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Municipal Antitrust Liability in a Federalist System

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I. INTRODUCTION

In *City of Lafayette v. Louisiana Power & Light Co.*,[1] the Supreme Court refused to extend blanket antitrust immunity to the governmental activities of municipalities.[2] Preceding Burger Court decisions had narrowly confined what was once thought an extensive exception to the reach of the antitrust laws.[3] Thus, the result in *City of Lafayette* was predictable.

Practically, the decision has a potential impact on the thousands of municipal government units in this country. Political subdivisions now may be liable for treble damages to the very citizens whom they tax and serve. Already the Justice Department has stated its intention to enforce the antitrust laws against municipalities as vigorously as it does against private corporations.[4]

Moreover, the decision has additional importance because of a possible tension with the current Court's recognition of the importance of the rights of the states and cities in our dual federalist governmental system.[5] In *City of Lafayette* the Court refused to extend automatic antitrust im-

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1. 435 U.S. 389 (1978).

2. *Id.* at 411-13.

3. *See* notes 10-57 *infra* and accompanying text.

4. Wall St. J., May 16, 1978, at 14, col. 2.

5. This digression is, some would say, concomitant with the Court's recent failure to recognize the rights of the individuals within those entities. *See* Tribe, *Unraveling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1065-66 (1977).

munity to municipalities under the state action antitrust doctrine.[6] In so holding, the Court declined to recognize any independent sovereign status for political subdivisions, while acknowledging that states do qualify for such treatment.[7] Thus, although *City of Lafayette* represents at least in part a policy decision about the reach of a judicially defined antitrust immunity, the decision may have significant federalist overtones concerning the sovereign attributes of states and cities.

This article will (1) examine the state action exemption applied within an antitrust context as initially interpreted in *Parker v. Brown*[8] and qualified by a series of recent Supreme Court decisions; (2) analyze the *City of Lafayette* decision; (3) discuss the *City of Lafayette* decision in light of *National League of Cities v. Usery*[9] and the significant federalist implications underlying both decisions; and (4) explore the ramifications of the *City of Lafayette* decision on the antitrust susceptibility of governmental activities of municipalities. Further, the article will attempt to show that the antitrust state action decisions read with *National League of Cities* provide the necessary framework for the protection of states and municipalities from intrusion by federal regulation.

II. THE *Parker v. Brown* DOCTRINE

In *Parker v. Brown*[10] the Supreme Court ruled that the antitrust laws did not apply to the anticompetitive consequences of a California state raisin prorate program.[11] The state legislature had authorized an elaborate marketing system for raisins which largely eliminated competition among the producers.[12] The program was designed to stabilize the price of raisins by regulating the raisin producers' output.[13]

A unanimous Court found that the antitrust laws did not extend to the California prorate program, reasoning that the Sherman Act was intended to prohibit individual and not state conduct.[14] Since the program

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6. 435 U.S. at 411-13.
7. *Id.*
8. 317 U.S. 341 (1943).
9. 426 U.S. 833 (1976).
10. 317 U.S. 341 (1943).
11. *Id.* at 350-51. Much earlier, in Olsen v. Smith, 195 U.S. 332 (1904), the Court had found that the state of Texas had plenary power to license barge pilots operating out of the port of Galveston in the absence of express congressional objection. Thus, the Court concluded that the pilotage services were not subject to the antitrust laws. *Id.* at 344-45. *See also* Lowenstein v. Evans, 69 F. 908 (C.C.D.S.C. 1895). *See generally* Rogers, *The State Action Antitrust Immunity*, 49 U. COLO. L. REV. 147, 151-54 (1978).
12. 317 U.S. at 346-48.
13. *Id.* at 346.
14. *Id.* at 352.

derived its authority and efficacy from the state legislature and would not have existed without a state mandate, the Court held that the anticompetitive aspects of the program were not a product of individual activity.[15]

Lower courts subsequently interpreted *Parker v. Brown* as placing any state or state authorized activity beyond the reach of the antitrust laws.[16] For over thirty years, however, the Supreme Court took little interest in the development of the exemption to the antitrust law that it had created, routinely denying certiorari on the issue.[17] Then, beginning with *Goldfarb v. Virginia State Bar,*[18] the Court began to significantly curtail the extent of the exemption.

In *Goldfarb,* the Court found that a minimum fee schedule published by the Fairfax, Virginia, County Bar Association and enforced by the Virginia State Bar constituted unlawful price fixing which was not shielded from the antitrust laws by *Parker v. Brown.* The Court held that the threshold requirement for conferring antitrust immunity on state related activity is whether the activity is required by the state acting in its sovereign capacity.[19] Further, the Court held that the immunity is justified only if the state action was in fact compelled rather than merely prompted or authorized by the state acting as sovereign.[20] Since the State of Virginia did not require the maintenance of a minimum fee schedule for lawyers, the action was not compelled by the state and the *Parker* immunity could not attach.[21]

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15. *Id.* at 350.

16. *See, e.g.,* Business Aids, Inc. v. Chesapeake & Potomac Tel. Co., 480 F.2d 754 (4th Cir. 1973); Gas Light Co. v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971), *cert. denied,* 404 U.S. 1062 (1972); Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248 (4th Cir. 1971); Wainwright v. National Dairy Prods. Corp., 304 F. Supp. 567 (N.D. Ga. 1969). *See generally* Woods Exploration & Producing Co. v. Aluminum Co., 438 F.2d 1286 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972); Marnell v. United Parcel Serv., Inc., 260 F. Supp. 391 (N.D. Cal. 1966). Individual conduct authorized by states was thought immune even though the *Parker* defendants were government officials. *See, e.g.,* Alabama Power Co. v. Alabama Elec. Coop., Inc., 394 F.2d 672 (5th Cir.), *cert. denied,* 393 U.S. 1000 (1968); Okefenokee Rural Elec. Membership Corp. v. Florida Power & Light Co., 214 F.2d 413 (5th Cir. 1954); Fleming v. Travelers Indem. Co., 324 F. Supp. 1404 (D. Mass. 1971). It should be remembered, however, that the Court in Olsen v. Smith, 195 U.S. 332 (1904), a case in which the state was not a party, held that state licensed pilots were not subject to the antitrust laws. *See* Rogers, *supra* note 11, at 165-66.

17. *See, e.g.,* Lamb Enterprises, Inc. v. Toledo Blade Co., 461 F.2d 506 (6th Cir.), *cert. denied,* 409 U.S. 1001 (1972); Hecht v. Pro Football, Inc., 444 F.2d 931 (D.C. Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972); E.W. Wiggins Airways, Inc. v. Massachusetts Port Auth., 362 F.2d 52 (1st Cir.), *cert. denied,* 385 U.S. 947 (1966); Allstate Ins. Co. v. Lanier, 361 F.2d 870 (4th Cir.), *cert. denied,* 385 U.S. 930 (1966). *Cf.* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) (Miller-Tydings Act did not entitle liquor distributor to enjoin price cutting in absence of contract).

18. 421 U.S. 773 (1975).

19. *Id.* at 790.

20. *Id.* at 791.

21. The Virginia legislature authorized the Virginia Supreme Court to regulate the legal profes-

Next, in *Cantor v. Detroit Edison Co.*,[22] the Court further refined the state action exemption. Cantor, a retail druggist, filed suit against Detroit Edison, the utility supplying electricity to southeastern Michigan, claiming that the utility's policy of dispensing free light bulbs to consumers of electricity restrained trade in the sale of light bulbs.[23] The practice was included in the tariffs filed by the defendant before the Michigan Public Service Commission, the state regulatory body having jurisdiction to regulate public utilities. The costs to the defendant of the distribution program were reflected in the rates approved by the commission and charged to the public.[24] The trial court[25] and the Sixth Circuit[26] both held that the regulatory agency's approval of the utility's tariffs exempted the practice from the antitrust laws pursuant to *Parker v. Brown*. The Supreme Court reversed, ruling that commission approval of the distribution program was not a sufficient basis for exempting application of the antitrust laws.[27]

The Court looked behind the mere approval by the commission of the tariffs containing the distribution program. It determined that the state of Michigan was neutral regarding the regulation of the distribution of light bulbs, even though the state regulatory agency routinely approved defendant's tariffs which proposed the plan.[28] The Court could find no state statute authorizing the regulation of the sale and distribution of light bulbs; further, the statute specifying the regulatory powers of the Michigan Public Service Commission contained no direct reference to light bulbs.[29]

Cantor did not involve state action standing alone but rather involved state authorized private activity. Although the plurality opinion written by Justice Stevens attempted to limit *Parker v. Brown* to state activity, a majority of the justices were not persuaded that *Parker* did not apply to

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sion in the state. The Court noted that no Virginia statute required the setting of fees; rather, the state supreme court's ethical code mentioned advisory fee schedules. The State Bar issued ethical opinions pursuant to the Supreme Court's ethical code but the Court found no indication that the Virginia court formally approved the opinions. Nor did the Court find state compulsion in the Virginia Supreme Court's regulation of the legal profession reflected in publication of a minimum fee schedule by the Fairfax County Bar and the schedule's enforcement by the State Bar. *Id.* at 789-92.

22. 428 U.S. 579 (1976).

23. *Id.* at 581.

24. *Id.* at 582.

25. 392 F. Supp. 1110 (E.D. Mich. 1974).

26. 513 F.2d 630 (6th Cir. 1975).

27. 428 U.S. at 585.

28. *Id.*

29. *Id.* at 584. Justice Stewart, in dissent, disagreed with the majority's finding of neutrality. He thought it too burdensome to require a state to incorporate regulatory details into statutory law to insure antitrust immunity. *Id.* at 626 n.11, 638-39 n.26.

private actions authorized by the state, at least in some cases.[30] In *Bates v. State Bar*,[31] however, the Supreme Court subsequently stated that the private nature of the involved activity in *Cantor* had profoundly affected the outcome of that case.[32]

Bates involved a challenge by two Phoenix lawyers to the state disciplinary rules prohibiting lawyer advertising. While the Court struck down the disciplinary rule on first amendment grounds,[33] it first considered whether the antitrust law could reach this kind of activity. For the first time since *Parker*, the Court granted antitrust immunity on state action grounds. The Court characterized the rule prohibiting lawyer advertising as the "affirmative command of the Arizona Supreme Court,"[34] which derived its authority for governing the legal profession from the state constitution.[35] Thus, the disciplinary rule met the *Goldfarb* standard, since the restraint on lawyer advertising was compelled by the state acting in its sovereign capacity.

