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Antitrust Law-Immunity-Anticompetitive Activities Required of State-Regulated Public Utility Not Immune From Antitrust Attack

William F. Murphy II

RECENT DEVELOPMENT

Antitrust Law—IMMUNITY—ANTICOMPETITIVE ACTIVITIES REQUIRED OF STATE-REGULATED PUBLIC UTILITY NOT IMMUNE FROM ANTITRUST ATTACK

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

Lawrence Cantor sold lightbulbs; the Detroit Edison Company, a state-regulated public utility, gave them away.[1] Cantor sued Detroit Edison, alleging that the company's practice of distributing free lightbulbs to many of its residential customers[2] was an attempt to monopolize the retail lightbulb market in violation of section 2 of the Sherman Act[3] and section 3 of the Clayton Act.[4] Detroit Edison moved for summary judgment, claiming antitrust immunity on the ground that the distribution program was part of an approved rate structure which the company was obligated to maintain under Michigan law.[5] The motion was granted and affirmed on appeal.[6] The Supreme Court granted certiorari,[7] and, in a plurality opinion,[8] reversed and remanded, holding that Detroit Edison was not immune from the federal antitrust laws.

Cantor v. Detroit Edison Co.[9] is the Supreme Court's most recent exploration of a recurring problem: When does state regulation provide a regulated industry with antitrust immunity?[10] The several opinions illustrate the conflict within the judiciary over the optimal reconciliation of two fundamentally different systems of

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[1] Cantor v. Detroit Edison Co., 96 S. Ct. 3110, 3113 (1976).

[2] Detroit Edison was responsible for almost 50% of the standard size lightbulbs distributed in the relevant market. *Id.* at 3113. If fluorescent and high-intensity lighting were added to the market, Detroit Edison's share of the market dropped to about 23%. *Id.* at 3113 n.4.

[3] 15 U.S.C. § 2 (1970).

[4] *Id.* § 14 (1970).

[5] 96 S. Ct. at 3112-13. Detroit Edison's rates, including the omission of a separate charge for lightbulbs, could not be changed without the approval of the Michigan Public Service Commission. *Id.* at 3113.

[6] 392 F. Supp. 1110 (E.D. Mich. 1974), *aff'd mem.*, 513 F.2d 630 (6th Cir. 1975).

[7] 423 U.S. 821 (1975).

[8] Mr. Justice Brennan, Mr. Justice White, Mr. Justice Marshall, and Mr. Justice Stevens comprised the plurality. 96 S. Ct. at 3112. Mr. Chief Justice Burger and Mr. Justice Blackmun filed separate concurring opinions. *Id.* at 3123 (concurring opinion, Burger, C.J.); *id.* at 3124 (concurring opinion, Blackmun, J.). Mr. Justice Stewart was joined in dissent by Mr. Justice Powell and Mr. Justice Rehnquist. *Id.* at 3128.

[9] 96 S. Ct. 3110 (1976).

[10] *See* Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 NW. U. L. REV. 71, 73-74 nn.12 & 13 (1974).

economic control:[11] state-sponsored anticompetitive regulation[12] and federal pro-competitive antitrust laws.[13] *Cantor*'s importance

[11] Competition and state regulation conflict not only in their theoretical foundations, but in their effects as well. *See* Beil, *Power for the People: Electricity and the Regulatory Agencies*, in THE MONOPOLY MAKERS 193 (M. Green ed. 1973); C. KAYSEN & D. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 191-93 (1971); Averch & Johnson, *Behavior of the Firm Under Regulatory Constraint*, 52 AM. ECON. REV. 1052 (1962); Baker, *Competition and Regulation: Charles River Bridge Recrossed*, 60 CORNELL L. REV. 159, 163 n.15 (1975). The anticompetitive business practices of public utilities have been investigated by Congress. *See Promotional Practices by Public Utilities and Their Impact Upon Small Business: Hearings Before the Subcomm. on Activities of Regulatory Agencies of the House Select Comm. on Small Business*, 90th Cong., 2d Sess. (1968).

[12] Scientific and legal studies have considered the advisability and impact of state regulation. *See, e.g.*, R. POSNER, ECONOMIC ANALYSIS OF LAW 139-66 (1972). The justification for state regulation varies with the regulated industry or trade. In the case of natural monopolies, regulation is often justified on the ground that competition would be impossible. Destructively competitive industries are thought to require regulation because competition would be unworkable.

A natural monopoly arises when one efficient firm can satisfy or exceed market demand at the competitive price and increase its capacity at lower cost than any new entrant. A typical example of a natural monopoly is an electric utility. A destructively-competitive industry is characterized hy low barriers to entry, chronically excess capacity, and inadequate access to information which results in frequent price-cutting to levels below marginal cost. A typical destructively-competitive industry is interstate motor carriage. *See* C. KAYSEN & D. TURNER, *supra* note 11, at 189-200.

"Regulation" takes many forms and varies in scope and impact from state to state and industry to industry. For instance, licensing attorneys, doctors, barbers, and taxicabs constitutes a form of regulation. Within a particular industry, regulation may prohibit certain practices outright, as well as affect entrance, pricing policies, capital expenditures, rate of return, output, allocation of markets, health and safety standards, and exit. For an overview and evaluation of regulation of electric utilities, see Note, *Regulation, Competition and Your Local Power Company*, 1974 UTAH L. REV. 785, 793-804. On the authority of the several federal and state systems to regulate the generation and transmission of electric power, see FEDERAL POWER COMMISSION, FEDERAL AND STATE COMMISSION JURISDICTION AND REGULATION OF ELECTRIC, GAS, AND TELEPHONE UTILITIES (1973). *See also* FEDERAL POWER COMMISSION, PROMOTIONAL PRACTICES OF PUBLIC UTILITIES: A SURVEY OF RECENT ACTIONS BY STATE REGULATORY COMMISSIONS (1970) (report to the Subcomm. on Regulatory Agencies, Select Comm. on Small Business, U.S. House of Representatives).

Recently, elected officials and appointed policy-makers have called for a broader application of the antitrust laws to regulated firms. *See* N.Y. Times, Oct. 9, 1974, at 24, col. 2 (President Ford); REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 282-93 (1955); Address by James T. Halverson, Director, Federal Trade Commission Bureau of Competition, to Harvard Business School Club of Houston (Nov. 8, 1974), *reported in* [1974] ANTITRUST & TRADE REG. REP. (BNA) No. 688, at E-1; Statement of Donald I. Baker, Director of Policy Planning for the U.S. Justice Department Antitrust Division, *reported in* [1973] ANTITRUST & TRADE REG. REP. (BNA) No. 631, at A-15. *See also* Donnem, *Federal Antitrust Laws Versus Anticompetitive State Regulation*, 39 ABA ANTITRUST L.J. 950 (1970).

