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Parker and Usery: Portended Constitutional Limits on the Federal Interdiction of Anticompetitive State Action

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I. INTRODUCTION

Despite considerable controversy concerning the size of the federal bureaucracy,[1] proposals continue to be advanced in Congress

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The opinions expressed in this article are solely those of the authors and do not necessarily represent the views of the Federal Trade Commission or those of the staff of its Bureau of Competition.

1. *See, e.g.*, U.S. NEWS & WORLD REP., Oct. 3, 1977, at 22.

and elsewhere to deal with the nation's economic and social problems by creating new federal agencies, armed with flexible administrative sanctions and broad substantive mandates,[2] or by adding to the arsenals of existing federal agencies.[3] Most, if not all, of these proposals are based on the federal commerce power.[4] Furthermore, they are fostered in part by the judicial imprimatur the Supreme Court has placed on Congress' use of the commerce power to regulate conduct that is only tenuously related to interstate commerce.[5]

Congress' continued pattern of providing federal statutory solutions for what previously were thought to be local problems raises questions about the proper relationship between rules and regulations promulgated by federal agencies and the prerogatives of state legislatures. Constitutional analysis is central to the relationship, since agency regulations are issued pursuant to a valid congressional exercise of commerce clause authority, and state sovereignty also is recognized implicitly in the Constitution's fabric, as well as explicitly in the tenth amendment.[6] Framed in more precise legal terms, the question is whether rules and regulations of federal agencies that implement congressional economic regulatory policies can invalidate or preempt state policies reflecting sovereign state regulatory goals that are not entirely consistent with Congress' scheme.

The Federal Trade Commission ("FTC" or "Commission") and its enabling legislation, the Federal Trade Commission Act of 1914[7] ("FTC Act"), provide an excellent opportunity to explore these is-

2. *See, e.g.*, Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977); S. 1685, 95th Cong., 1st Sess. (1977) (to create a Department of Education and Training); H.R. 9718, 95th Cong., 1st Sess. (1977) (to create a federal consumer protection agency).

3. *See, e.g.*, H.R. 3816, 95th Cong., 1st Sess. (1977) (to amend the Federal Trade Commission Act); H.R. 106, 95th Cong., 1st Sess. (1977) (to amend the Interstate Commerce Commission Act to strengthen motor carriers' safety standards); H.R. 77, 95th Cong., 1st Sess. (1977) (to amend the National Labor Relations Act).

4. U.S. CONST. art. I, § 8, cl. 3 provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

5. Katzenbach v. McClung, 379 U.S. 294 (1964); Wickard v. Filburn, 317 U.S. 111 (1942); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

6. U.S. CONST. amend. X provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

7. 15 U.S.C. §§ 41-58 (1976). Section 5 of the 1914 Act, Pub. L. No. 63-203, 38 Stat. 717 (1914), only prohibited "unfair methods of competition." The Supreme Court subsequently held in FTC v. Raladam Co., 283 U.S. 643 (1931), that this phrase was limited solely to conduct injurious to competition. Congress responded with the Wheeler-Lea Act, Pub. L. No. 75-447, 52 Stat. 111 (1938), which added to § 5 the phrase "unfair or deceptive acts or practices," and thereby empowered the FTC to prevent trade practices injurious to both competitors and consumers.

sues. The Commission is one of the original federal agencies created by Congress pursuant to its commerce power. The federal economic policies administered by the FTC find their genesis in the antitrust laws,[8] which represent the fullest use of congressional commerce authority to impose a national economic regulatory regime.[9] The hallmark of this regime, however, is not economic regulation by governmental fiat, but rather governmental reliance on the natural self-regulatory forces of a free competitive market unhampered by private anticompetitive trade restraints.

Using the FTC to explore the relationship between federal and state regulation of local commerce is all the more relevant because the Commission is currently embarking upon an aggressive campaign to prohibit, through a series of trade regulation rules, anticompetitive conduct that has little, if any, economic justification, but that nevertheless either is condoned, encouraged, or actually administered by state governments.[10] In addition, Congress recently has expanded the Commission's enforcement authority by enacting the 1975 Magnuson-Moss amendments to the FTC Act,[11] which extend the FTC's commerce jurisdiction to include unfair trade practices that merely affect interstate commerce[12] and also confirm the Commission's substantive rulemaking authority to define conduct constituting "unfair or deceptive acts or practices" violative of section 5 of the FTC Act.[13]

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8. The antitrust laws include the Sherman Act, 15 U.S.C. §§ 1-7 (1976), and the Clayton Act, 15 U.S.C. § 12-22, 44 (1976) as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a)-(d) (1976). The FTC has jurisdiction to enforce the Clayton Act and the FTC Act. Since the FTC Act was enacted to supplement the Sherman and Clayton Acts, it has been construed to include acts or practices that violate the spirit if not the letter of the antitrust laws. FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972).

9. United States v. American Bldg. Maint. Indus., 422 U.S. 271, 278 (1975).

10. *See, e.g.*, 3 TRADE REG. REP. (CCH) ¶¶ 10,198 (1978) (state regulation of legal services), 10,190 (1977) (state milk price regulation), 10,188 (1977) (restrictions on health maintenance organizations), 10,174 (1977) (state regulation of Blue Shield Plans), 10,186 (1977) (state regulation of accountants), 10,162 (1976) (eyeglass advertising restrictions), 10,169 (1976) (real estate brokerage regulation).

11. Magnuson-Moss Warranty—FTC Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified at 15 U.S.C. §§ 45, 46, 49, 50, 52, 56, 57a-57c, 2301-12 (1976)).

12. 15 U.S.C. § 45 (1976). Prior to amendment of the FTC Act, its jurisdiction was limited to unfair trade practices "in commerce." The change of an "affecting commerce" standard effected by the Magnuson-Moss Act was prompted by the Supreme Court's decision in United States v. American Bldg. Maint. Indus., 422 U.S. 271 (1975), in which the "in commerce" jurisdictional reach of § 7 of the Clayton Act was found to be more limited than that of the Sherman Act. The "affecting commerce" language therefore was chosen to give the FTC Act the same broad reach that Congress gave the Sherman Act.

13. 15 U.S.C. § 57a(a)(1)(B) (1976) provides that the Commission may prescribe "rules which define with specificity acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title). Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices." This grant of rulemaking

While the Commission was preparing this attack upon state-sanctioned anticompetitive conduct, however, the Supreme Court unanimously held in *Bates v. State Bar*[14] that the antitrust laws do not apply to sovereign state regulatory conduct. The Court recently reaffirmed this holding in *City of Lafayette v. Louisiana Power & Light Co.*[15] Moreover, the same Supreme Court that decided *Bates* and *City of Lafayette* suggested only one year earlier in *National League of Cities v. Usery*[16] that even Congress' exercise of its commerce clause authority may be limited from interfering with certain sovereign state policy decisions that affect interstate commerce.

This Article examines in detail the policies underlying these recent Supreme Court decisions interpreting the Sherman Act and shows that they have equal applicability to FTC enforcement of the Clayton and FTC Acts. The Article identifies the factual criteria used by the courts for distinguishing state and private conduct that is subject to the antitrust laws, and to congressional commerce dictates, from sovereign state regulatory conduct that is immune from antitrust sanction. The Article then focuses on the impact of *Usery*, which provides constitutional support for the so-called state action doctrine that was originated in *Parker v. Brown*.[17] Finally, we conclude that the state action doctrine is not limited to the confines of the Sherman, Clayton, or FTC Acts but may well stand as a constitutional limitation on the substantive, economic powers of Congress and its regulatory agencies.

II. The State Action Issue Properly Framed

Much of the confusion surrounding the FTC's authority to pro-

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authority, however, served only to place a congressional imprimatur on the holding of the Court of Appeals for the District of Columbia Circuit in National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). In that case the court held that the Commission's § 6(g) rulemaking authority included the power to promulgate substantive rules defining both "unfair methods of competition" and "unfair and deceptive acts or practices." Congress went on to state plainly in the Magnuson-Moss Act that it was not disturbing any rulemaking authority over "unfair method of competition" that the Commission already had by virtue of *National Petroleum Refiners:*

> The Commission shall have no authority under this subchapter, other than its authority under this section, to prescribe any rule with respect to unfair or deceptive acts or practices in or affecting commerce. . . . *The preceding sentence shall not affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce.*

15 U.S.C. § 57a(a)(2) (1976) (emphasis added).

14. 433 U.S. 350 (1977).
15. 98 S. Ct. 1123 (1978).
16. 426 U.S. 833 (1976).
17. 317 U.S. 341 (1943).

hibit anticompetitive state economic regulations is attributable to the manner in which this legal issue has been framed. One commentator suggests that the key to the inquiry is found in a preemption analysis based upon the Constitution's supremacy clause.[18] The supremacy clause approach argues that if a congressional intent to preempt inconsistent state law can be divined in the legislative history of the FTC Act or its amendments, then the FTC can preempt or prohibit anticompetitive sovereign state regulations.[19] Proponents of this view further contend that a preemptive congressional intent can be inferred from the legislative history of the Magnuson-Moss Act,[20] which contains references to the preemptive effect on conflicting state laws of substantive FTC rules defining "unfair or deceptive acts or practices."

