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State Action Immunity and Preemption in Antitrust Challenges to State Pricing Laws:  
Alcoholic Beverage Control Board v. Taylor Drug Stores, Inc.

INTRODUCTION

The Kentucky Distilled Spirits and Wine Fair Trade Act1 (Act) has prevented price competition among wholesale and retail liquor and wine merchants since 1940.2 The Kentucky Department of Alcoholic Beverage Control has promulgated regulations3 in order to facilitate the administration of the Act and to promote its overall purpose which is to "stabilize and make an orderly market for the sale of distilled spirits."4 In July of 1982 the Kentucky Supreme Court in Alcoholic Beverage Control Board v. Taylor Drug Stores, Inc.5 invalidated certain vital provisions6 of the Act as violative of the Sherman Antitrust Act.7 The Court relied primarily on the United States Supreme Court decision of California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.,8 which struck down the California Wine Fair Trade Contracts and Price Posting Act9 on the same grounds. Because the Kentucky court considered the Kentucky statute to be essentially indistinguishable from the stricken California statute, it had no choice but to invalidate the Kentucky Act.

Although both the California and Kentucky Acts were held to violate facially the Sherman Act, the critical determination in

1 KY. REV. STAT. §§ 244.380-.990 (Bobbs-Merrill 1981) [hereinafter cited as KRS].
2 Distilled Spirits and Wine Fair Trade Act, ch. 13, 1940 Ky. Acts 90 (codified at KRS §§ 244.380-.990 (1981)).
3 804 KY. ADMIN. REGS. 3:010-060 (1982).
4 804 KY. ADMIN. REGS. 3:010 (1982).
5 635 S.W.2d 319 (Ky. 1982).
6 Specifically KRS §§ 334.380, .390, .470.
both cases was that neither law qualified for "state action" immunity from the Sherman Act as articulated by the United States Supreme Court in *Parker v. Brown*. The Court in *Parker* held that the Sherman Act prohibited only the anticompetitive activities of individuals and corporations and did not restrain state action that tended to limit or prevent competition. In *Midcal*, the Supreme Court announced a two-pronged test to determine whether state legislation qualifies for *Parker* state action immunity: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." The California and the Kentucky Acts were both found not to require sufficient active state supervision to meet the second prong of the *Midcal* test; thus, neither state was able to use the *Parker* immunity as a shield against the Sherman Act and the federal policy of encouraging competition which it embodies.

Since the *Midcal* decision, other state and federal courts have grappled with the validity of a variety of state regulatory statutes under the two-pronged test for state action immunity and have come to surprisingly disparate conclusions. The purpose of this Comment is to suggest, by using the reasoning expressed by some of these state and federal courts, that the Kentucky Act is distinguishable from the California Act, that although the Kentucky Act does violate the Sherman Act, it is immune from the Sherman Act under the state action exemption, and that the Kentucky Supreme Court should have upheld the Act. This Comment also will discuss the possibility that the United States Supreme Court may have displaced the *Midcal* test in a more recent case by requiring analysis of whether the state statute in question is preempted by the Sherman Act before proceeding to a state action determination, a shift in emphasis the Kentucky Supreme Court may have to consider in the near future.

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11 In *Parker* the Court said, "we find nothing in the language of the Sherman Act or its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Id.* at 350.
13 *Midcal*, 445 U.S. at 106; 635 S.W.2d at 324.
I. FROM PARKER TO MIDCAL

In 1943 the United States Supreme Court, in Parker v. Brown, settled the issue of whether anticompetitive legislation by a state violates the Sherman Act. The Court examined the legislative history and plain language of the Sherman Act and concluded that the Act was not intended to preclude anticompetitive activity of the state as sovereign, thereby establishing the doctrine of state action immunity. This immunity was not unlimited; in setting its outer boundaries, the Court held that the state could not "give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful" and that the state could not become a "partic-

15 317 U.S. at 341. Parker involved a challenge to the controls placed on the 1940 California raisin crop by the California Agricultural Prorate Act of 1933. The Act "authorized the establishment . . . of programs for the marketing of agricultural commodities produced in the state, so as to restrict competition among the growers and maintain prices in the distribution of their commodities to packers." Id. at 346.

The plaintiffs claimed the program violated three federal provisions: 1) the Sherman Act, 2) the Agricultural Marketing Agreement Act of 1937 and 3) the commerce clause of the Constitution, art. 1, § 8, cl. 3. A unanimous Court upheld the program on all three grounds. The only portion of Parker under consideration here is the unsuccessful challenge to the program under the Sherman Act. See id. at 350-53.

16 In this context the Court said:

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." 21 Cong. Rec. 2562, 2457; see also at 2459, 2461. That its purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations, appears abundantly in its legislative history.

Id. at 351.

17 In reading the plain language of the Act, the Court concluded:

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. The act is applicable to "persons" including corporations, § 7, 15 U.S.C.A., and it authorizes suits under it by persons and corporations. § 15.

Id.

18 Id. The Court cited Northern Securities Co. v. United States, 193 U.S. 197 (1904) for the proposition that:

No State can, by merely creating a corporation, or in any mode, project its authority into other States, and across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce.

193 U.S. at 345.
participant in a private agreement or combination by others for restraint of trade."  

For thirty-two years following Parker, the Supreme Court left the evolution of state action immunity to lower courts. In 1975 the Court began to delineate the scope and application of Parker immunity with its decision in Goldfarb v. Virginia State Bar. The Court in Goldfarb placed an express limitation on state action immunity by holding that it is not enough that the activities are "'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as sovereign." In addition, the Court reaffirmed the validity of another limitation referred to in the Parker decision by holding that no state action immunity from the Sherman Act was available if the state "voluntarily joined in what is essentially a private anticompetitive activity."

