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# The State of "State Action" Antitrust Immunity: A Progress Report

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## I. INTRODUCTION

The state action doctrine is an implied exemption from the federal antitrust laws for activities that involve states. When the Supreme Court first explicitly recognized the doctrine over forty years ago, the exemption was understood to immunize conduct of a state that would otherwise violate the antitrust laws.[1] The Court inferred the exemption from the concept of federalism—Congress did not intend to subject sovereign states to the strictures of federal antitrust policy Eventually, the Court recognized that federalism required an exemption for private conduct appropriately authorized by a state, but even thirty-three years after the doctrine was established, four Justices resisted this conclusion.[2]

The history of the state action doctrine provides a classic study of the evolution of a legal principle. From a scholarly perspective, we are at an enviable point in time to observe this process. The doctrine has not developed in a consistent manner. Some changes have been progressive, others regressive. We now have a substantial body of precedent to analyze, but significant aspects of the doctrine remain unrefined. The Supreme Court has demonstrated special interest in the exemption during the past twelve years, and we can expect the Court to continue to force the doctrine along its evolutionary path. To predict the course of that development and to recommend desirable changes is the challenge.

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1. See Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307 (1943), discussed infra at notes 16-90 and accompanying text.

2. See Cantor v. Detroit Edison Co., 428 U.S. 579, 590-91, 96 S. Ct. 3110, 3117-18 (1976) (plurality opinion) (*Parker* did not hold that private actions authorized by the state are immune), discussed infra at notes 134-214 and accompanying text.

Many articles have been written on the state action doctrine.[3] Because the doctrine is evolving, many of these articles have become obsolete to the extent they described the current state of the exemption. Some articles have addressed primarily the question of why certain activities should be immune under the state action exemption.[4] I have argued elsewhere that Congress did not intend to subject the actions of politically-accountable governmental entities to antitrust strictures in part because the application of those laws to these public bodies would disserve the economic objective of antitrust policy.[5] This article surveys the reasons for state action immunity, but focuses on a different issue: what changes must be made in the interpretation of the principle and in the mechanical application of the exemption to concrete fact patterns in order to serve the purpose of the doctrine?

The article begins with a brief description of the proper interpretation of the doctrine.[6] The next section offers reasons for the description proposed, while tracing the exemption's actual development. Part IV summarizes the status of the doctrine and examines whether any changes in its interpretation and application are desirable. Finally, the article explores and resolves a few outstanding issues in state action dogma.

## II. Proposed Approach

This article will present a unified theory of state action immunity Most, though not all, of the Supreme Court's decisions in this area are consistent with the proposed analysis, though the rationales offered by the Court are often inconsistent. This section will sketch the theory,

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3. See, e.g., Richards, Exploring the Far Reaches of the State Action Exemption: Implications for Federalism, 57 St. John's L. Rev. 274 (1983); Burling, Lee & Quarles, "State Action" Antitrust Immunity—A Doctrine in Search of Definition, 1982 B.Y.U. L. Rev. 809 (1982); Areeda, Antitrust Immunity for "State Action" after *Lafayette*, 95 Harv L. Rev. 435 (1981); Morgan, Antitrust and State Regulation: Standards of Immunity After *Midcal*, 35 Ark. L. Rev. 453 (1981); 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 (1981); Posner, The Proper Relationship Between State Regulation and the Federal Antitrust Laws, 49 N.Y.U. L. Rev. 693 (1974). For a superb exposition of the doctrine in a treatise, see 1 P Areeda & D. Turner, Antitrust Law §§ 207-18 (1978) & §§ 212.1-212.7 (Supp. 1982).

4. The finest recent investigation of the foundations of state action is Easterbrook, Antitrust and the Economics of Federalism, 26 J. Law & Econ. 23 (1983). See also Wiley, A Capture Theory of Antitrust Federalism, 99 Harv. L. Rev. 713 (1986).

5. See Lopatka, State Action and Municipal Antitrust Immunity: An Economic Approach, 53 Fordham L. Rev. 23, 52-77 (1984).

6. Not only has the doctrine evolved, but my interpretation of its proper construction has evolved as well. The interested reader is invited to compare this article with Lopatka, id. at 52-54, and Lopatka, The Electric Utility Price Squeeze as an Antitrust Cause of Action, 31 UCLA L. Rev. 563, 620-22 (1984).

while the next section will add detail by analyzing specific cases decided by the Court.

The ultimate principle that should govern all claims of state action immunity is the following: Immunity should be granted if the state intended to engage in or permit the conduct that constitutes the restraint challenged. The Court has steadfastly maintained that the foundation of state action immunity is federalism.[7] A conflict between state and federal policies sufficient to trigger concerns of federalism arises whenever the state desires to allow conduct that would violate a federal mandate. Therefore, a sufficient justification for a grant of immunity arises whenever the state intends to authorize or permit conduct constituting a restraint of trade. There is no justification for withholding immunity unless the state demands conduct that would be unlawful.

An express statement of intent, of course, would be direct proof of the ultimate issue. Normally, however, intent is inferred from actions. Therefore, the standard can be rephrased as follows: Immunity should be granted if the state acts in such a way that the conduct constituting the challenged trade restraint was a likely consequence. Conversely, immunity should not be granted if the conduct constituting the challenged restraint was not a likely consequence of state action.[8]

Several implications of this principle bear emphasis. What conduct constitutes a restraint of trade is a separate question. Generally, a private party commits a civil antitrust violation by engaging in conduct that has an anticompetitive effect on a market or with the purpose to produce such an effect.[9] Apart from state action immunity, a state also might engage in conduct that violates the antitrust laws. Of course, some of a state's conduct has no counterpart in the private sector, and determining whether it would constitute an unlawful restraint of trade is not

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7 See, e.g., *Parker* 317 U.S. at 351, 63 S. Ct. at 313; Goldfarb v. Virginia State Bar, 421 U.S. 773, 790, 95 S. Ct. 2004, 2015 (1975); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 412, 98 S. Ct. 1123, 1136 (1978); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 103-04, 100 S. Ct. 937 942 (1980); Hoover v. Ronwin, 104 S. Ct. 1989, 1995 (1984); Southern Motor Carriers Rate Conference v. United States, 105 S. Ct. 1721, 1726 (1985) [hereinafter referred to as *SMCRC*].

8. "Likely consequence" means that the state's manner of conduct had at least a 50 percent probability of resulting in the conduct challenged as a restraint, measured at the time the state engaged in that course of conduct. A theoretically more precise determination of the necessary probability of the resulting action could be offered, but that analysis is not important here. This article is proposing a standard for implementation in practice and no standard requiring an assessment of probability finer than 50 percent would be workable in real cases.

9. See, e.g., United States v. United States Gypsum Co., 438 U.S. 422, 446 n.22, 98 S. Ct. 2864, 2878 n.22 (1978) ("the general rule [is] that either purpose or effect will support [civil antitrust] liability").

always easy But certainly, a state can take action that has an anticompetitive effect. If a state acts in that way, however, it should be immune under the operative standard suggested. Thus, if the state's own conduct constitutes the challenged of trade restraint, that conduct certainly will have been the "likely consequence" of the state's action. Indeed, the test becomes a tautology

The principle also applies when the conduct of a private party is challenged as an antitrust violation. If the state acted in such a way that the challenged conduct of the private party was a likely consequence, immunity should be granted in favor of the private party A grant of immunity requires a causal relationship flowing from the conduct of the state to the challenged actions of the private party However, the probability that the anticompetitive conduct will occur need not approach certainty For instance, if a state permitted the conduct, rather than required it, the probability that it would occur would be smaller. Nevertheless, the conduct would be a likely consequence and the private party would be granted immunity Thus, if the state explicitly provides that raisin growers may fix prices, subsequent price-fixing by the producers is a likely consequence and, therefore, the producers should be granted immunity Conversely, if a state's corporation laws permit stock acquisitions, an anticompetitive merger of two firms would not be a likely consequence, and, therefore, the firms should not be immune.

The principle is phrased in terms of the way in which a state acts to make it clear that immunity can arise from state inaction as well as action. The ultimate question for a grant of immunity is whether the state intended to authorize or engage in the challenged conduct. Intent can be inferred from action and inaction. The burden of persuasion on the issue of the state's intent, however, should fall on the proponent of immunity Simple reliance upon state inaction, in many actual cases, may be insufficient to meet that burden.

The standard refers to the "conduct constituting" a challenged restraint of trade to avoid the confusion that would be engendered by referring to the state's intent to authorize a "restraint." "Restraint" refers to conduct that has (or is intended to have) an anticompetitive effect and should not be interpreted to mean the anticompetitive effect. For state action immunity, it is not necessary that the state legislature intended that the effect result. It need not even have been aware at the time it authorized the challenged conduct that the effect would occur The state need only intend to authorize the conduct challenged. The reason for this standard is that to open the door in state action cases to claims that the state did not realize what it was doing, or was mistaken in its beliefs, would be exceptionally costly—the direct costs of litigating the claims would be immense, and the indirect costs created by a federal court inquiring into the "mental" processes of a state would be substantial. State governments are capable of realizing and

rectifying their own errors. Further, if immunity is not vitiated even when the state government is unaware that the conduct it engages in or authorizes will have an anticompetitive effect, *a fortiori*, immunity is not vitiated when the state is aware of the effect, but is motivated only in part or not at all by a desire to achieve that effect.

None of this means, however, that the rest of the country must pay, in the form of injury to consumer welfare, for a state's mistaken conferral of immunity Whether or not the state errs in extending immunity, a restraint engaged in or authorized by a state should be preempted under the Commerce Clause if an insubstantial proportion of the damage to consumer welfare caused by the restraint falls on the state's own residents.[10] Whether the state law bringing about the restraint is preempted or not, however, has nothing to do with whether the state accurately or inaccurately predicted the consequences of its actions. If a state acted mistakenly and immunity is granted, the state's residents will suffer as consumers, but they should not expect the federal government to spare them the consequences of their own imprudent political choices.[11]

If a state acts in such a way that the conduct constituting the restraint challenged is not a likely consequence, state action immunity should be withheld. There are two typical models that fall within this category In the first model, the state authorizes a broad class of activities, a private anticompetitive act falls within the class, but the state did not intend to authorize the anticompetitive act. A state that

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10. U.S. Const. art. I, § 8, cl. 3. The Commerce Clause not only is a source of power for Congress to pass laws that preempt, under the Supremacy Clause, inconsistent local governmental actions; it also, by its own force, preempts local governmental actions that impose an excessive burden on the national economy. Justice Blackmun recognized this in a state action immunity case, noting that "a state action that interferes with competition not only among its own citizens but also among the States is already subject [to] the Commerce Clause." *Cantor* 428 U.S. at 612, 96 S. Ct. at 3128 (Blackmun, J., concurring). For an excellent summary of the application of the Commerce Clause to state anticompetitive activities, see 1 P Areeda & D. Turner, supra note 3, at § 220b. See also J. Nowak, R. Rotunda & J. Young, Constitutional Law 266-75 (2d ed. 1983).

The test for Commerce Clause preemption proposed in the text is based on Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, 405 U.S. 707, 92 S. Ct. 1349 (1972), where the Court held that a municipality did not run afoul of the Commerce Clause by charging a tax of one dollar per commercial airline passenger for enplaning at the municipal airport. For a fuller exposition of the text proposed, see Lopatka, supra note 5, at 70-72.

11. The antitrust laws should be construed to serve the single purpose of allocative efficiency, or consumer welfare. The issue of whether the laws should be interpreted to serve additional goals as well has generated passionate debate over the years. See, e.g., 1 P Areeda & D. Turner, supra note 3, at §§ 109-09b; Blake & Jones, Toward a Three-Dimensional Antitrust Policy, 65 Colum. L. Rev. 422 (1965). Nevertheless, the arguments for restricting the objective to consumer welfare are compelling. See 1 P Areeda & D. Turner, supra note 3, at §§ 103-05; R. Bork, The Antitrust Paradox: A Policy at War with Itself 81 (1978); R. Posner, Antitrust Law: An Economic Perspective 8, 18-20 (1976).

authorizes stock acquisitions in its corporation laws, but that does not intend to authorize anticompetitive mergers, is an example of this model. In the second model, a private party undertakes an anticompetitive act that is not even within a broad category of activity authorized by the state, or perhaps, is even prohibited by the state. Obviously, no state action immunity should be found.

If a private act causes an anticompetitive effect only in combination with a state act, the private act may nevertheless constitute an illegal restraint. If the private act was undertaken with intent to produce an anticompetitive effect, it would constitute a civil antitrust violation regardless of effect.[12] Further, it is probably enough for an antitrust violation that a private act constitutes one of two or more necessary conditions for an anticompetitive effect.[13] If there is no causal connection running from the state act to the private act, the private restraint will not be immune under the state action doctrine. However, the private act might still be immune from antitrust attack under the *Noerr-Pennington* doctrine.[14]

Thus, when private conduct is challenged as an antitrust violation and the conduct was not the probable consequence of any state act, the state action doctrine will not afford immunity to the private party One way the private party might still be able to avoid liability is through *Noerr-Pennington* immunity Another possible way to escape liability is through a pre-trial motion to dismiss on the merits, on the ground that the complaint fails to state a cause of action. If the private party's conduct was not undertaken to achieve an anticompetitive effect, and such an anticompetitive effect was not the probable consequence of any action undertaken, no conduct of the private party could be accurately characterized as a restraint, and the complaint should be dismissed.[15]

The "state," for purposes of the state action doctrine, should at least include all constitutional branches of government and agencies economically disinterested in those subject to their jurisdiction. Thus,

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12. See supra note 8 and accompanying text.

13. For example, the participation of several firms in a price-fixing conspiracy might be necessary conditions to produce an anticompetitive effect. Even though no one firm could have driven up the price, each firm would be liable.

14. The *Noerr-Pennington* doctrine takes its name from two cases: Eastern R.R. Presidents Conf. v. Noerr Motor Freight, 365 U.S. 127 81 S. Ct. 899 (1961), and UMW v. Pennington, 381 U.S. 657, 85 S. Ct. 1585 (1965). In general, the doctrine provides that private attempts to secure anticompetitive actions from governmental entities, at least to the extent that the entities are acting in a policy-making rather than ministerial capacity, cannot form the basis of antitrust liability. See Woods Exploration & Producing Co. v. Aluminum Co. of Am., 438 F.2d 1286, 1298 (5th Cir. 1971) (the *Noerr-Pennington* doctrine only protects private conduct designed to influence government policy). See generally 1 P Areeda & D. Turner, supra note 3, at §§ 201-06.

15. See infra notes 375-76 and accompanying text.

if a state supreme court or public utilities commission intends to authorize the conduct challenged, immunity should attach. To withhold immunity when an agency, as opposed, for instance, to the legislature, expresses state intent would improperly intrude into internal state affairs and create an incentive to operate state government inefficiently The Court has refused to allow interested state agencies to represent the state for purposes of immunity because of understandable suspicions about the motives of these bodies. The way in which a state conducts its business, however, is an inappropriate matter for federal intervention. Further, distinguishing between interested and disinterested agencies may not be worth the effort. For these reasons, even if state policy is expressed by an interested agency, it should acquire immunity, and if the policy harms public welfare, the state will be forced to bear the injury or correct its mistake. If the harm is disproportionately imposed out-of-state, the policy should be preempted under the Commerce Clause, but such a policy should be preempted no matter which state body expressed it.

## III. The Evolution of the State Action Doctrine

### *A. Parker v Brown*

The state action exemption from the antitrust laws is generally regarded to have originated in *Parker v Brown*.[16] Indeed, the exemption is often referred to as the "*Parker* doctrine."[17] In *Parker*, California

16. 317 U.S. 341, 63 S. Ct. 307 (1943).

17 Actually, as Justice Stewart pointed out in *Cantor*, 428 U.S. at 615 n.3, 96 S. Ct. at 3129 n.3 (Stewart, J., dissenting), the antecedent of the doctrine is Olson v. Smith, 195 U.S. 332, 25 S. Ct. 52 (1904). In *Olsen*, marine pilots licensed by Texas sued a pilot for operating without a license. Id. at 338, 25 S. Ct. at 52. The defendant claimed, inter alia, that the state statutes requiring a license to perform pilotage services and fixing pilotage fees were void because in conflict with the antitrust laws. Id. at 339, 25 S. Ct. at 52-53. The Supreme Court rejected the argument.

> The contention that because the commissioned pilots have a monopoly of the business, and *by combination among themselves exclude all others* from rendering pilotage services, is also but a denial of the authority of the State to regulate, since if the State has the power to regulate, and in so doing to appoint and commission, those who are to perform pilotage services, it must follow that no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the State are alone allowed to perform the duties devolving upon them by law. When the propositions just referred to are considered in their ultimate aspects they amount simply to the contention, not that the Texas laws are void for want of power, but that they are unwise. If an analysis of those laws justified such conclusion—which we do not at all imply is the case—the remedy is in Congress, in whom the ultimate authority on the subject is vested, and cannot be judicially afforded by denying the power of the State to exercise its authority over a subject concerning which it has plenary power until

had enacted an Agricultural Prorate Act "to conserve the agricultural wealth of the State of California, and to prevent economic waste in the marketing of agricultural products or crops produced in the state."[18] The Act authorized the creation of an Agricultural Prorate Advisory Commission, which consisted of the state Director of Agriculture, as a member ex-officio, and eight other members appointed by the Governor and confirmed by the Senate.[19] The Court recited only one statutory requirement for membership—a member had to take the oath of office.[20] In fact, the statute specified that six of the eight appointed members of the Commission had to be producers of agricultural commodities, though no two could be producers of the same commodity, one member had to represent the interests of consumers, and one had to be a handler of agricultural products.[21]

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Congress has seen fit to act in the premises.

Id. at 344-45, 25 S. Ct. at 54-55 (emphasis added). It is curious that the Court referred to a "combination" of licensed pilots to exclude all others, since the defendant did not seem to allege a conspiracy of pilots. Rather, the defendants' theory appeared to be that the state laws requiring a license had the necessary consequence of limiting entry and were, therefore, in conflict with the Sherman Act. Perhaps the Court felt obliged to assume an allegation of a combination in order to treat the claim as a potential Sherman Act Section 1 violation, since the violation of that statute requires a plurality of actors. It is not obvious, however, why the defendant could not have been understood to allege a Section 2 violation, which would have obviated the need for a combination. In any event, there is no doubt that a government license can be an effective entry barrier, that a licensing scheme can injure consumer welfare, and that the scheme need not be a product of a conspiracy among licensees. See generally R. Bork, supra note 11, at 347-64 (1978). A licensing system may be as close to a self-executing governmental restraint, i.e., a restraint that does not involve private anticompetitive conduct, as exists in the real world. Because the state itself engaged in the conduct that constituted the challenged restraint, immunity was warranted.

18. 1939 Cal. Stats. ch. 894, § 1. See Parker v. Brown, 317 U.S. at 344, 63 S. Ct. at 307 (1943). The predecessor of the 1939 Act was enacted in 1933. 1933 Cal. Stats. ch. 754. The original Act was amended nine times prior to the decision in *Parker*: 1935 Cal. Stats. chs. 471, 743; 1938 Cal. Stats. Extra Sess. ch. 6; 1939 Cal. Stats. chs. 363, 548, 894; 1941 Cal. Stats. chs. 603, 1150, 1186.

19. *Parker* 317 U.S. at 346, 63 S. Ct. at 311.

20. Id., 63 S. Ct. at 311.

21. The provision in full stated:

> Six of the appointive members of said commission shall be engaged at the time of their appointment in the production of agricultural commodities as their principal occupation, but no two of these shall be appointed as representing the same commodity. One of said appointive members shall be neither a producer nor a handler of agricultural commodities but shall be appointed to represent consumers generally. One appointive member shall be an experienced commercial handler of agricultural products.

1939 Cal. Stats. ch. 894, § 3. Though the statute did not explicitly specify whether members served in a full-time or part-time capacity, it appears that members were expected to continue working in their prior occupations. The statute provided for compensation of only $10 per day for each day spent on official business, plus reimbursement for traveling expenses. 1939 Cal. Stats. ch. 894, § 4.

The statute provided that producers of a commodity could petition the Commission for the establishment of a proration zone and prorated marketing program.[22] If the Commission, after hearing, found that certain statutorily-prescribed economic conditions were satisfied, the Commission could grant the petition.[23] Once granted, the Director, with approval of the Commission, was required to appoint a Program Committee composed primarily of producers.[24] The Program Committee formulated a proration marketing program and submitted it for approval to the Commission.[25] If the Commission approved the program, and 65% of the affected producers and owners of 51% of the producing factors assented to it, the program was instituted.[26] The Program Committee was then authorized to appoint, subject to the approval of the director, an agent to administer the program under the direction of the Program Committee.[27] The Program Committee's exercise of power was subject to the general supervision of the Director.[28]

The statute authorized the Program Committee to "determine the method, manner, and extent of proration."[29] It specified that the proration plan could create surplus and stabilizing pools of commodities, that the contents of the surplus pools could not be marketed in direct competition with other parts of the crop, and that the contents of the stabilizing pool could be disposed of as the Program Committee directed.[30] Under the plan adopted in *Parker*, growers were required to

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22. *Parker* 317 U.S. at 346, 63 S. Ct. at 311.

23. Id., 63 S. Ct. at 311. Specifically, the Commission was required to find, inter alia:

> (2) That the economic stability of the agricultural industry concerned is being imperiled by market conditions prevailing or liable to prevail as to the variety or kind of commodity sought to be prorated or is being imperiled by the existence or imminence of a seasonal or annual surplus; and
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> (3) That agricultural waste [defined in § 2(b) of the Act] is occurring or is about to occur; and
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> (4) That the institution of a program of prorated marketing will conserve the agricultural wealth of the state and will prevent threatened economic waste; and
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> (5) That the institution of a proration program will advance the public welfare without discrimination against any producer; and
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> (6) That the institution and operation of a proration program will not result in unreasonable profits to the producers and that the commodity named in the petition can not be marketed at a reasonable profit to producers otherwise than by means of such a program.

1939 Cal. Stats. ch. 894, § 10.

24. *Parker* 317 U.S. at 346, 63 S. Ct. at 311.

25. Id. at 347, 63 S. Ct. at 311-12.

26. Id. 63 S. Ct. at 311-12.

27 Id. See also 1939 Cal. Stats. ch. 894, § 16.

28. 1939 Cal. Stats. ch. 894, § 22.

29. 1939 Cal. Stats. ch. 894, § 18.

30. 1939 Cal. Stats. ch. 894, § 19.

place 70% of their raisins in either a surplus or a stabilization pool, and could sell only 30% of their standard raisins through ordinary commercial channels.[31]

The obvious purpose of the Prorate Act, and the plan adopted in *Parker* pursuant to it, was to raise the price of agricultural commodities. The program was successful. The plaintiff alleged that the pre-season price of the 1940 raisin crop before the program became effective was $45 per ton and that immediately after the plan took effect the price rose to $55 per ton or higher.[32] The plaintiff, a producer and packer of raisins, brought suit to enjoin the enforcement of the 1940 raisin proration program against "the State Director of Agriculture, Raisin Proration Zone No. 1, the members of the State Agricultural Prorate Advisory Commission and of the Program Committee for Zone No. 1, and others charged by the statute with the administration of the Prorate Act."[33] In the district court, the plaintiff did not argue that the program conflicted with the Sherman Act, but claimed that it interfered with his constitutional right to engage in interstate commerce.[34] The district court held that enforcement of the program was unconstitutional under the Commerce Clause, and the original argument in the Supreme Court was limited to that issue.[35] Before the Court issued a decision, it held in *Georgia v Evans*[36] that a state could be a "person" entitled to bring an antitrust suit.[37] It therefore set *Parker* for reargument and requested the parties, as well as the Solicitor General, "to discuss the questions whether the state statute involved is rendered invalid by the action of Congress in passing the Sherman Act, the Agricultural Adjustment Act as amended, or any other Act of Congress."[38]

There is no doubt that the Supreme Court upheld the Prorate Act and its operation against challenges based on the Sherman Act,[39] Agricultural Adjustment Act,[40] and Commerce Clause.[41] Exactly what the Court held on the antitrust issue, however, has been disputed. Justice Stevens has argued that the Court held only that state officials themselves, acting pursuant to express legislative command, do not violate the Sherman Act, even though comparable actions by private parties

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31. *Parker* 317 U.S. at 348, 63 S. Ct. at 312.
32. Id. at 349, 63 S. Ct. at 312-13.
33. Id. at 344, 63 S. Ct. at 310.
34. See *Cantor* 428 U.S. at 586, 96 S. Ct. at 3115 (plurality opinion of Stevens, J.).
35. Id., 96 S. Ct. at 3115.
36. 316 U.S. 159, 62 S. Ct. 972 (1942).
37 *Cantor* 428 U.S. at 587 96 S. Ct. at 3110 (plurality opinion of Stevens, J.).
38. Id. at 587 n.16, 96 S. Ct. at 3116 n.16.
39. *Parker* 317 U.S. at 352, 63 S. Ct. at 313.
40. Id. at 358, 63 S. Ct. at 317
41. Id. at 368, 63 S. Ct. at 322.

would be illegal; the Court did not hold that private parties engaging in otherwise illegal restraints are immune from liability when they act pursuant to state law [42] Justice Stewart, however, has countered that the *Parker* Court held that the state statute was not preempted by the Sherman Act and presumably, therefore, all parties effecting a restraint created by a statute are exempt from prosecution under the antitrust laws.[43]

It is clear that the Court found an implied exemption from the antitrust laws for actions undertaken by state representatives that can be attributed to the state, and perhaps for action of others somehow authorized by a state. Because federal law contains no express exemption from the antitrust laws for state action, any exemption had to be implied.[44] The Court used federalism as the source from which to infer the exemption.[45] The Court began with the sweeping observation that

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42. *Cantor* 428 U.S. at 589-90, 96 S. Ct. at 3117 Justice Stevens, in this part of the opinion, represented the views of a total of four justices. Justice Stevens states that the plaintiff in *Parker* sued only state officials, so that the Court was not confronted with the issue of immunity for private parties. Id. at 585, 63 S. Ct at 3115. But the Court in *Parker* stated that the defendants included "Raisin Proration Zone No. 1" and members of the Program Committee. *Parker* 317 U.S. at 344, 63 S. Ct. at 310. It is not clear at all how the zone itself could have been a defendant. But more importantly, the Court's view of the status of the Committee members is uncertain. Justice Stevens may be assuming that the *Committee* members, as well as the *Commission* members, constituted state officials. But it is not clear that the *Parker* Court so viewed them, and the Court in Goldfarb v. Virginia State Bar, 421 U.S. at 791, 95 S. Ct. at 2015, explicitly held that a mere designation of a private party as a state official does not automatically turn that party's actions into official actions of the state for purposes of state action immunity. See infra notes 131-33 and accompanying text. In short, Justice Stevens's contention that only state officials were defendants in *Parker* is disputable.

43. *Cantor* 428 U.S. at 621-22, 96 S. Ct. at 3132-33 (Stewart, J., dissenting).

44. *Parker* 317 U.S. at 351, 63 S. Ct. at 313 ("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.") Compare, e.g., 49 U.S.C. § 10706(a) (1982) (express antitrust exemption for certain activities of railroads); 49 U.S.C. § 10706(b) (1982) (express antitrust exemption for certain activities of motor carriers); Clayton Act § 6, 15 U.S.C. § 17 (1982) ("Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticulture organizations. ").

45. I have argued that sole reliance on federalism for the basis of state action immunity is misplaced, that there is a positive economic reason to conclude that Congress intended to withhold application of the antitrust laws to governmental activities. Much of what governments do may interfere with competitive markets but promote competition, or may displace competition in instances of market failure. Some of what they do may be designed to sacrifice efficiency for some other value, or to generate monopoly profits for the public fisc or other purposes. In all cases, the government's actions: 1) serve the purpose of the antitrust laws and should be encouraged; 2) trade off consumer welfare for some other value in a manner for which a politically-accountable government is created and thus should be allowed; or 3) decrease efficiency in a way that is not politically-accountable but can be corrected by methods other than the antitrust laws. See Lopatka, supra note 5, at 52-72. See also Easterbrook, supra note 4.

in "a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."[46] In effect, the Court said that where application of a federal law would impinge upon state sovereignty, the presumption is that the law does not apply [47] The Court found no indication in the terms of the Sherman Act or its legislative history that Congress intended the Act to apply to states and, therefore, inferred an exemption for state action.[48]

If the court is to immunize *state* action, it is crucial to identify exactly what or who constitutes the state. After all, a state is not a human being. In *Parker*, the Court appeared to view the state as the *legislature*, and the immunized action as the enactment of the prorate law The Court said, "Here the *state command* to the Commission and to the program committee *of the California Prorate Act* is not rendered unlawful by the Sherman Act. "[49] The Court also said, "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*."[50] Yet the Court hinted that

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46. *Parker*, 317 U.S. at 351, 63 S. Ct. at 313.

47 The presumption that the antitrust laws do not apply when they conflict with state laws is the reverse of the presumption that is used when the antitrust laws conflict with some other federal statute. In the latter context, the Court is fond of reciting that repeal of the antitrust laws is not favored and is to be implied "only if necessary" to make the conflicting federal statute work, and then only to the minimum extent necessary. See, e.g., Silver v. New York Stock Exch., 373 U.S. 341, 357, 83 S. Ct. 1246, 1257 (1963); United States v. Borden Co., 308 U.S. 188, 198, 60 S. Ct. 182, 188 (1939); Georgia v. Pennsylvania R.R., 324 U.S. 439, 457, 65 S. Ct. 716, 726 (1945); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-51, 83 S. Ct. 1715, 1734-35 (1963); Gordon v. New York Stock Exch., 422 U.S. 659, 682, 95 S. Ct. 2598, 2611 (1975). The axiom sounds straightforward, but its meaning is ambiguous and its utility as a guide in reaching decisions is limited. See 1. P Areeda & D. Turner, supra note 3, at § 224(d). At least one member of the Supreme Court attempted to extend the pro-antitrust presumption applicable to conflicts with federal laws to conflicts with state laws. *SMCRC*, 105 S. Ct. at 1736 (Stevens, J., dissenting). The majority of the Court unequivocally rejected the attempt. Id. at 1727 n.21 For a discussion of *SMCRC*, see infra notes 424-62 and accompanying text.

48. *Parker* 317 U.S. at 351, 63 S. Ct. at 313. In later cases, the Court noted that though the *Parker* Court relied upon Congressional silence to infer immunity, there are "statements in the legislative history that affirmatively express a desire not 'to invade the legislative authority of the several States. "' *SMCRC*, 105 S. Ct. at 1726 n.19. See *Cantor* 428 U.S. at 632, 96 S. Ct. at 3137 (Stewart, J., dissenting) ("The legislative history reveals very clearly that Congress' perception of the limitations of its power under the Commerce Clause was coupled with an intent not to intrude upon the authority of the several States to regulate 'domestic' commerce.").

49. *Parker* 317 U.S. at 352, 63 S. Ct. at 314.

