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Using Currie's Interest Analysis to Resolve Conflicts Between State Regulation and the Sherman Act

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USING CURRIE'S INTEREST ANALYSIS TO RESOLVE CONFLICTS BETWEEN STATE REGULATION AND THE SHERMAN ACT

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INTRODUCTION

State economic regulations may compete with federal antitrust laws. A state law that attempts to avoid economic collapse by permitting or ordering competing producers to agree on prices and outputs for their products, for example, appears to conflict with the Sherman Act, which prohibits such agreements.¹

Pursuant to the supremacy clause of the Constitution,² federal laws preempt conflicting state laws. But the existence or extent of such conflict is often uncertain. Although state law may ostensibly conflict with the Sherman Act, the purpose of the state law may in fact be consistent with federal antitrust policy. And although the Sherman Act does not expressly specify an exemption for all state regulations, other federal economic regulations may, expressly or by implication, exempt state-regulated activity from application of antitrust legislation.³

The "state action" exemption doctrine is the United States Supreme Court's resolution to the problem raised by apparent conflicts between federal antitrust laws and state regulation. The Court has interpreted the Sherman Act to contain an implied "state action" exemption for all economic activity either undertaken by a state or authorized by a clearly articulated state policy that involves active state supervision.⁴

The state action exemption is not a coherent resolution of the tension between federal preemption and state autonomy. The resolution has drawn criticism for affording too little deference to state

1. See *Parker v. Brown*, 317 U.S. 341 (1943) (Price and output agreements among competitors, generally per se violations of section 1 of the Sherman Act, were required by California regulations). The Sherman Act makes unlawful "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1 (1982).

2. U.S. CONST. art. VI, cl. 2. The supremacy clause declares the constitution, laws, and treaties of the United States to be the supreme law of the land.

3. See *infra* text accompanying note 253-56. See also McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1012 (1987).

4. See, e.g., *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97 (1980). See also *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46-47 (1985) (municipal action must be authorized by clearly articulated state policy, but need not be actively supervised by the municipality).

autonomy,⁵ and for deferring too much to state autonomy.⁶ The Court at times has been its own critic, noting that the doctrine resulted in cases that "have not been entirely clear."⁷ The exemption apparently rests on a negative inference, drawn from "vague 'principles of federalism'"⁸ and the absence in the Sherman Act of express reference to state regulation,⁹ that Congress did not intend to allow the Act to preempt state regulations that are clearly articulated and involve active supervision.¹⁰

Without the strained negative inference, the Sherman Act would preempt conflicting state regulation. Consequently, the interpretation competes with the supremacy clause and undermines Sherman Act policies. State policies that conflict with the Act's policies may nevertheless escape preemption due to the Sherman Act's "federalism" policy of implied exemption for state action.¹¹

This Article proposes that the vague principles of federalism, judicially perceived to be implicit in the Sherman Act, can more coherently and consistently be implemented without the strained inference. The "federalism" interpretation of the Sherman Act as the conflict resolution method should be abandoned and replaced with the interest analysis Brainerd Currie developed for resolution of litigation involving the apparently conflicting laws of different states.¹² An interest analysis, applied to possible conflicts between the Sherman Act and state law, would effectively accommodate both federal and state interests.

5. See, e.g., Lopatka, *The State of "State Action" Antitrust Immunity: A Progress Report*, 46 LA. L. REV. 941 (1986); Page, *Interest Groups, Antitrust, and State Regulation: Parker v. Brown in the Economic Theory of Legislation*, 1987 DUKE L.J. 618.

6. See, e.g., Cirace, *An Economic Analysis of the "State-Municipal Action" Antitrust Cases*, 61 TEX. L. REV. 481 (1982); Conant, *The Supremacy Clause and State Economic Controls: The Antitrust Maze*, 10 HASTINGS CONST. L.Q. 255 (1983); Werden & Balmer, *Conflicts Between State Law and the Sherman Act*, 44 U. PITT. L. REV. 1 (1982); Wiley, *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713 (1986).

7. *Town of Hallie*, 471 U.S. at 46.

8. *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 74 (1985) (Stevens, J., dissenting).

9. See *Parker v. Brown*, 317 U.S. 341, 351-52 (1943).

10. The inference is not constitutionally compelled. The tenth amendment reserves to the states only those powers not constitutionally delegated to the federal government nor prohibited to the states, and federal antitrust legislation is clearly derived from the expressly delegated constitutional power to regulate interstate commerce.

11. See *infra* text accompanying notes 230-320.

12. B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963).

Currie's approach stresses conflict avoidance: a "true conflict"¹³ exists only when conflicting policies underlie the apparently conflicting rules of different jurisdictions and each jurisdiction has an interest in the application of its policy to the particular case presented.¹⁴ If only one jurisdiction has such an interest, the law of that jurisdiction is applied, resolving what is actually a "false conflict."¹⁵ In the event of a true conflict, however, a judicial choice between the conflicting policies must be made. Generally, unless an authoritative choice of law rule dictates a different choice, the choice is to pick the policy of the forum.¹⁶

Application of Currie's interest analysis to potentially conflicting federal and state laws would result in federal preemption, to the extent necessary to implement the federal interest, when a true conflict exists. In such cases, the supremacy clause, the authoritative choice of law rule for true conflicts between federal and state laws, requires that the federal rule will apply. Consequently, Currie's approach, in contrast with the implied state action exemption, would accommodate Sherman Act and supremacy clause values by refusing to authorize the subordination of federal antitrust policies to conflicting state policies.

Despite the nondeferential treatment of state policy in cases of true conflict, however, Currie's approach also would accommodate federalism values and state interests. If a false conflict exists due to the lack of a state interest, the Sherman Act can be applied without preempting any state law. False conflicts resulting from the lack of a federal interest allow for application of state law. In addition, Currie's method requires a moderate and restrained reassessment of state and federal policies and interests before concluding that the supremacy clause necessitates preemption of state policy.¹⁷ A moderate and restrained view of the substantive (rather than federalism) Sherman Act policies serves to significantly reduce the number of true conflicts, leaving many state policies intact. A conclusion upon reassessment that either the state or fed-

13. *Id.* at 183-84.

14. *See id.*

15. *Id.* at 183-84.

16. *Id.*

17. Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757 (1963).

eral government lacks an actual interest signals a false conflict, and the state policy will not be preempted.

This Article contains four parts. Part I briefly identifies state action conflicts, the existing rules for applying state action immunity, and some criticisms of the current approach.¹⁸ Part II critically reviews the conflict resolution method that the Supreme Court adopted in *Parker v. Brown*¹⁹ and the more recent extensions of that case; it then proposes Currie's interest analysis as an alternative.²⁰ Part III undertakes an interest analysis of various state action conflicts in Supreme Court cases.²¹ Part IV contrasts the interest analysis resolution with the current regime.²² It suggests that in certain respects the current state action exemption process, which involves a threshold inquiry and requires clear articulation and active supervision, already implements a form of interest analysis. Consequently, a change to a more explicit interest analysis would not require a radical shift from the current approach. A more direct application of interest analysis, however, would avoid significant intrusions into both federal and state interests.

I. THE STATE ACTION PROBLEM

A. Different Forms of State Action Conflicts

Conflicts between state regulations and the Sherman Act can arise from a direct challenge to a state regulation or in the context of a private antitrust suit in which the defendant claims that state regulation protects the acts in question. Municipal regulations may raise similar conflicts.

18. See *infra* text accompanying notes 23-73. Readers familiar with state action cases, rules and commentary can move quickly through the section. Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 Nw. U. L. Rev. 71 (1974), mentions that "in a paper presented to the American Bar Association Antitrust section in 1967, William Bachelder, a noted antitrust attorney, flatly claimed that there had been a 'dearth' of comment on *Parker v. Brown*." *Id.* at 73 n.12. The dearth certainly has disappeared.

19. 317 U.S. 341 (1943).

20. See *infra* text accompanying notes 74-132. Readers familiar with Currie's interest analysis and conflicts terminology can move quickly through the second portion.

21. See *infra* text accompanying notes 133-282.

22. See *infra* text accompanying notes 283-323.

1. Protection from enforcement of state regulation

A party may seek protection against enforcement of a state law by claiming that the enforcement would conflict with the Sherman Act. The state may contend that despite possible conflict with the federal antitrust laws, enforcement is permissible because the state policy is eligible for "state action" protection.

a. *Parker v. Brown*

Parker v. Brown,²³ which firmly entrenched the state action doctrine, is the classic example of a challenge to a state regulation on the ground that it conflicts with the Sherman Act.²⁴ In *Parker*, a California statute commanded raisin producers to adhere to industry-established price and output levels.²⁵ A raisin producer, wishing to sell at other than the prescribed levels, claimed that the law violated and therefore was preempted by the Sherman Act.²⁶

23. 317 U.S. 341 (1943).

24. 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987); *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982); and *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951) are also examples of challenges to state regulations on the grounds that they conflict with the Sherman Act.

In 324 *Liquor*, the Sherman Act preempted a New York statute that required its liquor retailers to charge no less than 112% of the wholesale price per bottle, effectively imposing a minimum resale price. The regulation enforced a system of resale price maintenance in conflict with the Act. 479 U.S. at 341-43.

In *Rice*, a California statute enforcing liquor distillers' decisions to prevent "unauthorized wholesaler[s] from obtaining the distiller's products from outside the distiller's established distribution chain," 458 U.S. at 661, was not preempted by the Sherman Act. The Court concluded that although the authorized restraints might have an anticompetitive effect, the regulation itself did not authorize violations of the Act, so the law need not be preempted. *Id.* at 661-62.

In *Schwegmann*, the Court found a Louisiana regulation that in effect compelled all Louisiana liquor dealers to adhere to resale prices set by the producer to be in conflict with the Sherman Act. The law prohibited any liquor dealer from selling particular brands at a price lower than the lowest price specified in signed resale price maintenance agreements between the producer and its dealers. 341 U.S. at 395.

25. *Parker*, 317 U.S. at 346-48. The California regulation required all raisin producers within a particular zone to conform to a price and production program if 65% of the producers competing in the zone consented to that program. *Id.* at 346-47.

26. *Id.* at 348-49. Absent state action immunity, an industry-wide agreement to adhere to price and output levels would violate section 1 of the Sherman Act. See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

The United States Supreme Court recognized the apparent conflict between the regulation and the Sherman Act,²⁷ but did not preempt the California Act. The Court dodged the conflict and permitted California to keep its regulation by interpreting the Sherman Act to be inapplicable to all "state action."²⁸ Under this interpretation, a state cannot violate the Sherman Act and the Sherman Act cannot preempt state acts.²⁹ The Court based its interpretation on the lack of an affirmative statement in the Act or in its legislative history that the Act applied to state acts³⁰ and on a desire to promote "principles of federalism and state sovereignty"³¹ that impliedly reside in the Sherman Act.³²

b. What constitutes state action?

The *Parker* state action immunity doctrine thus requires definitions of state acts and identification of who can undertake them.³³

27. 317 U.S. at 350.

28. *Id.* at 352.

29. *See id.* at 350-52; *see also* *Hoover v. Ronwin*, 466 U.S. 558, 567-68 (1984); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 103-04 (1980); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 359 (1977); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 (1975).

30. 317 U.S. at 350-51.

31. *Patrick v. Burget*, 108 S. Ct. 1658, 1662 (1988) (interpreting *Parker*, 317 U.S. at 350-51). *Accord* *324 Liquor Corp. v. Duffy*, 479 U.S. 335-43 (1987); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 39 (1985).

32. *See Parker*, 317 U.S. at 350-51. *Accord* *Patrick*, 108 S. Ct. at 1662; *Town of Hallie*, 471 U.S. at 38; *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 56 (1985); *Hoover*, 466 U.S. at 567; *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 412 (1978).

33. If a state itself has done the act in question, the act is a state action and *ipso facto* immune. *Hoover*, 466 U.S. at 567-68. In some cases, however, challenged activity is undertaken not by a state official, but rather by a nonlegislative instrumentality of the state. For example, in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), two Arizona attorneys who were suspended from the Arizona State Bar for advertising their prices for legal services argued that the Bar's ethical rules proscribing such advertisements violated the Sherman Act. *Id.* at 350. The Supreme Court concluded that suspension actions undertaken by the Arizona Supreme Court in its capacity as regulator of lawyers in the state constituted state action immune from the Sherman Act. *Id.* at 362-63. (*Bates* also held, on first amendment grounds, that attorney advertising could not be "subjected to blanket suppression." *Id.* at 383). Similarly, in *Hoover*, a candidate denied admission to the Arizona Bar accused the Arizona Supreme Court's Committee on Examinations and Admissions of violating the anti-trust laws. 466 U.S. at 558. The Supreme Court concluded that the conduct challenged "was in reality that of the Arizona Supreme Court" and thus was state action exempt from Sherman Act liability. *Id.* at 573. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), how-

i. Clear articulation and active supervision

In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*,³⁴ the Supreme Court instituted the current two-pronged test for state action: a regulatory activity is state action, and thus not subject to liability or preemption, if the activity required or authorized by the regulation is (1) "clearly articulated and affirmatively expressed as state policy" and (2) "'actively supervised' by the State itself."³⁵ The Court applied the clear authorization/active supervision test to a California regulation that required wholesale wine distributors to adhere to a resale price schedule established by wine producers,³⁶ and ultimately enjoined enforcement of the law. The regulation impermissibly conflicted with the Sherman Act policy of per se illegality for resale price maintenance³⁷ and was not eligible for state action immunity. California had clearly articulated its resale price maintenance ("RPM") policy, but its failure to actively supervise the RPM activity left the statute subject to preemption.³⁸

ii. Threshold inquiry

The Supreme Court has indicated that prior to assessing clear articulation and active supervision, a court must make a threshold inquiry to determine if the state regulation is "inconsistent with

ever, a Fairfax County, Virginia bar association published a fee schedule, and the Virginia State Bar published ethical opinions suggesting strongly that an attorney's failure to abide by such a schedule would be misconduct. *Id.* at 775-76. The Supreme Court concluded that this bar activity was not state action, however, because it was not undertaken by the state, and thus was unprotected. *Id.* at 788-92.

34. 445 U.S. 97 (1980).

35. *Id.* at 105 (citing *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978)). Both a state and a private party using the state law to force behavior presumably will face the same test. *Midcal*, by the time it reached the Supreme Court, was actually a private party trying to use the state statute to bar the activity; the state filed an amicus brief. *Id.* at 98. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), also involved a private attempt to enforce state regulations.

36. *Midcal*, 445 U.S. at 97. Wholesalers who did not adhere faced fines and license suspension or revocation. *Id.* at 100. The protesting wine wholesaler sold Gallo wine without conforming to the Gallo resale price schedule. *Id.*

37. *Id.* at 106. See *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984); *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373, 407 (1911).

38. *Midcal*, 445 U.S. at 105.

the antitrust laws.”³⁹ In other words, does the state plan, absent state action immunity, involve a Sherman Act violation? If the answer is no, the challenge to the state regulation fails, and no further inquiry follows. If the answer is yes, however, the Sherman Act will preempt the state regulation unless it meets the requirements for state action immunity.⁴⁰

2. *Protection from antitrust liability*

The federal-state conflict also can arise without a direct challenge to a state regulation in an antitrust suit between private parties or in suits brought by the Antitrust Division of the Department of Justice against a private party. Using “state action” as a defense, a defendant may claim that a state policy sanctioned her actions, thus making the acts “state actions” immune from antitrust liability. Two fairly recent examples are *Southern Motor Carriers Rate Conference v. United States*⁴¹ and *Patrick v. Burget*.⁴²

In *Southern Motor Carriers*, several southern states required truckers to submit their intrastate rates to its Public Utilities Commission for approval. Each of the states also permitted (but did not require) the truckers to collectively set those rates. The Antitrust Division of the Department of Justice sued the truckers, claiming that the collective ratemaking was a per se violation of the Sherman Act. The truckers argued that their acts were protected state actions.⁴³

The Supreme Court indicated that the reasoning used in *Parker* to find immunity for state action justified the extension of immunity to private parties who were undertaking “state action” as well.⁴⁴ Consequently, private parties can use state action as a defense, but immunity for the actions will not be given unless they

39. 324 Liquor Corp. v. Duffy, 479 U.S. 335, 341 (1987); *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982); see also *Parker v. Brown*, 317 U.S. 341, 350 (1943); *Midcal*, 445 U.S. at 102 (“The threshold question is whether California’s plan . . . violates the Sherman Act”); P. AREEDA & H. HOVENKAMP, *ANTITRUST LAW*, 81-83 (Supp. 1987).

40. *Rice*, 458 U.S. at 659, 661, 662 n.9.

41. 471 U.S. 48 (1985).

42. 108 S. Ct. 1658 (1988).

43. 471 U.S. at 50-51.

44. *Id.* at 56.

prove both prongs of the *Midcal* standard: (1) the existence of a clearly articulated and affirmatively expressed state policy of displacing competition and (2) active state supervision of the activity.⁴⁵ In *Southern Motor Carriers*, the Supreme Court found both prongs to be satisfied and granted immunity.⁴⁶

Patrick reached an opposite result. The case involved an Oregon physician who successfully demonstrated to a jury that certain other doctors had instituted peer-review activities designed to terminate his hospital privileges for anticompetitive reasons.⁴⁷ The jury found that the doctors had violated sections 1 and 2 of the Sherman Act. The defendants, however, argued that the Oregon health policy mandating peer-review procedures at hospitals shielded their acts from Sherman Act liability.⁴⁸ Without assessing clear articulation, the Supreme Court concluded that the activities undertaken by the defendants were not actively supervised by the state, and thus could not be considered state action.⁴⁹ The Sherman Act was fully applicable to the doctors' actions.⁵⁰

3. The effect of municipal regulations

A municipality also may enact or implement regulations that interfere with market rivalry. Consequently, a party may seek to

45. *Id.* at 57. State regulation is not preempted automatically if the *Midcal* showing fails. The regulation may survive, but it does not enable the firms affected by the regulation to engage in activity that violates the Sherman Act. See e.g., *Patrick*, 108 S. Ct. 1658 (1988) (the state statute requiring peer review was not preempted, but the defendants were liable because the state did not clearly supervise the activities found to violate the antitrust laws).

46. *Southern Motor Carriers*, 471 U.S. at 55-56. The Court concluded that even though the states did not compel the collective ratemaking, subjecting the practice to antitrust liability would frustrate state policy. The clear articulation requirement was satisfied because state legislators had "clearly sanctioned" collective ratemaking. *Id.* at 62-65. The government did not contest active supervision. *Id.* at 62, 66.

47. 108 S. Ct. at 1661.

48. *Id.* at 1663-64.

49. *Id.* at 1665-66.

50. *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), also fits into the category of a private defendant trying to use state regulation as a defense to Sherman Act liability. In *Cantor*, a regulated utility unsuccessfully argued that a tied sale of light bulbs and electrical power, claimed by an unregulated light bulb seller plaintiff to be in violation of the Sherman Act, was shielded from antitrust liability because the tied sale procedure had been approved by the Michigan Public Service Committee. *Id.* at 598.

avoid enforcement of the municipal ordinance by claiming that the Sherman Act preempts enforcement.

In *Fisher v. City of Berkeley*,⁵¹ Berkeley landlords, unenthusiastic about submitting to locally enacted rent-control ordinances, argued that the ordinances removed price competition in the rental market and consequently were incompatible with the Sherman Act.⁵² The Supreme Court, however, disagreed. The Court indicated that the threshold inquiry of whether the regulation involves an antitrust violation is appropriate for municipal as well as state regulations challenged under the Sherman Act, and in *Fisher* the answer was no.⁵³ According to the Court, the Berkeley ordinance affected the competitive nature of the market, but did not require any action that would violate the Sherman Act, and was thus not subject to preemption.⁵⁴ The Court did not evaluate state action immunity.⁵⁵

If the threshold inquiry reveals a violation, however, the question of whether the municipal regulation will be preempted or given immunity must be resolved. Cities have argued that because they are governmental entities, their actions are protected under the *Parker* interpretation of the Sherman Act, and should be given "municipal action" immunity. In *City of Lafayette v. Louisiana Power & Light Co.*,⁵⁶ two cities sued certain electric utilities, and one of the utilities counterclaimed that the cities had violated the Sherman Act by conspiring to exclude the utility from certain markets.⁵⁷ The cities argued that their behavior was state action and thus was not subject to antitrust liability. The Supreme Court held, however, that the municipalities were not eligible for a "municipal action" immunity. The state action immunity developed in

51. 475 U.S. 260 (1986).

52. *Id.* at 263.

53. *Id.* at 265.

54. *Id.* at 270.

55. *Id.* The Supreme Court thus did not actually decide if the municipal ordinance was state action; it applied the threshold inquiry of *Rice* and concluded that because the rent control regulations lacked elements of an agreement crucial to Sherman Act section 1 violations, they were not in conflict with the antitrust laws. *Id.*

56. 435 U.S. 389 (1978).

