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I. INTRODUCTION

Generally, the development of the European Economic Community (EEC) into something more than a customs union has progressed at a glacial pace typical of the development of most modern political institutions. An exception to this general pattern, however, is the development of EEC competition policy. In this area new legal principles are being generated at a pace that may well be exceeding the rate at which they can be digested by the affected parties. The latest of these principles has developed from the litigation known collectively as the *Sugar Cases.*[1]

Sometime in 1969, following consumers' complaints of producers' refusals to sell,[2] the Commission of the European Communities began investigating the marketing of sugar within the EEC.[3] Upon completion of its investigation the Commission charged, on May 31, 1972, that the 22 sugar producing and marketing organizations controlling 90 percent of EEC sugar production had engaged in practices which violated articles 85 and 86 of the Treaty of Rome.[4] More particularly, the Commission charged that the companies had violated article 85(1) by "concerted practices [which] consis-

1. Cooperative Vereniging "Suiker Unie" UA v. Commission, [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 7903, 17 Comm. Mkt. L.R. 295 (1975).

2. Opinion of the Advocate General, *id.* at 8285, 17 Comm. Mkt. L.R. at 304. The ostensible reason for the refusals was that "available supplies were reserved for the national market." Commission Decision on proceedings under articles 85 and 86 of the EEC Treaty, [1973-1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9570, at 9251-57, 9258, 12 Comm. Mkt. L.R. D65, D76 (1973) [hereinafter cited as Commission Decision]. In addition to the complaints noted in the text, the Commission's attention was attracted by (a) the investigation of the German Federal Cartel Office into an alleged grouping of German sugar producers, (b) an agreement among French sugar manufacturers notified to the Commission on October 31, 1968, and (c) an alleged sugar price war and an agreement for mutual cooperation among sugar producers in the Netherlands. [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 8285, 17 Comm. Mkt. L.R., at 304.

3. The investigation was initiated pursuant to the Commission's authority under EEC Regulation 17. 1 COMM. MKT. REP. (CCH) ¶ 2422 (1972).

4. Treaty Establishing the European Economic Community, *done* Mar. 25, 1957, 298 U.N.T.S. 3 (1958) [hereinafter cited as EEC Treaty].

ted mainly of: (i) consigning sugar directly to the sugar producers of countries in short supply, or (ii) refusing to consign to buyers other than these producers, or (iii) consigning sugar to other buyers in those countries but with express authorization of the national producers or with increased prices."[5] In addition, the Commission alleged that several of the companies had "abused dominant positions" in the marketing of sugar, a violation of article 86.[6] The companies responded to these allegations with both general and specific denials. In addition, they defended on the ground that the production and marketing of sugar was so thoroughly regulated within the Common Market that their actions were mandated by regulations or, alternatively, that their actions could not have negatively affected competition because existing regulations left no room for competition. The *Sugar Cases* are important because they represent "the first time . . . [the Commission] had to deal . . . with the application of the rules of competition in the Treaty to the production of and trade in an agricultural product . . . which is covered by a common organization of the market" (*i.e.*, by another section of the Treaty).[7]

In addition to regulation at the community level, sugar marketing is also regulated at the national level, and the sugar companies alleged that national regulation in Italy had led to the behavior that eliminated competition in sugar marketing.[8] To those familiar with United States antitrust law this line of defense will bring to mind the closely analogous doctrine of *Parker v. Brown*[9] in which the United States Supreme Court held that the Sherman Act does not apply to practices required by state action. This first appearance of the *Parker v. Brown* defense in EEC competition jurisprudence demands close analysis.

5. Commission Decision, *supra* note 2, at 9252, 12 Comm. Mkt. L.R. at D76-D77.

6. Commission Decision, *supra* note 2, at 9273-76.

7. [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 8286, 17 Comm. Mkt. L.R. 306. Although the Court dealt with trade in citrus fruits, apples, and pears, for which a common organization existed, in *Nederlandse Vereniging voor Fruit v. Commission,* [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8285, 16 Comm. Mkt. L.R. 123 (1975), there was no connection alleged between the common organization and the rules on competition. *See id.* at 7279, 16 Comm. Mkt. L.R. at 138.

8. Conflicts between national law and the EEC treaty provisions are to be resolved in favor of the latter. *See* Wilhelm v. Bundeskartellamt, [1967-1970 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8056, 8 Comm. Mkt. L.R. 100 (1969).

9. 317 U.S. 341 (1943).

II. THE SUGAR CASES

A. *Background*

To understand the *Sugar Cases*, it is necessary to first briefly examine the EEC sugar market. During the four marketing years[10] involved in the litigation—1968/69 to 1971/72—total production of white sugar within the Community rose from 6.8 million metric tons to 8.1 million metric tons and consumption rose from 5.9 million metric tons to 6.5 million metric tons.[11] Although the total market registered a surplus, individual countries did not. France and Belgium were surplus producers, but the Netherlands, Germany, and Italy were deficit areas. This situation and the fact that sugar is a standardized commodity should have insured a generally competitive environment for sugar with trade flowing from west to east.[12] The consequences of such competition would have been borne, however, by the growers of sugar beets were it not for government action to insulate growers from market price determinations. Such government action has been a characteristic of continental agricultural policies since the time of Napoleon I.

1. *The Common Market Organization for Sugar.*—The EEC system for the protection of sugar beet growers is outlined in Regulation 1009/67, which entered into force July 1, 1968.[13] The system provides for the annual setting of an "intervention price" for white sugar (art. 2).[14] From this intervention price, the Council of Ministers calculates backward to determine a schedule of minimum prices for sugar beets (art. 4).[15] Sugar manufacturers must pay no

10. "Sugar marketing years commence on July 1 in the first year quoted and end on June 30 in the next." Commission Decision, *supra* note 2, at 9253 n.2, 12 Comm. Mkt. L.R. at D69.

11. [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 8288, 17 Comm. Mkt. L.R. at 308.

12. "The Commission takes the view that the Italian market, because it has a sugar deficit, was destined to become the main theatre of competition between producers of countries having a sugar surplus." Submissions on the substance of the case, Summary of the Statements of Defense, [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 7962.

13. 10 J.O. COMM. EUR. 308/1 (1967), 1 COMM. MKT. REP. (CCH) ¶ 711, at 745 (1973). The regulation was an attempt to "reconcile . . . contradictory objectives." [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 8288, 17 Comm. Mkt. L.R. at 308.

14. *See* 1 COMM. MKT. REP. (CCH) ¶ 711B, at 748. The intervention price is initially determined for the EEC area having the largest surplus production. This area is in the north of France.

15. *See* 1 COMM. MKT. REP. (CCH) ¶ 711D, at 748. The reason for the back-

less than the specified price when purchasing beets for processing into sugar (art. 5).[16] In turn, "intervention agencies" stand ready to purchase sugar from the manufacturers at the intervention price (art. 9).[17] The intervention agencies may resell only at prices higher than the intervention price (art. 10).[18] Regulation 1009/67 is unique[19] among EEC agricultural regulations because, in addition to this structure of price supports, it provides for production quotas. National quotas for white sugar production are established with the stipulation that these are to be allocated to "each factory or each enterprise producing sugar" on the basis of an historic percentage of the national production (art. 23).[20] Sugar produced in excess of annual quotas may not be sold on the domestic (EEC) market (art. 25).[21]

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ward calculation is that beets themselves are not traded, but are grown and delivered under long term contracts to sugar producers. The formula for the calculation is intervention price minus figures for the processing margin, the yield, the income of the factories or enterprises from the sale of molasses, and any costs incurred for delivery of sugar beets to the factories. Reg. 1009/67, art. 4(2), 10 J.O. COMM. EUR. 308/1 (1967), 1 COMM. MKT. REP. (CCH) ¶ 715 at 749. One of the reasons why sugar beets are not traded is that they are "highly perishable." Norton, *The Heart of the Matter: U.K. and the EEC, the Problem of Agriculture,* 6 TEX. INT'L L.J. 221, 232 (1971).

16. *See* 1 COMM. MKT. REP. (CCH) ¶ 711E, at 749.

17. *See id.* ¶ 711J, at 750.

18. *See id.* ¶ 711K, at 751.

19. [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 8292, 17 Comm. Mkt. L.R. at 313. The quota system was supposed to terminate on July 1, 1975, but has been extended.

20. The precise formula is "the average annual sugar production of the factory . . . for the marketing years 1961-62 through 1965-66" times a factor, the numerator of which is the Member States' quota and the denominator the Member States' average production for the same marketing years. Denmark, Ireland and the U.K. are permitted to use the marketing years 1965-66 through 1969-70. Reg. 1009/67, art. 23(1), 10 J.O. COMM. EUR. 308/1 (1967), 1 COMM. MKT. REP. (CCH) ¶ 711Y, at 759.

21. There are actually two quotas—the basic quota and the maximum quota. Sugar sold in excess of the basic quota but within the maximum quota is subject to a production levy. It is sugar produced in excess of the maximum quota which may not be disposed of on the domestic market. [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 8151, 17 Comm. Mkt. L.R. at 403. *See* Reg. 1009/67, art. 25(1), 10 J.O. COMM. EUR. 308/1 (1967), 1 COMM. MKT. REP. (CCH) ¶ 712, at 760. Up to 60% of the production levy can be passed back to the beet growers; the manufacturers bear the other 40%. In fact production beyond the basic quota is the norm in countries other than Italy despite the need for paying the production levy. [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 8293. *See* Reg. 1009/67, art. 27(1), (4), 10 J.O. COMM. EUR. 308/1 (1967), 1 COMM. MKT. REP. (CCH) ¶ 712B, at 761.

Contrary to what might be expected, the production quotas have had little effect on the patterns of sugar marketing within the EEC because the quotas are fixed at a high level (ten percent above estimated human consumption).[22] The actual purpose of the production quotas appears to have been to restrain an increase in French and Belgian beet production expected to result from the setting of an initial intervention price above the then prevailing sugar price in those two surplus producing countries.[23] Since the total EEC production permitted under the quotas was more than sufficient to satisfy demand in deficit areas, the quotas could not affect the pattern of EEC trade in sugar.[24] The high intervention price,[25] on the other hand, combined with the low weight-to-value ratio of sugar could have resulted in surplus French and Belgian production being sold to the intervention agencies, rather than being exported to deficit areas such as Italy. The high intervention price could thus have a minimizing effect on intra-Community trade.[26] Although the price of sugar for the years in question remained close to the intervention price in the surplus countries, the Commission, nonetheless, found that the common market in sugar "impose[d] no restrictions on trade between Member States."[27] The Court of Justice supplied some reasons, lacking in the Com-

22. [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 8293, 17 Comm. Mkt. L.R. at 314. The maximum quotas were fixed at 135% of the basic quota for Germany, France, and Italy; 116% for Belgium and the Netherlands. Reg. 1009/67, art. 24(2), 10 J.O. COMM. EUR. 308/1 (1967), 1 COMM. MKT. REP. (CCH) ¶ 711Z, at 759.

23. 1 COMM. MKT. REP. (CCH) ¶ 715, at 773. "[T]he sole aim [of the quotas was to limit] the guarantee regarding prices and sales, and they are therefore not a form of sharing out production between Member States." Commission Decision, *supra* note 2, at 9278, 12 Comm. Mkt. L.R. at D111.

24. While the Court noted that quotas "cut down the quantities which producers can sell in the Common Market," [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 8151, it is not clear whether the Court means to imply that this had a significant effect on competition.

25. [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 8291, 17 Comm. Mkt. L.R. at 312.

26. *Id.* at 8151, 8152, 8294, 17 Comm. Mkt. L.R. at 316, 403. Despite the high intervention price, however, little sugar was offered to the intervention agencies—even in the surplus countries of France and Belgium because producers feared resales by the agencies. "[T]he intervention agencies were . . . dangerous potential competitors . . . ." *Id.* at 8292, 17 Comm. Mkt. L.R. at 313. Thus, the producers' reaction to a surplus was to withhold sugar from the market, including the intervention agencies. This was possible because sugar is a product that "keeps well." *Id.* at 8291, 17 Comm. Mkt. L.R. at 312.

27. *Commission Decision, supra* note 2, at 9258.

mission's opinion, to explain this. The Court suggested that while regulation 1009/67 might have a chilling effect on intra-Community trade because of the intervention price mechanism, it also provided for the general "disappearance of intra-Community barriers" to sugar trading.[28] Moreover, the Court pointed out that the common organization had "no appreciable effect" on areas affecting competition, such as "volume of demand and conditions of sale."[29] Finally, it was noted that the Community system provided for price floors but did not preclude the possibility of price competition.[30] On the last point the Court added that "there is a good deal of evidence . . . [that] the sale price . . . was the subject of tough negotiations."[31] Nonetheless, the Court, unlike the Commission, found that the common organization of the market left only a residual field of competition.[32]

2. *The Italian Regulations.*—During the period with which the litigation is concerned, maximum sugar prices in Italy were set by a government body—the Interdepartmental Committee on Prices (*Comitato Interministeriale dei Prezzi* or *CIP*). The price was computed by adding to the EEC-derived intervention price for Italy components representing various distributing and marketing costs.[33] The price also incorporated an excise tax (*sovrapprezzo*) of 23 lira per kilogram, the proceeds from which were to fund various aid programs for sugar beet growers.[34] The addition of the full 23 lira levy to the price of foreign sugar would, however, have precluded all imports of sugar into Italy.[35] To permit those imports

28. [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 8152.

29. *Id.*

30. *Id.*

31. *Id.*, 17 Comm. Mkt. L.R. at 404.

32. *Id.* at 8260, 17 Comm. Mkt. L.R. at 410. *But see id.* at 8152, 17 Comm. Mkt. L.R. at 404.

33. Order No. 1236 of Nov. 13, 1969, [1969] Gaz. Uff. 7106. The Italian intervention price was approximately 5% higher than that for the rest of the EEC. Commission Decision, *supra* note 2, at 9257, 12 Comm. Mkt. L.R. at D75. The Italian Counsel d'Etat annulled the order fixing maximum prices on February 29, 1972. [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 8157.

34. This *sovraprezzo* was supposed to equal "the difference between the current quotations in Italy and the new Community quotations . . . ." Order No. 1195 of June 22, 1968, [1968] Gaz. Uff. 4057, [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 7911.

35. [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 8155, 17 Comm. Mkt. L.R. at 407. This is apparently not completely correct because about 200,000 metric tons of sugar entered Italy during the four years in question after the full amount of the *sovraprezzo* was paid.

necessary to fill the gap between Italian production and consumption, a means was devised to ameliorate the effect of the levy. A system of import quotas was established, and sugar importers were invited to bid for the quotas. The bid represented a reduced *sovraprezzo.*[36] The bidders offering the highest *sovraprezzo* considered to be adequate (*prezzo congrue*) by the administrators of the Sugar Equalization Fund (*Cassa Conguaglio Zucchero*) were awarded the import quotas.