50. Id. at 350-51, 63 S. Ct. at 313.

the Advisory Commission might have constituted the state. The Court said, "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 by 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 "[51]

In any event, the Court never suggested that the Program Committee constituted the state. It should be noted that the Committee was predominantly composed of raisin growers.[52] Thus, if the idea of a prorate program had been solely that of the Committee, the program would not have been immune. The status of the Commission is less clear. Suppose, for example, the California legislature had established an agricultural advisory commission whose sole mandate was to regulate agricultural activities in order to promote the public welfare, and the commission had instituted the prorate program. Would the program have been immune? What the Court's answer would have been is arguable. The answer might have been affected by the composition of the commission. I argue later that an anticompetitive policy established by an agency with no direct financial interest in the subject of its regulation, a "legitimate" agency, is treated differently by the Court for state action purposes than a policy adopted by an interested, or "illegitimate" agency [53] But here, the statute dictated an agency membership representing diverse interests, and the status of such an agency is questionable.[54] Indisputably, however, the prorate program in *Parker* was contemplated by the state legislature. In the words of later cases, the prorate program was a "clearly articulated and affirmatively expressed" policy of the California legislature.[55] The statute was quite explicit as to the operation of the program, defining surplus and stabilization pools and dictating the way in which commodities placed in each could be marketed.[56] The statute left the mechanics of programs applicable to specific commodities to be hammered out by program committees, with the assent of affected producers and the approval of the Advisory Commission. But there can

51. Id. at 352, 63 S. Ct. at 314. The Court went on to say, "The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its applications." Id., 63 S. Ct. at 314. This reference to legislative activity is ambiguous. It may refer either to the legislature's enactment of the prorate law, or the Advisory Commission's quasi-legislative approval of a prorate plan which acquired the force of administrative regulations.

52. See supra note 24 and accompanying text.

53. See infra note 132 and accompanying text.

54. See supra note 21.

55. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. at 105, 100 S. Ct. at 943.

56. See supra notes 29-31 and accompanying text.

be no doubt that the legislature contemplated and authorized a price-fixing device.[57]

The Court never said that its decision depended on the fact that the price-fixing of the Program Committee was overseen by the Director and the rest of the Advisory Commission. The Court in a later case suggested that without this supervision, immunity might not have been conferred.[58] Perhaps the *Parker* Court viewed the continuing scrutiny of the Commission as an adequate substitute for the direct legislative specification of the prices to be charged or the quantities to be sold, and perhaps that kind of state involvement was important to the Court.[59] In another case, however, the Court implied that the existence of continuing oversight was irrelevant to the result in *Parker*.[60] Surely the *Parker* Court could have been explicit if it viewed supervision as integral to immunity. In any event, it is clear that if continuing oversight was relevant to the Court, the Advisory Commission must have been deemed qualified to provide it, since no one else, and certainly not the legislature, was supervising the Committee's activities. One interpretation of *Parker*, although not the only interpretation, is that state action immunity requires a clear statement of an anticompetitive policy and continuing supervision of the restraint, but that the statement must be made by the state legislature, whereas the program may be supervised by a state agency composed at least partially of members financially interested in the subject of their regulation. This suggested dichotomy of the state for purposes of articulating an anticompetitive policy and supervising a restraint is made clearer, though not explicit, in a later case.[61]

Another implication of *Parker*, and one which later courts tended to overlook, is that the price-fixing was not compelled by the state.[62]

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57 The legislature did not go quite as far as the Texas legislature had gone in Olsen v. Smith, 195 U.S. 332, 25 S. Ct. 52 (1904), where the legislature both limited the supply of pilots by requiring licenses and set the fees for pilotage services. See supra note 17. But in both cases, the legislature certainly contemplated and authorized the challenged restraint.

58. California Retail Liquor Dealers Assn. v. Midcal Aluminum, 445 U.S. at 104, 100 S. Ct. at 942 (discussing *Parker* the Court said, "Without such oversight, the result could have been different.")

59. As pointed out earlier, *Parker* was preceded by Olsen v. Smith. See supra note 17. There, the State of Texas not only limited the supply of marine pilots, but also specified maximum prices in the statute. *Olson*, 195 U.S. at 339-40, 25 S. Ct. at 52-53.

60. Hoover v. Ronwin, 104 S. Ct. at 1995-96 (1984) (in *Parker* the relevant conduct was that of the state legislature, and in such a case, the issue of state supervision need not be addressed). The decision in *Ronwin* represented a four Justice majority view, with three Justices dissenting and two Justices not participating.

61. See *SMCRC*, 105 S. Ct. at 1730, discussed infra at notes 424-62 and accompanying text.

62. As discussed infra at notes 121-25 and accompanying text, the Court in *Goldfarb*,

True, once a prorate program was adopted, all growers and handlers had to adhere to its terms, which were enforced by criminal punishment.[63] But the statute did not require growers to petition for and formulate prorate programs. It simply permitted them to do so, and established state machinery to administer and enforce any program adopted. Though price-fixing was clearly intended by the legislature, it was permitted, not required.[64]

As has already been noted, it is debatable whether the court intended to confer immunity on private parties as well as state officials.[65] Much of this confusion was generated by the Court's ambiguous language. The Court said, "The Sherman Act gives no hint that it was intended to restrain state action *or official action directed by a state*."[66] The Court might have intended the phrase "official action directed by a state" as a synonym for "state action" and simply neglected to insert a comma after the conjunction "or." More likely, the Court intended "official action directed by a state" as a distinct alternative to "state action," in which case the Court must have intended that immunity extend beyond state action. Even so, the meaning of "official" is not clear. The term might refer to an individual holding a state office, such as a governor. But then the distinction between state action and official action blurs, in that the state normally acts through its officers. "State" may refer exclusively to the legislature, in which case a distinction can be maintained between the state and state officials. But the scope of

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421 U.S. at 791, 95 S. Ct. at 2015, said that state action immunity is unavailable to private parties unless their conduct is "compelled by direction of the State acting as a sovereign" and cited *Parker* Id. at 790. Of course, some have argued that the *Parker* Court never considered the issue of immunity for private parties, as opposed to the state itself, so that the *Goldfarb* statement would not be inconsistent with *Parker* See supra notes 42-43 and accompanying text. But the better view is that the *Parker* Court's intention was not so limited, and certainly the *Goldfarb* Court itself thought it was applying *Parker* Lower courts after *Goldfarb* were in a quandary as to the meaning and continuing efficacy of this compulsion test as an independent requirement. See 1 P Areeda & D. Turner, supra note 3, at § 215b; id. at § 212.5 (Supp. 1982) ("The role of compulsion in *Parker* analysis continues to bedevil both courts and commentators."). Much of the confusion was eliminated in 1985 by *SMCRC*, 105 S. Ct. at 1728-29, where the Court held that compulsion is not a prerequisite to a finding of state action immunity. In fact, had the *Goldfarb* Court more carefully considered the *Parker* decision, it never would have suggested that state compulsion was necessary. Justice Blackmun apparently recognized this point in *Cantor*, 428 U.S. 579, 96 S. Ct. 3110, where he noted that the scheme in *Parker* "was initiated by the private actors at the invitation of a general statute." Id. at 609 (Blackmun, J., concurring).

63. *Parker*, 317 U.S. at 347, 63 S. Ct. at 311-12.

64. Compare *SMCRC*, 105 S. Ct. at 1727-30, where state statutes and regulations explicitly permitted but did not compel collective ratemaking by motor carriers.

65. See supra notes 42-43 and accompanying text.

66. *Parker*, 317 U.S. at 351, 63 S. Ct. at 313 (emphasis added).

officials would remain indistinct. It could be limited to a certain class of state representatives or encompass all persons designated by a state to perform some function. In its broader sense, official would mean something little different from a private party, yet the Court subsequently has resisted construing the mere designation of private individuals as state officials as altering their status for state action purposes.[67] What the Court meant is just not clear [68]

However murky the Court's view of private conduct authorized by a state may be, two explicit limitations on state action immunity noted by the Court are more obscure. The Court said, "[W]e have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade."[69] In fact, the prorate program required an agreement among growers, which the state, through the Advisory Commission, approved and enforced. This participation was apparently not the kind of state participation in a private combination the Court had in mind. Further, the Prorate Act might well have been adopted at the behest of farmers acting in concert, and it is doubtful that the Court would have deemed such state involvement in a private enterprise sufficient to strip the state of immunity [70] Ultimately, most state action cases involve a "blend of private and public decisionmaking."[71] If participation by the state in a restraint that involves private action is sufficient to vitiate antitrust immunity, immunity will be as prevalent as walruses in Texas. This cannot be what the Court intended. Indeed, if the Court had intended this, it would

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67 See *Goldfarb*, 421 U.S. at 791, 95 S. Ct. at 2015 (even though a state bar association was designated an official state agency, it was treated as a group of private individuals for state action purposes).

68. The Court also said, "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." *Parker* 317 U.S. at 350-51, 63 S. Ct. at 313. This statement is also ambiguous. "Agents" may be used in a non-technical sense to refer to anyone authorized by a legislature to do something or in a more restricted sense. If the prepositional phrase "from activities directed by its legislature" modifies "state" as well as "officers" and "agents" as it appears to do, then "state" must refer to something other than officers, agents, *or the legislature.*

69. Id. at 351-52, 63 S. Ct. at 313.

70. In the scenario posed, the farmers presumably would be immune from antitrust attack under the *Noerr-Pennington* doctrine, a doctrine separate from but related to the state action doctrine, which holds that agreements among private parties to obtain anticompetitive policies from governmental entities do not constitute antitrust violations. See Eastern R.R. Presidents Conf. v. Noerr Motor Freight, and UMW v. Pennington, supra note 14 and accompanying text. If the private parties are immune, presumably the state would be immune as well. But the *Noerr-Pennington* doctrine had not been established at the time of *Parker* and almost certainly the Court would have found the state immune whether or not a *Noerr-Pennington* doctrine had existed.

71. *Cantor* 428 U.S. at 592, 96 S. Ct. at 3118.

have reached the opposite result in *Parker* But if the mixture of public and private involvement in a restraint is represented by a continuum, locating the point at which the private conduct is so dominant that the state itself loses immunity promises to be a task at least vexatious and at most impossible.[72] If the Court meant to exclude immunity for a particular *kind* of state action, rather than for a restraint in which the relative *amount* of state conduct is minimal, it gave no guidance as to the character of that conduct.[73]

The second limitation is even more problematic. The Court said, "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."[74] This dictum has been oft-repeated by the Court[75] and was relied upon by it in its next state action decision.[76] But what does it mean? In fact, California authorized raisin growers to fix prices, and the Court held that the state thereby conferred immunity for what otherwise would have been an antitrust violation. The Court must have meant something by its statement that would not precisely contradict what it held.

Perhaps the Court's statement should be read quite literally If a state passed a law that provided, "citizens of the State of Superior are hereby authorized to violate the antitrust laws," or, "actions that violate the antitrust laws are hereby declared to be lawful," no immunity would arise. The difference between that kind of law and the California Prorate Act is the clarity with which the state authorizes the restraint challenged. In the case of the hypothetical law, the legislature did not act in such a way that conduct constituting the challenged restraint was a likely consequence. By contrast, the California legislature undoubtedly envi-

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72. Notice that the implication of the Court's statement is that the state itself may not be immune from antitrust attack if it participates in a private combination, not that the private actors alone will be exposed to liability. Compare, e.g., *Cantor* 428 U.S. 579, 96 S. Ct. 3110 (1976), where the issue was state action immunity for a *private* utility, when the restraint also involved action by the state.

73. The Court included a "cf." citation to Union Pacific R.R. v. United States, 313 U.S. 450, 61 S. Ct. 1064 (1941). *Parker* 317 U.S. at 352, 63 S. Ct. at 313. The reference is less than enlightening. The Court there held that a city could cooperate with a railroad to violate the anti-rate discrimination provisions of the Interstate Commerce Act. *Union Pacific R.R.*, 313 U.S. 450, 466-68, 61 S. Ct. 1064. In contrast to *Parker* the Court there held, in effect, that a governmental entity is never immune from liability under the Interstate Commerce Act if its conduct constitutes a violation.

74. *Parker* 317 U.S. at 351, 63 S. Ct. at 314.

75. See, e.g., *Cantor* 428 U.S. at 602, 96 S. Ct at 3123; California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. at 104, 100 S. Ct. at 942; Town of Hallie v. City of Eau Claire, 105 S. Ct. 1713, 1716 (1985).

76. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 386, 71 S. Ct. 745, 746 (1951), discussed infra at notes 91-108 and accompanying text.

sioned and intended to promote price fixing by raisin growers. Price fixing was a probable consequence of its law

The case that the Court cited for the proposition lends some support for this interpretation.[77] In the famous case of *Northern Securities Co. v United States*,[78] railroads attempting to effect, in the Court's view, an anticompetitive merger through a holding company defended on the ground that the holding company was not prohibited from acquiring the stock of the railroads by its charter, which was issued pursuant to state law [79] The federal government, the railroads contended, was forbidden by the Tenth Amendment from invading the rights of the state by prohibiting an act that was permissible under the state charter.[80] The Court correctly responded: "We cannot conceive how it is possible for anyone to seriously contend for such a proposition."[81] The state did not intend to engage in or permit anticompetitive mergers when it authorized in its corporation laws the acquisition of stock. As the Court said:

> It is proper to say in passing that nothing in the record tends to show that the State of New Jersey had any reason to suspect that those who took advantage of its liberal incorporation laws had in view, when organizing the Securities Company, to destroy competition between two great railway carriers engaged in interstate commerce in distant States of the Union.[82]

If a state authorizes a class of activities, such as stock acquisition, only a small percentage of which would violate federal antitrust laws, there is little reason to conclude that the state contemplated or intended to approve the tainted sub-class. The argument for immunity is commensurately weak.

Another interpretation of the *Parker* dictum is that the Court intended to distinguish between anticompetitive conduct merely authorized by a state and such conduct authorized and thereafter supervised by a state. According to this interpretation, the former is not immunized; the latter is.[83] I argue that supervision should not be required for state action immunity, and reject this interpretation.[84] Besides, there is little basis for this construction in the opinion. Nevertheless, the interpretation

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77 See *Parker* 317 U.S. at 351, 63 S. Ct. at 314.

78. 193 U.S. 197 24 S. Ct. 436 (1904).

79. Id. at 332, 24 S. Ct. at 454. For a fascinating discussion of what was actually going on in *Northern Securities*, see D. Dewey, Monopoly in Economics and Law 214-15 (1959).

80. *Northern Securities*, 193 U.S. at 344, 24 S. Ct. at 436.

81. Id. at 345, 24 S. Ct. at 460.

82. Id., 24 S. Ct. at 460.

83. See infra notes 291-93 and accompanying text.

84. See infra notes 294, 306-11 and accompanying text.

is one way to reconcile the dictum in *Parker* with its holding, and it is the interpretation the Supreme Court *now* gives to the statement.[85]

That the Court recognized in *Parker* that an antitrust exemption for state action *exists* is gratifying. The imprecision with which it defined the doctrine is frustrating, though understandable. After all, the Court, for the most part, was making its first venture into a perplexing area. What is truly disturbing, however, is the result of the case — the Court allowed California raisin growers to fix prices even though ninety to ninety-five percent of their crops were consumed out of state.[86] California was not politically accountable to the group injured by the restraint it established. If a significant proportion of the allocative inefficiency produced by the restraint had been suffered by California consumers, the federal government could fairly have left the whole matter to the political process. California citizens could have sanctioned the program, voted against it, or left the state.[87] But if a state restrains competition in such a way that the major proportion of the attendant burden is imposed on non-residents, the action should be preempted by the Commerce Clause so long as the burden substantially exceeds any benefits produced by the restraint.[88] There is no need to invalidate the action under the Sherman Act. The Commerce Clause not only is a source of power for Congress to pass laws that preempt inconsistent laws of subordinate governments through the Supremacy Clause; it also, by its own force, limits actions of subordinate governments that impose an excessive burden on the national economy.[89] The Court considered a

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85. *SMCRC*, 105 S. Ct. at 1729 n.23.

86. See *Parker*, 317 U.S. at 345, 63 S. Ct. at 310.

87. See J. Due & A. Friedlander, Government Finance: Economics of the Public Sector 46-51 (7th ed. 1981); W. Hirsch, The Economics of State and Local Government 18-24 (1970); W. Neenan, Urban Public Economics 59-67 (1981); Tiebout, A Pure Theory of Local Expenditures, 65 J. Pol. Econ. 416, 416-24 (1956). See generally J. Buchanan, Public Finance in Democratic Process (1967); A. Hirschman, Exit, Voice, and Loyalty (1970).

88. For a more thorough discussion of this point, see supra note 10 and accompanying text; Lopatka, supra note 5, at 70-72.

89. For an excellent summary of the application of the Commerce Clause to state anticompetitive activities, see 1 P. Areeda & D. Turner, supra note 3, at § 220b. See generally J. Nowak, R. Rotunda, & J. Young, Constitutional Law 266-75 (2d ed. 1983).

Judge Easterbrook has argued that when a state act imposes a burden on parties to which the state is not politically accountable, the act should be preempted by the Sherman Act. See Easterbrook, supra note 4, at 45-46. Though we both would preempt the state act, I prefer to use the mechanism of the Commerce Clause. The proper test for determining whether conduct violates the Sherman Act is whether it injures consumer welfare. It focuses upon the fact that allocative efficiency is impaired, not upon the identity of the consumers injured. The Commerce Clause, on the other hand, does focus upon the location of the economic incidents of governmental action. Professors Areeda and Turner appear to be in accord with my view, asserting that use of the Commerce Clause and other non-

Commerce Clause challenge in *Parker*, but, unfortunately, rejected it.[90]

### B. *Schwegmann Brothers v. Calvert Distillers Corp.*

The Court firmly established the state action doctrine in *Parker*, and did so in an unlikely case—one in which the state action really injured out-of-state consumers. The opinion raised many questions, though, and after waiting eight years to address the issue again, the Court reached a decision that was more confusing than illuminating. In *Schwegmann Brothers v. Calvert Distillers Corp.*,[91] Louisiana had passed a law that permitted sellers to agree upon resale prices and also required retailers who were not parties to an agreement to adhere to the prices specified in the agreement.[92] At the time, the Miller-Tydings Act provided that the Sherman Act did not "render illegal, contracts or agreement prescribing minimum prices for the resale" of certain commodities when "contracts or agreements of the description are lawful as applied to intrastate transactions" under local law.[93] The respondent distributors entered into contracts with retailers under which the retailers agreed to adhere to a minimum resale price schedule.[94] They brought suit to enjoin the petitioner, a retailer who refused to sign a contract, from selling at less than the minimum prices specified in the schedule.[95]

The distributors had two available arguments. One was that the Miller-Tydings Act authorized enforcement of the resale price maintenance scheme. The Court responded by pointing out two differences between the Miller-Tydings Act and the state statute. The federal statute only authorized agreements prescribing minimum resale prices, whereas the Louisiana law purported to authorize agreements as to minimum or maximum resale prices.[96] Clearly, however, the more significant difference to the Court was that the Miller-Tydings Act sanctioned the enforcement of vertical price-fixing agreements only against the parties to the agreements, whereas the state statute purported to allow a party to

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antitrust remedies for anticompetitive state conduct is superior to the imposition of antitrust liability. 1 P. Areeda & D. Turner, supra note 3, at § 220(e). See also Cantor, 428 U.S. at 612, 96 S. Ct. at 3128 (Blackmun, J., concurring) ("[A] state action that interferes with competition not only among its own citizens but also among the States is already subject under the Commerce Clause to much the same searching review of state justifications as is proposed here (for review under the Sherman Act)").

90. Parker, 317 U.S. at 359-68, 63 S. Ct. at 317-22.

91. 341 U.S. 384, 71 S. Ct. 745 (1951).

92. Id. at 386-87, 71 S. Ct. at 746-47.

93. Miller-Tydings Act, Ch. 690, 50 Stat. 693 (1937) (repealed by the Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, §2, 89 Stat. 801 (codified as amended at 15 U.S.C. §1 (1982)).

94. *Schwegmann*, 341 U.S. at 385, 71 S. Ct. at 745.

95. Id. at 385-86, 71 S. Ct. at 746.

96. Id. at 388, 71 S. Ct. at 747.

such an agreement to force a non-party to adhere to its terms.[97] Therefore, the distributors' attempt to force the non-signing retailer to sell at stipulated prices was not exempt from the Sherman Act by virtue of the Miller-Tydings Act.

The second argument available to the distributors was that, wholly apart from the Miller-Tydings Act, the Sherman Act did not apply to their actions because of the state action exemption. The State of Louisiana authorized distributors to impose resale prices on their retailers, and argued that like the action of the price-fixing raisin growers in *Parker*, the distributors' actions should be immune from antitrust attack. The Court's apparent response to this argument was curt and echoed the *Parker* dictum on state authorization without citing the prior case: "The fact that the state authorizes the price-fixing does not, of course, give immunity to the scheme, absent approval by Congress."[98] In fact, California had authorized raisin growers to fix prices in *Parker* and thereby gave immunity to the scheme even though Congress had not approved it. The Court there held that despite the absence of any affirmative approval, Congress did not intend the antitrust laws to apply.

What was different in *Schwegmann*? Recall that one possible construction of the *Parker* dictum focused upon the specificity of the state action.[99] If the state did not act in such a way that the conduct constituting the particular restraint challenged was a likely consequence, the restraint would not be immunized. In *Schwegmann*, however, the state apparently intended to authorize suppliers to force retailers to comply with price schedules even if the retailers had not agreed to the prices.[100] Louisiana clearly did act in a way that had a high probability of producing the challenged restraint.

Perhaps the holding of *Schwegmann* is that state action immunity will be denied unless the restraint is not only intended by the state, but is actively supervised by the state.[101] Louisiana did not undertake to

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97. Id. 71 S. Ct. at 747.

98. Id. at 386, 71 S. Ct. at 746.

99. See supra notes 77-82 and accompanying text.

100. The Court quoted the relevant provision of the statute:

> Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section 1 [§9809.1] of this act, *whether the person so advertising, offering for sale or selling is or is not a party to such contract*, is unfair competition and is actionable at the suit of any person damaged thereby.

*Schwegmann*, 341 U.S. at 387 n.2, 71 S. Ct. at 747 n.2.

101. See supra notes 83-85 and accompanying text. This is the position taken by Professors Areeda and Turner. See 1 P. Areeda & D. Turner, supra note 3, at § 213a. This argument, however, is not easily reconcilable with Hoover v. Ronwin, 104 S. Ct. 1989, 1996 (1984), where the Court said that active state supervision is irrelevant to state action immunity when the operative, injury-producing conduct is that of the state itself,

supervise the resale price maintenance scheme. Or perhaps the Court intended to distinguish between narrow and broad scale state authorized restraints.[102] A state law authorizing farmers to fix prices in order to improve the lot of a depressed agricultural industry is one thing, especially where the objectives of the statute are clearly set forth; a state law authorizing the imposition of resale prices by suppliers of a broad range of commodities, where the purpose of the act is obscure, is another.[103] The distinction though, is not obvious. Yet another interpretation of *Schwegmann*, and a rather ingenious, if not compelling one, was suggested by Justice Stewart.[104] Perhaps the Court interpreted the Miller-Tydings Act as an express antitrust exemption created by Congress in 1937 for some kinds of state laws. By expressly exempting certain conduct, the Congress of 1937, by implication, must have intended that different but related conduct would not be exempt. Therefore, even though the state-sanctioned restraint in *Schwegmann* would have enjoyed an implied exemption from the Sherman Act, as enacted by the Congress of 1890, the Congress of 1937, by negative inference, eliminated that exemption.

In the end, the rationale and originally-intended limits of *Schwegmann* remain mysterious. I believe the case was wrongly decided. Where the state clearly expresses a policy authorizing the challenged restraint, the state and attendant private parties should be immune from antitrust attack. The state action might still be preempted by the Commerce Clause, if an insignificant proportion of the harm caused by the restraint

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rather than of private parties. See the discussion infra at notes 353-70 and accompanying text. Nevertheless, this is the Court's current understanding of *Schwegmann*. In *SMCRC*, 105 S. Ct. at 1729 n.23, the Court stated:

> Contrary to the Government's arguments, our holding here does not suggest that a State may "give immunity to those who violate the Sherman Act by authorizing them to violate it" (citing *Parker* and *Schwegmann*). A clearly articulated *permissive* policy will satisfy the first prong of the *Midcal* test. The second prong, (state supervision), however, prevents States from "casting . . . a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement" (citing *Midcal*).

102. One commentator has written, "Perhaps we should understand *Schwegmann* as merely a refusal to extend *Parker* to general efforts by state legislatures to create wholesale exemptions from antitrust law, as distinct from more narrowly targeted efforts to supress competition in favor of state regulatory objectives." Robinson, The Sherman Act as a Home Rule Charter: Community Communications Co. v. City of Boulder, 2 Sup. Ct. Econ. Rev. 131, 133 (1983) (footnote omitted).

103. The preamble of the Louisiana statute merely provided: "An Act to protect trademark owners distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trademark, brand or name." 1936 La. Acts No. 13.

104. See *Cantor*, 428 U.S. at 637 n.25, 639, 96 S. Ct. at 3140 n.25 (1976) (Stewart, J., dissenting).

is imposed on state residents. But here, the law would not be preempted because the injury to consumer welfare, if any, was likely to befall Louisiana residents. *Schwegmann* exists as a precedent, however, and therefore should be interpreted to do as little evil as possible. I would adopt the interpretation that *Schwegmann* withholds immunity from broad-scale attempts to displace the antitrust laws and take an expansive view of what constitutes a "narrow" restraint. But the Court, at least in dicta, has adopted a broader interpretation. The Court now appears to adhere to the construction that the defect in *Schwegmann* was the failure of the state to supervise the authorized restraint.[105]

Because of the posture of the case, the *Schwegmann* Court was spared an unpleasant confrontation with one of the implications of its decision. The distributors in the case were seeking an injunction to force the retailer to comply with price schedules. The retailer, however, might have sued the distributors for treble damages alleging an antitrust violation. Presumably, the retailer would have won. The Court said that the interstate marketing arrangement challenged would "draw civil and criminal penalties" unless an antitrust exemption applied and then found that no such exemption existed.[106] Yet the effect of that conclusion is that distributors engaging in conduct specifically authorized by state law are held liable for civil damages and perhaps criminal punishment for that conduct. Such a result somehow offends the conscience.[107] As long as the plaintiff in a state action case requests only equitable relief, or

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105. See supra note 101. I once suggested that *Schwegmann* might no longer be good law. Lopatka, supra note 5, at 38. At that time, *Hoover*, 104 S. Ct. 1989, was the latest Supreme Court state action decision and neither the majority nor dissenting opinion cited *Schwegmann*. The Court's more recent statement in *SMCRC*, 105 S. Ct. at 1729 n.23, suggests that the conduct in *Schwegmann* was not immunized because of the absence of state supervision. This implies that state authorized but unsupervised restraints will continue to be unprotected and that *Schwegmann* retains some vitality.

106. *Schwegmann*, 341 U.S. at 386, 71 S. Ct. at 746.

107. One answer to this issue is that it is not unfair to require parties to desist from engaging in conduct authorized by a state, or even to disobey state commands, where the relevant conduct would violate federal law. Professors Areeda and Turner apparently ascribe to this view. See 1 P. Areeda & D. Turner, supra note 3, at § 215b1. They argue that compulsion by a foreign government might excuse conduct that would otherwise violate the antitrust laws, because it would be unreasonable to subject innocent private parties to inconsistent sovereign directives. This justification, however, does not apply to conduct compelled by state governments, they contend, because, under the Constitution state laws conflicting with federal statutes are invalid. This argument might be persuasive if federal law *always* preempted inconsistent state law. However, because "federal law may expressly or . . .impliedly give way to state law," id., they admit, as they must, that federal law does not always prevail. It seems equally unfair to force innocent private parties to predict when a court will hold that federal law *impliedly* gives way to state law as it is to force them to choose between the inconsistent directives of national sovereigns, especially when the determinants of implied deference are as esoteric as they are for state action immunity.

the court denies state action immunity to private parties because the state did not in fact intend to authorize the challenged conduct, the bitter after-taste of a seemingly unjust damage judgment is avoided. But where, as in *Schwegmann*, the Court holds that private parties are not protected by the state action doctrine from liability for conduct clearly authorized by the state because of some defect, for state action purposes, in the authorization or subsequent supervision, the potential inequity of a damage judgment is inescapable. Though the Court has tended to ignore this issue, a few Justices made a stab at addressing it in *Cantor v. Detroit Edison Co.*, discussed later.[108]

### C. *Goldfarb v. Virginia State Bar*

After *Schwegmann*, the Court waited 24 years to again consider the state action doctrine, then proceeded to decide an average of almost one state action case per year through 1985.[109] In *Goldfarb v. Virginia State Bar*,[110] the state and county bar associations established a price-fixing scheme for attorneys. All practicing attorneys in Virginia were required to belong to the State Bar.[111] The State Bar, an administrative

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108. *Cantor*, 428 U.S. at 598-603, 96 S. Ct. at 3121-24 (representing opinion of four Justices) (it is not unfair to hold private parties liable for damages when they could not have reasonably believed their actions to be immune); id. at 614 n.6, 96 S. Ct. at 3129 n.6 (Blackmun, J., concurring) (a defense against damages should be allowed on the basis of fairness whenever the conduct on which such damages would be based was required by state law). *Cantor* is the only Supreme Court state action case in which the plantiff sought antitrust damages and the Court held the defendant's conduct unprotected, despite the existence of an arguably clear state authorization. In *Cantor*, the plaintiff sought damages based on the defendant utility's free light-bulb program, which had been approved by the state public utilities commission. However, though the program was embodied in a tariff filed with the state agency, and which the agency could have disallowed, it can be argued that the agency did not affirmatively intend to authorize the program. See infra notes 160-63 and accompanying text. In *Goldfarb*, 421 U.S. 773, 95 S. Ct. 2004 (1975), the plaintiff sought treble damages and the Court held the state action exemption unavailable, but the attorney price-fixing challenged there was not clearly authorized by the state. Id. at 790, 95 S. Ct. at 2015. Similarly, in City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 98 S. Ct. 1123 (1978), a utility asserted an antitrust counterclaim against various cities requesting damages relating to the operation of the cities' electric utility systems and the Court rejected a state action defense. But there, too, the cities' activities apparently were not clearly authorized by the state.

109. See *Goldfarb*, 421 U.S. 773, 95 S. Ct. 2004; *Cantor*, 428 U.S. 579, 96 S. Ct. 3110; Bates v. State Bar of Arizona, 433 U.S. 350, 97 S. Ct. 2691 (1977); *City of Lafayette*, 435 U.S. 389, 98 S. Ct. 1123; New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 99 S. Ct. 403 (1978); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 100 S. Ct. 937 (1980); Community Communications Co. v. City of Boulder, 455 U.S. 40, 102 S. Ct. 835 (1982); *Hoover*, 104 S. Ct. 1989; Town of Hallie v. City of Eau Claire, 105 S. Ct. 1713 (1985); *SMCRC*, 105 S. Ct. 1721.

110. 421 U.S. 773, 95 S. Ct. 2004 (1975).

