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Federalism and Conspiracy: Is Governmentally Compelled Conduct Per Se Lawful Under 1 of the Sherman Act?

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FEDERALISM AND CONSPIRACY: IS GOVERNMENTALLY COMPELLED CONDUCT PER SE LAWFUL UNDER § 1 OF THE SHERMAN ACT?

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Sections 1 and 2 of the Sherman Act establish a national policy favoring competition.[1] This policy is often at odds with the desires of state and local governments to intervene in markets to achieve regulatory goals. The tension between the national policy favoring competition and the state and local policies favoring regulation raises a federalism concern about the respective roles of national, state, and local governments. This concern has been addressed by the Supreme Court in a series of cases balancing the national interest in competition with state and local interests by establishing immunity for certain state and local government acts.[2] The Supreme Court has recently disturbed that balance in a case purporting to resolve an antitrust issue unrelated to immunity or federalism.[3]

Part I of this article will discuss the structure of immunity for acts of states, political entities subordinate to states, and individuals acting under governmental authority. Part II will set forth the Supreme Court's recently

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1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (1982).

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2 (1982).

2. See *infra* text accompanying notes 4-51. The tension referred to in the text was also addressed by Congress in the Local Government Antitrust Act of 1984, which limits the remedy available against local governments and persons directed by such governments to injunctive relief. 15 U.S.C. §§ 34-36 (Supp. III 1985).

3. *See* Fisher v. City of Berkeley, 106 S.Ct. 1045 (1986).

adopted position that conduct compelled by a government cannot violate section 1 of the Sherman Act because such conduct does not satisfy the statute's concerted action requirement. Part III will demonstrate that the Supreme Court's position with respect to the concerted or unilateral nature of governmentally compelled conduct is contrary to the reasons the concerted action requirement was placed in the statute. Part IV will then analyze the impact of the Supreme Court's erroneous position regarding concerted action on the federalism balance achieved in the immunity cases.

I. *Immunity for Acts of States, Their Subordinate Political Entities, and Individuals Acting Under Governmental Authority*

Origins of Immunity—Acts of States

The Supreme Court created the doctrine of state action immunity to the antitrust laws in *Parker v. Brown*.[4] In that case a producer and packer of raisins challenged a program established pursuant to California law that restricted sales of raisins. California law allowed the creation of proration programs to restrict competition among agricultural producers and, thereby, raise the price of their products.[5] Such a program was created for the 1940 raisin crop. Under the proration program, producers were allowed to sell only 30 percent of their crop through ordinary commercial channels.[6] The remaining 70 percent of the crop was placed in pools subject to sale by program administrators. The plaintiff claimed that the proration program was invalid under section 1 of the Sherman Act as an illegal restraint of trade.[7]

The plaintiff's claim forced the Court to face a knotty problem created by our dual system of government. In the Sherman Act, the national government expressed a preference for free and open competition. However, states frequently restrict competition in order to achieve some other policy objective. When the preference stated in the Sherman Act for competition conflicts with a state law limitation on competition, the Court must resolve this conflict. One possible resolution would be to simply state that under the supremacy clause state laws are rendered invalid by conflicting federal laws,[8] and then determine whether the challenged state law conflicts with the Sher-

4. 317 U.S. 341 (1943).

5. *Id.* at 346.

6. *Id.* at 348. Even as to their 30 percent, producers were required to obtain certificates authorizing sales. This certification requirement was designed to control the timing of sales. *Id.*

7. A similar program organized by private parties would be per se illegal as price fixing. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940) ("Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.").

8. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

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

man Act prohibitions on agreements in unreasonable restraint of trade[9] and actual or attempted monopolization.[10] In *Parker v. Brown* the Supreme Court rejected this approach. Instead it held that the actions of states are immune from attack under the Sherman Act. In doing so, it was interpreting the Act as not applying to state action, thus avoiding the application of the supremacy clause.

> But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activity directed by its legislature. 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.[11]

The Court's approach was obviously motivated by a concern for the rights of sovereign states in our federal system of government.[12] The Court was willing to grant blanket immunity without regard to how anticompetitive the state conduct was. Under *Parker v. Brown*, immunity does not depend upon the application of Sherman Act policy, but rather the subordination of that policy to federalism concerns. Recognition that the controlling policy is based on the unique position occupied by states in the federal constitutional structure was important when the immunity established in *Parker v. Brown* was extended to subordinate political entities[13] and individuals.[14]

Because the blanket immunity established in *Parker v. Brown* applies only to actions of the state as sovereign, one must distinguish such action from acts of subordinate political entities and individuals. The Supreme Court faced this issued in *Hoover v. Ronwin*.[15] In that case the plaintiff failed the Arizona bar examination.[16] He sued four members of the Arizona Supreme

9. 15 U.S.C. § 1 (1982).

10. *Id.* § 2.

11. 317 U.S. at 350-51.

12. For a comparison of the *Parker v. Brown* Court's unwillingness to invalidate state economic regulation on antitrust grounds with the Court's unwillingness to overturn such regulation on substantive due process grounds, see Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After Midcal Aluminum*, 61 B.U.L. REV. 1099, 1104-07 (1981); Note, *Antitrust Immunity: The State of "State Action,"* 88 W. VA. L. REV. 783, 788 (1986).

13. See *infra* text accompanying notes 21-30.

14. See *infra* text accompanying notes 31-51.

15. 466 U.S. 558 (1984).

16. *Id.* at 564.

Court's Committee on Examinations and Admissions (the Committee) under section 1 of the Sherman Act alleging that they had conspired to reduce competition by excluding competent bar applicants from the practice of law. The defendants argued that even if the plaintiff's allegations were true, their actions were immune under *Parker v. Brown*. The Court held that legislative actions of the state supreme court were sovereign acts of the state and, thus, would qualify for the immunity established in *Parker v. Brown*.[17] Because action by the Committee would not be sovereign state action, the crucial issue was whether the plaintiff was denied bar admission by the state supreme court or by the Committee. A denial by the court would qualify as immune state action under *Parker v. Brown*, while a denial by the Committee would not.[18]

In an opinion by Justice Powell, the Supreme Court held that the plaintiff was denied admission to the bar by action of the state supreme court.[19] Justice Powell concluded that the Committee merely recommended candidates for admission by the court and that the court retained the final authority to grant or deny admission.[20] Thus, it was the court's denial of admission that injured the plaintiff, and the court's action was immune under *Parker v. Brown*.