[13] The Sherman Act was designed to be a comprehensive cbarter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. . . . [T]he unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958).

lies in its approval of stricter federal scrutiny of the business practices of firms regulated by state-created commissions.[14]

I

HISTORY OF THE "STATE-ACTION" IMMUNITY DOCTRINE

The power of the federal courts and of Congress to override state regulatory schemes is rooted in the commerce clause.[15] Commercial activity not affecting interstate commerce is beyond the reach of Congress, and therefore beyond the reach of the Sherman Act.[16] However, if state regulation of activity that is within the ambit of the commerce clause unreasonably burdens interstate commerce, the state legislation may be invalidated without reference to the Sherman Act.[17] Even if state regulation does not unreasonably burden interstate commerce, the state scheme may be preempted by federal legislation. To the extent that a state law's operation is inconsistent with federal legislation, it is invalid under the supremacy clause.[18]

Courts have held that valid and affirmative state involvement in the challenged activity precludes federal antitrust liability.[19]

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[14] *See* Litton Sys., Inc. v. Southwestern Bell Tel. Co., 539 F.2d 418, 422-24 (5th Cir. 1976), *citing* Cantor v. Detroit Edison Co., 96 S. Ct. 3110 (1976) (challenged telephone company conduct held not conduct of acquiescing state agencies or officials).

[15] "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

[16] *See* Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 743-46 (1976); Goldfarb v. Virginia State Bar, 421 U.S. 773, 783-85 (1975); United States v. Yellow Cab Co., 332 U.S. 218, 228-29 (1947).

[17] *See, e.g.*, Dean Milk Co. v. Madison, 340 U.S. 349 (1951); *cf.* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (state monopoly granted prior to Sherman Act found undue burden on interstate commerce).

[18] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . 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. *See* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 133-52 (1963); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951); Northern Sec. Co. v. United States, 193 U.S. 197 (1904).

[19] *See, e.g.*, New Mexico v. American Petrofina, Inc., 501 F.2d 363 (9th Cir. 1974) (state immune from counterclaim alleging it had fostered restraint of trade); Padgett v. Louisville & Jefferson County Air Bd., 492 F.2d 1258 (6th Cir. 1974) (local airport board granted immunity as a "quasi-governmental" agency); Business Aides, Inc. v. Chesapeake & Potomac Tel. Co., 480 F.2d 754 (4th Cir. 1973) (telephone company acting within scope of its tariff); Gas Light Co. v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972) (electric company rates regulated by state commission); Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248 (4th Cir. 1971) (electric company rates regulated by state commission); Ladue Local Lines, Inc. v. Bi-State Dev. Agency, 433 F.2d 131 (8th Cir. 1970) (transportation monopoly created by legislative acts of two states); Alabama Power Co. v. Alabama Elec. Coop., 394 F.2d 672 (5th Cir.), *cert. denied*, 393 U.S. 1000 (1968) (rural electric cooperative); E.W. Wiggins Airways, Inc. v. Mas-

Overtly, the rationale for this conclusion sprang from a judicial interpretation of congressional intent.[20] Tacitly, however, the eleventh amendment[21] and judicial notions of sovereign immunity carried forward from the English common law colored the analysis.[22] The line between liability and immunity remained obscure;[23] *Cantor* clarified it by increasing the antitrust exposure of state-regulated firms.

Cantor is a product of two distinct lines of antitrust cases. The first line, beginning with *Olsen v. Smith*[24] and *Parker v. Brown*,[25]

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sachusetts Port Auth., 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966) (port authority granting exclusive lease); Allstate Ins. Co. v. Lanier, 361 F.2d 870 (4th Cir.), *cert. denied*, 385 U.S. 930 (1966) (private bureau setting insurance rates subject to commissioner of insurance held "state action"); Continental Bus Systems, Inc. v. Dallas, 386 F. Supp. 359 (N.D. Tex. 1974) (action of two cities in granting exclusive airport transportation franchise); Trans World Assocs., Inc. v. City & County of Denver, [1974] TRADE CAS. (CCH) ¶ 75,293 (D. Colo. 1974) (action of city and county in granting exclusive auto rental franchise); Murdock v. City of Jacksonville, 361 F. Supp. 1083 (M.D. Fla. 1973) (exclusive lease of city coliseum for wrestling matches to private corporation); Hitchcock v. Collenberg, 140 F. Supp. 894 (D. Md. 1956), *aff'd mem.*, 353 U.S. 919 (1957) (Maryland Medical Practice Act regulating entry into naturopathy field); North Little Rock Transp. Co. v. Casualty Reciprocal Exch., 85 F. Supp. 961 (E.D. Ark. 1949), *aff'd mem.*, 340 U.S. 823 (1950) (insurance rates fixed by state commission).

[20] "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 v. Brown, 317 U.S. 341, 350-51 (1943).

[21] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

[22] C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 67-74 (1972).

[23] *Compare* Allstate Ins. Co. v. Lanier, 361 F.2d 870 (4th Cir.), *cert. denied*, 385 U.S. 930 (1966) (private bureau setting insurance rates subject to approval of state commissioner of insurance "state action"), *with* Asheville Tobacco Bd. of Trade, Inc. v. FTC, 263 F.2d 502, 508-10 (4th Cir. 1959) (private board authorized by statute to allocate selling time not "state action").

[24] 195 U.S. 332 (1904). *Olsen*, decided in 1904 and relied upon by the Court in Parker v. Brown, 317 U.S. 341 (1943) (discussed in note 25 *infra*), was a suit brought by licensed pilots of the port of Galveston, Texas, to recover damages from a nonlicensed pilot for providing unauthorized services and to enjoin further offerings. The defendant raised several defenses, among them that the state's grant of a monopoly to licensed pilots was repugnant to the Sherman Act. The Court summarily rejected this argument, declaring it

> 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.

