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State Action Antitrust Immunity-A Doctrine in Search of Definition

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"State Action" Antitrust Immunity—A Doctrine in Search of Definition

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I. INTRODUCTION

After an initial formulation of the state action doctrine of antitrust immunity in *Parker v. Brown*,[1] the Supreme Court of the United States has struggled in recent decisions to articulate standards for the general principle that anticompetitive actions undertaken by or at the direction of sovereign states should be exempt from the federal antitrust laws. The exemption announced in *Parker*, focusing on the identity of the actor, clearly removed a definable set of state officials from antitrust liability. But the fundamental unfairness of exempting public actors while holding private actors culpable under the same state regulatory scheme led the Court to focus on the extent of state involvement and the nature of the regulated activity.

In a series of decisions rendered annually since 1975,[2] the Court has broadened its scope of inquiry in determining whether a state is sufficiently involved in an anticompetitive practice to justify exemption from the antitrust laws. Despite the Court's repeated efforts to define a "state action" test, the price of its expanded inquiry has been growing uncertainty by states, municipalities, and regulated industries as to antitrust exposure for a host of activities previously assumed to be antitrust immune.

In one of the Supreme Court's most recent decisions concerning state action antitrust immunity, *Community Communi-*

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1. 317 U.S. 341 (1943).

2. This series of decisions consists of (in chronological order): Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Bates v. State Bar, 433 U.S. 350 (1977); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); Community Communications Co. v. City of Boulder, 102 S. Ct. 835 (1982).

cations Co. v. City of Boulder,[3] the Court appears to have dealt with the tension between broad analysis and concrete rules by providing for antitrust deference to state action in two distinct fashions: first, by utilizing previously announced state action tests to define a class of activities wholly immune from antitrust liability; and second, by confirming that, even as to those activities which do not fall within the class of wholly immune activities, state involvement nevertheless plays an important role in determining whether a substantive antitrust violation has occurred.

Whether the Court will adhere to the apparent resolution developed in *City of Boulder* remains to be seen. The two-fold state action approach does provide the necessary certainty for those actors and activities falling within the relatively well-defined sphere of complete immunity. At the same time, it recognizes that those participating in activities that are state regulated, but not wholly antitrust immune, should not be relegated to the status of purely private parties under the antitrust laws.

Part I of this Article recounts the development and early application of the state action doctrine. Part II details the broadening inquiry under the doctrine, which began in 1975 with *Goldfarb v. Virginia State Bar*[4] and continued through *New Motor Vehicle Board v. Orrin W. Fox Co.*[5] Part III examines the Court's first attempt to deal with the tension between this expansive analysis and the formulation of concrete rules in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*[6] Finally, part IV examines the state action doctrine as analyzed and applied in the recent *City of Boulder* decision.[7]

II. Declaration and Early Application of the State Action Doctrine—the Per Se *Parker* Rule

In its decision announcing the state action doctrine, *Parker v. Brown*,[8] the Court considered California's enactment of a reg-

3. 102 S. Ct. 835 (1982).

4. 421 U.S. 773 (1975).

5. 439 U.S. 96 (1978).

6. 445 U.S. 97 (1980).

7. The state action exemption has been the subject of extensive commentary. *See, e.g.*, Areeda, *Antitrust Immunity for "State Action" After* Lafayette, 95 Harv. L. Rev. 435 (1981); Note, Parker v. Brown *Revisited: The State Action Doctrine After* Goldfarb, Cantor, *and* Bates, 77 Colum. L. Rev. 898 (1977).

8. 317 U.S. 341 (1943). *But see* Cantor v. Detroit Edison Co., 428 U.S. 579, 615 n.3 (1976) (Stewart, J., dissenting). Prior to *Parker*, few decisions had addressed the issue of

ulatory scheme to restrict competition among private growers of raisins and to maintain prices to packers.[9] Specifically, the statute authorized the creation of an Agriculture Prorate Advisory Commission[10] which, upon petition by raisin producers, approved the creation of "production zones," selected a program committee for each zone, and approved "proration marketing programs" formulated by the respective "program committees."[11] Sales "without proper authority" for any commodity for which a proration program had been established were declared to be misdemeanors punishable by fines and imprisonment.[12]

The particular proration program at issue required raisin producers to deliver all raisins produced to receiving stations. There, the raisins were graded and seventy percent of the producers' raisins were placed in a pool (the "surplus pool" or the "stabilization pool").[13] A fixed price per ton was paid to the producers for raisins placed in the pools. The producers were permitted to sell the remaining thirty percent of their standard raisins if they first obtained a certificate of authorization.[14]

The plaintiff, a raisin producer who opposed the proration program, challenged the validity of the program under the Sherman Act and the commerce clause. The named defendants included the State Director of Agriculture, the Raisin Proration Zone, the Program Committee for that Zone, and the State Agricultural Prorate Advisory Commission.[15] Although producers had participated in adoption of the programs, no private defendants were included.

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anticompetitive state economic regulation. *See, e.g.*, Lowenstein v. Evens, 69 F. 908 (C.C.D.S.C. 1895); Northern Sec. Co. v. United States, 193 U.S. 197 (1904) (rejecting contention that state corporation law which permitted chartering of company and acquisition of stock was defense to Sherman Act violation resulting from agreement between two competing railroads to form a joint holding company). *See* Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 135-36 (1961) (tracing origin of state action doctrine to Standard Oil Co. v. United States, 221 U.S. 1, 57 (1911)).

9. 317 U.S. at 346.

10. The Commission had nine members. One was a state official—the Director of Agriculture serving ex-officio. The other eight members were appointed for terms of four years by the Governor. 317 U.S. at 346.

11. *Id.* at 346-47. The Director of Agriculture was required to declare a program instituted only when approved by the Commission and "consented to by 65 percent in number of producers in the zone owning 51 percent of the acreage devoted to production of the regulated crop." *Id.* at 347.

12. 317 U.S. at 347.

13. *Id.* at 347-48.

14. *Id.* at 348.

15. *Id.* at 344.

Chief Justice Stone, writing for a unanimous Court, reversed the decision of a three-judge district court enjoining enforcement of the challenged proration program. Assuming (without deciding) that the prorate program would violate the Sherman Act if undertaken by private parties,[16] the Court found "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."[17] Finding that the challenged program "was never intended to operate by force of individual agreement" and that it "derived its authority and its efficacy from the legislative command of the state,"[18] the Court held the California regulatory scheme immune from antitrust attack.

The principle announced in *Parker* was clear and simple: conduct undertaken by state officials at the direction of the legislature, no matter how anticompetitive, could not constitute a violation of the antitrust laws. The label adopted—the "state action" doctrine—was most appropriate, for only acts by the state were immunized.[19] The Court, however, refused to accept the proposition that private conduct acquired an exemption merely because it was prompted or sanctioned by the state: "[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 . . . ."[20] The state action exemption thus was virtually a

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16. *Id.* at 350 ("We may assume for present purposes that the California prorate program would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate.").

17. *Id.* at 350-51.

18. *Id.* at 350.

19. The Court stated that "[t]he Sherman Act makes no mention of the state as such and gives no hint that it was intended to restrain *state action* or official action directed by the state," and "[t]here is no suggestion of a purpose to restrain *state action* in the Act's legislative history." *Id.* at 351 (emphasis added). At least one commentator has suggested that the Court's description of the Sherman Act's legislative history was taken out of context. Slater, *Antitrust and Government Action: A Formula for Narrowing* Parker v. Brown, 69 NW. U.L. REV. 71, 83 (1974).

20. 317 U.S. at 341. In applying the state action exemption to the challenged program, the Court discounted the participation of private producers in formulation of prorate districts and in approval of prorate programs:

> Here the state command to the Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act . . . . It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commis-

per se rule which wholly immunized state officials from antitrust constraints.[21]

For over thirty years after *Parker*, the Supreme Court allowed lower courts to develop the state action doctrine with virtually no guidance.[22] In *Schwegmann Brothers v. Calvert Distillers Corp.*,[23] the Court appeared to apply *Parker* without using explicit state action analysis. In that case, the Court overturned a Louisiana statute which allowed liquor distributors to fix resale prices for all retailers by specifying the price in a contract with only one retailer.[24] In so holding, the Court rejected the contention that this "nonsigner" statute was authorized by the Miller-Tydings Fair Trade Act (now repealed) which generally excepted from the Sherman Act "contracts or agreements" prescribing resale price maintenance which were authorized by state law.[25] The Court's opinion contained no state action analy-

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sion, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy.

Id. at 352.

21. Although only the Sherman Act was involved in *Parker*, lower courts have generally assumed that the holding applied to other antitrust legislation. *See, e.g.*, Feldman v. Gardner, 661 F.2d 1295, 1304-06 (D.C. Cir. 1981) (Clayton Act); International Tel. & Tel. Corp. v. General Tel. & Elec. Corp., 351 F. Supp. 1153, 1198-1200 (D. Hawaii 1972) (mergers under § 7 of the Clayton Act), *rev'd in part on other grounds*, 518 F.2d 913 (9th Cir. 1975); Morton v. Nat'l Dairy Prods., 287 F. Supp. 753, 763-64 (E.D. Pa. 1968), *aff'd*, 414 F.2d 403 (3d Cir. 1969), *cert. denied*, 396 U.S. 1006 (1970); Reid v. University of Minn., 107 F. Supp. 439, 442-43 (N.D. Ohio 1952) (price discrimination prohibition of the Robinson-Patman Act). The applicability of the state action doctrine to § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), is unclear. *See* Note, Parker v. Brown *Revisited: The State Action Doctrine After* Goldfarb, Cantor *and* Bates, 77 COLUM. L. REV. 898 n.4 (1977).

