State Action Immunity: A Problem under Cantor v. Detroit Edison

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Since Parker v. Brown, which declared states immune from antitrust laws, the courts have been engaged in defining the parameters of state action immunity. In Cantor v. Detroit Edison Co., the Supreme Court has delineated the criteria to be used for determining the applicability of state action immunity to a private individual acting pursuant to a state mandate. The author analyzes the Cantor standards and discusses the post-Cantor status of state action immunity.

I. STATE ACTION IMMUNITY FROM THE ANTITRUST LAWS

Among various exemptions from the antitrust laws state action immunity has proven to be one of the most controversial. Dating from the 1943 case of Parker v. Brown,1 the Supreme Court appeared to have conferred at least a limited exemption from the antitrust laws on three classes of defendants: states, state officials, and private persons acting under the direction of the state.2 However, the Parker decision left two questions unanswered which were to plague the federal courts in later years. Were all

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The views expressed in this article are entirely personal and do not necessarily represent, or coincide with, those of any governmental agency.

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

2. The suit in Parker was filed against the State Director of Agriculture, a state commission, and a private group of citizens whose statutory duty was to create a restrictive marketing program. The Parker decision did not make clear whether the Court considered this latter group to be a private group or a state agency. However, subsequent lower federal cases made clear that they considered Parker applicable to private parties acting under state direction. Gas
three classes of potential immunees to be treated identically? If not, then what standards were to be applied to each class? In its 1975 decision in Goldfarb v. Virginia State Bar Association, the Court indicated that the three classes were not to be treated identically, stating that the immunity conferred on state agents may be lost if the agent can be shown to have acted outside of his grant of authority from the state. One year later, in the landmark decision of Cantor v. Detroit Edison Co., the Court attempted to delineate the standards and prerequisites which must be met by the third class of immunees—private parties acting under the direction of the state—in order to retain immunity. Although the Cantor decision appeared to have caused more confusion than clarification, a more careful analysis of the case demonstrates that the decision has made a significant contribution to resolving the unanswered questions of the Parker decision. This article attempts to assess the current status of the state action immunity, to point out major unanswered questions and issues that remain after Cantor, and to discuss the legal consequences of suggested answers to those questions.

II. SOURCE OF THE JUDICIAL CONFUSION

A. Pre-Cantor Supreme Court Case Law

Any analysis of state action immunity must have its origins in the seminal case of Parker v. Brown. Pursuant to a California statute, the State Director of Agriculture created the California Agricultural Prorate Advisory Commission, which in turn created the Raisin Proration Program Committee. These three parties then formulated, implemented, and enforced a restrictive raisin marketing program designed to stabilize the market price of raisins by restricting competition in the sale of raisins. A producer and packer of raisins filed suit against these three parties, claiming, among other

Light Co. v. Georgia Power, 440 F.2d 1135 (5th Cir. 1971); Allstate Ins. Co. v. Lanier, 361 F.2d 870 (4th Cir. 1965).
6. Under the provisions of the program the raisin crop of a producer was divided into standard raisins and inferior raisins. In 1940, a producer was required to distribute 20 percent of the standard raisins into the surplus raisin pool and 50 percent of these raisins into the stabilization pool. The producer was permitted to dispose of the remaining 30 percent of his standard raisins as he wished. The program committee determined the disposition of the raisins in these two pools. However, the surplus pool was not to be sold in the normal distribution market. Consequently, 20 percent of the standard raisin crop was eliminated from the market. The raisins in the stabilization pool were to be disposed of in such manner as to maintain prior
things, that this marketing scheme violated the antitrust laws. The Supreme Court stated that, while Congress presumably could have subjected states and state officials to the provisions of the Sherman Act, the words and history of the statute indicated that it was not intended to apply to actions of the state. The Court then held that the restrictive marketing scheme challenged was the action of the state, not of private individuals; therefore, the Sherman Act could not reach the Raisin Proration Program. However, the opinion left two important issues undecided.

First, while there was no question that the Advisory Commission was a state agency, and the Court viewed it as such, it is unclear whether the Court considered the Program Committee a state or a private agency. If the Court viewed the Committee as a private agency, then the Parker doctrine would have immunized both a state agency (the Commission) and a private agency that was acting pursuant to a legislative statute (the Committee). However, if the Court viewed the Committee as a state agency, then the Parker decision arguably has relevance only when dealing with state agents but is not germane to cases involving private parties acting pursuant to state direction.

Second, the Court failed to indicate what a state must do in order to immunize a state agent or a private party. In one sense Parker was an extreme case. The California statute clearly contemplated that the Commission and Committee would be able to institute anticompetitive programs. How-

stability in the raisin market. The restriction of raisin supply and the monopoly of the stabilization pooling mechanism had the effect of stabilizing raisin prices at a higher than competitive level. 317 U.S. at 347-49.

7. The plaintiff contended that this marketing agreement constituted a violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1970), in that the program constituted an agreement in restraint of trade and an attempt to monopolize the raisin market.

8. Under the plenary grant of authority to the Congress under the commerce clause, U.S. Const. art. I, § 10, there does not appear to be any constitutional limitation preventing the Congress from extending the antitrust laws to the actions of the states. See concurring opinion of Mr. Justice Blackmun in Cantor v. Detroit Edison Co., 96 S. Ct. 3110, 3124 (1976). Thus, the only question to be answered is one of statutory construction as to whether Congress intended this broad a reach for the Sherman Act.


There is no suggestion of a purpose to restrain state action in the Act’s legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only “business combinations” . . .

. . . 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 since, in view of the latter’s words and history, it must be taken to be a prohibition of individual and not state action.

Id. at 351.

10. In support of the Program Committee’s status as a state agency it should be noted that the Committee was created by state statute for the purpose of carrying out the statutory provisions. The Committee was compensated by the state for its services under section 18 of the Act and was granted specific enforcement powers under section 24. California Agricultural Prorate Act, Cal. Gen. Laws Ann. art. 143a, §§ 18, 24 (Deering 1837).
ever, the Court did not make clear whether a statute which was less specific in its authorization of anticompetitive activity would suffice to invoke the state action immunity.

Thus, after *Parker* only one thing was clear: a state official acting pursuant to a state statute which expressly authorized anticompetitive conduct was immune from antitrust liability. However, *Parker* did not answer (1) whether less specific authorization would also immunize a state official, or (2) whether the same type of authorization that immunizes a state official would also immunize a private party acting pursuant to state direction.

In practical terms these two issues were to prove crucial. Subsequent lower federal court immunity cases involved state utilities charged with anticompetitive practices. The utilities claimed state action immunity under *Parker* because they were regulated by state public utility commissions. Not knowing whether *Parker* applied to private utilities or whether regulation by a state public service commission was sufficient state direction to grant immunity to private parties, the federal circuits were wildly inconsistent in their treatment of this immunity.11

In *Schwegmann Brothers v. Calvert Corp.*12 the Court indicated that more stringent standards were required for a state to immunize a private party. While the *Parker* Court had at least held that express authorization to engage in anticompetitive conduct was sufficient to immunize a state agent, the *Schwegmann* Court indicated in dicta that such express authorization would not immunize private parties.13

However, in support of the Committee's status as a private body, the Committee was composed of raisin producers with a pecuniary interest in the very program they devised. The Committee members were nominated by the raisin producers and chosen (from among those nominated) by the State Director of Agriculture; thus, the selection method had elements of both state and private selection. Finally, the actual enforcement powers of the Committee were not delegated to the Committee in the statute itself, as would be the case with most state agencies, but instead had to rely on the Director of Agriculture for its delegation of responsibilities.

For these reasons the Committee took on the appearance of a quasi-state and quasi-private agency. However, there is little doubt that the *Cantor* plurality viewed the Committee as a state agency.


13. "Therefore, when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids." *Id.* at 389. In all probability the Court in *Schwegmann* intended to cite to that page of the *Parker* opinion wherein the Court stated: "[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." 317 U.S. 341, 351 (1943). Apparently, this is how the *Schwegmann* Court interpreted the actions of Louisiana—that it declared an otherwise illegal price maintenance scheme lawful. The Court in *Cantor* cited *Schwegmann* for the proposition that even where the state makes possible, without requiring, an anticompetitive
Twenty-four years after *Schwegmann* the Supreme Court heard *Goldfarb v. Virginia State Bar Association*. Due to the existence of a minimum fee schedule that had been promulgated by the Fairfax County Bar Association and enforced by the Virginia State Bar Association, the plaintiffs were unable to find a Virginia lawyer who would perform a required title search for less than the minimum fee stipulated by the County Bar Association. Consequently, the plaintiffs filed suit against both the State and County Bar Associations, claiming that the promulgation and enforcement of the minimum fee schedule violated section 1 of the Sherman Act. The State Bar Association claimed that by enforcing the County Bar Association’s minimum fee schedule it was doing nothing more than implementing the Virginia Supreme Court’s ethics code provisions relating to minimum fee schedules. Since the State Bar Association was authorized to enforce the ethics provisions of the Virginia State Bar Association, the State Bar claimed immunity under *Parker*. Despite the fact that the State Bar Association was a state agency under Virginia law, the Supreme Court denied it immunity from the Sherman Act, stating:

scheme, this will not immunize private parties acting pursuant to the state statute. 96 C. Ct. at 3118.

In the years intervening between *Schwegmann* and *Cantor* there was a notable increase in the number of cases brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970), which involved an expansive definition of official action under color of state law. See, e.g., *Monroe v. Henckel*, 431 F.2d 1299 (5th Cir. 1970); *Basista v. Weir*, 340 F.2d 74 (3d Cir. 1965); *Marshal v. Sawyer*, 301 F.2d 639 (9th Cir. 1962). In expanding the meaning of official action in civil rights cases, the Court made periodic pronouncements that the requirements for state action in civil rights cases had no relationship to state action in antitrust cases. *Lucas v. Wisconsin Elec. Power Co.*, 460 F.2d 638, 654 n.35 (7th Cir. 1972), cert. denied, 409 U.S. 1114 (1973).

In *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), the Court discussed the requirements for state action in civil rights cases and used a “cf.” cite to antitrust cases wherein the Court made clear that no expansion of state action in civil rights cases was to have any effect on the narrow interpretation that the Court had used in *Schwegmann*. *Id.* at 349 n.6.


15. The Virginia State Bar Association had “enforced” the minimum fee schedule to the extent that, in its opinions, it indicated that habitual failure to comply with local minimum fee schedules raised a presumption of misconduct. *Goldfarb v. Virginia State Bar Ass’n*, 421 U.S. 773, 776-78 (1975).