This reasoning overlooks the basic fact, however, that an inquiry into congressional intent, except where necessary to interpret broad or ambiguous language, is totally unnecessary when the question is whether a federal statute preempts a facially inconsistent state law.[21] Congressional intent to preempt is clear from the very fact of a conflict between the express provisions of the federal and state statutes. Since the supremacy clause[22] preempts any state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"[23] to require further

18. Verkuil, *Preemption of State Law by the Federal Trade Commission*, 1976 DUKE L.J. 225. *See also* Note, Parker v. Brown; *A Preemption Analysis*, 84 YALE L.J. 1164 (1975).

19. Professor Verkuil's article focuses upon the Commission's recent proposed rule that permits druggists to advertise prescription drug prices, despite numerous state laws that prohibit such advertisements. *See* Disclosure Regulations Concerning Retail Prices for Prescription Drugs, 40 Fed. Reg. 24,031 (1975) (to be codified in 16 C.F.R. § 447). Professor Verkuil frames the issue in terms of a search for congressional preemptive intent: "In the final analysis, the question to be answered remains the same: Did Congress intend to preempt state laws either through passage of the Sherman Act or the FTCA [FTC Act]?" Verkuil, *supra* note 18, at 231.

20. *Id.* at 240-41.

21. In Free v. Bland, 369 U.S. 663 (1962), Chief Justice Warren quickly dismissed the contention that Texas community property law took precedence over federal regulations governing survivorship rights in United States treasury bonds. Chief Justice Warren framed the issue hy noting:

> The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail. . . . [A]ny state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield. . . . *Thus our inquiry is directed toward whether there is a valid federal law, and if so, whether there is a conflict with state law.*

Id. at 666 (emphasis added).

22. U.S. CONST. art. VI, cl. 2.

23. Hines v. Davidowitz, 312 U.S. 52, 67 (1941), *quoted in* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141 (1963).

inquiry once a conflict is demonstrated is to suggest either that Congress did not really mean what it said or that the supremacy clause should not be given full effect. A court is unlikely to entertain seriously either suggestion.

Any doubt that the FTC Act preempts inconsistent state law was put to rest by the Eighth Circuit in *Chamber of Commerce v. FTC*,[24] decided shortly after the FTC Act was enacted. In *Chamber of Commerce* the FTC alleged that a grain exchange's restrictive regulations constituted unfair methods of competition despite a state statute authorizing the exchange to regulate its members. Rejecting the exchange's contention that its conduct was authorized by state statute and, therefore, immune from federal antitrust scrutiny, the Eighth Circuit declared: "Congress, in the Federal Trade Commission Act, has assumed to legislate concerning 'unfair methods of competition' . . . and if any action . . . has that effect it is certainly subject to that act, no matter what the state has or has not authorized or permitted in that respect."[25]

Furthermore, if Congress provides an administrative agency with substantive rulemaking power, then the agency's substantive rules should have the same preemptive effect as the underlying federal statute. No court that has considered the preemptive effect of substantive agency rules has suggested that a contrary result should obtain.[26] This premise is so obvious that many congressional spokesmen and witnesses commented during the Magnuson-Moss debates that the proposed amendments' reaffirmation of the preemptive effect of FTC substantive rules was totally superfluous.[27]

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24. 13 F.2d 673 (8th Cir. 1926).

25. *Id.* at 684. *See also* Peerless Products, Inc. v. FTC, 284 F.2d 825 (7th Cir. 1960), *cert. denied*, 365 U.S. 844 (1961); Royal Oil Corp. v. FTC, 262 F.2d 741 (4th Cir. 1959).

26. Jones v. Rath Packing Co., 430 U.S. 519 (1977) (agricultural regulations); Fry v. United States, 421 U.S. 542 (1975) (federal Pay Board regulations); Free v. Bland, 369 U.S. 663 (1962) (treasury regulations); Public Util. Comm'n v. United States, 355 U.S. 534 (1958) (procurement regulations). Professor Verkuil, who suggests that some inquiry is necessary into whether Congress intended an agency's substantive rules to be preemptive, concedes that no court has undertaken this inquiry once it determined that an agency's rules had the force and effect of law. Verkuil, *supra* note 18, at 229-30.

27. *See Consumer Protection Act of 1970: Hearings on S. 3201 Before the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 130-31 (1970) (remarks of Senator Ervin). In a dialogue with Senator Cook, Harold E. Kohn, a prominent member of the plaintiff antitrust bar, expressly stated:

> At the present time . . . if the Federal Trade Commission Act has a provision which conflicts with State law, it supersedes State law . . . . If it merely adds something to give greater protection, then the State law isn't superseded. . . . The same thing applies today. If it is a regulation under the act, it is a valid regulation. If they seek to make regulations not under the act, then it is not a valid regulation or the exercise of authority

Under traditional supremacy clause analysis, an inquiry into congressional intent beyond that expressed on the face of a federal statute is necessary only when the issue is whether Congress intended its statute to occupy an entire regulatory field to the exclusion of *non-conflicting* or even *complementary* state laws. In "occupation of the field" cases, courts frequently resort to an examination of legislative history in order to determine if the full purposes and objectives of Congress can be achieved only through exclusive federal regulation.[28] In the consumer protection field, the Magnuson-Moss debates clearly demonstrate that Congress did not intend to preempt nonconflicting state statutes merely by expanding the scope of FTC jurisdiction to include regulation of conduct "affecting commerce," or by confirming the FTC's substantive rulemaking authority.[29]

Having recognized that section 5 of the FTC Act preempts conflicting state laws, one must then address the altogether different question of whether sovereign regulatory acts of the state are themselves "unfair methods of competition" or "unfair or deceptive acts or practices" within the meaning of section 5. Of course, the method used to determine the coverage of the FTC Act, in order to decide if anticompetitive state actions are prohibited, bears a striking resemblance to the "occupation of the field" branch of preemption analysis—in both instances the language and legislative history of

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by the Commission under the act.

Now, today any authority that the Commission exercises under such act to the extent that it would conflict with the State law would supersede the State law . . . .

Id. at 122-24. In addition, Professor Milton Handler, a leading opponent of FTC substantive rulemaking authority, offered a substitute for the section detailing the preemptive effect of the Magnuson-Moss amendments, which read:

STATE LAWS NOT AFFECTED

SEC. 104. The amendments made by this title shall not affect the jurisdiction of any court or agency of any State or the application of the law of any State with respect to any matter over which the Federal Trade Commission has jurisdiction by reason of such amendment *insofar as such jurisdiction or the application of such law does not conflict with the provisions of the Federal Trade Commission Act, or the exercise of any authority by the Commission under such Act.*

Id. at 352 (emphasis added). This proposed section indicates Professor Handler's position, a view shared by many commentators, that a legitimate exercise of federal authority by the Commission preempts conflicting state law.

28. *See* Jones v. Rath Packing Co., 430 U.S. 519 (1977); Sperry v. Florida, 373 U.S. 379 (1963); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

29. SENATE COMM. ON COMMERCE, MAGNUSON-MOSS WARRANTY—FEDERAL TRADE COMMISSION IMPROVEMENT ACT, S. REP. No. 151, 93d Cong., 1st Sess. 27 (1973), in which the committee stated:

[T]he Committee was mindful of the danger of making the Commission alone responsible for eradicating fraud and deceit in every corner of the marketplace. This is not the Committee's intent in expanding the jurisdiction of the Commission. State and local consumer protection efforts are not to be supplanted by this expansion of jurisdiction.

the Act must be examined and, conceivably, so must the language and history of the Constitution. The resemblance is only superficial, however. In the determination of the substantive coverage of section 5, legislative history is used to interpret the express language of the statute; whereas in "occupation of the field" preemption analysis, legislative history is examined to determine the broad policy framework within which the express statutory language is designed to operate.

III. The Federal Trade Commission Act and Its Relation to Sovereign State Regulatory Conduct

A. *The State Action Doctrine of* Parker v. Brown

Whether Congress intended the Sherman Act to apply to the sovereign regulatory conduct of a state is precisely the issue decided by the Supreme Court in *Parker v. Brown*.[30] At issue in *Parker* was a California statute permitting local raisin producers to initiate a marketing program for the express purpose of collectively restraining supply in order to maintain higher-than-competitive prices. Under the statute, a marketing plan agreed upon by a majority of the local producers was implemented by the state department of agriculture; and any producer who failed to comply with the program was guilty of a misdemeanor. Thus the raisin marketing program represented a classic case of concerted action to fix prices—precisely the type of "restraint of trade"[31] forbidden by section 1 of the Sherman Act.[32]

In a suit to enjoin enforcement of this state statute, a dissenting producer argued that the regulatory scheme, enacted and administered by the state of California, was invalid because it conflicted with the Agricultural Marketing Agreement Act of 1937,[33] unduly burdened interstate commerce, and violated the Sherman Act. Upholding the state program on all three counts, the unanimous Court declared:

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from

30. 317 U.S. 341 (1943).

31. Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

32. At the outset the Court expressly stated that: "We may assume for present purposes that the California prorate program would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate." 317 U.S. at 350.

33. 7 U.S.C. § 608c (1976).

> activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally substract 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.
>
> The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.[34]

In brief, the Court held that the Sherman Act does not apply to official action taken by a state even when that action, as in *Parker*, is implemented at the behest of private parties and constitutes a direct restraint upon competition in interstate commerce.[35]

The Court's failure to hold that the Sherman Act preempted the specific California raisin marketing statute at issue in *Parker* does not, of course, indicate that the Sherman Act does not or cannot preempt conflicting state law. The *Parker* Court clearly recognized that the Sherman Act proscribes private anticompetitive behavior and preempts any state statute that seeks to authorize it: "True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ."[36] To support this proposition, the Court cited *Northern Securities Co. v. United States*.[37] In that case the defendants argued that, because their holding company had been organized in compliance with the New Jersey corporation law and was acting consistently with its charter, the company's business practices were immune from the Sherman Act. Rejecting this defense, the Court declared:

> If the certificate of the incorporation of that company had expressly stated that the object of the company was to destroy competition between competing, parallel lines of interstate carriers, all would have seen, at the outset, that the scheme was in hostility to the national authority, and that there was a purpose to violate or evade the act of Congress.[38]

Thus the *Parker* Court clearly distinguished a state statute that is merely permissive of private anticompetitive conduct from one that actually substitutes a policy of governmental regulation for the free-market policy of the federal antitrust laws. The former statute is preempted by the Sherman Act's prohibition of private anticompetitive behavior, while the latter enactment represents a sovereign

34. 317 U.S. at 350-51.

35. At the time *Parker* was decided, California produced nearly one half of the world's raisins, and between 90 and 95 percent of all California raisins were shipped in interstate commerce. *Id.* at 345.

36. *Id.* at 351.

37. 193 U.S. 197 (1904).

38. 317 U.S. at 345.

governmental decision not prohibited by the Sherman Act.[39]

The *Parker* Court also made plain that neither states nor their agents are immune from the Sherman Act merely by reason of their status as sovereigns. Citing *Union Pacific Railroad Co. v. United States*,[40] in which the Court upheld an injunction restraining a city from participating in a scheme to grant illegal concessions to a railroad,[41] the *Parker* Court declared that "we have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade. . . ."[42]

This view was reiterated in *City of Lafayette v. Louisiana Power & Light Co.*,[43] the Supreme Court's most recent application of the state action principle to a Sherman Act challenge. In *City of Lafayette* an investor-owned utility filed an antitrust counterclaim charging a municipally owned competitor with various violations of the Sherman and Clayton Acts. The district court dismissed the counterclaim on the ground that *Parker* immunizes all state or municipal conduct from the antitrust laws.[44] On appeal, the Fifth Circuit reversed the dismissal[45] and the Supreme Court affirmed the court of appeals decision.

Relying once again on *Union Pacific*, the Supreme Court held that a municipality's conduct, like that of any other antitrust defendant, is subject to the proscriptions of the antitrust laws, unless that conduct complies with a sovereign state governmental policy designed to displace competition with regulation.[46] In so holding, *City of Lafayette* should put to rest the notion that *Parker* merely held that state officials are immune from antitrust suits[47] or that

39. *See* Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977*, 77 COLUM. L. REV. 979, 1005 (1977); Handler, *The Current Attack on the* Parker v. Brown *State Action Doctrine*, 76 COLUM. L. REV. 1, 14-15 (1976) [hereinafter cited as *Current Attack*].

40. 313 U.S. 450 (1941).

41. The city was accused of violating the Elkins Act, 49 U.S.C. §§ 41-43 (1970). The Act's price discrimination provisions governing the railroad industry resemble the Robinson-Patman amendments to the Clayton Act, 15 U.S.C. § 13 (1976).

42. 317 U.S. at 351-52.

43. 98 S. Ct. 1123 (1978).

44. 532 F.2d 431, 433 (5th Cir. 1976).

45. *Id.* at 436.

46. The Supreme Court stated: "We therefore conclude that the *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." 98 S. Ct. at 1137.

47. *Id.* at 1136-37. Interestingly, Justice Stevens, who concurred in the Court's *City of Lafayette* opinion, maintained earlier in Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), that *Parker*'s protection was limited to state officials.

Parker grants states and their agents a license to disregard the antitrust laws when pursuing proprietary commercial activity.[48]

While *Parker* is the case most often cited in support of the Sherman Act's inapplicability to sovereign state regulatory acts, *Parker* was not the first case to reach this conclusion. As early as 1895, a South Carolina federal circuit court held in *Lowenstein v. Evans*[49] that the Sherman Act did not prohibit a state-operated liquor monopoly. In 1904, almost four decades before *Parker*, the Supreme Court held in *Olsen v. Smith*[50] that the Sherman Act did not apply to a state licensing scheme for river boat pilots. The *Lowenstein, Olsen,* and *Parker* trilogy illustrate the three traditional methods employed by states to supplant competition with governmental regulation: state-owned and operated monopolies, state licensing, and direct state supervision of private decisionmaking.[51] Thus these cases confirmed that the Sherman Act leaves a state free to choose from among these alternatives.

More important, *Lowenstein, Olsen* and *Parker* are not aberrations or results that limit the state action doctrine to the Sherman Act. Rather, the results in these cases rest firmly on the historical English common-law tolerance of commercial regulation by the sovereign within a reasonably well-developed law of trade restraints.[52] As the Supreme Court observed in *Munn v. Illinois*[53]—many years before the passage of the Sherman Act:

48. As a sequel to its *City of Lafayette* holding that local governments are not automatically immune from antitrust attack, the Court recently remanded for further consideration three other challenges to anticompetitive municipal conduct. Fairfax Hosp. Ass'n v. City of Fairfax, 562 F.2d 280 (4th Cir. 1977), *judgment vacated*, 98 S. Ct. 1642 (1978); City of Impact v. Whitworth, 559 F.2d 378 (5th Cir. 1977), *judgment vacated*, 98 S. Ct. 1642 (1978); Pleasure Driveway & Park Dist. v. Kurek, 557 F.2d 580 (7th Cir. 1977), *judgment vacated*, 98 S. Ct. 1642 (1978). The issue that must now be addressed in each of these cases is whether the city's conduct is part of a *Parker*-protected scheme to substitute economic regulation for the self-regulatory forces of a free market, or whether the city merely acted anticompetitively, for whatever purpose, in an otherwise unregulated market. If the latter, antitrust liability would attach.

49. 69 F. 908 (C.C.D.S.C. 1895).

50. 195 U.S. 332 (1904).

51. *See Current Attack, supra* note 39, at 8.

52. *Id.* at 3. Professor Robert H. Bork, however, argues in his recent book, R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978), that the English common law of trade restraints was neither well-developed nor internally consistent, and that it had little to do with the policies or design of the Sherman Act.

53. 94 U.S. 113 (1876).

> [I]t has been customary in England from time immemorial, and in this country from its first colonization, [for the sovereign] to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold.[54]

The constitutional doctrine of federalism bound the *Parker* Court to acknowledge that a state is entitled to the dignity of a sovereign.[55] Federalism, therefore, compelled the conclusion that, absent the expression of congressional intent to the contrary, the Sherman Act does not comprehend state action. Thus *Parker*'s conclusion is founded not only on the Sherman Act but also on the Anglo-American common law and the Constitution.

B. The Application of the Parker *Doctrine to the Federal Trade Commission Act*

Some commentators have suggested that since *Parker* was decided under the Sherman Act, its reasoning is not applicable to the FTC Act.[56] The Fourth Circuit did not draw this distinction, however, when given the opportunity to do so in *Asheville Tobacco Board of Trade, Inc. v. FTC*.[57] In that case, the Commission invoked section 5 to challenge local tobacco board regulations that restricted the selling time allocated to each warehouse. A North Carolina statute, however, authorized these local boards, composed solely of warehousemen, to use their own discretion in regulating selling time. On the basis of this statute, the Asheville Board asserted that its regulations were protected state action. The Fourth Circuit characterized the issue as "whether the activities of tobacco boards of trade . . . [fall] within the rule of *Parker v. Brown*."[58] After examining the provisions of the North Carolina statute, the court found that the statute did not substitute a sovereign regulatory scheme for private competitive business decisions. Instead, the state statute simply granted to private warehousemen the right to allocate selling time independently among themselves without the fear of governmental interference or sanction. Accordingly, the court rejected the board's state action defense and echoing the Supreme Court's direc-

54. *Id.* at 125.