22. During this period, the Supreme Court touched briefly upon the state action exemption in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 706 (1962) (rejecting a defense of compulsion by a foreign sovereign, supported by analogy to *Parker*, because there was no indication that the foreign government required or even approved the anticompetitive conduct in question) and in Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) (citing *Parker* for the proposition that a restraint of trade resulting from valid governmental action does not violate the antitrust laws).

23. 341 U.S. 384 (1951).

24. The resulting pricing scheme was very similar to that involved in California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980). *See infra* text accompanying notes 82-87. *See also* Taylor Drug Stores, Inc. v. Alcoholic Beverage Control Bd., 1982 Trade Cas. (CCH) ¶ 64,554 (Ky. Cir. Ct. 1982) (Kentucky fair trade contract pricing statute not antitrust immune).

25. Ch. 690, 50 Stat. 693 (1937) (repealed 1975). The Miller-Tydings Fair Trade Act specifically excepted "contracts or agreements prescribing minimum prices for the resale" of specified commodities when "contracts or agreements of that description are lawful as applied to intrastate transactions" under local law. The specified commodities included only products bearing the trademark, brand, or name of the producer or dis-

sis and merely cited *Parker* for the proposition that states could not authorize private persons to violate the antitrust law.[26] The Court concluded that the statutory nonsigner provision exceeded Miller-Tydings' authorization and that therefore the illegal private price fixing compelled by the Louisiana statute violated the Sherman Act.[27]

Because the conduct at issue was that of private parties, and not state officials,[28] the *Schwegmann* Court appears simply to have applied *Parker*'s per se rule and found no immunity. It would be another twenty-three years before the Court again addressed the state action exemption directly.[29]

III. The Broadening Inquiry and the Search for Standards

The Supreme Court next addressed the state action doctrine in *Goldfarb v. Virginia State Bar.*[30] As purchasers of a home in the Virginia suburbs of Washington, D.C., the Goldfarbs had unsuccessfully sought to employ a lawyer to examine title for less than the minimum fee published by the defendant Fairfax County Bar Association and enforced by the defendant Virginia State Bar. Alleging that the minimum-fee schedule for the legal services relating to real estate transactions constituted price fixing under section 1 of the Sherman Act, the Goldfarbs sued on behalf of a class of similarly situated homebuyers.

The unanimous Court divided its inquiry into four steps:[31]

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tributor and which were "in free and open competition with commodities of the same general class produced or distributed by others." *Id. See also* 341 U.S. at 386 n.1.

26. 341 U.S. at 389.

27. *Id.* at 395.

28. Although the Court recognized that the state compelled the challenged private conduct, it gave no weight to this mitigating circumstance. *Id.* at 389.

29. The intervening period resulted in a number of lower court decisions which recognized antitrust immunity for a wide range of economic regulatory activities involving varying degrees of state involvement. *E.g.*, Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248 (4th Cir. 1971) (utility tie-in arrangement which was neither approved nor submitted to state regulatory commission immune); Allstate Ins. Co. v. Lanier, 361 F.2d 870 (4th Cir.), *cert. denied*, 385 U.S. 930 (1966); Woods Exploration & Prod. Co. v. Aluminium Co. of Am., 284 F. Supp. 582 (S.D. Tex. 1968), *rev'd in part*, 438 F.2d 1286 (1971), *cert. denied*, 404 U.S. 1047 (1972).

30. 421 U.S. 773 (1975).

31. 421 U.S. 780, 788. The initial determination of whether an antitrust violation exists was the procedure employed in *Midcal* but not in *City of Boulder*. The Supreme Court's recent decision, Rice v. Norman Williams Co., 102 S. Ct. 3294 (1982), exhibits the wisdom of determining whether an antitrust violation exists before undertaking ex-

(1) Did the respondents engage in price fixing? (2) If so, were their activities in, or did they affect, interstate commerce? (3) If so, were the activities exempt from the Sherman Act because they involved a "learned profession"? and (4) If not, "[were] the activities 'state action' within the meaning of *Parker* and therefore exempt from the Sherman Act?"[32] Speaking through Chief Justice Burger, the Court answered the first three inquiries in favor of the plaintiff.[33] The Court then turned to the question of whether the "State Bar and . . . County Bar . . . [can] avail themselves of [the] so-called state-action exemption."[34]

In resolving that question the Court declared the "threshold" inquiry to be "whether the [anticompetitive] activity is required by the State acting as sovereign." The Court determined that it need inquire no further because "it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent."[35] Announcing a new rule to be employed in state action analysis, the Court held that it is not enough that anticompetitive conduct be "prompted" by state action; instead, the "anticompetitive activities must be compelled by direction of the State acting as a sovereign."[36]

Thus, the first Supreme Court decision directly applying *Parker* both expanded the factors considered in the state action inquiry and narrowed the conduct exempted by it. The focus shifted from the identity of the actor to the nature of the act of regulation and implicitly extended the immunity of public officials to private parties. In so reformulating the state action immunity from the antitrust laws, the Court analyzed the state's method of authorizing the challenged conduct—and required that the conduct be state *compelled.* Because the *Goldfarb* de-

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emption analysis. *See infra* text accompanying notes 154-69.

32. 421 U.S. at 780.

33. Specifically, the Court held that the county bar's suggested minimum fees and the state bar's ability to discipline lawyers habitually charging less than the minimum fees "coalesced to create a pricing system that consumers could not realistically escape." 421 U.S. at 783. Next, the Court held that, because the legal services were an integral part of an interstate transaction, a restraint on those services may substantially affect commerce for Sherman Act purposes. *Id.* at 785. Finally, the Court rejected the suggestion that Congress intended an implicit exemption from the antitrust laws for the professions. *Id.* at 787.

34. *Id.* at 788. Justice Powell, a member of the Virginia Bar, did not participate. *See id.* at 793.

35. 421 U.S. at 790.

36. *Id.* at 791.

fendants failed to meet even this threshold requirement of compulsion, the Court did not identify the considerations which followed the threshold inquiry. But the Court foreshadowed the reasoning in upcoming state action cases by emphasizing the state's compelling interest in regulating professions, and by observing that although the Virginia Bar minimum-fee schedules were "within the reach of the Sherman Act [the Court intended] no diminution of the authority of the State to regulate its professions."[37]

In the following Term the Court decided *Cantor v. Detroit Edison Co.*,[38] which presented another opportunity to define the bounds of the state action doctrine. In *Cantor*, the Court continued to expand the state action inquiry and, as a result, the unanimity which had marked *Parker* and *Goldfarb* was lost as individual justices proposed competing tests for determining the presence of the requisite state action.

In accordance with longstanding practice, Detroit Edison supplied free replacement light bulbs to its residential electricity customers. Although the practice predated state regulation of electric utilities, the Public Service Commission subsequently had approved it and Detroit Edison's current rate filing required that the practice continue until a new tariff was filed and approved.[39] A retail druggist claimed that Detroit Edison was using its monopoly power in the generation of electricity to foreclose competition in the sale of light bulbs in violation of the Sherman Act. With three separate opinions constituting the majority, the Court assumed that, unless it was exempt as state action, Detroit Edison's practice was an antitrust violation. It then held that neither the Public Service Commission's approval of Detroit Edison's initial filing, nor Detroit Edison's *state-compelled* compliance with its free light bulb program warranted an exemption from the antitrust laws.

The plurality opinion, authored by Justice Stevens and

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37. *Id.* at 793. During the next Term, the Court affirmed in dictum the regulatory powers of the states over professions in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). "Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways." *Id.* at 770 (citing Parker v. Brown, 317 U.S. 341 (1943)).

38. 428 U.S. 579 (1976).

39. The practice commenced in 1886. Michigan's regulation of electric utilities began in 1909, and in 1916 the first tariff containing the free light bulb program was approved. *Id.* at 583.

joined by Justices Brennan, White, and Marshall, concluded that *Parker* immunized only "official action taken by state officials," and not private conduct subject to state regulation.[40] Thus, "[s]ince the case now before us does not call into question the legality of any act of the State of Michigan or any of its officials or agents it is not controlled by the *Parker* decision."[41]

The plurality next examined the state involvement implicit in the tariff and mandatory continuation of the program until a new tariff was filed and approved. The four Justices of the plurality, in a portion of the opinion joined by Chief Justice Burger, engaged in a wide-ranging inquiry in deciding whether that involvement justified an exemption from the antitrust laws. They considered the absence of any expressed state policy concerning distribution of light bulbs, the insignificant involvement of the state as compared to the substantial participation by the private actor in the decision to adopt and continue the challenged program, and the anticompetitive effect of the restraint upon a substantial portion of the light bulb market.[42]

Neither the two concurring Justices nor the dissenting Justices approved the plurality's attempt to limit *Parker* to conferring immunity only upon state officials.[43] The two concurring Justices, however, accepted the ultimate holding of the majority that *Parker* did not mandate immunity in *Cantor*.

Chief Justice Burger authored the first concurring opinion. Rejecting the plurality's reading of *Parker* as incorrect and "unnecessary,"[44] the Chief Justice stated that the focus of judicial inquiry should be the nature of the action, rather than the identity of the actor. He agreed, however, with the plurality's conclusion that the light bulb program did not implement any statewide policy and that the state action exemption consequently did not apply.

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40. *Id.* at 591. In support of its reading of *Parker* the plurality recounted the procedural history of *Parker* and quoted extensively from the amicus brief of the United States. *Id.* at 586-89. *See also supra* notes 15-20 and accompanying text.

