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PREEMPTION OF ANTICOMPETITIVE STATE STATUTES BY SECTION 1 OF THE SHERMAN ACT: IS AN AGREEMENT REQUIRED?

INTRODUCTION

States often regulate economic activity in a way that stifles the free play of market forces.¹ Such regulation may frustrate the strong federal policy embodied in Section 1 of the Sherman Act² favoring uninhibited competition.³ The supremacy clause of the Constitution⁴ requires that a state law must be preempted if it “stands as an obstacle to the accomplishment” of the objectives underlying a federal law.⁵ Thus, Section 1 has been used to challenge the validity of various state regulations on the ground that they unconstitutionally restrain trade.⁶

1. *See Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 133 (1978) (unless a state could lawfully affect competition, it would be unable to engage in economic regulation); Conant, *The Supremacy Clause and State Economic Controls: The Antitrust Maze*, 10 Hastings Const. L.Q. 255, 264-68 (1983) (discussing when state regulations do or do not conflict with federal antitrust laws); Werden & Balmer, *Conflicts Between State Law and the Sherman Act*, 44 U. Pitt. L. Rev. 1, 2-6 (1982) (discussing how state regulation can affect competition). *But see* Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. Law & Econ. 23, 33-35 (1983) (arguing that while regulation limits competition, jurisdictions compete by the bodies of laws they offer).

2. 15 U.S.C. § 1 (1982). “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” *Id.*

3. *See United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972) (the Sherman Act is the “Magna Carta of free enterprise”); *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958) (the Sherman Act is a “comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade”).

4. U.S. Const. art. VI, cl. 2.

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” *Id.*

5. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). *See generally* J. Nowak, R. Rotunda & J. Young, *Constitutional Law* 292-96 (1983) (discussing preemption). *See infra* notes 14-18 and accompanying text.

6. *See, e.g., Rice v. Norman Williams Co.*, 458 U.S. 654 (1982) (designation statute); *California Retail Liquor Dealers Ass’n v. Midcal Aluminum*, 445 U.S. 97 (1980) (state-mandated resale price maintenance); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978) (state provided for hearing procedure by which dealers could delay the opening of competing dealerships); *Bates v. State Bar*, 433 U.S. 350 (1977) (state supreme court rule banned advertising by lawyers); *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966) (price affirmation statute); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951) (state-mandated resale price maintenance); *Battipaglia v. New York State Liquor Auth.*, 745 F.2d 166 (2d Cir. 1984) (price posting and adherence to those prices), *cert. denied*, 105 S. Ct. 1393 (1985); *Miller v. Hedlund*, 579 F. Supp. 116 (D. Or. 1984) (price posting and adherence, delivered pricing and prohibition of quantity discounts); *Serlin Wine & Spirits Merchants v. Healy*, 512 F. Supp. 936 (D. Conn.) (banning sales below a statutorily defined cost), *aff’d sub nom. Morgan v. Division of Liquor Control*, 664 F.2d 353 (2d Cir. 1981).

In *Rice v. Norman Williams Co.*,⁷ the Supreme Court set out two separate and distinct analyses⁸ to be made before preemption by Section 1 can be found. First, a court must decide whether the statute contemplates conduct that will always violate Section 1.⁹ If so, the statute is preempted unless the statutory conduct is determined, under the second analysis, to be state action.¹⁰ It is well established that Congress did not intend the Sherman Act to be applied to state action no matter how anticompetitive its effect.¹¹

Because a state law must mandate a Section 1 violation before Section 1 can be deemed to preempt the state law, Section 1's requirement of an agreement in restraint of trade presents a problem. Several courts have indicated that state statutes that merely require private parties to perform well defined acts, while neither requiring collaboration with other market participants nor granting control over other market participants,

7. 458 U.S. 654 (1982).

8. The tests are separate and distinct because each analysis can be made without reference to the other. A statute can be upheld if it is state action whether or not the court determines if it violates the Sherman Act. See *George W. Cochran Co. v. Comptroller of the Treasury*, 292 Md. 3, 7-8, 11, 437 A.2d 194, 196, 198 (1981) (assuming without deciding that the statute would violate). A statute can also be upheld if it does not violate the Sherman Act, whether or not it is state action. See *Wine & Spirits Specialty, Inc. v. Daniel*, 666 S.W.2d 416, 419 (Mo.) (en banc) (not deciding state action issue), *appeal dismissed*, 105 S. Ct. 56 (1984).

9. *Rice*, 458 U.S. at 661.

10. See *id.* at 662-63 n.9 ("because of our resolution of the pre-emption issue, it is not necessary for us to consider whether the statute may be saved from invalidation under the doctrine of *Parker v. Brown*"). *Parker v. Brown*, 317 U.S. 341 (1943), established the state action doctrine by holding that the Sherman Act was not intended to prohibit States from imposing restraints on competition. *Id.* at 350-52. The state action doctrine immunizes conduct from the antitrust laws. The analysis varies depending on the identity of the actor. The conduct of a private party is deemed state action if it passes a two-pronged test. First, the conduct must be "clearly articulated and affirmatively expressed as state policy Second, the State must supervise actively any private anticompetitive conduct." *Southern Motor Carriers Rate Conference v. United States*, 105 S. Ct. 1721, 1727, 1729 (1985) (citations omitted). If the actor is a municipality, the anticompetitive conduct need only satisfy the first prong of the state action test. *Town of Hallie v. City of Eau Claire*, 105 S. Ct. 1713, 1721 (1985). Dictum indicates that the test for municipalities might also apply to state agencies. *Id.* at 1720 n.10 (dictum). Where the state itself chooses to act, such conduct automatically constitutes state action. *Hoover v. Ronwin*, 104 S. Ct. 1989, 1995-96 (1984). The state itself includes the state legislature or state supreme court. *Id.* (plurality decision in which Justices Rehnquist and O'Connor did not participate).

11. The Court has examined the question of what conduct constitutes state action in a long series of cases. See, e.g., *Southern Motor Carriers Rate Conference v. United States*, 105 S. Ct. 1721 (1985); *Town of Hallie v. City of Eau Claire*, 105 S. Ct. 1713 (1985); *Hoover v. Ronwin*, 104 S. Ct. 1989 (1984); *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97 (1980); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Bates v. State Bar*, 433 U.S. 350 (1977); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951); *Parker v. Brown*, 317 U.S. 341 (1943).

shall not be deemed to require an agreement in restraint of trade.¹² These courts conclude that the statutes do not mandate a violation and thus preemption cannot occur.¹³ This Note will argue that any statutory scheme that replaces independent decisionmaking with required concerted action contains sufficient agreement for preemption purposes. Preemption should depend on the anticompetitive effects of the conduct required and on whether the conduct is deemed to constitute state action.

Part I of this Note will examine the framework for Section 1 preemption analysis. Part II will analyze the agreement issue and its place in this framework. Part III will examine the Supreme Court cases relevant to the agreement issue. Part IV will set out the proper effect the agreement requirement should have on preemption analysis. Part V will argue that the concerns courts raise in the agreement issue indicate that they may actually be making a state action determination. Finally, Part VI will examine fairness questions raised by holding that these statutes contain an agreement sufficient for preemption.

I. PREEMPTION BY SECTION 1 OF THE SHERMAN ACT

Preemption analysis protects the constitutionally mandated supremacy of federal law.¹⁴ In certain situations, federal legislation regarding a

12. See *Miller v. Hedlund*, 579 F. Supp. 116, 120 (D. Or. 1984); *Fisher Foods v. Ohio Dep't of Liquor Control*, 555 F. Supp. 641, 646 (N.D. Ohio 1982); *Enrico's Inc. v. Rice*, 551 F. Supp. 511, 513-14 (N.D. Cal. 1982), *vacated as moot*, 730 F.2d 1250 (9th Cir. 1984); *United States Brewers Ass'n v. Healy*, 532 F. Supp. 1312, 1329-30 (D. Conn.), *rev'd on other grounds*, 692 F.2d 275 (2d Cir. 1982), *aff'd mem.*, 464 U.S. 909 (1983); *Serlin Wine & Spirit Merchants v. Healy*, 512 F. Supp. 936, 939 (D. Conn.), *aff'd sub nom. Morgan v. Division of Liquor Control*, 664 F.2d 353 (2d Cir. 1981); *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 448-49 (S.D. Ohio 1980), *aff'd in part and remanded in part*, 679 F.2d 656 (6th Cir. 1982); *Intercontinental Packaging Co. v. Novak*, 348 N.W.2d 330, 334-35 (Minn. 1984); *Wine & Spirits Specialty, Inc. v. Daniel*, 666 S.W.2d 416, 418-19 (Mo.) (en banc), *appeal dismissed*, 105 S. Ct. 56 (1984); *J.A.J. Liquor Store v. New York State Liquor Auth.*, 64 N.Y.2d 504, 524, 479 N.E.2d 779, 790-91, 490 N.Y.S.2d 143, 154-55 (1985) (Jasen, J., concurring), *appeal filed sub nom. 324 Liquor Corp. v. McLaughlin*, 54 U.S.L.W. 3039, 3044 (U.S. June 28, 1985) (No. 84-2022); see also *Morgan v. Division of Liquor Control*, 664 F.2d 353, 355 (2d Cir. 1981) (statute does not compel agreement). *But see Battipaglia v. New York State Liquor Auth.*, 745 F.2d 166, 172 n.9 (2d Cir. 1984) (*Morgan* decided on state action grounds).

