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WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

1990 AUG 10

Form #3

NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

AGENCY: ATTORNEY GENERAL TITLE NUMBER: 142

CITE AUTHORITY W. Va. Code § 47-18-20

AMENDMENT TO AN EXISTING RULE: YES ___ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 18

TITLE OF RULE BEING PROPOSED: Proposed legislative rule pertaining to the regulated business exemption under the West Virginia Antitrust Act.

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

Roger W. Tapls.

TITLE 142
PROPOSED LEGISLATIVE RULE
ATTORNEY GENERAL
SERIES 18

Title: Proposed legislative rule pertaining to the regulated business exemption under the West Virginia Antitrust Act.

SUMMARY OF PROPOSED LEGISLATIVE RULE AND
STATEMENT OF CIRCUMSTANCES REQUIRING THE RULE

The Antitrust Division of the Office of the Attorney General is promulgating a rule designed to exempt certain anti-competitive relating to regulated businesses from an enforcement action brought pursuant to the West Virginia Antitrust Act.

The rule is divided into two sections. The first section, entitled "General," addresses the scope, authority, filing date, effective date, construction, and severability of the rule. The second section, entitled "Exemption from the West Virginia Antitrust Act for Regulated Businesses," sets forth and explains the regulated business exemption as set forth in decisions of the United States Supreme Court.

This rule is necessary to clarify the language of W. Va. Code § 47-18-5(b) (1978) and to identify the standard to be applied in situations involving regulated businesses.

For more information, please contact Robert William Schulenberg III, Senior Assistant Attorney General, or Donna S. Quesenberry, Assistant Attorney General, Office of the Attorney General, Antitrust Division, 812 Quarrier Street, Fifth Floor, Charleston, West Virginia 25301.

TITLE 142

PROPOSED LEGISLATIVE RULE
ATTORNEY GENERAL
SERIES 18

Title: Proposed legislative rule pertaining to the regulated business exemption under the West Virginia Antitrust Act.

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§ 142-18-1. General.

1.1 Scope - This rule shall apply to any action brought by the Attorney General under W. Va. Code §§ 47-18-1, -23 (1978).

1.2 Authority - W. Va. Code § 47-18-20 (1978).

1.3 Filing Date -

1.4 Effective Date -

1.5 Purpose - The purpose of this rule is to implement, apply, interpret, and make specific the exemption contained in W. Va. Code § 47-18-5 (1978) relating to regulated businesses.

1.6 Construction - This rule shall be interpreted in conformity with the federal decisional law relating to exemptions under the federal antitrust laws.

1.7 Severability - If, for any reason, any section, sentence, clause, phrase, or provision of this rule or the application thereof to any person or circumstances is held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect other sections, sentences, clauses, phrases, or provisions or their application to any other person or circumstance, and to this end, each and every section, sentence, clause, phrase, or provision of this rule is hereby declared severable.

§ 142-18-2. Exemption from the West Virginia Antitrust Act for Regulated Businesses.

In applying the regulated business exemption specified in W. Va. Code § 47-18-5(b) (1978), the courts shall apply the doctrines set forth in the decisions of the United States Supreme Court in Parker v. Brown, 317 U.S. 341 (1943); California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); and Patrick v. Burget, 486 U.S. 94 (1988).

TITLE 142
PROPOSED LEGISLATIVE RULE
ATTORNEY GENERAL
SERIES 18

Title: Proposed legislative rule pertaining to the regulated business exemption under the West Virginia Antitrust Act.

REPORT ON PUBLIC HEARING, PUBLIC COMMENT PERIOD AND AMENDMENTS

The Public Comment Period with respect to the above-referenced legislative rule expired at 5:00 p.m., August 7, 1990, and a Public Hearing on the proposed rule was held on that date, all pursuant to notice sent to the Office of the Secretary of State for publication in the State Register on July 6, 1990.

One comment was received in favor of the proposed rule and no one attended the Hearing.

A transcript of the Public Hearing will be forwarded immediately upon receipt from the court reporter.

The proposed rule was approved as amended pursuant to recommendations from the Attorney General and members of his staff. These recommendations for amendments were made for the purpose of clarifying the meaning of the originally proposed rule. The language of the original proposed rule was altered so that the rule's language conform to controlling decisional law and comport more directly with express legislative intent.

For further information, please contact Robert William Schulenberg, III, Senior Assistant Attorney General, or Donna S. Quesenberry, Assistant Attorney General, Antitrust Division, 812 Quarrier Street, Fifth Floor, Charleston, West Virginia 25301.

BEFORE THE WEST VIRGINIA ANTITRUST DIVISION

IN THE MATTER OF

HEARING ON PROPOSED LEGISLATIVE RULE PERTAINING TO THE ENFORCEMENT AND ADMINISTRATION OF THE WEST VIRGINIA ANTITRUST ACT, W. VA. CODE 47-18-1 THROUGH -23, AND AS IT MAY FROM TIME TO TIME BE AMENDED

L & S Building
812 Quarrier Street
Sixth Floor
Charleston, West Virginia
August 7, 1990

The above-entitled matter came on for hearing at 8:55 a.m. before:

DONNA QUESENBERRY, Hearing Officer

APPEARANCES: No appearances

I N D E X

Rule Making Exhibits	Marked	Received
No. 1, Sign In Sheet	4	4
No. 2, Letter dated July 27, 1990	4	4

PROCEEDINGS

HEARING OFFICER QUESENBERRY: On the record. My name is Donna S. Quesenberry, Assistant Attorney General, assigned to the Antitrust Division of the Attorney General's Office.

Today is August 7, 1990 and the time by my watch is 8:50 a.m.

We are here today for a public hearing on the Attorney General's Proposed Legislative Rule pertaining to the exemption of certain anti-competitive activity.

The public hearing in this matter was scheduled to begin at 8:30 a.m. today; however, there have been no persons appearing in this matter.

I would like to have attached to the comment record the sign-in sheets, which for the purpose of this rule, of course, are unexecuted, as well as a copy of the letter dated July 27, 1990 to Attorney General Tompkins containing favorable comments for this proposed legislative rule. The comments are from former Deputy Attorney General of the Antitrust Division, Daniel N. Huck. The original has been signed by Mr. Huck through Constance R. Tsokanis, Assistant Attorney General.

(WHEREUPON, the sign-in sheet was marked for identification as Rule Making Exhibit No. 1 and was received in evidence.)

(WHEREUPON, the letter dated July 27, 1990 was marked for purposes of identification as Rule Making Exhibit No. 2 and was received in evidence.)

In addition to these favorable comments from the Attorney General's staff, I would like to point out that the notice for the public hearing and comment period was filed in a timely manner with the Office of the Secretary of State on the 6th day of July, 1990.

In addition to the copy of the proposed legislative rule, Title 142, Series 18 and the Notice of Public Hearing, a fiscal note for the proposed legislative rule was also filed. We have not received any additional written comments to the rule other than those comments that have just been placed by the Division's staff.

I would also like to note for the record that I am not the original hearing officer assigned to this rule making proceeding. The hearing was originally to be conducted by Constance R. Tsokanis, Assistant Attorney General. However, because of unforseen circumstances I was called in as a substitute hearing officer for the purposes

of this proceeding. To that extent I will now be responsible for finally promulgating this rule and delivering the appropriate number of copies of the rule comments and other matters to the legislative rule making committee and the Office of the Secretary of State.

Those are all the comments I will make at this time. We will hold the oral comment period open until approximately 9:30 a.m. whereupon, if no one attends, the oral portion of the rule-making record will be closed.

The written portion of the comment period will be closed at about 5:00 p.m. today to allow persons who may have mailed comments or otherwise communicated in writing to successfully effectuate delivery of their comments. We will hold the oral comment period open for approximately another 35 minutes.

So, let's take a short recess.

(Whereupon, a short recess was taken.)

HEARING OFFICER QUESENBERRY: We are back on the record. I would note that there is still no one in attendance at this public hearing. Therefore, it being 9:30 a.m., I declare the oral comment period for this proposed rule closed and declare the written comment period for this proposed rule to be closed as of 5:00 p.m. today, August 7, 1990.

Thank you.

(WHEREUPON, at 9:30 a.m.
the hearing was adjourned.)

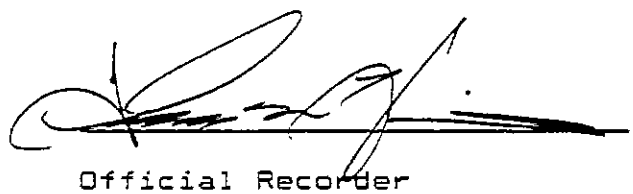
REPORTER'S CERTIFICATE

HEARING DATE: Tuesday, August 7, 1990

LOCATION: Charleston, West Virginia

I hereby certify that the proceedings and evidence herein are contained fully and accurately on the tapes and notes reported by me at the hearing in the above entitled matter before DONNA QUESENBERRY, Assistant Attorney General, Hearing Officer, and that this is a true and correct transcript of the case.

Date: August 10, 1990



Official Recorder

SIGN IN SHEET

TITLE 142 - SERIES 18

EXEMPTION OF CERTAIN ANTI-COMPETITIVE ACTIVITY

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STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

ROGER W. TOMPKINS
ATTORNEY GENERAL

(304) 348-2021

CONSUMER HOTLINE
(800) 368-8808

July 31, 1990

The Honorable Roger W. Tompkins
Attorney General of the
State of West Virginia
Room E-26, State Capitol
Charleston, West Virginia 25305

Re: Comments on the Proposed Legislative Rules Pertaining to the Enforcement and Administration of the West Virginia Antitrust Act, W. Va. Code §§ 47-18-1 through -23, and as it may from time to time be amended.

Dear Attorney General:

Please accept these comments for filing in support of the proposed legislative rules, which this division has submitted to the Secretary of State. These comments should not be construed as limitations to the proposed rules.

West Virginia Code § 47-18-20 authorizes the Attorney General to engage in rulemaking to aid in the enforcement or administration of the West Virginia Antitrust Act. Any rule proposed by Attorney General must be promulgated in accordance with the Administrative Procedures Act (APA). See W. Va. Code § 29A-3-1 (1986). Rules promulgated through the required rulemaking procedure and done in accordance with the APA have the force of law. See W. Va. Code § 29A-1-2(d)(1) (1986).

In the following comments, each rule will be treated separately. Each series and rule is and should be considered completely severable for the purposes of its adoption and construction.

142 Proposed Legislative Rule 14 §§ 1-3

Section 1 includes the general provisions involving scope, authority, filing date, purpose and construction. It is prefatory in nature, and does not require further comment. This is true of each proposed rule to follow.

Sections 2 and 3 address the question of how the statute of limitations will run with regard to continuing antitrust violations. The rule states that in the instance of a continuing antitrust violation, a cause of action shall be available for four years from the last date upon which the continuing violation took place. The rule also states that an antitrust violation which continues for a period of more than four years shall be deemed a present violation for the purpose of determining the date of accrual of a cause of action.

Actions brought under the Clayton Act must be brought within four years. Clayton Act, Section 4B, 15 U.S.C. § 15b (Law Co-op. 1985). Section 11 of the West Virginia Antitrust Act is analogous in that it addresses the limitation of actions.[1] The West Virginia Antitrust Act is demonstrably more flexible than its federal counterpart with respect to limitations of actions, however, in that it permits causes of action based upon a conspiracy to be brought within four years of the discovery of such conspiracy. It also carves out a clear exception to the four-year rule in the instance of a continuing violation.

The purpose of the proposed rule is to clarify the meaning of the sentence which declares "[f]or the purposes of this section, a cause of action for a continuing violation is deemed to arise at any time during the period of such violation." (Emphasis added.) The proposed rule is a codification of the judicial interpretation of the applicable accrual time for causes of action based on continuing violations in analogous cases outside the area of

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[1] The state limitation of action statute, W. Va. Code § 47-18-11 (1986), reads:

> Any action brought to enforce the provisions of this article shall be barred unless commenced within four years after the cause of action arose, or if the cause of action is based upon a conspiracy in violation of this article, within four years after the plaintiff discovered, or by the exercise of reasonable diligence should have discovered the facts relied upon for proof of the conspiracy. For the purpose of this section, a cause of action for a continuing violation is deemed to arise at any time during the period of such violation.

(Emphasis added.)

antitrust.[2] For example, under the West Virginia Human Rights Act, W. Va. Code § 5-11-1(19) (1987 & Supp. 1989), the West Virginia Supreme Court of Appeals has declared that, in an employment discrimination case dealing with compensation disparity, a continuing violation exists so that a violation of the Human Rights Act is deemed present for as long as the disparity existed and, therefore, a complaint based upon allegedly unlawful compensation disparity over a period of time is not barred even if filed within the limitation period after the compensation disparity last occurred. West Virginia Institute of Technology v. West Virginia Human Rights Commission, ___ W. Va. ___, 383 S.E.2d 490 (1988); see also West Virginia Human Rights Commission v. United Transportation Union, Local 655, ___ W. Va. ___, 280 S.E.2d 653 (1981).

The Legislature authorized a distinct treatment with respect to limitation of actions for continuing violations under the West Virginia Antitrust Act. This proposed rule illuminates that distinction in the context of ruling precedent in this State.

142 Proposed Legislative Rule 14 § 4

This rule seeks to clarify the provisions of W. Va. Code §§ 47-18-8 and -18-9 as they relate to the State's recovery of costs in successful antitrust enforcement actions. A state is not generally permitted to recover attorneys' fees unless that is specifically allowed by statute. The West Virginia Antitrust Act makes such a specific allowance. In pertinent part, W. Va. Code § 47-18-8, which allows the Attorney General to seek injunctive relief necessary to restore and preserve competition, declares that "[i]f a permanent injunction is issued at such proceedings, reasonable costs of the action may be awarded the State, including but not limited to expenses of discovery and document reproduction."

The following section, W. Va. Code § 47-18-9 of the Antitrust Act, allows any person who is damaged in his business or property by reason of a violation to recover "reasonable attorneys' fees, filing fees and reasonable costs of the action. Reasonable costs

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[2] As you know, there has been little judicial interpretation of the West Virginia Antitrust Act, so we must look to "comparable" federal law for guidance as to construction. See W. Va. Code § 47-18-16 (1986). Here, there is no "comparable" federal law. In fact, this is an area where the state statute departs from the federal law. In such instances, we must ascertain legislative intent by examining precedent in other areas of law on analogous points.

of the action may include, but shall not be limited to the expenses of discovery and document reproduction." The next paragraph of this provision makes the State a person for the purposes of that section. Therefore, both sections specifically permit the State cost recovery in successful actions. Both sections are broad provisions, which utilize a form of the phrase "includes but is not limited to." It is a well-settled point in West Virginia and in the federal system that phrases such as "includes, but is not limited to" are construed as a phrases of enlargement which do not limit statutory application to the illustrations given in the statute. Human Rights Commission v. Pauley, 212 S.E.2d 77 at 80, citing Pennsylvania Human Relations Commission v. AltoReste Park Cemetery Assoc., 453 Pa. 124, 306 A.2d 881 (1973). See also FPC v. Corporation Commission of the State of Oklahoma 362 F. Supp. 522 (D.C. Okla. 1973). The proposed rule illustrates the types of costs that the Legislature viewed as recoverable when the State expends precious resources to successfully enjoin violative behavior.

142 Proposed Legislative Rule 15 § 2

This proposed rule gives the citations for the body of federal antitrust law. This is necessary in the enforcement and administration of the state laws in that it specifies the federal law relevant to state antitrust enforcement and administration.

142 Proposed Legislative Rule 15 § 3

This proposed rule clarifies the meaning of the term "comparable," as used in W. Va. Code § 47-18-16. It illustrates the principle recently announced by the Supreme Court in California v. ARC America, ___ U.S. ___, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989) that state antitrust provisions which are contrary to or differ from federal antitrust provisions are not preempted by federal law. In that case, Justice White, writing for the majority, declared, "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies." Citing 21 Cong. Rec. 2457 (1890) (Remarks of Sen. Sherman); See also Cantor v. Detroit Edison Co., 428 U.S. 579, 96 S. Ct. 3110, 49 L. Ed. 2d 1141 (1976).

142 Proposed Legislative Rule 15 §§ 4.1 and 4.2

Sections 4.1 and 4.2 specify two types of anticompetitive behavior which have been deemed unlawful in the federal system and are violative of the broad prohibitions of the West Virginia Antitrust Act. The purpose of these proposed rules is to clarify

the Attorney General's position on this point based on a careful reading of the applicable law.

Section 4.1 refers to "tie-in" agreements. Such agreements condition the sale of one product or service upon the purchase of another product or service. The ability to condition the sale of one product upon the purchase of another necessarily implies a market power in the desired product and an attempt to leverage such power in the less desired product's market. Such agreements have been held unlawful under Section 1 of the Sherman Act, 15 U.S.C. § 1; Section 3 of the Clayton Act, 15 U.S.C. § 14 (1982); and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (a)(1) (1982).

In Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969), United States Steel tied favorable credit terms for contractors to the purchase of prefab housing. The Court declared that such arrangements, if proven, "generally serve no legitimate business purpose that cannot be achieved in some less restrictive way." Id. at 503. In International Salt Co. v. United States, 332 U.S. 392 (1947), the lease of an innovative salt processor was conditioned upon the purchase of a certain brand of raw salt. Of that arrangement, the Supreme Court held, "it is unreasonable per se to foreclose competitors from any substantial market." Id. at 396.

Since the time of these cases, tying has consistently been regarded as an undesirable and illegal when it unreasonably restricts free trade. See Capra, Inc. v. Ward Foods, Inc., 536 F.2d 39 (5th Cir. 1976); Moore v. Jas. H. Matthews & Co., 550 F.2d 1207 (9th Cir. 1977); Siegel v. Chicken Delight, Inc., 448 F.2d 41 (9th Cir. 1971), cert. den., 405 U.S. 955 (1972). Even recently, as the Supreme Court has been less willing to find tying arrangements unlawful per se, the Fourth Circuit continues to recognize the competitive damage such arrangements can do. In Matrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschraft, 828 F.2d 1033 (4th Cir. 1987), the court held that "quality control" was not a justification for tying the sale of repair parts to the sale of automobiles when the defendant had already issued specifications for such parts.

