documentary material, or may have any information, relevant to a civil antitrust investigation." In addition, in a further expansion of investigative powers for the Division, § 3(a) permits a civil investigative demand to require such person

. . . to produce such documentary material for inspection and copying or reproduction, to answer in writing written interrogatories, to give oral testimony concerning documentary material or information, or to furnish any combination of such material, answers, or testimony.

The effect of the language is to permit civil investigative demands to be directed to natural persons as well as business entities, and to third parties rather than only to the suspected violators, and furthermore, to permit the taking of sworn oral testimony. Any respondent required to give oral testimony may be accompanied by counsel who may advise in connection with the questions and may raise objections. Finally, the law expressly permits investigation of activities "in preparation for a merger, acquisition, joint venture, or similar transaction, which, if consummated, may result in an antitrust violation."<sup>32</sup>

These amendments are long overdue. Many state antitrust laws have contained for some years the kinds of discovery and investigatory mechanisms now placed in the federal arsenal for the first time. The rather pathetic capacity of the Department of Justice to investigate a suspected violation clearly reduced the effectiveness of enforce-

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<sup>30</sup> 15 U.S.C. § 1311 *et seq.* (1970).

<sup>31</sup> *United States v. Union Oil Co.*, 343 F.2d 29 (9th Cir. 1965).

<sup>32</sup> Pub. L. No. 94-435, 89 Stat. 1383, § 3(b)(1)(B)(1976).

ment activity, since adequate evidence can rarely be obtained from an unexplained compilation of company documents.

Moreover, the Department of Justice, before the enactment of these amendments, was forced either to file a complaint or to convene a grand jury in order to obtain fuller discovery. Filing a complaint in advance of adequate knowledge as to the existence of a violation is at the least unethical, and required defendants who might ultimately prove their innocence to expend major resources unnecessarily, with all the attendant publicity, rather than permitting the Antitrust Division, with more precise tools, to inquire into the existence of a violation at the outset. The convening of a grand jury without reason to believe that a criminal case might be in the offing was in all probability illegal. While the new discovery mechanisms will benefit antitrust enforcement, there can be little doubt that they will also benefit defendants, since by more complete discovery at earlier stages of proceedings, it is likely that major expense and legal problems on both sides can be avoided.

Title II of the Act providing for pre-merger notification and an automatic pause before the completion of a transaction is more controversial. Prior to the enactment of Title II, pursuant to a 1969 Federal Trade Commission resolution,<sup>33</sup> firms of a certain size contemplating merger were required to notify the Federal Trade Commission in advance. Corporations generally complied with the pre-merger notification requirement of the FTC, but it was not clear how strictly the notification requirements were enforced nor how complete the reports to the FTC actually were. Early versions of the Antitrust Improvements Act not only called for pre-merger notification, but also required courts in which acquisitions had been challenged to issue automatic temporary restraining orders, with a shift of the burden of proof on the ensuing motion for preliminary injunction from the government to the defendant. In addition, the original proposals contained a provision that would almost always have resulted in an automatic hold-separate order and would have required any losing defendant to yield up the benefits of the temporary acquisition. Both of these early provisions were eliminated from the final version.

Nevertheless, Title II was not without controversy. In general, Title II applies in any merger transaction if one of the firms has total net annual sales or assets of at least \$10 million and the other firm

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<sup>33</sup> Fed. Reg. Doc. 69-5617, May 9, 1969, *superseded* by 37 Fed. Reg. 7951 (Apr. 21, 1972), *supplemented* by 38 Fed. Reg. 5513 (March 1, 1973), *superseded* by 39 Fed. Reg. 35717 (Oct. 3, 1974).

has annual net sales or total assets of at least \$100 million.<sup>34</sup> In addition, the Act does not apply unless the acquiring company ends up with either \$15 million or 15 percent, or more, of the acquired company's voting securities or assets.

New § 7A of the Clayton Act, added by Title II of the Antitrust Improvements legislation, now prohibits any acquisition subject to the Act unless the parties have filed notification and the waiting period prescribed in the legislation has expired. The waiting period automatically begins on the day of the receipt by the FTC and the Assistant Attorney General in charge of the Antitrust Division of either a completed notification, or a partial notification and a statement of reasons for noncompliance, from both parties to the acquisition, and ends on the thirtieth day after the date of receipt.<sup>35</sup> The FTC is required to prescribe the contents of the notification, and the Act provides for severe penalties for noncompliance with the pre-merger notification provisions. In addition, the Act calls for expedited handling of anti-merger suits in the federal district courts, so that lengthy delays in resolving the legality of acquisitions will be avoided. Finally, Title II provides for twelve categories of exemption, mostly related to acquisitions for investment and acquisitions approved by federal regulatory agencies.

Title II represents an effort to accommodate conflicting, yet entirely legitimate concerns. The Department of Justice and the Federal Trade Commission point out that existing law makes difficult the attainment of injunctive relief in merger cases. Moreover, frequently the enforcement authorities only discover the existence of a potential violation of § 7 of the Clayton Act through a chance story in the press, and by the time an investigation can be initiated and facts gathered, the merger transaction is completed. The result is that the Department of Justice comes into court seeking to unscramble an already accomplished amalgamation, undoubtedly making courts more reluctant to grant injunctive relief. On the other hand, business firms undertaking to merge are very much aware that time is of the essence. Negotiations are frequently so delicate that even the most minute delays can result in all sorts of unexpected problems. Many have argued, therefore, that the automatic waiting periods required by Title II would make acquisitions much more difficult.

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<sup>34</sup> In the event nonmanufacturing firms are involved, assets are used as the only measure.

<sup>35</sup> In the case of a tender offer, the waiting period ends on the fifteenth day after receipt.

In fairness, it should be said that commencement of the waiting period need not await the completion of the transaction. Submission of material alone is sufficient to start the period. Thus, two firms contemplating acquisition could compile the necessary materials early in the preparation stage and submit them to the Department of Justice and the Federal Trade Commission. The waiting period could thus be ended before the closing of the merger transaction.

Moreover, the early submission of relevant material, and the resulting conferences that are likely to ensue, may avoid the possibility that the enforcement authorities will go into court seeking temporary bars to what ultimately may turn out to be wholly legal transactions. Thus again, it can be argued that the pre-merger notification and waiting period provisions are beneficial to business firms, and not just new enforcement tools for federal antitrust authorities.

By far the most controversial of the provisions of the new Act is Title III, which permits state attorneys general to sue for damages incurred by citizens of their states as the result of violations of the Sherman Act. Much of the heat generated in connection with this title focused on provisions no longer in the Act.<sup>36</sup> Nevertheless, the provisions that remained were the subject of continued criticism and heavy lobbying up to the day the legislation was signed into law by the President.

Section 301 of Title III amends § 4 of the Clayton Act by adding a new § 4C which provides that any attorney general may sue "as *parens patriae* on behalf of natural persons residing in such state" to recover damages for injury sustained by reason of a violation of the Sherman Act. The court is required by the new law to exclude from the amount of damages any duplicative relief awarded for the same injury, as well as any damages properly allocable to natural persons who have opted out of the state proceeding and any damages properly allocable to any business entity.

First, it is obvious that these provisions are carefully hedged in with a number of limiting concepts. No new antitrust violations are created. Whereas § 4 of the Clayton Act permits recoveries by "any person," the new bill permits recoveries only by "natural persons."

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<sup>36</sup> Included among these provisions were permission to sue on behalf of the "general economy" of the state, authorization of contingent fee arrangements for outside attorneys, provisions for requiring the Attorney General of the United States to institute suit when a state attorney general had not done so, authority for the state attorney general to institute damage suits on behalf of business entities in the state and provision for recovery of "aggregate damages" for all suits certified as class actions under Rule 23 of the Federal Rules of Civil Procedure.

Whereas § 4 of the Clayton Act authorizes recoveries based on violations of the "antitrust laws," the new law authorizes recoveries only for violations of the Sherman Act. The legislation as eventually passed permits only monetary relief, although earlier versions had included other relief such as, possibly, restitution, injunctive relief or other equitable relief.

The traditional defense arguments concerning standing and direct injury are apparently not available in *parens patriae* actions inasmuch as the state attorney general is expressly given standing to sue. Moreover, to read a direct injury requirement into the Act would apparently render it meaningless in a large majority of cases. Furthermore, the requirements of privity between plaintiff and defendant adopted by some courts are not likely to be used in connection with *parens patriae* actions and may not be necessary in light of the fact that the bill prohibits duplicative recoveries.

The state may sue for treble damages and the cost of suit, including a reasonable attorney's fee. Damages are to be measured, according to § 4D of the Act, at least in connection with allegations of price fixing, "in the aggregate by statistical or sampling methods, by the computation of illegal overcharges, or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit . . ." The state is thus not required to prove separately the individual claims of damaged persons on whose behalf the suit is brought.

Section 4E of the Clayton Act now provides that monetary relief recovered in *parens patriae* actions is to be distributed as the district court may in its discretion decide or, being deemed a civil penalty by the court, it may be deposited with the state as general revenues. In either event, the law imposes a requirement that there be available a reasonable opportunity to each natural person on whose behalf recoveries were obtained to secure his appropriate portion of the damage award.

The Act also provides for notice to be given to all potential members of the plaintiff group by publication, and in the event the court finds such notice inadequate on due process of law grounds, the court is authorized to direct further notice as may be appropriate in the circumstances of the case. After notice, any person on whose behalf an action is brought may elect to exclude himself from the case, and final judgment in the action is *res judicata* only as to any person on whose behalf the action was brought and who fails to give notice of exclusion. Settlements of *parens patriae* litigation must be approved by the court.

Interestingly, the definition section of the Act, now contained in

§ 4G of the Clayton Act, defines state attorney general to include any person authorized by state law to bring actions under the Act, but excludes any person employed or retained on a contingency fee basis, "unless the amount of the award of a reasonable attorney's fee to a prevailing plaintiff is determined by the court under the Act." The Act also provides for a reasonable attorney's fee to a prevailing defendant upon a finding that the state attorney general had acted "in bad faith, vexatiously, wantonly, or for oppressive reasons."<sup>37</sup>

The thrust of this legislation appears to be directed more toward forcing antitrust violators to "cough up ill-gotten gains" than in providing compensation for consumers. As such, it more nearly resembles a criminal prosecution than civil litigation for recovery of damages. While perhaps theoretically sound, the prospect of treble damages being recovered by the state attorney general on behalf of what may amount to millions of state residents is a new form of exposure that must leave serious observers of the antitrust scene at least slightly uneasy.

While compromises during consideration of the legislation produced a number of safeguards, the absence of the kind of restraints for *parens patriae* actions that are mandated by Rule 23 for federal class actions is not at all reassuring. And, though not a class action in form, the *parens patriae* suit will produce precisely the same burdens upon the judicial system as a class action, but presumably does not permit courts to avoid those burdens by finding lack of manageability, inadequate notice, or inferiority of the form of action as a vehicle for recovery.

The major means of lessening the burden is new § 4D of the Clayton Act permitting measurement of damages in the aggregate, which itself is alarming. It is perhaps here that the confusion between the deterrent and penal effects of this legislation and the compensatory nature of other antitrust laws is most serious. Gone are the requirements that individual plaintiffs prove actual damage together with the option of a defendant to contest each damage claim on the merits. The legislation is devoid of any clues as to the result where different statistical sampling methods produce radically contradictory results. Thus the deterrent effect of potentially ruinous recoveries is permitted in cases where the burden of proof is that traditionally found in civil litigation, the weight of the evidence, and not the stricter reasonable doubt standard found in criminal cases. One wonders whether the increased criminal penalties found in the Antitrust

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<sup>37</sup> Pub. L. No. 94-435, § 4C(d)(2), 90 Stat. 1383, 1395 (1976).

Penalties and Procedures Act of 1974 might not be adequate deterrence for antitrust violators. One wonders, too, whether the sampling provisions of the *parens patriae* law will withstand due process challenge.

While it is easy to sound alarmist in discussing legislation of this sort, it will be necessary to follow the effects of this Act closely. If attorneys bringing such actions are consistently awarded enormous counsel fees while the natural persons on whose behalf the suits are filed rarely if ever attain any recovery of substance, then one might ask whether the antitrust laws ought to be used to transfer wealth from corporate defendants to private law firms. But it is too early to assume that result, or that the attorneys general of the states will permit their own citizens to be mistreated in favor of lawyers handling the states' business.

Most important of all will be the assessment of whether the huge damage awards meted out as punishment really fit the crime of price fixing. If firms are to be sent into bankruptcy as the result of price fixing violations and *parens patriae* litigation, the Congress will surely wish to reconsider whether it intended violation of the Sherman Act to be a capital offense.

The Antitrust Improvements Act of 1976, together with the other legislation considered and passed in the antitrust area by the 94th Congress, shows that the tide is running in favor of strong antitrust enforcement. Both presidential candidates made much of the need for vigorous antitrust enforcement in their campaigns, and the new President may be expected to place strong emphasis on this policy during his administration. Exciting new legislative developments in the years to come are likely to be the result.

## II.

### THE CANTOR DECISION AND ITS IMPACT ON THE STATE ACTION DOCTRINE

Paralleling the criticism of protective economic regulation at the federal level in recent years has been a series of attacks, on constitutional<sup>38</sup> and antitrust<sup>39</sup> grounds, on various state statutes and economic regulations thought to restrict competition unjustifiably. A

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<sup>38</sup> *E.g.*, *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 96 S.Ct. 1817 (1976); *Consumers Union, Inc. v. American Bar Ass'n*, No. 75-0105-R (E.D. Va., filed Feb. 27, 1975); *American Motors Sales Corp. v. Division of Motor Vehicles*, No. 76-0513-R (E.D. Va., filed Nov. 4, 1976).

<sup>39</sup> *E.g.*, *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).



number of state schemes, particularly those involving occupational licensing<sup>40</sup> and restrictions on advertising,<sup>41</sup> have succumbed to constitutional challenges. On the other hand, efforts to subject those implementing or complying with such schemes to antitrust liability have often foundered, as it has long been held that the Sherman Act was not intended to reach state action.<sup>42</sup>

Thus, in the numerous antitrust-based attacks on state regulatory programs and agency action, the proper scope of this "state action doctrine" has often been the crucial issue. Though its boundaries have never been clearly delineated, the doctrine has generally been regarded as holding that the Sherman Act was not "intended to restrain state action or official action directed by a state."<sup>43</sup> Whatever the limits of the *Parker* defense, they were significantly eroded by the Supreme Court's recent decision in *Goldfarb*,<sup>44</sup> and have been narrowed further by the decision this Term in *Cantor v. Detroit Edison Company*,<sup>45</sup> which also portends drastic changes in the legal and factual criteria relevant to a determination whether the defense is available. While it is far too early to discern with precision the ramifications of *Goldfarb* and *Cantor*, the dim outlines of the post-*Cantor* law of state action are already evident.