In summary, action by a state as sovereign is immune from attack under the Sherman Act. This immunity is based upon the independent constitutional role of states in our dual system of government. Additional complexity arises when immunity is claimed by subordinate political entities or individuals acting under governmental authority, neither of which have sovereign constitutional status.

Immunity for Subordinate Political Entities

The extension of the immunity created in *Parker v. Brown* for states to counties, municipalities, state agencies, and other subordinate political entities troubled the Supreme Court for some time.[21] The Court in *Parker v. Brown* ruled that pro-competitive policies expressed in the Sherman Act were subordinate to the sovereign acts of states. It did not hold that the Sherman Act must yield to any act by any government.[22] Given the large number of

17. *Id.* at 568 (citing Bates v. State Bar of Ariz., 433 U.S. 350 (1977)).

18. Action by a committee established by a state supreme court might qualify for immunity as action of a subordinate political entity (see *infra* text accompanying notes 21-30), or of individuals acting pursuant to governmental authority (see *infra* text accompanying notes 31-51).

19. 466 U.S. at 573.

20. *Id.* at 576-79.

21. *See, e.g.*, Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978).

22. The *Parker* state-action exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution. But this principle contains its own limitation: Ours is a "*dual* system of government," *Parker*, 317 U.S. at 351 (emphasis added), which has no place for sovereign cities.

Community Communications Co. v. City of Boulder, 455 U.S. 40, 53 (1982).

actions by subordinate political entities that regulate or otherwise affect markets, the issue of whether and under what circumstances such entities qualify for immunity from attack under the Sherman Act is of great importance.

The Court resolved many of the complexities created by the extension of immunity to subordinate political entities in *Town of Hallie v. City of Eau Claire*.[23] In that case four townships located adjacent to Eau Claire, Wisconsin, alleged that Eau Claire violated the Sherman Act by monopolizing sewage treatment services and tying those services to sewage collection services.[24] Eau Claire denied sewage treatment services to the plaintiff townships and would supply such services to individuals in the townships only if their property was annexed to Eau Claire.[25] Eau Claire asserted that it was entitled to immunity under *Parker v. Brown*.

In a unanimous opinion by Justice Powell, the Court recognized that municipalities were not automatically entitled to immunity because, unlike states, municipalities have no constitutionally sovereign status.[26] Thus, if a municipality is to qualify for immunity under *Parker v. Brown*, that immunity must be derived from the state's constitutional status. The Court held that in order for a municipality to obtain immunity, its actions must be "taken pursuant to a clearly articulated state policy to replace competition . . . with regulation."[27] The Court rejected the plaintiff's assertions that a municipality must also demonstrate that the state compelled it to act or that the state actively supervised its conduct.[28] Eau Claire's action passed the "clearly articulated state policy" test because state statutes authorized the challenged conduct.[29] Thus, a subordinate political entity may inherit immunity under *Parker v. Brown* from the state so long as its actions are taken pursuant to a clearly articulated state policy to replace competition with regulation.[30]

Immunity for Individuals Acting Under Governmental Authority

Immunity for acts of states and subordinate political entities would be of little practical significance if the governmental bodies were immune but private individuals acting with or under the authority of those bodies were not. Governmental policies would be frustrated if individuals acting pursuant to those policies were liable under the Sherman Act. Thus, some form of immunity for individuals acting under governmental authority is necessary if the immunity established in *Parker v. Brown* is to have meaningful effect.

23. 471 U.S. 34 (1985).

24. *Id.* at 36.

25. *Id.* at 37.

26. *Id.* at 38 (citing City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 412 (1978) (Brennan, J.)).

27. 471 U.S. at 44.

28. *Id.* at 45.

29. *Id.*

30. In a footnote in *Town of Hallie* the Court suggested that state agencies would be treated in the same manner as municipalities. *Id.* at 46 n.10.

The rationale behind *Parker v. Brown*, however, does not require that the states be given the power to license violations of federal law. States cannot grant immunity to individuals merely by stating that their conduct is legal. The immunity created in *Parker v. Brown* is a limited exception to a generally applicable federal statute and is designed to allow states to carry out regulatory policies. Thus, immunity for individuals must be broad enough to allow the immune regulatory acts of governmental entities to have meaningful effect. It must be narrow enough, however, to allow the Sherman Act to reach anticompetitive individual conduct that is not needed to effect governmental policies.

The Court created a standard to meet these demands in *Southern Motor Carrier Rate Conference, Inc. v. United States*.[31] In that case the defendant rate bureaus were private organizations composed of motor common carriers. The rate bureaus submitted proposals for rates to state public service commissions. If a commission took no action, the rate became effective after a stated time period. Alternatively, a commission could hold a hearing to consider the rate and expressly approve or disapprove the proposal. State statutes allowed, but did not compel, common carriers to act together through the rate bureaus to submit rate proposals. The United States alleged that rate bureaus violated section 1 of the Sherman Act by fixing transportation rates.[32] The rate bureaus argued that their actions were immune under *Parker v. Brown*.[33]

In an opinion by Justice Powell, the Court applied a two-pronged test to determine when individuals qualify for immunity under *Parker v. Brown*.[34] The first prong of the test asks "whether the . . . challenged conduct was taken pursuant to a clearly articulated state policy."[35] The second prong of the test asks whether the individual conduct is actively supervised by the government.[36] If the challenged conduct is taken pursuant to a clearly articulated state policy and is actively supervised by the government, it is immune. The United States conceded that the second prong of the test was met, that is, that the rate bureaus' activities were actively supervised by the public service commissions.[37] The application of the first prong, however, raised an

31. 471 U.S. 48 (1985).

32. *Id.* at 53.

33. *Id.* The rate bureaus also argued that their conduct was immune under the *Noerr-Pennington* doctrine derived from Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) and United Mine Workers v. Pennington, 381 U.S. 657 (1965). This doctrine immunizes collective solicitation of action by governments. *See* ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 613-19 (2d ed. 1984). The Court, however, did not address this issue. *See* 471 U.S. at 53 n.11.

34. This test was drawn from California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

35. 471 U.S. at 62. This prong of the test set forth in the text is the same as the test established by Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985), for immunity for subordinate political entities. The *Town of Hallie* test has no second prong.