In Cantor v. Detroit Edison Co., a plurality of the Court attempted to make state action immunity unavailable to private citizens acting under color of state law. But since both concur-

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19 317 U.S. at 351-52. To support this limitation the Court cited Union Pac. R.R. v. United States, 313 U.S. 450 (1941) wherein a monopoly created by a combination between Kansas City, the State of Kansas, and the Union Pacific Railroad to control the operation of a new produce market was held to violate the Sherman Act.


22 Id. at 791. Goldfarb involved minimum-fee schedules for lawyer's services adopted and indirectly enforced by the Virginia State Bar. Even though the Bar was a state agency by law, the Supreme Court held that its activities in establishing minimum fees were not protected from the Sherman Act by state action immunity. The importance of this decision was the recognition that not all anticompetitive activities engaged in by state agencies are immune from the Sherman Act.

23 Id. at 792. The Court cites Parker, 317 U.S. at 351-52 as authority for this statement. See note 19 supra and accompanying text for further discussion.


25 In Cantor, the Court refused to extend state action immunity to a privately owned power company that was regulated by the state. Under a state tariff the power company entered into a program to distribute free light bulbs to its customers. The program was
ring opinions took exception to this new limitation and stated that *Parker* required examination of the activity, not of the status of the alleged offender, this modification did not ensue. Thus, *Cantor* simply stands for the proposition that a private power company subject to state regulation and acting pursuant to a state tariff does not per se qualify for *Parker* immunity in all its activities.

*Bates v. State Bar of Arizona* presented to the Supreme Court a Sherman Act challenge to attorney disciplinary rules promulgated by the Arizona Supreme Court. The rules were held to meet the *Goldfarb* limitation on *Parker* immunity because "the challenged restraint is the command of the Arizona Supreme Court" and thus is "compelled by direction of the State acting as sovereign." The state activity in *Bates* was distinguished from the activity held not immune in *Cantor* in that 1) the disciplinary rules in *Bates* reflected a clear articulation of state policy, and 2) the rules were subject to pointed reexamination by the state policymaker. The announcement of this two-part test was an important step in the evolution of the *Parker* state action immunity doctrine.

In 1978 the Supreme Court retreated from the generally held notion that all public officials, agencies and treasuries were safe from antitrust liability. In *City of Lafayette v. Louisiana Power* challenged by light bulb retailers who claimed it violated the Sherman Act. Significantly, the four Justice plurality stated that private citizens could not raise *Parker* immunity as a defense against a challenge to anticompetitive legislation even if the party claiming the immunity is subject to state regulation and the challenged activity is embodied in a tariff approved by a state commission.

26 428 U.S. at 604 (Burger, C.J., concurring) ("the Court has heretofore focussed on the challenged activity, not upon the identity of the parties to the suit"); id. at 613 n.5 (Blackmun, J., concurring) ("to the extent that the plurality, by stressing the identity of the state defendants in [Parker], intimates that a different result might have been reached had the raisin growers themselves been sued, I cannot agree").


28 See note 22 supra and accompanying text for a discussion of this limitation.

29 433 U.S. at 359-60.

30 Id. at 360 (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. at 791).

31 See note 25 supra and accompanying text.

32 433 U.S. at 362.

& Light Co., a majority of the Court held that Congress did not intend to exempt local governments per se from the Sherman Act. A four justice plurality wrote that "the Parker doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or by its subdivisions, pursuant to state policy." This decision represented another step toward narrowing available applications of state action immunity and also served to define its scope more clearly.

The Supreme Court restated the test for Parker immunity in New Motor Vehicle Board of California v. Orrin W. Fox Co., which involved a challenge to a California law requiring state licensing of new locations for retail automobile dealerships. The Court upheld the law as "a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom," thus emphasizing the first of the two criteria expressed in Bates.

In California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., the Supreme Court attempted to synthesize the holdings of Goldfarb, Cantor, Bates, Lafayette and Fox into a comprehensive standard for antitrust immunity under Parker. The Court announced the following two-pronged test to qualify for state action immunity: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." It was in light of this test that the Kentucky Supreme Court considered the validity of the Distilled Spirits and Wine Fair Trade Act against a Sherman Act challenge.

35 Id. at 394-408. The City of Lafayette argued that cities, as agents of the state, should not be subject to antitrust laws under the Parker doctrine.
36 Id. at 413. Chief Justice Burger in a concurrence wrote that cities engaged in "proprietary" enterprises require state authorization to obtain Parker immunity, perhaps implying that nonproprietary local government activity would automatically receive state action immunity. Id. at 418 (Burger, C.J., concurring).
37 For further discussion on the impact of Lafayette, see Areeda, supra note 33.
39 Id. at 100.
40 See notes 27-32 supra and accompanying text.
41 445 U.S. at 97.
42 Id. at 105 (quoting City of Lafayette, La. v. Louisiana Power & Light Co., 435 U.S. at 410).
II. **Midcal and Taylor Drug**

In striking down the Kentucky Act in *Taylor Drug*, the Kentucky Supreme Court held that "there is no fundamental basis upon which we can distinguish this case from *Midcal.*" The following discussion suggests *Midcal* and *Taylor Drug* are distinguishable and that the Kentucky Act, unlike the California Act, qualifies for *Parker* state action immunity from the Sherman Act, even though it does violate the Sherman Act.