57. The cities claimed that the defendant had violated the antitrust laws. *Id.* at 392 nn.5, 6.

Parker, based in federalism and sovereignty, applied only to states.⁵⁸

Consequently, no municipal action exemption exists. Unless the municipal actions reflect state policy, municipalities are subject to Sherman Act liability and their regulations are subject to preemption, even if the municipality clearly articulates its policy and actively supervises the activity in question.⁵⁹

In *Town of Hallie v. City of Eau Claire*,⁶⁰ however, the Supreme Court indicated that although municipalities are not eligible for the deference given to states they do not face the same obstacles as private citizens, either. According to the Court, to be considered state action, a municipal action must satisfy the first half of the *Midcal* test: the municipality must have acted "pursuant to a clearly expressed state policy."⁶¹ A showing that state policy authorizes the municipality "to displace competition with regulation

58. *Id.* at 408. The Supreme Court concluded that for purposes of protection from the Sherman Act activity undertaken or authorized by a municipality was different from activity undertaken or authorized by a state. The Court in *Parker* had based immunity on a need to avoid intruding on the states as sovereign because of "our 'dual system of government'." *Id.* at 412 (citing *Parker*, 317 U.S. at 351). Extension of immunity to municipalities was inconsistent with *Parker* because "[c]ities are not themselves sovereign; they do not receive all the federal deference of the States that create them." *Id.* The Court decided that actions by municipalities do not necessarily reflect state policy. To constitute state action, the municipal activity must be authorized by a specific state policy to displace competition with regulation. *Id.* at 412-13.

59. *See also* *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982). The City of Boulder, Colorado enacted regulations prohibiting a cable television firm from expanding its service area. The regulations were effective for a period during which the city sought applications from other cable television service providers to provide service in an area where the plaintiff wished to expand. *Id.* at 43-46. The plaintiff not only wished to avoid enforcement of the ordinance but also claimed that the city was liable for a Sherman Act violation. *Id.* at 47. The city argued, but to no avail, that the home rule provisions of the Colorado Constitution specifically authorized all of their municipal actions and thus made this ordinance state action. *Id.* The home rule provision alone did not transform the cable regulation into state action. *Id.* at 53.

60. 471 U.S. 34 (1985). In *Town of Hallie*, unincorporated townships sued the City of Eau Claire, claiming the city had acquired a monopoly over sewage disposal and refused to provide the townships with sewage services in violation of the Sherman Act. *Id.* at 36-37. Wisconsin statutes authorized the city to be a sewage disposal service provider and to deny service to unincorporated locations, however, and the city convinced the Supreme Court that those regulations transformed the municipal action into state action insulated from antitrust liability. *Id.* at 47.

61. *Id.* at 40 (emphasis added).

or monopoly public service"⁶² is sufficient. A municipality that meets the first half of the *Midcal* test need not demonstrate that the state actively supervises the municipal action, however, apparently because municipalities are presumed to act in the public interest.⁶³

B. Dissatisfaction with the Current Doctrine

Much of the recent literature concerning state action has expressed dissatisfaction with the current doctrine. The various proposals for resolution of the problem, however, differ markedly.

Some critics find state regulation to be frequently inefficient or anticompetitive. Consistent with a politically popular deregulation theme, they contend that such regulations are inconsistent with federal policy and should be preempted.⁶⁴ At least one commentator has proposed that state regulation should be allowed as protection against federal antitrust enforcement only when the state regulation corrects a market failure.⁶⁵ Another has proposed that state regulations enacted by "captured" legislators should not be allowed to negate federal antitrust enforcement if the regulations

62. *Id.* at 38-39 (citing *Lafayette*, 435 U.S. at 413).

63. *Id.* at 46-47. Elimination of the active supervision requirement for municipalities presumably applies only to cases in which the municipality is the actor doing an act that might violate the antitrust laws. Suppose, for example, that a state explicitly authorizes a city to regulate liquor distribution in that city, and the city promptly enacts a regulation identical to the regulation preempted in *Midcal*. If no active state supervision is necessary, would such a regulation be valid if enacted by a municipality pursuant to state authorization, although it would be preempted if enacted by a state directly? That would, of course, be a nonsensical result, perhaps more nonsensical than the conclusion in *Lafayette* that state action will accommodate a state because it is sovereign but not accommodate a municipality, because a municipality is somehow less sovereign. In addition, presumably a private party seeking protection for actions taken pursuant to a municipal ordinance will receive the protection only if the acts are pursuant to a municipal regulation that was authorized by the state and the activity is actively supervised by the state.

64. Cirace, *supra* note 6; Conant, *supra* note 6; Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. REV. 643 (1974); Werden & Balmer, *supra* note 6; Wiley, *supra* note 6. Others simply advocate using preemption analysis rather than immunity analysis. See *City of Boulder*, 455 U.S. at 60 (Rehnquist, J., dissenting); Handler, *Antitrust—1978*, 78 COLUM. L. REV. 1363, 1378 (1987); Hovenkamp & Mackerron, *Municipal Regulation and Federal Antitrust Policy*, 32 UCLA L. REV. 719, 778-79 (1985); Note, *Parker v. Brown: A Preemption Analysis*, 84 YALE L.J. 1164, 1177 (1975).

65. See Cirace, *supra* note 6, at 486; see also Spitzer, *Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory*, 61 S. CAL. L. REV. 1293, 1318-20 (1988); Wiley, *supra* note 6, at 743, 748, 762-64.

benefit producers and do not respond to a substantial inefficiency.⁶⁶ Others contend that conflicting local regulations should be preempted unless a federal court finds the municipality to be the optimal regulatory level.⁶⁷

Some critics argue that state autonomy values outweigh substantive Sherman Act policies. Consistent with a politically popular theme of minimization of federal control of society, these commentators argue that if a state wishes to adopt an explicit anticompetitive policy, federal antitrust policies should be subordinate to that state policy.⁶⁸ Some commentators seem to find the clear articulation standard useful but reject the active supervision requirement.⁶⁹ One commentator asserts that as long as the state's decision to replace the federal antitrust scheme is made "after competing interest groups have survived the traditional Madisonian gauntlet of legislative procedures,"⁷⁰ federalism values call for federal deference to the conflicting state law. Others suggest that a state should be free to regulate in a manner inconsistent with federal antitrust policies, but only as long as the citizens of the state bear the entire brunt of any monopoly overcharge that results from the regulation. Regulations that export the overcharge should be preempted.⁷¹

Some commentators and judges have argued that the appropriate method of resolving conflicts between state regulation and federal antitrust interests is to balance and pick the weightier interest.⁷² In addition, at least one authority has proposed that the

66. See Wiley, *supra* note 6, at 739-76.

67. See Hovenkamp & Mackerron, *supra* note 64, at 724, 765-77.

68. See Lopatka, *supra* note 5, at 943; Page, *supra* note 5, at 619; see also Gifford, *The Antitrust State-Action Doctrine After Fisher v. Berkeley*, 39 VAND. L. REV. 1257 (1986); Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption after Midcal Aluminum*, 61 B.U. L. REV. 1099 (1981) [hereinafter Page, *Antitrust, Federalism, and the Regulatory Process*].

69. See, e.g., Lopatka, *supra* note 5, at 943 (not considering active supervision a necessary criterion).

70. Page, *supra* note 5, at 619; see also Page, *Antitrust, Federalism, and the Regulatory Process*, *supra* note 68.

71. See Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. L. & ECON. 23 (1983); see also Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 CALIF. L. REV. 227, 253-56 (1987).

72. See Slater, *supra* note 18; *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 605-13 (1980) (Blackmun, J., concurring in judgment); Kennedy, *Of Lawyers, Light Bulbs and Raisins: An*

state action distinctions between state regulations and municipal regulations be abandoned.⁷³

An obvious conflict exists concerning the resolution of conflicts between state regulations and the Sherman Act. This Article proposes that Brainerd Currie's interest analysis, already consistent in certain respects with the current approach and some of the proposals by commentators, should be adopted as the appropriate mechanism for resolving "state action" conflicts. Accordingly, the Article turns to a closer scrutiny of *Parker's* conflict resolution and to a description of the interest analysis approach.

II. PREEMPTION, STATE ACTION EXEMPTION, AND INTEREST ANALYSIS

The state action issue presents, in two contexts, a choice of law question: (1) should a court grant a plaintiff an injunction or damages for a violation of Sherman Act policies by a defendant whose acts were compelled or authorized by state law; and (2) should a court grant a plaintiff an injunction against enforcement of a state law that appears to conflict with Sherman Act policy.

The results of state action cases have varied; sometimes federal law has been chosen,⁷⁴ sometimes state law.⁷⁵ In *Parker v. Brown*,⁷⁶ for example, the Court indicated that state law was the appropriate choice of law,⁷⁷ but nevertheless acknowledged that in some cases federal antitrust policies should prevail despite the presence

Analysis of the State Action Doctrine Under the Antitrust Laws, 74 NW. U.L. REV. 31, 66-69, 72-74 (1979). See also Davidson & Butters, *Parker and Usury: Portended Constitutional Limits on the Federal Interdiction of Anticompetitive State Action*, 31 VAND. L. REV. 579, 592-95 (1978).

73. *Community Communications v. City of Boulder*, 455 U.S. 40, 60-71 (1982) (Rehnquist, J., dissenting).

74. E.g., *Patrick v. Burget*, 108 S. Ct. 1658 (1988); *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97 (1980); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).

75. E.g., *Fisher v. City of Berkeley*, 475 U.S. 260 (1986); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985); *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985); *Hoover v. Ronwin*, 466 U.S. 558 (1984); *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *Parker v. Brown*, 317 U.S. 341 (1943).

76. 317 U.S. 341.

77. *Id.* at 368. The outcome was to let state enforcement stand, despite the assumption that the acts, if done by private parties alone, would violate the Sherman Act.

of a conflicting state policy.⁷⁸ The case thus presented the question: under what circumstances should the federal policy apply, and when should the state policy apply? Methodology for a choice of law decision therefore is necessary.⁷⁹

A. The State Action Exemption Resolution: Interpreting the Sherman Act to Contain Federalism Values

1. Parker - Midcal and implied federalism values

The *Parker* resolution of the federal-state conflicts, and the more recent amplifications of *Parker*, are controversial. The case and its extensions attempt to resolve conflicts between the Sherman Act and state policies by interpreting the Sherman Act to impliedly exempt from its application any action undertaken either by a state or pursuant to a state policy that is articulated clearly and involves active state supervision.⁸⁰ The interpretation reads into the Sherman Act strong federalism values that subordinate the Act's purposes to contrary state policies whenever the state policies are clearly articulated and involve active state supervision of the activities that conflict with the Sherman Act.

Parker involved an apparent conflict because the state regulation, in an effort to provide stability or increases for raisin prices, required industry-wide adherence to price and output levels set by industry participants.⁸¹ The state clearly had an interest in asserting its policy towards the plaintiff: if producers were free to depart from the set levels, the success of the program was jeopardized.⁸² The Court also explicitly recognized, however, that the industry agreements concerning price and output, the type of restraints made per se illegal by section 1 of the Sherman Act, raised a con-

78. *Id.* at 351 ("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").

79. See, e.g., *Southern Motor Carriers*, 471 U.S. at 61 ("The *Parker* doctrine represents an attempt to resolve conflicts that may arise between principles of federalism and the goal of the antitrust laws . . .").

80. See *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 105 (1980).

81. *Parker*, 317 U.S. at 346, 355, 359.

82. Any producer not adhering to the program was subject to criminal and civil liability. *Id.* at 347.

flict.⁸³ The Court resolved the apparent conflict by concluding that the Sherman Act should not apply to acts by a sovereign.⁸⁴ Consequently, the state regulation could not conflict with the federal law and stood in harmony with the Sherman Act.⁸⁵ Preemption was unnecessary.

Thirty-seven years later, *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*⁸⁶ added a limiting definition of when an act falls within *Parker's* protection for sovereign acts. Presumably to ensure that *Parker* was to be used only to advance the federalism value of avoiding nullification of state powers, *Midcal* required clear articulation of the state policy and active state supervision of the activity that conflicted with the Sherman Act as prerequisites to immunity.⁸⁷

The *Parker-Midcal* technique of skirting the federal-state conflict by interpreting the Sherman Act to contain federalism values avoids the operation of the supremacy clause.⁸⁸ If a court perceives that the state policy "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"⁸⁹

83. *Id.* at 350.

84. *Id.* at 351-52. The Court defined the regulatory program as state activities. *Id.* at 352.

85. *Id.* at 352. Using interest analysis terminology, the case was decided as a false conflict in favor of state law. According to the Court's interpretation of the Sherman Act, the federal government did not have an interest in applying the Sherman Act policy to these particular acts, even though it had an interest in prohibiting industry-wide price and output agreements. California had an interest in applying its policy to the plaintiff, and was allowed to do so. Of course, the Court in *Parker* neither undertook a proper interest analysis (although the point of this Article is that it probably should have) or employed interest analysis terminology.

86. 445 U.S. 97 (1980).

87. *Id.* at 104-05.

88. Article 6, clause 2 contains the supremacy clause:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI. The Constitution does not preclude states from passing economic legislation. The clause, however, requires federal law to supersede state law in the event of a conflict. See generally *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); Conant, *supra* note 6, at 259-261; Werden & Balmer, *supra* note 6, at 40-45; Note, *supra* note 64, at 1167-69. The clause establishes the primacy of federal law, ensuring a uniform national result and a national policy in those circumstances in which Congress has adopted a policy.

89. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

the court cannot decide that federal policy should be subordinated to the state policy.⁹⁰ The supremacy clause requires preemption of the state policy in such a case. Accordingly, if a state regulatory policy frustrates Sherman Act policy, the court cannot give the state regulation deference. An assertion that federalism values and the desire to give deference to state sovereignty are a part of federal Sherman Act policy, however, avoids the conflict with federal law, and possible preemption.⁹¹

2. *Is the "antitrust federalism" interpretation of the Act supportable?*

Parker described the Sherman Act's federalism values as consisting of noninterference with "a state's control over its officers and its agents."⁹² The absence of congressionally expressed intent to use the Sherman Act to interfere, combined with an apparent belief that preemption would do so, was evidence to the Court that federal policy did not extend so far.⁹³

Many writers have echoed the fear that preemption of state regulations that conflict with the substantive policies of the Sherman Act might radically interfere with a state's ability to govern. Professor Jorde has described the Court's willingness to imply strong federalism values into the Sherman Act as a judicially crafted ac-

90. For arguments that the supremacy clause seems to have been ignored or misapplied in *Parker*, see Conant, *supra* note 6, at 261-63; Davidson & Butters, *supra* note 72, at 579-80; Werden & Balmer, *supra* note 6, at 40-45.

91. It might be at least semantically tempting to describe state action cases as raising an actual conflict between a state regulatory policy and the Sherman Act, to be resolved by some type of balancing; when does "federalism" dictate deference to the state policy that conflicts with federal policy? See, e.g., Page, *supra* note 5, at 622 (describing the current state action process to be one where "[d]uly enacted, explicit [state] legislation in conflict with federal antitrust law" is nevertheless given deference if it has been authoritatively and democratically enacted); *id.* at 628 ("[a]n explicit legislative choice in conflict with the antitrust laws is entitled to greater deference . . ."). Such a phrasing of the issue is problematic, however, because the supremacy clause does not permit deference to a state policy that conflicts with the purposes and objectives of federal policy. See, e.g., Conant, *supra* note 6, at 261-64; Werden & Balmer, *supra* note 6, at 42-45, 59-62. If a proper level of deference is to be considered, it must be done within the context of considering the proper interpretation of the Sherman Act; to what extent does the Sherman Act itself contain a federal policy of deference to state regulation that conflicts with substantive Sherman Act policies?

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

93. *Id.* at 351-52.

commodation designed to avoid "wholesale invalidation of state regulatory regimes."⁹⁴ He recently praised the federalism interpretation of the Sherman Act because that resolution furthers federalism values of citizen participation, government efficiency, creative experimentation, and diffusion of power.⁹⁵ Professor Verkuil has described state action immunity as necessary to avoid imposition of intrusions by the federal judiciary into state regulatory autonomy that are analogous to *Lochnerian* substantive due process intrusions.⁹⁶

In support of the antitrust federalism interpretation of the Sherman Act, the Court in *Parker* pointed out that the Act is explicitly applicable to persons and corporations without mentioning "the state as such,"⁹⁷ and that the legislative history contained "no suggestion of a purpose to restrain state action."⁹⁸ The federalism interpretation, therefore, was based on a negative inference rather than on positive statements that the Act cannot preempt state regulation.

94. Jorde, *supra* note 71, at 227-28.

95. *Id.* at 230-34.

96. See Verkuil, *State Action, Due Process and Antitrust: Reflections on Parker v. Brown*, 75 COLUM. L. REV. 328 (1975) (arguing that using the Sherman Act to preempt conflicting state law is "more akin" to substantive due process than to normal preemption review, and thus must be done cautiously). See *Lochner v. New York*, 198 U.S. 45 (1905); see also Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L.J. 466, 509-10 (1986). The analogy to *Lochner* is too long a leap, however. *Lochner* provided the federal judiciary with the opportunity to review state regulation for its reasonableness, appropriateness, legitimacy, and directness of relation between the means and the ends. Substantive due process review was not constrained to the limits of any congressional policy or guidelines for how to make such a review. 198 U.S. 45 (1905). In contrast, Sherman Act preemption requires the judiciary to determine the congressionally enacted federal policy, and then compare the state regulation with the federal policy to ensure that the state policy does not frustrate the objectives of the federal policy. Granted, the Sherman Act is very general, and thus Congress has given the federal judiciary considerable discretion concerning definition of the federal antitrust policy, but the judiciary is nevertheless constrained by the limits of the federal policy, as originally established by Congress. Such a review is thus far more specific and leaves less room for judicial intrusion into state policy; intrusion extends no further than the federal policy. See Wiley, *Revision and Apology in Antitrust Federalism*, 96 YALE L.J. 1277, 1289 (1987). But see Hovenkamp & Mackerron, *supra* note 64, at 721 (arguing that the Sherman Act, rather than a specific federal regulatory standard, is a much more generally expressed federal preference for unrestrained markets, requiring different treatment).

97. *Parker v. Brown*, 317 U.S. 341, 350-51 (1943).

98. *Id.* "[A]n unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.*

Conversely, however, neither the Sherman Act nor its legislative history expressly authorizes states to adopt conflicting regulation.⁹⁹ The fact that state authority may suffer is not strong support for the federalism interpretation; some interference with state control is inevitable whenever federal and state regulations conflict. The implied interference value is simply a facet of the true conflict that arises when federal and state policies are inconsistent; it does not alone dictate that competing state policies should override federal policies.¹⁰⁰

Nor is interpreting the Sherman Act to contain federalism values that significantly limit the ability of the federal government to require conformance to the Act constitutionally mandated. Congressional power to enact the Sherman Act stems from Congress' power to regulate interstate commerce.¹⁰¹ As long as Congress has the constitutional power to fully regulate an activity or industry,¹⁰² federalism does not entitle a state to adopt a clearly articulated and actively supervised but different policy. The fact that the Sherman Act exercises less than total control does not suggest that a state is free to depart from federal policy. Similarly, the tenth

99. Hovenkamp & Mackerron, *supra* note 64, at 767 ("nothing in the legislative history of the antitrust laws either creates or forecloses a 'state action' exemption"); Garland, *supra* note 96, at 511; Slater, *supra* note 18, at 83; Spitzer, *supra* note 65, at 1295; Werden & Balmer, *supra* note 6, at 49-56. Determining what the original authors had in mind, often a useful but not determinative piece of information in any event, is not useful to decide the extent to which states and municipalities are free from Sherman Act policy. At the time of enactment, the state action issue was not considered, no doubt because Congress did not believe that it had the constitutionally granted regulatory power to regulate intrastate activity. See, e.g., Hovenkamp & Mackerron, *supra* note 64, at 725; Spitzer, *supra* note 65, at 1295-96. When congressional power was identified as more expansive, the reach of the Sherman Act expanded as well, creating the state action question.

100. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 479-81 (2d ed. 1988) concerning how to interpret federal law when undertaking preemption analysis. See also Conant, *supra* note 6; Werden & Balmer, *supra* note 6 (both arguing that the supremacy clause has been improperly ignored in determinations of state action immunity, but not discussing specifically whether the interference value justifies overriding the federal policy). But see Lopatka, *supra* note 5; Page, *supra* note 5; (both arguing that the Sherman Act should not interfere with at least legislatively implemented state regulation).

101. See, e.g., L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 708-12 (1977). The Sherman Act extends to all activity that Congress has constitutional power under the commerce clause to regulate. See *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948).

102. See *Parker v. Brown*, 317 U.S. 341, 350 (1943); Hovenkamp & Mackerron, *supra* note 64, at 759.

amendment, which reserves to the states all powers not delegated to Congress or prohibited to the states, does not significantly limit the Sherman Act's control over state activity.¹⁰³ The amendment does not suggest that in the absence of express indication to the contrary, all federal laws contain implicit permission for a state to assume a different and contradictory regulatory scheme.

The *Parker-Midcal* conclusion that federalism values within the Sherman Act mandate an exemption for some state regulations that conflict with federal antitrust policy competes with the supremacy clause.¹⁰⁴ The interpretation resolves the potential federal-state conflict by injecting into the Sherman Act a federalism component so powerful that it renders unobjectionable state schemes that may depart radically from, and therefore serve as obstacles to, the federal regulatory antitrust scheme. It permits any state to circumvent local application of the Act totally by a clear statement and active supervision. In contravention of a uniform federal policy, the interpretation allows each state to define the scope of federal Sherman Act policy.¹⁰⁵ Such an interpretation of federal policy, derived from a fear of interference and a negative inference, is not justified by the language of the Act, the legislative history, or the purposes of the Act.¹⁰⁶

B. Currie's Interest Analysis as an Alternative Method of Accommodating Preemption and Federalism Values

The tension between the Sherman Act and state regulation can be resolved without assuming that the federal law is designed to

103. The tenth amendment at times has been considered to preclude the federal government from interfering with a basic state service that is "essential to [the] separate and independent existence" of the states. *National League of Cities v. Usery*, 426 U.S. 833, 845-51 (1976). The tenth amendment as it is currently interpreted is not a limitation on the Sherman Act, however. See Hovenkamp & Mackerron, *supra* note 64, at 745-46. In any event, the Sherman Act would not intrude on the basic functions of a state government except in the highly unlikely event that a local economic regulation is defined to be essential to the independent existence of the state. See also L. TRIBE, *supra* note 100, at 378-400.

