
Follow this and additional works at: https://digitalcommons.law.byu.edu/lawreview

Part of the Antitrust and Trade Regulation Commons

Recommended Citation
Available at: https://digitalcommons.law.byu.edu/lawreview/vol1976/iss4/9
The Detroit Edison Company (Edison), a privately owned electric utility regulated by the Michigan Public Service Commission (Commission), distributes electricity and light bulbs to about five million people in southeastern Michigan. Edison is required to file with the Commission its proposed tariff, composed of the rules, regulations, and rates for all electrical services it supplies. When affirmatively approved by the Commission, the tariff becomes a Commission order; thereafter, any change or abandonment of the order without prior Commission approval would violate state law. Unlike the tariffs of other electric utilities regulated by the Commission, Edison's tariff includes a lamp exchange program by which Edison provides incandescent light bulbs to its residential customers at no additional charge. How-
ever, the cost of the service is incorporated in the residential
electric service rate and is paid by customers whether or not they
utilize the exchange program.4

In 1972, Lawrence Cantor, a retail drug store proprietor sell-
ing light bulbs in Detroit, commenced an action in federal district
court, charging that Edison’s lamp exchange program constituted
both a monopolization of the retail light bulb market in violation
of section 2 of the Sherman Act5 and an illegal “tie-in” require-
ment in violation of section 3 of the Clayton Act.6 Cantor sought
to enjoin Edison from effectively requiring the purchase of incan-
descent light bulbs in connection with its sale of electricity and
to recover treble damages. Granting Edison’s motion for sum-
mary judgment, the district court held that the Commission’s
affirmative approval of Edison’s tariff and its continuing supervi-
sion of Edison’s activities constituted “state action” that is
immune from the federal antitrust laws. The Court of Appeals af-
firmed.8 The Supreme Court reversed, finding that “neither
Michigan’s approval of the tariff . . . nor the fact that the lamp
exchange program may not be terminated until a new tariff is

businesses serviced by the Detroit Illuminating Company. 96 S. Ct. at 3114; Brief for
Petitioner, supra note 1, at 4-5. Further, the lamp exchange service appears to have its
origin in the Company’s desire to compete against gas illuminating companies. Id.
4. Brief for Petitioner, supra note 1, at 4.
shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among
the several states . . . .”
providing that

[i]t shall be unlawful for any person engaged in commerce . . . [to] make a
sale . . . of goods . . . or fix a price charged therefor . . . on the condition . . .
that the . . . purchaser thereof shall not use or deal in the goods . . . of a
competitor . . . where the effect of such . . . condition . . . may be to substan-
tially lessen competition or tend to create a monopoly in any line of commerce.
was made in the district court that, for purposes of the summary judgment proceeding,
the case be limited solely to the question of whether the state action exemption doctrine
of Parker v. Brown, 317 U.S. 341 (1943), applied to the Commission’s approval of Edison’s
lamp exchange program. 96 S. Ct. at 3113. The district court reasoned as follows:

[T]he question that must be decided in order to determine whether summary
judgment lies is whether the . . . light bulb program can be characterized as
state activity or private activity. If this light bulb program is in law state
activity, summary judgment in favor of the defendant would be appropriate
since in such instances the utility would be shielded from claimed antitrust
violations.
392 F. Supp. at 1111. The Court accepted the rule that “when a state agency acts affirma-
tively in approving rates and practices of a utility, there is no antitrust liability.” Id.
8. 513 F.2d 630 (6th Cir. 1975) (summarily affirming district court opinion).
filed, is a sufficient basis for implying an exemption from the federal antitrust laws . . . .”

I. BACKGROUND

A. The Sherman Act and State and Federal Exemptions

Pursuant to its commerce clause powers,10 Congress enacted the Sherman Anti-Trust Act of 1890,11 which codified as federal law the economic policy that free competition should determine the production and distribution of goods and services in interstate commerce. The Act was also an “enactment of political economy,” its proponents seeking to “curb private concentrations of economic—and therefore political—power.”12 Congress may create by statute express exemptions from the antitrust laws for federal regulatory schemes.13 If federal regulatory legislation contains no express exemption and is inconsistent with federal antitrust policies, the courts must ascertain whether Congress intended to implicitly exempt the regulatory scheme from the antitrust laws.14 Generally, the Supreme Court does not favor exemp-

9. 96 S. Ct. at 3121. The case was remanded to the district court for consideration of the question whether the complaint alleged a violation of the antitrust laws. Id. at 3123.

The popular mind is agitated with problems that may disturb social order, and among them none is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition.

21 CONG. REC. 2460 (1890). He also warned that “[i]f the concentrated powers of this combination [industrial trusts] are intrusted to a single man, it is a kingly prerogative, inconsistent with our form of government, and should be subject to strong resistance of the State and national authorities.” Id. at 2457.

It has been explained that “[t]he Supreme Court . . . has no control over federal statutory exemptions and is bound to enforce them regardless of whether they serve the public interest or were designed only to aid narrow special interest groups.” Slater, supra, at 80 (footnotes omitted).
14. See Note, Parker v. Brown—Gone to Hecht: A New Test for State Action Exemptions, 24 HASTINGS L.J. 287, 291 (1973). In United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897), the first case in which the Court was called upon to interpret the substance of the Sherman Act, the Act was read broadly to prohibit a rate-fixing
tions and is reluctant to find an implied "repeal" of the antitrust laws. Only in cases where the federal regulatory scheme is so pervasive that it is clearly repugnant to the antitrust laws will the Court find an implied repeal, and then only to the extent necessary.

State authority to substitute regulatory schemes for certain areas of competition has traditionally been upheld. Congress may, however, exercise its commerce clause powers to limit or even proscribe certain state regulatory action. Since only commerce within the ambit of the commerce clause is subject to the Sherman Act's prohibitions, the scope of the commerce clause determines the reach of federal antitrust laws.

In 1890, the commerce clause was given a fairly narrow interpretation and extended only to actual interstate buying, selling, and transportation incident thereto. As a result, even though the agreement among 18 railroads, even though the agreement had been filed with the Interstate Commerce Commission. Id. at 314-15. The Court emphasized the congressional intent to end restraints of trade no matter what their source. Id. at 340-41; see First, supra note 12, at 15-18.


17. In Munn v. Illinois, 94 U.S. 113, 125 (1876), the Court upheld a state's authority to supplant competition with regulation in an area of the economy "affected with a public interest" and noted that it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accomodations furnished, and articles sold.

See Handler, supra note 10, at 6-7.