13. See *Miller v. Hedlund*, 579 F. Supp. 116, 120 (D. Or. 1984); *Fisher Foods v. Ohio Dep't of Liquor Control*, 555 F. Supp. 641, 646 (N.D. Ohio 1982); *Enrico's Inc. v. Rice*, 551 F. Supp. 511, 515 (N.D. Cal. 1982), *vacated as moot*, 730 F.2d 1250 (9th Cir. 1984); *United States Brewers Ass'n v. Healy*, 532 F. Supp. 1312, 1330 (D. Conn.), *rev'd on other grounds*, 692 F.2d 275, (2d Cir. 1982), *aff'd mem.*, 464 U.S. 909 (1983); *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 448 (S.D. Ohio 1980), *aff'd in part and remanded in part*, 679 F.2d 656 (6th Cir. 1982); *Intercontinental Packaging Co. v. Novak*, 348 N.W.2d 330, 335 (Minn. 1984); *Wine & Spirits Specialty, Inc. v. Daniel*, 666 S.W.2d 416, 419 (Mo.) (en banc), *appeal dismissed*, 105 S. Ct. 56 (1984); *J.A.J. Liquor Store v. New York State Liquor Auth.*, 64 N.Y.2d 504, 524, 479 N.E.2d 779, 791, 490 N.Y.S.2d 143, 155 (1985) (Jasen, J., concurring), *appeal filed sub nom. 324 Liquor Corp. v. McLaughlin*, 54 U.S.L.W. 3039, 3044 (U.S. June 28, 1985) (No. 84-2022).

14. See generally *Conant*, *supra* note 1, at 259-61 (discussing application of the supremacy clause); *Werden & Balmer*, *supra* note 1, at 40-45 (discussing preemption

given subject will be found to be exclusive, thus preempting any concurrent state legislation.¹⁵ There are other areas, however, where the federal government and the states have concurrent power to regulate.¹⁶ In these areas, preemption occurs if the state and federal laws actually conflict, such as “‘where compliance with both federal and state regulations is a physical impossibility,’ or where the state ‘law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. . . .’”¹⁷ In this situation, preemption analysis follows a two-step process: first, determination of how the state and federal laws are construed; second, examination of whether they are in irreconcilable conflict.¹⁸

The antitrust laws allow coincident state regulation of competition.¹⁹ The Supreme Court enunciated the test for determining when a state statute is in irreconcilable conflict with Section 1 of the Sherman Act in *Rice v. Norman Williams Co.*²⁰ Different standards apply depending on whether a statute is attacked on its face or for its effects.²¹ A statute can be condemned on its face only when it mandates, authorizes or places irresistible pressure on private parties to engage in conduct constituting a per se violation²² of Section 1.²³ If the statute does not mandate conduct

where state and federal power is coincident). A state law held to be preempted is invalidated. Handler, *Antitrust—1978*, 78 Colum. L. Rev. 1363, 1379 (1978).

15. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, (1978), lists three situations where federal law will exclude any state regulation of a subject. First, pervasive federal regulation can create an inference that Congress intended to occupy the field. Second, a dominant national interest may cause preemption. Third, the federal statute's object or the character of the obligations it imposes may mandate preemption. *Id.* at 157-58 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). See generally Werden & Balmer, *supra* note 1, at 35-40 (discussing when federal legislation occupies the field); Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 Stan. L. Rev. 208, 209-17 (1959) (discussing how the scope of federal statutes is determined).

16. See Werden & Balmer, *supra* note 1, at 40-46.

17. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) and *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

18. *Perez v. Campbell*, 402 U.S. 637, 644 (1971).

19. See *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 130-34 (1978) (state law with anticompetitive effect upheld to avoid destroying the ability of the states to regulate economic activity); Conant, *supra* note 1, at 264; Werden & Balmer, *supra* note 1, at 59. See generally 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 208 (1978) (discussing the interaction of state and federal antitrust laws); *id.* ¶ 210 (discussing areas where federal law expressly defers to state law).

20. 458 U.S. 654 (1982).

21. See *id.* at 661.

22. Conduct characterized as per se unlawful is that which has been found to have a “‘pernicious effect on competition’ or ‘lack[s] . . . any redeeming virtue’” *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58 (1977) (quoting *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958)). Such conduct “‘would always or almost always tend to restrict competition and decrease output.’” *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19-20 (1979). When a per se rule is applied, a civil violation of the antitrust laws is found merely by proving that the conduct occurred and that it fell within a per se category. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 104 S. Ct. 1551, 1556 (1984); *Gough v. Rossmoor Corp.*, 585 F.2d 381, 386-89 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979);

violating a per se rule, the conduct is analyzed under the rule of reason,²⁴ which requires an examination of the conduct's actual effects on competition.²⁵ If unreasonable anticompetitive effects are created, the required conduct violates Section 1²⁶ and the statute is in irreconcilable conflict with the Sherman Act.²⁷ Then the statutory arrangement is analyzed to determine whether it qualifies as "state action" and is thereby saved from preemption.²⁸

Rice sets out guidelines to aid in preemption analysis. Preemption

see *White Motor v. United States*, 372 U.S. 253, 259-60 (1963) (a per se rule forecloses analysis of the purpose or market effect of a restraint); *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958) (same). This must be contrasted with rule of reason analysis. See *infra* note 24. Conduct considered per se unlawful includes horizontal price-fixing, *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927), market division, *United States v. Topco Assocs.*, 405 U.S. 596, 608 (1972) and vertical price-fixing, *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 102-03 (1980).

23. *Rice*, 458 U.S. at 661. If a statute does not require a per se violation, then it cannot be preempted on its face. *Id.*

24. The rule of reason is said to be the "traditional framework of analysis" to determine if Section 1 is violated. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977). The inquiry focuses on the restraint's effect on competition. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 691 (1978). The court analyzes "facts peculiar to the business, the history of the restraint, and the reasons why it was imposed," *id.* at 692, to determine the effect on competition in the relevant product market, see *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 45 (1977) (citing *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 382 (1967)), and geographic market, see *United States v. Columbia Steel Co.*, 334 U.S. 495, 519 (1948). A restraint violates Section 1 if it unreasonably restrains trade. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977); see *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911) (Congress only intended to prohibit agreements that were "unreasonably restrictive of competitive conditions").

25. See *Rice*, 458 U.S. at 661.

26. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 687-90 (1978); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977).

27. See *Battipaglia v. New York State Liquor Auth.*, 745 F.2d 166, 175 (2d Cir. 1984) (while declining to decide whether a statute required an antitrust violation in a facial attack, the court left open the possibility of preemption based on the statute's operation), *cert. denied*, 105 S. Ct. 1393 (1985); *Lanierland Distribs. v. Strickland*, 544 F. Supp. 747, 751 (N.D. Ga. 1982) (plaintiff failed to show anticompetitive effects sufficient to violate the rule of reason); *Wine & Spirits Specialty, Inc. v. Daniel*, 666 S.W.2d 416, 419 (Mo.) (en banc) (declining to decide whether the rule of reason might invalidate a law on the record before them), *appeal dismissed*, 105 S. Ct. 56 (1984); *United States Brewers Ass'n v. Director of N.M. Dep't of Alcoholic Beverage Control*, 100 N.M. 216, —, 668 P.2d 1093, 1099 (1983) (rejecting a facial attack on a statute but reserving a decision on whether the actual application of the statute might violate the antitrust laws), *appeal dismissed*, 104 S. Ct. 1581 (1984). But see *infra* note 149 for a discussion on the possibility of a much more limited rule of reason preemption analysis.

28. See *Rice*, 458 U.S. at 662-63 n.9 ("because of our resolution of the pre-emption issue, it is not necessary for us to consider whether the statute may be saved from invalidation under the [state action] doctrine"); *Capitol Tel. Co. v. New York Tel. Co.*, 750 F.2d 1154, 1157, 1165 (2d Cir. 1984) (holding that the state action doctrine protected the conduct of a private party after assuming that it violated the federal antitrust laws), *cert. denied*, 105 S. Ct. 2325 (1985); *Allied Artists Picture Corp. v. Rhodes*, 679 F.2d 656, 662 (6th Cir. 1982) (even if conduct violated Sherman Act, the statute is saved by the state action doctrine); *Miller v. Hedlund*, 579 F. Supp. 116, 124 (D. Or. 1984) (statute violating Section 1 saved by state action); *Flav-O-Rich, Inc. v. North Carolina Milk Comm'n*,

should not occur "simply because in a hypothetical situation a private party's compliance with the statute might cause him to violate the anti-trust laws."²⁹ This language suggests that preemption occurs only if economic analysis determines that the statutory requirements create "an unacceptable and unnecessary risk of anticompetitive effect,"³⁰ and does not occur simply because it is possible to use the statute in an anticompetitive manner.³¹ It should not mean that preemption is impossible whenever both procompetitive and anticompetitive results are conceivable.³² Such an interpretation would preclude preemption altogether because even restraints of trade condemned as per se violations may conceivably have no anticompetitive effects.³³ The per se rule "reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them."³⁴

Another important, yet, in the context of *Rice*, ambiguous guideline regarding preemption by Section 1 is the Court's statement that a "state statute is not preempted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect."³⁵ The meaning of this statement is clarified by examining the three cases cited in *Rice* to support the statement.³⁶

In *New Motor Vehicle Board v. Orrin W. Fox Co.*,³⁷ automobile manufacturers and retail franchisees contended that the Sherman Act preempted a statute requiring manufacturers to secure the permission of a state board before opening a new dealership if and only if a competing dealer protested.³⁸ They argued that a conflict existed because the stat-

593 F. Supp. 13, 17-18 (E.D.N.C. 1983) (though conduct violates Section 1, state action saves statute).

29. *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982).