195 U.S. at 345.

[25] 317 U.S. 341 (1943). In *Parker*, the Court rejected an attempt by an irate farmer to enjoin the enforcement of a California agricultural proration program limiting the quantity of raisins brought to market. The suit challenged the program on the ground that it violated the Sherman Act, that it conflicted with the Agricultural Marketing Agreement Act (Act of June 3, 1937, c. 296, 50 Stat. 246 (codified in scattered sections of 7 U.S.C. (Supp.

dealt with anticompetitive activities undertaken by states or their agents in accordance with express legislative command. The Supreme Court construed the Sherman Act, and held these activities immune from the operation of the federal antitrust statutes. The *Olsen-Parker* cases held that Congress did not intend the Sherman or Clayton Acts to reach the conduct of the states or their agents. The second line of cases, anchored by *Northern Securities, Co. v. United States*[26] and *Schwegmann Brothers v. Calvert Distillers Corp.*,[27] analyzed state legislation from a preemption standpoint.[28] These cases emphasized the limits of state authority to exempt private citizens from Sherman Act sanctions by enacting regulatory legislation;[29] states could not legislatively compel or sanction ac-

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V 1975))), and unduly burdened interstate commerce. 317 U.S. at 348-49. Because the Sherman Act holding was a small part of the Court's opinion (317 U.S. 341, 350-52), many commentators have expressed surprise that it expanded into the "*Parker* doctrine." *See, e.g.*, Slater, *supra* note 10, at 86-87.

[26] 193 U.S. 197 (1904). The Court allowed the Attorney General of the United States to sue a holding company organized under the laws of New Jersey in order to enjoin it from restraining trade. The Court held that no state could prevent Congress from exercising its authority over interstate commerce through the Sherman Act merely by creating a corporation. *Id.* at 332-33.

[27] 341 U.S. 384 (1951). *Schwegmann Bros.* involved the validity of a Louisiana retail price maintenance statute, which made minimum price agreements binding against nonsignatories if they had knowledge of the agreements. Distributors of gin and whiskey in Louisiana brought suit to enjoin a nonsigning retailer from selling the products at less than the price fixed by their contracts with other Louisiana retailers. The Court held that the Miller-Tydings Amendment to § 1 of the Sherman Act (Act of Aug. 17, 1937, c. 690, tit. viii, 50 Stat. 693) (repealed by Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801)), which exempted voluntary retail price maintenance programs from Sherman Act liability, did not authorize such a statute. *Id.* at 395. Without the protection of the Miller-Tydings Amendment the statute was held invalid as repugnant to the Sherman Act. 341 U.S. 384, 387-88 (1951).

[28] Preemption analysis first considers whether the relevant federal and state laws are operating in the same field. The court then determines whether Congress intended the federal law or policy to exclusively regulate the field. If federal law or policy is not exclusive, the court must determine whether the state law undermines the achievement of federal goals. Reconciliation rather than ouster of state law is preferred. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973). But if federal law is intended to be exclusive within a particular field, or if the state policy is an obstacle to effectuating federal policy, the state law is overturned. *See, e.g.*, Hamm v. City of Rock Hill, 379 U.S. 306 (1964) (Civil Rights Act of 1964 prevails over conflicting state laws); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) (Agricultural Marketing Agreement Act of 1937 not exclusive in its field); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) (United States Warehouse Act exclusive in its field); Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960) (Smoke Abatement Code of City of Detroit not an undue burden on interstate commerce). *See also* Note, *Parker v. Brown: A Preemption Analysis*, 84 YALE L.J. 1164 (1975).

[29] "Fixing minimum prices, like other types of price fixing, is illegal *per se*. . . . The fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, absent approval by Congress." Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 386 (1951) (citations omitted).

tions that the Sherman Act forbade.[30]

Antitrust exposure therefore turned on whether the challenged activity entailed so much state involvement that it became "state action" immune from antitrust attack.[31] Courts struggled with cases falling between the *Parker-Schwegmann* poles. Some expanded state action immunity to embrace nearly every anticompetitive scheme where some link could be found tying the actor or the activity to the state.[32] Others found the effects of a liberal application of immunity unsuitable, and became inventive in side-stepping the *Parker* doctrine.[33] Eventually, in *Goldfarb v. Virginia State Bar*,[34] the Supreme Court moved towards a restrictive application of immunity. There, the Court held that bar association minimum fee schedules were not immune from antitrust attack. Although not completely shunning the state-action standard, the Court said:

> The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign. Here we need not inqure further into the state-action question because it cannot fairly be said that the State of

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[30] "[W]hen a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids." *Id.* at 389.

[31] *See* note 33 *infra*.

[32] *See* cases cited in note 19 *supra*.

[33] *See, e.g.*, Woods Exploration & Prod. Co. v. Aluminum Co. of Am., 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs, Inc., 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970); Bale v. Glasgow Tobacco Bd. of Trade, Inc., 339 F.2d 281 (6th Cir. 1964); Asheville Tobacco Bd. of Trade, Inc. v. FTC, 263 F.2d 502 (4th Cir. 1959); United States v. National Soc'y of Professional Engineers, 389 F. Supp. 1193 (D.D.C. 1974), *vacated*, 422 U.S. 1031 (1975); Azzaro v. Town of Branford, [1974] TRADE CAS. (CCH) ¶ 75,337 (D. Conn. 1974); Fox v. James B. Beam Distilling Co., [1974] TRADE CAS. (CCH) ¶ 75,335 (S.D. Ind. 1974); United States v. Pacific Sw. Airlines, Inc., 358 F. Supp. 1224 (C.D. Cal. 1973), *cert. dismissed*, 414 U.S. 801 (1973); International Tel. & Tel. Corp. v. General Tel. & Elec. Corp., 351 F. Supp. 1153 (D. Hawaii 1972), *modified*, 518 F.2d 913 (9th Cir. 1975); Travelers Ins. Co. v. Blue Cross of W. Pa., 298 F. Supp. 1109 (W.D. Pa. 1969), *aff'd*, 481 F.2d 80 (3d Cir.), *cert. denied*, 414 U.S. 1093 (1973).

Lower courts have created several distinct exceptions to the *Parker* doctrine. Regulated firms that have undertaken activities which have subverted the outcome or mechanisms of regulation have been denied immunity. Woods Exploration & Prod. Co. v. Aluminum Co. of Am., 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs, Inc., 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970). When courts have found regulation to be nothing more than state-sanctioned self-regulation, the activity has been held vulnerable to antitrust attack. *See* Bale v. Glasgow Tobacco Bd. of Trade, Inc., 339 F.2d 281 (6th Cir. 1964); Asheville Tobacco Bd. of Trade, Inc. v. FTC, 263 F.2d 502 (4th Cir. 1959). *Parker* immunity has also been denied when the challenged activity, although arguably under the regulatory authority of the state, had not been expressly authorized by the state. *See* Travelers Ins. Co. v. Blue Cross of W. Pa., 298 F. Supp. 1109 (W.D. Pa. 1969), *aff'd*, 481 F.2d 80 (3d Cir.), *cert. denied*, 414 U.S. 1093 (1973) *See also* Slater, *supra* note 10, at 91-101.