#### A. State Action from *Parker* to *Goldfarb*

##### 1. *Parker v. Brown*

The modern origins of the state action doctrine are usually traced to the Supreme Court's 1943 decision in *Parker v. Brown*.<sup>46</sup> In *Parker*, a raisin producer brought suit to enjoin various state officials from enforcing the California Agricultural Prorate Act.<sup>47</sup> An appeal was taken to the Supreme Court after the district court granted the plain-

<sup>40</sup> *E.g.*, *Gibson v. Berryhill*, 411 U.S. 564 (1973).

<sup>41</sup> *E.g.*, *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 96 S.Ct. 1817 (1976).

<sup>42</sup> *E.g.*, *Parker v. Brown*, 317 U.S. 341 (1943).

<sup>43</sup> *Id.* at 351.

<sup>44</sup> *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

<sup>45</sup> 96 S.Ct. 3110 (1976).

<sup>46</sup> 317 U.S. 341 (1943). The Court's decision in *Parker* was based on *Olsen v. Smith*, 195 U.S. 332 (1904), and *Lowenstein v. Evans*, 69 F. 909 (C.C.D.S.C. 1895). It was held in *Olsen* that a statute prohibiting unlicensed pilots from entering the pilotage business did not violate the Sherman Act, while a state monopoly of the sale of liquor was sustained in *Lowenstein*. Despite these earlier holdings, however, *Parker* is viewed as the seminal decision.

<sup>47</sup> 317 U.S. at 344.

tiff's request for an injunction, holding that a raisin marketing program established under the Act unduly burdened interstate commerce.<sup>48</sup>

The statute challenged in *Parker* was enacted to "conserve the agricultural wealth" of California and to "prevent economic waste" in the marketing of the state's agricultural products.<sup>49</sup> Under the statute, producers were authorized to petition for the establishment of a prorate marketing plan governing the production of a particular commodity within a defined production zone. Following a public hearing, and an appropriate finding by the Agricultural Prorate Advisory Commission under the Act, the Director of the Commission was required to choose a program committee from nominees selected by the qualified producers within the zone. Then, the program committee was required to formulate a proration marketing program for review by the Commission.<sup>50</sup> If approved by the Commission, and by 65% of the zone's producers owning 51% of the acreage devoted to production of the regulated crop, a given program would be declared instituted. Thus, although the administrative machinery was established by the state, both the impetus and the final approval for a program came from the producers to be regulated.

The Act provided criminal sanctions for failure to comply with an instituted program.<sup>51</sup> Brown, a raisin producer, was subject to such a program and claimed that, unless enjoined, the program would be enforced against him and would prevent him from marketing his raisin crop in interstate commerce.<sup>52</sup> He challenged the program on three grounds: first, as an unconstitutional burden on interstate commerce; second, as a violation of the Sherman Act; and finally, as in conflict with the Federal Agricultural Marketing Agreement Act of 1937.<sup>53</sup> The Supreme Court reversed the district court's decision and upheld the California Act.

In reviewing the validity of the prorate program under the Sherman Act, the Supreme Court assumed that the program would violate the antitrust laws if it resulted from concerted action by private parties.<sup>54</sup> Having made this assumption, the Court stated:

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<sup>48</sup> *Brown v. Parker*, 39 F. Supp. 895 (S.D. Cal. 1941).

<sup>49</sup> 317 U.S. at 346.

<sup>50</sup> *Id.* at 347. The Commission was empowered to approve the program with or without modification.

<sup>51</sup> *Id.* at 347.

<sup>52</sup> *Id.* at 349.

<sup>53</sup> *Id.* at 348-49.

<sup>54</sup> *Id.* at 350.

But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. . . .

The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.<sup>55</sup>

In addition, the Court noted that the legislative history of the Sherman Act suggested no "purpose to restrain state action."<sup>56</sup>

Discussing the scope of this state action immunity or exemption, the Court observed that a state can neither authorize antitrust violations, nor declare the conduct of violators to be lawful.<sup>57</sup> Moreover, the Court noted that there was no question in *Parker* of state participation in a private agreement in restraint of trade.<sup>58</sup> Rather, the California Act was viewed as a state command that created the machinery for establishing prorate programs. The role of the regulated producers under the Act was discussed as follows:

Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing the condition of its application. The required vote on the referendum is one of these conditions.<sup>59</sup>

The Court concluded that the state, "as sovereign, imposed the re-

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<sup>55</sup> *Id.* at 350-51.

<sup>56</sup> *Id.* at 351, citing *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904).

<sup>57</sup> 317 U.S. at 351.

<sup>58</sup> *Id.* at 351-52, citing *Union Pac. R. Co. v. United States*, 313 U.S. 450 (1941).

<sup>59</sup> 317 U.S. at 352.

straint as an act of government which the Sherman Act did not undertake to prohibit."<sup>60</sup>

Although *Parker* held in general terms that the Sherman Act does not restrain "state action," it left the term undefined. Nevertheless, certain guidelines do emerge from a careful reading of the opinion. First, the Court clearly did not intend that the state action exemption should encompass all governmental activity, for it explicitly noted that a state cannot authorize or ratify antitrust violations, and that no question of state participation in such violations was presented.<sup>61</sup> Second, while the defendants in *Parker* were state officials, the Court's language plainly suggested that the producers affected by the plan were also immune from antitrust liability.<sup>62</sup> And finally, the Court did not conclude that any showing of regulatory necessity or consistency with federal policy would also be required, once the fact of state action had been established.<sup>63</sup> Notwithstanding these uncertainties, it was to be thirty-two years before the Supreme Court, in *Goldfarb v. Virginia State Bar*,<sup>64</sup> again considered the proper scope of the state action doctrine.<sup>65</sup> In the interim, however, the *Parker* opinion was interpreted in a vast array of lower court decisions.<sup>66</sup>

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<sup>60</sup> *Id.*, citing *Olsen v. Smith*, 195 U.S. 332, 344-45 (1904) and *Lowenstein v. Evans*, 69 F. 908, 910 (C.C.D.S.C. 1895).

<sup>61</sup> 317 U.S. at 351-52.

<sup>62</sup> For example, the Court held that state "agents" as well as officials were protected when acting pursuant to legislative direction. 317 U.S. at 350. Moreover, the Court stated that "[t]he prerequisite approval of the program . . . by . . . producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits." *Id.* at 352. Thus, the *Parker* opinion indicated that the exemption would be available to private parties whose conduct might be characterized as "state action."

<sup>63</sup> It should be noted, however, that the *Parker* Court declined to hold that the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, conflicted with or preempted the California statute. 317 U.S. at 358. This has been viewed in some later decisions as evidence that consistency with federal policy is required. See, e.g., *Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) and text accompanying notes 99-104 *infra*.

<sup>64</sup> 421 U.S. 773 (1975).

<sup>65</sup> In a case bearing directly on the state action doctrine, the Supreme Court did confirm its dictum in *Parker* that a state cannot authorize antitrust violations. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). In *Schwegmann*, which was decided prior to the passage of the McGuire Act, the question was presented whether the Miller-Tydings Act preempted a Louisiana statute creating a cause of action against retailers who failed to comply with fair trade programs. The challenged statute did not require adherence to the program but did authorize private enforcement of what were essentially price-fixing arrangements between manufacturers, distributors and retailers. Citing *Parker v. Brown*, the Court held that "when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act prohibits." 341 U.S. at 389.

<sup>66</sup> See, e.g., *City of Lafayette v. Louisiana Power & Light Co.*, 532 F.2d 431 (5th

2. *Parker* in the Lower Courts

Because public policy has long favored the pervasive regulation of natural monopolies, the *Parker* doctrine found fertile ground in a series of cases involving public utilities.<sup>67</sup> In the utilities field, of course, there is generally no question but that the state has determined that a detailed regulatory scheme is preferable to competition.<sup>68</sup> Thus, the decisions have generally focused on the relationship between the directives of the regulatory authority and the challenged activities.

One such case, *Washington Gas Light Co. v. Virginia Electric & Power Co.*,<sup>69</sup> represents the high water mark of the *Parker v. Brown* defense. In *Washington Gas Light*, the plaintiff sued Virginia Electric & Power Co. (Veeco), charging that the latter's pricing policies, which encouraged developers to build "all electric" homes by waiving installation charges for underground power lines, violated the anti-trust laws. The district court enjoined the Veeco program,<sup>70</sup> but the Court of Appeals for the Fourth Circuit reversed, holding that the regulatory power of the Virginia State Corporation Commission brought Veeco's conduct within the state action exemption.<sup>71</sup> Signifi-

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Cir. 1976); *Duke & Co. v. Foerster*, 521 F.2d 1277 (3d Cir. 1975); *Jeffrey v. Southwestern Bell*, 518 F.2d 1129 (5th Cir. 1975); *State of New Mexico v. American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974); *Business Aides, Inc. v. Chesapeake and Potomac Tel. Co.*, 480 F.2d 754 (4th Cir. 1973); *Lamb Enterprises v. Toledo Blade Co.*, 461 F.2d 506 (6th Cir. 1972); *Norman's on the Waterfront, Inc. v. Wheatley*, 444 F.2d 1011 (3d Cir. 1971); *Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971); *Ladue Local Lines, Inc. v. Bi-State Developmental Agency*, 433 F.2d 131 (8th Cir. 1970); and text accompanying notes 67-127 *infra*.

<sup>67</sup> See, e.g., *Gas Light Co. v. Georgia Power Co.*, 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972); *Washington Gas Light Co. v. Virginia Elec. & Power Co.*, 438 F.2d 248 (4th Cir. 1971).

<sup>68</sup> See, e.g., SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 519 (1970) ("[T]he electric power, gas, telephone, and railroad industries share certain economic characteristics which have historically made them prime targets for regulation."). Thus, as to such industries, the inquiry undertaken in *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 30 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970), may be unnecessary. See text accompanying notes 86-89 *infra*.

<sup>69</sup> 438 F.2d 248 (4th Cir. 1971).

<sup>70</sup> 309 F. Supp. 1119 (E.D. Va. 1970).

<sup>71</sup> *Washington Gas Light Co. v. Virginia Elec. & Power Co.*, 438 F.2d 248 (4th Cir. 1971). The Fourth Circuit also held that the challenged activity did not constitute an antitrust violation, sustaining Veeco's single-product defense to the plaintiff's tie-in charge. For a critical discussion of this second ground for the Fourth Circuit's decision, see Wheeler, *Some Observations on Tie-Ins, the Single-Product Defense, Exclusive Dealing and Regulated Industries*, 60 CALIF. L. REV. 1557 (1972); Comment, 85 HARV. L. REV. 670 (1972).

cantly, the *Parker* defense was held to apply even though Vepco's tariffs had not been investigated or approved by the State Corporation Commission, on the theory that the Commission's power coupled with its silence implied approval.<sup>72</sup> Thus, unexercised regulatory jurisdiction was found to constitute state action rendering the antitrust laws inapplicable. *Washington Gas Light* has been sharply criticized by those unsympathetic to the state action defense,<sup>73</sup> and is generally recognized as "[t]he case which seems to go farthest in applying the *Parker* doctrine."<sup>74</sup>

While declining to go as far as *Washington Gas Light*, other courts have generally agreed that the implementation of public utility rate structures is a peculiarly sovereign function, clearly constituting state action within the meaning of *Parker v. Brown*. For example, in *Gas Light Co. v. Georgia Power Co.*,<sup>75</sup> a case involving facts and issues similar to those raised in *Washington Gas Light*, the Fifth Circuit specifically refused to extend the *Parker* exclusion "to the point of its extension in *Washington Gas Light*."<sup>76</sup> The state action defense was sustained in *Georgia Power*, however, because the state's regulatory powers had actually been exercised. The Court stated:

Our view is that the *Parker* exclusion applies to the rates and practices of public utilities enjoying monopoly status under state policy when their rates and practices are subjected to meaningful regulation and supervision by the state to the end that they are the result of the considered judgment of the state regulatory authority.<sup>77</sup>

Thus, prior to *Cantor*, *Georgia Power* and other lower court decisions had established relatively clearly that adherence by a public utility to the rules and regulations of its operative tariff was a "classic example" of the sort of conduct exempted from antitrust attack by *Parker v. Brown*.<sup>78</sup>

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<sup>72</sup> 438 F.2d at 252.

<sup>73</sup> See, e.g., Kintner and Kaufman, *The State Action Antitrust Immunity Defense*, 23 Am. U. L. Rev. 527, 530-33 (1974).

<sup>74</sup> *Norman's On the Waterfront, Inc. v. Wheatley*, 444 F.2d 1011, 1018 (3d Cir. 1971). See *Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971), cert. denied, 404 U.S. 1047 (1972).

<sup>75</sup> 440 F.2d 1135 (5th Cir. 1971), cert. denied, 404 U.S. 1062 (1972).

<sup>76</sup> 440 F.2d at 1140.

<sup>77</sup> *Id.*

<sup>78</sup> *Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1134 (5th Cir. 1975). Accord, e.g., *Business Aides, Inc. v. Chesapeake and Potomac Tel. Co.*, 480 F.2d 754 (4th Cir. 1973); *Lamb Enterprises v. Toledo Blade Co.*, 461 F.2d 506 (6th Cir. 1972); *Alabama Power*

If the applicability of *Parker v. Brown* in the public utility context was thought to be relatively clear,<sup>79</sup> there developed a generally acknowledged confusion regarding its applicability in the absence of a pervasive regulatory scheme of the sort encountered in the utility cases.<sup>80</sup> For example, in *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*,<sup>81</sup> the Court of Appeals for the First Circuit held that the adoption by a public body of a contractor's specifications for swimming pools did not suffice to confer antitrust immunity on the contractor under the doctrine of *Parker v. Brown*.

Similarly, the court declined to extend the *Noerr-Pennington* doctrine<sup>82</sup> to the contractor's efforts to sell swimming pool gutter assemblies to certain public bodies acting under competitive bidding procedures. Whitten had charged that Paddock's selling efforts violated the antitrust laws because it conspired to require the use of its own specifications in the public swimming pool industry, with the intent to exclude Whitten.<sup>83</sup> The district court granted summary judgment for Paddock on *Noerr-Pennington* grounds.<sup>84</sup> On appeal, the First

Co. v. Alabama Electric Cooperative, Inc., 394 F.2d 672 (5th Cir.), cert. denied, 393 U.S. 1000 (1968).

<sup>79</sup> See cases cited in note 78, *supra*. It is probably accurate to state that *Georgia Power* suggests the areas within which the conduct of public utilities was thought to be clearly protected by the state action doctrine. As subsequent judicial reaction to the opinion evidenced, *Washington Gas Light*, on the other hand, dealt with conduct not clearly within this area of certainty.