20. See Slater, supra note 13, at 84-85. Given this narrow interpretation it is unlikely that Congress really considered at all whether a state's regulation of its public utilities was to be within the scope of the Sherman Act. Id. at 84. One scholar has noted, nevertheless, that
Sherman Act was interpreted quite broadly to strike down interstate activity permitted by state law, it was not a major tool for controlling predominantly intrastate economic activity. Within a few decades, however, purely intrastate activities could be regulated under the commerce clause if they had the requisite impact on interstate commerce. A concomitant expansion of state economic regulation soon precipitated the question of what result would obtain when the expanding ambit of the Sherman Act brings it into conflict with inconsistent state regulatory law.

B. The Parker Doctrine

Although earlier cases had rejected Sherman Act challenges

---

by 1889, the Supreme Court had been called upon to decide the validity of state or local regulation of rates in or entry into the lighting, water, and railroad industries. Thus, by 1890 the public utilities field was, in fact, "one of the few important areas of economic life" where government action had moved beyond the bounds of laissez faire.

First, supra note 12, at 13 (footnotes omitted). It has been argued that "a full reading of the legislative history of the Sherman Act is not likely to help answer . . . [whether] actions taken pursuant to the power of a state were to be included or excluded from the Sherman Act . . . ." Slater, supra note 13, at 83. For other discussions concerning the legislative intent of the Sherman Act as it relates to state regulatory schemes, see First, supra note 12, at 13 n.38; Teply, Antitrust Immunity of State and Local Governmental Action, 48 TUL. L. REV. 272, 277 n.39 (1974); Comment, Participant Governmental Action Immunity From the Antitrust Laws: Fact or Fiction?, 50 TEX. L. REV. 474, 482-84 (1972).

21. In Northern Sec. Co. v. United States, 193 U.S. 197 (1904), the Court rejected the argument that defendants' compliance with New Jersey's liberal incorporation laws in forming a holding company would shield from antitrust attack the consolidation of Hill's Great Northern Railway Company with Morgan's Northern Pacific Railway Company. Justice Harlan declared that under the supremacy clause "no state can endow any of its corporations . . . with authority to restrain interstate or international commerce, or to disobey the national will as manifested in legal enactments of Congress." Id. at 350.

22. In the early 1900's, however, the Court did employ an equal protection or substantive due process analysis to supervise and often invalidate certain state anticompetitive regulatory programs. Later, as numerous state and federal regulatory schemes were considered fair and necessary to extricate the country from the Great Depression, the Court largely abandoned economic interventionism in favor of judicial restraint or a "hands-off" policy. See Note, Federal Antitrust Policy v. State Anticompetitive Regulation: A Means Scrutiny Limit for Parker v. Brown, 1975 UTAH L. REV. 179, 180-82. See generally Hetherington, State Economic Regulation and Substantive Due Process of Law, 53 NW. U.L. REV. 13 (1958); McCloskey, Economic Due Process and the Supreme Court: An Exhumation and Reburial, 1962 SUP. CT. REV. 34, 36-40; Note, Counterrevolution in State Constitutional Law, 15 STAN. L. REV. 309 (1963).

23. Slater, supra note 13, at 85. See, e.g., NLRB v. Fainblatt, 306 U.S. 601, 605 (1939); Wisconsin R.R. Comm'n v. Chicago B. & O.R.R., 257 U.S. 563, 588 (1922). In United States v. E.C. Knight Co., 156 U.S. 1 (1895), the Supreme Court ruled that as long as the state regulated events within its own borders, other than transportation heading for an out-of-state destination, the federal government probably lacked authority to regulate these same events. However, E.C. Knight was explicitly disavowed in Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 235 (1948), decided only a few years after Parker v. Brown, 317 U.S. 341 (1943).
to restraints on competition involving state sovereigns,24 *Parker v. Brown*25 is the case 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 on trade as an act of government.26 In *Parker* the Court considered whether the California Agricultural Prorate Act (Prorate Act) was rendered invalid by the Sherman Act. Enacted as an antidepression measure, the Prorate Act was aimed at curing the chronic oversupply of agricultural commodities produced in California and preventing the economic waste resulting from competitive marketing. The Prorate Act authorized a state commission to enforce collective marketing programs designed to restrict competition among agricultural producers and maintain prices in the distribution of their commodities to packers.

Porter Brown, a producer and packer of raisins, brought suit to enjoin Parker, the Director of Agriculture, from enforcing the proration program operative in the raisin industry. A three-judge federal district court held that the program constituted an undue burden on interstate commerce and enjoined its enforcement. On direct appeal, the Supreme Court requested both parties to brief and argue the issue of "whether the state statute involved is rendered invalid by the . . . Sherman Act."27 Assuming arguendo that the proration program would have been illegal if established by private parties, the Court held that the Sherman Act was inapplicable to the state proration program since Congress did not intend to restrain "state action" or "official action directed by a state" when undertaken "in the execution of a governmental policy."28 Articulating its overriding desire to show deference to

---

24. In 1895, the first antitrust attack upon state action was repulsed in *Lowenstein v. Evans*, 69 F. 908 (C.C.S.C. 1895), in which the circuit court held that a South Carolina board having monopoly authority in the purchase and sale of liquor could not be sued under the Sherman Act since the state was neither a corporation nor a person. *Id.* at 911. In *Olsen v. Smith*, 195 U.S. 332 (1904), duly authorized harbor pilots, who were members of a state created regulatory board governing the licensing of pilots, sued to enjoin defendant from acting as a pilot without state authorization. Against defendant's claim that the state's restrictive regulatory scheme gave licensed pilots illegal monopoly powers, the Supreme Court held that "no monopoly or combination in a legal sense can arise from the fact that duly authorized agents of the State are alone allowed to perform the duties devolving upon them by law." *Id.* at 345.


28. 317 U.S. at 350-52. Noting that Congress could, if it desired, constitutionally prohibit a state from mandating a stabilization program, the Court declared:

We find nothing in the language of the Sherman Act or in its history which
state sovereigns, the Court ruled that “[i]n a dual system of government . . . an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress.”29 The Court warned, however, that “a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.”30 It also noted that it was not deciding the applicability of the Sherman Act where “the state or its municipality [becomes] a participant in a private agreement or combination by others for restraint of trade.”31

From Parker emerged the concept that the Sherman Act does not prohibit “state action,”32 although the Court did not espouse suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.

. . . .

... [It] is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. . . .

The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish a monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.

Id. (citations omitted).

