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Antitrust - Cantor v. Detroit Edison Co.: A Further Refinement of Parker's State Action Exemption

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ANTITRUST—Cantor v. Detroit Edison Co.: A Further Refinement of Parker’s State Action Exemption

Since Parker v. Brown1 was decided thirty-four years ago, it has been accepted that through state regulation, private business activity may be afforded a state action exemption from the antitrust laws. The continuing vitality of this exemption was the question presented in Cantor v. Detroit Edison Co.2 With the recent exception of Goldfarb v. Virginia State Bar,3 this was the first opportunity for the Supreme Court to review directly the Parker doctrine,4 and the first antitrust opinion delivered by Justice Stevens. The Cantor Court decided that Parker should not be extended to include private activity subject to state regulation unless it was clear that the decision to implement the anticompetitive activity was indisputably that of the state.5 Furthermore, the scope of the state action exemption must be limited to the minimum extent necessary in order to make the regulatory scheme work.6

The Sherman Act7 was promulgated to promote and protect a fundamental national policy—competition.8 This policy is deemed to be of such national importance that the Sherman Act has been often considered to approach constitutional status.9 The Sherman Act’s significance is further enhanced because it is considered to be an exercise of congressional authority to the fullest extent possible under the commerce clause.10 As a result, the Supreme Court has

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1. 317 U.S. 341 (1943).
2. 96 S. Ct. 3110 (1976).
5. 96 S. Ct. at 3118.
6. Id. at 3120.
9. Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.
declared that exemptions to the antitrust laws are not to be easily implied."

Contrasted to this important national interest in competition is the equally compelling and traditional state interest in regulating matters of local import. This conflict between two countervailing policies necessitated the compromise reached by the Court in *Parker v. Brown.*

**THE PARKER v. BROWN STATE ACTION EXEMPTION**

In *Parker v. Brown* the Court was presented with a state program for the marketing of California raisins. The express purpose of the plan was to restrict competition among growers and maintain a reasonable price level for California raisins. The court assumed that such a program would be a violation of the Sherman Act if it were solely the result of private efforts. However, this program was the result of a California statute and the defendants were the California Director of Agriculture and the gubernatorial commission charged with its administration. Presented with conflict between a state regulatory statute designed to effectuate a legitimate state objective, and a potential violation of the antitrust laws, the Court concluded that the Sherman Act was never intended to prohibit legitimate state activity. But this determination was qualified by the requirement that the anticompetitive program derive its authority from the legislative command of the state. Since the activities of the defendants under the California Prorate Program were directed by the legislature, the Court held the activity impliedly immune from the proscriptions of the Sherman Act.

Since *Parker v. Brown,* federal courts have traditionally refused

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14. *Id.*
15. *Id.* at 355.
17. *Id.* at 350-52.
18. *Id.*
19. *Id.* at 352.
to impose the strictures of the antitrust statutes upon the states or upon private action taken pursuant to state regulatory direction. However, close scrutiny reveals that *Parker* itself proffers little clear-cut authority for that proposition. *Parker* never adequately articulated either the quality or quantum of state involvement necessary for the creation of a state action exemption.20 However, courts later managed to glean from the language of *Parker* the justification for the extension of its rationale to the activities of private enterprise subject to state regulatory command.

The basic premise in *Parker* is that the imposition of restraints as a sovereign act of the state is not the type of agreement or conspiracy which the Sherman Act was intended to prohibit.21 To the extent that the state itself conducts the anticompetitive activities pursuant to a legislative resolution, there is an unquestionably valid exemption from the antitrust laws.22 The Sherman Act was construed by the *Parker* Court to be a "prohibition of individual and not state action."23 The extension of this state action exemption to private parties, however, has been the subject of great confusion and the cause of apparently incongruous decisions. The Supreme Court directly dealt with this question in *Cantor v. Detroit Edison Co.*

There is no explicit authority within *Parker* warranting an extension of the state action exemption to the legislatively sanctioned activities of a private party. Indeed, the Court attempted to restrict the exemption. "[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."24 Yet, courts have ignored this restriction,25 relying upon the Supreme Court's finding that the California Prorate Program "derived its authority and efficacy from the legislative command of the

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21. *Parker,* a case which disposed of the antitrust issue as a sidelight, . . . is too narrow a foundation for the vast body of doctrine which has been based on it.


24. 317 U.S. at 352.

state.\textsuperscript{26} Disregarding the fact that the legislative command in Parker was directed toward state officials, later courts have exempted private business from the antitrust laws where the business activity was subject to state regulation. Because the Parker Court made it clear that state authorization does not automatically immunize those who violate the Sherman Act, courts have inferred that the state action exemption is derived from the quality and force of the pertinent regulatory statute,\textsuperscript{27} and not merely from the identity of the defendant.\textsuperscript{28}

The Court in Parker did not foreclose the possibility of a future extension of the state action exemption to private activity taken at the direction of the state. However, it is equally clear that Parker does not, of itself, mandate such an extension. The Supreme Court left a gap in the Parker doctrine, a gap which was allowed to go unfilled for over thirty years. Consequently, invocation of Parker in subsequent decisions to span this gulf has only precipitated an inconsistency of results.\textsuperscript{29}

Regardless of any deficiency in Parker, it remains the foundation and starting point for any discussion of the application of the state action exemption. The state action exemption has been deemed to include private activity performed under the compulsion of state regulatory statutes.\textsuperscript{30} This extension of Parker resulted from later courts' extrapolation of its underlying rationale. Parker was basically an attempt to harmonize the interests of the several states with the federal government's interest in preserving competition.\textsuperscript{31} The Court explicitly recognized this conflict between dual sovereigns.\textsuperscript{32} The real consideration was to what extent the maintenance of this dual system required an accommodation of these conflicting policies.\textsuperscript{33}


\textsuperscript{27} See Gas Light Co. of Columbus v. Georgia Power Co., 440 F.2d 1135, 1140 (5th Cir. 1971), cert. denied, 404 U.S. 1062, reh. denied, 405 U.S. 969 (1972); Slater, supra note 10, at 73.