<sup>80</sup> It would be impracticable, of course, to characterize every regulatory scheme as consistent or inconsistent with general principles of utility regulation. It is generally accepted, however, that utility-type regulation is used primarily to control natural monopolies. See, e.g., R. WARREN, *ANTITRUST IN THEORY AND PRACTICE* 5 (1975). State economic regulation, which ranges from the comprehensive to the piecemeal, also affects a wide variety of businesses that cannot be characterized as natural monopolies. As to some of these businesses, the inefficacy of competition is not always readily apparent, and the application of *Parker v. Brown* in such situations has generated confusion and criticism. See, e.g., Donnem, *Federal Antitrust Law v. Anticompetitive State Regulation*, 39 *ANTITRUST L. J.* 950 (1970).

<sup>81</sup> 424 F.2d 25 (1st Cir. 1970).

<sup>82</sup> This doctrine, which is based on *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) and *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), holds that joint efforts to influence public officials in the passage of laws are beyond the scope of the antitrust laws. Antitrust immunity does not result, however, if such efforts are a mere sham, designed to camouflage anticompetitive conduct. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). See Oppenheim, *Antitrust Immunity for Joint Efforts to Influence Adjudication before Administrative Agencies and Courts*, 29 *WASH. & LEE L. REV.* 209 (1972).

<sup>83</sup> 424 F.2d at 27.

<sup>84</sup> See note 82 *supra*. The *Noerr-Pennington* doctrine, which protects private endeavors designed to influence governmental action, is distinct from the doctrine of *Parker v. Brown*, which immunizes private conduct required by the state.

Circuit reversed. Addressing the question whether the adoption of Paddock's specifications by public bodies was sufficient to bring defendants within the state action exemption, the court noted that the government action was taken in a proprietary capacity, and that the initial responsibility for recommending specifications was delegated to a hired professional, who was in turn subjected to often fraudulent and threatening sales tactics.<sup>85</sup> The court determined that *Parker v. Brown* precluded "the facile conclusion that action by any public official automatically confers exemption," and held that

. . . valid government action confers antitrust immunity only when government determines that competition is not the *summum bonum* in a particular field and deliberately attempts to provide an alternate form of public regulation.<sup>86</sup>

Thus, the court viewed *Parker* as applicable only where government has acted in the public interest to supplant competition with regulation, as where state agencies regulate utilities and other monopolies.<sup>87</sup> A second type of regulation, the court noted, occurs when underlying state policy is "neutral or silent with respect to restraints of trade."<sup>88</sup> In such cases there is no conflict between regulatory action and the benefits of competition, and there is consequently no reason to apply the state action exemption. Finally, there are cases in which state policy is neither anticompetitive nor neutral, but relies on the mechanisms of a competitive market. The court viewed laws requiring competitive bidding as falling into this category, and concluded that to confer immunity on Paddock would undermine the competitive bidding process.<sup>89</sup>

Similarly, in *Woods Exploration & Producing Co. v. Aluminum Co. of America*,<sup>90</sup> the Fifth Circuit held that neither the *Parker* de-

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<sup>85</sup> 424 F.2d at 29.

<sup>86</sup> *Id.* at 30. See *Parker v. Brown*, 317 U.S. 341, 350-51 (1943).

<sup>87</sup> See text accompanying note 68 *supra*.

<sup>88</sup> 424 F.2d at 31.

<sup>89</sup> *Id.* Paddock's *Noerr-Pennington* defense was rejected on the theory that, while Paddock was free to persuade the legislature to change its competitive bidding policy, its dealings with officials administering that policy should be subject to the same limitations as its dealings with private consumers. Thus, "the immunity for efforts to influence public officials in the enforcement of laws does not extend to efforts to sell products to public officials acting under competitive bidding statutes." *Id.* at 33. Of course, to the extent that the court relied on *Valentine v. Chrestensen*, 316 U.S. 52 (1942), its decision may now be suspect. See *Virginia Citizens Consumer Council, Inc. v. Virginia Bd. of Pharmacy*, 96 S. Ct. 1817 (1976).

<sup>90</sup> 438 F.2d 1286 (5th Cir. 1971).



fense nor the *Noerr-Pennington* doctrine<sup>91</sup> justified antitrust immunity for Texas gas producers alleged to have filed false nomination forecasts with the Texas Railroad Commission to reduce the plaintiffs' allowed production level.<sup>92</sup> While the Court acknowledged that the state had acted to reduce the "production allowable" assigned to plaintiffs, it cautioned that the presence of state participation "only begins the analysis, for it is not every governmental act that points a path to an antitrust shelter."<sup>93</sup> Rather, the court concluded that the crucial inquiry was "whether the real decision makers were public officials or private businessmen."<sup>94</sup>

Analyzing the facts before it in *Woods Exploration*, the court noted that the Commission's order relied on false facts adduced by the defendant. Moreover, the Commission had no meaningful opportunity to verify the facts, since the relevant information was within the exclusive control of the defendants. Recognizing that the Commission had no choice but to accept the proffered information at face value, the court stated:

Hence, defendants' conduct here can in no way be said to have become merged with the action of the state since the Commission neither was the real decision maker nor would have intended its order to be based on false facts. Indeed, plaintiffs' basic claim is that the applicable production allowable formula which the state would have intended to utilize was subverted to the injury of plaintiffs by defendants' filing of false nomination forecasts. The situation is analogous to the filing of fraudulent statements with the Patent Office, which has been held to be evidence of an antitrust violation.<sup>95</sup>

In addition to rejecting the *Parker* and *Noerr-Pennington* defenses, the court refused to hold that "because of extensive regulation the oil and gas industry is not susceptible to the strictures of the antitrust laws."<sup>96</sup> Rather, the court noted that immunity from the antitrust

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<sup>91</sup> See note 82 *supra*.

<sup>92</sup> 438 F.2d at 1289.

<sup>93</sup> *Id.* at 1294, *distinguishing* Okefenokee Rural Elec. Membership Corp. v. Florida Power & Light Co., 214 F.2d 413 (5th Cir. 1954).

<sup>94</sup> 438 F.2d at 1295, *quoting* George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 33 n.8 (1st Cir. 1970). This inquiry was also relevant to the Supreme Court in *Cantor*. See *Cantor v. Detroit Edison Co.*, 96 S. Ct. 3110, 3118-19 (1976), and text accompanying notes 166-74, 228-29, 258-67, and 280 *infra*.

<sup>95</sup> 438 F.2d at 1295.

<sup>96</sup> *Id.* at 1302.

laws is not lightly to be implied,<sup>97</sup> and declared it "incumbent upon this court to render both state regulatory and federal antitrust goals complementary rather than mutually exclusive."<sup>98</sup>

The *Woods Exploration* court was not alone in its suggestion, which seems to cut across certain basic tenets of federalism,<sup>99</sup> that the principles established in cases involving conflicts between the antitrust laws and other federal statutes should also be used to reconcile state regulatory schemes with federal antitrust policy. For example, in *Hecht v. Pro-Football, Inc.*,<sup>100</sup> the court stated that

. . . the proper inquiry would seem to be to what extent Congress has knowingly adopted a policy contrary to or inconsistent with the previously established antitrust laws, or, where state action is concerned . . . , the inquiry should be to what extent is the state action permissible as not contravening the federal antitrust laws, which in our federal system constitute overriding legislation under the federal commerce power.<sup>101</sup>

Although *Hecht* involved an antitrust challenge to certain restrictive provisions in a lease between Pro-Football and the District of Columbia Armory Board, a federally created governmental entity, the parties relied on *Parker* and its progeny, and the court acknowledged the similarity between the Armory Board and a state governmental agency.<sup>102</sup> The *Hecht* opinion plainly suggests that federal courts should review the policies underlying state statutes before determining whether the *Parker* exemption is available.<sup>103</sup> Indeed, in language suggestive of a straightforward preemption analysis, the court characterized the "overall question" as "to what extent, if any, the Congress intended to permit action not consistent with the antitrust laws."<sup>104</sup>

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<sup>97</sup> *Id.*, citing *United States v. First City Nat'l Bank*, 386 U.S. 361, 368 (1967).

<sup>98</sup> *Id.* This statement, of course, also foreshadowed *Cantor*. See *Cantor v. Detroit Edison Co.*, 96 S. Ct. 3110, 3119-20 (1976) and text accompanying notes 175-82, 230-40, 268-70, 277-79 *infra*.

<sup>99</sup> See Handler, *The Current Attack on the Parker v. Brown State Action Doctrine*, 76 COLUM. L. REV. 1 (1976).

<sup>100</sup> 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

<sup>101</sup> 444 F.2d at 935.

<sup>102</sup> *Id.* at 936.

<sup>103</sup> *Id.* at 935. Moreover, the court indicated that such review is not inconsistent with *Parker*: "Thus, *Parker v. Brown* involves not just state governmental action; it involves regulatory action in the state's capacity as sovereign, and it involves sovereign state regulatory action which is consistent with federal national policy, *i.e.*, the Agricultural Adjustment Act, enunciated by the National Congress, which is also the source of federal antitrust policy." *Id.* at 937.

<sup>104</sup> *Id.* at 938.

In addition to making it more difficult for private parties to avail themselves of the *Parker* defense, the *Hecht* court suggested that, because the antitrust laws might operate even in the presence of state action, the conduct of governmental entities might be subject to antitrust attack at least in some circumstances.<sup>105</sup> The court reasoned that Congress empowered the Armory Board to maintain and operate Kennedy Stadium, but did not authorize it to manage the only professional football team to be allowed to play in the Stadium. Thus, the Board went beyond its mandate, the court seems to say, when it entered into a contract that effectively guaranteed a monopoly to Pro-Football's Washington Redskins, and would not be exempted from antitrust liability.<sup>106</sup> This conclusion is entirely consistent with the holding in *Goldfarb* that the state action doctrine applies only to conduct "required by the State acting as sovereign,"<sup>107</sup> and post-*Goldfarb* decisions indicate that the potential liability of governmental entities will be analyzed accordingly.<sup>108</sup>

On the eve of the Supreme Court's decision in *Goldfarb v. Virginia State Bar*,<sup>109</sup> then, judicial analysis of the state action doctrine had delineated three broad areas of inquiry. The first, typified by decisions like *Washington Gas Light*<sup>110</sup> and *Georgia Power Co.*<sup>111</sup> was a definitional inquiry, which sought to determine what degree of state involvement was required to warrant a finding of "state action." The second area of inquiry centered on the proposition, evident in decisions like *Hecht*,<sup>112</sup> *Woods Exploration*,<sup>113</sup> and *George R. Whitten*,<sup>114</sup>

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<sup>105</sup> *Id.* at 938-40. *Cf.* *E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority*, 362 F.2d 52, 55 (1st Cir. 1966) (suggesting that the governmental-proprietary distinction may be significant to a determination whether *Parker v. Brown* applies); *Ladue Local Lines, Inc. v. Bi-State Developmental Agency*, 433 F.2d 131 (8th Cir. 1970).

<sup>106</sup> 444 F.2d at 939-40.

<sup>107</sup> *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 790 (1975).

<sup>108</sup> See *City of Lafayette v. Louisiana Power & Light Co.*, 532 F.2d 431 (5th Cir. 1976); *Duke & Co. v. Foerster*, 521 F.2d 1277 (3d Cir. 1975). *State of New Mexico v. American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974) is *contra*, but was decided prior to the Supreme Court's decision in *Goldfarb*.

<sup>109</sup> 421 U.S. 773 (1975).

<sup>110</sup> *Washington Gas Light Co. v. Virginia Elec. & Power Co.*, 438 F.2d 248 (4th Cir. 1971).

<sup>111</sup> *Gas Light Co. v. Georgia Power Co.*, 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972).

<sup>112</sup> *Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

<sup>113</sup> *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971).

<sup>114</sup> *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir. 1970).

that a substantive dimension, similar to that encountered in cases involving federal statutes that conflict with the antitrust laws,<sup>115</sup> should be added to the definitional analysis.

Finally, decisions like *Hecht v. Pro-Football*<sup>116</sup> raised the question whether the immunity afforded governmental entities under the *Parker* doctrine is greater than that available to private parties. The *Goldfarb* decision seemed to clarify some of the definitional uncertainties, and made it apparent that state agencies enjoyed no blanket immunity from antitrust liability. But it did not indicate whether further inquiry is required, once the presence of "state action" has been established.

In *Goldfarb v. Virginia State Bar*,<sup>117</sup> the plaintiff sued the Fairfax County Bar Association and the Virginia State Bar, claiming that the promulgation of a lawyers' minimum fee schedule by the Association violated § 1 of the Sherman Act. The trial court held that the conduct of the State Bar was state action exempt from antitrust challenge under the doctrine of *Parker v. Brown*,<sup>118</sup> and the Fourth Circuit affirmed.<sup>119</sup> The activities of the Fairfax County Bar Association, on the other hand, were found by the Fourth Circuit to be without the scope of the state action exemption.<sup>120</sup>

The Supreme Court, without specifying what a full *Parker v. Brown* analysis would entail, held that the Fairfax County Bar Association's state action defense never got past the threshold inquiry of whether the alleged anticompetitive activity was "required by the State acting as sovereign."<sup>121</sup> Neither approving mention of minimum fee schedules in ethical codes promulgated by the Supreme Court of Virginia nor their apparent approval by the State Bar was sufficient to confer immunity: "It is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as sovereign."<sup>122</sup>

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<sup>115</sup> *E.g.*, *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963).

<sup>116</sup> *Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

<sup>117</sup> 421 U.S. 773 (1975).

<sup>118</sup> 355 F. Supp. 491 (E.D. Va. 1973).

<sup>119</sup> 497 F.2d 1 (4th Cir. 1974). The Fourth Circuit held that the State Bar met three requirements considered in *Parker*: its activity was for the benefit of the public, took place pursuant to legislative command, and was subject to active supervision by the State. *Id.* at 4-12.

<sup>120</sup> *Id.* at 12-13.

<sup>121</sup> 421 U.S. at 790.

<sup>122</sup> *Id.* at 791.

