Antitrust

Lawrence D. Barnes

Follow this and additional works at: https://scholarship.law.berkeley.edu/californialawreview

Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z38Q25

This Article is brought to you for free and open access by the California Law Review at Berkeley Law Scholarship Repository. It has been accepted for inclusion in California Law Review by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
ANTITRUST

Rice v. Alcoholic Beverage Control Appeals Board:1
Sherman Act Preempts State Liquor Fair Trade Law

The supreme court invalidated California's liquor fair trade law,2 finding that the anticompetitive law was preempted3 by the federal Sherman Act's4 policy of promotion of competition.5 The challenged liquor price maintenance plan provided that producers must post minimum prices with the Alcoholic Beverage Control (ABC) Department,6 and that retail liquor dealers must not sell below the posted prices7 under penalty of a state-imposed fine or liquor license revocation.8 This "fair trade" law was enacted pursuant to the legislature's police power, in order to promote temperance among Californians.9 The theory behind the law was that establishment of minimum retail prices would prevent price wars and the increased consumption occasioned by lower prices.10 The state's only role in the plan was to enforce the posted prices that were determined by the producers.

3. General prerequisites to preemption are discussed at note 17 infra.
4. 15 U.S.C. §§ 1-7 (1976). Section 1 of the Sherman Act provides that "[e]very contract, combination... or conspiracy, in restraint of trade or commerce among the several States... is declared to be illegal." 15 U.S.C. § 1 (1976).
5. "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade... [T]he policy unequivocally laid down by the Act is competition... ." Northern Pac. Ry. v. United States, 356 U.S. 1, 4-5 (1958).
7. Id. § 24755(0.
8. Id. § 24755.1.
9. It is the declared policy of the State that it is necessary to regulate and control the manufacture, sale, and distribution of alcoholic beverages within this State for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate price wars which unduly stimulate the sale and consumption of alcoholic beverages and disrupt the orderly sale and distribution thereof, it is hereby declared as the policy of this State that the sale of alcoholic beverages should be subjected to certain restrictions and regulations. The necessity for the enactment of provisions of this chapter is, therefore, declared as a matter of legislative determination.
10. See CAIIFORNIA SENATE SELECT COMM. ON LAWS RELATING TO ALCOHOLIC BEVERAGES, VOL. III: THE ALCOHOLIC BEVERAGE INDUSTRY 18-19 (1974) [hereinafter cited as SENATE SELECT COMMITTEE] (remarks of Edward Kirby, Director of the Department of Alcoholic Beverage Control). Mr. Kirby also stated another theory behind the law, that it provides retailers with sufficient profits so that they would not be forced into forbidden practices. Id. New York's Moreland Commission, whose recommendation for repeal of liquor fair trade was accepted, rejected this argument as bordering on "moral blackmail." NEW YORK STATE MORELAND COMM'N ON THE ALCOHOLIC BEVERAGE CONTROL LAW, REPORT AND RECOMMENDATIONS NO. 3: MANDATORY RESALE PRICE MAINTENANCE 24 (1964) [hereinafter cited as MORELAND COMM'N REPORT].

546
The defendant in *Rice* was a small retailer who sold liquor to state undercover agents at prices below the posted levels. The ABC Department ordered suspension of the retailer's license, and the retailer appealed to the ABC Appeals Board, contending that the liquor fair trade law under which its license was suspended violated the Sherman Act and equal protection. The ABC Appeals Board vacated the suspension on both grounds. The department appealed and obtained a writ of review from the court of appeal reversing the Board.11

The California Supreme Court reversed the court of appeal and affirmed the Appeals Board's vacation of the license suspension. The court held that the liquor price maintenance law12 was invalidated by


Recent commentary has kept the RPM battle alive. See R. Bork, *The Antitrust Paradox* 280-98 (1978) (RPM may create efficiencies and should be legal where not restrictive of output); Conaar, *Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath*, 81 Harv. L. Rev. 1419, 1436-38 (1968) (per se illegality advocated; RPM efficiencies are largely in advertising and promotion that lead to product differentiation in the minds of consumers and increased market power); Gould & Yamey, *Professor Bork on Vertical Price Fixing: A Rejoinder*, 77 Yale L.J. 936, 938 (1968) (RPM-inspired promotion may shift demand and cost curves so as to lead to output restrictions and higher prices). Even Bork would disallow RPM where used as a policing device for a producers' cartel, as suggested in Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & Econ. 86, 96-99 (1960), or where used as a dealer cartelization device forced on manufacturers. Bork, *supra* at 292-95.
the Sherman Act's policy of unrestricted competition, despite California's involvement in the program and the twenty-first amendment's grant of liquor control to the states.  

