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STATE HOME-INDUSTRY LEGISLATION AND FEDERAL LAW: A LOOK AT FLORIDA'S ORANGE STABILIZATION ACT

As a result of either history, or geography, or both, the individual economy of many states has become oriented toward a particular industry. The fiscal welfare of the state may be dependent on the success of this industry for many reasons. The industry will frequently be responsible for the employment of a substantial number of the state's citizens. If the industry is booming, unemployment and welfare payments will be minimized. In addition, since the industry may affect interstate trade, its success will frequently cause an influx of commerce to the state. Such an influx will result in increased state tax revenue, so that the tax burden on all state citizens may be lightened.

In those states where one industry constitutes a substantial source of state wealth, legislation has often been passed to insure the continued success of the industry. Sometimes the legislature will establish a state body composed of persons directly engaged in growing or manufacturing the product to promote the industry by advertising, research, or educational programs.[1] More often, however, the legislature provides for a state body which may regulate the industry by establishing minimum prices to curtail destructive competition,[2] limiting production to prevent the existence of a surplus,[3] or otherwise eliminating wasteful practices.[4] Sometimes the regulatory body may be composed of any state citizens,[5] but usually is made up primarily of growers or manufacturers of the products involved.[6]

Although the interest of a state in its major industry is unquestionably very great, the right of the state to regulate that industry is circumscribed by the United States Constitution and federal law. Because nearly all important state industries substantially affect interstate commerce, the commerce clause will limit state regulatory power. Further, any state regulatory scheme under which those engaged in the industry agree to mutual restraints may lead to a

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1 See, e.g., N.D. Cent. Code §§ 4-28-01 to -09 (1959), which establishes a Wheat Commission for the purpose of promoting North Dakota's wheat industry.

2 See, e.g., Me. Rev. Stat. Ann. tit. 7, § 2954 (1964), as amended, (Supp. 1966), under which the Maine Milk Commission is authorized to fix prices.

3 See, e.g., Colo. Rev. Stat. Ann. § 7-3-6 (1963), allowing regulations by the Commissioner of Agriculture to prevent unnecessary waste of agricultural wealth because of excessive shipments to market; Pa. Stat. Ann. tit. 71, § 1709-3 (1962), enabling the Pennsylvania Department of Commerce to set up an Anthracite Producers Advisory Board and Anthracite Committee, which in turn may set a production figure for the coal industry.

4 See, e.g., Cal. Agric. Code § 1300.15(a) (West 1954), permitting Commission regulations governing unfair trade practices in connection with the marketing of agricultural products.

5 In Oklahoma, the gas and oil industries are regulated by the Corporation Commission. Okla. Const. art. 9, § 18. The Commission is composed of three persons chosen at a general statewide election. Okla. Const. art. 9, § 15.

6 See, e.g., Cal. Agric. Code § 2080 (West 1954) (agricultural products); Colo. Rev. Stat. Ann. § 7-3-7 (1963) (agricultural products); Idaho Code Ann. § 22-1002 (1947) (agricultural products); Me. Rev. Stat. Ann. tit. 7, § 2952 (1964) (milk).

violation of the federal antitrust laws.[7] Finally, if the industry is of substantial importance to the nation as a whole, the federal government may regulate it, bringing into question the validity of state regulation under the supremacy clause.

The purpose of this note is to determine the extent of permissible state regulation of a vital state industry in the light of the restrictions imposed by the three areas of federal law mentioned above. This determination will be made by analyzing a recent Florida statute, the Orange Stabilization Act (hereinafter referred to as the OSA), which regulates the Florida orange industry.[8] In addition to examining the Florida Act, *Parker v. Brown*,[9] a leading case in the area of state agricultural regulation, will also be discussed. *Parker* dealt with the impact of the antitrust laws, commerce clause, and supremacy clause upon a marketing program under a statute similar to the OSA, and constitutes the basis of current interpretation of the legal relationship between state regulation such as the OSA and federal law.

I. The Orange Stabilization Act

The orange industry represents a great source of wealth to the state of Florida, producing many millions of dollars each year.[10] The industry is also prominent nationally; about three-fourths of the nation's orange supply is grown in Florida.[11] The OSA was enacted for the purpose of maintaining an orderly market for Florida orange products, so that economic benefit to orange producers,[12] consumers,[13] and the State of Florida would be maximized.[14] Under the OSA, the Florida Citrus Commission (Commission), composed of twelve citrus fruit producers appointed every three years by the Governor,[15] may promulgate marketing orders to effect the purpose of the Act. The marketing orders may be issued after notice of the proposed order by

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[7] See Asheville Tobacco Bd. of Trade, Inc. v. FTC, 263 F.2d 502 (4th Cir. 1959).

[8] Ch. 67-220, 1967 Fla. Laws (Fla. Sess. Law Serv. 323 (1967)).

[9] 317 U.S. 341 (1943).

[10] In 1962, the total sale of Florida orange products was $231,031,000. National Industrial Conference Board, The Economic Almanac 183 (17th ed. 1964).

[11] Florida produced 71%, 71%, and 79% of this country's orange products in 1964, 1965, and 1966 respectively. Fruit Situation, Feb. 1, 1967, at 2.

[12] To enable producers . . . to correlate the supply of their oranges with market demands . . . .

. . . .

To eliminate or reduce economic waste in the production, handling, and marketing of oranges . . . .

To restore and maintain adequate purchasing power for orange producers . . .

