Formulation of the Two Part Analysis for State Action Exemption - Hoover v. Ronwin

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**INTRODUCTION**

Since 1890 when the Sherman Antitrust Act (the Act)\(^1\) was passed, governmental units and agencies have sought exemption from the Act’s provisions.\(^2\) The Supreme Court, in *Parker v. Brown*,\(^3\) determined that states, when acting in their sovereign capacity, were deemed exempt by the very language of the Act. Since 1943, the Supreme Court has tried to define precisely which actions performed by various government associated groups constitute state action for which the exemption applies.\(^4\) The Court’s objective has been to develop a clear application of the state action exemption which is broad enough to preserve the states’ sovereign rights to conduct their own economic policies, yet narrow enough to prevent the exemption from protecting purely private actors and, thereby, destroying the Acts federal antitrust purpose.\(^5\) Over

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1. The relevant section is 15 U.S.C. § 1 (1982) which prohibits “[e]very 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 . . . .”


3. 317 U.S. 341 (1943). It is usually common to talk of the exemption as being judicially granted by *Parker*. However, the Supreme Court found in that case that as Congress constitutionally could occupy the entire “legislative field” and chose not to do so (“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.”) the exemption was Congressionally granted and judicially applied. 317 U.S. at 350-51. It is interesting to note that Congress has not attempted to remove that exemption from the states.

4. This note will refer to the *Parker* doctrine as an exemption or as the *Parker* doctrine. Various authors, judges and Justices have referred to it haphazardly as an immunity, exemption, principle or doctrine. For an interesting article discussing the possible legal consequences of the *Parker* doctrine being an exemption rather than a grant of immunity see Kopetz, *State Action and the Sherman Antitrust Act: Should the Antitrust Laws Be Given a Preemptive Effect?*, 14 CONN. L. REV. 135 (1981) [hereinafter cited as Kopetz].

5. In *Parker*, the Court determined that liability for state action was left out

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the years, the Court's actual holdings in state action cases are remarkably consistent. However, the Court's terminology has created unnecessary confusion for commentators, judges and Justices.

_Hoover v. Ronwin_6 represents the Court's latest attempt to achieve the two part goal of protecting the federalist basis of _Parker_ while establishing an understandable framework for analyzing state action cases. In _Hoover_, the Court found that, when the Arizona Committee on Examinations and Admissions to the State Bar graded bar examinations according to the Rules of the Arizona Supreme Court, the Committee's actions were exempt from the Act. Justice Powell7 first scrutinized the Court's prior applications of the exemption and structured an opinion consistent with the prior rulings. He stated the conditions that must exist before the Court applies the exemption. In so doing, Justice Powell clarified the analytical process the Court must follow in deciding state action cases, a process which the Court previously had difficulty explaining. Certainly inconsistencies arise when any analysis is applied to various fact situations, and, probably, Justice Powell's process will be no exception. It is, however, a clear, logical step in the progression the Court has been following since at least the 1970s.8

This note begins by discussing the _Hoover_ case in light of the actual holding by the Court. It then tracks the history of the _Parker_ doctrine and examines the Court's progression in attempting to formulate a practical analysis for the state exemption. Finally, the note shows that Justice Powell's opinion in _Hoover_ articulated a clear and workable analytical process based on, and consistent with, previous Court decisions.

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7. This decision was written by Justice Powell. Justices Rehnquist and O'Connor took no part in the decision and Justices Stevens, White and Blackmun dissented. Note that though only two of the decisions discussed herein are plurality decisions, some of the concurring opinions have led to confusion over what "test" to apply in _Parker_ cases.
Edward Ronwin was an unsuccessful candidate for admission to the Arizona bar in 1974.²⁹ According to the Arizona Constitution, the Arizona Supreme Court has complete authority to determine admissions to the bar.³⁰ Pursuant to that authority the supreme court formulated the Arizona Supreme Court Rules.³¹ Under the Rules in effect in 1974, the supreme court established the Committee on Examinations and Admissions (Committee) to examine applicants on specified subjects and to recommend applicants for admission to the Arizona Bar.³² The seven member Committee,³³ appointed by the supreme court, was authorized to "utilize such grading or scoring system as the Committee deems appropriate in its discretion" in grading the examinations.³⁴ Rule 28(c) VII B required the Committee to submit its "proposed" grading formula to the court thirty days "before each examination."³⁵ After grading the examination the Committee was to compile a list of those applicants whom it considered to "have the necessary qualifications" for admission to the bar and file it with the supreme court, which was to take final action on the matter.³⁶ Only the court, under Rule 28(a) and Arizona case law, had final authority to grant or deny admission.³⁷ A rejected candidate had the right to seek individual-
ized review of an adverse Committee recommendation by filing a petition with the court. 18

After Ronwin failed the Arizona Bar exam in 1974, "the Committee recommended to the Arizona Supreme Court that it deny him admission to the Bar and the court accepted that recommendation." 19 The Arizona Supreme Court denied Ronwin's petition for review of the Committee's actions in conducting and grading the examinations. Ultimately, 20 he filed this action in Federal District Court against the Arizona State Bar, members of the Committee and others. 21

Ronwin alleged, among other things, that the Committee "had

18. Rule 28(c) provided that an "applicant aggrieved by any decision of the Committee . . . (C) for any substantial cause other than with respect to a claimed failure to award a satisfactory grade upon an examination; may within 20 days after such occurrence file a verified petition with this Court for a review . . . ."