The question of whether and in what circumstances the federal policy of competition preempts anticompetitive state laws has aroused controversy among commentators and has not yet been clearly settled by the United States Supreme Court. Part I of this Note discusses United States Supreme Court cases and scholarly commentary on Sherman Act preemption of state laws, and provides the background of law and proposed law relevant to the *Rice* decision. The California Supreme Court's reasoning in *Rice* is presented in Part II and analyzed in Part III; these parts will focus on the court's use of both a balancing test (in which procompetition policy is weighed against California's interest in liquor control under the twenty-first amendment) and a test that determines the legality of anticompetitive state laws by looking to the presence or absence of criteria such as state control and supervision of the anticompetitive activity. The Note concludes that while *Rice* leaves unclear the court's standard of preemption, the decision contains elements of a preemption approach that the California Supreme Court should consider adopting in future similar cases.

13. In view of its holding, the court found it unnecessary to decide whether the program also violated equal protection. It has upheld, on three prior occasions, the constitutionality of California's liquor fair trade laws. Samson Mkt. Co. v. Alcoholic Beverage Control Bd., 71 Cal. 2d 1215, 459 P.2d 667, 81 Cal. Rptr. 251 (1969) (legislative change from fair trade contract requirement to price-posting mechanism for establishing minimum retail prices does not constitute unlawful delegation of police power or Sherman Act violation); Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, 65 Cal. 2d 349, 420 P.2d 735, 55 Cal. Rptr. 23 (1966) (liquor fair trade laws constitutional; no unlawful delegation of legislative power); Allied Properties v. Department of Alcoholic Beverage Control, 53 Cal. 2d 141, 346 P.2d 737 (1959) (liquor fair trade laws not an improper exercise of police power or unlawful delegation of legislative power).


15. See notes 17-31 and accompanying text supra.

16. This Note discusses only preemption of anticompetitive state laws and does not treat the separate but related issue of whether and to what degree persons acting pursuant to such laws should be exposed to federal treble damage liability. The latter question is an open one, as evidenced by the United States Supreme Court's two most recent opinions on the subject, City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) (5 opinions), and Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) (four opinions). All the Justices agree that state compulsion of anticompetitive conduct is only the "threshold inquiry" in determining whether such conduct is exempt from the Sherman Act. Goldfarb v. Virginia State Bar, 421 U.S. 773, 790-91 (1975). On
I

THE PREEMPTION CONTROVERSY

Although the Sherman Act was passed in 1890, the question of preemption did not arise until the expanding power of Congress over interstate commerce brought the Sherman Act into contact with anticompetitive state laws that earlier would have been considered to affect only intrastate commerce. Current discussions of how best to resolve this conflict between state interests served by anticompetitive laws and the federal interest in competition center around the Supreme Court’s decision in 1943 in Parker v. Brown.

Parker v. Brown concerned a California program designed to protect raisin producers from low prices occasioned by bumper crops. The program provided that where a proportion of producers in a given area requested implementation of a competition-restricting marketing program, and gained approval from a commission appointed by the governor, producers would be required to sell a portion of their crop at prices determined by a producers’ committee appointed by the Director of Agriculture. The commission, in addition to making an initial determination that the marketing program would not lead to unreasonable profits, also was empowered to modify the program suggested by the producers’ committee.

The United States Supreme Court assumed, without deciding the question, that the program would have violated the Sherman Act’s prohibition of agreements restraining trade if the program were implemented by private individuals, without state involvement. The Court further assumed that Congress has the power under the commerce clause to prohibit states themselves from maintaining such pro-

---

17. Preemption occurs where Congress has constitutionally expressed an intent to regulate exclusively an area of conduct, or where there is an irreconcilable conflict between state and federal legislation. Sherman Act preemption is usually of the second variety. Where such conflicts exist, the supremacy clause of the Constitution, U.S. CONST. art. VI, cl. 2, requires state law to give way before the Sherman Act; where no irreconcilable conflict exists, state law prevails under the tenth amendment’s general reservation of power in the states. U.S. CONST. amend. X. On preemption generally, see Hirsch, Toward a New View of Federal Preemption, 1972 U. ILL. L.F. 515; Note, Pre-emption as a Preferential Ground: A New Canon of Construction, 12 STAN. L. REV. 208 (1959).


grams. 21 But the Court went on to hold that California’s program was not a private scheme and that the Sherman Act was intended to prohibit individual action, but not “state action.” 22 While a state cannot immunize antitrust violators from the Sherman Act simply by declaring their conduct lawful, such was not the case in California’s program: “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.” 23 Not surprisingly, Parker has been widely read as holding that certain anticompetitive state laws are beyond the reach of the Sherman Act and thus are not preempted. 24 Courts since Parker have searched for standards that would indicate which anticompetitive laws are preempted and which are not. Eight years after Parker, the Supreme Court partially answered the question in Schwegmann Bros. v. Calvert Distillers Corp. 25 by invalidating a state’s retail price maintenance “non-signer” provision. Louisiana law provided that producers could enter into minimum retail price agreements with retailers, and further provided that as long as a producer had made such an agreement with any retailer, the producer could enforce the agreed upon price against all retailers who sold the specified commodity. The Miller-Tydings Amendment 26 to the Sherman Act at that time allowed states to authorize resale price maintenance agreements, but was silent as to enforcement against nonsigners. When a liquor producer sought to enjoin a nonsigning retailer from selling below its minimum price, the Court refused to enforce the Louisiana nonsigner provision, and held that the state law was outside the limited Sherman Act exemption provided by the Miller-Tydings Amendment.