55. As Chief Justice Stone declared: "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 (emphasis added).

56. *See* Note, *The State Action Exemption and Antitrust Enforcement Under the Federal Trade Commission Act*, 89 HARV. L. REV. 715 (1976).

57. 263 F.2d 502 (4th Cir. 1959).

58. *Id.* at 508.

tive in *Parker*, asserted that: "A state can neither authorize individuals to perform acts which violate the antitrust laws nor declare that such action is lawful."[59]

In a further attempt to distinguish the FTC Act from the Sherman Act, it has been urged that sound policy considerations demand that the FTC Act apply to the sovereign regulatory conduct of a state.[60] It is argued that, because the FTC's remedies are prospective only and the FTC Act does not include a private treble damage sanction, enforcement of federal antitrust policy by the FTC does not pose the same threat to federalism that the Court perceived in *Parker*.[61] It is also asserted that the FTC Act was designed to reach conduct not comprehended by the Sherman or Clayton Acts, and that the regulation of state action represents an appropriate and desirable use of the Commission's expertise as an arbiter of trade regulation policy.[62]

But on closer examination, these appeals to policy do not sustain their burden. The absence of a treble damages provision in the FTC Act has no bearing upon the concerns expressed by the Court in *Parker*. The *Parker* case was brought in a court of equity where treble damages would not have been awarded even if plaintiff had sought them.[63] To the contrary, the key to *Parker* is its recognition of a state's right to regulate, not just the state's right to be free from money damages. Moreover, the argnment that *Parker*'s holding is limited to the concept of state immunity from Sherman Act sanctions[64] does not square with *Parker*'s reliance upon *Olsen*, in which the state action immunity from Sherman Act penalties was extended to private defendants. Neither does it square with *City of Lafayette*, which held that a city's status as a politial subdivision

59. *Id.* at 511.

60. Note, *supra* note 56, at 732-36.

61. This same concern for the potential of a treble damage sanction moved Justice Blackmun to dissent from the Court's *City of Lafayette* decision declaring: "It is a grave act to make governmental units potentially liable for massive treble damages when, however 'proprietary' some of their activities may seem, they have fundamental responsibilities to their citizens for the provision of life-sustaining services such as police and fire protection." 98 S. Ct. at 1152 (Blackmun, J., dissenting).

62. Note, *supra* note 56, at 736-37.

63. In the trial court, Brown sought an injunction against enforcement of the California Agricultural Prorate Act, alleging that the Act was an illegal interference with, and an undue burden on, interstate commerce. A three-judge federal district court granted the injunction solely on the basis of these allegations. The parties did not address the Sherman Act claim until requested to do so by the Supreme Court on its own motion for reargument. Cantor v. Detroit Edison Co., 428 U.S. 579, 585-86 (1976) (Stevens, J., for a plurality).

64. *Id.* at 591-92. In his plurality opinion, Justice Stevens, relying on excerpts from the *Parker* briefs, asserted that *Parker* is limited to a holding of immunity for official action taken by state officials. *See* note 47 *supra* and accompanying text.

of the state, without more, does not confer antitrust immunity.

In order to regulate economic activity, a state must be able to command the acquiescence of the private sector in the state's economic policies. It would be anomalous to argue that a state may, with impunity, impose anticompetitive economic regulations upon the business community, but that the individual businessmen who act in compliance with these regulations must respond in damages to injured competitors.[65] Even more anomalous, however, is the assertion that a prospective, remedial action taken by the FTC against an anticompetitive state economic regulation would not constitute exactly the type of interference with state sovereignty that *Parker* found to be a violation of federalism in the context of a private injunctive action brought under the Sherman Act. If anything, enforcement of the FTC Act offers even greater opportunity for interference with state sovereignty, because the FTC Act prohibits an even broader range of conduct than either the Sherman or the Clayton Acts.[66]

Perhaps in recognition of this problem, it also has been suggested that because the Commission is expert in matters of trade regulation policy, its judgments will best harmonize the twin policies of a competitive national economy and state regnlation of local activity.[67] But while the Commission is clearly an expert arbiter of federal trade regulation policy, and although its judgments may well be superior to those of the various states, the clear implication of *Parker* is that federalism preserves the freedom of the states to supplant the national policy of unrestrained competition with state regnlation, absent a clear congressional statement to the contrary. Viewed in this light, the conclusion is inescapable that the policy underlying *Parker* applies with equal vigor to the FTC Act.

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65. In his vigorous *Cantor* dissent, Justice Stewart severely criticized Justice Stevens' plurality view that *Parker* is limited to Sherman Act immunity for state officials:

> The plurality opinion would hold that [*Parker*] decided only that "the sovereign State itself" . . . could not be sued under the Sherman Act. This view of *Parker*, which would trivialize the case to the point of overruling it, flies in the face of the decisions of this Court that have interpreted or applied *Parker*'s "state action" doctrine, and is unsupported by the sources on which the plurality relies.

428 U.S. at 616-17. In the accompanying footnote, Justice Stewart adds: "If *Parker v. Brown*, *supra*, could be circumvented by the simple expedient of suing the private party against whom the State's 'anticompetitive' command runs, then that holding would become an empty formalism, standing for little more than the proposition that Porter Brown sued the wrong parties." 428 U.S. at 616-17 n.4.

66. Note, *supra* note 56, at 733-34.

67. *Id.* at 737.

IV. THE CRITERIA FOR IDENTIFYING *Parker*-PROTECTED STATE ACTION

A. The Application of Parker *Applies When There Is a Clear State Policy To Supplant Free Competition with State-Supervised Regulation*

Parker was not the last decision in which the Supreme Court or one of the lower federal courts had an opportunity to examine the ambit of the state action exemption. These subsequent cases, however, have neither added to nor subtracted from the rule of law announced in *Parker*—that state action is not subject to the Sherman Act. Instead, these cases have focused solely on a delineation of a satisfactory test for identifying sovereign regulatory acts. *Parker*'s progeny have isolated two indicia necessary for the existence of protected state action: (1) a clear state policy to supplant competition; and (2) state supervision of the scheme chosen to replace the rules of the marketplace. Unless both these requirements are met, the state regulation at issue will be subjected to Sherman Act scrutiny.

In *Schwegmann Brothers v. Calvert Distillers Corp.*,[68] for example, the Supreme Court struck down a Louisiana statute that allowed a manufacturer to enforce a resale price-maintenance agreement against every wholesaler or retailer to whom he sold his product, so long as at least one such wholesaler or retailer signed the agreement. While the Louisiana statute clearly reflected a state policy to supplant free competition, and thus met the first criterion of state action, the second requirement was not met because there was no state supervision of the resale price-maintenance scheme. After concluding that Louisiana's statute merely authorized private parties to engage in price-fixing—conduct clearly proscribed by the Sherman Act[69]—the Court invalidated the law under the supremacy clause.[70]

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68. 341 U.S. 384 (1951).

69. *E.g.*, United States v. Parke, Davis & Co., 362 U.S. 29 (1960); United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

70. The same analysis dictated the result in Chamber of Commerce v. FTC, 13 F.2d 673 (8th Cir. 1926), and Asheville Tobacco Bd. of Trade, Inc. v. FTC, 263 F.2d 502 (4th Cir. 1959). *See* text accompanying notes 24-25 & 56-58 *supra*. In both cases, a state statute merely authorized local agricultural exchanges to regulate their own affairs. There was no state involvement in any of the subsequent anticompetitive rules adopted by the respondents. In each case, the absence of any state supervision was fatal to the exchanges' state action defense. *Cf.* Allstate Ins. Co. v. Lanier, 361 F.2d 870 (4th Cir.), *cert. denied*, 385 U.S. 930 (1966) (*Parker* applies when the state approves rates established by a board of private insurance companies). *Allstate* suggests that so long as some state supervision is present, *Parker* will apply even when the initial decision, as in *Asheville*, is made solely by private parties.

More recently, in *Goldfarb v. Virginia State Bar*,[71] a state bar association's fee schedules were challenged in a private treble damage action brought under the Sherman Act. The state bar argued that the fee schedules were ancillary to the lawyer disciplinary rules established by the Virginia Supreme Court, and therefore were protected state action. The Supreme Court, however, could not identify any state statute or state supreme court rule or decision that sanctioned lawyer price-fixing.[72] Hence the first criterion was not met. Having found no protected state action, the Supreme Court held that the fee schedules were subject to the Sherman Act.

Chief Justice Burger noted in *Goldfarb*, however, that the Court's decision should not be read to imply that a state lacked power to restrain lawyer competition in the exercise of its sovereign authority:

> We recognize that the States have a compelling interest in the practice of professions within their boundaries . . . . We also recognize that in some instances the State may decide that "forms of competition usual in the business world may be demoralizing to the ethical standards of a profession." . . . In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions.[73]

These principles in no way were altered by the Supreme Court's 1976 decision in *Cantor v. Detroit Edison Company*.[74] In *Cantor*, a retail druggist challenged a light bulb exchange program offered by a state-regulated utility company on the grounds that the program was an illegal tying arrangement. The challenged program was part of a rate tariff which, pursuant to state statute, had been filed with the state public service commission. The program could not be abandoned until the utility filed a new tariff, which likewise would

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71. 421 U.S. 773 (1975).

