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THE ANTITRUST STATE APPROVED TRANSACTION EXEMPTION

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INTRODUCTION

For centuries the common law has recognized that certain callings and certain industries are affected with a public interest. Consequently, in a wide variety of economic activity, there is government involvement and control through statutory schemes administered by federal and state agencies and private bodies.[1] Following the depression in 1929, recovery efforts gave birth to many production and price-fixing laws as federal and state governments attempted to rationalize competition.[2] Governments—not just the federal government—fix, control or affect prices, license entry into industry and markets and otherwise regulate and control the production and sale of goods and services rendered.

The restraint of competitive practices is inherent in all such regulatory activity. There is a need in such regulatory schemes for industry-government cooperation which, if perpetrated solely in a private sector, would violate fundamental antitrust law. Statutes regulating commerce in most instances, however, do not expressly repeal antitrust laws

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1. It is well established that regulated industries are not per se exempt from the antitrust laws. Georgia v. Pennsylvania Ry. Co., 324 U.S. 439, 456 (1945); United States v. Borden, 308 U.S. 188, 198 (1939); Marnell v. United Parcel Serv. of America, Inc., 260 F. Supp 391 (N.D. Cal. 1966). A number of federal regulatory statutes, however, expressly provide immunity from the antitrust laws for certain approved conduct. Bank Merger Act of 1966, 12 U.S.C. § 1828 (Supp. II, 1967); Webb-Pomerene Act, 15 U.S.C. § 62 (1964); Shipping Act of 1916, 46 U.S.C. § 814 (1964); Federal Communications Act, 47 U.S.C. §§ 221(a), 222(c)(1) (1964); Interstate Commerce Act, 49 U.S.C. §§ 5(11), 5(b), 22 (1964); Federal Aviation Act, 49 U.S.C. § 1384 (1964).

2. Federal and state marketing orders for agricultural products, particularly milk, which remains the subject of strict economic control in many states, are examples of government intrusion into business specifically to control production and price. *See* Agricultural Marketing Agreement Act, 7 U.S.C. § 601 (1964). For an example of a state milk control law see VA. CODE ANN. § 3.1-420 (1966). The federal constitutionality of such laws is well established. Nebbia v. New York, 291 U.S. 502 (1933). The state constitutionality of the Virginia law was affirmed in *Highland Farms Dairy, Inc. v. Agnew*, 16 F. Supp. 575 (E.D. Va. 1936), *aff'd*, 300 U.S. 608 (1937). The myriad of fair trade laws sanctioning price-fixing practices are likewise representative of government involvement in business. *See* 1 TRADE REG. REP. ¶¶ 6000-6374 (1965).

forbidding monopolization and restraint of trade.[3] In a limited number of statutes, Congress has ordained certain conduct with immunity from the antitrust laws,[4] but state legislatures are powerless to create similar immunities. State legislation or state government action that conflicts with the federal antitrust laws is invalid under the supremacy clause of the Federal Constitution.[5]

As a result of the juxtaposition of antitrust laws and state regulatory statutes, including their administrative provisions, there has developed a source of anitrust exemption generally referred to as the "state approved transaction" or "state action" exemption.[6] Few cases have involved the

3. The Supreme Court has never held that a federal regulatory act has, by implication, completely displaced the antitrust laws. On the other hand, no serious challenge has ever been made that the acts of the federal government are a violation of the antitrust laws. In *United States v. Rock Royal Cooperative Ass'n*, 307 U.S. 533 (1939), a case in which the validity of federal milk orders was at issue, the Court said: "[T]he fact that their [the Federal milk orders] effect would be to give cooperatives a monopoly of the market would not violate the Sherman Act." *Id.* at 560.

This is not to say that federal regulation creates an antitrust exemption per se. Private action which is within the scope of the commerce clause of the United States Consitution is subject to the antitrust laws and is not exempted by a federal regulatory scheme unless the Sherman Act has been limited by Congress in the regulatory statute or an exemption by implication is inherent in the repugnancy of the regulatory statute to the antitrust laws. The reluctance of the courts to imply antitrust immunity is engrained in the national economic policy reflected in the antitrust laws.

> We have long recognized that the antitrust laws represent a fundamental national economic policy and have therefore concluded that we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry. We have, therefore, declined to construe industry regulation as an implied repeal of the antitrust laws even when the regulatory statute did not contain an accommodation provision such as the exemption provisions of the Shipping and Agricultural Acts.

Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 218 (1966).

> Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.

United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-51 (1963).

The canon of statutory interpretation which Mr. Justice Story stated in *Wood v. United States*, 41 U.S. (16 Pet.) 342, 362-63 (1842), was first propounded in an antitrust context in *United States v. Borden Co.*, 308 U.S. 188 (1939) where the court stated:

> It is not sufficient . . . "to establish that subsequent laws cover some or even all of the cases provided for by the prior act; for they may be merely affirmative, or cumulative, or auxiliary." There must be "a positive repugnancy between the provisions of the new law, and those of the old; and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy."

Id. at 198-99.

4. *See* note 1 *supra.*

5. U.S. CONST. art. 6. *See* Northern Securities Co. v. United States, 193 U.S. 197 (1903).

6. There are numerous exemptions from the antitrust laws. Some are provided by specific legislation. *See* note 1 *supra.* Only certain agreements may be affected, the Webb-Pomerene Act, 15 U.S.C. § 62 (1964), although broad areas of activities might be involved. Other areas of exemption have arisen from judicial interpretation; the "state action immunity" is such a creature. For a categorization of antitrust exemptions see

issue, and no single case has set forth the essentials of the doctrine. Certain characteristics of the principle,[7] however, can be gleaned from the decisions. This article will review the significant cases involving the exemption and consider the question of whether the declared unconstitutionality of a state regulatory statute should result in the withdrawal of immunity for activity during the life of the statute.

Parker v. Brown

While the Supreme Court immediately recognized that the Sherman Act should not apply to restraints imposed by government decree,[8] the state action exemption was not fully formulated until 1943 in *Parker v. Brown,*[9] wherein the exemption was first applied and its rational explication is best given.

In *Parker,* a program adopted by the state agricultural prorate advisory commission under the California Agricultural Prorate Act was attacked as being in conflict with the federal antitrust laws. The Prorate Act authorized the establishment of programs for the marketing of agricultural commodities produced in California so as to restrict competiton among the growers and maintain prices in the distribution of the commodities.