30. *Id.* at 668 (Stevens, J., concurring in the judgment).

31. *See Grendel's Den, Inc. v. Goodwin*, 662 F.2d 88, 100 n.15 (1st Cir.) (power to control others not sufficient for facial preemption where party had no institutional reason to make anticompetitive decisions especially likely), *aff'd on other grounds*, 662 F.2d 102 (1st Cir. 1981) (en banc), *aff'd sub nom. Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982); *Flav-O-Rich, Inc. v. North Carolina Milk Comm'n*, 593 F. Supp. 13, 15 (E.D.N.C. 1983) (in an oligopolistic market, price posting would result in an antitrust violation).

32. *But cf. Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 449 (S.D. Ohio 1980) (indicating that a statute neither requiring nor permitting an anticompetitive collaboration gives the private party enough freedom of choice to preclude preemption), *aff'd in part and remanded in part*, 679 F.2d 656 (6th Cir. 1982). *See infra* note 55 for a citation of cases in which statutes that did not require collaboration among, or grant control to, private parties were held to lack the agreements necessary for an antitrust violation.

33. *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977).

34. *Id.*

35. *Rice*, 458 U.S. at 659.

36. *Id.* (citing *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 110-11 (1978); *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 129-34 (1978); *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35, 45-46 (1966)).

37. 439 U.S. 96 (1978).

38. *Id.* at 109.

ute permitted "auto dealers to invoke state power for the purpose of restraining intrabrand competition."³⁹

In *Exxon Corp. v. Governor of Maryland*,⁴⁰ oil companies challenged a state statute requiring uniform statewide gasoline prices in situations where the Robinson-Patman Act⁴¹ would permit charging different prices. They reasoned that the Robinson-Patman Act is a qualification of our "more basic national policy favoring free competition" and that any state statute altering "the competitive balance that Congress struck between the Robinson-Patman and Sherman Acts" should be preempted.⁴²

In both *New Motor Vehicle* and *Exxon*, the Court upheld the statutes and rejected the arguments presented as

merely another way of stating that the . . . statute will have an anticompetitive effect. In this sense, there is a conflict between the statute and the central policy of the Sherman Act — 'our charter of economic liberty'. . . . Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the . . . statute. For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed.⁴³

This indicates that not every anticompetitive effect warrants preemption.⁴⁴ In neither *Exxon*⁴⁵ nor *New Motor Vehicle*⁴⁶ did the created effect constitute an antitrust violation. The *Rice* guideline therefore indicates that only when the effect unreasonably restrains trade, and is therefore a violation, can preemption occur.

The third case cited to support the "anticompetitive effect" guideline is

39. *Id.* at 110.

40. 437 U.S. 117 (1978).

41. 15 U.S.C. §§ 13-13b, 21a (1982).

42. *Exxon*, 437 U.S. at 133.

43. *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 110-11 (1978) (quoting *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 133 (1978)).

44. *First Am. Title Co. v. South Dakota Land Title Ass'n*, 714 F.2d 1439, 1455 (8th Cir. 1983) (preventing a party from carrying on its business in a desired manner has an anticompetitive effect, but insufficient for preemption), *cert. denied*, 464 U.S. 1042 (1984); *Allied Artists Picture Corp., v. Rhodes*, 679 F.2d 656, 662 (6th Cir. 1982) (incidental anticompetitive effect does not warrant preemption); *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 450-51 (S.D. Ohio 1980) (rejecting argument that statute forbidding competitive practice should be preempted because on its face and in effect, it allowed and fostered competition), *aff'd in part and remanded in part*, 679 F.2d 656 (6th Cir. 1982).

45. *See P. Areeda*, *Antitrust Law* ¶ 212.3, at 52-3 & n.3 (Supp. 1982) (citing *Exxon* as demonstrating that many challenged government activities do not violate the antitrust laws). In *Exxon*, the claim was that the statute upset the mix of competitive and anticompetitive actions mandated by the Sherman and Robinson-Patman Acts. *See supra* note 42 and accompanying text.

46. *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 110 (1978) (contrasting *Schwegmann* as a case involving private conduct violating the antitrust laws, unlike the statute at issue). In addition, *New Motor Vehicle* appears to have been decided on the grounds that the conduct involved was state action. *See id.* at 109-10.

Joseph E. Seagram & Sons v. Hostetter,⁴⁷ in which the Court rejected a facial Sherman Act preemption challenge⁴⁸ to a statute requiring that persons selling liquor to wholesalers affirm that the price charged was no higher than the lowest price at which sales were made anywhere in the United States during the previous month.⁴⁹ Since the attack was a facial one, and the state law required no per se violations, no preemption could occur.⁵⁰ The Court also rejected the possibility of preemption due to Sherman Act violations stemming from misuse of the statute.⁵¹ The Court stated that rather than imposing "irresistible economic pressure" on sellers to violate the Sherman Act, the statute "appears firmly anchored to the assumption that the Sherman Act will deter any attempts by the appellants to preserve their . . . price level [in one state] by conspiring to raise the prices at which liquor is sold elsewhere in the country."⁵² Thus, *Seagram* indicates that when conduct required by a state statute combines with other conduct that, taken together, constitutes an illegal restraint of trade, liability may be imposed for the restraint without requiring preemption of the state statute.

Rice v. Norman Williams Co. supports this misuse limitation on preemption. *Rice* states that while particular conduct or arrangements by private parties would be subject to per se or rule of reason analysis to determine liability, "[t]here is no basis . . . for condemning the statute itself by force of the Sherman Act."⁵³

Thus, when a state requires conduct analyzed under the rule of reason, it appears that a court must carefully distinguish rule of reason analysis for preemption purposes from the analysis for liability purposes. To analyze whether preemption occurs, the court must determine whether the inevitable effects of a statutory restraint unreasonably restrain trade. If they do, preemption is warranted unless the statute passes the appropriate state action tests. But, when the statutory conduct combines with other practices in a larger conspiracy to restrain trade, or when the statute is used to violate the antitrust laws in a market in which such a use is not compelled by the state statute, the private party might be subjected to antitrust liability without preemption of the statute.

II. THE AGREEMENT ISSUE

A Section 1 violation has three elements. It requires an agreement; the agreement must unreasonably restrain competition; and there must be an

47. 384 U.S. 35 (1966).

48. *See id.* at 41.

49. *See id.* at 39-40.

50. *Id.* at 45-46; *see Rice v. Norman Williams Co.*, 458 U.S. 654, 660-61 (1982) (discussing *Seagram*).

51. *Seagram*, 384 U.S. at 45-46.

52. *Id.*

53. *Rice v. Norman Williams Co.*, 458 U.S. 654, 662 (1982).

effect on interstate commerce.⁵⁴ In challenges to state statutes which require all competitors to perform particular acts, but which do not grant control over or require collaboration with other market participants, several courts have held that such statutes create no agreement between competitors and therefore no Section 1 violation warranting preemption.⁵⁵ Examples include statutes requiring price affirmation,⁵⁶ statutorily defined cost markups⁵⁷ or price-posting.⁵⁸ Such a holding may

54. *E.g.*, Richter Concrete Corp. v. Hilltop Basic Resources, Inc., 547 F. Supp. 893, 917 (S.D. Ohio 1981), *aff'd*, 691 F.2d 818 (6th Cir. 1982); Consolidated Farmers Mut. Ins. Co. v. Anchor Sav. Ass'n, 480 F. Supp. 640, 648 (D. Kan. 1979); Mardirosian v. American Inst. of Architects, 474 F.Supp. 628, 636 (D.D.C. 1979).

55. *See, e.g.*, Miller v. Hedlund, 579 F. Supp. 116, 120 (D. Or. 1984); Fisher Foods v. Ohio Dep't of Liquor Control, 555 F. Supp. 641, 646 (N.D. Ohio 1982); Enrico's Inc. v. Rice, 551 F. Supp. 511, 513-15 (N.D. Cal. 1982), *vacated as moot*, 730 F.2d 1250 (9th Cir. 1984); United States Brewers Ass'n v. Healy, 532 F. Supp. 1312, 1329-30 (D. Conn.), *rev'd on other grounds*, 692 F.2d 275 (2d Cir. 1982), *aff'd mem.*, 464 U.S. 909 (1983); Serlin Wine & Spirit Merchants v. Healy, 512 F. Supp. 936, 939 (D. Conn. 1981), *aff'd sub nom.* Morgan v. Division of Liquor Control, 664 F.2d 353 (2d Cir. 1981); Intercontinental Packaging Co. v. Novak, 348 N.W.2d 330, 334-35 (Minn. 1984); J.A.J. Liquor Store v. New York State Liquor Auth., 64 N.Y.2d 504, 524, 479 N.E.2d 779, 791, 490 N.Y.S.2d 143, 154-55, (1985) (Jasen, J., concurring), *appeal filed sub nom.* 324 Liquor Corp. v. McLaughlin, 54 U.S.L.W. 3039, 3044 (U.S. June 28, 1985) (No. 84-2022); Admiral Wine & Liquor Co. v. State Liquor Auth., 61 N.Y.2d 858, 861, 462 N.E.2d 146, 146, 473 N.Y.S.2d 969, 970 (1984) (mem.). *See also* Battipaglia v. New York State Liquor Auth., 745 F.2d 166, 170-73 (2d Cir. 1984) (discussing without deciding the issue), *cert. denied*, 105 S. Ct. 1393 (1985).

