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Antitrust and State Action: Lights Out for a Regulated Utility

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NOTES

Antitrust and State Action: Lights Out for a Regulated Utility

In *Cantor v. Detroit Edison,*[1] the U.S. Supreme Court held that a power utility regulated by the State of Michigan is not immune from federal antitrust liability, even though the Michigan Public Service Commission had approved the utility's activity under attack—a light-bulb program for customers—and the utility by state law had to maintain the program until it filed a new tariff with the Commission.[2]

The Michigan Public Service Commission pervasively controls the distribution of electricity in the state of Michigan. Under the command of the Michigan legislature,[3] the Commission approves the rates, fees and services of every supplier of electricity within the state. The Commission does not regulate the distribution of light bulbs, but since 1916 the approved tariff and rate structure of respondent Detroit Edison have included a light-bulb exchange program for Edison's customers in southeastern Michigan, where Edison is the sole supplier of electricity. The Commission has never held hearings on the advisability of the program or considered its impact on interstate commerce. State law was silent on the subject.[4]

A predecessor of Detroit Edison started the program in the late 19th century to boost sales of electricity. Edison continued the program and, at the time of petitioner Cantor's suit, furnished its customers light bulbs for home or commercial use in proportion to the amount of electricity used for lighting.[5] Since the cost of the program was included in Edison's general rate structure,[6] Edison's customers were in effect forced to buy light bulbs from the utility. In 1972 Detroit Edison furnished its five million customers approximately 50 per cent of the standard light bulbs they used. No other

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1. ___ U.S. ___, 96 S. Ct. 3110, 49 L. Ed. 2d 1141 (1976).

2. 96 S. Ct. at 3114, 49 L. Ed. 2d at 1146.

3. MICHIGAN COMPILED LAWS ANNOTATED (M.C.L.A.) §460.6 (Supp. 1976). Specific restrictions and regulations on electrical utilities are contained in M.C.L.A. §§460.551 through 460.559 (1967). "The heart of the Commission's function is to regulate the 'furnishing . . . [of] electricity for production of light, heat, or power . . .'." 96 S. Ct. at 3114, 49 L. Ed. 2d at 1146.

4. 96 S. Ct. at 3113-3114, 49 L. Ed. 2d at 1145, 1146.

5. New customers were given light bulbs to meet immediate needs; thereafter light bulbs would be replaced by Detroit Edison. 96 S. Ct. at 3113 n. 5, 49 L. Ed. 2d at 1145 n. 5.

6. In 1972 the program cost $2,835,000 for 18,564,381 light bulbs supplied. Large industrial customers had been dropped from the program in 1964 with the Commission's approval. The elimination of the service became effective as a general rate reduction for the industrial customers. 96 S.Ct. at 3113, 49 L.Ed.2d at 1145-1146.

utility in the state offered a similar program.

Cantor, a retail druggist who sold light bulbs, claimed that Edison was using its monopoly powers as a regulated distributor of electricity in Michigan to restrain competition in the light-bulb market. Cantor charged that Edison's activities violated §§1 and 2 of the Sherman Act[7] and §3 of the Clayton Act[8] and asked for treble damages and injunctive relief.[9] Edison moved for summary judgment solely on the basis of its relation with and control by the State of Michigan.[10]

The district court held that when a state agency acted affirmatively in approving the rates and practices of a utility company, the resulting practices were state action and exempt from antitrust liability by congressional intent.[11] The U.S. Court of Appeals for the Sixth Circuit affirmed without opinion the grant of summary judgment to Detroit Edison.[12] The Supreme Court, reversing,[13] held that the light-bulb program was private action and

7. Section 1 of the Sherman Act, 15 U.S.C.A. §1 (Supp. 1976), provides in part: "Every contract, combination in the form of trust or otherwise, in restraint of trade or otherwise, or conspiracy, in restraint of trade or commerce among the several states . . . is declared to be illegal . . . ." This act makes tying arrangments unlawful; Cantor first argued this violation in his brief to the Supreme Court. 96 S. Ct. at 3113 n. 3, 49 L. Ed. 2d at 1144 n. 3. For a brief description of tying arrangments, in which a seller of goods or a supplier of services conditions the sale of one product on the sale of the additional, or "tied," product, see ABA, ANTITRUST DEVELOPMENTS 1955-1968 at 7-9 (1968). See also Washington Gas Light Co. v. Virginia Elec. & Power Co., 309 F. Supp. 1119 (E.D. Va. 1970), *rev'd*, 438 F.2d 248 (4th Cir. 1971).

