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Antitrust Law -- State Action Immunity and State "Neutrality" in Regulated and Compelled Activities

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NOTES

Antitrust Law—State Action Immunity and State "Neutrality" in Regulated and Compelled Activities

In *Parker v. Brown* the United States Supreme Court held that there was nothing "in the language of the Sherman Act or in its history to suggest that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."[1] The state action exemption[2] recognized in *Parker* faced one of its rare Supreme Court tests in *Cantor v. Detroit Edison Co.*[3] This review was particularly timely in light of several recent analyses of the *Parker* doctrine,[4] the apparent confusion among lower federal courts about the scope of the exemption,[5] and the absence of a definitive statement setting the parameters of the doctrine in its most recent pre-*Detroit Edison* test.[6] While *Detroit Edison* did not overrule *Parker*, it did eliminate an exemption

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1. 317 U.S. 341, 350-51 (1943). *Parker* dealt with the Sherman Act, 15 U.S.C. §§ 1-7 (1970). Specific attention was paid to §§ 1 & 2, which provide:

> 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor . . . .
>
> 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor . . . .

2. For a summary of the range of additional exemptions, see P. AREEDA, ANTITRUST ANALYSIS 102-20 (2d ed. 1974).

3. 96 S. Ct. 3110 (1976). The *Parker* doctrine was also at issue in Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951), and Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). *See* text accompanying notes 27-41 *infra.*

4. *See, e.g.*, Donnem, *Federal Antitrust Law Versus Anticompetitive State Regulation*, 39 A.B.A. ANTITRUST L.J. 950 (1970); Handler, *The Current Attack on the Parker v. Brown State Action Doctrine*, 76 COLUM. L. REV. 1 (1976); Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. REV. 693 (1974); Simmons & Fornaciari, *State Regulation as an Antitrust Defense: An Analysis of the Parker v. Brown Doctrine*, 43 U. CIN. L. REV. 61 (1974); Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 NW. U.L. REV. 71 (1974); Verkuil, *State Action, Due Process and Antitrust: Reflections on Parker v. Brown*, 75 COLUM. L. REV. 328 (1975).

5. *Compare* Gas Light Co. v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972), *and* Marnell v. United Parcel Serv. of America, Inc., 260 F. Supp. 391 (N.D. Cal. 1966), *with* Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248 (4th Cir. 1971). *See also* Verkuil, *supra* note 4, at 331 n.17.

6. *See* text accompanying notes 36-41 *infra.*

based solely on state action in areas in which state policy is defined by the Court to be neutral—areas in which the *Detroit Edison* Court recognized an exemption based essentially on economic criteria.[7]

At issue in *Detroit Edison* was the practice of the Detroit Edison Company[8] of supplying light bulbs to its customers in exchange for their burned-out bulbs. The company supplied, at no extra charge, approximately fifty percent of the bulbs of the kinds most frequently used by its residential customers.[9] The program purported to increase the consumption of electricity. Antitrust action was brought by the owner of a drug store who alleged that the light bulb exchange program had damaged his business.[10] The defense offered by Detroit Edison was that its activity fell within the *Parker v. Brown* state action exemption: the company argued that the program had been approved by the Michigan Public Service Commission[11] and it was powerless to discontinue the service without further approval. In other words, the program had become compulsory and therefore was within the realm of state action.

The district court granted summary judgment for defendant on *Parker v. Brown* grounds.[12] The decision was affirmed by the Sixth Circuit Court of Appeals,[13] and the Supreme Court granted certiorari.[14] The Court, in a six to three decision, reversed the holding of the lower court and found that a *Parker v. Brown* exemption was not

7. The Court was severely divided. While the holding was supported by a clear six to three majority, it is difficult to ascertain a majority rationale. *See* text accompanying notes 51-63 *infra*.

8. The Detroit Edison Company is the sole supplier of electricity in southeastern Michigan. Its marketing area includes about five million people. 96 S. Ct. at 3113.

9. The cost of the light bulbs was included (in an accounting to the Michigan Public Service Commission) as an expense of Detroit Edison. Since utility rates were calculated on an average cost basis, the bulbs were obviously not free. However, no profit was recorded as arising directly from the exchange program. 96 S. Ct. at 3113-14.