29. Id. at 351.

30. Id.

31. Id. at 351-52.

32. The term “state action” is used interchangeably with “Parker immunity,” “Parker exemption,” “immunity,” and “exemption” (unless qualified as “implied federal exemption”). Some writers believe that the concepts of immunity and exemption should be differentiated to facilitate analysis, rather than used interchangeably as is done by some courts and commentators. See, e.g., Saveri, The Applicability of the Antitrust Laws to Public Bodies, 4 U.S.F.L. REV. 217, 217-18 (1970); Slater, supra note 13, at 71 n.4; Tepley, supra note 20, at 280 n.54; Comment, supra note 20, at 476. “Immunity” implies that a subject has never been encompassed by a rule of conduct; ‘exemption’ implies that a topic under regulation has been subsequently withdrawn from that regulation. . . .” Id.

“State action” is also referred to as “government action,” Slater, supra note 13, at 71, and must be distinguished from Fourteenth Amendment “state action.” One commentator speaking of Parker “state action” has explained that “[t]he term bears little relation to that used in the familiar fourteenth amendment context, and while its roots are ultimately traced to the eleventh amendment, most of the difficult questions will not be resolved by eleventh amendment analysis.” Verkuil, State Action, Due Process and Antitrust: Reflections on Parker v. Brown, 75 COLUM. L. REV. 328, 330-31 (1975). For a discussion of Fourteenth Amendment “state action,” see Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); 16 B.C. INDUS. & COM. L. REV. 867 (1975).

Similarly, Parker “state action” should not be confused with the Noerr-Pennington doctrine, which exempts from the scope of the antitrust laws joint efforts by private parties to influence political and policy decisions of public officials. See United Mine Workers v. Pennington, 381 U.S. 657 (1965); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). For commentaries on these cases, see Costilo, Antitrust’s Newest Quagmire: The Noerr-Pennington Defense, 66 MICH. L. REV. 333
any standard for determining whether a particular action involving a state sovereign is exempt.33 During the next decade, the Court applied Parker quite narrowly to deny state action immunity to conduct permitted under state regulatory and legislative authority.34 Since the Court did not directly confront the state action issue again until 1975,35 the Parker doctrine has been de-

33. Slater, supra note 13, at 73. Slater reasoned: "It is safe to assume that the language of the general exemption in Parker means that some state action is exempt; nevertheless, the language of limitation indicates that not all state action is exempt." Id.

34. In United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944), the Court held that the insurance industry was subject to the Sherman Act, despite extensive state regulation. Congress responded quickly, however, by enacting the McCarran-Ferguson Act of 1945, Pub. L. No. 15-20, 59 Stat. 34 (codified at 15 U.S.C. § 1012(b) (1970)), which exempted from federal statutes "any law enacted by any State for the purpose of regulating the business of insurance," with provision that the Sherman Act and other federal statutes would apply to "the extent such business is not regulated by State law." Later, in Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951), the Court invalidated a state fair trade statute permitting enforcement of vertical price-fixing agreements among private contracting parties against nonsigners. Although Congress had earlier passed the Miller-Tydings Fair Trade Act of 1937, ch. 690, 50 Stat. 693 (codified at 15 U.S.C. § 1 (1970)), which specifically exempted from the Sherman Act certain price maintenance agreements, the Court found the state statute enforcing pricing agreements against nonsigners to be beyond the statutory exemption and not within the Parker exemption. In response to Schwegmann, Congress passed the McGuire Bill of 1952, ch. 745, §§ 1, 2, 66 Stat. 632 (codified at 15 U.S.C. §§ 45(a)(2)-(5) (1970)). This bill extended the Miller-Tydings exemption to state statutes that enforced price agreements even against nonsigners.

35. See Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). In 1967, William Bachelder, a noted antitrust lawyer, reported to the A.B.A. Committee on Anti-Trust Exemptions that there was a "dearth of contemporaneous comment" on the holding and rationale of the Parker decision. Bachelder, State-Approved Transactions, 33 A.B.A. ANTITRUST L.J. 99, 101 (1967). He also foresaw the future of the doctrine:

[As the concept of interstate commerce and of the reach of the Sherman Act continue to expand, it is significant to note that there is probably a great body of public utility and other economic activity directed, encouraged or approved by various governmental agencies which operates under the assumed or assured
veloped primarily in lower federal courts as increasing numbers of antitrust defendants have claimed immunity on the basis of some degree of state involvement.36

1. Categorical approach

Through a literal reading of *Parker*, lower courts and many commentators have generally embraced a categorical approach to state action cases.37 Without identifying or balancing competing federal-state interests, courts employing this approach assume that a certain category of conduct defined as "state action" is per se exempt from the antitrust laws or is beyond the jurisdictional protection of antitrust exemption such as that recognized and applied in *Parker v. Brown*.

Id. at 103. For further commentary see Verkuil, *supra* note 32, at 331, explaining that "[t]he *Parker* variety of protected state action suffers from a conceptually amorphous content because it has atrophied over the years due to inattention by the Supreme Court and indecision by the lower federal courts."


37. One commentator has written:

*Parker v. Brown* may have been a correct decision. But the *Parker* doctrine has been expanded in a way which has little relation to the reasons underlying *Parker*. This seems to have occurred because the courts have looked for inspiration to a close reading of the language of *Parker*, a case which disposed of the antitrust attack as a side issue, in three pages of the *United States Reports*, and which is too narrow a foundation for the vast body of doctrine which has been based on it. A reexamination of the reasons for a state regulatory exemption should pave the way for at least some restoration of competition in many areas which are not insulated from competition by state regulation.

reach of the Sherman Act.\textsuperscript{38}

Various standards have been fashioned to determine whether particular conduct is within the court-defined category of \textit{Parker} immunity. Some courts require as a necessary, although not always sufficient, element of immunity that the entity charged with antitrust violation be either created or endowed by the state with governmental power.\textsuperscript{39} Other courts have based immunity on a finding of some defined threshold level of state authorization or approval,\textsuperscript{40} state control or supervision,\textsuperscript{41} state compulsion,\textsuperscript{42} or

---

\textsuperscript{38} Under this view "questions of validity of state regulatory schemes in light of the antitrust laws are generally regarded as foreclosed." Posner, \textit{supra} note 37, at 695. This approach concludes that "the Sherman Act must be construed to outlaw all anticompetitive state regulation or none, and that \textit{Parker} properly chose the latter." \textit{Id.} at 695 n.2. This approach is further typified by comments such as: "[A]lthough the Court in \textit{Parker} did not fully articulate the quantum of state involvement necessary to constitute protected state action, the \textit{Parker} doctrine should play a per se role in immunizing state public utility regulation from antitrust scrutiny." Verkuil, \textit{supra} note 32, at 339. Another scholar has summarized:

\texttt{[The Parker doctrine applies when a state seeks to implement public policy goals which it deems to be more beneficial to its citizens than competition. The approach adopted in Parker, however, is not one of balancing the importance of the state policy against the injury to competition. A fair reading of the case indicates that the Court believes that the Sherman Act, and its policy in favor of competition, do not apply to state action taken in pursuit of public policy goals, no matter how weak the public goals or how serious the injury to competition.}\texttt{\textsuperscript{[1] Slater, \textit{supra} note 13, at 91.}