104. See P. AREEDA & H. HOVENKAMP, *supra* note 39, at 103-04; Conant, *supra* note 6, at 270-71; Hovenkamp & Mackerron, *supra* note 64, at 725-28, 778; Kennedy, *supra* note 72, at 33-34; Slater, *supra* note 18, at 83; Werden & Balmer, *supra* note 6, at 59.

105. See Hovenkamp & Mackerron, *supra* note 64, at 724 ("the doctrine unwisely cedes to the states an important question of federal subject matter jurisdiction: What is the appropriate scope of the federal antitrust laws?").

106. See Conant, *supra* note 6; Werden & Balmer, *supra* note 6.

undermine itself. An interest analysis, proposed by Brainerd Currie for resolution of litigation involving the apparently conflicting laws of different states,¹⁰⁷ can accommodate state autonomy and federalism concerns without unnecessarily restricting federal anti-trust policy.¹⁰⁸

1. Currie's interest analysis

Currie's interest analysis arose out of his dissatisfaction with the choice of law process based on territorial rules (such as the law of the place of tort or contract) found in the 1934 Restatement and generally applied.¹⁰⁹ He pointed out that the rules worked "in irrational ways, by nullifying capriciously the interest of one state or another whose laws were said to be in conflict without analysis of their underlying policies."¹¹⁰

107. See generally B. CURRIE, *supra* note 12. See also R. CRAMPTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS* (3d ed. 1981); Kay, *Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CALIF. L. REV. 577 (1980); Sedler, *The Governmental Interest Approach To Choice of Law: An Analysis and a Reformation*, 25 UCLA L. REV. 181 (1977); *Symposium: Conflict of Laws*, 34 MERCER L. REV. 471 (1983).

108. The choice of law implications inherent in preemption cases are identified in R. CRAMPTON, D. CURRIE & H. KAY, *supra* note 107, at 952-53 ("[T]he question in such cases is the familiar choice-of-law problem of accommodating conflicting governmental interests: Does the purpose of the federal law require subordination of state policy?") Although application of Currie's interest analysis to these choice of law problems is not explicitly handled, the suggestion of doing so is unavoidable. In addition, at least somewhat similar approaches (that do not discuss Currie's interest analysis approach) have been proposed by Conant, *supra* note 6; Garland, *supra* note 96; Werden & Balmer, *supra* note 6; Note, *supra* note 64; and, more recently, to some extent, by Professor Spitzer, who calls for development of a state action doctrine that is based on whether state laws conflict with the purposes of the antitrust laws. Spitzer, *supra* note 65, at 1318. Professor Wiley also proposes to identify a federal interest and preempt those state regulations in conflict. Wiley, *supra* note 96.

109. See Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 539 (1983); Sedler, *supra* note 107, at 181. Currie was not the only one dissatisfied. Roger Traynor described the Restatement approach to be a "petrified forest." Traynor, *Is This Conflict Necessary?*, 37 TEX. L. REV. 657, 670 n.35 (1959).

110. B. CURRIE, *supra* note 12, at 180-81. Somewhat mirroring Currie's frustration with a rule oriented choice of law process, many commentators have expressed a belief that state action clear articulation and active supervision "rules" are causing perverse results. See, e.g., Wiley, *supra* note 6, at 733-36 (discussing the effect of the clear articulation requirement as generating ineffective and costly state and local behavior); Cirace, *supra* note 6, at 519; Conant, *supra* note 6, at 279-281; Hovenkamp & Mackerron, *supra* note 64, at 765, 782; Page, *Antitrust, Federalism, and the Regulatory Process*, *supra* note 68, at 1126-30.

In the place of territorial rules, Currie offered his interest analysis framework.¹¹¹ The framework, designed to accommodate the interests of all states, had a basis in federalism: it could eliminate unnecessary intrusions into the policies and goals of each state.¹¹²

Interest analysis involves evaluation of the possibly applicable rules of involved states to determine whether the policy underlying each rule is furthered by its application to the dispute. If a state's policy is furthered by application of its rule, the state is interested. Only when more than one state has an interest must the forum choose between them.¹¹³

The first step is to identify, for each involved jurisdiction, the rule and the policy the rule seeks to implement.¹¹⁴ Underlying policies are revealed by the problem that instigated enactment, the place of the rule in the state's overall regulatory scheme, and the benefits to the state community that will be achieved by employing the rule.¹¹⁵

The second step is to determine if a state has an interest in an application of its rule to the dispute at hand.¹¹⁶ A state is not necessarily interested because its rule might apply, or because the

111. B. CURRIE, *supra* note 12, at 177-87. See also R. CRAMPTON, D. CURRIE & H. KAY, *supra* note 107, at 216-19; Sedler, *supra* note 107, at 183.

112. Currie argued that the conflict of laws rules created false problems, solved them in irrational ways, and often nullified state interests without "reference to the merits of the respective policies and even without recognition of their existence." B. CURRIE, *supra* note 12, at 180. Interest analysis thus was designed to promote federalism values by recognizing the existence of the policies and interests of all involved states and when possible eliminating the needless nullification of one state's policies by another's. He did not believe an "assessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail" should be undertaken by the judiciary. *Id.* at 182. Absent a legislative solution, each state should be free to further its own legitimate interest, when invoking its rule would do so. *Id.* at 177-87.

113. R. CRAMPTON, D. CURRIE & H. KAY, *supra* note 107, at 237-40.

114. B. CURRIE, *supra* note 12, at 183-84; see R. CRAMPTON, D. CURRIE & H. KAY, *supra* note 107, at 216-17; Sedler, *supra* note 107, at 183.

115. Ratner, *Choice of Law: Interest Analysis and Cost- Contribution*, 47 S. CAL. L. REV. 817, 819 (1974).

116. B. CURRIE, *supra* note 12, at 183-84 ("This process is essentially the familiar one of construction or interpretation.") See also R. CRAMPTON, D. CURRIE & H. KAY, *supra* note 107, at 217; Sedler, *supra* note 107, at 183. The process is not without its critics. See, e.g., A. EHRENZWEIG, *PRIVATE INTERNATIONAL LAW* (1967); Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980); Ehrenzweig, "False Conflicts" and the "Better Rule": Threat and Promise in Multistate Tort Law, 53 VA. L. REV. 847 (1967). See also Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Re-*

state has a general interest in the subject matter of the dispute, or because a resident of the state is involved in the dispute.¹¹⁷ A state has an interest "when application of the state's rule to a dispute implements the underlying policy that the state has adopted to promote the welfare of its residents."¹¹⁸

Using interest analysis, potential conflict situations tend to fall into one of the following categories: false conflict, apparent conflict and true conflict.¹¹⁹

a. False conflicts

Often, if careful analysis reveals that only one state has an interest in the application of its policy, a false conflict is presented.¹²⁰ No "choice" is required. A dispute should be resolved by the rule of a state that has an interest rather than one that does not.¹²¹

b. Apparent conflicts

If more than one state appears to have an interest, an apparent conflict exists.¹²² Currie suggested that before making a choice be-

sponse to the 'New Critics,' 34 MERCER L. REV. 593 (1983) [hereinafter Sedler, *Interest Analysis*].

117. Ratner, *supra* note 115, at 819.

118. *Id.*

119. If all involved states have the same policy, or if the outcome would not vary depending on the law chosen, no conflict arises. The choice will in effect not matter. Some have identified this situation as a false conflict. See Sedler, *supra* note 107, at 186 n.38.

120. R. CRAMPTON, D. CURRIE & H. KAY, *supra* note 107, at 222-37, 245-51; B. CURRIE, *supra* note 12, at 184; Ratner, *supra* note 115, at 819; Sedler, *supra* note 107, at 186-87. An example of a false conflict is a situation in which a plaintiff and a defendant in a liability suit reside in a state that allows recovery for the action, but the action took place in a state that denies recovery. The state where the action took place has no interest in applying its nonrecovery rule to the two parties. Sedler, *supra* note 107, at 186. State action cases are false conflicts if either the state or the federal government has no interest in applying its policy to an activity in question.

121. B. CURRIE, *supra* note 12, at 184; Ratner, *supra* note 115, at 819. The unprovided-for case, in which neither jurisdiction is interested in applying its rule to the dispute, has also been identified. B. CURRIE, *supra* note 12, at 152; see also Sedler, *supra* note 107, at 189-90.

122. R. CRAMPTON, D. CURRIE & H. KAY, *supra* note 107, at 217; Sedler, *supra* note 107, at 187. The situation has also been described as an "apparent true conflict." See Kanowitz, *Comparative Impairment and Better Law: Grand Illusions in the Conflict of Laws*, 30 HASTINGS L.J. 255, 256 (1978); Kay, *supra* note 107, at 578; Kay, *supra* note 109, at 540; Note, *Conflict of Laws*, 65 CALIF. L. REV. 290, 293 (1977). The term "apparent conflict" (or "apparent true conflict") troubles me because of the ambiguity of the word "apparent." Although new terminology just for terminology's sake should be avoided, for state action conflicts

tween the conflicting rules, however, "more moderate and restrained interpretation both of the policy and of the circumstances in which it must be applied"¹²³ should be undertaken for each conflicting policy, to avoid the conflict if possible.¹²⁴ The result may be a false conflict.

(and perhaps for multistate conflicts as well) I propose "prima facie conflict" as a possible alternative phrase, because "apparent" has more than one applicable meaning. An apparent conflict could suggest those conflicts that are easy to see—obvious, or apparent, conflicts. The implication is that although these conflicts are obvious, others may be lurking but are not visible to the naked eye. See WEBSTERS THIRD NEW INTL. DICTIONARY 102-03 (1986) (definition one). Apparent also means seeming, but perhaps not in fact true; under this meaning, an apparent conflict would be a conflict that appears to be a true conflict, but in fact (perhaps upon reconsideration?) is not. See *id.* (definition two and synonym discussion). Although leaning more toward the second definition, "apparent conflict" and "apparent true conflict" arguably employ concepts from both of the definitions. An initial look may reveal clearly visible conflicts, but some of those conflicts in fact may not be true conflicts. A "prima facie conflict" is just another way of saying the same thing; there is reason to believe that a conflict exists, but that reason may disappear on a reconsideration that uses moderation and restraint. I do not mean to propose a change in the underlying analysis. As an anonymous review pointed out, "prima facie conflict" has the drawback of raising unhelpful evidentiary connotations.

123. Currie, *supra* note 17, at 757. See also Kay, *supra* note 109, at 549. The restrained interpretation aspect of Currie's process may appear unnecessary. Reconsideration seems appropriate only if the first analysis may be incomplete or incorrect, in which case a careful, complete initial analysis would seem to be the more desirable approach. In the absence of an apparent conflict, however, a more moderate and restrained interpretation may unnecessarily limit the scope of the applicable policy. Such an interpretation, therefore, should be considered only when a true conflict would otherwise be the result.

124. Currie is usually described as suggesting a moderate and restrained reconsideration "of the policy or interest of one state or the other." Kay, *supra* note 107, at 578 (quoting W. REESE & M. ROSENBERG, *CASES AND MATERIALS ON CONFLICT OF LAWS* 470 (7th ed. 1978)); see R. CRAMPTON, D. CURRIE, & H. KAY, *supra* note 107, at 217. In *The Disinterested Third State*, Currie seems to emphasize a reconsideration of the forum policy and interest:

[T]he mere fact that a suggested broad conception of a local interest will create conflict with that of a foreign state is a sound reason why the conception should be re-examined, with a view to a more moderate and restrained interpretation both of the policy and of the circumstances in which it must be applied to effectuate the forum's legitimate purpose.

Currie, *supra* note 17, at 757. Currie also apparently proposed reconsideration of the policies of all apparently interested jurisdictions. See B. CURRIE, *supra* note 12, at 168 ("There is room for restraint and enlightenment in the determination of what state policy is and where state interests lie"); W. REESE & M. ROSENBERG, *supra*, at 470 (the authors indicate that their description of Currie's approach, which includes the "one state or another" language quoted above, is taken from material Currie wrote for their use for the fourth edition of the book.). See also Kanowitz, *supra* note 122, at 268-73 (arguing that perhaps the reassessment should only apply to the forum policies and interests); Kay, *supra* note 107, at 597,

c. *True Conflicts*

If the attempts at conflict avoidance are unsuccessful, more than one state has an interest in applying its policy. This true conflict requires a choice between the policies of the interested states. In such a case, Currie reluctantly concluded that in the absence of a forum statutory choice of law rule directing the application of the rule of another interested state, the forum should apply its own substantive rule.¹²⁵ Currie believed that balancing competing states' functions is a nonjudicial function, and he strongly opposed judicial attempts to weigh or balance the competing interests.¹²⁶ According to Currie, true conflicts "cannot be solved by any science or method of conflict-of-laws."¹²⁷

n.114 (disagreeing with Kanowitz and arguing the reassessment should apply to all apparently conflicting policies).

There is a reason to focus especially on reconsideration of the forum policy and interest. Given Currie's rule of choosing forum law in true conflicts, a facile or expansive determination by the forum court that forum law is interested means that forum law will apply, either as the law of the only interested jurisdiction in a false conflict or as the applicable law in a true conflict. The reconsideration of forum policy accommodates foreign interests by ensuring that a selfish and provincial forum has not stretched too broadly its own policy to apply its rule, and thus serves a federalism value of avoiding unnecessary intrusion by one jurisdiction into the policies of another jurisdiction. In contrast, if the forum implements an overly moderate and restrained assessment of foreign policy, the method could be used systematically to find no true conflict and to select forum law. The need for reassessment of the foreign law accordingly is somewhat less compelling. Applied to state action cases, using a choice of law rule that requires application of federal law in true conflict cases, the point is that anti-intrusion values should be promoted by undertaking a reassessment of federal law using moderation and restraint prior to preempting a state law that apparently conflicts with the Sherman Act.

125. B. CURRIE, *supra* note 12, at 183-84. A state may enact a law that directs its courts to apply the rule of another interested jurisdiction in the event of a conflict. In that case, the forum's choice of law rule, rather than the forum's policy that conflicts with a foreign state's policy, is chosen. The supremacy clause is such a rule for all federal-state conflicts, directing state as well as federal courts to choose federal law in the event of a conflict.

126. *Id.* at 181-83. "[A] court is in no position to 'weigh' the competing interests, or evaluate their relative merits, and choose between them accordingly [A]ssessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function that should not be committed to courts in a democracy. It is a function that the courts cannot perform effectively . . . This is a job for a legislative committee." *Id.* at 181-82; see also R. CRAMPTON, D. CURRIE & H. KAY, *supra* note 107, at 260-65; Ratner, *supra* note 115, at 822 n.20; Sedler, *supra* note 107, at 216-17.

127. B. CURRIE, *supra* note 12, at 107; see Kay, *supra* note 107, at 579. Currie's selection rule in a true conflict is an acknowledged punt. In the face of an unresolvable conflict, Currie saw no reason to depart from a presumption that the forum generally does not depart

2. *Interest analysis for state action conflicts*

Currie's approach provides an effective system for accommodating state autonomy without undermining substantive federal antitrust interests. Interest analysis can mitigate the conflicts that appear between state or municipal laws and the Sherman Act. Such conflicts inevitably require extensive analysis of both state and federal rules; Currie's system can determine the underlying policies and identify false conflicts effectively, an approach that is especially useful for avoiding confrontations between state and federal laws. Interest analysis also promotes the federalism value of peaceful coexistence by avoiding unnecessary stultification of both state and federal interests. The identification of nonintrusive or consistent policies when they exist avoids the need to choose between deference and preemption.

Interest analysis, unlike the *Parker-Midcal* resolution, avoids stultification of federal antitrust policy and supremacy clause values.¹²⁸ In the presence of a true conflict between the federal Sherman Act and state law, the forum, whether a federal or a state court, must abide by the supremacy clause. The supremacy clause is an overriding choice of law rule that requires the application of federal law in both state and federal courts, thereby ensuring a consistent result.¹²⁹ Consequently, in true conflicts, as well as in false conflicts favoring the federal law, the Sherman Act policies will prevail.

from its own law. Professor Kay argues that the entire choice of law question should be phrased: "Under what circumstances is a departure from local law justified?" *Id.* at 617.

128. See B. CURRIE, *supra* note 12, at 119 (indicating that Currie was unwilling to sacrifice the advancement of the forum's interest for the sake of multistate concerns).

129. Currie's forum law solution for true conflicts has been criticized, in part because it promotes uncertainty and forum shopping; the same set of facts might receive different treatment depending on where the case is brought. See R. CRAMPTON, D. CURRIE & H. KAY, *supra* note 107, at 260-65; Sedler, *supra* note 107, at 216-20. Currie hoped that congressional action would provide a uniform choice of law rule in cases of true conflicts. B. CURRIE, *supra* note 12, at 183. The supremacy clause imposes such a rule for all federal-state conflicts, providing for a uniform resolution regardless of whether the matter arises in a federal or state court. R. CRAMPTON, D. CURRIE & H. KAY, *supra* note 107, at 272-73. In the event of a true federal-state conflict, forum law, which is to follow the choice of law rule contained in the United States Constitution, will be used. Accordingly, one of the major criticisms of Currie's method is not applicable to its use for resolution of conflicts between state regulations and the Sherman Act.

Currie's "moderate and restrained reassessment" mechanism for handling apparent conflicts is especially useful for state action conflicts. Unlike the *Parker-Midcal* state action doctrine, which accommodates state policy at the expense of federal interest, Currie's system accommodates state interests by building in a restrained view of the substantive federal antitrust policies. The moderate and restrained second look serves to implement the preemption principle that federal law should preempt a state law only when an irreconcilable conflict exists between the two laws.¹³⁰ Many state regulations raise at least an apparent conflict with the Sherman Act. But because federal law is the constitutionally directed applicable law in cases of true conflict, an overly expansive view of federal policy might intrude on state and local regulatory systems more than is necessary to achieve federal purposes. The moderate and restrained second look at federal policy appropriately ensures that the court has made a proper effort to find common ground between apparently competing policies.¹³¹

Using interest analysis rather than a federalism interpretation of the Sherman Act to accommodate federalism values also avoids the process of trying to determine federal policy by balancing state and federal interests. The balancing process is not consistent with the supremacy clause and may also impair federalism values if the balance unnecessarily subordinates nonconflicting state policy to federal regulation.¹³²

130. *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982).

131. An essential premise of the need to imply federalism values into the Sherman Act is that without the interpretation, large amounts of state regulation will be preempted by the Sherman Act. *See, e.g., Jorde, supra* note 71, at 227-28. Using interest analysis as the tool for resolving state action conflicts challenges that assumption. A moderate and restrained but relatively uncontroversial assessment of federal Sherman Act policy indicates that only a limited number of regulatory alternatives are denied to the states by the Sherman Act. *See infra* text accompanying notes 194-282. The Act need not be interpreted as a vehicle for preempting virtually all nonfederal regulation of business behavior. Consequently, the federalism interpretation could be dropped without imperiling vast quantities of state and local regulation.

132. Using interest analysis does not require trying to determine federal policy by balancing federal and state interests. Currie thought that balancing the interests of various states was judicially inappropriate; *see supra* note 126, and the supremacy clause does not permit such a balancing in the face of actual conflict between state and federal law. *See Werden & Balmer, supra* note 6, at 62 n.334. Consequently, although proposed by some as the appropriate process for resolving state action conflicts, *see supra* note 91, the balancing of federal and state interests is available as a resolution only if federal antitrust policy is defined to be

III. INTEREST ANALYSIS APPLIED TO STATE ACTION CONFLICTS

When a state action issue arises, the goal should be to determine whether there is a true conflict between state and federal policies. When the federal government has an interest in applying Sherman Act antitrust policies to an activity that falls under a state regulatory scheme, but the state has no interest in protecting the activity from such application, there is a false conflict. Under such a circumstance, federal law should be applied, but preemption is unnecessary. If the state has an interest in permitting an activity but the federal government has no interest in prohibiting it, a false conflict also exists, and the state policy of protection should be allowed to continue. In cases of true conflict, created because both the state and the federal government are interested in applying contrary policies, federal policy should prevail.

Using this framework will not "require the wholesale invalidation of state regulatory regimes."¹³³ It does require a substantive review of state laws by federal courts, but only for the purpose of determining whether the laws in fact conflict with Sherman Act policies.¹³⁴ This type of review is unavoidable whenever supremacy clause preemption is an issue.

one of applying only when, on balance, the Sherman Act substantive antitrust values outweigh the state values. Such an interpretation of the Sherman Act, however, appears wholly unsupportable; it would simply be a method of undertaking what the supremacy clause does not permit.

133. Jorde, *supra* note 71, at 227-28. Nor will the result interfere with federalism values of citizen participation, governmental efficiency, creative experimentation and diffusion of power any more than any other federal law that preempts some forms of state regulation. See generally *id.* at 230-34 (identifying these values as promoted by the state action doctrine).

134. Interest analysis does not require an evaluation of the appropriateness or legitimacy of state policies, except as to whether the policy conflicts with federal purposes in enacting the Sherman Act. Nor does it require a general assessment of the reasonableness of state regulation or of the directness of the relationship between the means of the state regulation and its regulatory purpose. The judiciary would be required to interpret state and federal policies with a bias toward the avoidance of a conflict. The values that the federal courts could use to strike down state laws would be judicially developed assessments of congressional values expressed in the Sherman Act, rather than judicially developed constitutional values. For better or worse, interest analysis does not call for a return to *Lochner*.