111. Id. at 776, 95 S. Ct. at 2007.

agency of the State Supreme Court,[112] issued reports condoning fee schedules and practical opinions indicating that an attorney who habitually disregards fee schedules is presumed to be guilty of misconduct and subject to disciplinary action.[113] In response, the County Bar, a voluntary association and not a state agency,[114] adopted a minimum fee schedule and advised attorneys that regularly charging lower fees would constitute an ethical violation.[115]

In an antitrust action brought by consumers for injunctive relief and damages against the state and county bars,[116] the State Bar argued that it was implementing the policy of the state supreme court.[117] That court had adopted the Code of Professional Responsibility, which suggested that fee schedules "provide some guidance on the subject of reasonable fees," and that the customary fee in a locality was one of eight factors to be considered in avoiding an excessive fee.[118] The court also had stated in a rule that, in setting fees, it was "proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association."[119] The rule further provided, however, "[B]ut no lawyer should permit himself to be controlled (by a fee schedule) or to follow it as his sole guide in determining the amount of his fee."[120]

The Court held that the State Bar did not enjoy state action immunity "because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities" challenged.[121] The Court acknowledged that the state court rules mentioned fee schedules, but noted that the rules did not "direct" the state bar to supply schedules or "require" the type of price floor which arose.[122] The Court continued, "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 a sovereign."[123]

The Court's reference to compulsion was unfortunate. It created a doubt as to the kind of state policy, or the strength with which a state must desire anticompetitive activities, that is necessary to win immunity. The doubt lingered until 1985, when the Court held that compulsion is

112. Id., 95 S. Ct. at 2007.
113. Id. at 776-78, 95 S. Ct. at 2007-08.
114. Id. at 790, 95 S. Ct. at 2015.
115. Id. at 777 n.4, 95 S. Ct. at 2008 n.4.
116. Id. at 778, 95 S. Ct. at 2008.
117. Id. at 790, 95 S. Ct. at 2015.
118. Id. at 789 n.19, 95 S. Ct. at 2014 n.19.
119. Id., 95 S. Ct. at 2014 n.19.
120. Id., 95 S. Ct. at 2014 n.19.
121. Id. at 790, 95 S. Ct. at 2015.
122. Id., 95 S. Ct. at 2015.
123. Id. at 791, 95 S. Ct. at 2015.

not a prerequisite for state action immunity.[124] The *Goldfarb* Court could have said merely that the state did not intend to engage in or permit the conduct that constituted the restraint challenged and had not acted in such a way that price-fixing was a likely consequence. The state supreme court apparently contemplated fee schedules, but did not authorize their use as a price-fixing mechanism. As the Court itself recognized, "[The state supreme] court has adopted ethical codes which deal in part with fees, and far from exercising state power to authorize binding price-fixing, explicitly directed lawyers not 'to be controlled' by fee schedules."[125]

One clear implication of the Court's opinion is that the state supreme court may embody the state for purposes of enunciating an anticompetitive policy. Had the court compelled adherence to fee schedules, the result might have been different.[126] Interestingly enough, however, the reason the court may embody the state is less clear. The Court, citing a Virginia statute, said, "Through its legislature Virginia has authorized its highest court to regulate the practice of law."[127] The implication is that the state legislature is the sole source of state power, but can delegate that power to the state supreme court, which then embodies the state for state action purposes. The Court also commented, however, that "[i]n addition, the Supreme Court of Virginia, has inherent power to regulate the practice of law in that State."[128] If "inherent power" is enough to turn an entity into the state for state action purposes, then presumably the state supreme court as well as the legislature and perhaps the governor each constitute the state when acting within its sphere of constitutional authority as an independent branch of government. If this is true, neither the supreme court nor the executive needs a delegation of authority from the legislature. If the sole ultimate source of power is the legislature, however, then a delegation of authority from the legislature is required for any other entity to act for the state, but

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124. See *SMCRC*, 105 S. Ct. at 1729.

125. *Goldfarb*, 421 U.S. at 789, 95 S. Ct. at 2014.

126. It is true, of course, that the *Goldfarb* Court said that state compulsion was a "threshold inquiry", and that the Court "need not inquire further into the state-action question" because the threshold test was not met; the Court never said that had it been met, state action immunity would have followed, or immunity would have followed if it and further requirements had been fulfilled. Id. at 790, 95 S. Ct. at 2015. See also *Cantor*, 428 U.S. at 600, 96 S. Ct. at 3110. Nevertheless, the tenor of the Court's opinion suggests that immunity was possible. Specifically, the Court today would likely hold that if the state court compelled adherence to price schedules and thereafter supervised the activity, the participants would enjoy immunity. Indeed, compulsion, as distinct from a clearly articulated state policy, would not even be required. See supra note 124 and accompanying text.

127. *Goldfarb*, 421 U.S. at 789, 95 S. Ct. at 2014.

128. Id. at 789 n.18, 95 S. Ct. at 2014 n.18.

presumably any state agency, not simply the supreme court or governor, could become the legislature's delegatee. In later cases, the Court reaffirmed the proposition that the state supreme court embodies the state for state action purposes without explicitly discussing the source of the court's power.[129] The Court has explicitly avoided opining on the status of the governor.[130] Although the state supreme court did not compel price-fixing, the State Bar had a potentially stronger argument for immunity—it *was* the state. If the bar constituted the state for state action purposes, it would not matter that the state supreme court provided no explicit authorization for the bar's price-fixing activities. The argument was not frivolous. The state legislature had authorized the supreme court to organize and govern the Virginia State Bar, and the supreme court had created the agency. The Supreme Court responded tersely to this implicit argument: "The fact that the State Bar is 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."[131]

The implications of the Court's statement bear some examination. An affirmative policy in favor of attorney price-fixing was articulated neither by the state legislature nor by the state supreme court. Yet the Court might be understood to have implied that the supreme court could have articulated such a policy, and thereby would have immunized those who implemented it, because the legislature delegated authority to the court to regulate the practice of law. If the legislature, in effect, could delegate the authority to express an anticompetitive policy to the supreme court, why was the supreme court unable to sub-delegate that authority to the state bar? Even if the Supreme Court thought that the source of the state court's ability to speak for the state was its inherent power, why was the court unable to delegate that authority to the agency? The answers, I believe, as far as the court was concerned, stem from the fact that the members of this state agency had a direct economic interest in the subject of its regulation. An anticompetitive policy that would benefit Virginia lawyers would benefit the state bar. As the Court's statement suggests, allowing the state bar effectively to adopt a policy of attorney price-fixing would allow "it to foster anticompetitive practices for the benefit of its members." The Court does not hold, however, that state agencies are invariably unqualified to articulate an anticompetitive policy sufficient for state action purposes. A state agency with no direct financial interest in the subject of its control, with no clear

129. See *Hoover*, 104 S. Ct. at 1995; *Bates*, 433 U.S. at 360, 97 S. Ct. at 2697.

130. See *Hoover*, 104 S. Ct. at 1995 n.17 ("This case does not present the issue whether a Governor of a State stands in the same position as the state legislature and supreme court for purposes of the state action doctrine."). This issue is discussed infra at note 500-03 and accompanying text.

131. *Goldfarb*, 421 U.S. at 791, 95 S. Ct. at 2015.

incentive to act to its advantage at the expense of the public welfare, can stand in the position of the state. For the sake of convenience, I label the interested, *Goldfarb*-type agency an "illegitimate" agency, and the disinterested one a "legitimate" agency, for state action purposes.[132]

Once the Court's view of the status of the state bar was clear, the county bar was doomed. Because neither the state legislature nor supreme court had articulated a policy in favor of attorney price-fixing, their actions did not immunize either the state or county bar.[133] If the state bar, as an official state agency, could independently have articulated an anticompetitive policy sufficient to immunize itself, then the county bar might have been able to claim derivative immunity, given that its actions appear to have been instigated by the state bar. But when the Court held that the state bar, in effect, occupied the position of any group of private parties, then the county bar could acquire no immunity from its state counterpart.

### *D. Cantor v. Detroit Edison Co.*

The Court next confronted the state action doctrine in *Cantor v. Detroit Edison Co.*,[134] and the opinions written in that case remain the most thorough exposition of the alternative ideological approaches to the issue that the Court has offered. Edison, a private electric utility, adopted a program in 1886, prior to the time Michigan began to regulate public utilities, of providing light-bulbs to customers at no charge in addition to its rates for basic services.[135] Shortly after Michigan instituted public utility regulation, Edison embodied the light-bulb program as a term of service in tariffs, which were filed with and approved by the Michigan Public Service Commission.[136] Thereafter, each time the regulatory agency approved a change in rates, it ordered the new rates to be embodied in tariffs filed with the Commission, and those tariffs contained the light-bulb program as a term of service. Thus, for the most part, the agency's approval of the program was implicit.[137] No state statute explicitly mentioned the program.[138] On one occasion, how-

132. Though some members of the Court are apparently sympathetic to this approach, see *City of Lafayette*, 435 U.S. at 431, 98 S. Ct. at 1146 (Stewart, J., dissenting), other members have resisted this distinction. Id. at 411 n.41, 98 S. Ct. at 1136 n.41. For a discussion of this aspect of *City of Lafayette*, see infra notes 261-64 and accompanying text.

133. *Goldfarb*, 421 U.S. at 790, 98 S. Ct. at 2015 (neither the legislature nor supreme court required the anticompetitive activities of *either* respondent).

134. 428 U.S. 579, 96 S. Ct. 3110 (1976).

135. Id. at 583, 96 S. Ct. at 3114.

136. Id., 96 S. Ct. at 3114.

137. Id., 96 S. Ct. at 3114.

138. Id. at 584, 96 S. Ct. at 3114-15.

ever, Edison proposed to eliminate the program for large commercial customers as part of a general reduction in rates to those customers. The Commission approved the elimination of the program for these customers and, in the same proceeding, authorized rates for other customers that again included the light-bulb program.[139] A utility is required by state law to provide the service at the rates specified in a tariff as long as the tariff is in effect; it cannot change its rates or services without first filing a new tariff and obtaining Commission approval.[140]

The Michigan Public Service Commission was created in 1939 to replace the Public Utilities Commission.[141] The statute creating the Public Service Commission provided:

> [N]o member of said commission shall be pecuniarily interested in any public utility or public service subject to the jurisdiction and control of the commission. . . . No commission member shall be retained or employed by any public utility or public service subject to the jurisdiction and control of the commission during the time he is acting as such commissioner, and for 6 months thereafter.[142]

The statute conferred broad power on the commission to regulate utilities, stating:

> [The Commission] is hereby vested with power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service and all other matters pertaining to the formation, operation or direction of such public utilities. It is further granted the power and jurisdiction to hear and pass upon all matters pertaining to or necessary or incident to such regulation of all public utilities, including electric light and power companies. . . .[143]

In an antitrust class action for damages and injunctive relief brought by a retail merchant of light-bulbs against Edison alone, the district court granted summary judgment in favor of the defendant on the basis of state action immunity.[144] The Sixth Circuit affirmed the judgment,[145] and the Supreme Court reversed, with four Justices writing opinions.[146]

In an opinion representing the view of four members of the Court, Justice Stevens asserted that *Parker* had held only that state officials

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139. Id. at 583, 96 S. Ct. at 3114.
140. Id. at 582-83, 585, 96 S. Ct. at 3113-15.
141. Mich. Comp. Law Preamble, § 460.1.
142. Mich. Comp. Law Preamble, § 460.1.
143. Mich. Comp. Law Preamble, § 460.6.
144. Cantor v. Detroit Edison Co., 392 F. Supp. 1110, 1112 (E.D. Mich. 1974).
145. 513 F.2d 630 (6th Cir. 1975).
146. 428 U.S. 579, 96 S. Ct. 3110 (1976).

acting pursuant to express legislative command are immune from antitrust attack; the Court there did not decide whether private actors could be immunized by state action.[147] A majority of the Court disagreed with this interpretation.[148] Of course, Justice Stevens's interpretation would not have resolved *Cantor* anyway, since he was arguing merely that *Parker* had not decided the issue posed in *Cantor*. But his view allowed him to dismiss the argument that it would be inappropriate or unfair to impose treble damage liability on the utility for engaging in conduct it assumed was immune from antitrust attack.[149] If *Parker* did not hold that private parties could be immunized by state action, Edison could not have reasonably believed that its action was exempt from the antitrust laws, and it would not be unfair to impose damage liability on the utility.[150] Again, apparently only four Justices ascribed to this position.[151]

In a section of the opinion joined by five members of the Court, Justice Stevens reasoned that it would be neither unjust nor contrary to Congressional intent to impose antitrust liability on Edison.[152] In his discussion of fairness, Justice Stevens offered an insight into state action cases that bears emphasis, however disputable his application of that insight was in *Cantor*. He pointed out that typically, state action cases "involve a blend of private and public decisionmaking."[153] He assumed,

147. Id. at 589, 96 S. Ct. at 3117.

148. See id., at 603-04, 96 S. Ct. at 3123 (Burger, C.J., concurring); id. at 613 n.5 96 S. Ct. at 3128 n.5 (Blackmun, J., concurring); id. at 622, 96 S. Ct. at 3132 (Stewart, J., dissenting).

149. Id. at 599, 96 S. Ct. at 3121-22. See also supra notes 106-08 and accompanying text.

150. *Cantor*, 428 U.S. at 601, 96 S. Ct. at 3122-23. Justice Stevens also had to reconcile *Goldfarb*, where the defendants consisted of the County Bar, which was unquestionably a private entity, *Goldfarb*, 421 U.S. at 779, 95 S. Ct. at 2009, and the State Bar, which was treated as a private entity, id. at 791, 95 S. Ct. at 2015. Though the Court denied immunity for want of a state command, it seemed to suggest that immunization of the private parties by state action was possible. Justice Stevens responded that by referring to state compulsion as a *threshold* inquiry, the Court was carefully avoiding the implication that immunity was necessarily possible. *Cantor*, 428 U.S. at 600, 96 S. Ct. at 3122.

151. *Cantor*, 428 U.S. at 603, 96 S. Ct. at 3124 (Burger, C.J., concurring). Three Justices dissented and specifically rejected Justice Stevens's reading of *Parker*. Id. at 614, 618, 96 S. Ct. at 3129-31 (Stewart, J., dissenting). Justice Blackmun did not explicitly refuse to concur in this part of Justice Stevens's opinion, but he explicitly rejected Justice Stevens's reading of *Parker*. Id. at 613 n.5, 96 S. Ct. at 3128 n.5 (Blackmun, J., concurring). And he opined that "a defense against damages (should be allowed) wherever the conduct on which such damages would be based was required by state law. Such a rule would . . . eliminate what seems to me the extremely unfair possibility that during a particular period . . . the regulatee could be required by state law to conform to a course of conduct for which he was all the while accumulating treble-damages liability under federal law." Id. at 614 n.6, 96 S. Ct. at 3129 n.6 (Blackmun, J., concurring).

152. Id. at 592-98, 96 S. Ct. at 3118-21.

153. Id. at 592, 96 S. Ct. at 3118.

*arguendo*, that if a private party did nothing more than obey a state command, if, in other words, the decisionmaking was predominately public, it would be unfair to impose antitrust liability.[154] If, however, the private party exercises "sufficient freedom of choice to enable the Court to conclude that he should be held responsible for the consequences of his decision," liability may justly be imposed.[155] In *Cantor*, imposing liability on Edison was not unjust because "the option to have, or not to have, [a light-bulb program was] primarily respondent's, not the Commission's"[156]

The degree of responsibility the private party bears for an anticompetitive restraint also relates to the majority's view of Congressional intent, though its discussion of this issue lacks clarity. Justice Stevens appears to say that Congress did not intend to exempt private participants in restraints that also involve the state unless two conditions are met: the state really intends that private parties engage in conduct that would violate the antitrust laws, and the state's reason for ordering the conduct is sufficiently meritorious that it should prevail over the federal mandate. The concern appears to be both with the *fact* of the state command, in other words, that the state intended to order conduct inconsistent with the antitrust laws, and the *policy* behind, or reason for that order. Justice Stevens pointed out that "merely because certain conduct may be subject both to state regulation and to the federal antitrust laws does not necessarily mean that it must satisfy inconsistent standards. . . ."[157] This point, which amounts to a truism, relates to the fact of a conflict between state and federal mandates. Justice Stevens continued:

> [S]econd, even assuming inconsistency, we could not accept the view that the federal interest must inevitably be subordinated to the State's; and finally, even if we were to assume that Congress did not intend the antitrust laws to apply to areas of the economy primarily regulated by a State, that assumption would not foreclose the enforcement of the antitrust laws in an essentially unregulated area such as the market for electric light bulbs.[158]

Though Justice Stevens suggests these two later observations are separate points, they are really one assertion, and it relates to the policy behind the state command.[159]

The majority's concern with a real conflict between state and federal commands is not frivolous. True, the utility was required by state law

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154. Id. at 592, 594-95, 96 S. Ct. at 3118-20.
155. Id. at 593, 96 S. Ct. at 3119.
156. Id. at 594, 96 S. Ct. at 3119.
157. Id. at 595, 96 S. Ct. at 3120.
158. Id., 96 S. Ct. at 3120.
159. See id. at 631, 96 S. Ct. at 3137 (Stewart, J., dissenting) (the plurality's second point is "merely a restatement of the third rationale").

to continue the light-bulb program as long as the relevant tariffs were effective. But the decision to have the program might still have been primarily the utility's. Suppose the State of Superior adopted the following policy: a utility engages in many practices, and with limited resources, we choose not to investigate and reach an independent judgment on the merits of each of them. However, we require the utility to embody all of their practices in tariffs and file them with the state regulatory commission, and we require the utility to comply with those tariffs. The requirement that the practices be described and open to public inspection will promote public awareness, facilitate objections by persons injured by them, and enable the state to concentrate its limited resources on those practices that generate the most controversy. The requirement that the utility adhere to the tariffs will prevent discrimination, a traditional objective of utility regulation. Given this kind of structure, to claim that a particular anticompetitive practice is intended by the state would be dubious.

Of course, the state's participation in *Cantor* was greater than in the hypothetical, but the Court hinted that *Cantor* was close to the level of participation in the hypothetical. The Court said, "Neither the Michigan Legislature, nor the Commission, has ever made any specific investigation of the desirability of a lamp-exchange program. . . ."[160] It noted that Edison was the only Michigan utility that had the program, and, therefore, "infer[red] that the State's policy is neutral on the question whether a utility should, or should not, have such a program."[161] The Court claimed that there was "no statute, Commission rule, or policy which would prevent respondent from abandoning the program merely by filing a new tariff."[162] And it concluded, "[T]here can be no doubt that the option to have, or not to have, such a program is primarily respondent's, not the Commission's."[163]

The majority's concern with the fact of a real conflict between federal and state mandates certainly relates to the ultimate question in state action cases: Did the state intend to engage in or permit the conduct that constitutes the restraint challenged?[164] Some of the Court's observations suggest that the state did not intend to permit the light-bulb program. To the extent the Court goes beyond that, and suggests that the state must not only intend to permit a practice, but must affirmatively desire it as well, the majority goes too far. If a state intends to authorize a specific practice, there is no theoretical need

160. Id. at 584, 96 S. Ct. at 3115.
161. Id. at 585, 96 S. Ct. at 3115.
162. Id., 96 S. Ct. at 3115.
163. Id. at 594, 96 S. Ct. at 3119.
164. Of course, where the restraint challenged constitutes a *prohibition* of certain conduct, the relevant question is whether the state contempleted and prohibited the activity.

stemming from the basis of the state action doctrine to require any particular level of state affection for the practice, and to attempt to gauge the depth of the state's interest will usually prove difficult and often futile.

The majority gave little attention in *Cantor* to evidence that the state did intend to authorize the program. Edison had proposed to drop the program as applied to large commercial customers and the utilities commission allegedly undertook a substantial investigation of the proposal. It approved the termination of the program as to these customers, but continued to allow the operation of the program as to other customers. This is significant evidence that the commission was aware of and affirmatively intended to authorize the program's continuance.

Further, because the only practical method of discerning intent is to infer it from actions, the operative standard for proving intent is whether the state acted in such way that the conduct constituting the restraint was a likely consequence. If a state creates a regulatory structure that requires tariffs specifying rates and services to be filed with an agency, confers power on the agency to reject or revise tariffs, and requires utilities to adhere to filed tariffs, the agency's approval of a tariff, whether it takes the form of an explicit assent or a failure to reject, would make the activity specified in the proposal a likely consequence, even if the agency never actually considered the tariff's content. In other words, the agency, like the Superior Regulatory Commission hypothesized above, would have taken action the probable consequences of which it did not intend. If immunity is withheld in such circumstances, however, the mental processes of state decisionmakers will become a contestable issue in state action cases. The direct and indirect costs of litigating the quality of state deliberative processes, including the cost of unseemly federal interventionism, would not be justified, especially because there should be very few instances in which a state does not intend the probable consequences of its actions. To put this point in a different way, an irrebutable presumption that the state intends to permit private anticompetitive conduct that is the probable consequence of the state's actions is efficient, even though there may be instances in which the presumption is incorrect.[165]

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165. In *Cantor*, the activity challenged was the operation of the light-bulb program, and that activity should have been held immune under the state action doctrine, because, within the context of regulatory procedure, it was the likely consequence of the agency's action, even if perhaps the agency did not intend to authorize it. The plaintiff might have challenged the utility's submission to the agency of the tariff embodying the program. That act was in no way caused by an act of the state, and, therefore, was not protected state action. That conduct, however, was almost certainly immune under the *Noerr-Pennington* doctrine. See *Cantor*, 428 U.S. at 624, 96 S. Ct. at 3133 (Stewart, J., dissenting)

The requirement for immunity specified in later cases by the Court, that the restraint challenged be the "clearly articulated and affirmatively expressed" policy of the state,[166] is another standard for assessing a state's intent. This standard appears on its face to require a more explicit authorization by the state of private anticompetitive activity than that the state have acted in such a way as to make the private conduct a likely consequence.[167] The clear state policy standard suffers the same potential flaw as the likely consequence standard—a state might express a clear policy in favor of an activity that it did not intend to authorize. For instance, an overworked state utilities commission might routinely ask regulated firms to draft orders affirmatively authorizing service offered by them, and issue those orders verbatim as commission directives without considering their contents. The clear policy test, therefore, does not eliminate the potential of the likely consequence standard to be overinclusive as an indicator of the state's intent.[168]

The clear policy test, however, creates a risk of underinclusion much greater than any created by the likely consequence test. Suppose that the state law requires a utility to file tariffs describing service proposed

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(the utility's act of proposing a tariff could not give rise to antitrust liability under *Noerr*).

The reason this conclusion is at all uncertain, however, is that the *Noerr-Pennington* doctrine seems to be based on the assumption that a governmental entity will actually consider a private proposal for an anticompetitive policy and make a reasoned decision to adopt it. The evidence in *Cantor* might have been construed to prove that the Michigan Public Service Commission never actually considered the light-bulb program. Whether requesting an anticompetitive policy in such a way that the governmental entity is not likely to evaluate the merits of the proposal before adoption should constitute abuse of governmental process and, thereby, vitiate *Noerr-Pennington* immunity is a question that deserves separate attention. At the very least, misuse would seem to require some threshold amount of effort on the part of the private party to make it likely that the government entity would not consider the proposal before adoption. In other words, a kind of fraud would be required for misuse; if the agency routinely operated carelessly, the private party would not have misused the process. In *Cantor*, there was little evidence that Edison engaged in any misuse. Further, to allow *Noerr-Pennington* immunity to be affected by whether a governmental body actually evaluated an anticompetitive proposal when it had an opportunity and a legal interest in doing so would invite the same kind of inquiry into state deliberative processes that allowing a plaintiff to prove that a state did not intend the probable consequences of its actions would invite. In neither context is the cost of that kind of inquiry justified.

166. See, e.g., *California Retail Liquor Dealers Ass'n*, 445 U.S. 97, 105, 100 S. Ct. 937, 943 (the challenged private restraint must be "one clearly articulated and affirmatively expressed" as state policy).

167. The Court's latest explanation of the clear state policy standard suggests that the test may not require a more affirmative expression of state intent than the likely consequence test. See infra notes 411-14 and accompanying text.

168. Because the likely consequence standard is broader than the clear state policy standard, and state actions satisfying the broader standard should create an irrebuttable presumption of state intent, *a fortiori*, the existence of a clear state policy should create an irrebuttable presumption of state intent.

and provides that the tariffs will become effective if not rejected by the agency. The agency's failure to reject a tariff might indeed represent a careful deliberation and an affirmative decision to authorize the service, yet the agency's conduct would not satisfy the clear state policy standard. The conduct would, however, satisfy the likely consequence test of proving state intent.

There may be situations, of course, in which the agency's mere failure to exercise its power to prohibit private activities does not constitute a course of conduct the probable consequence of which is the private restraint. For example, if a regulatory agency simply takes no action with respect to the activities of firms within its jurisdiction, that kind of failure to act would not increase the probability of any particular private activity, and immunity would be improper. But if a particular activity, claimed to be an antitrust violation, is specifically brought to the attention of the agency, and the agency conducts an investigation into it and permits it to continue, the activity should be held immune and would be held immune under the likely consequence standard, even though the agency would not have affirmatively articulated a policy in favor of it.[169]

The Court in *Cantor* was not only skeptical that there was a clash of state and federal policies, but also said that even if the policies did conflict, the state policy might not prevail.[170] Its discussion of this point, however, was vague. Justice Stevens pointed out that a traditional reason for state regulation of electric power is to cure the market defect of a natural monopoly.[171] Because light-bulb distribution is not a natural monopoly, a state could regulate electricity in furtherance of this conventional utility regulation objective without regulating light-bulb distribution.[172] Though this much is clear, it is not clear exactly what Justice Stevens infers from this. He might be saying that these observations further demonstrate, along with the sparse record of state involvement, that the light-bulb program was not the policy of the state, but the idea of the utility. Since the only apparent state objective is the regulation of natural monopoly service, and light-bulb distribution is not a natural monopoly, the induction is that the state did not intend to establish the light-bulb program, and, therefore, there is not conflict between federal and state policies.

The alternative interpretation is that Justice Stevens believed the state did intend to foster the light-bulb program, but because the natural

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169. The economic analysis suggested here of potential evidentiary tests of state intent is developed further at infra notes 295-311 and accompanying text.

170. See supra note 158 and accompanying text.

171. See *Cantor*, 428 U.S. at 595-96, 96 S. Ct. at 3120.

172. See id. at 596, 96 S. Ct. at 3120.

monopoly justification for regulation was absent, the state's reason for the program, whatever it was, was not sufficient to immunize the program in the face of a conflict with the federal antitrust laws. This interpretation, of course, would be far more intrusive into the affairs of a state than the former interpretation. Apparently Chief Justice Burger, and certainly Justice Blackmun would require an investigation into the content of state policy. Chief Justice Burger described *Cantor* as a "situation where the State, in addition to requiring a public utility 'to meet regulatory criteria insofar as it is exercising its natural monopoly powers,' . . . also purports, without any independent regulatory purpose, to control the utility's activities in separate, competitive markets."[173] The Chief Justice concluded, "To find a 'state action' exemption on the basis of Michigan's undifferentiated sanction of this ancillary practice could serve no federal or state policy."[174] These passages suggest that Chief Justice Burger might not grant state action immunity unless the state is regulating a natural monopoly. This would be consistent with one interpretation of Justice Stevens's opinion. A more literal reading of these sentences, however, suggests that a state objective other than natural monopoly regulation could support immunity, but that no such objective existed in *Cantor*. The Chief Justice said that Michigan acted "without any independent regulatory purpose" and that antitrust immunity would "serve no . . . state policy."

The Chief Justice's inability to discern a state purpose for the light-bulb program is curious. Neither the state legislature nor utilities commission articulated a purpose, and perhaps Chief Justice Burger was serving notice that if a state seeks antitrust immunity, it must provide an express justification for its actions. But the utility itself offered a rationale for the program, and even without the utility's assistance, a substantial justification could have been inferred.[175] By providing light-bulbs at costs, the utility lowered the price of electricity consumption and thereby stimulated demand. If the utility had excess capacity, the increased output would lower the average cost, and hence, the average price, of electricity. This may or may not in fact have been the purpose of the program. But it is a legitimate theoretical purpose, and the Court typically does not disdain apparent justifications. If the Chief Justice did perceive this to be the real purpose, it is difficult to understand why this policy should be deemed any less worthy than limiting entry and regulating the price of kilowatt hours of electricity. In a broad sense, the light-bulb program would be a component of natural monopoly regulation.

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173. Id. at 604, 96 S. Ct. at 3124.

174. Id. at 605, 96 S. Ct. at 3124.

175. Id. at 583, 96 S. Ct. at 3114 ("The purpose of the program, according to respondent's executives, is to increase the consumption of electricity.").

If the Chief Justice and Justice Stevens did intend to hold that only narrowly-defined state regulation of natural monopolies is a sufficient justification for antitrust immunity, they created a serious conflict with *Parker*. Raisin production is not a natural monopoly, yet the Court held that California's regulatory scheme was immune from antitrust challenge.[176]

Justice Stevens' and Chief Justice Burger's concerns with the purpose of state action are somewhat ambiguous. Justice Blackmun's concern, however, is unmistakable. He argued that immunity cannot turn upon whether the state program is mandatory or permissive, was initiated by the private party or the state, or was affirmatively articulated by the state.[177] Rather, Justice Blackmun advocated a rule of reason approach under which state-sanctioned anticompetitive activity is pre-empted if its potential harms outweigh its benefits.[178] Specifically, Justice Blackmun would withhold immunity unless the state-sanctioned practice is necessary to serve a legitimate state purpose. He stated that he would take a lenient approach to assessing the legitimacy of the state policy, and where the state's "justifications are at all substantial . . . , would be reluctant to find the restraint unreasonable."[179] In particular, he cited the protection of health or safety as legitimate state policies, and said that he would find an especially strong justification "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."[180]

Justice Blackmun, then would deem adequate a state policy to displace competition with regulation, protect public health, or protect

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176. See id. at 631-32, 96 S. Ct. at 3137 (Stewart, J., dissenting) ("Raisin production is not a 'natural monopoly.' If the limits of the state-action exemption from the Sherman Act are congruent with the boundaries of 'natural monopoly' power, then *Parker* was wrongly decided.") One argument that Justice Stevens and Chief Justice Burger could have made is that only regulation designed to cure market failure is sufficient for immunity, and even though raisin production is not a natural monopoly, it exhibits a separate kind of market defect. Justice Blackmun did raise the point. See id. at 613 n.5, 96 S. Ct. at 3128 n.5 (Blackmun, J., concurring). There is little indication in the *Parker* opinion, however, that any such consideration motivated the Court. And though Justice Blackmun disdained reliance on a state's articulation of a policy, see id. at 610, 96 S. Ct. at 3127 (Blackmun, J., concurring), most any state regulation can be justified as a response to some real or imagined market defect.

177. Id. at 609-10, 96 S. Ct. at 3126-27.

178. Id. at 610, 96 S. Ct. at 3127.

179. Id. at 611, 96 S. Ct. at 3127.

180. Id., 96 S. Ct. at 3127.

public safety. Of course, Michigan had displaced competition in the light-bulb market with regulation designed to achieve the ends of competition. The price of light-bulbs, included in electric service rates, was held to cost, and that is the end to which competition works. Apparently, Justice Blackmun objects to regulation of markets that are not natural monopolies or otherwise defective.[181] But every real-life market diverges to some extent from a model of pure competition. How extreme does the divergence have to be to justify, in the mind of a judge, state intervention? Agricultural prices might fluctuate wildly sometimes, but so might the prices of personal computers and gasoline.[182] Automobile dealers are smaller than car manufacturers, as television retailers are usually smaller than producers. Does this discrepancy in size create a market defect sufficient to justify a state in preventing manufacturers from increasing intra-brand competition?[183] The market "failure" is slight at best. For decades, states have been regulating markets that could be competitive, such as ambulance service and taxi cabs. Is this permissible? And will states lose their authority to regulate natural monopolies when the industries lose their natural monopoly characteristics, as apparently will happen to local telephone service?[184]

To deem regulation of competitive markets justifiable where undertaken to promote public health or safety hardly creates a meaningful test. Every product and service can be seen to affect health or safety somehow. Would the light-bulb program in *Cantor* have been permissible if the public service commission had justified it on the ground that light-bulbs sometimes explode and encouraging distribution through a single source results in a higher average quality of bulbs in use? If so, the problem in *Cantor* was simply the state's failure to articulate the right reason. But Justice Blackmun himself rejected reliance on affirmative articulation of a policy as a determinant for immunity, noting that it would "lead to perverse results."[185] In short, a judicial inquiry into

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181. See id. at 613, 96 S. Ct. at 3128 ("For all that appears, light-bulb marketing, unlike electric power production, is not a natural monopoly, nor does it implicate health or safety, nor is it beset with problems of instability or other flaws in the competitive market.").