16. Under the Virginia regulatory scheme plenary power to regulate the practice of law is granted to the state supreme court. VA. CODE ANN. § 54-49 (1974). The State Bar Association may be vested, by the supreme court, with sufficient power to enforce the rules and regulations promulgated by the supreme court. VA. CODE ANN. § 54-49 (1974):

> Organization and government of Virginia State Bar—The Supreme Court may, from time to time, prescribe, adopt, promulgate and amend rules and regulations of organizing and governing the association known as the Virginia State Bar, composed of the attorneys-at-law of this State, to act as an administrative agency of the Court for the purpose of investigating and reporting the violation of such rules and regulations as are adopted by the Court . . . .

17. VA. CODE ANN. § 54-49 (1974) refers to the State Bar Association as an administrative agency.
The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is \textit{required} by the State acting as sovereign. . . . Although the [Virginia] Supreme Court's ethical codes mention advisory fee schedules they do not direct either respondent to supply them, or require the type of price floor which arose from respondents' activities. . . . \textit{It is not enough that as the County Bar puts it, anticompetitive conduct is "prompted" by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.}\textsuperscript{18}

Given the Court's choice of wording in the above quote, there are two plausible interpretations of \textit{Goldfarb}'s effect on the state action immunity doctrine as it relates to state officials. First, it is possible that \textit{Goldfarb} was intended to partially overrule \textit{Parker}. In \textit{Parker}, while the statute clearly authorized the state agents to implement an anticompetitive marketing program, in no way could the state have been said to have \textit{compelled} the adoption of such a program. At the very least \textit{Parker} stands for the proposition that the actions of a state agent which are clearly authorized by the state are immune from antitrust liability.\textsuperscript{19} If \textit{Goldfarb} actually intended to require that a state must compel the anticompetitive activities of its agents before the agent may claim state action immunity, \textit{Goldfarb} would represent a significant restriction of the state action immunity vis-à-vis state agents.

However, a second, and more plausible, interpretation of \textit{Goldfarb} is that, due to peculiarities in the Virginia enabling statute, the Court determined that the State Bar Association had acted outside of the scope of the authority granted to it by the state, and that a state agent acting ultra vires should be treated as a private party insofar as the application of state action immunity is concerned. Under the Virginia statutory scheme, plenary power to regulate the practice of law is granted to the Virginia Supreme Court. Beyond this plenary granting of authority, the statutory scheme permits the Virginia Supreme Court to vest the State Bar Association with sufficient authority to enforce provisions of its regulations.\textsuperscript{20} Thus, there is reason to require that the State Bar Association point to direct authorization from the state supreme court in order to avoid the claim that the action taken was ultra vires. Once the Court viewed the Bar Association as a private party, then the "compelled action" standard enunciated by the Court would be applicable. This reading of the case is supported by the fact that the com-

\textsuperscript{18} 421 U.S. at 790-91 (emphasis added).

\textsuperscript{19} This does not mean that \textit{Parker} implies that one cannot sue a state to preempt state action which interferes with the policy of the Sherman Act. It only means that one cannot sue the state for injunction under the Sherman Act itself. However, preemption standards are more stringent.

\textsuperscript{20} VA. CODE ANN. §§ 54-48, 54-49 (1974).
pelled action standard was later repeated in the Court's *Cantor* decision, which dealt with immunity for private individuals who claimed to be acting pursuant to state direction.\(^{21}\) Therefore, it appears that the Court merely found that the State Bar Association had acted ultra vires and proceeded to treat the Association as a private party asking for immunity.\(^{22}\)

This second interpretation of *Goldfarb* accords more logically with the policy behind *Parker*, with the wording of the *Goldfarb* Court, and with the later *Cantor* opinion, than does the first interpretation. Most state regulatory statutes which delegate to some regulatory agency the authority to regulate a market are not drafted with such specificity that a given action can be said to have been compelled. For example, the California statute in *Parker* did not expressly compel the behavior that was held to be immune by the Court. Such a requirement would place an onerous burden on the state and would negate many of the advantages of creating a regulatory agency with special expertise to consider various problems in a market that is outside of the legislature's competence.

The rationale of *Parker* seems to imply that the state should have the right to delegate, to the limits of constitutionality, any regulatory powers that the state itself might exercise. Moreover, there is nothing in the language of *Goldfarb* to even suggest that the Court was intending to overrule *Parker*. Yet, the first interpretation of *Goldfarb* would necessarily overrule *Parker* to the extent that mere express authorization would no longer be sufficient to confer immunity on the state agent. Finally, there is logical consistency in requiring that a state agent acting ultra vires meet the same criteria that must be met by private parties as those criteria are set out in *Cantor*. In fact, it is not sensible, given the rationale of *Parker*, to require a state to use the same restrictive standards in delegating authority to its own agents that it must use in delegating authority to its private citizens.

The specific wording and analysis of the Court lends further credence to the second interpretation. In discussing the effect of the State Bar Association's status as a state agency the Court states:

*The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members. Cf. *Gibson v. Berryhill*, 411 U.S. 564, 578-579 (1973). The State Bar, by*

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\(^{21}\) 96 S. Ct. at 3121.

\(^{22}\) It would seem that if it were determined that the state agent acted ultra vires, and thus were treated as if he were a private party, under *Cantor* he could not successfully argue that his actions were compelled by the State. However, the effect of viewing the agent as a private party under *Cantor*, rather than just concluding that there is no immunity from the antitrust laws, is that there could still be immunity from treble damage liability if there were a showing of good faith. *See* note 47 *infra.*
providing that deviation from County Bar minimum fees may lead to disciplinary action, has voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act.\textsuperscript{23}

The statement that the State Bar is a "state agency for some limited purposes" is analytically close to the statement that the Virginia Supreme Court has endowed the State Bar with limited authority. Similarly the statement that the State Bar has joined in an essentially private (vs. governmental) activity suggests that the Court found that the Bar, acting as such, was no longer functioning as a governmental agency. An identical characterization would be that the Bar had exceeded its authority and was acting ultra vires.

It was apparent on the face of the Virginia statute that the state had not compelled the Bar Association to enforce minimum fee schedules. From an analytical viewpoint, therefore, if the Court had intended to require that the state compel anticompetitive conduct in order to confer immunity, it was unnecessary to discuss whether the State Bar Association had acted outside of the scope of its role as a "state agency for some limited purpose." That portion of the Court's analysis would have been superfluous.

In summary, the better interpretation of \textit{Goldfarb} is that it demonstrates that state agents who act outside of their grant of authority lose the privileged status established in \textit{Parker} and are relegated to the role of a private party claiming to be acting under direction of the state.\textsuperscript{24}

\textbf{B. Cantor v. Detroit Edison Co.}

\textit{Cantor v. Detroit Edison Co.},\textsuperscript{25} the Court's latest statement on the

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\item \textsuperscript{23} 421 U.S. at 791-92 (1975) (footnotes omitted). The citation to Gibson v. Berryhill, 411 U.S. 554 (1973), is potentially important. In \textit{Gibson}, the Court held that a state board of optometrists could not sit as jury in a state regulatory delicensing hearing because the board member optometrists had a financial interest in removing the licenses of other optometrists in order to gain the patients which would be lost by the potentially delicensed optometrists. A "\textit{cf.}" cite to a case indicates that the cited authority supports a statement, opinion, or conclusion of law different from that in the text but sufficiently analogous to lend some support to the text. A \textit{Uniform System of Citation} 7 (12th ed. 1976). Since \textit{Gibson} stands for the proposition that a group of persons with a systematic financial interest in the outcome of an adjudicatory proceeding cannot (consistent with due process) constitute an independent agency of the state for purposes of hearing the case, the \textit{cf.} cite to \textit{Gibson} in \textit{Goldfarb} arguably implies that a regulatory group with a systematic financial interest (such as the Virginia State Bar) in the profession being regulated cannot constitute an independent agency of the state for purposes of immunity.

\item \textsuperscript{24} It should be noted that, if the Court actually intended to require that a state mandate the conduct of its agents before those agents could claim immunity, the Virginia Supreme Court might well have been liable for treble damages since the enabling statute did not mandate that the Virginia Supreme Court promulgate minimum fee schedules.

\item \textsuperscript{25} 96 S. Ct. 3110 (1976).
\end{itemize}
proper application of the state action immunity, attempts to set standards for
the application of this immunity when dealing with private parties acting
under the direction of the state. The defendant in Cantor was a utility com-
pany furnishing electric power to southern Michigan. As part of its services,
the defendant maintained a light bulb exchange program through which new
residential customers were provided incandescent bulbs in such quantities as
were needed for all permanent fixtures. Thereafter, as a bulb burned out,
the utility would replace it with a new one free of charge. The bulb distribu-
tion program was approved by the Michigan Public Service Commission as
part of the tariff filed by the defendant and could not be changed or with-
drawn by the defendant until a new tariff was approved. The plaintiff, a
retail druggist who sold light bulbs, claimed that the bulb distribution pro-
gram was a violation of section 2 of the Sherman Act. A majority of the
Court, consisting of six justices, held that the state action immunity doctrine
did not apply, despite the regulation by the Public Service Commission.
Unfortunately, these six justices splintered into three groups. The plurality
opinion, written by Justice Stevens, carried the weight of five justices on
some issues but only four justices on the other issues. Chief Justice Burger,
who agreed with only a portion of the plurality opinion, filed his own con-
curring opinion. Justice Blackmun, who disagreed entirely with Justice Ste-
vens’ approach, also wrote a separate concurring opinion.

1. Justice Stevens’ Opinion

Justice Stevens’ opinion is divided into four parts. Parts I and III carried
a majority of five votes, while Parts II and IV carried only four votes.

a. Part II (4 votes). In Part II, Justice Stevens read Parker narrowly as
applying only to actions of the state or of state officials acting pursuant to
express legislative command. Under this interpretation, Parker does not

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26. It was claimed that the light bulb exchange program constituted an attempt to
monopolize the light bulb market, a violation under section 2 of the Sherman Act. In the
original complaint the plaintiff also alleged that the program constituted an illegal tying ar-
range ment whereby the utility was attempting to use its natural monopoly in the retail electric
power market to obtain a monopoly in the market for light bulbs. However, this latter allega-
tion was dropped. No explanation was given for dropping the tying theory. A possible explana-
tion is that a Sherman Act section 1 allegation requires proof of an agreement or conspiracy. 15
U.S.C. § 1 (1970). Since the damage award would, presumably, be identical under either the
section 1 or section 2 allegation, there was no need for the plaintiff to subject himself to the
additional burden of showing a conspiracy or agreement.