The *Bates* Court took pains to distinguish the *Cantor* decision. The Court believed that the *Cantor* situation differed fundamentally because the claim there was directed against a private party instead of a public official or public agency.[36] Further, the Court pointed out that in *Cantor* no independent regulatory interest in the marketing of light bulbs existed, in contrast to the state of Arizona's obligation to protect the public by controlling the legal profession.[37] The allowance of the light bulb distribution program in *Cantor* evinced only state acquiescence, whereas the regulation of the legal profession in *Bates* through disciplinary rules promulgated by the Arizona Supreme Court reflected an affirmative expression of state policy.[38]

The *Bates* Court's assertion that *Cantor* was distinguishable because a private rather than a public defendant was involved is troublesome. Initially, it should be noted that Justice Stevens could only obtain a plurality in *Cantor* when attempting to distinguish *Parker v. Brown* on the same grounds.[39] Thus, the *Bates* Court's interpretation of *Cantor* was appar-

30. *See* Rogers, *supra* note 11, at 165-66.
31. 433 U.S. 350 (1977).
32. *Id.* at 361.
33. *Id.* at 384. The Court ruled that the first amendment prohibited an absolute ban on lawyer advertising but suggested that some limitations might be constitutionally permissable. *Id. See also* Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 771 (1976).
34. 433 U.S. at 360.
35. *Id.*
36. *Id.* at 361.
37. *Id.*
38. *Id.* at 362.
39. *See* note 30 *supra* and accompanying text.

ently derived from the *Cantor* plurality rather than the *Cantor* majority. Further, the Court in *Bates* gave no indication why a suit against a private party acting pursuant to a legitimate, supervised state regulatory scheme presents "an entirely different case" than a suit against the public agency charged with policing the regulated activity.[40] Assuming that the regulation under scrutiny meets the *Goldfarb-Bates* standard, then the only additional inquiry mandated by the presence of a private defendant would seem to be whether the individual's actions were within the scope of the activity regulated.[41]

The state's express articulation of regulatory policy and active supervision of the legal profession in *Bates* is justifiable reason for distinguishing *Cantor*, however, since the state in *Cantor* was neutral about the regulation of the sale of light bulbs. The distinction supports the laudable rationale underlying the *Parker* exemption that states should be permitted to advance legitimate, controlled regulatory schemes without running afoul of the antitrust laws.

Another recent Supreme Court decision discussing the state action exemption, *New Motor Vehicle Board v. Orrin W. Fox Co.*,[42] decided after *City of Lafayette*, provides further evidence of the Court's position. Under attack there was the California Automobile Franchise Act, which required that a prospective automobile dealer secure the approval of the California New Motor Vehicle Board before opening a dealership in an area that would compete with an existing dealer if the existing franchise complained to the board about the prospective competition.[43] In denying plaintiff's antitrust argument, the Court applied the state action exemption since the regulatory scheme was "a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships."[44]

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40. 433 U.S. at 361. Presumably *Cantor* would have been decided no differently if the Michigan Public Service Commission had been a party, given the Court's finding of state neutrality on the regulation of light bulbs. *Cantor* did not involve a purposeful regulatory scheme.

41. In *Cantor* the Court articulated a "fairness" test in which antitrust liability would attach to private parties acting pursuant to state regulation only if the private party exercised sufficient freedom of choice in the initiation and enforcement of the activity. 428 U.S. at 593-95. Thus, *Cantor* suggests a stricter standard than the one set forth above since a party could be acting within the scope of a legitimate regulatory scheme, yet still be adjudged liable for antitrust violations because it exercised considerable influence in the promulgation of the regulation. For a discussion of other problems created by the fairness criterion see Rogers, *supra* note 11, at 162-63, 167, 171-73.

42. 439 U.S. 96 (1978).

43. *Id.* at 103.

44. *Id.* at 109. *Cf.* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) (Miller-Tydings Act did not entitle liquor distributors to enjoin price cutting in absence of contract).

Most recently in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*,[45] the Court determined that a California statute requiring wine producers and wholesalers to file with the state fair trade contracts or price schedules did not qualify for *Parker* immunity. The Court refused to grant immunity because although the program was "clearly articulated and affirmatively expressed as state policy" it was not "actively supervised" by the state.[46] The state simply authorized and enforced the prices set by the wineries; it did not establish the prices or review their reasonableness or control the terms of the fair trade contracts.[47] The Court concluded that *Parker* does not provide immunity where a state merely authorizes a violation of the Sherman Act.[48]

It is apparent that the Supreme Court believes that the states have the right to engage in purposeful, controlled economic regulation at the expense of unbridled competition. The Court, as signaled by *Goldfarb-Cantor* and most recently in *California Retail Liquor,* obviously does not intend, however, to permit every activity which can arguably fall under the rubric of state regulation to avoid antitrust scrutiny.[49]

It is important to note that *Parker v. Brown* failed to articulate the quantum of state involvement necessary to insulate state regulated activity from the antitrust laws.[50] Certainly more than official acquiescence is mandated to immunize any activity from antitrust liability.[51] *Goldfarb's* requirement that the state act in its sovereign capacity has been widely

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45. 100 S. Ct. 937, 943-44 (1980).

46. *Id.* at 943, *citing* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978) (opinion of Brennan, J.). Although the court cited *City of Lafayette* for the "active supervision" requirement it was in reality incorporating of the standard articulated in Bates v. State Bar, 433 U.S. 350 (1977). *See* notes 74-76 *infra* and accompanying text.

47. 100 S. Ct. at 943.

48. *Id.* at 944. *See* Parker v. Brown, 317 U.S. 341, 351 (1943). *See also* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 389 (1951).

49. Recently, in St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1978), the Court held that an alleged conspiracy to refuse to sell insurance was not immunized by the McCarren-Ferguson Act. The Court specifically pointed out that there had been "no state authorization of the conduct in question" leaving open the question of whether "the element of state regulatory direction or authorization of the particular practice" might be a defense under the state action doctrine of *Parker v. Brown. Id.* at 2936, 2937 n.27.

50. One commentator forcefully argues that although *Parker* was vague about the amount of state involvement necessary, the case should nevertheless be used to adopt a per se rule in immunizing state public utility regulation from antitrust scrutiny. Verkuil, *State Action, Due Process and Antitrust: Reflections on* Parker v. Brown, 75 COLUM. L. REV. 328, 339-40 (1975). *See also* Handler, *The Current Attack on the* Parker v. Brown *State Action Doctrine*, 76 COLUM. L. REV. 1 (1976). *Cf.* Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws,* 49 N.Y.U.L. REV. 693 (1974); Slater, *Antitrust and Government Action: A Formula for Narrowing* Parker v. Brown, 69 NW. U.L. REV. 71 (1974).

51. *See* Cantor v. Detroit Edison Co., 428 U.S. 579, 594 & n.31 (1976).

interpreted as excluding governmental entrepreneurial activity from immunity.[52] Thus, a state acting in competition with or conjunction with private enterprise may be held accountable for its antitrust violations.[53] On the other hand, a conscious state decision to engage in economic regulation within its borders, coupled with appropriate administrative control will, as illustrated by *Bates* and *Orrin W. Fox,* result in an immunity from antitrust accountability.[54]

In recognizing the right of states to regulate and, indeed, experiment with their economies, the Court has really made a policy decision concerning federalism. The Constitution supersedes only state laws which are contrary to express congressional edicts.[55] Little or no evidence exists that Congress intended the Sherman Act to restrict the states' right to displace competition.[56] Yet state regulation, at least in areas not concurrently regulated at the federal level, conflicts with the federal antitrust policy of maintaining a free market enterprise system. The Supreme Court has determined to give the states wide latitude to make determinations concerning the place and function of competition in the various sectors of their economies. For example, in *Orrin W. Fox* the Court expressly recognized that an adverse effect on competition was not, by itself, enough to invalidate a state law.[57] Thus, the Court made a policy decision, within the confines of federalism, to give the state virtual regulatory autonomy if criteria for serious state regulatory activity is met. The effect of this view

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52. *See, e.g.,* City of Fairfax v. Fairfax Hosp. Ass'n, 562 F.2d 280 (4th Cir. 1977), *vacated,* 435 U.S. 992 (1978); Kurek v. Pleasure Driveway & Park Dist., 557 F.2d 580 (7th Cir. 1977), *vacated,* 435 U.S. 992 (1978), *judgment reinstated,* 583 F.2d 378 (7th Cir. 1978); Duke & Co. v. Foerster, 521 F.2d 1277 (3d Cir. 1975).

53. *Cf.* New Mexico v. American Petrofina, Inc., 501 F.2d 363 (9th Cir. 1974).

54. The standard for immunity has been interpreted to require a clear statement by the legislature of its intention to displace the antitrust laws (or that such an intention be implicit in the legislative grant) and active supervision of the regulatory scheme. *The Supreme Court, 1977 Term,* 92 HARV. L. REV. 57, 282-84 (1978).

55. In Parker v. Brown, 317 U.S. 341 (1943), the Court took notice of the effect of the supremacy clause of the Constitution (U.S. CONST. art. VI, cl. 2) on state regulatory activity when it noted, "Occupation of a legislative 'field' by Congress in the exercise of a granted power is a familiar example of its constitutional power to suspend state laws." 317 U.S. at 350. The commerce clause has been judicially expanded so that virtually all state regulatory activities affect interstate commerce and thus are subject to federal intervention. U.S. CONST., art. I, § 8, cl. 3. *See* Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 229-30 (1948) (overruling United States v. E.C. Knight Co., 156 U.S. 1 (1895)); Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978). *See generally* Handler, *Antitrust—1978,* 78 COLUM. L. REV. 1363, 1378-82 (1978); Handler, *The Current Attack on the* Parker v. Brown *State Action Doctrine,* 76 COLUM. L. REV. 1 (1976).

56. In *Parker* the Court could "find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." 317 U.S. at 350-51. *See* Cantor v. Detroit Edison Co., 428 U.S. 579, 632-34 (1976) (Stewart, J., dissenting).