182. See id. at 613 n.5, 96 S. Ct. at 3128 n.5 (The decision in *Parker* was justifiable because "[w]ildly fluctuating agricultural prices are a prime candidate for some collective scheme that interrupts free competition in order to bring badly needed stability.")

183. In New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96, 99 S. Ct. 403 (1978), discussed infra at notes 265-81 and accompanying text, California justified a program that allowed an existing automobile dealer to prevent its manufacturer from locating new franchises in its area on the ground that manufacturers have more bargaining power than dealers. Id. at 100-01, 99 S. Ct. at 407. The Court held the program to be immune state action. Id. at 109, 99 S. Ct. at 411-12.

184. See generally, Noll, The Future of Telecommunications Regulation, in Telecommunications Regulation Today and Tomorrow 42-48 (E. Noam ed. 1983).

185. *Cantor*, 428 U.S. at 610, 96 S. Ct. at 3127 (Blackmun, J., concurring).

the content of state policy will either be an unwarranted intervention into local matters, producing erratic and unprincipled results, or become an insubstantial formality.

Judged by his standards, Justice Blackmun found *Cantor* easy to decide. The state justification for the light-bulb program was the promotion of electric power use. That policy, according to Justice Blackmun, might no longer have been a "plausible public goal," and even if it remained a permissible policy, the light-bulb program was not necessary to serve it.[186] Similarly, if the goal was to provide cheaper and better light-bulbs to consumers, the program was not necessary.[187] The utility could have offered light-bulbs at cost, without forcing consumers to purchase light-bulbs by including their cost in electric rates. To require an inquiry into the content of state policy for state action purposes, as would Justice Stevens, Chief Justice Burger, and particularly Justice Blackmun, is misguided, and it is this aspect of their opinions to which Justice Stewart in dissent most strongly objected. He observed:

> [T]he Court is adopting an interpretation of the Sherman Act which will 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.[188]

Justice Stewart concluded:

> In adopting this freewheeling approach to the language of the Sherman Act the Court creates a statutory simulacrum of the substantive due process doctrine I thought had been put to rest long ago. . . . For the Court's approach contemplates the selective interdiction of those anticompetitive state regulatory measures that are deemed not "central" to the limited range of regulatory goals considered "imperative" by the federal judiciary.[189]

In part, Justice Blackmun responded to Justice Stewart's concern about the difficulty of assessing the merits of a state policy by pointing out that the judiciary already was obliged to undertake that task under the Commerce Clause when the actions of a state affect residents of other states. He said, "[A] state action that interferes with competition not only among its own citizens but also among the States is already subject under the Commerce Clause to much the same searching review

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186. Id. at 613, 96 S. Ct. at 3128.
187. Id., 96 S. Ct. at 3128.
188. Id. at 630, 96 S. Ct. at 3136 (Stewart, J., dissenting).
189. Id. at 640, 96 S. Ct. at 3141 (Stewart, J., dissenting).

of state justifications as is proposed here."[190] What Justice Blackmun did not explain is why it is necessary or appropriate to use a federal policy to prevent a state from taking action "that interferes with competition . . . only among its own citizens." For, as Justice Blackmun's statement implies, that is the only context in which Sherman Act preemption would be necessary. In every other context, state action can be preempted under the Commerce Clause alone.[191]

Whether or not the state policy behind an anticompetitive program should affect antitrust immunity, of course, is technically an issue of Congressional intent. Unfortunately, the legislative history on this issue is ambiguous. Indisputably, the Congress of 1890 did not believe that its power under the Commerce Clause was broad enough to extend to most activities undertaken or authorized by states.[192] But the Court held that Congress intended the limits of the Sherman Act to expand with the limits of the commerce power, and only when the scope of the commerce power increased to embrace the activities of states did the question of state action immunity arise.[193] It is difficult to infer from this Congressional desire alone what the 1890 Congress would have intended with respect to state action had it foreseen the possibility of applying the statute to state activities. Justice Stewart, however, also divined from legislative history a Congressional intent "not to intrude upon the authority of the several States to regulate 'domestic' commerce."[194] Therefore, Justice Stewart concluded that Congress did not intend the Sherman Act to apply to state activities, regardless of their justifications, and that intent was unaffected by Congress's perception of its Commerce Clause power.[195] Justice Blackmun, however, found nothing in the legislative history other than a perception that Congress lacked the power to extend the Sherman Act to state activities.[196]

To Justice Stewart, the defendant in *Cantor* engaged in two activities: first, it proposed a tariff and, second, after state approval, it obeyed the tariff's terms. The first activity was immune under the *Noerr*[197]

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190. Id. at 612, 96 S. Ct. at 3128 (Blackmun, J., concurring).

191. I have argued that all action undertaken or effectively authorized by a governmental entity should be immune from antitrust attack, but that action should be preempted under the Commerce Clause unless a significant proportion of its harmful effects is borne by citizens of the state. See supra notes 10-11, 88-89 and accompanying text.

192. 428 U.S. at 632, 96 S. Ct. at 3137 (Stewart, J., dissenting); id. at 605, 96 S. Ct. at 3124 (Blackmun, J., concurring).

193. See id. at 635-36, 96 S. Ct. at 3137-39 (Stewart, J., dissenting).

194. See id. at 637, 96 S. Ct. at 3139-40 (Stewart, J., dissenting).

195. Id., 96 S. Ct. at 3139-40 (Stewart, J., dissenting).

196. Id. at 605, 96 S. Ct. at 3124-25 (Blackmun, J., concurring).

197. Eastern R.R. Presidents Conf. v. Noerr Moter Freight, Inc., 365 U.S. 127, 81 S. Ct. 523 (1961) (an agreement to seek anticompetitive legislation is not actionable under the antitrust laws).

doctrine and the second under *Parker* and *Goldfarb*.[198] Justice Stewart's construction of the state action doctrine, then, is that private activity investigated and approved by the state is immune, regardless of the state policy supporting the action. This is the proper approach.[199] The one potential difficulty with Justice Stewart's position, however, is the source from which he inferred a state intent to authorize the light-bulb program. Recall that Justice Stevens seemed incredulous that the program was anything but Edison's idea.[200] Justice Stewart, however, in describing the regulatory process, commented that the "Public Service Commission *investigates* the proposed tariff and either approves it or rejects it."[201] He also stated that Michigan's policy is not neutral with respect to whether a utility should have a light-bulb program.[202]

From what source Justice Stewart infers an affirmative state policy is not clear. Perhaps he found the agency's conduct with respect to the abandonment of the light-bulb program for large commercial customers compelling evidence that the agency had investigated, considered, and authorized the program. That conclusion would be a fair reading of the record. Or perhaps he believed that if a utility is required by law to specify in tariffs filed with an agency the service it proposes, the agency is empowered to approve or modify the proposal, and the utility is thereafter required to conform to the tariffs, the fact that an agency does not reject the specific activity described proves the state's intent to authorize that conduct. In that situation, which probably comes closest to describing *Cantor*, the challenged activity would have been the likely consequence of the state's action and therefore immunity would be proper. But perhaps Justice Stewart believed that for state action purposes, it is enough that an agency is given jurisdiction over a practice, has the power to investigate it, has the authority to prohibit it, and does not in fact forbid it, regardless of whether the challenged conduct is specifically presented to the agency for approval or the agency actually considers the challenged conduct. His opinion contains some support for this last interpretation. In explaining why Michigan's light-bulb pro-

198. *Cantor*, 428 U.S. at 624, 96 S. Ct. at 3133 (Stewart, J., dissenting).

199. See supra notes 7-11 and accompanying text. I have suggested that the proper test in practice is whether the state has acted in such a way that the conduct constituting the restraint challenged was a likely consequence. See supra notes 8, 165 and accompanying text. Justice Stewart would not require that these actions be taken by the state *legislature* (*Cantor*, 428 U.S. at 638 n.26, 96 S. Ct. at 3140 n.26), and neither would I. But in the absence of a clear and explicit expression of intent by the legislature or the appropriate state agency, I would require a strong circumstantial showing of state intent, perhaps a stronger showing than Justice Stewart would require.

200. See supra notes 157-63 and accompanying text.

201. *Cantor*, 428 U.S. at 624, 96 S. Ct. at 3133 (Stewart, J., dissenting) (emphasis added).

202. Id. at 626 n.11, 638 n.26, 96 S. Ct. at 3134 n.11, 3140 n.26.

gram was not neutral, Justice Stewart pointed only to the fact that the Michigan statutes vest the Public Service Commission "with complete power and jurisdiction to regulate all public utilities in the state."[203] If Justice Stewart intended to assert that agency power alone, though unexercised, is sufficient to demonstrate the state's intent to authorize specific anticompetitive conduct, even if that conduct represents a very small proportion of the regulated firm's activities, and there is no legal obligation on the utility to notify the agency of the specific conduct challenged and no indication that the agency actually became aware of it, he went too far. The restraint would not be a likely consequence of that official behavior.

There is no doubt that for Justice Stewart, a state agency can constitute the "state" for state action purposes. To him, the light-bulb program represented state policy because the legislature had conferred power on the Public Service Commission to regulate utilities, and the Commission had investigated and approved the program.[204] But it is not completely clear whether the majority of the Court in *Cantor* would have held that a state agency can constitute the state. Justice Stewart understood Chief Justice Burger and Justice Stevens to reject the possibility that an agency may represent the state, and to require instead a legislative articulation of state policy.[205] In fact, Chief Justice Burger appears to have been more concerned with emphasizing the lack of affirmative articulation of a state policy by *any* state representative than with distinguishing between a legislative and an administrative expression.[206] Similarly, the issue to Justice Stevens was whether the light-bulb program represented the policy of the state or of the utility, not whether it represented the policy of the Michigan legislature or of the Public Service Commission. But there are hints in Justice Stevens's opinion that he would have deemed the agency competent to express state policy. He stated that "[n]either the Michigan Legislature, nor the *Commission*" had specifically investigated the program and that there was "no statute, *Commission rule*, or policy" that prevented the abandonment of the program.[207] Later, in explaining that state action cases typically involve a blend of public and private decisionmaking, he referred to the public component of the light-bulb program as the *Commission's* participation,

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203. Id. at 638 n.26, 96 S. Ct. at 3140 n.26.

204. The Court in *Parker* had held that the legislature may constitute the state (see supra notes 49-50 and accompanying text) and in *Goldfarb* had implied that the state supreme court may embody the state. See supra note 126 and accompanying text.

205. *Cantor*, 428 U.S. at 626 n.11, 638 n.26, 96 S. Ct. at 3134, n.11, 3140 n.26 (Stewart, J., dissenting).

206. See id. at 604-05, 96 S. Ct. at 3125 (Burger, C.J., concurring).

207. Id. at 584-85, 96 S. Ct. at 3114-15 (emphasis added).

and concluded that the option to have the program was primarily the utility's, not the *Commission's*.[208]

The correct interpretation of *Cantor* on this issue is that a state policy can be effectively established by a state agency. In *Goldfarb*, of course, the state bar, even though an official state agency, was unable to express a state policy in favor of attorney price fixing in order to immunize the practice.[209] But the state bar comprised members with a direct economic interest in the subject of their regulation. By contrast, Michigan Public Service Commission members were forbidden to have a pecuniary interest in any public utility subject to Commission jurisdiction.[210] In my terminology, the Michigan agency was legitimate, the Virginia State Bar was illegitimate.[211] Where a legitimate state agency has jurisdiction over a matter, as the Michigan Public Service Commission had,[212] it can articulate a policy sufficient for state action immunity.[213] Precluding articulation by an agency, and requiring legislative articulation instead, would seriously frustrate the tremendous efficiency of conducting state affairs through administrative agencies, which in large part explains their growth and popularity.[214]

### *E. Bates v. State Bar of Arizona*

The Court next considered the state action doctrine in 1977. In *Bates v. State Bar of Arizona*,[215] the Arizona Supreme Court had adopted a rule that required members of the bar to comply with duties and obligations prescribed by the American Bar Association's Code of Professional Responsibility ("CPR"), as amended by the court.[216] One disciplinary rule contained in the CPR and adopted by the court prohibited lawyers from advertising.[217] Two Arizona lawyers advertised their services

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208. Id. at 593-94, 96 S. Ct. at 3119.

209. See supra notes 131-33 and accompanying text.

210. See supra note 142 and accompanying text.

211. See supra note 132 and accompanying text.

212. See supra note 143 and accompanying text.

213. The best interpretation of *Goldfarb* and *Cantor* is that only a legitimate state agency can immunize a practice. A preferable rule would be that any agency can effectively authorize a restraint. See infra notes 459-60 and accompanying text.

214. See *Cantor*, 428 U.S. at 638 n.26, 96 S. Ct. at 3140 n.26 (Stewart, J., dissenting) ("If a state legislature can ensure antitrust exemption only by eschewing such broad delegation of regulatory authority and incorporating regulatory details into statutory law, then there is a very great risk that the State will be prevented from regulating effictively.").

215. 433 U.S. 350, 97 S. Ct. 2691 (1977).

216. Id. at 360 n.12, 97 S. Ct. at 2697 n.12.

217. Id. at 355, 97 S. Ct. at 2694. In relevant part, the rule provided:

> A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.

in a newspaper, and the state bar's Board of Governors recommended a disciplinary suspension.[218] The lawyers sought review of the action in the Arizona Supreme Court, arguing, *inter alia*, that the disciplinary rule violated the Sherman Act.[219] The court rejected the claim on the basis of the state action doctrine, and on review of that decision, the Supreme Court affirmed.[220]

The application of the state action doctrine was simple enough. The state supreme court had clearly expressed a policy prohibiting advertising.[221] The state itself, therefore, committed an act that had a high probability of producing an anticompetitive effect. In other words, the Court itself had engaged in the restraint challenged. In *Goldfarb*, the court had not done so. In both *Bates* and *Goldfarb*, the state supreme court had adopted the Code of Professional Responsibility.[222] But the CPR explicitly prohibited advertising; it did not mandate adherence to price schedules.[223] Further, the Virginia Supreme Court had expressly cautioned that lawyers should not be controlled by fee schedules.[224] *Cantor* could have been and, in part was distinguished on the same basis.[225] In *Cantor*, a majority of the Court did not believe that the light-bulb program was truly the state's policy.[226] In *Bates*, the policy of the state was unmistakable.

The Court also echoed the *Cantor* majority's concern with the content of state policy, distinguishing that case on the additional ground that the justification for regulating light-bulbs was insufficient in the face of a conflict with the antitrust laws, whereas the state's interest in *Bates* was adequate.[227] The Court was somewhat ambiguous on this point, noting first that "the regulation of the activities of the bar is at the core of the State's power to protect the public."[228] Of course, regulation of the activities of a public utility also is recognized as a traditional function of the state.[229] What the *Cantor* majority, as well

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218. Id. at 354, 356, 97 S. Ct. at 2694, 2695.

219. Id. at 356, 97 S. Ct. at 2695.

220. Id. at 357, 363, 97 S. Ct. at 2695, 2698.

221. See id. at 360, 97 S. Ct. at 2697.

222. See supra note 118 and accompanying text.

223. See 433 U.S. at 360, 97 S. Ct. at 2697.

224. See supra note 120 and accompanying text.

225. In *Bates*, the Court asserted three distinctions between that case and *Cantor*. One concerned the clarity of the state policy. The Court said, "Finally, the light-bulb program in *Cantor* was instigated by the utility with only the acquiescence of the state regulatory commission. . . . The situation now before us is entirely different. The disciplinary rules reflect a clear articulation of the State's policy with regard to professional behavior." Id. at 362, 97 S. Ct. at 2698.

226. See supra notes 160-63 and accompanying text.

227. *Bates*, 433 U.S. at 361, 97 S. Ct. at 2697.

228. Id., 97 S. Ct. at 2697.

229. See generally W. Jones, Regulated Industries 1-69 (ed 2d. 1976).

as Justice Blackmun, required was an adequate rationale for the particular anticompetitive practice challenged, not for regulation of a service or industry in general. As applied to *Bates*, that meant a justification deemed acceptable by the Court for a ban on attorney advertising. The Court seemed to recognize this fact, but apparently found the justification for the ban, through the sheer duration of the practice, self-evident and obviously substantial. Without elaboration, the Court said, "More specifically, controls over solicitation and advertising by attorneys have long been subject to the State's oversight."[230]

The Court also distinguished *Cantor* on the ground that the defendant there was a private party.[231] *Bates* did not involve an antitrust complaint at all, but a petition for review of attorney disciplinary action recommended by the state bar in which the petitioners claimed that the suspension would be improper because the rule on which it would be based violated the Sherman Act. Technically, the petitioners were objecting to the suspension recommended by the state bar, and as *Goldfarb* had held, a state bar stands in the position of a private party when regulating attorney conduct.[232] But in *Bates*, the Court stated, "Here, the appellants' claims are against the State. The Arizona Supreme Court is the real party in interest; it adopted the rules, and it is the ultimate trier of fact and law in the enforcement process."[233]

The question in *Bates* was whether the ban on advertising was intended by the Arizona Supreme Court, and certainly it was. The court adopted the rule that expressly forbade advertising. Undoubtedly the bar committee's recommendation for disciplinary action was a likely consequence of the court's promulgation of that rule. The Supreme Court, however, also referred to the fact that the Arizona court was "the ultimate trier of fact and law in the enforcement process." Whether the Court would have found this fact alone sufficient for immunity had the Arizona court not affirmatively articulated the restraint as state policy in the rule or the enforcement process is problematic. For example, if the ban on advertising had been established by the Arizona Bar, the bar had recommended a suspension for its violation, and the court, without elaboration, had imposed the suspension, would the Court have

230. *Bates*, 433 U.S. at 362, 97 S. Ct. at 2698 (footnote omitted). The Court concluded, "Federal interference with a State's traditional regulation of a profession is entirely unlike the intrusion the Court sanctioned in *Cantor*." Id., 97 S. Ct. at 2698. Again, this suggests that the rationale for state regulation of professions is more compelling than the rationale for regulation of utilities. This misstates the concern in *Cantor*. The question posed by *Cantor* is whether the state's interest in banning attorney advertising is critically more substantial than in establishing a light-bulb program.

231. Id. at 361, 97 S. Ct. at 2697-98.

232. See supra note 131 and accompanying text.

233. *Bates*, 433 U.S. at 361, 97 S. Ct. at 2697.

deemed the restraint immunized state action?[234] If by referring to the Arizona Supreme Court as the "real party in interest" the Court merely meant to say that that court had intended the restraint, then its reference was simply a straightforward application of the principle developed in prior cases. If, however, the Court meant to suggest that the state can be the "real party in interest" and thereby immunize a restraint even when the state had not intended the anticompetitive activity, then the Court was announcing a novel principle. This ambiguity surfaced several years later.[235]

The doubt about the source of the supreme court's power to embody the state for state action purposes left open in *Goldfarb* was resolved by *Bates*.[236] In stating that the supreme court was "the ultimate body wielding the State's power over the practice of law," the Court cited the Arizona Constitution and an Arizona Supreme Court case, which had held that the supreme court has inherent power, stemming from the constitution, to regulate law practice, apart from any power the state legislature might confer.[237] Thus, for state action purposes, the supreme court embodies the state because, according to the state constitution, it is an independent branch of government, not because it is authorized by the legislature to speak for the state.

Finally, the Court noted that the supreme court rules reflected a "clear articulation of the State's policy" and that the rules were "subject to pointed re-examination by the policymaker—the Arizona Supreme Court—in enforcement proceedings."[238] The Court concluded, "Our concern that federal policy is being unnecessarily and inappropriately subordinated to state policy is reduced in such a situation; *we deem it significant that* the state policy is so clearly and affirmatively expressed

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234. In that situation, the adoption of the ban and the recommendation of the suspension ought not be immune under the state action doctrine, because those acts were in no degree caused by any state act. They might still acquire immunity, however, under the *Noerr-Pennington* doctrine, or might not constitute an antitrust offense. And of course, the state court would be immune from liability for ordering the suspension. See infra notes 371-79 and accompanying text.

235. See Hoover v. Ronwin, discussed infra at notes 342-84 and accompanying text. The reference to the state as "the real party in interest" creates a way to immunize private parties implicitly without resort to direct state authorization. If a private party is sued for an antitrust offense, and there is neither a clear state policy in favor of the restraint nor state supervision, one could hold the private party immune by characterizing the state as the "real party in interest" and dismissing the complaint against the proper defendant on the ground that the state itself cannot violate the antitrust laws. In essence, this is what the Court did in *Ronwin*.

236. See supra notes 126-29 and accompanying text.

237. *Bates*, 433 U.S. at 360, 97 S. Ct. at 2697. The Court cited In re Bailey, 30 Ariz. 407, 248 P. 29 (1926).

238. *Bates*, 433 U.S. at 362, 97 S. Ct. at 2698.

and the *the State's supervision is so active.*"[239] This is the first case in which the Supreme Court explicitly stated that active state supervision of a restraint is relevant to a determination of state action immunity. Unfortunately, the Court's reasons are cryptic, at best. The fear the Court expresses is the needless subordination of federal policy to that of the state. But the Court refers both to the existence of a clear state policy and active supervision as reducing the danger. It is not obvious why a restraint clearly and affirmatively expressed as state policy but not supervised would amount to an unnecessary and inappropriate subordination of federal policy. Moreover, if there were such a restraint, the Court does not say that immunity would be unavailable. The Court simply noted that supervision is "significant." Thus, though *Bates* contains the first explicit reference to state supervision as a relevant factor in state action immunity, the Court did not explain the extent of the factor's importance or the reason for it.

### *F. City of Lafayette v. Louisiana Power & Light Co.*

In *City of Lafayette v. Louisiana Power & Light Co.*,[240] cities brought an antitrust suit against several investor-owned electric utilities alleging that the utilities had engaged in various practices designed to impede the cities in their attempt to provide service through municipally-owned electric systems to customers located beyond city limits.[241] One of the defendants filed an antitrust counterclaim against the cities, alleging that the cities had engaged in various practices intended to injure the competitive position of the utility.[242] The district court dismissed the counterclaim on the basis of the state action doctrine, the Fifth Circuit reversed, and the Supreme Court, by a margin of five to four, affirmed.[243] The Court held that municipalities are not exempt from the antitrust laws simply by virtue of their status as governmental entities.

The topic of antitrust immunity for municipalities implicates some concerns that are common to all state action cases and some that are peculiar to politically-accountable governmental bodies. For that reason, it is a topic best considered separately, and I have offered elsewhere an analysis directed to municipal immunity.[244] For present purposes, however, a few points emanating from *City of Lafayette* relevant to state action immunity in general ought to be mentioned.

The Court did not hold that the cities were incapable of being immunized under the state action doctrine. Rather, the Court held that

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239. Id., 97 S. Ct. at 2698 (emphasis added).
240. 435 U.S. 389, 98 S. Ct. 1123 (1978).
241. Id. at 391-392, 392 n.5, 98 S. Ct. at 1125-26, 1126 n.5.
242. Id. at 392 n.6, 98 S. Ct. at 1126 n.6.
243. Id. at 392-94, 98 S. Ct. 1125-27.
244. See Lopatka, supra note 5.

cities are not immune simply because they are governmental entities, or because they are necessarily the agents of the state and their actions therefore automatically are the state's actions. The plurality stated that the *Parker* doctrine exempts "anticompetitive conduct engaged in as an act of government by the State as sovereign, or, *by its subdivisions*, pursuant to state policy to displace competition with regulation or monopoly public service."[245] To the extent the plurality implies that the state action doctrine immunizes only the conduct of the state itself or its subdivisions, the statement conflicts with the Court's apparent intentions in *Parker*, *Goldfarb*, and *Bates*.

In *Parker*, it appeared that had the plaintiff sued raisin growers for price-fixing, they would have been immune.[246] In *Goldfarb*, it seemed that the county bar, a voluntary association of lawyers, and the state bar, deemed a private party for state action purposes, would have been held immune had their conduct been compelled by the state supreme court.[247] And had *Bates* procedurally involved an antitrust complaint against the state bar, there is little doubt that the bar would have been held immune.[248] Thus, to the extent the plurality suggested that private parties cannot enjoy state action immunity, the suggestion was misleading and was explicitly rejected several years later.[249] Moreover, the plurality purported to limit a state in adopting a policy that will enjoy immunity to one designed "to displace competition with regulation or monopoly public service." There is no warrant for so limiting the range of policy objectives a state may pursue free of the threat of antitrust liability, and no prior case had expressly imposed such a limitation.

The plurality then considered the direction a state must provide a city in order to confer immunity. It stated that a city will be immunized if its activity is "contemplated" and authorized by the state:

> While a subordinate governmental unit's claim to *Parker* immunity is not as readily established as the same claim by a state government sued as such, we agree with the Court of Appeals that an adequate state mandate for anticompetitive activities *of cities and other subordinate governmental units* exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of."[250]

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245. *City of Lafayette*, 435 U.S. at 413, 98 S. Ct. at 1137 (emphasis added).

246. See supra notes 39-51 and accompanying text.

247. See supra notes 121-25 and accompanying text.

248. See supra notes 220-33 and accompanying text.

249. See *SMCRC*, 105 S. Ct. at 1726, discussed infra at notes 424-62 and accompanying text.

250. *City of Lafayette*, 435 U.S. at 415, 98 S. Ct. at 1138 (citation omitted) (emphasis added).

The Court remanded for consideration of the extent of the state's authorization.

The state's contemplation and authorization of a restraint is a useful allusion, but its application should not be restricted to subordinate governmental entities. Instead, it should be a sufficient requirement for determining whether *any* anticompetitive activity is immunized by state action. A state may act in such a way that a private anticompetitive act is a likely consequence even if it does not contemplate the private act, and so state contemplation should not be a necessary condition of immunity.[251] If a state does contemplate and authorize an activity, however, that activity surely is a likely consequence. Further, though the Court may not have intended to limit the relevance of contemplation and authorization to subordinate governmental entities, the Court explicitly seemed to do just that.[252]

Justice Stewart in dissent would have held that cities are automatically immune under the state action doctrine.[253] There are two rationales for this position, each of which can be detected in Justice Stewart's opinion. First, a city is a politically-accountable governmental body, as is a state, and Congress did not intend the Sherman Act to apply to any such governmental unit.[254] Second, a city is an instrumentality, or necessary agent of the state, and as such its actions necessarily constitute actions of the state without any further state authorization.[255] Under the first rationale, a city enjoys an independent immunity flowing from its nature as a governmental entity. Under the second, a city's immunity derives from the immunity granted to states. In either case, the result is the same.[256]

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251. See supra note 165 and accompanying text.

252. In a later case, the Court implied that the contemplation and authorization standard for assessing the clarity of a state policy adopted in *City of Lafayette* does apply to private defendants. See infra notes 312-13 and accompanying text.

253. *City of Lafayette*, 435 U.S. at 426, 98 S. Ct. at 1144 (Stewart, J., dissenting).

254. See id. at 426-30, 98 S. Ct. at 1144-45 (Stewart, J., dissenting).

255. See id. at 429, 98 S. Ct. at 1144-45 (Stewart, J., dissenting).

256. I would adopt the independent immunity rationale for reasons made clear in Lopatka, supra note 5, at 75-76. In general, I believe that Justice Stewart's opinions in the state action area have been most lucid and perceptive. His retirement from the Court and his subsequent passing have been felt in this area, as in other areas of the law. I do disagree with some of his dicta in *City of Lafayette*, however. He would have required that private action be *compelled* by the state in order to enjoy immunity. *City of Lafayette*, 435 U.S. at 431-32, 98 S. Ct. at 1146. As the Court has recently realized (see infra notes 398, 404-06, 440-44 and accompanying text), requiring state compulsion goes too far. What the Court ought to recognize is that a state's intent to engage in or authorize anticompetitive activity is sufficient for immunity. The Court's current construction of the clear state policy requirement, however, comes close to this proposition. See infra notes 411-14 and accompanying text.

Chief Justice Burger would have held that the distinction relevant to state action immunity for conduct of a city or a state is that between proprietary and governmental activities.[257] Governmental activities are immune. Proprietary activities, however, if they are undertaken by a municipality, can be immunized, but only if they are required by the state and are necessary to make the regulatory act work.[258] Of course, the Chief Justice purports to maintain the same distinction between proprietary and governmental activities for the conduct of states themselves as well as for the actions of cities. Presumably the state compulsion requirement would necessitate a state legislative command to engage in state anticompetitive proprietary activities. A distinction between governmental and proprietary activities for state action purposes would be unwise. Such a distinction has proven vexatious in the tort area and elevates form over substance.[259] A governmental entity may attempt to achieve the same end and produce exactly the same economic effects through governmental or proprietary actions. This asserted distinction has not reemerged in later cases.[260]

One final dispute between the dissent and the plurality relevant generally to the state action doctrine should be noted. Justice Stewart argued that the Court had never previously held that a governmental body could violate the antitrust laws, explaining *Goldfarb* on the ground that the state bar, though a state agency, assumed the status of a private party because of the nature of its membership and subject of its regulation.[261] Instead of simply responding that the Court had never held that a governmental body *could not* violate the antitrust laws, the plurality, in a footnote, rejected Justice Stewart's interpretation of *Goldfarb*. The plurality said, "We think it obvious that the fact that the ancillary effect of the State Bar's policy, or even the conscious desire on its part, may have been to benefit the lawyers it regulated cannot transmute the State Bar's official actions into those of a private organization."[262] This statement is unfortunate, because if a distinction cannot be made between legitimate and illegitimate agencies, a legitimate state agency will not be able to immunize private anticompetitive conduct

257. See *City of Lafayette*, 435 U.S. at 418, 422, 98 S. Ct. at 1139, 1141 (Burger, C.J., concurring); id. at 432, 98 S. Ct. at 1146 (Stewart, J., dissenting).

258. Id. at 425-26, 98 S. Ct. at 1142-43 (Burger, C.J., concurring).

259. See Lopatka, supra note 5, at 77-78; *City of Lafayette*, 435 U.S. at 432, 98 S. Ct. at 1146-47 (Stewart, J., dissenting).

260. Chief Justice Burger's attempt to require that state authorized proprietary conduct be necessary to make the regulatory act work was explicitly rejected by the Court in *SMCRC*, 105 S. Ct. at 1727 n.21, discussed infra at notes 424-62 and accompanying text.

261. *City of Lafayette*, 435 U.S. at 431, 98 S. Ct. at 1146 (Stewart, J., dissenting).

