State Regulation and the Federal Antitrust Laws

Leslie W. Jacobs
State Regulation and the Federal Antitrust Laws

Leslie W. Jacobs*

Regulation by a federal or state administrative agency can immunize the regulated activities from the federal antitrust laws in certain situations. However, profound differences exist between immunity resulting from federal regulation, where the issue is congressional intent, and immunity resulting from state regulation, where the issue is federalism. The author analyzes the Parker v. Brown state action exemption and concludes that the decisions of many federal courts have overextended Parker's holding. He then posits a framework for interpretation of these cases, suggesting that it will be useful to the courts in deciding antitrust cases in which state action is an issue.

I. INTRODUCTION

Several decisions announced by the Supreme Court1 in the last year have again focused the attention of antitrust practitioners on the doctrine of primary jurisdiction. These cases, as well as many recent decisions of lower federal courts,2 have

* B.S.B.A., Northwestern University, 1965; J.D., Harvard University, 1968. Member of the Ohio Bar and of the Committee on Industrial Regulation, Antitrust Section, American Bar Association.


2. Since 1973, district courts and courts of appeals have been engulfed with primary jurisdiction cases. See, e.g., MCI Communications Corp. v. American Tel. & Tel. Co., 496 F.2d 214 (3d Cir. 1974); Carpenters Dist. Council v. United Contractors Ass'n, 484 F.2d 119 (6th Cir. 1973); International Ass'n of Heat & Frost Insulators v. United Contractors Ass'n, 483 F.2d
been concerned with three related questions: whether exclusive juris-
diction resides in an administrative agency; whether express or
implied immunity from the federal antitrust laws results from regu-
latory statutes or administrative action; and whether prior resort to
administrative agencies is necessary before the judicial process can
be invoked. These questions have all arisen in the context of federal
legislation and agency regulation that may conflict with the judicial
enforcement of the federal antitrust laws in either government or
private litigation.8

Parallel questions arise in situations where state legislation and
regulation conflict with federal antitrust laws. These questions have
received less intensive consideration than they have in the federal
context. The questions are in many ways more troublesome and
challenging in the state setting because they not only involve many
of the same problems of discerning congressional intent, but also
touch upon constitutional principles.

This article will briefly review the approach of the courts in
balancing the federal interest in active competition as expressed in
the antitrust laws against other, possibly conflicting, federal inter-
ests as expressed in regulatory statutes. It will then examine in
greater detail the efforts of the courts in the more troublesome area
of balancing the federal interest in competition against the various
state interests in the regulation of economic activity and will compare
those efforts to the federal experience.

384 (3d Cir. 1973); Price v. Trans World Airlines, Inc., 481 F.2d 844 (9th
Cir. 1973); Deaktor v. L.D. Schreiber & Co., 479 F.2d 529 (7th Cir. 1973);
Fredrickson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 5 TRADE REG. REP.
(1974-2 Trade Cas.) ¶ 75,227 (N.D. Ill. Sept. 9, 1974); Foremost Int'l Tours,
Inc. v. Qantas Airways, Ltd., 5 TRADE REG. REP. (1974-2 Trade Cas.) ¶
75,177 (D. Hawaii July 26, 1974); In the Midwest Milk Monopolization Litiga-
tion, 5 TRADE REG. REP. (1974-2 Trade Cas.) ¶ 75,155 (W.D. Mo. June 11,
v. National Broadcasting Co., 5 TRADE REG. REP. (1974-1 Trade Cas.) ¶ 74,885
(C.D. Cal. 1973); Intermar, Inc. v. Atlantic Richfield Co., 364 F. Supp. 82
1054 (D.D.C. 1973); Macom Prods. Corp. v. American Tel. & Tel. Co., 359
1973-2 Trade Cas. ¶ 74,757 (N.D. Cal. 1973), cert. denied, 414 U.S. 1080
(1974); Executive Airlines, Inc. v. Air New England, 357 F. Supp. 345 (D.
(D. Hawaii 1973), aff'd, 489 F.2d 203 (9th Cir. 1973), cert. denied, 415 U.S.

3. 3 K. DAVIS, ADMINISTRATIVE LAW ¶ 19.05, at 25 (1958).
II. THE FEDERAL EXPERIENCE

Application of the antitrust laws to a federally regulated industry involves two inevitable controversies. The first is over whether the statutory antitrust provision in question may or should be invoked at all. The second focuses on the question of who will decide the first.

Occasionally regulatory legislation provides for a specific exemption from the antitrust laws, usually on the basis of affirmative regulation by the agency. The question then becomes one of interpreting the extent of the statutory exemption and the terms of the agency's approval. In other situations the antitrust laws apply on their face, but exclusive jurisdiction to enforce them is vested in a regulatory commission. Some types of antitrust violations, however, are completely ignored by the regulatory statutes for particular industries. It is in this area that general principles have been announced to the effect that antitrust exemptions should not be inferred lightly and that the existence of "a highly regulated in-


8. United States v. First City Nat'l Bank, 386 U.S. 361, 368 (1967); Cal-
dustry critical to the Nation's welfare makes the play of competition not less important but more so." The problem is fundamentally one of accommodating ambiguous congressional intentions. Where Congress has not spoken clearly, the Supreme Court has concluded that the antitrust laws may be avoided only if, and to the minimum extent that, it is necessary to make a regulatory scheme work.10

Where there is a clear statutory exemption, or where there is exclusive agency jurisdiction over an antitrust issue, the legal dispute is well on its way to resolution. But where neither is the case, a strategic battle looms on both the jurisdictional and substantive fronts. The federal experience in this regard may be summarized as a preference for the courts by litigants favoring competition and a preference for an administrative forum by litigants favoring regulation.

The courts have developed the doctrine of primary jurisdiction in the course of deciding which forum should be given jurisdiction over a legal dispute. The doctrine originated in the federal courts and concerns the threshold question of whether the court should consider a pending matter or should defer the initial determination to an administrative agency.11 In simplest terms, the doctrine is merely a matter of priorities,12 a consideration necessarily present in any judicial action raising issues that may also properly be considered in a proceeding before a regulatory agency. This view of the doctrine emphasizes administrative expertise and the benefits a court derives from deferring to agency determination before passing upon specialized questions.13 However, these assump-

13. See, e.g., Chicago Merchantile Exch. v. Deaktor, 414 U.S. 113, 115
tions have proved deceptive in many instances. Reliance upon supposed agency expertise has tended to obfuscate the existence of parochial bias in some regulatory situations. This theory of judicial "benefit," founded upon the anticipation of agency advice to the court on complicated and mysterious problems, has almost become an excuse for swift case dispositions. A dismissal of a pending matter on the ground that primary jurisdiction resides in an administrative agency easily avoids what in many instances promises to be an extended trial on the merits.

Another rationale for holding that an agency has primary jurisdiction has been the prevention of inconsistency within the agency's area of responsibility. This approach to the doctrine un-


derestimates both the expertise of the courts in resolving factual disputes and their ability to construe regulatory statutes together with other applicable law.\textsuperscript{17} Both of these activities may in fact provide valuable assistance and enlightenment to the agencies, and court decrees may be fashioned so as to avoid or limit troublesome inconsistencies.

The significance of the primary jurisdiction doctrine in the antitrust context arises from the inherent tension between the goals of the antitrust laws and the goals of many regulatory statutes.\textsuperscript{18} A change in forum for the initial proceeding often effectively changes the ground rules and may consequently affect the ultimate outcome of the litigation.\textsuperscript{19} Furthermore, any such change involves considerable delay, including the possible dismissal of a pending case, and may, therefore, make a court action impractical, if not impossible.\textsuperscript{20}

\textsuperscript{17} A recent example of good analysis leading to a denial of primary jurisdiction is Colorado & Wyo. Ry. v. Atchison, T. & S.F. Ry., 5 TRADE REG. REP. (1974-2 Trade Cas.) ¶ 75,354, at 98,126-27 (D. Colo. Oct. 2, 1974).


\textsuperscript{20} \textit{See}, e.g., the comment of Judge Goodwin in Mt. Hood Stages, Inc. v. Greyhound Corp., 1973-2 Trade Cas. ¶ 74,824 (D. Ore. 1973): "The litigation before the Commission has proceeded for approximately a decade with no apparent impact upon Greyhound's conduct. If Congress intended the Interstate Commerce Act to provide a remedy for competitors injured by predatory behavior on the part of regulated carriers, then the legislation is woefully inefficient." \textit{Id.} at 95,669. \textit{Cf.} United States v. National Broadcasting Co., 5 TRADE REG. REP. (1974-1 Trade Cas.) ¶ 74,885, at 95,990 (C.D. Cal. 1973) (as to the FCC); Walker v. United States, 208 F. Supp. 388, 392 (W.D. Tex. 1962), \textit{aff'd mem.}, 372 U.S. 526 (1963) (as to the ICC).