10. Plaintiff originally asserted that the program violated § 2 of the Sherman Act, 15 U.S.C. § 2 (1970), and § 3 of the Clayton Act, 15 U.S.C. § 14 (1970). 96 S. Ct. at 3112-13 n.3.

11. The Commission is vested with complete power to regulate all utilities in Michigan including "rates, fares, fees, charges, *services*, rules and conditions of service . . . ." MICH. STAT. ANN. § 22.13(6) (1970) (emphasis added).

12. 392 F. Supp. 1110 (E.D. Mich. 1974). The district court relied heavily on the language in *Parker* to the effect that a price fixing agreement among California raisin growers was not in violation of federal antitrust laws as long as it " 'derived its authority and its efficacy from the legislative command of the state and was not intended to become effective without that command.' " *Id.* at 1111 (quoting 317 U.S. at 350).

13. 513 F.2d 630 (6th Cir. 1975) (mem.).

14. 423 U.S. 821 (1975).

applicable.[15] The case was remanded for determination of whether the program, stripped of its state action immunity, was in fact a Sherman Act violation.[16] While this holding was supported by a clear majority of the Court, the six Justices favoring reversal were split in such a manner as to make it difficult to discern a common rationale.[17] The implications of the holding, the split within the Court, and the problems that are almost certain to be faced by lower courts in their attempts to apply *Detroit Edison* are best understood in the context of *Parker v. Brown* and its subsequent interpretations.

The dispute in *Parker* was the result of actions taken pursuant to the California Agricultural Prorate Act of 1933.[18] The Act established procedures within which price stabilization programs for agricultural commodities could be instituted.[19] These programs utilized price floors and production controls and involved the withholding of excess output from market. One such program, initiated for regulation of raisin production, was challenged by Brown, a California producer, who sought to enjoin Parker, the State Director of Agriculture, from enforcing it.[20] In a unanimous decision the Court declared the Sherman Act to be inapplicable. It did not evaluate the program in light of the Sherman Act but made, in essence, a jurisdictional decision. In writing for the Court, Justice Stone indicated that once the program was estab-

15. 96 S. Ct. at 3123.

16. *Id.* at 3121 n.38, 3123.

17. Justice Stevens wrote the plurality opinion for himself and Justices Brennan, Marshall and White. Chief Justice Burger and Justice Blackmun wrote separate concurring opinions. Justice Stewart filed a dissenting opinion in which Justices Powell and Rehnquist joined.

18. 317 U.S. at 344.

19. The Act created the Agricultural Prorate Advisory Commission, which, upon the petition of ten producers of a particular commodity (in this case raisins), would hold public hearings and determine whether the establishment of a prorate marketing plan for the commodity in a specified zone would "prevent agricultural waste and preserve agricultural wealth." *Id.* at 346. When it was determined that a program was advisable, the Commission was authorized to select a committee to formulate the specifics of the plan. Upon consent of 65% of the zone's producers who jointly owned at least 51% of the acreage devoted to the regulated crop, the plan would become effective. The program was enforced by fines levied against any producer who sold or any handler who received "without proper authority" a commodity for which a program was in effect. *Id.* at 347.

20. The case originated as a challenge to the constitutionality of the statute authorizing the price fixing program. Brown v. Parker, 39 F. Supp. 895 (S.D. Cal. 1941). Upon appeal from the district court the United States Supreme Court thought it appropriate that the Sherman Act inquiry be made. Justice Stewart indicated that this inquiry was probably in response to an interim decision, Georgia v. Evans, 310 U.S. 159 (1942), which held that a state is a "person" within the meaning of § 7 of the Sherman Act and reflected the concern of the Court with the relationship of states to federal antitrust legislation. 96 S. Ct. at 3115.

lished as being a product of state legislation, the Sherman Act would not have preemptive effect.[21] The fundamental consideration of the Court is clear from its statement that "in a dual system of government in which . . . the states are sovereign . . . an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."[22] The Court, however, refused to permit states to give immunity "to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."[23] Thus, the Court distinguished actions that "derived [their] authority and efficacy from the legislative *command* of the state"[24] from actions of a predominately private nature. In light of the *Detroit Edison* plurality opinion that *Parker* is distinguishable from *Detroit Edison* on the basis of defendant's status as a state official,[25] it is essential to note that the *Parker* Court did not indicate whether it would have ruled differently had defendant not been a state official.[26]