41. 428 U.S. at 591-93.

42. *Id.* at 593-96.

43. "I do not agree . . . that *Parker* . . . can logically be limited to suits against state officials." *Id.* at 603-04 (Burger, C.J., concurring); *see also id.* at 605-09 (Blackmun, J., concurring) and *id.* at 616-17, n.4 (Stewart, J., dissenting) ("If *Parker v. Brown* . . . could be circumvented by the simple expedient of suing the private party against whom the State's 'anticompetitive' command runs, then that holding would become an empty formalism, standing for little more than the proposition that Porter Brown sued the wrong parties.").

44. 428 U.S. at 604 (Burger, C.J., concurring).

The key concurring opinion was authored by Justice Blackmun. By weighing the regulatory justification for the challenged conduct against its anticompetitive effect,[45] Justice Blackmun sounded a theme that has recurred in succeeding cases and emerged explicitly in *City of Boulder*[46]—an expansive rule of reason analysis requiring "the balancing of implicated federal and state interests."[47] The expansive rule of reason described by Justice Blackmun went far beyond the traditional antitrust rule of reason, permitting consideration not only of the competitive impact of the challenged conduct but also of noneconomic justifications, such as public health and safety and the state's interest in regulating the professions. In fact, Justice Blackmun himself analogized this rule of reason to equal protection analysis.[48]

Recognizing the ever expanding inquiry that resulted from the standards enunciated by the plurality and Justice Blackmun, the dissent[49] described both approaches as a revival of the discarded doctrine of substantive due process, which created "a vehicle for ad hoc judicial determinations of the substantive validity of state regulatory goals."[50]

At the conclusion of the next Term the Court returned to the task of applying the state action doctrine, and again confronted the interplay between regulation of the legal profession and the Sherman Act. In *Bates v. State Bar*,[51] Justice Blackmun[52] declared the Arizona State Bar's ban on lawyer advertising to be exempt from the antitrust laws under the state action doctrine.[53] In concluding that the state action doctrine protected this activity from antitrust constraints, Justice Blackmun, true to his position in *Cantor*, did not attempt to articulate any easily applicable test. Instead, he considered several factors in bal-

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45. Justice Blackmun noted that he "would apply, at least for now, a rule of reason, taking it as a general proposition that state-sanctioned anticompetitive activity must fall like any other if its potential harms outweigh its benefits." 428 U.S. at 610 (Blackmun, J., concurring).

46. *See infra* text accompanying notes 133-49.

47. 428 U.S. at 611.

48. *Id.*

49. The dissenting opinion was authored by Justice Stewart and joined by Justices Powell and Rehnquist.

50. 428 U.S. at 627 (Stewart, J., dissenting, joined by Powell, J. and Rehnquist, J.).

51. 433 U.S. 350 (1977).

52. Chief Justice Burger concurred in the opinion and Justices Stewart, Powell, and Rehnquist concurred in the state action portions.

53. The Court ultimately rejected the advertising prohibition as conflicting with commercial free speech protected by the first amendment. 433 U.S. at 384.

ancing the state's interest in regulation against the federal policy of free and open competition, specifically noting that: (1) The challenged restraint was clearly set forth in the rules of a state agency, the Arizona Supreme Court (the test given great weight in *Goldfarb*);[54] (2) the claim was against a public agency rather than a private party (the original *Parker* test);[55] (3) the area of regulation—the practice of law—was one traditionally relegated to states (an important consideration in the *Cantor* Court's rejection of the light bulb program);[56] and (4) the restraint was subject to "pointed re-examination" by the state in the course of enforcement proceedings (a new test of continuing state interest and involvement).[57] Finally, in discussing the free speech issue, Justice Blackmun noted the ambiguous competitive effect resulting from the restraint.[58]

Thus, the *Bates* Court effectively applied Justice Blackmun's suggestion in his *Cantor* concurrence that an expanded rule of reason inquiry was required to determine state action immunity.[59] The Court emphasized that regulation of the activities of the bar was "at the core of the State's power to protect the public," in contrast to the apparent lack of traditional state interest in the regulation of a free light bulb program. Finally, the Court viewed the state's affirmative expression and close continuing supervision of its policy of banning lawyer advertising as a guarantee that federal policy would not be "unnecessarily and inappropriately subordinated to state policy."[60]

The Court's next encounter with the state action doctrine, in *City of Lafayette v. Louisiana Power & Light Co.*,[61] raised an additional consideration: Where does a city fall on the spectrum between states and private parties? In an opinion by Justice Brennan,[62] the Court held that electric utilities owned by two

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54. *Id.* at 362.

55. *Id.* at 361.

56. *Id.* at 362.

57. *Id.* at 361-62.

58. *Id.* at 377-78. In a recent decision, the Supreme Court found a rule of the Missouri Supreme Court regulating lawyer advertising unconstitutional under the first and fourteenth amendments. *In re* R _ M. J _, 102 S. Ct. 929 (1982).

59. Significantly, the three dissenters in *Cantor* who had objected to the result and the vagueness of the test articulated by Justice Blackmun, joined in that portion of the *Bates* majority opinion finding the state action exemption applicable.

60. 433 U.S. at 361-62.

61. 435 U.S. 389 (1978).

62. The opinion was joined by Justices Marshall, Powell, Stevens, and, in part, by Chief Justice Burger.

Louisiana cities were not immune from antitrust counterclaims asserted by a competing private utility. The district court had dismissed the private utility's counterclaims, relying on an earlier interpretation of *Parker* by the United States Court of Appeals for the Fifth Circuit.[63] However, the Fifth Circuit reversed, holding that *Parker* and *Goldfarb,* read together, required the district court to inquire whether the state legislature had contemplated the restraint imposed by the city, and that the intent of the state was determinative.[64]

The Supreme Court affirmed in an opinion by Justice Brennan. The Court held that cities were unquestionably "persons" within the meaning of the Sherman Act; therefore, "the conclusion that the antitrust laws are not to be construed as meant by Congress to subject cities to liability under the antitrust laws must rest on the impact of some [other] overriding public policy which negates the construction of coverage."[65] Considering those arguments "in light of the presumption against implied exclusions from coverage under the antitrust laws,"[66] the Court turned to the cities' argument that *Parker* applied with equal force to political subdivisions. Labeling that argument "[p]lainly . . . in error,"[67] the Court traced *Parker* through *Goldfarb* and *Bates* and held that *Parker* exempts "only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service."[68]

Consistent with his position in *Cantor,* Chief Justice Burger, in a concurring opinion, opined that the district court should focus upon the type of activity, and particularly on the activity's necessity to the functioning of the state's regulatory scheme. The Chief Justice viewed the cities' operation of electrical utilities to be proprietary rather than governmental, and thus accorded the cities' status even less weight because they were acting more as private parties than as governmental units. Chief Justice Burger appeared to be particularly swayed by the seeming inequity of allowing the Louisiana cities to use the anti-

63. Saenz v. University Interscholastic League, 487 F.2d 1026 (5th Cir. 1973).

64. City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431 (5th Cir. 1976), *aff'd,* 435 U.S. 389 (1978).

65. 435 U.S. at 396-97.

66. *Id.* at 398.

67. *Id.* at 408.

68. *Id.* at 408-13.

trust laws as a sword but state action immunity as a shield in the competitive battle with privately owned utilities.[69]

As in his *Cantor* dissent, Justice Stewart leveled the criticism always applicable to a rule of reason approach: the test employed by the Court was vague and uncertain and led to wide-ranging inquiry.[70] For him, cities were a sufficiently integral part of the state government that it was "senseless to require a showing of state compulsion when the State itself acts through one of its governmental subdivisions."[71]

Justice Blackmun filed a separate dissent, apparently agreeing with Justice Stewart that cities were equal to states under the state action doctrine and joining his conclusion that the state action exemption should render these cities immune.[72] Presumably as a result of his adoption of the rule of reason in *Cantor,* Justice Blackmun did not join Justice Stewart in his criticism of the rule of reason approach.

The 1978 Term saw a continuation of the Court's wide-ranging consideration of a number of factors in applying the state action doctrine. In *New Motor Vehicle Board v. Orrin W. Fox Co.,*[73] the Court considered challenges to California's Automobile Franchise Act.[74] The Act required approval of a state New Motor Vehicle Board for the opening of a retail distributorship in the marketing area of an existing franchise if the existing franchisee protested.[75]

Justice Brennan, again writing for the majority, at once rejected the contention that the statute conflicted with the Sherman Act, and went on to broaden the permissible scope of inquiry. Justice Brennan labeled the "dispositive answer" to the Sherman Act challenge to be that "the Automobile Franchise Act's regulatory scheme is a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfet-

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69. *Id.* at 418-22 (Burger, C.J., concurring in part).

70. *Id.* at 439 (Stewart, J., dissenting).

71. *Id.* at 432.

72. *Id.* at 441 (Blackmun, J., dissenting). *See id.* at 428-30 (Stewart, J., dissenting).

73. 439 U.S. 96 (1978).

74. CAL. VEH. CODE ANN. §§ 3062, 3063 (West Supp. 1978).

75. In addition to the claim that the California Act was in conflict with the Sherman Act, the Court considered and rejected a claim that the statutory scheme's grant of power to an objecting dealer violated due process, 439 U.S. at 104-08. The Court also rejected the claim that permitting a private party to trigger the automatic stay and review procedures constituted an impermissible delegation of powers to a private party. *Id.* at 109.

tered business freedom in the matter of the establishment and relocation of automobile dealerships. The regulation is therefore outside the reach of the antitrust laws under the 'state action' exemption."[76] Yet, the opinion considered much more.