In general, agency preemption of original jurisdiction can have four legal effects on a judicial proceeding. First, the mere initiation of an agency investigation before or during the pendency of litigation may cause a court to defer to the agency, even without an initial agency determination of jurisdiction or agency authorization of the conduct that allegedly violates the antitrust laws. Second, an opportunity is created for the agency to approve transactions and agreements it had not previously considered and thereby to grant immunity, after the fact, to arrangements that would have been vulnerable to the antitrust laws. Third, the doctrines of collateral estoppel and res judicata may apply to prohibit different conclusions in subsequent court actions, even in the absence of an express exemption from the antitrust laws. Fourth, without invoking collateral estoppel, the court may accept without further inquiry the agency’s recommendations, notwithstanding that the agency has no exclusive jurisdiction, no power to grant immunity and little sympathy for antitrust principles.


The doctrine of primary jurisdiction in the federal arena is in a state of confusion. Its application to a particular case can have a substantial impact, perhaps becoming determinative of the entire matter. But a litigant usually finds it impossible to predict whether the court will invoke the doctrine in a particular case. Authorities

(1963), where the Court dismissed a government Sherman Act complaint on the ground that the CAB had responsibility for enforcing a statutory provision (Federal Aviation Act § 411, 49 U.S.C. § 1381 (1970)) similar to § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1970), even though the CAB could not "approve" and thereby exempt activities violating that standard. Although the Court did not expressly say that the CAB had exclusive jurisdiction to adjudicate antitrust questions relating to the industry it regulates, 371 U.S. at 304-05, it nevertheless found primary jurisdiction in that agency notwithstanding the permissive language of § 411. But see Breen Air Freight, Ltd. v. Air Cargo, Inc., 1971 Trade Cas. ¶ 73,775 (S.D.N.Y. 1971), aff'd, 470 F.2d 767 (2d Cir. 1972), cert. denied, 411 U.S. 932 (1973), narrowly construing the immunity granted by a prior CAB authorization and denying primary jurisdiction.


26. A suit by Trans World Airlines against its former owner, Hughes Tool Co., is a perfect example. In Transcontinental & Western Air, Inc., Control by Hughes Tool Co., 6 C.A.B. 153 (1944), and in Trans World Airlines, Inc., Further Control by Hughes Tool Co., 12 C.A.B. 192 (1950), the CAB approved Toolco's acquisition of control over TWA. It subsequently modified those orders to incorporate aircraft transactions between the companies. Following Toolco's placement of its TWA stock in a voting trust as a condition of bank financing, new management of TWA was installed. TWA then filed an antitrust action against Toolco on June 30, 1961, alleging, inter alia, violations of Sherman Act, §§ 1 and 2, in relation to supplying aircraft to TWA and air carriers generally. The district court denied a motion to dismiss the complaint on the basis of antitrust exemptions and exclusive CAB jurisdiction, Trans World Airlines, Inc. v. Hughes, 214 F. Supp. 106 (S.D.N.Y. 1963), and the court of appeals affirmed, 332 F.2d 602 (2d Cir. 1964). The Supreme Court granted certiorari to consider Toolco's contention that the CAB had exclusive jurisdiction, 379 U.S. 912 (1964), then dismissed the writ as improvidently granted following full briefing, 380 U.S. 248, 249 (1965). The district court then proceeded to enter judgment for TWA based upon a discovery question, following a special master's damage award, 308 F. Supp. 679 (S.D.N.Y. 1969), 312 F. Supp. 478 (S.D.N.Y. 1970), aff'd, 449 F.2d 51 (1971). Toolco again sought and received a writ of certiorari, 405 U.S. 915 (1972). The CAB filed an amicus brief which pointed out that the exclusive jurisdiction question had not been raised by Toolco in this appeal and had been opposed by the Board in its 1964 amicus brief, that the Board had not intended to confer "antitrust or other immunity" by its orders many years before, that Pan Am. World Airways, Inc. v. United States, 371 U.S. 296 (1963), was not pertinent, and that "[i]t appears to be conceded that the treble damage award in this case is within the jurisdiction of the courts." Brief for CAB as Amicus Curiae at 15, Trans World Airlines, Inc. v. Hughes, 409 U.S. 363 (1973). Nonetheless, in what can only be called a surprise decision, the Court reversed the judgment and held that, despite the CAB's own opinion as to what it had done
for and against invocation of primary jurisdiction exist with respect to almost every federal agency, and arguments by analogy, legislative history or comparable statutory language inevitably lead to citation of precedents involving agencies and statutes other than the ones in point at the time.

This quagmire is the consequence of the two problems noted at the beginning of this Section. The first—whether to grant immunity from the antitrust laws—has been reviewed above. The second problem, choice of forum, has been alluded to. It was addressed specifically in *Texas & Pacific Railroad Co. v. Abilene Cotton Oil Co.*27 in which the Court, speaking through Chief Justice Taft, created the primary jurisdiction doctrine to allocate orderly decision making between two disparate systems—regulatory bodies and the judiciary. The first problem reflects the continuing refusal of Congress to resolve the contradictions between the policies favoring competition embodied in the antitrust laws and the various policies embodied in administrative regulation. Although administrative agencies are expected to consider effects upon competition in determining the public interest28 even where they have no jurisdiction to enforce the antitrust laws,29 it has been noted repeatedly that performance of that portion of their duties has been laggard at best.30

or not done in the 1940's and 1950's, and despite the Court's own inaction some 8 years earlier, the agency had effectively preempted antitrust enforcement and the complaint should be dismissed. 409 U.S. 363, *rehearing denied*, 410 U.S. 975 (1973). It is perhaps even more surprising that the opinion was written by Justice Douglas, who reached the opposite conclusion subsequently during the same term in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), albeit in the context of another regulatory statute, Federal Power Act § 202(b), 16 U.S.C. § 824a(b) (1970).

27. 204 U.S. 426 (1907).


29. Note 24 *supra*.

The courts appear now to be questioning the assumption that finding primary jurisdiction in an administrative agency is either efficient or sufficiently responsive to the country's traditional economic and political devotion to competitive principles. Thus, a recent opinion reviewing a Federal Power Commission proceeding has proposed a novel twist: so far as antitrust issues are concerned, the agency "may even, indeed, defer its disposition pending determination of relevant court litigation . . . . This would be in effect a reverse application of the doctrine of primary jurisdiction, a doctrine that has been appropriately referred to as supple and flexible." This approach to a case in which antitrust issues are predominant or substantial may be effectively supplemented by agency intervention or amicus participation in the judicial proceeding to explain the relevant regulatory considerations. A related procedure, providing for the trial court's request for a report from an administrative agency, has also been used, at least where the agency itself clearly had no jurisdiction to consider the antitrust issues. Even this procedure is not always appropriate, however. A district court has recently rejected it in a case in which an agency that lacked the statutory authority to exempt the challenged conduct from the anti-


31. This devotion has been recognized by the courts. Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958).


33. The Antitrust Division opposed a motion of the New York Stock Exchange for a federal district court to refer a pending suit against the Exchange to the SEC. The SEC intervened at the suggestion of the court of appeals, and the Antitrust Division noted that the Commission's participation was adequate for it to inform the court on regulatory considerations. BNA ANTITRUST & TRADE REG. REP. No. 546, at A-7, -8 (Jan. 18, 1972); Thill Sec. Corp. v. New York Stock Exch., 433 F.2d 264 (7th Cir. 1970), cert. denied, 401 U.S. 994 (1971). On remand in March 1972, the district court denied primary jurisdiction on the ground that the securities laws are not sufficiently "pervasive" to require referral, 1972 Trade Cas. ¶ 73,903, at 91,745 (E.D. Wis. 1972), and the court of appeals refused an appeal by the SEC from that order, 469 F.2d 12 (7th Cir. 1972).

trust laws had previously permitted the alleged antitrust violation "by its own action or inaction." The court refused to remand the case to the agency and thereby to require the plaintiff "to seek from the regulators an admission of their failure to properly regulate."338

III. STATE REGULATION

Just as federal regulation may result in antitrust immunity, so state regulation may sometimes define an area of exempt practices mandated by state law. Again, as in the exclusively federal context, the problem is two fold, but the analytical process for determining the scope of immunity is, theoretically if not in practice, more sophisticated because of the interplay of constitutional issues. In addition, procedural devices for resolving or avoiding an ultimate decision are considerably less justified.