. . . .

Ch. 67-220, §§ 1-601.154(1)(a), (d), (e), 1967 Fla. Laws (Fla. Sess. Law Serv. 323 (1967)).

[13] To stabilize the production and marketing of oranges . . . as . . . it will promote and protect the health, peace, safety, and general welfare of the people of this state . . . .

Id. § 1-601.154(1)(g).

[14] To conserve the agricultural wealth of the state of Florida.

Id. § 1-601.154(1)(f).

[15] Fla. Stat. Ann. § 601.04 (Supp. 1966), amending Fla. Stat. Ann. § 601.04 (1962).

newspaper publication is given and a public hearing is held.[16] In order to become effective, however, a marketing order must also be approved in a referendum by 65 percent of the producers who vote. In addition, those producers who vote for the program must have delivered into the primary channel of trade[17] at least 65 percent of the total number of oranges shipped during a preceding representative shipping season.[18]

The marketing orders may authorize the purchase of surplus oranges by the Commission for abandonment,[19] impose quality standards for oranges,[20] or establish a reserve pool of frozen concentrated orange juice.[21] They may not, however, fix prices in any manner.[22] A marketing order may fix assessments on producers for the privilege of delivering oranges into the primary channel of trade.[23] The assessments are used to pay the expenses of the Commission in creating and enforcing the marketing orders.[24] Violations of any provision are punishable by criminal sanction[25] and the circuit courts of Florida are given jurisdiction to enjoin such violations.[26]

II. Antitrust Laws

Under Section 1 of the Sherman Act,[27] a combination to fix prices,[28] or a combination whose necessary effect is to fix prices,[29] is illegal per se. Since the OSA provides that orange producers, through the Commission, may formulate marketing orders to be adopted by other orange producers, the OSA creates the machinery for combinations which may violate the Sherman Act.[30] In addition, a marketing order which establishes a reserve pool of concentrate or which abandons surplus oranges must necessarily have the effect of setting prices at a high level by decreasing the orange supply while not affecting the market demand.[31] Therefore, the requisites of a Sherman Act violation are present in a marketing program under the OSA.

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16 Ch. 67-220, §§ 1-601.154(2), (3), 1967 Fla. Laws (Fla. Sess. Laws Serv. 323, 324 (1967)).

17 Fruit shall be deemed to have been delivered into the primary channel of trade when it is sold or delivered for shipment in fresh form, or when it is received and accepted at a canning, concentrating, or processing plant . . . .

Fla. Stat. Ann. § 601.03(29) (1962).

18 Ch. 67-220, § 1-601.154(6), 1967 Fla. Laws (Fla. Sess. Law Serv. 323, 327 (1967)).

19 Id. § 1-601.154(5)(b) (Fla. Sess. Law Serv. at 326).

20 Provisions . . . fixing the minimum ratios of total soluble solids of the juice of such oranges to the anhydrous citric acid thereof . . . .

Id. § 1-601.154(5)(c).

21 Id. § 1-601.154(5)(d).

22 Id. § 2 (Fla. Sess. Law Serv. at 331).

23 Id. §§ 1-601.154(5)(e), (12) (Fla. Sess. Law Serv. at 326, 328).

24 Id. § 1-601.154(14) (Fla. Sess. Law Serv. at 324).

25 Id. § 1-601.154(16) (Fla. Sess. Law Serv. at 330).

26 Id. § 1-601.154(17).

27 15 U.S.C. § 1 (1964).

28 United States v. Trenton Potteries, Co., 273 U.S. 392 (1927).

29 United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

30 See Asheville Tobacco Bd. of Trade, Inc. v. FTC, 263 F.2d 502 (4th Cir. 1959).

31 See P. A. Samuelson, Economics 62-69 (5th ed. 1961).

The price at which any commodity will be sold is determined by the market forces of supply and demand. Producers are willing to sell more of the commodity at a higher price, and sell less at a lower price. Consumers are willing to buy less of the commodity

It has been held, however, that there can be no violation of the Sherman Act where federal or state governmental activity, rather than private action, is involved,[32] and this is supported by the legislative history of the Act.[33] In *Parker v. Brown*,[34] it was held that a program issued under the California Agricultural Prorate Act (CAPA)[35] did not violate the Sherman Act. The CAPA was very similar to the OSA. Upon application of ten producers to the Agricultural Prorate Commission (APC) for the formulation of a marketing program for a commodity, a public hearing is held. If the APC finds that some program is necessary to prevent economic waste and that a program can be drafted that will not permit the producers to obtain unreasonable profits, the Director of Agriculture chooses a committee to draft the program. The program becomes effective when approved by 65 percent of the producers of that commodity who also own 51 percent of the land upon which the product is grown.

The program in *Parker* classified raisins into three grades: inferior, substandard, and standard. Under the program, inferior raisins could be used for by-products only, while all of the substandard and a certain percentage of the standard raisins were put in surplus and stabilization pools. The APC used the pools to control the rate and volume of market flow. The effect of this program, like the effect of a program under the OSA, was to decrease supply without affecting demand and thus raise prices.

To determine the status of the program for purposes of the Sherman Act, the Supreme Court looked to whether the statute merely authorized private combinations or actually gave them effect as governmental action. Since the APC, a state agency, adopted the program and enforced it with state sanctions, the Court held that, as a matter of law, the promulgation of marketing programs represented state action. The Court recognized that ultimately the program could not become effective until it was approved by 65 percent of the producers. It discounted this fact, however, on the basis that once the state had exercised its administrative authority and promulgated a regulation, it could impose any condition, including producer approval, as a condition precedent to the effectiveness of the regulation.