The Rule further provided for a copy of the petition to be served "promptly" upon the chairman or some member of the Committee. Within 15 days of receiving the petition the Committee was to transmit the applicant's file, along with the Committee's reasons for not recommending the applicant, to the Arizona Supreme Court. The court would then "hold such hearings and give such directions as it may in its discretion deem best adapted to a prompt and fair decision as to the rights and obligations of the applicant judged in the light of the Committee's and [the] court's obligation to the public to see that only qualified applicants are admitted to practice as attorneys at law." 104 S. Ct. at 1993, n.8.


20. This case actually has an interesting history (referred to as a "long, unhappy and complex history" by Justice Feldman in his opinion at In re Ronwin, 136 Ariz. 566,-, 667 P.2d 1281, 1282 (1983).) In his petition for review Ronwin alleged that the Committee had failed to "provide him with model answers to the examination, had failed to file its grading formula with the court within the time period specified in the Rules, had applied a draconian pass-fail process, had used a grading formula that measured group, rather than individual, performance, had failed to test applicants on an area of the law on which the Rules required testing, . . . had conducted the examination in a pressure-cooker atmosphere[,] . . . abused its discretion, deprived him of due process and equal protection, and violated the Sherman Act. 104 S. Ct. at 1993. That petition was denied by the court, as were two other petitions for rehearing and retesting. (See In re Ronwin, 136 Ariz. 566, 667 P.2d 1281 (1983) for an enlightening recount of Mr. Ronwin's ongoing "feud" with the state bar and the Arizona Supreme Court.) Ronwin's petition for certiorari was denied by the United States Supreme Court. Ronwin v. Committee on Examinations and Admissions, 419 U.S. 967 (1974).

21. Ronwin v. State Bar of Arizona, 686 F.2d 692 (9th Cir. 1981). Also named as defendants were the Committee member's spouses. The district court dismissed the suit as to these defendants and the court of appeals affirmed the dismissal. Id. That aspect of the case was challenged in a conditional cross-petition for certiorari, which was denied. Ronwin v. Hoover, 103 S. Ct. 2110 (1983).
set the grading scale on his examination with reference to the number of new attorneys that it thought desirable, rather than with reference to some suitable level of competence.”

To Ronwin, that constituted a conspiracy to restrain trade in violation of § 1 of the Sherman Act by “artificially reducing the number of competing attorneys in the State of Arizona.” Ronwin also argued that, “although [Committee members] qualified as state officials in their capacity as members of the Committee, they acted independently of the Arizona Supreme Court” when devising the grading formula. To Ronwin, the Committee’s actions were not the court’s actions, thus the Committee members were not entitled to the Parker exemption.

The members alleged that they were immune from antitrust liability under the Parker doctrine, since by acting at the supreme court’s direction, their actions constituted state action. The District Court of the District of Arizona agreed with the Committee and granted, inter alia, the Committee members’ motion to dismiss the complaint under Fed. Rule Civ. Proc. 12(b)(6), the failure to state a claim upon which relief can be granted. The Court of Appeals for the Ninth Circuit reversed, stating that simply because the “Arizona Supreme Court has delegated to the Committee the general authority to examine applicants to determine if they are qualified to practice law and reviews the Committee’s recommendations” the Committee was not clothed with immunity. The court of appeals held that the Committee members could not establish that the alleged restraint was “clearly articulated and affirmatively expressed as state policy” and therefore the district court had improperly dismissed the complaint. The case was remanded to the district court for further action.

The Supreme Court granted certiorari to review the court of

22. 104 S. Ct. at 1994. Ronwin alleged that the Committee devised its grading formula after the exam was administered. This allowed the Committee to recommend a particular number of applicants and structure the formula accordingly. Id. at 1994, 1994 n.13.
23. Id.
24. Id. at 1996.
25. Id.
26. Id. at 1994.
27. Id. at 1994. The members also moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) for lack of subject-matter jurisdiction, which was also granted. Id.
28. 686 F.2d at 696.
29. Id. at 701.
appeals' application of the state action doctrine. The Court's plurality, relying on *Bates v. State Bar of Arizona*, decided that the actions of the Committee could not "be divorced from the [Arizona] Supreme Court's exercise of its sovereign powers" since, under the Rules of the Arizona Supreme Court, the court exercised the only authority as to who would, or would not, be granted admission to the bar. Justice Powell wrote that since the Arizona Supreme Court was actually the "real party in interest," and the court had established the Rules under its legislative capacity, the actions complained of were State actions. Therefore, under the *Parker* doctrine, the Committee actions were exempt from antitrust liability.