36. 471 U.S. at 57.

37. *Id.* at 66.

issue of law and an issue of fact regarding whether the rate bureaus' collective rate-making activities were pursuant to a clearly articulated state policy.

The issue of law was whether individual conduct that was permitted but not required by the state could qualify for immunity. The Court rejected any compulsion requirement and held that conduct permitted by a clearly articulated state policy satisfied the first prong of the test.[38] The Court reasoned that a compulsion requirement would reduce the regulatory options available to states and cause states to intrude more severely in markets by requiring rather than permitting individual conduct.[39]

The issue of fact was whether all of the relevant states had clearly articulated a policy allowing collective rate making. Statutes in three of the four states expressly permitted collective rate making.[40] Mississippi's legislature had not adopted such a statute.[41] While the Mississippi Public Service Commission permitted collective rate making, Commission action was not enough, standing alone, to satisfy the first prong of the test. The test requires a clear articulation of policy by the state acting as sovereign. Action by a state agency is not sufficient.[42] The Court held, however, that because the Mississippi legislature directed the Commission to regulate rates, the first prong of the test was satisfied. The test is whether "the State's intent to establish an anticompetitive regulatory program is clear,"[43] and the Mississippi legislature's action satisfied that test.

In *Southern Motor Carrier Rate Conference*, the Court faced the first prong of the two-prong test for individual immunity and concluded that the challenged conduct was taken pursuant to a clearly articulated state policy. The Court recently faced the second prong of the individual immunity test, that is, whether challenged individual conduct was actively supervised by the government. In *324 Liquor Corp. v. Duffy*,[44] a liquor retailer challenged the resale price maintenance provisions of New York's liquor control law. New York required liquor wholesalers to file, or post, each month schedules containing both case and bottle prices.[45] A liquor retailer was required to charge at least 112 percent of the bottle price posted by the wholesaler at the time of the retailer's sale.[46] The actual retail markup required, however, may exceed

38. *Id.* at 61. In *Town of Hallie*, 471 U.S. 34, the Court rejected a compulsion requirement for municipalities claiming immunity.

39. 471 U.S. at 61.

40. *Id.* at 65.

41. *Id.*

42. Parker immunity is available only when the challenged activity is undertaken pursuant to a clearly articulated policy of the State itself, such as a policy approved by a state legislature, see *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 99 S.Ct. 403, 58 L.Ed.2d 361 (1978), or a state supreme court, *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977).

Id. at 63.

43. *Id.* at 65.

44. 107 S.Ct. 720 (1987).

45. *Id.* at 722.

46. *Id.*

12 percent for several reasons. First, most retailers buy by the case and the posted case price on a per-bottle basis may be less than the posted bottle price.[47] Second, the posted bottle price may have increased since the retailer purchased the liquor. Thus, while New York law required liquor retailers to charge at least 112 percent of the posted bottle price, it did not fix any ratio between retail and wholesale prices.

The 324 Liquor Corporation argued that the New York statute resulted in resale price maintenance. Resale price maintenance is per se illegal under section 1 of the Sherman Act.[48] New York argued that its statutes were immune from antitrust scrutiny under *Parker v. Brown* and its progeny. In another opinion by Justice Powell, the Court applied the two-prong test and rejected the defendant's immunity argument.[49] The Court recognized that the first prong of the test was met. The challenged conduct was taken pursuant to a clearly articulated state policy.[50] The Court held, however, that the second prong of the test was not satisfied. The state did not actively supervise the conduct.[51] The state merely authorized and enforced the resale price maintenance without further involvement. The Court held that such a grant of authority did not constitute active supervision.

In summary, it is more difficult for an individual to qualify for immunity under *Parker v. Brown* than either a state or a subordinate political entity. A state action is automatically immune so long as it is the state as sovereign that is acting. A subordinate political entity qualifies for immunity if it is acting pursuant to a clearly articulated state policy. An individual is granted immunity, however, only if his action is taken pursuant to a clearly articulated state policy and is actively supervised by the government.

II. *The Supreme Court's Application of the Conspiracy Requirement to Governmentally Compelled Conduct*

Because section 1 of the Sherman Act prohibits contracts, combinations, or conspiracies in unreasonable restraint of trade, the threshold issue in any section 1 case is the existence of a contract, combination, or conspiracy.[52] The Act distinguishes unilateral from concerted behavior and subjects only concerted behavior to section 1.[53] Governmental conduct, like private conduct, does not violate section 1 unless it is part of a contract, combination, or conspiracy.

47. For cases containing forty-eight or fewer bottles, the posted case price must be at least $1.92 less than the sum of the posted bottle prices of the bottles in the case. *Id.*

48. Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

49. Justice Powell also authored the opinions of the Court in Hoover v. Ronwin, 466 U.S. 558 (1984), Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985), and Southern Motor Carrier Rate Conf., Inc. v. United States, 471 U.S. 48 (1985).

50. 107 S.Ct. at 725.

51. *Id.* at 726.

52. If such a contract, combination, or conspiracy is established, the conduct is illegal only if it unreasonably restrains trade. See *infra* text accompanying notes 77-80.

53. Unilateral conduct may be illegal under section 2 of the Sherman Act, 15 U.S.C. § 2 (1982), which prohibits monopolization and attempted monopolization.

The Supreme Court addressed the concerted action requirement of section 1 in the context of governmental conduct in *Fisher v. City of Berkeley*.[54] In that case the electorate of the city of Berkeley enacted a rent control ordinance by the initiative process.[55] The ordinance placed ceilings on the rents most residential landlords could charge. These ceilings could be raised by a Rent Stabilization Board in an annual general adjustment or upon a petition from an individual landlord.[56] A group of landlords challenged the ordinance in state court, arguing, among other things, that the ordinance was unconstitutional because it was preempted by the Sherman Act.

The Supreme Court, in an opinion by Justice Marshall, held that the ordinance was not preempted by section 1 of the Sherman Act because there was no conflict between the ordinance and the Act. The Court ruled that the rent control activities mandated by the ordinance did not involve concerted action. In the absence of concerted action, section 1 was not violated. The ordinance was not preempted because it did not conflict with federal law.