A. The Doctrine of Parker v. Brown

The central factor in every case of federal regulation is the struggle to make disparate federal legislative schemes coherent and relatively compatible.336 The controversies all revolve around conflicting interpretations of legislative history and statutory construction, an effort being made to discern the controlling national economic policy for each case and industry. With the possible exception of insurance regulation under the McCarran-Ferguson Act,337 there is no comparable difficulty of reconciling apparently inconsistent congressional intentions with regard to the interplay between federal antitrust statutes and state economic regulation. Congress has simply not addressed the problem. For the first 50 years after passage of the Sherman Act,338 it may have been assumed that there was no problem at all.339

That changed in 1943 when the Supreme Court announced in Parker v. Brown40 that the antitrust laws were not designed to re-

37. 15 U.S.C. §§ 1011-15 (1970) (exempting the "business of insurance" from the antitrust laws to the extent that it is regulated by the states, except for acts of "boycott, coercion, or intimidation"). There is a related problem in reconciling state liquor regulation pursuant to the 21st amendment. See note 106 infra.
40. 317 U.S. 341 (1943).
strain state action.\textsuperscript{41} \textit{Parker} involved a raisin growers' private marketing program adopted pursuant to a California statute authorizing the establishment of market and price controls. Although the state legislation in question paralleled the federal Agricultural Adjustment Act, which was itself in derogation of statutory antitrust policies, the opinion did not dwell on this narrow point. Nor did it emphasize the fact that the California law imposed a regulatory scheme. Rather, the Court acknowledged that California's prorate program would violate the Sherman Act if carried out by private parties, and indeed that the federal government \textit{could}, under the commerce power, prohibit programs such as California's. However, the Court held that there is "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."\textsuperscript{42}

The \textit{Parker} doctrine is the natural complement to the \textit{Noerr-Pennington} doctrine.\textsuperscript{43} The latter immunizes the seeking of govern-

\textsuperscript{41} Id. at 350-51.

\textsuperscript{42} Id.

\textsuperscript{43} In 1961 the Supreme Court announced in Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws." Id. at 135. The Court extended this holding to the conclusion that "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." Id. at 136.

The apparent rationale for this policy was a combination of the constitutional right to petition the government and the government's inherent authority to restrain competition through legislation and law enforcement. This justification for certain concerted actions by competitors was expressed more clearly four years later in United Mine Workers of America v. Pennington, 381 U.S. 657 (1965), where the Court rejected a test based on good faith:

Joint efforts to influence public officials do not violate the anti-trust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme violative of the Sherman Act.

\textit{Id.} at 670. Thus, the primary purpose for seeking governmental action might be either to obtain a legitimate regulation or restriction (for example, safety) with anticompetitive side effects, [to replace competitive restraints with more palatable "regulation,"] or to achieve the elimination of a competitor. The [last] was more clearly the case in the \textit{Pennington} situation.

\textsuperscript{43} Jacobs, supra note 16, at 108.

It is obvious that the encouragement to commercial competitors to combine in efforts to influence governmental action under the \textit{Noerr-Pennington} umbrella varies in direct relation to the extent of antitrust immunity for anticompetitive activities that is available under \textit{Parker v. Brown}. If only aggressive,
mental action; the former immunizes the governmental action itself. It is of course possible for a situation to involve only one of the doctrines. An incipient inducement of governmental action involves only a *Noerr-Pennington* issue, and an unsolicited governmental action benefitting a competitor involves reliance solely on *Parker*. But the usual case, where a competitor has been successful in obtaining some beneficial governmental involvement in a competitive relationship, will raise both issues.

With remarkably little analysis, the *Parker* doctrine has been invoked repeatedly to provide the equivalent of federal statutory antitrust exemption for state laws, a result never contemplated in the Court's original opinion. In two recent cases, regulated utilities successfully invoked the doctrine as a defense against private actions by competitors. In *Gas Light Co. of Columbus v. Georgia Power Co.*,44 the Fifth Circuit applied the traditional version of the doctrine to immunize from antitrust attack promotional programs which had previously been approved by orders of the state regulatory agency.45 Shortly thereafter, in *Washington Gas Light Co. v. Virginia Electric & Power Co.*46, the Fourth Circuit went well beyond previous notions of the *Parker* exemption by holding that the failure of a state agency to consider the challenged practices constituted implied consent and therefore state action.47 The significance of this expansion of *Parker* is highlighted by the revelation that in 1970, four years after commencement of the utility's program that was challenged in this case and after the district court had made its decision,48 the state regulatory commission prohibited further such activities in its first proceeding to examine them.49 The circuit court chided the plaintiff for its failure to protest to the agency when the program first started50 and announced that the *Parker* doctrine applies to all violations

affirmative state regulation provides a reliable shield, private interests will be less likely to urge governmental action than if less effective regulation is sufficient for *Parker* purposes.

45. This situation compares in the federal experience to immunity resulting from prior agency action. See note 4 supra.
46. 438 F.2d 248 (4th Cir. 1971).
49. 438 F.2d at 250 n.2, 252.
50. See Section IIIIB infra.
"within the ambit of regulation," whether or not regulation occurs.51 Clearly, the Virginia Electric decision, equating state action with passive administrative acquiescence or even ignorance, stretches Parker to the breaking point52 and disregards prior authorities rejecting such a premise in other contexts.53

51. 438 F.2d at 252.
52. International Tel. & Tel. Corp. v. General Tel. & Electronics Corp., 351 F. Supp. 1153, 1203 n.129 (D. Hawaii 1972) (dictum). But since the decision in Virginia Electric, the Fourth Circuit has decided Goldfarb v. Virginia State Bar, 497 F.2d 1 (4th Cir.), cert. granted, 43 U.S.L.W. 3246 (U.S. Oct. 29, 1974), in which that court reaffirmed the doctrine it had announced in Virginia Electric—that the silence of a state regulatory agency concerning the actions of the regulated entity implies consent to those actions and that, therefore, state action exists. In addition, a district court in that circuit has found that agency ignorance of the practice complained of, fostered by lack of notice to it from a competitor, is within the scope of the Parker doctrine. Business Aides, Inc. v. Chesapeake & Potomac Tel. Co., 339 F. Supp. 1391 (E.D. Va. 1972) (dictum), aff'd, 480 F.2d 754 (4th Cir. 1973). This Fourth Circuit aberration has been expressly rejected in the most recent case to consider it. United States v. Oregon State Bar, 43 U.S.L.W. 2234 (D. Ore. Nov. 25, 1974).

One of the decisions in the landmark class action case, Eisen v. Carlisle & Jacqueline, 54 F.R.D. 565 (S.D.N.Y. 1972), rev'd on other grounds, 479 F.2d 1005 (2d Cir. 1973), vacated on other grounds, 417 U.S. 156 (1974), casts doubt on the logic of granting an exemption despite a finding of nonregulation. The defendants, odd-lot traders and the New York Stock Exchange, argued immunity and/or primary jurisdiction of the SEC on the grounds that regulation of odd-lot trading was within the scope of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a et seq. (1970), and of the self-regulatory powers of the Exchange pursuant to that Act. Judge Tyler stated:

[If] the Exchange had exercised its self-regulatory powers by establishing rules in respect to odd-lot differentials, I would assume arguendo that review of such rules might be beyond the powers of this court. But the Exchange, by its own admission, failed to establish any rules or regulations with regard to odd-lot differentials. To put the matter bluntly, it is unlikely that this failure or "benign acquiescence" can be considered to constitute regulation mandated by the Act.

Id. at 572. See also International Tel. & Tel. Corp. v. General Tel. & Electronics Corp., 351 F. Supp. 1153, 1182 (D. Hawaii 1972); note 22 supra.
53. See, e.g., United States v. Borden Co., 308 U.S. 188 (1939), where the Court considered unapproved actions of milk marketers:

It will be observed that the District Court attributes this [anti-trust immunity] to the Agricultural Marketing Agreement Act per se, that is, to its operation in the absence, and without regard to the scope and particular effect, of any marketing agreements made by the Secretary of Agriculture or of any orders issued by him pursuant to the Act. In the opinion of the court below, the existence of the authority vested in the Secretary of Agriculture, although unexercised, wholly destroys the operation of § 1 of the Sherman Act with respect to the marketing of agricultural commodities.

We are of the opinion that this conclusion is erroneous. No provision of that purport appears in the Agricultural Act. While effect is expressly given, as we shall see, to agreements and orders which
The Fifth Circuit panel in the *Georgia Power* case distinguished the prior holding of another panel of that court in *Woods Exploration & Producing Co. v. Aluminum Company of America*, which had refused to apply the *Parker* doctrine to a state commission's orders controlling natural gas production. The *Woods* holding presented two propositions. First, and most important, it contradicted the *Virginia Electric* position by stating that all private action within a state regulatory framework is not ipso facto state action, even where state remedies specifically apply to the defendant's conduct. Second, in the light of a finding that defendants supplied false information to a regulatory body, the court refuted the presumption of state action: "[D]efendants' conduct here can in no way be said to have become merged with the action of the state since the Commission neither was the real decisionmaker [because it had to rely on defendants for its operative data] nor would have intended its order to be based on false facts." The *Georgia Power* panel did not embrace the first aspect of the *Woods* holding, which rejects outright *Virginia Electric*, but maintained its neutrality by finding it unnecessary to go as far as *Virginia Electric*. The absence of allegations of falsehood in *Georgia Power* was considered sufficient to distinguish it from *Woods* and to justify application of the *Parker* doctrine.