**BACKGROUND**

As Justice Powell stated in *Hoover*, "[t]he starting point in any analysis involving the state action doctrine is the reasoning of *Parker v. Brown*." In *Parker*, a raisin producer-packer brought suit against California officials, challenging that the California Agricultural Prorate Act violated, *inter alia*, the Sherman Antitrust Act. The California Legislature had enacted the Prorate Act as a program to be enforced "through action of state officials . . . to restrict competition among the [raisin] growers and maintain prices in the distribution of their commodities to packers."

The *Parker* Court stated that "nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." Since the prorate program "derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command", the program and its officials were held exempt from the Sherman Act. The Court stressed that a state cannot "give immunity to those who violate the Sherman Act by authorizing them

31. 104 S. Ct. at 1996.
32. *Supra* note 17.
34. 104 S. Ct. at 1998.
35. *Id.* at 1995.
36. 317 U.S. at 346.
37. 317 U.S. at 350, 351. *See supra* note 5.
38. 317 U.S. at 350.
39. *Id.* at 352.
to violate it, or by declaring that their action is lawful.”

The state’s direction must precede the action.

The Court then stated four important considerations which led to its decision: 1) it was the “state which created the machinery for establishing the prorate program;” 2) even though 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, it is the state, acting through the Commission, which adopts the program and enforces it with penal sanctions;” 3) the state and its appointees acted “in the execution of a governmental policy;” and 4) the state “itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application.”

The decision stands for the proposition that the Sherman Act does not apply to cases where the state acts in its sovereign capacity, through its officers or agents, in activities “directed by its legislature.” The Court will not inquire into the motive of the state in enacting and carrying out the anti-competitive program. The inquiry ends when the Court finds that it is the state that establishes, administers and supervises the program.

From 1943 until 1975 the Supreme Court did not deal directly with the Parker doctrine and the lower courts had to attempt to define it. Beginning with Goldfarb v. Virginia State Bar in 1975, the Supreme Court decided numerous cases concerned with the Parker doctrine. A chronological discussion of the most important cases follows.

40. Id. at 351, citing Northern Securities Co. v. United States, 193 U.S. 197, 332, 344-347 (1904).
41. 317 U.S. at 352.
42. At least one commentator, and a few courts, believe that this exemption extends to other antitrust legislation. Burling, et. al., “State Action” Antitrust Immunity—A Doctrine in Search of Definitions, 1982 B.Y.U.L. Rev. 809, 812 and note [hereinafter cited as Burling].
43. As Richards, Exploring the Far Reaches of the State Action Exemption: Implications for Federalism, 57 St. John’s L. Rev. 274 (1983) [hereinafter cited as Richards] states in the text on page 280 and notes 34 and 35, the lower courts “struggled to define the parameters of the Parker exemption.”
44. 421 U.S. 773 (1975).
45. These are the most important cases in terms of this Note. One very important field in the Parker context is that of municipalities. Besides the Boulder and Lafayette cases discussed herein, the Court will soon hear various questions concerning the rights of municipalities to grant monopolistic franchises. The Court might even rethink its reasoning in Boulder and Lafayette. See Middleton,
Goldfarb involved a suit by homebuyers wishing to employ a lawyer for less than the minimum fee as published in the county bar association schedule of fees. Upon finding that no lawyer would perform a title search for less, the Goldfarbs sued the state and county bars, alleging that the minimum fee schedule violated the Sherman Act by restraining trade.\

The fee schedule listed recommended minimum prices for common legal services. The county bar association published the schedule and the state bar enforced it by disciplinary action. Though no evidence existed that the state bar ever had taken formal disciplinary action, the bar had published ethical opinions and reports “suggesting” that a presumption of misconduct would be raised if any attorney “habitually charges less than the suggested minimum fee schedule adopted by his local bar Association.”

The state bar argued that it was “merely implementing the fee provision of the ethical codes” by issuing fee schedules and ethical opinions dealing with those schedules. The county bar argued that the ethical codes and the state bar opinions “prompted” it to issue fee schedules, thereby entitling it to the Parker exemption.

The Goldfarb Court, in refusing to apply Parker, stated that the “threshold inquiry” in determining whether the activity complained of is state action is “whether the activity is required by the State acting as sovereign.” The Court found that the State of Virginia did not require the anticompetitive activities through its Supreme Court Rules, nor did the state supreme court supervise the institution of the fee schedules or approve of the ethical opinions. The Court also stated that though the state bar is a “state agency for some limited purposes, [that] does not create a shield that allows it to foster anticompetitive practices for the benefit of its members.” In the most quoted line of the case, the Goldfarb


46. 421 U.S. at 776-78.
47. Id.
48. Id. at 777-78 and n.5.
49. Id. at 790.
50. Id.
51. Id., citing Parker, 317 U.S. at 350-52.
52. Id. at 790 and n.20, 789 n.18.
53. Id. at 791.
54. Id. Note that the Court included actions by the state supreme court to
Court held that it "is not enough that, as the County Bar puts it, anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign."\(^55\) Since the state did not compel the bar associations to establish the fee schedules, the bars' actions in so doing were not exempt from the provisions of the Sherman Act.

