ANTITRUST LAW—STATE ACTION EXEMPTION—PRIVATE ELECTRIC UTILITY'S CONDUCT IN AN UNREGULATED MARKET AREA AS APPROVED AND REQUIRED BY A STATE REGULATORY COMMISSION IS NOT EXEMPT FROM SHERMAN ACT APPLICATION—*Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976).

The Detroit Edison Company (Detroit Edison), a private electric utility and the exclusive supplier of electricity for southeastern Michigan, traditionally provided free light bulbs[1] to residential customers pursuant to its lamp exchange program.[2] Detroit Edison conducted the program in compliance with an approved rate tariff[3] filed

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[1] *See* Cantor v. Detroit Edison Co., 428 U.S. 579, 582–83 (1976). Although the light bulbs were provided to Detroit Edison's customers without additional cost, the program was not free. Brief for the Petitioner at 8 n.3, Cantor v. Detroit Edison Co., 428 U.S. 579 (1976). The program's cost had been paid indirectly by the customer as a component of the utility's Domestic Service Rate tariff approved by the state regulatory authority, the Michigan Public Service Commission. Brief for the Respondent at 4, Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) [hereinafter cited as Brief for Respondent]. Without making a profit from the lamp exchange program, Detroit Edison was able to provide customers with specially manufactured, longer-life bulbs at approximately half the retail market price of shorter-life ones. *See id.* at 8 n.16. The difference in bulb prices was attributed to the fact that "Detroit Edison, as [a] volume buyer, deal[t] directly with manufacturers" by competitive bid and was able to eliminate additional wholesale costs. *Id.* at 6, 8 n.16. Based on data from 1972 operations, one 100-watt Detroit Edison bulb lasted 1,350 hours and was exchanged at a cost of 15 cents to the utility. *Id.* at 8 & n.15. In comparison, it took two of petitioner's 100-watt bulbs to obtain a life of 1,350 hours at a cost of 60 cents. *See id.* at 8. Petitioner's wholesale cost for the shorter-life bulbs "was 21 cents . . . which he sold at retail for 32 cents . . . using the retail druggist's traditional 50% mark-up." *Id.* (citation & footnote omitted).

[2] Cantor v. Detroit Edison Co., 428 U.S. 579, 582–83 & n.5 (1976). The lamp supply program, initiated in 1886 to promote electrical consumption, provided Detroit Edison's new residential customers with light bulbs for their permanent fixtures and thereafter distributed bulbs in replacement for burned-out bulbs. *Id.* at 583 & n.5. Bulbs were exchanged through the utility's service centers in order to limit the program's coverage solely to Detroit Edison's customers. Brief for Respondent, *supra* note 1, at 5–6. An estimated 94% of the utility's residential subscribers utilized the lamp exchange services in 1970. Within the Detroit Edison service area, its light bulb distribution activities represented not more than 50% of all standard bulbs and approximately 23% of all bulb types marketed. 428 U.S. at 582 & n.4.

[3] The program was made effective "as a component of the service rate" by the Michigan Public Service Commission's 1972 order and tariff approval. *See* Brief for Respondent, *supra* note 1, at 15 & n.24. Operation of the lamp exchange program predated state regulation and was not incorporated into a tariff until 1916. *Id.* at 15. Subsequent "tariffs . . . included implicit approval of the lamp-exchange program." Cantor v. Detroit Edison Co., 428 U.S. 579, 583 (1976).

Absent a petition to the state agency for discontinuance, Detroit Edison's abandonment of the program was prohibited as a violation of the Commission's order and state law. *Id.* at 582–83. In 1964, the Commission approved Detroit Edison's petition for elimination of the lamp service to large commercial customers. Commercial customers

with the Michigan Public Service Commission (MPSC).[4]

Lawrence Cantor, a drugstore proprietor and electric light bulb retailer maintaining operations within Detroit Edison's service area, initiated a civil antitrust action against Detroit Edison in federal district court.[5] Cantor alleged that Detroit Edison's lamp exchange activities, in combination with the utility's monopolistic position in the distribution of electricity, unlawfully restrained trade in the electric light bulb market in violation of section 2 of the Sherman Act.[6] Detroit Edison contended that the state commission's approval of the company's light bulb exchange procedure rendered the utility's conduct action by the state and, thus, exempt from federal antitrust regulation.[7] The issue before the trial court was limited by stipulation to a determination of whether the utility's conduct was to be con-

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utilized flourescent lighting in preference to the lighting from standard bulbs available from the utility's bulb exchange. *Id.* at 583 & n.7. A corresponding rate adjustment was ordered by the Michigan Public Service Commission for this partial termination of service. *See id.*

[4] Cantor v. Detroit Edison Co., 428 U.S. 579, 582–83 (1976). The Michigan Public Service Commission is authorized by the state of Michigan "to regulate all public utilities in the state . . . including electric light and power companies." MICH. COMP. LAWS ANN. § 460.6 (1967). The agency has the

> power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service and all other matters pertaining to the formation, operation or direction of such public utilities [as well as] to hear and pass upon all matters pertaining to or necessary or incident to such regulation of all public utilities . . . .

Id. Electric utilities are required to petition the state "commission for authority to initiate" rate schedules for services and must receive the commission's approval before implementation. *Id.* § 460.552. Under section 460.6a, state approval is mandated before a utility may either directly or indirectly increase its rates by reducing services. *Id.* § 460.6a.

[5] Cantor v. Detroit Edison Co., 392 F. Supp. 1110 (E.D. Mich. 1974), *aff'd*, 513 F.2d 630 (6th Cir. 1975) (without published opinion), *rev'd and remanded*, 428 U.S. 579 (1976).

[6] Cantor v. Detroit Edison Co., 428 U.S. 579, 581 & n.3 (1976). Section 2 of the Sherman Act provides in pertinent part that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a misdeameanor [*sic*]." 15 U.S.C. § 2 (1970).

Petitioner also contended that the lamp supply program violated section 1 of the Sherman Act by tying sales of electricity and light bulbs—an arrangement prohibited under the Act as a "contract, combination . . . or conspiracy, in restraint of trade or commerce," 15 U.S.C. § 1 (1970). *See* 428 U.S. at 581 & n.3. Violation of section 3 of the Clayton Act, 15 U.S.C. § 14 (1970), was also asserted but not addressed by the Court. *See* 428 U.S. at 581 & n.3.

[7] *See* Cantor v. Detroit Edison Co., 392 F. Supp. 1110, 1111 (E.D. Mich. 1974), *aff'd*, 513 F.2d 630 (6th Cir. 1975) (without published opinion), *rev'd and remanded*, 428 U.S. 579 (1976).

sidered state action.[8]

Detroit Edison's motion for summary judgment was granted when the district court found that a federal antitrust exemption was applicable to the utility's conduct.[9] On appeal, the Sixth Circuit affirmed that decision.[10] Both courts based their holdings upon their interpretation of the state action antitrust exemption[11] formulated by the Supreme Court in *Parker v. Brown*.[12] This state action doctrine was deemed to shield private conduct, otherwise violative of the federal antitrust laws, from liability in circumstances where the activity had been sanctioned by the state.[13]

The United States Supreme Court granted certiorari[14] in order to review the applicability of the *Parker* rationale to this antitrust dispute.[15] It was the determination of a plurality of the Court in *Cantor v. Detroit Edison Co.*[16] that *Parker* was not applicable to the facts of *Cantor* because private action, although state approved, was at issue.[17] In speaking for the Court, Justice Stevens found that Detroit Edison's conduct constituted private action, characterized by individual initiative and consequently private liability.[18] Because "the

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[8] *See* Cantor v. Detroit Edison Co., 428 U.S. 579, 581–82 (1976). For a discussion of the state action doctrine in antitrust law, see notes 13, 35–58 *infra* and accompanying text.

[9] Cantor v. Detroit Edison Co., 392 F. Supp. 1110, 1111–12 (E.D. Mich. 1974), *aff'd*, 513 F.2d 630 (6th Cir. 1975) (without published opinion), *rev'd and remanded*, 428 U.S. 579 (1976).

[10] Cantor v. Detroit Edison Co., 513 F.2d 630 (6th Cir. 1975) (without published opinion), *rev'd and remanded*, 428 U.S. 579 (1976).

[11] Cantor v. Detroit Edison Co., No. 74-2136, slip op. at 2 (6th Cir., Apr. 23, 1975), *rev'd and remanded*, 428 U.S. 579 (1976); Cantor v. Detroit Edison Co., 392 F. Supp. 1110, 1112 (E.D. Mich. 1974), *aff'd*, 513 F.2d 630 (6th Cir. 1975) (without published opinion), *rev'd and remanded*, 428 U.S. 579 (1976).

[12] 317 U.S. 341 (1943), *discussed at* notes 20–31 *infra* and accompanying text.

[13] Cantor v. Detroit Edison Co., 392 F. Supp. 1110, 1111–12 (E.D. Mich. 1974), *aff'd*, 513 F.2d 630 (6th Cir. 1975) (without published opinion), *rev'd and remanded*, 428 U.S. 579 (1976).

[14] Cantor v. Detroit Edison Co., 423 U.S. 821 (1975).

[15] Cantor v. Detroit Edison Co., 428 U.S. 579, 581 (1976).

[16] 428 U.S. 579 (1976). The Court's opinion as written by Justice Stevens was joined by Justices Brennan, Marshall and White, and concurred separately in part by Chief Justice Burger. *Id.* at 603. Justice Blackmun concurred in the judgment. *Id.* at 605. A dissenting opinion was filed by Justice Stewart in which Justices Powell and Rehnquist joined. *Id.* at 614.

[17] *Id.* at 591–92. It had been anticipated that the Supreme Court's review of *Cantor* would prompt "a full dress reconsideration of *Parker*'s proper role in a federalism in which both the national government and the states possess sovereign powers." Handler, *The Current Attack on the* Parker v. Brown *State Action Doctrine*, 76 COLUM. L. REV. 1, 2–3 (1976) [hereinafter cited as Handler I] (emphasis in original).

[18] *See* 428 U.S. at 591, 593–94, 598. For a discussion of the impact of private initiative on a finding of state action, see note 77 *infra* and accompanying text.

legality of [an] act of the State of Michigan or any of its officials or agents" was not in question, the state action antitrust exemption was not applied.[19]

Although the roots of the state action exemption predate *Parker*, it is this decision which is most frequently relied upon as authority for that concept's existence.[20] In *Parker*, a raisin producer brought an action against the state director of agriculture[21] to enjoin enforcement of the California Agricultural Prorate Act.[22] The Prorate Act had created marketing programs for state agricultural products in order to reduce competition among producers and to stabilize prices for the purpose of preserving the vitality of the state's agricultural industries.[23] Specific marketing requirements for raisins had been

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[19] 428 U.S. at 591–92. The case was reversed and remanded for determination of the alleged antitrust violation committed by Detroit Edison. *Id.* at 603.