56. A price affirmation statute requires that a seller post and sell prices for his goods that are no higher than the lowest price at which the goods were sold in the nation during the previous or coming month. *E.g.*, Joseph E. Seagram & Sons v. Hostetter, 384 U.S. 35, 39-40 (1966) (previous month); United States Brewers Ass'n v. Healy, 532 F. Supp. 1312, 1329 (D. Conn.) (coming month), *rev'd*, 692 F.2d 275 (2d Cir. 1982), *aff'd mem.*, 464 U.S. 909 (1983). One case resting its antitrust preemption analysis on a finding of no agreement was United States Brewers Ass'n v. Healy, 532 F. Supp. 1312, 1328-30 (D. Conn.), *rev'd on other grounds*, 692 F.2d 275 (2d Cir. 1982), *aff'd mem.*, 464 U.S. 909 (1983). *Cf.* Joseph E. Seagram & Sons v. Hostetter, 384 U.S. 35, 45-46 (1966); United States Brewers Ass'n v. Director of the N.M. Dep't of Alcoholic Beverage Control, 100 N.M. 216, ___, 668 P.2d 1093, 1099 (1983) (dismissing a facial attack but reserving judgment on an attack based on a concrete case), *appeal dismissed*, 104 S. Ct. 1581 (1984).

57. Statutes forbidding sales below cost are also characterized as mandatory markup statutes and loss leader statutes. These statutes set a minimum price consisting of statutorily defined factors and a markup. Several cases uphold such statutes as not requiring an agreement. *See* Fisher Foods v. Ohio Dep't of Liquor Control, 555 F. Supp. 641, 646 (N.D. Ohio 1982) (also holding that the statute satisfied the state action test); Serlin Wine & Spirit Merchants v. Healy, 512 F. Supp. 936, 939 (D. Conn. 1981) (also holding that the statute satisfied the state action test); J.A.J. Liquor Store v. New York State Liquor Auth., 64 N.Y.2d 504, 524, 479 N.E.2d 779, 791, 490 N.Y.S.2d 143, 154-55 (1985) (Jasen, J., concurring) (Judge Jasen also felt the statute met the state action test), *appeal filed sub nom.* 324 Liquor Corp. v. McLaughlin, 54 U.S.L.W. 3039, 3044 (U.S. June 28, 1985) (No. 84-2022). Other cases uphold such statutes on state action grounds alone. *See* Morgan v. Division of Liquor Control, 664 F.2d 353, 356 (2d Cir. 1981) (also containing language regarding agreement, but not decided on this ground); George W. Cochran Co. v. Comptroller of the Treasury, 292 Md. 3, 7, 11, 437 A.2d 194, 196, 198 (1981) (finding state action without deciding whether there was a violation). Other cases cite the similar purpose of these laws and the antitrust laws as preventing any conflict warranting preemption. *See* William Inglis & Sons Baking Co. v. ITT Continental Bak-

preclude deciding whether the statute unreasonably restrains trades⁵⁹ or whether the statute satisfies the state action doctrine.⁶⁰

The conclusion that no agreement sufficient for preemption by Section 1 is present in conduct mandated by these statutes flows from the following reasoning. Statutes requiring competitors to perform particular acts require only unilateral activity of each individual competitor.⁶¹ A statutory framework requiring all competitors to engage in the same conduct is not seen as sufficient to establish a Section 1 agreement.⁶² Thus, this

ing Co., 668 F.2d 1014, 1050 n.62 (9th Cir. 1981) (also decided on grounds that the anticompetitive effect of the statute was insufficient for preemption), *cert. denied*, 459 U.S. 825 (1982); *Baseline Liquors v. Circle K Corp.*, 129 Ariz. 215, 222, 630 P.2d 38, 45 (Ct. App.) (such a statute is not a price-fixing statute violative of the Sherman Act), *cert. denied*, 454 U.S. 969 (1981); *Walker v. Bruno's Inc.*, 650 S.W.2d 357, 367 (Tenn. 1983) (statute does the opposite of conflict with the Sherman Act); *Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co.*, 328 S.E.2d 144, 156 (W. Va. 1984) (same purpose prevents conflict). *But see Kentucky Milk Mktg. & Antimonopoly Comm'n v. Kroger Co.*, 691 S.W.2d 893, 899-900 (Ky. 1985) (striking down statute as violating state constitution but also cognizant that such statutes violate the Sherman Act).

58. Price posting statutes require that a competitor post his prices with the state and adhere to them for a period with limited opportunity to change the prices. The prices are made available to all competitors. Cases upholding these statutes as requiring no agreement include *Miller v. Hedlund*, 579 F. Supp. 116, 120 (D. Or. 1984); *Enrico's Inc. v. Rice*, 551 F. Supp. 511, 513-15 (N.D. Cal. 1982), *vacated as moot*, 730 F.2d 1250 (9th Cir. 1984); *Intercontinental Packaging Co. v. Novak*, 348 N.W.2d 330, 335 (Minn. 1984) (also holding that the state action test was satisfied); *Wine & Spirits Speciality, Inc. v. Daniel*, 666 S.W.2d 416, 418 (Mo.) (en banc), *appeal dismissed*, 105 S. Ct. 56 (1984); *Admiral Wine & Liquor Co. v. State Liquor Auth.*, 61 N.Y.2d 858, 861, 462 N.E.2d 146, 147, 473 N.Y.S.2d 969, 970 (1984) (mem.); *cf. Battipaglia v. New York State Liquor Auth.*, 745 F.2d 166, 177 (2d Cir. 1984) (upholding the statute on the grounds that the statute did not require a violation in all cases in a facial attack and that the statute was a proper exercise of the authority reserved to the state by the twenty-first amendment); *M.H. Gordon & Son, Inc. v. Alcoholic Beverages Control Comm'n*, 14 Mass. App. Ct. 973, 975, 438 N.E.2d 1095, 1097-98, (1982) (statute met state action test). *But see Knudsen Corp. v. Nevada State Dairy Comm'n*, 676 F.2d 374, 378-79 (9th Cir. 1982) (lower court did not abuse its discretion in finding that the anticompetitive effect of a price posting statute would cause irreparable harm to the public); *Flav-O-Rich v. North Carolina Milk Comm'n*, 593 F. Supp. 13, 15-17 (E.D.N.C. 1983) (holding the statute violated the antitrust laws, but was saved by state action); *Lewis-Westco & Co. v. Alcoholic Beverage Control Appeals Bd.*, 136 Cal. App. 3d 829, 840, 186 Cal. Rptr. 552, 560 (preempting the statute), *cert. denied*, 464 U.S. 863 (1983); *see also Louis Finocchiaro, Inc. v. Nebraska Liquor Control Comm'n*, 217 Neb. 487, 496, 351 N.W.2d 701, 706-07 (1984) (price posting was a price-fixing statute and thus invalid under the due process clause of the state constitution). *But see, infra* notes 127-33 and accompanying text for a discussion that *Miller* was decided on no violation grounds.

59. *See, e.g. Enrico's Inc. v. Rice*, 551 F. Supp. 511, 515 (N.D. Cal. 1982), *vacated as moot*, 730 F.2d 1250 (9th Cir. 1984); *Admiral Wine & Liquor Co. v. State Liquor Auth.*, 61 N.Y.2d 858, 861, 462 N.E.2d 146, 147, 473 N.Y.S.2d 969, 970 (1984) (mem.).

60. *Wine & Spirits Speciality, Inc. v. Daniel*, 666 S.W.2d 416, 419 (Mo.) (en banc), *appeal dismissed*, 105 S. Ct. 56 (1984).

61. *Miller v. Hedlund*, 579 F. Supp. 116, 120 (D. Or. 1984); *Enrico's Inc. v. Rice*, 551 F. Supp. 511, 515 (N.D. Cal. 1982), *vacated as moot*, 730 F.2d 1250 (9th Cir. 1984); *United States Brewers Ass'n v. Healy*, 532 F. Supp. 1312, 1330 (D. Conn.), *rev'd on other grounds*, 692 F.2d 275 (2d Cir. 1982), *aff'd mem.*, 464 U.S. 909 (1983).

62. *See Enrico's Inc. v. Rice*, 551 F. Supp. 511, 513-15 (N.D. Cal. 1982) (rejecting claim that statute was "glue" providing agreement), *vacated as moot*, 730 F.2d 1250 (9th

approach concludes that when competitors are compelled by statute to engage in parallel conduct, such arrangements differ from arrangements created by private agreements and so avoid impinging on the congressional antitrust objectives served by limiting Section 1 to restraints created by agreement.⁶³ These cases would appear to limit preemption by Section 1 to statutes that either require collaboration between market participants or give certain market participants the power to control the conduct of other market participants.⁶⁴

III. THE AGREEMENT REQUIREMENT AND THE SUPREME COURT

The Supreme Court has analyzed a range of restraints created by state statutes that were challenged on preemption grounds.⁶⁵ Examining several of these helps determine the kinds of statutory frameworks that provide a sufficient agreement for Section 1 preemption.