Thus, the Court remained consistent with \textit{Parker}. The bar associations had no "legislative command of the state"\(^56\) to enact price floors and the state could not give, \textit{ex post facto}, "immunity to those who violate the Sherman Act . . . by declaring that their action is lawful."\(^57\) If that clear legislative command had been present, the actions performed pursuant to that order would have been exempt. The actions would have been, in effect, those of the state itself. \textit{Goldfarb} provides an example of an agency, which, because it has state authority to conduct certain activities, tries to cloak every action with state authorization. Activities of that kind which violate antitrust laws will not be granted exemption from those laws.

The Court fragmented in its next attempt to explain the degree of state "direction" necessary to empower groups to act as the state. In \textit{Cantor v. Detroit Edison Co.}\(^58\) decided in 1976, a retail druggist who sold light bulbs sued Detroit Edison, a privately owned utility, for its role in a state approved program whereby Detroit Edison supplied to its customers at no cost, fifty percent of the standard lightbulbs used by its customers.\(^59\) The program had been approved by the Michigan Public Service Commission.\(^60\)

In this plurality decision the Court held that the state regulatory body's simple rubber stamping of anticompetitive conduct was not enough to confer a \textit{Parker} exemption.\(^51\) However, the Court

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\(^{55}\) Id.
\(^{56}\) 317 U.S. at 350.
\(^{57}\) Id. at 351.
\(^{58}\) 428 U.S. 579 (1976). Justice Stevens wrote the Court's opinion, joined by Justices Brennan, White and Marshall. Chief Justice Burger joined except in parts II (dealing with applicability to state officials versus private actors) and IV and wrote a concurring opinion. Justice Blackmun wrote a concurring opinion and Justice Stewart entered the dissent, in which Justices Powell and Rehnquist joined. Richards at 282-86 and notes, as well as the case itself, discuss the various components of each Justice's rationale.

\(^{59}\) 428 U.S. at 581-82 and Richards at 282 n.47.
\(^{60}\) 428 U.S. at 581.
\(^{61}\) Id. at 598.
seemed to say that even if the state had commanded the anticompetitive activity, that command was only the first element needed to apply the exemption. Additionally, some method of ongoing supervision was needed. Justice Blackmun, in a concurring opinion, stressed that a balancing test of state and federal interests should be used in granting Parker exemptions. The dissent strongly objected to the plurality’s and Blackmun’s rationales (but not Chief Justice Burger’s), stating that the exemption should be limited to those areas where, among other things, the state, not the courts, feels it should establish anticompetitive measures and that once the state acting as sovereign has chosen to act anticompetitively the Parker exemption should apply.

The Cantor decision generally was not relied on in the subsequent cases except for its holding that neutrality by the state in an anticompetitive program does warrant an exemption. This lack of reliance is probably because the Cantor plurality discussed such issues as whether activities by purely private parties should ever be exempt, what extra limitations would be placed on private parties if Parker applies, and whether a private actor would be immune from treble damages when the state does not compel the activity.

At first glance Cantor seems to retreat from Goldfarb’s reasoning. However, on closer examination, the case follows the basic elements of Parker and Goldfarb. First, neither neutrality nor prompting by the state is sufficient to empower a private or state group to act as the state. The state direction must be of such strength that a reviewing court will be unable to separate the actions of the group from those of the state. Second, the state direction must precede the action. Cantor affirmed both of these elements.

62. This is because of the plurality’s emphasis on regulation (Id. at 584-85, 596-97, 602), state “decisionmaking” (Id. at 593), and Blackmun’s concurring opinion (Id. at 609).
63. 428 U.S. at 610-11 (Blackmun, J., concurring).
64. Id. at 630-31, 637 (Stewart, J., dissenting). Richards, at 286 and n.70.
65. See Part II of the Court’s opinion, Id. at 585-92, supra notes 68 and 76 and accompanying text; and City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 nn. 40, 41 (1978).
66. 428 U.S. at 592-93 and supra note 61.
67. Id. at 602.
68. The plurality felt that Parker did not directly apply because of the private actors. This argument was explicitly rejected by a majority of the Court: Id. at 603-4 (Burger, C.J. concurring); Id. at 609 (Blackmun, J., concurring); Id. at 622 (Stewart, J., Powell, J., Rehnquist, J., dissenting).
These elements were strengthened further in 1977 when the Court decided \textit{Bates v. State Bar of Arizona}. Bates involved the suspension of two lawyers by the state bar for violating a Disciplinary Rule against any attorney “publicizing” himself or his firm through newspaper advertisements. The attorneys argued that the ban on advertising violated the Sherman Act and attorneys’ first amendment rights. The state bar argued that the regulation was exempt from the Sherman Act because the Disciplinary Rule was established and enforced by the Arizona Supreme Court and, thus, was action “of the State of Arizona acting as sovereign.”