57. 439 U.S. 96, 111 (1978).

of federalism to local governments was then implicitly addressed by the Court in *City of Lafayette.*

III. *City of Lafayette v. Lousiana Power & Light Co.*

As noted, after *Goldfarb* and *Cantor* it became apparent that the *Parker v. Brown* immunity did not apply to all state government actions. As a result, lower federal courts became circumspect about granting the *Parker* immunity.[58] In particular, grants of antitrust immunity to local government units were diminished. In *Kurek v. Pleasure Driveway & Park District,*[59] the Seventh Circuit held that "a subordinate governmental unit's *Parker* claim is less obviously justified than is the same claim made by a state government . . . ."[60] The Fifth Circuit in *City of Lafayette* had previously refused to equate cities and states for purposes of determining state action,[61] as had the Third Circuit in *Duke & Co. v. Foerster.*[62]

With this background the Supreme Court considered *City of Lafayette.* The action arose when two Louisiana cities filed suit against four privately owned utilities alleging that defendants had conspired to restrain trade and monopolize the generation, transmission, and distribution of electric power.[63] Defendant Louisiana Power & Light Co. (LP&L) counterclaimed, claiming that the cities had themselves violated the antitrust laws in several respects.[64] Upon plaintiff's motion, the district court dismissed the counterclaim, holding that cities were immune from antitrust attack under *Parker v. Brown.*[65] The Fifth Circuit reversed, holding that municipalities could be exempt from the antitrust laws only if the alleged anticompetitive activities fell within the intended scope of the powers granted them by the legislature.[66] A sharply divided Supreme Court affirmed.

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58. *See, e.g.,* City of Fairfax v. Fairfax Hosp. Ass'n, 562 F.2d 280 (4th Cir. 1977), *vacated,* 435 U.S. 992 (1978); Whitworth v. Perkins, 559 F.2d 378 (5th Cir. 1977), *vacated sub. nom.* City of Impact v. Whitworth, 435 U.S. 992 (1978); City of Mishawaka v. Indiana & Mich. Elec. Co., 560 F.2d 1314 (7th Cir. 1977); Duke & Co. v. Foerster, 521 F.2d 1277 (3d Cir. 1975).

59. 557 F.2d 580 (7th Cir. 1977), *vacated,* 435 U.S. 992 (1978), *judgment reinstated,* 583 F.2d 378 (7th Cir. 1978).

60. *Id.* at 590.

61. 532 F.2d 431, 434 (5th Cir. 1976).

62. 521 F.2d 1277 (3d Cir. 1975).

63. City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 432 (5th Cir. 1976).

64. *Id.*

65. *Id.* at 433.

66. *Id.* at 436. *Cf.* Saenz v. University Interscholastic League, 487 F.2d 1026 (5th Cir. 1973) (holding that interscholastic league funded, staffed, and operated by State university was governmental entity exempt from the Sherman Act.).

The decision came in the form of a plurality opinion by Justice Brennan. Only part I of the three part opinion was joined by a majority.[67] The Court initially declared that municipalities were "persons" and thus met the jurisdictional requirement of the antitrust laws, whether the municipality is defendant or plaintiff.[68] The Court also found that no basis existed for the argument that Congress intended to exempt local government units from the antitrust laws.[69] Further, the Court could point to no public policy sufficiently important to overcome the strong presumption against implied exclusions from antitrust enforcement.[70]

In *City of Lafayette,* as in *Cantor v. Detroit Edison Co.,* the Court could not agree on the scope and meaning of the *Parker v. Brown* decision.[71] The plurality's view was that municipalities are not within the *Parker* doctrine since cities are not the sovereign equivalents of states.[72] The plurality believed that if local government actions reflected state policy, however, immunity from antitrust prosecution would attach since municipalities are instrumentalities of the states.[73] Thus, if the anticompetitive activity of a muncipality is mandated by a state acting in its sovereign capacity, the *Parker* exemption would sanction the conduct because of the state involvement.[74]

The plurality would not require specific, particularized legislative delegation of authority for the *Parker* defense to insulate anticompetitive actions of a municipality. Quoting the Fifth Circuit, the plurality asserted that adequate state involvement in municipal activities for purposes of allowing the *Parker* exemption is found "from the authority given a governmental entity to operate in a particular area, that the legislature con-

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67. The plurality included, in addition to Justice Brennan, Justices Marshall, Powell, and Stevens. Chief Justice Burger concurred in part I and in the judgment. Justice Marshall, although joining the plurality, wrote a short concurring statement. Justice Stewart dissented and was joined by Justices White, Blackmun (except for Part II-B), and Rehnquist. Justice Blackmun, in addition, wrote a separate dissenting statement.

68. 435 U.S. at 394-97. The Court relied on Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390 (1906), and Georgia v. Evans, 316 U.S. 159 (1942).

69. 435 U.S. at 397-408.

70. *Id.* at 398-408.

71. Although the Court could not agree upon an analysis, the argument that *Parker v. Brown* applies with equal force to municipal action was characterized as "petitioners' principal argument." *Id.* at 408.

72. *Id.* at 412, citing Edelman v. Jordan, 415 U.S. 651, 667 n.12 (1974); Lincoln Co. v. Luning, 133 U.S. 529 (1890). *See* notes 101-11, 133-37, 150 *infra* and accompanying text.

73. 435 U.S. at 413.

74. Presumably municipal activity meeting those standards would satisfy the threshold test set forth in Goldfarb v. Virginia State Bar, 421 U.S. 773, 790 (1975). *But see* notes 182-85 *infra* and accompanying text.

templated the kind of action complained of."[75] This articulation of the *Parker* doctrine gives municipalities somewhat more room to operate than a specific delegation requirement, but it leaves uncertain the amount of state control necessary to immunize municipalities from antitrust attack. The state must direct or authorize the anticompetitive practice but need not specifically delegate anticompetitive authority to the cities.[76] Under this view the freedom of municipalities to violate the antitrust laws pursuant to *Parker* is dependent upon judicial interpretation of this equivocal language to an indeterminate number of fact situations.

The Chief Justice concurred in the judgment of the Court because he believed that the cities were engaged in "business activity."[77] He would apply, for antitrust immunity purposes, a traditional distinction between a state acting as a sovereign in deciding to displace competition and a state acting in an entrepreneurial capacity.[78] Unlike the plurality, he would focus on the nature of the challenged activity, not on the identity of the parties.[79] Thus, a city engaged in activity analogous to private enterprise should be required to meet the standards for any private party seeking antitrust immunity under the state action exemption.[80]

The Chief Justice also questioned whether the leeway given the municipalities by the plurality is consistent with the standards set forth in *Goldfarb*.[81] *Goldfarb* requires that anticompetitive activities be compelled by the state to qualify for the *Parker* exclusion.[82] Following the rationale of *Goldfarb*, Burger would require that the state, in deciding to displace competition, *compel* the anticompetitive activity.[83] He would further require that the defendant government units show that the activity com-

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75. 435 U.S. at 415, *quoting* 532 F.2d 431, 434 (5th Cir. 1976).

76. 435 U.S. at 415-17. The recent Supreme Court decision in California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 100 S. Ct. 937 (1980), seems to suggest that the *City of Lafayette* plurality opinion would require active state supervision in addition to legislative contemplation of the local conduct in order for immunity to attach. It is questionable, however, whether this standard was meant to apply to political subdivisions as well as to state regulatory programs. *See* text accompanying notes 226-37 *infra*.

77. *Id.* at 418, 425 (Burger, C.J., concurring).

78. *Id.* at 422 (Burger, C.J., concurring).

79. *Id.* at 420 (Burger, C.J., concurring). *See* Cantor v. Detroit Edison Co., 428 U.S. 579, 603-04 (1976) (Burger, C.J., concurring).

80. *See* Cantor v. Detroit Edison Co., 428 U.S. 579 (1976).

81. 435 U.S. at 425-26 n.6 (Burger, C.J., concurring).

82. *See* notes 20-21 *supra* and accompanying text.

83. 435 U.S. at 425-26 n.6 (Burger, C.J., concurring). It would seem doubtful whether any actions of local governments which are not specifically delegated by the states could meet the compulsion standard. In any event the plurality's approval of municipal actions contemplated by the state would not appear to meet the *Goldfarb* threshold test. *See* notes 151-56 *infra* and accompanying text.

plained of was *essential* to the state's regulatory scheme.[84]

Justice Stewart's dissent expressed the fundamental disagreement within the Court over the interpretation of *Parker v. Brown*.[85] Stewart believes that *Parker* immunizes all government activity from the antitrust laws, whether emanating from a state or from a local government unit.[86] While *Parker* draws no distinction between the types of governmental units, according to Stewart, it does separate government action from private action.[87] Since the actions of the cities in *City of Lafayette* were the actions of government, Stewart felt that *Parker* should exempt the conduct from antitrust scrutiny.

The failure of the Court to agree about the application of the state action exemption to the activities of municipalities renders predictions about the impact of *City of Lafayette* difficult. The views of the plurality, the Chief Justice, and Justice Stewart exhibit fundamental disagreement. The discord appears to be on at least two planes: (1) differing conceptions of federalism and (2) differing policy attitudes. Perhaps by exploring the policy and federalism underpinnings of the positions taken, a better understanding of the future of antitrust liability for municipalities can be attained.

Initially, it should be noted that a majority of the Court did agree on one policy pronouncement. The Court refused to imply an exclusion from the reach of the antitrust laws to local government units, apart from consideration of whether the *Parker* immunity extends to municipalities in their role as agents of the state.[88] The policy determination that municipalities, standing alone, should not be immune was thus distinct from the considerations of federalism which underscore *Parker v. Brown*. Rather, the Court, wary of implying exceptions to the antitrust policy of unfettered competition, considered whether any of the policy arguments put forth by the cities were sufficient to outweigh the application of antitrust standards.[89]

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84. 435 U.S. at 425-26 n.6 (Burger, C.J., concurring).

85. Since Justices White, Rehnquist, and Blackmun (all but Part II-B) joined Justice Stewart's dissent, his opinion garnered as many votes as the plurality.

86. 435 U.S. at 428 (Stewart, J., dissenting).

87. *Id.* at 429 (Stewart, J., dissenting). This was the interpretation of *Parker v. Brown* set forth by the plurality in Cantor v. Detroit Edison Co., 428 U.S. 579, 591-92 & n.24 (1976), and adopted by the Court in Bates v. State Bar, 433 U.S. 350, 361 (1977). *See* notes 36-41 *supra* and accompanying text.

88. 435 U.S. at 400-08.

89. The Court noted that a presumption against implied exemptions to the antitrust laws existed unless it could be shown that the regulatory provisions were plainly repugnant to the antitrust laws. *Id.* at 398. *See* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-51 & n.28 (1963) (collecting cases).