27. The briefs submitted by the parties to the Supreme Court in Parker lend credence to
Justice Stevens’ reading of Parker. In the initial briefs both parties addressed the issues of
whether the California statute was an undue burden on interstate commerce and whether the
state statute was preempted by the Agricultural Marketing Agreement Act of 1937, U.S.C. §§
601-24, 641-59 (1970). However, the Supreme Court requested supplemental briefs on the issue of
whether the California statute was preempted by the Sherman Act. Despite the specificity of
apply unless (1) the defendant is either the state or a state official, and (2) the alleged antitrust violation is a state statute or action taken pursuant to an express legislative command. Since the Detroit Edison Company was a private utility, Justice Stevens refused to apply the Parker doctrine. However, it is essential that one not misread this section; it does not state or imply that private action pursuant to state mandate cannot be exempt from the antitrust laws. It merely states that Parker is not germane to any case wherein the defendant is a party other than the state or a state official.

b. Parts III (5 votes) and IV (4 votes). Despite his refusal to apply Parker in this case, Justice Stevens indicated that there might be instances in which private conduct that is required by state law should be exempt from the antitrust laws, and he established standards for granting immunity in such cases. In the portion of his opinion setting these standards Justice Stevens stated:

In this case we are asked to hold that private conduct required by state law is exempt from the Sherman Act. Two quite different reasons might support such a rule. First, if a private citizen has done nothing more than obey the command of his state sovereign, it would be unjust to conclude that he has thereby offended federal law. Second, if the State is already regulating an area of the economy, it is arguable that Congress did not intend to superimpose the antitrust laws as an additional, and perhaps conflicting, regulatory mechanism. We consider these two reasons separately.

We may assume, arguendo, that it would be unacceptable ever to impose statutory liability on a party who had done nothing more than obey a state command. . .

Apart from the question of fairness to the individual who must conform not only to state regulation but to the federal antitrust laws as well, we must consider whether Congress intended to superimpose antitrust standards on conduct already being regulated under a different standard. . .

. . . First, merely because certain conduct may be subject both to state regulation and to the federal antitrust laws does not neces-

the request, neither party briefed the preemption issue under the Sherman Act. Instead, both parties briefed the issue of whether the state had violated the Sherman Act. The only brief submitted that dealt with the preemption issue was by the United States as amicus. In this brief the United States stated: "But the question we face here is not whether California or its officials have violated the Sherman Act, but whether the state program interferes with the accomplishment of the objectives of the federal statute." Brief for United States as Amicus Curiae at 59, Parker v. Brown, 317 U.S. 341 (1943).

28. Presumably, the legislative command language is incorrect. It would appear from the rationale of Parker that the command could come in the form of an executive order, a statute, an administrative agency regulation, or a mandamus. Since the executive and judicial branches are co-equal branches with the legislature, there does not appear to be a rational basis for restricting the power to authorize to the legislature.
State action immunity necessarily mean that it must satisfy inconsistent standards; second, even assuming inconsistency, we could not accept the view that the federal interest must inevitably be subordinated to the State's; and finally, even if we were to assume that Congress did not intend the antitrust laws to apply to areas of the economy primarily regulated by a State, that assumption would not foreclose the enforcement of the antitrust laws in an essentially unregulated area . . . . 29

The structure and language employed by Justice Stevens are susceptible to at least two interpretations.

One plausible interpretation of this language is that a private defendant may qualify for state action immunity under either of two separate and distinct tests. First, if the defendant can demonstrate that his behavior was required by the state (where the decision to require the anticompetitive conduct was that of the state), 30 the private defendant qualifies for immunity under the first test. Second, if the defendant cannot qualify for immunity under the first test, he may qualify under a second test by showing that (a) the state statute or regulation mandating the conduct is part of a regulatory scheme that is repugnant to the antitrust laws, (b) the granting of immunity is essential to maintenance of the regulatory scheme, 31 and (c) the state's interest in maintaining the regulatory scheme is sufficiently primary to justify thwarting the federal policy of the antitrust laws.

A second interpretation of the quoted language is that Justice Stevens created only one test for immunity for private conduct mandated by the state. Under this interpretation a private defendant claiming state action immunity would have to demonstrate that (a) his actions were compelled by the state via a statute or regulation wherein the state's role in formulating the statute or regulation was predominant, (b) the state statute or regulation mandating the conduct is part of a regulatory scheme that is repugnant to the antitrust laws, (c) the granting of immunity is essential to maintenance of the regulatory scheme, and (d) the state's interest in maintaining the regulatory scheme is sufficiently primary to justify thwarting the federal policy of the antitrust laws.

The prime difference between the first and second interpretation is that the requirement that the defendant's actions be compelled by the state via a statute or regulation, wherein the state's role in formulating the statute

29. 96 S. Ct. at 3117-19.
30. One of the most important rationales for the decision in Cantor was that the decision to institute a light bulb exchange program was that of the defendant, not of the state. As the Court stated: "Nevertheless, there can be no doubt that the option to have, or not to have, such a program is primarily respondent's, not the Commission's." Id. at 3118.
31. This second requirement, while not specifically enunciated by Justice Stevens, is a traditional companion to the first in the primary jurisdiction cases. See notes 73-74 infra and accompanying text.
or regulation was predominant, under the second interpretation is merely one of four necessary conditions, but is not sufficient alone to confer immunity. However, under the first interpretation this first condition is sufficient by itself to insure immunity. For the purpose of referencing this first condition it shall be referred to hereinafter as the "first condition."

Those who urge the first interpretation derive support from the wording and structure of Justice Stevens' opinion. Justice Stevens does state that there are two separate reasons for granting immunity to conduct mandated by the state. Moreover, he goes to considerable length to demonstrate, first, that the activity of Detroit Edison was not mandated by the state, and second, that the light bulb exchange program was not necessary to the state's regulatory scheme. An entirely reasonable argument put forth by those who urge the first interpretation is that if indeed the first condition is an integral part of one test and not a separate test, then once the Court had demonstrated that Detroit Edison had failed the first condition it was not necessary to analyze whether Detroit Edison had failed any of the remaining three conditions. Only if the first condition and the remaining three conditions constitute separate immunity tests was it essential for the Court to analyze whether Detroit Edison had failed both the first condition and any of the other conditions. However, despite the reasonableness of these arguments, the first interpretation will not withstand a careful reading of Cantor and Goldfarb.

Justice Stevens did not specifically state that the first condition is a separate test. In paragraph two of Part III, he stated: "We may assume, arguendo, that it would be unacceptable ever to impose statutory liability on a party who had done nothing more than obey a state command." Thus, the Court assumed, for the sake of argument, that the first condition was a separate test without actually so deciding. Justice Stevens then went on to state that even if this were a separate test, Detroit Edison would not meet it. Therefore, the Court never had to reach the point of deciding whether the first condition was a separate test. However, a logical question is posed by proponents of the first interpretation: Why did the Court segregate the first condition from the other three in its analysis if it did not consider the first requirement a separate test? A highly probable answer is to be found in the fact that Detroit Edison argued in its brief that it should be immune under the Parker doctrine if it had done nothing more than obey a state order. Since Justice Stevens found that Detroit Edison had not merely obeyed a

32. "Regardless of the outcome of this case, Michigan's interest in regulating its utilities distribution of electricity will be almost entirely unimpaired." 96 S. Ct. at 3120.
33. Id. at 3118.
state order, it was easy to dispose of one of the defendant's key arguments without detailing a specific test. In any case, the argument that had the Court actually considered the four conditions to be a single test it would have ended its inquiry as soon as determining that Detroit Edison had failed the first condition is not persuasive. Given the fact that the test proposed in Cantor had never been enunciated before, it was incumbent upon the Court to analyze whether Detroit Edison's activities met any of the four conditions which the Court established as the test for conferring immunity in order to give some indication of the standards that the Court would apply in analyzing whether future situations met all of these conditions. Thus, there was every reason for the Court to fully analyze Detroit Edison's conduct vis-à-vis each separate condition even if failure to meet the first condition was sufficient to refuse immunity.

In addition to negating the rationales put forward by the proponents of the first interpretation, there are affirmative reasons for rejecting it. Justice Stevens' apparent reading of Goldfarb makes the first interpretation untenable. In Part IV of his opinion, Justice Stevens cited to and paraphrased the language in Goldfarb: "The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign."35 If the first condition is the "threshold inquiry" of Goldfarb, that characterization implies that it is nothing more than the first condition in a test which contains other conditions. This would make the first interpretation of Justice Stevens' opinion inaccurate.

However, in fairness to proponents of the first interpretation, there is one reading of Goldfarb's threshold inquiry which would make the first interpretation plausible. It is clear that the first condition actually engenders two subconditions: (a) that the state require the defendant's activity, and (b) that the decision to require the activity come from the state.36 It is not clear from the language of Goldfarb whether the "threshold" inquiry includes both of the subconditions or only subcondition a. If the threshold inquiry encompasses both, it is equivalent to the first condition. This makes the first interpretation of Justice Stevens' opinion untenable since the first condition would not be a separate test but, rather, would be only a threshold inquiry. On the other hand, if the threshold inquiry engenders only subcondition a, then the first interpretation of Justice Stevens' opinion is viable. Under this latter reading of Goldfarb, the threshold inquiry is whether the state required the defendant's activity (subcondition a of the first condition), and the

36. See note 30 supra.
remainder of the test is whether the decision to require the activity came from the state (subcondition b). The issue, then, would be whether Justice Stevens read the threshold requirement in *Goldfarb* as engendering both subconditions or only the first.

It is clear from Justice Stevens' statement of the facts at the beginning of the case that Detroit Edison was compelled by law to continue the light bulb exchange program. Therefore, in his discussion of whether Detroit Edison met the first condition, Justice Stevens addressed himself solely to the question of whether the primary source of the decision to institute the program came from the state or from the private party. After deciding that it was Detroit Edison itself which primarily initiated the program, Justice Stevens concluded that the first condition had not been met and therefore the immunity did not attach. It is clear, therefore, that Justice Stevens' formulation of his first condition includes both (a) that the state require the activity, and (b) that the decision to require the activity come from the state.

The *Goldfarb* case gave no clue as to the proper interpretation of its threshold inquiry; the Court found that the state had not "required" enforcement of minimum fee schedules in any sense. However, there is strong evidence that Justice Stevens read the threshold requirement of *Goldfarb* as encompassing both subconditions. First, there is a marked similarity between Justice Stevens' language regarding "a party who had done nothing more than obey a state command" (the first condition), and the *Goldfarb* language regarding "activity required by the State acting as sovereign" (the threshold inquiry). Arguably, such similar language is intended to convey similar meaning. This would imply that Justice Stevens read the threshold requirement as being equivalent to the first condition of his test, including both subconditions.