262. Id. at 411 n.41, 98 S. Ct. at 1136 n.41.

by expressing a policy in favor of it.[263] Rather, a constitutional branch of state government will have to express state policy, and the efficiency of operating government through administrative agencies will be impaired. Fortunately, the statement was *dicta*, completely unnecessary to the result in the case, and represented the opinion of only four Justices.[264]

### G. *New Motor Vehicle Board v. Orrin W. Fox Co.*

In *New Motor Vehicle Board v. Orrin W. Fox Co.*,[265] California had enacted the Automobile Franchise Act, which provided that if an automobile manufacturer wanted to establish a new dealership or relocate an existing dealership in the market area of an existing dealer, the incumbent could file a protest with the New Motor Vehicle Board.[266] The Board was then required to notify the manufacturer that a protest had been filed, schedule a hearing, and inform it that it was prohibited from opening the outlet at least until the conclusion of the hearing.[267] The hearing had to be convened within 60 days of the protest, but could be held at any earlier time if the Board found that the public interest so required.[268] At the conclusion of the hearing, the Board could permanently prohibit the establishment or relocation of the franchise for "good cause," a determination that required an assessment of the

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263. A better principle would be that any state agency can immunize a restraint (see infra notes 459-60 and accompanying text), but at least if *Goldfarb* is interpreted in the way suggested by Justice Stewart, some state agencies will be able to confer immunity.

264. Another issue raised in *City of Lafayette* concerned the imposition of damages on municipalities. The plurality expressly reserved the question of remedies, 435 U.S. at 402, 98 S. Ct. at 1131, Justice Stewart viewed the prospect of damages as one reason for municipal immunity, id. at 440-41, 98 S. Ct. at 1150-51 (Stewart, J., dissenting), and Justice Blackmun asserted that the issue deserved more attention than the plurality had devoted to it. Id. at 442-43, 98 S. Ct. at 1151-52 (Blackmun, J., dissenting). The issue resurfaced in Community Communications Co. v. City of Boulder, 455 U.S. at 56 n.20, 102 S. Ct. at 843-44 n.20 (the Court does not confront the issue of damages); id. at 65 n.2, 102 S. Ct. at 848 n.2 (Rehnquist, J., dissenting) ("It will take a considerable feat of judicial gymnastics to conclude that municipalities are not subject to treble damages. . . ."). Congress eliminated the problem by providing that no antitrust damage may be recovered from a local government, or from a private party based on an official act directed by local government. Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. 2750 (1984).

265. 439 U.S. 96, 99 S. Ct. 403 (1978).

266. Id. at 98 n.1, 99 S. Ct. at 406 n.1. The New Motor Vehicle Board consisted of nine appointive members, four of whom were new motor vehicle dealers and five of whom could not be. Cal. Veh. Code Ann. § 3001 (Supp. 1985).

267. *Orrin Fox*, 439 U.S. at 98 n.1, 99 S. Ct. at 406 n.1.

268. Id. at 103, 110, 99 S. Ct. at 408-09, 412.

new outlet's effect on the existing franchise and the public.[269] The purpose of the statute was to prevent manufacturers, perceived to have superior bargaining power, from abusing their dealers.[270] A manufacturer and would-be franchisees claimed that the statute denied Due Process and conflicted with the Sherman Act.[271] A three-judge district court held that the statute denied Due Process, but did not pass upon the antitrust claim.[272] The Supreme Court reversed on the constitutional issue and held that the program fell within the state action exemption.[273]

The plaintiffs challenged two aspects of the program. First, the statute allowed a dealer unilaterally to prevent a manufacturer from opening a new outlet prior to the time a hearing was concluded by the Board.[274] Thus, the dealer's unilateral act of filing a protest prevented the manufacturer from opening the dealership until the Board conducted a good cause hearing, which could be convened as long as 60 days after the protest was filed and could last for 30 days.[275] In effect, the dealer could forestall entry for up to 90 days without a determination of good cause by the Board. The shortest answer to this claim was that any anticompetitive effect of a 90-day delay was *de minimis*, especially since the opening of an enterprise as substantial as a car dealership was involved. Further, the Court pointed out that the Board had the authority to order an immediate hearing on the protest so that the "duration of interim restraint [was] subject to ongoing regulatory supervision."[276] In

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269. Id. at 98 n.1, 99 S. Ct. at 406 n.1. As to "good cause," the statute provided the following:

> In determining whether good cause has been established for not entering into or relocating an additional franchise for the same line-make, the board shall take into consideration the existing circumstances, including but not limited to:
>
> (1) Permanency of the investment.
>
> (2) Effect on the retail motor vehicle business and the consuming public in the relevant market area.
>
> (3) Whether it is injurious to the public welfare for an additional franchise to be established.
>
> (4) Whether the franchisees of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.
>
> (5) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest.

Cal. Veh. Code Ann. §§ 3062, 3063 (West Supp. 1978).

270. Id. at 100-02, 101 n.6, 99 S. Ct. at 407-08, 408 n.6.

271. Id. at 104, 99 S. Ct. at 409.

272. Id. at 99-100, 99 S. Ct. at 406-07.

273. Id. at 104, 109, 99 S. Ct. at 409, 412.

274. Id. at 110, 99 S. Ct. at 412.

275. Id. at 103 n.9, 99 S. Ct. at 409 n.9.

276. Id. at 110, 99 S. Ct. at 412.

other words, the dealer had very little unilateral power to impede entry.

The plaintiff's more substantial claim was that the statute allowed the Board and protesting dealers to prohibit entry indefinitely if good cause were found. The correct response to this claim was that the restraint was a likely consequence of the state's legislative enactment. In this case, the legislature passed a law allowing the Board, on protest of an incumbent dealer, to prohibit new entry. Supervision should not have been required, but it was present albeit in the form of an agency composed in part of interested members. The Court's actual response to this claim was rather curt, though not inconsistent with this analysis.[277]

The most interesting aspect of *Orrin Fox* is that, given the analysis espoused by Justices Stevens, Blackmun, and Chief Justice Burger in *Cantor*, the Court reached the result it did. Those Justices took the position that state action will be immunized only if the Court deems the state's policy sufficiently worthy to prevail over the federal policy embodied in the Sherman Act.[278] Justice Stevens and Chief Justice Burger, though ambiguously, might have been requiring a purpose to regulate a natural monopoly.[279] Justice Blackmun required a state purpose to protect public health or safety, or to correct market failure.[280] Selling automobiles is certainly not a natural monopoly. The market may not be perfectly competitive, but if it is sufficiently flawed to justify, in the Court's mind, governmental intervention, then every market is so flawed. And if the public health or safety demands protection from the proliferation of car dealerships, then the increase in athletic shoe outlets is ominous, and the multiplication of ice cream shops is positively perilous. It is unlikely that the Court in *Orrin Fox* would have admitted that it no longer believed that the content of state policy was relevant to state action immunity.[281] But either the Court had in fact reached that conclusion, or the inquiry into state policy had become so superficial that virtually any state objective would have been deemed adequate. Of course, the reason for state action never should have been relevant to immunity, so this apparent change in the Court's attitude was welcome. An explicit repudiation of the *Cantor* position should have been embraced.

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277. See id. at 110-11, 99 S. Ct. at 412.

278. See supra notes 170-85 and accompanying text.

279. See supra notes 171-74 and accompanying text.

280. See supra notes 180-81 and accompanying text.

281. Perhaps tellingly, the Court went to substantial lengths to explain why the federal and various state governments had enacted "legislation to protect retail car dealers from perceived abusive and oppressive acts by the manufacturers." *Orrin Fox*, 439 U.S. at 100-02, 99 S. Ct. at 407-08. The Court seemed almost defensive about immunizing this kind of program. If a state's policy must be deemed worthy by a court, the Court had good reason for its uneasiness. The rationale for dealer protection amounts to nothing more than big firms can hurt little firms.

### *H. California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*

*California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*,[282] considered by the Court two years after *City of Lafayette* and *Orrin Fox*, involved California statutes that created a system of vertical price fixing in the sale of wine at wholesale. The statutes required all wine producers, wholesalers, and rectifiers to file fair trade contracts or price schedules with the state.[283] If a wine producer had not set resale prices through a fair trade contract, wholesalers had to post a price schedule for that producer's brands.[284] A single contract or schedule for each brand set the price for all wholesale transactions in that brand within a trading area.[285] A wine wholesaler charging less than the stipulated prices was subject to fine, license revocation, and private damage suits.[286] The state had no direct control over the prices established and did not review the reasonableness of the prices set.[287] The state charged a wine wholesaler with violating the statute, and the wholesaler sought an injunction from the California Court of Appeals against the state's pricing program.[288] The court granted the relief, holding that the scheme was invalid under the Sherman Act and that application of the Sherman Act to prevent this state-created system of wine pricing was not prohibited by the Twenty-first Amendment.[289] The Supreme Court affirmed.[290]

The Court surveyed *Parker*, *Goldfarb*, *Cantor*, *Bates*, and *Orrin Fox* and concluded: "These decisions establish two standards for antitrust immunity under *Parker v. Brown*. First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself."[291] The Court held that the wine pricing program satisfied the first standard: "The legislative policy is forthrightly stated and clear in its purpose to

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282. 445 U.S. 97, 100 S. Ct. 937 (1980).
283. Id. at 99, 100 S. Ct. at 940.
284. Id., 100 S. Ct. at 940.
285. Id., 100 S. Ct. at 940.
286. Id. at 100, 100 S. Ct. 940.
287. Id., 100 S. Ct. at 940.
288. Id., 100 S. Ct. at 940.
289. Id. at 100-01, 100 S. Ct. at 940-41.
290. Id. at 102, 100 S. Ct. at 941.
291. Id. at 105, 100 S. Ct. at 943. The Court quoted the language of Justice Brennan in *City of Lafayette*, 435 U.S. at 410, 98 S. Ct. at 1135. It is interesting that the Court did not specify a third requirement—that the clear state policy serve an objective deemed sufficiently important to prevail over the Sherman Act. As in *Orrin Fox*, the Court might have been retreating from this *Cantor*-based notion, or it might have thought the adequacy of a policy to restrict liquor sales too obvious to warrant remark.

permit resale price maintenance."[292] However, the Court held, the program did not satisfy the second criterion:

> The State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program.[293]

The Court should never have stated that a clear and affirmative state policy and active state supervision are independent requirements for immunity. No prior case had so held. The closest the Court had come previously to so holding was in *Bates*, where the Court deemed it "*significant* that the state policy [was] so clearly and affirmatively expressed and that the States's supervision [was] so active."[294] The Court there, however, simply commented that the criteria were relevant, not that they were mandatory. Where the Court went wrong in *Midcal* was to confuse the ultimate fact at issue in state action immunity cases with subsidiary facts tending to prove the ultimate fact.

If the basis of state action immunity is federalism, a concern with conflicts between policies pursued by states and those pursued by the federal government, then the issue is whether the state intended to engage in or authorize conduct that would violate federal law.[295] The specific inquiry concerns the intent of the state. If the state does not intend to engage in or authorize conduct that constitutes the restraint, there is

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292. *Midcal*, 445 U.S. at 105, 100 S. Ct. at 943. Indeed, California had done more than permit resale price maintenance; the state had required it.

293. Id. at 105-06, 100 S. Ct. at 943.

294. *Bates*, 433 U.S. at 362, 97 S. Ct. at 2698 (emphasis added).

295. Because intent is normally inferred from conduct, the inquiry can be rephrased as follows: Did the state act in such a way that the conduct constituting the restraint challenged was a likely consequence? If the state itself undertakes action that constitutes a restraint, which does not involve anticompetitive conduct of private parties, nothing more should be required for immunity. For example, if the state requires a license to operate as a marine pilot, and limits the number of licenses granted so that the market price for pilotage services produces an economic profit, no conduct of licensees can be called anticompetitive, and the state itself should be immune. See supra note 17. The state's restraint here could be termed self-executing. For state action purposes, the question remains the intent of the state. In this case, the fact that the state itself undertook the anticompetitive activity does not necessarily mean that the state intended to produce the anticompetitive *effects* of its conduct. But the issue posed by federalism is whether the state intended to authorize or engage in the anticompetitive *conduct*. Further, it is axiomatic that persons can be presumed to intend the natural and probable consequences of their acts. The presumption should apply to states as well. Indeed, because allowing an inquiry during federal trial into a state's knowledge of and concern for the effects of its actions would increase the direct public and private costs of litigation as well as smack of unwarranted interventionism, the presumption should be irrebuttable.

no reason to presume that the state intended to pursue a policy potentially at odds with the federal policy, and, therefore, no reason to immunize the conduct in the name of federalism. Conversely, if the state does intend to undertake or authorize the activity, federalism is implicated whether the state demands or allows the conduct, whether the idea for the policy originates in state government or the private sector, whether the state thinks the policy is magnificent or just pretty good, whether it would be willing to abandon the policy in exchange for a $1,000 federal contribution to its highway fund or would rather secede from the union than alter its program.

If a state's intent were easily determined, there would be no need for any subsidiary question. But the intent of governmental bodies is not easy to discern, and even imperfect devices like legislative histories are notoriously deficient among the states. Therefore, other facts, easier to establish than the state's intent, may be used to prove the state's intent. If the existence of a subsidiary fact determines intent, that is, if the court establishes a rule that when the fact is found intent is proven and when it is not found intent is disproven, the evidentiary test becomes conclusive. Any such test can be justified as a requisite to prove intent only if the benefit it produces exceeds its costs. The benefit of an evidentiary test is the elimination or reduction of the cost produced by erroneously determining the ultimate fact at issue.

Specifically, there are two types of error a court can make in determining state intent. The probabilities of making each type of error are independent, as are the costs associated with each error.[296] Type A error results when a court erroneously concludes that a state intended a restraint that it in fact did not intend. The loss associated with this type of error is the injury to consumer welfare produced by the mistakenly immunized restraint, discounted by the probability that the court would have found the restraint to be an antitrust violation on the merits. This is the type of error with which the Court implicitly has been most concerned. Type B error results when a court erroneously concludes that a state did not intend a restraint that it in fact did intend. The loss associated with this type of error is the impairment of the policy the state wanted to pursue, discounted by the probability that the court

296. Thus, a given test may decrease the probability that an unintended restraint will be erroneously immunized while increasing the probability that an intended restraint will be erroneously deemed subject to the antitrust laws. Ideally, an evidentiary test will decrease the probability of both types of error, though potentially in differing amounts. Further, there is no reason to assume that the loss associated with an erroneous immunization is related to the loss associated with an erroneous failure to immunize. It is safe to assume that the Supreme Court views an erroneous immunization as substantially more dangerous than a mistaken failure to immunize. This probably has to do with a federal court's bias in favor of federal policies.

would have upheld the restraint against antitrust attack on the merits. Thus, the expected cost of error without the test equals the probability of type A error if the test is not used multiplied by its associated cost (the expected cost of type A error) plus the probability of type B error if the test is not used multiplied by its associated cost (the expected cost of type B error). Any rule established to determine intent serves both as an analysis of past conduct and a signal to influence future behavior. The test should work to decrease the probability of error and, at the limit, to eliminate it entirely. The test is justified if the reduction in the expected cost of error produced by the test exceeds the cost of compliance, defined as any cost that would not have been incurred except to satisfy the evidentiary test. In symbols, the test is justified if:

$$\Delta Pa\ La + Pb\ Lb > C$$

Where: Pa Probability that a court will erroneously find intent.
La Discounted loss caused by erroneously immunizing the restraint.
Pb Probability that a court will erroneously find no intent.
Lb Discounted loss caused by erroneously withholding immunity.
C Cost to the state of complying with the evidentiary test.[297]

It is obvious that as the cost of compliance drops, the reduction in the expected cost of error that will justify the test decreases as well. Thus, if the cost of complying with an evidentiary test is very low, even a very small decrease in the expected cost of error will justify the test.

If a test is not justified, but is imposed nevertheless, some form of loss will result. Suppose a state intends to immunize a restraint and the requirement has been established. The state will compare the cost of compliance with the certain discounted loss caused by the erroneous withholding of immunity (type B error). It will know that by failing to satisfy the test, immunity will be withheld. Thus, the probability of type B error approaches 100%. Further, there is no probability of type A error, since for present purposes, it can be assumed that it imposes no cost on a state to fail to comply with the evidentiary test. Put another way, if the state does nothing, it will not satisfy the test. By hypothesis, the court will not grant immunity and type A error, therefore, cannot occur. The state will fulfill the requirement if the loss caused by the

297. This analysis assumes that the imposition of an evidentiary test would reduce the probability of error. Theoretically, it could increase the probability instead. For this reason, the change in probability of error ($\Delta$ P) should be defined as the probability of error without the test *minus* the probability or error with the test (Po − Pt). If the test increases the probability of either type or both types of error, the net change in the expected cost of error may be a negative number. No positive cost of compliance could justify an increase in the expected cost of error.

absence of immunity exceeds the cost of compliance. In symbols, the state will comply if:

$$Lb > C$$

Whether or not the reduction in the total expected cost of error exceeds the cost of compliance, the state may or may not comply with any test adopted. If the reduction in total expected cost of error is less than the cost of compliance, however, but the test is adopted anyway, and the state complies, the economic loss occasioned by the test will equal the difference between the reduction in total expected error cost and the cost of compliance ($C - \Delta Pa\ La + \Delta Pb\ Lb$). If the state does not comply, the economic loss will equal the actual loss occasioned by the erroneous failure to find immunity (Lb).

A numerical example might help clarify this, but by no means do I intend to suggest that numerical values can easily be determined for these variables. Conversely, however, I do not believe that precise numerical values need be assigned for this analysis to yield fruitful conclusions. Suppose a state wants to immunize a restraint and the steps necessary to satisfy an evidentiary test of intent cost $300. Without the test, the probability of the court erroneously finding intent is 5%, and the loss that would be caused is $10,000; the probability of the court erroneously withholding intent is 10%, and the loss that would be imposed is $1,000. Finally, compliance with the test will reduce the probability of error to zero.

Thus:

$$\begin{aligned} \Delta Pa\ La + \Delta Pb\ Lb &> C \\ (.05 - 0)\ 10{,}000 + (.10 - 0)\ 1{,}000 &> 300 \\ (.05)\ 10{,}000 + (.10)\ 1{,}000 &> 300 \\ 500 + 100 &> 300 \\ 600 &> 300 \end{aligned}$$

The test is warranted because the reduction in the total expected cost of error produced by the test ($600) exceeds the cost of compliance ($300). Further, the state will comply with the test because the cost of compliance ($300) is less than the actual cost that would be imposed by the withholding of immunity, $L_b$ ($1,000).

Now suppose that the reduction in expected cost of error remains the same, but the cost of compliance increases, such that Pa = 5%; La = $10,000; Pb = 10%; Lb $1,000; *but* C = $800. Because the cost of compliance ($800) exceeds the reduction in total expected cost of error ($600), the test should not be adopted. If it is adopted, the state will comply, since the cost of compliance is less than the certain cost of the erroneous withholding of immunity, Lb ($1,000). The economic loss caused by imposing the test is $200 (cost of compliance minus the reduction in total expected cost of error).[298] Suppose that:

298. It is tempting to assume that the benefit to the state of not adopting the test is

Pa = 5%; La = $10,000; Pa = 10%; *but* Lb = $500; and C = $800. Again, the test should not be imposed because the cost of compliance ($800) exceeds the reduction in total expected cost of error ($550). But in this case, if it is adopted, the state will not comply, since the cost of compliance ($800) is greater than the certain cost of type B error ($500).[299]

Finally, assume that: Pa = 5%; La= $10,000; *but* Pb = 50%; Lb = $200; and C = $300. Here, the test is justified ($600 > $300), but the state will not comply, because the cost of compliance ($300) exceeds the certain cost of type B error ($200). The result is efficient, however, because the loss that would be borne without the test exceeds the loss imposed by the impairment of the policy the state wanted to pursue.

This analysis could be refined in various ways, but it is adequate for present purposes.[300] One question it poses that will be discussed at

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$700. But this assumption is incorrect. With the test, the state incurs a cost of $800. Without the test, the state will take all those measures of demonstrating intent such that the sum of the costs of those measures plus the remaining expected cost of type B error is minimized. Notice that as each additional measure is taken, the probability of error decreases. The upper limit on this amount is the expected cost of type B error when cost is incurred specifically to demonstrate intent, Pb Lb. Here, Pb Lb = $100. Thus, by not adopting the test, the state will save no less than $700, but could save more.

299. These illustrations indicate that if no evidentiary test is adopted, the state will incur a cost equal to the sum of the costs of measures demonstrating intent plus the expected cost of the remaining error, up to a maximum of the expected cost of type B error given no costs incurred to demonstrate intent (Pb Lb). The benefit to the state of not adopting the test is the difference between this amount and the lesser of the cost of compliance (C) and the loss associated with certain type B error (Lb). This result, however, overstates the benefit of rejecting the test because it is based on the assumption that the state intends the restraint. A state may intend not to authorize a restraint. With the test, the state incurs no cost of compliance and no expected cost of error. Without the test, the state will have to incur some cost. The maximum amount of that cost will be the probability of type A error multiplied by the proportion of the loss associated with type A error that the state will bear: Pa(X La), where X equals the percentage of type A loss suffered by the state. Notice that type A loss involves needless injury to consumer welfare, and some of this injury will be suffered out of state. The state will take those steps of indicating that it does not intend the restraint such that the sum of the costs of those measures plus the remaining expected cost of type A error is minimized. However small the cost imposed on a state that intends not to authorize a restraint by virtue of the absence of the evidentiary test, it is a cost not borne by the state if the test is adopted, and this cost must be subtracted form the gross benefit in expressing affirmative intent to measure the net benefit to the state. If the test is not justified on the basis of social cost, the net benefit to the state of not having the test will certainly be positive. If the test is justified, the state might still be better off without the test if the number of state action controversies is skewed toward instances in which the state does intend the restraint, or the state's interest in demonstrating the absence of intent is typically small.

300. For instance, this model assumes only two actors — the state and consumers generally, whose interests are protected by the federal court enforcing the antitrust laws.

some length later is the class to which the analysis should be applied.[301] Because the issue concerns the adoption of an evidentiary test, the analysis cannot be case specific and should be used to assess the desirability of each proposed evidentiary test. But each proposed test could be compared with some assumed average of all antitrust cases involving state action. In other words, the cost of a test would be compared with average probabilities of error and associated losses for all state action cases. However, the analysis could be applied to sub-classes of state action cases, and depending upon the results, any given evidentiary test would be adopted or rejected. For instance, the loss associated with type A error could be estimated separately for cases involving Sherman Act § 1, § 2, and Clayton Act § 7 violations. It could be estimated separately for price-fixing, tying arrangement, and boycott cases. It could be estimated separately for private and public defendants.

In general, the potential loss occasioned by type A error might vary based on the violation alleged or the identity of the defendant. For any sub-class selected, a given evidentiary test may or may not be justified, and would or would not be adopted. To generalize again, applying the analysis to sub-classes of state action cases will be warranted only to the extent that sub-classes are easily identifiable. If the analysis is used to establish an evidentiary test in one sub-class and not another, but it is unclear to which sub-class the defendant belongs, the costs and benefits of compliance will be uncertain. The Court so far has not varied the evidentiary tests it has adopted on the basis of the restraint alleged, but it has recently varied the application of a test on the basis of the identity of the defendant.[302]

A requirement for immunity that a challenged restraint be clearly articulated and affirmatively expressed as state policy, if ever justifiable, might be supportable on this basis. One could argue that if the state has clearly articulated and affirmatively expressed a policy in favor of the restraint, there is little probability that the state did not intend to authorize the conduct. Further, the cost of fulfilling the requirement is minimal. This argument, however, misses the point and contains a questionable assumption. The issue is not the probability of error with the test, but the *increase* in accuracy produced by the test relative to the risk of error absent the test. These are the differences, weighted by the associated losses, that must be compared to the cost of compliance. Without raising the existence of a clear state policy to the level of a

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If private parties are authorized to engage in a restraint and are potentially liable for antitrust violations, they become a third actor. Part of the cost of complying with an evidentiary test will be borne by them directly, rather than by the state, but their interest in complying is different from that of the state.

301. See infra notes 404-10 and accompanying text.

302. See infra notes 399-408 and accompanying text.

requirement, it would still most certainly be probative of the state's intent. Indeed, if a clear and affirmatively expressed state policy does exist, it should be conclusive proof that the state intended the restraint.[303] But the converse should not be true — if there is no clearly articulated state policy, it should not be conclusive proof that the state did not intend the activity.[304] The question is whether the probability of an erroneous determination of intent without using the clear state policy standard as determinative, but using any clear state policy as well as all other evidence of intent as indicative, is significantly less than the probability of error given the test. What answer an empirical study would give is uncertain, but intuitively, it seems that the test would yield a slight marginal increase in accuracy.

Against this slight increase in accuracy must be balanced the cost of the requirement. Though this might appear minimal, that appearance is deceptive. For one thing, determining what activities might be deemed anticompetitive, thereby requiring a clear state policy, poses costly information problems, given uncertainty in the substantive contours of antitrust law. For another, articulating a clear state policy must entail some cost, otherwise states would not authorize anticompetitive activity in any other way. Balanced against the potentially minimal cost of compliance, however, would be the virtual absence of any increase in the accuracy of the intent determination. Even if the loss associated with error were assumed to be very high, a positive cost of compliance would exceed a zero marginal gain in the expected cost of error.[305]

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303. See supra note 165 and accompanying text.

304. See supra note 169 and accompanying text. The efficiency advantage to the state of making the existence of a clear state policy conclusive of intent, relative to considering the policy merely to be evidence of intent, is the remaining expected cost of type B error given the policy as evidence. If a state clearly expresses and affirmatively articulates a policy in favor of a restraint, there is little chance that its intent will be misconstrued. But there is *some* chance.

305. The standard that private conduct that is the likely consequence of the way in which a state acts is an evidentiary test as well, because inferring state intent from state actions poses some risks of underinclusion and overinclusion. See supra notes 165-69 and accompanying text. In other words, the operative standard proposed in this article, that private conduct is immune if it is the likely consequence of the way in which the state acts, is not a perfect measure of state intent. This standard, however, unlike the clear state policy test, is justified. What the standard implies is that the state must assume the cost of acting in a way that it would not otherwise act to eliminate the probability of being misunderstood. This cost, however, will probably be miniscule. On the average, it will certainly be less than the cost of articulating an affirmative policy, because the state could always satisfy the likely consequence standard by expressing an affirmative policy, but in some circumstances, it could satisfy the standard by less costly behavior as well. On the other side of the equation, there is no other practical way to discern intent than through actions. Therefore, the likely consequence standard will provide a substantial increase in the accuracy of determining intent and, therefore, produce a large benefit in

Of course, this discussion suggests only that in some cases, the cost of complying with the clear state policy test is not justified by the reduction in the expected cost of error. The discussion does not prove that for all state action cases, or for an identifiable sub-class, the test is unwarranted. The test may be justified, but that conclusion is by no means self-evident. Further, it bears repeating that none of this discussion is intended to disparage the importance of a clear state policy in determining a state's intent. Ordinarily, a clearly articulated policy will be the strongest evidence of intent, and a state will know that if it chooses not to employ this method of demonstrating intent, it will run a greater risk of being misunderstood. The proponent of immunity, with the burden of proving intent, may fail. But the case for wholly taking this choice away from the state is weak.

However weak the case for requiring a clearly articulated state policy, the argument for requiring active state supervision is immeasurably weaker. If a state is actually supervising a restraint, the inference that the state intends to authorize what it is observing and permitting to continue is reasonable.[306] Thus, the existence of active supervision may be probative of intent. The question, however, is whether the marginal benefit of a supervision requirement in decreasing the expected cost of error exceeds the cost of compliance, especially, but not only if, the existence of a clear state policy is made a separate requirement. On the benefit side, it would seem that active supervision would have almost no effect on the expected cost of error if a clearly articulated and affirmatively expressed state policy authorizes the activity, or the state has otherwise acted to make the activity a likely consequence. In other words, if a state has clearly and affirmatively expressed its policy or otherwise made its policy known, the probability of erroneously determining intent is close to nonexistent. If that probability is near zero, no other indicator of intent could lower it significantly.

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lowering the expected costs of error. This benefit is far greater than the slight benefit, if any, that would be produced by the clear policy requirement. In sum, the cost of complying with the likely consequence standard is lower than the cost of complying with the clear policy requirement, and the benefit produced by it is greater.

This analysis assumes that clearly articulating and affirmatively expressing a policy requires something more than merely acting in such a way that the private conduct is a likely consequence, as the formulation of the clear policy criterion seems to suggest. The Court, however, has recently indicated that the clear policy standard may have a meaning close to, if not identical with, the likely consequence standard. See infra notes 411-14 and accompanying text. If the tests are synonymous, of course, the clear policy standard would be fully justified.

306. Of course, the fact that a firm is subject to ongoing regulatory oversight does not necessarily mean that the state is observing and permitting any particular activity challenged.

The Court has never really explained what purpose it believes the active supervision requirement serves, except that the Court has finally recognized that the requirement "serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy."[307] In fact, active supervision does have some marginal benefit, relative to a clear state policy alone, in reducing the probability of erroneously determining intent, but only if intent is understood broadly. Intent must be defined to include not only the state's initial intent to authorize the challenged conduct, but also its continuing intent to authorize the restraint as it is carried out and felt in practice. A clear state policy is an almost infallible indicator that the state initially intended to authorize the restraint, but its relevance to the state's continuing intent with respect to the restraint as it is carried out is only indirect.[308] Active supervision serves two additional, specific purposes. First, the state could change its intent because, at the time of initial authorization, it did not anticipate or fully comprehend the effects that the authorized conduct would have. Second, the actors authorized to engage in anticompetitive activities may exceed the bounds of the authorization. The restraint as authorized would not be the restraint as practiced. In both cases, active state supervision would facilitate corrective action, either by the state rescinding authorization and thereby expressing a new intent or by prosecuting the unauthorized conduct. Either action would reduce the potential cost of immunity. Of course, corrective action could be taken even if there were no supervision.

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307. Town of Hallie v. City of Eau Claire, 105 S. Ct. at 1720, discussed infra at notes 385-423 and accompanying text. In *SMCRC*, 105 S. Ct. 1721 (1985), the Court attempted to explain the value of the supervision requirement by quoting the Areeda and Turner treatise: "[The] active supervision requirement ensures that a state's actions will immunize the anticompetitive conduct of private parties only when the 'state has demonstrated its *commitment* to a program, through its exercise of regulatory oversight.' See 1 P. Areeda & D. Turner, Antitrust Law § 213a, p. 73 (1978)." Id. at 1729 n.23 (emphasis added). Though the Areeda and Turner treatise is truly extraordinary, I have always been puzzled by this statement. If by "commitment to a program," the authors mean merely intent to authorize a program, then we are talking about the same thing—active supervision is evidence of intent, and the analysis in the text applies. If, however, they mean some heightened level of state dedication to a program, then there is no basis for the underlying requirement that active supervision allegedly demonstrates. Federalism is not implicated only when states have a particularly strong taste for the policy that conflicts with federal law. It is implicated whenever a state adopts a conflicting policy, however passionate or tepid its attachment to the program. And no one has suggested that the Congress of 1890 expected the existence of an implied state action exemption to turn on the degree of affection the state has for its policy.

308. There is a reasonable inference that the state understands the effects of its actions. The fact that a state expresses a clear policy in favor of particular conduct is indirect evidence that it intends to authorize the conduct as it actually is undertaken and experienced.