Initially, the Court rejected the cities' contention that it would be anomalous to impose criminal and civil liabilities on municipalities, noting that cities have had to comply with other federal laws which impose similar sanctions upon "persons."[90] Next, the Court rejected the argument that municipalities should be exempt from antitrust law because their actions serve the public welfare and are not tantamount to private abuses of power.[91] The Court found that a municipality might be said to act to benefit its citizens, perhaps at the expense of non-residents. Thus, the Court concluded that local government policy choices are no more likely to take into account national economic well-being than are decisions of corporations seeking to advance the interests of their shareholders.[92] The additional argument that antitrust scrutiny of municipalities was unnecessary because municipalities are subject to the political process was also rejected. The Court observed that nonresidents injured by municipal utilities have no political redress except at the state level.[93] Access to state legislatures was a right shared by anyone aggrieved by the anticompetitive conduct of any corporation; further, Congress, by enacting the Sherman Act, articulated a broad policy mandating a competitive business economy which was to be administered by the neutral judiciary and not left "to the vagaries of the political process."[94] The Court concluded that the national policy of protecting competition would be significantly hindered if the thousands of local government units were free to advance their individual interests at the expense of an open market economy.[95]

It is important to recognize that, even while considering the policy arguments of the cities, the Court had principles of federalism in mind. The Court initially pointed out that in the only two instances in which it has been persuaded to override the presumption against implied antitrust exemptions "potential conflict with policies of signal importance in our national traditions and governmental structure of federalism" were apparent.[96] In *Parker v. Brown,* states were given immunity because the Court recognized the sovereignty of states under the Constitution and refused to infer from Congress an intent, through enactment of the Sherman Act, to circumvent the authority of states to exercise dominion over their officers and agents.[97] The second implied exemption from antitrust, the so-called

90. 435 U.S. at 400-02.
91. *Id.* at 403.
92. *Id.*
93. *Id.* at 406.
94. *Id.*
95. *Id.* at 408.
96. *Id.* at 400.
97. *Id.* In *Parker,* the Court had stated that "an unexpressed purpose to nullify a state's control

Noerr-Pennington exemption which protects private attempts to influence governmental activities,[98] is based on the policy of maintaining the open communication between government and its constituents necessary to assure the proper functioning of a representative democracy.[99] Equally important in protecting the ability of private persons to affect government decision-making is the constitutionally safeguarded right of petition.[100]

The cities in *City of Lafayette* were unable to raise any arguments which would provide municipalities with the type of fundamental policy principles necessary to overcome the federal design to foment competition. Municipalities lack constitutional standing as a sovereign apart from their relationship with states and no other argument sufficed to convince the Court that competition should be displaced.[101] Indeed, the Court seemed to believe that policy demanded that the antitrust laws apply to local government units to protect against "economic choices counseled solely by [municipalities'] own parochial interests and without regard to their anticompetitive effects."[102]

It should be apparent then that the Court's policy deliberations concerning antitrust exemptions cannot be divorced from the principles of federalism. The promotion of competition is, of course, a federal policy.[103] In order to displace this policy by granting an exemption from the antitrust laws, the Supreme Court must be convinced that contravening policies grounded in the federalist system of government are paramount.[104] As noted, the Court was not persuaded in *City of Lafayette* that such policy arguments exist for municipalities.

IV. MUNICIPALITIES AND FEDERALISM

The implications of *City of Lafayette* about the place of political subdivisions of states in our dual system of government are readily apparent when one considers the plurality's position that a different standard must

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over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 351.

98. *See* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972); United Mine Workers v. Pennington, 381 U.S. 657 (1965); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). The relationship of the *Noerr-Pennington* immunity to the state action doctrine is discussed in Rogers, *supra* note 11, at 169-73. *See generally* Fishel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the* Noerr-Pennington *Doctrine*, 45 U. CHI. L. REV. 80 (1977).

99. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 399 (1978).

100. *Id.*

101. *See* text accompanying notes 88-95, *supra*.

102. 435 U.S. at 408.

103. *Id.* at 398. *See also* United States v. Topco Assocs., 405 U.S. 596, 610 (1972); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 229-35 (1948).

104. *See* notes 55-57 *supra* and accompanying text.

be applied to exempt cities, as opposed to states, from the antitrust laws. The plurality believed that municipalities are not sovereign and are not entitled to the constitutional respect accorded the states.[105] In contrast, Justice Stewart, in dissent, considered the actions of municipalities to be an exercise of state sovereignty[106] and pointed out that states and municipalities have been given similar constitutional constructions in other contexts.[107] Justice Stewart viewed the Court's decision as severely restricting the right of states to function autonomously within the federalist system since it impaired the ability of states to delegate governmental authority to subordinate government bodies without express legislative approval.[108] Thus, under Stewart's analysis, the plurality's position constricts states' as well as cities' independence in self-government.

Although Justice Stewart recognized that municipal governments derive their sovereign nature from the states, he would grant cities antitrust immunity regardless of the involvement of the state in the local activities. To Stewart, the question of municipal immunity from the antitrust laws was one of statutory interpretation which, he asserted, the Supreme Court resolved in *Parker v. Brown*.[109] There the Court decided that Congress intended the Sherman Act to apply to private and not governmental action.[110] Since any action by a political subdivision is government action, Stewart concluded that *Parker v. Brown* confers antitrust immunity to local government units.[111]

Stewart also took issue with the plurality's reliance on eleventh amendment cases to establish the existence of different sovereign attributes of cities and states,[112] instead declaring that the Court's decision in *National League of Cities v. Usery*[113] was apposite if a constitutional perspective was necessary.[114]

National League of Cities involved an action challenging the constitutionality of the 1974 amendments to the Fair Labor Standards Act, which extended the coverage of federal minimum wage and maximum hour standards to virtually all public employees of states and their political

105. 435 U.S. at 412.
106. *Id.* at 430 (Stewart, J., dissenting).
107. *Id.* at 430 n.7 (Stewart, J., dissenting).
108. *Id.* at 434-35, 438 (Stewart, J., dissenting).
109. *Id.* at 428-29 (Stewart, J., dissenting).
110. Parker v. Brown, 317 U.S. 341, 350 (1943).
111. 435 U.S. at 428-29 (Stewart, J., dissenting).
112. *Id.* at 430 (Stewart, J., dissenting). *See* Edelman v. Jordan, 415 U.S. 651, 667 n.12 (1974); Lincoln Co. v. Luning, 133 U.S. 529 (1890). *See generally* Baker, *Federalism and the Eleventh Amendment*, 48 U. COLO. L. REV. 139 (1977).
113. 426 U.S. 833 (1976).
114. 435 U.S. at 430 (Stewart, J., dissenting).

subdivisions.[115] The Court, while recognizing that the wage and hour standards were, standing alone, within the scope of authority granted Congress under the commerce clause, nevertheless, held that the amendments were an unconstitutional intrusion upon the sovereignty of state and local governments.[116] According to the Court, Congress cannot interfere with "functions essential to separate and independent existence" of the states under the federalist model of government.[117] The labor provisions interfered with the right of states to decide the terms and conditions of employment of public servants thereby "displac(ing) state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require."[118] The Court viewed the states' power to determine the wages of its employees as an "undoubted attribute of state sovereignty."[119]

It is important to note that the *Parker v. Brown* decision did involve statutory interpretation of the Sherman Act, as Justice Stewart suggested.[120] The Court, looking to the language and legislative history of the Act, could find no evidence of congressional intent to apply the antitrust law to restrain state activities. The statutory analysis in *Parker* was undertaken with federalist principles foremost in mind, however. The Court assumed, without deciding, that Congress could prohibit the state prorate

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115. 426 U.S. at 837-39. The Act as originally enacted expressly exempted states and their subdivisions from the definition of "employer." Act of June 25, 1938, ch. 676, § 3(d), 52 Stat. 1060 (amended 1966, 1974). The exemption was partially removed by the 1966 amendments, with respect to employees of state hospitals, schools, and institutions. Pub. L. No. 89-601, § 102(b), 80 Stat. 830 (amended 1974). The 1966 amendments were upheld in Maryland v. Wirtz, 392 U.S. 183 (1968). *National League of Cities* expressly overruled that decision. 426 U.S. at 855. The 1974 amendments defined state and local governments as "public agencies," 29 U.S.C. § 203(x) (Supp. 1975), and "public agencies" as "employers," *id.* at § 203(d), thereby subjecting virtually all remaining state and local government employees to the federal wage and hour standards of the Act.

116. 426 U.S. at 841, 852. The decision was the first Supreme Court holding in 40 years to rule that a congressional regulation of commerce was an unconstitutional intrusion upon the sovereignty of state and local governments. *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936). *See also* Oregon v. Mitchell, 400 U.S. 112 (1970); Ashton v. Cameron County Water Improvement Dist. No. 1, 298 U.S. 513 (1936). While the amendments were within the authority of Congress to regulate commerce, the question in *National League of Cities* was whether the power to regulate was overridden because the amendments applied to states and their political subdivisions directly. 426 U.S. 833, 841-42. *See* Fry v. United States, 421 U.S. 542, 547 n.7 (1975).

117. 426 U.S. at 845, *quoting* Coyle v. Smith, 221 U.S. 559, 580 (1911), *quoting* Lane Co. v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1868). *See also* 426 U.S. at 851-52.

118. *Id.* at 847.

119. *Id.* at 845. Justice Brennan, in dissent, had strong doubts about such "sovereign" states rights. *Id.* at 863-64 (Brennan, J., dissenting). *See generally* Note, *Federal Securities Fraud Liability and Municipal Issuers: Implications of* National League of Cities v. Usery, 77 COLUM. L. REV. 1064, 1067-70 (1977).

120. *See* 317 U.S. 341, 350-51 (1943).

program through exercise of its commerce powers.[121] But since the state, under our dual system of government, is a sovereign, the Court refused to permit federal infringement into a state's authority to order its business, absent an express congressional intent to do so.[122] Thus, the Court's interpretation of the Sherman Act in *Parker* was influenced by the fact of state sovereignty.

The Court looked into the nature of the prorate program to assure itself that the program evinced the state's use of its sovereign power. In doing so, the Court recognized that a state has the right to impose a restraint as an act of government but cannot merely permit individuals to violate the antitrust laws.[123] Thus, a critical difference exists in *Parker* between purposeful state regulatory action to displace competition and state acquiescence or consent to anticompetitive conduct.[124]

Consideration of the federalist underpinnings of *Parker* and *National League of Cities* reveal the appropriate analytical framework. In *National League of Cities,* unlike *Parker,* Congress did expressly undertake to interfere with a state function, the setting of wages and hours for state and municipal employees, through use of its commerce power. The Court found that the federal amendments impermissably interfered with the integral governmental functions of states and were thus an unconstitutional use of Congress' commerce clause authority.[125] If in *Parker* Congress had acted expressly to prohibit state agricultural stabilization programs the Court would have confronted the precise issue it later did in *National League of Cities.*[126] If the stabilization program were found to be an exercise of an "integral" or "traditional" government function, the Congressional enactment would presumably give way to principles of state sovereignty, as in *National League of Cities.*[127]

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121. *Id.* at 350.