Rule 4.2 specifies reciprocity as a per se violation of the West Virginia Antitrust Act. Reciprocity typically occurs when one party buys goods from another only upon the condition that the second party will buy goods from the first. Such agreements have been held per se unlawful under Section 7 of the Clayton Act by the Supreme Court. FTC v. Consolidated Food Corp. 380 U.S. 592 (1965). The Fifth Circuit shed light upon the reason why reciprocal arrangements and tying arrangements were similarly pernicious to

competition in Spartan Grain & Mill Co. v. Ayers 581 F.2d 419, 425 (5th Cir. 1978), cert. den., 444 U.S. 831 (1979):

> The two labels [tying and reciprocity] refer to similar phenomena. In each case, one side of a transaction has special power in the market place. It uses this power to force those with whom it deals to make concessions in another market. In tying arrangements, a seller with economic power forces the purchaser to purchase something else to obtain the desired item. In reciprocal dealings, a buyer with economic power forces a seller to buy something from it to sell it goods. In both cases the key is the extension of economic power from one market into another market.

Either type of arrangement is clearly undesirable from an antitrust enforcement perspective. The Legislature signalled its awareness of this by giving the Attorney General broad enforcement powers and by prohibiting in W. Va. Code § 47-18-3(a) "every" contract in restraint of trade. Given this prohibition, these proposed rules are necessarily illustrative of the types of activities contemplated by the Act.

142 Proposed Legislative Rule 16 § 2

In the instance of an antitrust inquiry based upon the Attorney General's probable cause to believe that wrongdoing has occurred, W. Va. Code § 47-18-7(a) permits the Attorney General to "require production of . . . any matter which is relevant to the investigation." The West Virginia Supreme Court of Appeals has declared that the word "any" when used in a statute means any. In Thomas v. Firestone Tire and Rubber Co., ___ W. Va.___ , 266 S.E.2d 905 (1980), the Court stated:

> We are impressed that the word 'any' represents a fundamental and irreducible concept. It is a statue wrought from the letters A, N and Y; a monument to an idea; an artistic rendering designed to signify a meaningful unit of the English language. The Court is led to the unavoidable conclusion that the word 'any' when used in a statute should be construed to mean, in a word, any . . . .

Id. at 909. Given this clear judicial mandate concerning the construction of the statutory language, the Attorney General would argue that investigative interrogatories are both more desirable

in that they minimize expenditure of resources on both sides[3] and perfectly within the contemplation of the statute. The purpose of this rule, then, is to clarify the expressed legislative intent so that an occasionally perceived loop-hole may be resolved in favor of this practical and cost-effective means of investigation.

142 Proposed Legislative Rule 17 § 2

Section 2 of Proposed Legislative Rule 17 addresses itself to clarifying the prohibition articulated in W. Va. Code 47-18-7(d), in which the Attorney General is prevented from making public the name or identity of any person whose acts or conduct he has investigated, but against whom no enforcement proceeding has been brought under the article. Section 2 explicitly states what has always been implicitly true: A court action for mandamus may be brought against the Attorney General in order to ascertain such information. This rule acknowledges that a court of competent jurisdiction may balance, on a case by case basis, a targeted party's right to privacy when no actionable violation has been found with the public right to access to and supervision of the governing process.

142 Proposed Legislative Rule 18 § 2

This proposed rule explicates state action immunity as the Legislature has articulated it in W. Va. Code § 47-18-5(b). The Legislature recognized the need for state action immunity under the West Virginia Antitrust Act. State action immunity has been discussed at length in the federal system. In order for a course of conduct to qualify for state action immunity, it must be affirmatively be shown that: (1) The state expressed a clearly articulated and affirmative policy restricting competition; and (2) the state actively supervised that policy restricting competition. California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980). Satisfaction of both the existence of the public policy and active supervision elements must occur. If there is a failure in proof of either element, the test fails and the conduct is not immunized. This proposed rule merely adopts this ruling standard as articulated in Midcal in order to clarify the Legislature's intent in creating the exemption.

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[3] When taken in lieu of depositions, interrogatories are less disruptive for the target of an investigation, since they would allow the target of an investigation or its employees to answer questions under oath without forcing them to come to Charleston to do so.

142 Proposed Rule 19 §§ 2 and 3

These two sections simply express the means which the Attorney General would employ to compel the compliance of any person contemplated by W. Va. Code § 47-18-21 and the priority with which such action or any action to compel would be heard by the court. They have been proposed in order to articulate available redress the Attorney General has access to in the instance that a contemplated person should fail to cooperate.

Each of these rules is essential to the proper administration and enforcement of the West Virginia Antitrust Act. Therefore, I submit these comments in favor of the proposed legislative rules. Please feel free to contact me if you have any questions.

Sincerely,

Daniel N. Huck by CRT

DANIEL N. HUCK
DEPUTY ATTORNEY GENERAL
ANTITRUST DIVISION

trade in violation of section 1 of the Sherman Act. Therefore, we will affirm the order of the district court granting summary judgment in favor of all the defendants.

[¶ 67,997] **Timothy A. Patrick v. William M. Burget et al.**

U.S. Supreme Court. No. 86-1145. Dated May 16, 1988. On Writ of Certiorari to the U.S. Court of Appeals, Ninth Circuit.

Sherman Act

State-Action Immunity—Active Supervision—Physician Peer Review—Hospital Staff Privileges.—The state action doctrine did not protect physicians' hospital peer-review activities from antitrust challenges under Secs. 1 and 2 of the Sherman Act. The Supreme Court had established a two-pronged test to determine whether anticompetitive conduct engaged in by private parties should be deemed state action and shielded from the antitrust laws: (1) the challenged restraint must be one clearly articulated and affirmatively expressed as state policy, and (2) the anticompetitive conduct must be actively supervised by the state itself. Absent a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than the party's individual interests. The statutory scheme did not establish a state program of active supervision over peer-review decisions. The state's Health Division, which had supervisory powers over matters relating to the preservation of life and health, including the licensing of hospitals and enforcement of health laws, and its Board of Medical Examiners, which regulated the licensing of physicians, had no power to review private peer-review decisions and overturn a decision that failed to be in accord with state policy. Judicial review of privilege-termination decisions fell short of satisfying the active-supervision requirement and would be of a limited nature. Peer review is immune from antitrust scrutiny only if the state effectively has made the conduct its own.

See ¶ 1000.

For petitioner: Barbee B. Lyon and Don H. Marmaduke, of Tonkon, Torp, Galen, Marmaduke & Booth, Portland, Ore. **For respondents:** Thomas M. Triplett, of Schwabe, Williamson & Wyatt, Portland, Ore.

Reversing 1986-2 Trade Cases ¶ 67,299.

[Syllabus]

Petitioner, an Astoria, Oregon, surgeon, declined an invitation by respondents to join them as a partner in the Astoria Clinic, and instead began an independent practice in competition with the Clinic. Thereafter, petitioner experienced difficulties in his professional dealings with Clinic physicians, culminating in respondents' initiation of, and participation in, peer-review proceedings to terminate petitioner's privileges at Astoria's only hospital (a majority of whose staff members were employees or partners of the Clinic), on the ground that his care of his patients was below the hospital's standards. Petitioner filed suit in federal District Court, alleging that respondents had violated §§ 1 and 2 of the Sherman Act by initiating and participating in the peer-review proceedings in order to reduce competition from petitioner rather than to improve patient care. Ultimately, the court entered a judgment against respondents, but the Court of Appeals reversed on the ground that respondents' conduct was immune from antitrust scrutiny under the state-action doctrine of *Parker v. Brown* [1940-1943 TRADE CASES ¶ 56,250], 317 U.S. 341, and its progeny, because Oregon has articulated a policy in favor of peer review and actively supervises the peer-review process.

Held: The state-action doctrine does not protect Oregon physicians from federal antitrust liability for their activities on hospital peer-review committees. The "active supervision" prong of the test used to determine whether private parties may claim state-action immunity requires that state officials have and exercise power to review such parties' particular anticompetitive acts and disapprove those that fail to accord with state policy. This requirement is not satisfied here, since there has been no showing that the State Health Division, the State Board of Medical Examiners, or the state judiciary reviews—or even could review—private decisions regarding hospital privileges to determine whether such decisions comport with state regulatory policy and to correct abuses. The policy argument that effective peer review is essential to the provision of quality medical care and that any threat of antitrust liability will prevent physicians from participating

openly and actively in peer-review proceedings essentially challenges the wisdom of applying the antitrust laws to the sphere of medical care, and as such is properly directed to Congress. Pp. 3-11.

800 F.2d 1498, reversed.

MARSHALL, J., delivered the opinion for the Court, in which all other Members joined, except BLACKMUN, J., who took no part in the consideration or decision of the case.

Opinion

Justice MARSHALL delivered the opinion of the Court: The question presented in this case is whether the state-action doctrine of *Parker v. Brown* [1940-1943 TRADE CASES ¶ 56,250], 317 U.S. 341 (1943), protects physicians in the State of Oregon from federal anti-trust liability for their activities on hospital peer-review committees.

I

Astoria, Oregon, where the events giving rise to this lawsuit took place, is a city of approximately 10,000 people located in the northwest corner of the State. The only hospital in Astoria is the Columbia Memorial Hospital (CMH). Astoria also is the home of a private group-medical practice called the Astoria Clinic. At all times relevant to this case, a majority of the staff members at the CMH were employees or partners of the Astoria Clinic.

Petitioner Timothy Patrick is a general and vascular surgeon. He became an employee of the Astoria Clinic and a member of the CMH's medical staff in 1972. One year later, the partners of the Clinic, who are the respondents in this case,[1] invited petitioner to become a partner of the Clinic. Petitioner declined this offer and instead began an independent practice in competition with the surgical practice of the Clinic. Petitioner continued to serve on the medical staff of the CMH.

After petitioner established his independent practice, the physicians associated with the Astoria Clinic consistently refused to have professional dealings with him. Petitioner received virtually no referrals from physicians at the Clinic, even though the Clinic at times did not have a general surgeon on its staff. Rather than refer surgery patients to petitioner, Clinic doctors referred them to surgeons located as far as 50 miles from Astoria. In addition, Clinic physicians showed reluctance to assist petitioner with his own patients. Clinic doctors often declined to give consultations, and Clinic surgeons refused to provide back-up coverage for patients under petitioner's care. At the same time, Clinic physicians repeatedly criticized petitioner for failing to obtain outside consultations and adequate back-up coverage.

In 1979, respondent Gary Boelling, a partner at the Clinic, complained to the executive committee of the CMH's medical staff about an incident in which petitioner had left a patient in the care of a recently hired associate, who then left the patient unattended. The executive committee decided to refer this complaint, along with information about other cases handled by petitioner, to the state Board of Medical Examiners (BOME). Respondent Franklin Russell, another partner at the Clinic, chaired the committee of the BOME that investigated these matters. The members of the BOME committee criticized petitioner's medical practices to the full BOME, which then issued a letter of reprimand that had been drafted by Russell. The BOME retracted this letter in its entirety after petitioner sought judicial review of the BOME proceedings.

Two years later, at the request of respondent Richard Harris, a Clinic surgeon, the executive committee of the CMH's medical staff initiated a review of petitioner's hospital privileges. The committee voted to recommend the termination of petitioner's privileges on the ground that petitioner's care of his patients was below the standards of the hospital. Petitioner demanded a hearing, as provided by hospital bylaws, and a five-member ad hoc committee, chaired by respondent Boelling, heard the charges and defense. Petitioner requested that the members of the committee testify as to their personal bias against him, but they refused to accommodate this request. Before the committee rendered its decision, petitioner resigned from the hospital staff rather than risk termination.[2]

During the course of the hospital peer-review proceedings, petitioner filed this lawsuit in the United States District Court for the District of Oregon. Petitioner alleged that the partners of the Astoria Clinic had violated § § 1 and 2 of the Sherman act, ch. 647, 26 Stat. 209, 15 U.S.C. § § 1, 2. Specifically, petitioner contended that the Clinic partners had initiated and participated in the hospital peer-review proceedings to reduce competition from petitioner rather than to improve patient care. Respondents denied this assertion, and the District Court submitted the dispute to the jury with instructions that it

[1] Petitioner originally named all of the partners of the Astoria Clinic as defendants. One partner, however, was dismissed from the suit at the close of petitioner's case at trial.

[2] The court below did not address any issues arising from petitioner's decision to resign from the hospital staff prior to the ad hoc committee's determination, and respondents did not raise this matter in their response to the petition for certiorari. Accordingly, we do not address the significance, if any, of petitioner's resignation.

could rule in favor of petitioner only if it found that respondents' conduct was the result of a specific intent to injure or destroy competition.

The jury returned a verdict against respondents Russell, Boelling, and Harris on the § 1 claim and against all of the respondents on the § 2 claim. It awarded damages of $650,000 on the two antitrust claims taken together. The District Court, as required by law, see 15 U.S.C. § 15(a), 38 Stat. 731, trebled the antitrust damages.

The Court of Appeals for the Ninth Circuit reversed. See [1986-2 TRADE CASES ¶ 67,299] 800 F.2d 1498 (1986). It found that there was substantial evidence that respondents had acted in bad faith in the peer-review process.[3] The court held, however, that even if respondents had used the peer-review process to disadvantage a competitor rather than to improve patient care, their conduct in the peer-review proceedings was immune from antitrust scrutiny. The court reasoned that the peer-review activities of physicians in Oregon fall within the state action exemption from antitrust liability because Oregon has articulated a policy in favor of peer review and actively supervises the peer-review process.[4] The court therefore reversed the judgment of the District Court as to petitioner's antitrust claims.

We granted certiorari, 484 U.S. — (1987), to decide whether the state action doctrine protects respondents' hospital peer-review activities from antitrust challenge.[5] We now reverse.

II

In *Parker v. Brown*, 317 U.S. 341 (1943), this Court considered whether the Sherman Act prohibits anticompetitive actions of a State. Petitioner in that case was a raisin producer who brought suit against the California Director of Agriculture to enjoin the enforcement of a marketing plan adopted under the State's Agricultural Prorate Act. That statute restricted competition among food producers in the State in order to stablize prices and prevent economic waste. Relying on principles of federalism and state sovereignty, this Court refused to find in the Sherman Act "an unexpressed purpose to nullify a state's control over its officers and agents." *Id.*, at 351. The Sherman Act, the Court held, was not intended "to restrain state action or official action directed by a state." *Ibid.*

Although *Parker* involved a suit against a state official, the Court subsequently recognized that *Parker's* federalism rationale demanded that the state action exemption also apply in certain suits against private parties. See, e.g., *Southern Motor Carriers Rate Conference, Inc. v. United States* [1985-1 TRADE CASES ¶ 66,485], 471 U.S. 48 (1985). If the Federal Government or a private litigant always could enforce the Sherman Act against private parties, then a State could not effectively implement a program restraining competition among them. The Court, however, also sought to ensure that private parties could claim state action immunity from Sherman Act liability only when their anticompetitive acts were truly the product of state regulation. We accordingly established a rigorous two-pronged test to determine whether anticompetitive conduct engaged in by private parties should be deemed state action and thus shielded from the antitrust laws. See *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.* [1980-1 TRADE CASES ¶ 63,201], 445 U.S. 97 (1980). First, "the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy.'" *Id.*, at 105, quoting *Lafayette v. Louisiana Power & Light Co.* [1978-1 TRADE CASES ¶ 61,936], 435 U.S. 389, 410 (1978) (opinion of BRENNAN, J.). Second, the anticompetitive conduct "must be 'actively supervised' by the State itself." *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., supra*, at 105, quoting *Lafayette v. Louisiana Power & Light Co., supra*, at 410 (opinion of BRENNAN, J.). Only if an anticompetitive act of a private party meets both of these requirements is it fairly attributable to the State.

[3] Viewing the evidence in the light most favorable to petitioner, as appropriate in light of the verdicts rendered by the jury, the Court of Appeals characterized respondents' conduct as "shabby, unprincipled and unprofessional." 800 F.2d, at 1509.

[4] The Court of Appeals also determined that respondent Russell's activities as a member of the BOME likewise were immune from antitrust liability under the state-action doctrine. As we read the petition for writ of certiorari in this case, petitioner has declined to challenge this holding of the Court of Appeals. Indeed, petitioner asserts that this holding makes no difference to him because he suffered little or no damage from the BOME proceedings or respondent Russell's participation therein. Because petitioner has not brought this aspect of the Court of Appeals' decision before us, we express no view as to its correctness.

[5] The petition for certiorari also presented the question whether, assuming that respondent Russell's activities as a member of the BOME constitute state action and thus cannot directly form the basis for antitrust liability, evidence of those activities is admissible insofar as it indicates the presence of a nonimmune conspiracy in which Russell and others engaged. A close reading of the opinion below, however, reveals that the Court of Appeals did not address this question. This Court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court. See e.g., *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (*per curiam*). We see no reason to depart from this practice in the case at bar. Accordingly, we take no position on the evidentiary question raised by petitioner.

In this case, we need not consider the "clear articulation" prong of the *Midcal* test, because the "active supervision" requirement is not satisfied. The active supervision requirement stems from the recognition that "[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State." *Hallie v. Eau Claire* [1985-1 TRADE CASES ¶ 66,484], 471 U.S. 34, 47 (1985); see *id.*, at 45 ("A private party . . . may be presumed to be acting primarily on his or its own behalf"). The requirement is designed to ensure that the state action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies. *Id.*, at 46-47. To accomplish this purpose, the active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct. Cf. *Southern Motor Carriers Rate Conference, Inc. v. Unites States, supra*, at 51 (noting that state public service commissions "have and exercise ultimate authority and control over all intrastate rates"); *Parker v. Brown, supra*, at 352 (stressing that a marketing plan proposed by raisin growers could not take effect unless approved by a state board). The mere presence of some state involvement or monitoring does not suffice. See *324 Liquor Corp. v. Duffy* [1986-2 TRADE CASES ¶ 67,391], 479 U.S. —, —, n.7 (1987) (holding that certain forms of state scrutiny of a restraint established by a private party did not constitute active supervision because they did not "exer[t] any significant control over" the terms of the restraint). The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

Respondents in this case contend that the State of Oregon actively supervises the peer-review process through the state Health Division, the BOME, and the state judicial system. The Court of Appeals, in finding the active supervision requirement satisfied, also relied primarily on the powers and responsibilities of these state actors. Neither the Court of Appeals nor respondents, however, have succeeded in showing that any of these actors reviews—or even could review—private decisions regarding hospital privileges to determine whether such decisions comport with state regulatory policy and to correct abuses.