Justice Stevens quoted the threshold requirement from *Goldfarb* as if to say that Detroit Edison's activity, though mandated under the tariff, did not meet even that requirement. There was no question that Detroit Edison's conduct was required by the state, thereby meeting subcondition a. Thus, if the threshold requirement engendered only subcondition a, Justice Stevens would have found that Detroit Edison had met the threshold requirement. On the other hand, if Detroit Edison met subcondition a but failed subcondition b, and if Detroit Edison (under Justice Stevens' view) had failed to meet the threshold requirement, it must be because the threshold requirement included both subconditions a and b. Moreover, Justice Stevens clearly indicated that Detroit Edison failed subcondition b. Thus, even

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37. 96 S. Ct. at 3114.
38. *Id.* at 3118.
39. *See* note 30 *supra* and accompanying text.
though one could argue that the threshold inquiry of Goldfarb refers only to subcondition a, the more persuasive view is that Justice Stevens read the threshold requirement of Goldfarb to include both subconditions a and b. Thus, it would seem that Justice Stevens viewed the first condition in Cantor as merely a threshold requirement, which is consistent with the second interpretation of his opinion but wholly inconsistent with the first interpretation.\footnote{See note 35 supra and accompanying text. It is possible that Justice Stevens meant that Detroit Edison had met the threshold requirement but failed the remainder of the test; however, this is unlikely. If Justice Stevens was stating that Detroit Edison had failed a condition other than the threshold requirement, the opinion should have gone on to describe where Detroit Edison's activity failed. However, the opinion does not do this, suggesting that it was the threshold requirement that was failed.}

There are, in addition, problems in harmonizing the first interpretation with other sections of the opinion. The first section of Part IV of Justice Stevens' opinion deals with immunity from treble damage liability. It appears that Justice Stevens is saying that although there may be an antitrust violation, a private party who was only obeying a command that was substantially formulated by the state may be exempt from the treble damage provision. However, this is precisely the first test in the first interpretation of Justice Stevens' opinion, designed to grant total immunity—immunity from injunctive relief as well as from treble damage liability. If the Court can use this same test to declare the private party totally immune from antitrust attack, then there is no need to talk about immunity from treble damage liability. One could argue that there may be instances wherein the state's participation in the activity is not sufficient to confer total immunity but may be enough to raise issues of fairness in imposing treble damages;\footnote{The argument is a reasonable one. The courts are aware that their standards for determining whether state participation is sufficient to warrant total immunity are vague. Therefore, the courts may be inclined to give an antitrust defendant the benefit of the doubt with respect to treble damage liability.} however, there is little support for this explanation anywhere in the opinion.

Finally, Justice Stevens' own reading of congressional intent further supports the second interpretation of his opinion. In discussing the second or alternate immunity test of the first interpretation, Justice Stevens stated: "[W]e must consider whether Congress intended to superimpose antitrust standards on conduct already being regulated."\footnote{96 S. Ct. at 3119.} He then concluded that immunity should not be granted unless all three conditions comprising that second test were met because Congress intended to preempt state regulations that conflict with the antitrust laws if they do not meet these three criteria.\footnote{See note 8 supra. See also Parker v. Brown, 317 U.S. 341, 350 (1943).} However, under the first interpretation, there may be instances wherein a state regulation meets the first condition and is thereby vested
with immunity even though it fails at least one of the other three conditions which comprise the second test. Proponents of the first interpretation would grant immunity in this situation, despite the fact that Justice Stevens seemed to view Congress as having intended to preempt state regulations which do not meet all of the final three conditions.44

For these reasons the first interpretation is invalid, and it is the second interpretation which Justice Stevens probably intended. The second interpretation presents a logical approach to the problem. Before granting state action immunity, two prerequisites are required: first, that the action actually be state action (guaranteed by the first condition), and second, that Congress have intended for the state to be able to enact such conflicting legislation (guaranteed by the final three requirements). This would appear to be what Justice Stevens had in mind when he stated: "Certainly that careful use of language [the threshold inquiry in Goldfarb] could not have been read as a guarantee that a compliance with any state requirement would automatically confer federal antitrust immunity."45

The final portion (Part IV) of Justice Stevens' opinion is a confusing amalgam of disjointed threads left hanging by the first three parts. Justice Stevens first considered the guidelines to be used to grant protection to a nonexempt defendant from treble damage liability. While the decision is far from clear, Justice Stevens appears to suggest that if a private defendant either met the threshold condition of Goldfarb or "had engaged in anticompetitive conduct in reliance on a justified understanding that such conduct was immune from the antitrust laws, a concern with the punitive aspects of the treble damage remedy would be appropriate."46

Thus, it appears that the opinion states a fairly restrictive test for granting total immunity (both treble damage and injunctive immunity) to a private defendant acting under state mandate; however, it also seems that Justice Stevens might be willing to grant treble damage immunity if the threshold requirement of Goldfarb were met.47 Such an interpretation of

44. U.S. CONST. art. VI. Specifically, if Congress intended to preempt state statutes which failed to meet any of the three requirements in the second test (and assuming that Congress had sufficient authority under the commerce clause to do so), then state statutes which cannot meet the requirements should be preempted under the supremacy clause.
45. 96 S. Ct. at 3122.
46. Id. at 3121.
47. It cannot be said unequivocally that Justice Stevens was stating that there would be a dichotomy created so as to treat immunity from injunctive relief and from treble damage relief separately. In fact, Justice Stevens said in a footnote that the need for fairness when granting treble damage relief, despite a showing of good faith, sparked Congress to attempt to amend the antitrust law to allow for discretionary application of treble damage relief. 96 S. Ct. at 3121 n.39. However, the language quoted in the text seems to imply that the Court itself, out of concern for fairness, might create this dichotomy. Justice Blackmun, in his concurring opinion, expressly states this latter reading to be correct. Id. at 3128 n.6.
Cantor is a far more compatible blending of Parts III and IV than is possible under the first interpretation of Justice Stevens' opinion.

2. Justice Burger's Opinion

Justice Burger concurred in Parts I and III of Justice Stevens' opinion. However, he disagreed with Justice Stevens' analysis of Parker, suggesting that Parker stood not only for immunity for states and state officials but also for private action pursuant to state mandate. His concurrence was based on the thesis that Michigan was neutral to the light bulb exchange program; thus, the state never mandated participation in the program. It is tempting to argue that, since he concurred in Part III, Justice Burger agreed with the test set out by Justice Stevens for determining the application of the immunity. However, this assumption would be too sweeping. It is possible, perhaps likely, that Justice Burger felt that if the private defendant met the four conditions of what is urged to be the Stevens test, the action should be exempt under Parker, because the test encompasses Parker immunity. But this is not certain, and it is of little consequence whether the immunity stems from Parker or whether it stems from Justice Stevens' opinion. Finally, Justice Burger did not speak to the issue of whether a nonimmunized private defendant can claim protection from treble damage suits.

3. Justice Blackmun's Opinion

Perhaps the most curious approach was Justice Blackmun's. After reviewing several antitrust decisions, Justice Blackmun concluded that the Court has in the past held and "Congress itself has given support to the view that inconsistent state laws are preempted by the Sherman Act."48 In discussing his approach to the facts presented in Cantor vis-à-vis his preemption theory, Justice Blackmun stated:

I 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. This does not mean that state-sanctioned and private activity are to be treated alike. The former is different because the fact of state sanction figures powerfully in the calculus of harm and benefit. If, for example, the justification for the scheme lies in the protection of health or safety, the strength of that justification is forcefully attested to by the existence of a state enactment. I would assess the justifications of such enactments in the same way as is done in equal protection review, and where such justifications are at all substantial (as one would expect them to be in the case of most professional licensing or fee-setting schemes . . . ), I would be re-

48. Id. at 3125.
luctant to find the restraint unreasonable. A particularly strong jus-
tification exists for a state-sanctioned scheme if the State in effect
has substituted itself for the forces of competition, and regulates
private activity to the same ends sought to be achieved by the
Sherman Act. 49

It is difficult to assess how different this approach is in practice from that
of the other two opinions. It is possible that this test requires, as a
minimum, satisfaction of conditions 2, 3, and 4 of the Stevens test. In the
final footnote of his opinion Justice Blackmun asserts, as arguably does Jus-
tice Stevens, that there may be cases in which a nonimmune private defend-
ant may be protected from treble damage recovery. 50

4. Synthesis

It is important to be aware that all language and tests as to whether a
party should be immunized from the reaches of the antitrust laws or from
treble damage recovery are pure dicta. The real holding of the case is that a
majority of six justices voted that the actions of Detroit Edison Company
were not immunized from the antitrust laws—using whatever test each just-
tice applied. This does not necessarily imply that, were a private defendant
to meet Justice Stevens’ four conditions or Justice Blackmun’s balancing test,
the Court would be compelled to grant immunity. However, the dicta in
this case serve as a valuable guide in determining what factors the Court
finds important in granting immunity. Based on the foregoing analysis and
making the leap of faith necessary to infer from Justice Burger’s concurrence
in Parts I and III of Justice Stevens’ opinion that he assents to the four-
condition test for immunity, it is possible to derive the following principles
from Cantor:

Principles Carrying the Concurrence of Five Justices:

1. A private defendant acting pursuant to state mandate may receive
   immunity from the antitrust laws if:
   a. his actions were compelled by the state via a statute or regulation
      wherein the state’s role in formulating the statute or regulation was
      predominant,
   b. the state statute or regulation mandating the conduct is part of a
      regulatory scheme that is repugnant to the antitrust laws,
   c. the granting of immunity is essential to maintenance of the reg-
      ulatory scheme, and
   d. the state’s interest in maintaining the regulatory scheme is suffi-

49. Id. at 3126-27.
50. Id. at 3128.
cienly primary to justify thwarting the federal policy of the antitrust laws.

2. A defendant whose behavior is made more susceptible to antitrust prosecution by state regulation or who relied in good faith on the belief that his behavior was immunized by the state may be subject to injunctive suit but not to treble damage action under the antitrust laws.51

Principles Carrying the Concurrence of Fewer Than Five Justices:

1. The Parker doctrine is limited to cases in which the defendant is either a state or a state official and the action challenged is either a statute or official action pursuant to an express legislative mandate.
2. There is a rebuttable presumption that Congress intends to preempt state statutes that are inconsistent with the antitrust laws. The presumption may be rebutted by demonstrating that there is a rational basis for the state's regulatory scheme where the state is regulating in an area (such as health or safety) which is a traditional area of state concern.

III. THE STATUS OF STATE ACTION IMMUNITY AFTER GOLDFARB AND CANTOR

There can be no doubt that the state action immunity doctrine has undergone considerable reform within the past two years due to the Goldfarb and Cantor decisions. Prior to these cases most commentators and lower federal courts had interpreted the Parker doctrine as immunizing not only states and state agents but also private parties subject to state regulation.52 This has been changed by these two cases. The previous section discussed Goldfarb and Cantor in order to determine what changes the Court intended to make with these two cases. However, major questions still remain, and these will be discussed in the following sections.