A. **The Kentucky Act Does Violate the Sherman Act**

The Kentucky Court's Sherman Act analysis in *Taylor Drug* commences: "As in *Midcal*, we begin with the premise that the resale price maintenance system existing under the statute here in question violates the Sherman Act if applicable." This statement is a direct reference to the following passage from *Midcal*: "the threshold question is whether California's plan for wine pricing violates the Sherman Act. This Court has ruled consistently that resale price maintenance illegally restrains trade." Continuing its analysis in *Midcal*, the United States Supreme Court concluded that the California Act constituted resale price maintenance because "[t]he wine producer holds the power to prevent price competition by dictating the prices charged by wholesalers." Whereas the United States Supreme Court found actual resale price maintenance that resulted from California statutes requiring producers to post state-enforced price schedules to retailers and consumers and file fair trade contracts with the state, the Kentucky Supreme Court merely assumed that the Kentucky Act constituted resale price maintenance and thereby concluded that it violated the Sherman Act. Although the Kentucky Court did not explore the question of whether the Kentucky Act is an illegal resale price maintenance, its "premise"

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43 635 S.W.2d at 319.
44 Id. at 324.
45 Id. at 323.
46 445 U.S. at 102.
47 Id. at 103.
48 See CAL. BUS. & PROF. CODE § 24866 (West 1964) (repealed 1980).
was correct; the following discussion will show that the Act does indeed violate the Sherman Act.

The Second Circuit Court of Appeals dealt with an antitrust challenge to the Connecticut Liquor Control Act in the 1981 case of *Morgan v. Division of Liquor Control, Department of Business Regulation, State of Connecticut.* The court held these statutes, which were similar in their effect to the Kentucky Act, did not violate the Sherman Act and need not be saved by state action immunity. The Kentucky statutes in question incorporate aspects of both the California statutes struck down in *Midcal* and the Connecticut statutes upheld in *Morgan.* The California statutes governing wine prices expressly gave the wine producer

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49 CONN. GEN. STAT. ANN. §§ 30-1 to 30-113 (West 1975), specifically Part V, Prices §§ 30-63 to 30-68 (repealed 1981).
50 664 F.2d 353 (2d Cir. 1981).
51 The Connecticut Liquor Control Act, CONN. GEN. STAT. ANN. §§ 30-63 to 30-68, involved a three stage process. In the first stage the manufacturer or out-of-state shipper filed with the Division of Liquor Control the list of prices at which it would sell its products to Connecticut wholesalers. The second stage required wholesalers to file a list of prices at which it would sell products to retailers. Section 30-68e required minimum markups at this stage of 11% on spirits and cordials, 20% on beer and wine not bottled in Connecticut and 36% on wine bottled in Connecticut. The third stage involved retail prices. Retailers were required to mark up spirits a minimum of 21 1/2%, cordials 28%, wine 33 1/3%, and beer 20%. After *Morgan* the Connecticut legislature repealed all the minimum markup statutes except those governing wholesale prices of wine. In place of minimum markups the new statutes prohibit wholesalers and retailers from selling products at below statutorily defined cost. CONN. GEN. STAT. ANN. APPENDIX Unclassified 1981 Public Acts, P.A. 81-294. Nevertheless, the Second Circuit Court of Appeals held the minimum markup statutes did not violate the Sherman Act. Apparently forces opposing the minimum markup laws were working for their repeal both judicially and legislatively.

The Kentucky statutes struck down in *Taylor Drug*, KRS §§ 244.380, 244.390 and 244.470, are different from the Connecticut statutes upheld in *Morgan* only in that the Kentucky pricing laws require the wholesaler and retailer to enter into contracts with their suppliers providing that they will not resell at less than the price stipulated by the vendor, which price must reflect the markups specified by § 244.390. These markups are 15% for distilled beverages from producer to wholesaler, 20% for wines from producer to wholesaler, and a 33 1/3% minimum markup for all covered beverages from wholesaler to retailer. Section 244.400 requires that these contracts be filed with the state.

The effect of the Connecticut and Kentucky statutes is virtually identical in that retail prices to consumers are basically controlled by state-mandated markups. Whereas Connecticut simply enforced the markups by prohibiting sales below "cost" (which included the markups), the Kentucky statutes go further and require contracts between the producers, wholesalers and retailers to ensure enforcement of the markups set by the state.

52 664 F.2d at 355.
53 CAL. BUS. & PROF. CODE § 24866 (West 1964) (repealed 1980).
“the power to prevent price competition by dictating prices charged by wholesalers.”\(^{54}\) Thus, producers were allowed to set retail prices in their own economic interest, while “the state’s role is restricted to enforcing the prices specified by the producers.”\(^{55}\) In contrast, the Connecticut statutory scheme controlled only the minimum markup between producer, wholesaler and retailer and did not require producers to set state-enforced ultimate prices to consumers as in *Midcal*.\(^{56}\) The Second Circuit Court distinguished the California statutes which allowed producers to set resale prices enforced by the state in violation of the Sherman Act from the Connecticut statutes which required minimum markups from producer to consumer and did not violate antitrust laws.\(^{57}\)

The Kentucky statutes are similar to the Connecticut statutes in that the minimum price to consumers is governed by minimum markups set by the state. They are similar to the California statutes in that their mode of enforcement is by contract between producers, wholesalers and retailers. Although technically the Kentucky scheme does not allow producers to set ultimate prices

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\(^{54}\) 445 U.S. at 103. The California statute read:

Each wine grower, wholesaler licensed to sell wine, wine rectifier, and rectifier shall:

(a) Post a schedule of selling prices of wine to retailers or consumers for which his resale price is not governed by a fair trade contract made by the person who owns or controls the brand.