Oregon's Health Division has general supervisory powers over "matters relating to the preservation of life and health," Ore. Rev. Stat. § 431.110(1) (1987), including the licensing of hospitals, see § 441.025, and the enforcement of health laws, see § § 431.120(1), 431.150, 431.155(1). Hospitals in Oregon are under a statutory obligation to establish peer-review procedures and to review those procedures on a regular basis. See § 441.055(3)c), (d). The state Health Division, exercising its enforcement powers, may initiate judicial proceedings against any hospital violating this law. See § § 431.150, 431.155. In addition, the Health Division may deny, suspend, or revoke a hospital's license for failure to comply with the statutory requirement. See § 441.030(2). Oregon law specifies no other ways in which the Health Division may supervise the peer-review process.

This statutory scheme does not establish a state program of active supervision over peer-review decisions. The Health Division's statutory authority over peer review relates only to a hospital's procedures;[6] that authority does not encompass the actual decisions made by hospital peer-review committees. The restraint challenged in this case (and in most cases of its kind) consists not in the procedures used to terminate hospital privileges, but in the termination of privileges itself. The State does not actively supervise this restraint unless a state official has and exercises ultimate authority over private privilege determinations. Oregon law does not give the Health Division this authority: under the statutory scheme, the Health Division has no power to review private peer-review decisions and overturn a decision that fails to acccord with state policy. Thus, the activities of the Health Division under Oregon law cannot satisfy the active supervision requirement of the state action doctrine.

Similarly, the BOME does not engage in active supervision over private peer-review decisions. The principal function of the BOME is to regulate the licensing of physicians in the State. As respondents note, Oregon hospitals are required by statute to notify the BOME promptly of a decision to terminate or restrict privileges. See Ore. Rev. Stat. § 441.820(1) (1987). Neither this statutory provision nor any other, however, indicates that the BOME has the power to disapprove private privilege decisions. The apparent purpose of the reporting requirement is to give the BOME an opportunity to determine whether additional action on

[6] Indeed, the statutory scheme indicates that the Health Division has only limited power over even a hospital's peer-review procedures. The statute authorizes the Health Division to force a hospital to comply with its obligation to establish and regularly review peer-review procedures, but the statute does not empower the Health Division to review the quality of the procedures that the hospital adopts.

its part, such as revocation of a physician's license, is warranted.[7] Certainly, respondents have not shown that the BOME in practice reviews privilege decisions or that it ever has asserted the authority to reverse them.

The only remaining alleged supervisory authority in this case is the state judiciary. Respondents claim, and the Court of Appeals agreed, that Oregon's courts directly review privilege-termination decisions and that this judicial review constitutes active state supervision. This Court has not previously considered whether state courts, acting in their judicial capacity, can adequately supervise private conduct for purposes of the state action doctrine. All of our prior cases concerning state supervision over private parties have involved administrative agencies, see e.g., *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985), or state supreme courts with agency-like responsibilities over the organized bar, see *Bates v. State Bar of Arizona* [1977-2 TRADE CASES ¶ 61,573], 433 U.S. 350 (1977). This case, however, does not require us to decide the broad question whether judicial review of private conduct ever can constitute active supervision, because judicial review of privilege-termination decisions in Oregon, if such review exists at all, falls far short of satisfying the active supervision requirement.

As an initial matter, it is not clear that Oregon law affords any direct judicial review of private peer-review decisions. Oregon has no statute expressly providing for judicial review of privilege terminations. Moreover, we are aware of no case in which an Oregon court has held that judicial review of peer-review decisions is available. The two cases that respondents have cited certainly do not hold that a physician whose privileges have been terminated by a private hospital is entitled to judicial review. In each of these cases, the Oregon Supreme Court assumed, but expressly did not decide, that a complaining physician was entitled to the kind of review he requested. See *Straube v. Emanuel Lutheran Charity Board*, 287 Ore. 375, 383, 600 P.2d 381, 386 (1979) ("We have assumed (but not decided) for the purpose of this case that plaintiff is entitled to 'fair procedure' as a common law right"); *Huffaker v. Bailey*, 273 Ore. 273, 275, 540 P.2d 1398, 1399 (1975) ("In view of our conclusion that petitioner cannot prevail even assuming the case is properly before us, we find it unnecessary to decide these interesting questions [of reviewability]. Therefore, we assume, but do not decide, that the hospital's decisions are subject to review by mandamus . . ."). Moreover, the Oregon courts have indicated that even if they were to provide judicial review of hospital peer-review proceedings, the review would be of a very limited nature. The Oregon Supreme Court, in its most recent decision addressing this matter, stated that a court "should [not] decide the merits of plaintiff's dismissal" and that "[i]t would be unwise for a court to do more than to make sure that some sort of reasonable procedure was afforded that there was evidence from which it could be found that plaintiff's conduct posed a threat to patient care." *Straube v. Emanuel Lutheran Charity Board, supra*, at 384, 600 P.2d, at 386. This kind of review would fail to satisfy the state action doctrine's requirement of active supervision. Under the standard suggested by the Oregon Supreme Court, a state court would not review the merits of a privilege termination decision to determine whether it accorded with state regulatory policy. Such constricted review does not convert the action of a private party in terminating a physician's privileges into the action of the State for purposes of the state action doctrine.

Because we conclude that no state actor in Oregon actively supervises hospital peer-review decisions, we hold that the state action doctrine does not protect the peer-review activities challenged in this case from application of the federal antitrust laws. In so holding, we are not unmindful of the policy argument that respondents and their *amici* have advanced for reaching the opposite conclusion. They contend that effective peer review is essential to the provision of quality medical care and that any threat of antitrust liability will prevent physicians from participating openly and actively in peer-review proceedings. This argument, however, essentially challenges the wisdom of applying the antitrust laws to the sphere of medical care, and as such is properly directed to the legislative branch. To the extent that Congress has declined to exempt medical peer review from the reach of the antitrust laws,[8] peer review is immune from antitrust scrutiny only if the State effectively has made this conduct its own. The State of Oregon has not done so. Accord-

[7] The statutory provision requiring hospitals to inform the BOME of a decision to terminate privileges is only one of several statutory reporting requirements involving the BOME. Oregon law also provides that hospitals and licensees shall report medically incompetent conduct to the BOME. See Ore. Rev Stat. §677.415(2) (1987). Further, malpractice insurers must report all medical malpractice claims to the BOME. See §743.770. All of these reporting requirements appear designed to ensure that the BOME will learn of instances of substandard medical care so that it can decide whether official action is warranted.

[8] Congress in fact insulated certain medical peer-review activities from antitrust liability in the Health Division Care Quality Improvement Act of 1986, 42 U.S.C.A. §§ 11101-11152 (Supp. 1987). The Act, which was enacted well after the events at issue in this case and is not retroactive, essentially immunizes peer-review action from liability

ingly, we reverse the judgment of the Court of Appeals.

It is so ordered.

Justice BLACKMUN took no part in the consideration or decision of this case.

[¶ 67,998] **Pillar Corp. and Pillar Technologies, Inc. v. Enercon Industries Corp. and Ahlbrandt Systems, GmbH.**

U.S. District Court, Eastern District of Wisconsin. Case No. 86-C-1116. Filed April 6, 1988.

Sherman Act and Wisconsin Antitrust Law

Private Suits—Counterclaims—Failure to Raise Federal Antitrust Claims in Prior State Court Trade Secrets Litigation—State Rules v. Federal Rules.—A corona treatment company's claims against a competitor under the Sherman Act and Wisconsin antitrust law were not barred because the claims should have been asserted as counterclaims in prior state court trade secrets litigation. The State of Wisconsin did not have a compulsory counterclaim statute, and, even if it had, at least the federal antitrust claims could not have been brought in the state court action, because such claims lie within the exclusive jurisdiction of the federal courts. Moreover, since the concerns and substantive policies of the federal antitrust statutes outweighed the procedural concerns of the federal compulsory counterclaim rule, the rule did not mandate that the company's claims be dismissed.

See ¶ 9177.

Foreign Trade and Commerce—Extraterritorial Application of Sherman Act—Comity—Application of State Law—Further Discovery.—Whether extraterritorial application of the Sherman Act against a West German company was outweighed by principles of international comity so as to favor dismissal of antitrust claims could not be decided on a motion to dismiss. Dismissal of claims under Wisconsin antitrust law on the grounds that the state statute could not have extraterritorial application to a German corporation for acts done in West Germany also was denied. Whether the court could exercise personal jurisdiction over the company could be resolved only after further discovery, but not of the company's attorneys.

See ¶ 705, 1020.

For **plaintiffs:** Godfrey & Kahn, S. C., by W. H. Levit, Jr., Milwaukee, Wis. For **defendants:** Quarles & Brady, by Thomas O. Kloehn, Milwaukee, Wis.

Decision and Order

STADTMUELLER, D.J. [*In full text except for omissions as indicated by asterisks*]: Pillar Corporation and Pillar Technologies, Inc. (collectively, "Pillar") commenced this action against Enercon Industries Corporation ("Enercon") and Ahlbrandt Systems, GmbH ("Ahlbrandt") on October 14, 1986. Enercon was served that same day and Ahlbrandt was served on November 14, 1986 in Germany. The action was brought under the laws of the United States, particularly the Sherman Act, 15 U.S.C., § 1 *et seq.*, the Lanham Act, 15 U.S.C. § 1121 *et seq.*, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § § 1961 through 1968. The complaint also alleged various pendent state claims. Subject matter jurisdiction exists under the federal question statute, 28 U.S.C. § 1331, and venue is alleged to be proper under 15 U.S.C. § 15 and § 22, 18 U.S.C. § 1965 and 28 U.S.C. § § 1391(b)(c)(d).

Enercon filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) on November 3, 1986. The grounds for this motion are more fully set forth below. Ahlbrandt filed a motion to dismiss on December 5, 1986. The grounds for the motion are also more fully set forth below. The case was originally assigned to Judge Thomas J. Curran and was transferred to this branch of the court on October 7, 1987 following my appointment to the federal bench. At the time of transfer both motions were fully briefed.

Also pending before me is a patent action, *Enercon Industries Corp. v. Pillar Corp. and Pillar Technologies, Inc.*, Civil Case No. 86-C-740 filed by Enercon on July 18, 1986 (the "patent action"). The patent action was originally assigned to Judge Reynolds and was trans-

(Footnote Continued)

if the action was taken "in the reasonable belief that [it] was in the furtherance of quality health care," § 11112(a). The Act expressly provides that it does not change other "immunities under law," § 11115(a), including the state action immunity, thus allowing States to immunize peer-review action that does not meet the federal standard. In enacting this measure, Congress clearly noted and responded to the concern that the possibility of antitrust liability will discourage effective peer review. If physicians believe that the Act provides insufficient immunity to protect the peer-review process fully, they must take that matter up with Congress.

Citation
63 S.Ct. 307
87 L.Ed. 315
(Cite as: 317 U.S. 341, 63 S.Ct. 307)

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PARKER, Director of Agriculture, et al.

v.

BROWN.

No. 48.

Reargued Oct. 12, 13, 1942.

Decided Jan. 4, 1943.

Action by Porter L. Brown against W. B. Parker, Director of Agriculture, Agricultural Prorate Advisory Commission, Raisin Proration Zone No. 1, and others, to restrain enforcement as to plaintiff of a prorate program for raisins prescribed under authority of the California Agricultural Prorate Act, wherein defendant Proration Zone No. 1 filed a cross-complaint. From a judgment of a statutory three-judge District Court, 38 F.Supp. 895, defendants appeal.

Reversed.

See, also, 62 S.Ct. 948; 62 S.Ct. 1266, 86 L.Ed. 1779.

106K268
COURTS
K.
U.S. 1943.
A suit to restrain enforcement as to plaintiff of raisin marketing program adopted under California Agricultural Prorate Act, wherein complaint assailed validity of the program under anti-trust laws, was within jurisdiction of three-judge federal court as a suit 'arising under a law regulating commerce', and allegation and proof of jurisdictional amount were not required. Anti-Trust Acts, 15 U.S.C.A. ss 1--33; St.Cal.1933, p. 1969, as amended; Jud.Code s 266, 28 U.S.C.A. s 380.
PARKER v. BROWN
63 S.Ct. 307, 317 U.S. 341, 87 L.Ed. 315
See Words and Phrases, Permanent Edition, for all other definitions of 'Arising Under a Law Regulating Commerce'.

106K101
COURTS
K. Quorum or number of judges necessary to adjudication.
U.S. 1943.
A suit brought before statutory three-judge court to restrain enforcement as to plaintiff of raisin marketing program adopted under California Agricultural Prorate Act was within the equity jurisdiction of the court, where complaint alleged and evidence showed threatened irreparable injury to plaintiff's business and threatened prosecutions. St.Cal.1933, p. 1969, as amended; Jud.Code ss 238, 266, 28 U.S.C.A. ss 345, 380.
PARKER v. BROWN
63 S.Ct. 307, 317 U.S. 341, 87 L.Ed. 315

360K4
STATES
K. Status under Constitution of United States, and relations to United States in general.
U.S. 1943.
Congress has constitutional power to suspend state laws by occupying a

legislative field in the exercise of a granted power.
PARKER v. BROWN
63 S.Ct. 307, 317 U.S. 341, 87 L.Ed. 315
265K12(1)
MONOPOLIES
K. Purpose and effect of combination in general.
U.S. 1943.
The Sherman Anti-Trust Act was not intended to restrain a state or its officers or agents from activities directed by the state legislature. Sherman Anti-Trust Act ss 1--8, 15 U.S.C.A. ss 1--7, 15 note.
PARKER v. BROWN
63 S.Ct. 307, 317 U.S. 341, 87 L.Ed. 315
360K4
STATES
A. Status under Constitution of United States, and relations to United States in general.
U.S. 1943.
An unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.
PARKER v. BROWN
63 S.Ct. 307, 317 U.S. 341, 87 L.Ed. 315
265K28(1)
MONOPOLIES
K. In general.
U.S. 1943.
A state may maintain a suit for damages under the Sherman Anti-Trust Act, but the United States may not. Sherman Anti-Trust Act ss 1--8, 15 U.S.C.A. ss 1--7, 15 note.
PARKER v. BROWN
63 S.Ct. 307, 317 U.S. 341, 87 L.Ed. 315
265K12(1)
MONOPOLIES
K. Purpose and effect of combination in general.
U.S. 1943.
The purpose of the Sherman Anti-Trust Act was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations. Sherman Anti-Trust Act ss 1--8, 15 U.S.C.A. ss 1--7, 15 note.
PARKER v. BROWN
63 S.Ct. 307, 317 U.S. 341, 87 L.Ed. 315
265K12(1)
MONOPOLIES
K. Purpose and effect of combination in general.
U.S. 1943.
A state does not give immunity to those who violate the Sherman Anti-Trust Act by authorizing them to violate it, or by declaring that their action is lawful. Sherman Anti-Trust Act ss 1--8, 15 U.S.C.A. ss 1--7, 15 note.
PARKER v. BROWN
63 S.Ct. 307, 317 U.S. 341, 87 L.Ed. 315
265K12(1)
MONOPOLIES

K. Purpose and effect of combination in general.
U.S. 1943.
The raisin marketing program adopted under California Agricultural Prorate Act, after approval of producers on referendum as prescribed by the act, is not illegal as constituting a contract or conspiracy in restraint of trade within the Sherman Anti-Trust Act, since the restraint was imposed by the state as an act of government, which was not prohibited by the Sherman Act. Sherman Anti-Trust Act as 1--6, 15 U.S.C.A. as 1--7, 15 note; St.Cal.1933, p. 1959, as amended.
PARKER v. BROWN
63 S.Ct. 307, 317 U.S. 341, 87 L.Ed. 315
See Words and Phrases, Permanent Edition, for all other definitions of 'Conspiracy in Restraint of Trade' and 'Contract in Restraint of Trade'.
83K10
COMMERCE
K. Nonexercise of power by Congress.
U.S. 1943.
The Agricultural Marketing Agreement Act contemplates that its policies may be effectuated by a state program either with or without promulgation of a federal program by order of the Secretary of Agriculture, and the adoption of an adequate state program may be deemed by the secretary a sufficient ground for believing that the policies of the act will be effectuated without promulgation of an order. Agricultural Marketing Agreement Act of 1937, as amended, s 1 et seq., 7 U.S.C.A. s 601 et seq.
PARKER v. BROWN
63 S.Ct. 307, 317 U.S. 341, 87 L.Ed. 315
83K10
COMMERCE
K. Nonexercise of power by Congress.
U.S. 1943.
The Agricultural Marketing Agreement Act contemplates existence of state programs at least until such time as Secretary of Agriculture shall establish a federal marketing program unless the state program in some way conflicts with the policy of the act, and contemplates that each sovereign shall operate in its own sphere, but can exert its authority in conformity rather than in conflict with that of the other. Agricultural Marketing Agreement Act of 1937, as amended, s 1 et seq., 7 U.S.C.A. s 601 et seq.
PARKER v. BROWN
63 S.Ct. 307, 317 U.S. 341, 87 L.Ed. 315
23K1
AGRICULTURE
K. Constitutional and statutory provisions.
U.S. 1943.
The Agricultural Adjustment Act of 1938 and the Agricultural Marketing Agreement Act of 1937 are co-ordinate parts of a single plan for raising farm prices to parity levels, and a 'parity price' is computed by multiplying an index of prices paid by farmers for goods used in farm production and for family living expenses, together with real estate taxes and interest on farm indebtedness, by the average price during the base period of the commodity in question. Agricultural Marketing Agreement Act of 1937, as amended, s 1 et

seq., and s 2(1), 7 U.S.C.A. s 601 et seq., and s 602(1); Agricultural Adjustment Act of 1933, s 301 et seq., 7 U.S.C.A. s 1301 et seq.
PARKER v. BROWN
63 S.Ct. 307, 317 U.S. 341, 87 L.Ed. 315
See Words and Phrases, Permanent Edition, for all other definitions of 'Parity Price'.
83K10
COMMERCE
K. Nonexercise of power by Congress.
U.S. 1943.
The Federal Agricultural Marketing Agreement Act is not in conflict with the California Agricultural Prorate Act and the raisin marketing program adopted thereunder, with collaboration of officials of Department of Agriculture and aided by loans from Commodity Credit Corporation, and the mere adoption of federal act without issuance of order by secretary putting it into effect does not preclude effective operation of the raisin marketing program. St.Cal.1933, p. 1969, as amended; Agricultural Marketing Agreement Act of 1937 as amended, s 1 et seq., 7 U.S.C.A. s 601 et seq., Executive Order Oct. 16, 1933, No. 6340, and Aug. 7, 1935, No. 7219; Reorganization Plan No. 1, 5 U.S.C.A. following section 133t.
PARKER v. BROWN
63 S.Ct. 307, 317 U.S. 341, 87 L.Ed. 315
23K2
AGRICULTURE
K. Agricultural boards and officers.
U.S. 1943.
The raisin marketing program, adopted pursuant to California Agricultural Prorate Act by state officials, has the force of law. St.Cal.1933, p. 1988, as amended.
PARKER v. BROWN
63 S.Ct. 307, 317 U.S. 341, 87 L.Ed. 315
360K4
STATES
K. Status under Constitution of United States, and relations to United States in general.
U.S. 1943.
The state governments are sovereign within their territory except only as they are subject to prohibitions of the constitution or as their action in some measure conflicts with powers delegated to the federal government or with congressional legislation enacted in the exercise of those powers.
PARKER v. BROWN
63 S.Ct. 307, 317 U.S. 341, 87 L.Ed. 315
83K10
COMMERCE
K. Nonexercise of power by Congress.
U.S. 1943.
The grant of power to Congress by the commerce clause of Constitution did not wholly withdraw from the states authority to regulate the commerce with respect to matters of local concern on which Congress has not spoken. U.S.C.A.Const. art. 1, s 8, cl. 3.