The majority's opinion observed that the triggering of the Board's action by private parties did not cause the action to lose its exemption. First, the private parties' triggering activity—lodging a protest with the Board—did not "mandate significant delay," and any delay was subject to "ongoing regulatory supervision."[77] Second, the procedure involved was unlike the *Schwegmann*[78] grant of authority to private parties. Here a private party acting in good faith[79] did no more than invoke governmental action. Finally, the Court recognized that if an adverse effect on competition were sufficient "to render a state statute invalid, the State's power to engage in economic regulation would be effectively destroyed."[80]

Thus, although the Court cited the "clearly articulated and affirmatively expressed" intention to displace competition with regulation as "dispositive," it went on to examine every facet of the questioned state action: the specification of the state's goals; the legitimacy of those goals; the effectiveness of the regulatory scheme in fulfilling those goals; the amount of continuing input from the state through a regulatory mechanism; the relative roles of private parties and state officials under the regulation; the severity of the restraint's negative effect on competition; and potentially any other factors peculiar to the parties, the subject of regulation, or the restraint itself.[81] This expansive state action rule of reason far exceeded even the traditional antitrust rule of reason by its evaluation of many noneconomic factors in determining the reasonableness of any allegedly anticompetitive restraint.

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76. 439 U.S. at 109-11 (citing *Parker*, 317 U.S. 341 (1943); *Bates*, 433 U.S. 350 (1977); and *City of Lafayette*, 435 U.S. 489 (1978)).

77. 439 U.S. at 110.

78. 341 U.S. 384. *See supra* text accompany notes 23-29.

79. The Court noted that a "sham" complaint designed only to invoke the delay provisions might render the protester liable under the antitrust laws. 439 U.S. at 110 n.15 (citing California Motor Transp. Co. v. Trucking Unltd., 404 U.S. 508 (1972)).

80. 439 U.S. at 111 (citing Exxon Corp. v. Governor of Md., 437 U.S. 117, 133 (1978)).

81. 439 U.S. at 109-11.

IV. First Signs of the Dual Level "State Action" Analysis

The California wine pricing statute analyzed in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*[82] was strikingly similar to that struck down by the Court in *Schwegmann.*[83] The challenged California statute required all wine producers and wholesalers to file fair trade contracts or pricing schedules. Under the statute, producers could set wholesaler-to-retailer prices through fair trade contracts; alternatively, wholesalers could post resale price schedules specifying those prices. A single fair trade contract or schedule for a particular brand established the terms for all wholesale transactions in that brand in each of the three trading areas specified by the statute.[84] Any state-licensed wholesaler selling below the established price faced "fines, license suspension, or outright license revocation."[85] California's Department of Alcoholic Beverage Control, the state body charged with administration of the wine pricing program, did not participate in the establishment of wine prices pursuant to the statute and did not review the reasonableness of established prices.[86]

The plaintiff, Midcal Aluminum, Inc., was a southern California wholesale wine distributor charged by the Department of Alcoholic Beverage Control with selling twenty-seven cases of wine at prices lower than those specified by the producer, Ernest & Julio Gallo Winery, and with selling wine for which no price schedule or fair trade contract had been filed. Midcal Aluminum admitted the charges and the applicability of the penalties specified in the California wine pricing statute. It then commenced suit in the California Court of Appeal, seeking to enjoin enforcement of the statute.[87]

The California Court of Appeal found controlling a 1978 California Supreme Court decision, *Rice v. Alcoholic Beverage*

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82. 445 U.S. 97 (1980).

83. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951). *See supra* text accompanying notes 23-29.

84. 445 U.S. at 99. In addition, state regulations provided that wine prices posted by a single wholesaler within a trading area would bind all wholesalers in that area. *Id.* at 99-100.

85. *Id.* at 100. *See* Cal. Bus. & Prof. Code Ann. § 24880 (West Supp. 1980).

86. 445 U.S. at 100.

87. *Id. See* Midcal Aluminum, Inc. v. Rice, 90 Cal. App. 3d 979, 153 Cal. Rptr. 757 (1979).

Control Appeals Board,[88] which invalidated California's parallel distilled liquor price posting laws.[89] In the *Rice* case, the California Supreme Court had held that the distilled liquor price posting law clearly constituted resale price maintenance, a per se violation of the Sherman Act, and had found no state action immunity because California played only a passive role in liquor pricing.[90] The California Supreme Court also had held that the liquor pricing scheme was not protected from the antitrust laws by the twenty-first amendment, which empowers states to regulate liquor distribution free from many federal interstate commerce restrictions.[91]

In an opinion by Justice Powell,[92] a unanimous Supreme Court[93] affirmed the California Court of Appeal's ruling that neither the state action doctrine nor the twenty-first amendment prevented invalidation of the California wine pricing statute under the antitrust laws. The Supreme Court first considered the threshold question of whether the California wine pricing statute violated the Sherman Act, and concluded that the resale price maintenance inherent in the scheme was the type of practice long held a per se violation of section 1 of the Sherman Act.[94]

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88. 21 Cal. 3d 431, 146 Cal. Rptr. 585 (1978).

89. Rice v. Alcoholic Beverage Control Appeals Bd., 90 Cal. App. 3d at 983-84, 153 Cal. Rptr. at 760-61. In addition, the California Court of Appeal, relying on *Rice*, had earlier invalidated the wholesaler-to-retailer price setting provisions of California's wine marketing scheme. Capiscean Corp. v. Alcoholic Beverage Control Appeals Bd., 87 Cal. App. 3d 996, 151 Cal. Rptr. 492 (1979). The State did not appeal this decision. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. at 102 n.4.

90. 21 Cal. 3d at 444-45, 146 Cal. Rptr. at 594.

91. 21 Cal. 3d at 445-51, 146 Cal. Rptr. at 595-98. Section 2 of the twenty-first amendment provides: "The transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST., amend. XXI, § 2.

92. Justice Powell had dissented in *Cantor*, joining in Justice Stewart's reasoning that departure from an actor-oriented *Parker* test would open the door to federal substantive review of state regulation. Cantor v. Detroit Edison Co., 428 U.S. at 627. His *Midcal* opinion evidences an attempt to temper unrestricted review by developing seemingly clear rules for initial assessment of state involvement.

93. Justice Brennan did not participate in the decision of the case, *see* 445 U.S. at 114, and had not participated in prior cases involving the liquor industry, though he did participate in the recent Rice v. Norman Williams Co., 102 S. Ct. 3294 (1982).

94. 445 U.S. at 102-03 (citing Schwegmann Bros. v. Calvert Corp., 314 U.S. 384). In first examining this question, the Court followed the analytical approach utilized by the California Supreme Court in *Rice*. *See* 21 Cal. 3d at 439, 146 Cal. Rptr. at 590-91. This approach has the obvious advantage of rendering state action inquiry unnecessary where no antitrust violation exists. *See, e.g.*, Colby Distr. Co. v. Lennen, 227 Kan. 179, 606 P.2d 102, *appeal dismissed sub nom.* Grant Billingsley Wholesale Liquor Co. v. Lennen, 449

The Court then considered whether the state's limited involvement in the pricing process exempted it from antitrust scrutiny. Drawing from its recent state action decisions, the Court articulated a two-part test. First, relying upon *Goldfarb* and *Bates,* the Court stated that the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy."[95] Second, relying on *Cantor, Bates,* and *Orrin W. Fox Co.,*[96] the Court mandated that "the policy must be 'actively supervised' by the State itself."[97]

U.S. 943 (1980). This logical order of inquiry has not always been obvious to appellate courts.

95. 445 U.S. at 104-05. In Goldfarb v. Virginia State Bar, 421 U.S. at 791, the Court held that for the state action doctrine to apply, "anticompetitive activities must be compelled by direction of the State acting as a sovereign." *See supra* text accompanying notes 30-36. In Bates v. State Bar, 433 U.S. at 363, the Court applied the state action doctrine because the Arizona ban on lawyer advertising "reflect[ed] a clear articulation of the State's policy." *See supra* text accompanying notes 51-60.

The *Midcal* Court's formulation of the clearly articulated and affirmatively expressed state policy requirement has opened the question of whether actions of private parties under state regulatory schemes must be *compelled* (as in *Goldfarb*) in order to qualify for state action immunity. At least one court has held specifically that compulsion is still a necessary precondition for private party immunity. *See* United States v. Southern Motor Carriers Rate Conference, 672 F.2d 469 (5th Cir. 1982). *But see* Turf Paradise, Inc. v. Arizona Downs, 670 F.2d 813 (9th Cir.), *cert. denied,* 102 S. Ct. 2208 (1982).

96. 445 U.S. at 104-05. State action immunty was rejected in Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), because the state agency had only passively accepted the light bulb portion of the public utilities tariff. *See supra* text accompanying notes 38-50. The Court in Bates v. State Bar, 433 U.S. at 362, had emphasized that the prohibition of lawyer advertising was "subject to pointed reexamination by the policymaker—the Arizona Supreme Court—in enforcement proceedings." *See supra* text accompanying notes 51-60. Similarly, the California automobile dealership location statute reviewed in New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, specifically required the state to hold a hearing if an automobile franchisee objected to the establishment or relocation of a competing dealer. *See supra* text accompanying notes 74-81.