Certain rules of procedure limited the number of possible bidders. The minimum quota set for bids was 1000 metric tons.[37] Moreover, a performance bond "of a relatively high amount" had to be posted by successful bidders. Quota holders were required to import the full amount of their quotas or forfeit their security. In practice, this meant that participants in the tender process had to have firm offers in hand before bidding.[38] Failure to comply with all procedural rules resulted in a fine equivalent to the full amount of the *sovraprezzo.* Furthermore, two external factors limited the group of potential bidders: no industrial users had storage facilities for more than a few days supply of sugar, and no sugar distribution networks other than those of the Italian sugar producers existed in Italy.[39]

The Italian sugar producers' group, representing virtually 100

36. *See* Order No. 1215 of May 21, 1969, [1969] Gaz. Uff. 3080. Between 1969 and 1972 the *sovraprezzo* varied from 6.4 to 11.5 lira per kilo. [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 8310, 17 Comm. Mkt. L.R. at 335.

37. The minutes of the Paris meeting of July 29, 1969, indicate that one participant "suggested that Eridania . . . can arrange with the Italian authorities that the invitation to tender is only open to minimum tenders of 5000 metric tons, which should eliminate quite a large number of firms." [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 8003.

38. *Id.* at 7961. There is some evidence that firm offers on price and quantity were a legally required pre-condition of participation in the tender process. Even after this was "reduced," it was alleged that the requirement remained as a result of telephonic instructions from the Italian authorities. *Id.* at 7959-60.

39. The Italian producers explained their entry into distribution as a means of lowering their overhead since their processing plants operated only part of the year. *Id.* at 7949. This would have put them at a competitive advantage relative to firms attempting to compete solely as distributors. The Commission said this was not a substantial argument, however, since only about 25% of the imported sugar was destined for consumption in its original state—the only circumstance in which such a network was required. Moreover, the establishment of a distribution network does not present any special difficulties. During the years 1968-1972, 36% of all sugar imported into Italy was imported by importers other than refineries. *Id.* at 7959. This was cited as evidence that the establishment of distribution systems within Italy was possible. *Id.* at 7971.

per cent of domestic sugar production, was awarded 87.15 per cent of the import quotas for 1969/70, 77.4 percent for 1970/71 and 60.77 per cent for 1971/72.[40] "[T]he task of conducting the commercial negotiations for each invitation to tender was assigned . . . to one of the Italian producers, Eridania."[41] There was a similar concentration on the sellers' side, for all of the French and Belgian sugar producers, who were the natural exporters to the Italian market and who controlled 75 percent of French and 85 percent of Belgian production, participated in the tender procedure through one agent, Sucres et Denrees, a French sugar broker.[42] In fact, the Commission found that the tender procedure was by-passed by the importers and exporters who negotiated contracts without regard to the tender process and submitted the bids for import quotas after the deals had already been made. In short, the tender procedure had little to do with the importation of sugar into Italy, or in the more oblique language of the Commission, the "invitations to tender [were unable] to play the part assigned to them."[43]

There was considerable evidence that the buying and selling groups were in active cooperation. The Commission found that at meetings in Paris on July 29, 1969, and in Genoa on September 11, 1969, the French and Belgian producers and the Italian buyers (1) discussed measures to be taken to prevent "outsiders" from offering sugar for sale in the Italian market, and (2) agreed that sugar would not be sold to Italian purchasers other than the Eridania group except at prices boosted by a premium of 1.25 French francs per 100 kilos for 1968/69, 1.65 francs for 1969/70, and 1.75 francs for 1970/71. The Commission saw the collaboration among buyers, collaboration among sellers, and collaboration between buyers and sellers, as clear violations of article 85(1) of the Treaty, prohibiting "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market."[44]

B. *Legal Issues*

1. *Regulation 26.*—A threshold question raised by the Commission finding was the extent to which article 85 applied to trade in

40. *Id.* at 7984.
41. Opinion of the Advocate General, *id.* at 8311.
42. *See id.* at 7970.
43. *Id.* at 8157, 17 Comm. Mkt. L.R. at 408.
44. 1 COMM. MKT. REP. (CCH) ¶ 2005, at 1631.

agricultural products. Article 42 of the Treaty left open the question of whether the "rules on competition shall apply to the production of and trade in agricultural products."[45] Article 42 provides that the rules will apply "only to the extent determined by the Council . . . ." Clearly, the authors of the Treaty anticipated the conflict between the organization of agricultural markets with a view to maintaining producers' incomes and the preservation of competitive marketing conditions. The traditional solution had been a general exemption of agricultural marketing from antitrust legislation.[46] The Treaty did not go quite that far; it left the question open. The question was resolved by Council Regulation 26 (1962), which, rather surprisingly, stated that articles 85(1) and 86 apply to trade in all agricultural products. The general proposition was subject to two exceptions. Articles 85 and 86 would not apply to "agreements, decisions and practices" which (1) "form an integral part of a national market organization," or (2) "are necessary for the attainment of the objectives set out in article 39 of the Treaty [dealing with the general objectives of the common agricultural policy]."[47] The sugar producers sought to invoke both exceptions to Regulation 26 as a defense to the Commission's charge that their actions in marketing sugar in Italy violated article 85(1).

Analysis of the producers' argument that the Italian regulations constitute a "national market organization" must begin with the observation that that phrase is not defined in Regulation 26, nor anywhere else in EEC jurisprudence.[48] The meaning of the phrase must therefore be gleaned from those portions of the Treaty dealing with the scope of the common organization of the market.[49] Articles 39, 40, and 43 are particularly relevant. Article 39 provides the general objectives of the common market agricultural policy: (1) to increase agricultural productivity; (2) to increase the earning of farmers; (3) to stabilize markets; (4) to assure needed supplies;

45. Sugar could be termed a manufactured product. The agricultural aspect of sugar production is beet growing. Thus, it could be argued that sugar marketing should be subject to articles 85 and 86 in the same manner as any other industry.

46. *See, e.g.,* Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973); 7 U.S.C. §§ 291-92 (1970); 7 U.S.C. §§ 1-17 (1970); 15 U.S.C. § 17 (1970).

47. 1 COMM. MKT. REP. (CCH) ¶ 935, at 952.

48. *See* Commission v. Luxembourg, [1961-1966 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8028, at 7434, 4 Comm. Mkt. L.R. 58, 65-66 (1964).

49. *See id.* at 7433, 4 Comm. Mkt. L.R. at 66, for a definition of the national organization of the market.

and (5) to ensure reasonable prices to the consumer.[50] In working to achieve these objectives, "account shall be taken" of the social structure of the agriculture sector, the need for gradualism, and the central role played by agriculture in the economics of the Member States. Presumably, a domestic program—like the one in Italy—that has similar goals and that has "taken account of" the cautionary factors identified in article 39, would be a national market organization. This is confirmed by article 40(2), which indicates that the common organization of the markets is one that seeks to achieve the goals outlined in article 39.[51] The argument would thus run as follows: If an EEC-wide regulation taking into account the goals of article 39 would be a "common organization of the market," an Italian regulation taking into account the same goals would be a "national market organization."

The actual argument between the parties regarding the goals of the Italian regulations was somewhat truncated. Naturally, the producers argued for consistency with article 39 because the primary goal of the Italian regulations was to guarantee the employment and standard of living of the sugar beet growers. The Commission, on the other hand, argued that the central feature of the Italian regulations was a uniform price system designed to protect consumers, not to benefit producers.[52] The sugar producers had the better arguments since regulations designed to protect consumers also further one of the goals of article 39. Moreover, the *sovraprezzo* revenues—an integral part of the Italian program—were designed primarily to provide financial assistance to sugar beet growers.

Article 40(2) further states that a common organization "shall take one of the following forms . . . (a) common rules on competition; (b) compulsory coordination of the various national market organizations; [or] (c) a European market organization." The importance of this provision for present purposes is that the form of a national organization should be a domestic reflection of the form of the common organization on the EEC level. Applying the three possible forms of organization to the Italian case, it is readily apparent that the third form is irrelevant. The first form could apply only if there were rules relating explicitly to competition in the sugar market; there were no such rules in Italy.[53] Finally, for

50. 1 COMM. MKT. REP. (CCH) ¶ 405, at 519.

51. *Id.* ¶ 411, at 523.

52. [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 8010-11.

53. *See* argument of the Advocate General in *Commission v. Luxembourg, supra* note 48 at 7434, 4 Comm. Mkt. L.R. at 66. ("This last form [common rules

the second form to apply, one would have to find "compulsory coordination" of the sugar marketing organizations. This, of course, is what the present litigation is all about. It could be argued, however, that if the Italian regulations were so pervasive that they left only a *de minimus* area for competition in the Italian sugar market, the Italian government had exercised "compulsory coordination" of the Italian market; and since compulsory coordination was a form of market organization, the exception to Regulation 26 should apply in this case.

Article 43 of the Treaty sheds some light, if only by negative implication, on this question of what constitutes a national market organization.[54] In particular, paragraph 3 of that article provides that:

> The Council may . . . replace the national market organization by the common organization . . . if:
> (a) the common organization offers Member States which are opposed to this measure and which have an organization of their own for the production in question equivalent safeguards for the employment and standard of living of the producers concerned . . .; and
> (b) such an organization ensures conditions for trade within the Community similar to those existing in a national market.

This implies that an "organization," either common or national, provides "safeguards . . . [for] producers" and deals with "conditions for trade."[55] The Italian regulations were clearly an "organization" under these criteria.

The Commission argued, however, that even if the Italian regulations created a "national market organization," that organization ceased to exist on the day Regulation 1009/67 (creating the common organization for sugar) entered into force. In the Commission's view, a common organization meeting the requirements of article 43(3)(a) and (b), quoted above, a fortiori replaced the preexisting national organization.[56] For the Commission, a national

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of competition] cannot, however, be called a market organization, since it obviously disregards the influences exercised by the world market. I believe, as does the Commission, that a market organization providing effective protection for producers is inconceivable without protective measures with respect to the outside world.")

54. 1 COMM. MKT. REP. (CCH) ¶ 425, at 528.

55. This is essentially the definition argued for by the Advocate General in *Commission v. Luxembourg,* [1961-1966 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8028, at 7433-34, 4 Comm. Mkt. L.R. at 65-66.

56. [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 8010, 8017.

organization could continue to exist only if the Commission affirmatively decided to keep that organization in force.[57] In support of its arguments, the Commission cited the decision in *Public Prosecutor of Italy v. S.A.I.L.*,[58] in which the European Court of Justice was called upon to consider the vitality of the Italian system for milk distribution and, in particular, of milk distribution centers. Council Regulation No. 804/68 provided for "the gradual establishment of a common market organization." The Regulation also provided, *inter alia,* that Italy could maintain the milk centers only until December 31, 1969. The Court held that from the time the Regulation was issued "the Community authority alone could decide on a temporary retention of any national organization . . . for the products in question."[59]

The sugar producers attempted to distinguish *S.A.I.L.* on the ground that in that case the regulation explicitly called for an end to the milk distribution system, whereas in the present case, Regulation 1009/67 did not call for an end of the Italian organization of the sugar market. Moreover, they argued that Regulation 1009/67 did not provide for a common organization of the market since it contained features that were clearly intended to be transitional; namely, production quotas that were to expire on July 1, 1975. The producers sought to support this position by citing a paragraph in the preamble to Regulation 1009/67, reading as follows: "The realization of a common market for sugar calls for the removal of all obstacles to the free movement of the goods concerned at the internal frontiers of the Community."[60] The companies argued that since barriers to trade in sugar (*e.g.*, quotas) continued to exist after its entry into force, the Regulation did not create a common organization of the market at that time.[61]

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57. The text of Regulation 1009/67 at article 45 lends some weight to the Commission's argument, for it provides that "[i]n the event transitional measures are needed to facilitate the changeover . . . such measures shall be issued following the procedure . . . ." 1 COMM. MKT. REP. (CCH) ¶ 712V, at 768. This article can be interpreted as requiring affirmative action if departures are needed from the system outlined in the regulation.

58. [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8178, at 8010.

59. *Id.* at 8392.

60. 1 COMM. MKT. REP. (CCH) ¶ 711, at 746.

61. 1 COMM. MKT. REP. (CCH) ¶ 711, at 745. The producers also argued that the existence of the Italian regulations proved that there was no free movement of goods. They argued that Regulation 1009/67 did not even comply with article 43(3)(6) since conditions for trade within Italy were not the same as those within the Community. Both of the arguments are, of course, circular because they assume the vitality of the Italian regulations, precisely the point in dispute.

Assuming for the purpose of analysis that the producers had the better argument and that the Council's promulgation of Regulation 1009/67 did not alone bring an end to the Italian national market organization for sugar, the Commission then argued that particular features of the Italian market organization were in explicit conflict with Regulation 1009/67 and the Treaty and were, therefore, void under article 189 of the Treaty which provides in part: "[A] regulation shall have general application. It shall be binding in its entirety, and directly applicable in all Member States."[62] This provision—the EEC version of the "supremacy clause" of the United States Constitution—has been interpreted as prohibiting Member States

> from adopting measures . . . that are designed to alter the scope of that regulation or amend its provisions . . . . To the extent that the Member States have transferred their legislative powers . . . to the Community, in order to ensure a proper functioning of the common agricultural market, they no longer have the power to enact normative provisions in this field.[63]

The conflict between the two sets of regulations is readily apparent, for the Italian system is premised on the existence of import quotas, which are generally prohibited within the EEC and explicitly prohibited for sugar by article 35(1) of Regulation No. 1009/67. In addition, in *Capolongo v. Azienda Agricola Maya*[64] the Court held that if the proceeds were used to benefit the domestic product, a surcharge like the *sovraprezzo*, although levied on domestic and

62. 2 COMM. MKT. REP. (CCH) ¶ 4902, at 4111.

63. Hauptzollamt Hamburg-Oberelbe v. Bollmann, [1967-1970 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8098, at 8402, 9 Comm. Mkt. L.R. 141, 153 (1970).

In *Costa v. E.N.E.L.*, [1961-1966 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8023, at 7384, 3 Comm. Mkt. L.R. 425 (1964), the Court noted that by creating the EEC,

> the Member States, albeit within limited spheres, have restricted their sovereign rights and created a body of law applicable both to their nationals and themselves. The reception, within the laws of each Member State, of provisions having a Community source . . . has as a corollary the impossibility, for the Member States, to give preference to a unilateral and subsequent measure against a legal order accepted by them on a basis of reciprocity . . . .

Id. at 7390.

64. [1974 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8213, at 8891, 13 Comm. Mkt. L.R. 230 (1973). *See also* Reg. 1009/67, art. 20(2), 10 J.O. COMM. EUR. (1967), COMM. MKT. REP. (CCH) ¶ 711V, at 758 (prohibiting taxes having an effect equivalent to a customs duty).

imported sugar, would be considered to have an effect equivalent to that of a customs duty. Since the *sovraprezzo* was clearly intended to benefit the Italian beet and sugar producers, it fit this description and was in manifest conflict with article 35(1) of the Regulation as well as article 95 of the Treaty, which prohibits discriminatory internal charges.[65] Finally, there is the conflict between the policy of EEC target and intervention prices and the ability of a state to set its own level of sugar prices.