A. *Sherman Act Policy*

Using interest analysis to assess the possible conflict between a state regulation and the Sherman Act requires identification of the Sherman Act antitrust policy as applied to the state-regulated activity. That identification discloses whether the purposes of the Act are served by its application in the particular case and whether the federal government thus has an interest in asserting its policy.

The purposes of federal antitrust regulation have long been the topic of debate. The Sherman Act prohibits contracts, combinations, and conspiracies in restraint of trade, as well as monopolization and attempts to monopolize.¹³⁵ The purpose is to remove some, but not all, impediments to competitive market functioning. That policy is implemented by preventing competing market participants from agreeing to substitute their collective market power for individual market decisions, and by rendering illegal many activities that would enable an individual firm to acquire the ability to control all or a significant portion of a market. More broadly, the policy is designed to benefit society in general by enhancing the efficient use of resources and by reducing the opportunities for those with economic power to extract wealth from those lacking the power.

1. *Rules*

Section 1 of the Sherman Act prohibits all contracts, combinations and conspiracies in restraint of trade.¹³⁶ As judicially construed, this general rule protects market competition by prohibiting agreements between competitors concerning matters that influence purchaser choice, including price, quality, service, areas of distribution, and output.¹³⁷ The section forbids agreements that substitute collective industry judgment for the independent decisions of horizontal competitors. Competitors ordinarily are not allowed to band together, act as a larger unit, and acquire market power by reducing pressure that otherwise would exist from each other to offer a lower price, better quality, or larger output.¹³⁸

135. 15 U.S.C. §§ 1-7 (1982).

136. *Id.* § 1.

137. See generally L. SULLIVAN, *supra* note 101, ch. 3.

138. See *id.* at 182-86.

Accordingly, agreements by competitors to fix or coordinate prices or quality, restrain output, or allocate territories for competition, and agreements to facilitate or police such arrangements are per se violations of the Act.¹³⁹ Some vertical agreements, such as resale price maintenance agreements and a narrow set of tied sales, are also per se illegal.¹⁴⁰ Other vertical restraints, such as vertical territorial allocation, are not per se illegal, but may be found unreasonable and thus in violation of the Act, depending on the particular circumstances of the agreement.¹⁴¹

Courts have interpreted section 2, which prohibits monopolization, attempt to monopolize, and conspiracy to monopolize,¹⁴² to forbid efforts by a firm or group of firms to become the sole or the dominant producer of a product or service by methods other than price and quality competition.¹⁴³ Generally, a firm with a large portion of the market or the potential to acquire a large portion cannot otherwise exclude or frustrate entry into the market, intentionally hasten the exit of a competitor, or hamper a competitor's ability to compete on similar terms.

2. Policies or purposes

a. Efficiency

One major purpose of protecting competition is to restrict the ability of firms to act in a manner that enables them to increase their wealth but results in less efficient use of societal resources. A firm or group of firms with market power¹⁴⁴ is likely to exercise the

139. L. SULLIVAN, *supra* note 101, at 182-86, 311-15.

140. *See, e.g.*, *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) (tied sales); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) (resale price-maintenance).

141. *See, e.g.*, *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). On the general legality of vertical restraints, see H. HOVENKAMP, *ECONOMICS AND FEDERAL ANTI-TRUST LAW* 247-72 (1985).

142. 15 U.S.C. § 2 (1982).

143. *See generally* L. SULLIVAN, *supra* note 101, ch. 2. In some circumstances, firms are not permitted to compete by setting a price that is below their own cost, despite the fact that such an activity is a form of price competition.

144. Market power is the ability to price a product and set an output level in a manner at least somewhat unconstrained by other producers of the product. A firm with market power can sustain a price for its product that is higher than the price that would prevail in a perfectly competitive market.

power in a manner that tends to misallocate resources.¹⁴⁵ The misallocation is the efficiency reason for prohibiting anticompetitive behavior.¹⁴⁶

b. Pro-consumer distribution

Another underlying purpose of protecting competition is to encourage a distributive result that places surplus with consumers.¹⁴⁷ In a market where firm coordination is not permitted and individual firms are not allowed to acquire enough power to dominate, prices theoretically will gravitate towards the lowest price necessary to keep most producers in business. Although many consumers would be willing to surrender a higher price for the product, the competitive market tends to enable those consumers to pay the

145. See generally F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 20-21 (2d ed. 1980). Misallocation occurs due to a reduced industry output. A firm with market power maximizes profit by charging a price above the price that would exist in a competitive market. Some people who would have purchased at the (lower) competitively set price will not purchase at the higher price. These consumers are denied the benefits of the monopolistically priced product and are forced to do something else with the resources they would have expended on the competitively priced product, and too few resources are allocated to the production of the monopolistically priced product. The result is reduced welfare for the nonpurchasers and an inefficient allocation of resources. The misallocation theoretically could be avoided if the power-wielding firm perfectly price discriminates, i.e., identifies an amount each potential purchaser is willing to pay and manages to sell the entire quantity that would have been purchased at the competitive price. (The seller keeps the surplus, but output is unaffected.) Even in that highly unlikely event, inefficient expenditures of resources directed toward obtaining or keeping a monopoly may occur. See, e.g., Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807-27 (1975). Another efficiency-related rationale for restricting the ability of firms to obtain market power is the desire to reduce what is called X-inefficiency. Some economists have argued that firms not facing competition become less efficient, even though the firms continue to have strong incentives to reduce costs. See F. SCHERER, *supra*, at 464-69.

146. The Sherman Act efficiency value also inevitably contains a distributional implication: to promote the efficient use of resources, some methods that firms would otherwise use to increase wealth are restricted. A firm behaves in a manner that misallocates resources not because the firm benefits from the misallocation, but because the distributional benefit to the firm is large. A profit-maximizing firm that forces a misallocation suffers a tiny loss as a member of society, but reaps a gain from the monopoly behavior that greatly exceeds the tiny loss.

147. See, e.g., Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982). The pro-consumer distribution value is not generally incompatible or inconsistent with the efficiency value. Usually, the Sherman Act protection of the competitive process promotes both values simultaneously.

lower competitive price and to keep the surplus. As a consequence, an inevitable effect of protecting a competitive market environment by prohibiting firm coordination and acquisitions of single-firm market power is to provide consumers with a distributional benefit.¹⁴⁸ Similarly, preventing firms from agreeing on price and quality may provide information and consequent bargaining protection to unwary consumers unable to ascertain the existence of competitor agreements.¹⁴⁹

c. Small firm autonomy

Protection of competition also may reflect the purpose of preserving the autonomy of small producers. There is historical support for the argument that the small, independent firm protection value is present in the Sherman Act. The value, however, is somewhat incompatible with efficiency values also contained in the Act.¹⁵⁰

3. Initial inquiry concerning federal interests

In general, when a state regulatory policy interferes with competition, a federal interest in prohibiting the regulatory activity is present. In most state action cases, an initial inquiry concerning

148. For an assessment of some of the income distribution effects of monopoly power, see F. SCHERER, *supra* note 145, at 471-74.

149. The lack of knowledge could result in wasteful searches and ineffective bargaining. Prohibiting the agreements thus protects unwary consumers from wasting resources researching products that, due to agreements, are not at all competitive.

150. See, e.g., Elzinga, *The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1196-1200 (1977); see also Blake & Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377, 383 (1984) (discussing the Sherman Act as a tool for limiting the political power of firms). Because preserving competitive markets often will result in a market with a large number of smaller firms rather than a small number of larger firms, the efficiency and distribution values are not inevitably inconsistent with small-firm populist values. Always favoring smaller independent firms in larger numbers as a value, however, could lead to the overprotection of inefficiently sized firms, a result that is inconsistent with the promotion of the efficient use of resources. Both values appear to be present in the Sherman Act protection of competition, however. See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 68-69 (1977) (White, J., concurring) (indicating that the value of protection for the " 'autonomy of independent businessmen' . . . is without question more deeply embedded in our cases than the notions of 'free rider' effects and distribution efficiencies borrowed by the majority from the 'new economics of vertical relationships.'" *Id.*). The small-firm autonomy value may be one basis for the continued per se illegality of resale price maintenance.

activities falling within the scope of a state regulatory policy reveals at least a superficial federal interest in prohibiting what the state regulation requires or authorizes.¹⁵¹

B. State Policy and Interest

Given a federal Sherman Act interest in prohibiting an activity that falls within a state's regulatory scope, an interest analysis for state action conflicts must identify the state policy and purposes of its regulation. The question of whether a Sherman Act policy conflicts with a state regulatory policy is answered by determining the policy underlying the state regulation, the purpose for applying that policy to the particular case, and whether that application conflicts with the purposes of the Sherman Act.

Determining whether a state has an interest in protecting an activity is not a determination that the act is a "state act" undertaken by the legislature or some other state agency. A state will

151. In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97 (1980), and *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987), for example, state regulations enforced policies of allowing or requiring an owner to dictate the resale price for her item and prohibited deviations from that price. Section 1 of the Sherman Act has been interpreted to make such restrictions per se illegal. The Act attempts to protect resellers by allowing them to select the price at which they sell the product free from instructions by the original owners. Sellers of products are not allowed to require resellers of their products to adhere to owner-dictated resale prices. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), involved a similar federal interest in not allowing distributors and retailers to agree to the imposition of minimum resale prices on those retailers unwilling to sign resale price maintenance (RPM) agreements. *Id.* at 388. Signed RPM agreements had been exempted by Miller-Tydings Fair Trade Act of 1937, Aug. 17, 1937, ch. 690, 50 Stat. 693, 15 U.S.C. § 1 (1982), but the state system enabled a retailer to force all other retailers to conform to a minimum price, in effect enforcing a retailer cartel. In *Parker v. Brown*, 317 U.S. 341 (1943), *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), and *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985), the Sherman Act policy of prohibiting price and output agreements among competitors meant that the federal government had an interest in preventing the activities that fell within the scope of state regulation. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977), involved agreements by lawyers both to refrain from competing through advertising and to punish those who did not refrain; Sherman Act policy is to prohibit many of those types of agreements. In *Hoover v. Ronwin*, 466 U.S. 558 (1984), as well as *Patrick v. Burget*, 108 S. Ct. 1658 (1988), and *Bates*, the Sherman Act policy of prohibiting group boycotts that hamper or entirely prevent a competitor from competing raised a federal interest in banning the state-regulated activities. The Sherman Act policy of prohibiting tied sales agreements and attempts to monopolize raised an interest in prohibiting the defendant utility's alleged tied sale practice in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976).

always have a policy of some kind toward an activity that falls within Sherman Act proscriptions. That policy will be reflected by legislative or judicial statements, decisions or enactments, or the lack thereof. A state, however, does not have an interest in protecting an activity simply because one of its citizens wishes to engage in the activity or because the state generally regulates in the area.

The question is whether state policies will be furthered by protecting the activity the federal government appears to have an interest in preventing. A state has an interest in protecting an activity if continuation of the activity will enhance the welfare of and will achieve specific benefits for the citizens of the state. If the state has such an interest, application of the Sherman Act to the activities will frustrate the state policy. If the state policy is not furthered by protection, however, a false conflict exists, and federal law can be applied without conflict.¹⁵²

1. The state has an interest in applying its policy concerning compelled activity

When a state compels a specific activity, protection for the compelled activity is very likely to further state policy. The state thus has an interest in asserting its policy of compelling the activity. In *Parker v. Brown*,¹⁵³ for example, the state required raisin producers to adhere to the price and output agreements. The benefits sought were to "conserve the agricultural wealth of the State" and to "prevent economic waste in the marketing of agricultural products"¹⁵⁴ by reducing output and increasing prices. Applying the Sherman Act to the agreements would have frustrated the state policy. In *Midcal*,¹⁵⁵ the state required wholesale wine distributors to adhere to established resale prices, demonstrating that California had an interest in protecting the resale price maintenance scheme. The benefits sought from the regulation were not obvious; apparently they were to "promote temperance and orderly market-

152. Similarly, when a state policy requires protection only of acts that the federal government has no interest in prohibiting, a false conflict exists, and the state policy of protection can continue without conflicting with federal policy.

153. 317 U.S. 341 (1943).

154. *Id.* at 346.

155. 445 U.S. 97 (1980).

ing conditions."¹⁵⁶ Nevertheless, applying the Sherman Act's per se illegality rule to the compelled acts would have frustrated California's policy.

2. A state may have an interest in applying its policy of protection for a noncompelled activity

The fact that a state compels an activity is good evidence that a state has an interest in protecting the activity.¹⁵⁷ Compulsion should not be a prerequisite for a conclusion that a state policy will be advanced by protecting an activity, however;¹⁵⁸ despite its optional nature, the noncompelled activity may nevertheless further a state policy and cannot always be eliminated without conflict. The question is not whether a state desires an activity so strongly as to require it, but whether a state purpose or goal will suffer if the Sherman Act is applied to the activity.

*Southern Motor Carriers Rate Conference v. United States*¹⁵⁹ involves a noncompelled activity that a state nevertheless had an interest in protecting from Sherman Act vulnerability. Several southern states permitted and in some cases actively encouraged¹⁶⁰ truckers to engage in collective ratemaking, but the states did not

156. See *Midcal Aluminum v. Rice*, 90 Cal. App. 3d 979, 984, 153 Cal. Rptr. 757, — (1979). Obviously, those benefits can be achieved without resale price maintenance (RPM). Arguably, the only real benefit sought from the statute was to give the industry the freedom to undertake that which the Sherman Act prevents, resale price maintenance. Theoretically, RPM can reduce inefficiencies created by the temptation of all resellers to take a free ride on the pre-sale advertising and product-demonstration costs (wine tasting, for example) incurred by other resellers. See Page, *Antitrust, Federalism, and the Regulatory Process*, *supra* note 68, at 1131-34. In addition, permitting RPM might eliminate the need for inefficient vertical integration into distribution that might otherwise occur by brand owners who, for whatever reason, desire to avoid intrabrand price competition for their products.

157. See *Southern Motor Carriers*, 471 U.S. at 62; P. AREEDA & D. TURNER, 1 ANTITRUST LAW ¶ 215b, at 92-96 (1978) [hereinafter P. AREEDA & D. TURNER, ANTITRUST LAW]; P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 212.6, at 62 (Supp. 1982) [hereinafter P. AREEDA & D. TURNER, ANTITRUST LAW SUPPLEMENT] (arguing that compulsion is good evidence that a state has a clearly articulated, affirmatively expressed policy concerning the activity that is compelled).

158. See *Southern Motor Carriers*, 471 U.S. at 62; P. AREEDA & D. TURNER, ANTITRUST LAW, *supra* note 157, ¶ 215b, at 92-96, (arguing that under some circumstances a clearly articulated, affirmatively expressed state policy concerning an activity can be found even though the state does not compel the acts.)

159. 471 U.S. 48 (1985).

160. *Id.* at 51.

compel the price-fixing activity.¹⁶¹ The truckers were required to submit the collectively determined rates to the state Public Service Commissions for approval.

The states identified several benefits from their policies of permissive encouragement of collective ratemaking. The activity enabled carriers to share the cost of preparing rate proposals—perhaps an efficient method for complying with state rate-filing regulations.¹⁶² In addition, the jointly set and filed rates could: reduce the state regulatory burden by reducing the number of rates to approve; enable the state agency to consider more closely each submitted rate proposal; and provide what some of the states argued would be a desirable uniformity in prices.¹⁶³

Consequently, in order to preserve these benefits, each of the states had an interest in protecting the ability of the truckers to engage in collective ratemaking, even though none of the states compelled the activity.¹⁶⁴ The state policies would be negated, however, if the apparently conflicting Sherman Act policy prohibit-

161. The Supreme Court in effect concluded that the states had an interest in protecting the activity, *id.* at 65, but the Court did so in the process of establishing that a policy short of compulsion might still meet the clear articulation requirement. *Id.* at 61. The Court found that a clearly articulated state policy of permissiveness concerning the collective ratemaking activity would be frustrated by applying the Sherman Act to prohibit the activity, and held that the clear articulation requirement was satisfied despite the lack of compulsion. *Id.* at 59-62. The Court criticized the Fifth Circuit assumption "that if anticompetitive activity is not compelled, the State can have no interest in whether private parties engage in that conduct. This type of analysis ignores the manner in which the States in this case clearly have intended their permissive policies to work." *Id.* at 59.

162. *Id.* at 59.

163. *Id.* at 51 & n.5.

164. Stevens argued in dissent that because the state did not compel collectively set rates and the truckers were free to prepare and submit their rate proposals individually, the collective ratemaking could not have been essential to the state regulatory scheme. If none of the truckers chose to act collectively, none of the benefits would be achieved. *See id.* at 76 (Stevens, J., dissenting). He may have been arguing that unless a particular activity is essential to a state's overall regulatory scheme, the benefits from the regulation can be achieved without the activity, and therefore the state does not have an interest in protecting that activity. *Id.* at 76 n.17. This concept of state interest is too narrow; nonessential activity may be beneficial to the citizens of the state. Stevens' argument actually may have been that the state had an interest in protecting collective ratemaking, but the policies of achieving regulatory benefits by allowing collective ratemaking conflict with both the Sherman Act policy against price-fixing and the federal policy of deregulation of the motor carrier industry. *Id.* at 77-78.

ing the fixing of rates were applied to the collective ratemaking activity.

3. State regulatory involvement with an activity does not by itself demonstrate that the state has an interest in protecting the activity

A state's regulatory policy may include within its scope an activity that the federal government has an interest in preventing. While the state always has an interest in protecting its regulatory structure, if the state does not compel the activity, and there are no particular benefits to the citizens of the state resulting from the activity, the state may lack an interest in protecting the activity. Such cases present false conflicts in favor of federal law.

a. False conflicts - Cantor, Goldfarb and Hoover

Cantor v. Detroit Edison Co.,¹⁶⁵ for example, appears to present a true conflict between state regulatory policy and Sherman Act policy. The state, as part of a comprehensive regulatory policy concerning the defendant utility, gave the defendant authorization to provide both electricity and light bulbs to utility consumers without a separate charge for the light bulbs.¹⁶⁶ The plaintiff claimed the utility's joint sale of electricity and light bulbs for one price was a tied sale, a per se violation of the Sherman Act.¹⁶⁷ The utility defended on the grounds that the state approval shielded the company from Sherman Act liability.¹⁶⁸

The extensive regulation of the utility by the state, however, does not demonstrate that applying the Sherman Act to the utility's activity would frustrate a state policy. The state's approval of the light bulb giveaway, granted pursuant to the state's rate and service approval program,¹⁶⁹ meant that the state did not object to

165. 428 U.S. 579 (1976).

166. *Id.* at 581.

167. *Id.* at 581-82 & n.3.

168. *Id.* at 581.

169. The Michigan Public Service Commission (MPSC) extensively regulated electricity distribution in the state. *Id.* at 584. The MPSC required the utility to obtain approval for all rate and service offerings and to conform to the approved offerings, including the approved light bulb giveaway practice, until the utility submitted and received approval for a new rate and service schedule. *Id.* at 582-83. The utility was free to submit proposed altera-

the practice. But the state did not have a policy of encouraging, promoting, or requiring tied sales. No producer of electricity was required or encouraged to engage in the tie, there were no state policies concerning light bulbs that would be furthered by allowing the tied sale,¹⁷⁰ and disallowing the tie would not deprive the citizens of Michigan of demonstrable benefits.¹⁷¹

The state had an interest in applying its rate and service regulation policy. The purpose of the regulation was to ensure that the utility, a regulated monopolist supplier of electricity, would provide effective service but not extract too high a price from its consumers. The service and rate approval regulations thus were crucial to the regulatory policy of the state, but that policy is not furthered by allowing electricity producers to tie light bulbs to electricity. The state policy toward the tie was one of neutrality.¹⁷²

tions abandoning the practice, however, and, in 1964, the utility had received approval to eliminate the light bulb giveaway with respect to "large commercial customers." *Id.* at 583.

170. *Id.* at 584.

171. *Id.* at 584-85, 598. The MPSC did find the program to be in the public interest, *id.* at 630 (Stewart, J., dissenting), suggesting a possible state protective interest. Nothing in the case suggested that the state had affirmatively concluded that specific benefits to the citizens of Michigan arose from the tie, however. The purpose of the tied sale, according to the utility, was to increase the consumption of electricity. *Id.* at 584. The utility also argued that the program saved consumers three million dollars a year. *Id.* at 584 n.9. If demonstrated, this fact might have signalled a state interest in protecting the tie because it generated efficiencies in the distribution of light bulbs. In that event, rather than a false conflict, the conflict is an apparent true conflict between a state policy of protecting a tie and a federal policy prohibiting such ties.

Light bulb distribution efficiencies were not expressed as part of any state policy, however, and were not demonstrated. The savings argument was probably spurious, because the utility's costs incurred from buying and distributing the light bulbs appear to have been included in the utility's ratebase, and the partial elimination of the giveaway apparently had resulted in a general rate reduction for the customers no longer receiving the bulbs. *Id.* at 583. These facts suggest that consumers were paying the utility a profitable rate-of-return on the costs of providing the light bulbs as part of their electric bill. Because the utility did not bill in a pro rata fashion for the light bulbs, the probable effect was to subsidize those who used a lot of light bulbs at the expense of those who used a smaller amount, without reducing the overall cost to consumers of electricity and light bulb consumption. *Id.* The utility did not argue that it could purchase and distribute light bulbs more efficiently than could any other distributor, although bulk buying and distribution efficiencies were conceivably present. A tie is not necessary to achieve such efficiencies, however, suggesting that the state did not need to protect the tie to protect the ability of the utility to efficiently distribute light bulbs to those who would benefit from the distribution.