PARKER v. BROWN
63 S.Ct. 307, 317 U.S. 341, 87 L.Ed. 315
83K13
COMMERCE
K. Internal commerce.
U.S. 1943.
Many subjects and transactions of local concern not themselves interstate commerce or a part of its operation are within the regulatory powers of the state so long as the state action serves local ends and does not discriminate against interstate commerce, even though exercise of such powers may materially affect it. U.S.C.A.Const. art. 1, s 8, cl. 3.
PARKER v. BROWN
63 S.Ct. 307, 317 U.S. 341, 87 L.Ed. 315
83K19
COMMERCE
K.
U.S. 1943.
In applying mechanical test to determine when interstate commerce begins and ends for purposes of local regulation, 'manufacture' is not 'interstate commerce' even though the manufacturing process is of slight extent. U.S.C.A.Const. art. 1, s 8, cl. 3.
PARKER v. BROWN
63 S.Ct. 307, 317 U.S. 341, 87 L.Ed. 315
See Words and Phrases, Permanent Edition, for all other definitions of 'Interstate Commerce'.
83K53
COMMERCE
K. Licenses and privilege taxes.
U.S. 1943.
A state is free to license intrastate buying where purchaser expects in the usual course of business to resell in interstate commerce. U.S.C.A.Const. art. 1, s 8, cl. 3.
PARKER v. BROWN
63 S.Ct. 307, 317 U.S. 341, 87 L.Ed. 315
83K13
COMMERCE
K. Internal commerce.
U.S. 1943.
State regulation imposed before any operation of interstate commerce occurs is not prohibited by commerce clause of Constitution, however drastically it may affect interstate commerce. U.S.C.A.Const. art. 1, s 8, cl. 3.
PARKER v. BROWN
63 S.Ct. 307, 317 U.S. 341, 87 L.Ed. 315
83K40(1)
COMMERCE
K.
U.S. 1943.
The raisin marketing program adopted under the California Agricultural Prorate Act, which imposed duty on program committee to control marketing of crop so as to enhance or at least maintain prices by restraints upon competition of

producers in sale of their crops to buyers who eventually would sell and ship 85 per cent. of the crop in interstate commerce, was not void as interfering with 'interstate commerce', since the regulation was applied to transactions which, interstate before the raisins were ready for shipment in interstate commerce. St.Cal.1933, c. 1858, as amended; U.S.C.A.Const. art. 1, s 8, cl. 3.
PARKER v. BROWN
63 S.Ct. 307, 317 U.S. 341, 87 L.Ed. 315
83k3
COMMERCE
k. Nonexercise of power by Congress.
U.S. 1943.
Where Congress has not exerted its power under the commerce clause of the Constitution and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the conflicting demands of the state and federal interests involved. U.S.C.A.Const. art. 1, s 8, cl. 3.
PARKER v. BROWN
63 S.Ct. 307, 317 U.S. 341, 87 L.Ed. 315
83k13
COMMERCE
k. Internal commerce.
U.S. 1943.
State regulation of matter of local concern which is so related to interstate commerce that it also operates as a regulation of that commerce may be upheld on ground that on consideration of all relevent facts and circumstances it appears that the matter is one which may appropriately be regulated in the interests of safety, health, and well-being of local communities and which because of its local character and practical difficulties involved may never be adequately dealt with by Congress. U.S.C.A.Const. art. 1, s 8, cl. 3.
PARKER v. BROWN
63 S.Ct. 307, 317 U.S. 341, 87 L.Ed. 315
83k5
COMMERCE
k. Commerce among the states.
U.S. 1943.
The principal objects sought to be secured by the commerce clause of the Constitution are regulation of interstate commerce by a single authority and maintaining free flow of commerce. U.S.C.A.Const. art. 1, s 8, cl. 3.
PARKER v. BROWN
63 S.Ct. 307, 317 U.S. 341, 87 L.Ed. 315
157k20(1)
EVIDENCE
k. In general.
U.S. 1943.
The Supreme Court may take judicial notice of available data of raisin industry in California.
PARKER v. BROWN
63 S.Ct. 307, 317 U.S. 341, 87 L.Ed. 315
83k10

COMMERCE
K Nonexercise of power by Congress.
U.S. 1943.
The adoption by the state of California of legislative measures to prevent demoralization of raisin industry by stabilizing marketing of raisin crop was a matter of state as well as federal concern, and, in absence of inconsistent congressional action, was a problem whose solution was peculiarly within the province of the state. St.Cal.1933, p. 1880, as amended.
PARKER v. BROWN
63 S.Ct. 307, 317 U.S. 341, 87 L.Ed. 315
KF 4011
COMMERCE
K.
U.S. 1943.
The raisin marketing program adopted under California Agricultural Prorate Act, which imposed duty on program committee to control marketing of raisin crop so as to enhance price or at least maintain prices by restraints on competition of producers in sale of their crops to buyers who would ultimately ship 95 per cent. of the crops in interstate commerce, could be upheld notwithstanding its effect on interstate commerce on theory that it constituted a regulation of state industry of 'local concern' which under the circumstances did not impair federal control over 'interstate commerce' in manner or to degree forbidden by constitution. St.Cal.1933, p. 1858, as amended; U.S.C.A.Const. art. 1, s 8, cl. 3.
PARKER v. BROWN
63 S.Ct. 307, 317 U.S. 341, 87 L.Ed. 315
See Words and Phrases, Permanent Edition, for all other definitions of 'Local Concern'.

**310 *341 Appeal from the District Court of the United States for the Southern District of California.

*343 Messrs. Walter L. Bowers, of Los Angeles, Cal., and Strother P. Walton, of Fresno, Cal., for appellants.

Mr. G. Levin Aynesworth, of Fresno, Cal., for appellees.

Mr. Robert L. Stern, of Washington, D.C., for the United States as amicus curiae by special leave of Court.

*344 Mr. Chief Justice STONE delivered the opinion of the Court.

The questions for our consideration are whether the marketing program adopted for the 1940 raisin crop under the California Agricultural Prorate Act[FN1] is rendered invalid (1) by the Sherman Act, 15 U.S.C.A. s 1--7, 15 note, or (2) by the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. s 601 et seq., 7 U.S.C.A. s 601 et seq., or (3) by the Commerce Clause of the Constitution, art. 1, s 8, cl. 3.

FN1 Act of June 5, 1933, ch. 754, p. 1968, Statutes of California of 1933, as amended by chs. 471 and 743, pp. 1525, 2087, Statutes of 1935; ch. 5, p. 38, Extra Session, 1938; chs. 353, 548 and 894, pp. 1702, 1847, 2195, Statutes of 1939; and chs. 603, 1150 and 1186, pp. 2050, 2858, 2943, Statutes of 1941. Its constitutionality under both Federal and State

Constitutions was sustained by the California Supreme Court in Agricultural Prorate Commission v. Superior Court, 5 Cal.2d 650, 55 P.2d 495.

Appellee, a producer and packer of raisins in California, brought this suit in the district court to enjoin appellants--the State Director of Agriculture, Raisin Proration Zone No. 1, the members of the State Agricultural Prorate Advisory Commission and of the Program Committee for Zone No. 1, and others charged by the statute with the administration of the Prorate Act--from enforcing, as to appellee, a program for marketing the 1940 crop of raisins produced in 'Raisin Proration Zone No. 1'. After a trial upon oral testimony, a stipulation of facts and certain exhibits, the district court held that the 1940 raisin marketing program was an illegal interference with and undue burden upon interstate commerce and gave judgment for appellee granting the injunction prayed for. D.C., 39 F.Supp. 895. The case was tried by a district court of three judges *345 and comes here on appeal under ss 266 and 238 of the Judicial Code as amended, 28 U.S.C. ss 380, 345, 28 U.S.C.A. ss 380, 345.

As appears from the evidence and from the findings of the district court, almost all the raisins consumed in the United States, and nearly one-half of the world crop, are produced in Raisin Proration Zone No. 1. Between 90 and 95 per cent of the raisins grown in California are ultimately shipped in interstate or foreign commerce.

The harvesting and marketing of the crop in California follows a uniform procedure. **311 The grower of raisins picks the bunches of grapes and places them for drying on trays laid between the rows of vines. When the grapes have been sufficiently dried he places them in 'sweat boxes' where their moisture content is equalized. At this point the curing process is complete. The growers sell the raisins and deliver them in the 'sweat boxes' to handlers or packers whose plants are all located within the Zone. The packers process them at their plants and then ship them in interstate commerce. Those raisins which are to be marketed in clusters are sometimes merely packed, unstemmed, in suitable containers, but are more often cleaned, fumigated, and, when necessary, steamed to make the stems pliable. Most of the raisins are not sold in clusters; such raisins are stemmed before packing, and most packers also clean, grade and sort them. One variety is also seeded before packing.

The packers sell their raisins through agents, brokers, jobbers and other middlemen, principally located in other states or foreign countries. Until he is ready to ship the raisins the packer stores them in the form in which they have been received from producers. The length of time that the raisins remain at the packing plants before processing and shipping varies from a few days up to two years, depending upon the packer's current supply of raisins and the market demand. The packers frequently place orders with producers for fall delivery, before the *346 crop is harvested, and at the same time enter into contracts for the sale of raisins to their customers. In recent years most packers have had a substantial 'carry over' of stored raisins at the end of each crop season, which are usually marketed before the raisins of the next year's crop are marketed.

The California Agricultural Prorate Act authorizes the establishment, through action of state officials, 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. The declared purpose of the Act is to 'conserve the agricultural wealth of the State and to 'prevent economic waste in the marketing of agricultural crops' of the state. It authorizes, s 3, the creation of an Agricultural Prorate Advisory Commission of nine members, of which a state official, the Director of Agriculture, is ex-officio a member. The other eight members are appointed for terms of four years by the Governor and confirmed by the senate, and are required to take an oath of office. s 4.

Upon the petition of ten producers for the establishment of a prorate marketing plan for any commodity within a defined production zone, s 6, and after a public hearing, s 9, and after making prescribed economic findings, s 10, showing that the institution of a program for the proposed zone will prevent agricultural waste and conserve agricultural wealth of the state without permitting unreasonable profits to producers, the Commission is authorized to grant the petition. The Director, with the approval of the Commission, is then required to select a program committee from among nominees chosen by the qualified producers within the zone, to which he may add not more than two handlers or packers who receive the regulated commodity from producers for marketing. ss 11, 14, 15.

*347 The program committee is required, s 15, to formulate a proration marketing program for the commodity produced in the zone, which the Commission is authorized to approve after a public hearing and a finding that 'the program is reasonably calculated to carry out the objectives of this act.' The Commission may, if so advised, modify the program and approve it as modified. If the proposed program, as approved by the Commission, is consented to by 65 per cent in number of producers in the zone owning 51 per cent of the acreage devoted to production of the regulated crop, the Director is required to declare the program instituted. s 18.

Authority to administer the program, subject to the approval of the Director of Agriculture, is conferred on the program committee. ss 5, 18, 22. Section 22.5 declares that it shall be a misdemeanor, which is punishable by fine and imprisonment (Penal Code s 19), for any producer to sell or any handler to receive or possess without proper authority any commodity for **312 which a proration program has been instituted. Like penalty is imposed upon any person who aids or abets in the commission of any of the acts specified in the section, and it is declared that each infraction shall constitute a separate and distinct offense'. Section 25 imposes a civil liability of $500 'for each and every violation of any provision of a proration program.

The seasonal proration marketing program for raisins, with which we are now concerned, became effective on September 7, 1940. This provided that the program committee should classify raisins as 'standard', 'substandard', and 'inferior.' 'Inferior' raisins are those which are unfit for human consumption, as defined in the Federal Food, Drug and Cosmetic Act, 21 U.S.C. s 301 et seq., 21 U.S.C.A. s 301 et seq. The committee is required to establish receiving stations within the zone to which every producer must deliver all raisins which he desires to market. The raisins are graded at these stations. All inferior raisins are to be placed in the *348 'inferior raisin pool', to be disposed of by the committee 'only for assured by-product and other diversion purposes.' All substandard raisins, and at least 20 per cent of the total standard and substandard raisins produced, must be placed in a 'surplus pool'. Raisins in this pool may also be disposed of only for 'assured by-product and

other diversion purposes', except that under certain circumstances the program committee may transfer standard raisins from the surplus pool to the stabilization pool. Fifty per cent of the crop must be placed in a stabilization pool.

Under the program the producer is permitted to sell the remaining 30 per cent of his standard raisins, denominated 'free tonnage', through ordinary commercial channels, subject to the requirement that he obtain a 'secondary certificate' authorizing such marketing and pay a certificate fee of $2.50 for each ton covered by the certificate. Certification is stated to be a device for controlling 'the time and volume of movement' of free tonnage into such ordinary commercial channels. Raisins in the stabilization pool are to be disposed of by the committee in such manner as to obtain stability in the market and to dispose of such raisins, but no raisins, (other than those subject to special lending or pooling arrangements of the Federal Government) can be sold by the committee at less than the prevailing market price for raisins of the same variety and grade on the date of sale. Under the program the committee is to make advances to producers of from $25 to $27.50 a ton, depending upon the variety of raisins, for deliveries into the surplus pool, and from $30 to $55 a ton for deliveries into the stabilization pool. The committee is authorized to pledge the raisins held in those pools in order to secure funds to finance pool operations and make advances to growers.

Appellee's bill of complaint challenges the validity of the proration program as in violation of the Commerce *348 Clause and the Sherman Act; in support of the decree of the district court he also urges that it conflicts with and is superseded by the Federal Agricultural Marketing Agreement Act of 1937. The complaint alleges that he is engaged within the marketing zone both in producing and in purchasing and packing raisins for sale and shipment interstate; that before the adoption of the program he had entered into contracts for the sale of 1940 crop raisins; that unless enjoined appellants will enforce the program against respondent by criminal prosecutions and will prevent him from marketing his 1940 crop, from fulfilling his sales contracts, and from purchasing for sale and selling in interstate commerce raisins of that crop.

Appellee's allegations of irreparable injury are in general terms, but it appears from the evidence that he had produced 200 tons of 1940 crop raisins; that he had contracted to sell 782 1/2 tons of the 1940 crop; that he had dealt in 2,000 tons of raisins of the 1938 crop, and expected to sell, if the challenged program were not in force, 3,000 tons of the 1940 crop at $60 a ton; that the pre-season price to growers of raisins of the 1940 crop, before the program became effective, was $45 per ton, and that immediately afterward it rose to $55 per ton or higher. It also appears that the district court having awarded the final injunction prayed, appellee has proceeded with the marketing of his 1940 crop and has disposed of all except twelve tons, which remain on hand. Although the district court found that the amount in controversy exceeds $3,000, we are of opinion that as **313 the complaint asserts the validity of the program under the anti-trust laws, 15 U.S.C. ss 1--33, 15 U.S.C.A. ss 1--33, the suit is one 'arising under' a 'law regulating commerce' and allegation and proof of the jurisdictional amount are not required. 28 U.S.C. s 41(1), (8), 28 U.S.C.A. s 41(1, 8); Peyton v. Railway Express Agency, 316 U.S. 350, 62 S.Ct. 1171, 86 L.Ed. 1525. The majority of the Court is also

of opinion that the suit is within the equity jurisdiction of the court since the complaint *350 alleges and the evidence shows threatened irreparable injury to respondent's business and threatened prosecutions by reason of his having marketed his crop under the protection of the district court's decree.

Validity of the Prorate Program under the Sherman Act

Section 1 of the Sherman Act, 15 U.S.C. s 1, 15 U.S.C.A. s 1, makes unlawful every 'contract, combination * * * or conspiracy, in restraint of trade or commerce among the several States * * *.' And s 2, 15 U.S.C. s 2, 15 U.S.C.A. s 2, makes it unlawful to 'monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States * * *.' We may assume for present purposes that the California prorate program would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate. We may assume also, without deciding, that Congress could, in the exercise of its commerce power, prohibit a state from maintaining a stabilization program like the present because of its effect on interstate commerce. Occupation of a legislative field by Congress in the exercise of a granted power is a familiar example of its constitutional power to suspend state laws. See Adams Express Co. v. Croninger, 226 U.S. 491, 505, 33 S.Ct. 148, 151, 57 L.Ed. 314, 44 L.R.A.,N.S., 257; Napier v. Atlantic Coast Line, 272 U.S. 605, 607, 47 S.Ct. 207, 71 L.Ed. 432; Missouri Pacific R. Co. v. Porter, 273 U.S. 341, 47 S.Ct. 383, 71 L.Ed. 670; Illinois Natural Gas Co. v. Central Illinois Public Service Co., 314 U.S. 498, 510, 62 S.Ct. 384, 388, 86 L.Ed. 371.