Another decision squarely in conflict with the spirit of *Virginia Electric* and distinguished on its facts by *Georgia Power* is *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, in which the
First Circuit refused to exempt from the antitrust laws the action of a public official or agent when that action served to undermine the purpose of a state law. In *Paddock Pool* the defendant engaged in an elaborate program to have architects hired by public bodies include specifications that only the defendant's products could meet in bid terms adopted by those public bodies. Even though the act of recommending defendant's specifications was that of a quasi-official and the act of promulgating the anticompetitive requirement was that of a governmental unit, the court found both acts to be inconsistent with the underlying purpose of the competitive bidding law authorizing the actions. Because that law's purpose was consistent with the antitrust laws, the *Parker* doctrine was inapplicable since the state action was not intended to diminish competitive standards. The *Paddock Pool* court would recognize as within the ambit of the *Parker* doctrine only government action that "deliberately attempts to provide an alternate form of public regulation."57

Whether challenged activities constitute genuine state action is essentially a factual inquiry conducted on a case by case basis. Although the emphasis on particular facts may vary, most decisions are basically efforts to determine whether the pattern is state action with ancillary private participants or "individual action masquerading as state action."58 The degree of antitrust zeal of a court will usually be reflected in its examination of the facts and in the weight it accords to each in the balance.

A point more fundamental to the allowance of an exemption than the mere finding of state action was raised in *Hecht v. Pro-Football, Inc.*59 Where entirely legitimate state action does in fact exist, the inquiry should not end with an assumption of immunity under *Parker v. Brown*, but should proceed to consider whether the state action may continue without contravening federal antitrust laws, which, under the federal commerce power, constitutionally take precedence over state legislation.60 The distinction between private ac-

57. 424 F.2d at 30. See also Azzaro v. Town of Bradford, 5 TRADE REG. REP. (1974-2 Trade Cas.) ¶ 75,337 (D. Conn. Nov. 4, 1974).
59. 444 F.2d 931 (D.C. Cir. 1971), cert. denied, 404 U.S. 1047 (1972). It should be noted that *Hecht* involved action taken by the District of Columbia so that to a certain extent the problem of ascertaining congressional intent was involved in the court's decision; to that extent, the problem of federalism implicit in *Parker* may not exist as such in *Hecht*.
tion and governmental action for exemption purposes involves, then, a second and more subtle distinction between governmental action and constitutionally permissible governmental action. A simple use of labels should not suffice.

The cases purportedly concerning the *Parker* doctrine reflect a casual conglomeration of holdings which should be clearly distinguished to promote sound constitutional decisions and clear antitrust precedents. The categories to be recognized are: (1) actual state or local governmental operation of an economic activity, (2) governmental regulation of private economic activity, and (3) governmental approval of private economic activity. Each category should also be evaluated as to (a) consistency with the federal antitrust laws, (b) inconsistency with those laws but consistency with some other federal policy, or (c) total antipathy to federal policies.

1. Governmental Operation of Economic Activity

Category (1) appears to be within the broad language of *Parker* that refers to the activities of "a state or its officers or agents . . . directed by its legislature." There are discernible gradations even within this category. Occasionally a governmental entity, such

---

61. "Since a state rarely acts except through one or more of its political subdivisions, if governmental immunity is to have any but the most limited efficacy it must be available to protect the political subdivisions of the state from antitrust liability." Murdock v. City of Jacksonville, 361 F. Supp. 1083, 1092 (M.D. Fla. 1973). But see Azzaro v. Town of Bradford, 5 TRADE REG. REP. (1974-2 Trade Cas.) ¶ 75,337 (D. Conn. Nov. 4, 1974).

62. 317 U.S. at 350-51. At least one court has viewed the *Parker* authorities as limited to just this category where "the legislature create[s] the entity involved or endow[s] it with governmental character . . . ." Travelers Ins. Co. v. Blue Cross, 298 F. Supp. 1109, 1111 (W.D. Pa. 1969). But compare New Mexico v. American Petrofina, Inc., 5 TRADE REG. REP. (1974-2 Trade Cas.) ¶ 75,179 (9th Cir. July 17, 1974), where the court reserved the question in part: "In addition, we express no view concerning the circumstances in which state agents, officers, and employees acting in their official capacities are subject to the Sherman Act," *id.* at n.19, *with California ex rel. Christensen v. FTC, 5 TRADE REG. REP. (1974-2 Trade Cas.) ¶ 75,328 (N.D. Cal. Oct. 29, 1974) where the court went further and concluded: "There is a substantial probability that: (1) there is no jurisdiction in the Federal Trade Commission to proceed against the State of California, its instrumentalities, its agencies, or its officers in their official capacities [citing *Parker* and *New Mexico v. American Petrofina, Inc.*, *supra*]; and (2) the FTC may not avoid this fact by seeking to proceed instead against a private corporation aiding the State in carrying out the conduct in question [citing E. W. Wiggins Airways, Inc. v. Massachusetts Port Auth., 362 F.2d 52 (1st Cir. 1966)]," *id.* at 98,039, *and the language in Fox v. James B. Beam Distilling Co., 5 TRADE REG. REP. (1974-2 Trade Cas.) ¶ 75,335 (S.D. Ind. Sept. 25, 1974), quoted at note 72, infra.
as a city, will operate an economic activity along with other functions. Some governmental entities, such as port authorities, are established solely to maintain an economic activity.

But even in the category (1) situation, which is conceptually close to state sovereign immunity, three factors may still militate against exemption. First is the question whether the activity subject to attack is within the contemplation of the state's legislative mandate. Second is the element of intent, that is whether the state agency or official acted knowingly so that "the anti-competitive consequence is truly the action of the state," even where the type of act is clearly within the legislative authorization. The most frequently alleged defect of this variety concerns inaccurate or in-

---


[It is necessary to determine whether the anti-competitive result actually is a goal of the state entitled to the state's immunity rather than a private group masquerading under the banner of "state action." Such a determination necessarily involves an inquiry into legislative motives, and courts are understandably reluctant to apply the state's immunity to private parties without a clear indication by the state's legislature that the anti-competitive results have its sanction.

sufficient information on which to base a valid decision.\textsuperscript{68} And
third, some decisions involving the \textit{Noerr-Pennington} doctrine provide
a basis for suspicion that exemptions may be less than automatic
for activities by a governmental agency in a purely proprietary ca-
pacity.\textsuperscript{69} This exception is consistent with holdings limiting govern-
mental immunity in other contexts.\textsuperscript{70} Thus the court in \textit{Hecht v.
Pro-Football, Inc.}, which was generally hostile to the \textit{Parker}
philosophy, accepted antitrust immunity for those instances in which “the
state has either created or contracted with a corporate entity, which
became the state’s sole instrumentality in carrying out \textit{what clearly
would otherwise be a governmental function}.”\textsuperscript{71} An almost for-
gotten qualification by the Court in \textit{Parker v. Brown} supports the
need for careful consideration of the proprietary activity exception
to the state action exemption: “we have no question [presented
in this case] of the state . . . becoming a participant in a private
agreement or combination by others for restraint of trade . . . .”\textsuperscript{72}

\begin{itemize}
\item[68.] Woods Exploration & Producing Co. v. Aluminum Co. of America,
\item[69.] Dealing with governmental entities as potential customers or business
associates is decidedly different from seeking regulatory relief or assistance
from the government in its lawmaking capacity. The court in George R. Whitten,
Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.), \textit{cert. de-
\textit{\textsuperscript{71}See also}

\begin{itemize}
\item[70.] E.g., Casner & Fuller, \textit{Municipal Tort Liability in Operation}, 54 \textit{HARV.
L. REV.} 437 (1941); Seasongood, \textit{Municipal Corporations: Objections to the
Governmental or Proprietary Test}, 22 \textit{VA. L. REV.} 910 (1936).
\item[71.] 444 F.2d 931, 938 (D.C. Cir. 1971), \textit{cert. denied}, 404 U.S. 1047
(1972) (emphasis added). \textit{See also} E.W. Wiggins Airways, Inc. v. Massa-
chusetts Port Authority, 362 F.2d 52, 55 (1st Cir.), \textit{cert. de-
\textit{\textsuperscript{72}317 U.S. at 351-52. Azzaro v. Town of Bradford, 5 \textit{TRADE R\textsuperscript{e}.
REP.} (1974-2 Trade Cas.) \textit{\textsuperscript{f}75,337, at 97,312 (9th Cir. July 17, 1974):
“Our conclusion that a state is not covered by sections 1 and 2 of the
Sherman Act is inconsistent with the rationale of \textit{Hecht} . . . . W\textit{e}
disagree with the implication of \textit{Hecht} that a state may sometimes be liable.”
\item[72.] 317 U.S. at 351-52. Azzaro v. Town of Bradford, 5 \textit{TRADE R\textsuperscript{e}.
REP.} (1974-2 Trade Cas.) \textit{\textsuperscript{f}75,337 (D. Conn. Nov. 4, 1974). The good faith of
this consideration was challenged by plaintiff, but not seriously entertained by