The Court agreed with the state bar and, to help clarify why the exemption applied, distinguished \textit{Goldfarb} and \textit{Cantor}, both of which held against applying the exemption. In distinguishing \textit{Goldfarb} the Court stated that while the minimum fee schedule set up by the voluntary county bar in \textit{Goldfarb} was not required by the State of Virginia, the disciplinary Rule in \textit{Bates} was “the affirmative command of the Arizona Supreme Court under its Rules.” Since the court is the ultimate authority over the state’s practice of law, the Rule barring lawyer advertising was “compelled by direction of the State acting as a sovereign.”

The \textit{Bates} Court distinguished \textit{Cantor} by noting that in \textit{Cantor} the claim had been made against a private party rather than a public official or public agency. In \textit{Bates}, the majority declared that the “Arizona Supreme Court is the real party in interest [here].” To reinforce that concept the Court pointed out that the state supreme court in \textit{Bates} completely defined the state bar’s role in enforcing the Disciplinary Rules and that the bar was under

\begin{itemize}
  \item Id. at 353. Disciplinary Rule 2-101(B), incorporated in Rule 29(a) of Ariz. Sup. Ct. Rules, 17A Ariz. Rev. Stat. Ann. (Supp. 1976): “(B) A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisement . . . nor shall he authorize or permit others to do so in his behalf.” Id. at 355.
  \item Id. at 353.
  \item Id. at 357 (quoting In re Bates, 113 Ariz. 394 at 397, 555 P.2d 640 at 643 (1976)).
  \item 433 U.S. at 360.
  \item Ariz. Const., art. 3; 433 U.S. at 360.
  \item 433 U.S. at 360 (quoting 421 U.S. at 791).
  \item 433 U.S. at 361, n.13. Justice Blackmun stated, “[M]ost obviously, Cantor would have been an entirely different case if the claim had been directed against a public official or public agency, rather than against a private party.” Id.
  \item Id. at 361.
\end{itemize}
the court's "continuous supervision."78 Also, the Court stated that "the regulation of the activities of the bar is at the core of the State's power to protect the public" while the protection of the light bulb program was "not essential to the State's regulation of electric utilities."79 Further, Arizona's Disciplinary Rules reflected "a clear articulation" of the state's policy and were subject to "pointed re-examination by the policymaker."80 In Cantor, however, the light bulb program was "instigated by the utility with only the acquiescence of the state regulatory commission."81

The Bates Court held that the Parker exemption extended to the state bar since it was actually the supreme court which acted in barring lawyer advertising.82 By emphasizing the state's role as the actual performer or as the compellor and overseer of the bar's actions, the Bates decision strengthens Parker's criterion that the action must be that of the state acting in its sovereign capacity.

In its next important Parker doctrine case, City of Lafayette v. Louisiana Power & Light Co.,83 the Court faced the question of whether a municipality is exempt from antitrust laws.84 In Lafayette, the power company claimed that the city had conspired to restrain trade in violation of antitrust laws.85 The city defended, asserting that Parker held all governmental entities exempt from antitrust laws simply by their status as governmental entities.86

The Court showed that its prior rulings clearly rejected the city's assertions.87 Since the Parker doctrine is limited to "official action directed by a state" as sovereign,88 extending it to a non-

78. Id.
79. Id.
80. Id. at 362.
81. Id.
82. The case was reversed, however, on First Amendment grounds. Id. at 384.
84. See supra, note 45.
85. 435 U.S. at 392. The claim actually was brought in a counterclaim to the city's suit. The utility argued that the city had conspired with a private electric cooperative to delay the construction of a nuclear power plant, and had also attempted to restrict competition by using long term contracts and agreements conditioning the continuance of water and gas supplies on purchase of electrical power from the city. Id. at 392 n.6.
86. Id. at 408.
87. Id. at 408-13; supra note 5 discussing the federalist basis for the Parker doctrine.
88. 317 U.S. at 351.
sovereign municipality would be inconsistent with, and damaging to, that limitation.89

The Lafayette Court emphasized, however, that a municipality still might qualify for exemption if it acts pursuant to state policy, authorization or direction.90 Therein lies the beginning of the Court's development of the two step approach clarified by Justice Powell in Hoover and which is essential to Parker doctrine analysis. If the "conduct engaged in is an act of government by the State as sovereign,"91 the exemption applies regardless of state motive. This first step pertains to state legislatures and supreme courts acting in their legislative capacities or where the actor/agent's role is so "completely defined" by those bodies as to make the state the "real party in interest."92 If the first step does not apply, the exemption will cover the actor/agent only if it acts "pursuant to state policy" and is commanded to act by the state.93 Then the actor/agent will not be distinguished from the state and Parker will apply.