But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its *351 legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. The Act is applicable to 'persons' including corporations, s 7, 15 U.S.C.A., and it authorizes suits under it by persons and corporations. s 15. A state may maintain a suit for damages under it, State of Georgia v. Evans, 316 U.S. 159, 62 S.Ct. 972, 86 L.Ed. 1348, but the United States may not, United States v. Cooper Corp., 312 U.S. 600, 61 S.Ct. 742, 85 L.Ed. 1071--conclusions derived not from the literal meaning of the words 'person' and 'corporation' but from the purpose, the subject matter, the context and the legislative history of the statute.

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, abundantly appears from its legislative history. See Apex Hosiery Co. v. Leader, 310 U.S. 469, 492, 493, 60 S.Ct. 982, 992, 84 L.Ed. 1311, 128 A.L.R. 1044, and note 15; United States v. Addyston Pipe & Steel Co., 6 Cir., 85 F. 271, 46 L.R.A. 122, affirmed 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136; Standard Oil Co. v. United States, 221 U.S. 1, 54-58, **314 31 S.Ct. 502, 512, 515, 55 L.Ed. 619, 34 L.R.A.,N.S., 834, Ann.Cas.1912D, 734.

True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. Northern Securities Co. v. United States, 193 U.S. 197, 331, 344--347, 24 S.Ct. 436, 464, 469--471, 48 L.Ed. 679; and we have no question of the state or its municipality becoming a participant in a private agreement or combination *352 by others for restraint of trade, cf. Union Pacific R. Co. v. United States, 313 U.S. 450, 61 S.Ct. 1064, 85 L.Ed. 1453. Here the state command to the Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required vote on the referendum is one of these conditions. Compare Currin v. Wallace, 306 U.S. 1, 16, 59 S.Ct. 378, 397, 83 L.Ed. 441; Hampton, Jr., & Co. v. United States, 276 U.S. 394, 407, 48 S.Ct. 348, 351, 72 L.Ed. 624; Wickard v. Filburn, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. ---.

The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit. Olsen v. Smith, 195 U.S. 332, 344, 345, 25 S.Ct. 52, 54, 55, 49 L.Ed. 224; cf. Lowenstein v. Evans, C.C., 69 F. 908, 910. Validity of the Program Under the Agricultural Marketing Agreement Act

The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U.S.C. s 601 et seq., 7 U.S.C.A. s 601 et seq., authorizes the Secretary *353 of Agriculture to issue orders limiting the quantity of specified agricultural products, including fruits, which may be marketed 'in the current of * * * or so as directly to burden, obstruct, or affect interstate or foreign commerce'. Such orders may allot the amounts which handlers may purchase from any producer by means which equalize the amount marketed among producers; may provide for the control and elimination of surpluses and for the establishment of reserve pools of the regulated produce. s 8c(5), 7 U.S.C.A. s 608c(5). The federal statute differs from the California Prorate Act in that its sanction falls upon handlers alone while the state act, s 22.5(3), applies to growers and extends also to handlers so far as they may unlawfully receive or have in their

possession within the state any commodity subject to a prorate program.

We may assume that the powers conferred upon the Secretary would extend to the control of surpluses in the raisin industry through a pooling arrangement such as was promulgated under the California Prorate Act in the present case. See United States v. Rock Royal Co-op., 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446; Currin v. Wallace, supra. We may assume also that a stabilization program adopted under the Agricultural Marketing Agreement Act would supersede the state act. But the federal act becomes effective only if a program is ordered by the Secretary. Section 8c(3) provides that whenever the Secretary of Agriculture 'has reason to believe' that the issuance of an order will tend to effectuate the declared policy of the Act with respect to any commodity he shall give due notice of an opportunity for a hearing upon a proposed order, and s 8c(4) provides that after the hearing he shall issue an order if he finds and sets forth in the order that its issuance will tend to effectuate the declared policy of the Act with respect to the commodity **315 in question. Since the Secretary has not given notice of hearing and has not proposed or promulgated any order regulating raisins it must be *354 taken that he has no reason to believe that issuance of an order will tend to effectuate the policy of the Act.

The Secretary, by s 10(i), 7 U.S.C.A. s 610(i), is authorized 'in order to effectuate the declared policy' of the Act, and 'in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities,' to confer and cooperate with duly constituted authorities of any state. From this and the whole structure of the Act, it would seem that it contemplates that its policy may be effectuated by a state program either with or without the promulgation of a federal program by order of the Secretary. Cf. United States v. Rock Royal Co-op., Inc., supra. It follows that the adoption of an adequate program by the state may be deemed by the Secretary a sufficient ground for believing that the policies of the federal act will be effectuated without the promulgation of an order.

It is evident, therefore, that the Marketing Act contemplates the existence of state programs at least until such time as the Secretary shall establish a federal marketing program, unless the state program in some way conflicts with the policy of the federal act. The Act contemplates that each sovereign shall operate 'in its own sphere but can exert its authority in conformity rather than in conflict with that of the other'. H.Rep.No.1241, 74th Cong., 1st Sess. pp. 22--23; S.Rep. 1011, 74th Cong., 1st Sess. p. 15.[FN2] The only suggested possibility of conflict is between the declared purposes of the two acts. The object of the federal statutes is stated to be the establishment, by exercise *355 of the power conferred on the Secretary, of 'orderly marketing conditions for agricultural commodities in interstate commerce' such as will tend to establish 'parity prices' for farm products,[FN3] but with the further purpose that, in the interest of consumers, current consumptive demand is to be considered and that no action shall be taken for the purpose of maintaining prices above the parity level. s 2, 7 U.S.C.A. s 602.

FN2 See also 79 Cong.Rec. 9470, 11148-50, 11153; Hearings Before the Senate Committee on Agriculture and Forestry on S. 1807, (March, 1935) 29, 71; Hearings Before the House Committee on Agriculture (Feb.--March, 1935)

53, 178-9. The Agricultural Marketing Agreement Act of 1937 was for the most part a reenactment of certain provisions of the Agricultural Adjustment Act of 1933, 48 Stat. 31, as amended in 1935, 49 Stat. 750, s 10(b), which was first introduced in 1935, and reenacted without change in 1937.

'[A] parity price is one which will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period.' 7 U.S.C. s 602(1), 7 U.S.C.A. s 602(1). The parity price is computed by multiplying an index of prices paid by farmers for goods used in farm production, and for family living expenses, together with real estate taxes and interest on farm indebtedness, by the average price during the base period of the commodity in question. See Dept. of Agriculture, Parity Prices, What They Are and How They Are Calculated (1942). The base period for commodities other than tobacco and potatoes is August 1909--July 1914, however, by 7 U.S.C. s 608e, 7 U.S.C.A. s 608e, the period of August 1919--July 1929 or a part thereof may be used for any commodity as to which the Secretary finds and proclaims that adequate statistics for the 1909-14 period are not available. By proclamation dated June 26, 1942, the Secretary designated the period 1919--1929 as the base period for raisins, 7 Fed.Reg. 4867.

The declared objective of the California Act is to prevent excessive supplies of agricultural commodities from 'adversely affecting' the market, and although the statute speaks in terms of 'economic stability' and 'agricultural waste' rather than of price, the evident purpose and effect of the regulation is to conserve the agricultural wealth of the State 'by raising and maintaining prices, but 'without permitting unreasonable profits to the producers'...**316 s 10. The only possibility of conflict would seem to be if a State program were to raise prices beyond the parity price prescribed by the Federal Act, a condition which has not occurred.[FN4]

FN4 The parity price for raisins on June 15, 1942, as published by the Department of Agriculture was $100.51 per ton. Preliminary figures show the average price for the 1941-42 crop to be $80.60. Parity Prices, What They Are and How They are Computed, supra, vii. Parity prices for raisins for previous years are not published. However they may be computed from the base period price of $105.80 and the indices of prices paid by farmers published by the Department of Agriculture in the statistical publications cited infra, note 8. Such computations for 1933 and subsequent years, supplied by the Department of Agriculture, indicate that while the price received by the farmer for the 1940 crop was $57.80 the parity price for 1940 was $80.41 and for 1941 was $85.75. They further indicate that raisin prices have not since 1933 equalled parity and that the field prices for all crops prior to that of 1941 have been from $15 to $40 per ton below parity.

*356 That the Secretary has reason to believe that the state act will tend to effectuate the policies of the federal act so as not to require the issuance of an order under the latter is evidenced by the approval given by the

Department of Agriculture to the state program by the loan agreement between the state and the Commodity Credit Corporation.[FN5] By s 302(a) of the Agricultural Adjustment Act of 1938, 52 Stat. 43, 7 U.S.C. s 1302(a), 7 U.S.C.A. s 1302(a) the Commodity Credit Corporation is authorized 'upon recommendation of the Secretary and with the approval of the President, to make available loans on agricultural commodities * * *'. The 'amount, terms, and conditions' of such loans are to be fixed by the Secretary, subject to the approval of the Corporation and the President'. Under this authority the Commodity Credit Corporation made loans of $5,146,000 to Zone No. 1, secured by a *357 pledge of 109,000 tons of 1940 crop raisins in the surplus and stabilization pools. These loans were ultimately liquidated by sales of 76,000 tons to packers and 33,000 tons to the Federal Surplus Marketing Administration, an agency of the Department of Agriculture,[FN6] for relief distribution and for export under the Land-Lease program.[FN7] The loans **317 were conditional upon the adoption by the state of the present seasonal marketing program. We are informed by the Government, which at our request filed a brief amicus curiae, that under the loan agreement prices and sales policies as to the pledged raisins were to be controlled by a committee appointed by the Secretary, and that officials of the Department of Agriculture collaborated in drafting the 1940 state raisin program.

FN5 The Commodity Credit Corporation was created by Executive Order No. 6340, October 16, 1933. It has been continued in existence by Acts of Congress, 48 Stat. 4; 50 Stat. 5; 53 Stat. 510. By Reorganization Plan No. I, 53 Stat. 1429, approved by Act of Congress, 53 Stat. 813, and effective July 1, 1939, 5 U.S.C.A. following section 133t, the Corporation was transferred to the Department of Agriculture, to be 'administered as such department under the general direction and supervision of the Secretary of Agriculture.' By Executive Order No. 8219, Aug. 7, 1939, 4 Fed.Reg. 3565, exclusive voting rights in its capital stock were vested in the Secretary.

FN6 The Surplus Marketing Administration was created by Reorganization Plan No. III, 48 Stat. 1232, approved 54 Stat. 231, effective June 30, 1940, 5 U.S.C.A. following section 133t, as a consolidation of the Division of Marketing and Marketing Agreements of the Agricultural Adjustment Administration, and the Federal Surplus Commodities Corporation. The Surplus Commodities Corporation was incorporated on October 4, 1933, under the name of the Federal Surplus Relief Corporation. Its existence as 'an agency of the United States under the direction of the Secretary of Agriculture' was continued by Acts of Congress, 50 Stat. 323; 52 Stat. 36. The members of the Corporation are the Secretary of Agriculture, the Administrator of the Agricultural Adjustment Administration, and the Governor of the Farm Credit Administration.
As successor to the Corporation the Surplus Marketing Administration exercises the authority given by s 32 of the Agricultural Adjustment Act of 1935, 7 U.S.C. s 612c, 7 U.S.C.A. s 612c, to use 30% of annual gross customs receipts to encourage the exportation, and the domestic consumption by persons in low income groups, of agricultural commodities, and to reestablish farmers' purchasing power. As successor to the Division of Markets and Marketing Agreements, the Administration is charged with the

enforcement of the Agricultural Marketing Agreement Act of 1937.

FN7 Report of the President of the Commodity Credit Corporation (1941) 14, 21; Wm. J. Cecil (Zone Agent, Raisin Proration Zone No. 1), The 1940 Raisin Program, 30 Calif. Dept. of Agriculture Bulletin 48.

*358 Section 302 of the Agricultural Adjustment Act of 1938 requires the Commodity Credit Corporation to make nonrecourse loans to producers of certain agricultural products at specified percentages of the parity price, and authorizes loans on any agricultural commodity. The Government informs us that in making loans under the latter authority, s 302 has been construed by the Department of Agriculture as requiring the loans to be made only in order to effectuate the policy of federal agricultural legislation.[FN8] Section 2 of the Agricultural Adjustment Act of 1938, 7 U.S.C.A. s 1282, declares it to be the policy of Congress to achieve the statutory objective through loans. The Agricultural Adjustment Act of 1938 and the Agricultural Marketing Agreement Act of 1937 were both derived from the Agricultural Adjustment Act of 1933, 48 Stat. 31, 7 U.S.C.A. s 601 et seq., and are coordinate parts of a single plan for raising farm prices to parity levels. The conditions imposed by the Secretary of Agriculture in the loan agreement with the State of California, and the collaboration of federal officials in the drafting of the program, must be taken as an expression of opinion by the Department of Agriculture that the state program thus aided by the loan is consistent with the policies of the Agricultural Adjustment and Agricultural Marketing Agreement Acts. We find no conflict between the two acts and no such occupation of the legislative field by the mere adoption of the Agricultural Marketing Agreement Act, without the issuance of any order by the Secretary putting it into effect, as would preclude the effective operation of the state act.

We have no occasion to decide whether the same conclusion would follow if the state program had not been adopted with the collaboration of officials of the Department of Agriculture and aided by loans from the Commodity *359 Credit Corporation recommended by the Secretary of Agriculture.

FN8 See also Report of the President of the Commodity Credit Corporation (1940) 4, 6.

Validity of the Program under the Commerce Clause

The court below found that approximately 95 per cent of the California raisin crop finds its way into interstate or foreign commerce. It is not denied that the proration program is so devised as to compel the delivery by each producer, including appellee, of over two-thirds of his 1940 raisin crop to the program committee, and to subject it to the marketing control of the committee. The program, adopted through the exercise of the legislative power delegated to state officials, has the force of law. It clothes the committee with power and imposes on it the duty to control marketing of the crop so as to enhance the price or at least to maintain prices by restraints on competition of producers in the sale of their crop. The program operates to eliminate competition of the producers in the terms of sale of the crop, including price. And since 95 per cent of the crop is marketed in interstate commerce the program may be taken to have a substantial effect on the commerce, in placing restrictions on

the sale and marketing of a product to buyers who eventually sell and ship it in interstate commerce.

The question is thus presented whether in the absence of congressional legislation prohibiting or regulating the transactions affected by the state program, the restrictions which it imposes upon the sale within the state of a commodity by its producer to a processor who contemplates doing, and in fact does, work upon the commodity before packing and shipping it in interstate commerce, violate the Commerce Clause.

The governments of the states are sovereign within their territory as to **318 all, so they are subject to the prohibitions of the Constitution or as their action in some measure conflicts with powers delegated to the National Government, *360 or with Congressional legislation enacted in the exercise of those powers. This Court has repeatedly held that the grant of power to Congress by the Commerce Clause did not wholly withdraw from the states the authority to regulate the commerce with respect to matters of local concern, on which Congress has not spoken. Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 398, 400, 33 S.Ct. 729, 739, 740, 57 L.Ed. 1511, 48 L.R.A.,N.S., 1151, Ann.Cas.1916A, 18; South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177, 187 et seq., 825, 58 S.Ct. 510, 514 et seq., 82 L.Ed. 734; People of State of California v. Thompson, 313 U.S. 109, 113, 114, 61 S.Ct. 930, 932, 933, 85 L.Ed. 1213, and cases cited; Duckworth v. Arkansas, 314 U.S. 390, 62 S.Ct. 311, 86 L.Ed. 284, 138 A.L.R. 1144. A fortiori there are many subjects and transactions of local concern not themselves interstate commerce or a part of its operations which are within the regulatory and taxing power of the states, so long as state action serves local ends and does not discriminate against the commerce, even though the exercise of those powers may materially affect it. Whether we resort to the mechanical test sometimes applied by this Court in determining when interstate commerce begins with respect to a commodity grown or manufactured within a state and then sold and shipped out of it--or whether we consider only the power of the state in the absence of Congressional action to regulate matters of local concern, even though the regulation affects or in some measure restricts the commerce--we think the present regulation is within state power.

In applying the mechanical test to determine when interstate commerce begins and ends (see Federal Compress & Warehouse Co. v. McLean, 291 U.S. 17, 21, 54 S.Ct. 287, 288, 289, 78 L.Ed. 622, and cases cited; State of Minnesota v. Blasius, 290 U.S. 1, 54 S.Ct. 34, 78 L.Ed. 131, and cases cited) this Court has frequently held that for purposes of local taxation or regulation manufacture is not interstate commerce even though the manufacturing process is of slight extent. Crescent Cotton Oil Co. v. Mississippi, 257 U.S. 129, 42 S.Ct. 42, 66 L.Ed. 166; Oliver Iron Mining Co. v. Lord, 262 U.S. 172, 43 S.Ct. 526, 67 L.Ed. 929; Utah Power & Light Co. v. Pfost, 286 U.S. 165, 52 S.Ct. 548, 76 L.Ed. 1038; Hope Natural Gas Co. v. Hall, 274 U.S. 284, 47 S.Ct. 639, 71 L.Ed. 1049; Heisler v. Thomas Colliery Co., 260 U.S. 245, 43 S.Ct. 83, 67 L.Ed. 237; Champlin Refining *361 Co. v. Corporation Commission 286 U.S. 210, 52 S.Ct. 559, 76 L.Ed. 1062, 86 A.L.R. 403; Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, 56 S.Ct. 513, 80 L.Ed. 772. And such regulations of manufacture have been sustained where, aimed at matters of local concern, they had the effect of preventing commerce in the regulated article. Kidd v. Pearson, 128 U.S. 1, 9 S.Ct. 6, 32 L.Ed. 346; Champlin Refining Co. v. Corporation Commission, supra;

Gilligh v. Kirkwood, 237 U.S. 52, 35 S.Ct. 501, 59 L.Ed. 835; see Capital City Dairy Co. v. Ohio, 183 U.S. 238, 245, 22 S.Ct. 120, 123, 46 L.Ed. 171; Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55, 77, 57 S.Ct. 364, 374, 375, 81 L.Ed. 512; cf. Bayside Fish Flour Co. v. Gentry, supra. A state is also free to license and tax intrastate buying where the purchaser expects in the usual course of business to resell in interstate commerce. Chassaniol v. Greenwood, 291 U.S. 584, 54 S.Ct. 541, 78 L.Ed. 1004. And no case has gone so far as to hold that a state could not license or otherwise regulate the sale of articles within the state because the buyer, after processing and packing them, will, in the normal course of business, sell and ship them in interstate commerce.