[20] *Id.* at 615–16 (Stewart, J., dissenting). As stated by the dissent,

> [w]hile *Parker* did not create the "so-called state-action exemption" . . . from the federal antitrust laws, . . . it is the case that is most frequently cited for the proposition that the "[Sherman] Act was intended to regulate private practices and not to prohibit a State from imposing a restraint as an act of government."

Id. at 615–16 (footnotes omitted) (brackets & emphasis by the Court) (quoting from Goldfarb v. Virginia State Bar, 421 U.S. 773, 788 (1975)). *See generally* Handler I, *supra* note 17; Slater, *Antitrust and Government Action: A Formula for Narrowing* Parker v. Brown, 69 NW. U.L. REV. 71 (1974).

Shortly after the passage of sections 1 and 2 of the Sherman Act, Act of July 2, 1890, ch. 647, §§ 1–2, 26 Stat. 209, the question arose in Lowenstein v. Owens, 69 F. 908 (C.C.D.S.C. 1895), as to whether these provisions applied to actions undertaken by state governments. *Id.* at 909–11. The circuit court in *Lowenstein* held that a state was neither a "person" nor a "corporation" regulated by the Act. *Id.* at 911.

Less than ten years later, the basic issue presented in *Lowenstein* was addressed by the United States Supreme Court in Olsen v. Smith, 195 U.S. 332 (1904). It was the holding of the *Olsen* Court "that no monopoly or combination in a legal sense can arise from the" performance by State licensed individuals of responsibilities imposed upon them by statute. *Id.* at 345. Hence, under *Olsen*, "no antitrust violation [could] be predicated upon the acts of private persons [performed] pursuant to a state regulatory statute." Handler, *Twenty-Fourth Annual Antitrust Review*, 72 COLUM. L. REV. 1, 4 (1972) [hereinafter cited as Handler II]. *See generally* Handler I, *supra* note 17, at 8–9; Comment, *Antitrust Immunity: State Action Protection Under* Parker v. Brown, 7 U.S.F.L. REV. 453, 455–56 (1973). Following *Olsen*, the state action issue lay dormant for almost fifty years until the Supreme Court's decision in *Parker*. Handler II, *supra* at 4.

[21] 317 U.S. at 344. In addition, the plaintiff Brown named as defendants the members of the State Agricultural Prorate Advisory Commission, the Program Committee members for Zone 1 and the administrators of the Prorate Act. *Id.*

[22] *Id.* The Court acknowledged that "[t]he declared purpose of the Act is to 'conserve the agricultural wealth of the State' and to 'prevent economic waste in the marketing of agricultural products' of the state." *Id.* at 346 (quoting from Act of July 22, 1939, ch. 894, § 1, 1939 Cal. Stats. 2485 (amending Act of June 5, 1933, ch. 754, title [statement of purpose], 1933 Cal. Stats. 1969) (current version at CAL. AGRIC. CODE § 58652 (West 1968))).

[23] 317 U.S. at 346. Brown asserted that the marketing program for raisins authorized as part of the California Agricultural Prorate Act violated the Sherman Act, ch. 647, 26

formulated by a committee of raisin producers authorized to implement the program following its approval by the director of agriculture.[24] The producer contended that enforcement of that Act would result in a trade restraint in violation of the Sherman Act.[25]

The *Parker* Court determined that state enforcement of the Prorate Act constituted neither a conspiracy to restrain trade nor the establishment of a monopoly.[26] Rather, it was "an act of government which the Sherman Act did not undertake to prohibit."[27] From an examination of both the language and the legislative history of the Sherman Act,[28] the Court found that no congressional "intent[ion] to

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Stat. 210 (1890) (current version at 15 U.S.C. §§ 1–7 (1970 & Supp. V 1975)); the commerce clause of the Constitution, U.S. CONST. art. I, § 8, cl. 3; and the Agricultural Adjustment Act, ch. 296, §§ 1, 2(a), 50 Stat. 246 (1937) (current version at 7 U.S.C. §§ 601–24 (1970)). 317 U.S. at 348–49.

[24] *See* 317 U.S. at 346–48. The California Agricultural Prorate Act established a two-tier administrative structure consisting of government appointees and private individuals to effectuate the Act's purposes. *See id.* at 346–47. Under the Act, the authority to grant commodity petitions to producers was delegated to the Agricultural Prorate Advisory Commission. *Id.* at 346. Commission members included the State Director of Agriculture and legislative appointees. *Id.* Individual producers selected by the Director of Agriculture were named to program committees. *Id.* These committees devised and administered commodity marketing programs subject to Commission approval after a public hearing. *Id.* at 347. Before marketing plans could be imposed by the Director, both Commission approval of the committee's program and the consent of 65% of the affected zone's producers was required. *Id.* While the California regulation involved substantial participation by nongovernmental representatives, its creation and enforcement by the state characterized the marketing activity as state action. *See* note 31 *infra* and accompanying text.

[25] 317 U.S. at 349.

[26] *Id.* at 352.

[27] *Id.* Chief Justice Stone, speaking for a unanimous Court, cited *Olsen* and *Lowenstein* for the proposition that the enactment of the marketing scheme by the state was an act of the "sovereign." *Id.* For a discussion of both the *Olsen* and *Lowenstein* cases, see note 20 *supra*. The consideration of state action was introduced into the *Parker* dispute at the request of the Supreme Court for the purpose of defining "the relationship between the sovereign States and the antitrust laws," 428 U.S. at 587, in the wake of the decision in Georgia v. Evans, 316 U.S. 159 (1942). *See* 428 U.S. at 587 & nn.15–16. In *Evans*, it was determined that a state was a " 'person' " under sections 7 and 8 of the Sherman Act and thus had the right to prosecute a civil action for treble damages against antitrust violators. 316 U.S. at 162. Section 8 of the Act defined "the word 'person,' or 'persons,' . . . to include corporations and associations." Sherman Act, ch. 647, § 8, 26 Stat. 210 (1890) (current version at 15 U.S.C. § 7 (1970)).

[28] *See* 317 U.S. at 350–51. It has been generally agreed that the policy behind the federal antitrust laws

> was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.

Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 (1940); *see, e.g.*, Northern Pac. Ry. v.

restrain state action or official action directed by a state" had ever existed.[29] The purpose of the Sherman Act was characterized as the proscription of anticompetitive conduct by private individuals.[30] The *Parker* Court concluded that since the marketing scheme had "derived its authority and its efficacy from the legislative command of the state," it was exempt from federal antitrust law.[31]

Since *Parker*, the courts have focused upon the nature of the sovereign's involvement in order to designate a particular act as action by the state. In examining the extent of the state's involvement, the courts have not applied the *Parker* doctrine solely on the basis of the parties to the suit. It has been utilized where litigants have had private party status,[32] where one litigant was a quasi-governmental

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United States, 356 U.S. 1, 4 (1958); McCormick, *Group Boycotts—Per Se or Not Per Se, That Is The Question*, 7 SETON HALL L. REV. 703, 703 & n.1, 762 & n.260 (1976); Comment, *Antitrust Immunity—Reevaluation & Synthesis of* Parker v. Brown*—Intent, State Action, Causation*, 19 WAYNE L. REV. 1245, 1247–49 (1973). For a summary of the purpose of the antitrust laws and their relation to regulated industries, see Jones, *Antitrust and Specific Economic Regulation: An Introduction to Comparative Analysis*, 19 ABA ANTITRUST SECTION 261 (1961).

[29] 317 U.S. at 351. The Court assumed that had the activity been conducted by private parties, it would have been illegal. *Id.* at 350.

[30] *See id.* at 350–51.

[31] *Id.* The Court also recognized that the state adopted and enforced the prorate program through the commission as a means of effectuating the sovereign's policy. *Id.* at 352. *Parker* has been interpreted as standing for the position that federal antitrust statutes "do not apply to state action taken in pursuit of public policy goals." Slater, *supra* note 20, at 91; *see, e.g.*, Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U.L. REV. 693 (1974).

[32] *See* Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1132 (5th Cir. 1975) (residential telephone users against municipally regulated monopoly concerning the utility's municipally imposed rate structure); Business Aides, Inc. v. Chesapeake & Potomac Tel. Co., 480 F.2d 754, 758 (4th Cir. 1973) (state regulated telephone utility's compliance with state tariff in refusing to supply equipment to a telephone answering service); Gas Light Co. v. Georgia Power Co., 440 F.2d 1135, 1140 (5th Cir. 1971) (challenge of electric utilities' state approved rates and practices by regulated natural gas utilities), *cert. denied*, 404 U.S. 1062 (1972); Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248, 252 (4th Cir. 1971) (gas utility's complaint regarding an electric utility's promotional practice that was not specified by tariff provisions but found to be conduct controlled by the state regulatory authority); Region Properties, Inc. v. Appalachian Power Co., 368 F. Supp. 630, 632 (W.D. Va. 1973) (complaint by private construction groups against a regulated utility's activities viewed as within the control and authority of the state); Fleming v. Travelers Indem. Co., 324 F. Supp. 1404, 1406–07 (D. Mass. 1971) (individual contests premium rate fixing by insurance companies where firms were subject to state regulation); Wainwright v. National Dairy Prods. Corp., 304 F. Supp. 567, 574 (N.D. Ga. 1969) (board of education against regulated milk distributor who complied with milk prices recommended by the state milk commission); *cf.* Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) (Court acknowledged existence of *Parker* doctrine in dispute involving trucking companies against railroads but decided the case on first amendment grounds). *But see* Hecht v. Pro-

body,[33] as well as where a state or state subdivision was charged with an antitrust violation.[34] When the courts have applied *Parker* they

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Football, Inc., 444 F.2d 931, 934–38, 947 (D.C. Cir. 1971) (joint venturers against professional football team involving exclusive rights to play football in federally run stadium), *cert. denied*, 404 U.S. 1047 (1972); Woods Exploration & Producing Co. v. Aluminum Co., 438 F.2d 1286, 1294–96 (5th Cir. 1971) (gas well owners against gas producers concerning the production of natural gas as regulated by the state), *cert. denied*, 404 U.S. 1047 (1972); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 30–31 (1st Cir.) (manufacturers of swimming pool equipment challenged the activities of a competitor that had been undertaken pursuant to the specifications of a municipal contract), *cert. denied*, 400 U.S. 850 (1970); Chastain v. American Tel. & Tel. Co., 401 F. Supp. 151, 158–59 (D.D.C. 1975) (state regulated telephone utility's refusal to provide mobile telephone service to a mobile phone distributor using equipment manufactured outside the Bell System); Macom Prods. Corp. v. American Tel. & Tel. Co., 359 F. Supp. 973, 977 (C.D. Cal. 1973) (telephone equipment manufacturer challenged state regulated telephone utilities' compliance with state tariffs that had been implemented without state review); Travelers Ins. Co. v. Blue Cross, 298 F. Supp. 1109 (W.D. Pa. 1969) (insurance company against state regulated nonprofit health insurance carrier).