72. Chief Justice Burger declared:

> The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign. . . . Here we need not inquire further into the state-action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent. Respondents have pointed to no Virginia statute requiring their activities. . . .

421 U.S. at 790. The lack of any anticompetitive state policy also mandated the result in George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir. 1970). There a state-employed architect was charged with conspiracy to secure state adoption of pool specifications that excluded the plaintiff and many of the defendant's other competitors. The First Circuit was unable to identify any state policy to supplant free competition, and thus held that the architect was not entitled to *Parker* protection despite his status as a state employee.

73. 421 U.S. at 792-93.

74. 428 U.S. 579 (1976).

require state approval. Nevertheless, the Supreme Court rejected the utility's state action defense, finding that the relevant state statute, which clearly supplanted free competition in the sale of electricity with a state-supervised scheme of regulation, was silent regarding the sale of light bulbs. Since the state policy concerning light bulb sales was "neutral," if not procompetitive, there was no state policy that met the first criterion.[75] Therefore, the Court found that the light bulb exchange program was not "state" but only "private" action and thus fully subject to the Sherman Act.[76]

Finally, the Supreme Court's recent *City of Lafayette* decision demonstrates that unless the governmental conduct at issue meets both criteria, it is not exempt from the antitrust laws. Thus, *City of Lafayette* shows that *Parker*, and the principles of federalism from which it is derived, do not protect all governmental acts, but merely those that are reserved exclusively to sovereigns—such as the expenditure of public monies, or the decision to supplant free competition in a local market with a scheme of governmental regulation. Hence, if a state, by itself or through its agents, does not choose to supplant competition, but merely chooses to compete, for

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75. In his plurality opinion, Justice Stevens stated:

> The distribution of electric light bulbs in Michigan is unregulated. The statute creating the Commission contains no direct reference to light bulbs. Nor, as far as we have been advised, does any other Michigan statute authorize regulation of that business. . . . The Commission's approval of respondent's decision to maintain such a program does not, therefore, implement any statewide policy relating to light bulbs.

428 U.S. at 584-85. In his *Cantor* concurrence, Chief Justice Burger, the author of the Court's *Goldfarb* opinion, stressed that Justice Stevens' conclusion, quoted above, was all that was necessary to decide the *Cantor* case, assuming Justice Stevens was correct. Thus, in his view, the plurality's effort to limit *Parker* to antitrust immunity for state officers was inappropriate:

> I do not agree, however, that *Parker v. Brown* . . . can logically be limited to suits against state officials . . . . There was no need in *Parker* to focus upon the situation where the State, in addition to requiring a public utility "to meet regulatory criteria insofar as it is exercising its natural monopoly powers," . . . also purports, without any independent regulatory purpose, to control the utility's activities in separate, competitive markets. . . . To find a "state action" exemption on the basis of Michigan's undifferentiated sanction of this ancillary practice could serve no federal or state policy.

428 U.S. at 603-05.

76. The Supreme Court's analysis in *Cantor* should be compared with that of the Fourth Circuit in Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248 (4th Cir. 1971). There, a competing gas company challenged an electric utility's promotional practice of offering free underground wire installation to consumers who chose electric over gas appliances. The utility's promotional plan was filed with the State Corporation Commission and became effective when the Commission took no steps to disapprove it. The relevant state statute clearly authorized the Commission to regulate electric utility promotions. Accordingly, the court held that since the statute reflected a state regulatory policy, and the conduct required was ultimately subject to governmental control, the challenged conduct was *Parker*-protected, regardless of how aggressively the state actually exercised its supervisory role. *See also* Gas Light Co. v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971) (utility's promotional plan that was affirmatively sanctioned by the state was protected by *Parker*).

whatever public purpose, it must observe the antitrust laws like any other competitor. In short, proprietary or commercial acts, though done by a constitutional sovereign, enjoy no exemption from the antitrust laws, nor are any enabling statutes permitting such conduct immune from the automatic preemptive effect of the supremacy clause.

B. *The* Cantor*-Implied "Balancing Test" Rejected*: Bates v. State Bar

Despite the Court's consistent adherence to the two state action criteria set forth above, attempts have been made to extrapolate from the Court's *Cantor* opinion new limitations and restrictions on the basic rule of law announced in *Parker*. These efforts stem in large measure from Justice Blackmun's concurrence in *Cantor*, in which he suggested that a "rule of reason" approach should be used to assess the justification for state regulatory schemes, similar to the test used in the traditional equal protection review.[77] Justice Blackmun's argument seems to endorse Professor Slater's earlier suggestion[78] that a "balancing test" should be applied as a third criterion to restrict the scope of the *Parker* state action exemption. This balancing approach would further require that a state regulatory scheme be reasonably and rationally related to the policies it purports to promote.

Such a balancing test has no place in the state action doctrine, however, because it does not address the only constitutionally significant issue—whether the activity under review is sovereign regulatory conduct not subject to antitrust proscription. In fact, the balancing test can operate only under the assumption that the underlying state regulatory conduct is necessarily subject to the antitrust laws, an assumption not permitted by the *Parker* rationale.[79]

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77. Some of this interpretive difficulty associated with Justice Blackmun's *Cantor* concurrence can be traced to the manner in which he framed the issue:

> I also agree with MR. JUSTICE STEVENS that the particular anticompetitive scheme attacked in this case must fall despite the imprimatur it claims to have received from the State of Michigan. To say, as I have, that the Sherman Act generally pre-empts inconsistent state laws is not to answer the much more difficult question as to which such laws are pre-empted and to what extent.

428 U.S. at 609. He then went on to announce his unique "rule of reason" test: "I would apply, at least for now, a rule of reason . . . . I would assess the justifications of such enactments in the same way as is done in equal protection review, and where such justifications are at all substantial . . ., I would be reluctant to find the restraint unreasonable." 428 U.S. at 610-11.

78. Slater, *Antitrust and Government Action: A Formula for Narrowing* Parker v. Brown, 69 NW. L. REV. 71, 104-08 (1974).

79. Even Professor Slater, the herald of *Cantor*'s "balancing test," agrees that it is contrary to the Supreme Court's holding in *Parker*:

Furthermore, the *Cantor* balancing test not only erroneously presumes that state action is subject to antitrust scrutiny, but also mistakenly imports into federal commerce power analysis a fourteenth amendment test designed to determine whether state action comports with the commands of the due process and equal protection clauses.[80] Thus, this approach ignores the fact that applicability of the federal commerce power to state action is governed by a completely different set of standards than those governing the applicability of the fourteenth amendment.[81]

Moreover, this balancing test leads to the equally erroneous conclusion that an unconstitutional state economic regulatory scheme can be attacked as a "restraint of trade" violative of the antitrust laws. But proof that a state regulatory scheme is unconstitutional establishes only that the scheme is an impermissible exercise of sovereign regulatory authority, not that the scheme was private or state proprietary conduct that might violate the antitrust laws.

This distinction between unconstitutional state regulation and "state action" that violates the antitrust laws is central to the Supreme Court's decision in *Bates v. State Bar*.[82] In *Bates*, a unanimous Court dispelled all doubts that *Cantor* had generated about the continuing vitality of the *Parker* doctrine. Writing on behalf of the *Bates* Court, Justice Blackmun, the architect of the *Cantor* balancing test, implicitly withdrew his support of Professor Slater's

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The approach actually adopted in *Parker*, however, is not one of balancing the importance of the state policy against the injury to competition. A fair reading of the case indicates that the Court believes that the Sherman Act, and its policy in favor of competition, do not apply to state action taken in pursuit of public policy goals, no matter how weak the public goals or how serious the injury to competition.

Id. at 91.

80. Indeed, an "interest balancing" yardstick is traditionally employed by the Court to determine the validity of state action under the due process or equal protection clauses of the fourteenth amendment. *See* Graham v. Richardson, 403 U.S. 365 (1971); Shapiro v. Thompson, 394 U.S. 618 (1969); Griswold v. Connecticut, 381 U.S. 479 (1965). But the Court has rejected all scrutiny of state economic regulation under the "substantive due process" branch of the fourteenth amendment. Ferguson v. Skrupa, 372 U.S. 726 (1963). Nevertheless, all state action must comport with every relevant constitutional provision that applies to the states through the fourteenth amendment, as well as with the commerce clause. *See, e.g.*, Bates v. State Bar, 433 U.S. 350 (1977); Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366 (1976); Gibson v. Berryhill, 411 U.S. 564 (1973).

81. In order to meet the threshold jurisdictional requirement for fourteenth amendment scrutiny the conduct at issue must be "state action." *See* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) (fourteenth amendment did not apply to a private shopping center's antipicketing rules because the restrictions were not state action). On the other hand, as National League of Cities v. Usery, 426 U.S. 833 (1976), makes plain, certain "state action" is constitutionally exempt from the federal commerce power.