Section 2 of the Sherman Act, 15 U.S.C.A. §2 (Supp. 1976), provides in part: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several states . . . shall be guilty of a felony . . . ."

8. Section 3 of the Clayton Act, 15 U.S.C.A. §14 (1973), provides in part: "It shall be unlawful for any person engaged in commerce . . . to lease or make a sale . . . of goods . . . or other commodities . . . or fix a price charged therefore . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor . . . of the lessor or seller, where the effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

9. Section 16 of the Clayton Act, 15 U.S.C.A. §26 (1973), provides that injunctive relief against antitrust violations may be obtained by private parties. Section 4 of the Clayton Act, 15 U.S.C.A. §15 (1973) provides that private parties injured by violations of antitrust laws can sue for treble damages and costs, including reasonable attorney fees.

10. 96 S. Ct. at 3112-3113, 49 L. Ed. 2d at 1144-1145.

11. 392 F. Supp. 1110, 1111 (E.D. Mich. 1974). The court cited Gas Light Co. of Columbus v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971) *cert. denied*, 404 U.S. 1062 (1972), for the proposition that meaningful regulation and supervision by the state makes the state-action exemption from federal antitrust laws applicable. The district court in *Cantor* found material the facts that the Michigan Public Service Commission derived a comprehensive rate schedule after conducting investigations and hearings, and that the Commission ordered the tariff carried out and thereafter supervised the utility. The court rejected Cantor's contention that the Commission must consider the effects of the tariff on interstate competition. 392 F. Supp. at 1111, 1112.

12. 513 F.2d 630 (6th Cir. 1975).

13. A plurality of four, with Chief Justice Burger concurring in parts I and III and the judgment and Justice Blackmun concurring only in the judgment.

that it would be neither unfair nor contrary to congressional intent to hold Edison responsible for its activities.

The flagship of the federal antitrust laws is the Sherman Act of 1890,[14] "designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."[15] Congress passed the Sherman Act under its interstate commerce power[16] and worded the statute "every contract, combination . . . or conspiracy in restraint of trade or commerce among the several states,"[17] so that its impact would be commensurate with the reach of its commerce power.[18] In 1890 intrastate trade and commercial activities were considered beyond congressional control,[19] but where the commerce power did apply, regulations passed under it prevailed over conflicting state directives.[20]

The commerce power of Congress did not crystallize around 1890 standards. The Supreme Court in a series of decisions in the late 1930's and early 1940's upheld congressional schemes to regulate areas of commerce traditionally within the sphere of state or private control.[21] In *Parker v. Brown*[22] in 1943, given that Congress had the power to regulate the raisin industry, the Supreme Court had to decide whether the federal antitrust standards regulating competition would be applicable if a state purposefully foreclosed competition to achieve a state-perceived economic and social goal.[23]

In *Parker*, the Supreme Court held that under neither the Sherman Act

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14. C. 647, §§1-8, 26 Stat. 209 (1890), codified *as amended at* 15 U.S.C.A. §§1-7 (1973, Supp. 1976). The two other mainstays of the antitrust laws are the Federal Trade Commission Act, c. 311, §§1-18, 38 Stat. 717 (1914), *codified as amended at* 15 U.S.C.A. §§41-58 (1973, Supp. 1976), and the Clayton Act, c. 323, §§1-26, 38 Stat. 730 (1914), *codified as amended at* 15 U.S.C.A. §§12-27 (1973, Supp. 1976).

15. Northern Pac. Ry. v. United Sates, 356 U.S. 1, 4 (1958).

16. U.S. CONST. art. I, §8, cl. 3.

17. 15 U.S.C.A. §1 (Supp. 1976).

18. "It has been held that Congress intended the reach of the Sherman Act to expand along with that of the commerce power. Hospital Bldg. Co. v. Rex Hosp. Trustees, ___ U.S. ___, ___ n. 2, 96 S. Ct. 1848, 1852 n. 2, 48 L. Ed. 2d [388, 343 n.2] (1976), and cases cited." Cantor v. Detroit Edison, 96 S. Ct. 3110, 3124, 49 L. Ed. 2d 1141, 1158 (1976) (Blackmun, J., concurring).