[33] *See* Padgett v. Louisville & Jefferson County Air Bd., 492 F.2d 1258, 1260 (6th Cir. 1974) (taxicab operators challenging county air board's award of contract to competitor); Saenz v. University Interscholastic League, 487 F.2d 1026, 1028 (5th Cir. 1973) (slide rule manufacturer brought suit against state agency for eliminating the use of the manufacturer's slide rule from a scholastic competition); Ladue Local Lines, Inc. v. Bi-State Dev. Agency, 433 F.2d 131, 132, 134–35, 137 (8th Cir. 1970) (private bus company challenging state-created bus transportation authority's monopolization of school transportation contracts); Alabama Power Co. v. Alabama Elec. Coop., 394 F.2d 672, 677 (5th Cir.) (electric company against electric cooperative and governmental agencies to obstruct state financing of new generating facilities for the cooperative), *cert. denied*, 393 U.S. 1000 (1968); E.W. Wiggins Airways, Inc. v. Massachusetts Port Auth., 362 F.2d 52, 55–56 (1st Cir.) (fixed base operator against state airport authority's decision limiting the number of fixed base operators at a city airport), *cert. denied*, 385 U.S. 947 (1966); Allstate Ins. Co. v. Lanier, 361 F.2d 870 (4th Cir. 1966) (insurance firm against state commissioner of insurance challenging insurance premiums approved by the commissioner). *But see* Goldfarb v. Virginia State Bar, 421 U.S. 773, 788–92 (1975) (individuals against state and county bar associations objecting to minimum fee schedules for legal services); Norman's on the Waterfront, Inc. v. Wheatley, 444 F.2d 1011, 1018 (3d Cir. 1971) (liquor retailer seeking relief against enforcement of fair trade laws by alcoholic beverage board); Bale v. Glasgow Tobacco Bd. of Trade, Inc., 339 F.2d 281, 285–86 (6th Cir. 1964) (individual challenging tobacco board of trade's method of allocating selling time in tobacco warehouse); Asheville Tobacco Bd. of Trade, Inc. v. FTC, 263 F.2d 502, 509–10 (4th Cir. 1959) (trade association objecting to federal regulations for warehouse selling time); United States v. Oregon State Bar, 385 F. Supp. 507, 513, 517 (D. Or. 1974) (federal government's action to enjoin publication by state bar association of attorney fee schedules); Allegheny Uniforms v. Howard Uniform Co., 384 F. Supp. 460, 462–63 (W.D. Pa. 1974) (uniform manufacturer challenging state port authority's selection of uniform supplier).

[34] *See, e.g.*, City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431 (5th Cir. 1976). The Fifth Circuit's position in *Lafayette* that "[a] subordinate state governmental body . . . is not *ipso facto* exempt from the operation of the antitrust laws" reflects the present trend limiting application of the *Parker* exemption. *Id.* at 434 & n.6 (footnote omitted). Prior lower court decisions found the state action exemption relevant when a state subdivision's activity was challenged on antitrust grounds. Extension of the state

have acknowledged the principle that whenever a restraint of trade is the result of private action supported by governmental sanction no Sherman Act violation can occur.[35] There has been agreement, however, that "a general governmental immunity" from federal antitrust law should be disfavored[36] and that antitrust exemptions should not be " 'lightly implied.' "[37]

Parker has also been applied both to regulated competitive markets beyond the agricultural sector[38] and to state-regulated monopo-

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action immunity to political subdivisions followed from the theory that the "immunity available to 'official action directed by a state' " should apply to municipal conduct. Murdock v. City of Jacksonville, 361 F. Supp. 1083, 1091 (M.D. Fla. 1973) (quoting from Parker v. Brown, 317 U.S. at 351) (wrestling promoter against municipality); *see* Duke & Co. v. Foerster, 521 F.2d 1277 (3d Cir. 1975) (malt beverage manufacturer against municipalities and county); New Mexico v. American Petrofina, Inc., 501 F.2d 363 (9th Cir. 1974) (state against asphalt suppliers); Hitchcock v. Collenberg, 140 F. Supp. 894 (D. Md. 1956) (naturopathic practitioners against members of state medical board), *aff'd per curiam*, 353 U.S. 919 (1957).

[35] 317 U.S. at 352; *see, e.g.*, Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 136 (1961); Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1132 (5th Cir. 1975); E.W. Wiggins Airways, Inc. v. Massachusetts Port Auth., 362 F.2d 52, 55 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966); Asheville Tobacco Bd. of Trade, Inc. v. FTC, 263 F.2d 502, 509 (4th Cir. 1959) ("state action, not individual action masquerading as state action"); Travelers Ins. Co. v. Blue Cross, 298 F. Supp. 1109, 1110 (W.D. Pa. 1969).

[36] *E.g.*, Padgett v. Louisville & Jefferson County Air Bd., 492 F.2d 1258, 1259 (6th Cir. 1974). The court in George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 30 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970), rejected "the facile conclusion that action by any public official automatically confers exemption."

[37] United States v. Oregon State Bar, 385 F. Supp. 507, 509 (D. Or. 1974) (quoting from California v. FPC, 369 U.S. 482, 485 (1962)); *accord*, Allegheny Uniforms v. Howard Uniform Co., 384 F. Supp. 460, 463 (W.D. Pa. 1974). The *Parker* state action doctrine is distinguishable from those exemptions specified by federal statute in that it is an exemption judicially created and contingent upon the court's analysis of the antitrust laws. Since the Court "does not favor [or] lightly imply" exemptions, judicially created ones are reluctantly applied. Slater, *supra* note 20, at 80. For an extensive discussion of the statutory and judicial antitrust exemptions, see Pogue, *The Rationale of Exemptions from Antitrust*, 19 ABA ANTITRUST SECTION 313 (1961).

[38] For decisions in which the application of the *Parker* doctrine was considered in cases involving public utilities, see City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 433–35 (5th Cir. 1976); Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1132 (5th Cir. 1975); Business Aides, Inc. v. Chesapeake & Potomac Tel. Co., 480 F.2d 754, 756–58 (4th Cir. 1973); Gas Light Co. v. Georgia Power Co., 440 F.2d 1135, 1140 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972); Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248, 252 (4th Cir. 1971); Region Properties, Inc. v. Appalachian Power Co., 368 F. Supp. 630, 632 (W.D. Va. 1973); Macom Prods. Corp. v. American Tel. & Tel. Co., 359 F. Supp. 973, 977 (C.D. Cal. 1973). It is interesting to note that the applicability of this doctrine to state regulated utilities first appeared in the early 1970's. One view would automatically apply the *Parker* exemption to state regulated public utilities. Verkuil, *State Action, Due Process and Antitrust: Reflections on* Parker v. Brown, 75 COLUM. L. REV. 328, 340 (1975).

lies.[39] Generally, the courts have applied the *Parker* antitrust exemption where the regulated party has acted pursuant to a legislative directive.[40] In the context of regulated industries, several corollary

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Examples of other decisions involving regulated industries or professions where the applicability of the *Parker* doctrine has been considered include (1) *alcohol*: Norman's on the Waterfront, Inc. v. Wheatley, 444 F.2d 1011, 1018 (3d Cir. 1971); (2) *dairy products*: Morton v. National Dairy Prods. Corp., 287 F. Supp. 753, 763–64 (E.D. Pa. 1968), *aff'd on other grounds*, 414 F.2d 403 (3d Cir. 1969); *cert. denied*, 396 U.S. 1006 (1970); Wainwright v. National Dairy Prods. Corp., 304 F. Supp. 567, 573–74 (N.D. Ga. 1969); (3) *insurance*: Allstate Ins. Co. v. Lanier, 361 F.2d 870, 872–73 (4th Cir. 1966); Fleming v. Travelers Indem. Co., 324 F. Supp. 1404, 1407 (D. Mass. 1971); Travelers Ins. Co. v. Blue Cross, 298 F. Supp. 1109, 1112 (W.D. Pa. 1969); Miley v. John Hancock Mut. Life Ins. Co., 148 F. Supp. 299, 303 (D. Mass.), *aff'd mem.*, 242 F.2d 758 (1st Cir.), *cert. denied*, 355 U.S. 828 (1957); North Little Rock Transp. Co. v. Casualty Reciprocal Exch., 85 F. Supp. 961, 964 (E.D. Ark. 1949), *aff'd on other grounds*, 181 F.2d 174 (8th Cir.), *cert. denied*, 340 U.S. 823 (1950); (4) *legal profession*: Goldfarb v. Virginia State Bar, 421 U.S. 773, 790–92 (1975); United States v. Oregon State Bar, 385 F. Supp. 507, 509–12 (D. Or. 1974); (5) *licensed car dealers*: Semke v. Enid Auto. Dealers Ass'n, 456 F.2d 1361, 1365 (10th Cir. 1972); (6) *medical profession*: Hitchcock v. Collenberg, 140 F. Supp. 894, 902 (D. Md. 1956), *aff'd mem.*, 353 U.S. 919 (1957); (7) *tobacco*: Asheville Tobacco Bd. of Trade, Inc. v. FTC, 263 F.2d 502, 509 (4th Cir. 1959); (8) *transportation*: Padgett v. Louisville & Jefferson County Air Bd., 492 F.2d 1258, 1259 (6th Cir. 1974); Ladue Local Lines, Inc. v. Bi-State Dev. Agency, 433 F.2d 131, 135 (8th Cir. 1970); E.W. Wiggins Airways, Inc. v. Massachusetts Port Auth., 362 F.2d 52, 55–56 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966); United States v. Pacific Sw. Airlines, 358 F. Supp. 1224, 1226 (C.D. Cal.), *cert. dismissed*, 414 U.S. 801 (1973).

[39] *See, e.g.*, Gas Light Co. v. Georgia Power Co., 440 F.2d 1135, 1140 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972). Exemption of a regulated monopoly's act has been deemed appropriate where state regulatory measures foster monopolistic conditions—not competition—in the public's interest. United States v. Pacific Sw. Airlines, 358 F. Supp. 1224, 1228 (C.D. Cal.), *cert. dismissed*, 414 U.S. 801 (1973); *see, e.g.*, Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248, 252 (4th Cir. 1971); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 30–31 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970); Slater, *supra* note 20, at 91.