A. Issues Remaining After Goldfarb

If Goldfarb and Cantor indicate nothing else, they do indicate that the Supreme Court recognizes the differences between the three classes of immunees: the state, state agents, and private parties acting under the direction of the state.53 Given that the rationale for state action immunity is that

51. See note 47 supra.
52. See cases cited in note 11 supra. See also Jeffrey v. Southwestern Bell, 518 F.2d 1129 (5th Cir. 1975).
53. See Part I of this article supra (notes 1-4 and accompanying text).
Congress never intended the antitrust laws to restrict the activities of the state, if the state is the defendant, the immunity from the antitrust laws is absolute (with one possible, but improbable, exception 54). Nothing in the language, rationale, or the lower federal courts' interpretation of Goldfarb55 encroaches on the absolute antitrust immunity where suit is filed directly against the state. However, the rationale for state action immunity does not require, and Goldfarb indicates that the Court will not grant, an absolute immunity for state agents. Even if it were granted that Congress never intended the antitrust laws to bind the activities of a state and that one should not restrict the actions of state agents in carrying out powers which the state could exercise itself but has chosen to delegate, the rationale for state action immunity no longer applies if the state agent has acted beyond his grant of authority. The use of the antitrust laws to enjoin the actions of a state official acting ultra vires merely prevents activity which the state never desired in the first place.

While Goldfarb holds that a state official who acts outside of the scope of his authorization from the state will not be immune under Parker, the opinion gives no indication as to what a state must do to immunize its officials. One pre-Goldfarb and two post-Goldfarb lower federal court cases

54. It is possible to argue that a state is not exempt from the antitrust laws when it exceeds its constitutional authority since, by its very wording, Parker only exempts the state acting as a sovereign. The argument is that by enacting an unconstitutional statute the state is not acting as a sovereign. This argument is tenable at best.

55. See New Mexico v. American Petrofina, Inc., 501 F.2d 363 (9th Cir. 1974), in which Shell Oil and others filed a counterclaim against the state of New Mexico, claiming that the state had violated the antitrust laws by fixing prices and eliminating competition. In attempting to demonstrate that the state was not absolutely immune from the antitrust laws, Shell cited a series of cases in which the courts had refused to grant immunity to private corporations regulated by the state. In deciding that these suits were not relevant to a suit filed directly against the state, the court in Petrofina said:

But these cases involved suits against allegedly private defendants who defended on the basis that the state has authorized their anti-competitive conduct. The alleged authorization is normally either a putative regulatory scheme or a state created corporation intended to manage a monopoly in the public interest.

In either situation, 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.

But there is no indication from those cases that the legislature must declare its intent to supplant competition in an industry where there is no question that the conduct is committed by the state. Since the suit here is directly against the State, there can be no such question. . . . The "legislative mandate" test is useful, indeed possibly necessary, when there is doubt if the defendant or the regulatory scheme is really an instrument of the state. But when there is no doubt that the defendant is the state, the "legislative mandate" analysis is unnecessary.

Id. at 369-70.
have disagreed on the standards to be applied in making this determination. 

Allegheny Uniforms v. Howard Uniform Co., the one pre-Goldfarb case to consider this issue, held that the Port Authority of Allegheny County was not immune from antitrust liability for its part in encouraging Port Authority employees to purchase uniforms from a specific uniform manufacturer. The court stated:

In our opinion it is not every act of a state created entity that points a way to anti-trust protection. We search the cited act of the legislature in vain to find express language authorizing the Port Authority to manufacture, distribute or sell uniforms to be worn by its operators. . . .

. . .

No case was presented, nor has any been found, which authorizes an entity created by a state legislature to act or enter into transactions not mandated or directed by legislative enactment. Thus, we think such unmandated acts or transactions are ultra vires and illegal.57

This court required the state to expressly authorize its agent to engage in anticompetitive conduct by stating the authorization in a statute.

A somewhat less restrictive standard is urged by the Third Circuit in Duke and Co. v. Foerster, the first post-Goldfarb circuit court case. The plaintiff had filed suit against a municipal agency, vested with the authority to manage buildings and structures owned by Allegheny County, for conspiring to prohibit the sale of Duke products in county facilities. To this allegation the defendant interposed a defense of state action immunity. However, the Third Circuit disagreed, stating:

We read Goldfarb as holding that, absent state authority which demonstrates that it is the intent of the state to restrain competition in a given area, Parker-type immunity or exemption may not be extended to anti-competitive government activities. Such an intent may be demonstrated by explicit language in state statutes, or may be inferred from the nature of the powers and duties given to a particular government entity.59

This approach, less restrictive than that of Allegheny, permits a federal court to glean state authorization not only by analyzing the wording of the statute but also by examining the general provisions of the statute to determine whether the delegation of authority to regulate is sufficiently plenary to allow the inference that the state intended for the regulatory agency to use its judgment, including the decision to restrict competition.

A more extreme version of the Duke approach is presented by the Fifth

57. Id. at 462-63.
58. 521 F.2d 1277 (3d Cir. 1975).
59. Id. at 1280.
Circuit in *City of Lafayette v. Louisiana Power & Light Co.*, wherein Louisiana Power, a utility company, charged two cities with violating the antitrust laws. A key issue was whether the cities could claim *Parker*-type immunity. In denying the immunity to the cities the court stated:

A subordinate state governmental body is not *ipso facto* exempt from the operation of the antitrust laws. Rather, a district court must ask whether the state legislature contemplated a certain type of anticompetitive restraint. In our opinion, though, it is not necessary to point to an express statutory mandate for each act which is alleged to violate the antitrust laws. It will suffice if the challenged activity was clearly within the legislative intent. . . . Whether a governmental body’s actions are comprehended within the powers granted to it by the legislature is, of course, a determination which can be made only under the specific facts in each case. A district judge’s inquiry on this point should be broad enough to include all evidence which might show the scope of legislative intent.

To give some indication of the difference between the *Allegheny* standards and the *Louisiana Power* standards, consider the enabling statute which granted authority to the Virginia Supreme Court to regulate the practice of law in *Goldfarb*. It would be difficult to imagine a more general grant of authority. Nonetheless, despite the fact that this statute is silent regarding the state supreme court’s authority to promulgate or enforce minimum fee schedules (thereby failing the *Allegheny* test), the *Louisiana Power* court stated that, under its reading of *Goldfarb*, the Virginia State Supreme Court would have been immunized had it been sued.

Thus, the major controversy that remains after *Goldfarb* is an evidentiary one: granted that the state official must demonstrate that he was authorized to act, how can he demonstrate his authorization? On this issue, these three decisions differ markedly. As a matter of policy the *Allegheny* standards may be too harsh. One of the primary reasons a state legislature creates and delegates power to a regulatory commission is that the legislature is not competent to deal with (or perhaps even recognize) problems that may arise in a given market. Imposition of the *Allegheny* standards requires the legislature to anticipate such problems and make an a priori determination whether an anticompetitive solution is necessary. Such a determination may be well beyond the expertise of a legislative body.

With respect to the *Louisiana Power* approach, while it must be admitted that there is some legal support for the court’s reading of *Goldfarb*, it,
too, has deficiencies. There is language in *Goldfarb* which can be read as suggesting that, had the Supreme Court found an express authorization from the state supreme court to the State Bar Association, immunity would have been granted: “[A]lthough the Supreme Court’s ethical codes mention advisory fee schedules they do not direct either respondent to supply them, or require the type of price floor which arose from respondents’ activities.”

However, such an analysis would be a non sequitur had the Supreme Court not previously determined that the Virginia Supreme Court had received such authorization itself in the general legislative grant of authority. The analysis is weakened by the fact that the Supreme Court did not state that the Virginia Supreme Court would have been immune, nor was it necessary for the Court to reach that issue. Whether or not the state supreme court would have been immune, the Supreme Court found that the Virginia Supreme Court had not delegated whatever authority it had vis-à-vis minimum fee schedules to the State Bar. It was, therefore, irrelevant whether the state supreme court actually had the requisite authorization. Thus, the *Louisiana Power* interpretation of *Goldfarb* is not well supported. Moreover, from a policy perspective, it is an unsatisfactory solution. Given that there is a clear federal policy favoring competitive markets, it is dangerous to invite regulatory commissions to abrogate this national policy without a showing of clear mandate or necessity.

There is a third position based on the Supreme Court’s decision in *Silver v. New York Stock Exchange* which seems more defensible from both a legal and policy perspective than either the *Allegheny* or the *Louisiana Power* approaches. At the onset it should be conceded that where the state makes clear that it wishes to authorize a state board to adopt anticompetitive programs, the *Parker* rationale requires that federal courts grant immunity to such state bodies. Thus, if indeed a state agency could satisfy the restrictive *Allegheny* standards, there should be no question of granting immunity.

However, where the statute is ambiguous as to the grant of authority, there still may be instances where a state body is entitled to immunity. The mere fact that a state legislature has created a regulatory body implies that the legislature intended to delegate some authority to the body. Certainly, at a very minimum the state must have intended that the regulatory body have sufficient authority to implement and enforce regulations necessary to make the state’s regulatory program work or to achieve various goals announced by the legislature in its enabling legislation. Thus, as an alternative

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64. 421 U.S. at 790.
65. It is not necessary that the clear showing of mandate come directly from the statute. This requirement could be satisfied by examining a facet of the legislative history of the statute, such as floor or committee debates.
to the Allegheny and Louisiana Power approaches, it is preferable that a state body requesting immunity be first permitted to demonstrate that the enabling legislation specifically contemplates that the body have the authority to perform the challenged act; however, even if the defendant cannot point to some direct showing of legislative intent, it should still be accorded immunity if the defendant can produce evidence that such anticompetitive activities are necessary to effectuate the state’s regulatory program or regulatory goals. In the event the state body can do neither, then it should be treated as any other private defendant under the Cantor standards.

If the state agency can demonstrate that it acted in a good faith belief that it was immune, it may be entitled to protection from treble damage liability, thereby avoiding the argument that this approach may make public utility commissioners afraid to act for fear of massive treble damage liability. This procedure permits a federal court to enjoin a state regulatory body from engaging in anticompetitive activities which are neither clearly authorized by the state nor necessary to effectuate the state’s regulatory goals.