\textsuperscript{30} Posner, supra note 8, at 697-98. "'State action' within the meaning of Parker is action either by a state agency or by private firms under compulsion of a state agency." Id. at 720.


\textsuperscript{33} Slater, supra note 10, at 108.
A prerequisite to any valid state action exemption is that the regulation must be within an area of legitimate state concern.\textsuperscript{34} Parker recognized that the states have a genuine interest in regulating areas of public concern, even to the extent of eliminating competition in an entire area of the state economy. Since enforcement of the antitrust laws cannot coexist with valid anticompetitive state regulation, a certain degree of deference to the states was warranted. When the state has deliberately sought to implement public policy goals which it deems to be more beneficial to its citizens than competition,\textsuperscript{35} the Court determined the antitrust laws should not be enforced against the states.

This court-created deference depends entirely upon the existence of an overriding state interest in regulation; the mere intent of the state to supplant competition with a state-sponsored regulatory scheme is not sufficient. Otherwise, the exemption would permit the state to neutralize an important national concern without an equally compelling state interest. The entire rationale behind the state action exemption is to allow the states to impose regulatory schemes in areas where they have an interest comparable to the federal interest in competition. This element is essential and common to all of the cases in which a state action exemption has been allowed.\textsuperscript{36}

**Parker's Progeny**

In creating this state action exemption, the Court narrowly construed the Sherman Act to avoid a conflict with state sovereignty.\textsuperscript{37} The question posed and left largely unanswered was to what extent the antitrust laws and the national policy favoring competition should defer to state-regulated private activity. The criteria developed by Parker were totally inadequate for the development of a consistent approach to this problem.\textsuperscript{38} Consequently, the burden of discerning congressional intent and developing workable guidelines fell to the lower courts.

\textsuperscript{34} In Parker v. Brown, California had a legitimate interest in the welfare of its farmers and in the conservation of its agricultural wealth. See Hecht v. Pro-Football, Inc., 444 F.2d 931, 939 (D.C. Cir. 1971), cert. denied, 404 U.S. 1047 (1972); Ladue Local Lines, Inc. v. Bi-State Development Agency of the Missouri-Illinois Metropolitan District, 433 F.2d 131, 137 (8th Cir. 1970); Donnem, *supra* note 4, at 967.

\textsuperscript{35} Posner, *supra* note 8, at 715; Slater, *supra* note 10, at 91.

\textsuperscript{36} E.g., Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975).

\textsuperscript{37} Posner, *supra* note 8, at 699. See also Slater, *supra* note 10, at 108.

Minimum State Supervision

One line of judicial reasoning focused upon the identity of the party ultimately making the decision to implement the anticompetitive policy. Thus, when activities are "subjected to meaningful regulation and supervision by the state . . . they are the result of the considered judgment of the state regulatory authority." An example of this type of analysis can be found in the public utility rate-making process. Even though anticompetitive rates are proposed by the regulated industry, they may be exempt from the antitrust laws. The state's involvement in the rate-making process and supervision of the public utility transforms the individual action into state action for antitrust purposes. Such participation in the process, coupled with active supervision, was more than the mere authorization to violate the Sherman Act condemned in Parker.

This construction of the doctrine was carried to its logical extreme in Washington Gas Light Co. v. Virginia Electric and Power Co. Even though the state regulatory commission never exercised any effective supervision over the utility's allegedly anticompetitive practices, the Fourth Circuit exempted the electric company since its practices were "at all times within the ambit of regulation" of a state agency.

Few courts have ventured as far as the Fourth Circuit did in Washington Gas Light. However, the decision highlights some of the rationale's failings. Principally, these decisions fail to evaluate the relative importance of the state interest being protected with reference to the national interest being thwarted. Using this approach, courts could exempt private activity on the basis of minimal state involvement. Under this reasoning, the simple creation of a state agency with review power would be sufficient to exempt the private business from the antitrust laws. The court never has to consider the presence of actual, effective regulation. Although this analysis may be procedurally convenient, it does not accurately reflect the rationale behind the state action exemption. Congress certainly could not not

39. See Slater, supra note 10, at 91-95.
41. Id. See Asheville Tobacco Bd. of Trade, Inc. v. FTC, 263 F.2d 502 (4th Cir. 1959). In Asheville, the court declared that failure of the state to supervise rates which were the result of private action would not be "state action" within the meaning of Parker. See also Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (1972).
42. 438 F.2d 248 (4th Cir. 1971).
43. Id. at 252.
have intended that the antitrust laws be nullified by any state regulation. Unless the regulatory scheme clearly evinces a state purpose to supplant competition with its own regulation, the federal interests should control.

**Intentional Substitution of Regulation**

Another test of adequate state involvement for exemption of private activity was presented in *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.* 44 The First Circuit rejected the assertion that action by any public official automatically confers exemption; 45 the court observed that “the assertion that an act is valid governmental action suggests inquiry rather than ends it.” 46 Thus, an investigation into the extent and quality of state involvement in the allegedly anticompetitive private activity is required. 47 The *Whitten* court determined that a state action exemption should exist, “only when government determines that competition is not the *summum bonum* in a particular field and deliberately attempts to provide an alternate form of public regulation.” 48

*Whitten*, and cases like it, clearly indicate that an essential element for the creation of a state action exemption is the *intentional* substitution by the state of regulation for competition. 49 This substantially narrows the field in which the states can impart a state action exemption to the activities of private parties. However, many courts still fail to weigh the competing interests, i.e., if the state interest is legitimate, the court will not inquire into its significance relative to the national interest in competition. This tendency has drawn the criticism of commentators 50 and accentuates a continuing inconsistency of results. Nevertheless, this position was accepted by the majority of courts prior to *Goldfarb v. Virginia State Bar.* 51

*Goldfarb v. Virginia State Bar*

In *Goldfarb*, the Fairfax County Bar published a fee schedule which provided a suggested minimum fee for title examinations.