122. *Id.* at 351.

123. *Id.* at 351. *See* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) where the Court ruled that a retail price maintenance program authorized by a state fair trade law violated the Sherman Act. *See* Rogers, *supra* note 11, at 154-59; Rahl, *Resale Price Maintenance, State Action and the Antitrust Laws: Effect of* Schwegmann Brothers v. Calvert Distillers, 46 ILL. L. REV. 349 (1951).

124. *See* Handler, *Antitrust—1978,* 78 COLUM. L. REV. 1363, 1382 (1978).

125. 426 U.S. 833, 851-52. The Court listed fire prevention, police protection, sanitation, public health, and parks and recreation as illustrative of traditional government activities. *Id.* at 851.

126. The *Parker* Court assumed, but did not decide, that Congress could usurp the state programs through exercise of its commerce power. 317 U.S. at 350.

127. A raisin stabilization program does not, at first blush, appear to be either an integral or traditional government service. The question becomes closer if the state were acting to protect a class of beleaguered farm producers, rather than merely responding to strong lobbying efforts to protect an already viable industry. This suggests that questions of governmental purpose or intent might be determinative where state sovereignty is at issue.

Taken together, *Parker* and *National League of Cities* illustrate the appropriate analysis of federal-state conflict problems. First, a determination of the area of conflict must be judicially determined.[128] Next the Court must interpret the federal statute to determine whether Congress intended to preempt state law. If no preemptive intent, either express or implied,[129] is found, the Court should then look to the nature of the state law. If the state acted in its sovereign capacity to further a legitimate state interest, presumably the state law will stand, even though it conflicts with or renders ineffective federal policy.[130]

If, on the other hand, the Court determines that Congress intended the federal law to be exclusive, the state law must be found to be an integral or traditional governmental function to survive.[131] Arguably, the standard a state must meet to assert its sovereignty when Congress intended to usurp state policy or state law is more stringent than if no such intent is found. That is, the integral/traditional test of *National League of Cities* applies to a narrower scope of state governmental activities than permitted the state under *Parker*. As noted, the raisin prorate program of *Parker* could hardly be said to be an integral governmental function, even though it resulted from the legislative mandate of a state.[132]

The disagreement among the members of the Court in *City of Layfayette* centers, in a constitutional perspective, around the question of when the activities of political subdivisions are free from federal antitrust intrusion because of their relationship with the sovereign states. Justice Stewart would have applied the holdings in *National League of Cities* and *Parker* to municipal government conduct while Justice Brennan ar-

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128. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947); Hines v. Davidowitz, 312 U.S. 52 (1941). *See generally* Note, Parker v. Brown*: A Preemption Analysis,* 84 YALE L.J. 1164, 1167-69 (1975).

129. The subject matter of a statute may evince federal exclusivity or the need for uniformity. *See* Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973)(noise regulation by CAB); Perez v. Campbell, 402 U.S. 637 (1971)(discharge from bankruptcy). *Cf.* Aronson v. Quick Point Pencil Co., 99 S. Ct. 1096 (1979)(patent law does not preempt state contract law); Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974)(patent law does not preempt state trade secret laws); Goldstein v. California, 412 U.S. 546 (1973)(copyright laws do not preempt state record piracy laws). Or the federal scheme may be so comprehensive and pervasive that state regulation is precluded. Local 496, Nat'l Assoc. Letter Carriers v. Austin, 418 U.S. 264 (1974)(labor laws); Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964)(state unfair competition law preempted by patent law); Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964)(same).

130. *See* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963). *See also* Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 445-46 (1960).

131. *But cf.* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947) (given preemptive intent, less pervasive federal regulatory plan will prevail ever state scheme).

132. *See* note 127 *supra. See also* Davidson & Butters, Parker *and* Usery*: Portended Constitutional Limits on the Federal Interdiction of Anticompetitive State Action,* 31 VAND. L. REV. 575 (1978).

gued that those cases do not necessarily presage equal constitutional treatment for local governments.

Specifically, Brennan pointed out that *Lincoln County v. Luning*[133] long ago established that political subdivisions are not themselves sovereign.[134] *National League of Cities* did not hold otherwise and was not relevant, he asserted, in view of the plurality's position that municipalities are exempt from the antitrust laws to the same extent as the state itself when acting as a state agency in pursuance of state policy.[135] Likewise, in Brennan's view, *Parker* does not automatically extend to municipalities because the actions of a city may not always reflect the sovereign interest or command of the state.[136] According to him, the exemption granted the states in *Parker* was grounded upon principles of sovereignty which do not necessarily extend to municipalities.[137]

It is noteworthy that the Chief Justice in his concurring opinion also assumed that *National League of Cities* was relevant in the state action antitrust context. In his view, the qualities of state sovereignty which attached when the state's interest involved "functions essential to separate and independent existence" were not present in *City of Lafayette* since the supplying of electric service was merely a business enterprise, not a traditional prerogative of the state and not essential to the operation of the government.[138] Thus, municipal regulatory or proprietary conduct presumably would not be protected from federal interference by *National League of Cities.*

Burger also noted that the concept of federalism embodied in *National League of Cities* closely resembled the language in *Parker v. Brown.*[139] Each recognized that states had certain sovereign attributes derived from the Constitution which may not be congressionally vitiated.[140] According to Burger, however, the proprietary enterprises of municipalities, such as the running of a public utility, did not constitute one of the inalienable

133. 133 U.S. 529 (1890).

134. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 412 & n.42 (1978).

135. *Id.* at 412-13 n.42.

136. *Id.* at 412-13.

137. *Id.* at 411-12.

138. *Id.* at 423-24 (Burger, C.J., concurring). *See also* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352-53 (1974) (supplying of electric service not traditionally the prerogative of the state); United States v. California, 297 U.S. 175, 183-86 (1936) (state's operation of a railroad subject to federal regulation). Justice Stewart viewed the distinction between "proprietary" and "governmental" activities as a "quagmire" and "virtually impossible to determine." 435 U.S. at 433 (Stewart, J., dissenting). *See* Indian Towing Co. v. United States, 350 U.S. 61, 65-68 (1955).

139. 435 U.S. at 423 (Burger, C.J., concurring).

140. *Compare* National League of Cities v. Usery, 426 U.S. 833, 845 (1976), *with* Parker v. Brown, 317 U.S. 341, 351 (1943).

sovereign rights. Thus, he concluded that *Parker* and *National League of Cities* could not constitutionally immunize the municipal conduct in *City of Lafayette*.[141]

Parker, National League of Cities, and *City of Lafayette* each involved a conflict between federal policy expressed by acts of Congress and state economic autonomy. In each, the Court was cognizant of the rights of the states to make certain kinds of decisions without federal interference. It is problematical, however, whether *Parker* and *National League of Cities* support Justice Stewart's contention in *City of Lafayette* that municipalities have the same sovereign attributes as do the states.

Parker, for example, did not expressly hold that the activities of municipalities should be automatically exempt from the antitrust laws. At one point in *Parker*, however, the Court did suggest that local governments may be the legal equivalents of the states.[142] There the Court pointed out that either states or their political subdivisions could become a participant in a private combination to restrain trade.[143] But this recognition by the *Parker* Court falls short of an unequivocal assertion of equal antitrust treatment, as suggested by Justice Stewart. The statement is, to the contrary, in the negative; states and cities can be subjected to antitrust liability by participating in a private conspiracy to restrain trade.

Further, even if *Parker* could be stretched to confer antitrust immunity to municipal governments, the holding would amount to nothing more than dictum. *Parker* involved a suit against state agencies and state officials conducting a state mandated raisin prorate program, not a suit against a unit of local government.[144] Thus, it is more accurate to say that *Parker* failed to consider the application of its antitrust exemption to municipalities, particularly in view of its one uncertain reference to local governments.

Parker did, as Justice Stewart asserted, draw a distinction between

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141. Burger recognized however that state regulation of a utility pursuant to a state command to avoid unrestrained competition would be immune from antitrust attack under *Parker*. 435 U.S. at 424-25 (Burger, C.J., concurring). The critical distinction, to Burger, was "the difference between a State's entrepreneurial personality and a sovereign's decision — as in *Parker* — to replace competition with regulation." *Id.* at 422 (Burger, C.J., concurring). Thus, a municipality's proprietary enterprise, as the municipal conduct in *City of Lafayette* was characterized, could not qualify for immunity from the Sherman Act unless it was part of a state regulatory scheme to displace or temper competition. *Id.* at 424-25 (Burger, C.J., dissenting).

142. 317 U.S. at 351-52.

143. *Id.* Presumably, this language refers to the possibility that a governmental body may, in an entrepreneurial capacity, become entangled in an agreement with private industry that unlawfully restrains trade.

144. *Id.* at 344.

governmental action and private action.[145] As noted, however, *Parker* did not involve a suit against a municipality. Stewart attempted to expand the obvious federalist predicate of *Parker* uniformly to municipalities when the decision in *Parker* hinged upon the sovereignty of the states.[146] The plurality position that municipalities are free from antitrust scrutiny when engaged in activity contemplated by the state, not when acting independently of the state, reflects a more realistic analysis and application of *Parker* to local government units.

In *National League of Cities,* the Court sought to protect the freedom of the states "to structure integral operations in areas of traditional governmental functions."[147] The Court specifically included essential local government functions within the constitutionally protected sphere. But this protection was extended to municipalities because of their relationship with states. The application of the Fair Labor Standards amendments to political subdivisions was objectionable only because it infringed upon the ability of the states to make fundamental decisions about providing traditional government services.[148]

The *National League of Cities* Court did characterize "integral governmental services" provided by local government units as beyond the range of Congress under the commerce clause "just as if such services were provided by the State itself."[149] Nonintegral municipal services are subject to federal intrusion just as are nonintegral state governmental functions. For example, in *City of Lafayette* the actions of the cities in owning and operating electric utility systems may not be deemed "integral".[150] In that

145. *Id.* at 352.

146. *See id.* at 350-51.

147. 426 U.S. at 852.

148. The Court stated that congressional prescription of minimum wages to be paid and maximum hours to be worked by state and municipal employees "would impair the States' 'ability to function effectively in a federal system.'" *Id., quoting* Fry v. United States, 421 U.S. 542, 547 n.7 (1975). Congress had overstepped its authority, according to the Court, because the amendments would "significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation." 426 U.S. at 851. The states' power to determine employees' wages and hours was characterized as an "undoubted attribute of state sovereignty" which was necessary for the state's "separate and independent existence." *Id.* at 845, 851, *quoting* Coyle v. Smith, 221 U.S. 559, 580 (1911), *quoting* Lane Co. v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1868).