The Court thus had three opportunities to dispose of the case on EEC constitutional grounds. It could have determined (1) that the Italian regulations did not constitute a national market organization within the meaning of Regulation 26, (2) that even if the Italian regulations did constitute an organization, they were *ipso facto* voided by the promulgation of the common organization for sugar (Regulation 1009/67), or (3) that the Italian regulations were in conflict with Regulation 1009/67, and, therefore, void under article 189 of the Treaty. The Court chose none of these routes. More surprisingly, however, the Court did not even mention any of these arguments in its opinion.

There are several possible explanations for this failure. First, it is possible that the Court did not consider the present litigation to be the proper instance for a discussion and resolution of these questions. The Italian Government was not a party to the proceedings even though it had a central interest in these questions. The Court may also have considered the explicit procedure for Commission challenges to state aids such as the *sovraprezzo* provided by article 93 of the Treaty to be exclusive. Furthermore, article 169 of the Treaty provides, "If the Commission considers that a Member State has failed to fulfill an obligation under this Treaty, it shall deliver a reasoned opinion on them after giving the State concerned the opportunity to submit its observations."[66] The Court may have read this provision as precluding a collateral attack on the Italian regulations in the present litigation. A second possible explanation for the Court's failure to deal with the relationship between EEC rules and the Italian regulations is that the Court believed that defendants had a right to rely upon the Italian regulations until they were officially found to be incompatible with the

65. *See also* EEC Treaty, *supra* note 4, art. 92(3), 1 COMM. MKT. REP. (CCH) ¶ 2921, at 2121, (prohibits state aid "which distorts or threatens to distort competition"). On this issue see *France v. Commission,* [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8104, at 7148, 9 Comm. Mkt. L.R. 351 (1970).

66. 2 COMM. MKT. REP. (CCH) ¶ 4615, at 3821.

EEC rules.[67] For whatever reason, the Court assumed the continued vitality of the Italian regulations, and its opinion is an analysis of the effect of those regulations on competition in the Italian sugar market.[68]

2. *Effect on Competition.*—Recall that the Commission charged, *inter alia,* that the producers had engaged in "concerted practices . . . which have as their object . . . prevention, restriction or distortion of competition within the common market."[69] The Commission, therefore, believed that it need not prove an effect on competition. In the Commission's view,

> having produced evidence of cooperation *capable* of adversely affecting competition . . . [the Commission] does not have to prove that, in the absence of such collaboration, there would have been on the market real opportunities for competition. On the contrary, it is for the undertakings to prove that the characteristics of the market exclude effective opportunities for competition, whatever form it took (a situation which does not often arise), and that their conduct is explained by other reasons than the intention of adversely affecting competition. (Emphasis added.)[70]

This reading of article 85 was actually a bold attempt by the Commission to expand the holding in the leading case of *Etablissements Consten and Grundig-Verkaufs GmbH v. EEC Commission.*[71] In that case the Court condemned certain exclusive distributorships as violations of article 85. The Court held that "for purposes of applying Article 85, paragraph 1, it is not necessary to

67. *See* Cantor v. Detroit Edison Co., 428 U.S. 579, 601 (1976). ("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.")

The Commission commenced proceedings against Italy for the conflict with EEC regulations on December 4, 1974.

68. The producers also argued that the second exception provided for in Regulation 26—that article 85 does not apply to agreements "necessary for attainment of the objectives set out in article 39 of the Treaty"—applied. The companies argued that such agreements and practices need not be shown to attain *all* of the objectives outlined in article 39. The companies noted that in the present case the questioned arrangements "were necessary in order to attain at least two of the objectives mentioned in article 39, namely to stabilize markets . . . and to assure the availability of supplies . . . ." [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 8016.

69. *See* note 7 *supra.*

70. [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 7993.

71. [1961-1966 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8046, at 7618, 5 Comm. Mkt. L.R. 418 (1966).

take into consideration the actual effects of an agreement where its purpose is to prevent, restrict, or distort competition."[72]

The Court refused to extend the *Grundig* per se rule covering "agreements" to the present case charging "concerted practices" and, instead, ruled that article 85(1) required a showing that the practices "restrict or distort competition to an appreciable extent."[73] The "appreciable extent" language is taken from the opinion in *Beguelin Import Co. v. G.L. Import S.A.*[74] in which the Court held that this was to be measured by reference to the "situation . . . in the absence of the agreement."[75] In effect, the Court held that the Commission should have begun by considering the competitive possibilities in the Italian sugar market.

In the Court's view, the competitive situation in the Italian market had to be judged against a standard of "normal" competition—the situation where supply, demand, and price are determined by market forces. In Italy both the supply and the price of sugar were controlled by the Government. The available supply was the sum of domestic production plus imports. The latter was determined by Government import quotas.[76] In addition, the Italian Government "substantially reduced the opportunities available" to fix a price on the basis of market forces.[77] The Italian government directly affected prices in two ways: first, it fixed a maximum price for sugar sales, and secondly, it affected the price of imports by "the proportion of the *sovraprezzo* paid by the successful tenderer", and even this had to be ratified by the CIP which

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72. *Id.* at 7652, 5 Comm. Mkt. L.R. at 473.

73. The Advocate General argued that an *agreement* with the object of an adverse effect on competition was prohibited by article 85 without a showing that it had such an *effect,* but that if a concerted practice was alleged, a negative effect on competition must be established, citing *Imperial Chemical Industries Ltd. v. Commission,* [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8161, at 8001, 8036, 11 Comm. Mkt. L.R. 557, 571-73 (1972), where he had made a similar argument. [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 8299, 17 Comm. Mkt. L.R. at 321. Alternatively, the Advocate General argued that the object of the concerted practices must be to restrict or distort competition *to an appreciable extent. Id.* at 8312, 17 Comm. Mkt. L.R. at 337. The Court seems to have decided upon a formula combining both views.

74. [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8149, at 7697, 11 Comm. Mkt. L.R. 81 (1971).

75. *Id.* at 7704, 11 Comm. Mkt. L.R. at 96.

76. [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8834, at 8160, 17 Comm. Mkt. L.R. at 411.

77. *Id.*

fixed an "acceptable price" (*prezzo congruo*).[78] The Court concluded that in the absence of market determinations of supply, demand, and price, the area for competition was "to a great extent fundamentally restricted."[79]

Although perhaps accurate, the Court's statement regarding the effect on competition is irrelevant. The issue before the Court was not which theoretically possible areas of competition were foreclosed by Italian regulations, but which areas actually remained open. The case did not concern the entire Italian sugar market, but only the importation of sugar into Italy. More general considerations of price, supply, and demand are relevant only if they affect the market for imports. Contrary to the impression that might be gained by reading the judgment, the Commission did not ignore these issues.[80] The Commission, for example, did not allege that the "concerted action" had an effect on price.[81] Rather, the Commission pointed out that even in the absence of price competition, there could have been competition on the conditions of sale,[82] quality of sugar,[83] and service to the buyers.[84] Nor did the Commission

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78. The Italian regulations were designed to limit imports to the shortfall between national production and demand, to harmonize the cost of national and imported sugar, and "to keep prices in Italy at a uniform level and relatively low." *Id.* at 8158, 17 Comm. Mkt. L.R. at 409.

79. *Id.* at 8161, 17 Comm. Mkt. L.R. at 441.

80. The Commission seems to have attempted the analysis suggested by the Court in *Beguelin*: "[T]he most important thing [sic] to be considered is the nature of the products covered by the agreement, whether or not the quantity is limited, the position and size of the licensor and the licensee on the relevant market, whether the agreement stands alone or is one of a group of agreements and . . . whether exports or parallel imports are permitted . . . ." *See* note 75 *supra.* In fact, one commentator was surprised that the Commission was at such pains to ensure an economic analysis of the case before ruling, in view of "the vast array of documented anticompetitive practices." Note, *Article 85 and European Antitrust Litigation: A Search for Economic Balancing,* 27 STAN. L. REV. 1275, 1293 (1975).

81. [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 7967, 7997.

82. One of the Italian producers argued that "the United Nations have been actively engaged for decades in producing standard clauses in agreements for international trade." *Id.* at 7979.

83. The grades are determined by the degree to which sugar is refined. Grade IV has never been produced in the EEC, grade III only in France. Most EEC sugar is grade I and II. The trend is towards grade I. Commission Decision, *supra* note 2, at 9253, 12 Comm. Mkt. L.R. at D69. "The notices of the invitations to tender which do not deal with caster sugar, that is to say sugar in the first category, deal with sugar in the 'second and/or third category. . . .' The opportunity for competition with regard to quality is therefore proved . . . ." [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 7994.

rely solely on this negative evidence. Instead, it referred to what it considered onerous contract terms which it believed would not have been accepted by Italian sugar purchasers but for the lack of competition between suppliers.[85] The Commission pointed to clauses whereby purchasers agreed that (1) "the quality is deemed to have been noted, checked and accepted by you on delivery," (2) "the weight declared in the delivery documents is deemed to have been accepted by you," and (3) "even in the case of the sale of products net weight, the . . . list price shall be applied to the gross weight of the bags."[86] Finally, the Commission pointed to the suspicious sales transactions between producers who were normally competitors selling directly to distributors or consumers.[87] The Commission noted that this arrangement prevented the Italian consumers from freely obtaining the sugar they need from foreign suppliers.[88] The Court, however, said not one word in its opinion on these points. Thus, the case did not turn on the failure to prove an effect on competition, but instead, on the relationship between the conduct of the defendants and the Italian regulations.

3. *The Italian Regulations and Defendants' Conduct.*—The Commission began its analysis by noting that the Italian Government had apparently set up a competitive bidding system for sugar import quotas. This was at least some evidence of the Government's wish to provide for competition in sugar imports. Thus, the Commission had a difficult time understanding how "the invitations to tender, which by definition imply competition [could] strangle it."[89] The French and Belgian exporters, nonetheless,

84. *Id.* at 7963.

85. *Id.* at 7996. *See also id.* at 7965.

86. [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 7999.

87. Commission Decision, *supra* note 2, at 9267, 12 Comm. Mkt. L.R. at D92.

88. Commission Decision, *supra* note 2, at 9226, 12 Comm. Mkt. L.R. at D91. In the Commission's opinion, "[t]his concerted practice consisted of the abovementioned Italian producers agreeing together to buy sugar directly from the French, Belgian and German producers and then reselling it at the same prices and on the same conditions of sale as sugar produced by domestic producers."

89. [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 7993. At one point in the argument, some of the producers seemed to be saying that the competitive bidding system was irrelevant to how business was conducted in the sugar trade.

> No purchaser of goods spends time and money on inviting general and informative bids, from the maximum number of vendors. This is what happens in practice: The purchaser knows the average prices applied on the market . . . . If he finds . . . a good producer who offers him an advantageous price . . . he naturally buys from [that] producer.

argued that in practice the system encouraged collaboration. They asserted that the amounts put up for tender (50,000-170,000 metric tons at a time) were too large for any single enterprise, and that only a combination of the largest exporters could guarantee regular bulk deliveries.

While the Commission did not respond directly to them, these points must be considered against a more general background of alleged collaboration in the European sugar trade. In the Commission's view there was one EEC-wide producers' cartel.[90] The coordinating vehicle was the Common Market Commission of the European Committee of Sugar Producers (Comite European des Fabricants de Sucre).[91] The Common Market Commission was alleged to have met in Munich on May 30, 1968, to plan for the entry into force of Regulation No. 1009/67.[92] At this meeting it was apparently agreed to divide up the European market. The evidence before the Commission of the European Communities established that the principle used to divide up the market was "'*pas de mouvements de marchandises de pays à pays, si ce n'est en concertation de producteur à producteur*' (no movement of goods from country to country, save by concerted action between producer and producer)" or, as it was incorporated in telegraphic fashion, "'*chacun chez moi*' (each in his own home)."[93] The policy was implemented by strictly confining sales to competitors, or to third parties only with competitors' consent or at prices exceeding competitors' prices. Moreover, in the instant case the Court affirmed the Commission's finding that many of the exporters involved in the Italian market had engaged in concerted practices to limit competition in sugar exports to other EEC markets. Even more relevant was the finding that all of the parties to the present litigation had combined to defeat the EEC system of invitations to tender for refunds on export of sugar to third countries.[94] In view of this background it seems difficult to attribute collaboration among exporters with

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Id. at 7989. *Cf.* George R. Whitten Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 31 (1st Cir. 1970) ("when government acts under laws requiring competitive bidding it signifies its intent to respond to the signals of a competitive market . . . .").

90. [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 8295, 17 Comm. Mkt. L.R. at 316-17.

91. Commission Decision, *supra* note 2, at 9258, 12 Comm. Mkt. L.R. at D76.

92. *Id.*

93. *Id.*

94. [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 8257, 17 Comm. Mkt. L.R. at 484.

regard to the Italian market to the Italian requirements for bulk tenders.

The Italian sugar importers had a wider array of arguments justifying their combination. First, they argued that the system of import quotas forced them to combine because "[i]f sugar undertakings had competed with each other at the invitations to tender, . . . a single one of them could have been awarded the entire quota and, since this quota was fixed in advance, dictated the market laws (sic) for meeting the entire national requirement."[95] The establishment of maximum prices makes this highly unlikely, however, since there would be no benefit in monopolization. The importers also argued that the large minimum bid forced collaboration.[96] The minimum bid was only 1,000 metric tons, however, and the importers charged in the case each had roughly one third of a market involving annual imports ranging from 100,000 to 450,000 metric tons. Moreover, the importers each marketed about 500,000 metric tons of sugar annually in Italy.[97] The importers also argued that they had to combine to be able to bid on the large quantities of sugar which the sellers had to offer.[98] This, of course, complements the sellers' claim that they had to combine to offer the large quantities put up for tender. Finally, the producers claimed and the Court found that (1) the Italian government "wanted and requested . . . [Italian producers] to . . . import . . . in a rationalized way" and "always pursued the fundamental objective of a uniform price for the sugar processing industry," (2) that "a senior Italian official" informed the suppliers "of the need to harmonize supplies above and below the Franco-Italian frontier, in such a way that a uniform price can be maintained on Italian territory," and (3) that "the system of invitations to tender . . . was adopted as a means of obtaining such a uniform price, thanks to the undertaking given by the principal Italian importer to maintain the said uniform price."[99]

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95. *Id.* at 8006.

96. *Id.* at 8159, 17 Comm. Mkt. L.R. at 410.