2. Governmental Regulation of Private Economic Activity

Within the suggested conceptual framework, the holding of *Parker v. Brown* is of literal precedential value only for category (2) situations. The program subject to antitrust attack in *Parker* was in fact operated and enforced by state machinery. The courts have often overlooked the fact that the plaintiff's attack in *Parker* was not against violations of federal law by regulated private competitors but, rather, upon the state regulatory scheme itself as a violation of federal law. Mr. Parker, after all, was not a raisin grower; rather he was the State Director of Agriculture charged with enforcement of the challenged California Agricultural Prorate Act. The holding is probably most accurately stated that, in the absence of clear congressional intent, the courts will not invoke antitrust principles to restrain the process of state economic regulation. Per-

the court, in *Metro Cable Co. v. CATV of Rockford, Inc.*, 375 F. Supp. 350 (N.D. Ill. 1974), where the court acknowledged that "[l]ocal government units such as City Councils and County Boards are seldom completely free from personal interest and outside influences." *Id.* at 358. It was specifically pointed out in *Murdock v. City of Jacksonville*, 361 F. Supp. 1083, 1093 (M.D. Fla. 1973), that even where governmental immunity protects the governmental entity, "[c]learly the immunity ... is not available to the private corporate entity ... " dealing with the government; *contra*, *Trans World Associates, Inc. v. City and County of Denver*, 5 TRADE REG. REP. ¶ 75,293, at 97,900 (D. Colo. Oct. 15, 1974). Where the state law does not sanction conduct violating the antitrust laws, *Parker* does not apply. Thus in a case of the horizontal price fixing of liquor:

The allegations of this cause assert that the [industry] defendants formed and the ABC [state commission] acquiesced in an illegal combination to fix prices, the exact situation the Court in *Parker* decried ....

The complaint also states a claim against the ABC .... These cases demonstrate that when state employees or agencies act outside the scope of their authority, or unconstitutionally, the immunity provided to the state by the Eleventh Amendment is lifted ....

.... If proved to be as alleged, the complaint would show that the ABC has acted not only beyond the powers given it pursuant to state law, but also as a coconspirator to violate the federal antitrust laws.


74. Thus, the attack upon a defendant city council's action in granting a cable television franchise was properly dismissed upon the square authority of *Parker*. *Metro Cable Co. v. CATV of Rockford, Inc.*, 375 F. Supp. 350, 359 (N.D. Ill. 1974). *But cf.* *Goldfarb v. Virginia State Bar*, 497 F.2d 1, 6 (4th Cir.), *cert. granted*, 43 U.S.L.W. 3246 (U.S. Oct. 29, 1974), where the court interpreted *Parker* to hold the declared purpose of the California Agricultural Adjustment Act, namely to conserve agricultural wealth and to prevent economic waste, to be a benefit for the public and therefore a factor in deciding
haps a fair statement of the corollary is that, if a state is free to impose anticompetitive economic regulation, then a regulated enterprise may be required to accede to the state's requirements without exposure to federal antitrust liability as a consequence.\textsuperscript{7} This statement of the rule, however, should always be tempered with the observation that \textit{Parker} talks only about "official" action and not about mere legislative recognition of private regulation.\textsuperscript{7a}

3. \textit{Governmental Approval of Private Economic Activity}

Under this analysis of \textit{Parker} it would seem that no exemption is applicable when there is no actual regulation\textsuperscript{76} or when regulation is not necessarily inconsistent with antitrust compliance.\textsuperscript{77} But the more elusive point, which even fewer courts have recognized, is that \textit{Parker v. Brown} is not authority at all for a category (3) exemption. The Court issued a specific warning to that effect when it stated that "... a state does not give immunity to those who violate

---

that the Act is a valid state action. But the conclusion reached in \textit{Goldfarb} that the minimum fee schedule for lawyers is part of a scheme of ethical regulation intended primarily to benefit the public (and that the law is a "learned profession and therefore exempt from the antitrust laws"), suggests the question whether legislative purpose will be determined solely on the basis of the label used by the legislature, particularly when a specific item such as a minimum fee schedule may not in reality provide a direct benefit to the public. \textit{Compare id. at 9-10} (majority opinion) \textit{with id. at 21} (dissent). \textit{See also United States v. Oregon State Bar, 43 U.S.L.W. 2234} (D. Ore. Nov. 25, 1974) (defendants' motion for summary judgment denied and \textit{Goldfarb} not followed).


the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . .”78 Thus a firm line must be drawn between action *commanded* by a state and action merely approved or tolerated.79 The determination of this line between categories (2) and (3) will depend upon the type of regulation in question, the stringency and origin of the regulatory requirements and the nature of the regulator’s decisionmaking.

Actions or orders by state agencies to authorize or accept decisions previously made by private parties are by definition in category (3). When such a sequence of events occurs, it is illogical for a regulated person to contend that he acted pursuant to governmental compulsion.80 This is particularly obvious when there has been no regulatory agency consideration of a matter prior to antitrust attack.81 Less glaring, yet still quite apparent, are the defects in immunity claims based on permissive regulations such as those that

---

78. 317 U.S. at 351.
80. See, e.g., Marnell v. United Parcel Serv. of America, Inc., 260 F. Supp. 391, 406-10 (N.D. Cal. 1966); cf. Allstate Ins. Co. v. Lanier, 361 F.2d 870 (4th Cir. 1966), where the court construed uniform insurance rates and standards promulgated by private parties as state action. However, this holding involves the statutory McCarran-Ferguson Act insurance regulation test and is not truly a *Parker v. Brown* case. However, in Goldfarb v. Virginia State Bar, 497 F.2d 1, 6 n.11 (4th Cir.), cert. granted, 42 U.S.L.W. 3246 (U.S. Oct. 29, 1974), the court stated:

It is interesting to note that [Parker v. Brown] was not a case where individuals initially decided to take action, conspired to regulate competition and prices in the industry, and then received governmental approval through legislative action. On its surface such a sequence of events would appear to be an attempt by a state to grant immunity to those violating the Sherman Act. Indeed such “after the fact” legislation may create a rebuttable presumption that the state was attempting to camouflage individual action as state action.

See also id. at 8 n.19. See generally cases cited at note 94 infra.
81. Text accompanying notes 46-52 supra.
often arise from the filing of privately developed tariffs with a state public utility commission or from agency approval of merger proposals. In these circumstances there is little or no agency insistence upon specific acts or policies; the practices or rates originate with the regulated industries.

One step further removed from the obvious case is the situation where a state agency intends to regulate but has its purposes thwarted or deflected by inaccurate information or deception on the part of the regulated industry or competitor. Here again, although governmental directions may indeed have been issued, the inherent deficiencies in such state action preclude immunity based upon the presumption of an intent to regulate in the public interest. Next along the spectrum of category (3) non-exemption cases, progressing toward the line separating category (3) from category (2), is the situation where the state agency's processes are so casual as to refute the existence of active regulation.

Finally, and perhaps most arguable, is the case of active agency review that does not include a study and evaluation of the anti-competitive consequences of the pertinent regulatory action. The argument that this oversight precludes exemption is alluded to in International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp., Hecht v. Pro-Football, Inc. and Travelers Insurance Inc. v. Blue Cross of Western Pennsylvania. Moreover, at least one public utilities commission opinion demonstrates

---


86. 351 F. Supp. 1153, 1201-03 (D. Hawaii 1972). It is arguable that this case may be more appropriately classified as one rejecting exemption based on permissible rather than compulsory transactions. See United States v. Pacific Southwest Airlines, 358 F. Supp. 1224 (C.D. Cal. 1973), for this treatment of another merger case.


the broad impact on the Parker doctrine which this theory would have. Based on the interpretations of Parker v. Brown in Georgia Power and Virginia Electric the opinion concludes that the Commission is not to consider challenges to tariffs made before it on grounds of alleged antitrust violations. If the view that the anti-competitive effects of regulation are not to be considered prevails in other agencies, the ITT case suggests that regulation by these agencies may be insufficient for antitrust immunity.