In *Parker v. Brown*,⁶⁶ the Court dealt with a state statute authorizing the establishment of marketing programs. The Court characterized the statute's purpose as to restrict competition among producers and to maintain the producers' prices.⁶⁷ The statute created a procedure by which a commission chosen by the producers could create a marketing scheme which, if approved by the competitors, was intended to stabilize the market by limiting when and how much of each producer's product would be sold.⁶⁸ The Court assumed that this conduct would violate Section 1 if privately organized,⁶⁹ but that the conduct was not subject to Section 1 because it was state action.⁷⁰

In *Goldfarb v. Virginia State Bar*,⁷¹ the state bar, a state agency under Virginia law,⁷² was held to have violated Section 1 by punishing deviation from minimum fee schedules set by the county bars,⁷³ which were private parties.⁷⁴ The state bar had been insufficiently authorized by the

Cir. 1984); *Intercontinental Packaging Co. v. Novak*, 348 N.W.2d 330, 334 (Minn. 1984) (statute is not the equivalent of an agreement).

63. See *Battipaglia v. New York State Liquor Auth.*, 745 F.2d 166, 173 (2d Cir. 1984) (summarizing the appeal of this approach as the fact that "state compulsion of individual action is the very antithesis of an agreement").

64. This is because a finding of no agreement is sufficient to preclude preemption, see *supra* notes 59-60 and accompanying text, and because this finding occurs, under the rationale outlined *supra* notes 61-64 and accompanying text, whenever parties are simply required to perform an act.

65. While not all relevant to the discussion here, these would include the state action cases cited in *supra* note 11.

66. 317 U.S. 341 (1943).

67. See *id.* at 346.

68. *Id.* at 346-48.

69. See *id.* at 350.

70. See *id.* at 352.

71. 421 U.S. 773 (1975).

72. *Id.* at 789-90.

73. See *id.* at 791-92.

74. See *id.* at 790.

state to make its conduct state action.⁷⁵ Though a violation was found, this case is analogous to a situation where the regulations of a state agency are preempted.

These cases indicate that authorization or compulsion by state governmental authority of collaboration between private competitors regarding anticompetitive practices may be preempted by Section 1 if the collaboration does not meet the standards for state action. For example, a state's requirement that private parties collaborate to fix their prices, without supervising the prices set, would be preempted.⁷⁶ Therefore, such collaboration must be an agreement sufficient to satisfy the violation element of preemption analysis.

In two cases, the Court has struck down statutes authorizing primarily vertical restraints. The first was *Schwegmann Brothers v. Calvert Distillers Corp.*⁷⁷ The statute authorized liquor distributors to enforce the resale price maintenance provisions of a contract entered into with one retailer against all retailers in the state.⁷⁸ Resale price maintenance is a per se violation of Section 1.⁷⁹ Yet contracts authorized by state law were exempted from the application of the antitrust laws by the Miller-Tydings Act at that time.⁸⁰ Nevertheless, the Court struck down the provision enforcing such contracts against nonsigners.⁸¹ In the second case, *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*,⁸² the statute required wine producers and wholesalers to file "fair trade" contracts or price schedules with the state.⁸³ If producers had not set prices through a fair trade contract, wholesalers were required to post a resale price.⁸⁴ Retailers could sell only at prices either set out in a fair trade contract or posted.⁸⁵ In addition, the state was divided into trading areas.⁸⁶ Prices posted by a single wholesaler bound all other wholesalers in that trading area.

Another statute imposing what was characterized⁸⁷ as a vertical non-price restraint was analyzed in *Rice v. Norman Williams Co.*⁸⁸ The statute gave brand owners the power to limit the persons who could import

75. *Id.*

76. See P. Areeda & D. Turner, *supra* note 19, ¶ 213b, at 74.

77. 341 U.S. 384 (1951).

78. *Id.* at 387 & n.2.

79. See *id.* at 386.

80. *Id.* The Miller-Tydings Act, ch. 690, 50 Stat. 693 (1937), repealed by Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801.

81. See *Schwegmann*, 341 U.S. at 395.

82. 445 U.S. 97 (1980).

83. *Id.* at 99. A "fair trade" contract was one giving a seller the power to set the price at which others would resell goods purchased from it.

84. *Id.*

85. *Id.*

86. *Id.* at 99-100.

87. The Supreme Court implicitly rejected the horizontal characterization given the statute by the California Court of Appeal by holding that it was a nonprice vertical restraint. See *Rice v. Norman Williams Co.*, 458 U.S. 654, 658, 661-62 (1982).

88. 458 U.S. 654 (1982).

the brand owner's brand into that state from other states.⁸⁹ The statute only allowed importation of a brand by someone authorized by the brand owner or the brand owner's authorized agent.⁹⁰ Since vertical nonprice restraints are subject to the rule of reason,⁹¹ the Court held that this statute could not be preempted by a facial attack.⁹²

These cases show that the agreement element raises no obstacles to preemption where the state enforces the ability of one party to control another party. The Court's language in *Rice* requiring a "violation"⁹³ referred to a determination of whether the required restraint unreasonably restrained trade. It was not intended to incorporate into preemption analysis all of the agreement analysis developed to determine private liability.

In *Joseph E. Seagram & Sons v. Hostetter*, however, the conduct involved was imposed by the state legislature.⁹⁴ The statute did not require any collaboration between, or grant any control over, other market participants.⁹⁵ The Court might have held that preemption was precluded by the absence of an agreement, since no elements of collaboration or control were present.⁹⁶ Instead, the Court determined, as in *Rice*, that a restraint analyzed under the rule of reason could not be preempted on its face by Section 1.⁹⁷ *Seagram* appeared to focus preemption analysis on the acts of each individual competitor by stating that "[t]he bare compilation, without more, of price information on sales to wholesalers and retailers to support the affirmations filed with the State Liquor Authority would not of itself violate the Sherman Act."⁹⁸ Yet, to support this statement, the Court cited a case dealing with whether an agreement to disseminate particular categories of information among competitors would necessarily tend to lessen production arbitrarily or to raise prices,⁹⁹ not with whether an agreement was present. Thus, *Seagram* actually focused on the anticompetitive effect of a restraint imposed on all competitors by

89. *Id.* at 656-57.

90. *Id.*

91. *Id.* at 661.

92. *See id.*

93. *See id.*

94. *See* 384 U.S. 35, 39 (1966).

95. *See id.* at 45 (statute only required the individual compilation of price information to support the requirements of the price affirmation statute).

96. *See* *United States Brewers Ass'n v. Healy*, 532 F. Supp. 1312, 1329-30 (D. Conn.) (price affirmation statute did not require an agreement and thus was not preempted), *rev'd on other grounds*, 692 F.2d 275 (2d Cir. 1982), *aff'd mem.*, 464 U.S. 909 (1983).

97. *See* *Rice v. Norman Williams Co.*, 458 U.S. 654, 660-62 (1982) (discussing *Seagram* and analogizing it to *Rice*).

98. *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35, 45 (1966).

99. *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 585 (1925) (cited in *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35, 45 (1966)). The Court underscored this emphasis on the type of information made available by comparing *Maple Flooring* with *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921), wherein it was held that the degree and type of information exchanged was such that a conspiracy to restrain trade would result.

a statutory framework, not the conduct required of each competitor. The Court did not view the congressional objectives in limiting Section 1 to restraints created by agreements as limiting preemption to statutes involving collaboration or granting control because if it had, cases finding no agreement would have been cited.

IV. THE PROPER LIMITS ON PREEMPTION SET BY THE AGREEMENT REQUIREMENT OF SECTION 1

The congressional purpose behind limiting Section 1 to restraints created by agreement was to preserve independent markets.¹⁰⁰ This purpose was summarized in *Copperweld Corp. v. Independence Tube Corp.*:¹⁰¹

Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction.¹⁰²

The rationale underlying the agreement requirement in Section 1 is that so long as market participants respond independently to economic conditions, the self-regulating market mechanism of competitors can ensure allocative efficiency.¹⁰³ Agreements, however, allow market participants to subvert competition by concerted action that can limit the number of choices available in the market.¹⁰⁴

Statutes that require parallel conduct eliminate individual responses to market conditions more effectively than private agreements because private cartels are often unstable due to the diverging self interests of the participants as market conditions change.¹⁰⁵ This instability cannot occur when the restraint is enforced by the state.

100. This can be seen in Senator Sherman's emphasis that the bill would only "prevent and control combinations made with a view to prevent competition", 21 Cong. Rec. 2457 (1890) (remarks of Sen. Sherman), and would not affect lawful combinations that did "not combine to prevent competition," *id.* Senator Pugh, who, as a member of the Senate Judiciary Committee, was second only to Sherman in importance to the legislative history of the statute, Bork, *Legislative Intent and the Policy of the Sherman Act*, 9-11 J.L. & Econ. 7, 17 (1966), stated that trusts and combinations were contrary to the public policy of the United States because they "hinder, interrupt, and impair the freedom and fairness of commerce with foreign nations and among the States." 21 Cong. Rec. 2558 (1890) (remarks of Sen. Pugh).