\textsuperscript{42} See notes 65-67 and accompanying text \textit{infra}. 
state retention of final decisionmaking power.43 Still others have conditioned immunity on a finding that the challenged activity was undertaken pursuant to a declared legislative policy to supplant some area of free competition with regulation.44

In determining the applicability of *Parker* to anticompetitive provisions of electric utility tariffs, courts have generally granted immunity only when the utility’s rates and practices were subject to “meaningful regulation and supervision by the state” so that they were, in effect, the “result of the considered judgment of the state regulatory authority.”45 One lower court, however, has categorically stated that regulation by a governmental body of rates to be charged by a public utility is a “classic example of the *Parker v. Brown* exemption.”46 In what appears to be the furthest extension of *Parker*,47 immunity was granted to an electric utility engaging in anticompetitive practices even though the state regulatory commission had neither made investigations of nor given its affirmative approval to the utility’s anticompetitive tariff. Reasoning that the state commission possessed adequate regulatory power to control the utility if it chose to do so, the court justified immunity by inferring that the commission’s “silence means consent, i.e., approval.”48

2. *Federal-state policy balancing approach*

Criticizing the categorical approaches of lower courts, some

---

43. See Slater, supra note 13, at 91-95.
44. In George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.), cert. denied, 400 U.S. 850 (1970), the court of appeals was convinced by its reading of *Parker* that “valid government action confers antitrust immunity only when government determines that competition is not the *sumnum bonum* in a particular field and deliberately attempts to provide an alternative form of public regulation.” *Id.* at 30. The court then introduced a three-segment analysis to determine when antitrust immunity may derive from a state’s declared policy towards competition in a particular field. *Id.; see* Slater, supra note 13, at 96-97.
46. Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1133-34 (5th Cir. 1975) (unsuccessful attack against allegedly below-cost pricing of telephone rates regulated by state municipality).
commentators have interpreted *Parker*, in light of its underlying policies, through a preemption or other balancing approach. Preemption is a judicially created doctrine based on the supremacy clause and is designed to resolve conflicts between dual sovereigns by giving primacy to federal law. Out of respect for state sovereigns, however, courts may employ a judicial canon of construction providing that neither the general statutory language of the Sherman Act nor the general language of the commerce clause overrides important state interests.

In a preemption-type analysis, the court identifies the federal and state interests in a particular area. If a conflict exists, it determines whether Congress intended the federal policy to be exclusive; if so, the inquiry is ended and the state policy is voided. If it is not intended to be exclusive, the court ascertains the substance and scope of the policy intended by Congress and determines whether the state program "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." The state policy will be voided to the extent that it blocks the effectiveness of the federal policy. Viewed through preemption analysis, *Parker* has been interpreted as an implicit balancing of federal and state interests. Since the federal antitrust laws were never intended by Congress to be an exclusive system of regulation and the state regulatory action in *Parker* aimed at preserving economic wealth and protecting


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


52. See Posner, supra note 37, at 704.


56. The federal antitrust laws promote three general economic policies: to maintain allocative efficiency through free competition; to protect consumers by ensuring adequate quality at a fair price; and to preserve small competitors, both as a noneconomic social goal and as a means of approximating the perfect market. See *Bork, Bowman, Blake & Jones, Goals of Antitrust—A Dialogue on Policy*, 65 COLUM. L. REV. 363, 365, 369, 381-83 (1965).

57. See Preemption Analysis, supra note 49.

58. The antitrust laws are an interstitial system rather than a system exclusive of all other regulation. *H.R. REP. No. 1707, 51st Cong., 1st Sess.*, 1 (1890); *21 CONG. REC. 2456 (1890).*
small competitors did not block the effectiveness of the federal policy, it was not necessary in Parker to invalidate the Prorate Act in order to maintain the superior federal antitrust policies.59

C. The Goldfarb Refinement of Parker

In the 1975 case of Goldfarb v. Virginia State Bar,60 the Supreme Court reexamined the state action immunity doctrine for the first time in over two decades. Goldfarb brought suit against the state, county, and local bar associations, claiming that minimum fee schedules established and enforced by the bars constituted price-fixing in violation of the Sherman Act.61 Addressing the question of whether the Virginia State Bar, a "state agency by law,"62 was immune under Parker v. Brown as a state entity, the Court stated that "the fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members."63 The county bar, not a state agency but a private, voluntary association,64 claimed immunity on the ground that the "ethical codes and activities of the State Bar 'prompted' it to issue anticompetitive fee schedules."65 Rejecting this argument, the Court ruled that "the threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign."66 The Court further declared that "it is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State . . . ."67 The Court denied Parker immunity to both bars, finding that neither had been compelled by the state to engage in price-fixing activities.68

60. 421 U.S. 773 (1975).
62. 421 U.S. at 789-90. For the statutory language vesting authority in the state bar, see id. at 790 n.20.
63. Id. at 791.
64. Id. at 790.
65. Id.
66. Id. at 790 (emphasis added).
67. Id. at 791 (emphasis added). The Court stated that the County Bar's arguments for immunity "at most, constitute the contention that their activities complemented the objective of the ethical codes. In our view that is not state action for Sherman Act purposes." Id.
68. Id. at 790-91. The Goldfarb "compelled" or "required" threshold standard had been hinted at in Parker, 96 S. Ct. 3117 n.24, and had been expressly invoked by the
II. INSTANT CASE

The Supreme Court in the instant case confronted for the first time the task of determining the extent to which a state utility commission may immunize—without any independent regulatory purpose—a privately owned utility's anticompetitive conduct in a separate, unregulated, competitive market. A majority of the Court refused to find state action immunity for Edison's anticompetitive lamp exchange program, which had been approved by the Commission and which had to be continued while the approval remained effective.66

In Part I of the four-part plurality opinion,70 a majority agreed that there was no state legislative policy to supplant free competition in the distribution of light bulbs. Since the Commission's approval of Edison's decision to maintain an exchange program did not "implement any statewide policy relating to light bulbs," the Court inferred that "the State's policy [was] neutral on the question whether a utility should, or should not, have such a program."71

In Part II, the plurality concluded that the "only Sherman Act issue decided [in Parker] was whether the sovereign State itself . . . was . . . subject to its prohibitions."72 Since the instant case did not call into question the legality of any act of Michigan or any of its officials or agents, the plurality found that the case was not controlled by Parker.73 In a concurring opinion, Chief Justice Burger argued that the plurality's narrow reading