(b) Make and file a fair trade contract and file a schedule of resale prices, if he owns or controls a brand of wine resold to retailers or consumers.

CAL. BUS. & PROF. CODE § 24866 (West 1964) (repealed 1980).

\(^{55}\) 445 U.S. at 100-01 (quoting from Rice v. Alcoholic Beverage Appeals Bd., 579 P.2d 476 (Cal. 1978), a California Supreme Court decision striking down parallel alcoholic beverage pricing statutes).

\(^{56}\) 664 F.2d at 355.

\(^{57}\) *Id.* at 355-56 n.2 which states:

It may appear that the Connecticut system permits beer and wine producers and shippers to establish resale prices. The automatic application of the statutory markup to the initial offering price would seem to allow those who set that price to determine ultimate resale prices by adjusting their offering price. But this result occurs only because the *State* has dictated the markups, not because any producers or shippers have formed a conspiracy or combination. Moreover, the fierce competitive pressures at the retail level should prevent manufacturers from conspiring to establish prices for alcoholic beverages.
to consumers as in *Midcal*, instead requiring state-enforced minimum markups between producer and consumer as in *Morgan*, the Kentucky Act violates the Sherman Act because its method of enforcement is by fair trade contract.\(^{58}\) In *Midcal*, the United States Supreme Court foreclosed any argument for the validity of state-mandated resale price maintenance by holding that since Congress "repealed the Miller-Tydings Act . . . the Sherman Act's ban on resale price maintenance now applies to fair trade contracts unless an industry or program enjoys a special antitrust immunity."\(^{59}\) The statute in *Morgan* was facially valid because "[u]nlike the California statute in *Midcal*, the Connecticut statutes do not authorize or compel private parties to enter contracts or combinations to fix prices in violation of §1 of the Sherman Act."\(^{60}\) The Kentucky Act cannot claim such lack of compulsion since it requires private parties to enter into fair trade contracts. The Kentucky Supreme Court could have saved the Act by striking down only the sections calling for the filing of fair trade contracts\(^{61}\) and leaving intact the sections governing minimum markups\(^{62}\) under the theory expressed in *Morgan*.\(^{63}\) Instead, the Court chose to view the statutes as a single entity necessitating a finding that the composite Act violated the Sherman Act.

### B. The Kentucky Act Qualifies for Parker State Action Immunity

Statutes found to violate the Sherman Act still may be upheld on the alternative ground of *Parker* immunity. *Midcal* set up two

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\(^{58}\) KRS § 244.380(1). "No distiller . . . wholesaler . . . or retailer shall sell any distilled spirits or wine . . . except pursuant to a fair trade contract . . . ." *Id.*

\(^{59}\) 445 U.S. at 102-03.

\(^{60}\) 664 F.2d at 355.

\(^{61}\) The fair trade contracts are called for by KRS § 244.380; the requirements of filing and the necessary contents are set out in KRS § 244.400; and their enforcement is provided for in KRS § 244.470.

\(^{62}\) KRS § 244.390. A major difficulty with letting this section stand is that the enforcement of the minimum markup is made dependent upon the fair trade contracts through its preface: "The contract referred to in KRS § 224.380 shall provide for the following minimum resale prices without discount." *Id.* If the Court had not invalidated the statute, the legislature would have had to rewrite it in order to provide for a different mode of enforcement.

\(^{63}\) See note 57 supra and accompanying text.
criteria that must be met before state legislation can be protected from the Sherman Act by state action immunity. The first requirement is that the challenged restraint must be "clearly articulated and affirmatively expressed as state policy."64 Apparently the Kentucky Supreme Court presumed the Kentucky Act met this part of the test by virtue of its being state legislation.65 The second part of the test requires the state to supervise actively the enforcement of this policy.66 In finding that the Act does not meet this part of the test and therefore is not within the state action immunity, the Court did not use the term "active supervision." Instead it quoted language from Midcal giving examples of what "active supervision" might entail, i.e., establishing and reviewing prices, regulating the terms of fair trade contracts, monitoring market conditions or engaging in a pointed reexamination of the program.67 Based on this language, the Court concluded "that the critical test of 'state action' must be whether the state exercises some reasonable degree of control over the prices."68

65 635 S.W.2d at 323-24. The court merely mentions the first part of the test, id. at 324 n.8, as both parties conceded that this first prong was met. In contrast, the Supreme Court in Midcal looked at the California statute and concluded that "[t]he California system for wine pricing satisfies the first standard. The legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance." 445 U.S. at 105.
66 445 U.S. at 105.
67 635 S.W.2d at 323 (quoting language from California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. at 106). The exact language used in Midcal to describe a lack of active supervision was:
The program, however, does not meet the second requirement for Parker immunity. The State simply authorizes price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program. The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.
445 U.S. at 105-06 (emphasis added). Through the Act's system of minimum mark-ups, Kentucky has effectively "established prices."
68 635 S.W.2d at 324. The Court goes on to state:
Somewhere along the line an agency of the state must possess and must exercise the right to pass judgment, either by itself establishing the price, or by reviewing and accepting, rejecting or modifying a price set by someone else.
As the following examples indicate, other jurisdictions have given varying readings to *Midcal*'s active supervision requirement. Prior to *Midcal*, the California Supreme Court had invalidated parallel liquor pricing statutes\(^69\) in *Rice v. Alcoholic Beverage Control Appeals Board*.\(^70\) After a detailed review of the *Parker* immunity line of cases,\(^71\) the court concluded that the statute in question did not qualify for state action immunity because "the state play[ed] no role whatever in setting retail prices."\(^72\) This language is cited in *Midcal*\(^73\) and it is evident that the *Rice* analysis of state action immunity had great influence over the Supreme Court's enunciation of the second prong of the *Midcal* test.\(^74\) Thus, in *Rice* and *Midcal*, the state's involvement was held inadequate to meet the active supervision test because the state