In the post-*Parker* era the United States Supreme Court has only twice decided cases in which some clarification of the state action exemption doctrine was required.[27] In *Schwegmann Brothers v. Calvert Distillers Corp.*[28] the Court considered the 1937 Miller-Tydings amendment to the Sherman Act,[29] which exempted from the Act "contracts or agreements prescribing minimum prices for . . . resale" when such contracts are lawful under local law.[30] The fact that Louisiana statutes permitted resale price maintenance agreements exempted such agreements from the Act;[31] additionally, Louisiana law in-

21. 317 U.S. at 350. It should be noted that the exemption of "state action" from antitrust legislation does not foreclose the possibility of obtaining the sought-after relief on a procedural due process basis. *See* Verkuil, *supra* note 4, at 330, 354-56.

22. 317 U.S. at 351. *Parker* was not the first case to recognize this policy with regard to the Sherman Act. *See* Olsen v. Smith, 195 U.S. 332 (1904); Lowenstein v. Evans, 69 F. 908 (C.C.D.S.C. 1895). These cases are cited and discussed by Handler, *supra* note 4, at 8, 9.

23. 317 U.S. at 351.

24. *Id.* at 350 (emphasis added).

25. *See* text accompanying note 51 *infra.*

26. At least two commentators have interpreted the *Parker* decision as allowing for state action exemptions even when defendant is not a state official. *See* Handler, *supra* note 4, at 8-9; Rahl, *Resale Price Maintenance, State Action, and the Antitrust Laws: Effect of Schwegmann Brothers v. Calvert Distillers Corp.*, 46 ILL. L. REV. 349, 366 (1951).

27. *See* note 3 *supra.*

28. 341 U.S. 384 (1951).

29. Ch. 690, tit. VIII, § 1, 50 Stat. 693 (codified at 15 U.S.C. § 1 (1970)).

30. *Id.*

31. NOW LA. REV. STAT. ANN. § 51:392 (West 1965).

cluded a "nonsigner" proviso[32] that bound retailers who were not party to a price maintenance agreement to the same resale terms as contracting retailers. Calvert Distillers brought suit to enjoin Schwegmann Brothers, a nonsigning retailing chain, from selling at prices below the agreed-upon minimum. Schwegmann Brothers contended that the nonsigner proviso was beyond the scope of the Miller-Tydings amendment. A divided Court agreed that the amendment was not so expansive as to permit enforcement of the nonsigner clause.[33] The Court further held that Calvert Distillers was not acting within an area afforded *Parker v. Brown* protection. The Court reasoned that although nonsigner compliance was compelled by the state and therefore arguably protected by *Parker v. Brown*, the original price fixing agreement between Calvert and the signing retailers was voluntary.[34] Thus, Louisiana laws permitted but did not compel the original agreement; neither did they compel the effect of the nonsigner provision. While there has been disagreement about whether *Schwegmann* modified or simply clarified *Parker*,[35] the holding is clearly to the effect that the *Parker* exemption calls for state compulsion or a high degree of state participation.

The *Parker v. Brown* doctrine was applied again by the Court in 1975 in *Goldfarb v. Virginia State Bar*.[36] In *Goldfarb* a unanimous Court found that enforcement by the Virginia State Bar of a minimum fee schedule for lawyers established by the Fairfax County Bar Association was in violation of the Sherman Act.[37] Although the Virginia legislature had authorized the Virginia Supreme Court to "regulate the practice of law"[38] and designated the State Bar to act as an administrative agency of the court,[39] the United States Supreme Court ruled that

32. The nonsigner clause read as follows:

> Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section 1 [§ 9809.1] of this act, *whether the person so advertising, offering for sale, or selling is or is not a party to such contract,* is unfair competition and is actionable at the suit of any person damaged thereby.

341 U.S. at 387 n.2 (emphasis by the Court). It currently appears in substantially the same form as LA. REV. STAT. ANN. § 51:394 (West 1965).