97. Commission Decision, *supra* note 2, at 9254, 12 Comm. Mkt. L.R. at D71.

98. *See* note 96 *supra.*

99. [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 8158, 17 Comm. Mkt. L.R. at 408. This was also explained as a defensive alignment to counter otherwise weak bargaining power and a response to the earlier organization of suppliers. *See id.* at 7959, 7985. In the Commission's view article 85 did not permit this defense. *Id.* at 7968. Moreover, the Commission views it as interesting that "producer-exporters . . . make the opposite submission." *Id.* at 7994.

In considering these arguments, the Commission's view of the prevailing law was that the practices could only be justified if made "indispensible" by the Italian regulations.[100] It is doubtful that the evidence was sufficient to meet this standard. The Commission decided that it had not been met. The Court, on the other hand, took a more relaxed view of the law. Initially, the Court noted that the Commission's statement that the Italian regulations " 'do not explain everything' is tantamount to an admission that they at least explain certain aspects of the applicants' actions."[101] The Court then noted that in its investigations of the marketing of sugar in Italy, the Commission found that " 'the procedure . . . adopted at invitations to tender undoubtedly *encourages* the concerted action by Italian producers to control all imports.' " (Emphasis added.)[102] Finally, the Court referred to the allegations that the Italian government "wanted and requested" producers to import in a rationalized way and that a senior Italian official informed the suppliers of the need to harmonize supplies. This negative implication, and the Court's findings of encouragement, request, and need led it to conclude that the Italian regulations "had a determinative effect on some of the most important aspects of the course of conduct of the undertakings concerned which the Commission criticises, so that it appears that, had it not been for these regulations . . . the cooperation . . . either would not have taken place or would have assumed a form different from that found to have existed by the Commission."[103] This, of course, sounds like a "but for" test and would seem to insulate anticompetitive concerted action if it is merely "inspired" by the regulations.[104] What makes the Court's analysis even more startling is

100. *Id.* at 8011.

101. *Id.* at 8157-58, 17 Comm. Mkt. L.R. at 408.

102. *Id.*

103. *Id.* at 8160, 17 Comm. Mkt. L.R. at 410.

104. The Court's "but for" argument seems the mirror image of that attributed to the Commission by the Advocate General. According to the Advocate General:

> [T]he Commission has merely mentioned the "special measures taken by the national authorities" without having ascertained their consequences. It simply states that, if there had not been the concerted action to which it objects, suppliers would have been able to sell freely on the Italian market . . . not accompanied by any evidence . . . .

Id. at 8312, 17 Comm. Mkt. L.R. at 338. "Without these sales between producers . . . the sugar producers of the surplus countries . . . would sell their sugar individually on the Italian market, deciding on the quantities, prices and market-its failure to discuss a connection between the Italian regulations and the refusals to deal.

Recall that the Commission began its investigation of the sugar industry because of allegations that sugar producers refused to sell directly to users in other countries, but confined such inter-market transactions to producer-to-producer sales. The Commission proved that French and Belgian exporters had agreed not to sell to Italian importers outside the Eridania group except at prices increased by the surcharge indicated earlier.[105] The Commission found that the price increase was not justified by added distribution costs or commercial risks.[106] In fact, the price discrimination was not based on volume of purchases at all, but rather on membership in the Eridania group. Moreover, Eridania itself referred to the surcharge as a "margin of security."[107] This surcharge to non-cartel members was a clear violation of article 85(1)(d), which explicitly prohibits the application of "dissimilar conditions to equivalent transactions."

The Commission found that the refusal to deal was significant since substantial industrial buyers, like the confectionary firms of Molta and Alemagna, stood ready, able, and willing to buy.[108] The

ing organizations themselves. . . ." Commission Decision, *supra* note 2, at 9267, 12 Comm. Mkt. L.R. at D91.

105. The exporters argued that they were not charging non-producer buyers more, but were giving buyers who resell a discount as compared with buyers who are ultimate users—a universally accepted custom. The Italian producers argued that their discount was justified by the need to maintain a distribution organization and sell throughout Italy at a uniform price. [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 7957. Alternatively, the producers denied this arrangement was ever implemented. *Id.* at 7987. But the Commission cited a telex message from Sucres et Denrees to Eridania, dated October 2, 1970, which stated that several industrial Italian consumers begged Sucres et Denrees to sell them sugar and that Sucres et Denrees refused to sell and complied 100% with the rules of the cartel game. Moreover, the Commission took the view that the agreement did not have to be implemented. "As the concerted practice is a form of coordination which has not reached the stage where an agreement in the proper sense of the word has been executed, indirect proof of the conduct by which this coordination was effected can be adduced." *Id.* at 7998.

106. *Id.* at 7969.

107. *Id.* at 7999. The Commission found that the surcharge "includes both a distribution margin and a safety margin in favor of the Italian producers which has been increased several times." Commission Decision, *supra* note 2, at 9267, 12 Comm. Mkt. L.R. at D92. Some of the producers claimed that the exclusive dealing arrangement was forced upon them by the importers. [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 7951.

108. *Id.* at 7966.

refusal of the French and Belgian sugar producers to sell to buyers other than the Italian producers falls within a well-developed line of EEC cases. In *Electric Massage Instruments*[109] and *Etablissements Consten S.A. v. EEC Commission*[110] the Court fashioned the equivalent of a per se rule with regard to vertical exclusive dealing arrangements. While the Court in the instant case distinguished these cases as applying to "agreements" rather than "concerted action," that distinction is meaningful only with regard to the groupings of exporters and producer-importers, but not with regard to the relations between the two groups. Although the refusal of the exporters to sell to Italian buyers other than the Eridania group was clearly the product of an agreement fitting within the *Consten* rule, the Court never explicitly dealt with this issue. More importantly, it never attempted to show the relation between the Italian Government regulations and this refusal to deal. What seems readily apparent is that there was no relationship between the Italian regulations and the refusal to deal. The practice was instead clearly related to the policy adopted by all the major European sugar producers at the time the common organization of the market entered into force—the policy of *chacun chez moi* (each in his own home).

Two further matters cast doubt on the correctness of the Court's opinion. The defendants had argued that even if concerted action took place, the result was beneficial since the combination of sugar orders into large shipments enabled the Belgian and French exporters to obtain lower freight rates from the SNCF, the French national railroad company.[111] The Court accepted this argument noting that it was one of the advantages of collaboration. Even if this were true, however, such a defense can only be raised under paragraph 3 of article 85 and only if the arrangement has first been "notified" to the Commission.[112] None of the "concerted practices" were notified in this case, and any benefit to consumers that may

109. [1961-1966 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8030, at 7452, 4 Comm. Mkt. L.R. 231 (1965).

110. *See* note 71 *supra*.

111. [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 7956. The Commission denied that transport costs were an important item in the marketing of sugar. *Id.* at 7967. But the Court found that "transport costs of sugar are relatively high." *Id.* at 8151, 17 Comm. Mkt. L.R. at 403. The Commission also noted that "it is difficult to determine how different undertakings calculate costs for transport (either as actual cost or on a lump-sum basis) . . . ." Commission Decision, *supra* note 2, ¶ 9570, at 9257.

112. Regulation 17 of Article 4, 1 COMM. MKT. REP. (CCH) ¶ 2431, at 1752.

have resulted from these practices cannot properly be considered by the Commission or the Court. The same considerations apply to the Court's argument that collaboration in bidding for import licenses would result in a lower *sovraprezzo* and, therefore, lower sugar prices, whereas "competition relating to the amounts of the 'sovraprezzo' . . . was likely to increase a not inconsiderable item of the cost price . . . ."[113] Curiously, the Court is saying that collaboration between sellers to minimize an Italian government tax is permissible under the Treaty since it benefits consumers. This is unrealistic since the companies, having collaborated to reduce the *sovraprezzo,* would undoubtedly continue to collaborate to maximize the price to consumers, thus ensuring that any reductions in cost were translated into additional profits rather than lower prices. The Commission had dealt with this issue by stating rather simply that "price competition in the long run always benefits the consumer."[114]

C. *Stylistic Shortcomings in the Court's Opinion*

In commenting upon the *Sugar Cases, The Economist* noted that:

> [T]he decision . . . rounds off a thoroughly miserable period for the competition office in its dealings with the court. . . . The galling thing is that it does not necessarily miss the main legal points but that its briefs are too often badly prepared.[115]

While a fair reading of the Commission opinion shows an almost effortless leap from fact to conclusion in almost every instance, *The Economist* criticism still seems wide of the mark, for the Commission's opinion stands like a paragon of lucid analysis when compared with the treatment of the case by the Court.

That the Court's opinion is not a model of clarity has already

113. [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 8161, 17 Comm. Mkt. L.R. at 411. *See* producers' arguments, *id.* at 7950. In cases where quotas were awarded to non-producers the percentage of the *sovraprezzo* paid has been higher than that paid by the Italian producers. *See id.* at 7963. The producers answered that this was true because the successful non-producer bidders were near the frontier and thus paid lower freight costs. *Id.* at 7988. The Commission rejoined, however, that "[t]he relevant factor is not whether the differences between the tenders submitted . . . by the . . . group and those submitted by undertakings which are not members, are minimal or not but the absolute similarity of the tenders made by members of the group." *Id.* at 8001.

114. *Id.* at 7969.

115. THE ECONOMIST, Dec. 20, 1975, at 30.

been made apparent. Its opacity may in part be due to the effort required to produce a judgment running 377 printed pages. In part it may also be due to the numbered paragraph style of presentation, which turns each sentence into a separate paragraph with a resulting impression not only of visual, but, more importantly, of logical discontinuity. Moreover, the analyst working from the English language version of the judgment cannot help being aware that the judgment was drafted in another language and translated into English by one for whom English was not a native language. For example, paragraph 50 of the Law part of the judgment reads: "The Commission does not seriously deny that these regulations as well as the way in which they have been implemented affected the applicants' conduct to which exception is taken." What is the meaning of "seriously" when modifying "deny"? Does this mean the Commission did not challenge this conclusion, or that it challenged it but then conceded that there was an effect? Moreover, in the search for the critical link between the Italian regulations and the companies' conduct, is the word "affected"—connoting the weakest of all possible connections—the word the Court really meant to use? In any event, what the Court seems to be saying is that the Commission does not challenge the fact that these regulations affected the applicants' conduct. The superfluous language can only be attributed to poor translations. The same must be said of constructions like the first two lines of paragraph 54 which read as follows: "Finally the Commission has not refuted certain statements, which Eridania produced, partly as evidence upon which it relies, namely, on the one hand . . . ." This lack of clarity in style is not the most troublesome aspect of the decision. The various elements which tend to cloud understanding of the Court's judgment serve to mask the major problem—the Court's failure to adequately consider the import of the fact that it was introducing a new defense to proceedings under articles 85 and 86.

D. *The Article 85 Test*

Article 85 prohibits, *inter alia,* "practices . . . which . . . [restrict] competition within the Common Market . . . ." To this provision the Court added the word "appreciably," taken from its opinion in *Béguelin.*[116] Thus, the relevant legal test for this case was whether the applicant's conduct appreciably impeded compe-

116. [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 8161, 17 Comm. Mkt. L.R. at 411.

tition. In applying this test in the usual case, the Court would look at the actual and possible relationship between competitors. This may be a kind of "before and after" analysis if the challenged conduct is a new agreement or merger, or it may involve looking at the possibility of new competitors entering the market.[117] The Court may look beyond the conduct of the parties to "the nature of the products covered by the agreement."[118] This would involve an examination of the extent to which the product lends itself to competition. Relevant considerations would include the degree of brand differentiation, the extent of patent protection, etc. The Court in the *Sugar Cases* has proposed that this market analysis be extended to another element affecting competition—the extent of government intervention in the market. While this is unobjectionable in principle, in fact it calls for a much more difficult kind of analysis. Considering how competitors behaved "before and after" they embarked on a challenged course of conduct or gathering data on the reasonable likelihood of new competitors entering the market is a manageable task. It is far more difficult, however, to describe the competitive position in a market assuming that long-standing government regulation of that market is absent. The Court unconvincingly attempted to implement this kind of analysis by comparing the sugar market in Italy with the Court's simplistic model of "normal competition."[119]

Resolution of the issue presented by the Italian regulations could have been accomplished more easily by relying on Regulation 26. Regulation 26 provides for the application of the EEC competition rules to trade in agricultural products except, *inter alia,* when there is a "national market organization." Resort to this regulation would have required the Commission to determine whether the Italian regulations constituted a "national market organization." Although making this determination might present difficulties, as indicated above, it is easier than determining the quantum of potential competition extinguished by government regulation. While this analysis could have been used to resolve the present case, it would not, however, be applicable if the goods in question were not agricultural. Thus, it may well be that the Court sought to announce a doctrine of wider applicability by choosing not to resolve

117. *See, e.g.*, Europemballage and Continental Can Co. v. EEC Commission, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8171.

118. *See* note 75 *supra.*

119. [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8334, at 8160, 17 Comm. Mkt. L.R. at 411.

the case on Regulation 26 grounds. Whatever the Court's motives, legal advisors will certainly be uneasy for some time in attempting to advise clients on whether proposed actions are within a field of activity in which "the operation of the rules of competition . . . is [not] . . . to a great extent fundamentally restricted in its scope"[120] by existing government regulations.

Even more troublesome, however, will be the analysis of the relationship between the conduct of the parties and the government's regulations. The Commission described the requisite relationship as "indispensible."[121] The Court apparently softened the requirement by using terms like "affected," and "encourages," and by applying the "but for" test—*i.e.*, "had it not been for these regulations and their implementation, the cooperation . . . either would have not taken place or would assume a [different] form . . . ."[122] Because this issue of causal connection has been at the heart of the confusion in American courts attempting to apply a similar defense in antitrust actions, the American cases are particularly relevant to the *Sugar Cases*.

III. PARKER V. BROWN

A. *The Original Doctrine*

American courts have attempted to deal with a state action exception to the antitrust laws for 30 years. In the leading case of *Parker v. Brown*[123] the Supreme Court considered the California Agricultural Prorate Act,[124] which authorized the creation of programs compelling producers of various crops to remove up to 70 per cent of their crop from the market. As outlined in the Court's opinion, the scheme worked in the following manner. Upon petition by ten producers of a particular commodity in a production zone, and after public hearings and findings that a program would "conserve the agricultural wealth of the State," the State Agricultural Prorate Advisory Commission could authorize a program. If a program was authorized, the State Director of Agriculture selcted, from among the growers in the region, a "program committee," whose job it was to develop a "proration marketing pro-

120. *Id.* at 8161, 17 Comm. Mkt. L.R. at 411.
121. *Id.* at 8011.
122. *Id.* at 8160, 17 Comm. Mkt. L.R. at 410.
123. 317 U.S. 341 (1943).
124. Act of June 5, 1933, ch. 754, §§ 2000-2399, 1933 Cal. Stats. (current version at CAL. AGRIC. CODE §§ 59501-60015 (West 1968)).

gram." Following approval by the Commission, the program committee was authorized to administer the program. Such a program was instituted for raisin producers in plaintiff's zone in 1940, and the result was that up to 70 percent of plaintiff's raisin crop had to be withheld from the market. Dissatisfied with the situation, plaintiff sued the relevant California officials alleging, *inter alia,* that the program violated the Sherman Act.[125]

The State defended on three grounds. It argued first that the Sherman Act spoke of "persons" and was not intended to encompass states.[126] Second, it argued that the California Act paralleled similar federal agriculture legislation that had explicitly been exempted from the operation of the antitrust laws and that by implication, the analogous state legislation was likewise exempt.[127] Finally, the State argued that the Sherman Act was not intended to reach action by the states since, in the absence of a clear indication to the contrary, the states retained full sovereignty to regulate activity within their borders.[128]

The Court held for the State because there was no indication that the Sherman Act was meant to apply to "state action or official action directed by a state."[129] This holding affirmed the similar conclusion reached in the earlier cases of *Lowenstein v. Evans*[130] and *Olsen v. Smith.*[131] The decision, therefore, came as no great surprise, nor was it particularly controversial.[132] But *Parker*

125. Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7 (1970). Plaintiff also argued federal preemption and unlawful interference with interstate commerce. The Justice Department submitted an amicus brief arguing for the application of the Sherman Act.