In 1980, a unanimous Court continued this approach in California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.94 Midcal involved a California statute which required all wine producers and wholesalers to file fair trade contracts or price schedules with the state. The statute prohibited wholesalers from selling wine to a retailer at other than the price set in the schedule or contract. If one did so, he became subject to fines and either license suspension or license revocation.95 Midcal, Inc. challenged that statute as a violation of the Sherman Act. The Liquor Dealers Association argued that since it acted according to state law it

89. 435 U.S. at 412.
90. Id. at 413-14.
91. Id. at 413.
92. 433 U.S. at 361.
93. 435 U.S. at 413. This dichotomy was relied on expressly in Midcal and Hoover. While authors have written much concerning the differences in "command," "compel," "require," "authorize," and "direct," the discussion is actually "much ado about nothing." These terms simply show a need for the action complained of to be, in fact, that of the state. See generally Morgan, Antitrust and State Regulation: Standards of Immunity After Midcal, 35 ARK. L. REV. 453 (1981); 16 E J. VON KALINOWSKI, BUSINESS ORGANIZATIONS, ANTITRUST LAWS AND TRADE REGULATION, § 46.03 (1984).
94. 445 U.S. 97 (1980). Justice Brennan took no part in the consideration or decision of the case. Id. at 114.
should be exempt from federal antitrust laws under *Parker*.

The Court stated that the threshold question was whether the California wine pricing statute violated the Sherman Act. After finding that the statute did violate the Act, the Court analyzed the state's participation according to a two part test.

To be exempt under *Parker*, the Court stated, the challenged restraint must pass two standards. First, the restraint must be "'one clearly articulated and affirmatively expressed as state policy'"; and "second, the policy must be 'actively supervised' by the State itself." The Court held that the first standard was easily met since the policy was "forthrightly stated and clear in its purpose to permit resale price maintenance." The program, however, did not satisfy the second standard since the State "simply authorizes price-setting and enforces the prices established by private parties." There was no state review of the schedules, no monitoring of the market nor any regulation of the terms of the contracts.

This two standard test essentially made up the Court's decision. Fortunately, the Court did not discuss the *Parker* exemption in terms of a balancing test. That topic previously had led to confusing plurality decisions.

The "two standard test" in *Midcal* is not to be confused with the "two step analysis" explained in the *Lafayette* discussion above. The two standard test (clear articulation and active supervision) is actually the second prong of the two part analysis. The Court in *Midcal* did not discuss the first prong of *Lafayette* (whether the actor/agent was, in fact, the state). From the *Midcal* decision one can see that first prong would not apply to the Liquor Dealers Association. The two standard *Midcal* test is used when the first prong of the analysis would not apply.

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96. 445 U.S. at 100-02. The State, the original party to the suit, did not seek certiorari in the Court, but the California Retail Liquor Dealers Association, an intervenor below, did. *Id.* at 101-02.

97. *Id.* at 102-05. This test was first stated this way in New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96 (1978).


100. 445 U.S. at 105-06.

101. The Court did discuss state interests versus federal interests in its discussion of the Twenty-first Amendment. *Id.* at 110-14.

102. See *supra* note 7.

103. The first prong is usually easier to apply when the actor is a state agency.
The Court more clearly stated the two prongs of the analysis in *Community Communications Co. v. City of Boulder*. The issue was whether a "home rule" municipality should be exempt from federal antitrust laws. The city passed an ordinance that placed a temporary suspension on cable television expansion into new service areas. Community Communications complained that this action illegally restricted competition. The city alleged that *Parker* exempted it from federal antitrust laws when enacting its ordinances.

The Court analyzed the problem in two parts. The first was whether the challenged ordinance constituted the state acting in its sovereign capacity. On this issue the Court held that only states have sovereignty under federalist principles (on which *Parker* was decided). Furthermore, sovereignty cannot be transferred by states to any political subdivision. Cities, even home-rule cities were ruled not to be sovereign. Next, since the city did not qualify as a sovereign unit and its actions were not state actions, the Court addressed whether the ordinance was an express implementation of state policy for which the exemption would apply. The Court rejected this idea, stating that the policy was not clearly articulated or affirmatively expressed but was rather a policy of "neutrality."

Beyond a short discussion of balancing federal and state interests, the Court held consistently with its previous decisions concerning federalist beginnings of the exemption and the two step analysis necessary for implementing it.

**Analysis**

In holding that the state bar’s and the Committee on Examinations and Admissions’ actions were exempt from antitrust laws,

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104. 455 U.S. 40 (1982).
105. *Id.* at 43. A "home rule" municipality is one whose ordinances are granted, by the State Constitution, the right to supercede any conflicting state law. *Colo. Const.* art. XX, § 6.
106. 445 U.S. at 46-47.
108. *Id.*
109. 455 U.S. at 52-53. The City argued that since the home rule provision gave local autonomy to Boulder, an inference was created that Boulder’s anticompetitive action was within contemplation of that provision. *Id.*
110. *Id.* at 55.
the plurality in *Hoover*\(^\text{111}\) consolidated the prior cases’ holdings, dicta and reasonings and formulated a workable solution to the problem of applying the *Parker* exemption. That solution is a clarification of the two step analysis applied first in *Lafayette*.\(^\text{112}\)

The first “critical step” is to determine whether the challenged conduct is that of the state acting as a sovereign.\(^\text{113}\) If so, then the conduct is exempt from antitrust legislation. If not, then the second step must be taken. That step is the two tiered requirement of *Midcal*. Namely, if the conduct is “clearly articulated and affirmatively expressed” by the sovereign and if the conduct is “actively supervised” by the sovereign, the actions will be exempt.\(^\text{114}\)