Schwegmann showed that the Sherman Act policy of free competition extended beyond the actual terms of the Act, and could itself preempt an anticompetitive state law. The liquor distributor was acting independently to enforce its price against the retailer, and thus apparently entered into no agreement violative of the Sherman Act’s pro-

23. Id.
scription against concerted activity (contracts, combinations, and conspiracies in restraint of trade). The Court nevertheless invalidated the law under which the distributor sought enforcement because that law was contrary to the Sherman Act's competitive policy, even though the conduct complained of fell outside the explicit proscriptions of the Act.

*Schwegmann* also showed that states could not shield anticompetitive conduct from the federal antitrust laws simply by authorizing, or even compelling, the conduct. Nevertheless *Parker* (which *Schwegmann* did not purport to overrule) held that states could shield anticompetitive conduct from the federal antitrust laws, at least in some instances. Lower courts, attempting to distinguish between those state programs that fell within federal antitrust laws and those which did not, devised a variety of approaches for reconciling *Schwegmann* and *Parker*. *Schwegmann* and *Parker* are arguably distinguishable on grounds that in *Parker* the state had a legitimate purpose independent of frustrating federal policy, and the state provided control and supervision of the anticompetitive conduct. Thus, in determining whether state laws had been preempted, one lower court focused on state fea-

sance,27 two others emphasized state control,28 and another looked at the legitimacy of the state's purpose.29 These inconsistencies30 stemming from *Parker* and *Schwegmann* received little attention from commentators31 and none from the Court until recent years.

In the mid-1970's, commentators began to show more interest in the issue and in formulas for determining when federal antitrust laws should preempt anticompetitive state laws. One approach, suggested by Donnem,32 would invalidate state laws that do not stand up to the

---

27. See Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (1972) (failure of state agency to make an informed judgment).


30. Professor Slater described some of the various preemption tests used in the thirty years after *Parker* as: "who was the final decision maker; is the decision maker an independent state official; has the state legislature authorized what the state agency has done; has the state agency acted by its inaction; has the state agency acted when its decision is based on inaccurate information or no information at all." Slater, supra note 14, at 108 n.172. One indication of the confusion surrounding *Parker* is that commentators and even the Court have had to resort to the briefs in that case in order to determine what was decided there. See Cantor v. Detroit Edison Co., 428 U.S. 579, 583-92, 614-40 (1976) (plurality opinion per Stevens, J.) (Stewart, J., dissenting); Verkuil, supra note 14, at 332 n.26; Slater, supra note 14, at 104 n.158; Note, Parker v. Brown: A Preemption Analysis, 84 YALE L.J. 1164, 1174 n.61 (1975).

31. Handler, supra note 14, at 1; Slater, supra note 14, at 73.

antitrust scrutiny given private anticompetitive arrangements, i.e., whose anticompetitive harms outweigh their procompetitive benefits. This approach, which would strike down state laws solely on the basis of their net anticompetitive effects, met heated criticism from other commentators. Thus, Professor Handler argued that the Sherman Act was never intended, and should not be used, to strike down state surrogate methods of economic and social control, forcing states to comply with federal antitrust law would lead to a drastic and bizarre restructuring of the economy, with undesirable results. Other commentators sought a middle ground where federalism concerns would be accommodated, but the national interest in competition would not be ignored either. For example, Professor Slater argued for a balancing-of-interests test of preemption, similar to the test used to determine whether anticompetitive state laws unconstitutionally burden interstate commerce. Under this test, the judge would balance the state interest as served by its anticompetitive statute against the federal policy of competition, and consider the availability of less anticompetitive means of achieving the state's interest. Slater maintained that such balancing has proven workable in the commerce clause cases and is the only way to determine whether a state's interest or statutory scheme is qualitatively more important than the competition it restrains. Under his view, tests incorporating technical rules such as whether a state has final say over a program, or whether a legitimate state interest exists, ignore the major problem of determining which interest, state or federal, is more important. Professor Posner, on the other hand, advocated that states be required to explicitly consider competitive policy and that they adequately supervise their anticompetitive programs. Under this approach, where state anticompetitive law leads to results which would violate the Sherman Act if arranged by private persons, the law would be preempted unless the state demonstrates that the general type of regulation used is permissible, where economic regulation is concerned, permissibility would hinge on congressional intent not to interfere with state interests. Posner finds two such categories: public utility regulation of traditionally regulated industries, and state regulation supported by federal legislation outside the antitrust areas. Posner would defer to Slater's balancing test.
gram.\textsuperscript{38}