126. *See* New Mexico v. American Petrofino, Inc., 501 F.2d 363 (9th Cir. 1974) (detailed analysis); Lowenstein v. Evans, 69 F. 908, 911 (4th Cir. 1895).

127. 317 U.S. at 368. *See also* P. AREEDA, ANTITRUST ANALYSIS 116 (2d ed. 1974). The federal legislation was the Agricultural Marketing Agreements Act, 7 U.S.C. §§ 671-674 (1970). Section 691(d) of the Act explicitly exempted agreements made thereunder from the antitrust laws.

128. "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 351. The case was argued as a preemption case. *See* Note, *Parker v. Brown: A Preemption Analysis,* 84 YALE L.J. 1164, 1174 n.61 (1975).

129. 317 U.S. at 351.

130. 69 F. 908 (4th Cir. 1895).

131. 195 U.S. 332 (1904).

132. *See* Handler, *Twenty-Fourth Annual Anti-Trust Review,* 72 COLUM. L. REV. 1, 6 (1972) ("The key to understanding *Parker,* in my view, is the realization that there is nothing really new in Chief Justice Stone's decision.").

v. Brown did, however, raise an interesting possibility: Suppose the suit had been brought by a purchaser against a grower who failed to perform because of the Prorate program. If the purchaser alleged that the program was a violation of the Sherman Act, could the seller defend on the basis of *Parker v. Brown?* That is, could a private enterprise bring itself under the "state action" umbrella by alleging, *inter alia,* that the enterprise was an "agent of state"? The development of the doctrine since *Parker v. Brown* has involved the search for a test to determine whether and under what circumstances a private enterprise can become a state agent.[133]

B. *Subsequent Development of the Doctrine*

Under the narrowest reading of the case, the *Parker v. Brown* doctrine would be available to a defendant when behavior which is the subject of an antitrust action is the product of a state program that is consistent with a federal program "of at least equal dignity with the federal antitrust laws."[134] The *Parker* Court noted specifically that the California Agricultural Prorate Act established programs similar to those provided nationally by the Agricultural Marketing Agreement Act, which was explicitly exempted from federal antitrust legislation.[135] The difficulty with this narrow reading of *Parker v. Brown* is that the Court discussed the consistency of the federal and state programs in the context of the argument on federal preemption of the field of agricultural regulation,

133. *See* Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown,* 69 NW.U.L. REV. 71, 73 (1974); Note, *State Action Exemption from the Antitrust Laws,* 50 B.U.L. REV. 393, 397 (1970) ("[T]he courts have been particularly unsuccessful in framing general principles . . . .").

134. Teply, *Antitrust Immunity of State and Local Governmental Action,* 48 TUL. L. REV. 272, 288 (1973). *See also* Hecht v. Pro-Football, Inc., 444 F.2d 931, 937 (D.C. Cir. 1971) ("Parker v. Brown . . . involves sovereign state regulatory action which is consistent with federal national policy, i.e., the Agricultural Adjustment Act, enunciated by the national Congress, which is also the source of federal antitrust policy."); *Id.* at 946 ("We think it is significant that in those cases where the antitrust laws were held *not* to apply there was a national or state policy of importance approximately equal to the antitrust laws involved."); P. AREEDA, ANTITRUST ANALYSIS, 57-58 (1967), *discussed in* Verkuil, *State Action, Due Process and Antitrust: Reflections on* Parker v. Brown, 75 COLUM. L. REV. 328, 343n.77 (1975). *See also* Jacobs, *State Regulation and the Federal Antitrust Laws,* 25 CASE W. RES. L. REV. 221, 247, 249 (1975) (Doctrine should be limited to cases where "private enterprises [are] affirmatively and intentionally regulated by state law that is consistent with a federal policy that prevails over antitrust policies").

135. *See* note 127 *supra.*

and not in the context of a limitation on the general proposition that the Sherman Act was not intended to apply to the states.[136]

An imaginative variation on the preemption theme has been suggested in a recent law review note.[137] In the writers' view, the limitation in *Parker v. Brown* does not require consistency with federal policy in the area regulated by the state, but rather consistency between federal *antitrust* policy and the state regulation. Federal antitrust policy has at least three goals—protecting consumers, preserving competitors and efficiently allocating resources. Action taken as a result of a state program that is consistent with *one* of these goals is protected by the rule of *Parker v. Brown*. The difficulty with this reading is that the test is too easily satisfied. One would be hard-pressed to find a state program whose articulated purpose was not to achieve one of the aforementioned goals. In application the test is too easily reduced to a requirement that the state program be "for the benefit of the public," *i.e.*, no test at all.[138] Moreover, a reading of *Parker v. Brown* that searches for consistency with federal antitrust policy conflicts with the assumption in the case that the conduct at issue would clearly have violated the Sherman Act if engaged in by private individuals.[139]

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136. *See* Cantor v. Detroit Edison Co., 428 U.S. 579, 587n.15 (1976). *See also* Handler, *supra* note 132, at 16; Jacobs, *supra* note 134, at 232 ("[T]he opinion did not dwell on this narrow point."); Simmons & Fornaciari, *State Regulation as an Antitrust Defense: An Analysis of the* Parker v. Brown *Doctrine,* 43 U. CIN. L. REV. 61, 65, 96 (1974). The only case which has accepted this interpretation of *Parker* is *Hecht*. That case did not, however, involve a conflict between a state program and federal antitrust policy, but rather concerned a federal-federal conflict. *See* text at notes 162-163 *infra*. "This distinction is not without significance." New Mexico v. American Petrofina, Inc., 501 F.2d at 371 n.17 (9th Cir. 1974). For criticism of *Hecht* see Handler, *supra* note 132 at 16; Note, *Of Raisins and Regulation: The Revitalization of* Parker v. Brown, 10 WAKE FOREST L. REV. 567, 578 (1974).

137. *See* note 128 *supra*.

138. A showing of a public benefit will not usually be considered in a Sherman Act case. *See* Goldfarb v. Virginia State Bar, 497 F.2d 1, 6n.9 (4th Cir. 1974); Pennsylvania W. & P. Co. v. Consolidated G., E.L. & P. Co., 184 F.2d 552, 559 (4th Cir. 1950). Nonetheless, the Fourth Circuit saw this as one of the critical elements in the application of the *Parker* doctrine. The court found the public to be the primary beneficiary of the regulation of lawyers through minimum fee schedules despite "the fact that in some instances adherence to a suggested minimum fee schedule is financially helpful to the individual attorney." After all, the court noted, the raisin growers in *Parker* probably "received some spin-off benefits . . . ." 497 F.2d at 10.

139. 317 U.S. at 350. In *Hecht* the court noted that "the proper inquiry would seem to be . . . to what extent is the state action permissible as not contravening

If we can eliminate from *Parker v. Brown* the requirement of a parallel federal policy, the availability of the rule depends upon the presence of immunizing "state action." In *Parker v. Brown* the Court noted that the California program "derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command."[140] This language aptly described the California program, but as a guide to future conduct, it was almost guaranteed to cause confusion in the federal courts. And so it has. Nor was the situation aided by the Court distinguishing *Parker v. Brown* from an earlier

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the federal antitrust laws . . . ." 444 F.2d at 935. The most likely reading of this test is that the inquiry is whether the conduct in question is outside the reach of the antitrust laws because, even if engaged in by a private party, it would not be a violation. This test might also be interpreted as requiring consistency with federal antitrust policy. *See* note 128 *supra.* But the thrust of the *Parker* doctrine seems to be that state action is beyond the reach of the Sherman Act because it is the action of a state, not because it is consistent with the antitrust laws. *See* Simmons and Fornaciari, *supra* note 136, at 96. *See also* Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286, 1302 (5th Cir. 1971) ("We therefore think it incumbent upon this court to render both state regulatory and federal antitrust goals complementary rather than mutually exclusive.").

For a proposed balancing test weighing the state's interest in regulation against the value of preserving competition, see Slater, *supra* note 133, at 104, 108. This approach, however, raises serious constitutional questions as well as questions about its workability.

A recent article by Professor Verkuil suggests another approach to this case. *See* note 134 *supra.* Professor Verkuil argues that, under the prevailing view, the analysis of the compatibilty of state regulation with federal antitrust doctrine requires an evaluation of the wisdom of State economic policies, a route which the Court abandoned in 1937. Verkuil, *supra* note 134, at 334. Instead, Professor Verkuil argues that "at the core of the *Parker* doctrine are higher policies of federalism and judicial economic neutrality," and he concludes that the proper role for federal courts is to ensure that state economic regulations comply with *procedural* due process standards. *Id.* at 346, *citing* Silver v. New York Stock Exchange, 373 U.S. 341 (1963). If the state's procedures satisfy this requirement, a federal court should only proceed with an antitrust case when it finds that the state does not "have a pervasive regulatory scheme which will scrutinize the challenged conduct and be able to enjoin conduct that is deemed offensive." *Id.* at 349. The author terms this "a kind of state primary jurisdiction doctrine." *Id.* at 347. *See* Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973). *But see* Jacobs, *supra* note 134, at 250. Jacobs argues that offensive conduct that occurs before a state regulatory body has reviewed it lacks "the essential element of compulsion." *Id.* at 252. *See* Marnell v. United Parcel Service of America, Inc., 260 F. Supp. 391 (N.D. Cal. 1966) (state primary jurisdiction rejected). *See also* United States v. Morgan Drive Away, Inc., 1974-1 TRADE CAS. (CCH) ¶ 74,888 (D.D.C. 1974).

140. 317 U.S. at 350.

case, *Northern Securities Co. v. U.S.*[141] In that case two competing railroads were merged into a single holding company, thus eliminating competition between the two. The merger was authorized by state legislation. Nonetheless, the Supreme Court held that a state may not immunize individuals from the reach of the Sherman Act.[142] Between the "legislative command" and "immunization of individuals" lay a good deal of territory that the Court did not choose to explore in *Parker v. Brown*. Subsequent cases have explored that territory with mixed results.[143]

1. *Legislative Command.*—An initial attempt to narrow the unexplored terrain focused on the word "legislative" as used in *Parker v. Brown*. In *Marnell v. United Parcel Service,*[144] plaintiff alleged that defendant had charged discriminatory rates, below-cost rates, etc., in an attempt to monopolize the package delivery business. Defendants argued, *inter alia,* that its rates were fixed by the California Public Utilities Commission. The court held *Parker v. Brown* inapplicable, in part because it read the case as requiring that the requisite "command" emanate from the legislature and not from a state agency. Similarly, in *Travelers Insurance Co. v. Blue Cross,*[145] defendant utilized a hospital insurance contract specified by the Insurance Department of the Commonwealth of Pennsylvania. The court found *Parker* inapplicable since it was limited to cases where "the legislature . . . directs . . . [the utilization of] anticompetitive means to achieve a specific government purpose."[146] This distinction between a "legislative command" and the "command" of a state agency seems strained at best.[147] Since

141. 193 U.S. 197 (1904). *See* Asheville Tobacco Bd. of Trade, Inc. v. Fed. Trade Comm'n, 263 F.2d 502 (4th Cir. 1959).

142. 317 U.S. at 351. The Court's treatment of *Northern Securities* has been termed "somewhat *cryptic*." Verkuil, *supra* note 134, at 333n.29. Another writer has called it a careful qualification. *See* Donnem, *Federal Antitrust Law Versus Anticompetitive State Regulations,* 39 A.B.A. ANTITRUST L.J. 950, 960 (1970).

143. *See* 84 YALE L.J., *supra* note 128, at 1173; Slater, *supra* note 133, at 73, 108. Professor Verkuil has noted that *Parker* "has atrophied over the years due to inattention by the Supreme Court." Verkuil, *supra* note 134, at 331. Verkuil notes that at the time of his article the only application of *Parker* by the Supreme Court was in *Schwegmann Brothers v. Calvert Distillers Corp.,* 341 U.S. 384 (1951). Since Verkuil's article, the Court has had occasion to discuss *Parker* in *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975) and *Cantor v. Detroit Edison Co.,* 96 S. Ct. 3110 (1976).

144. 260 F. Supp. 391 (N.D. Cal. 1966).

145. 298 F. Supp. 1109 (W.D. Pa. 1969).

146. *Id.* at 1111.

147. *See* Simmons & Fornaciari, *supra* note 136 at 80, 85. They charge that

states can only act through agents, when Congress decided not to apply the Sherman Act to states, it must have intended to immunize agents of the state acting within the scope of their authority. Moreover, by creating a state agency the state legislature in effect delegates a portion of its legislative authority to that body.

In the very recent case of *Goldfarb v. Virginia State Bar*[148] the Supreme Court implicitly rejected the legislative command-state agency command distinction. In considering whether the state compelled adherence to minimum fee schedules, the Court began by observing that

> no Virginia statute . . . [requires] their activities; state law simply does not refer to fees, leaving regulation of the profession to the Virginia Supreme Court; although 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.[149]

The clear implication of this language is that if the Virginia Supreme Court had directed or required the maintenence of minimum fee schedules, the Court would have considered such action as the action of the state of Virginia for purposes of *Parker v. Brown.*[150] At the same time, the *Goldfarb* Court opened the question of when a state agent is not a state agent. The Court, in its discussion of *Parker v. Brown,* termed "[t]he State Bar, a state agency by law," but later noted that "[t]he fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield . . . ."[151] To say that a state bar association is not a state agency for purposes of antitrust analysis is, of course, to assume the conclusion. The Court cannot mean that the opinions issued by the State Bar that compelled adherence to the minimum fee schedules were *ultra vires* since the Court concedes that the State Bar had the power to issue the opinions. Why was the State Bar not a state agency? *Goldfarb* leaves this critical question unan-

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this interpretation distorts "the rationale of [*Parker*] to an unacceptable degree."