The basic test used in *Parker* to determine whether combinations which

at a higher price, and buy more at a lower price. As a result of these supply and demand forces, the price will settle at that point (called the equilibrium point) where the buyer and seller are willing to buy and sell, respectively, the same quantity.

If marketing orders abandoning a surplus, establishing a reserve pool, or imposing quality standards are issued under the OSA, the total orange supply will be substantially decreased. When the total supply which producers may sell is substantially decreased, the amount which producers will supply at any given price will be decreased. The effect of this is to raise the price at which the equilibrium point will settle. The reason for this is clear. The buyer will not buy the same quantity as before, because the price is too high; neither will he buy a lesser quantity at the same price as before, because he is willing to buy more at that price. Consequently, the new equilibrium point will be at a price higher, and at a quantity lower, than previously. Therefore, as a result of the marketing order, the new resultant of the market forces fixes prices at a higher level.

32 Allstate Ins. Co. v. Lanier, 361 F.2d 870 (4th Cir. 1966).

33 21 Cong. Rec. 2457, 2459, 2461, 2562 (1889).

34 317 U.S. 341 (1943).

35 See Agriculture Producers Marketing Law, Cal. Agric. Code §§ 2000-2400 (West 1954) for the CAPA in its present form.

are created under a state statute violate the antitrust laws has been applied in other cases to reach the opposite result. In *Asheville Tobacco Bd. of Trade v. FTC*,[36] the Fourth Circuit Court of Appeals was concerned with a North Carolina statute[37] which authorized local tobacco boards to make regulations for the handling and sale of leaf tobacco at auction. Under the *Parker* test, the court found that regulations issued by the local boards constituted private action. Unlike *Parker*, the state did not pay expenses of the boards, or appoint or run elections for board membership. Nor were the boards accountable to or supervised by the state, except that the state required that the regulations issued be just and reasonable. The boards were not obligated to comply with a North Carolina statute requiring each state agency to file with the Secretary of State all regulations issued.

The OSA contains provisions that are very similar to those found determinative in *Parker*. The fact that the members of the Commission are appointed by the Governor, and must subscribe to the oath of office in the Florida Constitution, leads to the conclusion that the Commission is a state agency. As in *Parker*, this state agency adopts the marketing programs and enforces them by penal sanctions. As a result, it seems clear that if *Parker* is followed as precedent, programs pursuant to the OSA will not be struck down for authorizing private action in violation of the antitrust laws.

The possibility that the OSA will be upheld on the authority of *Parker* is disturbing. The antitrust laws were enacted not only for the benefit of the competitors of price-fixers, but also for consumers at large.[38] The rationale of *Parker* is that state action represents a balancing of all interests since the state government is answerable to all voters within the state. Thus, a marketing order would only be promulgated by the Commission after an objective weighing of competitive impact on producers, consumers, and other affected classes. When an important national industry is involved, however, this rationale seems fundamentally defective. Consumers and producers outside the state are not represented in the creation of marketing orders;[39] yet, they will be affected by the price impact of these orders. It cannot be assumed, for example, that a Florida administrative agency will give due consideration to these out-of-state interests, especially if they may conflict with the interests of Florida producers and consumers. In addition, the *Parker* rationale is little more than a fiction when applied to the process of creating marketing orders under the OSA. Flordia consumers are directly affected by higher orange prices. As a practical matter, however, since marketing orders are created exclusively by producers, the consumer has no representation. While it is true that Florida consumers have an interest in maintaining a stable orange industry, since the industry does have such an effect on the general economy of the state, they do not want unnecessarily high prices. Without representation, the consumers have no assurance that the producers will not use marketing orders to obtain excessive profits.

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36 263 F.2d 502 (4th Cir. 1959).

37 N.C. Gen. Stat. § 106-465 (1960).

38 Dr. Miles Medical Co. v. Park & Sons Co., 220 U.S. 373, 409 (1911).

39 See Note, The Anthracite Coal Production Control Plan, 102 U. Pa. L. Rev. 368, 388 (1954).

The result of exempting marketing programs like those under the OSA from the antitrust laws is to permit the imposition of trade restraints on persons who have no ability to protect their interests, a result which seems to directly contravene the federal antitrust policy. It is submitted, therefore, that the rationale of *Parker* should be re-examined on this issue to avoid this anomalous result.

III. Regulation of Commerce

By virtue of its sovereignty, a state has the power to regulate its internal commerce.[40] This power, however, is subject to the pervasive power of Congress over interstate commerce under the commerce clause. The degree to which state power is limited by this clause has traditionally been determined by the "mechanical" or "direct burden" test. Under this test a determination is made whether the effect of the state regulation is to place a direct burden on interstate commerce by regulating an aspect of that commerce.[41] If a direct burden is found, the regulation is beyond the state power, and is void.