If a state that incorrectly estimated the consequences of its authorization would be moved to rescind its authorization given better information, the political process should work to provide that information and encourage remedial action. If an authorized actor exceeds the scope of authorization, that information would eventually be disseminated, and the state, as prosecutor, or injured private parties could be expected to seek remedial action through the judicial process. The benefit of state supervision is simply that corrective action might be taken more quickly than without that supervision.

This benefit appears minimal and may be more theoretical than real. A tremendous cost is balanced against this marginal decrease in the expected cost of error. The Court has never fully explained what is necessary to satisfy the active state supervision standard. One way to justify the requirement would be to construe it very loosely, so that any superficial oversight would suffice. But it appears that, by active supervision, the Court means something akin to public utility regulation.[309] The literature over the last twenty-five years has demonstrated that the direct costs of regulation are immense.[310] Further, regulation imposes indirect costs, perhaps even greater than its direct costs by weakening the traditional defenses of the consumer.[311]

It is incredible that the remote benefit of state supervision, as apparently understood by the Court, could exceed its staggering cost, whether supervision were required alone, in addition to a clear state policy, or in addition to some other requirement. The proper analysis is that state supervision should never be required, but potentially could be probative of intent. Supervision, however, is not nearly as probative of intent as is a clear state policy. A clear state policy in favor of a restraint obviously discloses at least the state's initial intent toward the

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309. For instance, in *Midcal*, the Court wrote, "The state neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The state does not monitor market conditions or engage in any 'pointed reexamination' of the program." 445 U.S. at 105-06, 100 S. Ct. at 943. This passage fairly describes many of the functions of utility commissions. It may also suggest that the Court perceives the benefit of active supervision as demonstrating the state's continuing intent to authorize the restraint as it exists in practice, but this may be wishful thinking.

For a description of the authority typically possessed by state regulatory commissions, see W. Jones, supra note 229, at 39-44; 1 A. Priest, Principles of Public Utility Regulations 31-33 (1969).

310. See, e.g., J. Hirshleifer, J. De Haven & J. Milliman, Water Supply: Economics, Technology, and Policy 74-82 (1960); Easterbrook, supra note 4, at 31; Posner, Theories of Economic Regulation, 5 Bell J. Econ. Management Sci. 335 (1974); Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. Management Sci. 3 (1971); Stigler & Friedland, What Can Regulators Regulate? The Case of Electricity, 5 J. Law & Econ. 1 (1962).

311. See, e.g., Cohen & Stigler, Can Regulatory Agencies Protect Consumers? 6-17 (Regulation 1971).

activity; a state generally regulating the activities of an actor may not even be aware that the actor is engaging in the specific conduct challenged as a restraint. For this reason, the existence of active supervision, unlike the existence of a clear state policy, should not be conclusive of affirmative intent, and any court confronted with the claim that supervision demonstrates intent should study the assertion discerningly.

### *I. Community Communications Co. v. City of Boulder*

In *Community Communications Co. v. City of Boulder*,[312] the Court returned to the issue of state action immunity for municipalities. Colorado is a constitutional "home rule" state; the state constitution grants cities the power to exercise "the full right of self-government in both local and municipal matters."[313] In 1964, Boulder granted the predecessor of Community Communications Co. ("CCC") a non-exclusive, 20-year permit to provide cable television service within the city limits.[314] The company instituted service to one area of Boulder, representing 20% of the population, which was geographically unable to obtain broadcast signals.[315] By the late 1970's, cable technology had advanced tremendously so that many additional services were feasible.[316] CCC notified the city in May, 1979, that it intended to expand its area of service to other geographic regions within the city.[317] At the same time, a competing cable company expressed an interest in obtaining a non-exclusive permit.[318] Fearing that CCC's expansion would preclude other firms, which could potentially offer better service, from entering the market, Boulder enacted an emergency ordinance prohibiting CCC from expanding into new areas of the city for a period of three months.[319] During that period, the city intended to draft a new cable ordinance and invite new cable firms to enter the Boulder market.[320]

CCC sought a preliminary injunction from the district court preventing implementation of the moratorium ordinance, claiming that the city, by imposing the restriction, would violate § 1 of the Sherman Act.[321] The district court granted the injunction, holding that state action

312. 455 U.S. 40, 102 S. Ct. 835 (1982).
313. Id. at 43, 102 S. Ct. at 836-37.
314. Id. at 44, 102 S. Ct. at 837.
315. Id., 102 S. Ct. at 837.
316. Id., 102 S. Ct. at 837.
317. Id. at 45, 102 S. Ct. at 837.
318. Id., 102 S. Ct. at 837.
319. Id. at 45 n.6, 45-46, 102 S. Ct. at 837-38 n.6, 837-38.
320. Id. at 46, 102 S. Ct. at 838.
321. Id. at 46-47, 102 S. Ct. at 838.

immunity was wholly inapplicable.[322] The Tenth Circuit reversed, but the Supreme Court, in a five to three decision, reversed, in turn, agreeing with the district court's conclusion.[323] The result in *City of Boulder* was certainly presaged by the Court's decision in *City of Lafayette*. For state action purposes, the only potentially significant difference between the two cases was that Colorado, unlike Louisiana, was a constitutional home rule state. It was possible, therefore, that because the explicit grant of governmental powers to Boulder constituted a sufficiently greater delegation of authority than that bestowed on Lafayette, Boulder's actions automatically enjoyed state action immunity.[324] The Court rejected the possibility.

*City of Boulder* is in part significant because it appears to place municipalities on a lower state action plateau than legitimate state agencies. Recall that in *Cantor*, had the Michigan Public Service Commission clearly expressed and affirmatively articulated a policy in favor of the light-bulb program, the activity might have been immunized.[325] The disinterested agency, acting within the scope of its delegated authority, would be empowered to speak for the state. By contrast, the City of Boulder, acting within the scope of its delegated power, was not deemed qualified to articulate a state policy. If this distinction is justifiable, perhaps the reason is that a municipality possesses greater independence from the legislative and executive branches of state government than other kinds of state agencies. Because the city is more removed from the branches of state government than are other state agencies, its policies are less obviously those of the state.

The City of Boulder should have been treated exactly like a state for state action purposes, so that it should have been able to acquire immunity simply by engaging in the challenged conduct. If a city is to be treated like a private party, however, then the Court was undoubtedly correct in finding that the state had not acted in such a way that the particular anticompetitive conduct challenged was a likely consequence.[326]

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322. Id. at 47, 102 S. Ct. at 838-39. The plaintiff also claimed that the city and the competing cable company that had expressed an interest in obtaining a permit were engaged in a conspiracy "to restrict competition by substituting" the competing company for CCC. Id. at 47 n.9, 102 S. Ct. at 838 n.9. The district court held that the evidence was insufficient to establish a probability that CCC would prevail on this claim. Id., 102 S. Ct. at 838 n.9. Thus, this issue was not considered on appeal.

323. Id. at 47-48, 102 S. Ct. at 839.

324. For purposes of the opinion, the Court assumed that the enactment of the moratorium ordinance fell within Boulder's home rule powers. Id. at 53 n.16, 102 S. Ct. at 841 n.16.

325. See supra notes 157-64 and accompanying text.

326. For purposes of the opinion, of course, the Court had to assume that the ordinance constituted an antitrust violation. It is ironic, however, that the Court used *City of Boulder*, a case in which the city's conduct was patently pro-competitive, to further elucidate its conservative approach to municipal immunity.

The Court's rationale, though, is important. The Court said that a plurality in *City of Lafayette* had required that a municipality's challenged conduct be pursuant to a clearly articulated and affirmatively expressed state policy.[327] That standard, according to the Court, was adopted by a majority in *Orrin W. Fox* and *Midcal*.[328] It therefore applies in *City of Boulder*, where the court held it had not been satisfied.[329] This analysis suggests that the clear state policy test applies in exactly the same way to cities as it does to other parties claiming immunity, for neither *Orrin W. Fox* nor *Midcal* involved municipal conduct. It also suggests that the rationale for the standard accepted in *City of Lafayette*, that a clear policy demonstrate that the state contemplated the restraint challenged, underlies the requirement as applied to private parties as well as cities, contrary to the intimation in *City of Lafayette* that state contemplation is a sufficient requirement for immunity only in municipality cases.[330]

By the time *City of Boulder* was decided, Justice Stewart, who had been a strong dissenting voice in *Cantor* and *City of Lafayette*, had retired from the Court.[331] The banner of the dissent was taken up by Justice Rehnquist, who authored his first state action opinion. Justice Rehnquist began by distinguishing between preemption and exemption: preemption applies when the enactments of two different sovereigns conflict, whereas exemption applies when the enactments of a single sovereign conflict.[332] State action issues, according to Justice Rehnquist, involve preemption, not exemption.[333] What purpose is served by drawing this distinction is not obvious. True, the presumption in exemption cases may be in favor of the antitrust laws, whereas in state action cases, at least the Court professes that the presumption will tip toward the conflicting state law.[334] But both doctrines turn fundamentally on Congressional intent. In exemption cases, the Court must determine whether Congress intended to expressly or impliedly authorize or command conduct that would otherwise violate a statute. If so, the conduct is exempt from the strictures of the statute. In state action cases, the Court must

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327. *City of Boulder*, 455 U.S. at 51, 102 S. Ct. at 840.

328. Id., 102 S. Ct. at 841. The Court pointed out that a majority of the Court in *Midcal* had adopted a second requirement as well—active state supervision. Id. at 51 n.14, 102 S. Ct. at 841 n.14. The Court said that because Boulder had not satisfied the clear state policy test, it did not have to decide the issue of whether a city must also satisfy the active supervision test. Id., 102 S. Ct. at 841 n.14.

329. Id. at 52, 102 S. Ct. at 841.

330. See supra note 252 and accompanying text.

331. See 453 U.S. VII, 101 S. Ct. 14 (1981).

332. *City of Boulder*, 455 U.S. at 61, 102 S. Ct. at 845-46 (Rehnquist, J., dissenting).

333. Id. at 62, 102 S. Ct. at 846.

334. See id. at 61-62, 102 S. Ct. at 846. See also supra notes 46-48 and accompanying text.

determine whether Congress intended the antitrust laws to apply to conduct authorized, commanded, or undertaken by a state. It seems accurate to describe an instance of state action immunity as one in which Congress impliedly intended to exempt the conduct from the antitrust laws.

The exemption/preemption distinction does serve one useful purpose, but even this purpose should not be overstated. If an anticompetitive state law or municipal ordinance is preempted, presumably the governmental body does not *violate* the federal law that preempts it; the law or ordinance simply loses efficacy.[335] A state or municipality cannot violate the antitrust laws by its enactments, and therefore, the issue of remedies disappears.[336] This analysis may be helpful for alleged antitrust violations by governmental bodies. It does not, however, resolve the issue of remedies for private parties whose claims of state action immunity are rejected. It the state law from which they seek protection against antitrust attack is deemed preempted, they no longer are shielded and presumably could violate the antitrust laws.

Justice Rehnquist reasoned that municipal ordinances should be treated like state statutes for state action purposes, and that preemption, rather than exemption, analysis should be applied to both.[337] The question becomes one of when these official enactments should be preempted. Justice Rehnquist answered that the enactment should be preempted unless it satisfies the *Midcal* criteria: "the ordinance survives if it is enacted pursuant to an affirmative policy on the part of the city to restrain competition and if the city actively supervises and implements this policy."[338] The deficiencies in the *Midcal* criteria have already been discussed.[339] There is another difficulty with Justice Rehnquist's answer, though. The *Midcal* criteria, however deficient, make logical sense when

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335. See id. at 64, 68, 102 S. Ct. at 847-48, 849-50. Justice Stevens wrote a concurring opinion in which he specifically disputed the dissent on this issue. It appears that he missed Justice Rehnquist's point. Justice Stevens read the dissent as arguing that the majority had determined that Boulder had violated the antitrust laws. Id. at 58, 102 S. Ct. at 844. (Stevens, J., concurring). In fact, he pointed out, the Court did not decide whether a violation had been committed, and the decision ultimately might be in the city's favor. Id. at 59-60, 102 S. Ct. at 844-45. Justice Rehnquist's point, however, was that an antitrust violation by a governmental entity in enacting law should be *impossible*; that a city might be held not to have violated the antitrust laws on the merits in any given case is not enough.

336. The possibility of imposing damage liability on municipalities was still present and troubling when *City of Boulder* was decided. See id. at 56 n.20, 102 S. Ct. at 843-44 n.20; id. at 65 n.2, 102 S. Ct. at 848 n.2 (Rehnquist, J., dissenting). The Local Government Antitrust Act, Pub. L. No. 98-544, 98 Stat. 2750 (1984), prohibiting the imposition of damage liability on cities, was not enacted until 1984.

337. See *City of Boulder*, 455 U.S. at 69-70, 102 S. Ct. at 850-51.

338. Id. at 69, 102 S. Ct. at 850.

339. See supra notes 294-311 and accompanying text.

applied to anticompetitive conduct of private parties who claim authorization from a state or local government.[340] The private conduct can be undertaken pursuant to a clear state policy and can be supervised by the state. They make little sense when the activities of the governmental body itself are alone challenged under the antitrust laws. For instance, if the moratorium ordinance in *City of Boulder* constituted a restraint, it would be unusual to require the city to expressly state a policy in favor of what it obviously was doing, and would be bizarre to require the city to supervise itself while it was doing it. Perhaps by referring to the supervision requirement as one satisfied when the city supervises "*and implements*" a policy—an addition to the standard as expressed in *Midcal*—Justice Rehnquist meant to suggest that a governmental body could satisfy the supervision test by undertaking the anticompetitive activity itself. And perhaps he would find the clear state policy test automatically satisfied when the conduct challenged is that of the governmental entity. But this matter is largely one of speculation. In fact, no matter who the defendant is, the issue for state action immunity should be whether the governmental body intended to engage in or permit the conduct challenged as a restraint. When the restraint is a self-executing act of the government so that, for instance, the restraint is a requirement that marine pilots have licenses or a prohibition on expansion by a cable television company, the conclusion is inescapable that the governmental body intended the restraint.[341]

### *J. Hoover v. Ronwin*

In *Hoover v. Ronwin*,[342] decided two years after *City of Boulder*, the Arizona Supreme Court established a committee of attorneys to examine and recommend applicants for admission to the state bar.[343] The court's rules specified subjects on which applicants were to be examined and required the committee to file with the court prior to the examination the formula it intended to use in grading the examination.[344] The committee ultimately was directed to submit a list of candidates recommended for admission, but "only the court had authority to admit or deny admission."[345] A rejected applicant was entitled to petition the court for and to receive individualized review.[346]

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340. Justice Rehnquist did recognize that the *Midcal* criteria do apply to private parties claiming authorization from state or local governments. *City of Boulder*, 455 U.S. at 69 n.5, 102 S. Ct. at 850 n.5.

341. See supra note 17.

342. 104 S. Ct. 1989 (1984).

343. Id. at 1991.

344. Id. at 1992.

345. Id.

346. Id. at 1992-93.

Ronwin failed the bar examination, was not recommended for admission by the committee, and was not admitted.[347] He filed a petition with the state supreme court to review the manner in which the committee conducted and graded the examination. That petition, and two subsequent petitions for rehearing, were denied.[348] Ronwin then brought an antitrust suit against members of the committee, alleging that they "had set the grading scale on the . . . examination with reference to the number of new attorneys they thought desirable, rather than with reference to some 'suitable' level of competence."[349]

The district court granted a motion to dismiss in part on the ground that the defendants' conduct was protected by the state action doctrine, and the Ninth Circuit reversed.[350] In a four to three decision, with Justices Rehnquist and O'Connor not participating,[351] the Supreme Court reversed again, holding that the challenged restraint, even though alleged to be the conduct of the bar committee, was really the action of the state supreme court and was, therefore, immune under the state action doctrine.[352]

The Court explained that when conduct constituting a restraint is that of the state itself, the conduct is automatically immune.[353] The requirements of clear articulation and active supervision are inapplicable; those requirements apply only when the conduct constituting the challenged restraint is that of private parties, or state representatives, who claim immunity on the basis of some action of the state.[354] The question in *Ronwin*, then, was whether the restraint challenged consisted of actions taken by the state supreme court.[355] Of course, the plaintiff did not sue

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347. Id. at 1993.

348. Id. He then filed a petition for certiorari in the United States Supreme Court, which was denied. Id.

349. Id. at 1994.

350. Id.

351. Id. at 2003.

352. Id. at 1995, 1998.

353. Id. at 1995-96, 1998, 2001.

354. Id. at 1995-96.

355. The Court pointed out that *Parker* held that the legislature acts for the state, and that *Bates* held that "a state supreme court, when acting in a legislative capacity, occupies the same position as that of a state legislature." Id. at 1995. The Court emphasized its reading of *Bates* by observing, "Therefore, a decision of a state supreme court, acting legislatively rather than judicially, is exempt from Sherman Act liability as state action." Id. Curiously, the Court appears to imply that a *judicial* action of a state supreme court would not be exempt from antitrust attack. What basis there is in the concept of federalism for distinguishing between the judicial and legislative actions of a state court is difficult to fathom. It would seem that the judicial actions of the judicial branch of government obviously would constitute state action for antitrust purposes, and that the significance of *Bates* is that the legislative actions of the judiciary may *also* constitute state conduct.

the Arizona supreme court; he sued members of the bar committee, and *Goldfarb* had clearly held that a bar committee occupies the position of a private party in state action analysis.[356] But the Court found that "the conduct that Ronwin challenge[d] was in reality that of the Arizona Supreme Court."[357] The Court found *Bates* controlling and concluded: "As in *Bates* 'the real party in interest'" was the state court.[358] The Court was ambiguous about exactly what conduct on the part of the state court constituted the challenged restraint. The Court referred to various actions by the state court as relevant or determinative. The Arizona court: 1) approved the particular grading formula used by the committee;[359] 2) retained sole authority to determine who should be admitted to the practice of law;[360] 3) knew and approved the number of applicants admitted;[361] 4) decided to deny Ronwin admission to the bar;[362] 5) retained strict supervisory powers over the committee and ultimate full authority over its actions;[363] and 6) provided individual review for aggrieved applicants.[364] The state court's conduct can most simply be viewed as comprising three distinct actions—the court approved the grading formula used by the committee; it admitted applicants and, at least tacitly, rejected applicants; and it provided review of adverse determinations. The Court's reasoning is simply not clear as to whether any one of these actions, a particular combination, or all three were necessary to its finding that the challenged restraint was conduct of the state court. Justice Stevens dissented. He admitted that "if the challenged conduct were that of the court, it would be immune under *Parker*."[365] He concluded, however, that the challenged conduct was "the decision to place an artificial limit on the number of lawyers," and that decision was made by the committee, not by the state supreme court.[366] He appeared to argue that an action of a private party becomes the conduct of the state only when the sovereign requires the private

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This is not, however, what the Court implies.

The Court also expressly reserved "the issue whether the Governor of a State stands in the same position as the state legislature and supreme court for purposes of the state action doctrine." Id. at 1995 n.17. The question is discussed infra at notes 499-502 and accompanying text.

356. See supra note 131 and accompanying text.
357. *Ronwin*, 104 S. Ct. at 1998.
358. Id. at 1999.
359. Id. at 1998.
360. Id.
361. Id. at 1999 n.28.
362. Id. at 2000 n.30.
363. Id. at 1997.
364. Id. at 1998.
365. Id. at 2006 (Stevens, J., dissenting).
366. Id.

act, citing *Goldfarb* and *Bates*.[367] Justice Stevens pointed out that the court's approval of the grading formula implied no assent to the committee's conduct because the information provided to the court did not disclose that the committee would score the examination to admit a predetermined number of applicants, as Ronwin alleged.[368] The provision for judicial review of adverse determinations was immaterial, according to Justice Stevens, because the Arizona cases demonstrated that only aggrieved applicants who had *passed* the bar examination but were denied admission received an individualized review and independent decision by the state supreme court. The court made no independent decision on review of a petition by an applicant, like Ronwin, who *failed* the examination.[369] The only conduct remaining deemed relevant by the majority was the court's action in actually admitting or denying admission to applicants. Justice Stevens, however, found "nothing in the record to indicate that the court ever made" a decision to deny Ronwin's application for admission.[370] Apparently, Justice Stevens believed that the action constituting the restraint was the decision to restrict the number of applicants admitted based on competitive considerations, and the state court never made that decision. Of course, the majority's response was that the committee never made that decision either, because it did not have the power to admit applicants. At most, the committee could have decided to restrict the number of applicants recommended to the court for admission.

*Ronwin* is a troubling case, and the majority and dissenting opinions were less than inspired. The majority adopts an analysis that might be called the antitrust analog of the tort doctrine of proximate cause. Where several actions are causes-in-fact of an anticompetitive effect, the Court will select the proximate cause from among them and attribute the restraint to that actor for state action purposes.[371] If the proximate actor

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367. Id. at 2006-07. Later in his dissent, Justice Stevens referred to the requirement of a clearly articulated and affirmatively expressed state policy favoring the restraint. Id. at 2009. Justice Stevens apparently would find the clear state policy requirement satisfied only when the state requires the challenged conduct, contrary to the Court's decision in *SMCRC*, 105 S. Ct. 1721, 1728 (1985). Justice Stevens made it clear that this was his position in *SMCRC*, id. at 1735-36 (Stevens, J., dissenting). *SMCRC* is discussed infra at notes 424-62 and accompanying text.

368. *Ronwin*, 104 S. Ct. at 2010 n.21 (Stevens, J., dissenting).

369. Id. at 2008 n.18 (Stevens, J., dissenting).

370. Id. at 2008 (Stevens, J., dissenting).

371. Perhaps the best general explanation of the proximate cause doctrine is contained in W. Prosser & W. Keaton, The Law of Torts 263-321 (5th ed. 1984). Professors Prosser and Keaton define a "cause in fact" as any action, omission, or condition which so far contributed to a result that the result would not have occured without it. Id. at 264-65. Courts often refer to this as "but for" causation. Id. at 265-66. The "proximate cause" is the legally responsible cause in fact. The choice of the proximate cause is a product

is the state, immunity follows ineluctably. If the proximate actor is a private party, state action immunity is granted only if the requirements of a clearly articulated state policy and active supervision are fulfilled. Thus, in *Ronwin*, assuming the plaintiff's allegations were true, candidates would not have been denied admission for anticompetitive reasons unless the bar committee based its recommendations on competitive impact and the state court followed those recommendations in granting and denying applications. Both the actions of the bar committee and the supreme court were causes in fact of the restricted entry into the bar, but the Court deemed the Arizona court to be the legally responsible actor.

The problem with *Ronwin* is not so much the result, but the way in which the court reaches the result. The analysis it uses misdirects the focus of inquiry in state action cases, complicates the issues needlessly, and creates the potential for incorrect decisions. For state action immunity, the conduct constituting the restraint must be a likely consequence of the state action. The court ascribes to illegitimate agencies the status of a private party, and when conduct of a private party is challenged, therefore, there must be some causal connection running from the state conduct to the private act. Clearly in *Ronwin*, there is no such connection. None of the authority delegated to the committee created a significant probability that the committee would use its power to limit entry based on competitive concerns. The case is analogous to *Northern Securities Co. v. United States*,[372] where companies claimed immunity for an anticompetitive merger based on a state's corporation laws that authorized stock acquisitions. In both cases, the state conferred broad authority to engage in a class of activities, only a small percentage of which would potentially violate antitrust laws. That kind of delegation does not make it likely that the delegatee will engage in activities within the tainted sub-class.[373] Of course, if the distinction between legitimate and illegitimate agencies is abandoned, so that any agency is legally capable of expressing an intent in favor of a restraint, then the bar

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of "those more or less undefined considerations which limit liability even where the fact of causation is clearly established." Id. at 273. It is a decision "associated with policy — with our more or less inadequately expressed ideas of what justice demands, or of [administrative possibility and convenience]." Id. at 264.

For a recent economic analysis of causation in tort law, see Landes & Posner, Causation in Tort Law: An Economic Approach, 12 J. Legal Stud. 109 (1983).

372. 193 U.S. 197, 24 S. Ct. 436 (1904). See supra notes 88-92 and accompanying text.

373. The case is also analogous to *City of Boulder*, where the state delegated to the city extensive home-rule powers, and the city engaged in an anticompetitive activity contained within the broad powers conferred. Granting home-rule power did not significantly increase the probability that the city would enact an anticompetitive ordinance. See supra notes 312-20 and accompanying text.

committee should have been immune in *Ronwin* not because the restraint was really effected by the court, but because the committee, as the embodiment of Arizona, clearly intended the restraint.

That the bar committee should not have been immunized under the Court's prevailing state action doctrine, however, does not mean that the committee's motion to dismiss should have been denied. The committee might have been immune under the *Noerr-Pennington* doctrine,[374] or more fundamentally, the committee's actions may not have constituted an antitrust violation. The committee's conduct did increase the probability of an entry restriction. But not every act that, in combination with other acts, produces an anticompetitive effect constitutes an antitrust offense. Suppose, for instance, economist Smith remarks at a backyard barbecue to his neighbor Jones, the president of Ajax Widget Company, that if the three largest widget companies reduced their production by 15%, each would reap staggering profits. Because of the comment, Jones thereafter solicits the agreement of his two competitors to limit output. Certainly Smith would not have violated the antitrust laws even though the production restriction would not have occurred but for Smith's remark. Smith's comment increased the probability of an anticompetitive effect, but by an infinitesimal amount, measured at the time the comment was made. Though conduct can be said to "cause" an anticompetitive effect whenever it increases the probability of the effect occurring, it will not be deemed a sufficient cause to incur antitrust liability unless the increase rises above some threshold.

The Court's analysis in *Ronwin* can be reconciled with this approach, but only uncomfortably. In *Ronwin*, the plaintiff challenged the conduct of the committee members. The Court employed a proximate cause analysis to conclude that the *real* defendant was the state court, and that the state is immune under *Parker*. The negative implication of the Court's decision is that the committee's conduct, judged by itself, did not violate the antitrust laws. The Court, however, should have made this implication explicit and the focus of its decision. The proximate cause, or "real party in interest", methodology obscures the target of an antitrust challenge. The Court provides little guidance for determining which is the "real party in interest", or proximate cause, when the actions of several parties combine to produce an anticompetitive effect. The "real" defendant should be whomever the plaintiff chooses to sue.

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374. See United Mine Workers of America v. Pennington, 381 U.S. 657, 85 S. Ct. 1585 (1965); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523 (1961). Generally, this doctrine provides that private attempts to secure anticompetitive governmental actions, at least if the government is acting in a policy-making rather than ministerial capacity, are immune from antitrust liability. For a general discussion of the doctrine, see 1 P. Areeda & D. Turner, supra note 3, §§ 201-06. See also supra notes 14 and 70.

If it is the state, the case should be dismissed on the ground of state action immunity, and as the Court correctly realizes, immunity should attach "regardless of the State's motives in taking the action."[375] But if the plaintiff sues a private party, that party's conduct should be examined independently. If the conduct blended with the action of the state to produce an anticompetitive effect, and the private conduct, judged *ex ante*, increased the probability of the effect insignificantly, the suit should be dismissed on the ground that the conduct challenged does not constitute an antitrust violation rather than on the basis of state action immunity. This result would hold unless the private party acted with intent to bring about the anticompetitive effect, in which case a prima facie violation would be established regardless of the probability of producing the effect.[376]

In *Ronwin*, the plaintiff's allegations indicated that the committee's conduct substantially increased the probability of an anticompetitive effect and was undertaken with the intent to produce that effect. Either aspect ought to have been enough to withstand a challenge to the sufficiency of the complaint on the merits. Even if the Court thought otherwise, however, it should have focused on the conduct of the committee, and determined whether that conduct constituted a potential antitrust violation; instead, the Court focused on the anticompetitive effect, and determined which party would be held legally responsible for that effect.

It should be noted that in state action cases, two kinds of causation issues are involved. The first is whether any conduct of the state caused or increased significantly the probability of conduct of the private party, and this issue relates directly to state action immunity. If there is no such causation, the private party cannot enjoy state action immunity. The second issue is whether the conduct of the private party caused or was intended to cause an anticompetitive effect. This question is not directly pertinent to state action immunity, but rather to the merits of the antitrust complaint. It may have particular importance in state action cases, however, because the participation of the state in producing the anticompetitive effect may peculiarly reduce the probability that private conduct will have the forbidden result.

If the private conduct was not caused by the state act, but did cause or was intended to cause an anticompetitive effect, the conduct is not protected by the state action doctrine and does constitute a prima facie antitrust violation. The actor may still be immune from antitrust liability, however, under the *Noerr-Pennington* doctrine.[377] The contours

375. *Ronwin*, 104 S. Ct. at 1999 n.28, 2001.
376. See supra note 9 and accompanying text.
377. See supra notes 14, 70 and 374.

of *Noerr-Pennington* immunity are intricate and will not be examined here. It is clear, however, that private conduct that prompts state conduct which, in turn, produces an anticompetitive effect, even if the private conduct is undertaken specifically to produce that effect, may nevertheless be immune from antitrust attack under this doctrine. If Ronwin's complaint against the bar committee members should have been dismissed, this was probably the basis on which dismissal should have been granted.[378] In fact, the defendants raised the defense, but the Court declined to consider it: "Our holding that petitioners' conduct is exempt from liability under the Sherman Act precludes the need to address petitioners' contention that they are immune from liability under the *Noerr-Pennington* doctrine."[379]

One final aspect of *Ronwin* should be noted. All seven members of the Court agreed that the actions of the sovereign itself are automatically immune under the state action doctrine. The majority stated that a state's actions are exempt "regardless of the State's motives"[380] or of whether "the sovereign acted wisely after full disclosure from its subordinate officers."[381] The dissent stated that when "the State itself governs entry into a profession, . . . even if [its action] is specifically designed to control output and to regulate prices, [the action] does not violate the antitrust laws."[382] The dissent also flatly stated: "[I]f the challenged conduct were that of the court, it would be immune under Parker."[383] This, of course, directly conflicts with the positions taken in *Cantor* by Justices Stevens and Blackmun and Chief Justice Burger, all of whom participated in *Ronwin*. Recall that in *Cantor*, the Court

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378. By no means is it certain that the defendants were entitled to *Noerr-Pennington* immunity. The question is a difficult one that deserves separate treatment. If a party misuses government processes to obtain an anticompetitive gomernment action, immunity is lost. See California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S. Ct. 609 (1972) (a conspiracy to use government processes in such a way as to deny competitors access to those processes and thereby achieve an anticompetitive end is not protected by the *Noerr-Pennington* doctrine). I have argued elsewhere that *Noerr-Pennington* immunity requires that the private party propose the anticompetitive policy to a government body that has the power to implement or prevent the implementation of the policy and has an interest in assessing the anticompetitive effects. See Lopatka, supra note 6, at 630-35. If a private party manages to use government processes to secure action that achieves an anticompetitive end, but the government actor is unaware of the reason for its action, an appealing argument can be made that the party misused government process.

379. *Ronwin*, 104 S. Ct. at 1998 n.25.

380. Id. at 2001. See also id. at 1999 n.28.

381. Id. at 1998. See also id. at 1995 ("When a state legislature adopts legislation, its actions constitute those of the State . . . and *ipso facto* are exempt from the operation of the antitrust laws.") (citation to *Parker* omitted).