After the commentary summarized above, the Supreme Court decided \textit{Cantor v. Detroit Edison Co.}\textsuperscript{39} Detroit Edison distributed standard light bulbs to its electricity consumers. The cost of supplying the bulbs was fed directly into the utility's rate base; the consumers were billed for electricity use but were not charged separately for the light bulbs. The scheme was approved by the state's regulatory agency and could not be changed without its approval. A retail druggist sued the company, alleging that Detroit Edison unlawfully restrained competition in the sale of light bulbs. The Court held that Michigan's involvement in the scheme did not shield the company from Sherman Act liability because the state's policy was neutral as to light bulb distribution, and the program was instigated by the company and merely approved by the regulatory agency.\textsuperscript{40} While \textit{Cantor} only determined the issue of Detroit Edison's liability, much of the discussion concerned the question of when anticompetitive state laws would be preempted. In a part of his opinion for the court joined by three Justices,\textsuperscript{41} Justice Stevens stated that the only Sherman Act issue decided in \textit{Parker} was whether the state and its officials could be held liable under the Sherman Act; in deciding that they could not, \textit{Parker} never reached the issue of whether the Sherman Act could preempt conflicting state law. \textit{Parker}'s narrow holding "made it unnecessary for the Court to agree or to disagree with the... view that a state statute permitting or requiring private conduct prohibited by federal law 'would clearly be void.'"\textsuperscript{42} And in a part of his opinion joined by four other Justices, Justice Stevens stated that "we could not accept the view that the federal interest must inevitably be subordinated to the State's..."\textsuperscript{43}

Justice Blackmun, concurring in the judgment, flatly stated that "the Sherman Act generally pre-empts inconsistent state laws..."\textsuperscript{39-44}

\textsuperscript{38} Another approach, urged by Professor Verkuil, would uphold anticompetitive state laws where the state asserts primary jurisdiction and provides fair procedures for aggrieved parties. Verkuil, \textit{supra} note 14, at 358. That view, while not adopted by the Court for antitrust preemption purposes, finds support in \textit{Silver v. New York Stock Exch.}, 373 U.S. 341, 361-62 (1963) and \textit{Gibson v. Berryhill}, 411 U.S. 564, 578-79 (1963), where the Court focused on the absence of fair procedures in self-regulating businesses.


\textsuperscript{39} 428 U.S. 579 (1976).

\textsuperscript{40} \textit{Id.} at 594.

\textsuperscript{41} Parts II and IV of the opinion were joined only by Justices Brennan, White and Marshall.

\textsuperscript{42} 428 U.S. at 590.

\textsuperscript{43} \textit{Id.} at 595.

\textsuperscript{44} \textit{Id.} at 609 (Blackmun, J., concurring in the judgment).
Schwegmann was cited as an example of preemption, and various Congressional enactments which explicitly granted Sherman Act immunity to state-sanctioned anticompetitive schemes were cited as showing that Congress believes the Sherman Act extends to the states as well as to persons. Justice Blackmun then stated that he would use a "rule of reason," taking it as a general proposition that state-sanctioned anticompetitive activity must fall like any other if its potential harm outweighs its benefits. But the fact of state sanction would weigh heavily in the balance. If the justification for the anticompetitive scheme were protection of health or safety, Justice Blackmun would appraise the challenged law "in the same way as is done in equal protection review, and where such justifications are at all substantial . . . would be reluctant to find the restraint unreasonable."

Justice Stewart, joined by two other Justices, argued in dissent that Congress clearly intended not to intrude on the regulatory authority of the States. Thus, five Supreme Court Justices agreed in Cantor that the federal interest in competition is not inevitably subordinated to the state's, and one other Justice went further to propose an equal protection type of preemption standard. Three dissenters stressed the importance of determining congressional intent, and also argued against a statutory revival of the substantive due process approach which would strike down state laws judicially deemed to be unwise or unimportant.

A year after Cantor was decided, the Court directly faced the antitrust preemption issue in Bates v. Arizona State Bar. In Bates, two attorneys were disciplined by the bar for violating its prohibition against attorney advertising. The attorneys argued that the advertising rules were preempted by the Sherman Act and that the state bar was not protected by Parker immunity. A unanimous Court rejected both arguments, but went on to strike down the bar requirements on First Amendment grounds. In attacking the advertising rules per se, the attorneys argued for a balancing test of preemption, asserting that the

45. Id. at 607-08 (Blackmun, J., concurring in the judgment).
46. Id. at 610 (Blackmun, J., concurring in the judgment).
47. Id. at 611 (Blackmun, J., concurring in the judgment). It is likely that Justice Blackmun meant to refer to commerce clause rather than equal protection cases, because the equal protection cases require only a minimally rational connection between the challenged law and the state's legitimate purpose. See New Orleans v. Duke's, 427 U.S. 297 (1976), rev'd Morey v. Doud, 354 U.S. 457 (1957) (Morey was the only modern Supreme Court case failing to find a rational connection); Dorman, State Action Immunity: A Problem Under Cantor v. Detroit Edison, 27 CASE W. RES. L. REV. 503, 537 (1977). Under an equal protection test, California's liquor fair trade law might survive: if California liquor consumers had an additional eighty million dollars per year to spend in the absence of the liquor fair trade law, it is at least minimally rational to believe that some of the borderline intemperates among them would use a portion of their share of that eighty million dollars to become outright intemperants.
48. 428 U.S. at 637 (Stewart, J., dissenting).
interest embodied in the Sherman Act must prevail over the state interest in regulating the bar, particularly because the advertising ban was not tailored so as to intrude upon the federal interest to the minimum extent necessary. The Court responded, however, in Posner-like terms:

The disciplinary rules reflect a clear articulation of the State's policy with regard to professional behavior. Moreover . . . the rules are subject to pointed re-examination by the policy maker—the Arizona Supreme Court—in enforcement proceedings. Our concern that federal policy is being unnecessarily and inappropriately subordinated to state policy is reduced in such a situation; we deem it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active.