[34] 421 U.S. 773 (1975).

> Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent.[35]

The lower courts swiftly applied *Goldfarb* to previously troublesome areas.[36] In *Cantor*, however, the Supreme Court chose to "inquire further."

II

THE *Cantor* DECISION: CONFRONTING STATE-REQUIRED ANTICOMPETITVE ACTIVITY

Writing for a plurality, Mr. Justice Stevens distinguished *Parker v. Brown*,[37] where the defendants were California state officials carrying out a legislative program of the state.[38] He read *Parker* to hold only that anticompetitive actions, taken by state officials pursuant to express legislative command, did not violate the Sherman Act; so limited, *Parker* had no bearing on the antitrust liability of a state-regulated natural monopoly.[39]

The plurality recognized, but rejected, two conceivable reasons for holding conduct required by state law immune from Sherman Act liability. First, noting that "typically cases of this kind involve a blend of private and public decisionmaking,"[40] Mr. Justice Stevens brushed aside contentions that it would be unjust to punish an individual or corporation for obeying state law. The plurality was unwilling to grant immunity where a party exercises "sufficient"

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[35] *Id.* at 790 (citations omitted).

[36] *See, e.g.*, City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431 (5th Cir. 1976) (city is not automatically exempt from federal antitrust laws); Duke & Co. v. Foerster, 521 F.2d 1277 (3d Cir. 1975) (discrimination against suppliers not compelled by direction of state as sovereign); Chastain v. American Tel. & Tel. Co., 401 F. Supp. 151 (D.D.C. 1975) (anticompetitive practice of telephone company not compelled by state regulation).

[37] 317 U.S. 341 (1943). *See* note 25 *supra*.

[38] The party defendants in the lower court were the California State Director of Agriculture, the members of the State Agriculture Prorate Advisory Commission, the members of the Program Committee for Prorate Zone No. 1, and others responsible for enforcing the program. 317 U.S. at 344.

[39] 96 S. Ct. at 3117. Although this is an extremely narrow interpretation of *Parker*, it has been suggested that the Sherman Act, read literally, does not shield a state from suit. 88 HARV. L. REV. 1021, 1021 n.5 (1975). Nevertheless, courts have generally conceded that the sovereign states are immune from antitrust attack. *See, e.g.*, New Mexico v. American Petrofina, Inc., 501 F.2d 363 (9th Cir. 1974). States may sue as *plaintiffs* for antitrust violations on the theory that an opposite ruling would leave states remediless. Georgia v. Evans, 316 U.S. 159, 162 (1942). The United States, possessing a remedy in its ability to prosecute antitrust violators criminally, may not act as a plaintiff in a treble damage civil antitrust action (United States v. Cooper Corp., 312 U.S. 600, 608 (1941)), but may recover its actual damages in a civil action (15 U.S.C. § 15a (1970)).

For the definition of "natural monopoly," see note 12 *supra*.

[40] 96 S. Ct. at 3118 (footnote omitted).

freedom of choice in the anticompetitive activity or participates in the process of regulatory decisionmaking.[41] Second, Mr. Justice Stevens found that Congress did not intend to give state regulatory agencies more power than federal agencies to exempt private conduct from the antitrust laws. A state can immunize private conduct from antitrust liability only to the minimum extent necessary to make a state regulatory scheme work.[42] Mr. Justice Stevens saw no need to grant an implied exemption for Detroit Edison's lightbulb program, and found no inconsistency in applying both public interest and competitive standards of behavior to a firm that operates within two industries, one regulated pervasively by the state, the other unregulated.[43] Nor was the federal interest to be "inevitably subordinate" to that of the states when a genuine inconsistency between the two interests appeared.[44] Thus, neither Michigan's approval of the lightbulb exchange program, nor the mandatory nature of that program, formed a sufficient basis for immunity.[45]

Mr. Chief Justice Burger, concurring, asserted that *Parker* could not be limited to suits against state officials.[46] He urged the Court to focus upon the relationship between the anticompetitive activity and the state's authority to regulate.[47] The Chief Justice would apply the federal antitrust laws when a state regulates a public utility as a natural monopoly, and "also purports, without any independent regulatory purpose, to control the utility's activities in separate, competitive markets."[48] He rejected state-action immunity based on "undifferentiated sanction of . . . ancillary practice[s],"[49] and concluded that an exemption for Detroit Edison's program would serve neither federal nor state policy.

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[41] *Id.*

[42] *Id.* at 3120. Mr. Justice Stewart criticized this assertion, pointing out that the doctrine of implied immunity operates only when *federal* statutes conflict with the antitrust laws. *See, e.g.*, United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-55 (1963). Implicit exemptions arising from state statutes are not only disfavored, but theoretically impossible. *Id.* at 3135 (dissenting opinion, Stewart, J.). *But see* note 100 and accompanying text *infra*.

[43] 96 S. Ct. at 3119. *See* Gulf States Utils. Co. v. FPC, 411 U.S. 747 (1972) (antitrust policy and anticompetitive consequences of action must be considered by FPC); Federal Maritime Comm. v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238 (1968) (FMC correct in considering antitrust policy in reaching decision); Denver & Rio Grande W.R. Co. v. United States, 387 U.S. 485 (1967) (ICC required to consider anticompetitive consequences in reaching decision).

[44] 96 S. Ct. at 3119.

[45] *Id.* at 3121.

[46] The Chief Justice concurred in the plurality's assertion that *Parker* was inapposite. *Id.* at 3121.

[47] *Id.* at 3123. "In interpreting *Parker*, the Court has heretofore focused on the challenged *activity*, not upon the identity of the *parties* to the suit." *Id.* (emphasis in original).

[48] *Id.* at 3123-24.

[49] *Id.* at 3124.