[40] Ladue Local Lines, Inc. v. Bi-State Dev. Agency, 433 F.2d 131, 135, 137 (8th Cir. 1970) (anticompetitive conduct "undertaken pursuant to legislative mandate" falls within a federal antitrust exemption); *see* E.W. Wiggins Airways, Inc. v. Massachusetts Port Auth., 362 F.2d 52, 55 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966); Travelers Ins. Co. v. Blue Cross, 298 F. Supp. 1109, 1112 (W.D. Pa. 1969).

Several tests concerning legislatively directed conduct have emerged. These guidelines include the following: (*1*) examination of the express purpose and scope of the directive as to the conduct authorized, Allegheny Uniforms v. Howard Uniform Co., 384 F. Supp. 460, 463 (W.D. Pa. 1974); *see* Goldfarb v. Virginia State Bar, 421 U.S. 773, 790–91 (1975); (2) ascertainment that the conduct is governed by "substantial state direction and involvement," United States v. Oregon State Bar, 385 F. Supp. 507, 511 (D. Or. 1974); and (*3*) determination that the conduct "was clearly within the legislative intent," City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434 (5th Cir. 1976); *see* Duke & Co. v. Foerster, 521 F.2d 1277, 1280 (3d Cir. 1975) (legislative intent could "be inferred from the nature of the powers and duties given to a particular government entity"); Jeffrey v. Southwestern Bell, 518 F.2d 1129 (5th Cir. 1975). For a discussion of tests for determining the applicability of the *Parker* state action exemp-

standards have evolved. Initially, the presence of state supervision was sufficient for application of the *Parker* doctrine.[41] A stricter version found state action where tariff provisions were the result of the regulatory agency's "considered judgment" and supervision.[42] Several

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tion, see 17 ABA UTILITY SECTION NEWSLETTER, No. 2, at 1 (Jan. 1, 1977).

It has been expressed that the various methods of determining and defining state action employed by the courts have not resulted in "a coherent doctrine of uniform application." Slater, *supra* note 20, at 108. The state action concept has been viewed as "unclear and difficult to apply . . . due to inattention by the Supreme Court and indecision by the lower federal courts." Verkuil, *supra* note 38, at 330–31 (footnote omitted); *see* Handler II, *supra* note 20, at 9, 11. Slater identified the variable definition of state action that has evolved as resulting from the dual nature of the state action concept presented in *Parker v. Brown*: *Parker* "declares that the Sherman Act was never intended to apply to state conduct, but at the same time the decision implies that not all state conduct will lie beyond the scope of that statute." Slater, *supra* at 108.

[41] *See* Allstate Ins. Co. v. Lanier, 361 F.2d 870, 872 (4th Cir. 1966). The state supervision principle was determinative in finding state action not a characteristic of a businessmen's tobacco board in Asheville Tobacco Bd. of Trade, Inc. v. FTC, 263 F.2d 502, 509 (4th Cir. 1959). The Board was authorized by the state to regulate auctioned tobacco sales. Since the Board's regulations were formulated by businessmen absent state supervision, the Board's conduct was identified as individual or private, not state action. *See id.* at 509; *accord*, Norman's on the Waterfront, Inc. v. Wheatley, 444 F.2d 1011, 1018 (3d Cir. 1971). *Contra*, Travelers Ins. Co. v. Blue Cross, 298 F. Supp. 1109, 1112 (W.D. Pa. 1969) ("regulation and supervision alone do not constitute a delegation of governmental authority"). *See generally* Teply, *Antitrust Immunity of State and Local Governmental Action*, 48 TUL. L. REV. 272, 285–98 (1974).

[42] Gas Light Co. v. Georgia Power Co., 440 F.2d 1135, 1140 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972). In *Gas Light*, the state action exemption was held to apply to the acts and practices of a regulated utility, where the utility's conduct was consistent with a rate schedule that had received the consideration of the state regulatory authority. 440 F.2d at 1140. The court characterized the consideration as "the state's intimate involvement with the rate-making process." *Id.* The regulation of public utility rates was cited as "a classic example of the *Parker v. Brown* [state action] exemption" in Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1134 (5th Cir. 1975) (emphasis in original). Referring to governmental rate formulation as "particularly 'sovereign,' " the *Jeffrey* court applied the standard developed in *Gas Light* and found the utility's disputed rate structure to be the result of the state's " 'meaningful regulation and supervision.' " *Id.* at 1133–34 (quoting in part from 440 F.2d at 1140). The *Gas Light* standard was influential in the formulation of the principle that antitrust immunity for utility activity pursuant to the utility's state tariff should be limited to instances where the tariff has been submitted to the "considered judgment" of the state regulatory authority. Business Aides, Inc. v. Chesapeake & Potomac Tel. Co., 480 F.2d 754, 756–57 (4th Cir. 1973). The "considered judgment" standard was determinative in the finding that a tariff automatically approved by the state thirty days after its filing lacked sufficient state consideration for application of the state action exemption. Macom Prods. Corp. v. American Tel. & Tel. Co., 359 F. Supp. 973, 977 (C.D. Cal. 1973).

The state action standard based on the regulatory agency's "considered judgment" of a utility tariff is inconsistent with the criterion indicative of state action enunciated by the court in Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248, 252 (4th Cir. 1971). The Fourth Circuit reasoned that where there existed a legislatively created, regulatory mechanism granting the state the authority to investigate utility con-

courts have taken the position that the regulated party's participation in the formulation of a tariff provision does not affect a finding of state action for conduct undertaken pursuant to that tariff.[43] Accordingly, one view has identified tariff specifications as "products" of the regulatory body even though the conditions of the tariff "originated with the regulated utility."[44] Other determinative factors in finding state action have rested upon whether a state commission approved[45] or "required"[46] the entity's conduct as specified by regulation.

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duct, that investigative inertia constituted "silent approval" sanctioning the utility conduct. "Silent approval" was said to bring the conduct within the privilege of state action. *Id.*; *accord*, Region Properties, Inc. v. Appalachian Power Co., 368 F. Supp. 630, 632 (W.D. Va. 1973). The *Washington Gas Light* case has been cited as espousing "the public utility/public calling" rationale of economic regulation in the public interest where an application of *Parker* is appropriate. Verkuil, *supra* note 38, at 353, 340. The "silent approval" theory involves minimal deliberation by government officials, and represents a potentially lower standard of regulation in the public interest than the "considered judgment" standard. *Cf.* Slater, *supra* note 20, at 101 ("fail[ure] to make an informed judgment" destroys the normal presumption that state regulation is in the public interest). *Washington Gas Light* has been noted as "[t]he case . . . go[ing] farthest in applying the *Parker* doctrine." Norman's on the Waterfront, Inc. v. Wheatley, 444 F.2d 1011, 1018 (3d Cir. 1971) (emphasis in original).

[43] *See, e.g.*, Gas Light Co. v. Georgia Power Co., 440 F.2d 1135, 1140 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972). The general theory is that state action may be found "although proposals may originate privately" as long as "their execution depends on state regulation or actual state implementation." Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248, 251 (4th Cir. 1971). *See also* Allstate Ins. Co. v. Lanier, 361 F.2d 870, 871 (4th Cir. 1966) (rates proposed by insurance rating bureau comprised of insurance companies designated within the *Parker* exemption where the "bureau was established and administered under the active supervision of the State"). That tariff provisions initiated by utilities fall within the state action sphere was an assumption inherent in Business Aides, Inc. v. Chesapeake & Potomac Tel. Co., 480 F.2d 754, 756–58 (4th Cir. 1973) (state action exemption applicable where utility followed conduct designated in the company's state tariff). *But see* notes 75–78 *infra* and accompanying text.

[44] Gas Light Co. v. Georgia Power Co., 440 F.2d 1135, 1140 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972).

[45] *See* Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248, 252 (4th Cir. 1971) (holding that the state's mere approval of private conduct constitutes sufficient state compulsion to establish antitrust immunity). *But see* United States v. Pacific Sw. Airlines, 358 F. Supp. 1224, 1228 (C.D. Cal. 1973) (occurrence of interstate merger not compelled as the result of commission approval since approval under California statute did not have the effect of a directive), *cert. dismissed*, 414 U.S. 801 (1973).

The general theory, however, is that the *Parker* antitrust exemption is applicable where the regulated conduct has been "specifically directed or approved" by a state authority. Chastain v. American Tel. & Tel. Co., 401 F. Supp. 151, 159 (D.D.C. 1975) (provisions in tariff too vague for classification as state requirement that company adopt an anticompetitive policy excluding mobile phones); *see* Norman's on the Waterfront, Inc. v. Wheatley, 444 F.2d 1011 (3d Cir. 1971); Handler II, *supra* note 20, at 10 & n.65.

[46] Goldfarb v. Virginia State Bar, 421 U.S. 773, 790 (1975). In designating activity as state action, the Supreme Court identified "[t]he threshold inquiry" to be "whether the

Although the lower federal courts have been unable to agree on the proper interpretation of the *Parker* doctrine, the Supreme Court has repeatedly denied certiorari to cases which raised the issue.[47] After thirty-two years of virtual silence in the area, the Supreme Court reconsidered the state action issue in *Goldfarb v. Virginia State Bar*.[48] The Court's review of the *Parker* doctrine in *Goldfarb* has had the effect of limiting the applicability of the exemption to situations involving conduct required by the state.[49]

The petitioners in *Goldfarb* were nonresidents of Virginia who sought to purchase real estate in that state. They had been unable to secure the services of any Virginia attorney for the execution of a title

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activity [had been] required by the State acting as sovereign." *Id.*; *see* Brenner v. State Bd. of Motor Vehicle Mfrs., Dealers & Salesmen, 413 F. Supp. 639, 646 (E.D. Pa. 1976). Application of the required activity standard, however, remains a fact sensitive issue centering on the scope of the sovereign's authority. In fact, one court has aptly noted that "[t]he concept of state action is not susceptible to rigid, bright-line rules." Woods Exploration & Producing Co. v. Aluminum Co., 438 F.2d 1286, 1294 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

Testing as to whether regulated conduct was ordered, approved, or required by the state as determinative of state action has been criticized as "play[ing] with words." Handler I, *supra* note 17, at 12–13. Proposed as a better test is a determination of "whether the conduct attacked . . . is sanctioned by state law." *Id.* at 13.

[47] *See* Handler I, *supra* note 17, at 10 & n.51; Slater, *supra* note 20, at 74 & n.13.

[48] 421 U.S. 773 (1975). Since 1943, the Supreme Court has not found a state action antitrust exemption using the *Parker* standard. *Goldfarb* has been referred to as the "Court's only major post-*Parker* explication of the 'state action' doctrine." City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 433 (5th Cir. 1976) (emphasis in original); *see, e.g.*, Handler I, *supra* note 17, at 2–3, 10–11; Slater, *supra* note 20, at 72 & n.6.