Applying this standard, the Court in *Parker* held that regulation of a product in its unprocessed state, before preparation for market, is not a regulation of interstate commerce even though it may have the effect of reducing the volume of interstate commerce with respect to that product. The Court distinguished the cases of *Lemke v. Farmers Grain Co.*[42] and *Shafer v. Farmers Grain Co.*[43] in which regulations of intrastate shipping were struck down because the intrastate activity was not for the purpose of resale or processing, but was only incidental to an interstate transaction. In *Lemke* and *Shafer*, operators of grain elevators in North Dakota attempted to enjoin the enforcement of state statutes regulating the grading, weighing, inspecting, and pricing of wheat purchased by the operators from local producers. In both cases, the operators were successful in obtaining an injunction upon a showing that only about 10 percent of the wheat grown in North Dakota was consumed locally, the remainder being sold primarily to local elevator operators who shipped and sold the grain interstate.

Under the OSA, marketing orders may be applied to any oranges shipped directly into the primary channel of trade. This definition would include not only oranges shipped to consumers or processors in Florida, but also oranges shipped from a processor or producer to out-of-state destinations. It is clear that the latter transactions are purely interstate, within the meaning of *Lemke* and *Shafer*, and therefore are not subject to state regulation. As a result, a marketing order could be effective only if applied to oranges before processing, or to oranges destined exclusively for intrastate use.

The mechanical test has been criticized,[44] however, and recently has

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40 Ware & Leland v. Mobile County, 209 U.S. 405 (1908).

41 Minnesota v. Blasius, 290 U.S. 1, 8 (1933).

42 258 U.S. 50 (1922).

43 268 U.S. 189 (1925).

44 In this case the traditional test of the limit of state action by inquiring whether the interference with Commerce is indirect or direct seems to me too mechanical, too uncertain in its application, and too remote from actualities, to be of value. In thus making use of the expressions "direct" and "indirect

been subordinated, with slight exception,[45] to the "balancing-of-interests" test.[46] Under the balancing test, a state regulation is valid only if the local interest in the subject to be regulated outweighs the national interest.[47] In *Parker*, the Court applied the balancing test and found the CAPA valid. After examining the history of the California raisin industry and the combined efforts of both federal and state governments to stabilize the raisin prices, the Court found that the state had a very great interest in the raisin industry.

> This history shows clearly enough that the adoption of legislative measures to prevent the demoralization of the industry by stabilizing the marketing of the raisin crop is a matter of state as well as national concern and, in the absence of inconsistent Congressional action, is a problem whose solution is peculiarly within the province of the state.[48]

In assessing the federal interest and its importance in comparison to the state interest, the Court put particular emphasis on the fact that Congress had attempted to remedy marketing conditions of other agricultural products by federal programs similar to the CAPA.

> It thus appears that whatever effect the operation of the California program may have on interstate commerce, it is one which it has been the policy of Congress to aid and encourage through federal agencies . . . . Hence we cannot say that the effect of the state program on interstate commerce is one which conflicts with Congressional policy or is such as to preclude the state from this exercise of its reserved power to regulate domestic agricultural production.[49]

Traditionally in commerce clause questions the Court has balanced the state interest against a federal interest in uniformity of regulation.[50] Although the Court did not expressly so state, it can be inferred that the Court was looking for evidence of an interest in uniformity in *Parker*. Instead, however, the Court found evidence, in the encouragement of Congress, that there was no need for uniformity of regulation. Thus, the Court concluded that the national interest in the regulation of the raisin industry was less than that of the state in which the industry is concentrated, and upheld the CAPA program.

In deciding that the state interest in raisin regulation prevailed over the federal interest, however, the Court overlooked the federal interest in maintaining a commerce free from unreasonable restraints of trade. This interest is clearly expressed by the antitrust laws. Although state activity may enjoy

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> interference" with Commerce, we are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached.

Di Santo v. Pennsylvania, 273 U.S. 34, 44 (1927) (Dissenting opinion by Justice Stone).

45 See Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949).

46 Colorado Anti-Discrimination Comm. v. Continental Air Lines, Inc., 372 U.S. 714 (1963); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 548 (1944).

47 Southern Pac. Co. v. Arizona ex rel. Sullivan, 325 U.S. 761, 768-69 (1945).

48 317 U.S. at 367.

49 Id. at 368.

50 Southern Pac. Co. v. Arizona ex rel. Sullivan, 325 U.S. at 767.

immunity from those laws, this does not mean that the policy embodied within them should not be considered under the commerce clause.

There is, however, one possible reason why the *Parker* Court did not consider the federal antitrust policy even though the raisin program restrained trade. The Federal Agricultural Marketing Agreement Act,[51] which provides for programs similar to the California program for other commodities, grants a specific exemption from the antitrust laws to marketing agreements promulgated under it.[52] Because the federal government had clearly renounced its antitrust policy in this field of regulation, the Court may have felt that there is no reason why that policy should be a bar to the state.

This argument is deficient, however, since it ignores the fact that the federal government may protect consumers and producers of all states from harmful trade restraints, and presumably considers the effects of potential restraints in formulating and administering its marketing regulations. A state, however, cannot be expected to fully protect the out-of-state consumer or producer from trade restraints except to the extent that it fears such restraints may decrease the market demand for its locally produced goods. Consequently, although the federal government furnishes machinery for establishing trade restraints, this fact is not grounds for excluding antitrust policy from the factors weighed in determining the ability of the state to regulate under the commerce clause.

As a result, it appears that the Court in *Parker* did not give the national interest in the regulation of the raisin industry the full weight it deserved. Although the particular local interest in the case may have been very persuasive, whether or not this interest outweighed the federal policy against restraints of trade is not so clear that the Court should have totally ignored the issue.