In holding that the rent control activities under the ordinance did not involve concerted action, the Court rejected two possible combinations asserted by the landlords.[57] First, the Court rejected the landlords' argument that the rent control ordinance created a combination between the city and each landlord who complied with the rent ceilings. In doing so, the Court relied upon the governmental authority of one of the parties to the alleged combination to order compliance by the other party.[58] The Court also rejected the landlords' argument that the rent ceilings resulted in a horizontal combination among the landlords.[59] The Court distinguished cases in which a governmental authority allowed other persons to act together. In such cases the collaboration of the nongovernmental entities constituted concerted action in the Court's view.[60]

54. 106 S.Ct. 1045 (1986).

55. *Id.* at 1047.

56. *Id.*

57. In addition to the two scenarios discussed in the text, the Court declined to address a third. The Court noted that the landlords did not claim that the manner of enactment caused the conflict with section 1. *Id.* at 1048. Presumably, the Court was referring to the possibility that the initiative process of enactment by vote of the electorate resulted in a combination sufficient for section 1. If such an argument prevailed, the *Noerr-Pennington* doctrine (see *supra* note 33) might protect such a combination. *See* Churchwell, *The Federal Implications of Local Rent Control: A Plaintiff's Primer*, 12 PEPPERDINE L. REV. 919, 930-36 (1985).

58. A restraint imposed unilaterally by government does not become concerted action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law. The ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy.

106 S.Ct. at 1049-50.

59. *Id.*

60. *Id.* at 1050-51. The Court cited California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) and Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951), as examples of such "hybrid restraints." In both of those cases, state law allowed suppliers to engage in resale price maintenance. The Court viewed the participation of the sup-

Because the Court held that no concerted action was present and, thus, section 1 was not violated, it did not address the possibility that the ordinance was immune under *Parker v. Brown* and its progeny.[61] Such immunity is required only if the conduct would otherwise violate the Sherman Act. The Court's approach troubled Justice Powell, who concurred in the judgment. Justice Powell authored the opinion of the Court in all four of the recent immunity decisions discussed above.[62] In his view, the validity of the Berkeley rent control ordinance could most appropriately be addressed on immunity grounds.[63] He agreed with the Court's judgment upholding the ordinance because he believed it qualified for immunity under *Town of Hallie v. City of Eau Claire*.[64] As discussed above,[65] that case provides immunity for actions of municipalities taken pursuant to an affirmatively expressed and clearly articulated state policy. Justice Powell found such a policy in the action of the California legislature approving an earlier rent control ordinance enacted in the city of Berkeley.[66] Because he would resolve the case on the basis of immunity, Justice Powell did not need to address the conspiracy issue faced by the majority.

Justice Brennan dissented. He viewed the ordinance as having the same effect as a price-fixing agreement by landlords.[67] The concerted action issue was, in his opinion, controlled by *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*[68] and *Schwegmann Bros. v. Calvert Distillers Corp.*[69] In those cases the state allowed suppliers to fix the resale price charged by distributors.[70] Justice Brennan saw no relevant distinction between those cases in which the state allowed two firms to fix a price and this case where

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plier and the restrained distributors to be sufficient to establish concerted action. The Court recently found such a hybrid restraint involving governmentally approved resale price maintenance in 324 Liquor Corp. v. Duffy, 107 S.Ct. 720, 724 n.8 (1987).

61. 317 U.S. 341 (1943).

62. *See* 324 Liquor Corp. v. Duffy, 107 S.Ct. 720 (1987); Southern Motor Carrier Rate Conf., Inc. v. United States, 471 U.S. 48 (1985); Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985); Hoover v. Ronwin, 466 U.S. 558 (1984).

63. 106 S.Ct. at 1051.

64. 471 U.S. 34 (1985).

65. See *supra* text accompanying notes 23-29.

66. 106 S.Ct. at 1052-53. *See also* Lopatka, *The State of State Action: Antitrust Immunity: A Progress Report*, 46 LA. L. REV. 941, 1030-32 (1986).

67. 106 S.Ct. at 1054. The Court had accepted a similar characterization. *Id.* at 1049. The characterization of the rent control ordinance as the analytical equivalent of a price-fixing agreement by landlords is mistaken. The landlords have no incentive to conspire to hold rents down. A more appropriate characterization of the rent control ordinance would be as a purchaser's cartel composed of tenants attempting to hold rents down. In any cartel there is an incentive to cheat on the cartel price. In this cartel cheating would take the form of a tenant obtaining a desirable apartment by offering the landlord more than the price fixed by the purchaser cartel. The rent control ordinance makes such cheating more difficult by making it illegal. The ordinance thus makes the city and each landlord part of the tenants' price-fixing conspiracy.

68. 445 U.S. 97 (1980).

69. 341 U.S. 384 (1951).

70. See *supra* note 60.

the city fixed the price to be charged by the landlord.[71] He viewed the Court's holding that the city did not enter into a combination with the landlords by telling them what to charge as a mere conclusory statement unsupported by authority or analysis.[72] Finally, disagreeing with Justice Powell,[73] Justice Brennan found that the ordinance did not qualify for immunity because of a lack of an affirmatively expressed state policy granting authority for such an ordinance.[74]

III. *Governmentally Compelled Conduct is Concerted*

The Reasons for Subjecting Concerted Action to Scrutiny Under Section 1 Apply to Governmentally Compelled Conduct

The distinction established by the Sherman Act between unilateral and concerted behavior subjects the two categories of conduct to different standards of legality. Unilateral conduct is subject only to section 2 of the Act and is illegal if it constitutes monopolization or attempted monopolization.[75] Concerted behavior is subject to section 1 of the Act,[76] and it is illegal if it creates an unreasonable restraint on trade.[77] The reasonableness of a restraint depends upon its impact on competition.[78] This impact may be measured under the Rule of Reason by assessing the pro-competitive and anti-competitive effects of the restraint.[79] Alternatively, unreasonableness is conclusively presumed if the restraint falls in an established per se illegal category.[80] Thus, the Sherman Act subjects concerted conduct to the

71. 106 S.Ct. at 1054-56.

72. *Id.* at 1055.

73. See *supra* text accompanying notes 61-66.

74. 106 S.Ct. at 1056-57.

75. 15 U.S.C. § 2 (1982).

76. Concerted behavior could also violate section 2 if it created or attempted an illegal monopoly. *Id.* Further, section 2 states that it is illegal for anyone to "combine or conspire with any other person or persons to monopolize." *Id.* Presumably, such a combination or conspiracy would also violate section 1.