Thus, the Supreme Court made it fairly clear that the definition of "state action" does not extend to passive approval of anticompetitive conduct, rejecting the rationale previously approved by lower court decisions like *Washington Gas Light*.<sup>123</sup>

In addition to ruling that the County Bar could not avail itself of the state action defense, the Supreme Court denied the exemption to the Virginia State Bar. The Court reasoned that the State Bar's status as a "state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members."<sup>124</sup> Thus, the Supreme Court viewed the state agency as having joined voluntarily in what otherwise would have been wholly private anticompetitive conduct. By holding the State Bar liable, the Supreme Court breathed new life into the *Parker* opinion's "exception" for state participation in activity repugnant to the antitrust laws.<sup>125</sup>

In the wake of *Goldfarb*, it became evident from lower court decisions that the boundaries of the state action exemption were shifting substantially on several fronts. As indicated above, *Goldfarb* itself diminished the scope of the exemption from a definitional standpoint, and made it clear that claims of immunity by governmental entities would be subject to more rigorous judicial scrutiny. These developments, in turn, sparked a more general assault on the *Parker v. Brown* defense.<sup>126</sup> Before the emerging trends could take hold, however, the Supreme Court handed down its decision in *Cantor v. Detroit Edison Company*.<sup>127</sup>

#### B. *The Supreme Court's Decision in Cantor v. Detroit Edison Company*

The *Cantor* litigation involved an antitrust challenge to the Detroit Edison Company's lamp supply program. The Company sup-

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<sup>123</sup> *Washington Gas Light Co. v. Virginia Elec. & Power Co.*, 438 F.2d 248 (4th Cir. 1971).

<sup>124</sup> 421 U.S. at 791 (footnote omitted).

<sup>125</sup> *Parker v. Brown*, 317 U.S. 341, 351-52 (1943). For a more thorough discussion of the *Goldfarb* Court's holding on state action, see Shenefield, *Annual Survey of Antitrust Developments 1974-75*, 33 WASH. & LEE L. REV. 259, 289-93 (1976).

<sup>126</sup> See, e.g., *City of Lafayette v. Louisiana Power & Light Co.*, 532 F.2d 431 (5th Cir. 1976); *Litton Systems, Inc. v. Southwestern Bell Tel. Co.*, 539 F.2d 418 (5th Cir. 1976); *Duke & Co. v. Foerster*, 521 F.2d 1277 (3d Cir. 1975).

<sup>127</sup> 96 S. Ct. 3110 (1976).

plied its residential subscribers with light bulbs for use in their homes, and replaced the bulbs without charge when they burned out. Detroit Edison had included the program in its proposed tariff, and the program became a mandatory service when the tariff was adopted by order of the Michigan Public Service Commission (PSC). Thus, the program was a part of Detroit Edison's approved rate structure, and could not be abandoned unilaterally.<sup>128</sup>

Cantor, who owned a drugstore, filed suit, charging that the lamp supply program had damaged him in his business by impairing his ability to sell light bulbs. Specifically, Cantor claimed that in pursuing the program Detroit Edison violated § 2 of the Sherman Act<sup>129</sup> and § 3 of the Clayton Act.<sup>130</sup> The plaintiff argued that Detroit Edison had instituted the plan for the purpose of increasing electrical consumption, and that "at best the Michigan Public Service Commission has rubber-stamped this plan."<sup>131</sup> In support of this argument, the plaintiff pointed out that the PSC neither held hearings on the program nor promulgated any regulations governing its administrative details.<sup>132</sup>

Detroit Edison moved for summary judgment on the ground that its business activities fell within the state action exemption to the antitrust laws because they were pervasively regulated by the Michigan Public Service Commission. The Company noted that the Commission had "plenary power" to regulate utilities under Michigan law, and that its order requiring the Company to provide free light bulbs to subscribers was well within the Commission's power.<sup>133</sup> Thus, the question was whether conduct required by Detroit Edison's approved rate tariff constituted "state activity . . . shielded from claimed antitrust violation."<sup>134</sup>

The district court held that the facts before it fell squarely within the exemption provided by the state action doctrine, and granted the Company's motion for summary judgment.<sup>135</sup> On appeal, the Sixth Circuit affirmed the trial court's decision without opinion.<sup>136</sup> The

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<sup>128</sup> Cantor v. Detroit Edison Co., 392 F. Supp. 1110, 1111 (E.D. Mich. 1974), *aff'd*, 513 F.2d 630 (6th Cir. 1975) *rev'd*, 96 S. Ct. 3110 (1976).

<sup>129</sup> 15 U.S.C. § 2 (1970).

<sup>130</sup> 15 U.S.C. § 14 (1970).

<sup>131</sup> 392 F. Supp. at 1111.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 1112.

<sup>136</sup> Cantor v. Detroit Edison Co., 513 F.2d 630 (6th Cir. 1975), *rev'd*, 96 S. Ct. 3110 (1976).

Supreme Court then granted certiorari,<sup>137</sup> indicating that for the second time in as many years it would examine the proper scope of the *Parker v. Brown* defense.

Writing for a plurality of the Court, Mr. Justice Stevens declared in the first paragraph of his lengthy opinion that the Court "must decide whether the *Parker* rationale immunizes private action which has been approved by a State and which must be continued while the state approval remains effective."<sup>138</sup> Thus, as it had done more than three decades before in *Parker v. Brown*,<sup>139</sup> the Court assumed that, without the approval of the Michigan Public Service Commission, Detroit Edison's conduct would violate the antitrust laws.<sup>140</sup>

The Supreme Court's opinion was divided into four parts. In Parts I and III, which expressed the views of five members of the Court,<sup>141</sup> Mr. Justice Stevens described Detroit Edison's lamp supply program, and found that neither its approval by the Public Service Commission nor the fact that it could not be terminated without PSC consent immunized the Company from antitrust liability. A plurality of the Court,<sup>142</sup> in Part II of the opinion, distinguished *Parker v. Brown* on the novel ground that the *Parker* concept of state action does not encompass private conduct, but only the conduct of state officials.<sup>143</sup> Moreover, in Part IV, the same plurality dealt summarily with several other arguments, including concern by regulated industries over massive treble damage exposure, and the impact of the *Cantor* decision on the *Noerr-Pennington* doctrine.<sup>144</sup>

### 1. The Majority Opinion: Part I

At the outset, Mr. Justice Stevens described Detroit Edison's lamp supply program,<sup>145</sup> and enumerated several facts, unmentioned

<sup>137</sup> 423 U.S. 821 (1975).

<sup>138</sup> *Cantor v. Detroit Edison Co.*, 96 S. Ct. 3110, 3112 (1976).

<sup>139</sup> 317 U.S. 341, 350 (1943).

<sup>140</sup> 96 S. Ct. at 3113.

<sup>141</sup> Joining in these parts of Mr. Justice Stevens' opinion were the Chief Justice and Justices Brennan, White and Marshall.

<sup>142</sup> The plurality consisted of Mr. Justice Stevens, who was joined by Justices Brennan, White and Marshall.

<sup>143</sup> 96 S. Ct. at 3117.

<sup>144</sup> *Id.* at 3121-23.

<sup>145</sup> The opinion explained that,

Under respondent's practice, new residential customers are provided with bulbs in 'such quantities as may be needed' for all of their permanent fixtures; thereafter, respondent replaces residential customers' burned out light bulbs in proportion to their estimated use of

in the trial court's opinion, that were significant to the Supreme Court's findings. The Court noted first that, by requiring that the program be implemented, the Michigan Public Service Commission had approved a marketing practice that had a "substantial impact on the otherwise unregulated business of distributing electric light bulbs."<sup>146</sup> In this connection, as the sole supplier of electricity in southeastern Michigan, Detroit Edison supplied consumers with almost 50% of the standard size light bulbs required most often for home use.<sup>147</sup> Emphasizing that the distribution of electric light bulbs in Michigan was unregulated, the Court noted specifically that the statute creating the Public Service Commission contains "no direct reference to light bulbs," and that no other Michigan statute authorized regulation of the light bulb business.<sup>148</sup>

Second, the Court observed that neither the PSC nor the Michigan legislature had ever investigated the desirability of the program from a regulatory standpoint, or evaluated its potential impact on competition in the light bulb market.<sup>149</sup> Indeed, while Detroit Edison's policy of providing light bulbs to its customers without charge predated the regulation of electric utilities by the State of Michigan,<sup>150</sup> the other utilities regulated by the PSC had no such programs.<sup>151</sup> This led the Court to conclude that PSC approval of Detroit Edison's program did not further any statewide policy regarding the distribution of light bulbs. Thus, the Court inferred "that the State's policy is neutral on the question whether a utility should, or should not, have such a program."<sup>152</sup>

Third, the Court recognized that Detroit Edison could not abandon the lamp supply program without violating state law:

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electricity for lighting. The customer incurs no direct charge for such bulbs at the time they are furnished to him, but normally turns in any burned out bulbs to obtain a new supply.

Cantor v. Detroit Edison Co., 96 S. Ct. 3110, 3115 n.5 (1976).

<sup>146</sup> *Id.* at 3112.

<sup>147</sup> *Id.* at 3113. The utility did not distribute fluorescent lights or high intensity lamps; if bulbs in those categories were included, Detroit Edison's share of the southeastern Michigan light bulb market would have been only 23%. 96 S. Ct. at 3113 n.4.

<sup>148</sup> *Id.* at 3114.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 3113. The historical purpose of the light bulb program, according to Detroit Edison, was to increase the consumption of electricity. The Company's records reflected no direct profit from the program, and the Company claimed that its policy saved consumers roughly \$3 million per year. Not surprisingly, Cantor argued that, whatever the program's purpose, its effect was "to foreclose competition in a substantial segment of the light bulb market." *Id.* at 3114 (footnote omitted).

<sup>151</sup> *Id.* at 3114.

<sup>152</sup> *Id.*



Although there is no statute, Commission rule, or policy which would prevent respondent from abandoning the program merely by filing a new tariff providing for a proper adjustment in its rates, it is nevertheless apparent that while the existing tariff remains in effect, respondent may not abandon the program without violating a Commission order, and therefore without violating state law. It has, therefore, both been permitted by the Commission to carry out the program, and also is required to continue to do so until an appropriate filing has been made and has received the approval of the Commission.<sup>153</sup>

Finally, Mr. Justice Stevens noted that no public official was a party to the litigation and that Cantor made no claim that any representative or agent of the state had violated the antitrust laws.<sup>154</sup>

## 2. The Plurality Opinion: Part II

In Part II of the Court's opinion, which represented the views of a four-man plurality,<sup>155</sup> Mr. Justice Stevens reviewed the concept of state action as set forth in *Parker v. Brown*.<sup>156</sup> To Mr. Justice Stevens, what might be termed the "legislative history" of *Parker* illuminated the proper scope of the state action exemption.<sup>157</sup> The Court noted that it had heard oral argument on the Commerce Clause issue in *Parker v. Brown* in early 1942, and that the case was later set for reargument on the Sherman Act issue presumably because the Court had held, in *Georgia v. Evans*,<sup>158</sup> that a state is a "person" entitled to sue for treble damages under the antitrust laws. The Court in *Parker* asked that, on reargument, the parties discuss the question whether the California statute was invalidated by the Sherman Act.<sup>159</sup>

Observing that the defendants in *Parker* were all state officials, Mr. Justice Stevens explained that, in an amicus curiae brief filed on behalf of the United States, the Solicitor General declined to argue that the State of California or the individual defendants in *Parker*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> Part II of Mr. Justice Stevens' opinion was joined by Justices Brennan, White and Marshall.

<sup>156</sup> 317 U.S. 341 (1943). A brief synopsis of the *Parker* decision, and its factual background, is set forth in the text accompanying notes 46-66 *supra*.

<sup>157</sup> 96 S. Ct. at 3114-15.

<sup>158</sup> 316 U.S. 159 (1942).

<sup>159</sup> 96 S. Ct. at 3115.

had violated the antitrust laws.<sup>160</sup> The *Cantor* opinion went on to note that, in the same brief, the Solicitor General “drew an important distinction between economic action taken by the State itself and private action taken pursuant to a state statute permitting or requiring individuals to engage in conduct prohibited by the Sherman Act.”<sup>161</sup> Having described the distinction drawn by the Solicitor General, Mr. Justice Stevens concluded that because the *Parker* holding involved a challenge to conduct taken by state officials, the concept of state action embodied in the *Parker* opinion does not encompass “private action taken under color of state law.”<sup>162</sup> As the defendant in *Cantor* was a private utility, and the conduct of the State of Michigan or its officials was not questioned, a plurality of the Court thus held that *Parker* was not controlling.<sup>163</sup>

### 3. The Majority Opinion: Part III

Because a majority of the Court did not agree with Mr. Justice Stevens’ holding that the *Parker v. Brown* defense can never shield private conduct from antitrust liability. Part II of the *Cantor* opinion left unanswered the question whether “private conduct required by state law is exempt from the Sherman Act.”<sup>164</sup> Addressing this question in Part III of its opinion, the Court recognized that “[t]wo quite different reasons might support such a rule.”<sup>165</sup>

First, if a private citizen has done nothing more than obey the command of his state sovereign, it would be unjust to conclude that he has thereby offended federal law. Second, if the State is already regulating an area of the economy, it is arguable that Congress did not intend to superimpose the antitrust laws as an additional, and perhaps conflicting, regulatory mechanism.<sup>166</sup>

As to the first rationale for a state action exemption, the Court assumed for the purposes of argument that it would be improper ever to impose antitrust liability on “a party who had done nothing more than obey a state command.”<sup>167</sup> But the Court did not view this

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<sup>160</sup> *Id.* at 3116.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 3117.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 3118.

assumption as decisive in the *Cantor* case and, indeed, remarked that it would probably not be dispositive in any actual case. This is so, the Court explained, because cases like *Cantor* typically involve "a blend of private and public decisionmaking."<sup>168</sup> In this connection, the Court referred to several cases which held that private conduct is not immune from antitrust scrutiny merely because the state has participated in or commanded the conduct.<sup>169</sup> The Court found it significant that, in each of these cases,

. . . notwithstanding the state participation in the decision, the private party exercised sufficient freedom of choice to enable the Court to conclude that he should be held responsible for the consequences of his decision.<sup>170</sup>

Thus, while the Court did recognize an immunity from liability for parties who have "done *nothing more* than obey a state command,"<sup>171</sup> its language plainly suggests that this immunity is very narrow.

Turning to an analysis of Detroit Edison's conduct under the "unfairness" standard, the Court acknowledged that the Company's lamp exchange program was required by its rate schedule and could not be abandoned without the approval of the Michigan Public Service Commission.<sup>172</sup> Nevertheless, the Court viewed the decision to have such a program as one made by Detroit Edison, and not by the Commission.<sup>173</sup> On this basis, the Court decided that

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<sup>168</sup> *Id.* (footnote omitted). The Court even observed that "there was significant private participation in the formulation and effectuation of the proration program" challenged in *Parker v. Brown*, 96 S. Ct. at 3118 n.25.

<sup>169</sup> *Id.* at 3118, citing *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951); *Parker v. Brown*, 317 U.S. 341, 351-52 (1943); *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904). The Court noted that "[i]n each of these cases the initiation and enforcement of the program under attack involved a mixture of private and public decisionmaking." 96 S. Ct. at 3118 & nn. 25-30.