---

70. Parts II and IV of Justice Stevens' plurality opinion were joined only by Justices Brennan, White, and Marshall. Chief Justice Burger joined in Parts I and III, and Justice Blackmun joined in Part III. Thus, Parts I and III represent a majority position of the Court.
71. 96 S. Ct. at 3114. The dissenters disagreed with the majority conclusion that Michigan's policy is "neutral" with respect to whether a utility should have a lamp exchange program. Id. at 3134 n.11. They argued that the broad powers vested in the Commission to "hear and pass upon all matters pertaining to or necessary or incident to such regulation," Mich. Comp. Laws Ann. § 460.6 (Supp. 1976-77), included the power to authorize the lamp exchange program. See id. at 3139 n.26. According to the dissent, a decision by the Commission to approve the program is itself an articulation of state policy.
72. 96 S. Ct. at 3117.
73. Id.
of *Parker* was unnecessary to the result in the instant case and noted that *Parker* immunity should be "focused on the challenged activity, not upon the identity of the parties to the suit."74

A majority agreed in Part III that *Parker* should not be extended to cover the instant case.75 The Court conducted a two-part inquiry76 to determine if the particular private conduct allegedly required by state law should be exempt from the Sherman Act. First, the Court asked whether it would be unfair to apply the federal antitrust laws to a private party who has done nothing more than obey the command of his state sovereign.77 Acknowledging such unfairness when the private party has done nothing more than obey a state's command, the Court announced a "fairness" standard for deciding cases involving a blend of private and public decisionmaking. Where a private party exercises "sufficient freedom of choice" or has an "option to have, or not to have" an anticompetitive program and voluntarily chooses the anticompetitive practice, it is not unfair to hold it responsible for the consequences of its decision.78 Next, the Court inquired whether Congress intended to superimpose the antitrust laws as an additional, and perhaps conflicting, regulatory mechanism in areas of the economy already regulated by a state.79 The Court rejected for three reasons Edison's argument that the antitrust laws were inapplicable to the lamp exchange program. First, there was "no logical inconsistency between requiring Edison to meet regulatory criteria insofar as it [was] exercising its natural monopoly powers and [requiring] it to comply with antitrust standards to the extent that it [engaged] in business activity in competitive areas of the economy."80 Second, even if such inconsistency exists, the standards for ascertaining the existence and scope of the state action exemption must be at least as severe as those applied in reconciling inconsistent federal regulatory legislation with federal antitrust laws.81 Finally, even though Congress did not intend the antitrust laws to apply to areas of the economy

74. Id. at 3123.
75. See id. at 3121.
76. The Court did not label its discussion a "two-part inquiry," but rather explored "two . . . different reasons" that might support a finding that "private conduct required by state law is exempt from the Sherman Act." Id. at 3117. The dissent, however, characterized the majority's approach as a "new two-part immunity test." Id. at 3133-35.
77. Id. at 3117.
78. Id. at 3117-19.
79. Id. at 3117.
80. Id. at 3119-20.
81. Id. at 3120; see notes 14-16 and accompanying text supra.
primarily regulated by a state, enforcement of the antitrust laws against Edison was not foreclosed in the essentially unregulated area of light bulb distribution.\textsuperscript{82} Chief Justice Burger agreed that "[t]o find a 'state action' exemption on the basis of Michigan's undifferentiated sanction of this ancillary practice could serve no federal or state policy."\textsuperscript{83}

Concurring in the majority's result, Justice Blackmun proposed that an equal protection-substantive due process "rule of reason" test be applied to determine if the potential harms outweigh the benefits of state sanctioned anticompetitive conduct.\textsuperscript{84}

A strong dissent rejected the plurality's narrow interpretation of Parker. The three dissenting Justices argued that the question whether state action effecting a restraint on trade is preempted by the Sherman Act was answered in the negative by the Parker decision.\textsuperscript{85} They also warned that an application of the majority's new immunity test to practices deemed ancillary to the state's regulatory goals creates a "statutory simulacrum of the substantive due process doctrine"\textsuperscript{86} and "will surely result in disruption of the operation of every state-regulated public utility company in the Nation."\textsuperscript{87} The dissenters cautioned that courts cannot go beyond the Goldfarb refinement of Parker "without disregarding the purpose of the Sherman Act not to disrupt state regulatory laws."\textsuperscript{88}

III. Analysis

The Court's decision in the instant case significantly restricts the ambit of state action qualifying for Parker immunity and, together with Goldfarb, severely limits the broad categorical interpretations recently given to Parker by many lower federal courts. Of paramount importance is the Court's explicit adoption of an analysis suited to identifying and resolving the conflicting

\textsuperscript{82} See id. at 3119.
\textsuperscript{83} Id. at 3124.
\textsuperscript{84} See id. at 3124-28. Justice Blackmun introduced his approach under the rubric of "preemption," id. at 3124, yet his discussion of an "equal protection-type rule of reason" approach would take "as a general proposition that state-sanctioned anticompetitive activity must fall like any other if its potential harms outweigh its benefits" in a consideration of the case on its merits. Id. at 3126. The "fact of state sanction [would] figure powerfully in the calculus of harm and benefit," which resembles an economic due process analysis. Id.
\textsuperscript{85} Id at 3132 (Stewart, J., dissenting).
\textsuperscript{86} Id. at 3140.
\textsuperscript{87} Id. at 3129.
\textsuperscript{88} Id. at 3139.
policies of dual sovereignties that should underlie application of Parker immunity. This case note will evaluate first the plurality's narrow interpretation of Parker and then the majority's two-part analytical framework for determining the applicability of state action immunity to anticompetitive practices of state-regulated utilities involving a blend of public and private decisionmaking.

A. The Plurality's Overly Narrow Interpretation of Parker

In Part I of its opinion, the plurality stated that the only Sherman Act holding in Parker was that a sovereign state, previously held to be a "person" within the meaning of section 7 of the Sherman Act, was not subject to the Act's prohibitions. Although the precise Sherman Act issue raised by the Court in Parker was phrased in traditional preemption terms, Parker may be read in categorical terms in light of the pre-Parker cases in which courts resolved conflicts between state regulatory law and the Sherman Act by finding that the state official or agent acting pursuant to state policy was not a "person" or "corporation" within the reach of the Sherman Act. Such a categorical approach would exempt as state action the conduct of a state entity, its officers, or its agents.

Consistent with this approach, the plurality's narrow interpretation is arguably supported by certain language in the Parker opinion. Since there was no claim in Parker, and hence no rul-
ing, that any private individual or corporation had violated the antitrust laws, the plurality is technically correct in ruling that the instant case "is not controlled by the Parker decision." As discussed below, however, Parker should not be read so narrowly. This narrow construction of Parker is inconsistent with the overall language of the Parker opinion, the post-Parker decisions, and a policy oriented preemption-type analysis of the decision.