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\(^69\) *CAL. BUS. & PROF. CODE* § 24755 (West 1964) (repealed 1980).
\(^70\) 579 P.2d 476 (Cal. 1978).
\(^71\) Id. at 483-85.
\(^72\) Id. at 486 (emphasis added). The court's reasoning was:

In the price maintenance program before us, the state plays no role whatever in setting the retail prices. The prices are established by the producers according to their own economic interests, without regard to any actual or potential anticompetitive effect; the state's role is restricted to enforcing the prices specified by the producers. There is no control, or "pointed re-examination," by the state to insure that the policies of the Sherman Act are not "unnecessarily subordinated" to state policy. Thus, in our view, we would be extending the decisions of the United States Supreme Court beyond their intended design if we were to hold, as the department urges, that this scheme is immune from the Sherman Act.

\(^73\) 445 U.S. at 100-01.
\(^74\) Compare *id.* with *id.* at 105-06 (the Court in *Midcal* simply restates and expands upon the standard expressed in *Rice*).
exerted no control over retail prices. The Kentucky Act tightly controls prices at three levels of commerce\textsuperscript{75} and cannot be said to fall into the category of statutes where the "State simply authorizes price-setting and enforces the prices established by private parties."\textsuperscript{76}

In a decision of particular interest since it also involved a challenge to an alcoholic beverage pricing law, the Massachusetts Supreme Court, in \textit{M. H. Gordon \& Son, Inc. v. Alcoholic Beverage Control Commission},\textsuperscript{77} held that a Massachusetts law\textsuperscript{78} passed the \textit{Midcal} two-part test. The Massachusetts scheme exerted substantially less state supervision than the Kentucky Act in that, in Massachusetts, "the commission ordinarily has no direct control over alcoholic beverage prices";\textsuperscript{79} yet it was upheld since "the commission . . . is the final arbiter of the price at which alcoholic beverages are sold by suppliers to Massachusetts wholesalers"\textsuperscript{80} and thus there is active state supervision.\textsuperscript{81}

The Louisiana Supreme Court recently upheld a state law regulating automobile dealerships\textsuperscript{82} on the ground of state action immunity in \textit{Benson and Gold Chevrolet v. Louisiana Motor Vehicle Commission}.\textsuperscript{83} The court concluded that, even though the program lacked many aspects of state supervision,\textsuperscript{84} since

\textit{Id.} (citation omitted).

\textit{Id.} For another example of a case in which mere authorization by a state statute and regulation by state commission combined to satisfy the active supervision test, see \textit{Bally Mfg. Corp. v. New Jersey Casino Control Comm'\n}, 426 A.2d 1000 (N.J. 1981).

\textit{Id.} (citation omitted).

\textit{Id.} The court detailed the following deficiencies in the statute regarding active state supervision:

[T]he Motor Vehicle Commission has never independently determined the market area for any dealership; . . . it has never conducted studies of mar-

\textsuperscript{75} See KRS § 244.390.
\textsuperscript{76} 445 U.S. at 105.
\textsuperscript{77} 434 N.E.2d 986 (Mass. 1982).
\textsuperscript{79} 434 N.E.2d at 991.
\textsuperscript{80} Id.
\textsuperscript{81} The court went on to hold:

Unlike the state activity in \textit{Midcal}, §§ 25B and 25D are not simply an authorization for private parties to engage in price fixing. The Commonwealth actively supervises the statute. The Commission ultimately controls pricing and the legislature has established a method by which the affirmed price will be reasonable.

\textit{Id.} (citation omitted).

\textsuperscript{83} 403 So.2d 13 (La. 1981).
\textsuperscript{84} The court detailed the following deficiencies in the statute regarding active state supervision:
supervision was by the state and not by private parties and the state agency involved was exercising its statutory duties, there was sufficient active supervision to allow application of state action immunity.

In George W. Cochran Co. v. Comptroller of the Treasury, Alcohol and Tobacco Tax Division, the Maryland Supreme Court upheld the Maryland Unfair Cigarette Sales Act. In determining whether active supervision existed, the court looked at the nature of state involvement to ensure that state action "is not simply an authorization for private parties to engage in price-fixing arrangements and is not merely an enforcement mechanism for prices agreed upon by private parties." After analyzing the statute, the court concluded that "the State Comptroller administers the statute, is charged with the duty of enforcing it, employs inspectors to that end, and may seek a variety of remedies to enforce the act. Thus, the legislative policy is 'actively supervised' by the state itself."

While state courts thus have uniformly upheld statutes challenged on antitrust grounds and have consistently upheld challenges to liquor control laws on various other grounds, federal

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ket conditions to discover instances of price fixing; . . . it has never made any follow-up determination to ascertain that a dealership's floor area or service facilities remain adequate; and . . . [it] has never suspended or revoked a dealership's license because of failure to maintain qualifications for a license.

Id. at 24.