<sup>170</sup> *Id.* at 3118.

<sup>171</sup> *Id.* (emphasis added).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* Interestingly, the Court analogized Detroit Edison's conduct to that of the defendant in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). In that case, the Court held that Metropolitan Edison's decision to terminate service to one of its customers did not constitute state action for purposes of 42 U.S.C. § 1983. The Court in *Jackson* described its reasoning as follows:

The nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory

[t]here is nothing unjust in a conclusion that respondent's participation in the decision is sufficiently significant to require that its conduct implementing the decision, like comparable conduct by unregulated businesses, conform to applicable federal law.<sup>174</sup>

After determining that no claim of unfairness would warrant immunizing Detroit Edison's conduct from the antitrust laws, the Court addressed the question "whether Congress intended to superimpose antitrust standards on conduct already being regulated under a different standard."<sup>175</sup> The Company argued that the public interest standard employed in the pervasive regulation of electric utilities and other natural monopolies is fundamentally inconsistent with the competitive standard imposed by the antitrust laws. The Court rejected this contention, reasoning that even if the antitrust laws were not intended to apply to "areas of the economy primarily regulated by a State, that . . . would not foreclose the enforcement of the antitrust laws in an essentially unregulated area such as the market for electric light bulbs."<sup>176</sup> Thus, while recognizing that some regulatory schemes are designed to prevent unrestrained competition,<sup>177</sup> Mr.

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body. Approval by a state utility commission of such a request from a regulated utility, where the Commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the Commission into 'state action.' At most, the Commission's failure to overturn this practice amounted to no more than a determination that a Pennsylvania utility was authorized to employ such a practice if it so desired. Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its actions in doing so 'state action' for purposes of the Fourteenth Amendment.

419 U.S. 345, 357 (1974) (footnote omitted), *quoted* in *Cantor v. Detroit Edison Co.*, 96 S. Ct. 3110, 3118-19 n.31 (1976). The analogy was rejected by the dissent. *Id.* at 3133 n.10.

<sup>174</sup> 96 S. Ct. at 3119 (footnote omitted). In a footnote to this statement, the Court declared that its conclusion is not "even arguably inconsistent" with the underlying rationale of *Parker v. Brown*, explaining that, in *Parker*, "California required every raisin producer in the State to comply with the Proration Program, whereas Michigan has never required any utility to adopt a lamp exchange program." *Id.* at 3119 n.32. Actually, the proration programs challenged in *Parker* were adopted only at the instance of raisin producers, just as the lamp supply program was adopted at the instance of Detroit Edison.

<sup>175</sup> 96 S. Ct. at 3119.

<sup>176</sup> *Id.*

<sup>177</sup> The Court acknowledged that the agricultural marketing program challenged in *Parker v. Brown* was such a scheme. 96 S. Ct. at 3119.

Justice Stevens wrote that "[t]here is no logical inconsistency between requiring [a public utility] to meet regulatory criteria insofar as it is exercising its natural monopoly powers and also to comply with antitrust standards to the extent that it engages in business activity in competitive areas of the economy."<sup>178</sup>

The Court then proceeded to delineate the proper standards for determining whether private conduct required by a state is exempt from antitrust scrutiny. Mr. Justice Stevens made it clear that the "mere possibility of conflict" between the regulatory policy embodied in a state statute, on the one hand, and the policy underlying the federal antitrust laws on the other, does not justify an exemption.<sup>179</sup> Rather, the Court held that the standards for ascertaining the existence and scope of the exemption must be at least as strict as those applied in cases involving conflicts between the antitrust laws and federal regulatory statutes.<sup>180</sup> In those cases, an exemption was implied only when required to make the regulatory act work, and then only to the minimum extent necessary.<sup>181</sup> Under this standard, the Court refused to imply any antitrust exemption for Detroit Edison's lamp supply program. Consistent with this conclusion, the Court expressed its view that Michigan's regulatory scheme did not conflict with the antitrust laws, and that a finding that the light bulb exchange program violated the antitrust laws would not impair the state's interest in regulating the distribution of electricity.<sup>182</sup>

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<sup>178</sup> *Id.* (footnote omitted).

<sup>179</sup> *Id.* at 3120. This was obvious, the Court found, since "Congress could hardly have intended state regulatory agencies to have broader power than federal agencies to exempt private conduct from the antitrust laws." *Id.* (footnote omitted).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* (footnote omitted). Significantly, the cases relied on by the Court in this portion of its opinion dealt with conflicts between the antitrust laws and federal regulatory schemes. See, e.g., *United States v. National Ass'n of Sec. Dealers*, 422 U.S. 694, 719-20 (1975) ("Implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system."); *Gordon v. New York Stock Exch.*, 422 U.S. 659, 692-93 (1975) (mere regulatory jurisdiction over challenged activities does not confer immunity; conduct required by the regulatory entity must be necessary to make the regulatory scheme work); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 391 (1973) (electric utility subjected to federal antitrust laws despite possible conflict between federal regulatory policy and federal antitrust policy).

<sup>182</sup> 96 S. Ct. at 3120. The Court was careful to note that its refusal to imply an exemption did not suggest that Detroit Edison's conduct violated the antitrust laws. *Id.* at 3121 n.38.

#### 4. The Plurality Opinion: Part IV

Part IV of Mr. Justice Stevens' opinion, which like Part II was joined in by only three other Justices,<sup>183</sup> dealt with the concerns voiced by other members of the Court that the holding in *Cantor* would precipitate massive treble damage claims against regulated firms, for actions taken in good faith to comply with regulatory requirements.<sup>184</sup> This concern over treble damage liability, the Court acknowledged, would be relevant in either of two situations:

If the hazard of violating the antitrust laws were enhanced by the fact of regulation, or if a regulated company had engaged in anticompetitive conduct in reliance on a justified understanding that such conduct was immune from the antitrust laws, a concern with the punitive aspects of the treble damage remedy would be appropriate.<sup>185</sup>

The Court concluded that neither of these circumstances was present in the *Cantor* case.

First, the Court observed simply that regulatory approval of a company's proposed tariff does not increase the likelihood that implementation of the programs contained in the tariff will violate the antitrust laws. The Court then devoted greater attention to the question of reliance, which was of far greater concern to the five Justices who declined to join in the plurality opinion. On this point, Mr. Justice Stevens wrote that Detroit Edison could not "fairly claim that it was led to believe that its conduct was exempt from the federal antitrust laws," since "[t]his Court has never sustained a claim that otherwise unlawful private conduct is exempt from the antitrust laws because it was permitted or required by state law."<sup>186</sup> The Court's prior holding in *Parker* was dismissed as a narrow one concerned only with the conduct of state officials.<sup>187</sup>

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<sup>183</sup> Mr. Justice Stevens' opinion in Part IV was joined by Justices Brennan, White and Marshall.

<sup>184</sup> Mr. Justice Stevens referred to this charge as "an oft-repeated criticism of the inevitably imprecise language of the Sherman Act and of the consequent difficulty in predicting with certainty its application to various specific fact situations." 96 S. Ct. at 3121 (footnote omitted). He added that "[t]he far-reaching value of this basic part of our law, however, has enabled it to withstand such criticism in the past." *Id.* (footnote omitted).

<sup>185</sup> *Id.* at 3121.

<sup>186</sup> *Id.*

<sup>187</sup> Regarding *Parker*, the plurality stated:

[T]he narrow holding in *Parker* concerned only the legality of the conduct of the state officials charged by law with the responsibility

In addition, the Court stated that Detroit Edison could not justifiably rely upon *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,<sup>188</sup> in which the Court had held that no antitrust violation can be predicated on an attempt to influence the passage or enforcement of legislation.<sup>189</sup> According to Mr. Justice Stevens, nothing in the *Noerr* opinion suggested that regulatory approval of a tariff justifies conferring antitrust immunity on conduct proposed by that tariff.<sup>190</sup> Referring to the *Noerr* Court's reliance on *Parker v. Brown*,<sup>191</sup> the Court reiterated the *Parker* dictum that a state cannot authorize antitrust violations, and concluded that the reference to *Parker* in the *Noerr* opinion "sheds no light on the significance of state action which amounts to little more than approval of a private proposal."<sup>192</sup> Thus, the plurality viewed its holding as a refusal to allow state agencies to do precisely what *Parker* forbade, namely, to grant immunity to conduct violative of the antitrust laws merely by directing private parties to engage in such conduct.<sup>193</sup>

At the close of its opinion, the Court observed that a simple rule, according immunity to private companies acting in compliance with state regulatory orders, would be supported by the "wholesome interest in simplicity in the regulation of a complex economy."<sup>194</sup> But this interest in simplicity was held to be outweighed by the strong federal interests underlying the antitrust laws, and by the concomitant interest in preventing the creation of antitrust immunities unrelated either to federal policy or to "necessary significant" state interests.<sup>195</sup>

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for administering California's program. What sort of charge might have been made against the various private persons who engaged in a variety of different activities implementing that program is unknown and unknowable because no such charges were made. Even if the state program had been held unlawful, such a holding would not necessarily have supported a claim that private individuals who had merely conformed their conduct to an invalid program has thereby violated the Sherman Act. Unless and until a court answered that question, there would be no occasion to consider an affirmative defense of immunity or exemption.

*Id.* at 3122. (footnote omitted). *But see* text accompanying notes 61-66 *supra*.

<sup>188</sup> 365 U.S. 127 (1961).

<sup>189</sup> *Id.* at 135-36.

<sup>190</sup> 96 S. Ct. at 3122.

<sup>191</sup> *Id.* at 3122 n.44, quoting *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135-36 (1961).

<sup>192</sup> 96 S. Ct. at 3122-23.

<sup>193</sup> *Id.* at 3123.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

The Court concluded that state action issues, like so many other issues arising in the antitrust field, should be adjudicated on a case-by-case basis.

Three separate opinions, representing the views of five Justices, were filed in the *Cantor* case. The Chief Justice filed an opinion concurring in the judgment and in all except Parts II and IV of the Court's opinion.<sup>196</sup> Also filing a concurring opinion was Mr. Justice Blackmun who agreed with the judgment and the holding that the sanction or requirement of anticompetitive conduct by state law does not of itself confer an antitrust exemption on such conduct, but whose reasoning differed significantly from that of the plurality.<sup>197</sup> Finally, Mr. Justice Stewart authored the vigorous dissent, which was joined in by Justices Powell and Rehnquist.<sup>198</sup>

### 5. The Concurring Opinions

While agreeing with the Court's judgment, Chief Justice Burger declined to join in its narrow reading of *Parker v. Brown*, on the ground that in previous decisions interpreting *Parker* the Court "focused on the challenged *activity*, not upon the identity of the *parties* to the suit."<sup>199</sup> The reading of *Parker* in Part II of the Court's opinion was, he reasoned, unnecessary to its holding, as *Parker* simply did not involve state action of the sort challenged in *Cantor*, where anticompetitive conduct in unregulated markets was required despite the absence of an "independent regulatory purpose."<sup>200</sup> The Chief Justice concluded that no federal or state policy would be served by finding a state action exemption on the facts presented in *Cantor*.

In a somewhat more lengthy concurring opinion, Mr. Justice Blackmun also agreed with the result reached by the plurality.<sup>201</sup> His approach, however, differs from that found in Mr. Justice Stevens' opinion. First, Mr. Justice Blackmun saw the principal question facing the Court in *Cantor* as that of the Sherman Act's preemptive effect on state law, and he agreed with the dissent that the question is primarily one of congressional intent.<sup>202</sup> Nevertheless, he refused to share the dissent's view that the legislative history of the Sherman

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<sup>196</sup> *Id.* at 3123 (Burger, C.J. concurring).

<sup>197</sup> *Id.* at 3124 (Blackmun, J., concurring).

<sup>198</sup> *Id.* at 3128 (Stewart, J., dissenting, joined by Powell and Rehnquist, JJ.).

<sup>199</sup> *Id.* at 3123 (Burger, C.J., concurring) (emphasis in original).

<sup>200</sup> *Id.* at 3124.

<sup>201</sup> *Id.* at 3124 (Blackmun, J., concurring).

<sup>202</sup> *Id.*



Act is useful in evaluating that intent. Rather, in Mr. Justice Blackmun's view, statements by framers of the Act reflect only the opinion, prevailing in 1890, that Congress lacked the power to regulate intra-state economic activity. Moreover, consistent with Supreme Court holdings that Congress intended the reach of the Sherman Act to expand along with that of the Commerce Clause<sup>203</sup> power, the extended ambit of the antitrust laws has brought them into conflict with state laws once thought to be beyond their reach.<sup>204</sup> Mr. Justice Blackmun stated that inconsistent state laws are preempted by the federal antitrust statutes in such situations.<sup>205</sup>

To say that the Sherman Act generally preempts conflicting state laws, Mr. Justice Blackmun continued, "is not to answer the much more difficult question as to which such laws are preempted and to what extent."<sup>206</sup> Thus, the prerequisite established in *Goldfarb*, that a state law require rather than simply authorize the challenged conduct, is not alone sufficient to confer an exemption.<sup>207</sup> Similarly, it is not decisive that the impetus of a particular state regulatory scheme originated in the private sector, especially since it may often be impossible to identify the origin of a statute or rule.<sup>208</sup> Finally, Mr.

<sup>203</sup> U.S. Const., Art. I, § 8.

<sup>204</sup> 96 S. Ct. at 3124, citing *Hospital Bldg. Co. v. Rex Hosp. Trustees*, 96 S. Ct. 1848 (1976).

<sup>205</sup> *Id.* at 3124 n.1, n.2, citing *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 386 (1951) ("[W]hen a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids.") and *Northern Sec. Co. v. United States*, 193 U.S. 197, 350 (1904) ("[N]o State can endow any of its corporations, or any combination of its citizens, with authority to restrain interstate or international commerce . . .").

After discussing *Schwegmann* and *Northern Securities*, Mr. Justice Blackmun concludes

. . . that some degree of state law preemption is implicit in the most fundamental operation of the Sherman Act. If a State had no antitrust policy of its own, anticompetitive combinations of all kinds would be sanctioned and enforced under that State's general contract and corporation law. Yet, there has never been any doubt that if such combinations offend the Sherman Act, they are illegal, and state laws to that extent are overridden.

96 S. Ct. at 3125 (footnote omitted). Mr. Justice Blackmun then proceeded to bolster this conclusion by noting that, if inconsistent state laws were not preempted by the Sherman Act, Congress would not have found it necessary to pass such statutes as the Miller-Tydings Amendment, 15 U.S.C. § 1, 50 Stat. 693, the McGuire Act, 15 U.S.C. §§ 45(a)(2)(5) (1970), 66 Stat. 632, and the McCarran-Ferguson Act 15 U.S.C. § 1011 *et seq.* (1970), 59 Stat. 34.