Justice Powell explained the above analysis clearly.\(^\text{115}\) Decisions of the state supreme court, acting legislatively rather than judicially, and actions by the state legislature are deemed actions by the sovereign.\(^\text{116}\) Additionally, when the “conduct at issue is in fact that of the state legislature or supreme court” the first step applies.\(^\text{117}\) This “action in fact” is an important element since, practically, state courts must delegate many of their duties and responsibilities to non-sovereign actors. State action in fact exists whenever the actions of the actor/agent are “commanded”\(^\text{118}\) by the state to such a degree that those actions, in reality are those of the state. This part of the analysis should be narrowly applied in order to protect the federalist concept behind *Parker*. The specific actions must be so clearly required by the state as to make the actor/agent and the state indistinguishable from one another. Once this fusion of actor/agent and state is shown, the *Parker* exemption will apply.

When the anticompetitive actions are carried out by actors/agents merely pursuant to state “authorization” and are not “directly those of the legislature or supreme court”, closer analysis is needed.\(^\text{119}\) Then, the non-sovereign actor/agent must show “that the conduct is pursuant to a clearly articulated and affirmatively expressed state policy to replace competition with regulation,” and

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111. *Supra*, note 7.
112. *Supra* notes 17-18 and accompanying text.
113. 104 S. Ct. at 1995-96.
114. *Id.* at 1995; *supra* text at notes 18-20.
116. *Id.* at 1995-96.
117. *Id.*
118. 317 U.S. at 350-51.

http://scholarship.law.campbell.edu/clr/vol7/iss2/6
that the state supervises the conduct at issue.\textsuperscript{120} A showing that the conduct was "prompted"\textsuperscript{121} or "contemplated"\textsuperscript{122} by the state, or that the state was "neutral"\textsuperscript{123} to the actions will not be enough.\textsuperscript{124} The actions must be "compelled" by direction of the state.\textsuperscript{125}

Since the Court found the contested action in \textit{Hoover} to be that of the supreme court, not the state bar, the plurality found no need to look for a clearly articulated policy or active supervision to apply the exemption. In reaching its conclusion that the "real party in interest" was the supreme court, the Court noted the strict powers of control exercised by the supreme court over all actions of the Committee. The Arizona Supreme Court had state constitutional power to determine who would and would not be admitted to the bar.\textsuperscript{126} While the court did delegate to the Committee the responsibility for preparing, administering and grading the examination,\textsuperscript{127} the court selected all members of the Committee and retained strict supervisory powers of preview (and review) over the Committee's actions.\textsuperscript{128} According to the supreme court Rules, the Committee could not act unless permitted by the court. One of the supervisory powers was the exact conduct of which Ronwin complained—the establishment of a grading formula. As the \textit{Hoover} Court noted, Rule 28(c) VII B required the Committee to submit its grading formula to the Supreme Court at least thirty days prior to the examination.\textsuperscript{129} Because of these facts the Court held the exemption applicable by the first step.

Importantly, the plurality and the dissent basically agreed that the two part analysis should be used in state action cases. The dissent, in noting that the potential for conflict arises whenever essentially private agencies are given authority to carry out the anticompetitive policies of the state, offered two methods to avoid such potential. Either the state can formulate and carry out the

\textsuperscript{120} Id.
\textsuperscript{121} 421 U.S. at 791.
\textsuperscript{122} 435 U.S. at 414.
\textsuperscript{123} Id.
\textsuperscript{124} Similarly stated in 428 U.S. at 592-93.
\textsuperscript{125} 421 U.S. at 791.
\textsuperscript{126} 104 S. Ct. at 1991.
\textsuperscript{127} The taking of the exam was required for admission to the bar. Id. at 1992.
\textsuperscript{128} Id. at 1997.
\textsuperscript{129} Id. at 1997 and n.22.
policies itself or it can clearly articulate, affirmatively express and appropriately supervise the actions of a delegated authority. For all intents and purposes, this is the same test that the plurality used.

The difference between the plurality and the dissent lies in determining just what is needed for actor/agent conduct to constitute "the state acting as sovereign." The plurality found that Bates controlled that determination. Since, in Bates, the state supreme court's supervision of the disciplinary rules were statutorally so pervasive and its control over the prior, final say of all enforcement actions so complete, the actions of the state bar could not be divorced from those of the State. "The logic of the Court's holding in Bates applies with greater force than the Committee and its actions" in Hoover. Besides all of the factors mentioned above, the Committee members were all "state officers."

Consequently, in Hoover, there was no need for the "affirmative command," the clearly articulated policy or the active supervision. In fact, the command and supervision both existed. To demand a policy statement from the state in this case would be to "misconceive the basis of the state action doctrine. The reason that state action is immune from Sherman Act liability is not that the State has chosen to act in an anti-competitive fashion, but that the State itself has chosen to act." This is the essence of the Parker doctrine.