Mr. Justice Blackmun, also concurring, agreed with the plurality that "anticompetitive conduct . . . sanctioned, or even required, by state law [is] not of itself . . . conduct beyond the reach of the Sherman Act."[50] The case turned on whether, and to what extent, Congress intended to preempt state regulation through the Sherman Act.[51] Mr. Justice Blackmun asserted that the Court's task was to balance federal and state interests to insure that the federal interest will prevail when a conflict arises.[52] To this end, he recommended applying "a rule of reason, taking it as a general proposition that state-sanctioned anticompetitive activity must fall like any other if its potential harms outweigh its benefits."[53] Mr. Justice Blackmun recommended that the Court should be reluctant to find an unreasonable restraint when the state-sponsored anticompetitive activity is supported by substantial justifications.[54] He concluded that the lightbulb exchange program was not crucial to the successful operation of the Michigan regulatory scheme, and that "ending competition in the lightbulb market cannot be accepted as an adequate state objective without some evidence—of which there is not the least hint in this record—that such competition is in some way ineffective."[55]

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[50] *Id.*

[51] "Congress itself has given support to the view that inconsistent state laws are preempted by the Sherman Act. Were it the case that state statutes held complete sway, Congress would not have found it necessary in 1937 to pass the Miller-Tydings Amendment . . . to the Sherman Act . . . ." *Id.* at 3125 (citations omitted). The Miller-Tydings Amendment exempted resale price maintenance programs from Sherman Act liability. Recently, Congress amended the Sherman Act to remove resale price maintenance programs from the list of exempted activities. Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (amending 15 U.S.C. § 1 (1970)).

[52] 96 S. Ct. at 3127.

[53] *Id.* at 3126.

[54] *Id.* at 3127 (citations omitted).

[55] *Id.* at 3128. Mr. Justice Blackmun's observation raises some fundamental questions. To what extent would, or could, the record brought to the Court on a motion for summary judgment reveal the ineffectiveness of competition in the retail lightbulb industry? A second related question is whether additional evidence should be marshalled to show the ineffectiveness of competition when the Court has before it the Michigan regulatory statute. It is unclear from *Cantor* whether the *fact* of legislative regulation constitutes prima facie evidence of the ineffectiveness of competition, or whether counsel must, in addition, supply other evidence to support the necessity of regulation. If the fact of state regulation is not enough, problems arise: might scholarly studies be introduced? Further, in many states an official legislative history is sparse or nonexistent. Both courts and counsel must then resort to statutory language and to conjecture to determine whether competition is "ineffective." Because the language of the regulatory statute may not expressly cover most challenged activities, defendants may face considerable difficulty in demonstrating that competition is ineffective. Mr. Justice Blackmun would make such a showing a prerequisite to reliance on an ambiguous state enactment for immunity from antitrust liability. *Id.* at 3126-27.

Mr. Justice Stewart, dissenting, predicted that the Court's ruling would have dire consequences for public utilities exposed to massive treble damage lawsuits.[56] He disagreed with the Court's "emasculation" of the *Parker* doctrine, finding in the legislative history of the Sherman Act an intent to have the federal law supplement, rather than preempt, existing state legislation controlling natural monopolies.[57] He argued that immunity should be granted when a state requires anticompetitive conduct.[58] Mr. Justice Stewart found two flaws in the plurality's reasoning. First, he contended that predicating antitrust exposure and potential liability on a firm's participation in the regulatory process was inconsistent with the Court's decision in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*[59] *Noerr* held that the first amendment al-

[56] The fear expressed by the dissent may be premature. Although treble damage awards are not entirely within the discretion of the court (Locklin v. Day-Glo Color Corp., 429 F.2d 873, 878 (7th Cir.), *cert. denied*, 400 U.S. 1020 (1970)), courts are precluded from awarding treble damages when: (*1*) liability-producing conduct is arguably lawful under the auspices of other federal legislation (Carnation Co. v. Pacific Westbound Conf., 383 U.S. 213, *modified*, 383 U.S. 932 (1966)); (*2*) a firm complies with a state court injunction, even if its issuance was in error (Janel Sales Corp. v. Lanvin Parfums, Inc., 396 F.2d 398, 401 n.2 (2d Cir.), *cert. denied*, 393 U.S. 938 (1968)); (*3*) the liability-producing conduct is a result of economic coercion and the defendant has no adequate legal remedy (*see* Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 245 F. Supp. 889, 894-98 (N.D. Ill. 1965)); (*4*) the plaintiff was in pari delicto with the defendant (reducing damages to those incurred while plaintiff was not a participant) (Gaines v. Carrollton Tobacco Bd. of Trade, Inc., 386 F.2d 757 (6th Cir. 1967)); and (*5*) the plaintiff has signed a valid release or disclaimer (Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971)). This last defense is limited because a release is inoperative if it embodies, or materially aids, the accomplishment of any of the illegal objectives of a conspiracy to restrain trade. Carter v. Twentieth Century-Fox Film Corp., 127 F. Supp. 675, 680-81 (W.D. Mo. 1955). *See also* Redel's, Inc. v. General Elec. Co., 498 F.2d 95, 98-101 (5th Cir. 1974); S.E. Rondon Co. v. Atlantic Richfield Co., 288 F. Supp. 879 (C.D. Cal. 1968). Further, both the plurality and Mr. Justice Blackmun would recognize a "domination" or "fairness" defense. 96 S. Ct. at 3119 (plurality); *id.* at 3128 n.6 (Mr. Justice Blackmun). *See* notes 64-65 and accompanying text *infra*.

[57] 96 S. Ct. at 3136-38.

[58] *Id.* at 3139.

[59] 365 U.S. 127 (1961). *Noerr* was brought by trucking companies and their trade association against a number of railroads, a railroad association, and a public relations firm. The complaint alleged that the defendants had conspired to restrain trade and monopolize the long-distance freight business through a publicity campaign desigued to foster and maintain laws destructive of the trucking industry. The Court held that no Sherman Act liability could be predicated on a combination organized to influence legislation:

> It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaigu may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. . . . To hold that the knowing infliction of such injury renders the campaign itself illegal would . . . be tantamount to outlawing all such campaigns.

Id. at 143-44. United Mine Workers of America v. Pennington, 381 U.S. 657 (1965), broadened the doctrine introduced by *Noerr*. There, the trustees of the UMW sued partners in a coal mining company for royalty payments. The partners cross-claimed, alleging

lows firms to conspire with one another to urge the passage of anticompetitive legislation, and that such activity is outside the sweep of Sherman Act sanctions. Second, Mr. Justice Stewart argued that determining whether the challenged activity was "crucial" to the success of the regulatory process forced the Court to make ad hoc judicial determinations of the reasonableness of state legislation.[60]

III

THE LIMITED REACH OF IMMUNITY IN THE AFTERMATH OF *Cantor*

A plurality opinion necessarily leaves uncertainty in the law, but a close reading of *Cantor* indicates a majority consensus on three issues. First, the Court reaffirmed the *Parker* doctrine as it applies to states and state officials acting pursuant to express legislative command.[61] The plurality's emphasis on language in *Parker*, that a state must act in its capacity as sovereign to enjoy immunity,[62] indicates that states may face antitrust attack if they engage in proprietary activities.[63]

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that the trustees, the UMW, and certain large coal operators had agreed to eradicate overproduction by eliminating smaller companies through the imposition of various uniform labor standards throughout the industry. The Court held that joint efforts to influence public officials cannot be the basis of antitrust liability, even where the purpose of such petitioning is the elimination of competition, or is, itself, part of a scheme violative of the Sherman Act. 381 U.S. at 670. In *Cantor*, Mr. Justice Stewart perceived a threat to this "doctrine" in the attempt to assess tbe "fairness" of applying antitrust sanctions to a given actor by measuring his participation in the regulatory process. 96 S. Ct. at 3132. *But see* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972) (antitrust action predicated on such combinations allowed where no true purpose of influencing legislation appears). *See generally* Jacobs, *Regulated Motor Carriers and the Antitrust Laws*, 58 CORNELL L. REV. 90, 108-13 (1972).