4. Relationship to Federal Policy

Because Parker v. Brown does not call for any federal antitrust exemption for category (3) regulation, the elements of the relationship between federal and state policies—(a) consistency with the federal antitrust laws, (b) consistency with some other federal policy but inconsistency with antitrust laws, and (c) total antipathy to federal policies—need only be evaluated with respect to the first two analytical categories previously outlined, namely (1) governmental operation of an economic activity and (2) governmental regulation of private economic activity. There is, of course, little room for argument about the validity of state action or regulation which is consistent with the federal antitrust laws. Perhaps the most obvious example of consistent regulation is state antitrust legislation which parallels the federal statutes. It has long been the law that the states may regulate even interstate commerce until Congress has acted. And in the absence of an expressed intention to do so contained in the federal antitrust laws, those statutes cannot be said to “occupy the field” of regulation to the exclusion of consistent state law. This position was squarely announced in California v. Zook, as follows:

89. Gas Light Co. of Columbus v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971).
But whether Congress has or has not expressed itself, the fundamental inquiry, broadly stated, is the same: does the state action conflict with national policy? . . .

We restate the familiar because respondents would have us pronounce an additional rule: that when Congress has made specified activity unlawful, "coincidence is as ineffective as opposition," and state laws "aiding" enforcement are invalid. . . .

. . . Neither the language nor the facts of the cases cited support an approach in such marked contrast with this Court's consistent decisional bases. 95

The state courts have reached the same conclusion. 96

_Parker v. Brown_ is probable authority for exemptions based on both governmental operation of an economic activity and governmental regulation of private economic activity where the governing state law is inconsistent with the federal antitrust laws but consistent with some other federal policy (that is, category (1)(b) and (2)(b) exemptions). The California prorate scheme in _Parker_, although in contravention of federal antitrust policies, was comparable to the federal Agricultural Adjustment Act. There was an additional factor, however, in that the federal legislation also directed the Secretary of Agriculture "to harmonize state and federal regula-

---

95. 336 U.S. at 729. This rule also leads to the almost forgotten conclusion that violations of consistent federal and state antitrust laws can result in multiple liability, even beyond the normal treble damages in private federal litigation.

This has long been settled. _Fox v. Ohio_, 5 How. 410, announced uncertainly what _United States v. Marigold_, 9 How. 560, later made clear: that "the same act might, as to its character and tendencies, and the consequences it involved, constitute an offence against both the State and Federal governments, and might draw to its commission the penalties denounced by either as appropriate to its character in reference to each." 9 How. at 569. [citing other cases.]


tion," thus implying Congressional recognition and tolerance of co-existing state law.\textsuperscript{97} It remains unclear to what extent this second factor was critical to the result in \textit{Parker} in view of the indiscriminate dicta expressed by the Court.\textsuperscript{98} Nonetheless, it is clear that the complex evaluation of element (b) situations goes beyond the analysis of \textit{California v. Zook} where the relatively simple test for state authority was one of conflict or consistency with federal policy. When one has two relevant but inconsistent federal policies, it is first necessary to determine predominance between them.\textsuperscript{99}

It does not seem ultimately helpful merely to add the existence of a state statute to the equation and balance a combined federal and state regulatory policy versus a single federal antitrust policy. The fundamental question is whether Congress has allowed room for the state to act at all. The decision inherently involves a preference, based on legislative history, statutory construction and possibly an economic examination, between two federal legislative schemes. This is precisely the problem confronted in Section II of this article. In those predicaments where Congress did not state or strongly imply its legislative priorities, the courts have resorted to the doctrine of primary jurisdiction at least in part to defer a difficult choice. Such a procedural resolution of the problem is not practical in the area of state law exemptions, for there is no rational reason to refer the interpretation of congressional intent to a state agency.\textsuperscript{100}

When a court looks to \textit{Parker v. Brown} for guidance in resolving an element (b) exemption, there will be a temptation to rely upon the dicta and grant immunity merely because of the existence of any federal statute that is in harmony with the state scheme. It is suggested that this is as uncritical an approach as is resort to the doctrine of primary jurisdiction. The court's decision should turn, instead, on whether the federal antitrust laws would prevail in the face of the competing federal regulation standing alone.\textsuperscript{101} In mak-

\begin{itemize}
\item \textsuperscript{97} P. Areeda, \textit{Antitrust Analysis} 116 (2d ed. 1974).
\item \textsuperscript{98} "This history [of the raisin industry] shows clearly enough that the adoption of legislative measures to prevent the demoralization of the industry by stabilizing the marketing of the raisin crop is a matter of state as well as national concern and, in the absence of inconsistent congressional action, is a problem whose solution is peculiarly within the province of the state." 317 U.S. at 367. \textit{Cf.} Hecht v. Pro-Football, Inc., 444 F.2d 931, 936-37 (D.C. Cir. 1971), \textit{cert. denied}, 404 U.S. 1047 (1972).
\item \textsuperscript{99} 444 F.2d at 946-47.
\item \textsuperscript{100} \textit{See} Section IIIB \textit{infra}.
\item \textsuperscript{101} Thus, the Court's decision in Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973), is not helpful on this issue and the second factor in \textit{Parker}, congressional recognition and tolerance of coexisting state law
\end{itemize}
ing this determination, the principles noted in Section II, for instances where regulatory legislation is silent on antitrust issues, should normally control.

The Sherman and Clayton Acts are relatively aged legislation. With regard to subsequently enacted federal regulatory schemes, "[i]t is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible." For matters that would have constituted antitrust violations before enactment of a federal regulatory statute, that dogma would seem to require that the regulatory statute be interpreted so as to authorize only regulations conforming to antitrust standards. Such a construction of a federal statute is hardly a sufficient ground to support a Parker exemption for state regulation pursuant to a comparable law. Significantly, the Agricultural Adjustment Act relevant in Parker v. Brown was not silent and specifically provided that "[t]he making of any . . . [approved marketing] agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful . . . ." Thus Parker is a case of state consistency with a federal regulatory scheme which includes an express antitrust exception, and its authority should be limited to those circumstances.

Element (c), a direct contradiction between the antitrust laws and state regulation with no federal counterpart, was anticipated and distinguished in California v. Zook: "The case would be different if there were conflict in the provisions of the federal and California statutes. But there is no conflict in terms, and no possibility of such conflict, for the state statute makes federal law its own in this para-

(text accompanying note 91 supra), is of only minimal significance. The provision in one federal statute for intentional collaboration with state regulation does not establish an intended collaboration or federal tolerance with respect to another federal statute, unless there is some independent basis upon which to conclude that the first federal statute itself takes precedence over the second. Cf. Hecht v. Pro-Football, Inc., 444 F.2d 931, 938 (D.C. Cir. 1971) (referring to Judge Goldberg's opinion in Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971)).

102. See notes 8-10 supra and accompanying text.


ticular." Despite broad language in Parker v. Brown, the Court has never held to the contrary and has applied the antitrust laws to industries regulated only by the states. Such a result in United States v. South-Eastern Underwriters Association led to the enactment of the McCarran-Ferguson Act in which Congress expressly exempted state-regulated insurance companies from most federal antitrust restrictions. Nevertheless, even such federal legislation establishing an exception to the rule for element (c) cases must be strictly construed in light of the strong presumption favoring a national antitrust policy. It is precisely this policy that distinguishes element (c) situations from those like the one faced by the Court in Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware.


in which a state law\textsuperscript{111} permitting the litigation of an issue arising out of a brokerage firm employment contract was enforced despite a contrary New York Stock Exchange rule\textsuperscript{112} which required arbitration and which was authorized by section 6 of the Securities Exchange Act of 1934.\textsuperscript{113} In that case, Mr. Justice Blackmun examined the claim of federal preemption and concluded that:

Convenience in exchange management may be desirable, but it does not support a plea for uniform application when the rule to be applied is not necessary for the achievement of the national policy objectives reflected in the Act. Indeed, Congress, in the securities field [unlike the antitrust field], has not adopted a regulation system wholly apart from and exclusive of state regulation.\textsuperscript{114}

The supremacy clause requires preemption of state law wherever it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."\textsuperscript{115} There can be no question that Congress' purpose in the area of competition has been clearly expressed.\textsuperscript{116} A conflicting state law standing alone cannot prevail.