Other Supreme Court decisions have cited to *Parker* in passing. For example, in Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 389 (1951), *Parker* was cited to support the premise that a state cannot require individuals to follow price policies prohibited by the Sherman Act. *Parker* was also noted in Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 137 n.17 (1961), *discussed at* notes 123–25 *infra* and accompanying text, which held that the Sherman Act was not applicable to lobbying activities advocating legislation having anticompetitive repercussions. 365 U.S. at 135–40. *Parker* was mentioned in the state action exemption sense in California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 516 n.3 (1972), and again in Virginia State Bd of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976), *noted in* Note, *Professional Advertising Ban Yields to Consumer Right to Know: Commercial Speech Granted First Amendment Protection*, 8 SETON HALL L. REV. 67 (1976), as support for state regulation of pharmacists. For a further historical discussion of the use of the *Parker* decision by the Supreme Court, see Handler I, *supra* note 17, at 10–11 & n.53; Slater, *supra* note 20, at 74 n.13.

[49] *See* 421 U.S. at 790. For a discussion of the *Goldfarb* case, see Tyler, Goldfarb v. Virginia State Bar: *The Professions Are Subject to the Sherman Act*, 41 MO. L. REV. 1, 12–15 (1976); Note, *Attorneys' Minimum Fee Schedules*—Goldfarb v. Virginia State Bar, 17 B.C. INDUS. & COM. L. REV. 243 (1976); Comment, *Bar Association Minimum Fee Schedules and the Antitrust Laws*, 1974 DUKE L.J. 1164.

examination at a fee below that specified in the prevailing minimum fee schedule.[50] The schedule had been issued by a county bar association and was enforced by the state bar.[51] Alleging price fixing in violation of section 1 of the Sherman Act, the petitioners sued both the state and county bar associations.[52] Both bar groups raised the *Parker* state action doctrine as a defense in order to establish their immunity from application of federal antitrust law.[53]

The Supreme Court found the minimum fees advocated by the respective bar associations to be conduct violating the Sherman Act.[54] The Court dismissed the state action defense reasoning that the *Parker* exemption was applicable only to circumstances involving anticompetitive conduct "required by the State acting as sovereign."[55] Due to the absence of any statutory directive requiring the state and county bar associations to promulgate fee schedules, the *Parker* antitrust exemption could not be applied. The state had delegated the regulation of the legal profession to the Virginia supreme court and that court's issuance of ethical codes referring to advisory fee schedules neither directed nor required the state or county bar associations to implement those schedules.[56] The state bar was found to have "voluntarily joined in . . . private anticompetitive activity" by providing "disciplinary action" for bar members failing to comply with the recommended fee schedules.[57] Since the county bar association claimed that its conduct had been merely " 'prompted' " by the state bar's recommended fee scales, the Supreme Court determined that the *Parker* state action standard—which designated only conduct required by legislative directive to constitute state action—had not been met.[58]

In *Cantor*, Justice Stevens declared that the state action concept of *Parker* was not applicable to the controversy at bar.[59] In a portion

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[50] 421 U.S. at 775–78.

[51] *Id.* at 776–79.

[52] *Id.*

[53] *Id.* at 779. In addition, the county bar association claimed that the fee schedules had only an "incidental" impact on interstate commerce, *id.* at 783, and that the practice of law was exempt from the Sherman Act as a "learned profession." *Id.* at 785–87.

[54] *Id.* at 788, 790–93.

[55] *Id.* at 790.

[56] *Id.* The Court implied that had the state supreme court approved the fee schedule, state action might have been found. *Id.*

[57] *Id.* at 791–92.

[58] *Id.* at 791. The Court stated further that "anticompetitive activit[y] . . . compelled by direction of the State" constituted state action. *Id.*

[59] 428 U.S. at 591–92. The district court had reasoned that the MPSC's "affirmative

of his opinion actually rejected by a majority of the Court,[60] Justice Stevens found that there were two reasons why the rationale of the *Parker* decision was inapposite.[61] First, there were differences in the character of the litigants in that Parker was a state official, whereas Detroit Edison was a private entity.[62] Secondly, in *Cantor*, "there [was] no claim that any state action violated the antitrust laws."[63]

To support his belief that the issue before the *Parker* Court was whether the Sherman Act's prohibitions applied to "the sovereign State itself,"[64] Justice Stevens examined the arguments and briefs submitted to the *Parker* Court.[65] He determined that the *Parker*

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action . . . in approving the [utility's] rate structure" rendered Detroit Edison's lamp exchange program immune from antitrust liability under the state action concept described in *Parker* and post-*Parker* cases. Cantor v. Detroit Edison Co., 392 F. Supp. 1110, 1112 (E.D. Mich. 1974), *aff'd*, 513 F.2d 630 (6th Cir. 1975) (without published opinion), *rev'd and remanded*, 428 U.S. 579 (1976).

[60] 428 U.S. at 585–92; *see id.* at 603–05 (Burger, C.J., concurring in part); *id.* at 613 n.5 (Blackmun, J., concurring); *id.* at 616–17 (Stewart, J., dissenting); notes 104–10, 121 *infra* and accompanying text. The precedential weight of Justice Stevens' interpretation of the *Parker* holding is thus limited by the fact that it represents the opinion of only a minority of the Court.

[61] 428 U.S. at 591.

[62] *Id.* Justice Stevens observed that in writing the *Parker* opinion, Chief Justice Stone used phrases referring only "to official action taken by state officials." *Id.* Justice Stevens stated that "[t]he cumulative effect of these carefully drafted references unequivocally differentiates between official action . . . and individual action (*even when commanded by the State*)." *id.* at n.24 (emphasis added).

In his concurring opinion, Chief Justice Burger disagreed with Justice Stevens' view that the *Parker* doctrine applies only "to suits against state officials," noting that the determinative factor in employing the state action principle has been the nature of the controverted activity involved in the case and not the status of the litigants. *Id.* at 603–04. Limiting the applicability of the *Parker* exemption on the basis of parties in litigation has been identified as a "misconception" surrounding the *Parker* doctrine. Handler I, *supra* note 17, at 8–9. Numerous cases applying this state action exemption have involved antitrust challenges against participants other than state officials. *See* cases cited note 32 *supra*; Posner, *supra* note 31, at 694–95.

[63] 428 U.S. at 591.

[64] *Id.*

[65] *Id.* at 585–89. This was done in order to identify the extent of the state action concept defined by *Parker*. *Id.*

Among the arguments considered by the *Parker* Court, and reviewed by Justice Stevens, included one submitted by the Attorney General of California, who advocated against the use of the Sherman Act to sustain the district court's injunction. The state attorney general maintained "that even though a State is a 'person' entitled to maintain a treble-damage action as a plaintiff, Congress never intended to subject a sovereign State to the . . . Sherman Act." *Id.* at 588 & n.18. Justice Stevens felt that Chief Justice Stone's acceptance of the Attorney General's argument limited the issue addressed by the *Parker* Court and necessarily narrowed the *Parker* holding to apply to "official action" as differentiated from "individual action." *Id.* at 591 & n.24.

The dissenting Justices questioned the appropriateness of referring to "the adver-

decision established only that there can be no Sherman Act violation when a state officer has acted "pursuant to express legislative command."[66] Since the *Cantor* dispute questioned the imposition of antitrust liability on a state-regulated private utility where no official action was challenged, the *Parker* state action exemption sanctioning acts by state officers in their official capacity was held to be inappropriate.[67]

Those activities identified by Justice Stevens as not within the *Parker* state action sphere included purely private conduct[68] as well as "private action taken under color of state law."[69] He also noted that the state action doctrine credited to *Parker* is distinct from the broad state action concept developed in the context of civil rights litigation.[70]

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sarial briefs and arguments" when construing a written Supreme Court decision since "[a] contrary rule would permit the 'plain meaning' of our decisions to be qualified or even overridden by [the] briefs submitted by the contending parties." *Id.* at 617–18.

[66] *Id.* at 589. *Parker*'s state action immunity applies "even though comparable programs organized by private persons would be illegal." *Id.*

[67] *Id.* at 591–92.

[68] *Id.* at 591. Private conduct is action undertaken by an individual party or company in a competitive economic sector absent governmental regulation. *See id.*

[69] *Id.* at 590. Conduct taken "under color of state law" has been defined as the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." United States v. Classic, 313 U.S. 299, 326 (1941). As used in the context of section 1983 of the Civil Rights Act, 42 U.S.C. § 1983 (1970), " 'under color' of law" has been equated with the " 'state action' " concept associated with the fourteenth amendment. United States v. Price, 383 U.S. 787, 794 n.7 (1966) (quoting from 42 U.S.C. § 1983 (1970)).

Justice Stevens extensively explained the " 'under color of' state law" concept in reference to the Civil Rights Act in Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638, 653–58 (7th Cir. 1972) (en banc) (quoting from 42 U.S.C. § 1983 (1970)), *cert. denied*, 409 U.S. 1114 (1973), *noted in* Note, *The State Action and Due Process Doctrines*, 14 B.C. INDUS. & COM. L. REV. 317 (1972).

[70] 428 U.S. at 590–91.

The fourteenth amendment prohibits a state from "depriv[ing] any person of life, liberty, or property, without due process of law; [or] deny[ing] to any person . . . the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The amendment is not applicable to singularly private conduct not under color of state law. Shelly v. Kraemer, 334 U.S. 1, 13 (1948). For a discussion of "under color of state law," see note 69 *supra*.

As developed in the context of civil rights litigation, fourteenth amendment state action has been found to exist where "the private entity assumes powers or functions comparable to that of the state" as well as where the state has exercised significant involvement in private activity. Comment, *State Action And Public Utilities*, 24 DE PAUL L. REV. 1023, 1025 (1975). For a discussion of the development and extent of the fourteenth amendment state action doctrine, see Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974); Comment, *supra* at 1024–32. While application of the state action concept associated with fourteenth amendment disputes has broadened, application of the *Parker* state action exemption has become more limited. Verkuil, *supra* note 38, at 330 & n.14.

After deciding that *Parker* did not control the facts before it, a majority of the Court[71] went on to identify two reasons why "private conduct required by state law" might give rise to the implication of an antitrust exemption.[72] First, a majority of the members of the Court recognized the unfairness of attaching an antitrust penalty to private actions undertaken in compliance with a state command.[73] Detroit Edison's activity, however, was not deemed to be conduct devised and ordered exclusively by the state.[74] The tariff resulted from "a blend of private and public decisionmaking."[75] The Court determined that the state had not been the dominant participant in the tariff's formulation.[76] Although the state had participated in the decision, the Court named Detroit Edison as the initiator of the program and consequently found it reasonable to place responsibility for compliance with federal antitrust laws upon the utility.[77] The company had prompted state approval by proposing the program's inclusion as part of the state's regulatory scheme.[78] In addition the com-

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[71] This section of the opinion delivered by Justice Stevens represented the majority opinion as it was joined by Justice Brennan, Justice White, Justice Marshall and Chief Justice Burger. 428 U.S. at 581 n.†, 603.