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44. 424 F.2d 25 (1st Cir.), cert. denied, 400 U.S. 850 (1970).
45. Id. at 30.
46. Id.
47. Id.
48. Id.
50. Slater, supra note 10; Donnem, supra note 4; Posner, supra note 8; Verkuil, supra note 20.
Although the fee schedule purported to be advisory only,\textsuperscript{52} the plaintiff was unable to find any lawyer who would charge a price less than that "suggested" by the County Bar. Consequently, the plaintiffs brought a class action suit against the State and County Bars alleging that the operation of the minimum fee schedule constituted price fixing in violation of the Sherman Act.

Both the Virginia State Bar and the Fairfax County Bar raised the defense that their actions were state action and thereby exempted from the antitrust laws. The State Bar sought shelter within the \textit{Parker} doctrine by virtue of its status as a state agency. Further, the State Bar argued that its fee schedule reports and ethical opinions were merely designed to effectuate the fee provisions of the ethical codes adopted by the Virginia Supreme Court. The County Bar also claimed its actions were "prompted" by a state agency and therefore were state action within the meaning of \textit{Parker v. Brown}.\textsuperscript{53}

The United States Supreme Court expressly recognized that Virginia has a compelling state interest in the practice of law within its borders and has the power to regulate that practice for the benefit of its citizens.\textsuperscript{54} Furthermore, the Court declared that it did not intend to undermine Virginia's authority to regulate its professions. Nevertheless, the Court held that neither the County Bar nor the State Bar were exempted from the Sherman Act by virtue of state action. The Court stated that the "threshold inquiry . . . is whether the activity is required by the State acting as sovereign." Since the Virginia Supreme Court's ethical codes contained no direction to either the State or the County Bar to supply minimum fee sched-

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\textsuperscript{52} The Virginia Supreme Court is authorized by the State of Virginia to regulate the practice of law. \textit{VIRGINIA CODE ANN.} § 54-48 (1974). In performing this function, that court had adopted various ethical codes dealing in part with attorney's fees and advisory fee schedules. These canons allowed lawyers to consider advisory fee schedules and fees customarily charged in a locality in setting their own charges. \textit{Code of Professional Responsibility}, 211 Va. 295, 302 (1970). However, the Virginia Supreme Court specifically stated that fees for legal services should not be controlled by such schedules. Rules for Integration of the Bar, 171 Va. xxiii (1938).

The Virginia State Bar is statutorily constituted as a state administrative agency through which the Virginia Supreme Court regulates the practice of law. \textit{VIRGINIA CODE ANN.} § 54-49 (1972); 421 U.S. at 789-90. Apparently, the State Bar had the power to issue ethical opinions concerning compliance with this regulation. In its role as a state agency, the State Bar sought to implement the fee provisions of the Supreme Court's ethical codes. The ethical opinions and fee schedule reports which emerged as a result of this effort did not compel adherence to minimum fees, but did threaten professional sanctions against those attorneys who habitually disregarded their suggestions. 421 U.S. at 791, n.21. This action by the State Bar induced the Fairfax County Bar to provide the fee schedules which were the root of the controversy in \textit{Goldfarb}.

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\textsuperscript{54} \textit{Id.} at 792-93.
ules,55 the Court concluded that their activities had not been required by the State of Virginia.

The criterion espoused in Goldfarb is that there can be no state action exemption unless it can be said that the private anticompetitive activity was required by the state. This basically embraces the standard adopted by earlier courts that the state must consciously seek to supplant competition, but goes further adding a note of compulsion. The Court failed to elucidate exactly what would constitute such a state requirement disposing of the glut of ambiguous and inconsistent criteria by developing a one-word test. Unfortunately, as many meanings could be attributed to “required” as were attributed to “necessary” in McCulloch v. Maryland.56 Apparently, dissatisfied with the one-word catch-phrase, the Court seized the opportunity in Cantor v. Detroit Edison Co.57 to fashion a new test.

CANTOR’S RESTRICTION OF PARKER

Detroit Edison is a public utility and the sole supplier of electric-ity to five million people in southeastern Michigan. It also supplies approximately fifty percent of the standard light bulbs most frequently used by its customers.58 Detroit Edison provides these bulbs free of charge; the expense is incorporated into the rate which all consumers must pay for their electricity. The rates, including the omission of any separate charge for the light bulbs, had been approved by the Michigan Public Service Commission and could not be changed without prior Commission approval.59

Plaintiff, a retail druggist whose trade also consists of the sale of light bulbs, alleged the utility’s monopoly in the distribution of electricity was used to restrain competition in the sale of light bulbs.60 The plaintiff claimed that the light bulb program foreclosed competition in a substantial segment of the light bulb market.61 The

55. The liability of the Virginia State Bar resulted from the disciplinary action threatened in its ethical opinions against attorneys who deviated from the prices set by the County Bar’s fee schedule. The Court concluded that the activities of the defendants resulted in price-fixing in violation of the Sherman Act.
57. 96 S. Ct. 3110 (1976).
58. Id.
59. The Michigan Public Service Commission is a statutorily created state agency charged with “complete power and jurisdiction to regulate all utilities in the state . . . .” The Commission has the express power “to regulate all rates, fares, fees, charges, services, rules, conditions of service and all other matters pertaining to the formation, operation, or direction of such public utilities.” MICH. COMP. LAWS ANN. § 460.6 (1967); 96 S. Ct. at 3114.
60. 96 S. Ct. at 3112.
Supreme Court assumed that an antitrust violation would exist unless it found that Michigan’s regulation of Detroit Edison was within a narrow antitrust exemption. The precise issue facing the Court was whether the *Parker* doctrine immunizes private action approved by a state which must continue while that approval remains effective.62