In its discussion of what appears to be the state liability issue, the Court distinguished Cantor as a case where the state had no real regulatory interest, saying that:

[An exemption for the program was not essential to the State's regulation of electric utilities. In contrast, the regulation of the activities of the bar is at the core of the State's power to protect the public. . . . Federal interference with a State's traditional regulation of a profession is entirely unlike the intrusion the Court sanctioned in Cantor.]

While the Court's statement that "an exemption for the program [in Cantor] was not essential to the State's regulation of electric utilities" might fairly be read as implying a willingness to examine whether a state's regulatory objective might be achieved by less restrictive (anticompetitive) means, the Court did not explicitly continue the usual course of the test by balancing Arizona's interest in protecting the public (by means of prohibiting attorney advertising) against the national interest in competition. Whether this failure to overtly weigh the competing interests stemmed from a belief that the result was obvious or whether it stemmed from the Cantor dissenters' federalism concerns is unclear.

The Court's present approach appears to be one of upholding anticompetitive state laws so long as the state's policy is to replace competition with regulation, the state supervises the conduct, and the law satisfies the least restrictive means inquiry. Whether because it found

50. *Id.* at 360-61.
51. *Id.* at 362.
52. *Id.* at 361-62.
53. *Id.* at 361.
54. After *Bates*, the Court discussed "state action" again in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), where the Court held that municipalities are not shielded from the Sherman Act unless their conduct is pursuant to a state policy of displacing competition with regulation or public monopoly. Justices Brennan, Marshall, Powell and Stevens joined the plurality opinion. Chief Justice Burger concurred in part and in the judgment, but also would
the results obvious in the cases before it, or because of concerns of undue state-federal friction, the Supreme Court has yet to explicitly ask whether a state's interest as served by an anticompetitive law is more important than the competition it displaces.

II

THE RICE OPINION

In striking down California's liquor price maintenance law, the Rice court began by seeking to "isolate the characteristics which will qualify a program or rule as a sovereign act of the state so as to exempt it from the Sherman Act." The court stated that:

The heart of the issue is whether the sovereign act of the state which will immunize a price fixing law from the Sherman Act must be either the act of the state itself or one over which the state has the ultimate power of decision, or whether it is sufficient to invoke the exemption if, as in the program we here consider, the state compels private persons to engage in anticompetitive conduct and essentially exercises no control over the substance of their actions.

The court noted that neither Parker nor Bates, the decisions that had found exemptions from the Sherman Act, "involved private conduct the substance of which was totally unconfined by state regula-

have required states to show that an exemption from the antitrust laws was necessary to the state's regulatory scheme; the Chief Justice would have granted an exemption only to the "minimum extent necessary." Id. at 426. Justice Marshall's separate concurring opinion interpreted the plurality's test as already incorporating the Chief Justice's requirement of necessity. Id. at 417-18. Justice Stewart, joined by Justices White and Rehnquist, and partly joined by Justice Blackmun, dissented on the congressional intent and substantive due process grounds raised earlier in Cantor. Id. at 426-41. Justice Blackmun's separate dissent saw the dissenters' objections as going to the liability rather than the preemption issue, and urged the Court to take up the liability and remedy problems directly. Id. at 441-43.

55. 21 Cal. 3d at 444, 579 P.2d at 485, 146 Cal. Rptr. at 594.
56. Id. at 444, 579 P.2d at 485, 146 Cal. Rptr. at 594.

It should be noted that California really compelled no unsupervised conduct. While liquor retailers were compelled to sell at or above posted prices, they were certainly supervised by the state; disobedience could lead to state sanctions, as indeed originally happened to the real parties in Rice. The court was apparently referring to the unsupervised producers who actually were not compelled to engage in any anticompetitive conduct. On the contrary, the producers were free to opt for competition and post minimum prices of one cent if they so desired. No prices would then be fixed, as a practical matter, and no dangerous exchange of price information, as condemned in United States v. Container Corp., 393 U.S. 333, 336-37 (1969), would occur. Thus, as in Schweigmann, the retailers were compelled, but the producers merely authorized, to engage in anticompetitive conduct. The only material difference between Rice and Schweigmann, which would otherwise be controlling, is that California law purports to promote temperance while the Louisiana nonsigner law in Schweigmann had no such health and safety justification. This illustrates the importance of examining the legitimacy of the state's interest and the extent to which it is served by the challenged law. While state final authority and supervision may be important factors, they should hardly be determinative in themselves. See Part III, infra.
tion.” In *Parker* a commission appointed by the governor had final authority over prices and had discretion to modify the program. In *Bates* the advertising prohibition was a direct order of the state but, even so, was subject to “pointed re-examination” in disciplinary proceedings; and its administration was “actively supervised by the court so as to reduce the likelihood that federal antitrust policy would be unnecessarily subordinated to state policy.” In the program challenged in *Rice*, however, the state had no say in setting liquor prices, and acted only to enforce the prices set by producers. Further, there was no “pointed re-examination” to ensure that Sherman Act policies were not “unnecessarily subordinated” to state policy. Thus, in the California court’s view, to have immunized the liquor fair trade program would have been to extend the Supreme Court’s decisions “beyond their intended design.”