[72] *Id.* at 592; *see id.* at 592–98.

[73] *Id.* at 592. But the Court stated that "[s]uch an assumption would not decide this case, if, indeed, it would decide any actual case." *Id.*

[74] *Id.* at 593–95.

[75] *Id.* at 592. The majority indicated that it would be unusual to find the situation where a private party acted solely to obey a state command. *See id.* Governmental regulation of private conduct within an industry is generally the product of individual and governmental input. This combination typified the interaction between Detroit Edison, as the regulated private party, and the MPSC, as the state regulator. *See id.* at 583. The opinion identified several Court decisions finding federal antitrust laws applicable where "state authorization, . . . approval, . . . encouragement, . . . or participation [was involved in the formulation of a tariff resulting] in restrictive private conduct." *Id.* at 592 & nn.26–30 (footnotes omitted).

[76] *Id.* at 593–94.

[77] *Id.* An analogous example of the use of private initiation was previously developed by the Supreme Court to determine the presence of state action for fourteenth amendment purposes. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974). The Court held that even though the utility-initiated provision for the termination of service for nonpayment had been approved by the regulatory authority, state action could not be said to exist since "the commission ha[d] not put its own weight on the side of the proposed practice by ordering it." *Id.* For a discussion of this case, see Note, *Public Utilities State Action*, 16 B.C. INDUS. & COM. L. REV. 867 (1975); Comment, *State Action and Public Utilities*, 24 DE PAUL L. REV. 1023 (1975).

Justice Stevens referred to prior decisions placing dual "initiation and enforcement" characteristics upon regulated private parties where it had been held that "the private party exercised sufficient freedom of choice to enable the Court to conclude that [the regulated party] should be held responsible." 428 U.S. at 593.

[78] *See* 428 U.S. at 583, 594. The fact that the lamp exchange program had been in

pany had the choice of terminating the service following the state's approval of a Detroit Edison petition for discontinuance.[79] The MPSC's mere approval of the tariff did not constitute "a sufficient basis for" the implication of an antitrust exemption.[80] Furthermore, Detroit Edison's involvement in the ratemaking process was "sufficiently significant" to render the activity comparable to the pricing decisions of an unregulated business and therefore subject to the federal antitrust laws.[81]

Secondly, a majority of the Court suggested that antitrust liability might not apply to "private conduct required by state law" where conflicting state and federal regulatory policies extended to one market area.[82] The Court maintained, however, that the mere existence of overlapping federal and state regulatory statutes for an economic sector would not automatically promote incompatible standards of conduct.[83] If an inconsistency did result, the federal plan could preempt the state scheme.[84] Additionally, the Court noted that even if it had found that the antitrust laws had not been intended to apply to governmentally regulated economic areas, that such legislation could apply to predominately unregulated markets.[85]

The Court observed that no inconsistency between state and federal standards surrounded Detroit Edison's light bulb distribution system.[86] Although the state exercised a regulatory program for the distribution of electricity in a monopolistic market,[87] it lacked a reg-

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operation before the state implemented its comprehensive program of utility regulation supported the theory that the risk for violating federal antitrust laws properly fell upon the utility. *See id.*

[79] *See id.* at 594; note 3 *supra*.

[80] 428 U.S. at 598.

[81] *Id.* at 594. The distribution of light bulbs was identified as an unregulated market. *Id.* at 584. Arguably, the lamp exchange program represented an activity not involving a public utility service. *Cf.* Priest, *Some Bases of Public Utility Regulation*, 36 MISS. L.J. 18, 25 (1964) (telephone company's publication of directory not universally characterized as having a public nature).

[82] 428 U.S. at 592–96.

[83] *Id.* at 595–96. For example, the *Parker* Court deemed the raisin marketing program sanctioned by the State of California as consistent with federal agricultural legislation that had been enacted for the purpose of "raising farm prices to parity levels." 317 U.S. at 358.

[84] 428 U.S. at 595. The Supremacy Clause of the Constitution declares that the "Constitution, and the laws of the United States . . . shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2; *see, e.g.*, Northern Secs. Co. v. United States, 193 U.S. 197, 336 (1904) (plurality opinion).

[85] 428 U.S. at 595.

[86] *Id.* at 596.

[87] *Id.* at 582; *see id.* at 595–96. In monopolistic markets, the general objective of

ulatory policy for the competitive light bulb sector.[88] Since preservation of competition is the function of federal antitrust legislation,[89] the Court concluded that no conflict existed between the state and federal standards. Detroit Edison was thus compelled to follow state regulations in conducting monopolistic activities in the distribution of electricity, and to follow federal antitrust standards for activities as a light bulb retailer in a competitive economic area.[90]

A majority of the members of the Court recognized that antitrust immunity for state regulated conduct could be implied only when the exemption was critical to the effectiveness of the state's regulatory scheme, and " ' "then only to the minimum extent necessary." ' "[91]

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public utility regulation is to provide "a substitute for competition." Note, *Regulation, Competition, and Your Local Power Company*, 1974 UTAH L. REV. 785, 787. The retail, geographic distribution of electricity generally represents "[a] natural monopoly [where] competition is inadequate to prevent the concentration of economic wealth and power." *Id.* at 787 n.19. The purpose of utility regulation is the protection of the public's interest by insuring that the utility continues to adequately provide its essential service to the public. This is accomplished through regulation of service rates that are reasonable to both consumers, in that they are not excessive, and to the utility's investors, in that the utility's revenues generate a fair rate of return. *See, e.g.*, Demsetz, *Why Regulate Utilities?*, 11 J.L. & ECON. 55 (1968); Ileo & Parcell, *Economic Objectives of Regulation—The Trend in Virginia*, 14 WM. & MARY L. REV. 547, 547–50 (1973); Priest, *supra* note 81, at 19–24; Note, *supra* at 786–89, 796–98. *See also* Munn v. Illinois, 94 U.S. 113, 126 (1876), where the standard was enunciated that public utilities are " 'affected with a public interest.' " *Id.* at 126 (quoting from Hale, *De Portibus Maris*, 1 A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 78 (F. Hargrave ed. 1787)) (spelling modernized by the Court).

[88] *See* 428 U.S. at 584, 596. The Supreme Court has recognized that

> [t]he nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body.

Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974).

[89] *See* note 28 *supra*.

[90] *See* 428 U.S. at 582, 596. Both Chief Justice Burger and Justice Blackmun concurred with Justice Stevens that the state's neutrality in regulating light bulb marketing supported the policy that competition should control. They saw the key fact for denial of an antitrust exemption to be the competitive nature of the light bulb sector, as distinct from the utility's monopolistic position for the distribution of electricity. *Id.* at 604 (Burger, C.J., concurring in part); *id.* at 612–14 (Blackmun, J., concurring).

[91] *Id.* at 597 & n.37 (quoting from Otter Tail Power Co. v. United States, 410 U.S. 366, 391 (1973) (Stewart, J., dissenting) (quoting from Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963))).

The Court determined in *Otter Tail* that a state and federally regulated utility's refusal to wholesale electric power to municipalities was a violation of the Sherman Act, where its refusal was "solely to prevent municipal power systems from eroding its monopolistic position." 410 U.S. at 378. In a dissenting opinion, Justice Stewart advocated "leaving governmental regulation to the [Federal Power] Commission instead of the invariably less sensitive and less specifically expert process of antitrust litigation."

Because the light bulb exchange program was not essential to the state's regulation of Detroit Edison's distribution of electricity, immunity from federal antitrust laws could not be implied.[92]

The final section of the *Cantor* opinion—a consensus by only a plurality of the Court[93]—responded to the contention that application of the antitrust laws would impose punitive treble damages upon regulated companies who had acted under the mistaken belief that state approval of their conduct provided a shield from antitrust liability.[94] The Court rejected the suggestion that there be treble damage immunity for conduct approved by a state regulatory authority[95] as being simplistic and inconsistent with the "required" activity standard

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Id. at 391. A settlement of the *Otter Tail* dispute by the federal and state authorities regulating the utility, instead of by the courts, is consistent with the principles of primary jurisdiction. *See id.* For a discussion of the primary jurisdiction doctrine, *see* note 129 *infra*. For an analysis of the *Otter Tail* case, see Allen, Otter Tail *And its Import For Regulated Utilities*, 9 WAKE FOREST L. REV. 407 (1973); Hale & Hale, *The Otter Tail Power Case: Regulation By Commission Or Antitrust Laws*, 1973 SUP. CT. REV. 99; Note, *Power Company's "Refusal to Deal" with Former Municipal Customers Found to Violate Sherman Act*, 5 SETON HALL L. REV. 92 (1973).

[92] 428 U.S. at 598.

[93] *Id.* at 581 n.†, 598–603. This section of the opinion concerning the imposition of treble damages as a factor for finding antitrust immunity was joined by Justices Brennan, White and Marshall. *Id.* at 581 n.†.

[94] *Id.* at 598–600. Justice Stevens advanced a second theory calling for the discontinuance of treble damage liability where state regulation increased the possibility of an antitrust violation. *Id.* He noted that modification of the character of the treble damages imposed against violators into a "discretionary rather than mandatory" penalty has repeatedly been sought. *Id.* at 599 n.39. One such proposal would permit the assertion of state compulsion of private conduct as a defense against punitive damages, but not against injunctive relief. *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 236 (1976). To question the appropriateness of imposing treble damages against a state regulated utility is, arguably, beyond the scope of the state action exemption issue debated in *Cantor*. For a discussion of possible remedies that could be applied to regulated activity found invalid under antitrust criteria, see Posner, *supra* note 31, at 735–39. An explanation of the deterrent and compensatory policies behind treble damage liability is given in Schaefer, *Passing-On Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis*, 16 WM. & MARY L. REV. 883, 883–84 (1975).