97. 445 U.S. at 105. *See also* Miller v. Oregon Liquor Control Comm'n, 1982-2 Trade Cas. (CCH), ¶ 64,862 (9th Cir. July 7, 1982) (Oregon beer and wine pricing regulations not antitrust immune because not actively supervised by state); Knudsen Corp. v. Nevada State Dairy Comm'n, 676 F.2d 374 (9th Cir. 1982) (denying immunity to Nevada dairy price regulatory scheme for lack of active state involvement); Benson v. Arizona State Bd. of Dental Examiners, 673 F.2d 272 (9th Cir. 1982) (exempting under *Midcal* the licensing practices of the Arizona State Board of Dental Examiners). The Court of Appeals for the Sixth Circuit has recently held that where a state statute is "self executing" no active state supervision is required. Allied Artists Picture Corp. v. Rhodes, 679 F.2d 656 (6th Cir. 1982). For examples of recent cases applying this two-part test, see Turf Paradise, Inc. v. Arizona Downs, 670 F.2d 813 (9th Cir. 1982) (regulation of horse racing dates); Morgan v. Division of Liquor Control, 664 F.2d 35 (2d Cir. 1981) (Connecticut liquor law prohibiting sales of alcoholic beverages); Grendel's Den, Inc. v. Goodwin, 662 F.2d 88 (1st Cir. 1981) (granting of liquor licenses conditional on lack of objection from neighboring churches or schools), *aff'd en banc on other grounds,* 662 F.2d 102 (1st

Applying this test to the California wine pricing scheme, the Court held that although the California scheme satisfied the first standard, it failed to meet the second.[98] The Court concluded that "[t]he legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance."[99] But the Court found insufficient state involvement because California did not establish the prices, review the reasonableness of the price schedules, regulate the terms of fair trade contracts, or monitor market conditions. In short, there was no " 'pointed reexamination' of the program" by the state at any time.[100] Finally, the Court determined, as had the California Court of Appeal, that the twenty-first amendment did not preclude application of the Sherman Act.[101]

The *Midcal* Court effectively distilled the state action principles announced in its recent decisions to arrive at a well-defined two-part test. The Court's decision, however, went well beyond simple application of that test to the California wine pricing statute. In reaching the determination that the challenged system was not entitled to antitrust immunity, the opinion included observations concerning the state's interest in the regulation, the regulation's success in meeting goals specified by the state, the wisdom of the state's goals, and the competitive advantages and disadvantages of the scheme. Thus, while announcing a seemingly straightforward two-part state action test, the *Midcal* Court considered all those factors examined by prior state action decisions.

For example, Justice Powell reviewed California's stated goals in promulgating the wine pricing scheme: the promotion of temperance and the preservation of small retail stores.[102] Although the Court appeared willing to examine the justification

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Cir. 1981); North v. New York Tel. Co., 1980-2 Trade Cas. (CCH) ¶ 63,675 (S.D.N.Y. 1980) (telephone rate regulation); Hinshaw v. Beatrice Foods, Inc., 1980-1 Trade Cas. (CCH) ¶ 63,584 (D. Mont. 1980) (milk price regulation); Sausalito Pharmacy, Inc. v. Blue Shield, 1980-1 Trade Cas. (CCH) ¶ 63,695 (N.D. Cal. 1980) (prepaid prescription drug plans).

98. 445 U.S. at 105.

99. *Id.*

100. *Id.* at 105-06. *Accord* Taylor Drug Stores, Inc. v. Alcoholic Beverage Control Bd., 1982-1 Trade Cas. (CCH) ¶ 64,554 (Ky. Cir. Ct. 1982).

101. 445 U.S. at 106-14.

102. 445 U.S. at 101, 112, 113. Much of this analysis was undertaken in deciding the contention that the twenty-first amendment barred application of the Sherman Act. The factors considered, however, were precisely the type reviewed in prior state action decisions.

for these goals and to balance them against competing federal concerns, it found that examination unnecessary because the proffered goals had not in fact been achieved:

> We need not consider whether the legitimate state interests in temperance and the protection of the small retailers ever could prevail against the undoubted federal interest in a competitive economy. The unsubstantiated state concerns put forward in this case simply are not of the same stature as the goals of the Sherman Act.[103]

The Court was also particularly impressed that the California courts—one important voice of the state sovereign—had questioned the state's goals in enacting the pricing statute, had found that the goals were not being achieved under the statute, and had concluded that in practice the statute was highly anticompetitive.[104] Moreover, the Court noted that the State of California did not petition for certiorari in *Rice v. Alcoholic Beverage Control Appeals Board,* did not appeal the decision in *Capiscean Corp. v. Alcoholic Beverage Control Appeals Board,*[105] which invalidated the consumer pricing portion of California's wine statute, and did not appeal the California Court of Appeal's decision in *Midcal.*[106] Thus, the Court concluded that "the State of California has shown less than an enthusiastic interest in its wine pricing system" and that this lack of interest left the case in an "unusual posture."[107]

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103. *Id.* at 113-14. In finding that the California scheme had not achieved its state goals, the Court adopted the California Supreme Court's findings in *Rice v. Alcoholic Beverage Control Appeals Bd.* that there was "little correlation between resale price maintenance and temperance" and that "fair trade laws were [not] necessary to the economic survival of small retailers." *Id.* at 112-13 (citation omitted).

Further, Justice Powell recited the Court's conclusions that the inherent evils of vertical price maintenance had been compounded under the California pricing scheme by resulting horizontal price-fixing of which the Court in *Rice v. Alcoholic Beverage Control Appeals Bd.* found "direct evidence." *Id.* at 101, 103 n.7.

104. 445 U.S. at 113.

105. *See supra* note 89.

106. 445 U.S. at 101-02. Rather, the California Retail Liquor Dealers Ass'n, an intervenor before the California Court of Appeal, sought certiorari in *Midcal. Id.* at 105. Although the Court did not articulate the implication, the retailers' interest in upholding the wine producers' power to specify the wholesaler-to-retailer price was not likely to be a procompetitive one.

107. *Id.* at 111 n.12. "[T]he state agency responsible for administering the program did not appeal the decision of the California Court of Appeal . . . . [N]either the intervenor nor the State Attorney General . . . has specified any state interests protected by the resale price maintenance system other than those noted in the state court opinions." *Id.*

In balancing the competing federal antitrust interests against state regulatory concerns, the *Midcal* Court found little to justify the latter. However, it is the Court's methodology in balancing the competing state and federal interest, rather than the ultimate result, that is most revealing. None of the factors weighed in the balance had any relevance to the two-part test articulated by Justice Powell—a test under which the Court concluded that although the state had clearly articulated its wine pricing policy, the scheme could not be immune from antitrust scrutiny for lack of continuing state supervision.[108] Despite the simple test announced, the broad inquiry continued.[109]

V. THE *City of Boulder* SOLUTION

In the most recent Supreme Court decision analyzing the state action exemption, *Community Communications Co. v. City of Boulder*,[110] the Court applied its two-part *Midcal* test to deny antitrust immunity to a municipal ordinance which temporarily limited the service area of a local cable television franchise.[111] The City of Boulder, a home rule municipality under the Constitution of the State of Colorado,[112] had enacted an ordinance in

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108. The role of the twenty-first amendment in *Midcal* certainly affected the state action analysis, but did not render that analysis significantly distinct from the general state action question. The twenty-first amendment merely added additional justification for immunity by evidencing beyond question that liquor regulation was generally an area of state concern. If anything, the *Midcal* result suggests that potential antitrust defendants may not depend on immunity because the questioned activity previously had been exclusively a state concern.

109. Prior to *Midcal*, lower courts had followed the Supreme Court's lead by considering a variety of factors. For example, the court in Sound, Inc. v. American Tel. & Tel. Co., 631 F.2d 1324 (8th Cir. 1980) considered:

> the existence and nature of any relevant statutorily expressed policy; the nature of the regulatory agency's interpretation and application of its enabling statute, including the accommodation of competition by the regulator; the fairness of subjecting a regulated private defendant to the mandates of antitrust law; and the nature and extent of the state's interest in the specific subject matter of the challenged activity.

Id. at 1334. After *Midcal*, the same courts appeared to abandon the broad approach for rigid application of the two-part *Midcal* test. *E.g.*, City of Kirkwood v. Union Elec. Co., 671 F.2d 1173, 1180 n. 15 (8th Cir. 1982).

110. 102 S. Ct. 835 (1982).

111. Justice Brennan authored the majority opinion in which Justices Marshall, Blackmun, Powell and Stevens joined. Justice Stevens authored a concurring opinion which, like Justice Rehnquist's dissent, provides an illumination of the rigid state action exemption analysis coupled with the broader rule of reason analysis adopted by the majority. Chief Justice Burger and Justice O'Connor joined in Justice Rehnquist's dissent. Justice White took no part in the decision.

112. COLO. CONST. art. XX, § 6. This provision of the Colorado Constitution entitled

1964 granting a cable television company a twenty-year, revocable, nonexclusive permit to conduct a cable television business within the city limits.[113] That permit eventually was assigned to Community Communications, which, for nearly fourteen years, confined its service to a specific area of the city. "[M]arkedly improved technology" became available to Community Communications in the late 1970's; consequently, in May 1979, the company informed the Boulder City Council that it planned to expand its service. A competitor of Community Communications almost simultaneously informed the City Council of its interest in obtaining a permit to provide competing cable television service.[114]

After reviewing its cable television policy,[115] the City Council enacted an emergency ordinance prohibiting Community Communications from expanding its service into other areas of the city for a period of three months.[116] During this moratorium

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each city and town to exercise "the full right of self-government in both local and municipal matters" and "with respect to such matters the City Charter and ordinances supersede the laws of the state." 102 S. Ct. at 836-37. After *Lafayette*, some courts treated "home rule" provisions of state constitutions as sufficient authorization for local governments to implement their own anticompetitive policies. *E.g.*, Hybud Equip. Corp. v. City of Akron, 654 F.2d 1187 (6th Cir. 1981), *vacated and remanded*, 50 U.S.L.W. 3667 (U.S. Feb. 22, 1982) (establishment of waste disposal and energy reconversion project and prohibition of alternative waste disposal sites authorized by home city rule); Pueblo Aircraft Serv. v. City of Pueblo, 498 F. Supp. 1205 (D. Colo. 1980) (immunity for municipal airport derived from home rule authority). *But see* Woolen v. Surtran Taxicabs, Inc., 461 F. Supp. 1025 (N.D. Tex. 1978) (no state action immunity when city grants one taxicab company the privilege of picking up passengers at airport).