Subsequently, a program was adopted to control the production and sale of raisins. Minimum prices were prescribed and producers were

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American Bar Association Section of Antitrust Law Committee on Antitrust Exemptions, *Antitrust Exemptions,* 33 ABA ANTITRUST L.J. 99 (1966).

7. The cases all involve actions under the Sherman Act. The Robinson-Patman Act has not been reviewed in litigation in such a context. Though a specific inclusion is not contained in the Act, sales transactions between private firms and the federal government are generally not regarded as subject to the Robinson-Patman Act. Perhaps this explains the absence of litigation involving that statute.

Shortly after the passage of the Robinson-Patman Act, it was amended to provide that nothing therein "shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit." 15 U.S.C. § 13(c) (1964). The purpose of this legislation was "to make certain that favors in price which are occasionally extended to eleemosynary institutions, because of the character of the institution, do not fall under the ban of the Act." H.R. REP. No. 2161, 75th Cong., 2d Sess. (1938). This objective and the principle of statutory construction that a statute will not be construed to restrict the prerogatives and privileges of a sovereign unless expressly provided, is the basis of the implicit exclusion of sales transactions to the government from the application of the Act. 38 OP. ATT'Y GEN. 539 (1936).

On the other hand, in the realm of contracts solely between private parties meeting the jurisdictional requirements of the Robinson-Patman Act, a "state action immunity" case is certainly conceivable. *But see* note 16 *infra.*

8. In *American Banana Co. v. United Fruit Co.,* 213 U.S. 347 (1909), Justice Holmes, commenting on the action of a foreign sovereign, stated: "[I]t is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a foreign sovereign power to bring about a result that it declares by its conduct to be desirable." *Id.* at 358.

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

directed to sell at not less than such prices. The plaintiff, a producer and packer of raisins, brought suit to enjoin the enforcement of the program by the Director of Agriculture and members of the state prorate commission, alleging that the program was invalid because it conflicted with the federal antitrust laws. The District Court for the Southern District of California agreed and enjoined the operation of the program. But the Supreme Court reversed upon the following reasoning:

> 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. . . .
>
> But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It 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. 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 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 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.
>
> 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. . . .
>
> There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only "business combinations." . . .
>
> . . . Here the state command to the Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be

> approved by referendum of producers,[10] it is the state acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy.[11]

The Court construed the Sherman Act as intending to suppress combinations to restrain competition and individual and corporate attempts to monopolize but not to restrain a state or its officers from action directed by its legislature. In so doing, however, the Court did not immunize a large area of private action within the meaning of the commerce clause from the antitrust laws simply because the industry or parties involved were subject to state regulation. Consonant with the well-settled rule that regulated industries are not per se exempt from the federal antitrust law,[12] the *Parker* decision itself recognizes that "[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 . . . ."[13]

In judging the applicability of the *Parker* rule to other situations, it is essential to inquire whether the action in question is direct or indirect state action and, if indirect, whether it is action taken at the express and affirmative direction of the state so as to make the conduct "state action." Only the conduct of state government is beyond the reach of the antitrust laws. Since the conduct of private business has the mere sanction of the sovereign, it is not immunized under the rule. A number of cases are particularly significant in delineating the elements of the state action theory.

Comprehensiveness of Regulatory Scheme

In every decision considering the state action immunity doctrine it is apparent that an important feature is the presence of a pervasive regulatory statute. *Allstate Insurance Co. v. Lanier*[14] convincingly in-

10. The procedure for establishing a California prorate program was as follows: A petition signed by at least ten producers in the area requesting a program was filed with the Commission. The Prorate Commission, a state appointed agency, could grant the petition upon making certain findings, and thereafter select a Program Committee from nominees chosen by the producers in the area. The Prorate Commission could select two additional members to represent the distributors. The Program Committee, composed primarily of producers, would propose a specific marketing program for the commodity, subject to the approval of both the Prorate Commission and sixty-five percent of the affected producers owning at least fifty-one percent of the acreage devoted to the creation of the regulation.

11. Parker v. Brown, 317 U.S. 341, 350-52 (1943).

12. *See* note 3 *supra.*

13. Parker v. Brown, 317 U.S. 341, 351 (1943).

14. 242 F. Supp. 73 (E.D.N.C. 1965), *aff'd*, 361 F.2d 870 (4th Cir.), *cert. denied*, 385 U.S. 930 (1966).

dicates the importance of a comprehensive state regulation.

In *Allstate*, the authorized anticompetitive activity complained of involved the fixing of insurance rates by a state bureau, the North Carolina Automobile Rate Administration Office. Through this office North Carolina maintained a system of automobile insurance regulations under which uniform rates and standards were promulgated. As in *Parker*, the initiative for rates and standards came from a rating bureau composed of insurance companies. Their proposals were ultimately approved, modified or disapproved by the Commissioner of Insurance. All companies selling insurance were compelled to adhere to the established rates and standards as a condition of doing business in the state. Individual companies were thereby effectively precluded from competing through offering lower premium rates. Allstate, wanting to offer insurance in North Carolina at less than state approved rates, brought suit for a declaratory judgment seeking invalidation of the North Carolina program on the ground that it permitted the unsupervised establishment of minimum premiums by private companies.[15] The Justice Department filed an amicus memorandum supporting this position.[16]

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15. *Compare* Asheville Tobacco Bd. of Trade, Inc. v. FTC, 263 F.2d 502 (4th Cir. 1959) *with* Winn Ave. Warehouse v. Winchester Tobacco Warehouse, 341 F.2d 287 (6th Cir. 1965); Bale v. Glasgow Tobacco Bd. of Trade, 339 F.2d 281 (6th Cir. 1965) *and* American Fed'n of Growers v. Neal, 185 F.2d 869 (4th Cir. 1950). The boards of trade, though created by statute, were usually composed of the local warehousemen and received little government supervision. Antitrust coverage was generally assumed and disputed practices were decided mainly on the issue of reasonableness. In *Asheville*, the board was, typically, established "to make reasonable rules and regulations for the economical and efficient handling of the sale of leaf tobacco at auction on the warehouse floors . . . in North Carolina . . . ." N.C. GEN. STAT. § 106-465 (1966). The statute specifically stated that it did not authorize the organization of any association having for its purpose the control of prices or the making of rules and regulations in restraint of trade.

16. The *Allstate* case is significant because the Department of Justice filed an amicus memorandum in the district court. Following the district court's decision that the establishment of rates was a governmental function, the United States did not join in the appeal. Allstate Ins. Co. v. Lanier, 361 F. 2d 870, 872 n.2 (4th Cir. 1966).