<sup>206</sup> 96 S. Ct. at 3126. See text accompanying notes 248-54 *infra*.

<sup>207</sup> *Id.* at 3126.

<sup>208</sup> *Id.*

Justice Blackmun determined that a standard requiring "some degree of affirmative articulation by the state of its conscientious intent to sanction the challenged scheme, and its reasons therefor" would also be inadequate.<sup>209</sup> In lieu of one of these relatively simple, outcome-determinative standards, Mr. Justice Blackmun would apply a rule of reason analysis, "taking it as a general proposition that state-sanctioned anticompetitive activity must fall like any other if its potential harms outweigh its benefits."<sup>210</sup> Applying this balancing test to Detroit Edison's light bulb exchange program, Mr. Justice Blackmun had no trouble deciding that, whatever the benefits of the plan might be, they did not justify a finding of immunity.<sup>211</sup>

## 6. The Dissent

In a lengthy dissent joined in by Justices Powell and Rehnquist, Mr. Justice Stewart forcefully and meticulously attacked the reasoning of the plurality opinion,<sup>212</sup> and disagreed sharply with the result reached by a majority of the Court.<sup>213</sup> The tone of the dissent was set in its first paragraph, where Mr. Justice Stewart stated:

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<sup>209</sup> *Id.*

<sup>210</sup> *Id.* Mr. Justice Blackmun compared his proposed benefit-harm analysis to the rationality test used in certain equal protection cases. In this connection, he implied that the mere fact of enactment would weigh on the "benefit" side of the scales, thus suggesting that to some unspecified degree the federal courts should defer to the judgment of state legislatures. Presumably, a state statute appearing on its face to conflict with federal antitrust policy would receive less deference than one apparently consistent with that policy. *Cf. United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

Nevertheless, Mr. Justice Blackmun would be reluctant to find that a statute whose justification was "at all substantial" is preempted by the antitrust laws.

A particularly strong justification exists for a state-sanctioned scheme if the State in effect has substituted itself for the forces of competition, and regulates private activity to the same ends sought to be achieved by the Sherman Act. Thus, an anticompetitive scheme which the State institutes on the plausible ground that it will improve the performance of the market in fostering efficient resource allocation and low prices can scarcely be assailed.

96 S. Ct. at 3127.

<sup>211</sup> *Id.* at 3127-28.

<sup>212</sup> *Id.* at 3128 (Stewart, J., dissenting). In addition to rejecting the arguments of the plurality opinion, a running battle with Mr. Justice Blackmun's concurring opinion is conducted in the footnotes to Mr. Justice Stewart's dissent. *See* 96 S. Ct. at 3129 n.4 and 3139 n.25.

<sup>213</sup> Both the Chief Justice and Mr. Justice Blackmun concurred in the result reached by the Court. Thus, a total of six justices agreed that the decision of the court of appeals should be reversed, and the case remanded to the district court. The formu-

I respectfully dissent from this unprecedented application of the federal antitrust laws, which will surely result in disruption of the operation of every state-regulated public utility company in the Nation and in the creation of the prospect of massive treble damage liabilities payable ultimately by the Company's customers.<sup>214</sup>

*Parker v. Brown*<sup>215</sup> provided the starting point for the dissent's analysis of the *Cantor* case. To Mr. Justice Stewart, the plurality's reliance on the "legislative history" of the *Parker* opinion, which provided the basis for the conclusion that *Parker* held only that the state itself could not be sued under the Sherman Act,<sup>216</sup> was both improper and inadequate.<sup>217</sup> The dissenting justices agreed that the narrowing of *Parker* endorsed by the plurality would "trivialize that case to the point of overruling it."<sup>218</sup> Moreover, Mr. Justice Stewart reasoned that the narrow view of *Parker* taken by the plurality is refuted by subsequent Supreme Court cases interpreting the state action doctrine, as well as by the sources on which the plurality relied. For example, in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,<sup>219</sup> the Court viewed *Parker* as holding that

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lation of the proper test to be applied in state action cases, set forth in Part III of Mr. Justice Stevens' opinion, represented the view of only five justices. Mr. Justice Blackmun articulated a different test, which would require a benefit-harm analysis. Finally, Parts II and IV of Mr. Justice Stevens' opinion, which concluded that *Parker v. Brown* applies only when the conduct of state officials or agencies is challenged, were written on behalf of a four-justice plurality of the Court.

<sup>214</sup> *Id.* at 3129 (footnote omitted).

<sup>215</sup> 317 U.S. 341 (1943).

<sup>216</sup> See 96 S. Ct. at 3114-17. (Stevens, J.).

<sup>217</sup> *Id.* at 3129-32 (Stewart, J., dissenting).

<sup>218</sup> *Id.* at 3129 (footnote omitted). The dissent also criticizes Mr. Justice Blackmun's statement that he sees "no reason to disapprove the holding in *Parker*," *id.* at 3128 n.5 (Blackmun, J., concurring), on the ground that his concurring opinion does in effect reject *Parker*.

Mr. Justice Blackmun's position is that the Sherman Act does prohibit all state-imposed restraints which do not satisfy the Sherman Act's 'rule of reason' — a view quite different from the holding in *Parker*. The fact that the *result* in *Parker* could have been reached by a different route . . . is simply irrelevant.

*Id.* at 3129 n.4 (Stewart, J., dissenting) (emphasis in original). The dissent also expressed curiosity at the willingness of five justices to "emasculate" the *Parker* holding, which in its view had been reaffirmed by the Court's recent decision in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 96 S. Ct. 1817 (1976). To the dissent, the narrowing of *Parker* was inconsistent not only with the legislative history of the Sherman Act, but also with long standing principles of stare decisis. *Id.* at 3129 n.4, citing *Edelman v. Jordan*, 415 U.S. 651, 671 n.14 (1974).

<sup>219</sup> 365 U.S. 127 (1961).

“where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out.”<sup>220</sup> Similarly, it was clear to the dissent that, in *Goldfarb v. Virginia State Bar*,<sup>221</sup> the Supreme Court acknowledged that in some circumstances the *Parker v. Brown* defense would immunize private conduct.<sup>222</sup> Thus, Mr. Justice Stewart concluded that “[l]itigation testing the limits of the state action exemption has focused on whether alleged anticompetitive conduct by private parties is indeed ‘the result of’ state action.”<sup>223</sup>

Accordingly, to the dissent, the proper disposition of *Cantor* was dictated by the Court’s prior holdings in *Parker*, *Noerr* and *Goldfarb*.

The regulatory process at issue has three principal stages. First, the utility company proposes a tariff. Second, the Michigan Public Service Commission investigates the proposed tariff and either approves it or rejects it. Third, if the tariff is approved, the utility company must, under command of state law, provide service in accord with its requirements until or unless the Commission approves a modification. The utility company thus engages in two distinct activities: it proposes a tariff and, if the tariff is approved, it obeys its terms. The first action cannot give rise to antitrust liability under *Noerr* and the second — compliance with the terms of the tariff under the command of state law — is immune from antitrust liability under *Parker* and *Goldfarb*.<sup>224</sup>

Mr. Justice Stewart concluded that, by rejecting this conclusion, the plurality had overruled “not only *Parker* but the entire body of post-

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<sup>220</sup> *Id.* at 136 (footnote omitted). To the Court in *Noerr*, it was “clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or monopoly.” *Id.*

<sup>221</sup> 421 U.S. 773 (1975).

<sup>222</sup> 96 S. Ct. at 3132-33 (Stewart, J., dissenting), citing *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 790-91 (1975).

<sup>223</sup> 96 S. Ct. at 3132. (Stewart, J., dissenting).

<sup>224</sup> *Id.* at 3133 (footnote omitted). The plurality’s reliance on *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), was viewed as misplaced. The Court had held in *Jackson* that a utility’s discontinuance of service to a customer for nonpayment of bills was not “state action” within the meaning of the Due Process Clause of the fourteenth amendment. The dissenting opinion viewed this constitutional holding as irrelevant to the question whether a utility’s conduct in compliance with a tariff constitutes “state action” for purposes of Sherman Act liability. Thus, the latter question was characterized as one of legislative intent, properly answered on the basis of a separate line of authority, *i.e.*, decisions such as *Parker* and *Noerr*. *Id.* at 3133 n.10.

*Parker* case law in this area, including *Noerr*.<sup>225</sup>

Mr. Justice Stewart then described the two-part test fashioned by the plurality. In his view, the test would focus first on whether it would be unjust to subject state-regulated utilities to antitrust liability, and second, on whether the "antitrust standards" implicit in the Sherman Act were meant to be superimposed on conduct compelled by state regulatory authority.<sup>226</sup> In the light of the Chief Justice's concurring opinion, a majority of the Court had approved the new test, at least in situations where the challenged conduct, though required by the state, is only incidental to the state's regulatory purposes.<sup>227</sup>

The new test, according to the dissent, is plainly inconsistent with the rationale of *Noerr*.<sup>228</sup> Under the first part of its test, the majority had concluded that Detroit Edison's "participation" in the decision-making process that led to mandatory implementation of the lamp exchange program was significant, and consequently, that there was nothing "unjust" about requiring the company to comply with federal antitrust laws. To accord an antitrust exemption to private persons complying with state rules or orders only if those rules or orders were adopted as the result of the state's unilateral decision, to the dissent, would conflict squarely with the teaching of *Noerr* and would penalize the First Amendment right to petition.<sup>229</sup>

<sup>225</sup> *Id.* at 3133.

<sup>226</sup> *Id.* at 3133-34.

<sup>227</sup> *Id.* Thus, even though the Michigan Public Service Commission undoubtedly had the authority to compel Detroit Edison's compliance with the lamp supply program, the regulatory purposes of the Commission were unrelated to the competitive market for the retail sale of light bulbs. The five-justice majority seemed to say that, to the extent the Commission's order had an anticompetitive impact outside the "target area" of its regulatory mandate, actions taken in compliance with that order would not enjoy an exemption from the antitrust laws. See text accompanying note 186 *supra*.

<sup>228</sup> *Id.* at 3134. The *Noerr* case held that concerted attempts to influence public officials (i.e., lobbying) are protected by the First Amendment right to petition, and do not violate the Sherman Act. *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961). The holding in *Noerr*, together with that in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), is generally referred to as the *Noerr-Pennington* doctrine. See note 82 *supra*.

<sup>229</sup> 96 S. Ct. at 3134 (Stewart, J., dissenting). Mr. Justice Stewart viewed the burden placed on the right to petition by *Cantor* as having economic as well as constitutional significance.

Today's holding will not only penalize the right to petition but may very well strike a crippling blow at state utility regulation. As the Court seems to acknowledge, such regulation is heavily dependent on the active participation of the regulated parties, who typically propose tariffs which are either adopted, rejected, or modified by utility com-

Moreover, the dissent viewed the second arm of the Court's new immunity test as "a vehicle for ad hoc judicial determinations of the substantive validity of state regulatory goals, which closely resembles the discarded doctrine of substantive due process."<sup>230</sup> The Court's references to the doctrine of implied repeal, represented by cases such as *Gordon v. New York Stock Exchange*,<sup>231</sup> were dismissed by the dissent as inapposite.<sup>232</sup> First, the dissent noted that the Supremacy Clause<sup>233</sup> prohibits the implied repeal of federal statutes by inconsistent state laws.<sup>234</sup> Second and of more concern to the dissenters, the Court's new standard would

. . . allow the federal judiciary to substitute its judgment for that of state legislatures and administrative agencies with respect to whether particular anticompetitive regulatory provisions are 'sufficiently central,' . . . to a judicial conception of the proper scope of state utility regulation.<sup>235</sup>

Mr. Justice Stewart viewed this approach as radically different from that employed in *Gordon* and the implied repeal cases,<sup>236</sup> and further-

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missions. But if a utility can escape the unpredictable consequences of the second arm of the Court's new test . . . only by playing possum — by exercising no 'options' in the Court's terminology . . . 96 S. Ct. at 3118 — then it will surely be tempted to do just that, posing a serious threat to efficient and effective regulation.

*Id.* at 3134.

<sup>230</sup> *Id.* at 3134, citing *Ferguson v. Skrupa*, 372 U.S. 726 (1963). See generally Verkuil, *State Action, Due Process and Antitrust: Reflections on Parker v. Brown*, 75 COLUM. L. REV. 328 (1975).

<sup>231</sup> 422 U.S. 659 (1975). Other cases involving the doctrine include *United States v. National Ass'n of Sec. Dealers*, 422 U.S. 694 (1975); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963); *Thill Sec. Corp. v. New York Stock Exch.*, 433 F.2d 264 (7th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971). For a discussion of the implied repeal doctrine as it applies to conflicts between the federal antitrust and securities laws, see Shenefield, *Annual Survey of Antitrust Developments 1974-75*, 33 WASH. & LEE L. REV. 259, 298-316 (1976).

<sup>232</sup> 96 S. Ct. at 3135.

<sup>233</sup> U.S. CONST., art. VI, cl. 2.

<sup>234</sup> 96 S. Ct. at 3135.

<sup>235</sup> *Id.* at 3136, (quoting the opinion of the Court at 3120 n.37 (Stevens, J.)).

<sup>236</sup> 96 S. Ct. at 3135. Referring to *Gordon* and the implied repeal cases, the dissent stated:

Those cases turned exclusively on issues of statutory construction and involved no judicial scrutiny of the abstract 'necessity' or 'centrality' of particular regulatory provisions. Instead, the federal regulatory statute was accepted as a *given*, as was the federal antitrust law. The Court's interpretative effort was aimed at accommodating these argu-

more, as a judicial usurpation of state regulatory power contrary to the expressed intentions of the framers of the Sherman Act.<sup>237</sup>

In summary, the dissent viewed the state action doctrine embodied in *Parker* and *Goldfarb* as a fundamentally sound reconciliation of the extensive jurisdictional reach of the Sherman Act<sup>238</sup> with the intention of its drafters that the Act not intrude on the regulatory authority of the sovereign states.<sup>239</sup> After *Cantor*, however, state regulatory commands that, in the view of a federal court, are unnecessary to the accomplishment of the regulatory purposes of the issuing authority, will not confer antitrust immunity on those obeying them.

ably inconsistent bodies of law, not at second-guessing legislative judgments concerning the 'necessity' for including particular provisions in the regulatory statute.