113. 102 S. Ct. at 837.

114. *See id.*

115. *See id.*

> The . . . City Council . . . initiat[ed] a review and reconsideration of cable television in view of the many changes in the industry since . . . 1964. . . . Accordingly, they hired a consultant, . . . and held a number of study meetings to develop a governmental response to these changes. The primary thrust of [the consultant's] advice was that the City should be concerned about the tendency of a cable system to become a natural monopoly. Much discussion in the City Council centered around a supposed unfair advantage that [petitioner] had because it was already operating in Boulder. Members of the Council, and the City Manager, expressed fears that [petitioner might] not be the best cable operator for Boulder, but would nonetheless be the only operator because of its head start in the area. The Council wanted to create a situation in which other cable companies could make offers and not be hampered by the possibility that [petitioner] would build out the whole area before they even arrived.

Id. at 837-38 n.6 (quoting from the district court's opinion, 485 F. Supp. 1035, 1037 (D. Colo. 1980)) (brackets and deletions by the Supreme Court).

116. 102 S. Ct. at 838. The preamble of the ordinance set forth a list of justifications which included the city's interest in permitting competition among interested cable tele-

period, the city announced its plan "to draft a model cable television ordinance and to invite new businesses to enter the Boulder market under its terms."[117]

Community Communications sought and obtained a preliminary injunction on the ground that the restriction of its proposed business expansion violated the antitrust laws. In granting the injunction, the district court specifically considered but rejected the city's contention that, as a home rule municipality, it enjoyed antitrust immunity under *Parker*.[118] The district court not only found that status as a home rule municipality did not provide local autonomy over the operations of cable television, but also held that, even if local autonomy extended to this ordinance, *Parker* was "wholly inapplicable."[119]

The Court of Appeals for the Tenth Circuit reversed, finding the city's regulation exempt from the antitrust laws.[120] The court of appeals first found the regulation and proposed model ordinance to be within the home rule authority of the city.[121] It then distinguished *City of Lafayette* on the ground that, unlike municipal operation of a revenue producing utility, the licensing of a cable television service was not a proprietary activity be-

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vision companies, the negative impact which immediate expansion by Community Communications might have on other interested companies and the absence of any impairment of Community Communications' ability to serve those within the area presently served by it. *Id.* at 838 n.7.

117. 102 S. Ct. at 838.

118. 485 F. Supp. at 1039. Curiously, the district court held that Community Communications had not established a probability of success on the merits of its claim that the City of Boulder and the prospective franchisee had conspired in restraint of trade. *Id.* at 1038. Instead, with little analysis other than unexplained citations to boycott cases, the district court appears to have found an antitrust violation in the city's unilateral refusal to allow Community Communications to expand to the full area delineated in its initial permit. This potential violation satisfied the Tenth Circuit's preliminary injunction standard of "fair ground for litigation and thus for more deliberate investigations." Continental Oil Co. v. Frontier Ref. Co., 338 F.2d 780, 782 (10th Cir. 1964).

119. 485 F. Supp. at 1039. The focus of the district court appeared to be not only the 90-day moratorium, but the method adopted by the city for promulgating the model ordinance. The city drafted a proposed ordinance and submitted it to the cable television industry for comments. *Id.* at 1038. The district court believed the purpose of this procedure was to obtain "an agreed ordinance which could not later be attacked," and held "the approach taken is not an appropriate exercise and articulation of a policy or regulation." *Id.* at 1038-39.

120. 630 F.2d 704 (10th Cir. 1980). The court of appeals noted that the three-month moratorium expired one day following the district court's entry of the restraining order and therefore assumed "that the trial court was considering the model ordinance as a substantial and continuing factor." *Id.* at 705.

121. 630 F.2d at 707.

cause the city itself did not provide the services.[122] The court of appeals also cited *Midcal* and held that the city's regulation met the two-pronged *Midcal* test by the state's (through the city's) clear and affirmative articulation of its cable television policy and the opportunity for active supervision and enforcement under the regulatory scheme.[123]

The Supreme Court reversed, with Justice Brennan writing for the majority. The Court first examined the extent to which *Parker* had been refined by *City of Lafayette, Orrin W. Fox Co.,* and *Midcal,*[124] and then concluded that the challenged ordinance could not be antitrust immune unless (1) "it constitutes the action of the State of Colorado itself in its sovereign capacity"; or (2) "it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy."[125] Justice Brennan found that, although enacted pursuant to the city's home rule authority, the challenged ordinance failed both tests.

First, he rejected the contention that, as a result of home rule, the cable television moratorium ordinance was "an 'act of government' performed by the city *acting as the state* in local matters."[126] Characterizing this argument as misstating the letter and misunderstanding the spirit of the *Parker* doctrine, Justice Brennan found no antitrust exemption for "city-states":

> *Parker* recognized Congress' intention to limit the state action exemption based upon the federalism principle of limited state sovereignty. *City of Lafayette, Orrin W. Fox Co.,* and *Midcal* reaffirmed both the vitality and the intrinsic limits of the

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122. *Id.* at 708 ("*City of Lafayette* must be distinguished from the case before us because, as discussed above, no proprietary interest of the City is here involved.").

123. 630 F.2d at 708. "The policy was affirmatively expressed through the language of the ordinances. The second part of the *[Midcal]* test was met by the active supervision and enforcement of the policy by imposition of the 90-day moratorium on construction and by issuance of civil and then criminal citations to cable workers when the moratorium was ignored." *Id.*

124. 102 S. Ct. at 839-41.

125. *Id.* at 841. Justice Brennan found in the plurality opinion in *City of Lafayette* "a principle that makes no accommodation for sovereign subdivisions of States," and a standard which "would shield from antitrust liability [only] municipal conduct engaged in 'pursuant to state policy to displace competition with regulation or monopoly public service.' " *Id.* at 840-41 (quoting from *City of Lafayette,* 435 U.S. at 413). This standard, according to Justice Brennan, was adopted by the majority of the Court in *Orrin W. Fox Co.,* 439 U.S. 96 (1978), and *Midcal,* 445 U.S. 97 (1980).

126. 102 S. Ct. at 841-42 (emphasis in original). A similar result was reached in Woolen v. Surtran Taxicabs, Inc., 461 F. Supp. 1025 (N.D. Tex. 1978). *See supra* note 112.

> *Parker* state action doctrine. It was expressly recognized by the plurality opinion in *City of Lafayette* that municipalities "are not themselves sovereign," . . . and that accordingly they could partake of the *Parker* exemption only to the extent that they acted pursuant to a clearly articulated and affirmatively expressed state policy . . . .[127]

Turning to the clearly articulated state policy standard,[128] Justice Brennan determined the general power grant embodied in home rule authorization to be only an expression of the state's neutrality concerning the challenged ordinance:

> A State that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which the municipal liability is sought. Nor can those actions be truly described as "comprehended within the powers granted," since the term, "granted" necessarily implies an affirmative addressing of the subject by the state . . . . Acceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of "clear articulation and affirmative expression . . . ."[129]

The majority applied the first prong of the *Midcal* test and, finding no "clear articulation and affirmative expression" for the cable television moratorium ordinance by the State of Colorado, determined the challenged ordinance to be outside that narrow class of activities wholly immune from antitrust scrutiny.[130] Although the district court in *City of Boulder* had reviewed factors which the Supreme Court had considered relevant in its most recent state action decisions,[131] neither the district court nor the Supreme Court analyzed the legitimacy of the city's goals, the subject of the regulation, the duration of the regulation, or the effect of the regulation on competition. Thus, Justice Brennan appeared to have resolved the state action exemption issue without the broad rule of reason inquiry in which he, writing for the

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127. 102 S. Ct. at 842.

128. In spite of the Tenth Circuit's apparent reliance upon the governmental function—proprietary enterprise distinction enunciated by Chief Justice Burger in *City of Lafayette*, 435 U.S. 422-24, Justice Brennan did no more than note Community Communications' contention that it met this test. 102 S. Ct. at 842 n.18.

129. 102 S. Ct. at 843.

130. *Id.* at 841 n.14.

131. *See supra* note 119 and accompanying text.

majority, had engaged in *Orrin W. Fox Co.*[132]

However, the majority (and, in fact, the entire Court[133]), recognized the adverse impact which the antitrust laws could have upon manifestly proper state and municipal regulation if factors that do not affect competition, but do affect health, safety, and welfare, were not considered at some point. Consequently, Justice Brennan noted the "preliminary posture" of the litigation[134] and found "it unnecessary for us to consider other issues" such as the substantive validity of the challenged ordinance under the antitrust laws.[135] As to this issue, the majority indicated that the traditional rule of reason which focuses upon the anticompetitive nature of the restraint,[136] might not apply to "government defendants."[137] Instead, the majority alluded to a broader rule of reason which, unlike that delineated in the most recent cases using the traditional rule of reason, would require consideration of more than the competitive effect of the challenged activity.[138] The *City of Boulder* majority appears to have

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132. 439 U.S. 96.