Because of the Court's incomplete analysis, the *Parker* decision should not provide a complete answer to the status of the OSA. Even if *Parker* were followed, however, there are certain factual distinctions which may lead to a different result. It is true that the problems to be solved under the OSA are within the ambit of state concern, and that Florida, like California, is in a particularly apt position to protect its industry from surpluses and meteorological catastrophes, in spite of the national repercussions these problems may have.[53] In fact, Florida may have a greater interest in its oranges than California in its raisins.[54] On the other hand, the national importance of the Florida orange industry in 1967 is greater than that of the California raisin industry in 1943.[55] More important, there is no evidence that the regulation

[51] 48 Stat. 31 (1933), as amended, 7 U.S.C. §§ 601-24 (1964), as amended, 7 U.S.C. §§ 602, 608c, 608f, 612c-1 (Supp. II, 1967).

[52] 7 U.S.C. § 608b (1964).

[53] In *Parker*, close to 90% of the nation's raisins were produced in California. 317 U.S. at 345. Florida produces a slightly lower percentage of the nation's oranges. See note 11 supra.

[54] In 1962, the total sale of Florida orange products was $231,031,000, which was 27.6% of the state's gross agricultural product. National Industrial Conference Board, The Economic Almanac 183 (17th ed. 1964). The exact dollar figure for California raisins is uncertain, but it is almost certainly less than the orange total.

[55] In 1953, California produced nearly 229,000 tons of raisins. 23 Encyclopedia

of the orange industry need not be uniform,[56] and a finding on this issue appears to have been decisive in *Parker.*

On balance, it is unclear whether the importance of the orange industry to Florida and the fact that Florida has a special knowledge of the industry's problems outweighs the national interest in the industry, including antitrust policy and the need (if any) for uniformity of regulation. Because neither the state nor national interest in the orange industry is perceptibly preponderant, it is uncertain whether the OSA can withstand a commerce clause attack. It is certain, however, that if such an attack occurs, *Parker* should be reexamined because of its limited analysis of the factors tending to exclude state regulation.

IV. PRIVILEGE TAX

As a general principle, a state may impose a tax on the privilege of doing intrastate business, and within reasonable limits, may apply the tax rate to a fair proportion of the taxpayer's business done within the state, if he does both interstate and intrastate business.[57] A state may not, however, base a tax on the privilege of carrying on a business which is solely interstate in character,[58] since the power to regulate, and therefore tax, interstate commerce resides solely in Congress under the commerce clause. Likewise, a state may not tax an intrastate transaction if that transaction is incidental to an interstate transaction.[59] The test must necessarily lie in the transaction itself, the problem being to determine whether it is primarily interstate or intrastate in nature.

The OSA provides for an assessment on every producer[60] for the privilege of delivering oranges into the primary channel of trade. Fruit which is "sold or delivered for shipment in fresh form" is included in the definition of primary channel of trade.[61] Since some orange producers may sell or deliver exclusively for shipment interstate, with respect to these producers the state tax cannot be validly imposed since it will be a tax on the privilege of carrying on an exclusively interstate business. These producers will be exempt from the tax even if they ship the fresh oranges intrastate first, provided that the intrastate delivery is merely incidental to an essentially interstate transaction. If, however, the intrastate shipment is for more than an incidental purpose, such as canning, concentrating or processing, then the producer may be taxed

Americana 194 (1958). It is doubtful that this figure was higher ten years earlier. In 1966, Florida produced 6,408,000 tons of oranges. Fruit Situation, Feb. 1, 1967, at 2.

56 In *Parker*, the Court pointed to congressional and administrative approval of the state program as evidence that national uniformity was not necessary. No such federal approval exists with regard to the OSA. Letter from George L. Mehren, Assistant Secretary, Department of Agriculture, Sept. 1, 1967.

57 International Harvester Co. v. Evatt, 329 U.S. 416 (1947).

58 Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951).

59 Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954).

60 Ch. 67-220, § 1-601.154(12), 1967 Fla. Laws (Fla. Sess. Law Serv. 323, 328 (1967)).

61 Fla. Stat. Ann. § 601.03(29) (1962).

even though the oranges are to be transported out of the state soon after delivery.[62]

V. Supremacy Clause

The supremacy clause dictates that all laws made pursuant to the United States Constitution shall be binding upon the states, any state law to the contrary notwithstanding. With this clause as a starting point, the courts have developed the doctrine of preemption. Under this doctrine, if federal law and state law occupy the same field, and there is a clear intent manifested in the congressional act that the federal regulation is to be exclusive, then the state is precluded from regulation in that field.[63] Usually, the intent to exclude state regulation must be expressed in the federal act.[64] The requisite congressional intent may also be inferred, however, if it is found that the scheme of federal regulation is so pervasive that there is no room for supplementary state action,[65] or if it is found that national interest in the area is predominant.[66] Any determination of the validity of Florida's regulation of the orange industry, then, must take into account the potential preemptive effect of congressional regulation of agriculture.

The Agricultural Marketing Agreement Act (AMAA)[67] is the major congressional act in the field of agricultural regulation. The AMAA does not in its own terms attempt to regulate the marketing of any agricultural commodity. Instead, it first sets forth a broad policy, and then grants power to the Secretary of Agriculture to promulgate marketing orders in accordance with the policy. Through these orders, the Secretary may control the quantity of a commodity which may be marketed in interstate commerce in four ways:[68] (1) by allotting the amount which each handler may purchase from producers or ship interstate to outlets; (2) by disposing of a surplus; (3) by establishing a reserve pool for any commodity; and (4) by maintaining inspection requirements. Because of the nature of this scheme, the impact of the AMAA on state regulation will be considered on two levels. First, do the policies set out in the Act evidence an intent to exclude state regulation? Second, do the orders issued by the Secretary pursuant to the Act create conflicts with state regulation which will have the necessary effect of preempting state action?