In light of the cases applying the state action theory, the Federal Trade Commission has announced that it does not regard the antitrust laws as extending to the sale of milk by a distributor if the sale is made in compliance with state milk orders. Advisory Op. No. 154, 3 TRADE REG. REP. ¶ 18,138 (1967). In that opinion, the distributor did not have a warehouse in the state in question, but shipped dairy products into the state from warehouses located in neighboring states. In most cases, significant price increases were required by the order issued pursuant to the state's dairy products marketing act. Except where higher prices were required by law, the distributor sold the products at substantially lower prices to stores located in the neighboring states because of competitive pressures.

The distributor expressed concern that, by agreeing to comply with the orders of the state, he would subject himself to possible liability under the Sherman Act, the Federal Trade Commission Act or the Clayton Act, as amended by the Robinson-Patman Act, since the sales of commodities of like grade and quality were made at different prices to purchasers in different states. Hence, an advisory opinion was requested as to whether the distributor would be in violation of the above federal antitrust legislation adminis-

The statute creating the North Carolina rating bureau established substantial state control. Although the insurance carriers proposed rates, the final authority to approve or disapprove rate changes was lodged in the Commissioner of Insurance. Most importantly, the statute specifically authorized price-fixing[17] since it required adherence to the rates prescribed by the bureau. Under the circumstances, the district court found that the North Carolina rating bureau was operated under the active supervision of the state[18] and Allstate did not challenge that finding on appeal.[19]

In affirming the decision of the district court granting defendant's motion for summary judgment, the Fourth Circuit Court of Appeals said:

> The central question in both cases [*Parker* and *Allstate*] is whether a program of regulation established and actively supervised by a state is subject to the antitrust laws. Absent Congressional action departing from the rule of *Parker v. Brown,* the North Carolina statutory plan is clearly valid.[20]

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tered by the Commission if he complied with the state laws fixing the minimum resale prices of dairy products.

> The Commission advised that it was of the opinion that the distributor would not be subject to a charge of violating any of the laws it administers because of its compliance with the lawful orders of the states as to the minimum resale prices of dairy products. In the Commission's view, it is well settled that the antitrust laws have application to the actions of individuals, partnerships and corporations and not to the activities of a state. While a state may not authorize individuals to perform acts which violate the antitrust laws nor declare that such action is lawful, it may, in the exercise of its sovereign power, itself conduct such regulation of business activities within its borders as its own legislature shall properly deem necessary in the public interest. So long as the resulting regulation is a state as opposed to individual activity, those subject to the regulation would not be subject to a charge of violating the antitrust laws by reason of their compliance with the state's order.

Id.

17. N.C. GEN. STAT. § 58-246(1) (1965).

18. The North Carolina statute creating the rating bureau provided:

> There is hereby *created* a bureau to be known as the North Carolina Automobile Rate Administrative Office, which office shall be established in the Compensation Rating and Inspection Bureau of North Carolina, created under § 97-102, and *shall be a branch* and under the management of general manager of the Compensation Rating and Inspection Bureau of North Carolina.

N.C. GEN. STAT. § 58-246 (1965) (emphasis added).

19. Allstate Ins. Co. v. Lanier, 361 F.2d 870, 872 (4th Cir. 1966).

20. *Id.* The district court reviewed the legislative history of the McCarran Act which provides for the retention of controls of the antitrust statutes in all areas of the insurance business "to the extent that such business is not regulated by state law." McCarran Act, 15 U.S.C. § 1012(b) (1964). While under consideration, section 2(b) was strongly opposed by Senator Pepper who advocated greater subjection of the insurance business to the antitrust laws. The court stated that section 2(b) was a legislative recognition of the *Parker* doctrine:

> There can be no doubt that the McCarran Act permits the State to regulate the

In another insurance rate-fixing case, a proceeding similar to *Allstate,* the North Little Rock Transportation Company sought to enjoin the fixing of automobile liability insurance rates under the Arkansas automobile risk plan.[21] Unlike the North Carolina rate bureau statute[22] in the *Allstate* proceeding, the Arkansas statute[23] did not create the rate-fixing bureau as an agency of the state, but rather the bureaus were private organizations licensed by the state. As in North Carolina, however, the bureaus were expressly provided the means whereby private insurance companies could, with statutory sanction, engage in cooperative action in rate-making.

As the Court assumed in *Parker,* the district court concluded that the price-fixing activities of the bureau, in the absence of public regulations or Congressional exemptions, would constitute a violation of the Sherman Act.[24] In declining to issue an injunction against the rate bureau's activities, the court said, "[t]he Sherman Act is not violated by acts authorized and regulated by state statute."[25]

The common thread in *Parker, Allstate* and *North Little Rock Transportation Co.* is the comprehensive nature of the state regulatory scheme and the ultimate state regulation of the accused transaction or conduct. Even though a scheme is initiated among private businessmen and results in anticompetitive restraints, its connection with a legitimate state regulatory purpose creates an immunity.

Specific Direction of Immune Transaction

Of equal importance to the pervasive character of the regulatory scheme is the requirement that the alleged anticompetitive activity be of specific state direction. This was the situation in both *Allstate* and *North Little Rock Transportation.* In *Parker,* the challenged activity was specifically decreed by the prorate commission. It is not sufficient that an industry is subject to state supervision, even though the supervision is

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insurance business to the extent of regulating and handling, disposition of policies, and prices paid for insurance and proceeds for claims. *Parker v. Brown* indicates it would go that far in the field of insurance, and Congress went at least as far as that decision with the McCarran Act.

Allstate Ins. Co. v. Lanier, 242 F. Supp. 73, 87 (E.D.N.C. 1965).

21. North Little Rock Transp. Co. v. Casualty Reciprocal Exch., 85 F. Supp. 961 (E.D. Ark. 1949), *aff'd,* 181 F.2d 174 (8th Cir. 1950).