Finally, if the state, after the injunction issues, determines that it wishes to authorize such anticompetitive programs, it is free to enact clear enabling legislation. Such an approach avoids the harsh consequences of the Allegheny standards; does not interfere with clear state mandates or necessary state programs (even in the absence of clear state mandate); avoids forcing a federal court to presume, in the absence of a clear state mandate, that a state wishes to subvert the national free market policy engendered in the antitrust laws; and has already been used by the Supreme Court in the parallel situation where it had to harmonize the provisions of an anticompetitive federal statute with the Sherman Act.67

B. Issues Remaining After Cantor

In analyzing Cantor, it was urged that Justice Stevens had set up a four-condition test whereby a private defendant acting pursuant to state mandate may receive immunity from the antitrust laws if (a) his actions were compelled by the state via statute or regulation wherein the state’s role in formulating the statute or regulation was predominant, (b) the state statute or regulation mandating the conduct is part of a regulatory scheme that is repugnant to the antitrust laws, (c) the state’s interest in maintaining the regulatory scheme is sufficiently primary to justify thwarting the federal policy of the antitrust laws, and (d) the granting of immunity is essential to maintenance of the regulatory scheme. Having implied these four requirements, the Court in Cantor offered

67. See SECTION III(B)(2) infra (notes 72-100 and accompanying text) for a discussion of the exclusive jurisdiction cases.
guidance as to what standards were to be used in applying these conditions only with respect to condition $a$. However, standards for the proper application of conditions $b$ and $c$ may be gleaned from federal case law in related fields. Unfortunately, condition $d$ is highly "fact oriented" and must be applied on a case-by-case basis; it is not possible to develop general guidelines for the application of this condition. This subsection examines each of the first three Cantor conditions in order to determine what standards the federal courts are likely to use in applying these conditions.

1. Actions Compelled by the State

Dating from Parker, the Court has traditionally been solicitous about granting state action immunity. Despite Justice Stevens' opinion that immunity for private action pursuant to state direction does not derive from Parker, it is clear that this form of the immunity is at least a derivative of state action immunity. However, the antitrust laws espouse an important national policy favoring freely competitive markets. The Cantor decision leaves no doubt that mere authorization or approval by the state of private action will not immunize such action.

The Court has already decided that state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity. . . .

. . . .

In each case, notwithstanding the state participation in the decision, the private party exercised sufficient freedom of choice to enable the Court to conclude that he should be held responsible for the consequences of his decision. 68

The language of the Court leaves little doubt as to the standard to be applied in judging the sufficiency of the first condition. The determination to require the challenged conduct must be made by the state. One of the recurrent themes of Cantor is that the decision to maintain a light bulb exchange program was that of Detroit Edison and not of the state. 69 There is language in the opinion to suggest that had the Michigan Public Service Commission conducted hearings or debated the merits of a light bulb exchange program and made it clear that the state had made an independent determination to have a light bulb exchange program (instead of merely rubber stamping the Detroit Edison proposal to have such a program), the

68. 96 S. Ct. at 3118 (emphasis added).
69. See note 30 supra.
program would have met the first condition. Thus, it is essential that the state make an independent decision to require the challenged conduct.

Moreover, Cantor appears to stand for the proposition that the conduct of the private defendant must be mandated by the state to the degree that had the defendant acted otherwise, he would have been subject to legal sanctions. There appears to be sound reason for this requirement, despite the fact that mere authorization should be sufficient to immunize state agents. Since a state acts only through its agents, the legislature must be able to delegate discretionary authority in order that state government can function. Imposition of the Cantor standards, requiring a state legislature to specifically order the activity of a state agent before that agent can be granted immunity, would severely interfere with the ability of the state to operate. However, private conduct is a different matter. Even in Parker, the Court was adamant that a state cannot merely “give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.” In order to safeguard against this excess it is rational to require that (1) the state make the decision to require anticompetitive conduct and (2) the private defendant’s activities be compelled by state mandate.

Before the Cantor decision the lower federal courts applied inconsistent standards to determine whether an activity was directed by the state. The decision in Cantor will bring about a dramatic change in those circuits that previously applied lax standards.71


71. For examples of the types of case analyses that will be changed due to Cantor, see Okefenokee Rural Elec. Membership Corp. v. Florida Power & Light Co., 214 F.2d 413 (5th Cir. 1954), wherein the Fifth Circuit stated that action by a public service commission refusing to permit the plaintiff to run a power cable along the only feasible access road to a city “immunized” the conduct of the defendant (opposing the power line and physically obstructing it) despite the fact that the public service commission had acted on the basis of misinformation deliberately fed to it by the defendant. The court held that since there was no legal right of access to the road and the commission refused to grant a permit, there was no legal injury either, and therefore the defendant, a private party, was not held liable for what otherwise was clearly a violation of the antitrust laws. Contra, Woods Exploration and Prod. Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971).

However, the most egregious violation of Cantor principles occurred in Washington Gas Light Co. v. Virginia Elec. and Power Co., 438 F.2d 248 (4th Cir. 1971), where the court held that the mere authority to control a public utility was sufficient to immunize the conduct of the utility despite the fact that the state agency with the authority to act gave no evidence that it had ever approved of the defendant’s conduct. The court stated that the silence of the state public service commission could be interpreted as approval of the utility’s behavior. See also Business Aides, Inc. v. Chesapeake and Potomac Tel. Co., 480 F.2d 754 (4th Cir. 1973).
2. Repugnance of the Regulatory Scheme to the Antitrust Laws

In rejecting the argument that Congress did not intend to superimpose the antitrust laws in an area currently regulated by the state, Justice Stevens stated: "[M]erely because certain conduct may be subject both to state regulation and to the federal antitrust law does not necessarily mean that it must satisfy inconsistent standards." In other words, it is incumbent upon the private defendant to demonstrate that the standards set by his state's regulation are so repugnant to the antitrust laws that he could not meet both requirements simultaneously. Traditionally, the federal courts would not presume that a regulatory statute was intended to supplant the antitrust laws unless there was a clear repugnance between the regulatory scheme and the antitrust laws; and then, a repeal of the antitrust laws would be permitted only to the extent necessary to effectuate the regulatory scheme. This requirement had its origins in the "exclusive jurisdiction" cases. These cases present a common scenario. For example, Congress passes a regulatory statute such as the Securities Exchange Act of 1934 vesting authority to control the activities of some industry in a regulatory agency (such as the Securities and Exchange Commission). Later, an antitrust action is filed against some firm in the regulated industry. The firm defends by claiming that the regulatory act was intended to supersede the antitrust laws. The court then examines the regulatory statute to determine whether it is repugnant to the antitrust laws and whether it is necessary to immunize the challenged conduct in order to effectuate the regulatory scheme.

The Cantor Court gave clear indication that it intended to incorporate the standards used in these exclusive jurisdiction cases in determining whether the state regulatory scheme should supersede the antitrust laws.

The mere possibility of conflict between state regulatory policy and federal antitrust policy is an insufficient basis for implying an exemption from the federal antitrust laws. Congress could hardly have intended state regulatory agencies to have broader power than federal agencies to exempt private conduct from the antitrust laws. Therefore, assuming that there are situations in which the existence of state regulation should give rise to an implied exemption, the standards for ascertaining the existence and scope of such an exemption surely must be at least as severe as those applied to federal regulatory legislation.

In this language the Court makes it clear that the standards for determin-
ing when a state statute is not preempted by the federal antitrust legislation will, at a minimum, be as restrictive as those applied to federal statutes which may conflict with the antitrust laws, and that the principles applied on the federal side are to be used to analyze cases dealing with state legislation. However, it is clear that the two situations are not directly analogous. The inquiry on the federal side can include a determination of whether a subsequent congressional act overrides the prior antitrust law, while on the state side the question is what areas did the Congress intend to leave for state control at the time that it passed the antitrust laws. Yet, even with this distinction in mind, it is clear that, according to Justice Stevens, we must look to the federal cases as setting at least a minimum standard to apply to the state laws.

Of the many federal cases considering the issue of whether a federal regulatory statute is intended to supersede the antitrust laws, five are particularly helpful in establishing standards for determining whether the regulatory statute is repugnant: United States v. Borden Co., United States v. RCA, Pan American World Airways, Inc. v. United States, Marnell v. United Parcel Service of America, Inc., and Gordon v. New York Stock Exchange, Inc.

In Borden, the Court was required to consider the relationship of the Capper-Volstead Act of 1937 and the Agricultural Marketing Agreement Act of 1937 with the Sherman Act. Both the Capper-Volstead Act and the Agricultural Marketing Agreement Act created limited exceptions to the Sherman Act, and both statutes gave a right of review to the Secretary of Agriculture. Suit was filed by the United States against a group of dairymen for restrictive practices that were thought to fall outside of the scope of the exceptions created by these two statutes. In their defense the dairymen ar-

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76. 308 U.S. 188 (1939). The inquiry in these cases is whether the regulatory scheme was so pervasive that it empowered the agency to enforce the antitrust policies of the Sherman Act in light of the needs of the particular regulatory scheme the agency was implementing. This did not preclude Court review of the agency's determination. Pan American World Airways v. United States, 371 U.S. 296, 309 (1963). However, it did preclude a separate and/or concurrent court determination of the antitrust issues alone. For this reason, the agency's jurisdiction is referred to as "primary" rather than "exclusive." See United States v. R.C.A., 358 U.S. 334, 338 (1959); 3 K. Davis, ADMINISTRATIVE LAW TREATISE §§ 19.05, 19.06 (1958). However, once the Court determines that the agency in question has primary jurisdiction, the review will be very limited since the Court shows a great deal of deference to the expertise of agencies in enforcing broad and complicated regulatory systems.


80. 422 U.S. 659 (1975).


82. Id. § 671.

83. The Capper-Volstead Act permitted producers of agricultural products and dairymen to form cooperatives for express agricultural purposes, 7 U.S.C. § 291 (1970), and the Act also authorized the Secretary of Agriculture to ascertain whether any such cooperatives restrained
gued that these two statutes gave exclusive jurisdiction to the Secretary of Agriculture to determine the illegality of their practices. Beginning with *Borden*, a theme appeared that would recur in each of the other exclusive jurisdiction cases: The mere fact that a regulatory statute vests certain powers of review in an agency is an insufficient reason to conclude that that agency's regulations should replace court review under the Sherman Act. There must be some special reason for taking an industry out of the purview of the antitrust laws.

Four important points emerge from this case. First, there is a strong presumption against taking an industry outside of the purview of the Sherman Act. Second, a statute which contains an express exemption from the Sherman Act will generally not be construed more broadly than the wording requires. Third, in the absence of a clear policy rationale, an act which provides only limited remedies for antitrust violations will not be presumed to supplant the broad remedies of the Sherman Act. Fourth, statutes which give other agencies or officials the right to review specific antitrust violations will be held to be auxiliary to the general provisions of the antitrust laws. While the *Borden* decision does not delineate a specific test for determining the inconsistency between the regulatory statute and the Sherman Act, it is important because it establishes the general principle that, wherever possible, the Court will attempt to harmonize the regulatory act and the Sherman Act.