[60] The "second arm" of the plurality test is in substance a determination of whether Congress intended to superimpose antitrust standards on conduct already regulated by the states. Mr. Justice Stewart's dissent asserted that the factors used by the plurality in arriving at a determination had little or nothing to do with congressional intent. 96 S. Ct. at 3134. *See* Verkuil, *State Action, Due Process and Antitrust: Reflections on Parker v. Brown*, 75 COLUM. L. REV. 328 (1975).

[61] 96 S. Ct. at 3116 (plurality); *id.* at 3123 (concurring opinion, Burger, C.J.); *id.* at 3128 n.5 (concurring opinion, Blackmun, J.).

[62] "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." *Id.* at 3116 n.21, *quoting* Parker v. Brown, 317 U.S. 341, 350-51 (1943). The Court did not articulate the degree of legislative direction that is sufficient to enable a regulated firm to claim immunity. One possible option is a variant to the "alter ego" test, applicable to state agencies seeking shelter under the state's sovereign immunity. *See, e.g.*, S.J. Groves & Sons Co. v. New Jersey Turnpike Auth., 268 F. Supp. 568 (D.N.J. 1967).

[63] 96 S. Ct. at 3117 n.24. *Cf.* Lincoln County v. Luning, 133 U.S. 529 (1890) (counties); City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431 (5th Cir. 1976) (cities); Duke

Second, even the Justices voting for reversal found "state action" relevant in situations where extensive state involvement with an activity would render application of antitrust sanctions to particular actors unfair.[64] Only one Justice explored the distinction between fair and unfair application of the antitrust laws;[65] compulsion of the variety confronting Detroit Edison obviously did not justify immunity.[66] One question posed by *Cantor* is the extent to which this proposed "fairness" defense is limited by a firm's participation in the regulatory process.[67] Most regulated firms participate in the regulatory process,[68] and the dissent in *Cantor* observed that this is advisable.[69] To protect a firm opposing legisla-

& Co. v. Foerster, 521 F.2d 1277 (3d Cir. 1975) (county agencies); Fox v. James B. Beam Distilling Co., [1974] TRADE CAS. (CCH) ¶ 75,335 (S.D. Ind. 1974) (state agencies). *But see* New Mexico v. American Petrofina, Inc., 501 F.2d 363 (9th Cir. 1974) (state). Another possible analysis in this context is found in the implicit consent of a state to bear antitrust liability. *Cf.* Parden v. Terminal Ry., 377 U.S. 184 (1964) (state subjects itself to jurisdiction of Federal Employer's Liability Act by operating railroad); Department of Transp. v. American Commercial Lines, Inc., 350 F. Supp. 835 (N.D. Ill. 1972) (state agency consents to counterclaim by invoking federal court's jurisdiction).

[64] 96 S. Ct. at 3119 (plurality); *id.* at 3128 n.6 (concurring opinion, Blackmun, J.).

[65] [A] defense based on fairness would be a defense to a damage recovery but not injunctive relief. The latter, of course, presents no danger of unfairness. . . . [T]he defense rests on the theory, not that the challenged restraint is legal, but that since the defendant has committed no voluntary act in implementing it, he cannot be said to have violated any law.

Id. at 3128 n.6 (concurring opinion, Blackmun, J.). Mr. Justice Blackmun also urged application of the fairness defense where regulatory "lag" led to the liability of the regulated firm. *Id.*

[66] Mandatory compliance with an approved commission order serves only to insure that rate changes affecting consumers are implemented after proper notice and hearing. But "any alteration or amendment in rates or rate schedules applied for by any public utility which will result in no increase in the cost of service to its customers may be authorized and approved without any notice or hearing." MICH. COMP. LAWS § 460.6a (MICH. STAT. ANN. § 22.13(6a) (Callaghan Supp. 1976)). The Court might well have chosen to question the "mandatory" nature of the lightbulb exchange program, and reversed the judgment of lower courts on the ground that mere state approval does not yield antitrust immunity. Northern Sec. Co. v. United States, 193 U.S. 197 (1904).

[67] The plurality indicated that the fairness of applying antitrust laws to state regulated firms would be directly proportional to their participation in the regulatory process. 96 S. Ct. at 3119.

[68] *See* Gray, *The Passing of the Public Utility Concept*, 16 J. LAND & PUB. UTIL. ECON. 8, 9-10 (1940).

[69] 96 S. Ct. at 3134 (dissenting opinion, Stewart, J.). The optimal extent of participation by regulated firms in the regulatory process is far from clear. Critics of regulatory agencies note that industry participation in regulatory schemes frequently develops into subservience of the agency to the industry. *See* M. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 183-87 (1955); L. KOHLMEIR, JR., THE REGULATORS 69-82 (1969); WORKING ON THE SYSTEM—A COMPREHENSIVE MANUAL FOR CITIZEN ACCESS TO FEDERAL AGENCIES 9-12 (J. Michael ed. 1974). On the other hand, it is difficult to conceive of a successful regulatory scheme operating in an information vacuum with respect to the industry it controls. The advisability of using a participation test for antitrust exposure thus turns on which perception of regulatory behavior is accepted by the courts.

tion or administrative rulings from antitrust liability on "fairness" grounds, while exposing that same firm to antitrust liability when it supports legislation or administrative rulings on "participation" grounds, raises serious questions under *Noerr*.[70] Such a rule would discourage regulated firms from constructively participating in the regulatory process. This problem could be somewhat alleviated by limiting *Noerr* to its facts; attempts to influence legislation would thus be protected from antitrust liability, while attempts to influence regulatory agency rulings would not. However, such a distinction contradicts the realities of the regulatory process.