149. 426 U.S. at 855-56 n.20. At the same time, the Court noted that political subdivisions "derive their authority and power from their respective States." *Id.*

150. In United States v. California, 297 U.S. 175, 182 (1936), the operation of a railroad by a state was held subject to federal regulation. The *National League of Cities* Court pointed out that operation of a railroad is not an integral state governmental function and thus should not be immune from Congressional interference. 426 U.S. at 854 n.18. Thus, the operation of an electrical utility by a municipality, even under express authority of the state, would be subject to congressional control unless judically determined to be an integral government function.

instance, the Louisiana cities would lose their ability to forestall express congressional intervention, according to *National League of Cities.*

Thus, while *National League of Cities* does extend the sovereign attributes of states to cities because of their relationship with the states, it must be remembered that the grant of sovereignty to each is unequivocally limited. Since it is unlikely that *Parker* confers blanket antitrust immunity on municipalities, *Parker* and *National League of Cities* together do not support Stewart's argument that all municipal actions should be immune from federal encroachment through the antitrust laws.

In contrast, the plurality's position appears to reflect more accurately the federalist principles of the two cases. Local government services found to be "integral" will usually have been adopted pursuant to state authorization and be reflective of state policy.[151] The *National League of Cities* Court seemingly recognizes this limitation when it asserts that municipalities are entitled to sovereign treatment because they "derive their authority and power from their respective States."[152] Further, the plurality's expansion of *Parker* to provide municipal immunity only when the local activities were contemplated by the state pursuant to authority given to local governments is consistent with the obvious deference shown by the *Parker* Court to state regulatory decision-making.

The plurality, in extending *Parker* to cover municipalities only when acting in furtherance of state policy to displace competition, may appear to have implicitly equated the reach of the state action immunity with the scope of constitutional protection afforded the states.[153] At least superficially, equating state sovereignty with antitrust immunity appears sound since each represents state resistance to federal policy.[154] Indeed, *Parker v. Brown* treated the application of antitrust to the states as a problem involving federalist principles.[155] The subsequent development of the im-

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151. A difficulty with such an analysis is that an "integral" local government function may not be authorized by the state in the "contemplation" sense required by the *City of Lafayette* plurality. Thus there may be a difference between an "integral" municipal activity and an explicitly authorized one. *See* Jordan v. Mills, 473 F. Supp. 13 (E.D. Mich. 1979) and text accompanying notes 215-26 *infra.*

152. 426 U.S. at 856 n.20. *But see* notes 194-98 *infra* and accompanying text.

153. Justice Stewart, on the other hand, states that constitutional protection afforded to municipalities varies according to the factual and legal context. 435 U.S. at 430 & n.7. However, he believed that the appropriate constitutional analogy when considering possible municipal antitrust liability was *National League of Cities,* since both it and *City of Lafayette* involved the reach of congressional power under the commerce clause. *Id.* at 430. According to Justice Stewart, *National League of Cities* held that states and political subdivisions are entitled to equal constitutional deference. *Id.* Thus, Justice Stewart equated the state action antitrust doctrine with state sovereignty.

154. That is, it would appear that state immunity from the antitrust laws is a specific application of the general principle of state sovereignty.

155. The *Parker* Court assumed, without deciding, that Congress had the power to suspend a state program such as the California raisin prorate plan, as long as it acted expressly to do so. 317

munity further paralleled judicial attitudes toward state sovereignty. In *Goldfarb v. Virginia State Bar*, the Court limited the *Parker* immunity to acts compelled by the state acting as sovereign.[156] Thus, it is logical that any extension of the *Parker* antitrust immunity to municipalities must, as a minimum requirement, rest on sovereign precepts.

However, the *Goldfarb* interpretation of the state action antitrust exception may mean that state antitrust immunity does not extend to the full breadth of state sovereignty, since *Goldfarb* presumably indicates that a state can act as a sovereign by merely prompting or authorizing, and not compelling, acts by state officials.[157] According to *Goldfarb, Parker* does not apply to sovereign acts not compelled by the state.[158] The apparent disparity between state sovereignty and the state action antitrust immunity is heightened by the position taken by Justice Stevens' plurality opinion in *Cantor v. Detroit Edison Co.*[159] Stevens viewed *Goldfarb* as a refusal to guarantee "that compliance with any state requirement would automatically confer federal antitrust immunity."[160]

As noted, however, both the plurality and dissent in *City of Lafayette* seem to implicitly equate the notion of state sovereignty with the expanse of the state action antitrust immunity, at least for the purpose of determining whether the immunity should extend to municipal government actions. Arguably, federalist principles require that, at a minimum, municipal actions reflect state sovereignty in some way to qualify for antitrust immunity. Certainty, if a state or its political subdivision is acting as an entrepreneur there are strong policy arguments, within the principles of federalism, that anticompetitive acts of the body should be subject to antitrust enforcement.[161] Further, since municipal governments are creations of the state, it is logical that any concept of local government sovereignty must be derived from the state.[162] Municipal activities that are not deriva-

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U.S. at 350. Thus *Parker* is not inconsistent with *National League of Cities* since the Court only assumed that Congress could strike down a state regulatory plan and did not consider whether the plan was an integral government function. However, neither could *Parker* arguably be precedent for *National League of Cities*.

156. 421 U.S. 773, 790-91 (1975).

157. *Id.* at 791. It is important to note that *Goldfarb* characterized the test it articulated for determining if state action is beyond the reach of the Sherman Act as only "the threshold inquiry." *Id.* at 790.

158. *Id.* at 790-91.

159. 428 U.S. 579 (1976).

160. *Id.* at 600. *Cantor*, of course, concerned state authorized private activity. *See* notes 22-30 *supra* and accompanying text.

161. *See* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 403-08, 415-16 (1978).

162. *See id.* at 412; National League of Cities v. Usery, 426 U.S. 833, 855-56 n.20 (1976); Edelman v. Jordan, 415 U.S. 651, 667 n.12 (1974); Lincoln Co. v. Luning, 133 U.S. 529 (1890);

tive from states would not be spared federal regulation since those activities have no independent constitutionally recognized status.[163]

The plurality position giving municipalities immunity for activities contemplated by the states, while in fundamental disagreement with the dissent's blanket grant of immunity to local governments, still may expand the boundaries of permissable state action. The Court in *Goldfarb* had posited the requirement that anticompetitive activities must be compelled by the state to qualify for antitrust immunity.[164] Although the compulsion standard of *Goldfarb* has been distinguished as applying only to state authorized private conduct,[165] the *Goldfarb* Court viewed the requirement as having arisen in *Parker* itself, a case involving a state regulatory program.[166] In *City of Lafayette,* where municipal action was challenged, the plurality largely ignored the compulsion standard[167] and used such terms as "authorization," "contemplation," and "direction" to describe the requisite state involvement for antitrust immunity.[168]

The plurality's flexible standard, which succeeds in transferring the sovereignty of the states to an uncertain amount of municipal activities, seemingly reflects a policy choice to continue to give the states wide latitude to regulate. Since the typical state grant of authority to political subdivisions may not include specific delegations of power or acts of state compulsion, the plurality, by using imprecise language, has recognized the right of the states to give general regulatory power to their municipalities. The limits of that right will be determined by subsequent litigation.[169]

Louisiana *ex rel.* Folsom v. Mayor of New Orleans, 109 U.S. 285, 287 (1883).

163. In another context, in Monroe v. Pape, 365 U.S. 167 (1961), the Court held that Congress did not intend to bring municipal corporations within section 1983 of the Civil Rights Act of 1871 because Congress doubted that it could constitutionally impose any obligation upon municipalities. *Id.* at 190. In Monell v. Department of Social Servs., 436 U.S. 658 (1978), the Court overruled *Monroe v. Pape,* and stated that "the doctrine of dual sovereignty apparently put no limit on the power of federal courts to enforce the Constitution against municipalities that violated it." *Id.* at 680. The *Monell* Court specifically limited its analysis "to local government units which are not considered part of the State for Eleventh Amendment purposes," thus making *National League of Cities v. Usery* irrelevant to its holding. *Id.* at 690 n.54.

164. 421 U.S. at 791.

165. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 431-32 (1978) (Stewart, J., dissenting).

166. 421 U.S. at 790-91.

167. The Court did note that the *Parker* requirement that the state "command" anticompetitive activity could not be met unless the state authorized or directed the municipal action. 435 U.S. at 414, *citing* Parker v. Brown, 317 U.S. 341, 352 (1943).

168. 435 U.S. at 414-16. *See also* St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 553, 554 n.27 (1978).

169. Not surprisingly, the lower courts have registered uncertainty thus far in applying *City of Lafayette* to municipal conduct. One court noted that since no legislative history accompanied the applicable state statute, it was difficult to determine whether the municipal conduct was contemplated

In contrast, the sovereignty principles of *National League of Cities* may often fail to equal the breadth of the state action antitrust immunity. The *National League of Cities* Court emphasized that state sovereign precepts attached to integral government services "which the States and their political subdivisions have *traditionally* afforded their citizens."[170] Undue emphasis on traditional governmental operations may limit the ability of the states to function free from federal interference. Areas of government activity may change and progress as the needs of the citizenry change. A particular governmental function may be a necessary and legitimate exercise of a state's governing authority without being traditional;[171] but, under a strict reading of the *National League of Cities* rationale, the activity would be subject to possible federal interference.

Certainly the state action antitrust exemption may apply to state governmental services that are not considered traditional. This disparity would affect municipalities since nontraditional governmental functions delegated by the states to local government units would presumably qualify for the state action exemption but would not otherwise be exempt from federal regulation. Thus, the sovereignty standard of *National League of Cities* should be significantly narrower than the state action antitrust immunity.[172]

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by the legislature, as required by *City of Lafayette*. Pinehurst Airlines, Inc. v. Resort Air Servs. Inc., 476 F. Supp. 543, 551 (M.D.N.C. 1979). The cases granting local governments immunity have taken a rather broad view of the delegation of authority to municipalities. *See* Miracle Mile Assocs. v. City of Rochester, 1979-2 Trade Cas. ¶ 62,735 (W.D.N.Y. 1979); Cedar-Riverside Assocs., Inc. v. United States, 459 F. Supp. 1290 (D. Minn. 1978). *See also* Shrader v. Horton, 471 F. Supp. 1236 (W.D. Va. 1979); Huron Valley Hosp., Inc. v. City of Pontiac, 466 F. Supp. 1301, 1311-15 (E.D. Mich. 1979). In contrast, the cases denying antitrust immunity have required more specific state authorization and supervision. *See* Mason City Center Assocs. v. City of Mason City, 468 F. Supp 737 (N.D. Iowa 1979). *See also* Pinehurst Airlines, Inc. v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979); Winters v. Indiana & Mich. Electric Co., 1979-2 Trade Cas. ¶ 62,797 (N.D. Ind. 1979).