However, in *RCA* and *Pan American*, the Court set out what has become the most important test for determining repugnance between the Sherman Act and conflicting regulatory statutes: the pervasiveness of the regulatory scheme. The *RCA* decision involved an allegation that RCA and NBC had coerced Westinghouse into trading one of its TV stations for one of NBC's. In its defense NBC urged that the Federal Communications Commission (FCC) had been given exclusive authority under the Federal Communications Act to pass judgment on trades of TV stations using "the public interest, convenience, and necessity" as the criterion (which may include a consideration of possible anticompetitive effects). Therefore, it was argued, if the United States wished to attack this trade, its sole recourse was to intervene in the FCC proceeding. However, the Court held otherwise:

"In contradistinction to communication by telephone and tele-

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85. 358 U.S. at 337.

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trade to the extent that agriculture prices were unduly enhanced. *Id.* § 292. The Marketing Agreement Act authorized the Secretary to establish orderly marketing conditions to stabilize the purchasing power of farmers. *Id.* § 671. The lower court held that (a) the cooperatives complained of were within the exclusive purview of the Secretary of Agriculture under the Capper-Volstead Act and (b) the Marketing Agreement Act gave exclusive jurisdiction to the Secretary to handle other violations, quashing all counts in the indictment.
graph, . . . the [Communications] Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition as it has done in the case of railroads . . . .” Thus, there being no pervasive regulatory scheme, and no rate structures to throw out of balance, sporadic action by federal courts can work no mischief. The justification for primary jurisdiction accordingly disappears.86

The pervasive-regulatory-scheme language is repeated in most of these cases. This has become the major justification for supplanting the antitrust laws in a regulated industry.

RCA offers little guidance as to what constitutes a pervasive regulatory scheme because the Court failed to find that the regulatory scheme envisioned by the Federal Communications Act pertaining to television was pervasive. However, Pan American87 is one of the few instances in which the Court did find a pervasive regulatory scheme. Pan American was accused of conspiring to block another airline’s application for the right to operate north of the Canal Zone and of having divided air routes with another airline. Pan American defended on the ground that the Federal Aviation Act 88 granted to the Civil Aeronautics Board (CAB) plenary power to regulate the airline industry and that imposition of the Sherman Act would thwart the regulatory scheme contemplated by Congress. The Court agreed. Despite cautious language stating that it was not removing the airline industry completely from the purview of the antitrust laws, the Court stated:

Limitation of routes and divisions of territories and the relation of common carriers to air carriers are basic in this regulatory scheme. The acts charged in this civil suit as antitrust violations are precise ingredients of the Board’s authority in granting, qualifying, or denying certificates to air carriers, in modifying, suspending, or revoking them, and in allowing or disallowing affiliations between common carriers and air carriers.89

. . . .

In case of a prospective application of the Act, the Board’s order, as noted, would give the carrier immunity from antitrust violations “insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order.” § 414. Alternatively, the board under § 411 can investigate and bring to a halt . . . all “unfair methods of competition,” including those which started prior to the Act. If the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide.90

86. Id. at 349-50 (emphasis added).
87. See note 78 supra.
89. 371 U.S. at 305.
90. Id. at 309-10.
Apparently, the Court's rationale was that since the CAB is given plenary power to regulate unfair trade practices as well as to regulate sundry aspects of the airline industry, it would be unnecessary and perhaps destructive of the CAB's regulatory practices to permit the antitrust laws to intrude upon CAB regulation. This, by itself, gives very little guidance. It must be remembered that the FCC also has authority to deal with unfair trade practices and to regulate various aspects of the television industry. Yet, in RCA the Court refused to grant exclusive jurisdiction to the FCC.

The real lesson of Pan American is to be found by examining the language quoted above in light of the striking differences between FCC regulation and CAB regulation. The FCC, while empowered to grant, deny, and revoke licenses, only controls entry and exit from the market and by the power to force unwilling exit, also controls certain forms of behavior. However, the FCC has no control over the rates charged per minute of commercial time and has only limited control over the type of programming. Regulation by the CAB is, in contrast, much more detailed. The rates charged, the equipment used, the flight schedules, and other matters are all under the control of the CAB. There is little competition under the current regulation by the CAB. Thus, the major difference between the FCC and the CAB is that the FCC is empowered to review unfair trade practices in order to permit free competition to properly function in the market, while the CAB reviews unfair trade practices in order to permit its own regulatory scheme to function. The courts are quite capable of handling unfair trade practices where the goal is free competition; nonetheless, if the goal of reviewing trade practices is the efficient functioning of a regulatory scheme which is peculiar to that industry and where the competitive market has been largely supplanted by a planned market, there is little justification for permitting anyone but the regulatory agency to review trade practices. This will be the case whenever the regulated industry is a natural monopoly.91

A district court decision in Marnell v. United Parcel Service of America, Inc.92 gives some evidence as to the interpretation of Pan American by lower federal courts. In Marnell, the plaintiff, who engaged in the delivery of retail packages from department stores to private homes, alleged that the defendant United Parcel Service had engaged in conspiracies to damage the plaintiff. As one element in its defense United Parcel Service claimed that there was a repugnance between the antitrust laws and the regulatory policy of the Interstate Commerce Act.93 As support for this claim the defendant

91. The major justification for supplanting competitive standards is that the industry is a natural monopoly. For an excellent discussion of market and production conditions which make for a natural monopoly, see A. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS (1970).


cited *Pan American*. The lower court disagreed:

This Court is of the opinion that *Pan American* does not support defendants in this case because ... the Interstate Commerce Commission has not been empowered (as was the Civil Aeronautics Board under § 411 of the Federal Aviation Act) to deal with the "precise ingredients" of the conduct alleged in the present complaint—monopolization, attempted and achieved, either by cease and desist order or by an award of damages therefor. 94

It is difficult to harmonize this decision with that of *Pan American*. Under both the Federal Aviation Act and the Interstate Commerce Act the agencies are empowered to grant or deny the common carriers access to specific routes, to suspend fare and rates which the agency determines to be unreasonable, to review trade practices, and so on. Thus, one must search hard to find how the regulatory scheme of the CAB differs from that of the Interstate Commerce Commission (ICC). There is, however, one major difference which may justify the difference in treatment. Under the Interstate Commerce Act, the ICC is prohibited from considering the goodwill or earning power of the common carrier in allowing or disallowing a tariff. 95 However, the CAB is known to allocate markets, adjust routes, and set fare rates in order to stabilize the earning power of the airlines. 96 Thus, while review of trade practices in the trucking industry may not affect the basic structure of the industry, any action by a federal court under the antitrust laws with regard to the aviation industry may upset the mix of route awards, competitive advantages, and fare structure put together by the CAB in order to permit each airline to earn a fair rate of return.

Finally, in *Gordon v. New York Stock Exchange, Inc.*, 97 the Supreme Court recently indicated that the pervasive regulation test is not the only one which can be used to demonstrate repugnance between the regulatory statute and the Sherman Act. *Gordon* was a private antitrust suit against the New York Stock Exchange, claiming that the fixed rate of stock commissions established by the Exchange was a Sherman Act violation. The Exchange defended on the ground that the Securities Exchange Act of 1934, section 19(b)(9), 98 authorized the SEC to supervise the exchanges "in respect of such matters as ... the fixing of reasonable rates of commission," 99 and that this provision took the setting of commission rates outside of the purview of the antitrust laws. In its amicus brief the United States suggested that be-

94. 260 F. Supp. at 405.
96. For a good general discussion of regulation in the air transport industry, see L. Keyes, *Federal Control of Entry into Air Transportation* (1968).
99. 422 U.S. at 662.
cause there was no evidence that the Act was a pervasive regulatory scheme, the setting of commission rates should not be immune from antitrust prosecution. The Court disagreed:

The United States appears to suggest that only if there is a pervasive regulatory scheme, as in the public utility area, can it be concluded that the regulatory schemeousts the antitrust laws. Brief for the United States as Amicus Curiae 16, 35. It is true that in some prior cases we have been concerned with the question of the pervasiveness of the regulatory scheme as a factor in determining whether there is an implied repeal of the antitrust laws . . . . In the present case, however, respondents do not claim that repeal should be implied because of a pervasive regulatory scheme, but because of the specific provision of § 19(b)(9) and the regulatory action thereunder . . . . Hence, whether the Exchange Act amounts to pervasive legislation ousting the antitrust acts is not a question before us. 100

It is difficult to determine what the Court was implying. One possible explanation of the decision is that the Court interpreted section 19(b)(9) as an indication of congressional intent to vest authority with the SEC. If this is the case, Gordon stands for nothing more than the proposition that if the statute clearly demonstrates an intent to remove review of a procedure from the purview of the antitrust laws, it will be removed. Such a holding is reasonable when applied to federal statutes. However, one must be very careful in transferring it to a case of state regulation. Cantor makes clear that the state cannot at its whim remove private conduct from the purview of the antitrust laws. Thus, if the state creates a statutory scheme which is not repugnant to the antitrust laws so that imposition of both the state regulatory standard and the antitrust standards would not require the private defendant to satisfy contradictory standards, it will not immunize the private defendant. However, Gordon may still have some implication for this area of immunity. It is possible to read Gordon as standing for the proposition that a particular regulatory provision may be inconsistent with the antitrust laws despite the fact that the regulatory scheme as a whole is not pervasive.

In synthesizing these cases it is difficult to find a consistent theme. The Court has indicated as a general matter that it will not readily find that a state regulatory statute displaces the antitrust laws, and the presumption is that it does not. However, Borden suggests that statutes giving a regulatory commission the power to investigate restraints of trade in order to permit free market mechanisms to operate will be held auxiliary to antitrust review. The Gordon case may further imply that a regulatory statute which recognizes anticompetitive behavior as a legal violation, but presents only limited

100. Id. at 688-89.
remedies, will also be construed as auxiliary to the antitrust laws rather than as replacements for them.