33. 341 U.S. at 388-89.

34. 341 U.S. at 389. This analysis is taken from Simmons & Fornaciari, *supra* note 4, at 66-67.

35. *Compare* Simmons & Fornaciari, *supra* note 4, at 67, *with* Rahl, *supra* note 26, at 366.

36. 421 U.S. 773 (1975).

37. *Id.* at 793.

38. *Id.* at 788.

39. VA. CODE § 54-49 (1974).

this authorization was not sufficient for the price fixing activity to be deemed "state action." Chief Justice Burger, writing for the Court, indicated that the "threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is *required* by the State acting as sovereign."[40] The fact that anticompetitive activity was "prompted" by the state was not to be equated with compulsion by the state.[41] The Court in *Goldfarb* did not consider the question of whether a *Parker* exemption was only applicable in suits in which state officials are defendants. Whether the Court simply preferred to make its decision on other grounds or regarded the employment affiliation of defendant as inapposite is not clear.

Lower federal court interpretations of *Parker* have not been uniform. In the context of *Detroit Edison*, it is most instructive to compare the interpretation of the Fourth Circuit Court of Appeals in *Washington Gas Light Co. v. Virginia Electric & Power Co.*[42] with that employed by the Fifth Circuit in *Gas Light Co. v. Georgia Power Co.*[43] In both cases the practices of state regulated utilities were challenged as violative of section 1 of the Sherman Act.[44] In both cases defendants claimed an exemption based on *Parker v. Brown*. In *Washington Gas Light* plaintiff argued that no inference of state approval could be made since there had been no investigation or affirmative approval by the relevant regulatory commission;[45] however, the Fourth Circuit indicated its willingness to infer consent from silence and ruled that *Parker* was applicable.[46]

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40. 421 U.S. at 790 (emphasis added).

41. *Id.* at 791.

42. 438 F.2d 248 (4th Cir. 1971).

43. 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972).

44. At issue in *Washington Gas Light* were promotional practices of Virginia Electric & Power Company (VEPCO). The company compensated builders through the use of a rebate program for the costs of installing underground transmission lines. The amount of the rebate was a function of the degree to which a home was "all electric." 438 F.2d at 250. Rebate programs similar to those in *Washington Gas Light* were also at issue in *Gas Light Co.* In addition plaintiff challenged a quantity discount rate system and a plan allowing consumers to pay their bills in 12 equal installments. 440 F.2d at 1137.

45. 438 F.2d at 252.

46. *Id.* In *Washington Gas Light* the court expressed concern that plaintiff did not exhaust the remedies available through the state regulatory commission, indicating that this consideration may have been a factor in the decision. This is noted in Kinter & Kaufman, *The State Action Antitrust Immunity Defense*, 23 AM. U.L. REV. 527, 532 (1974), and Verkuil, *supra* note 4, at 337-38. The Fifth Circuit has rejected an exhaustion of state remedies requirement. *See* Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286, 1296 (5th Cir. 1971), *cert. denied*,

In *Gas Light Co.* the Fifth Circuit rejected the "consent by silence" reasoning of the Fourth Circuit. While the court found enough active state supervision in the form of full adversary hearings[47] to find *Parker* applicable, it drew limits, stating, "it is not necessary for us to extend the *Parker* exclusion to the point of its extension in *Washington Gas Light* and we do not do so."[48] Of these two approaches it is clear that the Fifth Circuit's stricter requirement of greater than general supervision is more typical than the approach employed by the Fourth Circuit in *Washington Gas Light*.[49] Of equal importance in view of the likely repercussions of *Detroit Edison* is the uniform tendency of the lower federal courts to avoid substantive economic analysis in making a *Parker v. Brown* decision.[50]

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404 U.S. 1047 (1972), *cited in* Kinter & Kaufman, *supra*, at 532 n.32. In addition, the decision may be partially explained by the tendency of the courts to view state regulated utilities in a more favorable light with respect to the *Parker* exemption than private enterprises. According to Professor Verkuil, "The rationale of that case [*Washington Gas Light*] is firmly rooted in the public utility/public calling context." Verkuil, *supra* note 4, at 353.

47. 440 F.2d at 1140.