82. 433 U.S. 350 (1977).

third criterion and reaffirmed the vitality of *Parker*.

Bates arose in the context of a disciplinary proceeding against two lawyers who violated an Arizona Supreme Court injunction against lawyer advertising. The lawyer-appellants, relying on *Goldfarb* and *Cantor*, challenged the disciplinary action in a state court, asserting that the state bar association's rules, as adopted and enforced by the Arizona Supreme Court, violated the Sherman Act. On appeal from an Arizona Supreme Court decision that imposed modified sanctions against the appellants, the United States Supreme Court dismissed the appellants' Sherman Act defense. The Court noted that the advertising ban reflected a sovereign state policy to restrict lawyer competition[83] and that the Arizona Supreme Court supervised the ban through its participation in disciplinary procedures such as those instituted against the appellants.[84] On this basis alone the Court held that the state bar association's lawyer advertising ban was sovereign regnlatory action immune to antitrust attack.[85]

Employing the fourteenth amendment, the *Bates* Court then went on to invalidate Arizona's ban on lawyer advertising as an infringement upon plaintiff's first amendment right of commercial free speech.[86] But this constitutional holding played no part in the Court's Sherman Act analysis. No balancing test was utilized and no antitrust liability was found or even suggested.[87] Thus, *Bates*

83. Justice Blackmun stated: "In the instant case . . . the challenged restraint is the affirmative command of the Arizona Supreme Court . . . . [T]hus, the restraint is 'compelled by direction of the State acting as a sovereign.' " *Id.* at 359-60.

84. Justice Blackmun further noted that the State Bar acts as the Arizona Supreme Court's supervised agent in enforcing that court's rules: "Although the State Bar plays a part in the enforcement of the rules, its role is completely defined by the court; the appellee acts as the agent of the court under its *continuous supervision.*" *Id.* at 361 (emphasis added).

85. The appellants contended that the Arizona advertising ban failed the so-called "balancing test" because the state's interest in regulating the bar was not outweighed by the federal interest embodied in the Sherman Act. *Id.* at 360-61. The Court rejected this argument, however, by citing *Goldfarb*'s assertion that a state's regulatory interest in the practice of professions is beyond peradventure. *Id.* at 360 n.11. There was no mention of a countervailing federal interest in free competition.

86. *Id.* at 363-82.

87. It has been suggested, however, that since *Cantor*, two courts ostensibly have applied a balancing test—the Ninth Circuit in Boddicker v. Arizona State Dental Ass'n, 549 F.2d 626 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977), and the Eastern District of Virginia in Surety Title Ins. Agency, Inc. v. Virginia State Bar, 431 F. Supp. 298 (E.D. Va. 1977). But it should be noted that neither case actually supports a balancing test. The issue in *Boddicker* was whether the practice of dentistry was a learned profession exempt from the antitrust laws. Citing *Goldfarb*, the Ninth Circuit held that it was not. In *Surety Title*, while the court purportedly undertook a balancing test, the issue was whether a Virginia bar association's opinion regarding the unauthorized practice of law shielded the defendant's anticompetitive conduct. The bar association's opinion, however, had no greater claim to state action immunity than the fee schedules in *Goldfarb*; and thus a balancing test was unnecessary to a finding

confirms that the Supreme Court's adherence to *Parker* and the doctrine of federalism remains as vigorous today as in 1943. Indeed, the recent *City of Lafayette* decision provides final although perhaps unnecessary reassurance of the continued vitality of the *Parker* state action doctrine: "*Parker* and its progeny make clear that a State properly may, as States did in *Parker* and *Bates*, direct or authorize its instrumentalities to act in a way which, if it did not reflect state policy, would be inconsistent with the antitrust laws."[88]

C. A Factual Inquiry Is Mandated To Determine the Applicability of the Twin Parker *Criteria*

The preceding analysis is not meant to suggest, however, that the Commission should abandon its campaign against anticompetitive regulatory conduct that is only thinly cloaked with the mantle of the state. Quite to the contrary, the twin criteria of state action—a clear state policy to supplant competition and adequate state supervision—are not conclusions to be reached as a matter of law, but rather are factual determinations. When a state action defense is raised before a court or the FTC, each of those tribunals is clearly entitled to look behind the pleadings to determine if a sovereign state policy to supplant free competition actually exists and whether the state is in fact supervising it. The Court remanded *City of Lafayette* and three similar cases to the trial court for precisely this type of factual examination.[89]

In addition, it would appear that this was the basis for the Ninth Circuit's remand of the Commission's challenge in *California v. FTC*.[90] In that case, a California statute authorized the formation of a Milk Advisory Board composed of industry members appointed by the governor.[91] In conjunction with the state agriculture department, the advisory board was empowered to disseminate advertisements encouraging public consumption of milk as a generic commodity. Another section of the statute, however, prohibits adver-

of liability. Moreover, both courts explicitly qualified their opinions by adverting to *Bates*. *See* 549 F.2d at 631 n.6; 431 F. Supp. at 309.

88. 98 S. Ct. at 1139.

89. The Court's remand of this case raises the spectre of treble damages. This concern prompted Justice Blackmun to dissent in *City of Lafayette*. *See* note 60 *supra*. The *City of Lafayette* plurality rejected this consideration, noting that the issue of remedy would become relevant only after the district court had found that the defendants actually violated the antitrust laws. 98 S. Ct. at 1131 n.22. It may well be, however, that an argument based upon the doctrine of sovereign immunity will preserve municipal treasuries from the threat perceived by Justice Blackmun.

90. 549 F.2d 1321 (9th Cir.), *cert. denied*, 434 U.S. 876 (1977).

91. Marketing Act of 1937, CAL. FOOD & AGRIC. CODE §§ 58601-59293 (West).

tisements that are unfair or misleading.[92] Pursuant to this statute, and under the aegis of both the Advisory Board and the state department of agriculture, an advertisement was issued urging that milk be consumed in unlimited quantities.

Because medical evidence suggests that unrestricted milk consumption might actually injure public health, the Commission commenced an administrative proceeding to ban this advertisement as "unfair and deceptive" under the FTC Act. The Advisory Board brought an action in federal district court to enjoin the Commission's proceeding, arguing that, as a state agency, the *Parker* doctrine placed it beyond the Commission's jurisdiction. The district court issued a preliminary injunction, finding that because the Board was a state agency, the FTC probably lacked jurisdiction as a matter of law.[93] The Ninth Circuit reversed the lower court and remanded the case to the Commission, holding that the FTC is entitled to hold a factual hearing on the question of its subject matter jurisdiction.[94]

City of Lafayette makes plain the fact that the Board's mere status as a state agency will not shield it from the Commission's jurisdiction. Indeed, because the state statute specifically prohibits false and misleading advertisements, the Commission may well find that no state policy supplants the federal policy embodied in the FTC Act, and that, therefore, the Board's conduct is subject to the sanctions of the FTC Act.[95]

Furthermore, should the Commission eventually enjoin the Board's advertisement, the factual setting presents an excellent example of how the FTC can employ its broad substantive powers to prevent an offensive trade practice that is neither a traditional antitrust violation nor state action, without exposing the offending party to the devastation of treble damages. This is precisely the role Congress had in mind for the Commission—to deal flexibly with

92. *Id.* at § 58889.

93. California v. FTC, 1974-2 TRADE CASES (CCH) ¶ 75,328 (N.D. Cal.). The district court asserted that whether the FTC had jurisdiction over the advisory board depended upon whether the board is a "person," "partnership," or "corporation" as defined by the FTC Act. The court then cited *Parker v. Brown* for the proposition that the FTC was probably without jurisdiction to proceed against the Board. *Id.* at 98,039. In framing the issue in this manner, the court mistakenly construed *Parker* to hold that a state's mere status as a sovereign exempts its conduct from antitrust scrutiny. *See* text accompanying note 47 *supra*.

94. The court held that the plaintiffs' suit to enjoin the FTC proceeding was not ripe because the plaintiffs had not exhausted their administrative remedies. The court went on to state that "a full factual development is an essential prerequisite for determining the *Parker v. Brown* issue." 549 F.2d at 1325.

95. The case would stand in the same posture as George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir. 1970). *See* note 71 *supra*.

pernicious trade practices not otherwise subject to attack by the Justice Department or private parties through court enforcement of the Sherman or Clayton Acts.[96]

V. THE *Parker* PRINCIPLE AS A CONSTITUTIONAL DOCTRINE: *National League of Cities* v. *Usery*

The Court has not yet addressed the issue of whether Congress, through the use of the commerce power, could amend the Sherman or FTC Acts to include state action within the coverage of the Acts or to prohibit certain sovereign state policy choices affecting interstate commerce. The *Parker* Court expressly reserved this question declaring: "We may assume also, without deciding, that Congress could, in the exercise of its commerce power, prohibit a state from maintaining a stabilization program like the present because of its effect on interstate commerce."[97] The answer to this constitutional issue, however, may well have been foreshadowed in *National League of Cities v. Usery*.[98]

The question presented in *Usery* was whether the 1974 extension of the Fair Labor Standards Act's[99] minimum wage provisions to nearly all state and local governmental employees[100] was a constitutional exercise of the commerce power. In an opinion authored by Justice Rehnquist, a divided Court[101] held that, even though the wages of state and local governmental employees affected interstate commerce, the application of the federal minimum wage statute to these wages transgressed an affirmative constitutional limitation on the federal commerce power. The constitutional limitation recognized in *Usery* preserves the sanctity of a sovereign state policy decision, even though that decision conflicts with a federal mandate governing the private sector. In so holding, the Court explicitly overruled its 1968 decision in *Maryland v. Wirtz*[102] that had upheld a similar application of the federal minimum wage statute to state school and hospital employees.