Third, state-sanctioned anticompetitive activities "comparably imperative" or "crucial"[71] to the operation of an otherwise valid regulatory scheme remain immune from attack, while the ancillary activities of a regulated firm are granted no immunity. No Justice attempted to define "ancillary" or "crucial."[72] Presumably, courts should examine the challenged activity against some yardstick of acceptability. Whether this yardstick is to be the state-enacted regulatory legislation, administrative decisions or rulings, or judicial perception of the purposes or reasonableness of state regulation is left unexplained.

The ambiguities resulting from the Court's failure to construct tests to determine whether activities are ancillary or crucial to a regulatory scheme open a number of possible avenues of defense for public utilities and other regulated firms facing antitrust challenges. Because one regulatory scheme, to function properly, may require a wider variety of anticompetitive activity than would a differing statutory pattern,[73] activity crucial to the successful operation of a state statute controlling natural monopolies may not be vital to the operation of a scheme regulating destructively-competitive industries[74] or professions.[75] The primary lesson of *Cantor*—that "ancillary" practices compelled by state regulatory bodies are vulnerable to antitrust attack—compels a case-by-case analysis of the nature of the particular regulated industry. For

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[70] *See* note 59 and accompanying text *supra*.

[71] 96 S. Ct. at 3120 n.36 (plurality); *id.* at 3128 (concurring opinion, Blackmun, J.).

[72] *See* text accompanying notes 94-102 *infra*.

[73] *See* note 12 *supra*. Thus, while rate control is vital to regulatory schemes dealing with natural monopolies and destructively-competitive industries, it is seen as ancillary to the regulation of professions. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); text accompanying notes 34-35 *supra*.

[74] *E.g.*, MICH. COMP. LAWS §§ 475.1-479.49 (MICH. STAT. ANN. §§ 22.531-.587(109) (1970 & Callaghan Supp. 1976)) (motor carriers).

For the definition of a "destructively-competitive" industry, see note 12 *supra*.

[75] *E.g.*, MICH. COMP. LAWS §§ 600.901-.949 (MICH. STAT. ANN. §§ 27A.901-.949 (Callaghan 1976)) (attorneys).

example, in determining "ancillary" practices, six Justices agreed that the status of a public utility as a regulated natural monopoly did not justify entry into a complementary product group, retail lightbulb sales.[76] Such a result might not follow where a member of a destructively-competitive industry enters a complementary product group with regulatory blessing, or even where natural monopolies like Detroit Edison enter some complementary product groups.[77]

A similar analysis applies when examining how the regulatory schemes of different states affect a particular industry. A natural monopoly confronted with an antitrust challenge similar to that faced by Detroit Edison, but operating under a regulatory statute broader in scope or language than the Michigan statute, may convince a court that the anticompetitive practice found vulnerable in *Cantor* should be given immunity as "crucial" to the operation of that broader regulatory framework.[78] Conversely, the more narrowly a regulatory statute is drawn or construed, the more likely a practice will be found "ancillary" to the operation of the regulatory scheme and thus open to liability.

Cantor's narrow interpretation of *Parker* and the limited immunity available to a firm when economic regulation does not directly involve the state place a sizeable burden on a firm confronted with a state regulatory order compelling it to engage in anticompetitive activity.[79] The analyses utilized by the plurality—emphasizing fairness and pragmatism—to restrict "unwarranted hyperextentions"[80] of *Parker* are theoretically unimpeachable. Nonetheless, they obscure the vital issue of the limits placed on

[76] Two products are said to be complementary when an increase in the demand for one leads to an increase in the demand for the other. *See* R. POSNER, *supra* note 12, at 108 n.2.

[77] Public utilities engaged in the generation and transmission of electric power may, for instance, justify entry into other "competitive" markets such as high-tension wiring, elevated power transmission poles, and other products necessarily incident to their primary function. Safety, efficiency, or the need for standardization provide possible justifications.

[78] For a comparison of various state regulatory statutes, see FEDERAL POWER COMMISSION, FEDERAL AND STATE COMMISSION JURISDICTION AND REGULATION OF ELECTRIC, GAS, AND TELEPHONE UTILITIES (1973).

[79] Prior to *Cantor*, private firms connected in any way to state regulatory schemes enjoyed a comparative immunity advantage relative to firms regulated by federal agencies. *Compare* Gas Light Co. v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972), *with* Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). *Cantor* possibly turns the table, in that antitrust liability is clearly suspended within the ambit of authority enjoyed by a federal regulatory agency. *See, e.g.*, Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 385 (1973); Pan Am. World Airways, Inc. v. United States, 371 U.S. 296, 304-05 (1963). The suspension of antitrust liability within the ambit of a state agency's authority is questionable in light of *Cantor*.

[80] International Tel. & Tel. Corp. v. General Tel. & Elec. Corp., 351 F. Supp. 1153, 1203 n.129 (D. Hawaii 1972), *modified*, 518 F.2d 913 (9th Cir. 1975).

state regulatory authority by the federal antitrust laws. They also fail to meet the larger issue avoided by the *Cantor* Court: Why should there be immunity at all?

At common law, immunity emerged from a judicial perception that "the King can do no wrong."[81] In England, however, the sovereign immunity doctrine was never an absolute bar to suit.[82] Retention of the doctrine in the United States was based on the desire of the Framers to create a federal system with "sister sovereignties"; this led Hamilton to say: "[i]t is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*."[83] Immunity developed from the understanding that though the federal courts are the only tribunals sufficiently impartial to try the states,[84] the practice—except in enumerated circumstances[85]—could result in disruption of the federal system. The Framers thus left many matters of immunity to the states themselves.

The legislative history of the Sherman Act supports the thesis that it supplements, rather than displaces, existing state regulatory enactments.[86] The confusion in *Cantor* results from the Court's failure to solve the problem of state action by examining the functional roots of immunity.[87] Immunity is rooted in a perception that the Constitution leaves states free to act within their spheres of sovereignty. In applying a "rule of reason"[88] only through the operation of the fairness defense, the plurality left valuable but merely functional activities of regulated firms open to antitrust attack.[89] Although the decision may lead to state antitrust liability in certain circumstances,[90] an equally plausible reading of *Cantor* would find the Court's interpretation of *Parker* an ironclad prohibition of suits against states. The concurring opinion of Mr. Justice

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[81] W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131, at 975 n.48 (4th ed. 1971).

[82] This statement was largely an illusion even to the English courts at the time of the American Revolution. *See* C. JACOBS, *supra* note 22, at 5-9.