All of these cases proceed on the ground that the taxation or regulation involved, however drastically it may affect interstate commerce, is nevertheless not prohibited by the Commerce Clause where the regulation is imposed before any operation of interstate commerce occurs. Applying that test, the regulation here controls the disposition, including the sale and purchase, of raisins before they are processed and packed preparatory to interstate sale and shipment. The regulation is thus applied to transactions wholly intrastate before the raisins are ready for shipment in interstate commerce.

**318 It is for this reason that the present case is to be distinguished from Lemke v. Farmers' Grain Co., 258 U.S. 50, 42 S.Ct. 244, 66 L.Ed. 458, and Shafer v. Farmers Grain Co., 268 U.S. 189, 45 S.Ct. 481, 69 L.Ed. 909, on which appellee relies. There the state regulation held invalid was of the business of those who purchased grain within the state for immediate shipment out of it. The Court was of opinion that the purchase of the wheat for shipment out of the state without resale or processing was a *362 part of the interstate commerce. Compare Chassaniol v. Greenwood, supra.

This distinction between local regulation of those who are not engaged in commerce, although the commodity which they produce and sell to local buyers is ultimately destined for interstate commerce, and the regulation of those who engage in the commerce by selling the product interstate, has in general served, and serves here, as a ready means of distinguishing those local activities which, under the Commerce Clause, are the appropriate subject of state regulation despite their effect on interstate commerce. But courts are not confined to so mechanical a test. When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved. See Di Santo v. Pennsylvania, 273 U.S. 34, 44, 47 S.Ct. 267, 271, 71 L.Ed. 524 (with which compare People of State of California v. Thompson, supra); South Carolina State Highway Dept. v. Barnwell Bros., supra; Milk Control Board v. Eisenberg Farm Products, 306 U.S. 346, 59 S.Ct. 528, 83 L.Ed. 752; Illinois Natural Gas Co. v. Central Illinois Public Service Comm., 314 U.S. 498, 504, 505, 62 S.Ct. 384, 386, 387, 86 L.Ed. 371.

Such regulations by the state are to be sustained, not because they are 'indirect' rather than 'direct', see Di Santo v. Pennsylvania, supra; cf. Wickard v. Filburn, supra, not because they control interstate activities in

such a manner as only to affect the commerce rather than to command its operations. But they are to be upheld because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character and the practical difficulties involved, may never be adequately dealt with *363 by Congress. Because of its local character also there may be wide scope for local regulation without substantially impairing the national interest in the regulation of commerce by a single authority and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the Commerce Clause. See Minnesota Rate Cases (Simpson v. Shepard), supra, 230 U.S. 388-410, 33 S.Ct. 729, 745, 57 L.Ed. 1511, 48 L.R.A.,N.S., 1151, Ann.Cas.1915A, 18; People of State of California v. Thompson, supra, 313 U.S. 111, 61 S.Ct. 932, 85 L.Ed. 1213. There may also be, as in the present case, local regulations whose effect upon the national commerce is such as not to conflict but to coincide with a policy which Congress has established with respect to it.

Examination of the evidence in this case and of available data of the raisin industry in California, of which we may take judicial notice, leaves no doubt that the evils attending the production and marketing of raisins in that state present a problem local in character and urgently demanding state action for the economic protection of those engaged in one of its important industries. [FN9] Between 1914 and 1920 **320 there was a spectacular rise in price of all types of California grapes, including raisin grapes. The price of raisins reached its peak, $235 per ton, in 1921, and was followed by large increase in acreage with accompanying reduction in price. The price of raisins in most *364 years since 1922 has ranged from $40 to $60 per ton but acreage continued to increase until 1926 and production reached its peak, 1,433,000 tons of raisin grapes and 280,000 tons of raisins, in 1938. Since 1920 there has been a substantial carry over of 30 to 50% of each year's crop. The result has been that at least since 1934 the industry, with a large increase in acreage and the attendant fall in price, has been unable to market its product and has been compelled to sell at less than parity prices and in some years at prices regarded by students of the industry as less than the cost of production.[FN10]

FN9 The principal statistical sources are U.S. Tariff Commission, Grapes, Raisins and Wines, Report No. 134, Second Series, issued pursuant to 19 U.S.C. s 1332, 19 U.S.C.A. s 1332 and the following publications of the U.S. Department of Agriculture: Yearbook of Agriculture (published annually until 1936); Agricultural Statistics (published annually since 1936); Crops and Markets (published quarterly); Season Average Prices and Value of Production, Principal Crops, 1940 and 1941 (Dec. 18, 1941). For general discussions of the economic status of the raisin industry see Grapes, Raisins and Wines, supra; Shear and Gould, Economic Status of the Grape Industry, University of California, Agricultural Experiment Station Bulletin No. 428 (1927); Shear and Howe, Factors Affecting California Raisin Sales and Prices, 1922-29, Giannini Foundation of Agricultural Economics, Paper No. 20 (1931).

FN10 Studies made under the auspices of the University of California indicate that the cost of production of Thompson Seedless raisins, including the growers' labor, a management charge, depreciation, and interest on investment, is $49.58 per ton on a farm yielding two tons per acre, and $72.00 per ton on a farm yielding 1 ton per acre. A two-ton yield is described as 'good' a one-ton yield as 'usual'. Adams, Farm Management Crop Manual, University of California Syllabus Series No. 279 (1941) 102-5. Another student has computed the cost of production at $53.58 for a two-ton per acre yield, about $65 for a 1.5 ton yield, and $90 for a one-ton yield. Smulyan, Standards of Production, Labor, Material and other Costs for Selected Crops and Livestock Enterprises, University of California Extension Service (1939) 13. Field prices for Thompson Seedless raisins were below $45.00 in 1933, 1929, 1932, and 1938; since 1912 they have been at $65.00 or higher in only 5 years, and have only once been as high as $72.00. Grapes, Raisins and Wines, supra, 148.
For parity prices for raisins, see supra, note 4.

The history of the industry at least since 1929 is a record of a continuous search for expedients which would stabilize the marketing of the raisin crop and maintain a price standard which would bring fair return to the producers. [FN11] It is significant of the relation of the local interest in maintaining this program to the national interest in interstate commerce, that throughout the period from 1929 until the adoption of the prorate program for *385 the 1940 raisin crop, the national government has contributed to these efforts either by its establishment of marketing programs pursuant to Act of Congress or by aiding programs sponsored by the state. Local cooperative market stabilization programs for raisins in 1929 and 1930 were approved by the Federal Farm Board which supported them with large loans.[FN12] In 1934 a marketing agreement for California raisins was put into effect under s 8(2) of the Agricultural Adjustment Act of 1933, as amended, 48 Stat. 528, which authorized the Secretary of Agriculture, in order to effectuate the Act's declared policy of achieving parity **321 prices, to enter into marketing agreements with processors, producers and others engaged in handling agricultural commodities 'in the current of or in competition with, or so as to burden, obstruct, or in any way affect, interstate or foreign commerce'. [FN13]

FN11 For discussion of private efforts within the industry prior to 1929 to regulate the marketing of raisins, see Grapes, Raisins and Wines, supra, 52--5.

FN12 See Annual Report of the Federal Farm Board (1930) 18, 73; id. (1931) 58-61, 91; Grapes, Raisins and Wines, supra, 82-84; S. W. Shear, The California Grape Control Plan, Giannini Foundation of Agricultural Economics, Paper No. 22 (1931); Stokdyk and West, The Farm Board (1939) 135-9. Loans of $4,500,000 in 1929 and $6,785,000 in 1930 were made by the Federal Farm Board. Shear, supra, states that the 1930 program, which provided for the formation of a single marketing agency, and the destruction or diversion to by-product use of surplus raisins, 'was designed by the Federal Farm Board'.

The Federal Farm Board was created by s 2 of the Agricultural Marketing Act of 1929, 46 Stat. 11, 12 U.S.C.A. s 1141a, which authorized the Board to make loans to cooperative associations to aid in the effective merchandising of agricultural commodities * * *' s 7, 12 U.S.C.A. s 1141e, so as to achieve the statutory objective of placing agriculture on a 'basis of economic equality with other industries' s 1, 12 U.S.C.A. s 1141.

FN13 See U.S. Dept. of Agriculture, Agricultural Adjustment in 1934, 120. The marketing program adopted is published by the Agricultural Adjustment Administration, Department of Agriculture, as Marketing Agreement Series--Agreement No. 44, License Series--License No. 88. It was in effect from May 29, 1934 to Sept. 14, 1935. The agreement provided for the creation of a control board on which representatives of packers and growers should have an equal voice. Subject to the approval of the Secretary of Agriculture the control board could fix minimum prices to be paid growers and require a percentage of the crop to be delivered to the control board. 15% of the 1934 crop was required to be delivered to the board, and prices for that crop were fixed at $60, $65 and $70 per ton for Muscat, Sultana, and Thompson Seedless raisins respectively.

*366 Raisin Proration Zone No. 1 was organized in the latter part of 1937. No proration program was adopted for the 1937 crop but loans of $1,244,000 were made on raisins of that crop by the Commodity Credit Corporation.[FN14] In aid of a proration program adopted under the California Act for the 1938 crop, a substantial part of that crop was pledged to the Commodity Credit Corporation as security for a loan of $2,568,000, and was ultimately sold to the Federal Surplus Commodities Corporation for relief distribution.[FN15] Substantial purchases of raisins of the 1939 crop were also made by Federal Surplus Commodities Corporation, although no proration program was adopted for that year.[FN16] In aid of the 1940 program, as we have already noted, the Commodity Credit Corporation made loans in excess of $5,000,000, and 33,000 tons of the raisins pledged to it were sold to the Federal Surplus Marketing Administration.[FN17]

FN14 Report of the President of the Commodity Credit Corporation (1940) 16. These raisins were ultimately sold to the Federal Surplus Commodities Corporation for relief distribution. Ibid.; Report of the Federal Surplus Commodities Corporation (1938) 15.

FN15 Report of the President of the Commodity Credit Corporation (1940) 15; Report of the Associate Administrator of the Agricultural Adjustment Administration in Charge of the Division of Marketing and Marketing Agreements, and the President of the Federal Surplus Commodities Corporation (1938) 32. The federal loan was conditioned upon the adoption of a state proration program by which 20% of the crop was delivered into a stabilization pool.

FN16 Cecil, the 1940 Raisin Proration Program, supra, 48; Report of the Federal Surplus Commodities Corporation (1940) 6.

FN17 The Commodity Credit Corporation similarly made loans on the 1937, 1938, and 1940 crops of dried prunes, the loans on the 1938 and 1940 crops being in aid of proration programs which were very similar to those adopted for raisins. Report of the President of the Commodity Credit Corporation (1940) 13, 21, 22, (1941) 13-14, 21; Report of the Surplus Marketing Administration (1941) 33-4.

*367 Our history shows clearly enough that the adoption of legislative measures to prevent the demoralization of the industry by stabilizing the marketing of the raisin crop is a matter of state as well as national concern and, in the absence of inconsistent Congressional action, is a problem whose solution is peculiarly within the province of the state. In the exercise of its power the state has adopted a measure appropriate to the end sought. The program was not aimed at nor did it discriminate against interstate commerce, although it undoubtedly affected the commerce by increasing the interstate price of raisins and curtailing interstate shipments to some undetermined extent. The effect on the commerce is not greater, and in some instances was far less, than that which this Court has held not to afford a basis for denying to the states the right to pursue a legitimate state end. Cf. Kidd v. Pearson, supra; Bligh v. Kirkwood, supra; Champlain Refining Co. v. Corporation Commission, supra; South Carolina State Highway Department v. **322 Barnwell Bros., supra, and cases cited at page 188, of 303 U.S., at page 516 of 53 S.Ct. 82 L.Ed. 734, and notes 4 and 5; People of State of California v. Thompson, supra, 313 U.S. 113, 115, 61 S.Ct. 832, 833, 85 L.Ed. 1218, and cases cited.

In comparing the relative weights of the conflicting local and national interests involved it is significant that Congress, by its agricultural legislation, has recognized the distressed condition of much of the agricultural production of the United States, and has authorized marketing procedures, substantially like the California prorate program, for stabilizing the marketing of agricultural products. Acting under this legislation the Secretary of Agriculture has established a large number of market stabilization programs for agricultural commodities moving in interstate commerce in various parts of the country, including seven affecting California crops.[FN18] All involved attempts *368 in one way or another to prevent over-production of agricultural products and excessive competition in marketing them, with price stabilization as the ultimate objective. Most if not all had a like effect in restricting shipments and raising or maintaining prices of agricultural commodities moving in interstate commerce.

FN18 Twenty-eight such programs affect milk, and nineteen affecting other agricultural commodities, were in effect during the fiscal year ending June 30, 1941. Report of the Surplus Marketing Administration (1941) pp. 7, 10. For discussions of the nature and purpose of these programs see the annual reports of the Agricultural Adjustment Administration; Nourse, Marketing Agreements under the A.A.A. (1935).

It thus appears that whatever effect the operation of the California program may have on interstate commerce, it is one which it has been the policy of Congress to aid and encourage through federal agencies in conformity to the Agricultural Marketing Agreement Act, and s 302 of the Agricultural Adjustment

Act. Nor is the effect on the commerce greater than or substantially different in kind from that contemplated by the stabilization programs authorized by federal statutes. As we have seen, the Agricultural Marketing Agreement Act is applicable to raisins only on the direction of the Secretary of Agriculture when, instead of establishing a federal program has, as the statute authorizes, cooperated in promoting the state program and aided it by substantial federal grant. Hence we cannot say that the effect of the state program on interstate commerce is one which conflicts with Congressional policy or is such as to prevent the state from this exercise of its reserved power to regulate domestic agricultural production.

We conclude that the California prorate program for the 1940 raisin crop is a regulation of state industry of local concern which, in all the circumstances of this case—which we have detailed, does not impair national control over the commerce in a manner or to a degree forbidden by the Constitution.

Reversed.

END OF DOCUMENT

Citation
100 S.Ct. 937
63 L.Ed.2d 233, 1980-1 Trade Cases P 63,201
(Cite as: 445 U.S. 97, 100 S.Ct. 937)

FOUND DOCUMENT

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CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION, Petitioner,
v.
MIDCAL ALUMINUM, INC., et al.
No. 79-97.
Argued Jan. 16, 1980.
Decided March 3, 1980.

Wholesale distributor of wine filed writ of mandate asking for injunction against California's wine pricing system. The California Court of Appeal, 80 Cal.App.3d 879, 153 Cal.Rptr. 797, ruled that wine pricing scheme restrained trade in violation of Sherman Act and ordered California Department of Alcoholic Control not to enforce resale price maintenance and price posting statutes for the wine trade, and intervenor, association of liquor retailers, appealed. The California Supreme Court declined to hear the case, and certiorari was granted. The Supreme Court, Mr. Justice Powell, held that: (1) California's system for wine pricing constituted resale price maintenance in violation of Sherman Act; (2) state's involvement in price-setting program was insufficient to establish antitrust immunity under Parker v. Brown; and (3) Twenty-first Amendment did not bar application of Sherman Act.

Affirmed.