*Id.* (emphasis added) To demonstrate that the Court's approach in *Cantor* was qualitatively different from that in *Gordon* and similar cases, the dissent quoted liberally the plurality opinion's statements to the effect, *e.g.*, that the lamp supply program was not "imperative" to effective utility regulation, that utility regulation in Michigan would be able to "function effectively" without the program, and that the *Cantor* decision would leave Michigan's interest in regulating electric utilities "almost entirely unimpaired." See 96 S. Ct. at 3120 (Stevens, J.) (emphasis added).

<sup>237</sup> 96 S. Ct. at 3136-40. Quoting extensively from the legislative history of the Sherman Act, the dissent concludes that the drafters of the Act intended its reach to be coextensive with that of the commerce power, see 20 Cong. Rec. 1167 (1889), yet did not intend to "interfere with" state laws designed to "prevent and control combinations within the limits of the State." 21 Cong. Rec. 2456 (1890) (emphasis added by Mr. Justice Stewart). Rather, the Sherman Act was designed to supplement state regulatory efforts, which by necessity could not reach activities in other states. 96 S. Ct. at 3137.

The retroactive extension of the jurisdictional reach of the Sherman Act, occasioned by expansive interpretations of the Congress' power under the Commerce Clause, *e.g.*, *Wickard v. Filburn*, 317 U.S. 111 (1942), was in large part responsible for the genesis of the *Parker* doctrine. Thus, the post-New Deal concept of interstate commerce "created a potential for serious conflict between state statutes regulating commerce which, in 1890, would have been considered 'domestic' but which, in 1942, were viewed as falling within the jurisdictional reach of the Sherman Act." 96 S. Ct. at 3139. To the dissent, the state action doctrine of *Parker v. Brown*, as clarified by *Goldfarb*, provided the best possible accommodation between the "clearly expressed congressional intent not to intrude on the regulatory authority of the States" and the "judicial expansion of the jurisdictional reach of the Sherman Act." *Id.* at 3139.

<sup>238</sup> See, *e.g.*, *Hospital Bldg. Co. v. Rex Hosp. Trustees*, 96 S. Ct. 1848 (1976).

<sup>239</sup> In this connection, the dissent rejected Mr. Justice Stevens' view that the framers of the Sherman Act intended to exempt only compliance with state commands fashioned to regulate a firm's actions within the scope of its natural monopoly powers. 96 S. Ct. at 3119 (Stevens, J.). Referring to this assertion as a "Delphic reading of the Sherman Act," Mr. Justice Stewart observed that the state regulatory scheme challenged in *Parker* restrained conduct in a market that, far from being a natural monopoly, was thought to be too competitive. *Id.* at 3136 (Stewart, J., dissenting).

Thus, despite the plurality's lengthy discourse on "fairness," the dissent emphasized the simple fact that, after *Cantor*, a regulated company "may be subjected to treble damages as a penalty for its compliance with state law."<sup>240</sup>

### C. *State Action After Cantor: The New Test and Its Implications*

The antitrust laws, and especially the Sherman Act,<sup>241</sup> have long been characterized as constitutional in scope.<sup>242</sup> Therefore, like judicial interpretations of the most sweeping constitutional provisions, major antitrust decisions frequently raise many more questions than they answer.<sup>243</sup> *Parker v. Brown*<sup>244</sup> was such a case. For more than three decades *Parker* reigned as the benchmark against which countless courts measured the validity of an antitrust defendant's assertion of the "state action" defense. The Supreme Court's 1975 decision in *Goldfarb v. Virginia State Bar*<sup>245</sup> refined the concept of state action, making it clear that the exemption would apply only to conduct required, and not merely authorized, by a state. But while it narrowed the state action defense, *Goldfarb* left the rationale of *Parker* basically intact.

Rather than making further refinements to the *Parker-Goldfarb* concept of state action, the Court's recent decision in *Cantor v. Detroit Edison Co.*<sup>246</sup> appears to have superimposed several additional strata of substantive inquiry onto the analytical foundation laid in *Parker* and *Goldfarb*. Moreover, the *Parker-Goldfarb* test for state action has been relegated to the status of a threshold inquiry, possibly with little bearing on the ultimate question whether conduct commanded by the state should be immune from antitrust attack. *Cantor* is thus probably a major decision, one that may have profound effects on private antitrust enforcement and on state economic regulation. While delineation of its precise impact must await judicial interpretation of its dictates, for purposes of this survey it is appropriate to

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<sup>240</sup> *Id.* at 3140-43 (Stewart, J., dissenting).

<sup>241</sup> 15 U.S.C. § 1 *et seq.* (1970).

<sup>242</sup> *E.g.*, *United States v. Topco Associates, Inc.*, 405 U.S. 595, 610 (1972).

<sup>243</sup> An excellent example, unrelated to our discussion here, is the Supreme Court's decision in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). The *per se* rule apparently enunciated in *Schwinn* is the subject of countless lower court decisions, which have sought to define its reach on the one hand, and have created an array of exceptions to the rule on the other. See Note, *Exceptions to Schwinn's Per Se Rule: Their Validity and Implications for the Future*, 31 WASH. & LEE L. REV. 643 (1974).

<sup>244</sup> 317 U.S. 341 (1943).

<sup>245</sup> 421 U.S. 773 (1975).

<sup>246</sup> 96 S. Ct. 3110 (1976).



examine what appears to be the "new test" fashioned in *Cantor* and to discuss generally some of the decision's likely ramifications.<sup>247</sup>

### 1. The Post-*Cantor* Requisites of the State Action Exemption

At the outset, it should be noted that the *Cantor* opinion does not set forth, in step-by-step fashion, the requirements that must be met before private conduct required by state law will be exempted from antitrust liability. Nevertheless, the opinion does suggest that a number of distinct inquiries are necessary to test the validity of a particular state action defense.

First, preceding even the "threshold inquiry" referred to in *Goldfarb*<sup>248</sup> is the question of the Sherman Act's preemptive effect on inconsistent state statutes. It is clear from the language of *Parker v. Brown*,<sup>249</sup> and from other decisions of the Supreme Court,<sup>250</sup> that at least some state laws are so irreconcilable with the Sherman Act as to be unenforceable.<sup>251</sup> Yet, it is equally clear that the antitrust laws were not intended to sweep aside all state economic regulation, or the state action defense would never have evolved.<sup>252</sup> Although many statutes arguably inconsistent with the Sherman Act may be uncon-

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<sup>247</sup> Unfortunately, a detailed analysis of the many subtle implications of the *Cantor* case is beyond the scope of this survey. Some of the areas in which *Cantor* may create problems have already been discussed by other commentators. The authors would refer the reader interested in pursuing these questions to, *inter alia*, the following articles: Handler, *The Current Attack on the Parker v. Brown State Action Doctrine*, 76 COLUM. L. REV. 1 (1976); Verkuil, *State Action, Due Process and Antitrust: Reflections on Parker v. Brown*, 75 COLUM. L. REV. 328 (1975); Kintner & Kaufmann, *The State Action Antitrust Immunity Defense* 23 AM. U. L. REV. 527 (1974); Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U.L. REV. 693 (1973); Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 NW. U. L. REV. 71 (1974); Donnem, *Federal Antitrust Law v. Anticompetitive State Regulation*, 39 ANTITRUST L. J. 950 (1970); Note, *Parker v. Brown: A Preemption Analysis*, 84 YALE L. J. 1164 (1975).

<sup>248</sup> *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 (1975).

<sup>249</sup> 317 U.S. 341, 351 (1943) ("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 . . .").

<sup>250</sup> *E.g.*, *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951); *Northwestern Sec. Co. v. United States*, 193 U.S. 197 (1904).

<sup>251</sup> In his concurring opinion in *Cantor*, Mr. Justice Blackmun stated that where such laws have been invalidated, it is because they have been preempted by the Sherman Act. 96 S. Ct. at 3124-25 (Blackmun, J., concurring).

<sup>252</sup> If the Sherman Act had been intended to preempt the field, only state regulatory programs having no effect on interstate commerce could be permissible. In that event, the "state action" defense would not exist separate and apart from the defense that the challenged conduct had no effect on interstate commerce.

stitutional for reasons independent of this inconsistency,<sup>253</sup> as far as conflicts with federal antitrust policy are concerned the line between permissible and impermissible state regulation has never been clearly drawn. Obviously, if a statute is so repugnant to federal antitrust policy that it cannot be enforced, the question of state action immunity will never arise. But it remains unclear, after *Cantor*, what criteria a state regulatory statute must satisfy in order to avoid preemption by the federal antitrust laws. Implicit in the *Cantor* opinion, of course, is the assumption that the regulatory statutes governing Michigan's electric utilities are at least presumptively constitutional, and it seems safe to assume that similar legislation enacted by other states is also valid.<sup>254</sup>

Assuming that the conduct challenged in a given case is taken pursuant to a state regulatory scheme that is enforceable despite its potential conflicts with federal antitrust policy, the question arises whether such conduct is immune from the antitrust laws. After *Cantor*, it is possible that the question whether the anticompetitive activity has been "required by the State acting as sovereign" may be no more than a "threshold inquiry."<sup>255</sup> Thus, while there could be no state action exemption for conduct that is merely authorized, and not commanded, by a state, a finding that this threshold inquiry is satisfied will not automatically confer immunity.<sup>256</sup>

Moreover, it is unclear precisely which commands are those of the "State acting as sovereign." Certainly the state is acting as sovereign when conduct is required by an express statutory command. But there is less certainty, for example, where anticompetitive action is taken in compliance with orders or regulations promulgated by a state agency.<sup>257</sup> The Court in *Cantor* seems to have passed over these and other uncertainties inherent in this threshold inquiry, preferring to address them in subsequent stages of its analysis.

Having determined that anticompetitive conduct is required by state law, the *Cantor* Court next inquired whether it would be "unjust" to subject a private party to treble damages for its compliance

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<sup>253</sup> *E.g.*, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 96 S. Ct. 1817 (1976). *Gibson v. Berryhill*, 411 U.S. 564 (1973). *See also* *Consumers Union, Inc. v. American Bar Ass'n*, No. 75-0105-R (E.D. Va., filed Feb. 27, 1975).

<sup>254</sup> It should be noted that it may be argued from *Cantor* that only state laws of the sort in force when the Sherman Act was passed are presumptively valid. *See* text accompanying note 166 *supra*.

<sup>255</sup> *Cantor v. Detroit Edison Co.*, 96 S. Ct. 3110, 3121, (1976), *citing* *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 (1975).

<sup>256</sup> *See Cantor v. Detroit Edison Co.*, 96 S. Ct. 3110, 3121-22 (1976).

<sup>257</sup> *See id.* at 3117-18 (1976).

with the state's commands. For purposes of this inquiry, the Court assumed "that it would be unacceptable ever to impose statutory liability on a party who had done *nothing more* than obey a state command."<sup>258</sup> This fairness inquiry, it seems, turns on the extent to which the defendant has participated in the decision-making process that led to the adoption and enforcement of the statute or rule requiring the conduct under attack.<sup>259</sup> In *Cantor* the defendant's participation was held to be "sufficiently significant" to require that its conduct, like similar conduct by unregulated firms, comply with the federal antitrust laws.<sup>260</sup> The Court itself acknowledged that, by this standard, few defendants would ever gain immunity for having done "nothing more" than obey a state command.<sup>261</sup>

Thus, the Court indicated in *Cantor* that the fact of participation by a regulated company in a decision-making process, which ultimately results in the promulgation of orders or regulations binding on that company, is somehow relevant to the question whether the company's actions taken in compliance with those regulations should be immune from antitrust challenge. This seems ill-advised for a number of reasons. For instance, as a practical matter, the regulatory process involves so much interaction between the regulators and the regulated that it may often be impossible to pinpoint the source of a given rule or order.<sup>262</sup> Moreover, to premise a finding of antitrust liability on the fact that a private party sought to participate in the regulatory process can only discourage such participation, and this is significant for two reasons, one constitutional and one economic. First, by discouraging participation in the regulatory process, *Cantor* effectively discourages the exercise of the First Amendment right to petition the government.<sup>263</sup> The plurality offers little solace to those concerned about this implication of its holding, stating in effect that only those firms that succeed in influencing the regulatory process need fear antitrust liability.<sup>264</sup> Second, lessened participation by regulated firms in the decisions that affect them may have the additional consequence of depriving regulatory agencies of access to a substan-

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<sup>258</sup> *Id.* at 3117 (emphasis added).

<sup>259</sup> This inquiry had been foreshadowed by the *Woods Exploration* and *George R. Whitten* cases. See text accompanying notes 86 & 95 *supra*.

<sup>260</sup> 96 S. Ct. at 3119.

<sup>261</sup> *Id.* at 3118. The Court questioned whether the inquiry would ever "decide any actual case."

<sup>262</sup> *Id.* at 3126 (Blackmun, J., concurring).

<sup>263</sup> See, e.g., *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1965).

<sup>264</sup> 96 S. Ct. at 3122-23.

tial body of expertise about the very industries they are charged with regulating. This potential development would probably bode ill both for the regulated companies and the public they serve.

Nevertheless, such companies may find themselves compelled to withdraw from at least certain facets of the regulatory decision-making process, in order to limit their antitrust exposure. Under *Cantor*, if this withdrawal results in the state's participation in a decision being "so dominant that it would be unfair to hold a private party responsible for his conduct implementing it,"<sup>265</sup> then a case for immunity, at least from treble damage liability, will have been made out. In this connection, it is significant that the Michigan Public Service Commission approved the lamp supply program without any review whatsoever, since lower courts may determine that when tariff provisions are adopted by regulatory agencies after a meaningful review process, the state's role becomes "so dominant" that some sort of immunity is required.<sup>266</sup> Thus, the "fairness" standard mandated in *Cantor* provides fertile ground for a resurgence of the state action defense.<sup>267</sup>

In any event, the analysis suggested by *Cantor* requires one more step if it is determined that subjecting a defendant to treble damage liability for action taken in compliance with state law would not be unjust. At this point the question becomes whether, despite the fact that the imposition of liability would not be unjust, the existence of the state's regulatory command should give rise to an implied exemption from the antitrust laws. According to *Cantor*, the standards for ascertaining the "existence and scope" of such an implied exemption must be at least as severe as those applied when federal regulatory legislation conflicts with the antitrust laws. In such situations, the Supreme Court has refused to find an exemption unless such treatment is necessary to make the regulatory act work, and even then, the exemption is granted only to the minimum extent necessary.<sup>268</sup> As the dissent points out,<sup>269</sup> this standard of necessity requires some

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<sup>265</sup> *Id.* at 3119.

<sup>266</sup> See, e.g., *Gas Light Co. v. Georgia Power Co.*, 440 F.2d 1135 (5th Cir. 1971), cert. denied, 404 U.S. 1062 (1972).