22. N.C. GEN. STAT. §§ 58-246 to -248 (1965), particularly § 58-246(1).

23. ARK. STAT. ANN. §§ 66-3101, 66-3115 to -3124 (1966).

24. North Little Rock Transp. Co. v. Casualty Reciprocal Exch., 85 F. Supp. 961, 964 (E.D. Ark. 1949).

25. *Id.* Out of context this dictum is too broad; however, within the facts of *North Little Rock Transportation* it is acceptable. The decision is similar to the rationale of the immunity cases.

general and broad. As indicated earlier,[26] the existence of state regulation does not assure antitrust immunity.[27]

In *Miley v. John Hancock Life Insurance Co.*,[28] an insurance broker licensed in Massachusetts brought a private treble damages action under the Sherman Act against certain Massachusetts insurance companies, certain officers of those companies and members of the State Employees Group Insurance Commission. Plaintiff, along with other insurance companies, had submitted a proposal to provide insurance coverage for state employees in accordance with specifications established by the Massachusetts State Employees Group Insurance Commission. Subsequently, the Commission negotiated with and ultimately awarded the contract to companies other than those represented by plaintiff. Plaintiff alleged that the insurance contract was awarded to the other companies as the result of a conspiracy between the successful bidders and the Commission. Noting the regulatory nature of the statute establishing the State Employees Group Insurance Commission, a motion to dismiss was granted. The Court stated:

> [T]he fact that the transaction was regulated by Massachusetts law removes it from the scope of the Sherman Act and any violation of the state regulations is a matter solely of state law.[29]

The State as a Party to the Proceeding

In certain decisions subsequent to *Parker,* it would appear that a state agency or officer must be named as a respondent for the state action immunity doctrine to be applicable.[30] Indeed, in *Parker* the prorate districts were established through the actions of state officials[31] and operated under the supervision of the state's Director of Agriculture. Parker, the respondent, was the Director of Agriculture of California. Similarly, in *Miley* the Massachusetts Insurance Commission and officials of the State Employees Group Insurance Commission, a legislative creature, were included as defendants.[32]

No decision has directly considered the issue of whether the state action exemption is available only in a proceeding against a state or state

26. *See* notes 11-12 *supra* and accompanying text.
27. Marnell v. United Parcel Serv. of America, Inc., 260 F. Supp. 391 (N.D. Cal. 1966).
28. 148 F. Supp. 299 (D. Mass.), *aff'd per curiam*, 242 F.2d 758 (1st Cir. 1957).
29. 148 F. Supp. at 302. *See also* E.W. Wiggins Airways, Inc. v. Massachusetts Port Authority, 362 F.2d 52 (1st Cir. 1966).
30. Asheville Tobacco Bd. of Trade v. FTC, 263 F.2d 502 (4th Cir. 1959).
31. *Parker* was instituted as an action against a state official. Brown v. Parker, 39 F. Supp. 895 (S.D. Cal. 1942). *Cf.* Asheville Tobacco Bd. of Trade v. FTC, 263 F.2d 502 (4th Cir. 1959).
32. Miley v. John Hancock Life Ins. Co., 148 F. Supp. 299 (D. Mass. 1957).

agency. In cases instituted against tobacco boards of trade which were staffed by local growers and authorized to regulate marketing, the state action principle was not applied, partially on the grounds that the boards were not agencies of the state. The Fourth Circuit, for example, in *Asheville Tobacco Board of Trade v. FTC*,[33] quoting from the related FTC opinion, stated:

> [T]he officers and directors of the Asheville Board, and of other boards, are neither elected by the people nor appointed by State authority; they are businessmen who own and operate warehouses on the tobacco market.[34]

Defending an attack on certain of its marketing rules, the Board argued that it was in effect a "state agency" and, therefore, under *Parker*, not subject to the antitrust laws. The Court rejected this contention even though the Board existed under a North Carolina statute authorizing tobacco warehousemen and buyers to organize boards of trade.[35]

Notwithstanding the denial to apply the state action immunity rule in *Asheville Tobacco* and similar cases and the implication of the quoted dictum, it appears that immunity should not be denied simply because the defendants are private parties to the antitrust action. Though *Parker* was an antitrust action against a state official, it seems clear from the decision that its principle is to have more than a fortuitous application. "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.*"[36]

An analysis of the tobacco board cases places the decisions in a class which denies immunity because there is neither a specific legislative mandate reflected in the action attacked nor a comprehensive legislative system of regulation. The Asheville Tobacco Board of Trade was organized primarily for the benefit of those engaged in the business. The articles of association and by-laws constituted a contract among the members by which each member consented to reasonable regulations pertaining to the conduct of the business. The officers and members of the Board were not elected, appointed or paid by the state.[37]

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33. 263 F.2d 502 (4th Cir. 1959).
34. *Id.* at 510.
35. *Cf.* Rogers v. Douglas Tobacco Bd. of Trade, 244 F.2d 471 (5th Cir. 1957); American Fed'n of Tobacco Growers v. Neal, 183 F.2d 869 (4th Cir. 1950). *See* note 15 *supra.*
36. 317 U.S. at 351 (emphasis added).
37. 263 F.2d at 509. The *Asheville* decision is distinguishable from the true state action case. The Court noted that the board of trade was not a creation of the state and although the sale of tobacco at auction was of great importance to the state, the actions of the board were really the operation of a business in the hands of private parties.

Significantly, the challenged conduct in the tobacco board cases was not activity responsive to state mandate. As the Sixth Circuit noted in distinguishing a Kentucky tobacco board case:

> [W]e are not concerned with a statute passed by the Kentucky Legislature, but rather with a regulation adopted by the defendant (Board of Trade) in pursuance of the Statute (authorizing the organization of boards of trade). The argument, therefore, that the Sherman Act does not restrain State action, as decided in *Parker v. Brown,* is not applicable to the facts of this case.[38]

Rather than restricting or obfuscating the state action immunity principle, these decisions underscore its salient feature—where alleged anticompetitive conduct is pursuant to a specific power granted to a state agency or mandate to a private body as an integral part of a comprehensive regulatory scheme, the antitrust immunity will obtain. The teaching of *Parker* has effected the reconciliation between two areas of law that otherwise might be mutually repugnant, namely the federal antitrust laws and federally acceptable state regulatory processes[39] executed as part of a state's general police powers to protect the public interest. Other decisions support this view.[40]

Anticompetitive Activity Subject to State Direction

While it does not appear necessary that a state official be a respondent for the principle of *Parker* to apply, it is essential that that the

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The state bore no expense for operations of the board. The officers and directors of the board were not elected by the people nor appointed by the state; neither were they accountable to the state in any significant sense nor supervised by state officials. The action by the state was confined to assuring that the statutory requirements were satisfied—the regulations adopted by the board had to be just, reasonable and not in restraint of trade.

38. Bale v. Glasgow Tobacco Bd. of Trade, Inc., 339 F.2d 281, 285 (6th Cir. 1964). As in most of the tobacco cases, the applicability of the antitrust laws was virtually assumed in *Glasgow.*

39. *E.g.,* state regulation of the milk industry. *Cf.* Nebbia v. New York, 291 U.S. 502 (1934).