170. 426 U.S. at 855 (emphasis added).

171. *See* New York v. United States, 326 U.S. 572, 591 (1946) where Justice Douglas, dissenting, pointed out, "A State's project is as much a legitimate governmental activity whether it is traditional, or akin to private interprise, or conducted for profit . . . . What might have been viewed in an earlier day as an improvident or even dangerous extension of state activities may today be deemed indispensable." *See also* Schwartz, National League of Cities v. Usery — *The Commerce Power and State Sovereignty Redivivus*, 46 FORD. L. REV. 1115, 1129 (1978).

172. Another possibility is that *National League of Cities* could be applied to traditional municipal services not sufficiently delegated by the state to qualify for antitrust immunity. *See* notes 215-27 *infra* and accompanying text. *See also* Jordan v. Mills, 473 F. Supp. 13 (E.D. Mich. 1979).

Examination of *National League of Cities* in this light raises the interesting question of whether Congress, through the exercise of its commerce power, could amend the Sherman Act to specifically include state governmental functions within its coverage, thus denying the states the benefits of the *Parker* immunity. It would seem that under *National League of Cities* such congressional action would be permissible only to the extent that traditional state decisions relating to integral governmental functions were unaffected. *See generally* Davidson & Butters, *supra* note 132.

It is important to remember, however, that *National League of Cities* involved an express congressional mandate to replace state control over minimum wages and maximum hours of state and local government employees. In contrast, express congressional intent to replace state regulatory authority through enactment of the Sherman Act was found wanting.[173] It should not be surprising that wider latitude is permitted states when acting contrary to a general federal policy not specifically intended to usurp state functions than when states run afoul of congressional enactments directed expressly at them.

Although *City of Lafayette* has been hailed as a significant defeat for municipalities, eight members of the Court, representing the plurality and dissent, favor, in varying degrees, the grant of significant antitrust immunity to local government activities. The plurality's uncertain criteria for municipal immunity reflects, at the least, continued judicial deference to the rights of the states to order their economies. The dissent would extend that deference to political subdivisions irrespective of state involvement. The disagreement of the Court, as shown, centers around different views of federalism.[174] Contrary policy arguments implicitly underscore the federalism conflicts and differing interpretations of cases such as *Parker* and *National League of Cities*, however.

Although both sides agree that states have a significant, relatively autonomous role in the government, they appear to have conflicting perceptions of the ability of local governments to act responsibly and the ability of states to effectively control their activities by broad grants of power. The cities were unable to persuade a majority of the Court that policy considerations mandated automatic antitrust immunity for municipalities.[175] The plurality's further refusal to extend immunity to the cities because of their relationship with the states reflects, in part, the same distrust of municipal accountability, particularly where "parochial" entrepreneural enterprises are involved.[176] It also reflects a policy determination that states be made to exercise substantial dominion over municipalities to resist federal encroachment. The dissent, in arguing that municipalities have constitutional parity with the states, impliedly asserted that cities, as a matter of policy, should be free from antitrust challenge. The dissent believed that the plurality position will substantially

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173. In Parker v. Brown, 317 U.S. 341, 350-51 (1943) the court stated: "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."

174. *See* notes 131-41 *supra* and accompanying text.

175. 435 U.S. at 397-408.

176. *Id.* at 408, 415-16.

interfere with the right of the states to broadly delegate governmental authority to political subdivisions.[177] Sovereign principles should preclude federal intrusion into the state's granting and delegation of authority to local government units, according to the dissent. This position also reflects a policy decision that states should be permitted to exercise their authority over their political subdivisions without federal supervision. Presumably, municipal behavior would be solely for the states to scrutinize. Federal policy choices would then give way to state policy choices, if a sovereign state function is involved.

Justice Stewart presupposes that states will always exercise authority over their political subdivisions. Given the broad ranging, but parochial, nature of municipal concerns, unflagging state supervision is unlikely.[178] And given the lack of policy reasons and legal basis for municipal autonomy, it is arguably preferable that both the federal and state governments be able to exercise control over local government actions in a manner that does not interfere with state sovereignty.

V. THE EFFECTS OF *City of Lafayette* ON MUNICIPAL ACTIVITIES

Thus far this article has mentioned, without really focusing on, the effect that *City of Lafayette* will likely have on the myriad of activities engaged in by municipalities.[179] As discussed earlier, the state action antitrust immunity, even as applied to municipalities, exceeds the sovereign prerogatives of the states as espoused in *National League of Cities*.[180] The plurality in *City of Lafayette* sought to place definable limits on the reach

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177. *Id.* at 438 (Stewart, J., dissenting). According to the plurality, the dissent engaged in pure "hyperbole." *Id.* at 416. Justice Brennan believed that the states would still be able to allocate governmental power to municipalities. The result reached by the Court only meant that municipalities must obey the antitrust laws "when the State itself has not directed or authorized an anticompetitive practice." *Id.*

178. The activities that municipalities engage in are as wide ranging as one's imagination. In Kurek v. Pleasure Driveway & Park Dist., 557 F.2d 580 (7th Cir. 1977), *vacated*, 435 U.S. 992 (1978), *judgment reinstated*, 583 F.2d 378 (7th Cir. 1978), an arm of a local government was charged with conspiring to fix prices at pro shops located on five municipal golf courses. The park districts were apparently attempting to enrich themselves by coercing licensed concessionaires at the courses to fix retail prices. 557 F.2d at 585. On a lighter note, the town of Visalia, California, recently purchased a minor league baseball franchise, sharing operating expenses with the major league Minnesota Twins, who supply the players under an affiliation agreement. *See* Lancaster, *Hey, Charlie Finley, Here's a Ball Club With 40,000 Bosses*, Wall St. J., June 15, 1978, at 1, col. 4.

179. As noted, the extent of the control depends on the nature of the conduct involved as well as the nature of the federal law. Express federal directives could be usurped only by the state's delegation of traditional or integral governing authority to its political underlings. *See* notes 131-32 *supra* and accompanying text. General federal policy may be more easily circumvented by state delegation or authorization of contrary regulatory action. *See* notes 125-30 *supra* and accompanying text.

180. *See* note 169 *supra* and accompanying text.

of the immunity to the actions of local governments.

Certainly, the right of states to delegate governing authority to political subdivisions is a sovereign right. But it is the delegation or authorization by the states pursuant to a state policy to displace competition[181] that is the focal point for scrutinizing municipal antitrust susceptibility.

Municipal liability depends on the nature of the governmental activity in respect to the grant of authority by the state. According to the *City of Lafayette* plurality, the local activity must be of the kind "contemplated" by the legislature.[182] Thus, in order to discern the legislature's contemplation, the type of municipal activity involved must be compared to the type of state authorization.[183]

Concentration on these two variables should provide some measure of predictability to what appears to be a purposefully flexible standard.[184] It will also, however, serve to illustrate that the plurality approach creates excessive antitrust exposure for municipalities and probable conflicts with the narrower federalist mandate of *National League of Cities v. Usery.* The possibly extensive antitrust exposure of local government units is engendered in large part by the failure of the Court to adequately consider the great variety of municipal government activities as well as the differing types of authorization granted by states to their political subdivisions.[185]

The lack of the constitutionally mandated sovereign status enjoyed by the states deprives municipalities of the right to regulate their economies, unless policy or constitutional arguments can be maintained on their behalf by reason of their relationship with the states.[186] Cities typically rely upon enabling acts of state legislatures for their powers, since they have no independent constitutional existence and are the legal creation of states.[187] States delegate broad authority to municipalities under the

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181. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 100 S. Ct. 937, 942 (1980); New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 109-11 (1978); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 413 (1978).

182. 435 U.S. at 415.

183. As noted, the type of municipal activity can vary infinitely as can the method of state authorization. *See* note 178 *supra.*

184. *See* note 169 *supra* and accompanying text.

185. *See* Note, *The Application of Antitrust Laws to Municipal Activities,* 79 COLUM. L. REV. 518, 528 (1979).

186. The Constitution safeguards the rights of the states, but is silent about their political subdivisions. U.S. CONST. amend. X (reserving to states those powers not given to the federal government); *id.* at amend. XI (immunizing states from suits by citizens of foreign states). *See generally* Herget, *The Missing Power of Local Governments: A Divergence Between Text and Practice in Our Early State Constitutions,* 62 VA. L. REV. 999 (1976).

187. *See* City of Trenton v. New Jersey, 262 U.S. 182, 187 (1923); Hunter v. City of Pittsburg, 207 U.S. 161, 178-79 (1907). *See generally* 1 E. MCQUILLIN, MUNICIPAL CORPORATIONS §2.08(a)

rubric of police power, enabling cities to act for the health, safety, and welfare of their citizens. In its governmental functions, the municipality is said to act as the agent of the state.[188] Accordingly, municipalities may be adjudged an arm of the state and given equal constitutional deference with the states for some purposes, if the municipal activity is derived directly from the state.[189] Then federal interference with local government action may impinge upon the sovereign right of the states to govern, assuming that the challenged activity is judicially interpreted to be necessary to the autonomy of the state.[190] Presumably, regulatory authority delegated directly to municipalities by the state would qualify for the state action antitrust exemption if part of a purposeful state decision to displace competition coupled with active state supervision, since the Supreme Court has determined that the states may regulate their economies free from federal interference.[191]

However, the courts have long recognized that municipalities may act in a proprietary or commercial capacity as well as in a governmental capacity.[192] Proprietary functions include quasi-public activities performed for the convenience of the citizenry or for the monetary benefit of the municipality, such as the ownership and operation of water and power companies, sewage disposal plants, and transportation systems.[193] Fre-

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(3d ed. 1971).

188. 1 E. MCQUILLIN, MUNICIPAL CORPORATIONS §2.09 (3d ed. 1971). *See also* City of Trenton v. New Jersey, 262 U.S. 182, 191 (1923); City of Longview v. First Nat'l Bank, 152 F.2d 97, 98 (5th Cir. 1945), *cert. denied*, 327 U.S. 784 (1946).

189. *See, e.g.*, Waller v. Florida, 397 U.S. 387 (1970) (double-jeopardy clause); Avery v. Midland Co., 390 U.S. 474, 480-81 (1968) (actions of local government are the actions of the state for fourteenth amendment purposes); City of Trenton v. New Jersey, 262 U.S. 182 (1923) (impairment of contract clause).