48. *Id.*

49. *See, e.g.*, Norman's on the Waterfront, Inc., v. Wheatley, 444 F.2d 1011 (3d Cir. 1971); United States v. Oregon State Bar, 385 F. Supp. 507 (D. Ore. 1974); United States v. Pacific Southwest Airlines, 358 F. Supp. 1224 (C.D. Cal. 1973); Marnell v. United Parcel Serv. of America, Inc., 260 F. Supp. 391 (N.D. Cal. 1966). *See also* Kinter & Kaufman, *supra* note 46, at 533. While the degree of supervision has been the overriding issue in many lower court cases, the courts also have looked to the legitimacy of the state purpose and evidence of legislative compulsion. *See, e.g.*, Hecht v. Pro-Football, Inc., 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970). These cases are cited in Note, *Antitrust Law—The Sherman Act and Minimum Legal Fee Schedules: Learned Professions and State-Action Immunity*, 53 N.C.L. REV. 399, 406 nn.53-55 (1974).

50. *See* cases cited note 49 *supra*. As will be discussed, the Court's decision in *Detroit Edison* may force the lower federal courts to make substantive economic analyses. *See* text accompanying notes 62-63 *infra*. The decision of the First Circuit Court of Appeals in George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970), provides a good example of the careful reasoning required to make a *Parker v. Brown* analysis without becoming involved in economic policy. In *Whitten* both parties were involved in competitive bidding for contracts to build swimming pools and supply swimming pool equipment for public and quasi-public institutions. The bids were based on specifications that were drafted by an architect employed by the buyers. Paddock Pools, Inc., had experienced a great deal of success in influencing the architect to adopt plans that were particularly well suited to Paddock's prefabricated filtering systems, thus placing Paddock in an advantageous competitive position. Paddock contended that its practices were afforded a *Parker v. Brown* state action exemption as a result of adoption of its plans by the public body. In vacating the summary judgment for Paddock Pools granted by the district court, the First Circuit indicated that *Parker* was applicable only in cases in which "government determines that competition is not the *summum*

Given the importance of the decision to grant a state action exemption and the various standards employed by the lower federal courts, the decision in *Detroit Edison* deserves careful examination as a possible guidepost to future decisions. The plurality opinion, written by Justice Stevens, viewed the light bulb exchange program as falling outside of *Parker v. Brown*, and offered an alternative method of determining whether an activity is to be afforded an exemption. Justice Stevens distinguished *Detroit Edison* by indicating that, unlike *Parker*, defendant in the original suit was not a state official; hence, *Parker* was not controlling. The plurality considered it an open question whether *Parker* might have been decided differently if charges had been brought against private parties implementing state programs rather than against state officials.[51]

Justice Stevens offered for the plurality a two-step analysis for determining whether an activity qualifies for a Sherman Act exemption. First, the fairness of not applying a *Parker* exemption to activity compelled by state law was examined.[52] This inquiry was particularly relevant in light of the possibility of treble damages. On this point Justice Stevens did not distinguish a state regulated utility from a private business (as in *Schwegmann*). The plurality reasoned that Detroit Edison, by playing a dominant role in the decision to maintain the light bulb exchange program, did not qualify for immunity under a "state action" rationale. The plurality distinguished this case from others in which the private party actually obeyed a state order or in which the state's role was so dominant that it would be unfair to hold the private party responsible. In short, while Detroit Edison was compelled to continue the program, it was not compelled to initiate the program. As a result of this exercise of free choice in implementation of the program the threat of treble damages was not regarded as unfair.[53]

The second step of the plurality's analysis concerned the appropriateness of superimposing federal antitrust regulations on state utilities regulations.[54] The plurality rejected the contention that federal antitrust laws should not be applied in areas already regulated by state

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bonum in a particular field and deliberately attempts to provide an alternate form of public regulation." *Id.* at 30. The existence of a bidding program was regarded as clear evidence that there had been no decision to eliminate competition. *Id.* at 31.