19. 96 S. Ct. at 3136-3137, 49 L. Ed. 2d at 1174-1175 (Stewart, J., dissenting). *See* Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 Nw. U. L. REV. 71, 84 (1974).

20. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). The secondary case under consideration in this Note, Parker v. Brown, 317 U.S. 341 (1943), is better known for its discussion of the Commerce Clause and the Supremacy Clause, U.S. Const. Art. VI, §2, than for its two pages on antitrust. *See* Slater, *supra* note 19, at 72 n. 5.

21. Most notably, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); United States v. Darby, 312 U.S. 100 (1941); and Wickard v. Filburn, 317 U.S. 111 (1942).

22. 317 U.S. 341 (1943).

23. Governmental regulation of commerce goes back to the Magna Carta, and the laissez-faire economic theory reflected in the antitrust laws is an upstart, according to Handler, *The Current Attack on the Parker v. Brown State Action Doctrine*, 76 COLUM. L. REV. 1, 4 (1976).

nor the Commerce Clause[24] could California officials be enjoined from maintaining a state program designed to control the market for California raisins. Farmer Brown sought to enjoin a program set up by the cumulative effort and initiative of both raisin growers and state agricultural officials, who were operating under an express legislative command to restrict competition in agricultural commodities so that the agricultural wealth of the state would be conserved. The raisin program affected interstate commerce and therefore was within the regulatory power of Congress.[25]

The Supreme Court assumed that the Sherman Act would have been violated if private individuals had conspired to establish the marketing program, but said that under the Constitution the states are sovereign unless they are limited by explicit congressional action.[26] The Court decided that Congress, in passing the Sherman Act, had not intended to subject the states to the restraints of the law:

> We find nothing in the language of the Sherman Act or its history which suggests that its purpose was *to restrain a state or its officials* from activities directed by the state legislature . . . . The Sherman Act makes no mention of the states as such, and gives no hint that it was intended *to restrain state action or official action* directed by a state.[27]

The Court's rationale and its use of the phrase "state action or official action"[28] were broad enough to encompass the activities of private persons acting within the framework of state law,[29] but the Court did not decide

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24. The commerce question in *Parker* was: If Congress had not extended its power over the interstate market for raisins, did the State of California, by establishing a marketing program, intrude into Congress' power over interstate commerce? 317 U.S. at 359. The Court responded that, since Congress had not exerted its powers and the state regulation concerned local commerce even though it had an affect on interstate commerce, the power granted to Congress and the power reserved for the states would be balanced to accommodate competing demands. 317 U.S. at 362. This balancing of interests and the issue of Congress' preempting state regulations is the thrust of Justice Blackmun's concurrence in *Cantor*, 96 S. Ct. at 3124, 46 L. Ed. 2d at 1158.

25. 317 U.S. at 345-350.

26. *Id.* at 351.

27. *Id.* at 351-352 (emphasis added).

28. *Id.* at 352.

29. The Court cited Olsen v. Smith, 195 U.S. 332 (1904), to support its holding. In *Olsen*, the Supreme Court said that federal antitrust laws could not be used to deny a state's lawful regulatory powers over commerce, and that if the state has the power to regulate, no monopoly in a legal sense can arise from the fact that only state-licensed riverboat pilots, the defendants in the suit, could ply the waters around Texas. 195 U.S. at 345. *Olsen*, according to Handler, *supra* note 23, at 8-9, stands for the proposition that state-directed activities cannot be the subject of an antitrust suit. *Olsen* is not mentioned in the opinions for reversal in *Cantor*. In Northern Sec. Co. v. United States, 193 U.S. 197 (1904), the U.S. Government petitioned to enjoin the merger of corporate holdings into what was alleged to be an unlawful combination in restraint of the railroad trade. A primary defense was that all actions of the defendant were legal under the corporate law of New Jersey. The Court said that a state could not authorize private individuals to restrain competition. 193 U.S. at 346.

this point, because the defendants in *Parker* were state officials carrying out state law. In fact, the Supreme Court did not analyze state action within the context of the antitrust laws for more than a quarter of a century,[30] and the state-action exemption as it relates to private persons was left to the circuit courts to develop.