[95] 428 U.S. at 603. The dissenting justices forcefully contended against the imposition of treble damages upon public utilities as the penalty would be "payable ultimately by the companies' customers." *Id.* at 615. This analysis recognizes that the foremost objective of utility regulation is to insure the continuity of service to the public. An attempt to financially penalize the utility for an antitrust violation would in all likelihood be transferred to its investors in the form of decreased dividends. In an extreme sense, such a decrease could signal a reverberation dampening the utility's investment attractiveness in the capital market with the resulting danger that the utility would have inadequate capital to meet the company's operating and developmental needs. To sustain the company financially, utility revenues would have to be maintained. Revenues are derived from rates paid by the utility's users—the public. For a discussion of the objectives of public utility regulation, see note 87 *supra*.

previously utilized by the Court in *Goldfarb*.[96] Justice Stevens argued that under this standard, state action conferring immunity could be found where there existed "little more than approval of a private proposal."[97] As a result he noted that state regulatory authorities would have the power to curtail the effect of federal antitrust legislation even in instances where the state exerted only a "peripheral or casual" interest.[98] Justice Stevens contended that no generalization should control the application of an antitrust exemption. Rather, an interpretation of the Sherman Act should develop from the Court's "process of case-by-case adjudication of specific controversies."[99] Furthermore, he indicated that state approval of the utility's lamp exchange procedure had not increased the company's risk of acting in violation of the federal law since the program was operated at Detroit Edison's election. It was determined by a majority of the Court that the service was voluntarily offered to utility customers since the program had been in operation prior to the implementation of the state's regulatory scheme,[100] and by the fact that the company had never petitioned the state for permission to terminate the service.[101] Justice Stevens surmised that since it was the utility's option to operate the distribution program, the utility assumed the risk of possibly contravening the antitrust laws with its consequent penalty of treble damages.[102] He concluded that no unfairness would result from the enforcement of a treble damage penalty if Detroit Edison's conduct was found to be violative of the antitrust laws.[103]

Chief Justice Burger concurred with the determination that *Parker* was inapplicable, but not with Justice Stevens' analysis. He proffered the reason that *Parker* "[did] not address the precise issue raised" in *Cantor*.[104] *Parker* was distinguishable on the ground that

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[96] *See* 428 U.S. at 600. It was Justice Stevens' opinion that the *Goldfarb* Court considered the determination of "whether the anti-competitive activity had been required by the State acting as sovereign [to be] the 'threshold inquiry' in" defining conduct to be immune from the federal antitrust laws. *Id.* (quoting from Goldfarb v. Virginia State Bar, 421 U.S. at 790); *see* note 46 *supra*.

[97] 428 U.S. at 602.

[98] *Id.* at 603.

[99] *Id. See also id.* at 599 n.40.

[100] *See id.* at 594, 598.

[101] *See id.* at 594.

[102] *See id.* at 599–600.

[103] *Id.* at 599.

[104] *Id.* at 604 (Burger, C.J., concurring in part). It was the Chief Justice's opinion that the discussion of *Parker* beyond finding it to be inapplicable was "unnecessary to the result." *Id.*

the state had an independent regulatory purpose motivating its control of conduct in a competitive market.[105] In Chief Justice Burger's view, the *Cantor* Court, in comparison, questioned the application of the antitrust laws to the state-approved practices of a monopoly in a competitive market area where the state had no independent regulatory interest.[106]

Chief Justice Burger joined with the dissenting Justices in questioning the validity of invoking *Parker* only in situations where an act of a state official is challenged.[107] Chief Justice Burger indicated that the idea of distinguishing *Parker* on the basis of the parties involved was inconsistent with the Court's interpretation of the *Parker* doctrine enunciated in *Goldfarb*, where the challenged activity was the central element.[108] The Court in *Goldfarb*, according to Chief Justice Burger, did not deny an antitrust exemption on the basis that the state and county bar groups were " 'voluntary association[s] and not . . . state agenc[ies].' "[109] Rather, the *Cantor* dissent joined Chief Justice Burger in noting that the *Goldfarb* Court stressed the distinction between activity " 'prompted' " by the state where no antitrust exemption was created and activity required by the state where the exemption existed.[110]

Justice Blackmun also concurred in the result but suggested an alternative rationale for reaching the majority's conclusion.[111] He proposed that a rule of reason test which balanced the relative harm and benefit to society from "state-sanctioned anticompetitive activity" would provide a more accurate analysis for determining antitrust immunity.[112] It was suggested by Justice Blackmun that a process

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[105] *See id.*

[106] *See id.* Detroit Edison's activities as a light bulb distributor were similar to those of an unregulated entrepreneur. *See id.* at 584, 594.

[107] *Id.* at 603–04 (Burger, C.J., concurring in part); *id.* at 622, 625 (Stewart, J., dissenting).

[108] *Id.* at 624; *see id.* at 623–25. The dissent contended that to hold *Parker* inapplicable to circumstances involving "state-compelled private conduct flies in the face of . . . the *Goldfarb* opinion." *Id.* at 624 (emphasis in original); *see* Goldfarb v. Virginia State Bar, 421 U.S. at 790–92.

[109] *See* 428 U.S. at 604 (quoting from Goldfarb v. Virginia State Bar, 421 U.S. at 790).

[110] 428 U.S. at 604 (Burger, C.J., concurring in part); *id.* at 624 (Stewart, J., dissenting); *see* note 48 *supra*.

[111] *See* 428 U.S. at 605, 609–14. Justice Blackmun identified three alternative standards as invalid for characterizing conduct as exempt from the antitrust laws. These invalid standards included the finding that a specific activity was required by the state, crediting a private party rather than the state as the conduct's initiator, and finding from evidence of the state's "affirmative articulation" that the state sanctioned the conduct. *See id.* at 609–10.

[112] *Id.* at 610–12. The rule of reason test is a standard that has been utilized by the

similar to that associated with equal protection review could be used in applying the rule of reason test to determine whether or not there existed substantial justification for a given anticompetitive regulatory program.[113] Justice Blackmun stated that "our constitutionally mandated task . . . is the balancing of implicated federal and state interests with a view to assuring that when these are truly in conflict, the former [will] prevail."[114] He could foresee little difficulty in applying this balancing approach in light of the Court's familiarity with the harm against benefit analysis, especially as used in the area of interstate commerce.[115] Under a rule of reason test, antitrust exemptions would be warranted where "the protection of health or safety" was identified as the regulatory purpose.[116] By applying these standards, Justice Blackmun concluded that an antitrust exemption should not be applied to Detroit Edison's conduct since the light bulb market was neither a natural monopoly nor an unstable competitive market necessitating state controls in the public interest.[117]

Justice Stewart, writing for the dissent, identified the issue in *Parker* to be "whether the [state] statute was pre-empted by the Sherman Act, not whether sovereign States were immune from suit under the Sherman Act."[118] The dissent contended that Justice Stevens had misread the briefs submitted to the *Parker* Court, which resulted in the improper identification of that case's issue and holding.[119] The California marketing scheme was viewed as a plan the state, " 'as sovereign, imposed . . . as an act of government which

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courts to determine antitrust violations. Under the rule of reason standard, acts causing trade restraints that injure the public's interest are deemed unreasonable and violative of the antitrust laws. *See* United States v. American Tobacco Co., 221 U.S. 106, 179–80 (1911). For a discussion of the rule of reason as contrasted with the per se violation standards used in antitrust decisions, see Loevinger, *The Rule of Reason in Antitrust Law*, 19 ABA ANTITRUST SECTION 245 (1961); McCormick, *supra* note 28, at 703–07 & nn.2–8; Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 MICH. L. REV. 1139, 1150–52 (1952).

[113] 428 U.S. at 611.

[114] *Id.*

[115] *Id.* at 611–12. One leading commentator has suggested the use of a rule of reason approach when testing the accommodation of state regulations and federal antitrust laws. Posner, *supra* note 31, at 705–06.

[116] 428 U.S. at 611.

[117] *See id.* at 613–14. Justice Blackmun reasoned that state regulation of a private monopoly was valid where the regulation had the effect of simulating competitive forces. In those circumstances, the purpose for the enactment and for the federal antitrust laws would be consistent. *Id.* The state's interest in regulating Detroit Edison's activities as the monopolistic supplier of electricity was to protect the utility's rate payers from "excessive prices." *Id.* at 611.

[118] *Id.* at 618; *see id.* at 618–21 & nn.6 & 8.

[119] *Id.* at 621; *see id.* at 617–22.

the Sherman Act did not undertake to prohibit.' "[120] This finding led to the conclusion that Justice Stevens' interpretation of the *Parker* holding "trivialize[s] that case to the point of over-ruling it, . . . flies in the face of the decisions of this Court that have interpreted or applied *Parker*'s 'state action' doctrine, and is unsupported by the sources on which the plurality relies."[121] Justice Stewart then proposed two theories for finding a state action exemption for Detroit Edison's conduct.[122] First, the private utility's participation, as initiator in the regulatory process for tariff adoption was deemed to be protected by the principles determined in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*[123] That case found a publicity campaign that was intended to sway legislative members to adopt anticompetitive policies detrimental to the trucking industry was not violative of the Sherman Act.[124] The lobbying activities in *Noerr* were considered to be analogous to the utility's participation in the state regulatory process.[125] To find otherwise would "penalize the [utility's] right to petition" the state regulatory agency.[126] Secondly, the utility's required conduct was exempt from antitrust law by the principles of *Parker* and *Goldfarb*.[127] The dissent also argued that the

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[120] *Id.* at 622 (quoting from Parker v. Brown, 317 U.S. at 352).

[121] 428 U.S. at 616–17 (footnote omitted) (emphasis in original).

[122] *Id.* at 624–40 (Stewart, J., dissenting).

[123] 365 U.S. 127 (1961); *see* 428 U.S. at 622–26. The relevance of invoking the principles established in *Noerr* to contradict the *Cantor* Court's no-exemption conclusion on the basis of Detroit Edison's tariff proposal to the state is not novel. It has been commented that "*Parker* and *Noerr* problems frequently go hand-in-hand, since a plaintiff is likely to attack the defendant's efforts to move the state to act, as well as whatever state action ultimately ensues." Handler II, *supra* note 20, at 12 (emphasis in original).

[124] 365 U.S. 127 (1961), *noted in* 47 CORNELL L. Q. 250 (1962); 81 HARV. L. REV. 847 (1968).

[125] *See* 428 U.S. at 624.

[126] *Id.* at 627. Justice Stewart warned that the *Cantor* decision would cause utilities to refrain from submitting recommendations to regulatory authorities in order to avoid the risk of antitrust liability and the threat of treble damages that would accompany state implementation of any utility proposal. This reaction would reduce the flow of information obtained voluntarily by government agencies from utility companies and possibly decrease the efficiency and effectiveness of the regulatory process. *Id.*; *see* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. at 139; 81 HARV. L. REV. 847, 849–50 (1968). It is questionable whether utilities would actually refrain from submitting tariff proposals that they view to be in their economic interest.

[127] 428 U.S. at 624. For a discussion of the antitrust exemption for activity required by the state, see notes 51–54 *supra* and accompanying text. Justice Stewart criticized the majority's reference to Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), as being inapposite. He drew the distinction between the two cases on the ground that *Jackson* involved application of the fourteenth amendment whereas *Cantor* involved a question of a Sherman Act violation. The dissent implied that the state action concepts cannot be equated: "[t]he latter is a question of legislative intent, not constitutional law." 428 U.S. at 624 n.10.