148. 421 U.S. 773 (1975).

149. *Id.* at 790.

150. This has now been confirmed in *Bates & O'Steen v. State Bar of Arizona,* 45 U.S.L.W. 4895, 4998 (1977), where the Court indicated that "affirmative command of the Arizona Supreme Court" would constitute immunizing state action.

151. *Id.* at 791.

swered.[152] It was, however, answered in *Cantor v. Detroit Edison Company.*[153]

2. *State Agent.—Cantor* involved a suit against a regulated public utility whose free light bulb program was alleged by plaintiff, a light bulb retailer, to violate the Sherman Act. Defendant sought to invoke *Parker v. Brown* arguing that the Michigan Public Service Commission approved the light bulb program and that so long as that approval remained in effect, the company was required to continue it. It is difficult to articulate precisely what the case held. Although the majority found *Parker v. Brown* inapplicable, Justice Stevens, writing for the Court, provided various reasons for this conclusion. Only three of his colleagues joined in his opinion; the remaining two members of the majority, the Chief Justice and Justice Blackmun, concurred in the result but disagreed with virtually everything the plurality said. Nowhere was this disagreement clearer than on the question of what constitutes a state agency for purposes of *Parker v. Brown.* The Stevens opinion contains the astounding conclusion that "Chief Justice Stone . . . carefully selected language which plainly limited the Court's holding to official action taken by state officials."[154] (The two concurring and three dissenting Justices disagreed with this conclusion.)

Justice Stevens reached his conclusion by following two paths. In his opinion he incorporated an extensive analysis of the briefs and arguments in *Parker.* But as Justice Stewart's dissent points out, this "history" of one of the Court's decisions is not analogous to the legislative history of a congressional enactment. The Court's holding must be gleaned, except in "rare instances," from the four corners of the opinion.[155] More importantly, Justice Stevens' analysis does not compel his conclusion, but, in fact, leaves the matter open. Perhaps sensing this, Justice Stevens attempted to buttress

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152. The district court opinion distinguished between activities of the State Bar authorized by State law and those which were not. *See* Goldfarb v. Virginia State Bar, 355 F. Supp. 491, 495-496 (E.D. Va. 1973).

153. 428 U.S. 579 (1976).

154. 428 U.S. at 591 (footnote omitted). This conclusion is stunning since the Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 96 S. Ct. 1817 (1976), decided less than two months before *Cantor,* had noted that "Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them *or protect them from competition in other ways. Cf. Parker v. Brown,* 317 U.S. 341. . . (1943)." (Emphasis supplied.) *Id.* at 1829, 1830.

155. 428 U.S. at 617.

his conclusion by citing in a footnote thirteen references to state action in Chief Justice Stone's opinion. Justice Stevens noted that "[e]ach time his language was carefully chosen to apply only to official action, as opposed to private action approved, supported, or even directed by the State."[156] Justice Stevens' references do not, however, support his point. Two of his references, for example, are simply to the term "state action," a phrase that is not necessarily limited to action by state officials. In fact, the distinction presented in the footnote is somewhat different than that in the text. In the text Justice Stevens says that "state action" for purposes of *Parker v. Brown* must be interpreted as limited "to official action taken by state officials," but in his footnote he argues that Chief Justice Stone distinguished between official action and private action approved, supported, or directed by the state.

The proposition to be tested, however, is whether Chief Justice Stone's language is amenable to an interpretation that would convert a private action into state action by making a private party an agent of the state. The quoted term, "state action," is surely consistent with such an interpretation. Moreover, in items number (2) and (3) quoted in Justice Stevens' footnote, Chief Justice Stone refers to "a state or its officers or agents" and "a state's control over its officers and agents." Is this the "carefully selected language which plainly limited the Court's holding to official action taken by State officials"? If so, it is because "officers or agents" or "officers and agents" can only mean "officials." Would it not be equally permissible to believe that Chief Justice Stone meant "officials and agents"? If so, is it inconceivable that a private party may be made an agent of the state for certain purposes? It seems hard to disagree with Justice Stewart's observation in dissent that "[t]his view of *Parker* . . . would trivialize [sic] that case to the point of overruling it . . . ."[157] Since four other Justices agreed with Justice Stewart on this point, it seems safe to continue this exposition of the *Parker v. Brown* doctrine on the assumption that it is not available only to state officials.[158]

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156. *Id.* at 591 n.24.

157. *Id.* at 616.

158. The issues seem to have been reopened in *Bates & O'Steen v. State Bar*, *supra* note 150, where after noting that "*Cantor* would have been an entirely different case if the claim had been directed against a public official," the Court went on to note that although the State Bar was the defendant, the "real party in interest" was the Supreme Court of Arizona. The "real party in interest" doctrine raises the possibility that where private parties act as agents of the state, the state may be the real party in interest.

3. *Legislative Intent.*—Recall that *Travelers Insurance, supra,* read *Parker v. Brown* as requiring a situation where "the legislature . . . directs . . . [the utilization of] anticompetitive means . . . ."[159] Some courts use language such as this, but, instead of focusing solely on the word "legislature," consider the entire phrase and, therefore, distinguish situations in which the legislature has delegated a general authority from those in which there is an explicit legislative grant of authority to require a specific anticompetitive act. This has come to be known as the "legislative intent" test. *Cantor* validated this test. In drawing a distinction between *Parker* and *Cantor* the Court noted that in *Parker* "[t]he express purpose of the program was to restrict competition among the growers . . .," whereas "[t]he statute creating the Commission contains no direct reference to light bulbs."[160] While the latter observation is true, the former seems open to question. For authority on the "express purpose" of the California program, Justice Stevens cites not the California statutes, but the Court's language in *Parker.* The statute itself says nothing about "restricting competition," but speaks instead of "correcting adverse marketing conditions" and maintaining "purchasing power at an equitable and reasonable level."[161] Thus, the question is: How clear must a state policy be before it is express? Or perhaps the inquiry should be as to form, since clarity may be a function of form?

The *Cantor* Court should have studied the lower court cases that attempted to articulate a legislative intent test before stepping out onto that uncertain terrain. A recent example of this analysis is *Hecht v. Pro-Football, Inc.,*[162] in which a congressionally created agency—the Armory Board—leased Kennedy Stadium for the exclusive use of the Washington Redskins. One rationale for finding the Board in violation of the Sherman Act was that, although it performed a governmental function, "it had not received a specific delegation of authority to regulate by restraint of trade."[163] The

159. *See* note 146 *supra.*

160. 428 U.S. at 584, 585.

161. CAL. AGRIC. CODE §§ 59542-46 (West 1968).

162. *See* note 134 *supra.*

163. Teply, *supra* note 134, at 297. *See* Note, *Antitrust Immunity-Reevaluation and Synthesis of* Parker v. Brown—*Intent, State Action, Causation,* 19 WAYNE L. REV. 1245, 1252 (1973) ("For Parker immunity . . . it is first necessary to find that the state *intends* to suspend the competitive principles of the antitrust laws . . . .") (Citing *Hecht*). Although *Hecht* deals with a federal-federal, rather than federal-state, conflict, the court deals with the case as one governed by *Parker v. Brown. See* 444 F.2d at 936-38 (D.C. Cir. 1971). The

clearest statement of the legislative intent test has been made by the First Circuit in *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*[164] There the court said, "Our reading of *Parker* convinces us that valid government action confers antitrust immunity only when government determines that competition is not the *summum bonum* in a particular field and deliberately attempts to provide an alternate form of public regulation."[165] How "specific" the delegation, how clear the "determination," and how "deliberate" the attempt need be, are not made clear in the cases. *Cantor* has certainly not improved the situation.[166]

4. *State Compelled.*—Before *Cantor* the focal point for analysis of *Parker v. Brown* was the word "command" in the phrase "legislative command."[167] A new emphasis was given to this aspect of *Parker v. Brown* in *Goldfarb,* in which the Court noted that the *Parker* doctrine was only available when "anticompetitive activities . . . [are] compelled by the state acting as sovereign."[168] The Court noted that this was a threshold inquiry and that without a showing of compulsion, there was no further need to analyze the possible applicability of *Parker v. Brown.*[169] Since the compulsion

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legislative mandate test was rejected in *New Mexico v. American Petrofina, Inc.,* 501 F.2d at 369-70. For the argument that *Parker* only applies where the legislature directs the anticompetitive act, see *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.,* 424 F.2d 25, 30 (1st Cir. 1970); Marnell v. United Parcel Service of America, Inc., 260 F. Supp. at 409-10; Travelers Ins. Co. v. Blue Cross, 298 F. Supp. at 1112. *See also* Asheville Tobacco Bd. of Trade v. Fed. Trade Comm'n, 263 F.2d at 509 ("When a state has a public policy against free competition in an industry important to it . . . .").

164. 424 F.2d 25 (1st Cir. 1970).

165. 424 F.2d at 30. *See also* Comment, Whitten v. Paddock: *The Sherman Act and the "Government Action" Immunity Reconsidered,* 71 COLUM. L. REV. 140, 144 (1971) ("The prorate program at issue [in *Parker*] . . . was *specifically* directed by the state legislature. The statute . . . delineated the specific measures which the program committees could employ . . . ."). *See* text at note 161 *supra.*

166. The difficulties inherent in a legislative intent test are made clear in Justice Blackmun's concurring opinion. 428 U.S. at 610-12.

167. *See* Asheville Tobacco Bd. of Trade v. Fed. Trade Comm'n, 263 F.2d at 509. In *Parker* the Court uses the terms "directed," "commanded," and "imposes." 317 U.S. at 350, 352.

168. 421 U.S. at 791. For an example of state anti-competitive activity where the state was not operating in its sovereign capacity, see *Reid v. University of Minnesota,* 107 F. Supp. 439 (N.D. Ohio 1952) (state university press). *See also* Union Pacific R.R. Co. v. United States, 313 U.S. 450 (1941); Ladue Local Lines, Inc. v. Bi-State Dev. Agency, 433 F.2d 131 (8th Cir. 1970); Jacobs, *supra* note 134, at 239; Slater, *supra* note 133, at 89-90.

169. While the Court had used the terms "directed," "commanded," and

element has been made critical by *Goldfarb,* it may be worthwhile to examine the Court's treatment of it in that case.

"imposed" in *Parker v. Brown,* lower courts occasionally found the requisite degree of state involvement when the state "approved" or "authorized" private conduct. *See, e.g.,* Gas Light Co. of Columbus v. Georgia Power Co., 440 F.2d 1135, 1140 (5th Cir. 1971) ("approved"). ("Defendant's conduct cannot be characterized as individual action when we consider the state's intimate involvement with the rate-making process. Though the rates and practices originated with the regulated utility, Georgia Power, the facts make it plain that they emerged from the Commission as products of the Commission."). *See also* Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248 (4th Cir. 1971) (the court interpreted the silence of the state regulatory agency as approval). The court of appeals in *Goldfarb* apparently reaffirmed its view in *Virginia Electric* that State silence implies consent. *See* Jacobs, *supra* note 134, at 234n.52. Some thin support for this view might have been gleaned from *Continental Ore Co. v. Union Carbide and Carbon Corp.,* 370 U.S. 690 (1962). In that case a subsidiary of Union Carbide (Electro Met) had been appointed by the Canadian government as its exclusive purchasing agent for vanadium. In its purchases Electro Met was alleged to have deliberately discriminated against Continental. While upholding the dismissal of the treble damage action, the Court rejected the availability of the *Parker* defense on the ground that while Electro Met acted "in a manner permitted by Canadian law . . . [t]here [was] nothing to indicate that such law in any way compelled discriminatory purchasing . . ." nor even that the Canadian government "approved or would have approved of joint efforts to monopolize . . . ." *Id.* at 706, 707. The negative implication is that if compulsion or approval had been present, a Sherman Act claim would not be made out. The case may be distinguishable on the ground that different considerations are involved when dealing with the action of a foreign sovereign. But the Court never reached that point. For a case holding that foreign sovereign compulsion is a defense in an antitrust case, see *Interamerican Refining Corp. v. Texaco Maracaibo Inc.,* 307 F. Supp. 1291, 1296, 1303 (D. Del. 1970). *See also* Note, *Development of the Defense of Sovereign Compulsion,* 69 MICH. L. REV. 888 (1971).

Whatever the validity of the state approval concept, it seems to have been ended by *Goldfarb.* In that case the County Bar argued that the promulgation of minimum fee schedules had been "prompted" by the State. The Court explicitly rejected this view. Instead it noted, "[T]he threshold inquiry . . . is whether the activity is required by the state acting as sovereign. Here we need not inquire further into the state action question because it cannot fairly be said that the State of Virginia through its Suprěme Court Rules required the anticompetitive activities of either respondent." 421 U.S. at 790. Despite the clarity of this holding, one sentence in the opinion leaves a nagging doubt. In the course of its discussion of the lack of state involvement the Court noted that: "Although the State Bar apparently has been granted the power to issue ethical opinions, there is no indication in this record that the Virginia Supreme Court approves the opinions." *Id.* The Court had already concluded that the Supreme Court was a state agency for purposes of *Parker v. Brown* and the State Bar was not. Does the sentence mean the case would have been different if the Supreme Court had *approved* the opinions? *Cantor* seems to indicate approval would not be sufficient.

The Supreme Court of Virginia adopted rules governing the conduct of the Bar. Several of those rules dealt with the question of fees. Rule II, § 12 provided, *inter alia,* that in setting a fee, attorneys were to take into account "the customary charges of the Bar for similar services."[170] In doing so, the Rules noted that "it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but *no lawyer should permit himself to be controlled* thereby or to follow it as his sole guide in determining the amount of his fee."[171] The Code of Professional Responsibility adopted by the court in 1971 also dealt with fees. In particular, the Code provided that "[s]uggested fee schedules . . . provide some guidance on the subject of fees" and that "[t]he fee customarily charged in the locality for similar legal services" was a factor to be considered "in avoiding an excessive fee."[172] The Court notes that despite the fact that the codes "mention advisory fee schedules they do not direct either respondent [State Bar Association] to supply them . . . ."[173] While it could be argued that the codes presupposed the existence of minimum fee schedules, the Court sought an explicit direction to promulgate minimum fee schedules. This may represent a more restricted view of the requisite state command than was present in *Parker.* In *Parker v. Brown* the prorate scheme was initiated by filing a petition signed by ten growers. After a program was authorized by the state, it was developed by a committee of growers, but the growers were not "compelled" to file a petition. Nor were they "compelled" to develop a program after state authorization. "[B]ut for" both of those events, there would be no program. Was this then a case where participation in an anticompetitive program was compelled? Applying the *Goldfarb* reasoning, the response must be negative, since California did not "compel" the bringing into existence of a prorate scheme any more than Virginia compelled the issuance of minimum fee schedules.[174]

Cantor attempted to clarify the compulsion issue emphasized in *Goldfarb.* The Court assumed *arguendo* that *Parker* would be

170. 421 U.S. at 789 n.19.