The major policies of the AMAA are explicitly delineated in the Act:

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[62] See International Harvester Co. v. Department of Treasury, 322 U.S. 340 (1944); Department of Treasury v. Wood Preserving Corp., 313 U.S. 62 (1941). Since Florida may not tax producers who are engaged exclusively in interstate commerce, some potential revenue will be lost. This loss should be relatively slight, however, since the bulk of the industry is made up of oranges sent intrastate for processing or other change of form, and these oranges are subject to the tax.

[63] See Rice v. Board of Trade, 331 U.S. 247 (1947).

[64] Maurer v. Hamilton, 309 U.S. 598, 614 (1940); Gilvary v. Cuyahoga Valley Ry., 292 U.S. 57, 60 (1934).

[65] Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942).

[66] Hines v. Davidowitz, 312 U.S. 52 (1941).

[67] 48 Stat. 31 (1933), as amended, 7 U.S.C. §§ 601-24 (1964), as amended, 7 U.S.C. §§ 602, 608c, 608f, 612c-1 (Supp. II, 1967).

[68] 7 U.S.C. § 608(c)(6) (1964).

> [T]o establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices . . . .
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> To protect the interest of the consumer by . . . authorizing no action . . . which has for its purpose the maintenance of prices to farmers above the level of the parity price . . . .
>
> [T]o establish and maintain such minimum standards of quality and maturity . . . as will be in the public interest . . . .
>
> [T]o establish and maintain such orderly marketing conditions . . . as will provide, in the interests of producers and consumers, an orderly flow of the supply . . . to avoid unreasonable fluctuations in supplies and prices.[69]

These stated policies contain no express manifestation of an intent to exclude state agricultural regulation. Yet, if these policies alone were determinative, it might be possible to infer preemptive intent from the pervasiveness of the policies and the manifest national interest. The Court in *Parker*, however, noted the existence of another section of the AMAA that negates such an inference.

Under Section 10(i)[70] of the AMAA, the Secretary of Agriculture is authorized "in order to effectuate the declared policy" of the Act, and "in order to obtain uniformity in the formulation, administration, and enforcement of federal and state programs relating to the regulation of the handling of agricultural commodities," to confer and cooperate with duly constituted authorities of any state. The Court found in this section a policy encouraging state action complementary to action under the AMAA. Thus, the Court found an express intent not to preempt, but instead to encourage, state regulation to the extent that the state action is complementary. As a result, the Court held that California could regulate the raisin industry; the logic of this holding would also allow Florida to regulate the orange industry.

The Court noted, however, that it is not enough that the general policy of the federal act is to encourage complementary state regulation. It is possible that there are specific policies, stated in the AMAA, which will conflict in whole or in part with the state regulatory scheme within the area the stated federal policy covers. In *Parker*, the Court noted a possibility of conflict between the federal parity policy and the marketing orders issued under the CAPA. Although parity is defined at length in the Agricultural Adjustment Act of 1938,[71] and this definition is used under the AMAA, it is sufficient for purposes of this note to define parity as giving to agricultural commodities a purchasing power with reference to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in a certain period determined by the Secretary of Agriculture. Because the CAPA made no mention of a limitation on prices based on parity, it was logically possible that the raisin program issued under the CAPA might be used to drive raisin prices above parity.

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[69] 7 U.S.C. § 602 (1964).
[70] 7 U.S.C. § 610(i) (1964).
[71] 7 U.S.C. § 1301(a)(1) (1964).

Without comparing the two policies, the Court found no conflict between the raisin program and the federal parity policy, relying on evidence of federal acquiescence to the state program. This acquiescence was inferred from the fact that the Department of Agriculture had collaborated in the preparation of the raisin program and helped finance the program through one of its agencies.[72] The Court found this approval to be convincing evidence that the state program would not drive prices above parity and thus would not conflict with the AMAA policy. The persuasive force of this evidence is revealed by the limitation the Court placed on its holding.

> We have no occasion to decide whether the same conclusion would follow if the state program had not been adopted with the collaboration of the officials of the Department of Agriculture and aided by loans from the Commodity Credit Corporation recommended by the Secretary of Agriculture.[73]

The OSA policies are nearly identical to those of the CAPA.[74] Like the CAPA policies, the OSA policies of maximizing gain to producers, consumers, and the state do not conflict with the AMAA policies to establish minimum standards in the public interest or prevent unreasonable fluctuations in price and market flow. The only AMAA policy which might conflict with the OSA is the parity price policy. For two reasons, however, the issue of OSA validity with regard to parity may not be determined solely on the basis of *Parker*. First, *Parker* treated the validity of market programs issued under a regulatory statute, while the question under the OSA is the validity of a regulatory statute where no marketing orders have been issued under it. Second, there has been no federal approval of the OSA or any program under it.[75]

The holding in *Parker*, that the program was unobjectionable on supremacy clause grounds implies, that the CAPA itself is valid. Beyond this, however, there is an additional basis for upholding the CAPA, and, by analogy, the OSA. The absence of a parity provision in the CAPA allowed only for a *possible* conflict between a marketing order and the AMAA. That is, although a marketing order may be created under the CAPA which conflicts with the federal parity policy, marketing orders may be created that do not conflict. Under the supremacy clause, however, the Court has held that an *actual* conflict must be present before the state regulation falls.[76] On this basis alone, the AMAA parity policy is not a bar to the OSA. Although the OSA policies of improving the economic condition of Florida producers and consumers could lead to marketing orders that result in price rises above parity, such a conflict is not a necessary result. Since it has been established that the AMAA is not in itself a bar to the OSA under the supremary clause, it is necessary to proceed to the next level of federal agricultural regulation—the Secretary of Agriculture's program.