In the leading case of *Asheville Tobacco Board of Trade, Inc. v. FTC*,[31] the U.S. Court of Appeals for the Fourth Circuit said that the "teaching of *Parker v. Brown* is that antitrust laws are directed against individual action and not state action."[32] The court defined state action as the decision by state authorities to regulate an industry and the subsequent enforcement of that regulation for some public purpose tied to the elimination of competition. State action would not become private action, the court said, even if private persons controlled by the regulation participate in its making and enforcement, as long as they are adequately supervised by independent state officials.[33]

The Fourth Circuit later retreated from the stringent standard for finding state action developed in *Asheville Tobacco Board of Trade*. In *Washington Gas Light Co. v. Virginia Electric & Power Co.*,[34] it held that administrative silence on a suspect activity of a regulated private utility conferred the title of state action on the activity and therefore exempted it from scrutiny under the federal antitrust laws. In contrast, the Fifth Circuit, looking at a similar activity of a power utility in *Gas Light Co. of Columbus v. Georgia Power Co.*,[35] held that private commercial activity

30. Eastern Ry. Presidents Conf. v. Noerr Motor Freights, Inc., 365 U.S. 127, 136, 137 n. 17 (1961), and Continental Co. v. Union Carbide, 370 U.S. 690, 706 (1962), are the cases in which the antitrust holding of *Parker* is more than simply referred to. *Noerr* and United Mine Workers v. Pennington, 381 U.S. 657 (1965), stand, generally, for the proposition that group attempts to influence legislative action or public officials, regardless of intent or purpose, are not illegal under the Sherman Act. A. STICKELLS, FEDERAL CONTROL OF BUSINESS-ANTITRUST LAWS §§33 and 34 (1972). The reason is partly congressional intent as found in *Parker* and partly a First-Amendment right to petition the government. Eastern Ry. President's Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 137-138 (1960). *But see* Slater, *supra* note 19, at 74 n. 13.

31. 263 F.2d 502 (4th Cir. 1959). The court affirmed a cease-and-desist order of the Federal Trade Commission against the Asheville Tobacco Board of Trade, Inc., on findings that the latter unreasonably restrained trade in the purchase and sale of tobacco. *Id.* at 505. The defendants were operating warehouses and auctions pursuant to state law, but the Board was formed and operated by private persons who were not supervised at all by the state. *Id.* at 508, 510.

32. *Id.* at 509.

33. *Id.*

34. 438 F.2d 248 (4th Cir. 1971), *rev'g* 309 F. Supp. 1119 (1970). The Virginia Elec. & Power Co. had an underground residential distribution (U.R.D.) plan, by which the utility installed underground wiring for houses if they were built total electric and in a later program offered consumers credit on underground wiring costs based on anticipated electrical usage. *Id.* at 250.

35. 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972). The Gas Light Co. of Columbus complained of Georgia Power's U.R.D. plan, see *supra*, note 34, its rate struc-

could become state action within the scope of *Parker* only if an independent governmental agency charged with overseeing the utility conducted adversary hearings on the activity in question and exercised continued control over the utility. As these two decisions indicate, there was no uniform test for finding a state-action exemption from federal antitrust law. The decisions do reflect, however, a recognition that the *Parker* principle—Congress did not intend to subject the states to the antitrust laws—needed effective limitation, lest the merest pretense of official state involvement in private conduct place anticompetitive activities under the state-action umbrella.[36]

In *Goldfarb v. Virginia State Bar*,[37] the Supreme Court analyzed state action and federal antitrust laws for the first time in 33 years and held that before any restraint on commerce can become state action and exempt from antitrust laws, the restraint must first be required by the state acting as sovereign. The Goldfarbs had brought suit for treble damages against a county bar association in Virginia for setting a fee schedule and against the Virginia State Bar for enforcing the schedule. The Court conceded that for some purposes the Virginia State Bar was a state agency, but said that the Bar's mandate from the Supreme Court of Virginia did not expressly require it to enforce fee schedules. The local bar argued that it was exempt from antitrust liability because the state bar prompted its fee schedule. The Court responded that anticompetitive activities must be compelled by the state as sovereign and that neither the state bar nor the local bar could escape liability for their private anticompetitive activities.[38]

In *Cantor*, decided shortly after *Goldfarb*, four justices agreed that the state-action exemption of *Parker* is applicable only to antitrust suits against state officials,[39] but the Chief Justice, relying on the Court's opinion in *Goldfarb*, said in his concurrence that the focus of the exemption is on the activity, not the person sued.[40] The Chief Justice nevertheless found *Parker* inapplicable, because Michigan had no statewide policy with respect to the market for light bulbs and was essentially neutral on the subject.[41] Justice Blackmun, concurring,[42] also thought *Parker* could not be

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ture, its installation practices, and its promotional schemes for housing contractors. 440 F.2d at 1137.