171. *Id.* (emphasis supplied by the Court).

172. *Id.*

173. *Id.* at 790.

174. Once the programs were established, California "compelled" compliance by making non-compliance a criminal offense, 317 U.S. at 347, while Virginia made "habitual disregard of fee schedules" grounds for professional discipline, 421 U.S. at 791n.21.

available to a party "who had done nothing more than obey a state command," because the alternative would have been "unjust."[175] The Court then went on to state that such a situation would rarely occur since "typically cases of this kind involve a blend of private and public decision making."[176] And in a footnote, the Court seems to say that even *Parker* itself could not meet the "unjust" standard because of the private participation in the prorate scheme.[177] To further illustrate its meaning, the Court referred to *Schwegmann Brothers v. Calvert Distillers Corp.*,[178] the only case prior to *Goldfarb* in which the Supreme Court discussed *Parker.*

Schwegmann dealt with the legality, under the Miller-Tydings Act, of the so-called "non-signers clause," a provision of Louisiana law which provided that if one retailer signed an agreement with a dealer agreeing to a fixed retail price, all other retailers of the product were bound by that "fair trade" agreement. In a suit alleging that this was a price-fixing scheme in violation of the Sherman Act, the *Parker* doctrine was raised in defense.[179] It was alleged that a non-signer was bound to maintain the fair trade price under Louisiana law in exactly the same way that the nonconsenting raisin grower in California was bound to withhold a portion of his crop from market under California law. The Court was not persuaded by the analogy and did not even discuss this aspect of the case. The Court only mentioned *Parker v. Brown* in observing that the Miller-Tydings Act did not cover "horizontal" price fixing. "Therefore," continued the Court, "when a State compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids."[180] On its face this language could be read as overruling *Parker v. Brown* since that case assumed that the challenged conduct, if engaged in by private parties, would have violated "the Sherman Act and it was only the fact that it was 'commanded' by the State which took it beyond the reach of that Act."

Cantor tells us that when the Court in *Schwegmann* characterized the Louisiana statute as "compel[ling] retailers," the compulsion was not so great as to be "unjust" since "the private party exercised sufficient freedom of choice to enable the Court to con-

175. 428 U.S. at 592, 593.
176. *Id.* at 592.
177. *Id.* at 593 n.29.
178. 341 U.S. 384 (1951).
179. 341 U.S. at 386.
180. *Id.* at 389.

clude that he should be held responsible for the consequence of his decision."[181] Thus, with one simple stroke, the Court reconciled *Schwegmann* and *Parker,* a task that had troubled commentators for years.[182] The price of this housekeeping, however, was the destruction of the *Parker* doctrine. Actually, the major damage had been done when the *Cantor* Court concluded that *Parker v. Brown* applied only to state officials. Since states are not in the habit of "compelling" or "commanding" their officials to act, there will be little future need to discuss this question, which *Goldfarb* had termed the threshold issue in a *Parker v. Brown* analysis. This must be further examined, however, since a majority of justices did not agree that *Parker v. Brown* applied only to state officials, and the Court left open that rare possibility "where the State's participation in a decision is so dominant that it would be unfair to hold a private party responsible. . . ."[183]

181. 428 U.S. at 593.

182. Justice Blackmun read *Schwegmann* as a straight preemption case. *Id.* at 606. The three dissenting Justices read *Schwegmann* as a Court interpretation of the congressional intent expressed in the Miller-Tydings Act. *Id.* at 637n.25, 639n.27. Moreover, the dissenters point out that the Court misread the congressional intent since *Schwegmann* was legislatively overruled by the McGuire Act. *Id.* at 637 n.25.

Earlier attempts by legal scholars to distinguish *Parker* and *Schwegmann* pointed out that in *Parker v. Brown* the state legislation is consistent with federal legislation manifesting a congressional intent not to apply the antitrust laws in this area whereas in *Schwegmann* there was no such parallel federal policy. *See* Donnem, *Federal Antitrust Law Versus Anticompetitive State Regulations,* 39 A.B.A. ANTITRUST L.J. 950 (1970).

Other commentators have distinguished the two cases on the ground that in *Schwegmann* the state played a more passive role in the program than did California in *Parker.* In *Schwegmann* the price maintenance contracts were negotiated without state supervision. In *Parker,* on the other hand, interested parties had to petition a state agency for a program, the hearings were conducted under state auspices, and the program was implemented after approval by a state official. Moreover, the program in *Parker* was supported with state funds. *See, e.g.,* Simmons & Fornaciari, *supra* note 136, at 67. ("In *Schwegmann,* state compulsion occurred only by the most circuitous of routes . . . ."). These commentators, like the Court in *Cantor,* see *Schwegmann* as a case in which Louisiana merely permitted non-signer clauses, but did not compel their insertion as a condition of doing business in Louisiana. It has been suggested that the anticompetitive acts in *Parker* (*i.e.,* production and marketing quotas) are less inconsistent with federal antitrust policy than are the price-fixing agreements in *Schwegmann. Id.* at 68. This ignores the fact that production and marketing restrictions are a method of price-fixing.

183. 428 U.S. at 594-95. In the recent case of *Bates & O'Steen v. State Bar, supra* note 150, at 4898, the Court again reopened the "affirmative command" issue and found it present.

5. *State Participation Through Supervision.*—Detroit Edison's argument in *Cantor* was apparently based upon *Goldfarb* as well as the Fourth Circuit decision in *Washington Gas Light Co. v. Virginia Electric and Power Co.*[184] The latter case involved a conflict between utilities supplying competing sources of energy for domestic use. Plaintiff gas company alleged that defendant made use of illegal tying arrangements to induce builders to provide for electric rather than gas fuel. The Fourth Circuit permitted the *Parker* defense because defendant's "activities . . . [fell] under state supervision" and were "within the ambit of [state] regulation."[185] The Court was severely criticized for this decision because it substituted state "approval" for the *Parker* requirement of "command."[186] Likewise, in *Goldfarb* the Fourth Circuit permitted the invocation of *Parker* in a case in which "the regulation of the industry was actively and continually supervised by the State . . . ."[187] The Supreme Court's reversal of *Goldfarb* and its emphasis on "compulsion" were presumably designed to bring home to the Fourth Circuit the error of its ways. To provide the compulsion element in *Cantor,* Detroit Edison argued that once its free

184. 438 F.2d 248 (4th Cir. 1971).

185. 438 F.2d at 252. The "active supervision" test for state involvement is relied upon in *Asheville Tobacco Bd. of Trade,* 263 F.2d at 509, and in *Goldfarb,* 497 F.2d at 6. It is criticized in Simmons & Fornaciari, *supra* note 136 at 68, 89.

186. This decision is criticized in *Int'l Tel. & Tel. v. General Tel. & Elec. Corp.,* 351 F. Supp. 1153, 1203n.129 (D. Hawaii 1972) ("an unwarranted hyperextension of *Parker*"); Jacobs, *supra* note 134, at 234 ("stretches *Parker* to the breaking point"); Kinter & Kaufman, *The State Action Antitrust Immunity Defense,* 23 AM. L. REV. 527, 530-33 (1974); Note, *Noerr-Pennington and* Parker *Defenses Inapplicable to Filing of False Information with State Regulatory Commission,* 46 TUL. L. REV. 526, 530 & n.29 (1972); 13 WM. & MARY L. REV. 229, 230-31 (1971). For a defense of a decision on the theory that the *Parker* defense is available whenever the State regulatory program "would have survived substantive due process challenge on economic grounds," see Verkuil, *supra* note 134, at 339. This reduces itself to a *per se* rule where state public utility regulation is involved. *Id.* For the suggestion that the "active supervision" test would have resulted in liability in *Continental Ore,* see Simmons & Fornaciari, *supra* note 136, at 89.

There is a strong element of primary jurisdiction philosophy in the *Washington Gas Light* decision. The court notes that "the gas company concedes that the SCC possessed adequate regulatory power to stop VEPCO . . . and finally ended the promotional practices upon which the suit is based. The antitrust laws are a poor substitute, we think, for plaintiff's failure to promptly protest to the SCC . . . ." 438 F.2d at 252. *See also* CSI/Communication Systems, Inc. v. South Central Bell Tel. Co., 346 F. Supp. 487 (E.D. Tenn. 1971).

187. 497 F.2d at 6.

light bulb program became a part of its tariff and that tariff was declared effective by the Michigan Public Service Commission, Detroit Edison could not abandon the program without violating State law.[188] Even under the pre-*Cantor* interpretations of *Parker v. Brown* this was a weak argument.

The Court could have disposed of *Cantor* even under the reasoning of the much-criticized *Washington Gas Light* case, for in *Cantor* Michigan's regulatory interest was clearly in the distribution of electricity, not the distribution of light bulbs. Without countenancing a strict legislative intent test, it would seem reasonable for the Court to have held that Michigan's "active supervision" of Detroit Edison extended only to the distribution of electricity, not the distribution of light bulbs.[189] In fact, "the Commission ha[d] never made any specific investigation of the light bulb market."[190] The Court was wise to stay out of the "active supervision" thicket since it is unsupported by *Parker* and would have widened the potential area for invocation of the *Parker* doctrine.[191]

The Court could have decided *Cantor* more easily and could have maintained perfect consistency with *Goldfarb,* by basing its decision on the absence of the requisite compulsion. Unlike Farmer Brown in *Parker* and the non-signing liquor retailer in *Schwegmann,* Detroit Edison could have abandoned the free light bulb program at any time by filing an appropriate petition with the Michigan Public Service Commission. There was no evidence that the State or the Public Service Commission desired that this program continue; they were indifferent, as evidenced by the fact that other utilities regulated by the Commission did not have a free light bulb program. It is difficult to see how counsel for Detroit Edison kept a straight face while arguing that his clients were "compelled" to maintain the free light bulb program, having never attempted to show that they had filed with the Commission a petition to abandon it.

188. 428 U.S. at 585.

189. The Chief Justice would have based his decision on this distinction. *Id.* at 603-05.

190. *Id.* at 584.

191. The Court seems to have jumped back into the thicket in *Bates & O'Steen v. State Bar, supra* note 150, at 4898, by distinguishing *Cantor* on the ground that in the present case "the State's supervision was so active." Since the Court also found that the prohibition on advertising by lawyers was also an "affirmative command" of the Arizona Supreme Court, the significance of the active supervision is not readily apparent.

A second factor which vitiated compulsion in *Cantor* was the fact that the "respondent initiated the program years before the regulation agency was even created."[192] In *Asheville Tobacco Board of Trade, Inc. v. F.T.C.*, the legislature of North Carolina authorized "local tobacco boards to make reasonable rules and regulations for the economic and efficient handling of the sale of leaf tobacco at auction."[193] The rules included provisions limiting the number of days each warehouse could sell tobacco. A warehouse owner who was dissatisfied with his time allocation brought suit alleging Sherman Act violations. Among the considerations deemed relevant by the court in deciding that *Parker v. Brown* was inapplicable was the fact that local tobacco boards of trade had existed for many years at common law in North Carolina.[194] While there was no doubt that warehousemen were "compelled" to abide by the regulations limiting selling times, the pre-existing nature of the arrangements raised some question about whether compulsion really existed or whether the situation fit neatly within the *Northern Securities* rule—an attempt at "state immunization" of private conduct.[195] The fact that Detroit Edison continued the identical free light bulb program before and after becoming the subject of regulation is persuasive evidence that the program was not compelled by the State.[196]

192. *Id.* at 594.

193. 263 F.2d at 505. Paradoxically, the North Carolina legislation provided that the authorized regulations not be "in restraint of trade." N.C. GEN. STAT. §§ 106-465.

194. *See* Gray v. Central Warehouse Co., 181 N.C. 166, 106 S.E. 657 (1921).

195. *See, e.g.,* Marnell v. United Parcel Service of America, Inc., 260 F. Supp. at 406-10; Goldfarb v. Virginia State Bar, 497 F.2d at 6 n.11.

196. Another case in which compulsion appeared to be present but was not is *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971). That case involved the regulation of natural gas production by the Texas Railroad Commission. Binding monthly production quotas were determined on the basis of producer's forecasts filed with the Commission by operators having wells in the field. Defendant allegedly filed false forecasts that became the basis of production orders depriving plaintiff of its correct production quota. Having found that the forecasts were false, the Fifth Circuit held that the prerequisite of state compulsion was missing because the real decision makers were not public officials since their decisions were actually ministerial acts based entirely upon data supplied by private businessmen. *Id.* at 1295. For the argument that *Parker* does not require that the State decisions be soundly based on facts, see 10 WAKE FOREST L. REV. at 583, *citing* Handler, *supra* note 132.

For an alternatipe reading of *Woods* arguing that when the Commission rubber stamped all industry proposals, it was acting outside the scope of its duties and, therefore, no state action can result, see Note, 50 B.U.L. REV. 393, 415 (1970).

C. *Present Status of the Parker Doctrine*

Cantor nearly overruled *Parker.*[197] If it had, the state action defense would have been eliminated from United States antitrust law. According to *Cantor, Parker* may now be invoked only by state officials. Five Justices disagreed with this narrowing of *Parker,* however, and thus left open the questions of whether, and under what circumstances, the doctrine might be available to a defendant who is not a state official. This interpretation has now been made more plausible by the recent case of *Bates and O'Steen v. State Bar of Arizona*[198] where the Court introduced the concept of the "real party in interest" and treated a suit against the State Bar as a suit against the Arizona Supreme Court. In *Bates* the Court noted that "the appellee [the State Bar] acts as the agent of the court under its continuous supervision." It is clear that while the State Bar was the agent of the state, it was not a state official or a state agency as those terms have been utilized. Thus, *Bates* can be read as having reopened the question of the availability of the *Parker* doctrine to nongovernmental organizations. Assuming that the state is found to be a "real party in interest," a court's analysis will focus on what *Goldfarb* termed the threshold question—whether the defendant's alleged anticompetitive behavior was compelled by the state. The court must ask whether "the option to have . . . such a program is primarily respondent's."[199] Evidence helpful in answering this question will include preregulation behavior and the behavior of other entities subject to the regulatory scheme. Ultimately, however, although its articulation had to await *Cantor,* the test will remain what it has always been since *Parker*—whether holding a defendant liable for its anticompetitive behavior would be unfair or unjust.

IV. THE SUGAR CASES AND PARKER V. BROWN COMPARED

A. *Similarities*

Even the casual observer cannot help but notice an uncanny similarity between these two cases. It is almost as if the Court of Justice waited for a similar case to announce an analogous doctrine. Both cases deal with agricultural programs instituted by

197. The *Cantor* Court makes this clear by emphasizing that in *Goldfarb* it characterized the doctrine as "this so-called state action exemption." 428 U.S. at 600.