A categorical analysis would have been sufficient to dispose of Parker, but the Court did not limit its analysis to the issue of whether a state is a "person" within the meaning of the Sherman Act. It also raised, without deciding, the question of whether a state or its municipality, by participating in a private agreement or combination by others for restraint of trade, would maintain its antitrust immunity. This issue would not arise under a strictly categorical approach. Also, since the Parker opinion mentioned both "state action" and "official action directed by the state," it is probable that the latter refers to action by private parties pursuant to the mandate of the state sovereign (such as the prorate producers in Parker) as well as to action of a state entity. Moreover, the plurality's narrow interpretation "would trivialize [Parker] to the point of overruling it," as the dissent correctly argued.

If Parker stands for the sole proposition that state entities are beyond the reach of the antitrust laws, such categorical immunity can be easily circumvented by bringing suit against a private party who is implementing the state's anticompetitive command. It is obvious that the dual system of federal-state regulation that Parker serves to safeguard would cease to exist if the doctrine failed to protect private parties acting under the command of a state decisionmaker.

94. 96 S. Ct. at 3117.
95. The Court could have ruled that the state is not a "person" or "corporation" suable under the antitrust laws, i.e., that a state official is beyond the jurisdictional reach of the antitrust laws. Since Parker was an official of the state, such a jurisdictional ruling would have dismissed the complaint brought by Brown.
96. 317 U.S. at 351-52.
97. If a state were not within the Act on jurisdictional grounds as a state entity, the fact of joining a private conspiracy should not affect that immunity. See Preemption Analysis, supra note 49, at 1173.
98. 96 S. Ct. at 3129 (Stewart, J., dissenting).
99. In this posture, Parker would effectively stand only for the trivial proposition that Brown should have sued private raisin growers instead of the California Director of Agriculture. See id. at 3129 n.4.
The plurality's narrow categorical interpretation, which limits immunity to only state entities, would contradict and overrule all lower court decisions granting immunity to private, state-directed defendants. More importantly, this narrow construction would overrule the Supreme Court's holding in Goldfarb, which focused on the "challenged activity, not upon the identity of parties to the suit." The analysis of Goldfarb by Chief Justice Burger is clear and persuasive:

If Parker's holding were limited simply to the nonliability of state officials, then the Court's inquiry in Goldfarb as to the County Bar Association's claimed exemption could have ended upon our recognition that the organization was "a voluntary association and not a state agency. . . ." Yet, before determining that there was no exemption from the antitrust laws, the Court proceeded to treat the association's contention that its action having been "prompted" by the State Bar, was "state action for Sherman Act purposes."

Hence, the emphasis in Goldfarb on activities, instead of parties, stands in direct opposition to the plurality's narrow interpretation.

The confusion and inconsistency of judicial categorical decisions may be resolved if Parker is analyzed in preemption terms. When so approached, the deciding factor in Parker was not that a state official was named as a defendant, but that the Prorate Act, enacted by the state legislature to supplant competition in the agricultural industry, was not wholly inconsistent with superior federal policies. Thus, Parker did not create blanket immunity for all "state action" or "official action directed by the state"; rather, recognizing that the federal system contemplates states as sovereign within their spheres of authority, the Court showed deference to a state anticompetitive program not incompatible with federal law. Clearly, comity need not be shown to all state programs, but federal courts should be reluctant to void an explicit state policy. This preemption approach to Parker is inconsistent with the plurality focus on "parties" but consistent with the Goldfarb focus on "activity." Since state law may be superseded by the Sherman Act regardless of whether state offi-

100. See cases involving a private rather than a governmental defendant listed in note 36 supra.
101. 96 S. Ct. at 3123 (Burger, C.J., concurring) (emphasis in original).
102. Id.
103. Preemption Analysis, supra note 49, at 1173-76.
cials are subject to suit for violation of the Act, it cannot be supposed that the Court would have found the Prorate Act any less valid had the question been raised in a suit against the private producers implementing the program, instead of against the state officials administering and enforcing it.

B. Two-Step Determination of State Action Immunity

If all state or private conduct involving interstate commerce authorized by a state were governed by the federal antitrust laws, there would be a drastic restructuring of our entire economic system. Congress clearly did not intend such a result, and Parker expressly held that the Sherman Act did not proscribe all state action leading to results which, if privately arranged, would offend the federal antitrust laws. In recognizing this major antitrust exemption, however, the Court failed to articulate an analytical framework for determining the extent to which state policy could undermine the strong federal antitrust policy. In subsequent cases the Court merely indicated that some state action was not immune; and, while Goldfarb articulated a threshold inquiry, it did not establish an analytical approach for determining state action cases once the threshold is passed.

The two-part analytical framework used by the Court in the instant case provides the flexibility necessary to decide each state action case on its peculiar facts and, at the same time, achieve consistent results. First, a court must decide whether it would be unfair to apply the federal antitrust laws to private anticompetitive conduct undertaken in response to the command of a state sovereign by considering whether the private party has exercised a "sufficient freedom of choice" in the matter. Second, the court

104. 96 S. Ct. at 3131 & n.7.
105. See Slater, supra note 13, at 75. Despite the rather wide construction of the Parker doctrine over the last decade, the Director of Policy Planning, Antitrust Division, Department of Justice, warned in 1970 that "much anticompetitive state law and anticompetitive activity claimed to be protected thereby in fact violate federal antitrust law . . . the alleged state law being ineffective to confer immunity. Donnem, Federal Antitrust Law Versus Anticompetitive State Regulation, 39 A.B.A. ANTITRUST L.J. 950, 957 (1970). He also foresaw the decision in the instant case by declaring that "if a state law were contrary to the Sherman Act . . . the state law would be invalid under the Supremacy Clause of the Constitution." Id. at 958.
106. See Handler, supra note 10, at 7.
107. See note 34 supra.
108. See notes 66-67 and accompanying text supra.
109. Since industries regulated by state law vary greatly in the rationale, administration, and intensity of their regulation, a categorical rulemaking approach would not be an acceptable solution.
must consider whether Congress intended to superimpose antitrust standards on conduct already being regulated by a state.

1. The fairness standard

The unwillingness of lower courts to apply federal antitrust laws to state influenced private conduct has been predicated chiefly upon the perceived unfairness of imposing treble damages against practices approved, required, or tightly supervised by state legislative or regulatory authority. The plurality's discussion of unfairness presupposes the possibility of awarding treble damages in state action cases. The Court justifies such imposition by assuming that unfairness would result only if (1) "the hazard of violating the antitrust laws were enhanced by the fact of regulation" or (2) a "regulated [industry] had engaged in anticompetitive conduct in reliance on a justified understanding that such conduct was immune from the antitrust laws."