The court stated in this context:

Immunity from antitrust legislation is conditioned upon a state policy being actively supervised by the state itself, rather than by private parties. The decisions of the United States Supreme Court make it clear that the evil to be eliminated is that which occurs when essentially private interests claim immunity from antitrust legislation by inducing some involvement by the state in regulation which is basically protective of private interests.

Id.

Id. at 25.


437 A.2d at 198.

Id.

See notes 77-90 supra and accompanying text.

See Jules Inc. v. Boggs, 270 S.E.2d 679, 681 n.3 (W. Va. 1980) ("The Twenty-First Amendment . . . has been found to give a state broad powers beyond the normal
courts have been less consistent in the wake of Midcal in holding state statutes valid when claimed to be anticompetitive. In Morgan v. Division of Liquor Control, discussed earlier, the Second Circuit found that the Connecticut alcoholic beverage control statutes qualified for state action immunity as an alternative ground for upholding the statutes. The court found active supervision in the fact that the pricing system’s merits had frequently been debated in the legislature and in the “structuring [of] a detailed mechanism for determining prices for alcoholic beverages.” A number of other federal circuit courts also have found sufficient active state supervision to uphold state statutes challenged on Sherman Act grounds.

In contrast, some federal circuit courts have struck down state statutes for failure to meet Midcal’s two-pronged test for police powers to regulate intoxicating liquor.” Interestingly, the court cites Midcal, among other cases as authority for this proposition; Colby Distributing Co. v. Lennen, 606 F.2d 102, 111 (Kan. 1980) (“We hold pursuant to the power and authority granted the state by the Twenty-first Amendment and pursuant to . . . the Kansas Constitution, to promote temperance and for the protection of the general welfare, health and safety of the people of Kansas, the legislature properly acted to permit a system of exclusive brand franchising. . . .”), appeal dismissed, 449 U.S. 943 (1980). See also notes 77-81 supra and accompanying text. For a case invalidating a liquor control law on first amendment grounds see Bellanca v. New York State Liquor Auth., 429 N.Y.S.2d 616, 620 (N.Y. 1980) (“The State’s power to control and regulate the sale of alcoholic beverages is designed to protect the public from abuses related to alcohol consumption. It is not a license to censor whatever occurs at premises authorized to sell alcohol” and therefore the state Liquor Authority could not ban topless dancing at licensed premises), rev’d per curiam, 452 U.S. 714 (1981).

664 F.2d 353. See notes 49-63 supra and accompanying text discussing Morgan in the context of whether the Kentucky Act violates the Sherman Act.

679 F.2d 656 (9th Cir. 1982) (The court, in dicta, after finding the statute did not violate the Sherman Act, stated that Ohio’s prohibition of film studio blind bidding arrangements satisfied active supervision requirement); Euster v. Eagle Downs Racing Ass’n, 677 F.2d 992 (3d Cir. 1982) (state set jockey fees actively supervised); Turf Paradise, Inc. v. Arizona Downs, 670 F.2d 813 (9th Cir. 1982) cert. denied, 102 S. Ct. 2301 (1982) (Arizona race track allocation law mandated active supervision by the state).
state action immunity. In *Miller v. Oregon Liquor Control Commission*, the Ninth Circuit Court of Appeals invalidated Oregon’s alcoholic beverage pricing regulations on the theory that “Oregon mandates posting of prices to be charged by each wholesaler, but does not in any way review the reasonableness of the price set.” Since the regulations merely effectuated price posting and prohibited quantity discounts, the court concluded that the program was not actively supervised under *Midcal* and therefore did not qualify for state action immunity from the Sherman Act.

In *Knudsen Corp. v. Nevada State Dairy Commission*, the Ninth Circuit sustained an injunction preventing enforcement of the Nevada regulatory scheme for milk pricing. The court found that there was a high probability that the suit challenging the regulations would succeed on the merits in district court and that “the consuming public in Nevada would suffer irreparable harm if the injunction were not granted.” Although the holding in this case did not require the lower court to invalidate the statute, the appellate court did make a point of expressly commenting on the “absence of active supervision by the state” since the state “does not set wholesale prices and simply enforces privately-set prices through the mechanism of advance filing.” This enforcement of producer-posted prices is analogous to the procedures for alcoholic beverages and wine in *Miller* and *Midcal*. The common thread in these cases is that state enforcement

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98 688 F.2d 1222 (9th Cir. 1982).
100 688 F.2d at 1226-27.
101 676 F.2d 374 (9th Cir. 1982).
102 NEV. REV. STAT. §§ 584.583(5)-.584 (1979).
103 676 F.2d at 378.
104 Id. at 379.
105 For another instance where a federal circuit court invalidated a state statute under *Midcal*, see Corey v. Look, 641 F.2d 32 (1st Cir. 1981) (regulations governing a local steamship authority failed to meet both *Midcal* tests).
For recent state action cases not decided on active supervision grounds see Grendel’s Den, Inc. v. Goodwin, 662 F.2d 88 (1st Cir. 1981), aff’d *sub nom.* Larkin v. Grendel’s Den, Inc., 103 S. Ct. 505 (1982) (statute giving churches and schools veto power over the issuing of alcoholic beverage licenses found not to be compelled by state interests under the facts in the case); Virginia Academy of Clinical Psychology v. Blue Shield, 624 F.2d 476, 482 n.10 (4th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981) (Blue Cross not allowed to
of manufacturer-posted prices is not sufficient active state supervision to overcome the anticompetitive effect of these statutes and be shielded by *Parker* immunity. This thread does not run to the Kentucky Act which, instead of protecting producer-posted prices, enforces state-mandated minimum markups by wholesalers and retailers.