On the Sherman Act side of the balance, the court quoted Justice Black’s frequently cited statement in *Northern Pacific Railway Co. v. United States*:

> The Sherman Act was designed to be a comprehensive charger of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.

The California court stated:

> In the vindication of this policy any combination which tampers with the price structure is unlawful. . . .

> It is well established that resale price fixing is illegal under the Sherman Act (*Schwegmann*) and we have concluded above that such conduct is not exempt from the act because it is performed under the compulsion of state law. The imposition of a retail price by a producer

---

57. 21 Cal. 3d at 444, 579 P.2d at 485, 146 Cal. Rptr. at 594.
58. *Id.* at 445, 579 P.2d at 485, 146 Cal. Rptr. at 594.
59. *Id.* at 445, 579 P.2d at 486, 146 Cal. Rptr. at 595.
60. *Id.*
61. Compare the pre-*Cantor* case of Norman’s on the Waterfront, Inc. v. Wheatley, 444 F.2d 1011 (3d Cir. 1971), where the Virgin Islands’ newly enacted liquor fair trade law, nearly identical to California’s, was struck down in a declaratory judgment action; the court held that *Parker* provided no defense in the absence of state control over prices. *Id.* at 1018 (citing Asheville Tobacco Bd. of Trade v. Federal Trade Comm’n, 263 F.2d 502, 509 (4th Cir. 1959) (state supervision a prerequisite to state action defense)).
63. *Id.* at 4-5.
is a clear violation of federal law absent such an exemption.\textsuperscript{63}

Not only does the liquor fair trade law allow illegal vertical price-fixing, the court stated, it has the potential for facilitating horizontal price-fixing among producers as well. While it may be illegal for competitors regularly to exchange price information, California's price posting system makes competitors' prices available to any producer. And the court cited evidence of liquor price uniformity "which persuasively demonstrates the absence of 'free and unfettered competition' in the California liquor industry."\textsuperscript{64} Thus, the liquor price maintenance provisions "clearly violate the policy underlying the Sherman Act."\textsuperscript{65}

On the other side of the balance, the court found it doubtful that liquor fair trade fulfills its purpose of promoting temperance,\textsuperscript{66} and found that retail price maintenance is now contrary to public policy. The court noted that small retailers are protected from predatory pricing by the less restrictive means of prohibiting below-cost sales, and decided that a fear of dislocating small liquor retailers\textsuperscript{67} does not justify continuation of laws that eliminate retail price competition.\textsuperscript{68}

\textsuperscript{63} 21 Cal. 3d at 453-54, 579 P.2d at 491, 146 Cal. Rptr. at 600.

\textsuperscript{64} Id. at 455, 579 P.2d at 492, 146 Cal. Rptr. at 601. \textit{See also} CALIFORNIA SENATE SELECT COMMITTEE ON LAWS RELATING TO ALCOHOLIC BEVERAGES, VOL. I: FINAL REPORT 9 (1974) [hereinafter cited as \textit{Final Report}] (Liquor fair trade "has resulted in the elimination of any semblance of competition within the industry.").

\textsuperscript{65} 21 Cal. 3d at 456, 579 P.2d at 493, 146 Cal. Rptr. at 602.

\textsuperscript{66} Per capita consumption of distilled spirits in California increased 42\% between 1950 and 1972. PROGRAM REVIEW BRANCH, AUDITS DIV., DEPT OF FINANCE, ALCOHOL AND THE STATE: A REAPPRAISAL OF CALIFORNIA'S ALCOHOL CONTROL POLICIES 15 (1974). There is little to suggest that fair trade promotes temperance or contributes in any significant way to the minimization of alcohol abuse. \textit{Id.} at xi. Studies indicate that the demand for liquor is price inelastic over a broad range. \textit{Id.} at 14 n.22; MORELAND COMM'N REPORT, supra note 10, at 17-23. \textit{See also} SENATE SELECT COMMITTEE, supra note 10, at 69; Dunsford, \textit{State Monopoly and Price Fixing in Retail Liquor Distribution}, 1962 WIS. L. REV. 454, 483.