382. Id. at 2004 (Stevens, J., dissenting).

383. Id. at 2006 (Stevens, J., dissenting).

required an inquiry into the content of state policy and would have granted immunity to what is unquestionably a state action only if the policy is deemed sufficiently meritorious.[384] Whether *Ronwin* represents a shift toward the contrary view espoused by Justice Stewart in *Cantor*, or merely inadvertence, remains to be seen.

The Court's opinion in *Ronwin* was provocative, but probably produced more confusion than illumination. Perhaps because of this, the Court accepted certiorari on two state action cases the following year and decided both on the same day. For the most part, the cases served as vehicles to refine the doctrine and make explicit certain principles that had been implied. But the opinions also made independent contributions to some important aspects of state action analysis.

### *K. Town of Hallie v. City of Eau Claire*

In *Town of Hallie v. City of Eau Claire*,[385] a Wisconsin municipality refused to supply unincorporated townships with sewage treatment services, but offered to supply services to landowners located within those areas if they agreed to be annexed by the city and to use the city's sewage collection and transportation services.[386] Four townships brought an antitrust suit for injunctive relief against the city, alleging monopolization and a tying arrangement.[387] A Wisconsin statute authorizes cities to construct sewerage systems and to "'describe with reasonable particularity the district to be [served].'"[388] Another statute provides that a city operating a public utility:

> may by ordinance fix the limits of such service in unincorporated areas. Such ordinance shall delineate the area within which service will be provided and the municipal utility shall have no obligation to serve beyond the area so delineated.[389]

A third statute permits the state's Department of Natural Resources to require that a city's sewerage system be constructed so that other areas can connect to the system and to order that such connections be made.[390] It provides, however, that a Department order for the connection of unincorporated territory to a city system shall be void if the territory refuses to become annexed to the city.[391] In a related state antitrust case, the Wisconsin Supreme Court had inferred from these statutes a

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384. See supra notes 170-87 and accompanying text.
385. 105 S. Ct. 1713 (1985).
386. Id. at 1715-16.
387. Id. at 1715.
388. Id. at 1718.
389. Id.
390. Id.
391. Id.

legislative intent to allow a city to require annexation as a condition of providing sewage treatment services.[392] The state court concluded that the legislature had "viewed annexation by the city of a surrounding unincorporated area as a reasonable quid pro quo that a city could require before extending sewer services to the area."[393]

The district court dismissed the complaint on the ground of state action immunity, holding that there was a clear state policy in favor of the city's conduct and that the conduct was adequately supervised by the state.[394] The Seventh Circuit affirmed the result, also finding a clear state policy, but held that active state supervision is not a requirement for immunity where a local government is "performing a traditional municipal function."[395] The Supreme Court affirmed.[396] The Court's three major holdings can be easily summarized: 1) the clearly articulated state policy test, at least as applied to municipalities, is satisfied if the anticompetitive conduct challenged was a "foreseeable" result of the state's pronouncements;[397] 2) at least as applied to cities, immunity does not require that the state compel the anticompetitive conduct;[398] and 3) active state supervision is not necessary for cities to obtain immunity, at least when their actions are governmental.[399] The Court's analysis, however, is more instructive than its decision.

The Court here acknowledges that the purpose of requiring active state supervision, or of requiring state compulsion, would be to prove the state's intent. The Court said, "As with respect to the compulsion argument . . ., the requirement of active state supervision serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy."[400] No doubt the Court would have agreed that the requirement of a clearly articulated and affirmatively expressed state policy serves exactly the same function. The recognition that requirements such as supervision, compulsion, and a clear state policy are essentially evidentiary tests is

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392. Id. at 1719 n.8, citing Town of Hallie v. City of Chippewa Falls, 105 Wis. 2d 533, 314 N.W.2d 321 (1982).

393. *City of Chippewa Falls*, 105 Wis. 2d at 540-41, 314 N.W.2d at 325.

394. *Town of Hallie*, 105 S. Ct. at 1716.

395. Id.

396. Id.

397. Id. at 1718.

398. Id. at 1720.

399. Id. at 1721. The Supreme Court did not emphasize the relevance of the type of municipal action at issue, but the Court of Appeals explicitly referred to the "traditional" nature of the municipal action involved, Town of Hallie v. City of Eau Claire, 700 F.2d 376, 384 (7th Cir. 1983), and it is not clear whether the Supreme Court would make a similar distinction.

400. Id. at 1720.

the first step in embracing the analysis proposed in this article.[401] The Court could clarify its position further by explaining what it meant by "engaging in the challenged [conduct] *pursuant to* . . . state policy."[402] That, according to the Court, is the ultimate fact the potential evidentiary tests tend to prove. The phrase could be fairly interpreted to mean a state intent to permit or to engage in the challenged conduct, which is the issue this article posits is determinative.[403]

The Court reasoned that neither a compulsion nor an active supervision requirement will be applied to cities because the amount of harm that would result if immunity were granted erroneously will be less than if immunity were mistakenly found for a private actor.[404] The Court stated: "We may presume, absent a showing to the contrary, that the municipality acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf."[405] In a footnote, the Court continued:

> Among other things, municipal conduct is invariably more likely to be exposed to public scrutiny than is private conduct. Municipalities in some states are subject to "sunshine" laws or other mandatory disclosure regulations, and municipal officers, unlike corporate heads, are checked to some degree through the electoral process. Such a position in the public eye may provide some greater protection against antitrust abuses than exists for private parties.[406]

In essence, the Court employed the analysis set out previously in this article, that an evidentiary requirement is not warranted unless the reduction in the expected costs of errors produced by the test exceeds the cost of compliance, $\Delta$ Pa La + $\Delta$ Pa Lb > C.[407] It applied the formula to a class of antitrust defendants and concluded that, for that class, the loss associated with finding immunity where the state intended to confer none, La, was lower than for other defendants. Because the left side of the equation decreased, only the costs of complying with fewer evidentiary tests could be justified.[408]

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401. See supra notes 7-9, 295 and accompanying text.

402. *Town of Hallie*, 105 S. Ct. at 1717.

403. See supra note 7 and accompanying text.

404. The Court correctly recognized that compulsion would be probative of state intent, indeed, that it "may be the best evidence of state policy," but concluded that it would not be required to prove intent. *Town of Hallie*, 105 S. Ct. at 1720. The Court undoubtedly viewed the significance of state supervision in a similar way.

405. Id. at 1720.

406. Id. at 1720 n.9.

407. See supra notes 296-97 and accompanying text.

408. The Court's willingness to discard the supervision requirement as applied to cities

Although the Court's application of the analysis is sound as far as it goes, it is important to recognize its limitations. The Court could have strengthened the rationale for its result by pointing out that the cost of compliance (C) with a requirement of supervision or compulsion may be higher when the actor is a city than when it is a private party. For instance, a state may be more experienced in supervising private parties than in supervising municipalities, with institutions designed to oversee private activities already in place, so that requiring supervision of municipalities would impose a marginal cost of inexperience upon the state. With respect to supervision and compulsion, demanding either requirement for municipal immunity would impose a unique cost on the city by abridging the autonomy of a politically-accountable entity. The Court recognized this cost as it relates to the content of the clear state policy requirement, but did not explicitly acknowledge its relevance to an analysis of the other two requirements as well.[409]

The Court's analysis suggests that the value of the left side of the equation proposed, *i.e.*, the reduction in the expected cost of error, is lower for municipal defendants than for private defendants. The Court's discussion, however, does not address the issue of whether the value of the left side of the equation exceeds the value of the right side of the equation for *private* defendants. In other words, the Court has made

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suggests that it might be willing to apply the formula offered to other classes of defendants and likewise discard the requirement as to them. No other relevant classes of defendants are readily apparent, however. Perhaps *Town of Hallie* indicates that the Court would be willing to consider the justification for the supervision requirement as applied to different categories of antitrust violations. This issue is considered infra at notes 506-13 and accompanying text.

The Court's perceptive argument as to why cities are inherently less likely to engage in activities injurious to consumer welfare not only tends to show that erroneous immunization of their actions would be less harmful than erroneous immunization of private conduct; it also goes a long way toward demonstrating that cities ought to be independently and automatically immune from antitrust liability. The Court resisted this conclusion in *City of Lafayette* and *City of Boulder*. The Court might do well to reconsider its position in light of its own recent insight.

Though there is an analytical justification for withholding the active supervision requirement from municipalities, the Court's decision might have to do with non-doctrinal factors. The *City of Lafayette* and *City of Boulder* decisions, exposing cities to antitrust liability, drew outrage from some quarters of the country, particularly municipal governments. See Lopatka, supra note 5, at 23-24. Those unhappy with the decisions were largely responsible for persuading Congress to eliminate antitrust damage liability in the Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. 2750 (1984). The Court was undoubtedly aware of this widespread displeasure, and eliminating any need for state supervision was one way at least partially to placate the objectors.

409. Id. at 1719. An argument could have been made that the probability of type A error (Pa) is less when cities are involved than when private parties are involved, but the argument is weak and the Court wisely did not assert it. See Lopatka, supra note 5, at 51.

a good case for the proposition that the requirements of supervision and compulsion are less justifiable when applied to municipal conduct than when applied to private conduct, but not for the proposition that the requirements are justified when applied to private parties. The issues are distinct. Indeed, in *Southern Motor Carriers Rate Conference v. United States*, the Court held that compulsion is not required for immunity of private defendants.[410] An equally insightful reexamination of the supervision requirement would be most welcome.

The Court's exposition of the clear state policy requirement comes close to adopting the analysis advocated in this article.[411] I have argued that the ultimate issue in state action cases is whether the state intended to engage in or permit the conduct that constitutes the restraint challenged, and that the only test for proving intent should be whether the state acts in such a way that the conduct constituting the restraint challenged was a likely consequence. The Court here ostensibly maintains the requirement of a clear state policy, which I have argued ought to be discarded,[412] but it holds the requirement satisfied when the challenged anticompetitive conduct is the foreseeable result of a state's legislation.[413] The Court correctly recognizes that immunity should not depend on whether the state foresaw the effects of anticompetitive conduct, but only on whether it intended to authorize the conduct itself.[414] It is a short step indeed from inferring intent because anticompetitive conduct is the foreseeable result of legislative pronouncements to inferring intent because such conduct is the foreseeable result of any state action or inaction. If the clear state policy test is defined to mean that the state has acted in such a way that the conduct constituting the restraint was a likely consequence, then it coalesces with the test proposed in this article and ought to be retained as the sole evidentiary requirement.

The application of this principle in *Town of Hallie* was straightforward. No statutes explicitly recited that a town could withhold sewage treatment services from individuals who refused to become annexed. But as the Court recognized, the statutes disclosed a definite legislative intent

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410. See *SMCRC*, 105 S. Ct. at 1729.

411. See supra notes 7-9, 295-311 and accompanying text.

412. See supra notes 303-05 and accompanying text.

413. *Town of Hallie*, 105 S. Ct. at 1718.

414. The Court stated:

> [T]he statutes clearly contemplate that a city may engage in anticompetitive conduct. . . . It is not necessary . . . for the state legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects. . . . We think it is clear that anticompetitive effects logically would result from this broad authority to regulate.

Id. at 1718. In essence, the Court held that states are presumed to intend the logical effects of the conduct they authorize. As long as the conduct that constitutes the restraint is a foreseeable result of the state's actions, immunity will be granted.

to allow precisely that conduct. Thus, the city's actions were the likely consequence of the legislative enactment. The Wisconsin Supreme Court's similar interpretation of the statutes was even more significant than the Court allowed. The Court correctly stated that the state court's opinion could not decide the question of federal antitrust immunity.[415] The Court said, however, that the opinion was "*instructive* on the question of the state legislature's intent in enacting the statutes."[416] A state supreme court's interpretation of the state legislature's intent would seem to be more than "instructive," but virtually determinative.

Because *Town of Hallie* concerned municipal antitrust immunity, it is possible that the Court's analysis of the clear state policy test applies only to cities, and that a more restrictive construction of the requirement will apply to private defendants. This deduction would be an unfortunate one, and one which the majority of the Court did not appear to intend.[417] Certainly the public or private character of the defendant was relevant in the Court's analyses of compulsion and supervision.[418] One might extrapolate from those analyses that because a city is likely to do less harm than private parties, a less stringent and less costly clear state policy requirement is warranted when applied to municipalities. The Court, however, did not expressly rely upon the status of the defendant in explaining the clear state policy requirement, though it did rely upon that factor in discussing compulsion and supervision. Further, in support of its clear state policy analysis, the Court cited *Orrin W. Fox*, a case that did not involve a municipality, explaining that in that case, there was "no express intent to displace the antitrust laws, but [the] statute provided regulatory structure that inherently 'displace[d] unfettered business freedom.'"[419] Moreover, the Court's analysis of clear state policy is universally applicable regardless of the defendant's identity. Finally, it is unlikely that the Court intended to generate the confusion that would attend the establishment of a single evidentiary test, the meaning of which would vary depending on the status of the actor. In *Town of Hallie* and *Southern Motor Carriers Rate Conference*, the Court rejected the compulsion requirement as applied to all defendants.[420] In *Town of Hallie*, the Court held that the supervision requirement does not apply

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415. Id. at 1719 n.8.

416. Id. (emphasis added).

417. See supra note 399.

418. That the Court chose to reject the compulsion requirement through an analysis that depended upon the governmental character of the defendant seems strange in light of the fact that it rejected the requirement as applied to private defendants in another case decided on the same day. See *SMCRC*, 105 S. Ct. at 1728. For a possible explanation, see infra notes 443-44 and accompanying text.

419. *Town of Hallie*, 105 S. Ct. at 1718.

420. See id. at 1720; *SMCRC*, 105 S. Ct. at 1729.

to cities, but said that it does apply to private parties.[421] Thus, the Court has imposed or withheld certain requirements on all defendants or classes of defendants, but it has not varied the meaning of any test between classes.[422]

A final aspect of *Town of Hallie* should be noted. Similar to the analysis in *Ronwin*, a case not cited by the Court, the Court's rationale does not imply that the content of state policy is relevant to immunity.[423] No doubt a seemingly virtuous objective could have been proffered for the state's policy, but the Court indicated no interest in finding one.

### *L. Southern Motor Carriers Rate Conference v. United States*

In *SMCRC*,[424] decided by the Supreme Court on the same day it decided *Town of Hallie*, four states had established public service commissions to regulate the intrastate transportation of commodities by motor common carriers.[425] Three states, North Carolina, Georgia, and Tennessee, enacted statutes that permit but do not require common carriers to agree upon rates that they will collectively submit for approval to the respective regulatory agencies.[426] The fourth state, Mississippi, enacted no such statute, but its regulatory commission promulgated a rule that permits collective rate-making.[427] In all four states, no rate becomes effective unless the agency either takes no action within a specified time period on a proposed rate submitted to it or affirmatively

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421. See *Town of Hallie*, 105 S. Ct. at 1720 n.10.

422. The Court's opinion in *SMCRC* further supports the contention that the Court intended the clear state policy requirements to apply to private parties and cities in the same way. The Court there cited *City of Lafayette*, a municipal immunity case, for the proposition that a "*private* party acting pursuant to an anticompetitive regulatory program need not 'point to a specific, detailed legislative authorization' for its challenged conduct." *SMCRC*, 105 S. Ct. at 1730-31 (emphasis added). Recall that at the time *City of Lafayette* was decided, there was some reason to doubt that the Court's explanation of the clear state policy criterion in that case applied to private parties. See supra note 250-52 and accompanying text.

It is clear, however, that Justices Stevens and White in *Town of Hallie* and *SMCRC* did intend to distinguish between the clear state policy requirement as it applies to cities and as it applies to private parties. See id. at 1732 n.2 (Stevens, J., dissenting); infra notes 443-44 and accompanying text.

423. See supra notes 380-84 and accompanying text. It is peculiar that none of the opinions written in *Town of Hallie* and *SMCRC* cited *Ronwin* for any proposition, even though *Ronwin* was the Supreme Court's latest state action case at that time and had been decided less than a year earlier. It is almost as if the Justices shook their heads at what they had done and agreed silently never to mention their misdeed.

424. *SMCRC*, 105 S. Ct. 1721.

425. Id. at 1723.

426. Id. at 1724, 1730.

427. Id.

approves the proposal.[428] Collective ratemaking assertedly improves the efficiency of the rate regulation process by reducing the number of rate increase proposals filed, thereby allowing agencies to consider the proposals more carefully.[429] It also allegedly tends to produce uniformity in rates, a condition deemed desirable by two of the states.[430] Motor carriers operating in the four states involved formed two rate bureaus to formulate and submit joint rate proposals to the regulatory agencies.[431]

The United States brought an antitrust complaint against the rate bureaus.[432] The district court entered summary judgment in favor of the government, rejecting a state action defense.[433] The Fifth Circuit affirmed, holding that the *Midcal* test was not applicable to private defendants, and that if it were applicable, the clear state policy requirement is satisfied only when the challenged anticompetitive conduct is compelled by the state.[434] The Supreme Court reversed, finding that the activities of the rate bureaus in all four states were immune.[435]

A good portion of the Court's opinion was devoted to making explicit certain aspects of state action dogma that had become generally accepted without express confirmation. Thus, the Court put to rest whatever doubt lingered after *Cantor* that state action can indeed immunize the conduct of private parties.[436] The Court also confirmed the common belief that the test for immunity of private parties is the one set out in *Midcal*—there must be a clearly articulated and affirmatively expressed state policy in favor of the challenged conduct and active supervision.[437] In so doing, the Court explicitly rejected Justice Stevens's contention in dissent that state action immunity is appropriate only when the exemption is necessary to make the regulatory act work.[438] That test, the Court explained, is appropriate when there is a conflict between the antitrust laws and a federal statute, because in that case, if the Court misinterprets legislative intent and withholds immunity, Congress can correct the mistake by enacting an express exemption.[439] If the Court misinterprets the intent of a state, however, the state, because of the Supremacy Clause, cannot easily remedy the error.

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428. Id. at 1723-24.
429. Id. at 1724.
430. Id. at 1724 n.5.
431. Id. at 1723.
432. Id. at 1725.
433. Id.
434. Id.
435. Id. at 1731.
436. Id. at 1726-27.
437. Id. at 1727-28.
438. Id. at 1727 n.21.
439. Id.

The Court also held that state compulsion is not required for immunity of private parties.[440] Technically, it held that compulsion is not necessary to satisfy the clear state policy prong of the *Midcal* test, though it recognized that compulsion may be "the best evidence that the State has a clearly articulated and affirmatively expressed policy to displace competition."[441] Again, the Court's decision merely confirmed what had become the better view of the compulsion issue,[442] though this was the issue on which Justice Stevens voiced his most vigorous dissent.[443] The Court reached its decision through an analysis that differed from the rationale it used in *Town of Hallie* to conclude that cities are not subject to the compulsion requirement. Perhaps the Court employed different rationales in order to win unanimity on the Court for its decision in *Town of Hallie*. Justices Stevens and White were prepared to spare cities from the compulsion requirement, but not to spare private parties.[444]

The correct reason for not imposing a compulsion requirement is that federalism, the basis of state action immunity, is implicated regardless of whether the state compels conflicting behavior or permits it. The Court recognized this reason, noting that a compulsion requirement would reduce "the range of regulatory alternatives available to the State," presumably by precluding those policies that merely permit anticompetitive conduct.[445] The Court also pointed out that the requirement

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440. Id. at 1729.

441. Id.

442. See, e.g., 1 P. Areeda & D. Turner, supra note 3, at § 215b2.

443. *SMCRC*, 105 S. Ct. at 1734-36 (Stevens, J., dissenting).

444. Id. at 1732 n.2 (Stevens, J., dissenting, joined by White, J.). An implication of the dissent's position is that these Justices would define the clear state policy requirement differently for municipal and private defendants, contrary to the argument presented in this article. See supra notes 417-20 and accompanying text. These Justices require both municipalities and private parties to act pursuant to a clear state policy, but only when the actor is a private party does the standard necessitate state compulsion.

445. Id. at 1729. The Court suggested a reason why a state might prefer a permissive rather than mandatory policy. Either mandatory or permissive joint ratemaking, for example, would tend to allow the state and the carriers to realize the efficiencies of the practice. But only a permissive policy would allow that economy to be tempered by price competition, in that only under a permissive policy could a carrier submit an individual rate proposal. See id. at 1728. In effect, the court reasoned that the state may have an interest in allowing firms to cheat on any cartel it sanctions. This observation seems indisputable, though its significance for state action purposes is simply to demonstrate that a state may affirmatively prefer a permissive policy, and federalism is implicated if that preference is denied. The Court should not be understood to be asserting that appreciably less price-fixing will result if permissive policies are immunized than if only mandatory policies are protected. Nevertheless, the Court's illustration does suggest that *somewhat* less price-fixing might result, and to that extent, the Court's observation bolsters its contention that requiring state compulsion would disserve the purpose of the antitrust laws. See infra note 446 and accompanying text.

might produce a larger sphere of activities exempted from antitrust scrutiny, whereas the test is intended to restrict the size of the exemption, by encouraging states to demand anticompetitive conduct when they would have preferred merely to have allowed it.[446]

The most significant addition to state action doctrine provided by *SMCRC* is the Court's treatment of the identity of the state. In three states, the permissive policy in favor of collective ratemaking was affirmatively expressed by the legislature, but in Mississippi, it was articulated by the public service commission, acting pursuant to authority delegated by the legislature to regulate common carriers.[447] Recall that in *Cantor*, the light-bulb program might have been held immune had it been intended by the regulatory commission; the plurality appeared to believe that the program was solely the idea of the utility.[448] By contrast, in *Goldfarb*, attorney price-fixing was intended by the state bar association, an official state agency, yet the practice was held not to be exempt.[449] The article suggested that these cases should be reconciled on the basis of the nature of the agencies involved. A legitimate agency, one whose members are financially disinterested in the subject of their regulation, such as the Michigan Public Service Commission, can embody the state for immunity purposes, whereas an illegitimate agency, such as the Virginia State Bar, cannot.[450] Based on this distinction, the Mississippi Public Service Commission was a legitimate state agency, it was qualified to represent the state, and its expression of a policy in favor of collective ratemaking should have satisfied the clear state policy criterion.[451]

The Court found the agency's action sufficient for immunity, but it did not use this analysis. The rationale the Court did employ is irreconcilable with its prior decisions. The Court said that the Mississippi commission, acting alone, "could not immunize private anticompetitive conduct."[452] But if "the State as sovereign clearly intends to displace

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446. Id. Justice Stevens called this analysis "seriously flawed," arguing that it improperly assumes states would respond to a compulsion requirement by demanding the previously permitted conduct, and that if states did respond by compelling the activity, the analysis incorrectly assumes that Congress would not act to preempt the state laws. Id. at 1738 (Stevens, J., dissenting). In fact, the Court's assumptions seem entirely plausible, and Justice Stevens's prediction of Congressional response seems speculative.

447. Id. at 1730.

448. See supra notes 152-63 and accompanying text.

449. See supra notes 112-23 and accompanying text.

450. See supra notes 209-14 and accompanying text.

451. See Miss. Code Ann. § 77-1-1 (1972): "The commissioners shall not operate, own any stock in, or be in the employment of any railroad, common or contract carrier by motor vehicle, telephone company, gas or electric utility ocmpany, or any other public utility that shall come under their jurisdiction or supervision."

452. *SMCRC*, 105 S. Ct. at 1730.

competition in a particular field with a regulatory structure," and the regulatory agency then authorizes the restraint, the clear state policy test is satisfied.[453] The Court distinguished *Cantor* on the ground that there, "the anticompetitive acts of a private utility were held unprotected because the Michigan Legislature had indicated no intention to displace competition in the relevant market."[454]

The problem with this analysis is that it purports to distinguish between the specificity with which the Mississippi legislature authorized the regulatory commission to permit collective ratemaking, and the specificity with which the Michigan legislature authorized the agency to permit a light-bulb program. The distinction is so fine as to be invisible. In both cases, the legislature conferred broad authority on its agency to regulate the operations of utilities, and in both, the specific conduct at issue fell within the agency's power. It is nonsense to claim that joint ratemaking was more closely related to the mission of the agency than was the distribution of light-bulbs, and to require that a distinction be made on that basis will prove utterly futile. The only intelligible criterion with which to judge whether an agency is capable of authorizing specific conduct is whether that authorization falls within the scope of the agency's delegated power. Thus, if a utilities commission prohibits grocery stores from selling peaches, the policy would not constitute that of the state. In both *SMCRC* and *Cantor*, however, the respective policies fell within the agencies' statutory jurisdiction and, therefore, did represent state intent. The better way to have distinguished *Cantor* is that the Michigan Public Service Commission did not clearly express an intent in favor of the light-bulb program; in *SMCRC*, the Mississippi agency's intent to authorize collective ratemaking was unmistakable. The Court's own comments undercut the distinction it proposed. The Court cogently explained the reason for state agencies:

> If more detail than a clear intent to displace competition were required of the legislature, States would find it difficult to implement through regulatory agencies their anticompetitive policies. Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature. Requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness.[455]

Similarly, requiring a legislature to enumerate the particular kinds of activities, such as light-bulb distribution, within a larger category of

453. Id. at 1731.
454. Id.
455. Id.

conduct, such as utility service, that an agency is empowered to regulate, or requiring a legislature to do anything more than to delegate broad authority to act in a general area, would "diminish, if not destroy, [the agency's] usefulness."

Whether a distinction should be drawn between legitimate and illegitimate agencies is a separate question. The state bar in *Goldfarb* was given authority over the fee-setting activity of attorneys, yet its policy in favor of price-fixing was not sufficient to immunize that conduct. The Court in *SMCRC* did not use the legitimate/illegitimate distinction to explain *Goldfarb*. Instead, it said simply, "In *Goldfarb*, the Court held that *Parker* immunity was unavailable only because the State *as sovereign* did not intend to do away with competition among lawyers."[456] Perhaps the Court was suggesting a different and rather clever distinction. The Virginia Supreme Court had explicitly cautioned that "no lawyer should permit himself to be controlled [by a fee schedule] or to follow it as his sole guide in determining the amount of his fee."[457] Perhaps, then, the *Goldfarb* principle is that whether a state agency is legitimate or illegitimate, a policy it expresses, even though within the scope of its authority, will not constitute state policy if the policy conflicts with express pronouncements of the relevant branch of government. The trouble with this interpretation is that the opinion in *Goldfarb* contains no hint that the Court had this idea in mind. This interpretation implies that had the Virginia court not expressly condemned price fixing, the state bar's policy would have effectively immunized the conduct. Yet there is little doubt that the Court would have rejected the claim of immunity even if the state court had not expressed its disfavor.[458]

Even though the legitimate/illegitimate distinction is the proper way to explain *Goldfarb*, it should be abandoned. A policy pertaining to an area within the scope of an agency's jurisdiction that authorizes a restraint should immunize the conduct regardless of the agency's make-up. The intuition behind a legitimacy requirement is that an illegitimate agency is apt to foster anticompetitive policies that serve the financial

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456. Id. (emphasis in original).

457. See supra note 120 and accompanying text.

458. Even in the absence of the explicit prohibition, price fixing would not have been "compelled by direction of the State acting as a sovereign." See supra note 123 and accompanying text.

Another interpretation of *Goldfarb* is possible. Perhaps the Court in *SMCRC* was distinguishing between regulatory agencies and other types of agencies. A non-regulatory agency, like a state bar, is incapable of expressing state intent to authorize specific activity even if it is granted power to oversee that same activity. A regulatory commission, however, can effectively authorize activity that is closely related to the mission of the agency. A distinction between regulatory and non-regulatory agencies, however, is untenable in theory and unworkable in practice.

interests of its members at the expense of the public. However true this statement may be, it is primarily an internal matter for the state to resolve. If the state chooses to empower an agency with an incentive to disserve the public, its own citizens will suffer, and any remedy ought to be left to the political process. Of course, if the injury to consumer welfare caused by such an agency falls overwhelmingly on non-state residents, the action should be preempted under the Commerce Clause.[459] But such a policy should be preempted whether the promulgating agency is legitimate or illegitimate, and for that matter, even if the policy is established by a constitutional branch of state government. The fact that any particular agency is more or less likely to harm consumers ought not determine whether its policies are categorically immune from antitrust challenge. At most, the illegitimate nature of an agency should simply serve to warn a federal judge that, for purposes of Commerce Clause preemption, the agency's policy ought to be scrutinized for injurious impact. Eliminating the legitimacy requirement would not only be theoretically sound, but would produce practical benefits as well. A court would be spared the task of inquiring into the composition of an agency and the troublesome issue of categorizing an agency composed in part of interested members and in part of disinterested members.[460]

One implication of the Court's analysis of an agency's status, and one the Court perhaps did not realize, constitutes a final, novel contribution to state action dogma. The *Midcal* test requires a clearly articulated state policy and active state supervision. In *SMCRC*, the Court said that unless "the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure," an agency's policy, even if within the scope of its power, does not represent state policy.[461] Therefore, according to the Court, even if the light-bulb policy in *Cantor* had been clearly intended by the Michigan Public Service Commission, it would not have satisfied the clear state policy test. However, the Court appeared to say that regulatory oversight by an agency with broad jurisdiction over an industry would fulfill the active supervision requirement, even if the legislature had not "clearly sanctioned" the challenged conduct.[462] For instance, the Michigan agency did satisfy this criterion. Thus, the "state", for purposes of active supervision, is not the "state", for purposes of articulating a policy. Neither *Midcal* nor any other case intimates this distinction. The analysis

459. See supra notes 10-11, 88-89 and accompanying text.

460. See, e.g., supra note 21 and accompanying text.

461. *SMCRC*, 105 S. Ct. at 1731.

462. The Court said that oversight by the public service commission in *SMCRC* satisfied the active supervision requirement; only thereafter did it explain that the clear state policy test required that "collective ratemaking [has been] clearly sanctioned by the *legislatures* of the four states" involved. Id. at 1730 (emphasis added).

of state agencies proposed above in the article would eliminate the discrepancy. An agency acting within the scope of its authority would be able to supervise conduct and articulate policy. Even if a legitimacy requirement were maintained, a legitimate agency would be able to satisfy both prongs of the *Midcal* test, and an illegitimate agency would be able to satisfy neither prong.

*M. . Fisher v. City of Berkeley*

In *Fisher v. City of Berkeley*[463] the Court reached an unexceptional result through a perplexing analysis. In 1972, Berkeley adopted an initiative amendment to the city's charter providing for residential rent control.[464] The amendment established a maximum base rent and allowed adjustments in maximum rents to be made only by an elected rent control board after a hearing on petitions submitted by individual landlords or tenants.[465] The state constitution at that time required ratification of city charter amendments by the legislature, and the rent control amendment was presented to and approved by both houses of the California legislature.[466] In 1976, the California Supreme Court invalidated the amendment on federal constitutional grounds.[467] It held that by permitting adjustments of maximum rents only through cumbersome, individual hearings, the law was certain to have a confiscatory effect on those landlords whose costs had surpassed their rent ceilings while they awaited hearings on their rent increase petitions.[468]

Thereafter, in June of 1980, the electorate of Berkeley enacted a rent control ordinance presumably to replace the rent control charter amendment struck down by the California Supreme Court.[469] The California constitution did not require this ordinance to be submitted to the legislature for ratification. The ordinance recited that it was intended "to protect tenants from unwarranted rent increases . . . in order to help maintain the diversity of the Berkeley community," and that it was designed, in part, to "advance the housing policies of the City with regard to low and fixed income persons, minorities, students, handicapped, and the aged."[470] The ordinance excepted certain units, including all newly constructed buildings. As to the rest, the ordinance established

463. 106 S. Ct. 1045 (1986).