The Court held that *Parker v. Brown* was not dispositive of the issues presented in *Cantor*.63 In addition, the Court determined that the *Parker* rationale could not be extended to include private activity approved by the state, regardless of the fact that the program could not be eliminated without prior approval of the Michigan Public Service Commission.64 Consequently, Detroit Edison was denied the protection of a state action exemption, despite the fact that any unilateral decision on its part to discontinue the program would have violated state law.65

In his plurality decision, Justice Stevens re-examined *Parker* and its progeny, placing special significance on the fact that all the *Parker* defendants were state officials. In *Parker*, there was no claim that any private citizen or business had violated the antitrust laws. Thus, *Parker* never reached the issue of whether an exemption from the Sherman Act should be created for private activities approved or required by the state.66 Consequently, *Parker* alone did not specifically support the proposition raised in *Cantor*—a private business can be exempt from the antitrust laws by virtue of state action.67

Examining the history of *Parker*, the Court in *Cantor* relied upon evidence that the federal government, as *amicus curiae*, did not contest California’s claim that the Sherman Act was never intended to proscribe the activities of a sovereign state.68 Attempting to protect its antitrust enforcement concerns, the Government drew a clear distinction between anticompetitive conduct by the state itself and private actions taken pursuant to a state statute. The Govern-

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62. 96 S. Ct. at 3112.
63. *Id.* at 3114-17.
64. *Id.* at 3117-21.
65. *Id.* at 3114.
66. *Id.* at 3117.
67. *Id.* It should be noted that Chief Justice Burger dissented from this portion of the Court’s decision in his concurring opinion. Burger disagreed that the holding in *Parker* could be limited to suits against state officials. *Id.* at 3123 (Burger, C.J., concurring).
68. *Id.* at 3116. The dissent questioned the propriety of any inquiry into the briefs submitted by the contending parties in *Parker v. Brown*. The dissent opined that such a practice would undermine the “plain meaning” of the Court’s decision. *Id.* at 3130 (Stewart, J., dissenting).
ment claimed that private activity conducted pursuant to a state statute, either permitting or requiring such conduct, was the type of behavior intended to be proscribed by the Sherman Act and would be clearly illegal."

Justice Stevens determined that the Parker Court was persuaded by the Government's argument and that it accepted the concession that the Sherman Act was not intended to apply to the states and their activities. However, since the Parker controversy only concerned the activities of state agents, that Court did not address the question of whether private action taken pursuant to a state statute could ever be subjected to the antitrust laws. With reference to the Parker decision, Justice Stevens concluded: "The Court's narrow holding also precluded any question about the applicability of the antitrust laws to private action taken under color of state law."70

While Justice Stevens concedes that "state action" can be broadly construed to include private activity in which the state is involved, he concluded that such a construction was not intended by Chief Justice Stone in Parker.71 Therefore, the Cantor Court found Parker v. Brown inapposite to the issues raised in Cantor.72

Despite Justice Stevens' somewhat dubious reliance upon selected portions of the briefs submitted in Parker, it is evident that the Parker Court was not required to consider whether the antitrust laws were intended to be applicable to private action taken under the color of state law. Parker v. Brown was a case which disposed of the antitrust issues as a side-light73 and is too narrow a foundation for the vast body of doctrine which claims its justification from that decision.74 In his discussion of Parker, Justice Stevens recognized

69. Id. at 3116.
70. Id. at 3117.
71. Id. at 3117.
72. Id. Justice Stevens also made note of the fact that thirteen references were made to "state action" in Parker v. Brown. Justice Stevens interpreted the language in these references as having been carefully chosen so as to limit the holding to official action only and not to private action supported, approved or directed by the state. Id. at 3117 n.24.
73. Id. The dissent took issue with the determination by the Court that the only issue decided by Parker was that a sovereign state itself is not subject to the antitrust laws. The dissent claimed that such a view would "trivialize that case to the point of overruling it ..." Id. at 3129 (Stewart, J., dissenting).
74. Posner, supra note 8, at 739.
that it was of limited precedential value with respect to the issue raised in Cantor. However, he also acknowledged that the state action exemption was not solely dependent upon the language used in Parker, but upon the continued vitality of the rationale underlying that decision.\textsuperscript{75}

**Cantor: The New Criteria**

The only real issue presented in Cantor was articulated by Justice Stevens as "whether the Parker rationale immunized private action which has been approved by a State and which must be continued while state approval remains effective."\textsuperscript{76} Having already determined that Parker had no direct bearing upon this issue, Justice Stevens proceeded to present the possible justification for the extension of the Parker rationale to private parties and the criteria which the state regulation would be required to meet. The justification proffered took the form of a two-pronged test:

First, if a private citizen has done nothing more than obey the command of his state sovereign, it would be unjust to conclude that he has thereby offended federal law. Second, if the State is already regulating an area of the economy, it is arguable that Congress did not intend to superimpose the antitrust laws as an additional, and perhaps conflicting, regulatory mechanism.\textsuperscript{77}

**State Domination of the Decision-Making Process**

The first part of this two-pronged test focuses upon the regulatory decision-making process. At the outset, the Court recognized obedience to a state command as clearly permissible activity.\textsuperscript{78} Seemingly, this comports with the criteria developed in Goldfarb v. Virginia State Bar. Goldfarb established that an exemption for private conduct will exist only where that conduct is required by the state acting in its capacity as sovereign.\textsuperscript{79} Both statements connote that compulsion is the relevant consideration. However, Justice Stevens appreciates that few, if any, parties do nothing more than obey a state command. Indeed, Justice Stevens states that such instances of statutorily required private conduct "typically . . . involve a blend of private and public decisionmaking."\textsuperscript{80} The implication is

\textsuperscript{75}Following his discussion of Parker v. Brown, Justice Stevens devoted the major portion of the opinion to a consideration of whether the Parker rationale should be extended to immunize Detroit Edison’s light bulb program.