Like the *Parker* decision, *Usery*'s result is not a consequence of

96. *See* Verkuil, *supra* note 18, at 234.

97. 317 U.S. at 350.

98. 426 U.S. 833 (1976).

99. 29 U.S.C. §§ 201-219, 557 (1970).

100. The only state or local government personnel exempted from the 1974 version of the Act are executive, administrative, or professional employees, as well as public officeholders and their staffs. 29 U.S.C. §§ 203(e)(2)(C), 213(a)(1) (Supp. V 1975).

101. Justice Rehnquist was joined by Justices Stewart and Powell, and Chief Justice Burger. Justice Blackmun concurred separately. Justice Brennan dissented, joined by Justices White and Marshall. Justice Stevens dissented separately.

102. 392 U.S. 183 (1968).

preemption analysis. At the outset of his opinion Justice Rehnquist carefully points out that the issue in *Usery* is not federal preemption of an inconsistent state law:

> Congressional power over areas of private endeavor, even when its exercise may pre-empt express state law determinations contrary to the result which has commended itself to the collective wisdom of Congress, has been held to be limited only by the requirement that "the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution."[103]

Nor was the issue in *Usery* whether the state statute or regulatory scheme affected interstate commerce. The interstate commerce nexus in both cases was clear: in *Parker*, the state-created program affected large quantities of raisins that moved in interstate commerce; and in *Usery*, the wages paid to state and municipal employees also affected interstate commerce.[104] Rather than assessing the effect of the Fair Labor Standards Act on interstate commerce, the Court interpreted the scope of an affirmative constitutional limitation on the federal commerce power:

> Appellants in no way challenge . . . the breadth of authority granted Congress under the commerce power. Their contention, on the contrary, is that when Congress seeks to regulate directly the activities of States as public employers, it transgresses an affirmative limitation on the exercise of its power akin to other commerce power affirmative limitations contained in the Constitution.[105]

The *Usery* Court resolved this legal issue in a fashion similar, if not identical, to the approach taken in *Parker*. Implicit in *Parker* was a recognition of the states' sovereign right, grounded in Anglo-American common law, to regulate local commerce;[106] *Usery*, too, explicitly recognized the long-standing sovereignty of the states:

> Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States. But in many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized.[107]

But, the proposition that some forms of state action are constitutionally protected from Congress' exercise of its plenary constitu-

103. 426 U.S. at 840, *quoting* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 262 (1964).

104. *See* United States v. Darby, 312 U.S. 100 (1941) (local wages affect interstate commerce).

105. 426 U.S. at 841.

106. *See* text accompanying notes 50-51 *supra*.

107. 426 U.S. at 844, *quoting* Lane County v. Oregon, 74 U.S. (7 Wall.) 71 (1868).

tional powers is not unique to *Usery*. The same view was expressed in *New York v. United States*,[108] in which Chief Justice Stone, the author of the *Parker* opinion, declared on behalf of four concurring members of the Court that Congress cannot tax states in the same fashion as private individuals:

> A State may, like a private individual, own real property and receive income. But in view of our former decisions we could hardly say that a general non-discriminatory real estate tax (apportioned), or an income tax laid upon citizens and States alike could be constitutionally applied to the State's capitol, its State-house, its public school houses, public parks, or its revenues from taxes or school lands, even though all real property and all income of the citizen is taxed.[109]

While a state's limited constitutional exemption from the federal taxing power is well recognized,[110] a similar exemption from the federal commerce power has never been explicitly rejected. Admittedly, the Fair Labor Standards Act, the same statute challenged in *Usery*, was upheld in *United States v. Darby*[111] as a valid exercise of the commerce power. Moreover, the Court in *Darby* rejected the defendant's claim that the real target of the Act, regulation of local labor conditions, was reserved to the control of the states by the tenth amendment.[112] *Darby*, however, does not represent the denial of a state sovereignty exemption from the commerce power. The 1941 version of the Fair Labor Standards Act addressed only private conduct, and the defendant's labor contracts in *Darby* had no connection to the state whatsoever. Thus, the defendant's tenth amendment defense had less force than if the state itself had been the proponent, and his only colorable claims were based upon other constitutional provisions and upon the assertion that the private conduct the Fair Labor Standards Act sought to regulate did not affect interstate commerce. Chief Justice Stone, for a unanimous Court, acknowledged that "[w]hatever their motive and purpose, regulations of commerce which do not infringe some constitutional

108. 326 U.S. 572 (1946).

109. *Id.* at 587-88. The case was decided by an eight-member court. Justice Frankfurter, who delivered the opinion of the Court (in which only one other justice joined), would have sanctioned a federal tax on state activity as long as the federal tax did not discriminate against a state. *Id.* at 583-84. Justice Frankfurter nevertheless acknowledged that some state activity, such as maintaining a statehouse, could never be taxed without unjustifiably interfering with state sovereignty. *Id.* at 582. Most intriguing was the dissenting opinion of Justices Douglas and Black, who would have found all state activity immune to federal taxation. *Id.* at 590-98.

110. Texas v. White, 74 U.S. (7 Wall.) 700 (1868).

111. 312 U.S. 100 (1941).

112. *Id.* at 106.

prohibition are within the plenary power conferred on Congress by the Commerce Clause."[113]

He then disposed of the defendant's tenth amendment argument as follows:

> Our conclusion is unaffected by the Tenth Amendment which . . . states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.[114]

In brief, the Court in *Darby* held that when a federal statute meets all other constitutional requirements and does not infringe upon state sovereignty, the tenth amendment does not inhibit the operation of the supremacy clause.

Similarly, *Usery* is consistent with Chief Justice Stone's earlier opinion in *United States v. California*.[115] In *California* the Federal Safety Appliance Act[116] was held applicable to a state-owned and operated railroad. Finding that the state's railroad clearly affected interstate commerce,[117] the Court further noted that application of the federal statute to the railroad caused no injury to the state's integrity as a sovereign. Applying the federal statute, the Court made California's railroad adhere to national safety standards:

> [W]e think it unimportant to say whether the state conducts its railroad in its "sovereign" or in its "private" capacity. That in operating its railroad it is acting within a power reserved to the states cannot be doubted. . . . [T]he exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution.[118]

This observation in *United States v. California* does not contradict but rather confirms the conclusions in *Parker* and *Usery*. All three

113. *Id.* at 115.

114. *Id.* at 123-24 (citations omitted).

115. 297 U.S. 175 (1936). Review of *United States v. California* and the other precedents relevant to this section of the Article—*Parker, Darby* and *New York v. United States*—reveals a previously unacknowledged fact: Chief Justice Stone's opinions etched the intricate twentieth-century relationship between the states and the federal government. With the overruling of *Maryland v. Wirtz, Usery* confirmed that the Court today remains true to the supple principle of federal-state accommodation described by Stone more than a generation ago.

116. 45 U.S.C. §§ 1-16 (1970).

117. 297 U.S. at 182-83.

118. *Id.* at 183-84.

cases indicate that the mere status of a state as a sovereign does not prevent preemption under the supremacy clause and that only a threat to the constitutionally recognized sovereign activity of a state can inhibit the application of the federal commerce power.[119]

The *United States v. California* holding, however, was central to the Court's interim decision in *Maryland v. Wirtz*,[120] which *Usery* expressly overruled. Like *Usery*, *Wirtz* involved the constitutionality of the Fair Labor Standards Act. In 1966, Congress amended the Act to extend the minimum wage provisions to state school and hospital employees. The appellants in *Wirtz* contended that the 1966 amendments were not within the commerce power because Congress was, in effect, telling states how to perform such traditional state functions as the provision of medical and educational services. The Court properly discerned that this contention was "not factually accurate."[121] As the Court realized, the 1966 amendments did no more than tell the states that, in the operation of their schools and hospitals, they had to pay certain employees a minimum wage. The true vice of the Act, as the *Usery* Court later recognized, was not that it told states how specifically to administer schools, hospitals, or other state functions or services, but rather that it interfered with the states' more basic decisions concerning the allocation of resources among the various sovereign functions the states are expected to perform. The *Wirtz* Court apparently did not appreciate this distinction, probably because Maryland incorrectly framed the issue of infringement. When the Court determined that Maryland's claim of interference with sovereignty was unfounded, it disposed of the case on the basis of a mechanical application of *United States v. California*.[122] Nevertheless, the *Wirtz* Court did note in passing that when interpreting the scope of the commerce power, the Court "has ample power to prevent what the appellants purport to fear, 'the utter destruction of the State as a

119. Justice Stone also commented that even if operation of a railroad were a state function, exempt from federal taxation, and one in which the state traditionally and customarily had engaged, the state still would have to conform its conduct to the federal mandate:

> [W]e look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.