The dissent would pose much stricter limits when determining whether the actions of a Committee or agency are in fact those of the state. The dissent likens this case to Goldfarb. Bates troubled the dissent because, while in Bates there existed an "affirmative command" under Rules 27(a) and 29(a) for the actions complained of there, no "affirmative command" existed in the Rules of the Arizona Supreme Court as to the use of any particular grading scheme in Hoover. Since there was no "requirement" by the

130. Id. at 2004 (Stevens, J., dissenting).
131. Id. at 1996-98.
132. Id. at 1997.
133. Id.
134. Id. at 1998.
135. Id. at 2006-07 (Stevens J., dissenting).
136. Id. at 2005 (Stevens, J., dissenting). "In short, one looks in vain in Arizona law, petitioners' briefs, or the pronouncements of the Arizona Supreme Court for an articulation of any policy besides that of admitting only competent attorneys to practice in Arizona." Id.
state that the Committee propose a specific grading scale for the purpose of limiting the number of lawyers in the bar, the actions could not be that of the state.

The need for a "requirement" misses the point of the exemption entirely. If a clearly articulated policy were required of the state each time it wished to act anticompetitively, the *Parker* doctrine would be emasculated. The state is exempt from federal antitrust laws not because it can show good cause or a compelling need. It is exempt simply because it is a state. The motives behind its anticompetitive practices cannot be questioned with regard to the Sherman Act. This concept must extend to an actor/agent who performs subject completely to the supervision of the sovereign. A sovereign must delegate actions. When it gives specific powers to delegatees, retains active supervision over all the delegate's actions and provides the final determination for the delegate's recommendations (as the supreme court did here) before action is taken, then it must be recognized that the state is the "real" actor. If for no other reason, this is why the plurality's decision reflects the concepts behind *Parker*. "State action" spoken of in *Parker* and exempt from the Sherman Act is state action in fact. In *Goldfarb* there was no active supervision by the state, therefore, the state did not have the ultimate responsibility of the fee schedules. Without ultimate power the actions could not be those of the state.

As one can tell, the Court has had trouble clarifying which words (compelled, directed, authorized) pertain to the first step or the second step in the proper *Parker* analysis. Confusion over these terms probably led to the dividing point between the plurality and dissent in *Hoover*. The Court must become less concerned with the "proper" usage of terms and concentrate on the analysis clarified by Justice Powell.

Naturally, overlap of terms will exist to some extent when analyzing the two steps. The terms all have strong connotations used to emphasize how inseparable the actions of the actor/agent must be from the state's mandate in order for the *Parker* doctrine's application. The inseparability must exist whether the first or second step covers the actors and their actions. The distinction between

137. 421 U.S. at 791.
138. This trouble arises only when the challenged actions are performed by actors/agents. The Court faces no trouble when the legislature or supreme court act in their own capacity. Clearly those actions are exempt from antitrust laws. They might be invalid if contrary to a federal regulation based on the Commerce Clause.
the steps is one of degree. As the mandate becomes clearer, more compelling, the actor/agent's conduct and identity becomes more indistinguishable from those of the state and the less a need exists for a clearly articulated policy. If the mandate is less powerful, the distinction between the actor/agent and the state becomes more apparent and the need for the policy statement becomes greater.

This sliding scale exists in order to preserve the balance between the sovereign rights of the states and the purpose of the federal antitrust legislation. When the steps are analyzed according to this scale of degree, the Court's decisions and Justice Powell's explanation in *Hoover* of the exemption become clearer.

The *Hoover* procedure appears to be the standard for analyzing future state action cases. Though the decision itself was a plurality, the two Justices not taking part in the decision were Justices Rehnquist and O'Connor. Justice Rehnquist supported granting an exemption in four of the six cases discussed herein and his desire to reinvigorate federalist principles was shown clearly in *National League of Cities v. Usery*. Justice O'Connor opted for exemption in *Boulder.* With their additional support, the next state action case promises to give precedential impact to Justice Powell's analysis in *Hoover*.

**CONCLUSION**

The plurality decision in *Hoover v. Ronwin* plainly shows the consistency in the Court's prior rulings on the issue of antitrust exemption for state actions. In fact, the dissenting opinion seems to put forth the same test. The divergence comes not in formulating the test, but on the question when does a state delegate authority and, yet, still act as sovereign. The Court's confusion in previous cases over terminology aided in creating this divergence. In *Hoover* the plurality's argument is more sensible than the dissent's. Action performed by a committee can be classified as action by the sovereign, and exempt under the *Parker* doctrine, if it is in fact that of the state legislature or supreme court acting in its sovereign, legislative capacity. In order to determine this, one looks at the actual enabling documents, the level of active, continuous state supervision and whether the state retains ultimate control over the

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140. Justice O'Connor opted for the exemption in *Boulder*, the only case discussed here in which she took part.
final determination of procedure. To demand, as the dissent does, a clear articulation of policy each time power to control competition is delegated would render *Parker* and its progeny useless and intrude upon the very basis for the doctrine. Justice Powell’s analysis, certain to become the standard for future state action cases, upholds the principles expressed in *Parker*.

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