\textsuperscript{76}96 S. Ct. at 3114.

\textsuperscript{77}Id. at 3117.

\textsuperscript{78}Id.

\textsuperscript{79}421 U.S. at 790.

\textsuperscript{80}96 S. Ct. at 3118.
that any participation in the decision-making process by the private business would constitute more than simple obedience. Consequently, this would disqualify the business from enjoying a state action exemption. The Cantor plurality would institute a more stringent test than that contemplated in the Goldfarb decision.

Justice Stevens buttressed this analysis by referring to specific prior instances where the Court held that mere state authorization,\textsuperscript{81} approval,\textsuperscript{82} encouragement,\textsuperscript{83} or participation\textsuperscript{84} in anticompetitive conduct conferred no immunity upon private businesses.\textsuperscript{85} All of these cases involved a blend of private and public decision-making in the initiation and enforcement of a particular state program.\textsuperscript{86} Moreover, in each instance, the business exercised sufficient freedom of choice in its participation in the anticompetitive program to justifiably hold it responsible for its conduct.\textsuperscript{87} In furthering this line of decisions, Cantor holds a private party responsible for its anticompetitive conduct whenever its participation in the state decision-making process is more than cursory.\textsuperscript{88}

Essentially, Cantor is saying that the decision to employ anticompetitive practices must unequivocally be that of the state to cloak private enterprise with an antitrust exemption. If private business has a hand in the final decision, then it seems the program is considered a private scheme conducted with state approval. The Court will not give such a plan the benefits of state sovereignty, but instead holds the parties accountable under the antitrust laws.

Detroit Edison was responsible, as are most public utilities, for the proposal of tariffs to the public utility commission. The light bulb program was submitted to the Commission as part of the utility's tariff proposal. Consequently, Detroit Edison and not the Commission exercised the option to create the light bulb program.\textsuperscript{89} Although Detroit Edison could not discontinue the program without prior Commission approval, it was free to present a new tariff excluding the light bulb program.\textsuperscript{90} If the Commission rejected such a

\begin{itemize}
\item \textsuperscript{81} Northern Securities Co. v. United States, 193 U.S. 297, 346 (1904).
\item \textsuperscript{82} Parker v. Brown, 317 U.S. 341, 351 (1943).
\item \textsuperscript{83} Goldfarb v. Virginia State Bar, 421 U.S. 773, 791 (1975).
\item \textsuperscript{84} See Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690 (1962).
\item \textsuperscript{85} 96 S. Ct. at 3118.
\item \textsuperscript{86} Id.
\item \textsuperscript{87} Id.
\item \textsuperscript{88} This criterion brings to mind the test applied by prior circuits which turned upon the question of where the ultimate decision-making authority lay. See text accompanying notes 42-44, supra. That rule, however, mandated a much shallower Court consideration than is required by Cantor v. Detroit Edison Co., 96 S. Ct. 3110 (1976).
\item \textsuperscript{89} Id. at 3118.
\item \textsuperscript{90} Id. at 3114.
\end{itemize}
tariff and ordered Detroit Edison to continue the program, that
would, presumably, have qualified Detroit Edison for a state action
exemption under the first part of the new, two-pronged test. The
decision to continue the anticompetitive activities would have
rested solely with the state. However, Detroit Edison never sought
to eliminate the light bulb program and forced the Court to examine
the utility’s involvement in the rate-making procedure.

The Court concluded that Detroit Edison’s participation in the
rate-making process was “sufficiently significant” to require con-
formity to federal antitrust laws. In effect, a regulated business
which has the power to choose whether to pursue potentially anti-
competitive programs must now consider the antitrust implications
of its decision. The regulated business cannot reap the benefits of
state action protections when that business has opted to pursue
anticompetitive activites. The Court reasoned that a regulated busi-
ness which has chosen to participate in an anticompetitive regula-
tory scheme is in a situation substantially similar to that of an
unregulated business. Since the unregulated enterprise must cope
with the antitrust implications of its activities, the regulated enter-
prise must likewise consider the antitrust proscriptions before en-
gaging in the regulatory program.

The Court ameliorates this decision somewhat by admitting that
“there may be cases in which the State’s participation in a decision
is so dominant that it would be unfair to hold a private party re-
sponsible for his conduct implementing it . . . .” But this concess-
sion is at best chimeric. If the decision-making process is dominated
by the state, the private party has no option to refuse participation
in the regulatory program. This melioration is merely a semantic
juxtaposition of the Court’s first prerequisite. When a state domi-
nates the decision-making process, it clearly presents a situation
where the regulated enterprise has “done nothing more than obey a
state command.” Regardless of how the state domination question
is determined, its resolution is a prerequisite for the ultimate appli-
cation of the state action exemption. Failure to satisfy this part of
Cantor’s two-pronged test precludes consideration of the delimiting
second part of the test.