133. Justice Rehnquist, joined by Chief Justice Burger and Justice O'Connor, recognized that such traditional subjects of municipal regulation as zoning and licensing would now be subject to full antitrust scrutiny: "The Court's decision in this case . . . will . . . impede, if not paralyze, local governments' efforts to enact ordinances and regulations aimed at protecting public health, safety, and welfare, for fear of subjecting the local government to liability under the Sherman Act . . . ." 102 S. Ct. at 843.

134. *Id.* at 843 n.20. On the other hand, the "preliminary" characterization may have resulted from the particular questions presented to the Court in the petition for certiorari. As framed, the petition appears to have requested only a determination whether the City of Boulder was automatically exempt from antitrust liability. On this narrow question, the Court, applying the *Midcal* test, found the City of Boulder's moratorium and model ordinance not to fall within that narrowly defined class of state activities which are wholly immune from the antitrust laws. This "preliminary" decision did not, however, foreclose consideration of governmental interests when the substantive antitrust violation ultimately was decided.

Finally, it is possible, although unlikely, that the Court was alluding to a subsequent ordinance enacted by the City of Boulder which limited Community Communications to certain areas of the city. That ordinance was the subject of yet another motion for preliminary relief and, on September 5, 1980, the district court issued a restraining order against enforcement of that new ordinance. Community Communications Co. v. City of Boulder, 496 F. Supp. 823 (D. Colo. 1980), *rev'd*, 660 F.2d 1370 (10th Cir. 1981).

135. 102 S. Ct. at 843 n.20.

136. The traditional rule of reason was most recently enunciated in National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978).

137. 102 S. Ct. at 843 n.20. The Court had previously suggested that "certain activities which might appear anticompetitive when engaged in by private parties take on a different complexion when adopted by a local government." City of Lafayette v. Louisiana Power & Light Co., 435 U.S. at 417 n.48.

138. Specifically, Justice Brennan cited Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978), as standing for the proposition that "anticompetitive effect is an insufficient

contemplated consideration of justifications for governmental activity unrelated to promotion of competition as factors in the analysis of the substantive reasonableness of the restraint at issue.[139] Thus, even as to those activities which were not wholly immune from antitrust scrutiny under the *Midcal* test, the majority indicated that state involvement would continue to play an important role in ultimately determining antitrust liability.[140]

That public welfare justifications remain important even in those cases not involving immunity under *Midcal* is implicitly confirmed by Justice Stevens' concurring opinion and explicitly confirmed by Justice Rehnquist's dissent.[141] In his concurrence, Justice Stevens emphasized that "the [antitrust] violation issue

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basis for invalidating a state law." 102 S. Ct. at 843 n.20. In *Exxon,* the Supreme Court upheld a Maryland statute restricting retail sales by oil producers. In so holding, the Court stated:

> [Appellant's argument] is merely another way of stating that the Maryland statute will have an anticompetitive effect. In this sense, there is a conflict between the statute and the central policy of the Sherman Act—our "charter of economic liberty." Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the Maryland statute. For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the State's power to engage in economic regulation would be effectively destroyed.

437 U.S. at 133 (citation omitted).

139. The majority also left open the issue of what damage remedies would be available from municipal officials. 102 S. Ct. at 843 n.20 ("It will take a considerable feat of judicial gymnastics to conclude that municipalities are not subject to treble damages . . . .") (Rehnquist, J., dissenting).

140. The importance of governmental involvement even in those cases involving activities not wholly immune has apparently already been recognized by the Court of Appeals for the Ninth Circuit. Phonetele, Inc. v. American Tel. & Tel. Co., 664 F.2d 716 (9th Cir. 1981) ("Our holding that appellees have no immunity does not mean that we disregard their status as a regulated common carrier").

141. 102 S. Ct. at 844-45 (Stevens, J., concurring); *id.* at 845 (Rehnquist, J., dissenting). The order in which the majority decided the issues of state action exemption and substantive antitrust liability is curious. In *Midcal,* the Court instructed that the first issue to be determined is whether the challenged activity violated the antitrust laws; only when this inquiry reveals an antitrust violation should the issue of the availability of the state action exemption be considered. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. at 102-03. See also Justice Rehnquist's dissent in *City of Boulder:* "The *Midcal* standards are not applied until it is either determined or assumed that the regulatory program would violate the Sherman Act if it were conceived and operated by private persons." 102 S. Ct. at 850 n.5 (Rehnquist, J., dissenting). Nevertheless, the majority in *City of Boulder* passed the issue of the existence of antitrust liability and immediately decided the state action issues. The majority postponed consideration of the claimed antitrust violation in spite of the availability of the evidence which had permitted the district court to find the requisite probability of success on the underlying antitrust claim. *Id.* at 841-43.

is separate and distinct from the exemption issues."[142] While offering no "gratuitous advice" about the ultimate issue of liability, Justice Stevens did state that "the violation issue is not nearly as simple as the dissenting opinion implies."[143] By emphasizing the directness and complexity of the Sherman Act liability issue left to be decided, Justice Stevens appears to have acknowledged the importance and expansiveness of the factors to be considered when the rule of reason is finally applied.

Justice Rehnquist was more direct. In his dissent he explicitly stated that "[m]ost troubling . . . will be questions regarding the factors which may be considered by the Court pursuant to the Rule of Reason."[144] He recognized that treating a municipality as a private litigant would require, under the traditional rule of reason test as most recently articulated in *National Society of Professional Engineers v. United States*,[145] that

> an ordinance could not be defended on the basis that its benefits to the community in terms of traditional health, safety, and public welfare concerns, outweigh its anticompetitive effects. A local government would be disabled from displacing competition with regulation. Thus, a municipality would violate the Sherman Act by enacting restrictive zoning ordinances, by requiring business and occupational licenses and by granting exclusive franchises to utility services, even if the City determined that it would be in the best interests of its inhabitants to displace competition with regulation.[146]

While not explicitly stating that the majority appeared prepared to adopt a rule of reason in state action cases, Justice Rehnquist acknowledged that rejection of "the rationale of *Professional Engineers* to accomodate municipal defendants" would result in a modified rule of reason permitting "a municipality to defend its regulation on the basis that its benefits to the community outweigh its anticompetitive effects."[147] Justice Rehnquist expressed concern that such a test would result in a revival of the *Lochner*[148] era and a standardless inquiry into the reason-

142. 102 S. Ct. at 844 (Stevens, J., concurring).

143. *Id.* at 845.

144. 102 S. Ct. at 848 (Rehnquist, J., dissenting). Justice Rehnquist also was concerned with whether per se rules of illegality would apply to municipal defendants and whether municipalities would be liable for treble damages.

145. 435 U.S. 679 (1978).

146. 102 S. Ct. at 848 (Rehnquist, J., dissenting).

147. *Id.* at 849.

148. Lochner v. New York, 198 U.S. 45 (1905).

ableness of local regulation.[149]

Neither this concern nor the expansive inquiry which caused it is new. Instead, the modified rule of reason analysis is precisely the type of inquiry which the Court undertook in its earlier decisions and which caused Justice Stewart to voice concerns about vague, uncertain and wide-ranging inquiries in his *Cantor* and *City of Lafayette* dissents.

The apparent willingness of the majority to adopt a "modified rule of reason" should allay Justice Rehnquist's fears that municipal defendants would be treated no differently from private litigants and that, as a result, the relationship between the states and their subdivisions would be radically altered.[150] The Court's two-fold inquiry provides needed certainty for those actions and activities falling within the well-delineated area of complete immunity, while recognizing the importance of consideration of governmental action in state-regulated, but not wholly immune, activities. This two-part approach thus provides a resolution of the conflict between the need to accomodate the broad justifications for governmental action and the Court's apparent desire for a clear, readily applicable test to determine those state actions and activities which are to be wholly antitrust immune.

The Supreme Court has not yet applied this modified rule of reason and therefore many questions remain unanswered.[151] Among the more significant are whether accommodating municipal interests in the public health and welfare requires that per se rules be inapplicable to municipal defendants, and what remedies will be available in the event that certain governmental actions violate even the expanded rule of reason. Equally important is whether the analysis which the *City of Boulder* Court

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149. 102 S. Ct. at 849 (Rehnquist, J., dissenting).

150. As one leading commentator has noted, "[c]oncerns over questionable antitrust challenges to state authorization are not fanciful." Areeda, *supra* note 7, at 450. *E.g.*, Corey v. Look, 641 F.2d 32 (1st Cir. 1981) (claim of collusion between city and successful bidder for lease); Whitworth v. Perkins, 559 F.2d 378 (5th Cir. 1977), *remanded for reconsideration in light of Lafayette*, 435 U.S. 992, *antitrust judgment reinstated*, 576 F.2d 696 (1978), *cert. denied sub nom.* City of Impact v. Whitworth, 440 U.S. 911 (1979) (challenge to zoning ordinance). Stauffer v. Town of Grand Lake, 1981-1 Trade Cas. (CCH) ¶ 64,029 (D. Colo. 1980) (conspiracy among members of zoning board).