Supreme Court's determination that the lamp exchange program was not " ' "sufficiently central" ' " to the state's plan for regulation of the monopoly represented an intrusion by the Court into the state's discretionary power to regulate in the public interest.[128]

By determining the antitrust exemption issue in this case, the Court seemed to indicate that consideration of the *Cantor* dispute was not more properly a matter of state concern falling within the doctrine of primary jurisdiction.[129] This view is evidenced by the fact that both the Supreme Court and the lower courts in *Cantor* were silent regarding application of the primary jurisdiction doctrine.[130] Arguably, the absence of the primary jurisdiction doctrine from the *Cantor* determination resulted from the Court's inference that the state lacked a regulatory policy for light bulb marketing,[131] and that no purpose would be served by referring the issue to the administrative agency for clarification of its regulatory policy in approving the utility's distribution program.[132]

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[128] 428 U.S. at 630 (Stewart, J., dissenting) (quoting from *id.* at 597 n.37 (majority opinion) (quoting from Robinson, *Recent Antitrust Developments: 1975*, 31 REC. N.Y.C.B.A. 38, 57–58 (1976))).

[129] Primary jurisdiction provides the basis for the stay of a federal court determination pending referral of certain issues to a particular administrative body. In order for a court to accommodate both regulatory and antitrust interests, the agency is allowed to render the initial judgment on the issue and define its purposes for instituting the regulation. The court retains its jurisdiction to review any substantive issues relating to the agency's regulation. K. DAVIS, ADMINISTRATIVE LAW TEXT §§ 19.01, .05–.06 (3d ed. 1972); *see, e.g.*, Botein, *Primary Jurisdiction: The Need For Better Court/Agency Interaction*, 29 RUTGERS L. REV. 867, 876–77 (1976); Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037 (1964).

[130] *See* 428 U.S. 579 (1976); Cantor v. Detroit Edison Co., No. 74-2136 (6th Cir. Apr. 23, 1975), *rev'd and remanded*, 428 U.S. 579 (1976); Cantor v. Detroit Edison Co., 392 F. Supp. 1100 (E.D. Mich. 1974), *aff'd*, 513 F.2d 630 (6th Cir. 1975) (without published opinion), *rev'd and remanded*, 428 U.S. 579 (1976).

[131] *See* 428 U.S. at 584–85.

[132] This analysis is supported by a Fifth Circuit opinion subsequent to *Cantor* that involved similar circumstances. Citing *Cantor*, the Fifth Circuit held in Litton Syss., Inc. v. Southwestern Bell Tel. Co., 539 F.2d 418 (5th Cir. 1976), that where a regulated utility's conduct had been deemed to be self-initiated and "routinely acquiesced in by [a state] regulatory board," that a direction to the state agency for "prior reference was an abuse of discretion" by the lower court. *Id.* at 423, 424.

For cases where the doctrine of primary jurisdiction has been applied to private claims of federal antitrust violation by state regulated utilities, see Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248, 252 (4th Cir. 1971) (exhaustion of administrative remedies before court adjudication of federal antitrust issues); Region Properties, Inc. v. Appalachian Power Co., 368 F. Supp. 630, 633 (W.D. Va. 1973) (whether utility conduct violates state regulations rests with the state agency); Macom Prods. Corp. v. American Tel. & Tel. Co., 359 F. Supp. 973, 977 (C.D. Cal. 1973) (doctrine applicable where agency's determination will substantially aid the antitrust proceedings); CSI/Communication Syss., Inc. v. South Cent. Bell Tel. Co., 346 F. Supp.

One aspect of the *Cantor* decision which deserves criticism is Justice Stevens' unwarranted limitation of the *Parker* holding. It can be argued on two grounds that *Parker* was incorrectly held inapplicable to the facts of the *Cantor* dispute.

First, by distinguishing *Parker*, Justice Stevens eliminated from consideration the Supreme Court's review and interpretation of that case as rendered in *Goldfarb*.[133] In *Goldfarb*, the Court found that the *Parker* state action exemption was applicable to circumstances where conduct had been required by the state.[134] The Court in *Cantor*, however, was apparently hesitant to utilize the *Parker-Goldfarb* required activity standard to decide the antitrust exemption issue, despite the fact that the utility's program was technically required by the state as part of a tariff provision.[135] Without addressing *Goldfarb* directly, a majority of the Court looked beyond the fact that Detroit Edison was required by state law to comply with the company's state approved tariff, and reasoned that the state's requirement of the conduct was not sufficient for the implication of an antitrust exemption.[136] Among the determinative factors was the consideration that not only had the utility sponsored the lamp program by proposing its inclusion in the state tariff, but also that the utility had the opportunity to petition the state for approval to discontinue the program.[137] By not addressing the *Goldfarb* decision, the Justices shifted the focus of the state action determination away from consideration that the state activity had been required by the regulatory mechanism. The Court decided to evaluate the activity conducted by the utility in a competitive economic area as if it had been undertaken by an unregulated private business.[138]

Secondly, Justice Stevens' interpretation of *Parker* as applicable only to cases where a state official is a party[139] represents a significant limitation of that case without regard to a substantial number of prior lower court decisions applying *Parker* to private litigants.[140] Admit-

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487, 488 (E.D. Tenn. 1971) (utility's intimidating activities is a question for state and federal regulatory agencies).

[133] For a discussion of the *Goldfarb* decision, see notes 49–58 *supra* and accompanying text.

[134] 421 U.S. at 790–91. Finding that the activity in question had not been required by the state, the *Parker* doctrine was held not to control. *Id.*

[135] *See* 428 U.S. at 594; notes 77–79 *supra* and accompanying text.

[136] *See* 428 U.S. at 598.

[137] *See id.* at 594.

[138] *See id.*

[139] *Id.* at 591–92.

[140] *See* note 32 *supra* and accompanying text.

tedly, Justice Stevens' limitation of *Parker* on the basis of parties was a weak response to the strong *Parker* arguments stressed in the numerous court decisions that applied the *Parker* doctrine in circumstances involving state regulation of privately owned utilities.[141] In effect, Justice Stevens' dismissal of that case and his refusal to reconcile that dismissal with the decisions of the lower federal courts interpreting *Parker*[142] represents a repudiation of those holdings. The future viability of Justice Stevens' limitation of *Parker* remains to be seen, especially since his opinion was joined by only a plurality of the Court.[143]

Justice Stevens' decision to bypass *Parker* should be construed as a means to reinstate the broad ambit of the Sherman Act. It reaffirms the policy of permitting antitrust exemptions in areas where governmental involvement in regulation is remote. This insures the effectiveness of federal antitrust laws by maintaining the reach of federal regulation into competitive market areas even where they are ostensibly subject to state regulation. Limitation of antitrust exemptions in competitive economic sectors is consistent with the purpose of federal antitrust legislation in checking anticompetitive business practices in areas where competition is desired.[144] To have found state action in this case would have excluded a competitive sector from the control of federal antitrust law.

The portion of the *Cantor* decision agreed to by a majority of the Court decidedly affects the field of public utility regulation. The *Cantor* decision places the responsibility for compliance with the federal antitrust laws upon private utility companies, even though state regulated, where the private utility at its option has undertaken the controverted conduct in a competitive market area.[145] Implicit in the decision is the rule that only utility conduct initiated by the state and therefore forced upon the regulated party can be shielded from application of the antitrust laws. Here, the utility's risk in violating the antitrust laws was not unduly increased by the state's approval of that conduct because the utility could be credited with the conduct's initi-

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[141] *See* note 38 *supra* and accompanying text.

[142] *See* notes 32–46 *supra* and accompanying text.

[143] *See* note 60 *supra* and accompanying text.

[144] For a discussion of the purposes of the Sherman Act, see note 28 *supra*. Justice Stevens stated that to allow mere approval of conduct to give rise to an antitrust exemption would "give a host of state regulatory agencies broad power to grant exemptions from an important federal law for reasons wholly unrelated either to federal policy or even to any necessary significant state interest." 428 U.S. at 603.

[145] *See* 428 U.S. at 593–94, 598.

ation and continuance.[146] Accordingly, Justice Stevens' view, that treble damages would remain an appropriate penalty for utilities found to be in antitrust violation, is consistent with the theory that businesses should bear the responsibility for antitrust infractions.[147]

There is no indication that a majority of the Court considered whether or not their finding would adversely influence the effectiveness of the government's regulation, in the public interest, of privately owned public service businesses. An appropriate policy consideration would have been whether the regulated party's reaction to the *Cantor* decision, would be to abstain from volunteering possible regulatory schemes or proposals for tariff provisions.[148] A reduction in the free-flow of information and cooperation between the regulatory authority and the regulated entity could result. No doubt, however, utilities will continue to propose tariff specifications that benefit them economically while taking precautions to ascertain the antitrust repercussions of the proposed practice.

For their operations in competitive sectors, the *Cantor* opinion allows antitrust responsibility to fall upon the regulated party. Placing the antitrust burden upon the utility places a corresponding obligation upon the regulators to object to the incorporation of anticompetitive activity into tariff schedules. In fulfillment of their function of regulating in the public interest, regulatory authorities are responsible for consideration of the interests of parties in the tariff proceeding and those affected by its implementation, including the consumer, the utility's investors, and competitors operating within the regulated market area.[149] The *Cantor* decision, therefore, does not place any hardship on either the regulated party or the regulator. It is a decision requiring both the regulated entity and the regulator to be concerned that utility conduct, specified by state tariff, complies with federal antitrust legislation.

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[146] *See id.*

[147] *See id.* at 600.

[148] In criticizing the majority's decision, the dissenting Justices anticipated that utility companies would react to the *Cantor* decision by refraining from "active participation" in the regulatory process. *Id.* at 627. This result was expected to decrease the efficiency and, subsequently, the effectiveness of regulation. *Id.*

[149] For a discussion of utility regulatory objectives, see note 87 *supra*. A regulatory agency's approval of conduct potentially violative of the antitrust laws is arguably regulation adverse to the public interest in light of the possible treble damage burden that would be transferred to the utility's rate payers. *See* note 95 *supra* and accompanying text.

The *Cantor* determination represents a pro-consumer determination by the Court. It is consumer-oriented in that the decision to disallow an antitrust exemption affirms the application of the federal antitrust statute and its policy promoting competitive economic conditions and the benefits resulting to the consumer from such a system.[150]

The *Cantor* Court found that those who are regulated cannot hide behind the state when their conduct in an unregulated competitive market is challenged as violative of the antitrust laws. The decision reflects an affirmative application of antitrust policy and stands as a warning to utility management to act pursuant to federal antitrust legislation.

Ann DeBevoise Stevens

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[150] By taking this approach, the Justices considered the long-term economic benefits to the consumer from a competitive economic system rather than the immediate economic benefit available to the utility's customers under the distribution program. At the time the action arose, Detroit Edison provided bulbs to its customers at approximately half the retail market price. *See* note 1 *supra*.