Limiting the Scope of the Exemption

The second part of this test concerns the extent a private party’s
activities may be exempted from the antitrust laws by virtue of

91. Id. at 3119.
92. Id.
"state action." For the Court, a state action exemption will be implied only if an exemption is necessary to the continued effectiveness of the state regulation "only to the minimum extent necessary."93 The Court rejected the argument that the mere existence of pervasive state regulation in an area of the economy should automatically exempt a private regulatee from the antitrust laws.94 Justice Stevens proffered three reasons for this determination:

1. compliance with both state regulation and the antitrust laws does not necessarily demand satisfaction of inconsistent standards;
2. the inevitable subordination of the federal interest to state interests is not acceptable; and
3. since the light bulb market in Michigan is essentially unregulated, even the opposite conclusion as to congressional intent would not foreclose the enforcement of the antitrust laws as against Detroit Edison’s light bulb program.95

This approach is premised upon what the Court found to be the intent of Congress in passing the Sherman Act.98 Congress did not contemplate state regulatory agencies having greater power to exempt private conduct from the antitrust laws than that given federal regulatory agencies.97 As a result, the second prong of the Cantor test is identical to the standards used to measure federal regulatory legislation for purposes of implying exemptions to the antitrust laws.98 Although more restrictive than the tests promulgated by Parker’s progeny, the Court believed these new criteria do not foreclose a state action exemption to a properly situated business.99

**Noncompetitive vs. Competitive Market Areas**

The Court contends that compliance with both state regulatory

93. Id. at 3120.
94. Detroit Edison claimed that the Parker rationale essentially teaches that the federal antitrust laws were not meant to be applied to areas of the economy which are pervasively regulated by state agencies. It was asserted "that the competitive standard imposed by antitrust legislation is fundamentally inconsistent with the 'public interest' standard widely enforced by regulatory agencies. . . ." Id. at 3119.
95. Id.
96. The dissent was critical of the Court’s reliance upon congressional intent for its failure to reveal the sources of its divinations. For further discussion of congressional intent, see text accompanying notes 128-134 infra.
97. 96 S. Ct. at 3119.
99. The Court expressly assumed that there are situations in which the existence of state regulation should give rise to an implied exemption. 96 S. Ct. at 3120.
statutes and the federal antitrust laws does not necessarily demand satisfaction of inconsistent standards.\textsuperscript{100} All economic regulation does not necessarily suppress competition; indeed, regulation may serve to restore competition or its beneficial aspects to the economy. For example, regulation of public utilities is based upon the assumption that a private firm controls a natural monopoly making public controls necessary to reinstate the salubrious effects of competition.\textsuperscript{101} A public utility can conform with state regulatory statutes in the operation of its natural monopoly while complying with the federal antitrust laws when it competes in other areas of the economy. Since the light bulb market was not related to Detroit Edison's natural monopoly in the production and distribution of electricity, the utility was forced to comply with the antitrust laws in the sale of light bulbs—a competitive market.\textsuperscript{102}

The Court's use of public utilities and natural monopolies as an illustration of this principle is unfortunate. The language strongly implies that state regulation can provide an exemption only in non-competitive areas of the economy.\textsuperscript{103} This implication, if accepted, would virtually limit the existence of a state action exemption to public utilities only. But state regulation of public utilities is a practice of such long standing that few would advocate the imposition of competition upon them.\textsuperscript{104} The result is logical; the state action exemption would be restricted to those enterprises which are excused from competition, and the exemption would essentially be eliminated.

This result must be discredited. A closer examination of the language and tone of the opinion dissuades one from such an anomalous conclusion. Preceding the illustration, Justice Stevens cited \textit{Parker} as an example of "economic regulation in which the very purpose . . . is to avoid the consequences of unrestrained competition."\textsuperscript{105} Use of a non-monopolistic industry was at least an indication that the exemption can apply to state regulation expressly restraining competition.\textsuperscript{106}

Justice Stewart, in his dissent, also criticized the use of the public utilities illustration. He read Justice Stevens' analysis as allowing

\begin{flushright}
\textsuperscript{100} \textit{Id.} at 3119. See \textit{Hecht v. Pro-Football, Inc.}, 444 F.2d 931, 938 (D.C. Cir. 1971), cert. denied, 404 U.S. 1047 (1972).

\textsuperscript{101} \textit{But see} the minority's discussion of this line of reasoning, \textit{Id.} at 3135 n.13.

\textsuperscript{102} \textit{Id.} at 3120.

\textsuperscript{103} \textit{See id.} at 3135 n.13.

\textsuperscript{104} \textit{See generally Donnem, supra note 4.}

\textsuperscript{105} 96 S. Ct. at 3119.

\textsuperscript{106} \textit{Id.}
\end{flushright}
the exemption in those cases where state regulation is intended to restrain competition, while denying the exemption where the purpose is "duplicating the effects of competition—i.e., keeping prices down." In effect, this construction could reward businesses whose prices were raised by the suppression of competition while penalizing businesses where the regulation sought to keep prices down. As aptly recognized by Justice Stewart, this result would be untenable. Penalizing an abortive attempt to provide the beneficial aspects of competition while allowing an exemption for successful attempts to suppress competition would clearly fly in the face of congressional intent.

It would seem that the Court simply intended to indicate that a state action exemption for one purpose, such as the exercise of natural monopoly powers, does not automatically exempt a public utility from the antitrust laws in other competitive areas of the economy. In a competitive market, the regulated business in question would have to qualify for an exemption by separate reference to Cantor's two-pronged test. Since Detroit Edison was unable to do so in the light bulb market, the Court was compelled to deny it an exemption. This determination was not based solely upon a characterization of the activity as being within a competitive area of the economy. The Court focused on the quality and quantum of Michigan's involvement in the light bulb exchange program and held that the decision to implement this anticompetitive program must be irrefutably that of the state. The Court did not propose to foreclose legitimate areas of public concern from state regulation, be they competitive or not.

Subordination of Federal Interest

The Court further supported its restriction of the state action exemption by asserting that "even assuming inconsistency, we could not accept the view that the federal interest must inevitably be subordinated to the State's." Thus, the Court refused to permit the mere possibility of a conflict between state regulation and fed-

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107. *Id.* at 3135 n.13 (Stewart, J. dissenting).
108. This rationale will not bear its own weight. If compliance with a state program aimed at suppressing competition in non-monopoly industries—i.e., raising production—cannot give rise to Sherman Act liability, then surely compliance with a state program aimed at controlling the terms and conditions of service performed incident to the provision of a "natural monopoly" product cannot give rise to treble damages.