\textsuperscript{67} A worrisome aspect of the \textit{Rice} decision is its effect on small liquor retailers. Package stores and groceries with liquor sales of less than $10,000 per month constitute 10\% of California off-sale licensees, and those with monthly sales between $10,000 and $18,000 constitute another 20\%. SENATE SELECT COMMITTEE, supra note 10, at 207-08 (report of legislative analyst A. Alan Post). It is likely that some of these retailers will suffer hardship or dislocation in the absence of fair trade's price umbrella, \textit{id.}, but that absence may not hurt small retailers as a group in the long run. The \textit{Rice} court cited evidence that the small firm failure rate was 55\% higher in states with fair trade laws than in states without such laws, and that small retailers had a 32\% higher growth rate in free trade as compared with fair trade states. 21 Cal. 3d at 456, 579 P.2d at 493, 146 Cal. Rptr. at 602. One California study recommended a gradual 10-year phaseout of liquor fair trade, with termination only after examination of economic effects of the phaseout. PROGRAM REVIEW BRANCH, AUDITS DIV., DEPT OF FINANCE, ALCOHOL AND THE STATE: A REAPPRAISAL OF CALIFORNIA'S ALCOHOL CONTROL POLICIES (1974). Another study recommended allowance of small retailer cooperatives for purchase and distribution. \textit{Final Report}, supra note 64, at 85.

\textsuperscript{68} 21 Cal. 3d at 457-58, 579 P.2d at 493-94, 146 Cal. Rptr. at 602-03.

California's former Legislative Analyst A. Alan Post made a "conservative estimate" based on 1971 consumption figures that repeal of liquor fair trade would result in annual consumer savings of $81,600,000. SENATE SELECT COMMITTEE, supra note 10, at 65-66. He also estimated that in the absence of liquor fair trade the state excise tax on liquor could be doubled (providing
III

Analysis

While the Rice court properly invalidated California’s liquor fair trade law, the court’s preemption analysis gives rise to unfortunate implications that may mislead the legislature and lower courts, causing arbitrary results.

First, although the court properly used a balancing of interests and less restrictive means test of preemption, it apparently did so only because the twenty-first amendment was raised as a bar to preemption. In cases not involving liquor, the court would apparently utilize a test that looks to whether the state has the “ultimate power of decision” over private conduct and whether the conduct is subject to “pointed re-examination.” While these criteria of control and re-examination may be relevant to a preemption analysis, they do not constitute a sufficient preemption test because they fail to consider the importance of the state’s interest, whether that interest is well-promoted by the challenged law, and whether less restrictive means of promoting that interest are available. Such a test would uphold an anticompetitive law that does little to fulfill a legitimate state purpose (such as the light bulb program in Cantor) so long as control and supervision are present. On the other hand, a significantly more beneficial law (such as the raisin program in Parker) would be struck down.

A preferable approach would use these criteria in conjunction with an examination of the state’s interest as served by its anticompetitive law, and a consideration of less restrictive alternative means. As noted, the court actually used that approach, but apparently limited its use to cases where constitutional provisions are raised as ostensible bars to preemption. The court should consider removing this limitation in the future.

The court’s emphasis on state control and supervision apparently stems from the selective incorporation of Posner’s preemption criteria into United States Supreme Court case law. Posner, as earlier noted, would generally require state legislatures to choose overtly between competition and regulation, and to supervise private decisionmakers. The United States Supreme Court has not adopted Posner’s requirement of enaction after legislative consideration of competition versus regulation. But in Bates the Court did stress, among other things, the state bar’s supervision and “pointed re-examination” of its attorney ad-

annual revenue of about $67 million from package sales) while still providing a net savings to consumers. This recommendation was adopted by the California Senate Select Committee in its report recommending repeal of liquor fair trade laws. Final Report, supra note 64, at 17-18.


70. See note 37 and accompanying text supra.
vertising prohibition. From Bates, the California Supreme Court incorporated the supervision and re-examination elements of Posner's approach. Posner considered these elements important, but it is unlikely that either he or the United States Supreme Court would view them as sufficient to shield a state law from the Sherman Act. Posner would decide cases like Rice by using a balancing test and perhaps also by requiring state supervision and an overt legislative choice regarding competition. Rather than focusing exclusively or primarily on control and supervision, he would ask outright how much temperance is gained at the cost of how much competition.\(^7\)

Given that some accommodation of competing state and federal interests is necessary, a weighing of interests as served by their conflicting statutes has the advantage of being a straightforward method that focuses directly on the problem. It avoids the arbitrary results of more technical tests and has proved judicially workable.\(^2\) Even the United States Supreme Court, which has so far taken a deferential stance toward state interests that perhaps befits a federal tribunal, has found that the states' interests do not inevitably reign over the federal interest in competition.\(^3\) The Court has examined the strength of the states' justifications for anticompetitive schemes, and has looked to the availability of less restrictive means of furthering states' interests. Thus, where state anticompetitive regulation discriminates against nonresidents, the Court has not hesitated to balance the competing state and federal interests.\(^4\)


72. See, e.g., cases cited in note 74 infra.

73. See note 43 and accompanying text supra.

74. See, e.g., Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951). In Dean Milk, a city ordinance restricted milk sales to local producers, excluding nonresident competitors from the market. In finding an unconstitutional burden on interstate commerce, the Court balanced the city's interest in health and safety as served by the ordinance against the federal interest in the unrestricted flow of commerce. Rejecting the city's argument that the ordinance must be upheld if its purpose was permissible, the Court examined the practical effect of the ordinance and the availability of less restrictive means. Id. at 354-56. See also Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361 (1964). Cf. Note, Pre-emption as a Preferential Ground: A New Canon of Construction, 12 STAN. L. REV. 208, 220 (1959) (arguing that "the Court has adopted the same weighing of interests approach in preemption cases [involving commerce clause statutes] that it uses to determine whether a state law unjustifiably burdens interstate commerce ").