The lower courts have regularly abused \textit{Parker v. Brown} as authority for averting judicial eyes from flagrant antitrust violations, some having minimal connections with state action. A more careful review of the law leads to the conclusion that antitrust immunity under the \textit{Parker} doctrine is proper only for (1) actual governmental operation of a non-proprietary activity within the scope of legislative authority and for (2) private enterprises affirmatively and intentionally regulated by state law that is consistent with a federal policy that prevails over antitrust policies. Determination of the existence of these circumstances calls for a surgical separation of assertions and appearances from reality. The collateral existence of state action or regulation should not be relied upon as a touchstone. The fact of state participation "only begins the analysis, for it is not every governmental act that points a path to an antitrust shelter."\textsuperscript{117}

\begin{itemize}
\item \textsuperscript{111} California Labor Code § 229 (West 1970).
\item \textsuperscript{112} New York Stock Exchange Rule 347(b), 2 CCH NEW YORK STOCK EXCHANGE GUIDE ¶ 2347 (1974).
\item \textsuperscript{114} 414 U.S. at 136-37.
\item \textsuperscript{116} Sherman Act § 1, 15 U.S.C. § 1 (1970).
\item \textsuperscript{117} Woods Exploration & Producing Co. v. Aluminum Co. of America,
Primary jurisdiction in a federal agency, apart from exclusive jurisdiction, has been justified, as noted in Section II, by presumptions of agency expertise and by recognition of the need to formulate uniform regulatory enforcement. Exclusive jurisdiction may be based upon express statutory language or the conclusion that a regulatory scheme is so pervasive that it is inherently inconsistent with judicial antitrust intervention, even though the agency itself may be obligated to take competitive principles into account in its consideration of the public interest. These rationales for both primary and exclusive jurisdiction are applicable only on the federal level. There has developed, however, an ill-conceived theory of state primary jurisdiction.

The state primary jurisdiction theory originated in the case which most notably misconstrued the scope of the Parker doctrine, Washington Gas Light Co. v. Virginia Electric & Power Co. This case held that state action could be inferred from unapproved private actions by a public utility when the actions were within a regulatory commission's range of authority, even where there was no showing of conscious failure to regulate or any examination by the commission of the utility's challenged activities. The posture of this case presents a category (3)(c) situation in the analytical outline constructed above (that is, mere governmental approval of private economic activity that is totally antipathetic to federal policies). Parker v. Brown is of no precedential value for such an exemption. In fact, the Court's discussion in Parker, stripped of subsequent lower court gloss, is quite to the contrary. Nevertheless, the Fourth Circuit in Virginia Electric went beyond this fundamental error and volunteered the potentially more harmful observation that in any event the plaintiff should be relegated to the state regulatory commission for relief.

The court in Virginia Electric sought to turn adversity to advantage in its strained reasoning when it pursued a three step progression from (1) administrative inaction to (2) administrative inaction.

---

438 F.2d 1286, 1294 (5th Cir. 1971), citing George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 30 (1st Cir. 1970).

118. Text accompanying notes 11-20 supra.

119. 438 F.2d 248 (4th Cir. 1971), discussed in text at notes 46-53 supra.

120. Id. at 254.

121. "It is just as sensible to infer that silence means consent, i.e., approval." Id. at 252.
authority and finally to (3) a concept of primary state jurisdiction, albeit not labeled as such. Thus, primary jurisdiction here turns *Parker v. Brown* on its head. State action immunity may arguably apply to private persons complying with affirmative state regulation, but actions merely approved and not compelled by state regulation are not protected. Yet *Virginia Electric* holds that a state regulatory body must be provided an opportunity to act upon previously unregulated private conduct before a federal court will impose antitrust liability, even for past activities preceding agency review.

This premise completely misconstrues the circumscribed nature of the *Parker* holding which permits, *but does not encourage*, some state deviations from national competitive standards. It also confuses antitrust enforcement with an unsophisticated version of the doctrine of exhaustion of administrative remedies, a failing that has been repeated in at least one subsequent decision. The fault with the latter concept in this context is that it applies a procedural tool to obfuscate more important questions of substantive rights. It is difficult to see this fault clearly when the viewer’s perspective is distorted by a defective perception of the substantive principles, as the court’s perspective was in *Virginia Electric*. Therefore, once the premise is understood that there is no exemption for private conduct not compelled by a governmental authority, even where the agency could effectively regulate if it so chose, it becomes clear that an aggrieved competitor (for example) may have two separate rights. The first is, depending upon state law, the right to seek active state regulation, and the second is to enforce federal antitrust claims. Despite insinuations in *Virginia Electric* and its progeny, these are

---

122. The commission eventually, after the period for which the antitrust action sought relief, “spoke affirmatively and first modified and finally ended the promotional practices [of the defendant] upon which the suit was based.” *Id.*

123. “The antitrust laws are a poor substitute, we think, for plaintiff’s failure to promptly protest to the SCC and to seek the administrative remedy ultimately shown to have been available and effective.” *Id.* But see *CSI/Communication Syss.*, Inc. v. South Cent. Bell Tel. Co., 346 F. Supp. 487 (E.D. Tenn. 1971), where the court found primary jurisdiction in the appropriate state or federal agency, and not in the district court.

124. 438 F.2d at 254.


neither alternative nor necessarily sequential rights. This conclusion has been expressed in *Woods Exploration & Producing Co. v. Aluminum Company of America*,\(^\text{128}\) where the court stated: "... While state remedies may exist to correct this conduct, such activities also may state a cause of action under the federal antitrust laws."\(^\text{129}\)

There is no justification for primary state administrative agency jurisdiction in these circumstances. If private action has occurred without concurrent regulation, the subsequent invocation of the jurisdiction of a state regulatory body cannot conceivably provide the essential element of compulsion for the prior private action to have qualified at the time as state action. The *Parker* opinion made it clear that "a state does not give immunity to those who violate the Sherman Act . . . by declaring their action is lawful."\(^\text{130}\) It is difficult to imagine a more transparent set of circumstances for that parameter of the *Parker* doctrine.

In *Business Aides, Inc. v. Chesapeake and Potomac Telephone Co. of Virginia*\(^\text{131}\) the court purported to follow *Virginia Electric* on the exhaustion of remedies principle. The *Business Aides* court found, however, that the utility's refusal to provide certain services which was challenged under sections 1 and 2 of the Sherman Act was pursuant to a tariff approved by the state regulatory agency. Without indicating any recognition of the principle of dual federal and state rights alluded to in *Woods*,\(^\text{132}\) the court concluded that "[t]he Virginia Constitution and Code provide an adequate remedy . . ."\(^\text{133}\) and the "public utility is not required to seek revision of its tariff for the convenience of a customer."\(^\text{134}\) Rather the burden is on the customer to challenge the tariff. Within a few months, *Communication Brokers of America, Inc. v. Chesapeake

\(^\text{128}\) 438 F.2d 1286 (5th Cir. 1971).
\(^\text{129}\) Id. at 1296. The language used in another context in *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966), to the effect that a plaintiff should not be able to receive a dual recovery of antitrust damages plus Federal Maritime Commission "reparations" is not apposite. Few state regulatory laws provide for damage awards, and in any event the situation posed in this article involves the laws of two sovereigns.

\(^\text{130}\) 317 U.S. at 351.
\(^\text{132}\) 438 F.2d 1286 (5th Cir. 1971).
\(^\text{133}\) Id. at 1286. The language used in another context in *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966), to the effect that a plaintiff should not be able to receive a dual recovery of antitrust damages plus Federal Maritime Commission "reparations" is not apposite. Few state regulatory laws provide for damage awards, and in any event the situation posed in this article involves the laws of two sovereigns.
\(^\text{134}\) Id. at 758.
and Potomac Telephone Co. of Virginia\textsuperscript{135} purported to follow both Virginia Electric and Business Aides, Inc. The holding was "... that this action should at this time be dismissed because of the plaintiff's failure to pursue its administrative remedies in the first instance."\textsuperscript{136} The court left no doubt as to its primary jurisdiction rationale because it rejected the ambit-of-regulation interpretation of Parker which had been announced in Washington Gas Light Co. v. Virginia Electric & Power Co. The Communication Brokers court stated:

\ldots [A]rguably the expansive effect given to the Parker doctrine in Washington Gas Light Co. would justify a similar ruling in the case at bar irrespective of plaintiff's failure to pursue his administrative remedies. But such a reading of Washington Gas Light Co. is probably not justified in light of the approach taken in Business Aides, Inc., and accordingly at this time the court declines to accept defendant's argument that summary judgment should be granted on the basis of a "state action" exemption of its activities.\textsuperscript{3} Nevertheless, this court is of the opinion that Washington Gas Light Co. and Business Aides, Inc., taken together, provide support for the conclusion in this case that the antitrust laws should not be utilized in the first instance in an area in which the state has provided for comprehensive regulation and redress of grievances.

\textsuperscript{3} The Supreme Court limited the doctrine of "state exemption" in Parker. ... It is thus possible that after pursuing its administrative remedies, plaintiff could proceed with an antitrust action.\textsuperscript{137}

This series of Fourth Circuit cases has created total chaos in the state action area. Proceeding from an unsupported interpretation of Parker v. Brown, the Communication Brokers court constructed an express doctrine of state agency primary jurisdiction while hesitating, ironically, to endorse the original expansion of the Parker doctrine and refusing to reach the issue whether an antitrust action might or might not be appropriate in any event. The question that the court ignored, the answer to which would illuminate the fault in its approach, is why must the antitrust action be delayed until after seeking state administrative relief?