101. 104 S. Ct. 2731 (1984).

102. *Id.* at 2741.

103. See *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958) (competition is the best way to ensure allocative efficiency).

104. See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 389 (1951) ("when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids").

105. See P. Areeda, *Antitrust Analysis* ¶ 318, at 346-49 (3d ed. 1981).

To some extent, all business regulation undermines the congressional desire to prevent concerted market action embodied in the agreement requirement. However, the creation of concerted market action is not enough for preemption by Section 1. Two limits on the types of concerted action which may be preempted prevent vast categories of state regulation from being rendered void. First, the concerted action must unreasonably restrain trade.¹⁰⁶ Second, the restraint must not be state action.¹⁰⁷

Because statutes imposing restraints on each market participant create concerted action that undermines the purpose of the agreement requirement of Section 1, preemption should not be limited to statutes requiring collaboration or granting control. Whether a statute requires each private party to engage in conduct sufficient for Section 1 liability should be irrelevant.¹⁰⁸ Any statutory framework eliminating independent decisionmaking with regard to trade practices must be examined to determine its anticompetitive effect and whether the restraint constitutes state action.

This analysis gains support, and an approach incorporating agreement analysis for determining liability is discredited, in *Schwegmann Brothers v. Calvert Distillers Corp.*, where the Court struck down a state law enforcing resale price maintenance contracts against nonsigners.¹⁰⁹ The parties attempting to enforce the contract's provisions against nonsigners argued that the Sherman Act forbids only agreements restraining trade. Thus, to preempt the requirement that nonsigners adhere to resale price maintenance terms in a contract, such adherence must be the equivalent of an agreement.¹¹⁰ Therefore, under the antitrust exemption in effect at that time, which immunized resale price maintenance agreements authorized by state law,¹¹¹ the nonsigner provision was either immunized by the exemption as an agreement or outside the scope of Section 1 as lacking an agreement.¹¹² The Court rejected this argument by reasoning that the exemption sanctioned consensual agreements and was not price-fixing accomplished by coercion.¹¹³ "[W]hen a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids. . . . [W]hen retailers are *forced* to abandon price competition, they are driven into a compact in violation of the spirit of the

106. See *supra* note 27 and accompanying text.

107. See *supra* note 28 and accompanying text.

108. See Werden & Balmer, *supra* note 1, at 60. See generally Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. Rev., 693, 698-703 (1974) (state laws hindering the "spirit" of the Sherman Act may be preempted though the conflict may not be an express violation).

109. See *supra* notes 77-81 and accompanying text.

110. *Schwegmann*, 341 U.S. at 387.

111. See Miller-Tydings Act, ch. 690, 50 Stat. 693 (1937), *repealed by* Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801.

112. *Schwegmann*, 341 U.S. at 387.

113. See *id.* at 388.

proviso which forbids 'horizontal' price fixing."¹¹⁴ Thus, although the distributor had made no agreement with the nonsigner and there was no unlawful private action that violated the antitrust laws, preemption occurred.¹¹⁵ This indicates that preemption and liability are not necessarily coextensive, and that an "agreement" insufficient for liability can cause preemption.

Further support for an approach focusing on the entire statutory framework to determine if concerted action is present can be found in Justice Rehnquist's dissenting opinion in *Community Communications Co. v. City of Boulder*,¹¹⁶ in which he first suggested the preemption standards later accepted by the Court in *Rice v. Norman Williams Co.*¹¹⁷ Justice Rehnquist stated in *Boulder* that the first step in Sherman Act preemption analysis should be either a determination or assumption "that the regulatory program would violate the Sherman Act if it were conceived and operated by private persons."¹¹⁸ Thus, whether the statute encompasses collaboration or enforces control is not dispositive. The total effect of the statute should be examined to determine if concerted action is created. Any concerted action unreasonably restraining interstate commerce which is not state action should be preempted.

Several courts appear to accept this principle by holding that statutes that simply require a party to engage in certain practices might force a Section 1 violation.¹¹⁹ One case finding preemption of such a statute, *Lewis Westco & Co. v. Alcoholic Beverage Control Appeals Board*,¹²⁰ stated that the proper analysis should focus on "the effect of the statutory pricing scheme rather than its form."¹²¹ This language has been criticized¹²² for going against the guideline in *Rice v. Norman Williams Co.* that preemption should not occur "simply because the state scheme

114. *Id.* at 389 (citations omitted) (emphasis in original).

115. See P. Areeda & D. Turner, *supra* note 19, ¶ 209, at 61.

116. 455 U.S. 40, 60 (1982) (Rehnquist, J., dissenting).

117. Compare *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 68-69 & n.5 (1982) (Rehnquist, J., dissenting) with *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982) (outlining a two-step violation and state action analysis).

118. *Community Communications Co.*, 455 U.S. at 69 n.5 (Rehnquist, J., dissenting).

119. See *Knudsen Corp. v. Nevada State Dairy Comm'n*, 676 F.2d 374, 378-79 (9th Cir. 1982) (holding that trial court did not abuse its discretion by preliminarily enjoining the enforcement of a priceposting statute); *Flav-O-Rich, Inc. v. North Carolina Milk Comm'n*, 593 F. Supp. 13, 15 (E.D.N.C. 1983) (holding that a statute resulting in price exchanges between competitors in an oligopolistic market violated Section 1); *Lewis-Westco & Co. v. Alcoholic Beverage Control Appeals Bd.*, 136 Cal. App. 3d 829, 839-40, 186 Cal. Rptr. 552, 559-60 (1982) (holding that priceposting statute was preempted by Section 1), *cert. denied*, 464 U.S. 863 (1983); *cf.* *Louis Finocchiaro, Inc. v. Nebraska Liquor Control Comm'n*, 217 Neb. 487, 496, 351 N.W.2d 701, 706 (1984) (holding a prohibition against quantity discounts and limitations on price reductions were price-fixing statutes violating the due process clause of the state constitution).

120. 136 Cal. App. 3d 829, 840, 186 Cal. Rptr. 552, 560 (1982), *cert. denied*, 464 U.S. 863 (1983).

121. *Id.* at 835, 186 Cal. Rptr. at 556 (emphasis in original).

122. See *Miller v. Hedlund*, 579 F. Supp. 116, 120 (D. Or. 1984).

might have an anticompetitive effect."¹²³ This criticism may be interpreting the *Rice* guidelines as incorporating into preemption analysis the liability doctrine that consciously parallel conduct is insufficient to establish an agreement for liability.¹²⁴ Yet the basis for the doctrine in the liability context is that parallel conduct should not be penalized where it results from independent decisionmaking,¹²⁵ unlike the situation where a statute causes the conduct. The *Rice* language should be interpreted as meaning that the potential misuse of a statute by a private party is not a ground for preemption, and that a statute that does not unreasonably restrain trade should not be preempted.¹²⁶

An alternate analysis also allowing the preemption of statutes that require parties to perform particular acts is possible. *Miller v. Hedlund*¹²⁷ is a case cited as supporting the proposition that price posting statutes and post off statutes do not require an agreement and thus could not be preempted.¹²⁸ While there is language to this effect,¹²⁹ the case also held that statutes that require each individual competitor to quote only prices at delivery and that forbid giving quantity discounts violated the Sherman Act.¹³⁰ The court noted that "the State . . . forces all wholesalers to agree to abide by these restraints as a condition for continuing to do business"¹³¹ This was an agreement sufficient for preemption.¹³² The court then noted that the price posting and post off rules also contain "an element of agreement," but that "it is not an antitrust violation for a number of wholesalers to adhere to their own publically-known prices."¹³³ Thus *Miller* actually was decided on the ground that the restraint did not unreasonably restrain trade. The case suggests that the implicit agreement between competitors to obey the law is a sufficient agreement for preemption.

Implicit agreements sufficient for preemption are present in all statutory frameworks requiring concerted action. Several courts have distinguished the statute preempted in *Midcal* from statutes simply requiring conduct by stating that the resale price maintenance compelled in *Midcal* contained an implicit agreement.¹³⁴ If we interpret this to mean that

123. *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982).

124. See *Intercontinental Packaging Co. v. Novak*, 348 N.W.2d 330, 335 (Minn. 1984).

125. See Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 658-59 (1962).

126. See *supra* notes 35-46 and accompanying text.

127. 579 F. Supp. 116 (D. Or. 1984).

128. See *Battipaglia v. New York State Liquor Auth.*, 745 F.2d 166, 173 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 1393 (1985).

129. See *Miller v. Hedlund*, 579 F. Supp. 116, 121 (D. Or. 1984) ("These provisions are not preempted because as to the essential activity to which they relate—pricing—the provisions do not require inter-wholesaler agreement or concerted action.").

130. See *id.* at 121.

131. *Id.*

132. *Id.*

133. *Id.* at 121 n.3.

134. See, e.g., *Battipaglia v. New York State Liquor Auth.*, 745 F.2d 166, 172 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 1393 (1985); *Enrico's Inc. v. Rice*, 551 F. Supp. 511, 514

only vertical restraints can be preempted, we are forgetting that statutes requiring horizontal collaboration or allowing some competitors to control others may be preempted,¹³⁵ and that horizontal elements of the statute in *Midcal* were also preempted.¹³⁶ Limiting preemption to vertical statutory restraints would result in protecting horizontal restraints, which are almost universally condemned, and not vertical restraints, whose anticompetitiveness is debated.¹³⁷ If we distinguish *Midcal* by simply arguing that only statutes giving private parties control over others or fostering collaboration may be preempted, we forget the threat to the policy underlying the agreement requirement whenever concerted action is present.