51. 96 S. Ct. at 3122.
52. *Id.* at 3117-19.
53. *Id.* at 3118-19.
54. *Id.* at 3117, 3119.

agencies. Instead, the plurality declared that federal interests are not to be "inevitably . . . subordinated to the State's."[55] Thereby, the plurality exhibited a willingness to consider each activity of the public utility on an individual basis.[56] Finding no evidence that the Michigan legislature or the regulatory commission desired to regulate actively the light bulb market, the plurality regarded the state's policy as neutral.[57] While this neutrality was regarded as sufficient to preclude a "state action" exemption, it was not considered necessary. Thus, once a firm has ventured into a field in which it is not a natural monopoly, or when there is no other economic basis for an antitrust exemption, the plurality has indicated its willingness to deny a state action exemption, even if there is state regulation.[58] Acording to Justice Stevens, the "Court has consistently refused to find that regulation gave rise to an implied exemption without first determining that exemption was necessary in order to make the regulatory act work, 'and even then only to the minimum extent necessary.' "[59] The basis of this declaration was the belief that the relationship between federal laws and state regulation should parallel that found between federal laws and federal regulation.[60]

Two facets of *Detroit Edison* are particularly important for future applications of *Parker v. Brown*. First, a majority of the Court definitively rejected the notion that *Parker* applies solely to suits against state officials.[61] A second conclusion may be derived by joining the plurality's willingness to make substantive economic analyses in almost all areas of state activity[62] with the Chief Justice's willingness to make

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55. *Id.* at 3119.

56. *Id.* To support this willingness to inquire into the individual activities of state-regulated utilities the plurality offered its interpretation of the "threshold inquiry" language of *Goldfarb*. According to the pluality, the "threshold inquiry" of whether anticompetitive activity is required by a state is *not* dispositive with respect to an antitrust exemption. Instead, it is only the initial step. 96 S. Ct. at 3121-22.

57. *Id.* at 3114.

58. *Id.* at 3119-20.

59. *Id.* at 3120 (footnote omitted) (quoting Otter Tail Power Co. v. United States, 410 U.S. 366, 391 (1973), which was quoting Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963)).

60. 96 S. Ct. at 3120.

61. Only the four members of the plurality were willing to narrow *Parker* to this extent.

62. It must be recalled that the plurality recognized what it regarded as state neutrality vis-à-vis the light bulb exchange program, but did not regard neutrality as necessary to preclude Sherman Act exemption. It would instead apply a form of substantive economic analysis. It would allow exemptions in cases of natural monopoly and, perhaps, in agricultural programs similar to the one in *Parker*. *See* text accompanying notes 54-59 *supra*. At this point the plurality really no longer spoke in terms of a *Parker v. Brown* exemption. The *Parker* Court reasoned that there was no evi-

the same type of analysis in areas he regards as neutral vis-à-vis state policy.[63] This "majority" indicated that approval of a program by a

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dence that Congress intended to apply the Sherman Act to restrain "a state or its officers or agents from activities directed by its legislature." 317 U.S. at 350-51. There was no economic analysis to be made. *Parker* was based on the nature of the federal system, *see* text accompanying notes 21-24 *supra*, and simply stated that state legislative command was not to be preempted by the Sherman Act; therefore, it is inappropriate to label an exemption based on an economic rationale as a *Parker* exemption.

63. Although the Chief Justice joined with the plurality in holding that the light bulb exchange program was beyond *Parker v. Brown* protection, he disagreed with that part of the plurality opinion that would narrow *Parker* to suits against state officials. 96 S. Ct. at 3123. The Chief Justice pointed out that the emphasis in *Parker v. Brown* was not on individuals per se, but on activities. According to the Chief Justice, if the plurality's reading of *Parker* had been applied in *Goldfarb*, the decision in that case could have been based on no more than finding that the Virginia Bar was a voluntary organization, not a state agency. Thus, the plurality approach was deemed inconsistent with that employed just one year earlier in which the Court viewed the degree of state supervision as decisive. *Id.*

The Chief Justice's concurrence with the holding of the plurality was based on what he agreed was a state policy of neutrality with respect to the light bulb exchange program. *Id.* at 3124. Whether he would go as far as the plurality in allowing federal intrusion in cases of nonneutrality is not entirely clear. On one hand he expressed general agreement with those parts of the plurality opinion that called for this more intrusive analysis, yet when discussing the specifics of his rationale, he spoke only in terms of "neutrality" or the need for an "independent regulatory purpose." *Id.* It is essential to note that the "neutrality" in *Detroit Edison* is quite different from that involved in Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951). *Schwegmann* took place in the context of a private business and involved individual conduct that was *permitted* by Louisiana law. The state took no active role and the individual found that taking advantage of a law that permitted certain conduct was no assurance that the conduct would be exempt from the Sherman Act. In *Detroit Edison* the conduct was by a state regulated utility that had to have the express approval of the state regulatory agency.