172. *Id.* at 585.

Consequently, *Cantor* represents a false conflict. The federal policy of prohibiting tied sales did not conflict with the state's interest in maintaining its regulatory program, because the state did not have a policy that would be furthered by protecting the tied sale of light bulbs and electricity.¹⁷³ The state had an interest in applying its policy of disapproving any aspect of the utility's rate and service offerings that the state found not to be in the public interest. It had no interest, however, in protecting the utility's acts from a federal law that might find the activity objectionable even though the state did not.¹⁷⁴

In *Goldfarb v. Virginia State Bar*,¹⁷⁵ a different kind of state regulatory program appeared to but in fact did not conflict with Sherman Act policy. Regulation of the conduct of lawyers by the State of Virginia included ethical standards established and enforced by the state supreme court.¹⁷⁶ The Fairfax County Bar Association established a fee schedule that lawyers were expected to follow, and facilitated adherence with the threat that failure to comply could subject an attorney to sanctions for violation of the state supreme court-imposed ethical standards. A consumer of legal services sued the county and state bar associations, claiming that the fee schedule was price-fixing, a per se violation of the Sherman Act.¹⁷⁷ The Sherman Act policy prohibiting price-fixing thus appeared to conflict with a state policy of telling lawyers that failure to adhere to the price schedules constituted unethical behavior.

The state, however, did not require conformance to fee schedules; the legislature had "explicitly directed lawyers not 'to be con-

173. See *id.* at 598 (opinion of Stevens, J.). In effect, the Court decided that there was no conflict between a state policy and the Sherman Act, and denied the claim of immunity.

174. Stewart argued in dissent that the fear of concurrent antitrust liability may chill a state's ability to regulate effectively. *Id.* at 627-28 (Stewart, J., dissenting). If his argument is correct, then the state's regulation in and of itself may indicate a state interest in protecting all activity by all regulated firms from federal antitrust enforcement. Stewart's argument is not particularly persuasive, however, both for *Cantor* and in general. State regulation that approves an activity but does not confer immunity from the Sherman Act can still be effective. In fact, the state may be interested in having the Sherman Act apply; it can then reduce its regulatory assessment, leaving the antitrust laws to police certain aspects of the firm's conduct.

175. 421 U.S. 773 (1975).

176. *Id.* at 775-77.

177. *Id.* at 775-78.

trolled' by fee schedules."¹⁷⁸ The fact that the state had "a compelling interest in the practice of professions within their boundaries,"¹⁷⁹ and thus had an interest in applying its policy of regulating some of the activities of the bar, did not mean that a state policy would be furthered by protecting agreements between competing lawyers both to conform to fee schedules and to subject nonconforming lawyers to disciplinary action. As a result, Virginia had no interest in protecting the activity, and the apparent conflict was actually a false conflict.¹⁸⁰

*Hoover v. Ronwin*¹⁸¹ also involves a conflict rendered false by the lack of a state interest. Hoover, an applicant denied admission to the Arizona bar, sued the individual members of the bar's Examination and Admissions Committee, claiming they had conspired to place an artificial limit on the number of lawyers in the state in violation of section 1 of the Sherman Act.¹⁸² The committee argued that its actions were protected by state action immunity, thus raising the spectre of conflict.¹⁸³

Arizona has a policy of requiring a bar examination; the purpose is to identify people who are not minimally competent to practice law and prevent them from practicing in the state. The plaintiff, however, did not claim that Arizona's competence policy was illegal or that the state had a policy of allowing lawyers to make anticompetitive agreements that were not designed to identify minimal competence. He simply alleged an illegal agreement among lawyers to exclude competent potential competitors from the market. Consequently, unless Arizona had an interest in protecting the agreements that Hoover alleged to have taken place, the conflict is false.

Arizona has no interest in protecting agreements among lawyers to exclude competent applicants from practicing law in Arizona. The state did not indicate that its policy allowed the activity and

178. *Id.* at 789.

179. *Id.* at 792.

180. The Supreme Court concluded that the fee schedules were not part of state activity, and thus state action immunity was not granted. *Id.* at 789-90.

181. 466 U.S. 558 (1984).

182. *Id.* at 565.

183. *See id.* at 566. The Supreme Court agreed and barred the suit, *id.* at 582, a result contrary to my contention that the case is a false conflict and that federal law should have been applied.

the citizens of the state would not obviously benefit from such agreements. The state policy of ensuring minimal competence is not frustrated by the application of section 1 of the Sherman Act to agreements among lawyers to hamper competent entry. The fact that the Arizona Supreme Court, rather than the Committee, made the ultimate decision concerning Hoover's admission¹⁸⁴ strongly suggests that Hoover's claim ultimately would have failed, because the Committee did not have the ultimate power to effectuate his asserted result. A substantial likelihood that the plaintiff would not prevail on the merits, however, does not demonstrate that Arizona had any interest in allowing the activity that allegedly violated the Sherman Act, let alone a state interest sufficient to bar the suit altogether.¹⁸⁵

There is no need to reach for conflicts that do not exist. Contrary to the result the majority reached in *Hoover*, state and federal policies could exist side-by-side. Federal law should have been applied.

b. Patrick - false conflict?

*Patrick v. Burget*¹⁸⁶ is a tougher call. In *Patrick*, a doctor claimed that a peer-review process contemplating termination of his hospital privileges was motivated by competing doctors' desire to eliminate him as a competitor, and thus violated sections 1 and 2 of the Sherman Act.¹⁸⁷ At trial, the jury found for the plaintiff, confirming that the federal government had a Sherman Act interest in prohibiting the activity.¹⁸⁸ The state, however, had a policy of requiring peer-review activities; hospitals in Oregon were "under

184. *Id.* at 561 & n.2.

185. The majority concluded that all acts of the Committee were state acts, and thus the acts alleged by the plaintiff were protected by state action. *Id.* at 572-574. The suit was dismissed. The majority did not find, however, that Arizona actually had a policy of allowing lawyers to make the agreements claimed by the plaintiff. *Id.* at 574. Justice Stevens argued in dissent that the activities were not state action and were not eligible for immunity. *Id.* at 593-96 (Stevens, J., dissenting). For a discussion of why *Hoover* might have been dismissed properly on summary judgment even if state action immunity were not available, see Lopatka, *supra* note 5, at 1014-16.

186. 108 S. Ct. 1658 (1988).

187. *Id.* at 1660-61.

188. *Id.* at 1661.

a statutory obligation to establish peer-review procedures."¹⁸⁹ Consequently, the defendants, also doctors, claimed that Oregon's policy requiring peer review transformed their activity into state action that was exempt from antitrust liability, thus raising a conflict between state and federal policies.¹⁹⁰

Did Oregon have an interest in protecting the defendants' activity from the Sherman Act? The mandatory peer-review policy certainly did not compel or condone anticompetitive activity that conflicted with Sherman Act policy, and peer review can be effectively implemented without violating the Sherman Act. The defendants' efforts to terminate the plaintiff's hospital privileges seem to fall outside the scope of the state's protective policy because they were anticompetitively motivated rather than legitimate peer-review activity. The state was interested in protecting its policy of mandatory peer review, but the interest may have extended only to protecting those peer-review activities that did not run afoul of the Sherman Act.

On the other hand, as the defendants argued, "any threat of antitrust liability will prevent physicians from participating openly and actively in peer-review proceedings."¹⁹¹ Congress ultimately recognized this problem and took steps to correct it.¹⁹² Consequently, it is hard to dismiss the argument that protecting virtually all peer-review related activities from the Sherman Act would significantly further Oregon's policy of mandatory peer review. Without the protection, no peer-review program would be fully effective, and benefits from Oregon's policy of mandatory meaningful peer review would be undermined.¹⁹³ A policy of protecting all

189. *Id.* at 1663.

190. *Id.* at 1662. The Supreme Court withheld immunity, finding that the *Midcal* active supervision requirement was not met. *Id.* at 1662-63.

191. *Id.* at 1665.

192. See 42 U.S.C. §§ 11101-11152 (Supp. IV 1986). Congress specifically found that antitrust liability "unreasonably discourages physicians from participating in effective professional peer review," and removed all damages liability for peer review acts and reporting of information, as long as the acts were done in a reasonable belief that the actions were in furtherance of quality health care. *Id.* §§ 11101, 11111(a)(1)-(2), 11112. See *Patrick*, 108 S. Ct. at 1665 n.8.

193. This analysis may seem to reach to find a conflict in a manner contrary to Currie's admonition to use restraint and moderation in interpreting state policies and interests. (Reaching for conflict is also inconsistent with my criticism of the result in *Hoover*. See text accompanying notes 183-86). Possible state interests should not be ignored at the initial

peer-review related activities, however, apparently conflicts with the Sherman Act policy of preventing anticompetitive activity among competitors regardless of whether it is connected to peer-review.

C. Resolving Apparent Conflicts: Moderate and Restrained Reassessments of Federal and State Policy

In many state action cases, an initial assessment suggests both a federal interest in preventing an activity and a state interest in protecting the activity from Sherman Act liability. In such cases, an apparent, or a *prima facie*¹⁹⁴ conflict between federal and state policy exists, and the Currie interest analysis calls for reconsideration of the relevant policies and interests to determine whether a more moderate and restrained interpretation would avoid the conflict. Such a reconsideration, especially concerning federal policy, may indicate that some *prima facie* conflicts are in fact false conflicts.

assessment stage, however; a restrained and moderate initial assessment of the state interest may simply result in assuming that the state policy did not conflict with the federal policy. An initial finding that Oregon has no interest might interfere needlessly with Oregon's peer-review system if upon reassessment federal interest is lacking. *See supra* note 124. Unless, upon reassessment, a federal interest is not present, the Oregon policy will not protect the defendants regardless of whether the case is viewed as a false conflict, due to the absence of state interest, or a true conflict. Either way, federal law will be applied.

What makes *Patrick* arguably different from *Cantor*, *Goldfarb* and *Hoover* is that the fear of treble damage antitrust liability may seriously undermine the state policy of evaluations by private party peers. In *Goldfarb* and *Cantor*, fear of liability did not frustrate any state regulatory policy. In *Hoover*, application of the Sherman Act would not hamper the state's efforts to establish standards for and test for minimum competence for lawyers. If the committee was subject to antitrust liability, perhaps attorneys would be fearful of serving on the committee; but the uniform minimum standard for competence, dictated by the state, is far different from the case-by-case nature of peer review. The state, which made the ultimate decisions regarding competence and how to test for it, *Hoover v. Ronwin*, 466 U.S. 558, 561 (1984), could hire its own employees instead of using a committee of lawyers, and could implement the identical procedures without any fear. By contrast, *Patrick* involved a state policy that required private parties to evaluate each other. Peer review could perhaps be accomplished with reviews by noncompeting doctors (thus reducing antitrust concerns), or by hiring doctors whose sole function would be peer review, but neither of these alternatives would implement an actual "peer" review.

194. A *prima facie* conflict is established by evidence sufficient to support a finding that the state and federal government have an interest in applying their policies to the disputed activity. It does not mean anything different from what Currie adherents describe to be apparent conflicts or apparent true conflicts. *See supra* note 122.

The reassessment does not involve ignoring the federal interest, or assuming that the federal policy is one of deference to a conflicting state policy, as *Parker* and its progeny appear to have done. Sherman Act policies, properly defined, however, do not prohibit all inefficient or anticompetitive activity. Consequently, a moderate and restrained view of the federal policy narrows the area of federal-state conflict. In addition, a state policy that provides for supervision of the conflicting activity in a manner that accommodates the antitrust concerns with the activity may not be in actual conflict with the Sherman Act. The federal antitrust interest in prohibiting certain activities may also be narrower in some cases than Sherman Act policy alone would suggest, because other federal policies that supplement Sherman Act policies must be considered.

1. *The scope of Sherman Act policy*

A comprehensive, "manifest destiny" interpretation of Sherman Act policy could suggest that virtually all state regulation conflicts with the Sherman Act. If Sherman Act policy really "establish[es] a regime of competition as the fundamental principle governing commerce in this country,"¹⁹⁵ virtually all state regulation is inconsistent, because by definition state regulation tampers with the market process.¹⁹⁶ Similarly, enrollees of the efficiency-only school may argue that if the sole purpose of the Sherman Act is to promote efficiency, state regulations conflict with the Act and should be preempted unless they enhance efficiency.¹⁹⁷

195. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398 (1978) (citing *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 229-35 (1948)); see also *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. . . . [T]he freedom guaranteed each and every business, no matter how small, is the freedom to compete"); *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 61 (1985) ("[T]he goal of the antitrust laws [is] unfettered competition in the marketplace.").

196. See, e.g., Easterbrook, *supra* note 71, at 24-25; Hovenkamp & Mackerron, *supra* note 64, at 721; Wiley, *supra* note 6, at 745. This sort of analysis leads to the argument that without the federalism interpretation of the Sherman Act and state action immunity virtually all state regulation would be preempted. See, e.g., Jorde, *supra* note 71, at 227-28.

197. See Cirace, *supra* note 6, at 486 (proposing efficiency as part of a preemption test); Garland, *supra* note 96, at 508-12 (criticizing the approach); Spitzer, *supra* note 65, at 1318-21 (discussing, rather than advocating, such an approach).

These global policy statements exaggerate the true extent of federal antitrust policy. If implemented, they would apply a maximum Sherman Act policy to state regulations, a policy stronger than the policy currently applied to nonregulated activity. Adopting such strong, expansionary views of Sherman Act policies when reassessing whether federal policies and interests are in true conflict with state policies and interests, however, would result in preempting state laws that do not irreconcilably conflict with the Sherman Act. For that reason, the broad policy pronouncements are particularly misleading in the state action area. A moderate and restrained view of Sherman Act policy is far less extreme than either of these views and can coexist with many forms of state regulation.

a. The Sherman Act does not prohibit all anticompetitive or inefficient activity

A restrained and moderate evaluation of the scope of Sherman Act policy must not ignore the methods chosen to implement the Act's purposes. Although the antitrust laws implicitly assume that unconstrained firms will try to increase their wealth in ways that are harmful to society, the Sherman Act proscription of methods that firms might employ is actually quite restrained. The Act itself represents an accommodation; it does not proscribe all anticompetitive or inefficient activity. In addition, the Act is behaviorally oriented; it is directed toward elimination of activities rather than toward results.

The result of attempting to prohibit all inefficient or anticompetitive activity probably would be to deter considerable beneficial activity, and in any event the Sherman Act does not attempt to do so. Instead, the efficiency and distributive goals of the Sherman Act are promoted by prohibiting a more limited number of activities. The Act facilitates but does not mandate competition or a competitive market. Firms may refuse to compete with competitors as long as they do not agree to do so; they are free, for example, to broadly announce their pricing policies, publicly decry price competition, and identically imitate the behavior of other firms in their industry. Similarly, firms are not forbidden from engaging in inefficient activity, squandering resources, or pricing in a welfare-harmful monopolistic manner. Section 1 only prohibits agreements in

restraint of trade, not all inefficient acts, all anticompetitive acts, or all restraints of trade. Similarly, section 2 does not prohibit all monopoly power or all inefficient monopoly behavior. Firms are discouraged from obtaining market power, but possession is not a crime. Monopoly (or above-cost) pricing, which usually results in both welfare losses and distribution away from purchasers if done by one or several firms, is not prohibited by either section 1 or section 2 of the Sherman Act.

The pro-consumer distributional purpose of the Act is also limited in scope. Many activities that enable firms to extract surplus from consumers or that result in a distribution significantly at variance with what a competitive market would yield are not prohibited. The underlying policy is to prevent some, but not all, firm activity that facilitates the extraction of surplus from consumers.¹⁹⁸

b. The Sherman Act does not contain a laissez-faire or a deregulation policy

Although the antitrust laws generally reflect a pro-competition policy, they are not designed to implement and do not implement a noninterventionist, deregulatory policy that would prohibit all state regulations not given special immunity.¹⁹⁹ The Sherman Act obviously is itself a regulation, and thus imposes an interventionist, nonlaissez-faire policy on the market. The Act is a well-recognized paradox; it seeks to facilitate a more competitive environment by market interference that tampers with an open and unrestricted market.

198. The Sherman Act also promotes the small firm autonomy value in a less than sweeping manner. Many activities that inevitably place smaller, independent businesses at a disadvantage are perfectly legal. For example, a firm that expands internally or integrates to achieve the lower costs that result from economies of scale, management, mass reserves and the like will hurt the smaller independents, but the Act does not invariably make such activity illegal.

199. Some portions of the legislative history of the Sherman Act suggest that state regulation of firms' activities was anticipated. See *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 632-35 (1976) (Stewart, J., dissenting) ("Far from demonstrating an intent to pre-empt state laws aimed at preventing or controlling combinations or monopolies, the legislative debates show that Congress' goal was to supplement such state efforts" *Id.* at 633.). Although the legislative history does not reveal a congressional desire to leave state regulation free from preemption, see *Werden & Balmer*, *supra* note 6, at 46-56, it does suggest that Congress did not believe that a state's tampering with the market was inevitably contrary to Sherman Act purposes. See also *Garland*, *supra* note 96, at 511.

In addition, the history of the Sherman Act does not suggest that it condemns state or local government regulation simply because that regulation tampers with the market. The problems that prompted the enactment of the Sherman Act were not related to inefficient or anticompetitive state regulations of the market.²⁰⁰ During the period when expansions of congressional power expanded the reach of the Sherman Act, thereby creating the state action problem,²⁰¹ federal as well as state economic regulation proliferated,²⁰² an indication of a lack of federal hostility towards governmental regulatory tampering with markets.²⁰³ As the Court recognized in *Parker*, the language of the Act is not geared toward elimination of large quantities of state regulation.²⁰⁴

The Act thus does not reflect a federal mandate for a nonregulated economic environment. Its more limited focus—prevention of industry domination through competitor agreements or the actions of a single firm—is on prohibition of industry self-regulation²⁰⁵ rather than on total deregulation. The Supreme Court has held that Sherman Act policies are not broad enough to preempt state

200. In fact, one of the reasons for enactment was the belief that states alone could not effectively control the powerful trusts existing at the time. See Easterbrook, *supra* note 71, at 41.

201. See *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 635-37 (1976) (Stewart, J., dissenting); Easterbrook, *supra* note 71, at 40-41; Hovenkamp & Mackerron, *supra* note 64, at 725-28; Spitzer, *supra* note 65, at 1295; Werden & Balmer, *supra* note 6, at 56-58.

202. See Kennedy, *supra* note 72, at 33 n.16; Wiley, *supra* note 6, at 718-19.

203. But see generally Wiley, *supra* note 6. Professor Wiley suggests that relatively recent federal limitations on regulation and Supreme Court decisions limiting state action immunity reflect an increasing societal hostility towards governmental regulation. *Id.* at 715-28.

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

205. See, e.g., *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986) (refusing to allow dentists to counteract possible inadequate treatment choices by patients by agreeing not to submit patient X-rays to insurance companies); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978) (refusing to allow the Society to agree not to compete on price as a method of ensuring safe construction); *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972) ("certain private citizens or groups" are not allowed to foreclose the ability of others the freedom to compete); *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941) (disallowing industry agreements designed to correct possible unfair trade practices and tortious activities and indicating correction must be left to state law); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (indicating that activity formerly regulated by government is per se illegal when no longer regulated; an industry is not allowed to make anticompetitive agreements to self-regulate to correct a market failure, regardless of the efficiency of the activity).

regulations simply because they may impose an anticompetitive result.²⁰⁶ Rather than conflicting in every case with the Sherman Act, state-imposed economic regulation can be a nonconflicting method of dealing with market imperfections that is vastly preferable to industry self-regulation through agreement.²⁰⁷

2. A moderate and restrained Sherman Act policy

Because the Sherman Act neither contains antigovernmental regulation values nor precludes all inefficient or anticompetitive activity, a state regulation might inefficiently interfere with market rivalry but not be in conflict with Sherman Act policy. Regulations should be considered along with all other activity that possibly falls within the Sherman Act policy proscriptions. Regulatory interference with market rivalry conflicts with Sherman Act policy when it is accomplished by requiring, encouraging, or allowing firms to make agreements that will enhance their collective power; by enforcing such agreements; or by enabling or allowing a single firm or group of firms to obtain or maintain unconstrained power over price and output.²⁰⁸

Conversely, regulations that do not impose or enforce agreements in restraint of trade and do not confer unconstrained market power do not conflict with the Sherman Act, even if they are inefficient or restrain market rivalry.²⁰⁹ Such regulations are possi-

206. See, e.g., *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982); *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 133 (1978).

207. See, e.g., *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982) (indicating that maximum medical prices set by a state agency are preferable to a system that allows the competitors to set prices themselves).

208. See Garland, *supra* note 96, at 506 (regulations that "delegate to private parties the power to restrain competition" conflict with the Sherman Act, because the restraints are "the particular evil Congress intended the Sherman Act to prevent."). See also Conant, *supra* note 6, at 267; Werden & Balmer, *supra* note 6, at 63. (Neither of the latter two articles, however, proposes to limit the area of conflict to the extent suggested by the moderate and restrained interpretation discussed in this section.)