*Id.*
109. *Id.* at 3119.
eral antitrust policy to suggest an exemption to the antitrust laws.\textsuperscript{110} While admitting that there are instances where a state program warrants an implied exemption,\textsuperscript{111} the Court stated that the standards used for ascertaining the exemption’s scope must be at least as rigorous as the standards applied when federal regulatory legislation is at issue.\textsuperscript{112} Looking to the legislative history of the antitrust laws, the Court concluded that Congress never intended state regulatory agencies to have greater power to exempt private conduct from the antitrust laws than do federal regulatory agencies.\textsuperscript{113}

The Court has been extremely reluctant to imply antitrust exemptions to parties subject to federal regulation.\textsuperscript{114} Indeed, the Court will not imply an exemption without first determining that it is “necessary to make the [regulatory act] work, and even then only to the minimum extent necessary.”\textsuperscript{115} Applying this standard in \textit{Cantor}, the Court found an exemption unwarranted. Specifically, the Court determined that refusal to imply an exemption for Detroit Edison’s light bulb program would not impair the continued effectiveness of Michigan’s regulation of electric utilities.\textsuperscript{116} The Court examined the legislation creating the Michigan Public Service Commission and concluded that regulation of such a light bulb program was not a central purpose of the Commission.\textsuperscript{117} Therefore, implied repeal was not necessary in order to make Michigan’s regulatory scheme work.\textsuperscript{118}

In addition, the Court declared that the market for light bulbs in Michigan was essentially unregulated and that enforcement of the antitrust laws cannot be foreclosed in such an area of the economy. Even if Congress intended the antitrust laws to reach those competitive markets pervasively regulated by the state, this is not one of them.\textsuperscript{119} This rationale has little significance to the decision in \textit{Cantor} or to the future application of the \textit{Cantor} two-pronged test;

\textsuperscript{110} \textit{Id.} at 3120.
\textsuperscript{111} \textit{Id.}
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} \textit{Id.}
\textsuperscript{116} 96 S. Ct. at 3120.
\textsuperscript{117} MICH. COMP. LAWS ANN. § 460.501 (1967). The Commission’s primary function was to regulate the furnishing of electricity for the production of light, heat and power. \textit{Id.} at 3114.
\textsuperscript{118} Recent cases make it clear that the relevant “aspect of the agency’s jurisdiction must be sufficiently central to the purposes of the enabling statute so that implied repeal of the antitrust laws is ‘necessary to make the [regulatory scheme] work.’” Robinson, \textit{Recent Antitrust Developments: 1975}, 31 RECORD OF N.Y.C.B.A., 38, 57-58 (1976); see 96 S. Ct. at 3120 n.37.
\textsuperscript{119} 96 S. Ct. at 3119.
however, it may provide a ground upon which this decision could be distinguished or limited by future courts.

**The Dissent’s Criticism**

The dissenting Justices in *Cantor* argued: (1) the “implied immunity” doctrine was inapposite to cases involving state regulatory statutes;\(^\text{120}\) (2) the errant application of this federal test was simply “windowdressing” used to conceal judicial “second-guessing” of the necessity of particular state regulatory provisions;\(^\text{121}\) and, (3) the Court misread the congressional intent of the Sherman Act.\(^\text{122}\) For the dissenters, the second prong of the Court’s new test was merely a “vehicle for *ad hoc* judicial determinations of the substantive validity of state regulatory goals. . . .”\(^\text{123}\)

Justice Stewart first claimed that the federal “implied immunity” test could not be used to accommodate the federal antitrust laws with inconsistent state regulatory statutes. State, not federal, courts are the only forum empowered to substantively review state statutes.\(^\text{124}\) The *Cantor* situation was not analogous to those cases where a federal regulatory statute may be inconsistent with the antitrust laws. Where federal statutes are in controversy, federal courts are fully authorized to harmonize conflicting provisions.

In *Cantor*, the Court determined if the permitted light bulb program was “necessary” and “central” to the state’s regulatory scheme. Justice Stewart claimed this was an improper review of the state regulatory statute.

The dissent also termed the proposed process of conciliation as endorsing a return to the era of substantive due process.\(^\text{125}\) This criticism, however, cannot withstand close scrutiny. Since the state action exemption is essentially a doctrine of judicial creation,\(^\text{126}\) the Supreme Court can clearly modify, limit or entirely eliminate a

\(^{120}\) *Id.* at 3135. “Implied immunity” is the name given the doctrine and criteria by which exemptions for federal regulatory legislation may be implied.

\(^{121}\) *Id.*

\(^{122}\) *Id.* at 3136-40.

\(^{123}\) *Id.* at 3134.

\(^{124}\) See *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938).

\(^{125}\) The dissent finds this a process which “closely resembles the discarded doctrine of substantive due process.” 96 S. Ct. at 3134. However, *Cantor v. Detroit Edison Co.* does not parallel the cases, e.g., *Lochner v. New York*, 198 U.S. 45 (1905), in which a substantive due process type of analysis was used. In those decisions, the Court invalidated state regulatory laws as being inconsistent with vaguely defined perceptions of national policy which existed primarily in the hearts and minds of the Supreme Court. *Cantor* can be differentiated due to the fact that Michigan’s regulatory statute conflicts with a specific federal statute representing an established national policy.

\(^{126}\) Slater, *supra* note 10, at 80.
construction or doctrine which it has fostered. The refinement of the Parker doctrine in Cantor was premised upon a construction of the Sherman Act, not a substantive examination of Michigan's regulatory statute. In exploring the congressional history, the Court found no intention to exempt private anticompetitive activity unless it was clear that the state made the actual decision pursuant to a genuine state interest. To evaluate this genuine state concern, some inquiry into the "necessity" and "centrality" of the relevant state statute is required. If the Court was bound by the self-serving assertions of the states, the intent of the antitrust laws could clearly be thwarted. Consequently, the Court should not be precluded from engaging in this limited inquiry into the substantive aspects of state regulatory statutes.\textsuperscript{127} Such an inquiry is merely ancillary to enforcement of the antitrust laws as intended by Congress.