40. Woods Exploration & Producing Co. v. Aluminum Co. of America, 284 F. Supp. 582 (S.D. Tex. 1968); Miley v. United Parcel Serv. of America, Inc., 148 F. Supp. 299 (D. Mass. 1957); North Little Rock Transp. Co. v. Casualty Reciprocal Exch., 85 F. Supp. 961 (E.D. Ark. 1949); Ins. Co. of North America v. Ins. Comm'n, 237 Miss. 759, 116 So. 2d 224 (1959). *Cf.* Olsen v. Smith, 68 S.W. 320 (Tex. 1902), *aff'd,* 195 U.S. 332 (1904). In the *Woods* case, the complaint involved allegations that the defendants, by submitting false information to the Texas Railroad Commission, had procured an order from the Commission which unfairly discriminated against the plaintiff as to production and allocation quotas. That the restraint would have been illegal under the antitrust laws if it had been arranged by the gas producers themselves was unquestioned. But because it was ultimately the consequence of the Railroad Commission's functions, the plaintiff's action was denied on the authority of *Parker. See also* Eastern Ry. Presidents' Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

activity be within the ambit of a comprehensive regulatory scheme to be immune from antitrust attack. In addition, the specific activity, conduct or transaction should be subject to state regulation and responsive to the powers of an officer or agency of the state.

In *Marnell v. United Parcel Service of America, Inc.*,[41] the complainants alleged that the defendants had unlawfully monopolized the business of delivering retail packages from department and specialty stores in the San Francisco Bay area. The defendants urged that the activities[42] complained of were, in effect, activities of the State of California because their business operations were subject to regulation by the California Public Utilities Commission. The California Public Utilities Code required the defendants and other intrastate common carriers to file rate schedules with the Commission for approval, to file contracts and instruments of other arrangements between carriers with the Commission, to obtain operating certificates of convenience and necessity and to furnish service in adequate fashion and at reasonable rates.

In denying defendant's motion to dismiss and rejecting the argument that the regulatory jurisdiction of the Commission resulted in the activities being activities of the state, the district court said:

> It is apparent that the regulatory scheme of the California Public Utilities Code is quite different from the regulatory scheme of the Prorate Act considered in *Parker v. Brown* . . . .
>
> Although California's scheme of regulation for motor carriers emanates from the State as sovereign to carry out the declared purposes of the Public Utilities Code, *the regulatory scheme is one of general supervision rather than one of specific direction.*
>
> Although the California Public Utilities Code requires and directs that motor carriers shall not operate without compliance with certain of its provisions (e.g., requiring an operating permit or certificate) and although it further provides and directs that motor carriers must affirmatively do other things (e.g., file rate schedules in the case of common operations and refrain from charging minimum rates fixed by the Commission), the Act does not otherwise affirmatively direct

41. 260 F. Supp. 391 (N.D. Cal. 1966).

42. Specifically, the activities complained of included the purchasing of competitors and potential competitors, obtaining covenants not to compete in defendant's territory and not to oppose defendant's applications before various regulatory bodies, securing exclusive service controls from customers as a condition for doing business, thwarting attempted competition by clandestine investigation of potential competitors and reporting on their abilities to customers and conspiring with labor unions, all in pursuit of a monopoly in the market.

what the carrier's rates of contracts shall be—except that they shall be reasonable.

Just as under the Interstate Commerce Act, the motor carrier initially fixes and files his own rates (except re common carrier rate increases which must be justified and approved by the Commission) and forms and files its own contracts subject, of course, to the supervisory power of the State Public Utilities Commission.

The mere fact that California entrusts to the Public Utilities Commission plenary reserve power to change these rates or these contracts if it deems necessary in the public interest does not mean that the rates and contracts under which defendants have until now operated, although lawful, authorized and presumably reasonable, have been directed by the State of California in the sense considered in *Parker v. Brown* . . . .[43]

Thus, even though a state plan of regulation may be one of general supervision, that alone is not enough to establish immunity. The accused conduct under the scheme must be state directed or prescribed and of a character for which a state official or agency is responsive. In effect, the activity must be on behalf of the state.[44] The district court could not make this determination from the conduct challenged in *Marnell.* After a thorough review of the Interstate Commerce Act and the California Public Utilities Code, which were found parallel in many aspects, the court could not agree that the conduct in question was directed by the state pursuant to the Utilities Code.

In the cases where immunity has been granted, the regulatory schemes were effectuated through agencies of the state or in a manner responsive to a state official or department. The presence of a responsive elected or appointed state officer, the existence of a legislatively established system of operation for the promulgation of the state activity, regulation financed through state funds and the furtherance of a governmental policy established by the legislature are indispensable characteristics to the application of the doctrine.

43. Marnell v. United Parcel Serv. of America, 260 F. Supp. 391, 409 (N.D. Cal. 1966) (emphasis added).

44. *See* Knuth v. Erie-Crawford Dairy Cooperative Ass'n, 395 F.2d 420 (3d Cir. 1968). Action which is not required by a state statute, though engaged in by a regulated industry in restraint of trade, violates the Sherman Act where the commerce element is present. *See also Travelers Ins. Co. v. Blue Cross of W. Pa.,* 298 F. Supp. 1109 (W.D. Pa. 1969), where the application of the state immunity doctrine was denied since the anticompetitive means were not shown to be authorized by the state nor intended to achieve any specific governmental purpose.

Motive for Anticompetitive Activity

The state action exemption is available even though the action is intended to eliminate competition or produce an adverse effect on a certain party or segment of the economy. It appears that such activity is shielded from the Sherman Act regardless of the intent and purpose.[45] If the Sherman Act does not reach anticompetitive state action, there can be no legal injury under the antitrust laws for which recovery is allowable. In this respect, the state action immunity cases have employed the rationale of *Eastern Ry. President's Conference v. Noerr Motors Freight, Inc.*[46] and *United Mine Workers v. Pennington*[47] which exempted joint efforts to influence public officials from antitrust sanctions. There have been two cases which clearly illustrate the application of this rationale.[48]

In *Woods Exploration & Producing Co. v. Aluminum Co. of America,*[49] the complaint alleged that the defendants, by submitting false information to the Texas Railroad Commission, had procured an order from the Commission which discriminated against plaintiff in assigning production and allocation quotas. The restraint involved unquestionably would have been illegal under the antitrust laws had it been arranged by the gas producers themselves. But, as the ultimate responsibility was that of the Commission, the restraint was held to be the result of valid government action for which there was no recoverable element of damages under the antitrust laws, notwithstanding the harmful intentions in submitting false affidavits.