[1]
265K17(1.3)
MONOPOLIES
K. Resale prices.
U.S.Cal. 1980.
Sherman Act's ban on resale price maintenance applies to fair trade contracts unless an industry or program enjoys a special antitrust immunity. Sherman Anti-Trust Act, s 1 et seq., 15 U.S.C.A. s 1 et seq.
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.
100 S.Ct. 937, 445 U.S. 97, 63 L.Ed.2d 233, 1980-1 Trade Cases P 63,201

[2]
265K17(1.3)
MONOPOLIES
K. Resale prices.
U.S.Cal. 1980.
Where, under California statutes governing wine pricing, no state-licensed wine merchant could sell wine to retailer other than for price set either in an effective price schedule or in an effective fair trade contract, where licensee selling below established prices faced fines, license suspension, or outright license revocation, and where wine producers held power to prevent price competition by dictating prices charged by wholesalers, California's system for wine pricing constituted resale price maintenance in violation of Sherman Act. Sherman Anti-Trust Act, s 1 et seq., 15 U.S.C.A. s 1 et seq.; West's Ann.Cal.Bus. & Prof.Code, ss 24752, 24862, 24864-24866, 24880.
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.
100 S.Ct. 937, 445 U.S. 97, 63 L.Ed.2d 233, 1980-1 Trade Cases P 63,201

[3]
265K12(15)
MONOPOLIES

K. Regulated industries; public utilities.
U.S.Cal. 1980.
The two standards for antitrust immunity under Parker v. Brown are: first, challenged restraint must be one clearly articulated and affirmatively expressed as state policy, and second, policy must be actively supervised by the state itself. Sherman Anti-Trust Act, s 1 et seq., 15 U.S.C.A. s 1 et seq.
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.
100 S.Ct. 937, 445 U.S. 97, 63 L.Ed.2d 233, 1980-1 Trade Cases P 63,201
[4]
265K12(16)
MONOPOLIES
K. Regulated industries; public utilities.
U.S.Cal. 1980.
Where, under California statutes governing wine pricing, state simply authorized price setting and enforced prices established by private parties, state neither established prices nor reviewed reasonableness of price schedules nor did it regulate terms of fair trade contract, and state did not monitor market conditions or engage in any pointed reexamination of program, state's involvement in price-setting program was insufficient to establish antitrust immunity under Parker v. Brown, even though legislative policy was forthrightly stated and clear in its purpose to permit resale price maintenance. Sherman Anti-Trust Act, s 1 et seq., 15 U.S.C.A. s 1 et seq.; West's Ann.Cal.Bus. & Prof.Code, ss 24762, 24862, 24864-24866, 24950.
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.
100 S.Ct. 937, 445 U.S. 97, 63 L.Ed.2d 233, 1980-1 Trade Cases P 63,201
[5]
265K12(16)
MONOPOLIES
K. Regulated industries; public utilities.
U.S.Cal. 1980.
Comprehensive regulation of distribution of liquor in states that completely control such distribution within their boundaries would be immune from Sherman Act under Parker v. Brown since state would displace unfettered business freedom with its own power. Sherman Anti-Trust Act, s 1 et seq., 15 U.S.C.A. s 1 et seq.
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.
100 S.Ct. 937, 445 U.S. 97, 63 L.Ed.2d 233, 1980-1 Trade Cases P 63,201
[6]
223K6
INTOXICATING LIQUORS
K. Legislative regulation.
U.S.Cal. 1980.
In determining state powers under Twenty-first Amendment, primary focus is on language of the provision rather than history behind it. U.S.C.A.Const. Amend. 21.
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.
100 S.Ct. 937, 445 U.S. 97, 63 L.Ed.2d 233, 1980-1 Trade Cases P 63,201
[7]
223K8
INTOXICATING LIQUORS

(Cite as: 445 U.S. 97, 100 S.Ct. 937)
K. Legislative regulation.
U.S.Cal. 1980.
Under Twenty-first Amendment, state's control over transportation or importation of liquor into its territory logically entails considerable regulatory power not strictly limited to importing and transporting alcohol. U.S.C.A.Const. Amend. 21.
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.
100 S.Ct. 937, 445 U.S. 97, 63 L.Ed.2d 233, 1980-1 Trade Cases P 63,201
[8]
83K77.10(1)
COMMERCE
K. In general.
U.S.Cal. 1980.
Notwithstanding Twenty-first Amendment, states cannot tax imported liquor in violation of export-import clause. U.S.C.A.Const. Amend. 21.
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.
100 S.Ct. 937, 445 U.S. 97, 63 L.Ed.2d 233, 1980-1 Trade Cases P 63,201
[8]
223K16
INTOXICATING LIQUORS
K. Taxation.
U.S Cal. 1980.
Notwithstanding Twenty-first Amendment, states cannot tax imported liquor in violation of export-import clause. U.S.C.A.Const. Amend. 21.
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.
100 S.Ct. 937, 445 U.S. 97, 63 L.Ed.2d 233, 1980-1 Trade Cases P 63,201
[8]
92K240(3)
CONSTITUTIONAL LAW
K. Intoxicating liquors.
U.S.Cal. 1980.
States cannot insulate liquor industry from Fourteenth Amendment's requirements of equal protection and due process. U.S.C.A.Const. Amends. 14, 21.
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.
100 S.Ct. 937, 445 U.S. 97, 63 L.Ed.2d 233, 1980-1 Trade Cases P 63,201
[9]
92K296(1)
CONSTITUTIONAL LAW
K. In general.
U.S.Cal. 1980.
States cannot insulate liquor industry from Fourteenth Amendment's requirements of equal protection and due process. U.S.C.A.Const. Amends. 14, 21.
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.
100 S.Ct. 937, 445 U.S. 97, 63 L.Ed.2d 233, 1980-1 Trade Cases P 63,201
[10]
83K74.35
COMMERCE
K. Powers reserved to states.
U.S.Cal. 1980.
Twenty-first Amendment grants states virtually complete control over whether to

permit importation or sale of liquor and how to structure liquor distribution system, but, although states retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations; the competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a concrete case.
U.S.C.A.Const. Amend. 21.
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.
100 S.Ct. 937, 445 U.S. 97, 63 L.Ed.2d 233, 1980-1 Trade Cases P 63,201
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221k6
INTOXICATING LIQUORS
K. Legislative regulation.
U.S.Cal. 1980.
Twenty-first Amendment grants states virtually complete control over whether to permit importation or sale of liquor and how to structure liquor distribution system, but, although states retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations; the competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a concrete case.
U.S.C.A.Const. Amend. 21.
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.
100 S.Ct. 937, 445 U.S. 97, 63 L.Ed.2d 233, 1980-1 Trade Cases P 63,201
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265k10
MONOPOLIES
K. Constitutional and statutory provisions.
U.S.Cal. 1980.
Congress exercised all the power it possessed under the commerce clause when it approved the Sherman Act. Sherman Anti-Trust Act, s 1 et seq., 15 U.S.C.A. s 1 et seq.
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.
100 S.Ct. 937, 445 U.S. 97, 63 L.Ed.2d 233, 1980-1 Trade Cases P 63,201
[12]
170Bk382
FEDERAL COURTS
K. Court rendering decision.
U.S.Cal. 1980.
Supreme Court accords respectful consideration and great weight to views of a state's highest court on matters of state law and customarily accepts factual findings of state courts in the absence of exceptional circumstances.
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.
100 S.Ct. 937, 445 U.S. 97, 63 L.Ed.2d 233, 1980-1 Trade Cases P 63,201
[13]
170Bk612
FEDERAL COURTS
K. Questions of fact, verdicts and findings.
U.S.Cal. 1980.
Supreme Court accords respectful consideration and great weight to views of a state's highest court on matters of state law and customarily accepts factual findings of state courts in the absence of exceptional circumstances.

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.
100 S.Ct. 937, 445 U.S. 97, 63 L.Ed.2d 233, 1980-1 Trade Cases P 63,201
[13]
223k2
INTOXICATING LIQUORS
k. United States.
U.S.Cal. 1980.
Twenty-first Amendment did not bar application of Sherman Act to California's wine pricing system, where nothing in the record suggested that resale price maintenance mandated by the system helped sustain small retail establishments, where record did not demonstrate that the program inhibited the consumption of alcohol by Californians, and where asserted state interests were therefore less substantial than national policy in favor of competition. West's Ann.Cal.Bus. & Prof.Code, ss 24866, 24866(b); Sherman Anti-Trust Act, s 1 et seq., 15 U.S.C.A. s 1 et seq.; U.S.C.A.Const. Amend. 21, s 2.
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.
100 S.Ct. 937, 445 U.S. 97, 63 L.Ed.2d 233, 1980-1 Trade Cases P 63,201
**939 Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

*97 A California statute requires all wine producers and wholesalers to file fair trade contracts or price schedules with the State. If a producer has not set prices through a fair trade contract, wholesalers must post a resale price schedule and are prohibited from selling wine to a retailer at other than the price set in a price schedule or fair trade contract. A wholesaler selling below the established prices faces fines or license suspension or revocation. After being charged with selling wine for less than the prices set by price schedules and also for selling wines for which no fair trade contract or schedule had been filed, respondent wholesaler filed suit in the California Court of Appeal asking for an injunction against the State's wine-pricing scheme. The Court of Appeal ruled that the scheme restrains trade in violation of the Sherman Act, and granted injunctive relief, rejecting claims that the scheme was immune from liability under that Act under the "state action" doctrine of Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315, and was also protected by s 2 of the Twenty-first Amendment, which prohibits the transportation or importation of intoxicating liquors into any State for delivery or use therein in violation of the State's laws.
Held:
1. California's wine-pricing system constitutes resale price maintenance in violation of the Sherman Act, since the wine producer holds the power to prevent price competition by dictating the prices charged by wholesalers. And the State's involvement in the system is insufficient to establish antitrust immunity under Parker v. Brown, supra. While the system satisfies the first requirement for such immunity that the challenged restraint be "one clearly articulated and affirmatively expressed as state policy," it does not meet the other requirement that the policy be "actively supervised" by the State

itself. Under the system the State simply authorizes price setting and enforces the prices established by private parties, and it does not establish prices, review the reasonableness of price schedules, regulate the terms of fair trade contracts, monitor market conditions, or engage in any "pointed reexamination" *98 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. Pp. 943-944.

2. The Twenty-first Amendment does not bar application of the Sherman Act to California's wine-pricing system. Pp. 944-948.

(a) Although under that Amendment States retain substantial discretion to establish liquor regulations over and above those governing the importation or sale of liquor and the structure of the liquor distribution system, those controls may be subject to the federal commerce power in appropriate situations. Pp. 944-946.

(b) There is no basis for disagreeing with the view of the California courts that the asserted state interests behind the resale price maintenance system of promoting temperance and protecting small retailers are less substantial than the national policy in favor of competition. Such view is reasonable and is supported by the evidence, there being nothing to indicate that the wine-pricing system helps sustain small retailers or inhibits the consumption of alcohol by Californians. Pp. 946-948.

90 Cal.App.3d 879, 153 Cal.Rptr. 757, affirmed.

**940 William T. Chidlaw, Sacramento, Cal., for petitioner.

Jack S. Owens, San Francisco, Cal., for respondents.

George J. Roth, Sacramento, Cal., for the State of California, as amicus curiae, by special leave of Court.

*98 Mr. Justice POWELL delivered the opinion of the Court.

In a state-court action, respondent Midcal Aluminum, Inc., a wine distributor, presented a successful antitrust challenge to California's resale price maintenance and price posting statutes for the wholesale wine trade. The issue in this case is whether those state laws are shielded from the Sherman Act by either the "state action" doctrine of Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), or s 2 of the Twenty-first Amendment.

I

Under s 24866(b) of the California Business and Professions Code, all wine producers, wholesalers, and rectifiers must file fair trade contracts or price schedules with the State. [FN1] If a wine producer has not set prices through a fair trade contract, wholesalers must post a resale price schedule for that producer's brands. s 24866(a). No state-licensed wine merchant may sell wine to a retailer at other than the price set "either in an effective price schedule or in an effective fair trade contract . . . ." s 24852 (West Supp.1980).

FN1. The statute provides:

"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 Ann. s 24866 (West 1964).

The State is divided into three trading areas for administration of the wine pricing program. A single fair trade contract or schedule for each brand sets the terms for all wholesale transactions in that brand within a given trading area. ss 24862, 24864, 24865 (West Supp.1980). Similarly, state *100 regulations provide that the wine prices posted by a single wholesaler within a trading area bind all wholesalers in that area. Midcal Aluminum, Inc. v. Rice, 60 Cal.App.3d 979, 983-984, 153 Cal.Rptr. 757, 760 (1979). A licensee selling below the established prices faces fines, license suspension, or outright license revocation. Cal.Bus. & Prof.Code Ann. s 24880 (West Supp.1980). [FN2] The State has no direct control over wine prices, and it does not review the reasonableness of the prices set by wine dealers.

FN2. Licensees that sell wine below the prices specified in fair trade contracts or schedules also may be subject to private damages suits for unfair competition. s 24752 (West 1964).

Midcal Aluminum, Inc., is a wholesale distributor of wine in southern California. In July 1978, the Department of Alcoholic Beverage Control charged Midcal with selling 27 cases of wine for less than the prices set by the effective price schedule of the E. & J. Gallo Winery. The Department also alleged that Midcal sold wines for which no fair trade contract or schedule had been filed. Midcal stipulated that the allegations were true and that the State could fine it or suspend its license for those transgressions. App. 19-20. Midcal then filed a writ of mandate in the California Court of Appeal for the Third Appellate District asking for an injunction against the State's wine pricing system.

The Court of Appeal ruled that the wine pricing scheme restrains trade in violation of the Sherman Act, 15 U.S.C. s 1 et seq. The court relied entirely on the reasoning in Rice v. Alcoholic Beverage Control Appeals Bd., 21 Cal.3d 431, 146 Cal.Rptr. 585, 579 P.2d 478 (1978), where the California Supreme Court struck down parallel restrictions on the sale of distilled liquors. In that **941 case, the court held that because the State played only a passive part in liquor pricing, there was no Parker v. Brown immunity for the program.

"In the price maintenance program before us, the state plays no role whatever in setting the retail prices. The *101 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." 21 Cal.3d, at 445, 146 Cal.Rptr., at 595, 579 P.2d, at 488.

Rice also rejected the claim that California's liquor pricing policies were protected by s 2 of the Twenty-first Amendment, which insulates state regulation of intoxicating liquors from many federal restrictions. The court

determined that the national policy in favor of competition should prevail over the state interests in liquor price maintenance--the promotion of temperance and the preservation of small retail establishments. The court emphasized that the California system not only permitted vertical control of prices by producers, but also frequently resulted in horizontal price fixing. Under the program, many comparable brands of liquor were marketed at identical prices. [FN3] Referring to congressional and state legislative studies, the court observed that resale price maintenance has little positive impact on either temperance or small retail stores. See infra, at 947.

FN3. The court cited record evidence that in July 1976 five leading brands of gin each sold in California for $4.85 for a fifth of a gallon, and that five leading brands of Scotch whiskey sold for either $8.39 or $8.40 a fifth. Rice v. Alcoholic Beverage Control Appeals Bd., 21 Cal.3d, at 454, and nn. 14, 16, 146 Cal.Rptr. 585, 800, and nn. 14, 16, 579 P.2d, at 481-482, and nn. 14, 16.

In the instant case, the State Court of Appeal found the analysis in Rice squarely controlling. 90 Cal.App.3d, at 984, 153 Cal.Rptr., at 760. The court ordered the Department of Alcoholic Beverage Control not to enforce the resale price maintenance and price posting statutes for the wine trade. The Department, which in Rice had not sought certiorari from *102 this Court, did not appeal the ruling in this case. [FN4] An appeal was brought by the California Retail Liquor Dealers Association, an intervenor. [FN5] The California Supreme Court declined to hear the case, and the Dealers Association sought certiorari from this Court. We granted the writ, 444 U.S. 824, 100 S.Ct. 45, 62 L.Ed.2d 31 (1979), and now affirm the decision of the state court.

FN4. The State also did not appeal the decision in Capiscean Corp. v. Alcoholic Beverage Control Appeals Bd., 87 Cal.App.3d 996, 151 Cal.Rptr. 492 (1979), which used the analysis in Rice to invalidate California's resale price maintenance scheme for retail wine sales to consumers.

FN5. The California Retail Liquor Dealers Association, a trade association of independent retail liquor dealers in California, claims over 3,000 members.

II

[1] 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. In Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 407, 31 S.Ct. 376, 384, 55 L.Ed. 502 (1911), the Court observed that such arrangements are "designed to maintain prices . . . and to prevent competition among those who trade in [competing goods]." See Albrecht v. Herald Co., 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968); United States v. Parke, Davis & Co., 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960); United States v. A. Schrader's Son, Inc., 252 U.S. 85, 40 S.Ct. 251, 64 L.Ed. 471 (1920). For many years, however, the Miller-Tydings Act of 1937 permitted the States to authorize resale price maintenance. 50 Stat. 693. The goal of that statute was to allow the States to protect small retail

establishments that Congress **942 thought might otherwise be driven from the marketplace by large-volume discounters. But in 1975 that congressional permission was rescinded. The Consumer Goods Pricing Act of 1975, 89 Stat. 801, repealed the Miller-Tydings Act and related legislation. [FN6] Consequently, the Sherman Act's ban on resale price *103 maintenance now applies to fair trade contracts unless an industry or program enjoys a special antitrust immunity.

FN6. The congressional Reports accompanying the Consumer Goods Pricing Act of 1975, noted that repeal of fair trade authority would not alter whatever power the States hold under the Twenty-first Amendment to control liquor prices. S.Rep. No. 94-466, p. 2 (1975); H.R.Rep. No. 94-341, p. 3, n. 2 (1975), U.S.Code Cong. & Admin.News, p. 1569. We consider the effect of the Twenty-first Amendment on this case in Part III, infra.

[2] California's system for wine pricing plainly constitutes resale price maintenance in violation of the Sherman Act. Schwegmann Bros. v. Calvert Corp., 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035 (1951); see Albrecht v. Herald Co., supra; Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951); Dr. Miles Medical Co. v. John D. Park & Sons Co., supra. The wine producer holds the power to prevent price competition by dictating the prices charged by wholesalers. As Mr. Justice Hughes pointed out in Dr. Miles, such vertical control destroys horizontal competition as effectively as if wholesalers "formed a combination and endeavored to establish the same restrictions . . . by agreement with each other." 220 U.S., at 408, 31 S.Ct., at 384. [FN7] Moreover, there can be no claim that the California program is simply intrastate regulation beyond the reach of the Sherman Act. See Schwegmann Bros. v. Calvert Corp., supra; Burke v. Ford, 389 U.S. 320, 88 S.Ct. 443, 19 L.Ed.2d 554 (1967) (per curiam).

FN7. In Rice, the California Supreme Court found direct evidence that resale price maintenance resulted in horizontal price fixing. See supra, at 941, and n. 3. Although the Court of Appeal made no such specific finding in this case, the court noted that the wine pricing system "cannot be upheld for the same reasons the retail price maintenance provisions were declared invalid in Rice." Midcal Aluminum, Inc. v. Rice, 90 Cal.App.3d 979, 983, 153 Cal.Rptr. 757, 760 (1979).

Thus, we must consider whether the State's involvement in the price-setting program is sufficient to establish antitrust immunity under Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). That immunity for state regulatory programs is grounded in our federal structure. "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, *104 an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." Id., at 351, 63 S.Ct., at 313. In Parker v. Brown, this Court found in the Sherman Act no purpose to nullify state powers. Because the Act is directed against "individual and not state action," the Court concluded that state regulatory programs could not violate it. Id., at 352, 63 S.Ct., at 314.

Under the program challenged in Parker, the State Agricultural Prorate Advisory Commission authorized the organization of local cooperatives to develop marketing policies for the raisin crop. The Court emphasized that the Advisory Commission, which was appointed by the Governor, had to approve cooperative policies following public hearings: "It is the state which has created the machinery for establishing the prorate program. . . . [I]t is the state, acting through the Commission, which adopts the program and enforces it . . . ." Ibid. In view of this extensive official oversight, the Court wrote, the Sherman Act did not apply. Without such oversight, the result could have been different. The Court expressly noted that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . ." Id., at 351, 63 S.Ct., at 314.