The Secretary's program provides for a Growers Administrative Com-

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72 317 U.S. at 358.

73 Id. at 358-59.

74 See p. 122 supra.

75 Letter from George L. Mehren, supra note 56.

76 Head v. New Mexico Bd. of Examiners, 374 U.S. 424 (1963).

mittee composed of eight or nine producers selected by the Secretary after yearly nominations by the producers,[77] and a Shippers Advisory Committee composed of eight handlers selected by the Secretary after yearly nominations by the handlers.[78] All members may be discharged by the Secretary at any time, and any act of a committee may be voided by the Secretary.[79] Marketing orders are formulated by the Secretary in three stages. First, before suggesting any orders for any fruit, the committees submit to the Secretary a detailed report setting forth an advisable marketing policy.[80] Second, the committees submit proposed orders to the Secretary. These orders may limit the shipment of fresh fruit by enforcing quality and maturity standards,[81] by prescribing the type of shipping container to be used,[82] or by prohibiting any shipment.[83] Third, if the Secretary finds that the purposes of the AMAA will be effectuated by any order, he may issue that order.[84] Revenue to finance the creation of marketing regulations is obtained by taxing each handler in proportion to his share of the total fruit shipped.[85]

Before examining the relationship between the Secretary's program and the OSA, it is necessary to determine the status of the Secretary's program for purposes of the supremacy clause. If state action is complementary to the Secretary's program, there can be no supremacy clause problem. A problem may arise, however, if state action conflicts with the Secretary's program, for the logical inference is that Congress intended that the conflicting state regulation be ineffective. Otherwise, the state could defeat the AMAA purpose of having federal regulation of agricultural commodities. Therefore, for purposes of the supremacy clause, the Secretary's program under the AMAA should have the same force as congressional action.[86] As a result, the OSA will be valid only to the extent that it does not conflict with the Secretary's program.

When the Secretary's program and the OSA are compared, one fact immediately stands out. Federal marketing orders may apply to nonprocessed fruit, whereas marketing orders under the OSA may regulate both processed and nonprocessed fruit. This fact eliminates any consideration of Florida marketing orders relating to processed orange products from the conflict issue. The focus, then, must turn to fresh orange marketing orders under the OSA.

There are two types of marketing orders available to the Commission to regulate fresh orange production. The Commission may purchase and abandon a surplus, and impose quality and maturity standards. The policy behind authorizing purchase and abandonment orders under the OSA is to

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[77] 7 C.F.R. § 905.21 (1967).
[78] 7 C.F.R. § 905.24 (1967).
[79] 7 C.F.R. § 905.35 (1967).
[80] 7 C.F.R. § 905.50(a) (1967).
[81] 7 C.F.R. § 905.52(a)(2) (1967). This limitation may be "only in terms of grades and sizes."
[82] 7 C.F.R. § 905.52(a)(5) (1967).
[83] 7 C.F.R. § 905.52(a)(3) (1967).
[84] 7 C.F.R. § 905.52(a) (1967).
[85] 7 C.F.R. § 905.41 (1967).
[86] See Public Util. Comm'n v. United States, 355 U.S. 534 (1958).

prevent the decline of orange prices caused by destructive competition. This policy is nearly identical to the Secretary's policy underlying the authorization of marketing orders to limit the quantity of oranges shipped. It is true that action under these policies could conflict; for example, the Florida Citrus Commission may pass a marketing order authorizing a purchase of surplus so that the total shipment of oranges would be limited, when the Secretary did not want any shipment limitations. It is also possible, however, that purchase of surplus would not result in any practical limitation on shipment or that limitation of shipment would not be contrary to the Secretary's policy. Therefore, a situation of possible conflict is present. As discussed above, such a possibility of conflict cannot void the OSA provisions. The supremacy clause would only be a bar to an OSA marketing order that came in actual conflict with the Secretary's program. Hence, the provision allowing the purchase and abandonment of a surplus can withstand a supremacy clause attack.

The OSA provision empowering the Commission to measure maturity by a chemical test[87] poses a more difficult problem. The relationship between this provision and the Secretary's program is unclear. The OSA calls for maturity standards based on the ratio of soluble solids in the juice to anhydrous citric acid. The Secretary's policy regarding quality standards is set forth in his program. He may: "[L]imit the shipment of any variety by establishing and maintaining, only in terms of grades and sizes, or both, minimum standards of quality and maturity."[88]

The precise meaning of the phrase "minimum standards" in this policy has recently been litigated. In *Florida Lime & Avocado Growers, Inc. v. Paul,*[89] the Supreme Court interpreted this policy in the Secretary's avocado program merely to set minimum quality standards, which could be implemented by more stringent state requirements. As a result, the Court upheld a state eight percent oil-content requirement in spite of the fact that six out of every hundred avocados approved by the federal government under its program were excluded by the California Act.