In the instant case the hazard of violating the antitrust laws flowed from Edison's tariff, which was a product of Edison's business judgment and private decisionmaking, not of a mandatory order by the Commission to comply with the tariff. The Commission neither initiated the lamp exchange program nor recom-

110. The problems surrounding imposition of treble damages in state action cases is discussed in Posner, supra note 37, at 729-31:

It is not unlikely that the prospect of damages and the absence of any mitigating doctrine has had an inhibiting effect on efforts to curtail the reach of Parker.

A privilege should be developed against damage liability for good faith actions of private firms in securing or operating under state regulation. "Good faith" would relate to the existence and reasonableness of a belief that the state regulation was not invalid.

The policy justifications for developing such a privilege are twofold:

First the line between valid and invalid regulation, whether permissive or mandatory in form, is not always a clear one. If a prospective defendant must bear the entire risk of invalidity, he is likely to be reluctant to comply with, or avail himself of, state regulation even when it is valid.

Thus, a privilege for good-faith reliance on invalid state regulation is desirable, in order to encourage individuals to rely on valid state regulation.

The second policy justification to support the privilege proposed is unfairness to defendants subject to conflicting statutory commands.

Id. Another scholar has cautioned that "antitrust treble damage action is an inappropriate vehicle for regulating public utilities." Verkuil, supra note 32, at 339. He argues that "[t]reble damage actions tend to introduce irrationality" into the system of state public utility regulation and "may contradict the assumption underlying the need for regulation in the first place." Id.

If the antitrust laws were enforced only prospectively against state regulated industries through injunction, there would never be a serious question of unfairness.

111. 96 S. Ct. at 3121.
mended its continuance. Although the Commission's approval of the tariff may have provided an arguable defense against charges of antitrust violation, such approval could not logically have increased Edison's risk of violating the antitrust laws.

The Court found no facts showing that the Commission or any other state agency led Edison to believe that its conduct was exempt from the antitrust laws. Even assuming the Commission had issued such assurances or guarantees, Parker warned that "a state cannot give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." The Court characterized state action immunity as an affirmative defense to conduct that is otherwise assumed to be unlawful. Therefore, it is likely that a party raising this defense has engaged in conduct that, without the involvement of the state, would be unlawful.

Under the system of federalism, there is no justification for treating state-involved private anticompetitive conduct differently from other private practices violative of the antitrust laws, except where a "sufficiently significant" nexus exists between the private conduct and the state policy. For cases involving a blend of private and public decisionmaking, the Court in the instant case articulated the threshold level of private decision-making that is requisite to a finding of immunity.

112. Concerned primarily with the reasonableness of utility rates in relation to electrical services supplied, the Commission considered the exchange program only with regard to the light bulb expenditures included in Edison's service rate cost analysis. The district court found that the rate schedules were derived after Edison "furnished the Commission with data including information on the free [light] bulb exchange program." Yet, Cantor's uncontradicted argument on appeal was that "the only data to which Judge Feikens could be referring is a two line entry of bulb costs supplied in pencilled work sheets which Edison made available to [Commission] auditors in 1972 which Edison's rate making officer admitted were part of voluminous documents." Brief for Petitioner, supra note 1, at 10.

113. Edison probably relied upon 90 years of uninterrupted Commission approval. It is likely that if Edison had considered any antitrust implications of its lamp exchange service, it may have relied on the generally expanded interpretation of the Parker doctrine, which treated rate making activities of public utilities as per se exempt from the antitrust laws. See notes 37-38, 46-48 and accompanying text supra.

114. 317 U.S. at 351.

115. 96 S. Ct. at 3121.

116. The Court used the conclusory "sufficiently significant" phrase in declaring that "[t]here is nothing unjust in a conclusion that respondent's participation in the decision is sufficiently significant to require that its conduct implementing the decision, like comparable conduct by unregulated businesses, conform to applicable federal law." 96 S. Ct. at 3119.

117. It would serve neither the state interest in economic regulation nor the federal interest in maintaining free competition and dispersed economic power to allow mere state participation to exempt private conduct. See id. at 3123-24.
Although the threshold inquiry in the instant case is couched in "fairness" language, this touchstone is merely an alternative linguistic form of the Goldfarb "required" or "compelled" threshold inquiry. The "fairness" standard, phrased in terms of "sufficient freedom of choice" or "option to have, or not to have," restates the "required" or "compelled" standard by approaching the same threshold inquiry from the opposite direction. Both approaches attempt to delineate that degree of state participation necessary to sustain a claim of immunity, but here the restatement is much stricter than that of Goldfarb. In Goldfarb the Court considered only the voluntary, unilateral decision of the state and county bar associations to engage in price-fixing. The instant case, however, presented a complex blend of private, voluntary decisionmaking and state-enforced, mandatory compliance with decisions reached.

Prompted by the facts of the instant case, the Court chose to refine the Goldfarb standard. Judged by the Goldfarb standard alone, Edison's lamp exchange program would likely be immune from antitrust attack as an activity "required" or "compelled" by state order. Now, despite an accompanying state requirement to adhere to one's private decision, when one freely elects to engage in anticompetitive activity the Court will not likely grant an exemption. This clarification shifts the focus of inquiry from the decisionmaking action of the state to the decisionmaking freedom of the private party. In the absence of a definite state policy against competition in some area of the economy, this redirected emphasis will prevent further extension of the state action exemption to private anticompetitive conduct that "masquerades behind self-created imprimaturs of state approval." Since the federal antitrust laws should defer only to the economic policy decisions of state sovereignties—as opposed to private business judgments—it is not unfair to provide that a party exercising the "option to have, or not to have" an anticompetitive program engages in such practices at his own peril.

118. See notes 66-67 and accompanying text supra.
119. Whereas Goldfarb focused on the degree of state involvement to determine whether the state "compelled" or "required" the activity, the instant case focused on the degree of private involvement to determine whether private decisionmaking was superseded by state mandate.
120. The plurality noted that the Goldfarb standard would arguably "allow every state agency to grant . . . immunity by merely including a direction to engage in the proposed conduct in an approval order." 96 S. Ct. at 3123.
121. In Goldfarb, the state neither approved the price-fixing nor required the bars to comply with their own price schedules. 421 U.S. at 789-92.
122. Verkuil, supra note 32, at 357-58.
In applying the new "fairness" standard, unfair results can be avoided where a private party is forced to choose between two conflicting laws.\textsuperscript{123} If a party has no choice, but is compelled by the state to engage in anticompetitive conduct, any violation flowing therefrom should be deemed state action and liability should not attach to the private party.\textsuperscript{124} By limiting the scope of exemption to cases in which private discretion or business judgment is superseded by state mandate, and by making private parties responsible for their own anticompetitive choices, the objectives of the antitrust laws to promote allocative efficiency and protect against a concentration of private economic power will not be smothered under the proliferation of state regulatory schemes.