Justice Blackmun also rejected the plurality's narrowing of *Parker* to suits against state officials. *Id.* at 3128 n.5. His agreement with the holding of the court is based on what he regarded as evidence of congressional intent for the Sherman Act to have preemptive effect with respect to inconsistent state laws. Citing congressional action to exempt specific activities from the Sherman Act, Justice Blackmun concluded that if a general state action exemption were desired Congress would have provided for it. *Id.* at 3125-26.

The dissenting Justices, led by Justice Stewart, agreed with the Chief Justice that the "state officials only" interpretation of *Parker* offered by the plurality was entirely too narrow. *Id.* at 3129. They would have disposed of the case through a two-step analysis. First, the actions of Detroit Edison in proposing what may have been an anticompetitive program would not be subject to the Sherman Act under Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), *cited in* 96 S. Ct. at 3133. In *Noerr* the Court held that the Sherman Act "does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.". 365 U.S. at 136. Second, once the plan was approved, and Detroit Edison was in effect required to continue it, the activities were protected by *Parker*. 96 S. Ct. at 3133.

In supporting its own conclusion that all the activities of Detroit Edison were beyond the Sherman Act, the dissent relied on the legislative history of the Act and

state regulatory agency is not necessarily to be regarded as sufficient evidence of affirmative (or nonneutral) state policy deserving a *Parker* exemption; therefore, it is clear that an approach like that employed by the Fourth Circuit in *Washington Gas Light* would now be inappropriate.

Precisely what constitutes "nonneutrality" after *Detroit Edison* is not clear; therefore, the lower federal courts are faced with continuing problems of interpretation. First, is state policy neutral? Clearly, approval by state agencies is not sufficient to find nonneutrality. Secondly, if state policy is neutral, does the activity have validity in terms of the state's regulatory goals? This question, of course, opens the door to economic analysis. In answering this question the courts will have to determine whether a natural monopoly does exist or whether there is some other economic basis for anticompetitive activity. Market analysis, the weighing of competing economic interests and detailed examination of regional economic conditions may be required just to determine whether the activity should be open to Sherman Act review.

Underlying the reasoning of a majority of the Court is an apparent desire to treat the relationship between federal legislation and state regulation in the same manner as the relationship between federal legislation and federal regulation.[64] In order to permit this analogous treatment the majority either ignored *Parker*'s role in balancing federal and state interests or felt that the federalism justification for *Parker* must be subordinated to the public interest in efficient allocation of economic

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an analysis of the historical context of *Parker v. Brown*. The dissent cited language from the legislative history of the Sherman Act indicating that the Act was not intended "'*to invade the legislative authority of the several States or even to occupy doubtful grounds.*'" *Id.* at 3137 (emphasis added by the Court) (quoting H.R. REP. No. 1707, 51st Cong., 1st Sess. 1 (1890)). It then described the post-1890 period as one of "retroactive" expansion of the jurisdictional reach of the Sherman Act due in large part to expanded interpretation of the commerce clause. *Id.* at 3138. According to the dissent, without this expanded interpretation of the commerce clause and the parallel expansion of the Sherman Act, *Parker v. Brown* would not have arisen. Once it did arise, though, the dissent viewed the decision as the "best possible" accommodation of the original Sherman Act intent and its post-1890 commerce clause expansion. *Id.* at 3139.

64. The exact language of the plurality is: "Congress could hardly have intended state regulatory agencies to have broader power than federal agencies to exempt private conduct from the antitrust laws." 96 S. Ct. at 3120. As the dissent correctly notes, the premise that state regulatory agencies could provide exemptions to federal legislation is itself invalid under the supremacy clause of the United States Constitution. *Id.* at 3135.

resources.[65] Either way, *Parker* was not carefully considered in the majority's balance..