36. *See* Slater, *supra* note 19, at 91.

37. 421 U.S. 773 (1974).

38. *Id.* at 790-791.

39. 96 S. Ct. at 3117, 49 L. Ed. 2d at 1150. *But see* Olsen v. Smith, 195 U.S. 332 (1904).

40. 96 S. Ct. at 3123, 49 L. Ed. 2d at 1157.

41. 96 S. Ct. at 3124, 49 L. Ed. 2d at 1158. See Verkuil, *State Action, Due Process, and Antitrust: Reflections on Parker v. Brown*, 75 COLUM. L. REV. 328 (1975), for the suggestion that the state-action exemption should turn partially on the procedure by which the regulation is adopted. If the state is actually involved in the decision-making process and the decision can withstand scrutiny under due-process review, the Court should defer to the state. *Compare* Gibson v. Berryhill, 411 U.S. 564 (1973), in which the Supreme Court invalidated on due-process grounds action taken by a state board so permeated by private parties inter-

limited to suits against state officials. Although there was no majority opinion on why Detroit Edison did not fall within *Parker,* the combined opinions denied the utility the state-action defense to antitrust liability.

The Court did not completely jerk the *Parker* rug from under Detroit Edison's feet. The Chief Justice specifically joined the four-justice plurality[43] in deciding that Edison could not be held liable for violating the antitrust laws (1) if Edison had done nothing more than obey the commands of the state sovereign, or (2) if Edison's total compliance with the tariff scheme approved by the Michigan Public Service Commission were necessary to make the state regulatory act work.[44] Edison did not meet either criteria.

Regarding the first, the Court said, "There is nothing unjust in a conclusion that respondent's participation in the decision [to have the light-bulb program] is sufficiently significant to require that its conduct in implementing the decision . . . conform to applicable federal law."[45] Here, as in other cases, the Court said, the decision to implement a program is a blend of private and public decision-making, and if the private party exercises sufficient freedom of choice, it must take the responsibility for the decision.[46]

The Court preserved the tension between state sovereignty and the supremacy of federal law in answering in the negative Edison's second possible defense. The Court recognized that not all economic regulation suppresses competition and that in cases involving a power utility, state control is necessary to protect the public from the natural monopoly of the utility. But, the Court said, imposing antitrust standards on activities in competitive and unregulated markets, such as the light-bulb market, would not conflict with the state's scheme to control the natural monopoly powers of utilities.[47] Even if there were a conflict between conduct proscribed by the federal government and that prescribed by the state, the Court would not find an implied exemption from federal standards unless it were absolutely necessary to make the regulatory act work. The Court decided that Detroit Edison's compliance with the antitrust standards of competition would not hinder the function of the Michigan Public Service Commission.[48]

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ested in the result that board hearings were fundamentally unfair.

42. 96 S. Ct. at 3124, 49 L. Ed. 2d at 1158.

43. 96 S. Ct. at 3123, 49 L. Ed. 2d at 1157.

44. 96 S. Ct. at 3117-3121, 49 L. Ed. 2d at 1150-1154 (Part III).

45. 96 S. Ct. at 3119, 49 L. Ed. 2d at 1152.

46. 96 S. Ct. at 3118, 49 L. Ed. 2d at 1151.

47. Antitrust laws are applicable to electrical utilities. Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

48. The Court said the exemption would be judged by the same standards as implied exemptions for federal agency jurisdictions. 96 S. Ct. at 3120, 49 L. Ed. 2d at 1153-1154. *See* Gordon v. New York Stock Exchange, 422 U.S. 659 (1975).