2. Balancing of federal and state interests

Although a finding of "sufficient freedom of choice" on the part of Edison would have disposed of the case, the Court further explored the state action defense to consider how conflicts between federal and state interests should be resolved in state action exemption cases. The Court's preemption-type analysis is premised on the belief that \textit{Parker} reflected not only a valid legal conclusion but a proper determination of policy as well. The "state action" policy issue is whether Congress intended to superimpose the antitrust laws as an additional, and perhaps conflicting, regulatory mechanism in areas of the economy predominantly within the scope of state regulation. In \textit{Goldfarb}, the Court did not go beyond the "required" or "compelled" threshold inquiry. Lower courts have generally ignored the need to balance state and federal interests by reasoning that activity that meets the threshold test is per se immune.\textsuperscript{125} Thus, perhaps the greatest contribution of the instant case will be its exposition and exploration of the policies underlying \textit{Parker} that should be considered in applying the state action immunity concept.

In Part I, the plurality laid the foundation for a preemption-type analysis\textsuperscript{126} by identifying the incandescent light bulb market

\textsuperscript{123} The majority realized that "there may be cases in which the State's participation in a decision is so dominant that it would be unfair to hold a private party responsible for his conduct implementing it . . . ." 96 S. Ct. at 3119.

\textsuperscript{124} \textit{See Van Cise, supra} note 13, at 84-85.

\textsuperscript{125} \textit{See Verkuil, supra} note 32, at 357-58; Handler, \textit{supra} note 10, at 16; note 37 \textit{supra}.

\textsuperscript{126} The Court advanced three reasons for rejecting the argument that the antitrust laws were inapplicable in the area of light bulb distribution. \textit{See} 96 S. Ct. at 3119; notes
as the economic area affected by Edison's challenged activity. This program was carefully distinguished from Edison's unchallenged activities in furtherance of its more traditional electric utility services.\(^{127}\) Declaring that the state's policy was neutral on the question of light bulb distribution, the Court found no reason grounded on concepts of federalism or dual sovereignty not to apply the antitrust laws to Edison the same as to any other party engaging in anticompetitive conduct in an unregulated field. In the absence of a state policy, there was no federal-state conflict; thus, the preemption analysis was essentially concluded.

In terms of preemption or balancing of federal-state interests, the instant case was a relatively easy case to decide. More difficult issues arise, however, when a state policy is articulated and must be reconciled with competing federal policies.\(^{128}\) In the instant case the Court announced that, in resolving actual federal-state interest conflicts, the standards for ascertaining the applicability of state action immunity must be at least as severe as those applied to determine implied federal exemptions.\(^{129}\) The adoption by the Court of the federal exemption standard\(^ {130}\) involving a balancing of competing policies generally rejects the categorical approach prevailing prior to the instant case, which regarded as foreclosed any inquiry into the validity or pervasiveness of state regulatory schemes.\(^ {131}\) Applied to the facts of the

79-82 and accompanying text \textit{supra}. The first and third reasons are both elements of a preemption-type analysis.

127. 96 S. Ct. at 3113-14.

128. \textit{Parker} and \textit{Schwegmann Bros. v. Calvert Distillers Corp.}, 341 U.S. 384 (1951), presented situations involving a definite state policy inconsistent with the federal antitrust laws. The legislative policy in \textit{Parker} was to supplant free competition in the marketing of raisins with collective marketing and other anticompetitive practices. In \textit{Schwegmann}, the state legislative enactment clearly allowed for enforcement of resale price-fixing agreements against nonsigners, thus implying the state's policy of allowing this anticompetitive practice.

129. 96 S. Ct. at 3120.

130. The Court in the instant case has either adopted the federal implied exemption standard for use in state action cases or merely used it by analogy to defeat Edison's claim of per se immunity as a state-regulated public utility. Whether the Court has explicitly adopted the same standards is not crucial, for the importance of the instant case is the overt decision by the majority to give maximum weight to antitrust policies in state action cases through a preemption or other balancing-of-interests analysis.

131. \textit{See note 37 supra}. The dissent argues that the majority approach will resurrect the once discarded doctrine of economic due process. See 96 S. Ct. at 3139-41. Although reaching perhaps the same results as economic due process analysis, the preemption-type approach of the instant case does not require the courts to substitute their own policy judgment for those of the state by scrutinizing either the ends or the means of a state regulatory policy. Assuming that a clearly defined state policy had been articulated, the application of the supremacy clause would merely give primacy to federal policy when it
instant case, the federal exemption standard would not result in a finding of state action exemption for Edison's lamp exchange program. Following this decision, courts deciding state action cases should favor the federal antitrust policies, both in deciding the weight to be given to antitrust laws and in determining whether the effect of the regulatory action is to suspend the operation of the antitrust laws.

In contrast with the wide expansion of the Parker doctrine by many lower courts, the preemption-type analysis of the instant case may restore competition to some areas of the economy previously insulated from competition by state regulation. This restoration is critical since the policy reasons for exempting public utilities or natural monopolies from the antitrust laws are meaningless when maintenance of the monopoly ceases to be inevitable or power in the monopoly area radiates outward into areas where competition is both possible and desirable. Although a preemption-type approach using a federal exemption standard may inhibit the discretion of state legislators or regulatory agents, it is a result that seems "compelled by the existence of a fairly well-defined federal antitrust policy and the supremacy clause." 

is confronted by inconsistent state policy. If Congress does not agree with the Court's application of the antitrust laws to areas of the economy that are "ancillary" to the traditionally exempt rate making practices of public utilities, it may create an express exemption as it has done in the past. See note 34 supra. The fact that Congress granted exemptions after courts refused to create such exemptions "does not indicate that the Court's decisions were erroneous, but merely that the Court had successfully placed the responsibility on Congress to decide whether to replace competition with a system of public control. It is certainly arguable that Congress is the proper and better equipped forum for such lawmaking." First, supra note 12, at 31.

There is no "plain repugnancy" between Michigan's regulatory scheme and the federal antitrust laws. 96 S. Ct. at 3120. Nor is the lamp supply program "imperative in the continued effective functioning of Michigan's regulation of the utilities industry." Id. at 3120 n.36. The Court concluded that "[r]egardless of the outcome of this case, Michigan's interest in regulating its utilities' distribution of electricity will be almost entirely unimpaired." Id. at 3120.


133. P. AREEDA, ANTITRUST ANALYSIS 106 (2d ed. 1974).

134. Slater, supra note 13, at 105.