The *Woods* decision rested heavily on the *Noerr-Pennington*[50] doctrine. It also relied on *Okefenokee Rural Elec. Membership Corp. v. Florida Power & Light Co.,*[51] which also involved prevarications and abusively damaging conduct. In this case, the plaintiff alleged an unlawful combination and conspiracy to monopolize exclusive control in supplying power. The record clearly indicated the existence of a conspiracy in which the defendants had willfully presented false arguments to the State Road Department which had the power to deny service applications. In

45. Woods Exploration & Producing Co. v. Aluminum Co. of America, 284 F. Supp. 582 (S.D. Tex. 1968).
46. 365 U.S. 127 (1961).
47. 381 U.S. 657 (1965).
48. Okefenokee Rural Elect. Membership Corp. v. Florida Power & Light Co., 214 F.2d 413 (5th Cir. 1954); Woods Exploration & Producing Co. v. Aluminum Co. of America, 284 F. Supp. 582 (S.D. Tex. 1968).
49. 284 F. Supp. 582 (S.D. Tex. 1968). *Cf.* Woods Exploration & Producing Co. v. Aluminum Co. of America, 36 F.R.D. 107 (S.D. Tex. 1963); Woods Exploration & Producing Co. v. Aluminum Co. of America, 382 S.W.2d 343 (Tex. 1964).
50. *See* notes 46-47 *supra* and accompanying text.
51. 214 F.2d 413 (5th Cir. 1954).

addition, the defendants admittedly conducted a smear campaign to keep plaintiffs out of the county. The district court, in dismissing the complaint for want of a legal injury, held that there was no liability under the Sherman Act where the injury resulted from official action of a state agency, whether or not the acts were inspired by individuals.[52]

Effect of Repeal or Unconstitutionality of State Regulatory Laws

The essence of the state action exemption is that the Sherman Act does not extend to restraints which result from the exercise of a legitimate governmental function. What if those functions were exercised under a statute creating a regulatory system which is later declared unconstitutional? Is an antitrust action available for redress of an injury that is not barred by limitations?

When a statute is repealed or expires, the general effect of its termination is prospective and matters and transactions closed pursuant to the law while extant are judged thereunder.[53] It is a black letter rubric in many cases, however, that an unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.[54] Perforce of this rule, conduct has been judged outside the purview of an invalid statute.

More recently the Supreme Court, in dealing with the effect of an unconstitutional act, has said:

> It is quite clear . . . that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official.

52. *See also E.W. Wiggins Airways, Inc. v. Massachusetts Port Authority*, 362 F.2d 52 (1st Cir. 1966), involving refusal by the Port Authority to renew a concession license; *Hitchcock v. Collenberg*, 140 F. Supp. 894 (D. Md. 1956), a case against the state board of medical examiners for refusing to grant a license to practice medicine.

53. *See* 16 Am. Jur. Const. Law § 423 (1964).

54. Norton v. Shelby County, 118 U.S. 425 (1886).

> It has again and again been held that an unconstitutional statute is simply a statute in form, is not a law, and under every circumstance or condition lacks the force of law, and, further, that it is of no more saving effect to justify action taken under it than as though it had never been enacted.

Minnesota Sugar Co. v. Iverson, 91 Minn. 30, 97 N.W. 454, 457 (1903).

> Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature of both of the statute and of its previous applications, demand examination. These questions are among the most difficult of those which have engaged the attentions of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.[55]

Justice Hughes' dictum has since been favorably reflected upon in another Supreme Court decision in which Justice Jackson opined: "[E]ven where a statute is unconstitutional and hence declared void as of the beginning, this Court has held that its existence before it has been so declared is not to be ignored."[56]

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55. Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1939). Even in the history of earlier cases, it appears that Justice Story's pronouncement in the *Norton* decision was not universal. *See* Dexter v. Alfred, 64 Hun 636, 19 N.Y.S. 770 (Sup. Ct. 1893).

> The defendant, in his answer in this case, undertakes to justify or mitigate the alleged trespass committed by him after the passage of the act, and before the same was declared unconstitutional by the courts, on the ground that the commissioner of highways was acting under and in pursuance of the provisions of this act, while it was in force, and before it was adjudged to be unconstitutional, and that the defendant was acting under the orders of the commissioner. It was no part of the duty of the commissioner of highways to decide whether the law in question was or was not constitutional. His duty was to execute the law as he found it. "Under our system of government, no power is given to public officers to refuse or suspend their obedience to laws on any opinion of their own that a law is unconstitutional."
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> . . . [W]e think in this case that it was competent for the defendant to set up, as a defense or partial defense to this action, the acts of the commissioner under this statute, and that the acts done by the defendants were under the direction or orders of the commissioner and that the judgment and order on the demurrer should be affirmed.

Id. at 771.

56. NLRB v. Rockaway News, 354 U.S. 71, 77 (1953). The question of retroactive application of a judicial ruling was reviewed in depth in *Linkletter v. Walker*, 381 U.S. 618 (1965).

> At common law there was no authority for the proposition that judicial decisions made law only for the future. Blackstone stated the rule that the duty of the court was not to "pronounce a new law, but to maintain and expound the old one." . . . This Court followed that rule in Norton v. Shelby County, 118 U.S. 425 (1886), holding that unconstitutional action "confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." The judge rather than being the creator of the law was but its discoverer. . . . In the case of the overruled decision [or statute] . . . it was thought to be only a failure at true discovery and was consequently never the law; while the overruling one, *Mapp*, was not "new law but an application of what is, and theretofore had been, the true law." . . .
>
> On the other hand, Austin maintained that judges do in fact do something more than discover law; they make it interstitially by filling in with judicial

Retrospective Application of Changes in Antitrust Law

The Supreme Court and many lower courts have repeatedly emphasized that the private remedy of the antitrust laws was established by the Congress as a matter of public policy.[57] Through the award of treble

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interpretation the vague, indefinite, or generic statutory or common-law terms that alone are but the empty crevices of the law. Implicit in such an approach is the admission when a case is overruled that the earlier decision was wrongly decided. However, rather than being erased by the later overruling decision, it is considered as an existing juridical fact until overruled, and intermediate cases finally decided under it are not to be disturbed.