209. For example, a state might pass a regulation that requires the price for a product to be set at a specific level. The legislation removes all price competition, but it does not require or encourage any firm to violate the antitrust laws, because the legislation requires no agreement, does not entitle producers to dictate resale prices to resellers, and does not give any firm unconstrained monopoly power. The effect of the regulation is indistinguishable from the effect of an adhered-to horizontal agreement among competitors to charge that price, but all activities that yield a result identical to the result of a horizontal agreement

bly inefficient but not illegal activity, analogous to inefficient private firm activity that falls beyond the scope of the Act because it does not amount to an agreement in restraint of trade or monopolization.²¹⁰

This restrained interpretation protects federalism values without adopting them as part of Sherman Act policy. A state is allowed to regulate in any manner it chooses—including eliminating competition entirely—as long as it does not permit firms to collectively determine prices, output, quality and other forms of competition and does not provide firms with market power and the unrestrained ability to exercise it. Health, safety and competence regulations established by the state, rather than by any industry agreement, for example, will not be in conflict with the Sherman Act.²¹¹

a. The problem of capture

This restrained and moderate interpretation will not satisfy those interested in eliminating what they perceive to be inefficient, undesirable state regulations that tamper with the market and seem to have been enacted solely to benefit producers. The inter-

are not contrary to Sherman Act values. The theoretical perfectly competitive market in equilibrium, for example, to some the nirvana of antitrust enforcement, would perform in a manner indistinguishable from a horizontal agreement on price by all market participants. In fact, any set of prices charged by firms in a market yields a result indistinguishable from adherence to a horizontal agreement among the participants in the industry that they will charge those prices. Under a restrained and moderate view, the state price regulation, which may or may not be inefficient, would not clearly conflict with federal policy, because Sherman Act policy is not to prevent all activities that might yield a result similar to the result an agreement might yield. In contrast, a statute that permits or requires firms in an industry to agree on a price to charge or to set resale prices, or that enforces those arrangements, probably would be in conflict with section 1 of the Sherman Act. *But see Slater, supra* note 18, at 78 ("The state action facilitates an anticompetitive effect which could not otherwise have taken place in the private sector without an actual conspiracy. Although the technical elements of a Sherman Act violation may not be present, the Sherman Act policy in favor of competition is certainly breached.").

210. The policy identified in this section is not so far from the policy the Supreme Court announced in *Fisher*. See *supra* text accompanying notes 51-55. It is also not so far from the language, if not the result and current interpretation, of *Parker*; a state does not violate the Sherman Act just by regulating, but a state may not authorize Sherman Act violations.

211. It is conceivable that in a rare case a state may enact a licensing regulation that gives a firm or a group of firms an unrestrained power to control price and output. In that case, the regulation may allow monopolization acts in conflict with Section 2 of the Sherman Act. See Conant, *supra* note 6, at 266; Werden & Balmer, *supra* note 6, at 64-68.

pretation only deprives the states of regulatory methods that blatantly conflict with the Sherman Act and leaves states with considerable latitude to directly regulate firm behavior. The federalism camp may be somewhat mollified by the result, but it may place a large furrow in efficiency and deregulation brows.

Because states will be free to regulate firm behavior, firms will continue to be tempted to manipulate that regulatory power for their own benefit. As Professor John Wiley has emphasized recently, economic theory and history indicate that private industry may be able to successfully induce state and local (as well as federal) governments to adopt regulations that provide producers with monopoly profits unavailable in a competitive market.²¹² Abandoning state action immunity and antitrust federalism in favor of an interest analysis and preemption of truly conflicting state laws can eliminate "captured" regulations that enable firms to make agreements or that give a firm unconstrained market power, but it will not prevent other capture-oriented results. Inefficient direct price and output regulation or regulatory structures conducive to long-run manipulation and susceptible to rubber stamp approval of industry "suggestions" may persist.²¹³

Consequently, the restrained and moderate interpretation of Sherman Act policy will not adequately combat what Wiley argues is "the real problem with state and local regulation—capture."²¹⁴ To correct the capture problem, Wiley has proposed that the Sherman Act should be interpreted to contain an anticapture value, and that the value should be implemented by preempting all state regulations that interfere with market rivalry (virtually all regulations), are enacted due to the "decisive efforts of producers," and are not demonstrated to respond to a "substantial market inefficiency."²¹⁵

212. Wiley, *supra* note 6.

213. Agreed-upon efforts by the industry and dominant single firm activities that induce the government to adopt such potentially harmful regulations are not violations of the Sherman Act. See *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). Firms are thus free to propose and to aggressively promote these regulatory proposals, although consumers are just as free to oppose them or to propose their own regulations.

214. Wiley, *supra* note 6, at 733. See also Wiley, *supra* note 96.

215. Wiley, *supra* note 6, at 743.

The proposal, which has been characterized as "radical,"²¹⁶ and its harms and merits, have been discussed thoroughly in the literature.²¹⁷ Capture may in fact be a real problem, and Wiley's proposed policy may be effective and advisable for dealing with it, but despite the disillusionment with regulation in some circles, federal anticapture policy is not obviously embedded in federal antitrust laws. The Sherman Act is designed to deal with behavior such as agreements and monopolization, rather than with regulations that do not correct for market failure and have the effect of benefitting producers. The firm behavior that Wiley finds objectionable—the activity of capturing legislators and regulators—does not violate the Act.²¹⁸ Federal deregulation has not been accomplished by the judiciary or through judicial conclusions that federal antitrust laws or other regulations called for deregulation. To the extent deregulation has taken place, it has been implemented on an industry-by-industry basis, at a painstaking pace, through the political process.²¹⁹ The federal deregulation movement did not create within the Sherman Act a federal policy calling for immediate and complete deregulation of all industries in which the producers supported regulations that cannot be justified as correcting a substantial market failure.

Consequently, although more moderate and restrained than interpretations that would find the Sherman Act in true conflict with all state regulation or all inefficient state regulation, the proposed anticapture interpretation still expands Sherman Act policy far beyond a minimum or necessary scope. The interpretation is pre-

216. Page, *supra* note 5, at 619. Wiley referred to aspects of his proposal as approaching "antitrust imperialism." Wiley, *supra* note 6, at 767. See also Gifford, *supra* note 68, at 1303 (terming the proposal "extreme").

217. See, e.g., Garland, *Antitrust and Federalism: A Response to Professor Wiley*, 96 YALE L.J. 1291, 1293 (1987); Garland, *supra* note 96; Gifford, *supra* note 68; Page, *Capture, Clear Articulation, and Legitimacy: A Reply to Professor Wiley*, 61 S. CAL. L. REV. 1343 (1988); Page, *supra* note 5; Spitzer, *supra* note 65; Wiley, *A Capture Theory of Antitrust Federalism: Reply to Professors Page and Spitzer*, 61 S. CAL. L. REV. 1327 (1988) [hereinafter Wiley, *Capture*]; Wiley, *The Berkeley Rent Control Case: Treating Victims as Villains*, 1986 SUP. CT. REV. 157 [hereinafter Wiley, *Berkeley*]; Wiley, *supra* note 6; Wiley, *supra* note 96.

218. See *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

219. See M. DERTHICK & P. QUIRK, *THE POLITICS OF DEREGULATION* (1985); S. BREYER, *REGULATION AND ITS REFORM* 317-40 (1982).

mised on the idea that extensive state and local economic regulation is not legitimate and should be preempted; the burden is placed on the state to justify, whenever producers decisively supported the regulations, that the regulations are correcting for market failure.²²⁰ The Sherman Act does not subject private firm behavior that does not involve agreements or monopolization to such a burden. Yet a regulation that similarly does not solicit, compel, or condone agreements or monopolization would be subjected to that burden if it were enacted due to legal efforts by producers.²²¹ Adoption of such a strong view of Sherman Act policy would impair state autonomy values significantly.²²²

The bias in an interest analysis, however, should be toward avoiding nullification of state policies unless conflict is unavoidable and irreconcilable. Currie's plan for conflict avoidance counsels specifically against pushing the interpretation of an apparently conflicting policy to its constitutional or ultimate possible limit.²²³ By asserting that a strong deregulatory agenda for inefficient regulation is part of federal Sherman Act policy, the anticapture interpretation seeks rather than avoids conflict. Until Congress more clearly articulates a deregulation agenda aimed at inefficient, captured state and local regulations,²²⁴ such a policy should not be

220. Wiley, *supra* note 6, at 763.

221. *Id.* at 764.

222. See Garland, *supra* note 96, at 516 n.181; Wiley, *supra* note 6, at 740-41; see also Page, *supra* note 5.

223. See Currie, *supra* note 17, at 757:

[I]t may be clear that if the forum were to assert an interest in the application of its policy, it would be constitutionally justified in doing so. But no principle dictates that a state exploit every possible conflict, or exert to the outermost limits its constitutional power. On the contrary, to assert a conflict between the interests of the forum and the foreign state is a serious matter; the mere fact that a suggested broad conception of a local interest will create conflict with that of a foreign state is a sound reason why the conception should be re-examined, with a view to a more moderate and restrained interpretation both of the policy and of the circumstances in which it must be applied to effectuate the forum's legitimate purpose.

Id. at 757 (emphasis in original).

224. See Garland, *supra* note 217, at 1293. The issue is not whether Congress could or should adopt such a policy; Congress has the power, and the adoption of such a policy would be consistent with antitrust values. Such an interpretation, however, is not moderate and restrained or an inevitable conclusion concerning federal policy and is not necessary to resolve the currently existing conflicts. See also Gifford, *supra* note 68, who argues that the

assumed to be part of Sherman Act policy, and should not be used to preempt state regulation. For purposes of identifying conflicts between state and federal policies, the federal interest should be only coextensive with the activities the Sherman Act prohibits. This more moderate and restrained interpretation itself may further some anticapture values.²²⁵

current state action approach is unworkable, *id.* at 1286-87, and that federal policy concerning state regulation should be clarified by congressional action, *id.* at 1294. Gifford proposes federal legislation that would allow state and local regulations to depart from Sherman Act policies only if the public has adequate information concerning the pluses and minuses of such regulation, and only so long as the anticompetitive effects of any such regulation do not cross state lines. *Id.* at 1294-99. Gifford's proposed law, a federally articulated policy containing Wiley's capture test, or any additional federal legislation would of course facilitate the determination of the federal interest. This Article deals with the conflict between state regulations and federal policy as it currently exists.

225. Wiley seems to present a choice between adopting the anticapture proposal or returning to the thrilling days of yesteryear, i.e. an approach to state regulation that is totally deferential to state autonomy values. Wiley, *supra* note 6, at 740-41. The choice is not necessary. Abandoning the "principles of federalism" approach, and substituting an interest analysis that preempts state regulations that permit anticompetitive agreements or confer unconstrained power, accommodates a restrained and moderate Sherman Act policy, and to some extent accommodates the anticapture value. If firms convince a state to adopt "captured" regulations that permit anticompetitive agreements or confer unconstrained power, the regulations will be preempted. Although Wiley argues that the inevitable result of that preemption will only be more direct harmful regulation, producers may have more difficulty marshalling the power needed to convince a state to adopt more direct and comprehensive regulations that benefit the producers. See Easterbrook, *supra* note 71, at 33. Producers that were able to agree to seek regulation enabling them to make agreements may splinter into less powerful pieces when trying to reach a consensus on what the direct regulation should entail. The result may be that no consensus will emerge. As well, the all-encompassing nature of more direct forms of regulation may make it far more expensive to implement and, therefore, unattractive to legislatures. Further, as Spitzer points out, see *supra* note 65, at 1303-09, many different groups with different interests can attempt to influence the regulatory process. Consumers, who may exercise their own power, can be expected to oppose any regulation that is contrary to their interests.

Nevertheless, rather than frustrating capture, the limited accommodation may simply result in more direct state regulation that is less efficient because it is less flexible. Cartels fall apart more rapidly than direct regulation. It is hard to predict whether the net result of the limited frustration will be beneficial or harmful. See Easterbrook, *supra* note 71, at 32. Such a result is not inconsistent with the Sherman Act. The Act, rather than imposing an iron-clad rule concerning competition and efficiency, takes a more ambivalent approach: firms are not allowed to agree even if that would be the most efficient solution to a problem, but they are not forbidden from parallel behavior effectuating a result indistinguishable from a highly anticompetitive agreement; firms are strongly discouraged from obtaining market power because exercising power is harmful, but they are allowed to exploit any legally obtained power at the expense of consumers and society; firms are prohibited per se from

b. False conflicts - Fisher and Rice

A moderate and restrained reassessment of federal policy renders many *prima facie* conflicts false, because the reassessment indicates no true federal interest in preventing the regulatory activity. *Fisher v. City of Berkeley*²²⁶ illustrates such a false conflict.

In *Fisher*, landlords asserted that a Berkeley, California rent-control ordinance was in conflict with sections 1 and 2 of the Sherman Act. By placing a ceiling on rents, the ordinances eliminated some aspects of a competitive rental housing market. If all landlords in the city agreed to impose such a price ceiling, for example, their agreement probably would be a *per se* violation of the Sherman Act.²²⁷ The case thus involved an apparent conflict; the city had an interest in protecting its regulation and the federal government had an interest in protecting competition by prohibiting the regulation.

The United States Supreme Court, however, affirmed a California Supreme Court decision that the ordinance did not conflict with the Sherman Act.²²⁸ The ordinance did not require acts that violated the Sherman Act, because it did not require or permit landlords to agree with each other concerning rental rates or output, and no actual agreement existed between each landlord and the city. Nor did the ordinance compel or sanction agreements among consumers of rental housing, or provide anyone with unconstrained market power.²²⁹ Consequently, although the ordinance

resale price maintenance, but are not prohibited from inefficiently vertically integrating and selling their own product at whatever price they choose.

226. 475 U.S. 260, 263 (1986).

227. Price-fixing of maximum rates is generally *per se* illegal. See, e.g., *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

228. *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 693 P.2d 261, 209 Cal. Rptr. 682 (1984), *aff'd on other grounds*, 475 U.S. 260 (1986). The California Supreme Court used a test derived from the commerce clause to determine that no conflict existed between the Berkeley ordinance and the Sherman Act. 475 U.S. at 264.

229. The Supreme Court skipped over the possibility that the ordinance itself was an agreement among lessees of rental property to not pay more than a certain amount for each rental unit. See Wiley, *Berkeley*, *supra* note 217. Collusively acquired monopsony power (i.e., purchasing power, rather than selling power) is potentially just as harmful as collusively acquired monopoly power; collusive acquisition of monopsony power is therefore generally equally illegal under the Sherman Act. See, e.g., *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 (1948). Consumers had considerable input into the rental

distorted or eliminated certain aspects of a competitive rental market environment,²³⁰ it neither required, encouraged, or enforced agreements by the producers or consumers in restraint of trade, nor created a monopoly.²³¹ Because it did not require or promote a violation, it was not in true conflict with the Sherman Act. Federal interest in prohibiting the regulation was lacking.

Employing a moderate and restrained view of both federal and state policy, *Rice v. Norman Williams Co.*²³² can also be viewed as posing a false conflict in favor of state law. In *Rice*, the enforcement of a California statute that prohibited imports of liquor not consigned to a licensed importer or authorized by the distiller was challenged by state licensed but unauthorized liquor importers. Because the statute enforced distillers' decisions to restrain competition for the importation of their brands into California, the nonauthorized importers argued that the law gave "brand owners the unfettered power to restrain competition,"²³³ a per se violation of the Sherman Act,²³⁴ and that therefore the law should be preempted.

rate process, *Fisher*, 475 U.S. at 269, but the ordinance did not enforce a set of rental prices agreed upon by consumers who otherwise might compete with each other in a bidding war for a particular rental unit. Similarly, the ordinance did not give monopsony power to any renter or group of renters. To the extent that the law disallowed increases in rental rates, it forced a short term distributional shift towards those actually able to rent. The decision may reflect a conclusion that ultimate consumers or tenants cannot commit agreements in restraint of trade, although the Court makes no pronouncement to this effect. See Wiley, *Berkeley*, *supra* note 217, at 163-66 (arguing that *Fisher* could be interpreted as a populist-based, nonefficiency, pro-consumer distribution promoting decision).

230. By taking away a certain range of price increases, the regulation denies landlords the opportunity to compete by offering higher rents. The regulation may also have the effect of fixing rates at the maximum level. Conceivably, rent control discourages new entry into the market and hastens exit, thus giving remaining landlords a joint monopoly. Given the regulation, however, no landlord or group is given an increase that can be exploited. The regulation is designed to curb exploitation of the power they already have.

231. *Fisher*, 475 U.S. at 269-70.

232. 458 U.S. 654, 656-57 (1982). The law was designed to preserve the integrity of the importing manufacturers distribution systems. The law prohibited California sellers of imported liquor from obtaining supplies of various imported brands, not from the manufacturer's distribution system but from wholesalers in other states. *Id.* at 657.

233. *Id.* at 658 (quoting *Norman Williams Co. v. Rice*, 108 Cal. App. 3d 348, 356, 166 Cal. Rptr. 563, 569 (1980), *rev'd*, 458 U.S. 654 (1982)).

234. *Id.* at 659.

The California statute, however, did not require acts that inevitably conflicted with Sherman Act policy.²³⁵ The regulation enabled the owners to designate who could import, and thus who could sell, their brands. Such authorizations by the owners did not inevitably impose illegal restraints. The effect of the authorizations would depend on whom the owners authorized and where authorized importers were located. In addition, vertical nonprice restraints are not per se antitrust offenses; even if the designations resulted in exclusive importer territories, for example, such a practice might be reasonable and not illegal.²³⁶ Accordingly, although the regulation permitted distillers to distort the functioning of the import market, the federal government did not have an interest in prohibiting all activities enforced by the regulation.

Similarly, California's policy could be achieved without protection of activity by the brand owners that violated the Sherman Act. The purpose of the regulation was to give distillers the opportunity to prevent California wholesalers from importing the distillers' product by obtaining supplies from Oklahoma wholesalers.²³⁷ The regulation could serve that purpose without protecting those distillers who used the authorization provisions to impose anticompetitive restrictions, such as territorial allocations, that would violate the Sherman Act.²³⁸

As a result, there was no true conflict between state and federal policy and preemption of the state law was unnecessary. The federal interest in preventing some activities that the owners might undertake did not extend to a federal interest in prohibiting the statute in its entirety, and California's interest in protecting its regulation did not extend to protection of activities that would violate the Sherman Act. State and federal policies could coexist; the statute remained effective, but state policy would not rescue au-

235. *Id.* at 661-62.

236. *Id.* at 662. Vertical agreements other than resale price maintenance are subjected to rule of reason analysis, and will be upheld as reasonable unless demonstrated to actually cause anticompetitive effects. *See, e.g., Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

237. *Rice*, 458 U.S. at 657.

238. *Id.* at 662. The Supreme Court's conclusion in *Rice* is thus consistent with a restrained and moderate interpretation of the Sherman Act.

thorization activities by distillers that violated Sherman Act policy.

3. State regulations that provide protections against anticompetitive activity

A reassessment of *prima facie* or apparent conflicts may reveal that a state regulates an anticompetitive activity in a way that provides antitrust protection sufficient to satisfy the federal interest. When reconsideration discloses that state supervision of the activity effectively precludes possible antitrust harms, interfering with the state regulatory system would not further Sherman Act policies. In such cases, a false conflict exists due to the lack of a federal interest.

a. Adequate supervision

A state regulation such as the one in *Parker v. Brown*²³⁹ that allows competitors to agree on prices and outputs creates an apparent conflict with Sherman Act policy. If the state also regulates the prices and output of these firms in a manner that eliminates the welfare harms and pro-producer distributions that might result from the agreements, however, Sherman Act policy is not facilitated by invalidating the agreements or the regulation. The Sherman Act prohibitions are based on the assumption that firms with market power will harmfully exploit the power. If state regulation removes all opportunities to exploit, compliance with the Sherman Act creates a false conflict. The state supervision negates the federal interest in prohibiting the activity.

Accordingly, interest analysis accommodates state regulatory needs, without implying federalism values, by allowing a state to adopt a policy of shielding activities from the Sherman Act. A state interested in doing so must satisfy federal concerns by enacting a regulatory structure that ameliorates the antitrust harms from the activity that ordinarily would be prevented by application of the Sherman Act. A state that comprehensively regulates public utilities, for example, does not do so in true conflict with the Sherman Act, as long as the state regulations prohibit a utility from

239. 317 U.S. 341 (1943).

reducing output and service quality and from extracting from consumers more revenue than what would be sufficient to earn a competitive rate of return.²⁴⁰ Although the regulation might raise an apparent conflict, because entry protection and grants of monopoly are not uncommon aspects of regulation of a natural monopoly market,²⁴¹ the conflict is in fact false.

The examination of whether the antitrust harms have been ameliorated by the full extent of the state's regulatory policy must focus on whether the regulatory system protects against the antitrust harms from the activity that raises the apparent conflict. And the examination should be strict. The *quid pro quo* of a restrained and moderate interpretation of the Sherman Act is that the remaining Sherman Act policies must not be nullified; thus the examination should require that the state regulations protect the federal values and render application of the Act superfluous. If state regulation confers entry protection or monopoly power to a firm, or allows competitors to make agreements concerning various aspects of competition, and fails to protect consumers and society in general from extraction of monopoly prices and imposition of welfare losses by the beneficiaries of such regulations, the regulations conferring the power are in true conflict and should be preempted.