The broadly-phrased Sherman Act itself has more resemblance to a constitutional provision than a statute, and one might expect it to be applied in a manner similar to such provisions as the commerce clause. See United States v. Topco Assoc., 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise . . . 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."); Appalachian Coals v. United
Balancing is as appropriate for state judges in cases where residents are victims of state anticompetitive laws as it is for federal judges when nonresidents are the victims. Indeed, the only real criticism of a balancing test is that it may lead to intergovernmental friction when done by freewheeling federal judges, a concern that loses force where state rather than federal tribunals are involved. California courts should be equal to the task of balancing the interests. As demonstrated in Rice, the balancing test is familiar, workable, and adaptable. Therefore, in further antitrust preemption cases the California Supreme Court should consider balancing the competing interests, as served by conflicting state and federal statutes, rather than looking to criteria such as state supervision that lead to less accurate accommodations of those interests.

CONCLUSION

While the United States Supreme Court has adopted a weighing of interests approach in commerce clause cases where state anticompetitive laws discriminate against nonresidents, it has not yet explicitly adopted that approach in cases where the victims of such laws are residents who must rely on federal antitrust preemption, rather than the commerce clause. This judicial reticence possibly stems not from any dysfunction of the balancing test, but rather from fears of possible intergovernmental friction occasioned by the nullification of state regulatory statutes by the federal judiciary.

The California Supreme Court, free of such concerns, used the balancing test in Rice in order to determine whether the twenty-first amendment shields a state law that otherwise would be preempted by the Sherman Act. To answer the question of whether the state law is preempted in the first instance, the California court limited itself to the more arbitrary criteria distilled from United States Supreme Court opinions, where concerns peculiar to the federal judiciary were present. No such limitation is warranted, however, because concern over state hostility toward balancing by federal judges—which has perhaps prevented the United States Supreme Court from embracing, for antitrust

States, 288 U.S. 344, 359-60 (1933) ("As a charter of freedom the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions.").

75. An additional objection was voiced by Posner. Where economic, rather than health and safety, regulation is involved he objects to balancing to the extent that a balancing test would permit expansion of state regulation beyond traditional categories, such as electrical utilities. Posner, supra note 14, at 710 n.66.

76. Note, Parker v. Brown Revisited: The State Action Doctrine After Goldfarb, Cantor, and Bates, 77 COLUM. L. REV. 898, 933 (1977) (author critical of preemption: "[t]he issue is not only whether a federal policy should nullify a state one, but also whether access to federal courts should be available where the federal policy might be effectuated through state procedures without intergovernmental friction.").
preemption purposes, the balancing test that it has successfully used in commerce clause cases involving anticompetitive state laws—is not a problem when a state court is deciding the issue. The balancing approach more directly addresses the central problem involved in the preemption question, accommodation of the competing state and federal interests, without bringing in confusing and ultimately arbitrary criteria under the rubric of “state action.”

Having found that the California liquor fair trade scheme was preempted by the Sherman Act under the principles established in the Parker through Bates line of cases, the court had to overcome the further obstacle created by the twenty-first amendment to the United States Constitution,\(^{77}\) which gives to the states the power to control the transportation or importation of liquor. The state argued that the amendment barred application of the Sherman Act to the liquor fair trade laws. The court determined that twenty-first amendment case law required a balancing of California’s interests in controlling commerce in liquor against the Sherman Act’s policy of unfettered competition.\(^{78}\) The court resolved this question in favor of the Sherman Act policy, and thus concluded that the twenty-first amendment did not prevent preemption.

\textit{Lawrence D. Barnes}\(^*\)

\footnote{77. The twenty-first amendment repealed the eighteenth amendment (prohibition). It prohibits “[t]he 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 . . .” U.S. Const. amend. XXI, §§ 1, 2.}

\footnote{78. 21 Cal. 3d at 451, 579 P.2d at 490, 146 Cal. Rptr. at 599. The issue of whether the twenty-first amendment should operate as a complete bar to statutory preemption of state liquor laws is beyond the scope of this Note. \textit{See, e.g.}, Craig v. Boren, 429 U.S. 190, 206 (1976) (twenty-first amendment and commerce clause legislation must “be considered in the light of [each] other, and in the context and interests at stake in any case”).

* A.B. 1976, University of California, Berkeley; third-year student, Boalt Hall School of Law.}