The Blackstonian view ruled English jurisprudence and cast its shadow over our own as evidenced by *Norton v. Shelby County, supra. However, some legal philosophers continued to insist that such a rule was out of tune with actuality largely because judicial repeal ofttime did "work hardship to those who (had) trusted to its existence."* . . . The Austinian view gained some acceptance over a hundred years ago when it was decided that although legislative divorces were illegal and void, those previously granted were immunized by a prospective application of the rule of the case. *Bingham v. Miller,* 17 Ohio 445 (1848). And as early as 1863 this Court drew on the same concept in *Gelpcke v. Dubuque,* 1 Wall. 175 (1863) . . . . In *Gelpcke,* which arose after the overruling decision, this Court held that the bonds issued under the apparent authority granted by the legislature were collectible. "However, we may regard the late (overruling) case in Iowa as affecting the future, it can have no effect upon the past." The theory was, as Mr. Justice Holmes states in *Kuhn v. Fairmont Coal Co.,* 215 U.S. 349, 371 (1910), *"that a change of judicial decision after a contract has been made on the faith of an earlier one the other way is a change of the law."* And in 1932 Mr. Justice Cardozo in *Great Northern R. Co. v. Sunburst Oil & Refining Co.,* 287 U.S. 358, applied the Austinian approach in denying a federal constitutional due process attack on the prospective application of a decision of the Montana Supreme Court. He said that a State "may make a choice for itself between the principle of forward operation and that of relation backward." Mr. Justice Cardozo *based the rule on the avoidance of "injustice of hardship"* citing a long list of state and federal cases supporting the principle that the courts had the power to say that decisions though later overruled "are law none the less for intermediate transactions." At 364. Eight years later Chief Justice Hughes in *Chicot County Drainage Dist. v. Baxter State Bank,* 308 U.S. 371 (1940), in discussing the problem made it clear that the broad statements of *Norton, supra,* "must be taken with qualifications." *He reasoned that the actual existence of the law prior to the determination of unconstitutionality "is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration." He laid down the rule that the "effect of the subsequent ruling as to invalidity may have to be considered in various aspects."*

Id. at 622-25 (footnotes omitted and emphasis added). Endorsing the approach in *Chicot,* the Court said:

Thus the accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective. And "there is much to be said in favor of such a rule for cases arising in the future."

While the cases discussed above deal with the invalidity of statutes or the effect of a decision overturning long-established common-law rules, there seems to be no impediment—constitutional or philosophical—to the use of the same rule in the constitutional area where the exigencies of the situation require such an application.

Id. at 628.

57. Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 138 (1968); United States v. Borden, 347 U.S. 514, 518 (1954).

damages the private sector is induced to assist in the enforcement of these laws. Measured as a law directed at the economic regulation of private business, the private remedy has had a significant role in antitrust enforcement. Discouraging that role should be permitted only with great caution. Nevertheless, the consideration of the retroactive applications of decisional changes in antitrust laws has been before the courts several times in private treble damage cases. Fairness and equity have been adjudged properly served by denying the retrospective effect of a change in law.

The most recent antitrust case presenting the issue is *Simpson v. Union Oil Co.*[58] where the issue was raised as the result of a 1964 Supreme Court decision holding that a consignment device could not give shelter to the consignor responsible for retail price-fixing practices from the prohibitions of the antitrust laws.[59] The appellants had urged that limiting the Supreme Court decision to a prospective application would run afoul of the Constitution's due process requirement. The Ninth Circuit rejected the appellant's contention and held that the district court had ruled correctly in deciding that

> [t]he equities warrant only prospective application to damage suits of the rule respecting price fixing by the consignment device announced in *Simpson v. Union Oil Company of California,* and particularly do not warrant application of the rule to this case.[60]

While this decision has since been reversed by the Court so as not to deny the plaintiff the fruits of his litigation, the principle of prospective application of a change in juridical law has not been abnegated.[61]

Prior to the remand of *Simpson,* another district court resolved the nearly identical question in a similar manner.[62] The issue again evolved from the 1964 decision in *Simpson.*

> [T]he circumstances seem to me to compel the conclusion that the doctrine of Union Oil should not retroactively govern

58. 270 F. Supp. 754 (N.D. Cal. 1967), *aff'd,* 411 F.2d 897 (9th Cir.), *rev'd,*—— U.S.——, 90 S. Ct. 30 (1969). At the earlier stage of the litigation, where the consignment method was found illegal as a price-fixing device, the Court concluded:

> We reserve the question whether, when all facts are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the "consignment" device which we announce today.

Simpson v. Union Oil Co., 377 U.S. 13, 24-25 (1964).

59. *Id.*

60. Simpson v. Union Oil Co., 270 F. Supp. 754, 757 (N.D. Cal. 1967).

61. *See* note 58 *supra.*

62. Lyons v. Westinghouse Elec. Corp., 235 F. Supp. 526 (S.D.N.Y. 1964).

this case. If we are to look at the purpose of the Union Oil doctrine, that purpose would appear to be to prohibit price fixing by means of an agency or consignment contract, to the end that competition shall be free from this restraint. It could be said that it does not necessarily further the accomplishment of this purpose to impose a liability for treble damages upon one who made such a contract many years ago. The price fixing in such a case is of historical importance only. Its effect on competition is long since past. Competition in electric lamps in 1951 cannot be revived by awarding damages to these plaintiffs in 1964.

Be that as it may, it is the element of reliance by defendants upon the former rule that is to me most compelling. To hold Westinghouse liable now for damages for making and carrying out a contract which was perfectly legal at the time that it was made and carried out would be manifestly unjust. It is hard to conceive of a case in which there could be stronger "equities" in defendants' favor.[63]

The Third Circuit, after finding that the Supreme Court had overruled the prior interpretation of certain facets of the antitrust law, did not give retrospective effect to the decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[64]

Recent decisions of the Supreme Court in criminal cases have made it clear that the unrealistic theory that the law has always been what the latest case for the first time declares it to be, the so-called Blackstonian view, must yield to the practical realization that conduct had occurred in reliance on the earlier rules of law to the contrary. In antitrust cases the question of retroactivity is still open. We believe that retroactivity should be determined from the circumstances of the particular case, having in mind the purpose which the new rule of law seeks to accomplish and the practical weighing of the comparative benefits and evils of retroactivity. In civil cases, unlike criminal cases, it is appropriate to recognize that businessmen must rely upon counsel, who in turn are guided by the existing precedents in making difficult decisions on the effect of the antitrust laws on specific business conduct. In suits for damages in such cases it is particularly appropriate to be mindful of the injustice of

63. *Id.* at 537.
64. 377 F.2d 776 (7th Cir. 1967), *rev'd on other grounds*, 393 U.S. 481 (1968).