In summary, courts have found active state supervision if: the state, not private parties, provided the supervision; the state administered and enforced the statute; the state was the final arbiter of prices at which alcoholic beverages were sold; or the state legislature had merely debated the merits of the regulation and established a detailed enforcement mechanism. In contrast, courts have found active supervision lacking when the state did no more than require manufacturers to post prices and then enforce those prices.

In *Taylor Drug*, the Kentucky Supreme Court implied that the Kentucky Act had merely placed "a gauzy cloak of state involvement over what is essentially a private price fixing arrangement" and stated that to satisfy the second prong of the *Midcal* test the "state must exercise some reasonable degree of control over the prices." The Kentucky Court's interpretation of what constitutes active supervision therefore is more stringent than that of any other state or federal court. Under any of the standards reviewed previously, the Kentucky Act seemingly constituted sufficient active state supervision to qualify for *Parker* immunity. Even under the Kentucky Court's own, more stringent,
standard, the Act, in establishing and enforcing minimum mark-ups from producer to consumer, does provide state control over prices at three levels of commerce\textsuperscript{113} and thus should satisfy the active supervision requirement.

III. LOOKING AHEAD: STATE ACTION IMMUNITY PREEMPTED

As the state action doctrine has evolved in the Supreme Court, a minority undercurrent has argued that the primary issue should not be whether states are immune from the Sherman Act but rather whether state legislation is preempted by the supremacy clause.\textsuperscript{114} This movement originated in the dissenting opinion of Justices Stewart, Powell and Rehnquist in \textit{Cantor v. Detroit Edison Co.},\textsuperscript{115} wherein Justice Stewart wrote that the issue in \textit{Parker} "was whether the California statute was preempted by the Sherman Act, not whether sovereign States were immune from suit under the Sherman Act."\textsuperscript{116} This interpretation remained quiescent following \textit{Cantor} and did not surface again until the recent case of \textit{Community Communications Company, Inc. v. City of Boulder, Colorado},\textsuperscript{117} wherein Justice Rehnquist, writing for himself, Chief Justice Burger and Justice O’Connor, dissented: "The question addressed in \textit{Parker} and in this case is not whether State and local governments are exempt from the Sherman Act, but whether statutes, ordinances and regulations enacted as an act of government are preempted by the Sherman Act under the operation of the Supremacy Clause."\textsuperscript{118} The preemption question came to the forefront recently in \textit{Rice v. Nor-
man Williams Co.,\textsuperscript{119} in which the majority of the Court, led by Justice Rehnquist, held that a California Alcoholic Beverage statute\textsuperscript{120} was not preempted\textsuperscript{121} by the Sherman Act and that therefore state action analysis was not required to determine the validity of the statute.\textsuperscript{122} The Court reconciled Midcal with this shift in emphasis by observing that the California statute in question in Midcal "mandated resale price maintenance, an activity that has long been regarded as a \textit{per se} violation of the Sherman Act."\textsuperscript{123} This observation implies that the statute found to be lacking active state supervision in Midcal and incapable of being shielded by Parker immunity also would have been preempted by the Sherman Act, thus leading to the same result.

The holding in Norman Williams indicates that a different approach must be taken in the future when analyzing state anticompetitive legislation. Norman Williams implies that a state statute can have an anticompetitive effect and still be upheld; it will not be preempted by the Sherman Act unless "there exists an irreconcilable conflict between federal and state regulatory schemes. The existence of a hypothetical or potential conflict is insufficient to warrant the preemption of the state statute."\textsuperscript{124}

\textsuperscript{119} 102 S. Ct. 3294.
\textsuperscript{120} CAL. BUS. & PROF. CODE § 23661 (West Supp. 1981). The statute prohibited importers of alcoholic beverages from buying from anyone except state authorized dealers.
\textsuperscript{121} The Court explained its analysis as follows:

In determining whether the Sherman Act preempts a state statute, we apply principles similar to those which we employ in considering whether any state statute is preempted by a federal statute pursuant to the Supremacy Clause. As in the typical preemption case, the inquiry is whether there exists an irreconcilable conflict between the federal and state regulatory schemes. The existence of a hypothetical or potential conflict is insufficient to warrant the preemption of the state statute.

102 S. Ct. at 3299.
\textsuperscript{122} Id. at 3301 n.9.
\textsuperscript{123} Id. at 3299 (citing California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. at 102-03).
\textsuperscript{124} Id. In this context the Court further stated:

A state regulatory scheme is not preempted by the federal antitrust laws simply because in a hypothetical situation a private party's compliance with the statute might cause him to violate antitrust laws. A state statute is not preempted simply because the state scheme might have an anticompetitive effect. [citations omitted].

A party may successfully enjoin the enforcement of a state statute only if the statute on its face irreconcilably conflicts with federal antitrust policy.

Id.
Thus the Court set up a standard for preemption by the Sherman Act that will be difficult for parties challenging state legislation to meet. In attempting to define the threshold of preemption better, the Court concluded that a state statute "may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute."\(^{125}\) As an example of the type of statute that would be preempted, the Court pointed out that the statute challenged in *Midcal*, whereby the state enforced retail prices set by producers, had a "pernicious effect on competition and lack[ed] . . . any redeeming virtue,"\(^{126}\) thus requiring preemption by the Sherman Act.