[83] THE FEDERALIST No. 81, at 548 (A. Hamilton) (Wesleyan Univ. Press ed. 1961) (emphasis in original).

[84] THE FEDERALIST No. 80, at 534-36 (A. Hamilton) (Wesleyan Univ. Press ed. 1961).

[85] *Id.* at 539-41. Such circumstances include controversies between two or more states, between a state and citizens of another state, and between two citizens of the same state claiming lands under grants of different states. U.S. CONST. art. III, § 2, cl. 1.

[86] 96 S. Ct. at 3137 (dissenting opinion, Stewart, J.). *See also* H.R. REP. No. 1707, 51st Cong., 1st Sess. (1890); Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958).

[87] The state action immunity doctrine derives from the sovereign immunity doctrine. *See* note 33 & text accompanying note 31 *supra*.

[88] *See generally* Standard Oil Co. v. United States, 221 U.S. 1 (1911).

[89] *See* note 67 *supra*.

[90] 96 S. Ct. at 3119 (plurality opinion); *id.* at 3128 n.6 (concurring opinion, Blackmun, J.).

Blackmun, espousing a rule of reason in all cases, offers regulated firms a more extensive range of immunity.[91] But Mr. Justice Blackmun's reasoning would strike a balance between the federal interest in fostering competition and state actions that have little relation to legitimate state interests.[92] The better analysis, suggested but never articulated by the concurring opinion of Mr. Chief Justice Burger,[93] looks to the terms of the state regulatory statute. Such an analysis is consistent with the federalism basis for immunity and also provides courts and potential litigants with a more concrete measure of the extent of antitrust exposure facing regulated firms.

Thus, when a state's extension of authority into an area of the economy has an anticompetitive impact, preemption analysis is appropriate for balancing conflicting federal and state interests.[94] However, state-regulated activity mandated by a state regulatory scheme that is not specifically preempted should face antitrust scrutiny on the same grounds as an order of a federal regulatory commission.[95] An activity authorized by a regulatory agency should not receive antitrust immunity when the regulatory agency or commission lacks the requisite express statutory authority.[96] The finding of "crucial" or "ancillary" practices springs not from the Court's determinations of the substantive validity of state legislation,[97] but from the statutory framework itself. Immunity should arise only when granted by the express terms of a state statute or an agency regulation enacted within the proper bounds of its del-

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[91] "Ancillary" practices would be allowed if the harm flowing from a restraint was outweighed by its benefits. 96 S. Ct. at 3123.

[92] *See* 96 S. Ct. at 3126-27.

[93] 96 S. Ct. at 3123-24. The gist of this suggestion is the Chief Justice's perception of state "neutrality" regarding the lightbulb program, suggesting that affirmative state involvement through specific statutory authorization might change the outcome. *Id.* at 3124.

[94] *See* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 388-90 (1951). *See also* Note, *supra* note 28.

[95] State regulatory orders are open to challenge and review on several grounds: (*1*) as so arbitrary, capricious, or abusive of discretion as to contravene the due process clause of the fourteenth amendment (Consolidated Edison Co. v. NLRB, 305 U.S. 197, 225-26 (1938)); (2) because the evidence upon which the order was based is not substantial enough to warrant the result (*see* Woods Exploration & Prod. Co. v. Aluminum Co. of Am., 438 F.2d 1286, 1304-07 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972)); and (*3*) because the rates set are confiscatory (*see* Safe Harbor Water Power Corp. v. FPC, 179 F.2d 179, 187-88 (3d Cir. 1949), *cert. denied*, 339 U.S. 957 (1950)).

[96] Public Util. Comm'n v. United Fuel Gas Co., 317 U.S. 456 (1943); FPC v. Natural Gas Pipeline Co. of Am., 315 U.S. 575 (1942); Morgan v. United States, 298 U.S. 468 (1936); Rocky Mountain Airways, Inc. v. Colorado Pub. Util. Comm'n, 181 Colo. 170, 509 P.2d 804 (1973). Michigan recognizes that the Public Service Commission has limited authority. Detroit Edison Co. v. City of Wixom, 382 Mich. 673, 172 N.W.2d 382 (1969).

[97] 96 S. Ct. at 3134 (dissenting opinion, Stewart, J.).

egated authority, and not from the nexus between a firm's activities and "the state." In areas where regulatory agencies clearly possess express authority, the proper result, based on the principle of federalism underlying immunity, would be to withhold application of antitrust sanctions.[98] The reference in the plurality opinion to implied exemptions[99]—a non sequitur from a federal preemption standpoint[100]—acquires validity in this context because every statute either prescribes or prohibits a penumbral series of practices too numerous to specify in the text of the statute, yet essential for its effective performance. Although courts should not favor implicit immunity, it is available to make the regulatory act work.[101] Federal courts, in passing on the ancillary or comparably imperative nature of certain activities, thus have the latitude to recognize the functional aspects of state regulatory schemes and have clearer guidance as to which firms or activities may claim immunity.[102]

Statutory review of this kind leaves the federal courts in a position to measure the activities of a regulated firm against federal competitive standards and the state interest in regulation. This standard has the further merit of presenting regulated firms with discernible limits of protection and liability.

CONCLUSION

Cantor v. Detroit Edison Co. is the Supreme Court's most recent effort to clarify the law of state-action immunity. Although the plurality decision leaves some uncertainty, stricter federal scrutiny of state-sponsored anticompetitive schemes is forthcoming. The confusion within the Court as to the proper extent of this scrutiny results from the failure of the Justices to consider the functional roots of immunity as it relates to state regulation. A potentially useful analysis would follow the terms of the state regulatory statute. This would nurture certainty in the law and allow federal courts the necessary latitude to accommodate state and federal goals within the broad constraints of preemption.

William F. Murphy II

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[98] *See* Foremost Int'l Tours, Inc. v. Qantas Airways, Ltd., 525 F.2d 281, 284-85 (9th Cir. 1975), *cert. denied*, 97 S. Ct. 57 (1976); Hecht v. Pro-Football, Inc., 444 F.2d 931, 939-40 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

[99] 96 S. Ct. at 3120.

[100] *Id.* at 3135 (dissenting opinion, Stewart, J.).

[101] "Repeals of the antitrust laws by implication . . . are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-51 (1963) (footnotes omitted).

[102] *See* International Tel. & Tel. Corp. v. General Tel. & Elec. Corp., 351 F. Supp. 1153, 1202 (D. Hawaii 1972), *modified*, 518 F.2d 913 (9th Cir. 1975).