Lastly, the dissent criticizes the Court for couching its decision in terms of congressional intent without substantiating its construction through references to either the legislative history of the Sherman Act or the decision in Parker v. Brown. While the dissent correctly points out that the Court never fully addressed the intent behind the Sherman Act, an analysis of its legislative history would likely be of little help in answering the question posed in Cantor.\textsuperscript{128}

When the Sherman Act was enacted in 1890, the commerce clause was still being construed in an extremely narrow fashion.\textsuperscript{129} There was little conflict between the respective spheres of federal and state regulation. Congress, more likely than not, never actually considered whether the activity of the respective states was to be included within the ambit of the Sherman Act.\textsuperscript{130} This was implicitly recognized in Parker, where the Court found "nothing in the language of the Sherman Act which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."\textsuperscript{131} By corollary, there was nothing in the history or language of the Sherman Act to suggest that it was not intended to proscribe anticompetitive private activities directed by a state. Congress simply never dealt with the problem.

However, the absence of a congressional mandate should not preclude the Court from reaching the conclusion it did.\textsuperscript{132} The Sherman

\textsuperscript{127} See Posner, supra note 8, at 704; New Mexico v. American Petrofina, Inc., 501 F.2d 363, 369 (9th Cir. 1974).
\textsuperscript{128} Slater, supra note 10, at 83.
\textsuperscript{129} See, e.g., United States v. E. C. Knight Co., 156 U.S. 1 (1895).
\textsuperscript{130} Slater, supra note 10, at 84.
\textsuperscript{131} 317 U.S. 341, 350-51 (1941).
\textsuperscript{132} See Posner, supra note 8, at 704.
Act regulates industry to the fullest extent of Congress' authority under the commerce clause. Consequently, state regulation which "affects" interstate commerce and restrains competition, survives at the sufferance of Congress. If Congress desired to do so, it could clarify whether the antitrust laws apply to the states. In lieu of such congressional action, the task falls upon the Supreme Court.

**RAMIFICATIONS WITH RESPECT TO THE NOERR DOCTRINE**

A major concern raised in the dissent was the possible ramification of the decision in Cantor upon the Noerr doctrine. By excluding private enterprises from the state action exemption when their role in the decision-making process is "sufficiently significant," the Court may penalize the right to petition state governments or regulatory agencies. For Justice Stewart, the consequences will be that private businesses subject to state regulation will refuse to participate in the regulatory process due to the threat of treble damage liability. Public utility regulation is typically heavily dependent upon the participation of the regulated utility. Withdrawal of that expertise may imperil the continued efficient and effective regulation of those industries. There is a certain appeal and logic in this argument; however, examination of the Noerr doctrine reveals such fears are unfounded.

Noerr protects concerted activities conducted with the goal of influencing state legislation. The entire thrust of Noerr is to insure that the right to communicate special interests to the government is not infringed by the antitrust laws, even though motivated by a desire to promote advantageous, anticompetitive legislation. The attempt to influence legislation is immunized by Noerr; the immunity does not extend to private activities conducted as a result of any

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137. *Id.*


legislation. Although the dissent may be correct in the assertion that the significance of the *Noerr* doctrine is diminished, it does not detract from the fact that private anticompetitive activity in compliance with state law has never been immunized by *Noerr* alone.

**THE IMPACT OF CANTOR**

While the situation in 1977 is very different from that in 1942, the *Parker* rationale is undoubtedly still valid. However, in the wake of *Parker* an increasingly large sector of our economy has been placed beyond the pale of the antitrust laws with the growth of state regulation.\(^{140}\) Conflicting with that growth is an expanding trend toward a renewed emphasis upon ensuring competition through antitrust enforcement.\(^{141}\) A great deal of this state regulation may be of dubious importance when contrasted with this national policy favoring competition.\(^{142}\) Some mechanism beyond the *Parker* doctrine was needed to inspect the validity of these state statutes.

Although the *Parker* Court accepted some anticompetitive activity as a cost of dual sovereignty, *Cantor* held that the antitrust laws must take precedence over these qualitatively less important state interests. To accommodate this shift in emphasis, it was necessary for the Court to construe the *Parker* doctrine more restrictively than earlier lower courts.\(^{143}\) Since state regulatory interests and the antitrust laws could not be expanded to their maximum limits simultaneously, it was clear that one interest would have to yield to the other. Inevitably, the state interest in regulation was forced to retreat. Viewed from this perspective, the decision in *Cantor* is clearly consonant with a 1977 interpretation of the *Parker* doctrine.

**CONCLUSION**

The Supreme Court's decision in *Parker v. Brown* nurtured a doctrine whose vitality has been gradually eroded through a succession to maneuvers by courts suspicious of a tenet which allows states to nullify a primary federal policy. *Cantor v. Detroit Edison Co.* was the natural extension of this trend, resulting inevitably in a highly restricted *Parker* doctrine. *Cantor* will require that the state be the initial, dominant force behind the decision to implement an anti-

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142. See Donnem, *supra* note 4, at 950-58.  
143. See text accompanying notes 37-56 *supra*. 
competitive policy; otherwise, the regulated business must operate within the proscriptions of the antitrust laws. As a consequence, a plethora of state regulatory laws are bound to come under scrutiny by both state legislatures and private businesses subject to such regulation. Repeal of regulatory legislation may be one result, with confusion being a major by-product of Cantor. In any event, Cantor will certainly result in a larger section of the economy being exposed to the beneficial effects of the antitrust laws; however, the somewhat equivocal language of the decision may retard total application. Because the language in Cantor is susceptible to a variety of interpretations, an evenhanded application of its rationale may have to await further explication by the Supreme Court. Hopefully, the Supreme Court will not wait another thirty-four years before again addressing this issue.

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