Justice Blackmun, concurring in the judgment,[49] said Congress intended that the reach of the Sherman Act expand along with that of the commerce power; if the power of Congress conflicts with inconsistent state laws, the state statute becomes preempted by the federal statute. Justice Blackmun would determine inconsistency and, hence, preemption by a rule of reason, "taking it as a general proposition that a state-sanctioned anti-competitive practice must fall like any other if its potential harms outweigh its benefits."[50]

The three-justice dissent[51] denounced the majority decision as a disruption of every state-regulated utility in the nation and an imposition of treble damages on consumers. The dissent pointed out that *Parker v. Brown* was authority for the Supreme Court to hold that joint attempts by private persons to influence the passage of state laws and regulations were exempt from antitrust laws, according to the *Noerr-Pennington* doctrine,[52] and that the present decision could effectively overrule the entire post-*Parker* case law.

The six justices who voted to reverse the circuit court failed to agree about why *Parker v. Brown* was inapplicable to this case. Even so, the death-knell of state-action exemption to antitrust laws rings clearly. A majority of the court rejected two broad arguments: (1) the federal standards of competition have no place in an area of the economy regulated by the state, and (2) Congress did not intend to impose antitrust standards on activities or persons traditionally regulated by the states.[53] Whether these two rejections are considered refinements or limitations on the *Parker* decision, *Parker's* viability as the cornerstone in structuring an antitrust defense based on state regulation is unquestionably challenged.

Because only the plurality was willing to limit *Parker* to suits against state officials, the traditional state-action defense will continue to be raised by private parties when the state or its officials have expressly ordered the anticompetitive activity to implement a legislative objective.

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49. 96 S. Ct. at 3124-3128, 49 L. Ed. 2d at 1158-1163.

50. 96 S. Ct. at 3126, 49 L. Ed. 2d at 1161. *See* Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. REV. 693 (1974).

51. 96 S. Ct. at 3128-3141, 49 L. Ed. 2d at 1164-1179. The dissent viewed the majority holding as a lapse back into substantive due process, in which the judiciary substitutes its own views on the wisdom of state legislation for that of the state legislature. 96 S. Ct. at 3140, 49 L. Ed. 2d at 1178. See Verkuil, *supra* note 41.

52. 96 S. Ct. at 3133, 49 L. Ed. 2d at 1168. *See supra* note 30. *But see* Slater, *supra* note 30, at 74 n. 13, which says First-Amendment rights to petition the governments were the controlling consideration in *Noerr*.

53. Remarks by Donald I. Baker, Asst. Atty. Gen., Antitrust Div. of the U.S. Dept. of Justice, *Parker v. Brown: The Great Bicentennial Celebration* (Before the Council of ABA Public Utility Law Section, Oct. 28, 1976). According to Baker, *Goldfarb, Cantor*, Gibson v. Berryhill, 411 U.S. 564 (1973), and Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., ___ U.S. ___, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976), must be read together to learn the present Court's view toward state regulation and competition.

But even in these situations, the analysis for determining whether an exemption exists should follow the guidelines set forth by the plurality and Chief Justice Burger. Having already determined that no state action existed, they considered the extent of the private party's freedom of choice in implementing the activity and the necessity of the proscribed activity in relation to a state scheme for the protection of the public.[54] The six justices voting for reversal indicated that a case-by-case determination for an exemption is in order and, with the exception of the Chief Justice, were willing to balance the activity prescribed by the Michigan Public Service Commission against federal standards or goals for trade and commerce as reflected in the antitrust laws.[55]

The implication is that private persons cannot use the state as a tool for fostering anticompetitive practices, even if the state sets up the machinery, as it did in *Parker*. The *Cantor* decision itself is limited to suits against private parties when there is no state law at stake, but the decision could be used by the Court to strike down a state law that, in the view of the Court, unnecessarily restrains competition.

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54. Part III of the plurality opinion, 96 S. Ct. at 3117-3121, 49 L. Ed. 2d at 1150-1154.

55. Justice Burger's concurrence limits his opinion to those situations in which there is no state law on point (for example, no law on the need for regulating light bulbs). Thus, a distinction is necessary between an activity prescribed by a state regulatory agency and an activity prescribed by state law. Justice Blackmun makes no such distinction, and neither does the plurality's analysis. In fact, the plurality opinion contains an analysis of the state's need to regulate public utilities. 96 S. Ct. at 3119-3120, 49 L. Ed. 2d at 1152-1153. *Cf.* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951).