Consequently, the federal interest is not satisfied simply by the fact of oversight regulatory authority, by extensive regulation or by a determination that the activity in question is in the public interest.²⁴² Oversight authority does not eliminate antitrust concerns; extensive regulation may or may not provide protection, depending on the regulatory structure adopted by the state. The public interest standard may ignore or understate possible antitrust harms from an activity,²⁴³ such a policy conflicts with the Sherman Act,

240. Several commentators have suggested that such regulations do not conflict with the Sherman Act. See, e.g., Conant, *supra* note 6, at 265; Werden & Balmer, *supra* note 6, at 63. Many academics believe, however, that comprehensive price and output regulation of natural monopolies is inadvisable. See, e.g., Demsetz, *Why Regulate Utilities?*, 11 J. L. AND ECON. 55 (1968); see also S. BREYER, REGULATION AND ITS REFORM 15-19, 156-83 (1982).

241. See S. BREYER, *supra* note 240, at 15.

242. Thus the assessment of the state regulation must be considerably different and more strict than the current active supervision requirement for state action immunity. See *infra* text accompanying notes 313-20.

243. See S. BREYER, *supra* note 240, at 71-95.

which dictates that antitrust harms cannot be ignored or discounted.

A showing simply that the conflicting activity is directed toward, or takes place in, an industry characterized by market failure, or that overall the regulation is efficient, similarly does not satisfy the federal antitrust interest. Even in the presence of a natural monopoly or some other form of market failure, inefficient output effects and extraction of wealth from consumers can result from allowing firms to collude or conferring unsupervised market power.²⁴⁴ Despite proof that a regulation is efficient, consumers may be worse off if the activity that conflicts with the Sherman Act is permitted. If so, the state's regulatory scheme does not adequately protect the pro-consumer distribution value of the Sherman Act.²⁴⁵

b. Spillover

A state's supervisory regulation of an industry may satisfy the federal antitrust interest in restraining activity in that state, but the federal interest in preventing the activity may persist if the effects of the state-sanctioned and supervised activity spill over into states that do not have regulations protecting against anticompetitive abuses.²⁴⁶ The federal antitrust interest in preventing

244. Nor is the federal interest satisfied by a showing that state or local level regulation is the optimal level for regulation. *See, e.g.,* Hovenkamp & Mackerron, *supra* note 64, at 765-77. A decision by an optimal regulator to allow firms to agree on prices and output still conflicts with Sherman Act policy unless the optimal regulator's program contains adequate protections.

245. A regulation that enables firms to fix prices might be efficient; the reduction in the resources firms had been using to compete on price might more than offset the welfare losses from the lack of price competition. *See, e.g.,* F. SCHERER, *supra* note 145, at 22. (I was told in economics graduate school that this fact is true in part because "rectangles are usually bigger than triangles.") Consumers might face a higher price than they would if no agreement existed, however. The resource savings is not necessarily passed on in better quality or service, and even if it is, the regulation has removed the consumer's choice of paying a lower price for inferior quality.

246. Many commentators have expressed a concern with the problem of state and local regulations whose effect spills over into other jurisdictions. *See* Gifford, *supra* note 68, at 1296; Hovenkamp & Mackerron, *supra* note 64, at 768-71; Jorde, *supra* note 71, at 253; Lopatka, *supra* note 5, at 945; Posner, *supra* note 64, at 718; *see also* Spitzer, *supra* note 65, at 1320-21. Easterbrook, *supra* note 71, at 45-49, suggests that state regulation should be preempted only if a monopoly overcharge spillover results; otherwise the regulation should be allowed. The federal interest is not satisfied, however, simply by showing that the antitrust harms from an activity remain within state borders. Citizens of a state are entitled to

the activity continues if the in-state supervision does not prevent economically harmful out-of-state effects.²⁴⁷

c. Parker - the federal antitrust interest not satisfied

The California statute challenged in *Parker v. Brown*²⁴⁸ involved regulatory supervision of the price and output agreements authorized by the regulation. The regulation instructed the Director of Agriculture to supervise the program committee activities and the programs established by the committee could not be implemented without the approval of the state Agricultural Prorate Advisory Commission.²⁴⁹ The state also mandated that the instituted programs could not permit the producers to earn "unreasonable profits."²⁵⁰

Antitrust protection, however, was inadequate. The regulation lacked a mechanism that would ensure that the producers, when making agreements concerning prices and output, were not engaging in welfare harmful output reduction. The absence of such a protection is understandable, because the entire purpose of the Depression-era regulatory scheme was to get the industry to restrict

the protections of all federal policies, including those reflected in the Sherman Act and in the supremacy clause of the Constitution. On the other hand, inefficient spillover does not itself indicate a true conflict with the Sherman Act, because not all inefficiency-causing regulations conflict with Sherman Act policies. Some argue that the spillover might be an unconstitutional interference with interstate commerce. See, e.g., Lopatka, *supra* note 5, at 1039.

247. A spillover test that would preempt all state regulations that resulted in inefficiency spillovers (as distinct from overcharge spillovers), but would leave each state free to adopt inefficient market-power-conferring regulation that did not impose the spillovers (thereby promoting federalism values) is not workable. See Easterbrook, *supra* note 71, at 45-49; Jorde, *supra* note 71, at 256; Spitzer, *supra* note 65, at 1321. The test probably would require preemption of all market power-conferring state regulation that is not efficient, because the misallocation of resources resulting from exercises of market power is "a general equilibrium problem, involving the balance of all sectors in the economy." F. SCHERER, *supra* note 145, at 18. The tracing of the ultimate welfare-loss effects of inefficient market-power-conferring regulation would be difficult, but all effects are unlikely to remain within a state. Even when the overcharge is not exported, the resource misallocation is likely to be.

248. 317 U.S. 341 (1943). Pursuant to the regulation, program committees, consisting in part of horizontal competitors, formulated the proration marketing programs that required the producers to conform to quality classifications, prices, and output levels. *Id.*

249. *Id.* at 346.

250. *Id.* *Midcal* suggests that if state supervision had not been present in *Parker*, the California regulation might have been preempted. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 104 (1980). See also Lopatka, *supra* note 5, at 954.

output in the hope that prices would rise and eliminate the Depression.²⁵¹ But because output restriction agreements facilitate output reduction—the exact activity thought to cause economic harm—the state regulation requiring that activity undermined the antitrust concern, despite the state’s “unreasonable profits” ban.

In addition, the California raisins were sold to the world rather than exclusively to California consumers.²⁵² The California supervision could not ameliorate the harms from output reduction and the distributional effects that occurred outside of the state. The federal interest in prohibiting those antitrust harms was not satisfied by the California regulatory policy.

4. Modification of Sherman Act policy by other federal regulation

A state regulation that apparently conflicts with Sherman Act policy does not do so if the state policy is expressly or impliedly approved by another federal regulation.²⁵³ *Parker* exemplifies such a false conflict. At the time of the regulation in *Parker*, the Depression had resulted in a collapse of agricultural prices throughout the Nation. Faith in the market was low. The Agricultural Marketing Agreement Act of 1937, which authorized the Secretary of Agriculture to issue orders limiting the quantity of specified agricultural products, including fruits, reflected a federal policy

251. During the Depression, it was thought that encouraging collusion among firms might raise prices, and that the country might be able to cartelize itself out of the Depression. It is now thought that such policies hurt rather than assist the efforts to escape the downward cycle. See R. POSNER & F. EASTERBROOK, *ANTITRUST* 126-28 (2d ed. 1981).

252. *Parker*, 317 U.S. at 345. See also Jorde, *supra* note 71, at 253-54.

253. See Kennedy, *supra* note 72, at 41-43, 71 n.171; Gifford, *supra* note 68, at 1289. Wiley, *supra* note 6, at 745-48, makes this point as part of his capture test. An evaluation of whether the Sherman Act policy is modified by other federal regulation does not involve granting implied immunity for all private activity that is consistent with a federal regulation. The question is whether a state policy that raises an apparent conflict with the Sherman Act but mirrors a federal policy is a true conflict, not whether a federal program entitles private nonregulated parties to immunity. If a federal regulatory program includes explicit or implied antitrust immunity for an activity, an identical state policy can protect those activities from liability without conflicting with Sherman Act policy. The issue of whether the federal regulatory program was designed to occupy the field and thus preempts state regulation, however, may need to be resolved. See, e.g., *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963); Werden & Balmer, *supra* note 6, at 35-40.

designed to raise prices by reducing output.²⁵⁴ Consequently, a state-sanctioned output reduction program comported with federal policy,²⁵⁵ and *Parker* did not pose a true conflict.²⁵⁶

D. True Conflicts

Many state action conflicts are true conflicts. In such cases, the federal rule should prevail. If the state regulation is challenged directly, it should be preempted. If a private party claims the state regulation as a defense, a court should deny the defense and apply federal policy.

1. Midcal

*California Retail Liquor Dealers Ass'n v. Midcal Aluminum*²⁵⁷ involved a true conflict. The federal interest in not permitting producers to dictate resale prices conflicted with a state policy requiring such behavior,²⁵⁸ and the apparent conflict is not resolvable by a restrained and modified reassessment. The state did not supervise the per se illegal vertical restraints or their effects in the industry; the state regulatory structure did not include, for example, price regulation, review of the reasonableness of the restraints, or other regulation of the terms of competition. The state left these matters to the discretion of the industry. The state policy was in true conflict with Sherman Act policy; the federal rule concerning

254. See *Parker*, 317 U.S. at 352-53.

255. See Kennedy, *supra* note 72, at 41-43; Wiley, *supra* note 6, at 745.

256. Output restraints are no longer an approved cure for depression. The *Parker* regulations, unaccompanied by protection against harmful output reductions and monopoly prices, now would conflict with federal antitrust policy and ought to be preempted.

257. 445 U.S. 97 (1980).

258. In a sense, the regulations do not require agreements and thus arguably do not conflict with the Act. See, e.g., P. AREEDA & H. HOVENKAMP, *supra* note 39, at 74. But the regulations do require retailers adhere to manufacturer-dictated resale prices, an activity that, according to various Supreme Court cases, is specifically forbidden by the Sherman Act. See *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49-50 (1977); *Albrecht v. Herald Co.*, 390 U.S. 145, 153 (1968); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911). Thus, *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987), indicates that RPM (especially industry wide RPM) rather than an RPM agreement is per se illegal. But see *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (a manufacturer may announce resale prices and refuse to deal with those not selling at that price).

resale price maintenance requires preemption of a conflicting state rule.²⁵⁹

2. *Southern Motor Carriers*

*Southern Motor Carriers Rate Conference v. United States*²⁶⁰ also involved a true conflict. The apparent conflict between Sherman Act policy that would prohibit collective ratemaking agreements by truckers on various intrastate rates and a state policy of allowing and encouraging the activity can not be resolved. The Court, therefore, should have applied the Sherman Act policy of preventing collective ratemaking among horizontal competitors.

The conflict is not avoided by the fairly extensive state regulation of the trucking industry. Because each state had the theoretical power to disapprove any rates that might extract more than a competitive rate from the consumer or inflict welfare losses on society generally,²⁶¹ the federal interest arguably was satisfied. This "no true conflict" analysis of *Southern Motor Carriers* is superficial, however, because the state did not supervise the rate-bureau activities or the deleterious effects of the agreements. Even though the states supervised the carriers' rates and perhaps could keep the rates below supernormal levels, the collective rate submissions may have deprived consumers of the opportunity to choose from a variety of price and service combinations.²⁶² State regulation did not correct for this potential result of collective ratemaking.

In addition, despite extensive historical federal regulation of interstate trucking and a prior federal policy of antitrust immunity

259. 324 *Liquors*, 479 U.S. 335 (1987), similarly is a true conflict requiring application of federal law.

260. 471 U.S. 48 (1985).

261. Each state's Public Utility Commission maintained "ultimate authority and control" over the rates. 471 U.S. at 51.

262. For example, if all carriers agreed to submit the same rates, price shopping would be unavailable to consumers, yet the carriers would be in compliance unless the rate was unreasonable. *Id.* at 79. In addition, most of the jointly filed rates could be approved routinely without a hearing. See Jorde, *supra* note 71, at 245. The review did not adequately satisfy the federal interest in protecting consumers and society from welfare losses and distributional shifts. Permitting truckers to set all intrastate rates collectively also could have a significant spillover effect on interstate rates. The rates for movements between states that allowed collectively set rates effectively were fixed; they were the sums of the intrastate collectively set rates.

for all interstate collective ratemaking, at the time of the case there was no federal policy that could render the apparent conflict false. After years of permitting collective ratemaking, the federal government had largely deregulated the motor carrier industry and significantly limited the antitrust immunity for collective ratemaking of interstate rates.²⁶³ This change of policy subjected interstate trucking to price competition. The state policies no longer mirrored the federal policy.

3. *Patrick*

Patrick v. Burget,²⁶⁴ too, presented a true conflict. At the time the activities of the case took place, Congress had not expressed a federal policy regarding medical peer review. The Oregon state policy, which may have included an interest in insulating all medical peer review activity from antitrust liability, conflicted with the federal policy of preventing competitors from using peer review procedures to hamper competition rather than to improve patient care. The state policy, however, did not provide the level of antitrust protection that would render the conflict false. The state did not supervise the decisions of peer-review committees.²⁶⁵ The state did oversee peer-review procedures, but the policy did not include a structure that could monitor the decisions to ensure they were avoiding antitrust harms.²⁶⁶ Nor does the current federal peer-review policy resolve the conflict. Congress recently expressed a federal policy of immunizing peer-review action from antitrust damage liability as long as the action is based on a "reasonable belief" that it would further health care,²⁶⁷ but this expression came five years after the acts in *Patrick* took place. *Patrick* thus presented a true conflict, and necessitated application of the Sherman Act to

263. See 471 U.S. at 77 nn.19-20; 49 U.S.C. §§ 10706(b)(1)-(5) (1982). The Motor Carrier Act of 1980 entirely removed immunity for collective ratemaking on single-line rates, and subjected all permitted collective ratemaking activities to extensive procedural protections built into federal law. In contrast, the state regulations permitted all collective ratemaking, and the federal-style protections were not present in the state regulatory structures. 471 U.S. at 78.

264. 108 S. Ct. 1658 (1988).

265. *Id.* at 1664.

266. *Id.* at 1664-65.

267. *Id.* at 1665 n.8, 42 U.S.C. § 11112(a) (Supp. IV 1986).

the defendants' activities. Preemption of anything other than a state policy insulating peer-review activity from antitrust scrutiny was unnecessary, however, and the same acts undertaken today would be insulated from damages liability pursuant to federal policy.²⁶⁸

4. *Bates*

*Bates v. State Bar of Arizona*²⁶⁹ raised a true conflict, not because the state adopted a policy of prohibiting advertising by lawyers, but because the Arizona policy involved extensive anticompetitive agreements among lawyers. The rule against advertising, which originated from an agreement by lawyers that advertising was an unethical form of competition, was part of the ABA Code of Professional Responsibility.²⁷⁰ The Arizona Supreme Court empowered to regulate lawyers in Arizona, required all lawyers in the state to conform to the ABA code or be subject to discipline by the Bar.²⁷¹ The Arizona regulatory scheme thus allowed lawyers (i.e., competitors) to make agreements concerning the appropriate methods of competition, to change the standard, to decide who had violated the standard, and to institute disciplinary proceedings against those who did not conform.²⁷² Consequently, an apparent conflict existed between the regulatory system and section 1 of the Sherman Act.

The Arizona Supreme Court supervised the Bar activities. But contrary to the United States Supreme Court's decision,²⁷³ the supervision did not adequately ameliorate federal antitrust concerns. Although the Arizona Supreme Court made the final decision concerning all disciplinary matters, there was no supervision to ensure

268. The activities might still be enjoined, however, because the basis of the federal policy is that exposure to damages chills the review. 42 U.S.C. § 11101.

269. 433 U.S. 350 (1977).

270. *Id.* at 360.

271. *Id.*

272. In the absence of state involvement, such agreements among competitors would unquestionably violate section 1 of the Sherman Act. See, e.g., *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978); *Fashion Originator's Guild of America v. FTC*, 312 U.S. 457 (1941).

273. The Supreme Court indicated that the Arizona Supreme Court's "active" supervision of the bar played a significant role in the decision to give state action immunity to the advertising ban. 433 U.S. at 362.

that consumers denied the benefits of advertising would not suffer. The Arizona Court apparently did not adequately recognize that an agreement by lawyers to refrain from advertising would be harmful to competition and the consuming public.²⁷⁴

Within first amendment limits, a state can prescribe the kinds of advertising lawyers may undertake without conflicting with the Sherman Act.²⁷⁵ Such regulation should not, however, leave the decisions about the kinds and extent of permissible competition to the industry. The Arizona system let the lawyers make agreements concerning the levels of competition, and then enforced those agreements. That system conflicted with the Sherman Act.

5. *New Motor Vehicle Board of California*

*New Motor Vehicle Board of California v. Orrin W. Fox Co.*²⁷⁶ also involved a true conflict, although the area of conflict, properly assessed, is very narrow. The statute in question, the California Automobile Franchise Act, required car manufacturers to obtain approval from the New Motor Vehicle Board before granting a new franchise if an existing franchisee located within ten miles of the proposed new dealership protested.²⁷⁷ The Board had the power to prohibit a proposed franchise permanently if the protestor demonstrated sufficient good cause.²⁷⁸

The purpose of the regulation was to control manufacturer abuses of franchisees, but the method chosen was to prohibit increases in intrabrand competition if the new competition proved to be injurious to both the existing franchisee and the public interest.²⁷⁹ The regulation therefore conferred entry protection and could potentially allow the existing franchisee to maintain significant market power, and thus appears to conflict with section 2 of the Sherman Act.²⁸⁰

274. *Id.* at 356.

275. *Id.* at 359-63.

276. 439 U.S. 96 (1978).

277. *Id.* at 98-103.

278. *Id.* at 102-03.

279. *Id.* at 102.

280. The regulation did not require or allow territorial allocation agreements between manufacturers and dealers, however, so it did not conflict with section 1, even if it facilitated *de facto* allocations.

The California act contained several protections, however. The ten-mile restriction itself was a protection; intrabrand competition from outside of the area could significantly constrain the franchisee. Interbrand competitors could not protest at all, so interbrand competition within (as well as outside) the ten-mile area could not be eliminated. In addition, the state specified that a finding that "the establishment of an additional franchise would increase competition and therefore be in the public interest"²⁸¹ was an appropriate criterion for refuting good cause. The criterion helps to protect against prohibitions that would harm competition. Consequently, actual conflict was minimal, and did not require preemption of the statute. Nevertheless, if a prohibition by the Board has the effect of maintaining market power for an existing franchisee, that decision should be preempted, because the franchisee is not supervised by the state in a way that would protect consumers from exploitation of that power.²⁸²

IV. A CONTRAST BETWEEN INTEREST ANALYSIS AND CURRENT STATE ACTION METHODOLOGY

In certain respects, the Supreme Court's current state action methodology—involving both a threshold inquiry and *California Retail Liquor Dealers Ass'n v. Midcal Aluminum's*²⁸³ clear articulation and active supervision requirements—implements an interest analysis resolution of state action conflicts. The threshold test is a preliminary inquiry as to whether there is an irreconcilable

281. 439 U.S. at 99-100 n.1.

282. In fact, the Motor Vehicle Board upheld only one of the first 117 protests. Although the Court suggested that the California Act was consistent with federal policy, *id.* at 100-01, the conflict is not avoided by a mirrored federal act. The federal policy only provided for certain contract actions and did not provide franchisees with protection from abuse by any system of entry protection. See Automobile Dealers' Day in Court Act, 70 Stat. 1125 (1956) (codified at 15 U.S.C. §§ 1221-1225 (1982)). The conflict is not avoided by a mirrored federal act. See also Wiley, *supra* note 6, at 746-47 (assessing whether the California Act was sufficiently analogous to a labor regulation to justify protecting the Act under the labor exemption to the antitrust laws). The Act also was challenged because the protest period potentially gave the existing franchisee a few months of entry protection. As the Court pointed out, however, dealers who pressed their protests for the sole purpose of delaying establishment of a competitor might fall within the sham exception to *Noerr* contained in *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), and be vulnerable to antitrust suits. 439 U.S. at 110 & n.15.

283. See *supra* notes 257-59.

conflict between the state regulation and the Sherman Act. *Midcal*, far from solidifying *Parker v. Brown*'s²⁸⁴ state action immunity into a rule that would insulate virtually any state policy from Sherman Act preemption, significantly limited *Parker*. Despite the Supreme Court's continuing affirmation of a state action immunity based on federalism values,²⁸⁵ the *Midcal* requirements may have been originally designed to limit *Parker*'s state action immunity to situations involving a false conflict due to a lack of a federal interest.²⁸⁶

The threshold and *Midcal* requirements already implement at least a partial interest analysis approach. A negative answer to the threshold inquiry indicates a false conflict due to a lack of a federal interest, and enables the application of state policy. The absence of clear articulation indicates lack of a state interest, signaling a false conflict in favor of federal policy and thus triggering application of the Sherman Act. A failure to find active supervision signals either a false conflict due to no state interest or a true conflict, both of which are resolved by choosing federal policy. When the state has an interest in protecting an activity, as evidenced by a clearly articulated policy of replacing competition with the regulated activity, and the federal government does not have a corresponding interest in preventing that activity, evidenced by state supervision that satisfies federal antitrust concerns, a false conflict in favor of state policy allows that policy to persevere.

Parker and its progeny are not wholly inconsistent with interest analysis. Despite its federalism bent, the Court in *Parker* did not assert that all state policies were protected from the Sherman Act solely by virtue of being sovereign enactments.²⁸⁷ Although the

284. 317 U.S. 341 (1943).

285. See *Patrick v. Burget*, 108 S. Ct. 1658, 1662-63 (1988); *Fisher v. City of Berkeley*, 475 U.S. 260, 265-67 (1986); *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 56 (1985); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 103-05 (1980). See also *Jorde*, *supra* note 71, at 240-47.