The introduction of preemption analysis by the majority in *Norman Williams* puts the status of *Parker* in doubt. The Court in *Norman Williams* held that, since the statute being challenged was not preempted, it was unnecessary to proceed to a state action analysis.\(^{127}\) Though unclear, this concept possibly includes two implications important to analysis of state anticompetitive legislation: 1) statutes that are anticompetitive in nature, though not so "pernicious" or "irreconcilable" with federal antitrust policy as to be preempted, no longer need to pass the *Midcal* tests for state action immunity to be held valid; and 2) a statute that was held preempted could be shielded from the Sherman Act by *Parker* immunity. Although Justice Rehnquist does imply, perhaps inadvertently, that *Parker* immunity could be resorted to in order to save a preempted statute,\(^{128}\) the *Parker* decision itself might preclude such a possibility. The Court in *Parker* held that state action immunity is not available where a state "give[s] immunity to those who violate the Sherman Act by authorizing them to violate it, or . . . declare[s] that their action is law-

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125 Id. at 3300.
126 Id. at 3299 n.5 (quoting Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 (1977)).
127 Id. at 3301 n.9. The Court observed: "Because of our resolution of the preemption issue, it is not necessary for us to consider whether the statute may be saved from invalidation under the doctrine of *Parker v. Brown*, 317 U.S. 341 (1943) or under the Twenty-First Amendment." Id.
128 See note 127 supra.
ful . . . [or] become[s] a participant in a private agreement or combination by others for restraint of trade." Thus, the outer limit of Parker immunity may coincide with the point where a statute is so irreconcilable with the Sherman Act as to require preemption under Norman Williams. Similarly, a statute which would qualify for the Parker immunity would seem to be valid under Norman Williams as an anticompetitive statute not requiring preemption. Thus, state action immunity has apparently become a shield with nothing to protect.

CONCLUSION

The Kentucky Act challenged in Taylor Drug should not have been invalidated by the Kentucky Supreme Court. The Act did violate the Sherman Act, but it should have been protected from the Sherman Act by Parker state action immunity. By holding that anticompetitive legislation must exert "some reasonable degree of control over the prices" and thereby refusing to extend state action immunity to the Act, the Court applied a stricter standard than is required by the United States Supreme Court decision in Midcal, as interpreted by other courts. In addition, a careful analysis of the Kentucky Act discloses that it does exert such reasonable control as to meet this test.

The Kentucky Retail Liquor Dealers Association has decided not to appeal the Taylor Drug decision to the United States Supreme Court. If Taylor Drug had been appealed, it probably would not have been finally decided on state action grounds. Unless Norman Williams proves to be an aberration, the Court would have determined whether the Kentucky Act was preempted by the Sherman Act, not whether it was immune from its dictates. If preemption analysis had been applied to the

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129 317 U.S. at 351-52.
130 635 S.W.2d at 324.
131 See notes 69-105 supra and accompanying text for a discussion of these court decisions.
132 See note 51 supra for an analysis of the provisions in question. Also see note 68 supra for further discussions by the Court as to what this standard requires. The provisions of the Kentucky Act could easily be construed to fall within this standard.
Act, it would have been upheld under the new standards laid down in Norman Williams, negating any need for further investigation into the correctness of denying Parker immunity to the Act.

The Kentucky Supreme Court may have an opportunity to evaluate this post-Midcal shift to preemption analysis. In the wake of Taylor Drug, the Kroger Company is seeking invalidation of the Kentucky Milk Marketing Law134 (Milk Law) as violative of antitrust laws in Kroger Co. v. Kentucky Milk Marketing and Antimonopoly Commission.135 If a preemption analysis is used, the Kentucky courts should find the Milk Law to be preempted by the Sherman Act if it "irreconcilably conflicts with federal antitrust policy,"136 has a "pernicious effect on competition and lack[s] ... any redeeming virtue."137 It is unclear whether the Milk Law, if preempted, still could be saved by state action immunity if found to meet the two-pronged test of Midcal.138

Like the alcoholic beverage act,139 the Milk Law probably does violate the Sherman Act since it calls for the establishment of prices by producers and provides for enforcement of these prices by prohibiting vendors from selling milk products below cost.140 In Norman Williams the Supreme Court stated that resale price maintenance of the type under attack in Midcal was a per se violation of the Sherman Act,141 and required the statute to be preempted. The Milk Law mandates that the state engage in exactly this sort of resale price maintenance and should probably be preempted. Still, Norman Williams does leave unanswered the question whether state action immunity can save a statute from invalidation even though it would otherwise be preempted. If the answer to this question is affirmative, active state super-

135 Kroger Co. v. Kentucky Milk Marketing and Anti-monopoly Comm'n, No. 82-CI-1175 (Franklin Cir. Ct.). Briefs were to be submitted by the parties on March 11, 1983. A restraining order was dissolved on January 19, 1983.
136 102 S. Ct. at 3299.
137 Id. at 3299 n.5.
138 See notes 128-29 supra and accompanying text.
139 See notes 45-58 supra and accompanying text.
141 See note 126 supra and accompanying text.
vision would once again be the crucial factor in determining the validity of the statute. The Kentucky Supreme Court has held that the key to active supervision is whether the statute "exercisable[s] some reasonable degree of control over the prices." Under this standard the Milk Law would fail since the prices are essentially controlled by the producer and enforced by the state so that the state has insufficient control to qualify for active supervision. Unless the Kentucky Supreme Court decides to modify its holding in *Taylor Drug* and broaden its definition of active state supervision to place it in line with decisions by other state courts and federal courts, the Milk Law would have to be invalidated. Whether such a strict construction of *Midcal*’s active state supervision requirement is correct may ultimately have to be resolved by the United States Supreme Court.

*Randy Donald Shaw*

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142 635 S.W.2d at 324.