<sup>267</sup> While there is little doubt that *Cantor* and *Goldfarb* have essentially overruled cases like *Washington Gas Light*, see text accompanying notes 69-74 *supra*, the state action exemption may still be granted, consistent with *Cantor*, in situations like that presented in the *Georgia Power* case, where regulation results from the "considered judgment of the state regulatory authority." See text accompanying notes 75-78 *supra*.

<sup>268</sup> *Id.* at 3120, citing, e.g., *United States v. National Ass'n of Sec. Dealers*, 422 U.S. 694, 720 (1975).

<sup>269</sup> 96 S. Ct. at 3135-36 (Stewart, J., dissenting).

judicial divination of the purposes underlying a state regulatory scheme since, unless the purposes are defined, it is impossible to ascertain whether the anticompetitive conduct ordered by the state is "necessary to make the regulatory act work." The process will necessarily entail some judicial review of state legislative and agency judgments concerning the "necessity" for particular conduct in the light of underlying regulatory goals.<sup>270</sup> Under this standard, the nature of the private conduct required and its relationship to legitimate regulatory objectives, rather than the fact that the conduct has been commanded by the state, may be crucial.

The standard for finding an implied exemption may be less rigorous, on the other hand, if the defendant is a state agency or a member of a state regulatory commission rather than a private person. Although the *Cantor* decision does not expressly formulate a standard applicable to "public defendants," the plurality does purport to narrow *Parker v. Brown* to the proposition that "action taken by state officials pursuant to express legislative command" does not violate the Sherman Act.<sup>271</sup> Moreover, in *Goldfarb*, the Virginia State Bar incurred antitrust liability because its actions "foster[ing] anticompetitive practices for the benefit of its members" did not further the "limited purposes" for which it was a state agency.<sup>272</sup> Thus, at least where the defendant is a regulatory agency or a full-time regulatory official, there would seem to be an exemption for conduct taken either pursuant to an express legislative command, or within the scope of a valid grant of regulatory authority.<sup>273</sup>

Where the public defendant plays a dual role, however, the standards are less clear. For example, if a member of a regulatory commission is also a sometime officer of one of the firms the commission regulates, or a member of a profession regulated by the commission, his conduct as a regulator may be subject to the antitrust laws even

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<sup>270</sup> See *id.* at 3135 (Stewart, J., dissenting). See also Verkuil, *State Action, Due Process and Antitrust: Reflections on Parker v. Brown*, 75 COLUM. L. REV. 328 (1975).

Of course, if on examination the purposes of the state regulatory statute are found to be impermissible in the light of federal antitrust policy, the statute itself may be unenforceable. See, e.g., *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). While *Cantor* did not hold that the tariff requiring Detroit Edison to implement the lamp supply program was unenforceable, it seems quite possible that, in the future, utilities themselves may have to challenge the enforceability of some regulations in order to limit their antitrust exposure.

<sup>271</sup> See text accompanying notes 155-63 *supra*.

<sup>272</sup> *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975).

<sup>273</sup> Cf. *Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

though clearly within the scope of his statutory authority. This result will be particularly likely if the members of a regulatory body take action that, though authorized, may redound to their personal benefit.<sup>274</sup> Of course, the identity of a particular state official, like the fact of participation in the regulatory process by private persons, while apparently significant for purposes of post-*Cantor* state action decisions, seems wholly irrelevant to the justification for a particular regulatory requirement from the standpoint of state economic policy.

In summary, the standards applicable to a determination whether conduct commanded by a state should be exempt from the antitrust laws may be considerably more complicated in the post-*Cantor* world. And correspondingly, assertion of the state action doctrine as a defense to antitrust claims, at least where the conduct commanded is not clearly necessary to the implementation of a legitimate regulatory scheme, will be much more difficult for both "public" and "private" antitrust defendants. The various analyses seemingly required by the melding of *Cantor* with *Parker* and *Goldfarb* contain many areas of uncertainty, one or more of which may enable subsequent decisions to restore some vitality to the state action defense. Assuming, however, that the preceding synopsis of the *Cantor* "test" is fundamentally accurate, we turn to a brief consideration of *Cantor's* implications.

## 2. *Cantor's* Implications for the Future

With its four separate opinions and multiple legal approaches, *Cantor* has produced a dimension of uncertainty that is its primary weakness. The inability of courts to provide clearer guidelines for business firms which rely on predictability as to the future is one of the costs extracted by our system of case-by-case resolution of business disputes. Courts do have an obligation to attempt to be as clear as possible when treating the legality of conventional business conduct. This is all the more true when, as in *Cantor*, firms must choose between what may be conflicting laws at the federal and state level, with penalties and forfeitures attaching to either course of conduct. In an area of such great uncertainty and hazard, the failure of the Court in *Cantor* to speak more clearly is particularly disappointing.

The uncertainty is fostered by the absence of any basis on which to predict the preempting effects of the federal antitrust laws.<sup>275</sup> Jus-

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<sup>274</sup> See, e.g., *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975); *Gibson v. Berryhill*, 411 U.S. 564, 578 (1973).

<sup>275</sup> See note 254 *supra*.

tice Blackmun's opinion deals with the question directly, but he seeks a rule of reason approach, weighing harms and benefits, a process with which, the Justice suggests, federal courts are well acquainted in the antitrust field. The fact that no other Justice joined this suggestion is significant enough, but even more important is the uselessness of such a test to guide the day-to-day practical behavior of business firms in the marketplace. It is one thing to say to a firm that its conduct will be judged under a rule of reason that balances business justifications against laws designed to protect competition, so that the desirability of competition in a particular area can be assessed in advance with some accuracy by businessmen who know the area best. It is quite another thing to say that state statutes will be weighed according to harms and benefits that must be quantified on the basis of the validity and seriousness, in the eyes of a federal court, of competing policy objectives at different levels of our federal system.

Admittedly, situations of conflict do occur within our legal system. In the area of race relations years ago, state statutes required conduct that was clearly forbidden by federal law. The distinguishing characteristic of that kind of conflict was that the inarticulate moral imperatives found within the conscience of each American citizen were the best possible guides to federal constitutional law. That can scarcely be duplicated where the conflict is between competition, on the one hand, and regulation of natural monopolies on the other, and where violation of the antitrust laws may result in a felony conviction, while violation of a regulatory order may result in loss of the license to stay in business.

Clearly, one of the major implications of *Cantor* is that regulated industries will be forced to seek through the legislative process the kind of legal framework that the *Cantor* Court might find acceptable. There is, for instance, in the concurrence of Justice Blackmun a suggestion that state law may be preempted unless it has been saved by a congressionally created exception, such as the McCarran-Ferguson Act<sup>276</sup> in the insurance industry. Some such mechanisms for a more reliable accommodation between federal antitrust policy and state regulation are certainly in order. For state economic regulation is now clearly at risk in the absence of such a federal sanction, at any moment subject to being held preempted by federal law with attendant antitrust liability for all participants, state officials as well as private firms. In light of *Cantor*, Congress must accept responsibility

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<sup>276</sup> 15 U.S.C. § 1011 *et seq.* (1970).

for creating an appropriate method of resolving the conflict, which operates clearly, in advance, and with maximum predictability. Whether Congress in its current mood of antitrust fervor will find it congenial to establish limitations on the antitrust laws, even though they are designed to sanction existing and conventionally acceptable state economic regulation, is as yet unclear.

An alternative is to seek a legislative solution that puts all economic regulation, even that governing state and local activity, at the federal level. One solution in the electric utility context described in *Cantor* might be to make the Federal Power Commission, for instance, responsible for the nationwide regulation of retail electric rates and services, thus removing state government from the business of electric utility regulation entirely. Alternatively, the federal government might choose to make delegate agencies of all state regulatory commissions, thus clothing their actions with the immunizing protection of federal authority. But nationalizing the business of economic regulation reverses 200 years of federalism and seems even less likely than our present institutions to accomplish the valid ends of regulation. Admittedly, federally regulated industries might be less subject to the unresolved conflicts between antitrust and regulation, since these would apparently be harmonized according to the principles worked out in such cases as *Gordon*,<sup>277</sup> *NASD*,<sup>278</sup> and *Ricci*.<sup>279</sup> Nevertheless, it is hard to be persuaded that the best interests of the nation's economy will have been served by centralizing all economic regulation in Washington, D.C.

The implications of *Cantor* for the shape and content of state legislation, assuming some economic regulation is to be left at the state level, are also as yet unforeseen. Relying as heavily as the case does on the explicit requirements of state legislation, apparently the only totally safe state regulatory structure is that embodied in a detailed and comprehensive statute. To put the onus for developing detailed regulatory policy on the legislature, however, is to turn back the clock in administrative practice, and to ignore the practical necessities that originally forced inexperienced legislatures to delegate powers to administrative agencies or forego regulation altogether.

If *Cantor* indeed requires state statutes to reach that level of specificity, anyone familiar with the political process is likely to see the effort as a hopeless one. As a practical matter, it is difficult enough to persuade legislatures to deal even with general subjects on a coher-

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<sup>277</sup> *Gordon v. New York Stock Exch.*, 422 U.S. 659 (1975).

<sup>278</sup> *United States v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694 (1975).

<sup>279</sup> *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289 (1973).



ent basis, much less to achieve consensus on the detailed provisions of a regulatory scheme for a highly specialized industry. Perhaps more importantly, predictability will have vanished if the legislature is itself to be the regulator, since intricate and unpopular decisions may be reversed by majority vote.

Equally as unattractive is the implication of *Cantor* for participation of private individuals in the regulatory process. The present pattern of regulation at both the federal and the state levels assumes substantial participation by private firms. Quite frequently, the initiation of various regulatory actions is at the hands of the regulated firm. Nothing about that should strike the observer as sinister or unethical, since the administrative pattern is typically one of application and approval. Moreover, the regulated firms frequently have access to expertise and other resources that are helpful in making sensible administrative decisions.

And yet *Cantor* seems to base liability on, among other things, the precise degree of participation by private firms or private individuals in the regulatory process. The inevitable tendency may be for private firms and private individuals to withdraw from the process, which in turn would deprive regulatory authorities of the expertise and data that are sometimes plentiful in the private sector. Furthermore, regulation has never sought to "plan," as that word is used by economic policymakers, but instead has left as much scope for private initiative as possible within the regulated context. The dual characteristics of control without loss of private initiative, which are part of the unique genius of American regulation, will inevitably be sacrificed if private firms are forced into silence and acquiescence in the regulatory process.

Nevertheless, the tendency to withdraw after *Cantor* will be felt. Participation in the regulatory process by private firms will surely become less useful, less constructive, more grudging. For every incident of participation may be the very item that will be seen by the courts as tipping the balance in favor of antitrust liability.

The *Cantor* decision is also disquieting because it seems to be at war with the central premise of the *Noerr-Pennington* doctrine.<sup>280</sup> If the trigger of private liability is participation in the administrative process, and nothing more, then the First Amendment no longer protects the private firm's right to petition government agencies, whether it be for a rate change, a certification of a new service or for a particular method of light bulb distribution. Thus, *Cantor* seems

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<sup>280</sup> See note 82 *supra*.

to meld an activity by a private firm hitherto thought protected by the First Amendment together with approval by a state regulatory agency, itself apparently exempt from the antitrust laws, to construct an antitrust violation for the private utility. As the dissent points out, the right to petition has arguably been transmuted from a constitutionally protected activity into the trigger of antitrust liability. It is difficult to embrace that result in light of the multitude of different ways in which private firms in this country communicate with, apply to, or seek from every kind of government agency or authority, especially because it is certain that without private action, reaction and interaction, the governmental process will suffer immeasurably.

Evidently, what the Court in *Cantor* sought was to put state regulation on the same footing vis-a-vis the federal antitrust laws as federal regulation. In cases such as *Silver*,<sup>281</sup> *Gordon*,<sup>282</sup> *NASD*<sup>283</sup> and the like, the central question is whether the conduct approved by the regulatory agency is central to the grant of regulatory authority, or to put it differently, whether there is a direct repugnance between the antitrust laws and the state regulatory scheme. The *Cantor* Court is clearly engaged in that kind of inquiry when it decides that light bulb distribution is unregulated by the State of Michigan, in spite of the fact that the conduct of Detroit Edison in distributing light bulbs is wholly subject to orders of the Michigan Public Service Commission. The premise of the Court's examination can only be that state agencies ought not to be able to repeal, by implication or otherwise, the federal antitrust laws any more easily than federal agencies.

That premise, which sounds so plausible, is hardly self-evident, however. The goal is to determine the intention of Congress. In a case involving conflicts among federal policies, the Court might well award priority to the antitrust laws. But in any balancing of federal and state policies, an additional dimension that is sometimes characterized as an incident of our federal system enters the equation. Of course Congress has the power to override conflicting state law in virtually every case. But the crucial question in the *Cantor* context is whether Congress, on behalf of federal antitrust policy, showed more deference to the interests of the states than to the policies of federal agencies. The very concept of the federal system, together with the familiar Brandeis notion that the states are testing grounds for various governmental and regulatory experiments, would suggest

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<sup>281</sup> *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963).

<sup>282</sup> *Gordon v. New York Stock Exch.*, 422 U.S. 659 (1975).

<sup>283</sup> *United States v. National Ass'n of Sec. Dealers*, 422 U.S. 694 (1975).

that identical standards in both sets of cases might not be appropriate.

The basic concern after *Cantor* must be that, in an effort to achieve preeminence for federal competition policy, the Court has managed to jeopardize the efficacy of state regulation. The implications of *Cantor* are that state regulatory commissions are impotent to protect regulated companies from conflicting legal regimes in the absence of detailed legislative prescriptions, and that the regulated firms put themselves into jeopardy by undertaking to cooperate with the state regulatory authority. In attempting to solve a major problem of federalism by seeking the adjustment of conflicting economic policies, the Court has created additional problems that can now in all likelihood only be resolved in the halls of Congress.

### III.

#### CONCLUSION

The year 1975-76 thus saw determined attempts on a variety of fronts to exalt competition policy at the expense of regulation. In Washington, both Court and legislature sought to prune away some of the constraints that have been imposed on the effectiveness of antitrust policy and enforcement. *Cantor* itself seems to point to new difficulties for regulatory authorities and the firms they regulate, and implies legal tests that make regulation both more inefficient and less acceptable to the regulated industries. It is perhaps too much to assume that the Court sees itself as cooperating with the proponents of deregulation in Congress by attempting to array even the regulated firms on the side of deregulation. And yet that may well be the result of *Cantor*, which may make regulation so unattractive and so fraught with pitfalls that even the regulated company prefers to see it end. With firms free in a natural monopoly context to reap the benefits of their market power, subsequent courts evaluating *Cantor* may well wonder whether the decision was, in the end, wise. And legislators in Congress studying deregulation proposals have the obligation to answer the questions that *Cantor* raises before washing their hands of regulation and a century of American economic history.