Although agreements to obey the law may provide a more comfortable basis for preemption for some courts, this is an unnecessary fiction. The better approach would be to evaluate the concerted action brought about by the statute against the Sherman Act.

V. THE "NO AGREEMENT" ANALYSIS AS A STATE ACTION DETERMINATION

Each step of the *Rice* preemption analysis addresses different policies. Establishing a violation ensures that preemption is limited to statutes creating anticompetitive effects.¹³⁸ The state action doctrine allows states to regulate in a way that fosters benefits other than competition.¹³⁹ When the state regulates private parties, the state action doctrine requires that the private parties act pursuant to a clearly articulated state policy and that they be supervised actively by the state.¹⁴⁰ If this test is passed, the state law will not be preempted. Compulsion by a statute is almost con-

(N.D. Cal. 1982), *vacated as moot*, 730 F.2d 1250 (9th Cir. 1984); *United States Brewers Ass'n v. Healy*, 532 F. Supp. 1312, 1329 (D. Conn.), *rev'd on other grounds*, 692 F.2d 275 (2d Cir. 1982), *aff'd*, 464 U.S. 909 (1983).

135. See *supra* notes 66-76 and accompanying text.

136. See *supra* note 86 and accompanying text.

137. See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 70 (1977) (White, J., concurring) (arguing that the majority's holding that nonprice vertical restraints should be subject to the rule of reason because such restraints can be procompetitive might also apply to vertical price restraints for the same reason). See also *Battipaglia v. New York State Liquor Auth.*, 745 F.2d 166, 179 (2d Cir. 1984) (Winter, J., dissenting), *cert. denied*, 105 S. Ct. 1393 (1985).

138. See P. Areeda, *Antitrust Law* § 212.13, at 53 n.3 (Supp. 1982) (an anticompetitive effect that is not a violation should not cause preemption). See *supra* note 45.

139. See P. Areeda & D. Turner, *supra* note 19, § 212a, at 69 (Part of the rationale of the *Parker* case was that applying the Sherman Act to states would have removed their authority "to adopt other than a regime of competition."); Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After Midcal Aluminum*, 61 B.U. L. Rev. 1099, 1104-09 (1981) (the state action doctrine was developed as part of the movement away from substantive due process invalidation of state law and toward deference to considered state economic choices).

140. See *Southern Motor Carriers Rate Conference v. United States*, 105 S. Ct. 1721, 1727-29 (1985) (describing *Midcal* test and holding it applies to private parties).

clusive evidence that the act follows state policy,¹⁴¹ but may not sufficiently satisfy the supervision requirement.¹⁴²

The question addressed by the supervision prong of the state action doctrine is "whether the operative decisions about the challenged conduct are made by public authorities or by the private parties themselves."¹⁴³ Professors Areeda and Turner discuss situations in which "the initial legislative decision may leave nothing further to be decided by the relevant private parties, as well as nothing for the state to supervise."¹⁴⁴ These statutes are characterized as "self executing" because "the initial enactment would be a legislative decision that would itself satisfy the supervision requirement."¹⁴⁵ Thus a self-executing statute that compelled conduct would qualify as state action.

This Note suggests that courts saying that preemption is precluded because no agreement is present actually mean that the statute is self-executing and that all conduct pursuant to it is therefore state action. The "no agreement" analysis is concerned with the fact that any anticompetitive concerted action regarding prices is a product of private decisions.¹⁴⁶ But rule of reason analysis is sufficiently sophisticated to condemn agreements regarding practices that are only indirectly con-

141. *Id.* at 1729; see *Town of Hallie v. City of Eau Claire*, 105 S. Ct. 1713, 1720 (1985).

142. See P. Areeda, *supra* note 45, ¶ 212.5, at 60.

143. P. Areeda & D. Turner, *supra* note 19, ¶ 213b, at 73.

144. *Id.* ¶ 213d, at 76.

145. *Id.*; see *Allied Artists Picture Corp. v. Rhodes*, 679 F.2d 656, 662 (6th Cir. 1982) (describing a trade screening requirement as self-executing and therefore satisfying the supervision prong). It is unclear what constitutes sufficient supervision. See *Battipaglia v. New York State Liquor Auth.*, 745 F.2d 166, 176-77 (2d Cir. 1984) *cert. denied*, 105 S. Ct. 1393 (1985). Compare *Morgan v. Division of Liquor Control*, 664 F.2d 353, 355 (2d Cir. 1981) (enforcement of a detailed statutory pricing mechanism should be sufficient supervision) with *Miller v. Oregon Liquor Control Comm'n*, 688 F.2d 1222, 1225 (9th Cir. 1982) (examination of the prices posted to determine if they are reasonable is necessary). Resolution of this issue is necessary to determine the type of statute that can be self-executing. Justice Stevens' concurring opinion in *Rice v. Norman Williams Co.*, 458 U.S. 654, 665 (1982) (Stevens, J., concurring in the judgment) sets out an analysis that indicates that certain statutes are always state action. If a statute contemplates a private market decision enforced by a nonmarket mechanism, the court determines whether the power given to the private party creates an unacceptable and unnecessary risk of anticompetitive effect by giving an unreasonable degree of unsupervised power to regulate to the private party. *Id.* at 668-69 (Stevens, J., concurring in the judgment). A public regulatory scheme, which does not grant private parties any private regulatory power, is permissible. *Id.* at 665 n.1 & 667 n.2 (Stevens, J., concurring in the judgment). It appears that Justice Stevens' public regulatory scheme is the equivalent of a self-executing statute, because both focus on the lack of any supervision problems.

146. See, e.g., *Miller v. Hedlund*, 579 F. Supp. 116, 121 (D. Or. 1984) ("[T]here is no reason why the . . . price . . . should not gravitate down to its most competitive level, absent some sort of private agreement to use the regulations for anticompetitive purposes.") (emphasis in original); *Intercontinental Packaging Co. v. Novak*, 348 N.W.2d 330, 335 (Minn. 1984) (whether to amend prices is a decision left to the individual wholesaler); *Wine & Spirits Specialty, Inc. v. Daniel*, 666 S.W. 2d 416, 418 (Mo. 1984) (en banc) (any price change by wholesalers pursuant to the statute is based on their independent judgment), *appeal dismissed*, 105 S. Ct. 56 (1984).

cerned with the price or output of a product.¹⁴⁷ Judicial experience has found certain restraints with such indirect effects to be so anticompetitive that they are subject to the per se rule.¹⁴⁸ Economic analysis of the relevant market should determine the scope of the effects of a restraint that is examined for preemption purposes.¹⁴⁹ Then the state action doctrine will determine who is making the decisions regarding the restraint and what aspects of the restraint should be protected by state action.¹⁵⁰ These determinations should not be made when a court analyzes whether violative conduct is caused by the statute.

Resolving state action issues by holding that no violation is present causes problems. The "no agreement" analysis seems to immunize automatically any statutory arrangement, of any governmental body, that merely requires conduct. This Note has argued that such statutes may impinge on congressional objectives, and that sorting between those that do and do not should be done by investigating the degree of anticompetitive effect and by applying the state action doctrine. For example, a municipal statute that was self-executing at the city government level still might not follow any clearly articulated state policy and thus would not be state action.¹⁵¹ Protecting such a statute would be unjustified.

147. This is seen in the Supreme Court's cases regarding data dissemination. See *United States v. Container Corp. of Am.*, 393 U.S. 333, 337 (1969) (irresistible inference that a casual agreement to exchange price information would stabilize prices); *United States v. American Linseed Oil Co.*, 262 U.S. 371, 390 (1923) (price information exchange had the "necessary tendency" of suppressing competition); *American Column & Lumber Co. v. United States*, 257 U.S. 377, 399 (1921) (exchange of price information did not have a definite agreement as to production and prices, but this was supplied by man's "inherent disposition to make all the money possible").

148. *E.g.*, *United States v. Topco Assocs.*, 405 U.S. 596, 608 (1972) (horizontal market division, whether or not accompanied by other restraints, is per se illegal).

149. See *supra* notes 24-27 and accompanying text. An alternative that precludes preemption where a private party had the option to act competitively could arguably be justified by the Supreme Court's language regarding hypothetical conflict, see *supra* note 30 and accompanying text, and by the presumption against the preemption of state law by federal law. See *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 446 (1960); *Handler*, *supra* note 14, at 1380. However, the logical result of such an approach would be to limit severely rule of reason preemption. This is because any statutory practice not a per se violation and not otherwise directly concerned with price or output would be presumed to not cause the self interested anticompetitive decisions of private parties where procompetitive decisions were possible. It would create an arbitrary distinction among restraints that indirectly affect price and output by only preempting those that almost always are unreasonably anticompetitive, and therefore are subject to per se rules, and those that are anticompetitive in only certain markets, and are therefore subject to the rule of reason. This approach would also limit the protection of antitrust policies to finding liability. This approach would ignore the cause and effect relationships accepted in the context of private liability.