> retroactive imposition of the penalty of treble damages. . . . United should not be held to have violated the antitrust laws before the change occurred in the law which for the first time made its conduct unlawful.[65]

The pervasiveness of governmental economic regulation in today's society, regulation that often carries the force of civil and criminal sanctions, requires an approach to the problem that is based on the jurisprudence of Justice Hughes' dictum. Arguably, in all contexts the question presented when a statute is declared invalid should not be as concerned with whether the statute ever had the force of law, but should inquire into the fairness of giving retrospective recognition to the ruling. Overruled decisions are judicial facts, and practical consequences, such as hardship or injustice, have been taken into account in deciding whether changes in decisional law should be retroactive.[66] There is no reason why

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65. 377 F.2d at 789. On appeal, the Supreme Court finding that there was no issue involving the overruling of prior judicial precedent did not reach the question of retrospective application. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 393 U.S. 481, 496 (1968).

66. City of Chicago v. Federal Power Comm'n, 385 F.2d 629 (D.C. Cir. 1967). Prospective effect only has been given to many judicial decisions overruling extant law, whether the rule is statutory or decisional. Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940); Annot., 53 A.L.R. 268 (1928). For decisions overruling prior case law see Johnson v. New Jersey, 384 U.S. 719 (1966) (effect of *Miranda* and *Escobedo* dealing with custodial policy questioning of suspects); Tehan v. United States *ex rel.* Shott, 382 U.S. 406 (1966) (effect of *Griffin* dealing with comment on failure of defendant to take the stand); Linkletter v. Walker, 381 U.S. 618 (1965) (effect of *Mapp* dealing with illegally seized evidence); Benson v. Carter, 396 F.2d 319 (9th Cir. 1968); Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959) (tort immunity of school); Schiller v. Lefkowitz, 242 Md. 461, 219 A.2d 378 (1966) (jury composition in civil cases); Parker v. Post Huron Hosp., 361 Mich. 1, 105 N.W.2d 1 (1960) (effect of abolition of charitable immunity rule); Brown v. City of Omaha, 183 Neb. 430, 160 N.W.2d 805 (1968) (abolition of governmental immunity rule retroactive only if government entity insured and then only to extent of insurance); Meyers v. Drozda, 180 Neb. 183, 141 N.W.2d 852 (1966) (abolition of charitable immunity rule retroactive only if charity insured and then only to extent of insurance); Rabon v. Rowan Mem. Hosp., Inc., 269 N.C. 1, 152 S.E.2d 485 (1967) (abolition of tort immunity of hospitals); *In re* Western Pa. Nat'l Bank, 424 Pa. 161, 225 A.2d 676 (1967) (changed rule of will construction inapplicable to will of decedent dying before Supreme Court decision changing rule); Wojtanowski v. Franciscan Fathers' Minor Conventuals, 34 Wis. 2d 1, 148 N.W.2d 54 (1967); Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963) (abolition of parental immunity).

For cases involving the invalidity of statutes see Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 233 (1864) (effect of bonds issued under unconstitutional statute); J. A. Doughtery's Sons, Inc. v. Commissioner, 121 F.2d 700 (3d Cir. 1941) (for purposes of determining federal undistributed profits tax, taxpayer held entitled to accrue deduction for state taxes for the taxable year imposed by a state statute subsequently held unconstitutional); Anniston Mfg. Co. v. Davis, 87 F.2d 773 (5th Cir. 1937); Cudahy Packing Co. v. Harrison, 18 F. Supp. 250 (N.D. Ill. 1937) (suit against tax collector who collected taxes under unconstitutional statute); Austin v. Campbell, 91 Ariz. 195, 370 P.2d 769 (1962) (reimbursement of expenses paid state legislators under statute later declared unconstitutional denied); McCormack v. Friel, 327 Ill. App. 208, 63 N.E.2d 784 (1945); Gordon v. Connor, 183 Okla. 82, 80 P.2d 322 (1938) (officer pro-

a similar inquiry should not be made when determining whether an antitrust exemption is available for anticompetitive conduct pursuant to government mandate under a statute later found invalid.

In some postures the purpose of the antitrust laws—the prohibition of price-fixing—may be furthered by imposing liability retrospectively subsequent to a decisional change in the law. In the case of a retrospective application involving the state action immunity principle where contracts are made or conduct engaged in upon faith in the existing regulatory scheme, a retrospective application would appear certain to be unduly severe.

The Sherman Act is not a proscription of all societal ills; regulatory statutes involving the state action theory are equally significant. Indeed, as compared to the general language of the Sherman Act, most regulatory laws are explicit as to the economic restraints they are designed to effect and detailed as to implementation and enforcement. Where business conduct is decreed by a political entity, should the segment of society regulated thereunder be penalized for adherence to its directives if the law which created the entity is repealed or declared invalid? The public has a right to presume that a statute is an operative fact until legislatively or judicially excised, and a member should not be visited with harsh sanctions in meeting its duty to comply.[67]

CONCLUSION

When state processes are conceived to embrace more than simply economic considerations, it is proper that the Sherman Act be interpreted so as not to thwart those ends. The functions of government foster many purposes and are responsive to many interests. The imposition of restraints which are not uniquely economic but addressed to other areas and other problems of proper governmental concern should not result in liability under the Sherman Act.

The regulation of activity to which the Sherman Act is properly applied is of a nature which should be governed solely by market mechanisms. If the government is involved as a customer in the market place—an economic unit rather than a maker of policy in the political process—there should be no exemption from the Sherman Act and

tected in paying salaries under unconstitutional statute); Golden v. Thompson, 194 Miss. 241, 11 So. 2d 906 (1943) (official not liable for excluding students from public schools under unconstitutional statute); Rust v. Newby, 171 Tenn. 127, 100 S.W.2d 989 (1937) (plaintiff's claim barred where plaintiff conspired in bad faith to evade regulatory statute subsequently declared unconstitutional); Gottlieb v. City of Milwaukee, 33 Wis. 2d 408, 147 N.W.2d 633 (1967) (effect of unconstitutional statutory tax exemption used as incentives to attract business).

67. Austin v. Campbell, 91 Ariz. 195, 370 P.2d 769 (1962).

Parker affords none. But when there is no question about the legitimacy of government concern, the action of private parties pursuant to its proper directive should be free from antitrust exposure. There is a great practical utility to the doctrine if liberally applied. It affords the private businessman a modicum of predictability in resolving antitrust questions which may arise in his dealings with state government officers and agencies and enables legislative policy to be effectuated in a regulated industry.