198. *See* note 150 *supra.*

199. *Id.* at 594.

subordinate political institutions where the principal political bodies have spoken both in the substantive area—agriculture—as well as in the area of competition. Thus, the California Prorate legislation can be equated with the Italian regulations, and the Agricultural Marketing Agreement Act plays the role of Regulation 1009/67 on the Common Market Organization for Sugar. Given this parallel, perhaps the best way to analyze the extent to which United States jurisprudence can shed light on the *Sugar Cases* is to treat those cases as if they were *Parker* and retrace our discussion of *Parker,* using the facts of the *Sugar Cases,* rather than the problems of Farmer Brown.

Under the narrowest reading of *Parker,* the Sherman Act applies only to persons, a term not intended by Congress to include states. This was not directly in issue in the *Sugar Cases* since Italy was not a party to the action. Article 85 does, however, speak of "undertakings," a term that could reasonably be interpreted to exclude Member States. Nonetheless, there has never been any doubt that the competition rules apply to the Member States.[200] Beyond the definitional argument, we considered whether the *Parker* defense is only available when there is a "consistent federal program of at least equal dignity" with the Sherman Act. In the *Sugar Cases* the sugar producers argued that the Italian regulations were "consistent" with Regulation 1009/67 because both gave priority to the well-being of sugar growers,[201] and Regulation 1009/67 enjoyed equal dignity with EEC competition policy. In neither case, however, did the issue appear material. It was discussed in the *Parker* opinion, but, as noted above, in the preemption rather than antitrust context. In the *Sugar Cases* it was never mentioned.

B. *Approval versus Compulsion*

The critical element in both *Parker* and the *Sugar Cases* is the nexus between government and private conduct. The Court in the *Sugar Cases* recognized a defense when the conduct is affected, when it is encouraged, or when it would not have taken place but for the government action. The analogous interpretation of *Parker—i.e.,* the explanation requiring the weakest connection

200. Article 90 of the EEC Treaty provides for the full application of the competition rules to public enterprises.

201. In both cases the opposing side also argued preemption by the program of the superior political institution.

between conduct and government—was set forth in *Washington Gas Light Co. v. Virginia Electric & Power Co.*, which permitted the *Parker* defense when the defendant's "activities . . . fall under state supervision."[202] To plaintiff's argument that the state agency with jurisdiction had "made no investigations and gave no affirmative approval" of defendant's conduct, the court responded that it was permissible, indeed "more likely . . . that silence means consent . . . ."[203] Thus, the rule of *Washington Gas Light* is that *Parker* is available when the state has approved the defendant's conduct.

There are analogous elements of approval in the *Sugar Cases*, in particular the Court's cryptic reference to the unnamed senior Italian official who informed the French-led export cartel of the need to harmonize supplies in the discussion of the Italian government's desire that importers proceed "in a rationalized way." There is, however, an important distinction between *Washington Gas Light* and the *Sugar Cases*. Although both may involve a weak form of government approval, the particular source of approval is crucial. In *Washington Gas Light*, approval emanated from a state body explicitly designed to oversee competition in utility services. Thus, it is possible for a court to say that the Sherman Act's protection will not be extended to cases dealing with a state agency with a similar concern; *i.e.*, preserving competition. In the *Sugar Cases* the Italian agencies were not concerned with competition, but with ensuring an adequate supply of sugar. Thus, if article 85 could not reach the Italian situation because of government actions, there was no functionally equivalent Italian agency to perform the role of supervising competition. But since Italy has no antitrust law, this was an inappropriate case for the Court of Justice holding that article 85 does not extend to practices approved by national authorities.

Although the lower United States courts have explored other phrases for the relationship between government regulation and private conduct, the Supreme Court seems to have finally settled the issue in *Goldfarb* by its use of the term "compelled."[204] This, of course, resembles the Commission's view in the *Sugar Cases* that the conduct must be "indispensible" to the Italian regula-

202. *See* note 185 *supra*.

203. 438 F.2d at 252.

204. *See* Cantor v. Detroit Edison Co., 428 U.S. at 592-93. ("The Court has already decided that the state authorization, approval, encouragement, or participation . . . confers no anti-trust immunity.") (Footnotes omitted.)

tions. While the Commission's view undoubtedly emanates from a desire to narrowly restrict the availability of this defense, the Supreme Court's use of the term "compelled" is the product of 30 years of unsuccessful attempts to apply any other term. To permit, for example, state approval to be the trigger for the *Parker* doctrine would open the door to all kinds of trivia evidencing approval and would lead to the point reached in *Washington Gas Light* where approval was held to be the absence of disapproval. Given the natural lethargy of bureaucracy, this reading could make the state action defense an enormous loophole in antitrust policy. But even the adoption of a standard like "compulsion" or "indispensible" will not end the difficulty, for if compulsion is not read to mean state approval—either before or after the alleged anticompetitive act—it comes very close to the legislative intent test. The *Parker* defense should only be available when the state explicitly directs the creation of the institution attacked; for example, the minimum fee schedules in *Goldfarb* or the joining together of Italian importers and French and Belgian exporters in the *Sugar Cases.* Even in *Parker,* however, this test would not have been met since that case dealt with an enabling act that authorized the use of restrictions in marketing programs, but did not order that they be incorporated.

C. *The Inevitable Result Test*

The fact pattern in the *Sugar Cases* and, presumably, in most United States and EEC cases involving the state action doctrine, is a step removed from an explicit legislative intent. Thus, in the *Sugar Cases* it was not alleged that the Italian government directed the importers and exporters to combine forces and act through a single agent, but rather that the Italian government had created a set of circumstances that made it "indispensible" that Eridania would act as sole agent for the Italian importers and that Sucres et Denrees would act as sole agent for the French and Belgian exporters. Although this is a permissible reading of the compulsion standard in *Goldfarb,* applying this less rigid standard to a given fact pattern is difficult. For an illustration embracing a set of circumstances analogous to those in the *Sugar Cases,* we might look to *Schenley Industries, Inc. v. N.J. Wine & Spirit Wholesalers Association.*[205]

The State of New Jersey regulated the prices of liquor sold in

205. 272 F. Supp. 872 (D.N.J. 1967).

that state by requiring that every 90 days manufacturers list the prices at which they would sell to wholesalers as well as their minimum retail prices for each of their products. Wholesalers were required to file the prices at which they would sell to retailers. Both manufacturers and wholesalers were obligated to offer liquor at the filed prices to all buyers without discrimination. The purpose of this price regulation system was "the preservation of an orderly market so as to prevent cutthroat competition . . . ."[206] Plaintiff, Schenley, desired to increase its market share in New Jersey by lowering its price to consumers. It proposed to defendants that the cost reduction be shared equally by the manufacturer and the wholesalers. While some wholesalers were amenable to the suggestion, the majority rejected the proposal. Schenley then sued alleging a Sherman Act violation, and the wholesalers defended by invoking, *inter alia, Parker v. Brown.* Schenley argued that defendants conspired to fix prices "to perpetuate uniform and unreasonably high profit margins"[207] and that "no statute or judicial decision warrants the inference, let alone holds, that New Jersey sanctions price-fixing in the manner alleged."[208] The wholesalers, on the other hand, argued "that since New Jersey provides the vehicle of Regulation 34 to promote price coordination, any concerted action resulting in uniformity is sanctioned by the State . . . ."[209] The court ruled for plaintiffs on the theory that, while "New Jersey sanctions price uniformity," there was no showing that New Jersey approved "any means collectively taken by the wholesalers to that end."[210] In particular, there was no showing that New Jersey sanctioned coercion to achieve price uniformity.[211]

Note the similarity of the wholesalers' argument and the argument of the importers and exporters in the *Sugar Cases,* in which it was alleged that the system of bidding for import quotas and the

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206. 272 F. Supp. at 879.
207. *Id.* at 877.
208. *Id.* at 879.
209. *Id.*
210. *Id.* at 880.
211. The Court distinguished *Parker v. Brown* with the observation that "New Jersey's encouragement of price stability . . . falls far short of the express delegation to the raisin growers [of the power] to propose and approve the proration plan. Further, the Supreme Court emphasized that it was still the State of California which had to give final approval and enforce the program." *Id.* at 882n.16. The distinction seems a close one, particularly since the State Department of Alcoholic Beverage Control enforces compliance with suggested retail prices. *Id.* at 876.

establishment of government price ceilings in the Italian market inevitably led to combinations of importers and exporters. In both cases the courts were called upon to evaluate the link between the alleged cause and effect, not in logical terms, but rather in terms of predictable business reaction. The issue was: How would the normal businessman react to these government policies? The modifier "normal" is required to eliminate the possibility that a businessman will act in an anticompetitive way if given the slightest excuse or chance to get away with it.

Application of this test to the New Jersey liquor wholesalers' conduct makes their case seem stronger than the court perceived it to be. New Jersey had decided that there would be only one price to wholesalers and uniform prices from wholesalers to retailers. Since there was only one manufacturer, he alone determined his desired selling price. But there were 27 wholesalers. How then would they agree on their selling price under the State scheme? The New Jersey "[r]egulations provide a brief inspection period after the prices are initially posted, in which wholesalers can examine all posted prices and raise or lower their own competing prices. Once adjusted, the new prices then become binding . . . ."[212] This provision was designed to eliminate price competition at the wholesale level. But what of the initial price setting? What if a wholesaler wishes to set a price lower than that of another wholesaler? This is permissible under the regulations and, given New Jersey's desire for price uniformity, would result in wholesale prices being set at the lowest common denominator. The New Jersey regulations, however, evidence no desire to increase the retailers' profits at the expense of wholesalers. Therefore, the normal business result of the New Jersey regulations is some form of coordination of prices among wholesalers. In fact, the New Jersey regulations can be viewed as a vehicle for facilitating this coordination in the face of a natural reluctance of competing wholesalers to do so.

The *Schenley* case illustrates the difficulties encountered in applying the "inevitable result" test when inevitability is a function of business decision-making. This field is difficult for courts to probe, and its boundaries are almost infinite. Thus, while the "inevitable result" test and the "compulsion" test may seem to lend themselves to more rigorous analysis than connectors such as "affect," "encourage," "prompt," or "flow from,"[213] experience in

212. *Id.* at 877.
213. *Id.* at 879.

United States courts holds no promise for the European Court of Justice that a viable legal rule lies down these paths. *Cantor,* in fact, can fairly be read as an abandonment of the search for a definitive connector between state action and private conduct.

D. *The Agency Test*

A better possibility for both United States and EEC jurisprudence was suggested by the First Circuit in *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.,*[214] in which it stated the issue as "whether the real decision-makers were public officials or private businessmen." The Supreme Court spoke similarly in discussing "unfairness" in the *Cantor* opinion. According to the Court, "unfairness" is established if it is shown that "the State's participation in a decision is so dominant that it would be unfair to hold a private party responsible . . . ."[215] On the other hand, when the respondent's participation in the decision is sufficiently significant, the Sherman Act is applicable. Although discussed in the context of "unfairness," the same inquiries arise in implementing the Court's second ground for possible exemption of the Sherman Act—legislative intent. All nine Justices agreed in *Cantor* that Congress did not intend that the Sherman Act should apply to "the sovereign State itself" or to its officials. Five Justices disagreed, however, that this was the outer limit of *Parker* and thus left the possibility that *Parker* might extend to state agents—non-officials whose otherwise illegal anticompetitive behavior is immunized by *Parker.* Whether a party is immunized depends upon whether his "participation in the decision [to behave anticompetitively] is sufficiently significant" to consider him a co-venturer and, thus, responsible for his conduct, or whether the "[s]tate's participation in a decision is so dominant" that he can realistically be viewed as the agent of the state. The question is whether the private parties have become agents of the state for antitrust purposes. The obvious advantage of this approach over the "unfairness" approach is that there is a well-established body of law dealing with the relationship between government and private conduct.

The framework for analysis within the EEC would be as follows. In EEC competition cases involving agricultural products, Regulation 26 provides that articles 85 and 86 do not apply to "national

214. 424 F.2d at 33 n.8.
215. 428 U.S. at 594, 595.

market organizations." In the *Sugar Cases* the Court should thus have determined (1) whether a national market organization for sugar in Italy existed; and (2) whether the sugar companies had been incorporated into that organization and thus had become agents of the state (or, more particularly, agents of the market organization). If both questions were answered affirmatively, no violation of article 85 should have been found.

E. *The Difference in United States and EEC Competition Policy*

The agency test may well be easier for companies to accept than the indispensibility test suggested by the Commission or the compulsion test suggested by the Court in *Cantor.* One can volunteer to become an agent. Will, then, the result of the proposed analysis create a gaping loophole in EEC competition policy? The distinction between United States and EEC competition policy becomes significant in answering this question. In an American case the agency aspect of the analysis is the focal point since the Sherman Act does not apply to states. In the EEC, on the other hand, labeling a company an agent of the state or determining that a company's conduct was compelled by the state does not result in the nonapplicability of article 85 since that article (except for Regulation 26) applies even to the action of states. Thus, what is at issue in an EEC case is the viability under article 85 of a state program of which the company's conduct is a part. The thrust of the Commission's future challenges must be directed, not against a company, but against the Member State into whose program the company has been incorporated. Proceeding against the company alone can only result in the kind of convoluted opinion handed down in the *Sugar Cases.* Future cases of this type should thus proceed under article 169, which explicitly provides for Commission proceedings against Member States who fail to fulfill an obligation under the Treaty. In evaluating the Member State's program the Commission will determine whether the Member State has incorporated private companies into its program as agents of the state. If so, the program will be analyzed as a totality with the private companies' conduct considered an integral part of the state program. On the other hand, if the companies' conduct is not the result of an agency relationship with a Member State's program, that conduct itself can be measured against the article 85 standard.

V. Conclusion

Once it concluded that the Sherman Act did not apply to the states, the United States Supreme Court apparently found it necessary to hold that the Act did not reach agents of the state or those whose action was compelled by the state. The state action defense to an antitrust proceeding was thus created. In *Cantor,* at least four Justices decided they did not like the results of this experiment, and they virtually put an end to the state action defense. The Court of Justice of the European Communities was not similarly pressured to find a state action defense to proceedings under articles 85 and 86 of the Treaty, but, nonetheless, did so in the *Sugar Cases.* Having pronounced the doctrine in 1942, the United States Supreme Court remained silent on the subject until 1975, when in *Goldfarb* it decided the doctrine was inapplicable to a minimum fee schedule promulgated by a state bar association. One year later in *Cantor* the doctrine was completely emasculated. Hopefully, the Court of Justice will not wait so long to define the parameters of the EEC state action defense. In making its next pronouncement on the issue the Court of Justice can benefit from United States experience, which manifests the difficulty of articulating criteria for the availability of the defense. The Court of Justice might mind the lesson of *Cantor* and conclude that the state action defense should not be allowed in an article 85 or 86 proceeding, particularly since those articles apply equally to the conduct of Member States and their agents. If the Court of Justice does establish the state action defense as a permanent feature of EEC policy, United States experience suggests that it should adopt a state agency rather than a state action analysis.