77. Although section 1 on its face appears to prohibit every contract, combination, or conspiracy in restraint of trade, the Supreme Court long ago interpreted the statute as applying only to unreasonable restraints.

> But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

78. *See* National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679, 688 (1978) ("Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions.").

79. *See, e.g.*, National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 98-120 (1984).

80. *See* Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958) ("[T]here are certain

heightened scrutiny of section 1 while declaring unilateral behavior to be lawful unless it achieves or attempts a monopoly.

The threshold nature of the concerted action requirement of section 1 has two important aspects. First, it limits judicial antitrust review of unilateral conduct to the relatively infrequent cases of actual or attempted monopolization.[81] This limitation forces competitors concerned about the unilateral actions of their rivals to wage their battles in the marketplace rather than the antitrust courtroom. This is so even though some may not survive.[82] Second, because the concerted action requirement is only a threshold, it is not, by itself, a test of illegality. Concerted action is illegal under section 1 only if it violates the Rule of Reason or a per se rule.[83] The concerted action requirement merely defines a category of conduct to which the Rule of Reason and per se rules will be applied. It does not separate lawful from unlawful conduct.

A mistake in the definition or application of the concerted action requirement will impair the goals of the statute in one of these two aspects. If unilateral action is mistakenly characterized as concerted, judicial intervention will be allowed when the statute directs that it should not.[84] If concerted conduct is mistakenly characterized as unilateral, the conduct will be held to be lawful when the statute demands that the Rule of Reason and per se rules be applied to determine the legality of the conduct. Obviously, the correct analysis of the concerted action requirement is essential to achieving the goals of the statute.

The Supreme Court considered the special role of the concerted action requirement in *Copperweld Corp. v. Independence Tube Corp.*[85] In that case, the jury found that a parent corporation and its wholly owned subsidiary had conspired in violation of section 1.[86] The Supreme Court held that a parent corporation is incapable of conspiring with a wholly owned subsidiary under section 1.[87] In reaching this conclusion, the Court analyzed the reasons that

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agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."). Categories of per se illegal conduct include price fixing among competitors, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); resale price restrictions imposed by a supplier upon a distributor, Albrecht v. Herald Co., 390 U.S. 145 (1968); market division by competitors, United States v. Topco Assocs., 405 U.S. 596 (1972); boycotts by competitors, Klor's, Inc. v. Broadway Hale Stores, Inc., 359 U.S. 207 (1959); and tying agreements, Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984).

81. Unilateral conduct may also constitute unfair competition under state or federal law.

82. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) ("The antitrust laws, however, were enacted for 'the protection of *competition*, not *competitors*,' Brown Shoe Co. v. United States, 370 U.S. at 320.") (emphasis in original).

83. Most concerted action does not violate section 1. Every contract constitutes concerted action, but very few contracts violate section 1.

84. Such intervention would assess the reasonableness of the conduct.

85. 467 U.S. 752 (1984).

86. *Id.* at 757-58.

87. *Id.* at 777.

concerted action is more dangerous than unilateral action and, thus, is treated more harshly by the Sherman Act.

> [Concerted action] deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction.[88]

Thus, concerted action increases competitive risk because of three characteristics. First, it eliminates independent centers of decision making. Second, it causes the actors to act as one rather than pursue their own separate interests. Third, it aims economic power in one direction. While each of these three characteristics is linked to the others, they may be used cumulatively to define the concerted action requirement. If challenged conduct has all three of these characteristics, it is concerted for purposes of section 1.

The Supreme Court's conclusion in *City of Berkeley*—that when a government compels a person to act, the government's act and the compelled person's response does not constitute concerted action[89]—must be measured against this definition.[90] Under the rent control ordinance challenged in *City of Berkeley*, the city issues a command to each landlord specifying the rent the landlord may charge, and the landlord is required to comply. The Court held that the combination of the city's command followed by the landlord's unwilling compliance does not constitute concerted action.[91] The Court's only explanation for this conclusion is that one of the actors is a governmental unit operating with force of law.[92] While the governmental nature of one of the participants may be relevant to the application of *Parker v. Brown* and its progeny,[93] it is irrelevant to the application of the concerted action requirement. The tripartite definition of concerted action drawn from *Copperweld* mandates the conclusion that the Court erred in *City of Berkeley* when it held that governmentally compelled conduct is not concerted.[94]

88. *Id.* at 768-69.

89. See *supra* text accompanying note 58.

90. For a critique of lower court cases prior to *City of Berkeley* finding no concerted action between governments and persons compelled to act by such governments, see Note, *Preemption of Anticompetitive State Statutes by Section 1 of the Sherman Act: Is an Agreement Required?*, 54 FORDHAM L. REV. 247 (1985). Although it is clear that the author of the note believes that those cases are wrongly decided, it is unclear whether his reason for this conclusion is that agreement analysis should be abandoned in this context, that concerted action exists among the compelled persons, or that concerted action exists between the compelling government and each compelled person. *See id.* at 260-64.

91. 106 S.Ct. at 1049-50.

92. *Id.*

93. See *supra* text accompanying notes 4-51.

94. *But cf.* Gifford, *The Antitrust State-Action Doctrine After Fisher v. Berkeley*, 39 VAND.

Governmentally compelled conduct has all of the characteristics of concerted conduct set forth in *Copperweld*.[95] First, governmentally compelled conduct eliminates the compelled party as an independent center of decision making. The Berkeley rent control ordinance takes the decision about what rent to charge away from the landlord. Second, when a governmental unit compels someone to act in a specified manner, the governmental unit and the compelled party act as one to fulfill the governmental interest, and the compelled party is prevented from pursuing his own separate interest. The city of Berkeley and the compelled landlord act as one to fulfill the city's low-rent objective and the landlord is prevented from pursuing his own interest in higher rents. Third, governmentally compelled conduct aims economic power in the one direction desired by the governmental unit. The Berkeley rent control ordinance prevents the economic power of each landlord and each tenant from being expressed in diverse directions in the market and aims economic power in the direction desired by the city.[96] Governmentally compelled conduct has each of the characteristics that makes concerted conduct more dangerous than unilateral conduct. Therefore, it should be treated as concerted conduct for purposes of section 1.[97]

The Vertical Agreement Cases Do Not Require That Governmentally Compelled Conduct be Treated as Unilateral

In 1984 the Supreme Court addressed the concerted action requirement as applied to compelled conduct in the context of vertical restrictions on distribution. In dicta, the Court concluded that in limited circumstances compelled conduct in that context is not concerted. The Court based this conclusion on a controversial case decided in 1919. The Court's conclusion in its 1984 dicta does not control in the context of governmentally compelled conduct.