The decision in *Detroit Edison* is also clear evidence that the Court stands firm in its willingness to provide a forum for review collateral to that available through state and federal regulatory agencies.[66] By lowering the *Parker v. Brown* barrier the Court seems to have increased the role of the lower federal courts in this area. To the extent that the doctrine of primary jurisdiction[67] is part of the process of balancing state and federal interests in a dual system of government, a broad interpretation of *Parker* would seem to further this objective by forcing plaintiffs to place primary reliance on remedies available through *state* regulatory agencies.[68] Here again the Court seemed to assign relatively little importance to this facet of *Parker.*

One additional aspect of the *Detroit Edison* opinion must be underscored: it is entirely conceivable that a utility could go through the entire regulatory process and, after gaining state approval of its rates and proposed programs, find that it is liable for treble damages in an antitrust action. The decision in *Detroit Edison* would not permit this result "if a private citizen has done nothing more than obey the command of his state sovereign."[69] However, the Court did not equate continuing practices that defendant proposed and have become compulsory with obeying the initial command of the state. As a result, when formulating proposals, state regulated utilities must be conscious of federal antitrust legislation as well as state regulatory policies.

In *Detroit Edison* the Court calls for economic justification for Sherman Act exemptions in those areas of activity in which state policy is deemed to be "neutral." Neutrality was found to exist even though the program in question was that of a regulated utility and had been approved by the state regulatory agency. The Court seemed to discount the role *Parker v. Brown* has played in the delicate process of balancing federal and state interests. If one views *Parker*'s role in bal-

65. In the case of federal law/state regulation, this objective runs directly into the constitutional issue of the allocation of power between federal and state interests. *See* Note, *Parker v. Brown: A Preemption Analysis,* 84 YALE L.J. 1164 n.8 (1975).

66. *Accord,* Nader v. Allegheny Airlines, Inc., 96 S. Ct. 1978 (1976).

67. According to Professor Verkuil, "Primary jurisdiction directs a federal court to dismiss or stay an antitrust action pending a resolution of the challenged conduct by the appropriate administrative agency." Verkuil, *supra* note 4, at 348-49 (footnote omitted).

68. *See* Handler, *supra* note 4, at 13-14; Verkuil, *supra* note 4, at 340-50.

69. 96 S. Ct. at 3117.

ancing these interests as transcending the public interest in allocative efficiency, the decision may represent injudicious tampering. On the other hand, if one views the balancing process and the benefits of allocative efficiency as concerns of comparable magnitude, then the net benefit from the tradeoff may not be apparent for some time.

JEFFREY LYNCH HARRISON

Civil Procedure—Collateral Estoppel: The Fourth Circuit Squeezes an Oversized Judgment Through a Narrow Issue

Collateral estoppel[1] is a procedural doctrine whereby essential issues that have been decided in a prior action are treated as conclusive in any subsequent proceeding, thus foreclosing a party from relitigating the same issue.[2] Among the policy objectives collateral estoppel furthers are safeguarding against inconsistent results and avoiding needless litigation. The seductiveness of these ends, however, should never obscure the necessity for careful analysis of whether the issue asserted as collaterally estopped was both actually determined and substantially identical with the present one, lest a litigant be unfairly denied his day in court. In *Azalea Drive-In Theatre, Inc. v. Hanft*,[3] the Fourth Circuit held that a seemingly ambiguous finding by a state court in an action to recover on a promissory note that an affirmative defense of duress based upon an alleged threat of a group boycott had not been established was conclusive as to whether the threat was in fact made in a subsequent affirmative antitrust action brought by the defendant in a federal district court.

Azalea Drive-In Theatre, plaintiff in the federal action, leased films from defendant distributors under agreements providing for payment of a percentage of the box office receipts. These agreements also authorized periodic inspections to insure that the theatre was not

1. Also known as a species of res judicata or issue preclusion.

2. *The Restatement of Judgments* defines the rule as follows: "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." RESTATEMENT (SECOND) OF JUDGMENTS § 68 (Tent. Draft No. 1, 1973).

3. 540 F.2d 713 (4th Cir. 1976).