This question was asked in Marnell v. United Parcel Service of America, Inc.\textsuperscript{138} where the court was faced with a motion for a stay

\begin{quote}
\textsuperscript{135} 370 F. Supp. 967 (W.D. Va. 1974).
\textsuperscript{136} Id. at 968.
\textsuperscript{137} Id. at 969-70 (emphasis added). Accord, Industrial Communications Sys., Inc. v. Pacific Tel. & Tel. Co., 5 TRADE REG. REP. (1974-2 Trade Cas.) ¶ 75,291 (9th Cir. Oct. 4, 1974).
\end{quote}
to refer the antitrust case to the California Public Utilities Commission. The court first considered whether the state commission would review past rates or would act only prospectively. By way of comparison, the court noted that the Interstate Commerce Commission does not pass upon the reasonableness of past rates.\textsuperscript{139} However, it failed to point out an important distinction: if the ICC acted retroactively, it might confer immunity from the antitrust laws upon past rates under express federal statutory provisions,\textsuperscript{140} whereas comparable state approval of past rates would not seem sufficient under \textit{Parker v. Brown} to immunize private wrongful action not compelled by the government.\textsuperscript{141} Therefore, deferring to the state agency could in no way affect the validity of the antitrust challenges.\textsuperscript{142}

The \textit{Marnell} opinion did not stop with that comparison, but based its holding on the most significant primary jurisdiction consideration, namely whether agency action could either materially aid the court or alternatively have a determinative effect on the antitrust suit. The court found that it was questionable whether the Commission would hold a hearing at all. Thus, the first alternative, upon which the Supreme Court has recently relied in ordering trials stayed pending advice from federal administrative agencies,\textsuperscript{143} was not relevant. Even if an administrative hearing were held, the district court found that the Commission would decide only whether the rates and practices under attack were "just, reasonable and not unduly preferential" under state regulatory statutes and would make no decision as to a violation of the federal antitrust laws.\textsuperscript{144} As to the second

\textsuperscript{139} \textit{Id.} at 413.

\textsuperscript{140} Note 22 \textit{supra}.

\textsuperscript{141} \textit{See} text at note 129 \textit{supra}.

\textsuperscript{142} Another case considering the primary jurisdiction of the California Public Utilities Commission was decided on an injunction issue when the alleged antitrust violation remained only a threat. There this problem, of course, did not arise. Industrial Communications Sys., Inc. v. Pacific Tel. & Tel. Co., 5 \textit{TRADE REG. REP. (1974-2 Trade Cas.)} ¶ 75,291 (9th Cir. Oct. 4, 1974). In such a situation the fact that a condition precedent to the threatened conduct is state regulatory agency action seems logically to require the conclusion that the threat is not sufficiently imminent to create a justiciable case, rather than the conclusion that the state agency should acquire primary jurisdiction vis-à-vis a federal antitrust suit. That holding by the district court was expressly reversed by the Ninth Circuit. \textit{Cf.} United States v. Michigan Nat'l Corp., 95 S. Ct. 10 (1974).


alternative, the court concluded that action by the state commission "... would be neither useful nor determinative upon the issue of monopoly presented in this case. ..."

This realization resulted in the final conclusion:

For the foregoing reasons, referral of the issue as requested by defendants for an agency determination would not materially assist the Court in disposing of this case. The cost, time and effort of such a referral would seriously attenuate the purpose of the antitrust laws under which this suit is brought.

This result would be appropriate even where state agencies do evaluate the effects of an activity on competition because those evaluations are usually based on state rather than federal laws. In addition, constructions of federal statutes by state administrative agencies may not, under the supremacy clause, usurp the jurisdiction of the federal judiciary, the recognized repository of antitrust expertise.

It is essential to remember that cases dealing with federal primary jurisdiction are not reliable authority for state primary jurisdiction cases, because federal agencies may be obligated to consider the federal antitrust laws and their decisions on antitrust issues may strongly influence subsequent judicial action.

(1971), have since held that the same commission involved in Marnell would have to weigh carefully the competitive factors "[w]here, as here, a finding in favor of the utilities will result in a potential threat to free competition. ..." 5 TRADE REG. REP. (1974-1 Trade Cas.) ¶ 75,013, at 96,482 (Cal. Sup. Ct. 1974). See also Industrial Communications Sys., Inc. v. Pacific Tel. & Tel. Co., 5 TRADE REG. REP. (1974-2 Trade Cas.) ¶ 75,291 (9th Cir. Oct. 4, 1974).


146. Id. The same conclusion was reached in a subsequent decision by the court, although it did not cite Marnell. BBD Transp. Co. v. United States Steel Corp., 5 TRADE REG. REP. (1974-2 Trade Cas.) ¶ 75,266 (N.D. Cal. Oct. 1, 1974).


148. The apparent ease of ignorantly transferring federal precedent is demonstrated in Industrial Communications Sys., Inc. v. Pacific Tel. & Tel. Co., 5 TRADE REG. REP. (1974-2 Trade Cas.) ¶ 75,291 (9th Cir. Oct. 1, 1974).

149. See note 13 supra. But see Industrial Communications Sys., Inc. v. Pacific Tel. & Tel. Co., supra note 148.

150. See notes 28-29 supra. But see Aloha Airlines, Inc. v. Hawaiian Airlines, Inc., 489 F.2d 203, 212 (9th Cir. 1973), where the court used similar reasoning to that of the text to deny the CAB primary jurisdiction.

151. This influence is subject to valid criticism. See notes 25-26 supra and accompanying text.
A proper approach to the overall problem is well demonstrated in United States v. Morgan Drive Away, Inc., where the defendants urged:

... the Court to refer the issues raised by their alleged conduct wholly within individual states to state agencies having authority over the for-hire transportation of mobile homes. The only purpose that would be served by such deferral to state agencies would be to ascertain whether defendants' conduct is entitled to immunity under the holding of Parker v. Brown, 317 U.S. 341 (1943). Parker confers antitrust immunity upon conduct which is directed, commanded or imposed by the state legislature acting as sovereign. Mere state approval of the defendants' actions would not shield their alleged anti-competitive conduct from antitrust attack. See Marnell v. United Parcel Service, 260 F. Supp. 391 (N.D. Cal. 1966). Deferral to state agencies will be unnecessary since defendants can be easily protected from prejudice at trial by the exclusion of evidence of conduct immunized by Parker. This course of proceeding is preferable to the delay that would accompany deferral to state agencies.

IV. Conclusion

The federal courts have not been sufficiently critical in their evaluations of Parker v. Brown defenses. State action is a complex concept, and only limited categories of state action qualify for antitrust immunity. If a state agency has previously acted, and the defendant's challenged conduct was allegedly within the scope of that state regulation, it is the function of the court to hear evidence and then weigh the elements of the state action against the Parker analysis outlined in this article. If the state has not yet acted, and if there is nothing other than latent authority in the regulatory agency, there is no occasion to measure the status of state law at all.

In dealing with state action claims, the courts have confused judicial precedents dealing with federal regulatory schemes with those appropriate for state regulation situations. Primary jurisdiction is an historical federal procedural device which contains inherent inconsistencies and is subject to numerous criticisms, but even within its proper limitations it bears no relation to the balancing of state regulation against the federal antitrust laws. The nature of the limited antitrust immunity provided by state law under Parker v. Brown,

152. 5 TRADE REG. REP. (1974 Trade Cas.) ¶ 74,888, at 95,999-96,000 (D.D.C. 1974).
153. Id. at 96,000.
as contrasted with the various grounds for exemption based on federal regulation, makes a finding of primary jurisdiction in a state agency wholly inappropriate for federal antitrust litigation. State agencies, by definition, have no duty to consider federal antitrust policies in their decision processes, and many have no restrictions on their discretion under state antitrust law. Primary jurisdiction has not served efficiently to extend antitrust enforcement to federally regulated industries. It should not be tolerated in the resolution of the conflict between state regulatory schemes and the national economic policy favoring competition.\textsuperscript{154}

\textit{United States v. Morgan Drive Away, Inc.} presents a balanced resolution of the problem. The federal court should retain and exercise its antitrust jurisdiction, and the burden of proving valid \textit{Parker} defenses should rest squarely on the defendant.

\textsuperscript{154} To conclude otherwise not only violates sound legal analysis but magnifies the "danger" against which the Supreme Court warned in \textit{United States v. Marine Bancorporation, Inc.}, 94 S. Ct. 2856, 2879 (1974), "of subjecting the enforcement of the [federal] antitrust laws to the policies of a particular . . . [state] regulatory official or agency . . . ."