A vertical restriction on distribution occurs when a supplier limits what its distributor may do with the product sold by the supplier to the distributor.[98] The restriction may specify the price the distributor must charge when it resells the product. Such a restriction is usually referred to as resale price

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L. REV. 1257, 1231 (1986), where the author accepts without criticism the Court's conclusion in *City of Berkeley* that governmentally compelled conduct is not concerted.

95. *But cf.* 6 P. AREEDA, ANTITRUST LAW 39-59 (1986), where Professor Areeda concludes that not all coerced conduct should be considerd conspiratorial.

96. The ordinance obviously prevents the economic power of landlords from being expressed in higher rents. However, the ordinance also prevents tenants who can afford higher rents from obtaining desirable apartments by offering to pay more. The allocation of desirable apartments must be made on some nonprice basis.

97. Obviously, the conclusion set forth in the text does not mean that all governmentally compelled conduct is illegal under section 1. Governmentally compelled conduct, like all concerted action, will usually be lawful under section 1 because neither the Rule of Reason nor any of the per se rules will be violated. Further, governmentally compelled conduct will be immune from attack under section 1 under some circumstances under *Parker v. Brown* and its progeny.

98. A vertical restraint results from concerted action between parties at different levels of the distribution chain. It is distinguished from a horizontal restraint, which results from concerted action between competitors.

maintenance (RPM). Alternatively, the restriction may affect some nonprice aspect of resale such as where or to whom the distributor may resell.

The application of section 1 of the Sherman Act to vertical restrictions on distribution involves two controversial issues. The first is whether vertical restrictions on distribution should be subject to the Rule of Reason or be per se illegal. Presently, RPM is per se illegal,[99] while nonprice vertical restrictions are subject to the Rule of Reason.[100] Whether RPM should continue to be per se illegal is hotly debated.[101] The second controversial issue raised by the application of section 1 to vertical restrictions on distribution is determining when supplier and distributor conduct is concerted. Conduct by a supplier and a distributor is subject to section 1 only if it is concerted.

The Supreme Court faced the concerted action issue and avoided the issue of whether RPM should continue to be per se illegal in *Monsanto Co. v. Spray-Rite Service Corp.*[102] Spray-Rite was a distributor of herbicides that it purchased from Monsanto. After Monsanto terminated Spray-Rite as a distributor, Spray-Rite sued under section 1 of the Sherman Act.[103] The jury found that the termination "was pursuant to a conspiracy between Monsanto and one or more of its distributors to set resale prices."[104] The trial court instructed the jury that such an RPM conspiracy is per se illegal.[105] On appeal two issues were presented to the Supreme Court: first, whether there was sufficient evidence to support the jury's finding of an RPM conspiracy, and second, whether RPM should be per se illegal.

The Solicitor General submitted an amicus brief arguing that the Court should overturn the per se rule against RPM.[106] It argued that the economic effects of RPM and nonprice vertical restrictions were the same and they should both be judged by the Rule of Reason.[107] The Court, in a footnote, declined to overturn the per se rule against RPM because neither party had challenged the rule below or on appeal.[108]

99. Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

100. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

101. *See, e.g.*, R. BORK, THE ANTITRUST PARADOX 280-98 (1978); H. HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 247-72 (1985); R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 147-66; Anderson, *The Antitrust Consequences of Manufacturer-Suggested Retail Prices—The Case for Presumptive Illegality*, 54 WASH. L. REV. 763 (1979); Baxter, *Vertical Practices—Half Slave, Half Free*, 52 ANTITRUST L.J. 743 (1983); Calvani & Berg, *Resale Price Maintenance After Monsanto: A Doctrine Still at War With Itself*, 1984 DUKE L.J. 1163; Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135 (1984); Scherer, *The Economics of Vertical Restraints*, 52 ANTITRUST L.J. 687 (1983).

102. 465 U.S. 752 (1984).

103. *Id.* at 757.

104. *Id.* at 757-58.

105. *Id.* at 757.

106. Brief for the United States as Amicus Curiae in support of Petitioner at 19-29, Monsanto Co. v. Spray-Rite Serv. Corp., 456 U.S. 752 (1984).

107. *Id.*, Brief at 21-22.

108. The Solicitor General (by brief only) and several other amici suggest that we take this opportunity to reconsider whether "contract[s], combination[s] . . . or conspirac[ies]" to fix resale prices should always be unlawful. They argue that the

The Court addressed at length the basis for the jury's finding of concerted action. Spray-Rite alleged that Monsanto engaged in an RPM conspiracy with other distributors and that Monsanto terminated Spray-Rite because it refused to keep prices up. The Supreme Court held that the cumulative weight of four pieces of evidence supported the jury's finding of an RPM conspiracy between Monsanto and other distributors.[109] In dicta, the Court rejected the conclusion of the court of appeals that evidence of complaints to Monsanto about Spray-Rite's low prices by other distributors would, standing alone, support the jury's RPM finding.[110] Courts of appeals had disagreed about whether an RPM finding could be supported by evidence that a low price distributor was terminated in response to complaints by other distributors.[111] The dicta in this case resolved the conflict.

Nothing in the Supreme Court's refusal to abolish the per se rule against RPM or in its rejection of distributor complaints as a sufficient basis for an RPM finding affects the analysis of the concerted nature of compelled conduct set forth in the previous section.[112] However, in explaining its conclusion about the sufficiency of evidence of distributor complaints, the Court resurrected a doctrine that characterizes compelled conduct as unilateral in some circumstances. The Court asserted that if evidence that a supplier terminated a distributor in response to price-related complaints from other

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> economic effect of resale price maintenance is little different from agreements on nonprice restrictions. They say that the economic objections to resale price maintenance . . .—such as that it facilitates horizontal cartels—can be met easily in the context of rule-of-reason analysis.
>
> Certainly in this case we have no occasion to consider the merits of this argument. This case was tried on per se instructions to the jury. Neither party argued in the District Court that the rule of reason should apply to a vertical price-fixing conspiracy, nor raised the point on appeal. In fact, neither party before this Court presses the argument advanced by amici. We therefore decline to reach the question, and we decide the case in the context in which it was decided below and argued here.