The interpretation of the federal maturity standard in *Avocado* is subject to criticism. While the majority decided that the minimum standards demanded only that a state not impose a less stringent requirement, four dissenters, Justices White, Black, Clark and Douglas felt that a state could not even require a higher standard, because the Secretary's maturity policy called for uniform treatment of avocados based on size and weight. In reaching this conclusion, the dissenters stressed the fact that the Secretary had expressly rejected chemical tests and that state chemical tests seriously undermined the ability of the Secretary to enforce his standard. It is submitted that the federal interest in maturity standards is basically one of uniformity of regulation, that the federal standards are more than mere minimum standards, and that the dissent's reading of the federal policy was proper.

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87 Ch. 67-220, § 1-601.154(5)(c), 1967 Fla. Laws (Fla. Sess. Law Serv. 323, 327 (1967)).

88 7 C.F.R. § 905.52(a)(2) (1967).

89 373 U.S. 132 (1963).

If the dissent's reading of the federal maturity policy is accepted, there is serious question as to the validity of the OSA policy of determining maturity of the basis of a chemical test. Assuming that there is no relation between the ratio of soluble solids to anhydrous citric acid and the size and grade of fruit, it is very possible that the chemical test of the OSA will treat oranges of the same size and shape differently. For example, assume that the Secretary issues an order excluding from market all oranges less than three inches in diameter, and the Commission promulgates a marketing order imposing its chemical test as a quality standard for all Florida oranges.

There would be three possible results of these agencies regulating maturity in this manner. First, the Commission's standards might at all times be stricter than those of the Department of Agriculture. In this case, the state regulation would be valid as to all oranges less than three inches in diameter, but as to larger oranges the OSA standards would conflict with those of the Secretary. If, however, uniformity is not a basic part of the federal policy, then the federal standard would only be setting a minimum, and a stricter state standard would not conflict. Second, the Commission's standards might at all times be more lenient than those of the Department of Agriculture. In this case, the state minimum standard would conflict directly with the Secretary's minimum and could not stand. Third, the Commission's standards may sometimes be more lenient and other times stricter than the Secretary's standards. The state regulation in this case must also be invalid because it is an attempt to treat oranges of three inches in diameter differently when the federal policy of uniformity demands that oranges of the same size and grade be treated equally.

As a practical matter, if the assumption that there is no direct relation between size and grade and the ratio of soluble solids to anhydrous citric acid is valid, the third possible situation will occur. Since it is possible that the Commission's standards will always be more strict than the Secretary's, only a possibility of conflict is present and the supremacy clause would not be a bar to the existence of the state maturity policy. It may be, however, that the marketing orders available within this narrow category are not realistic maturity standards and, thus, the practical result is that the possibility of conflict excludes all reasonable regulation using chemical standards.

Although the majority holding in *Avocado* appears to allow the Florida Citrus Commission to impose a chemical maturity test, there is some evidence that the Commission has realized that this may impair federal-state relations. The Commission has chosen to adopt the federal quality standards and to enforce those standards as state law.[90]

Even though Congress has exercised its perogative to regulate the orange industry, the applicable federal legislation indicates a clear purpose that state regulation of the industry be maintained. It is true that the Secretary's regulations pursuant to the congressional action place certain limitations on Florida's freedom to regulate. Nevertheless, neither the federal law nor regulations circumscribe Florida's regulatory power to the extent that the state does not have broad authority over its orange industry.

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90 Letter from George L. Mehren, supra note 56.

VI. Conclusion

From the above analysis of the OSA, some general conclusions may be drawn as to the restrictive effects of the antitrust laws, commerce clause, and supremacy clause on the power of a state to regulate a local industry.

Although the present state of antitrust law allows a state to regulate a local industry through a state agency composed of persons directly engaged in the industry, the fact that many interested parties are not fairly represented in such a regulatory system could lead to a reconsideration and alteration of this area of the law. At the moment, the method of market control employed by the OSA enjoys immunity from the antitrust laws. In view of the strong arguments against regulation without representation, however, it is conceivable that either Congress or the courts will broaden the scope of antitrust law to prohibit this particular form of state regulation.

The commerce clause, unlike the antitrust laws, presents an imminent threat to a state's ability to regulate a major industry. Because the validity under the commerce clause of state regulation of a local industry having interstate ramifications is currently determined under the "balancing-of-interests" test, however, it would be futile to attempt to formulate a general rule stating the extent to which this clause circumscribes state power. By virtue of the balancing technique, each market control mechanism must be examined according to the particular federal and state interests involved. Because the states are becoming increasingly interdependent, with more and more products being drawn into interstate trade, and because a substantial state industry will usually have national importance, the commerce clause must always be regarded as a major threat to state regulation of a substantial local industry.

The supremacy clause has a far less restrictive effect than the commerce clause on the ability of a state to regulate an important local industry. Unlike the commerce clause, the supremacy clause does not even come into play until Congress has acted with respect to the particular industry involved. Even where Congress has so acted, it is improbable that federal regulation will be so far-reaching that there does not remain extensive regulatory power in the state, unless the need for uniformity of regulation is disproportionately large. The relationship of the AMAA to the OSA indicates that action by the federal government will generally provide ample room for complementary state action.

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