464. See Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 135-37, 130 Cal. Rptr. 465, 470-71, 550 P.2d 1001, 1006-07 (1976).

465. See id., 17 Cal. 3d at 138, 130 Cal. Rptr. at 472, 550 P.2d at 1008.

466. See id., 17 Cal. 3d at 137, 130 Cal. Rptr. at 471, 550 P.2d at 1007.

467. Id., 17 Cal. 3d at 136, 169-71, 130 Cal. Rptr. at 470-71, 493-95, 550 P.2d at 1006-07, 1029-31.

468. Id.

469. Fisher v. City of Berkeley, 106 S. Ct. 1045, 1047, 1052 (Powell, J., concurring).

470. Id. at 1047

a base rent ceiling reflecting rents in effect at the end of May 1980.[471] Like the invalidated rent control amendment, the ordinance allowed landlords to petition a rent stabilization board for individual rent adjustments.[472] But unlike the prior amendment, the ordinance allowed the board to make annual, across-the-board adjustments to the rent ceiling.[473] The California Supreme Court found this difference, as well as provisions in the new ordinance that expedited hearings on individual petitions, decisive in upholding the constitutionality of the ordinance.[474] Certain *amici* in the state court proceedings attacking the ordinance claimed that the ordinance was pre-empted by the antitrust laws.[475] Under conventional state action analysis, the issue presented was relatively simple. As a municipality, Berkeley could impose a restraint so long as the restraint represented the clear policy of the state.[476] Because the original rent control scheme was specifically submitted to and approved by the state legislature, there appeared to be a clearly articulated and affirmatively expressed state policy in favor of the measure. Few arguments were available to resist this conclusion. Perhaps the legislative ratification was not a sufficiently affirmative articulation of state policy. This argument impressed Justice Brennan.[477] But surely the heart of the clear state policy requirement is the assurance that the state actually intends the restraint challenged, and the intent of the California legislature to authorize the rent control scheme specifically presented to it was beyond doubt.

Assuming the legislative ratification would have immunized the 1972 amendment, the only other way to avoid finding immunity for the 1980 ordinance was to argue that, for some reason, the original ratification did not carry over to the later municipal action. Four reasons were possible. Perhaps a municipal restraint must be imposed contemporaneously with its legislative approval, so that the mere passage of time rendered the initial ratification inoperative. This argument, however, would represent an unfounded attack on the ability of a legislature to

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471. Id.

472. Id. It might be noted that the rent control board under the amendment was popularly elected (*Birkenfeld*, 17 Cal. 3d at 138, 130 Cal. Rptr. at 472, 550 P.2d at 1008), whereas the rent stabilization board under the ordinance was appointed (*City of Berkeley*, 106 S. Ct. at 1047).

473. Id. See also Fisher v. City of Berkeley, 37 Cal. 3d 644, 687-91, 687 n.44, 209 Cal. Rptr. 682, 716-19, 717 n.44, 693 P.2d 261, 296-97, 296 n.44 (1984).

474. Fisher v. City of Berkeley, 37 Cal. 3d 644, 687-91, 209 Cal. Rptr. 682, 716-20, 693 P.2d 261, 295-99 (1984).

475. *City of Berkeley*, 106 S. Ct. at 1047.

476. See supra notes 250-52, 323-24, 396-97 and accompanying text.

477. *City of Berkeley*, 106 S. Ct. at 1056 (Brennan, J., dissenting) ("There are serious doubts that this purely *pro forma* approval would qualify the amendment for the *Parker* exemption.")

authorize future conduct and a dangerous intrusion into the realities of state legislative procedures. The force of legislative pronouncements cannot be assumed to evaporate over time. A second claim would be that the California Supreme Court's invalidation of the 1972 amendment in *Birkenfeld* somehow cancelled the effectiveness of the legislative authorization. But *Birkenfeld*, as a judicial decision, could not represent a shift in the legislature's policy and did not even constitute a state supreme court determination that the policy was substantively impermissible.[478] A closely-related argument would be that the state must authorize the specific restraint imposed, and because the legislature never considered the rent control ordinance, its approval of the prior amendment establishing a different scheme was insufficient. But this argument misconstrues the nature of the clear state policy requirement. The restraint must be the "foreseeable" result of the state's pronouncements, and certainly a legislature's specific ratification of a city's rent control scheme would extend to a procedurally different but substantively identical plan. Finally, during the interim between enactment of the amendment and passage of the ordinance, the California legislature enacted a comprehensive planning and zoning law, which provided in part: "Nothing in this article shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government to impose rent controls. . . ."[479] One might argue that this law revoked the previous ratification of the amendment. But as Justice Powell explained, this law expressly left intact preexisting authority to impose rent control.[480]

When *City of Berkeley* reached the Supreme Court, two justices chose to analyze the case under the state action doctrine, though they reached opposite conclusions.[481] The remaining seven justices, however, found that it was not a state action case at all. Rather, the majority held that because the ordinance was not facially inconsistent with the antitrust laws, it was simply not pre-empted by those laws, and the Court did not have to "address whether, even if the [rent] controls were to mandate § 1 violations, they would be exempt under the state-

478. Both Justices Powell and Brennan addressed this argument. Justice Powell concluded that, because *Birkenfeld* purported only to find the rent control scheme procedurally inadequate, the substantive policy expression of the legislature remained unaffected. *City of Berkeley*, 106 S. Ct. at 1053 (Powell, J., concurring). Justice Brennan simply asserted that *Birkenfeld* invalidated the legislative ratification for state action purposes. Id. at 1056 (Brennan, J., dissenting).

479. *City of Berkeley*, 106 S. Ct. at 1053 (Powell, J., concurring).

480. Id. One other lurking problem for conventional state action analysis was presented by the case. The city set the initial rent ceiling, but adjustments were to be made by the rent stabilization board. To what extent may a *municipality* delegate price setting authority to an agency? Should a municipal agency be treated like a state agency?

481. See id. at 1051-53 (Powell, J., concurring), 1053-57 (Brennan, J., dissenting).

action doctrine from antitrust scrutiny."[482] In particular, the Court found that § 1 prohibits concerted action in restraint of trade, and since Berkeley imposed rent ceilings unilaterally, the city's action did not conflict with the Sherman Act.[483] The Court's analysis is not only inconsistent with its treatment of at least one similar case, but misconceives the nature of antitrust offenses.

The state action doctrine constitutes, in effect, a defense to what otherwise might be an antitrust violation. A complaint might allege that certain conduct violates the antitrust laws, or that governmental conduct inconsistent with the antitrust laws is pre-empted by those laws. In either case, however, there is no need to resort to the state action doctrine unless the conduct challenged conflicts with the antitrust laws. One might defeat an antitrust claim, therefore, in either of two ways—by finding that the conduct challenged does not substantively offend the antitrust laws, or by holding that, in any event, the conduct is immunized by the state action doctrine. In the state action cases where the Court has found immunity, the Court typically seems to have assumed that the challenged conduct would offend the antitrust laws, but then accepted the state action defense.[484] No doubt the assumption in many cases was easy to make, so that the only viable method of avoiding the application of the antitrust laws was through the state action doctrine. But logically, a court could choose to consider either part of the two-step analysis first, and if it reached a result favorable to the defendant with respect to that first issue, it would not have to address the second issue at all.

Indeed, if a plaintiff's claim of a substantive conflict with the antitrust laws was easy to reject, while the issues surrounding a state action defense were complex, interests in judicial economy would argue for dismissing the complaint on substantive grounds without reaching the state action defense. So, for example, if a plaintiff claimed that a city ordinance that prohibited leaf burning conflicted with the antitrust laws, a court would do well to dismiss the complaint on the ground that the ordinance did not substantively offend the antitrust laws without even considering the more difficult issues posed by conventional state action analysis. And, of course, with respect to the substantive antitrust conflict part of the analysis, whether the defendant is a city or a state is inconsequential.[485] In fact, it would not matter if the defendant were

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482. Id. at 1051.

483. Id. at 1049, 1051.

484. E.g., in *Parker*, the Court said, "We may assume for present purposes that the California prorate program would violate the Sherman Act . . .," but went on to hold the program immune. 317 U.S. at 350, 63 S. Ct. at 313.

485. The Court in *City of Berkeley* appears to acknowledge this. *City of Berkeley*, 106 S. Ct. at 1048.

a private citizen—if the antitrust laws did not substantively apply to the conduct challenged, there can be no antitrust cause of action.

The Court in *City of Berkeley*, therefore, did not *necessarily* go wrong in addressing the substantive conflict issue first. The Court did go wrong, however, in its analysis of the substantive conflict issue. Besides, in this particular case, the state action issue was easy to resolve, should have been addressed first, and its resolution would have eliminated the need to consider the conflict problem.

The Court used the distinction between concerted and unilateral action to conclude that Berkeley's ordinance did not offend § 1 of the Sherman Act. But this distinction makes sense in the context of private restraints of trade only because it separates actions that have the potential of producing an anticompetitive effect from those actions that typically have no such capacity. A group of competitors may acquire the power to injure consumer welfare only by acting in concert. A single firm acting unilaterally will not be able to injure consumer welfare unless it possesses monopoly power, in which case whether consumers will be entitled to protection will depend upon the legality of the monopoly. Instances in which a single firm, acting alone, is able to acquire, maintain, or extend monopoly power unlawfully are likely to be rare. In the private context, therefore, the concerted action requirement serves principally to separate business conduct that can have an adverse effect on efficiency from conduct that cannot. In the public context, however, a government has the power to produce adverse effects through unilateral actions. The ability to injure stems not from collective action, but from the coercive power of the state. Thus, a distinction between concerted and unilateral action in the setting of governmental conduct does not aid in identifying actions that injure consumer welfare.

This is not to say that the language of the Sherman Act can be ignored. Section 1 indeed only prohibits *collective* action in restraint of trade. But the proper inference to be drawn from the statute is that Congress did not intend to proscribe state-imposed restraints of trade because they represent governmental action, not because they constitute unilateral conduct. The logic of the Sherman Act implies a model of private business activity; governmental action is foreign to the universe envisioned by Congress in the Act.

Though the Court's analysis works toward the right end, it generates unnecessary problems. First of all, the Court was unwilling to find concerted action in *City of Berkeley*, but it has not always been so timid. It would not have required an intellectual somersault to find a combination between the city and complying landlords that would satisfy the standards sometimes espoused by the Court.[486] Additionally, the

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486. For example, in Albrecht v. Herald Co., 390 U.S. 145, 88 S. Ct. 869 (1968),

Court's analysis applies only to a claimed violation of § 1; a § 2 offense does not require concerted action. The Berkeley rent control ordinance was challenged under § 2 as well as § 1, but the Court sidestepped the issue. It commented that the appellants had "not pressed the point with any vigor" and concluded, "As to this claim, we note only that the inquiry demanded by appellants' allegations goes beyond the scope of the facial challenge presented here."[487] Of course, Congress no more intended § 2 to apply to actions of governments than § 1. But how the Court will avoid finding a substantive conflict between anticompetitive governmental action and § 2, when it confronts the merits of the claim, without the benefit of its formalistic distinction between unilateral and concerted conduct, remains to be seen.

A more disturbing aspect of the Court's analysis is the anomalous results it can produce. The Court distinguished between unilateral restraints, such as the Berkeley rent control ordinance, which do not conflict with the Sherman Act, and "hybrid restraints," which do.[488] Hybrid restraints are those in which government imposed "mechanisms merely enforce private marketing decisions"—instances in which "private actors are thus granted 'a degree of private regulatory power.'"[489] The Court said that *Schwegmann*[490] and *Midcal*[491] involved hybrid restraints because, though the state in each case required adherence to specified prices, the prices themselves were set by private parties.[492] Suppose the Berkeley city council concludes that housing facilities in the community have deteriorated because landlords are unable to generate sufficient revenue to maintain a level of housing quality deemed desirable by the council. It believes that if allowed to earn monopoly profits,

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petitioner, an independent newspaper carrier, alleged that respondent publisher set maximum resale prices, terminated petitioner's distributorship when petitioner refused to comply, hired a solicitation agent to persuade petitioner's customers to purchase directly from the publisher, and replaced petitioner with a new distributor. Id. at 147, 88 S. Ct. at 870-71. The Court held that concerted action was established by the agreements between the publisher, the solicitation agent, and the new distributor. Id. at 150, 88 S. Ct. at 872. The Court also held that "petitioner could have claimed a combination between respondent (publisher) and himself, at least as of the day he unwillingly complied" with the fixed price, a theory whose application to *City of Berkeley* is apparent. Id. at 150 n.6, 88 S. Ct. at 862 n.6. The protesting landlords in Berkeley unwillingly complied with the maximum rents allowed by the city. For good measure, the Court held that petitioner could successfully have claimed a combination between the publisher and other distributors who acquiesced in the set prices and said that petitioner's allegation of a combination between the publisher and petitioner's customers was not "a frivolous contention." Id.

487. *City of Berkeley*, 106 S. Ct. at 1051 n.2.

488. See id. at 1050.

489. Id.

490. See supra notes 91-108 and accompanying text.

491. See supra notes 282-93 and accompanying text.

492. *City of Berkeley*, 106 S. Ct. at 1050-51.

landlords would improve their buildings. It therefore passes an ordinance reciting these findings and purposes and requiring landlords to charge rents 20% higher than the rents in effect on May 31, 1986. Presumably, this would constitute unilateral conduct unassailable under the antitrust laws.[493] Suppose, however, that instead of setting a baseline date and percentage increase, the council recites the same findings and purposes, but orders landlords to confer, agree upon rents, and thereafter adhere to them. Acting pursuant to the ordinance, landlords increase rents by 20% over those prevailing at the end of May, 1986. Clearly, the Court would term the latter scheme a hybrid restraint inconsistent with the antitrust laws. Yet what sense does it make to find a substantive conflict with the Sherman Act when a governmental entity orders firms to set monopoly prices and adhere to them, but not when the government itself sets the very same prices and orders adherence? Surely the substantive conflict with the policies of the antitrust laws is identical, whatever difference the court may imagine between the two systems for purposes of state action immunity.[494]

The final difficulty with *City of Berkeley* is that it is inconsistent with the spirit, if not the letter, of *City of Boulder*.[495] A city ordinance ordering a moratorium on the construction of cable television facilities would appear to be unilateral conduct and, therefore, not inconsistent with the antitrust laws. Under the *City of Berkeley* rationale, the complaint should have been dismissed on that ground. Instead, the Court analyzed the case under the state action doctrine and, though it technically did not hold that the ordinance conflicted with the antitrust laws,[496] it certainly seemed to believe there was a substantive conflict.[497]

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493. Of course, the Court's characterization of the Berkeley rent control scheme as purely unilateral governmental conduct is problematic. The city established a rent ceiling based on the rents in effect on a specified date. But those rents were set by the landlords. The effective rent, therefore, was a function of the city's choice of a base rent date and the landlord's determination of a particular rent—the rest represented, in the words of Justice Stevens, a "blend of public and private decisionmaking."

494. The Court's distinction between unilateral and hybrid restraints is also bound to invite spurious claims of conspiracies between governmental officials and private parties. In *City of Berkeley*, the Court said that it had "been given no indication [of] . . . any conspiracy among landlords or between the landlords and the municipality." 106 S. Ct. at 1051. But if the Court's rationale had been anticipated, certainly a clever litigant would have alleged such a conspiracy. For instance, because their rents were unaffected, owners of newly constructed buildings stood to benefit from the rent control ordinance. An allegation of a conspiracy between these landlords and the city council would have been plausible. Just how far a district court may go in investigating the merits of such a contention before dismissing a complaint on the unilateral action ground is left unclear by the court's decision.

495. See supra notes 312-41 and accompanying text.

496. *City of Boulder*, 455 U.S. at 56 n.20, 102 S. Ct. at 843 n.20.

497. There were allegations of a conspiracy between the city council and private firms,

Under the state action analysis proposed in this article, *City of Berkeley* is an easy case. The city, a politically-accountable governmental entity, clearly intended the challenged restraint, and the restraint should therefore have been immune. The majority's recognition that an antitrust claim might be defeated either because of state action immunity or for lack of a substantive conflict with the antitrust laws may be worthwhile. There may be a case in which application of the proposed analysis would be more difficult than assessment of the substantive claim, and efficiency in litigation resources would dictate resolution of the substantive issue first. But *City of Berkeley* was not such a case, and even the hypothetical leaf burning ordinance posed earlier could be resolved under the proposed state action standard as easily as it could under substantive scrutiny. If there is such a case, however, the determination of substantive conflict should not depend on whether the conduct challenged is unilateral or collective. Rather, conduct conflicts with the policy of the antitrust laws if it injures consumer welfare.

The foregoing criticisms of *City of Berkeley* should not obscure the positive contribution that decision makes to the development of state action principles. The result was patently correct. Even the Court's flawed analysis will lead to the proper results in many cases in which the Court might have reached erroneous conclusions under conventional state action analysis. Every case that involves a unilateral, government-imposed restraint, protected from antitrust attack under the *City of Berkeley* rationale, will also present a restraint intended by the government and, therefore, immune under the proposed state action analysis.[498] Further, the decision represents a new, less intrusive attitude toward challenging government activity under the antitrust laws than the Court had previously exhibited, in cases like *City of Boulder*, and that change should be applauded. In effect, the Court established a novel, albeit limited method of avoiding antitrust condemnation of government conduct, a way that would have seemed unfruitful prior to *City of Berkeley*. In all, the Court's performance was not unlike a batter struck by a pitched ball. Given the right circumstances, the result can be as effective as a hit. But at other times, only a home run will do, and most assuredly, the Court did not drive one into the stands.

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which, if true, would have rendered the ordinance a hybrid restraint under the Court's analysis. Those allegations, however, were not before the Court. See id. at 47 n.9, 102 S. Ct. at 838 n.9.

498. Of course, the Court's test will not always lead to the same result as the test proposed here, and it is, for that reason, an inadequate substitute. So-called hybrid restraints are unprotected by the Court but may be immune under the proposed analysis.

## IV. *Summary*

At this point in the article, a summary of where the state action doctrine is and where it ought to be is in order. Under current doctrine, conduct that would otherwise constitute an antitrust violation will be immune if it is the action of the state or if it is the effectively authorized action of private parties. The "state", for purposes of state *action*, includes at least the legislature and the state supreme court when acting in a legislative capacity. It should and probably does include the governor and the supreme court acting in any constitutionally appropriate capacity.[499] It also includes some state agencies, but the analysis for determining which agencies constitute the state is uncertain. The best interpretation of Supreme Court precedent is that only legitimate state agencies acting within the scope of their authority represent the state. The Court's most recent opinion, however, suggests that an agency embodies the state if its actions bear some close relationship to authority delegated by the appropriate branch of government. Ideally, any agency would embody the state to the extent it acts within the broad scope of its power.

Effective authorization of *private* conduct requires a clearly articulated and affirmatively expressed state policy in favor of the restraint and active state supervision of it. For purposes of both expressing policy and supervising activity, the best interpretation of precedent is that the state includes the legislature, supreme court, governor, and legitimate state agencies. Recently, however, the Court suggested that, while all state agencies can effectively supervise private conduct, state agencies can articulate policies only to the extent the policies are closely related to policies expressed by a constitutional branch of government. If the active supervision requirement is retained, all branches of government and all state agencies acting within the scope of their authority ought to be able to express state policy and supervise the restraint. Better yet, supervision should not be required at all for immunity, but should merely serve as evidence of state intent.

The clear state policy requirement is satisfied if the private conduct that constitutes the restraint challenged was the foreseeable result of the state's pronouncements. The state need not explicitly refer to the challenged activity or the anticompetitive effects of that conduct. The state need not compel the activity; a permissive state policy is adequate. Nor does immunity require that the activity be necessary to make the regulatory act work. The best position on the issue is that private conduct challenged as a restraint is protected if the state intended to allow it, and that intent is established if the state acted in such a way that the private conduct was a likely consequence. Active supervision requires

499. See infra notes 500-03 and accompanying text.

rather vigorous oversight, something akin to traditional public utility regulation.

A municipality stands in the position of neither a legitimate state agency nor a private party. Unlike a legitimate agency, a municipality must satisfy the clear state policy requirement, and unlike a private party, it need not satisfy the active supervision requirement. Ideally, a municipality would be treated exactly like a state—its actions would be automatically immune from antitrust liability, and private restraints that it intends to allow would be immune as well.

Where an anticompetitive effect is caused by a combination of state and private action, the Court may engage in a kind of proximate cause analysis to determine whether the restraint will be attributed to the state, and therefore automatically immune, or to the private party, and therefore immune only if effectively authorized. The analysis is imprecise, but the Court generally focuses on the effect and decides which party ought to be held legally responsible for the anticompetitive effect. The better analysis is that if the plaintiff sues a private party, the case should be dismissed if the challenged conduct of the defendant does not constitute a substantive antitrust violation, was authorized by the state, or is protected by the *Noerr-Pennington* doctrine.

Some of the Supreme Court's older opinions suggest that immunity will not be granted unless the policy that underlies the state's own anticompetitive actions or the private actions which the state authorizes is deemed sufficiently meritorious by the court. More recent cases, however, indicate that the Supreme Court will not assess the content of state policy. The Court should abandon altogether any inquiry into the value of state policy. Anticompetitive action should be immune from antitrust challenge if a state intended to engage in or permit the activity, regardless of the state's motive. The action, however, should be preempted under the Commerce Clause if the effects of the action fall insubstantially on the state's own citizens.

## V. *Resolution of Outstanding Issues*

Based on the principles summarized above, a few issues that have been explicitly left open or have actually not been decided by the Court will be examined briefly. The resolutions of most are easy; the answer to one is more difficult.

### *A. Status of the Governor*

In *Ronwin*, the Court explicitly stated, "This case does not present the issue whether the Governor of a State stands in the same position as the state legislature and Supreme Court for purposes of the state

action doctrine."[500] There is little doubt, however, that the governor does stand in that position. In *Bates*, the Court held that the Supreme Court embodied the state to the extent it regulated attorneys because the state constitution conferred authority on the court to supervise the bar.[501] The clear inference is that any constitutional branch of government represents the state so long as it is exercising its constitutional powers. Further, state action immunity is grounded in federalism, and that concept points directly to a state's constitution as the source of the government's authority and identity. Though the Court in *Ronwin* alluded to *Bates* as the origin of its mysterious suggestion that a state court's judicial, as opposed to legislative actions are not immune, *Bates* contained no such limitation, and no analogous limitation should apply to the actions of a governor.[502] The only limitation implied by *Bates* is that the branch of government be operating within its constitutionally-defined sphere.[503]

### *B. Supervision of State Agencies*

In *Town of Hallie*, the Court said that, similar to cases involving municipalities, "[i]n cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue."[504] In fact, the Court came very close to deciding that issue in *SMCRC*. In that case, though the public utility commissions were not sued,[505] the private defendants were held immunized in part because they were supervised by the agencies. There was no indication that the agencies themselves were supervised, however, and it would be remarkable indeed if an unsupervised agency could effectively supervise private conduct but be subject to antitrust liability itself. Besides, it is hard to imagine a greater intrusion into the internal affairs of a state than a federal inquiry into the government's oversight of its own agencies, and it is not easy to imagine just how a state in practice

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500. *Ronwin*, 104 S. Ct. at 1995 n.17.

501. See supra notes 236-37 and accompanying text.

502. See supra notes 215-39 and accompanying text.

503. In Deak-Perera Hawaii, Inc. v. Department of Transp., 745 F.2d 1281 (9th Cir. 1984), cert. denied, 105 S. Ct. 1756 (1985), the Ninth Circuit held that the Hawaii Department of Transportation was immune from antitrust challenge for awarding an exclusive concession to the plaintiff's competitor. 745 F.2d at 1282. The court correctly observed that the executive branch of government is entitled to state action immunity. Id. at 1283. The case, however, involved an executive agency, not the governor himself, and the court's analysis of the agency's source of immunity is slightly confused. See id. at 1282-83. In fact, the agency should be immune if it is acting within the scope of the power delegated to it by whatever branch of government under which it is organized.

504. *Town of Hallie*, 105 S. Ct. at 1720 n.10.

505. *SMCRC*, 105 S. Ct. at 1725 n.13.

would go about supervising its agencies. Usually, agencies do the supervising.

### C. *Clayton Act §7 Violations*

The Court has never held that anticompetitive mergers violative of Section 7 of the Clayton Act[506] can be immunized under the state action doctrine. The Court has considered allegations of Sherman Act §1 and §2 violations, however, and has never indicated any unease in applying the doctrine in the context of both of these provisions.[507] Further, the principle of federalism is not affected by which particular federal statute conflicts with state desires. In sum, state action should be able to immunize conduct otherwise unlawful under § 7.[508]

The more difficult question relates to the requirements of immunity. The answer proposed by this article is simple enough—a merger should be exempt if the state intended to allow it, and intent is proven if the state acted in such a way as to make the merger a likely consequence.[509] If the merger is proposed to a state agency, which explicitly approves it, immunity obviously should be granted.[510] The answer suggested by

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506. 15 U.S.C. § 18 (1982).

507. For example, *Parker* involved a potential § 1 violation; *Town of Hallie* involved a potential § 2 violation.

508. The Second Circuit has held that the state action doctrine applies to § 7 of the Clayton Act. Cine 42nd Street Theater Corp. v. Nederlander Organization Inc., 54 U.S.L.W. 2601 (2d Cir. May 17, 1986). The Fourth Circuit also apparently reached this conclusion. In North Carolina ex. rel. Edmisten v. P.I.A. Asheville, Inc., 740 F. 2d 274 (4th Cir. 1984) (en banc), rev'g 722 F.2d 59 (1983), cert. denied, 105 S. Ct. 1865 (1985), in response to a federal law, North Carolina enacted legislation that required a firm to obtain a certificate of need from a state agency prior to making a substantial acquisition of health care facilities. 740 F.2d at 277-78. The state law specified thirteen criteria to be used by the agency in evaluating a request for a certificate. Id. at 278. The operator of one of two private psychiatric hospitals in a region attempted to acquire 50% of the stock of the other hospital and obtained a certificate of need for the acquisition. Id. at 276. North Carolina challenged the acquisition, *inter alia*, under the Clayton Act. Id. The Fourth Circuit, sitting *en banc*, held that the acquisition was not immune under the state action doctrine for failure to satisfy the active supervision requirement, but implied that a state action exemption from section 7 of the Clayton Act was possible. Id. at 277, 279.

509. The application of Commerce Clause preemption analysis, however, is slightly more complex. A merger may make the exercise of market power more likely even though it does not result in the actual exercise of that power. If a merger only increases the danger of exercised market power, no anticompetitive effects will be suffered by consumers at the time of the merger. Yet subsequently, if market power is exercised, harm may be imposed primarily on out of state consumers. At that time, the only effective remedy may be structural, but a structural remedy may be impossible in practice. Thus, a merger intended by the state should be preempted by the Commerce Clause if it is likely to produce significant injury to allocative efficiency and an insubstantial portion of the harm is likely to be imposed on the state's citizens.

510. The acquisition in *North Carolina ex rel. Edmisten* would have been immune under this analysis. See supra note 508.

Supreme Court precedent is less clear. The requirement of a clear state policy and the meaning of that requirement should be unaffected by the fact that the conduct challenged would violate §7 of the Clayton Act, rather than the Sherman Act. Though the application of the active supervision requirement is problematic, the criterion should not be construed to apply.

If active supervision can be justified as a requirement, it is because it marginally reduces the probability of erroneously inferring the state's intent to permit a restraint as the conduct is carried out and felt in practice.[511] Active supervision allows the state to reevaluate its initial intent to authorize conduct in light of the actual effects of that conduct and to be quickly made aware of any transgressions of authority conferred, thereby hastening state action to alter the permission granted. This unique advantage of supervision can justify supervision as a requirement only if the marginal benefit in expected error cost avoided exceeds the cost of compliance. When a merger is challenged, the cost of compliance with a supervision requirement is apt to exceed the benefit of it by a far greater margin than when the requirement is applied to other antitrust violations.

A merger may violate §7 if it tends to create a monopoly, even though it does not result in the acquisition of monopoly power.[512] Thus, conduct that has no immediate effect on consumer welfare may nevertheless violate the antitrust laws. By contrast, the Supreme Court's state action cases have involved restraints, such as price-fixing, the exclusion of competition, and tying arrangements, in which the anticompetitive effect flows immediately from the challenged conduct. If supervision is required to immunize mergers, the state may have to oversee in perpetuity the operation of a merged firm even though the firm never acquires, much less exercises, market power. It is most unlikely that the state would change its mind about the scope of its authorization if no anticompetitive effects flow from its permission. Further, the private party's conduct cannot exceed the bounds of its permission because a merger authorization does not establish limitations on subsequent conduct. If the state is not apt to change its mind, and the possibility of a private party's transgressing its authority is nonexistent, the usefulness of supervision in reducing the probability of erroneously construing the state's continuing intent disappears.

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511. See supra notes 307-11 and accompanying text.

512. For example, in United States v. Von's Grocery Co., 384 U.S. 270, 277, 86 S. Ct. 1478, 1482 (1966), the Court explained: "By using . . . terms in § 7 which look not merely to the actual present effect of a merger but instead to its effect upon future competition, Congress sought to preserve competition among many small businesses by arresting a trend toward concentration in its incipiency before that trend developed to the point that a market was left in the grip of a few big companies."

Moreover, if a state does reverse a decision, the benefit to consumers is likely to be produced by the state acting to rescind its permission and directing the parties to halt the previously authorized conduct. For instance, it California authorizes price-fixing by raisin growers, and after supervising that conduct, realizes that the effects are worse than it had anticipated, consumers benefit only if the state quickly withdraws its permission and orders the practice to cease. And the state can be expected to take that corrective action where the remedy involves merely discontinuing private activity. Where a merger is authorized, however, and the state subsequently realizes its error, the state is far less likely to take corrective action because such action would entail costly structural relief. The state might have to order the dissolution of a working enterprise. Additionally, the cost of supervising a merged firm may exceed the cost of supervising other restraints such as price fixing, because the conduct that must be overseen is likely to be more diffuse, encompassing the entire operations of the firm. In short, supervision offers little benefit in the merger context, far too little to justify its extreme cost.

The Court's decision in *Town of Hallie* offers some support for this conclusion. There, the Court applied the kind of analysis suggested here to a particular class of defendants, i.e. municipalities, and concluded that the cost of supervision would exceed its benefits.[513] The Court might be willing to apply the analysis to a particular class of antitrust violation, anticompetitive mergers, and similarly conclude that the cost of supervision cannot be justified.

## VI. *Conclusion*

The state action doctrine did not appear one day in polished form, with intricacies explored and conundrums solved. It evolved and will continue to evolve. Some of the stages of the process have been predictable, others less so. Today, the areas most in need of refinement are the confused status of state agencies, the misunderstood nature of municipalities, and the misguided requirement of supervision. Because the doctrine is evolving, however, there is hope. The Court's recent exposition of the clear state policy standard and its recent failure to substitute its own judgment for the policy decisions of the states are cause for optimism.

The doctrine of state action is still evolving. The doctrine is certain to change, and with some luck, it might someday do what it ought to do—immunize from antitrust challenge all conduct engaged in or authorized by a state.

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513. See supra notes 406-08 and accompanying text.