151. In United States v. Southern Motor Carriers Rate Conference, 672 F.2d 469 (5th Cir. 1982), the Fifth Circuit discussed the potential importance of state involvement even where the challenged activity failed to qualify for automatic state action under *Midcal*. The Court indicated that particularly under rule of reason analysis and where damages were sought, state involvement at this second level would be an important factor in assessing antitrust liability. *Id.* at 474-75.

was prepared to apply is generally applicable to cases involving any type of governmental activity, is particularly tailored for and consequently available only to municipal defendants,[152] or is merely the product of the peculiar context in which the case arose.[153]

Many of the issues that the Supreme Court has considered in its recent development of the state action doctrine were presented to the Court in *Rice v. Norman Williams Co.*[154] In that case, the California Court of Appeal[155] had invalidated a statute which provided that a licensed liquor importer could not purchase or accept delivery of any brand of liquor unless that importer had been designated as an authorized importer by the brand owner (the so-called "primary source" or "designation" provision).[156]

Without an extended analysis of whether the statute did or might cause a per se violation of the Sherman Act, or had failed a rule of reason analysis, the California Court of Appeal had found that the statute "clearly" restrained interstate trade.[157]

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152. One indication that the procedures and standards enunciated by the majority are limited to the context of local governmental action is the majority's suggestion that the second *Midcal* test of "active state supervision" might not apply to municipalities. 102 S. Ct. at 841 n.14. In his dissent, Justice Rehnquist persuasively argued that it would be illogical to require active state supervision of municipal ordinances. *Id.* at 851 n.6 (Rehnquist, J., dissenting). *But see* Stauffer v. Town of Grand Lake, 1981-1 Trade Cas. (CCH) ¶ 64,029 (D. Colo. 1980).

153. One possible explanation for the Court's resolution in *City of Boulder* is that, as the issues were presented, the Court was unable to first determine whether a violation of the antitrust laws had occurred. Thus, it is possible that the Court viewed the case as presenting only the narrow issue of the availability of a total exemption from the antitrust laws and therefore decided only that issue.

154. Rice v. Norman Williams Co., 102 S. Ct. 3294 (1982).

155. 108 Cal. App. 3d 348, 166 Cal. Rptr. 563 (1980).

156. 102 S. Ct. at 3298.

157. 108 Cal. App. 3d at 358-59, 166 Cal. Rptr. at 570-71. This result appears to be in clear conflict with the decision of the Kansas Supreme Court in Colby Distrib. v. Lennen, 227 Kan. 179, 606 P.2d 102, *appeal dismissed sub nom.* Grant Billingsley Wholesale Liquor Co. v. Lennen, 449 U.S. 943 (1980). In 1979, Kansas enacted a complete reorganization of its liquor control laws. In an effort to introduce price competition into Kansas' liquor distribution scheme, the enacting statute permitted distributors to negotiate exclusive brand franchise contracts for a particular territory, barred other same-brand distributors from selling to the exclusive franchisee in that territory, and provided for minimum price mark-ups by regulation, intending that "price[s] [would] seek [their] own level in the marketplace as a result of competition between brands." 227 Kan. at 182, 606 P.2d at 104. Three distributors who had been unable to obtain significant franchises challenged the constitutionality of the statute. Upholding the Kansas statute in a decision rendered two months before the Supreme Court's *Midcal* decision, 445 U.S. 97 (1980), the Kansas court rejected the plaintiffs' assertions that the exclusive franchising scheme violated the Sherman Act and that conduct under the Kansas statute

Relying on *Midcal,* the California court then declined to find the statute antitrust immune under the state action doctrine because it was "devoid of state involvement."[158] Finally, again purporting to apply *Midcal,* the California court held that the state's interest in the regulation of liquor importation under the twenty-first amendment and the manner in which the state pursued that interest were outweighed by the federal policy favoring competition as expressed in the Sherman Act.[159]

In an opinion by Justice Rehnquist,[160] the Supreme Court reversed, concluding that the California court was "mistaken in its application of antitrust and preemption principles."[161] True to its earlier teaching that the existence of a substantive antitrust violation was the threshhold question, the Court turned first to the purported conflict between the challenged statute and the antitrust laws. Justice Rehnquist identified the appropriate analysis: "[A]s in the typical preemption case, the inquiry is whether there exists an irreconcilable conflict between the federal and state regulatory schemes."[162]

Making clear that which had been implicit in its earlier holdings, the Court declared that "[a] party may successfully enjoin the enforcement of a state statute only if the statute on its face irreconcilably conflicts with federal antitrust policy."[163] Thus, only where the statute "mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistable pressure on a private party to violate the antitrust laws in order to comply with the state statute,"[164] will the Court find the statute to be preempted by the

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should not be immunized by the state action exemption. Specifically, the Kansas court found no showing of any antitrust violation, and further found inapplicable the California court's *Midcal* decision, 90 Cal. App. 3d 979, 153 Cal. Rptr. 757 (1979), which had denied state action immunity to the California wine pricing statute. 227 Kan. at 190-91, 606 P.2d at 110.

Particularly unconvincing was the California court's distinguishing of Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977). The California court found *GTE Sylvania* inapposite because it was the state rather than the distillers who imposed the vertical restraints. Norman Williams Co. v. Rice, 108 Cal. App. at 357, 166 Cal. Rptr. at 570. The vertical nonprice restraints resulting from the primary source law are precisely the types of restraints made subject to the rule of reason in *GTE Sylvania.*

158. Norman Williams Co. v. Rice, 108 Cal. App. 3d at 358, 166 Cal. Rptr. at 571.

159. *Id.* at 359-63, 166 Cal. Rptr. at 571-73.

160. Rice v. Norman Williams Co., 102 S. Ct. 3294 (1982).

161. *Id.* at 3297.

162. *Id.* at 3299.

163. *Id.*

164. *Id.* at 3300.

federal antitrust laws. That facial inconsistency between the state and federal regulatory schemes can be determined in the abstract, Justice Rehnquist continued, only when the state statute compels conduct which in all cases constitutes a per se violation.

When the rule of reason applies to a challenged restraint, however, "an examination of the circumstances underlying a particular economic practice is required" and "the statute cannot be condemned in the abstract."[165] Reconfirming its prior holding in *Continental T.V., Inc. v. GTE Sylvania, Inc.*[166] the Court held that the vertical nonprice restraints on intrabrand competition that might result from the designation statute were subject to analysis under the rule of reason.[167] Consequently, "no basis [existed] for condemning the statute itself by force of the Sherman Act"[168] and, therefore, the Court was not required to reach the issue of state action exemption.[169] Thus, the Supreme Court left for another day the application of the full state action rule of reason to resolve challenges to state regulatory activity not automatically condemned or immunized under *Midcal*.

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165. *Id.*

166. 433 U.S. 36 (1977).

167. 102 S. Ct. at 3300-01.

168. *Id.*

169. Justice Stevens, joined by Justice White, 102 S. Ct. at 3302, concurred in this judgment, but noted that the restraint imposed by the statute was a "hybrid restraint" because it permitted a private market decision—the decision to limit the number of importers dealing in the manufacturer's good—but provided a governmental nonmarket enforcement mechanism—resort to the statute. Referring to *Schwegmann* and *Midcal* as cases in which the hybrid restraint involved per se violation of vertical price fixing, the concurring Justices noted that it was the state's failure to supervise the private decision made effective by state law which led to invalidation.

Because the private restraint involved under the California designation statute was subject to the rule of reason, the concurring Justices recognized that evaluating the validity of the statute presented a much more difficult task than in *Schwegmann* or *Midcal*. But the concurring Justices declined to evaluate the statute solely on the basis of whether the private actions under the statute were subject to rule of reason or per se analysis. Rather, because the state's enforcement power drastically enhanced the market power of the manufacturer in the establishment of the manufacturer's control over their California distribution system, "[t]he inquiry . . . cannot simply be whether the Sherman Act would have been violated had the distillers obtained the control over their distribution system without the aid of the designation statute." 102 S. Ct. at 3303. Instead, the concurring Justices advocated that the inquiry be broadened on remand to the sophisticated question of whether the provision of the "additional club" of a statute to the market power of the distillers was sufficient to afford them an unreasonable degree of unsupervised power to regulate their distribution systems. 102 S. Ct. at 3304. Inherent in that question was the possibility that the inquiry would find "such an unacceptable and unnecessary risk of anticompetitive effect to result in its invalidation." *Id.*

VI. Conclusion

Several aspects of the two-part *Midcal* test require further definition which can be obtained only through application of the test in varied factual contexts. For example, it remains unclear to what extent the state may delegate to subsidiary bodies or subdivisions the authority to "clearly articulate" and "affirmatively express" state policy. Also unsettled is the level in the state hierarchy at which the "active state supervision" must occur. Despite these important definitional gaps, the strict state action immunity is now as well defined as it has been since *Parker*.

The principal question for future litigation under the state action doctrine is: To what degree should noneconomic factors be balanced against the antitrust laws where state involvement is insufficient to justify automatic and full immunity under the two-part *Midcal* test?[170] Specifically, the courts must develop criteria for weighing traditional competitive goals against the noneconomic factors which the Supreme Court has indicated should be considered. Formulation of concrete standards for state action concerns at this level of ultimate liability will be no easier than formulation of the preliminary test for complete immunity. Indeed, even broader inquiry may be required. The struggle to define the state action doctrine has thus largely passed from development of a threshold exemption to a later point in state action antitrust analysis. Yet the *Midcal* two-level approach is a positive development, for certain state action defendants can now readily determine their immunity at the outset of litigation. The resulting necessary evil of a broad examination of economic and noneconomic factors in determining ultimate antitrust liability suggests that, for those not wholly immune under the state action doctrine, the search for standards will continue.

170. This question was left open in *City of Boulder*.