286. See *Midcal*, 445 U.S. at 105. The *Midcal* tests apparently were drawn from *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977). *Bates* had noted that Sherman Act values and federal supremacy values are impaired by allowing a state to adopt a contrary scheme, but concluded that when the state "clearly and affirmatively" expresses its policy and when "the State's supervision is so active," the concern that federal policy is being unnecessarily and inappropriately subordinated to state policy is reduced. *Id.* at 362.

287. 317 U.S. at 351.

Court did not specifically employ an interest analysis methodology, the results of many United States Supreme Court state action cases—including *Parker v. Brown*,²⁸⁸ *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*,²⁸⁹ *Cantor v. Detroit Edison Co.*,²⁹⁰ *Goldfarb v. Virginia State Bar*,²⁹¹ *Rice v. Norman Williams Co.*,²⁹² *Fisher v. City of Berkeley*,²⁹³ *324 Liquor Corp. v. Duffy*,²⁹⁴ and *Patrick v. Burget*²⁹⁵—are consistent with an interest analysis.

On the other hand, the threshold inquiry and the *Midcal* test's methodology depart from an interest analysis in some significant ways. The current process identifies some false conflicts and selects the law of the only interested jurisdiction in those cases. Especially in light of recent pronouncements concerning the active supervision requirement, however, the process does not implement an interest analysis that selects state law only in the event of a false conflict resulting from the lack of a true federal interest in preventing an activity.

A. The Threshold Requirement

The Supreme Court has indicated that "the threshold question" in state action cases is whether the challenged restraint is "inconsistent,"²⁹⁶ or "irreconcilably conflicts" with the Sherman Act.²⁹⁷ If the answer is no, the Court goes no further, finding no federal in-

288. 317 U.S. 341.

289. 445 U.S. 97 (1980).

290. 428 U.S. 579 (1976).

291. 421 U.S. 773 (1975).

292. 458 U.S. 654 (1982).

293. 475 U.S. 260 (1986).

294. 479 U.S. 335 (1987).

295. 108 S. Ct. 1658 (1988).

296. *324 Liquor Corp.*, 479 U.S. at 341 (citing *Midcal*, 445 U.S. at 102). See also P. AREEDA & H. HOVENKAMP, *supra* note 39, at 84 (the initial question is whether the activity involved "restrain[s] competition so much as to be inconsistent on its face with the Sherman Act").

297. *Rice*, 458 U.S. at 659 (1982). In *324 Liquor*, the initial inquiry was whether the state regulation imposing "a regime of resale price maintenance on all New York liquor retailers," 479 U.S. at 341, was inconsistent with section 1 of the Sherman Act. The Court found the regulation inconsistent, and moved on to determine if, despite the inconsistency, the regulation was nonetheless eligible for state action protection. *Id.* at 343. In *Rice*, the initial inquiry addressed a California regulation prohibiting all licensed liquor importers from purchasing or accepting "delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner. . . ." 458 U.S. at 656-57. The *Rice*

terest, and, consequently, a false conflict. If the answer is yes, the state policy will be preempted unless it is eligible for state action immunity.²⁹⁸

Accordingly, the threshold inquiry facilitates identification of a federal interest. Like Currie's approach, the inquiry seems to contemplate a moderate and restrained reassessment of Sherman Act policy. Regulation does not automatically conflict with the Sherman Act even though it may distort a competitive market environment. In *Rice* and *Fisher*, for example, the Court used the threshold inquiry to conclude that there was no "irreconcilable conflict" between the Sherman Act and the regulations in question.²⁹⁹ In each case, the regulation tampered significantly with the market but did not require or allow firm behavior proscribed by the Sherman Act. The Court upheld each regulation without an assessment of state action immunity. The cases were thus handled as false conflicts due to no federal interest.³⁰⁰

The threshold inquiry suggests a concern with true and false conflicts. Rather than using the test to extensively assess federal and state policies and interests, however, the Court seems instead to be using it as a preliminary and somewhat superficial review of whether the regulated activity falls within Sherman Act prohibitions. *Fisher*, for example, focused exclusively on agreements and did not fully assess federal interests.³⁰¹ In addition, the inquiry does not assess the extent of the state's interest and thus does not identify false conflicts resulting from no true state interest.³⁰² As a result, although the threshold inquiry will identify some false con-

regulation was not inconsistent, removing the need for further inquiry into state and federal interests.

298. See, e.g., *Rice*, 458 U.S. at 662. This conclusion may have different effects, depending on how the state action issue arises. A state law not inconsistent with the Sherman Act will not be preempted. The finding that the state law does not conflict with the Sherman Act may be due to the fact that the state policy does not include the activity that a defendant claims should receive immunity. Consequently, in a private suit, a private defendant may not be able to use the law as protection from the Sherman Act.

299. See *supra* notes 226-38 and accompanying text.

300. See also *Exxon Corp. v. Governor of Md.*, 437 U.S. 117 (1978) (finding that a state law prohibiting vertical integration by oil companies into retail distribution might have an anticompetitive effect, but nevertheless did not conflict with the Sherman Act).

301. See *Fisher*, 475 U.S. at 269-70.

302. It could also result in ignoring an apparent conflict. *Rice*, for example, did not extensively assess California's interest in protecting the activities authorized in its regulation

flicts and leave the state law intact, and will also identify an apparent federal interest when the activity appears to fall within a Sherman Act proscription, the threshold analysis alone does not currently involve a comprehensive interest analysis.

B. The Midcal Requirements

If the threshold inquiry indicates that the federal government has an interest in prohibiting a state-regulated activity, state policy is more fully evaluated using the clear articulation and active supervision requirements from *Midcal*. If the requirements are not met, the state regulation is not applied to protect the activity, apparently because the implied Sherman Act federalism values remain unimpaired. In addition, however, the absence of such articulation and supervision may indicate the lack of a state interest in protecting the activity from the Sherman Act requirements, thereby creating a false conflict. Conversely, the presence of both articulation and supervision may suggest that the state has an interest in protecting an activity but the federal government may lack an interest in prohibiting it. The *Midcal* requirements thus complement the interest analysis implications of the threshold inquiry.

1. The clear articulation requirement

The clear articulation requirement implements a basic interest analysis prerequisite by facilitating identification of the state policy. The absence of a clearly articulated, affirmatively expressed state policy favoring a particular activity may suggest a policy of neutrality concerning the activity,³⁰³ a policy that will not be impaired by application of federal law. In the event of such an absence, both the federal antitrust policy and the state policy can be applied without conflict. *Cantor* and *Goldfarb*, presaging *Midcal*'s adoption of the clear articulation requirement, suggest strongly that the requirement is a tool for determining when conflicts are rendered false by the lack of a state interest.

from Sherman Act liability, the extent of the California's regulatory scheme, and the presence of other federal policies that might affect the federal interest.

303. See *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 59 (1985).

The requirement was applied in *Southern Motor Carriers Rate Conference v. United States* in a manner suggesting that if a state has an interest in protecting its policy from Sherman Act liability, the requirement is satisfied.³⁰⁴ Brushing aside the argument that the states failed to satisfy the clear articulation requirement because the states did not compel collective ratemaking, the Court indicated that a clearly articulated intent to adopt a permissive policy satisfies the requirement.³⁰⁵

As it now stands, however, the clear articulation requirement does not fully coincide with interest analysis. The answer to the question of whether the state has clearly articulated its intention to displace competition may not correlate closely enough with the answer to the question of whether the state has an interest in protecting the activity in question from the Sherman Act. The clear articulation test runs a dual danger: too much flexibility could result in finding a clearly articulated state policy when a state interest in protecting an activity is lacking, while an overly insistent clear articulation requirement could result in ignoring and thus perhaps needlessly nullifying an actual state interest.

One commentator has argued that the requirement has become very lenient and will be satisfied if the anticompetitive conduct is a "foreseeable" or "logical" result of a state regulation.³⁰⁶ This view of the requirement would provide immunity for private actions if the state "delegates regulatory authority for a particular type of activity or area of the economy."³⁰⁷ Foreseeable or logical conduct, however, may not be conduct the state has an actual interest in protecting. Under such a standard, the false conflict result in *Cantor* might be reversed; a court might well have found that Michigan clearly articulated a policy of replacing competition with regulation, because it regulated in the area, and the tied-sale conduct of the utility was not only foreseeable, it was approved.

Conversely, under a more stringent requirement, a state may have an interest in protecting an activity but fail to articulate its policy clearly. The focus in *Southern Motor Carriers* was on the

304. *Id.* at 60.

305. *Id.*

306. Jorde, *supra* note 71, at 242 (citing *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42 (1985)). See also *Hoover v. Ronwin*, 466 U.S. 558, 568-69 (1984).

307. Jorde, *supra* note 71, at 247.

clearly articulated intent of the state to displace competition.³⁰⁸ Interest analysis, however, requires assessment of the underlying policies rather than the legislative intent,³⁰⁹ and lack of clarity is not synonymous with lack of interest. If the legislators did not conceive of the need for protection and thus did not express their "intent," but protection nevertheless is a necessary ingredient of the policy, the interest may be ignored under the clear articulation requirement. In such a case, the federal policy would be applied, without considering whether the state actually has an interest and whether the policies actually conflict.³¹⁰

The Court also has shown an inclination toward providing *ipso facto* immunity for state activity without assessing the extent to which state policy involves agreements or entry protection policies that conflict with the Sherman Act. In *Hoover v. Ronwin*, for example, the Court found state supreme court involvement with the Bar committee activity, granted immunity, and ended the inquiry, refusing to consider whether the state had clearly articulated a policy that conflicted with the Sherman Act.³¹¹ The basis for the immunity was "that the State itself has chosen to act."³¹² This approach ignores identification of the state policy and interest.

The clear articulation requirement probably was designed to restrict state action immunity to those cases in which the state has a policy that would be furthered by protecting an activity that actually conflicts with Sherman Act policy.³¹³ The requirement does

308. *Southern Motor Carriers*, 471 U.S. at 64.

309. See Ratner, *supra* note 116, at 819; Sedler, *supra* note 116, at 610.

310. Using *Patrick* as an example, a stringent requirement might ignore Oregon's possible interest in insulating all peer review activities, including anticompetitive ones, from the Sherman Act. Because Oregon did not clearly articulate and adequately express the need to insulate all peer review from the Sherman Act (to preserve the beneficial aspects of the peer review and to avoid wholesale refusals by the peers to undertake the reviews), state action immunity probably was not available. But if no peer-review program will be effective if the reviewers are subjected to Sherman Act scrutiny, Oregon would in fact have an interest in protecting the activity. If, unlike Oregon's actual policy, the state policy included an independent state review to ensure that peer review decisions were health-based rather than competitively based, that policy could satisfy the federal interest and avoid a conflict. Nevertheless, under a state action analysis, the failure to meet the first prong of the *Midcal* test might nullify the state policy.

311. 466 U.S. 558 (1984).

312. *Id.* at 574.

313. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 362 (1977) (clear articulation reduces the "concern that federal policy is being unnecessarily and inappropriately subordinated to

implement the false conflict result of applying federal policy if the state has not articulated its policy of displacing competition clearly. A far more effective method, however, would be to simply ask: does the state have an interest in protecting the activity from Sherman Act policy? The articulated policies of the state will, of course, be of substantial use in answering that question.

2. *The active supervision requirement*

When the threshold and clear articulation analyses suggest that the federal government has a policy of restraining an activity and the state has a policy of protecting it, the second prong of the *Midcal* test—a requirement that the challenged restraint be “‘actively supervised’ by the State itself”³¹⁴—is applied. Although not clearly specified to achieve such a goal, the requirement could be a determinant of whether the apparent conflict between the state regulatory policy and Sherman Act policy is in fact a true conflict. Under an interest analysis, supervision that satisfies federal antitrust concerns signals a false conflict due to the lack of a true federal interest, and the state policy survives. A state policy of providing firms with an unsupervised opportunity to extract wealth in a manner harmful to efficiency or consumer-biased distribution signals a true conflict between the state and federal policy requiring application of federal law.

Perhaps the interest analysis implication originally was implicitly recognized in the active supervision requirement. Some Supreme Court language implies that the requirement was meant to determine if the supervision vitiated antitrust harms from the activity.³¹⁵ The Court, however, has not identified the active supervi-

state policy.”). Before *Midcal* adopted the requirement, Areeda and Turner described the test as a method for ensuring that a state rather than a private policy existed and that the state policy is actually inconsistent with federal antitrust policy. P. AREEDA & D. TURNER, ANTITRUST LAW, *supra* note 157, ¶ 215b, at 80-92. *But see* Page, *supra* note 5, at 628-29 (describing the requirement as requiring “[a]n explicit legislative choice in conflict with the antitrust laws,” because explicit legislative choices are entitled to greater deference than policies adopted by executive or independent agencies).

314. *California Retail Liquor Dealers Ass’n v. Midcal Aluminum*, 445 U.S. 97, 105 (1980) (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978)).

315. *See, e.g., Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 79 (1985) (Stevens, J., dissenting) (“Active supervision of the rate bureau process—like that provided in the Motor Carrier Act of 1980—might minimize the anticompetitive effects of

sion requirement as a tool for ensuring that a state policy that apparently conflicts with the Sherman Act can avoid preemption only if the state supervises private activity sufficiently to eliminate the antitrust harms created by the policy. Instead, apparently in an effort to accommodate federalism values, the requirement has become a gauge of state involvement with the activity. The Court recently described the requirement as "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."³¹⁶ The requirement provides "realistic assurance that a private party's anticompetitive conduct promotes state policy"³¹⁷ and thus serves "essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy."³¹⁸

These descriptions simply recapitulate the clear articulation requirement, used to ascertain whether the state has clearly ex-

collective ratemaking. . . . Unless the Commissions 'actively supervise' the price-fixing process itself, they cannot eliminate the upward pressure on rates caused by collusive ratemaking." *Id.* at 79.); see also *Patrick v. Burget*, 108 S. Ct. 1658, 1663 (1988) ("the mere presence of some state involvement or monitoring does not suffice").

316. *Patrick*, 108 S. Ct. at 1663.

317. *Id.* The active supervision requirement probably has its basis in the *Parker* language 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," *Parker v. Brown*, 317 U.S. 341, 351 (1943) (cited in *Midcal*, 445 U.S. at 104, 106), and in the fact that *Parker* pointed to California supervision as a reason why the activity in question was "state" policy. *Midcal*, 445 U.S. at 104.

318. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985). The requirement probably was not intended as a method of determining whether an activity is part of a state policy and thus deserves protection. In *Midcal*, the Court found a lack of state supervision over the state-mandated resale price maintenance scheme, because the state did not establish prices, review reasonableness, or otherwise regulate the terms, leaving those matters to the industry. *Midcal*, 445 U.S. at 105-06. Consequently, state action immunity was unavailable, and the Sherman Act preempted the law. The preemption, however, can scarcely be justified on the ground that because the state did not supervise the activities, the required activities were not really promoting state policy. The state explicitly enforced the privately established resale prices and was interested in protecting its policy. The law was properly preempted not because the acts were not part of state policy, but because the state policy of protecting those acts conflicted with federal antitrust policy. Without state supervision that ameliorates the potential antitrust harms from the activity, federal law should prevail. Consequently, *Midcal* did not use the active supervision requirement to conclude that application of federal law would not be intrusive because the sovereign state had no policy. The requirement was used to protect supremacy clause and Sherman Act values in a true conflict between state and federal policy.

pressed a policy designed to depart from the federal laws.³¹⁹ They do not call for assessment of whether the supervision ameliorates the antitrust harm. Without such an assessment, however, immunity can be granted, and the state policy applied, in a true conflict.

As *Bates v. State Bar of Arizona*³²⁰ demonstrates, state supervision of an activity to ensure that the activity departs from the federal policy would satisfy this version of the active supervision requirement. Such a regulatory system, however, obviously would not negate Sherman Act concerns. If state supervision does not ameliorate those concerns, the supervision may only more clearly demonstrate that a true conflict exists and that state policy should be preempted.

Consequently, the current state action methodology only goes part of the way with interest analysis and contains a fatal flaw. The state action rule appears to be: in case of a true conflict, if supervision indicates the activity is part of state policy, choose state law. The result can unacceptably nullify what should be an overriding federal interest.

C. Municipal Regulations

The current approach for handling possible municipal conflicts with the Sherman Act is characterized by a distinct lack of clarity. Use of interest analysis to resolve possible federal-municipal conflicts would avoid the needless state action inquiry into whether municipal compulsion or authorization of an activity furthers a policy expressly articulated by the state.³²¹ The possible federal preemption issue raised by municipal action is essentially the same as the state action question: whose law should apply if federal law appears to conflict with a municipal regulation? Municipalities are recognized as political subdivisions of the state, and neither the

319. See Jorde, *supra* note 71, at 244-50 (arguing that the requirement currently does not require intense supervision and promotes the federalism value of ensuring citizen participation); Wiley, *supra* note 6, at 721, 733-36; Page, *Antitrust, Federalism, and the Regulatory Process*, *supra* note 68, at 1128-30.

320. 433 U.S. 350 (1977).

321. Under the current tests, the municipal activity is protected only if protecting the municipality, or the activity with which the municipality is involved, furthers a clearly articulated, affirmatively expressed state policy. See *supra* text accompanying notes 50-63.

Constitution nor federalism requires that they receive different treatment.³²²

The resolution of a potential municipal-federal conflict should not hinge on whether the state clearly articulates its authorization for a municipality to undertake an activity. If the state does not forbid the municipality from enacting such an ordinance, the municipal action does not conflict with state law. The real issue, however, is whether the ordinance conflicts with federal law.

As with possible federal-state conflicts, the underlying purposes and interests of the federal and municipal policies should be identified. If they reveal a false conflict, the law that implements an interest should be applied.³²³ If either state or municipal supervision negates antitrust harms by an apparently conflicting municipal policy, the municipal policy may not be in true conflict with federal law. If an apparent conflict is not eliminated by a more moderate and restrained interpretation, the municipal regulation should be preempted by federal law.

CONCLUSION

The Supreme Court has resolved cases involving conflict between the federal antitrust policy of the Sherman Act and state or municipal regulation by reading into the Act vague federalism principles that give immunity to clearly articulated and actively supervised "state action." This constrained interpretation of the Sherman Act enables a state to circumvent federal policy and the supremacy clause preemption mandate by firmly identifying and implementing a contrary state policy.

The tension raised by conflicts between state and local regulations and the Sherman Act can be more effectively resolved by application of the interest analysis proposed by Brainerd Currie for

322. See *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 69 (1982) (Rehnquist, J., dissenting). The Supreme Court's justification for the distinction is that municipalities are not "sovereign" but states are. See *Town of Hallie*, 471 U.S. at 38 (citing *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 412 (1978)). This rationale apparently stems from the notion that the Sherman Act contains a set of federalism values pertaining only to states.

323. The threshold inquiry currently implements this approach to some extent, by identifying some false conflicts due to a lack of federal interest. See, e.g. *Fisher v. City of Berkeley*, 475 U.S. 260 (1986).

resolution of multistate conflicts. Interest analysis calls for the identification of the policies underlying each apparently competing regulation. The goal is to determine whether either or both of the policies will be furthered, and a corresponding federal or state interest manifested, by application of the policy to the activity in question.

Interest analysis accommodates federalism values without imputing them into the Sherman Act. The absence of either a state or a federal interest creates a false conflict, thereby accommodating federalism concerns, because in such a case, the policy of the only interested jurisdiction is applied, and intrusion is avoided. In addition, before final resolution of an apparent conflict between federal and state interests, the policies and interests should be reconsidered and if possible given more moderate and restrained interpretations.

The reconsideration should recognize (1) that the Sherman Act is not so broad in scope as to proscribe all anticompetitive or all inefficient activity, including state and local regulations; (2) that other federal regulations may indicate limitations on Sherman Act policy; and (3) that state or municipal regulatory policies may include regulation that in fact protects Sherman Act policy. The reconsideration will therefore identify as false many of the apparent conflicts between state and municipal regulations and the Sherman Act, and state and local regulatory authority will not be undermined on a wholesale basis. Conflict is avoided if the regulation does not compel or condone agreements in restraint of trade and does not confer unconstrained market power to a firm or group of firms. Regulations that do so, however, will be preempted unless the state regulation fully ameliorates the antitrust harms from those conflicting activities, or the regulation mirrors another federal policy.

If a true conflict remains, state regulation will be preempted by federal antitrust policy, pursuant to the supremacy clause. The clause, which provides for a uniform result in cases of true conflict, accommodates federal policy.

Current Supreme Court doctrine, including threshold inquiry and *Midcal's* clear articulation and active supervision requirements, may reflect an interest analysis to some extent. The doctrine, however, is largely wedded to unspecified notions of federal-

ism, and ends up sacrificing federal policy and supremacy clause values in favor of state autonomy. A more direct, explicit interest analysis would handle state action conflicts in a manner more consistent with federal policies, state policies and the constitutional mandate of the supremacy clause. Interest analysis focuses on the real problem of possibly conflicting policies and supremacy clause preemption, rather than on whether state action "rules" have been satisfied. The analysis would not assume away the federal interest in applying its Sherman Act policy to state-regulated activity, because states would not be allowed to depart from Sherman Act proscriptions simply by a clear assertion and supervision of contrary policy. Nevertheless, state economic regulation would not be extensively undermined. Interest analysis could eliminate the curious current disparate treatment of municipal regulation. And perhaps most significant, it would stimulate a clearer delineation of what the Sherman Act proscribes, and why.