Id. at 185.

120. 392 U.S. 183 (1968).

121. *Id.* at 193.

122. Justice Harlan stated: "But while the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. . . . This was settled by the unanimous decision in United States v. California, 297 U.S. 175." *Id.* at 196-97.

sovereign political entity.' "[123] Thus, if the nature of the Act's interference with Maryland's sovereign right to allocate its resources had been presented to the Court as clearly as it was later in *Usery*, the Court might have sustained Maryland's position.

In any event, the Court did not persist on the errant course set by *Wirtz*. Six years later, in *Fry v. United States*,[124] the Court again addressed the scope of the affirmative state sovereignty limitation on the commerce power. In June 1973 President Nixon declared a national economic emergency and invoked the standby authority granted him by Congress to impose temporary wage and price controls.[125] Shortly thereafter, a federal Pay Board created by executive order to set wage-hike restrictions established a seven percent limit on all salary increases. Seeking to implement a 10.6 percent increase for state employees, Ohio applied to the Board for an exemption. Upon the denial of that petition, Fry and another state employee secured a writ of mandamus from the Ohio Supreme Court to compel state officials to pay the salary increase.[126] The United States then enjoined enforcement of the mandamus in federal district court, and on appeal to the Temporary Emergency Court of Appeals, the district court's decision was affirmed on the basis of the Supreme Court's rulings in *United States v. California* and *Wirtz*.[127]

On certiorari to the United States Supreme Court, the state employees urged that although their wages had an effect on interstate commerce, the Pay Board's salary freeze was unconstitutional because, like the federal minimum wage law in *Wirtz*, the salary freeze interfered "with sovereign state functions and for that reason the Commerce Clause should not be read to permit regulation of all state and local governmental employees."[128] The Court rejected this argument, finding that a federally ordered temporary wage-freeze was even less intrusive upon state sovereignty than the federal minimum wage law upheld in *Wirtz*.[129] In dismissing the *Fry* petition, however, the Court foreshadowed the later holding in *Usery*:

> Petitioners have stated their argument, not in terms of the Commerce power, but in terms of the limitations on that power imposed by the Tenth Amendment. While the Tenth Amendment has been characterized as a

123. *Id.* at 196.

124. 421 U.S. 542 (1974).

125. The President derived his authority from the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 (1976). The President's authority expired on April 30, 1974.

126. State v. Ferguson, 34 Ohio St. 2d 252, 298 N.E.2d 129 (1973).

127. United States v. Ohio, 487 F.2d 936 (Temp. Emer. Ct. App. 1973), *cert. denied* as to the State of Ohio, 421 U.S. 1014 (1975).

128. 421 U.S. at 547.

129. *Id.* at 548.

"truism," stating merely that "all is retained which has not been surrendered," *United States v. Darby*, 312 U.S. 100, 124 (1941), it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.[130]

Only after disposing of the tenth amendment argument did the Court give preemptive effect to the administrative ruling of the Pay Board: "Since the Ohio wage legislation conflicted with the Pay Board's ruling, under the Supremacy Clause the State must yield to the federal mandate."[131] In this respect *Fry* followed the approach of the Court's Sherman Act decision in *Schwegmann Brothers v. Calvert Distillers Corp.*[132] In *Schwegmann*, the supremacy clause and its mandatory preemptive effect also was called into play when the Louisiana non-signer resale price-maintenance statute, which conflicted with the Sherman Act, was found not to rise to the level of *Parker*-protected state action.

When placed in its historical context, *National League of Cities v. Usery* should be viewed not as an aberration, but rather as the latest enunciation of the long-recognized principle that the Constitution affirmatively protects the right of states to engage in activities reserved to them as sovereigns—a principle implicit in *New York v. United States, Darby, United States v. California, Wirtz, Fry*, and, of course, *Parker*. It also should be stressed that *Usery*'s result rested not upon a feared impact upon any particular state or municipal service, but rather upon the extent of encroachment upon certain state decisions that embody their role as governmental units.[133] Application of the federal statute in *Usery* would have stripped the states of their discretion in setting wages. This abridgement of discretion, in turn, would have denied the states the flexibility to make fundamental decisions regarding how local tax monies and other public resources should be spent.[134] For this reason, as the *United States v. California* Court had suggested, attempts to limit this doctrine by distinguishing between the traditional or non-

130. *Id.* at 547 n.7.

131. *Id.* at 548.

132. 341 U.S. 384 (1951).

133. Justice Rehnquist explicitly stated: "We earlier noted some disagreement between the parties regarding the precise effect the amendments will have in application. We do not believe particularized assessments of actual impact are crucial to resolution of the issue presented, however." 426 U.S. at 851.

134. The *Usery* Court noted: "If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' 'separate an independent existence.'" *Id.*

traditional nature of a particular state service affected by a federal statute are untenable.[135]

Usery also demonstrates that it is no answer to the infringement of sovereignty that the impact of the federal statute on the state is no different from its impact on private employers. Nor is it relevant that enforced state compliance enhances the achievement of congressional objectives. These arguments cannot save a statute that directly threatens state sovereignty:

> Th[e] dilemma presented by the minimum wage restrictions may seem not immediately different from that faced by private employers . . . . The difference, however, is that a State is not merely a factor in the "shifting economic arrangements" of the private sector of the economy . . ., but is itself a coordinate element in the system established by the Framers for governing our Federal Union.[136]

It should be stressed that *Usery*—like *Parker* and its progeny—did not declare a blanket rule that any federal commerce statute interfering with a state policy choice is unconstitutional. Rather, *Usery* and *Parker* held only that certain state policy decisions that directly affect a state's ability to carry out its functions as a sovereign governmental unit are protected from federal commerce power interference. A case-by-case factual examination is required to determine first if the activity challenged is conduct reserved to states as federally recognized sovereigns and, second, whether federal intervention will imperil the state's integrity as a constitutional sovereign.

VI. CONCLUSION

Both *Usery* and the *Parker* doctrine rest upon the constitutional principle that the federal commerce power cannot be exercised in a fashion that drastically impairs a state's ability to function as a sovereign in a federal system. Furthermore, as the precedents un-

135. *See* note 118 *supra*. One such effort is made by Professor Frank I. Michelman in his article, *States' Rights and States' Roles: Permutations of "Sovereignty" in* National League of Cities v. Usery, 86 YALE L.J. 1165 (1977). Professor Michelman seizes on the list of "traditional" governmental functions enumerated in *Usery* to assert that *Usery* really protects the states' role as providers of free public services. *Id.* at 1172. He goes on to raise the possibility that since this role of the states is constitutionally protected by *Usery*, those citizens for whom the services are intended may, as a result of *Usery*, have a constitutional right to receive them. *Id.* at 1182. There are several flaws in Professor Michelman's analysis—not the least of which is his failure to recognize that the character of the service affected by the minimum wage law in *Usery* is irrelevant to the Court's decision. The proper issue in *Usery* is whether states shall be free from federal commerce power interference to make certain economic decisions that fundamentally affect their role as coordinate sovereigns in the federal system.

136. 426 U.S. at 848-49.

derlying both *Parker* and *Usery* demonstrate, this principle is not antithetical to the Constitution's supremacy clause. The supremacy clause merely dictates that when federal and state statutes operate in the same area, the federal rule overrides that of the state whenever there is a direct conflict between the two, or when Congress determines that the federal rule shall be exclusive. The altogether different constitutional issue addressed by *Parker* and *Usery* is whether certain state policy choices that form the basic elements of a state's role as a sovereign can be subordinated to a federal commerce power directive.

The *Parker* doctrine makes plain that Congress intended the antitrust laws to defer to sovereign state economic regulatory decisions. This deference, therefore, must be paid by both the FTC and the courts. Nevertheless, the *Parker* line of cases require that only conduct pursuant to genuine sovereign state regulatory choices enjoys antitrust immunity. States are not free to authorize private anticompetitive conduct, nor to disregard the antitrust laws themselves in pursuit of purely commercial objectives.

Similarly, *Usery* gives explicit constitutional recognition to the underlying premise of *Parker* and holds that principles of federalism prohibit even Congress from using the commerce power to encroach upon state sovereignty. Thus, by casting *Parker* in a constitutional mold, *Usery* extends *Parker*'s significance far beyond the confines of antitrust. Consequently, *Parker* and the twin state-action criteria identified by its progeny mark the boundary of state conduct that is not only immune from the antitrust laws, but also immune from the federal commerce power.