465 U.S. at 761 n.7 (citations omitted).

109. The Court relied upon the following four pieces of evidence. First, Spray-Rite's low prices had been the object of complaints by other Monsanto distributors. Second, Monsanto threatened to withhold adequate supplies of a new corn herbicide from the price-cutting distributors if they did not raise prices. Third, a threatened distributor assured Monsanto that it would raise prices. Fourth, a distributor had written a newsletter which the Court found could reasonably be interpreted as referring to an understanding that distributors would maintain prices and Monsanto would terminate price-cutting distributors. *Id.* at 764-66.

110. *Id.* at 764.

111. The court below recognized that its standard was in conflict with that articulated in Edward J. Sweeney & Sons, Inc. v. Texaco, Inc. Other circuit courts also have rejected the standard adopted by the Court of Appeals for the Seventh Circuit. The Court of Appeals for the Fourth Circuit has adopted the Seventh Circuit's standard. One panel of the Court of Appeals for the Eighth Circuit also has adopted that standard, while another appears to have rejected it in an opinion issued the same day.

Id. at 759 n.5 (citations omitted).

112. See *supra* text accompanying notes 75-97.

distributors was held to be sufficient to support an inference of an RPM conspiracy, two important doctrines would be threatened. First, the distinction between per se treatment for RPM and Rule of Reason treatment for nonprice vertical restraints could be eroded.[113] A set of nonprice restrictions might give rise to price-related complaints by distributors who believed low-price competitors were not abiding by the nonprice restriction. If such price-related complaints transformed the nonprice vertical restrictions into RPM, the distinction between the two types of restraints would be threatened. In rejecting the sufficiency of distributor complaint evidence, the Court also sought to preserve the *Colgate* doctrine. This doctrine characterizes some compelled conduct as unilateral in the context of vertical restrictions on distribution.

In *United States v. Colgate & Co.*,[114] the Court affirmed the judgment of the district court dismissing an indictment charging RPM. In doing so, it stated what has become known as the *Colgate* doctrine.

> In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.[115]

The basis for the Court's conclusion seemed to be that under such circumstances no concerted action would be present. Obviously, if a supplier may lawfully coerce compliance with RPM by announcing in advance that it will refuse to deal with noncomplying distributors, the per se rule against RPM would be substantially weakened.

The *Colgate* doctrine has been subject to great debate and controversy concerning its meaning and validity in both cases[116] and commentary.[117]

113. 465 U.S. at 761-64.

114. 250 U.S. 300 (1919).

115. *Id.* at 307.

116. *See, e.g.* United States v. Parke, Davis & Co., 362 U.S. 29 (1960); United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944); Federal Trade Comm'n v. Beech-Nut Packing Co., 257 U.S. 441 (1922); Frey & Son, Inc. v. Cudahy Packing Co., 256 U.S. 208 (1921); United States v. Schrader & Son, Inc., 252 U.S. 85 (1920); Russell Stover Candies, Inc. v. Federal Trade Comm'n, 718 F.2d 256 (8th Cir. 1983).

117. *See, e.g.*, ABA ANTITRUST SECTION, MONOGRAPH NO. 9, REFUSAL TO DEAL AND EXCLUSIVE DISTRIBUTORSHIPS (1983); Anderson, *Vertical Agreements Under Section 1 of the Sherman Act: Results in Search of Reasons*, 37 U. FLA. L. REV. 905 (1985); Campbell & Ware, *Russell Stover and the Vertical Agreement Puzzle*, 52 ANTITRUST L.J. 83 (1983); Fulda, *Individual Refusals to Deal: When Does Single-Firm Conduct Become Vertical Restraint?*, 30 L. & CONTEMP. PROBS. 509 (1965); Kilburn, *Other Vertical Problems: Pricing, Refusals to Deal, Distribution*, 51 ANTITRUST L.J. 173 (1982); Levi, *The Parke, Davis-Colgate Doctrine: The Ban on Resale Price Maintenance*, 1960 SUP. CT. REV. 258; Pitofsky & Dam, *Is the Colgate Doctrine Dead?*, 37 ANTITRUST L.J. 772 (1968); Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962).

However, for present purposes it is sufficient to recognize that in *Monsanto* the Court resurrected the doctrine in its most extreme form.

> A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. Under Colgate, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination.[118]

The revival of a pristine form of the *Colgate* doctrine in *Monsanto* was a startling development for three reasons. First, the *Colgate* doctrine had been subject to uncertainty and qualification almost since its inception.[119] For several decades preceding *Monsanto*, its practical vitality had been in serious doubt.[120] Second, the conduct protected by the *Colgate* doctrine has all three of the characteristics of concerted action set forth in *Copperweld Corp. v. Independence Tube Corp.*[121] The *Colgate* doctrine allows a supplier to coerce distributor compliance with RPM because the doctrine mistakenly characterizes the parties' conduct as unilateral. The conduct of the coercing supplier and the coerced distributor has all of the characteristics contained in the *Copperweld* Court's description of concerted action[122]: the supplier's successful coercion eliminates the distributor as an independent center of decision making; the distributor does not pursue his own interest separately but is coerced into acting for the benefit of the supplier; and economic power is now aimed in the direction desired by the supplier. Thus, the *Colgate* doctrine is at odds with the analysis of concerted action set forth in *Copperweld*, a case decided in the same term as *Monsanto*.[123]

The third reason that the revival of the *Colgate* doctrine in *Monsanto* was surprising is that it creates an anomalous disparity of treatment between two types of RPM. RPM protected by the *Colgate* doctrine is per se lawful because that doctrine states that no concerted action is present. All other RPM is per se illegal.[124] Thus, a supplier may lawfully coerce compliance with RPM by announcing that distributors who do not comply will be terminated. A supplier violates section 1, however, by asking for and receiving an assurance that a distributor will comply.[125] The Court did not explain in *Monsanto* why coerced compliance with RPM under the *Colgate* scenario

118. 465 U.S. at 761 (citations omitted).

119. *See* Levi, *supra* note 117.