Several recent decisions have applied Parker 's analysis. In Goldfarb v. Virginia **943 State Bar, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), the Court concluded that fee schedules enforced by a state bar association were not mandated by ethical standards established by the State Supreme Court. The fee schedules therefore were not immune from antitrust attack. "It is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign." Id., at 791, 95 S.Ct., at 2015. Similarly, in Cantor v. Detroit Edison Co., 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), a majority of the Court found that no antitrust immunity was conferred when a state agency passively accepted a public utility's tariff. In contrast, Arizona rules against lawyer advertising were held immune from Sherman Act challenge because *105 they "reflect[ed] a clear articulation of the State's policy with regard to professional behavior" and were "subject to pointed re-examination by the policymaker--the Arizona Supreme Court--in enforcement proceedings." Bates v. State Bar of Arizona, 433 U.S. 350, 362, 97 S.Ct. 2691, 2698, 53 L.Ed.2d 810 (1977).

Only last Term, this Court found antitrust immunity for a California program requiring state approval of the location of new automobile dealerships. New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96, 99 S.Ct. 403, 58 L.Ed.2d 361 (1978). That program provided that the State would hold a hearing if an automobile franchisee protested the establishment or relocation of a competing dealership. Id., at 103, 99 S.Ct., at 408. In view of the State's active role, the Court held, the program was not subject to the Sherman Act. The "clearly articulated and affirmatively expressed" goal of the state policy was to "displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships." Id., at 109, 99 S.Ct., at 412.

[3][4][5] These decisions establish two standards for antitrust immunity under Parker v. Brown. 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. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410, 98 S.Ct. 1123, 1135, 55 L.Ed.2d 364 (1978) (opinion of Brennan, J.). [FN8] The 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. 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 *106 the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program. [FN9] 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. As Parker teaches, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . ." 317 U.S., at 351, 63 S.Ct., at 314.

FN8. See Norman's On the Waterfront, Inc. v. Wheatley, 444 F.2d 1011, 1018 (CA3 1971); Asheville Tobacco Bd. v. FTC, 263 F.2d 502, 509-510 (CA4 1959); Note, Parker v. Brown Revisited: The State Action Doctrine After Goldfarb, Cantor, and Bates, 77 Colum.L.Rev. 886, 918 (1977).

FN9. The California program contrasts with the approach of those States that completely control the distribution of liquor within their boundaries. E. g., Va.Code §§ 4-15, 4-28 (1979). Such comprehensive regulation would be immune from the Sherman Act under Parker v. Brown, since the State would "displace unfettered business freedom" with its own power. New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96, 109, 99 S.Ct. 403, 412, 58 L.Ed.2d 361 (1978); see State Board v. Young's Market Co., 299 U.S. 59, 63, 57 S.Ct. 77, 78, 81 L.Ed. 38 (1936).

**944 III

Petitioner contends that even if California's system of wine pricing is not protected state action, the Twenty-first Amendment bars application of the Sherman Act in this case. Section 1 of that Amendment repealed the Eighteenth Amendment's prohibition on the manufacture, sale, or transportation of liquor. The second section reserved to the States certain power to regulate traffic in liquor: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The remaining question before us is whether § 2 permits California to countermand the congressional policy--adopted under the commerce power--in favor of competition.

A

[6][7] In determining state powers under the Twenty-first Amendment, the Court has focused primarily on the language of the *107 provision rather than the history behind it. State Board v. Young's Market Co., 299 U.S. 59, 63-64, 57 S.Ct. 77, 78-79, 81 L.Ed. 38 (1936). [FN10] In terms, the Amendment gives the States control over the "transportation or importation" of liquor into their territories. Of course, such control logically entails considerable regulatory power not strictly limited to importing and transporting alcohol. Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138, 60 S.Ct. 163, 166, 84 L.Ed. 128 (1939). We should not, however, lose sight of the explicit grant of authority.

FN10. The approach is supported by sound canons of constitutional interpretation and demonstrates a wise reluctance to wade into the complex currents beneath the congressional proposal of the Amendment and its

ratification in the state conventions. The Senate sponsor of the Amendment resolution said the purpose of s 2 was "to restore to the States . . . absolute control in effect over interstate commerce affecting intoxicating liquors. . . ." 76 Cong.Rec. 4143 (1933) (remarks of Sen. Blaine). Yet he also made statements supporting Nidcal's claim that s 2 was designed only to ensure that "dry" States could not be forced by the Federal Government to permit the sale of liquor. See 76 Cong.Rec., at 4140-4141. The sketchy records of the state conventions reflect no consensus on the thrust of s 2, although delegates at several conventions expressed their hope that state regulation of liquor traffic would begin immediately. E. Brown, Ratification of the Twenty-first Amendment to the Constitution 104 (1938) (Wilson, President of Idaho Convention); id., at 191-192 (Darnall, President of Maryland Convention); id., at 347 (Gaylord, Chairman of Missouri Convention); id., at 458-473 (resolution adopted at Washington Convention calling for state action "to regulate the liquor traffic"). See generally Note, The Effect of the Twenty-First Amendment on State Authority to Control Intoxicating Liquors, 75 Colum.L.Rev. 1578, 1580 (1975); Note, Economic Localism in State Alcoholic Beverage Laws--Experience Under the Twenty-First Amendment, 72 Harv.L.Rev. 1145, 1147 (1959).

This Court's early decisions on the Twenty-first Amendment recognized that each State holds great powers over the importation of liquor from other jurisdictions. Young's Market, supra, concerned a license fee for interstate imports of alcohol; another case focused on a law restricting the types of liquor that could be imported from other States, Mahoney v. Joseph Triner Corp., 304 U.S. 401, 58 S.Ct. 952, 82 L.Ed. 1424 (1938); two others *108 involved "retaliation" statutes barring imports from States that proscribed shipments of liquor from other States, Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395, 59 S.Ct. 256, 83 L.Ed. 248 (1939); Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391, 59 S.Ct. 254, 83 L.Ed. 243 (1938). The Court upheld the challenged state authority in each case, largely on the basis of the States' special power over the "importation and transportation" of intoxicating liquors. Yet even when the States had acted under the explicit terms of the Amendment, the Court resisted the contention that s 2 "freed the States from all restrictions upon the police power to be found in other provisions of the Constitution." Young's Market, supra, 229 U.S., at 64, 57 S.Ct., at 79.

[8][9] Subsequent decisions have given "wide latitude" to state liquor regulation. Joseph E. Seagram & Sons, Inc. v. Hostetter, **945 384 U.S. 35, 42, 86 S.Ct. 1254, 1258, 16 L.Ed.2d 336 (1966), but they also have stressed that important federal interests in liquor matters survived the ratification of the Twenty-first Amendment. The States cannot tax imported liquor in violation of the Export-Import Clause. Department of Revenue v. James Beam Co., 377 U.S. 341, 84 S.Ct. 1247, 12 L.Ed.2d 362 (1964). Nor can they insulate the liquor industry from the Fourteenth Amendment's requirements of equal protection, Craig v. Boren, 429 U.S. 190, 204-209, 97 S.Ct. 451, 460-463, 50 L.Ed.2d 397 (1976), and due process, Wisconsin v. Constantineau, 400 U.S. 433, 436, 91 S.Ct. 507, 509, 27 L.Ed.2d 515 (1971).

More difficult to define, however, is the extent to which Congress can regulate liquor under its interstate commerce power. Although that power is

directly qualified by s 2, the Court has held that the Federal Government retains some Commerce Clause authority over liquor. In William Jameson & Co. v. Morgenthau, 307 U.S. 171, 59 S.Ct. 804, 83 L.Ed. 1189 (1939) (per curiam), this Court found no violation of the Twenty-first Amendment in a whiskey-labeling requirement prescribed by the Federal Alcohol Administration Act, 49 Stat. 977. And in Ziffrin, Inc. v. Reeves, supra, the Court did not uphold Kentucky's system of licensing liquor haulers until it was satisfied that the state program was reasonable. 308 U.S., at 139, 60 S.Ct., at 167.

*108 The contours of Congress' commerce power over liquor were sharpened in Hostetter v. Idlewild Liquor Corp., 377 U.S. 324, 331-332, 84 S.Ct. 1293, 1298, 12 L.Ed.2d 350 (1964).

"To draw a conclusion . . . that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been pro tanto 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect."

The Court added a significant, if elementary, observation: "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." Id., at 332, 84 S.Ct., at 1298. See Craig v. Boren, 429 U.S., at 208, 97 S.Ct., at 461. [FN11]

FN11. In Nippert v. Richmond, 327 U.S. 416, 66 S.Ct. 586, 90 L.Ed. 760 (1946), the Court commented in a footnote:
"[E]ven the commerce in intoxicating liquors, over which the Twenty-first Amendment gives the States the highest degree of control, is not altogether beyond the reach of the federal commerce power, at any rate when the State's regulation squarely conflicts with regulation imposed by Congress . . . ." Id., at 425, n. 15, 66 S.Ct., at 591, n. 15.

This pragmatic effort to harmonize state and federal powers has been evident in several decisions where the Court held liquor companies liable for anticompetitive conduct not mandated by a State. See Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951); United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 65 S.Ct. 661, 89 L.Ed. 951 (1945). In Schwegmann Bros. v. Calvert Corp., 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035 (1951), for example, a liquor manufacturer attempted to force a distributor to comply with Louisiana's resale price maintenance program, a *110 program similar in many respects to the California system at issue here. The Court held that because the Louisiana statute violated the Sherman Act, it could not be enforced against the distributor. Fifteen years later, the Court rejected a Sherman Act challenge to a New York law requiring liquor dealers to attest that their prices were "no higher than the lowest price" charged anywhere in the United States. Seagram & Sons v. Hostetter, supra. The Court concluded that the statute exerted "no irresistible economic pressure on the [dealers] to violate the Sherman Act in order to comply," but it **946 also cautioned that "[n]othing in the Twenty-

first Amendment, of course, would prevent enforcement of the Sherman Act" against an interstate conspiracy to fix liquor prices. Id., at 45-46, 85 S.Ct., at 1261. See Burke v. Ford, 389 U.S. 320, 88 S.Ct. 443, 19 L.Ed.2d 554 (1967) (per curiam).

[10] These decisions demonstrate that there is no bright line between federal and state powers over liquor. The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a "concrete case." Hostetter v. Idlewild Liquor Corp., supra, at 332, 84 S.Ct., at 1298.

B

[11] The federal interest in enforcing the national policy in favor of competition is both familiar and substantial.

"Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *111 United States v. Topco Associates, Inc., 405 U.S. 596, 610, 92 S.Ct. 1126, 1135, 31 L.Ed.2d 515 (1972).

See Northern Pacific R. Co. v. United States, 356 U.S. 1, 4, 78 S.Ct. 514, 517, 2 L.Ed.2d 545 (1958). Although this federal interest is expressed through a statute rather than a constitutional provision, Congress "exercis[ed] all the power it possessed" under the Commerce Clause when it approved the Sherman Act. Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 435, 52 S.Ct. 607, 609, 76 L.Ed. 1204 (1932); see City of Lafayette v. Louisiana Power & Light Co., 435 U.S., at 386, 98 S.Ct., at 1129. We must acknowledge the importance of the Act's procompetition policy.

[12] The state interests protected by California's resale price maintenance system were identified by the state courts in this case, 90 Cal.App.3d, at 983, 153 Cal.Rptr., at 780, and in Rice v. Alcoholic Beverage Control Appeals Bd., 21 Cal.3d, at 451, 146 Cal.Rptr., at 538, 579 P.2d, at 490. [FN12] Of course, the findings and conclusions of those courts are not binding on this Court to the extent that they undercut state rights guaranteed by the Twenty-first Amendment. See Hooven & Allison Co. v. Evatt, 324 U.S. 652, 658, 65 S.Ct. 870, 874, 89 L.Ed. 1252 (1945); Creswill v. Knights of Pythias, 225 U.S. 246, 261, 32 S.Ct. 822, 827, 56 L.Ed. 1074 (1912). Nevertheless, this Court accords "respectful consideration and great weight to the views of the state's highest court" on matters of state law, Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 100, 58 S.Ct. 443, 446, 82 L.Ed. 685 (1938), and we customarily accept the factual findings of state courts in the *112 absence of "exceptional circumstances." Lloyd A. Fry Roofing Co. v. Wood, 344 U.S. 157, 160, 73 S.Ct. 204, 206, 97 L.Ed. 165 (1952).

FN12. As the unusual posture of this case reflects, the State of California has shown less than an enthusiastic interest in its wine pricing system. As we noted, the state agency responsible for administering the program did not appeal the decision of the California Court of Appeal. See

supra, at 841; Tr. of Oral Arg. 20. Instead, this action has been maintained by the California Retail Liquor Dealers Association, a private intervenor. But neither the intervenor nor the State Attorney General, who filed a brief amicus curiae in support of the legislative scheme, has specified any state interests protected by the resale price maintenance system other than those noted in the state-court opinions cited in text.

[13] The California Court of Appeal stated that its review of the State's system of wine pricing was "controlled by the reasoning of the [California] Supreme Court in Rice [supra]." 90 Cal.App.3d, at 993, 153 Cal.Rptr., at 757. Therefore, we turn to that opinion's treatment of the state interests in resale price maintenance for distilled liquors.

**947 In Rice, the State Supreme Court found two purposes behind liquor resale price maintenance: "to promote temperance and orderly market conditions." 21 Cal.3d, at 451, 146 Cal.Rptr., at 599, 579 P.2d, at 490. [FN13] The court found little correlation between resale price maintenance and temperance. It cited a state study showing a 42% increase in per capita liquor consumption in California from 1950 to 1972, while resale price maintenance was in effect. Id., at 457-458, 146 Cal.Rptr., at 602-603, 579 P.2d, at 494, citing California Dept. of Finance, Alcohol and the State: A Reappraisal of California's Alcohol Control Policies, at, 15 (1974). Such studies, the court wrote, "at the very least raise a doubt regarding the justification for such laws on the ground that they promote temperance." 21 Cal.3d, at 457-458, 146 Cal.Rptr., at 602, 579 P.2d, at 494. [FN14]

FN13. The California Court of Appeal found no additional state interests in the instant case. 90 Cal.App.3d, at 984, 153 Cal.Rptr., at 760-761. That court rejected the suggestion that the wine price program was designed to protect the State's wine industry, pointing out that the statutes "do not distinguish between California wines and imported wines." Ibid.

FN14. See Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 38, 86 S.Ct. 1254, 1258, 16 L.Ed.2d 336 (1966) (citing study concluding that resale price maintenance in New York State had "no significant effect upon the consumption of alcoholic beverages").

The Rice opinion identified the primary state interest in orderly market conditions as "protect[ing] small licensees from predatory pricing policies of large retailers." Id., at 456, 146 Cal.Rptr., at 602, 579 P.2d, at 493. [FN15] In gauging this interest, the court *113 adopted the views of the Appeals Board of the Alcoholic Beverages Control Department, which first ruled on the claim in Rice. The state agency "rejected the argument that fair trade laws were necessary to the economic survival of small retailers . . . ." Ibid. The agency relied on a congressional study of the impact on small retailers of fair trade laws enacted under the Miller-Tydings Act. The study revealed that "states with fair trade laws had a 55 percent higher rate of firm failures than free trade states, and the rate of growth of small retail stores in free trade states between 1956 and 1972 was 32 per cent higher than in states with fair trade laws." Ibid., citing S.Rep. No. 94-466, p. 3 (1975). Pointing to the congressional abandonment of fair trade in the 1975 Consumer

Goods Pricing Act, see supra, at 942, the State Supreme Court found no persuasive justification to continue "fair trade laws which eliminate price competition among retailers." 21 Cal.3d, at 457, 146 Cal.Rptr., at 803, 579 P.2d, at 494. The Court of Appeal came to the same conclusion with respect to the wholesale wine trade. 80 Cal.App.3d, at 983, 153 Cal.Rptr., at 780.

FN15. The California Supreme Court also stated that orderly market conditions might "reduce excessive consumption, thereby encouraging temperance." 21 Cal.3d, at 458, 146 Cal.Rptr., at 802, 579 P.2d, at 493. The concern for temperance, however, was considered by the court as an independent state interest in resale price maintenance for liquor.

We have no basis for disagreeing with the view of the California courts that the asserted state interests are less substantial than the national policy in favor of competition. That evaluation of the resale price maintenance system for wine is reasonable, and is supported by the evidence cited by the State Supreme Court in Rice. Nothing in the record in this case suggests that the wine pricing system helps sustain small retail establishments. Neither the petitioner nor the State Attorney General in his amicus brief has demonstrated that the program inhibits the consumption of alcohol by Californians. We need not consider whether the legitimate state interests in temperance and the protection of small retailers *114 ever could prevail against the undoubted federal interest in a competitive economy. The unsubstantiated state concerns put forward in this case simply are not of the same stature as the goals of the Sherman Act.

We conclude that the California Court of Appeal correctly decided that the Twenty-first Amendment provides no shelter for the violation of the Sherman Act caused by **948 the State's wine pricing program. [FN16] The judgment of the California Court of Appeal, Third Appellate District, is

FN16. Since Midcal requested only injunctive relief from the state court, there is no question before us involving liability for damages under 15 U.S.C. s 15.

Affirmed.

Mr. Justice BRENNAN did not take part in the consideration or decision of this case.

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August 10, 1990

The Honorable Ken Hechler
Secretary of State
State Capitol
Suite 157-K
Charleston, West Virginia 25305

RE: Filing of agency approved proposed legislative rule pertaining to the regulated business exemption under the West Virginia Antitrust Act; Title 142, Series 18

Dear Mr. Hechler:

By this letter I am informing you that I have filed the above proposed legislative rule with the Legislative Rule-Making Review Committee as an agency approved rule. I am also filing at this time:

(1) a copy of the agency approved rule because of a change in the language from the previously filed rule;

(2) a copy of the notice of agency approval (and the submission) to the Legislative Rule-Making Review Committee;

(3) a report on public hearing, public comment period and amendments; and

(4) a summary of proposed legislative rule and statement of circumstances requiring the rule.

A copy of all items received at the public hearing is forthcoming.

Please feel free to contact Rob Schulenberg or Donna Quesenberry of my staff at 348-0246 if you have any questions.

Very truly yours,

ROGER W. TOMPKINS
ATTORNEY GENERAL

RWS/rm
Enclosures