150. See *supra* note 28 and accompanying text. In *Parker v. Brown*, 317 U.S. 341 (1943), the seminal state action case, see *supra* note 10, in making the determination that the statute was state action outside the scope of the antitrust laws, the Court stated that the challenged statute "was never intended to operate by force of individual agreement or combination." See *id.* at 350-51. This suggests that the lack of enforcement of private decisions by a statute is an element of the state action determination.

151. To be state action, anticompetitive conduct authorized by a city must be pursuant

Several courts appear to recognize implicitly the danger of automatic immunization of statutes that merely require conduct by reserving judgment on whether the rule of reason analysis might show sufficient agreement for preemption.¹⁵² However, it is possible that courts, despite proof that statutory concerted action created anticompetitive effects,¹⁵³ still might find the preemption issue resolved by the fact that the statute does not facially require an agreement between the parties.¹⁵⁴ One court doing this left open the possibility that private liability was still available.¹⁵⁵ Yet obtaining evidence of a tacit private agreement where the statutory framework provides all the mechanics of carrying it out might be difficult. Where the anticompetitive result is inevitable due to market conditions, the statute should be held in conflict with the Sherman Act, so that the statutory framework will have to satisfy the state action doctrine to

to a clearly articulated state policy. See *Town of Hallie v. City of Eau Claire*, 105 S. Ct. 1713, 1721 (1985). For a case discussing, without deciding, the possibility that a city rent control law may be saved because it does not require any agreement, see *Fisher v. City of Berkeley*, 37 Cal. 3d 644, ___ & nn.10-11, 693 P.2d 261, 276-77 & nn.10-11, 209 Cal. Rptr. 682, 697-98 & nn.10-11 (1984) (en banc), *prob. jurisdiction noted*, 105 S. Ct. 2653 (1985). It might be possible to argue that government regulation of private parties forms a single enterprise incapable of conspiring, as in *Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731 (1984) (holding that a parent company and its wholly owned subsidiary are incapable of conspiring). However, the Court found that the parent-subsidiary coordinated conduct was a single enterprise because they had complete unity of interest and common objectives guided or determined by a single corporate consciousness. *Id.* at 2742. While a state's comprehensive regulation completely controlling a business would be immune from the Sherman Act, the reason for this would be the supervision provided, which satisfies the state action doctrine. See *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 106 & n.9 (1980). Where a statute requires all market participants to engage in a particular practice, the market participants retain sufficient freedom of action to prevent duplicating the situation characterized in *Copperweld*. Where no freedom of action is left, while private parties may argue the *Copperweld* rule, governmental bodies should be distinguished because of their power to compel adherence and thus should be required to meet the state action tests.

152. See *Battipaglia v. New York State Liquor Auth.*, 745 F.2d 166, 175 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 1393 (1985); *United States Brewers Ass'n v. Director of the N.M. Dep't. of Alcoholic Beverage Control*, 100 N.M. 216, ___, 668 P.2d 1093, 1099 (1983), *appeal dismissed*, 104 S. Ct. 1581 (1984); *Wine & Spirits Specialty, Inc. v. Daniel*, 666 S.W.2d 416, 419 (Mo.) (en banc), *appeal dismissed*, 105 S. Ct. 56 (1984). *Miller v. Hedlund*, 579 F. Supp. 116 (D. Or. 1984), discussed *supra* notes 131-36 and accompanying text, recognized this danger by saying that the "no agreement" approach, "[t]aken to its extreme, . . . would uphold any state regulatory scheme that mandated any private action." *Id.* at 121. The court distinguished a priceposting and adherence statute, which lacked an agreement, from delivered pricing requirements and prohibitions on quantity discounts, which had an agreement, on the grounds that the delivered price/quantity discount statutes were per se violations. *Id.* This appears to be the approach discussed and discredited *supra* note 149.

153. See *Intercontinental Packaging Co. v. Novak*, 348 N.W.2d 330, 333 (Minn. 1984) (trial court found that the price posting system tended to fix prices at an artificially high level).

154. See *id.* at 335.

155. See *id.* (If the statute has been used to facilitate price fixing, "the conspirators may not invoke the statute to insulate their conduct from scrutiny under the Sherman Act."). Such language indicates that the analytical framework underlying *Intercontinental* may be that approach discussed and discredited *supra* note 149.

avoid preemption.¹⁵⁶ Otherwise, the protection of antitrust policies would be limited to finding liable those parties who make their tacit agreements too explicit. This Note has argued that rule of reason preemption analysis should focus on whether the practice required has led to anticompetitive results in the particular market, not whether it took some private coordination to do so.

VI. ENSURING FAIRNESS: DISTINGUISHING BETWEEN A VIOLATION LEADING TO PREEMPTION AND A VIOLATION LEADING TO LIABILITY

The preemption analysis suggested by this Note would broaden the categories of statutes in which preemption might be found. Because private antitrust liability might follow, courts might hesitate to find the "violations" required by *Rice* where private parties were compelled to perform certain acts. Such reluctance is unjustified. A violation sufficient for preemption would not necessarily mean antitrust liability for the regulated market participants.

First, the state action doctrine provides safeguards where both preemption and liability are at issue. The doctrine allows states to promote policies other than competition.¹⁵⁷ It also protects private party conduct mandated by state law from antitrust liability.¹⁵⁸

It is possible, however, that the compelled conduct of a private party may be insufficiently supervised and therefore not state action.¹⁵⁹ Profes-

156. This approach would resolve the divergent treatments of statutes requiring price posting and adherence to those prices. See *supra* note 58. The disagreement stems from the Supreme Court's unusual treatment of agreements to post and adhere to prices. A private agreement to post prices and adhere to them was struck down in *Sugar Inst. v. United States*, 297 U.S. 553, 601 (1936), and was described as a per se violation in dictum in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (per curiam) (dictum). However, *Sugar Institute* specifically based its holding on the oligopolistic nature of the sugar market. See *Sugar Institute*, 297 U.S. at 600 (a small number of refiners refine practically all of the imported raw sugar processed in this country). An agreement to exchange presale price information in an oligopolistic market was also condemned in *United States v. Container Corp. of Am.*, 393 U.S. 333, 337-38 (1969). Thus, some may regard price exchanges with adherence to the prices exchanged as per se unlawful if the market is oligopolistic. Preemption analysis regarding price posting should undertake limited market analysis to determine if the market is oligopolistic. If so, the statute should be preempted if it does not satisfy the state action test. This is the approach taken in *Flav-O-Rich, Inc. v. North Carolina Milk Comm'n*, 593 F. Supp. 13, 15-16 (E.D.N.C. 1983). If not, no preemption should occur without full rule of reason analysis. Market analysis is not always precluded by a per se rule. See *National Collegiate Athletic Ass'n v. Board of Regents*, 104 S. Ct. 2948, 2962 n.26 (1984) (dictum).

157. See *P. Areeda & D. Turner*, *supra* note 19, ¶ 212, at 69. See also *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 67 (1982) (Rehnquist, J., dissenting) (discussing the problems, with respect to cities, of a preemption approach that focused solely on the effect of competition).

158. See *Southern Motor Carriers Rate Conference v. United States*, 105 S. Ct. 1721, 1729 (1985).

159. Where the state compels private parties to collaborate, or compels one private party to obey another private party, the state must supervise the results. See *supra* notes

sors Areeda and Turner suggest a variety of circumstances, in addition to state action, where private parties should not be liable for damages. If there were no substantial reason to believe a challenged act was unlawful at the time of the private party's conduct, or where the private party was "formally invited, approved, or directed . . . by state law and its agencies and instrumentalities" acting within their apparent authority, then no damages should be awarded.¹⁶⁰ The Supreme Court has suggested that liability should hinge on whether a party exercised sufficient freedom of choice to warrant making him liable for his actions.¹⁶¹ In certain cases, preemption might occur because imposing certain conduct on a particular market in ways that did not satisfy the state action doctrine would create an irresistible pressure to violate the law. Yet that irresistible pressure is the party's own self interest, therefore making him sufficiently independent to warrant liability.

In addition, a private party could argue that preemption and liability prerequisites for an agreement are different. As in *Schwegmann*, conduct that was not subject to liability could still be sufficient for preemption.

CONCLUSION

Statutes requiring market participants to engage in particular conduct can threaten the congressional objectives underlying the agreement requirement of Section 1 whether or not that conduct involves collaboration with or control over another party. The concerted action required should move the inquiry to the anticompetitive effect of the conduct and whether that conduct is state action.

Courts that end preemption analysis when the conduct does not involve another party misconstrue Supreme Court precedents regarding preemption analysis. They raise concerns that are better addressed under the state action doctrine. Finding an agreement sufficient for preemption does not raise the spectre of conduct compelled under state law creating private antitrust liability. The state action doctrine will immunize certain such conduct. A fairness defense may immunize a broader category of conduct. Finally, agreements for preemption and liability purposes may well be different, thus providing further protection.

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66-93 and accompanying text. Where the state compels particular, well-defined acts, the type of supervision required is unclear. See *supra* note 145.

160. See P. Areeda & D. Turner, *supra* note 19, ¶ 217b, at 108. See also *Wainright v. National Dairy Prods. Corp.*, 304 F. Supp. 567, 574-75 (N.D. Ga. 1969) (statute invalidated by the state constitution provides a valid state action defense).

161. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592-93 (1976).