120. *See* United States v. Parke, Davis & Co., 362 U.S. 29 (1960); George W. Warner & Co. v. Black & Decker Mfg. Co., 277 F.2d 787 (2d Cir. 1960).

121. 467 U.S. 752, 768-69 (1984).

122. See *supra* text accompanying note 88.

123. For an argument that a test for concerted action based upon the dependence of the parties' conduct may be drawn from *Copperweld* and that the *Colgate* doctrine violates such a dependence-based test, see Anderson, *supra* note 117, at 927-30, 937-38.

124. *See* Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

125. *See Monsanto*, 465 U.S. at 764 n.9.

should be automatically lawful when assured compliance with RPM is illegal per se.

While the *Monsanto* Court's resurrection of the *Colgate* doctrine is difficult to explain, the Court was not adopting the general proposition that compelled conduct is unilateral. Even the extreme form of the *Colgate* doctrine stated in *Monsanto* is limited to cases involving vertical restrictions on distribution. It does not apply to other vertical cases.[126] Further, the doctrine does not apply in the horizontal context.[127] Thus, outside the context of vertical restrictions on distribution the *Colgate* doctrine does not operate and compelled conduct remains concerted.[128]

Even within the context of vertical restrictions on distribution, the *Colgate* doctrine does not characterize all compelled conduct as unilateral. If a supplier goes beyond merely announcing and following a policy of refusing to deal with noncomplying distributors, concerted action may be found. If the supplier coerces the distributor into giving an assurance of compliance, concerted action is present.[129] Even under the *Colgate* doctrine, the fact that the assurance was coerced does not make it unilateral.

In summary, the Court in *Monsanto*, without explanation, resurrected the *Colgate* doctrine. This doctrine characterizes some compelled conduct in the context of vertical restrictions on distribution as unilateral. However, the doctrine is limited to the context of vertical restrictions on distribution and even within that context does not characterize all compelled conduct as unilateral. Thus, *Monsanto* does not alter the conclusion set forth above that governmentally compelled conduct is concerted.[130]

IV. *The Supreme Court's Erroneous Characterization of Governmentally Compelled Conduct as Unilateral Disrupts the Balance of National and State Interests Struck by the Immunity Cases*

In the immunity cases discussed above,[131] the Court struck a balance between the national interest in competition expressed in the Sherman Act and state interests in regulatory policies. This balance is rooted in concerns about federalism and the constitutional status of states. The balance results in the sovereign acts of states being automatically immune,[132] the acts of subor-

126. For example, a tying agreement is not viewed as unilateral even though the supplier coerces the purchaser into buying both the tying and tied products by announcing a policy of only selling the products together.

127. A cartel which results from one competitor coercing a second competitor into following the first competitor's price is not lawful unilateral action.

128. For one possible explanation of why the Court in *Monsanto* was willing to adopt the *Colgate* doctrine for vertical restrictions on distribution, see Anderson, *supra* note 117, at 940-42.

129. *See Monsanto*, 465 U.S. at 764 n.9.

130. See *supra* text accompanying notes 89-97.

131. See *supra* text accompanying notes 4-51.

132. *See* Hoover v. Ronwin, 466 U.S. 558 (1984); Parker v. Brown, 317 U.S. 341 (1943). See also *supra* text accompanying notes 4-20.

dinate political entities being immune if pursuant to a clearly articulated state policy,[133] and the acts of individuals acting pursuant to governmental authority being immune if taken pursuant to such a state policy and actively supervised by the government.[134] Obviously this pattern of immunity leaves the acts of subordinate political entities subject to the federal antitrust laws if they are not taken pursuant to the requisite state policy and the acts of individuals subject to such federal laws if the required state policy or governmental supervision is absent.

The Court's erroneous holding in *City of Berkeley* disrupts the balance between concerns about competition and federalism struck in the immunity cases by shielding all governmentally compelled conduct from scrutiny under section 1.[135] When the Court mistakenly treats governmentally compelled conduct as unilateral, it declares it lawful under section 1.[136] As discussed above,[137] this conclusion is counter to the analysis of the concerted action requirement set forth in *Copperweld*. Furthermore, in reaching its conclusion the Court relies upon the governmental nature of one of the parties.[138] The immunity cases, however, declare the governmental character of the participants to be insufficient to shield the conduct from antitrust review unless the conditions of immunity are satisfied. If such conditions are not satisfied, that is, where there is no clearly articulated state policy, or in the case of individual conduct, where governmental supervision is absent, the immunity cases direct that the antitrust laws be applied.[139] The Court's holding in *City of Berkeley* destroys this structure for the application of state and federal law when it uses the governmental nature of one of the parties to shield governmentally compelled conduct from scrutiny under section 1. Thus, in *City of Berkeley* the Court turned its back on both the analysis of the concerted action requirement set forth in *Copperweld* and the balance of state and national interests achieved in the immunity cases.

Conclusion

In *City of Berkeley* the Supreme Court held that a municipality and an individual do not act in a concerted manner when the municipality tells the in-

133. *See* Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985). See also *supra* text accompanying notes 21-30.

134. *See* Southern Motor Carrier Rate Conf., Inc. v. United States, 471 U.S. 48 (1985). See also *supra* text accompanying notes 31-51.

135. *See* Fisher v. City of Berkeley, 106 S.Ct. 1045, 1056 (1986) (Brennan, J., dissenting). *See also* Gifford, *supra* note 94, where the author argues that such disruption constitutes an improvement.

136. It is, of course, possible that conduct which is deemed to be unilateral may violate section 2 of the Sherman Act if it constitutes actual or attempted monopolization.

137. See *supra* text accompanying notes 75-97.

138. See *supra* text accompanying note 58.

139. It is, of course, possible that concerted conduct by governments that is not immune will be judged by antitrust standards different from the Rule of Reason and the per se rule developed for private business behavior. *See* Community Communications Co., Inc. v. City of Boulder, 455 U.S. 40, 56 n.20 (1982).

dividual what to do and the individual complies because of fear of prosecution. This holding is contrary to the Court's 1984 analysis of the concerted action requirement set forth in *Copperweld*. Because the Court's conclusion in *City of Berkeley* is based upon the governmental nature of one of the parties, it also disturbs the balance of the national government's interest in competition and the states' interest in regulation attained in the immunity cases.