There is a sound basis for these legal principles. If the regulatory statute recognizes the policy of free competition, there is no reason to fear interference with the state's regulatory system by enforcement of the antitrust laws. Conversely, repugnance between the antitrust laws and the state's regulatory system may create two problems. First, if it is clear that the state has empowered its regulatory commission to review various types of conduct in order to effectuate a regulatory scheme that does not admit to free market principles, then imposition of antitrust principles will interfere with the state scheme. This is precisely the principle of Pan American on the federal level. The CAB's regulation under the Federal Aviation Act has virtually eliminated free competition from the airline industry. The Act further contemplates that the CAB will control allocation of markets, fares, etc. in order to stabilize rates of return on debt and equity in the industry. Such a complete regulatory scheme, which has in reality substituted the planning of the CAB for free market principles, will not work if competition is infused randomly through antitrust attack. Second, even if the regulatory scheme is not pervasive, it may be that the particular action challenged is closely related to ratemaking or some other regulated aspect of the market. If the state has empowered the regulatory agency to consider anticompetitive aspects of the conduct challenged in setting rates, imposition of the antitrust laws may disrupt the rate-making process. However, this argument was raised in RCA and the Court was not receptive.

3. Sufficiency of the State's Interest

One of the most dramatic facets of Cantor has been the infusion of preemption concepts directly into the immunity process. In Part III of his opinion, Justice Stevens stated: "Even assuming inconsistency [between the state statute and the antitrust laws], we could not accept the view that the federal interest must inevitably be subordinated to the State's." In context, this implies that there is some private conduct pursuant to a state statute which satisfies all of the other three Cantor criteria but will not immunize private defendants because the state's interest in supplanting the antitrust laws is not sufficient. This represents the first suggestion that the test for antitrust immunity for any of the three classes of immunees contains an element of preemption. Moreover, in his separate concurring opinion, Justice Blackmun indicated that he views Cantor solely as a preemption case.

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101. 96 S. Ct. at 3119.
Since a majority of six justices have indicated an intent to infuse preemption concepts into the immunity, it is likely that such will be done. However, the Court has not indicated what standards will be used to judge the sufficiency of the state’s interest. Justice Blackmun spoke directly to this issue, indicating that where the state is regulating in areas that are traditionally of state concern,\(^{102}\) he would use a rule of reason test with a standard like that used for equal protection issues;\(^{103}\) that is, in those traditional areas of state interest he would require only a showing of minimum rationality in order to uphold the state regulation. In Cantor, Justice Blackmun determined that the light bulb exchange program was unnecessary to the state’s regulation of electricity.

However, it is at least questionable whether Justice Blackmun’s standard in Cantor is actually equivalent to the minimum rationality test under the equal protection clause. In only one case under the equal protection clause has the Court refused to uphold the state statute under a minimum rationality test, and that was because the state’s classification was not permissible, not because the Court quarrelled with the necessity of the state’s scheme. Even that case was recently overruled.\(^{104}\) In reality, it would appear that Justice Blackmun is using a modified version of the equal protection test wherein there is some presumption in favor of the state; however, the presumption is not as strong as in the equal protection area.

Aside from Justice Blackmun’s statement, the Court does not indicate what preemption test it will use. Presumably, unless the Court develops a special test, it will refer to traditional preemption standards under the commerce clause. Some authorities have said that “the Court has adopted the same weighing of interests approach in preemption cases that it uses to determine whether a state law unjustifiably burdens interstate commerce. In a number of situations the Court has invalidated statutes on the preemption ground when it appeared that the state laws sought to favor local economic interests at the expense of the interstate market.”\(^{105}\)

The commerce clause cases have demonstrated that the Court will substitute its judgment for that of the legislature, consider whether the state could achieve the same goals by other means which do not burden interstate commerce (or in this case, the free market principles behind the antitrust laws), consider whether there is a need for national uniformity in state regu-

\(^{102}\) Specifically, Justice Blackmun cited safety, health, and professional ethics standards as traditional areas. *Id.* at 3127.

\(^{103}\) *Id.* at 3126-27.


lation, and weigh state and federal interests. Under this more traditional preemption test there is a more substantial probability that state regulatory statutes will fail to grant immunity.

However, from a policy perspective, imposition of traditional preemption principles may well be a fiasco. In the constitutional area it appears that the Court has retreated from a stance of substituting its judgment for that of the state legislature in those cases which have arisen under the fourteenth amendment due process and equal protection clauses. However, imposition of traditional preemption standards in antitrust immunity cases may practically result in the courts substituting their judgment for that of the state. Every rationale for abandoning this second guessing approach in the constitutional area also applies in the antitrust area. It would appear that the preemption element in the immunity test should not amount to more than a consideration of whether the anticompetitive regulations of the state meet a standard similar to the one enunciated by Justice Blackmun—minimum rationality.

4. Problems Under Cantor

The language and dicta of Cantor presage serious problems in certain antitrust cases. Prior to Cantor there was a clear dichotomy between state and private action. A given course of conduct was one or the other. After Cantor this is no longer true. For example, assume that a state enacts a statute which fixes the fees charged by lawyers for various legal services but that the statute does not meet the Cantor standards. Suit is then filed against a group of lawyers, charging them with price fixing. The lawyers defend on the ground that they never agreed to fix prices; prices were fixed by the state. Note this crucial distinction. The lawyers are not claiming that the statute immunized their behavior, they are claiming that their behavior does not constitute an antitrust violation to be immunized because the essential element of agreement is absent. Prior to Cantor this argument would not have been available because state action immunity under Parker made it unnecessary. If, under Parker, the action was regarded as compelled by the

106. 96 S. Ct. at 3127.
108. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to "subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.
109. For example, a court could find under Cantor that the state's participation in formulating the rates is not sufficient or its interest in regulating the income of its attorneys is not adequate.
state, then it was state action. Thus, had the lawyers' conduct not passed the 
Parker immunity standards it would have been tantamount to finding the 
lawyers' behavior was private, not state, action, but in either case the viola-
tion was assumed.

After Cantor, however, it is possible to have conduct mandated by the 
state which will not be immunized. Justice Stevens has stated that the im-
munity of private action mandated by the state is no longer a pure state 
action immunity. While these lawyers could not claim immunity, this does 
not mean that they agreed to fix prices.

The very wording in Part IV of Cantor gives credence to this possibility. 
Justice Stevens addressed himself to the issue of what might have happened 
to the private parties in Parker had they been sued:

What sort of charge might have been made against the various 
private persons who engaged in a variety of different activities im-
plementing that program is unknown and unknowable because no 
such charges were made. Even if the state program had been held 
unlawful, such a holding would not necessarily have supported a 
claim that private individuals who had merely conformed their 
conduct to an invalid program had thereby violated the Sherman 
Act.\footnote{\textsuperscript{110}}

This is a puzzling statement. If the state program were unlawful, then surely 
the enabling statute or regulations would fail to meet at least one of the 
Cantor criteria (perhaps that the state's interest was insufficient). Yet, Jus-
tice Stevens did not say that compliance with an invalid statute might im-
munize these persons from treble damage liability; he stated that there 
might be no claim at all that these persons violated the Sherman Act. At 
least one, and perhaps the only, way in which this might occur is if the fact 
that these persons were obeying a statute means that the requisite elements 
of a conspiracy using the Interstate Circuit\footnote{\textsuperscript{111}} test are not present. Thus, Cantor may have unwittingly opened a Pandora's box.

\footnote{\textsuperscript{110}} 96 S. Ct. at 3122 (emphasis added).

\footnote{\textsuperscript{111}} Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939). This case involved a suit 
against a group of movie theater owners and eight movie distributors wherein the owners circu-
lated a letter to each of the eight distributors asking that each one refuse to distribute its 
movies to theater owners who would not comply with certain restrictions dealing with the 
admission price and number of movies that could be shown at one time. There was little evi-
dence that the eight distributors had previously agreed among themselves to the restrictions; 
however, all eight complied with the restrictions. When later joined in this suit the distributors 
urged that they had each acted independently and were not guilty of any conspiracy. However 
the Supreme Court disagreed.

It was enough that, knowing that concerted action was contemplated and invited, 
the distributors gave their adherence to the scheme and participated in it. Each 
distributor was advised that the others were asked to participate; each knew that 
cooperation was essential to successful operation of the plan. . . .

. . . Acceptance by competitors, without previous agreement, of an invitation to
IV. Conclusion

After Cantor it appears that the Court will still recognize three separate classes of immunees: the state, state officials, and private persons acting under the direction of the state. However, the status of private persons seeking the immunity has been clarified by the opinion. Not only does the state have to mandate the action, but the four-part test created by the Court also seems to place restrictions on the type of conduct that the state may immunize.

The Court’s test for determining whether a private defendant who allegedly acted under the direction of the state is deserving of antitrust immunity requires the defendant to demonstrate that (1) he was acting pursuant to a mandatory regulation or statute and that the state’s role in formulating the regulation or statute is sufficiently dominant to enable a federal court to conclude that the defendant’s actions were compelled by the state; (2) the state’s statute is repugnant to the antitrust laws; (3) the state’s interest in creating a statutory scheme repugnant to the antitrust laws is sufficiently primary to justify supplanting the antitrust policies; and (4) in order to give effect to the state’s regulatory scheme or to achieve the goals of that scheme, it is necessary to immunize the conduct of the defendant.

Although the current trend, as exemplified by the Cantor decision, seems to limit the availability of the state action immunity by setting up a

participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act. Id. at 226-27. See also Theatre Enterprises, Inc., v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954).

In the context of the hypothetical concerning state fixed lawyer fees it could be argued that, despite the lack of a concerted agreement between the lawyers under the Interstate Circuit rationale, there was a conspiracy to the extent that each lawyer knew that he was participating in a plan in which cooperation among all of the state’s attorneys was essential and in which a necessary consequence of the plan, if carried out, would be a restraint of interstate commerce. This was sufficient to invoke the operation of section 1 of the Sherman Act. Because the lawyers were only following the command of the state, they would not under Justice Stevens’ opinion in Cantor, be subject to treble damage liability, only to injunction.

The courts have split on the issue of whether the conspiracy element requires that the actor be a willing participant. This issue has arisen previously in the context of tying arrangements where the franchisee attempts to sue its franchisor for illegal tying arrangements. The courts have differed as to whether the franchisee is required to demonstrate that the tying arrangement was coerced. Compare FTC v. Texaco, Inc., 393 U.S. 223 (1968) with Unger v. Dunkin Donuts of America, Inc., 68 F.R.D. 65 (E.D. Pa. 1975),rev’d, 755 ANTITRUST & TRADE REG. REP. (BNA) E-1 (3d Cir. 1976). If the element of conspiracy does require a willingness to cooperate, then it would seem that the lawyers could not be said to have violated the Sherman Act because their actions were coerced by the state; however, if willingness is not required, then it would be possible to find that the lawyers had conspired in violation of the Sherman Act.
strict test for applicability, that same decision may presage a new flexibility in the enforcement of the antitrust laws by creating a dichotomy between injunctive and treble damage relief. If the Court does take this direction, then an important flexibility will have been created that allows the courts to enforce the policy of the antitrust laws while being sensitive to the dilemma of a private individual who, in good faith, is following a state mandated course of conduct.