190. *See, e.g.*, National League of Cities v. Usery, 426 U.S. 833 (1976). *See* notes 212-15 *infra* and accompanying text. *See also* California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 100 S. Ct. 937, 943 (1980).

191. *See* New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 110-11 (1978); Exxon v. Governor of Maryland, 437 U.S. 117, 133 (1978).

192. *See* City of High Point v. Duke Power Co., 120 F.2d 866, 870 (4th Cir. 1941), *quoting* Illinois Trust & Sav. Bank v. City of Arkansas City, 76 F. 271, 282 (8th Cir. 1896).

193. *See* Note, *The Antitrust Liability of Municipalities Under the* Parker *Doctrine*, 57 B.U.L. REV. 368, 378 & n.65 (1977). The courts often experience difficulties in ascertaining when to draw the line between the governmental and proprietary behavior of municipalities. *See, e.g.*, City of Trenton v. New Jersey, 262 U.S. 182, 191-92 (1923) (no established rule for distinction). *See also* Note, *Antitrust Law and Municipal Corporations: Are Municipalities Exempt From Sherman Act Coverage Under the* Parker *Doctrine?*, 65 GEO. L. J. 1547, 1557 & n.63 (1977) [hereinafter cited as *Municipal Corporations*]. When municipal bodies perform proprietary or business like functions, courts treat them as individuals with regard to tort liability. *See* Vanlandingham, *Local Government Immunity Re-Examined*, 61 NW. U. L. REV. 237, 247 (1966). The difficulty, however, in making the distinction together with often contradictory results has led at least one court to abandon municipal tort immunity altogether. *See* Becker v. Beaudoin, 106 R.I. 562, 261 A.2d 896 (1970). Similarly, in

quently, municipal operation of a proprietary service results in a municipally controlled monopoly.

A somewhat different relationship between states and municipalities exists in home rule jurisdictions. Home rule provisions in state constitutions permit municipalities to administer local affairs without the necessity of specific state legislative delegation by authorizing broad grants of authority by the legislature or by making such grants directly to the political subdivisions.[194] Of course, municipalities have less freedom to act if a state grants home rule through legislation rather than directly through the constitution, because a state legislature may always retract or ignore home rule or the courts may rule that the home rule provisions constitute an unconstitutional delegation of state power.[195] However, in neither situation are municipalities completely free from state control. If a municipal ordinance conflicts with state law or if state legislation has preempted a field, the state will generally prevail, indicating a judicial recognition of at least some state control.[196] Nevertheless, an argument can be made that, as a general proposition, municipalities in home rule jurisdictions should not be accorded constitutional recognition as the agents of a state since home rule municipalities have a substantial, legally definable autonomy.[197] Thus, a failure to give constitutional protection to home rule polit-

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New York v. United States, 326 U.S. 572, 580-83 (1946), the distinction between proprietary and governmental activities was severely criticized, although not done away with, by the Court in determining whether a state was liable for federal excise taxes on mineral water produced at state owned and operated springs. Cities are generally immune from federal income tax liability for income derived through municipal governmental activities, as opposed to activities labeled as proprietary. United States v. Baltimore & O.R.R., 84 U.S. (17 Wall.) 322, 329 (1873); Kreipke v. Commissioner, 32 F.2d 594, 597 (8th Cir. 1929).

194. *See* Vanlandingham, *Municipal Home Rule in the United States,* 10 WM. & MARY L. REV. 269 (1968). As of 1966 33 states had enacted some type of constitutional provision for home rule. *Id.* at 277. *See also* Macchiarola, *Local Government Home Rule and the Judiciary,* 48 J. URB. L. 335 (1971). The trend seems to be for more home rule jurisdictions. Illinois amended its constitution in 1970 to include a home rule provision. ILL. CONST. art. VII, §6(a). *See* Michael & Norton, *Home Rule in Illinois: A Functional Analysis,* 1978 U. ILL. L. FORUM 559. Vanlandingham noted, however, that home rule is widely practiced in only a few states. Vanlandingham, *supra,* at 283.

195. Vanlandingham, *supra* note 194, at 275-76.

196. *See Municipal Corporations, supra* note 193, at 1560. *But see* Hunter v. City of Pittsburgh, 207 U.S. 161, 179-81 (1907), where the Court suggested that state authority over a municipality's proprietary activities may be somewhat circumscribed. *See also* Gomillion v. Lightfoot, 364 U.S. 339, 342, 344 (1960). The federal government may delegate specific powers to political subdivisions, thus circumventing state control. *See* City of Tacoma v. Taxpayers, 357 U.S. 320, 340 (1958); City of Davenport v. Three-fifths of an Acre of Land, 252 F.2d 354, 355-56, 355 n.1 (7th Cir. 1958). *See also* Owen v. City of Independence, 100 S. Ct. 1398 (1980) (municipalities sued under Civil Rights Act not entitled to a qualified immunity based on good faith of their officials); Monell v. Department of Social Servs., 436 U.S. 658 (1978) (municipalities can be sued directly under Civil Rights Act of 1871).

197. This assumes, of course, that there is no conflict with the state and that the state has not

ical subdivisions in their areas of independence of action does not interfere with the sovereignty of the states, since there is little or no state control present.[198]

It should be obvious that a municipality may engage in monopoly (or in a restraint of trade) pursuant to a home rule charter, a broad legislative enabling act, or a specific delegation of regulatory authority. To escape antitrust liability, under the *City of Lafayette* plurality approach, the municipal monopoly would have to be authorized by the state pursuant to a state policy to displace competition. Further, the specific municipal conduct attacked would have to be within the contemplation of the state when it authorized the municipal action.[199]

Part of the difficulty with the plurality's approach stems from the ambiguity of its use of the term "authorize." Authorized conduct may mean any activity which does not violate state law. On the other hand, it may signify that "conscious" authorization is required by the state to exempt municipal conduct from the antitrust laws. The latter interpretation seems more plausible, particularly in view of the basic state action immunity requirement that the activity scrutinized must be part of a state policy, "clearly articulated and affirmatively expressed," to displace competition.[200] The additional requirement that the municipal action be within the contemplation of the state legislature further supports a restricted reading of the authorization edict. The contemplation requisite necessarily focuses attention on legislative intent.[201] Thus, there must be a discernible legislative intent to displace competition, as opposed to an intent to exempt the municipal conduct,[202] for immunity to attach.

At first blush, the ability of a political subdivision to show a legislative intent to permit monopolistic conduct in lieu of competition where the

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preempted the field.

198. The supposed autonomy of home rule municipalities may actually increase the likelihood that those jurisdictions will have to comply with the antitrust laws. *See* Bangasser, *Exposure of Municipal Corporations to Liability for Violations of the Antitrust Laws: Antitrust Immunity After the* City of Lafayette *Decision*, 11 URB. LAW. vii, xxxii (1979). If home rule municipalities do act, for some purposes, independently of the states, then application of the antitrust laws to those activities arguably does not infringe upon the sovereign right of the states to displace competition. The municipal activity would be neither part of a recognized state regulatory scheme nor adequately supervised by the state.

199. 435 U.S. at 415.

200. *Id.* at 410; New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 109 (1978); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 100 S. Ct. 931, 943 (1980).

201. *See* Note, 1979 WIS. L. REV. 570, 572-73, 594-95.

202. *See* Star Lines, Ltd. v. Puerto Rico Maritime Shipping Auth., 451 F. Supp. 157, 162, 166-68 (S.D.N.Y. 1978), where the court found that a state law providing that "the Antitrust laws shall not be applicable to any action of the Authority taken pursuant to the provisions hereof," *id.* at 162, did not, by itself, establish a legislative intent to displace competition with regulation.

municipality is acting pursuant to broad enabling legislation or a home rule charter may appear uncertain at best. But it must be remembered that antitrust immunity depends not only upon state authorization but also upon the precise nature of the municipal conduct as it relates to the state authorization. Thus, a municipally controlled public utility may support a finding of implied legislative intent, or contemplation, even in a home rule jurisdiction, if municipal utilities are widely permitted in the state or if the state itself is an active regulator of utilities.[203]

However, specific anticompetitive practices perpetrated by a political subdivision in furtherance of a state granted monopoly would require further scrutiny. For example, the allegations in *City of Lafayette* that the city sought to defeat electric utility competition and expand its monopoly by engaging in sham litigation and unlawful tie-ins with city water and gas service[204] would, if proved, presumably be beyond the contemplation of the state's authorization of municipal utilities.

A more difficult problem is raised when the municipal activity questioned is pursuant to the state's authorization or is necessary for the implementation of the authorized conduct. Often, in this context, the municipality deals directly with private parties, usually to the exclusion of other private parties, in granting contractual privileges.[205] For example, in *Woolen v. Surtran Taxicabs, Inc.*,[206] a municipal airport's exclusive licensing of the right to pick up passengers at the airport to one taxicab company was successfully challenged by rival firms. The district court held it unlikely that the Texas legislature contemplated the implementation of anticompetitive activities by local government units in their authorized operation of airports. Restraining competition among taxicabs could not be viewed as necessary or pursuant to the lawful running of a city airport.[207]

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203. *See, e.g.*, E.W. Wiggins Airways, Inc. v. Massachusetts Port Auth., 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966); Huron Valley Hosp., Inc. v. City of Pontiac, 466 F. Supp. 1301 (E.D. Mich. 1979).

204. 435 U.S. at 392 n.6. *See also* Note, *supra* note 185, at 532 & n.113.

205. *See, e.g.*, City of Fairfax v. Fairfax Hosp. Ass'n, 562 F.2d 280 (4th Cir. 1977), *vacated and remanded*, 435 U.S. 992 (1978); Duke & Co. v. Foerster, 521 F.2d 1277 (3d Cir. 1975); Saenz v. University Interscholastic League, 487 F.2d 1026 (5th Cir. 1973).

206. 461 F. Supp. 1025 (N.D. Tex. 1978).

207. *Id.* at 1032-33. Interestingly, *Surtran* involved a home rule charter. The court refused to grant automatic immunity to home rule cities, ruling that the home rule provisions must first "evince a state policy 'to displace competition with regulation or monopoly public service' " before antitrust immunity can attach. *Id.* at 1029, quoting City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 419, 425 (1978). For a pre-*City of Lafayette* case granting immunity on essentially the same facts *see* Padgett v. Louisville & Jefferson County Air Bd., 492 F.2d 1258 (6th Cir. 1974). *See also* Murdock v. City of Jacksonville, 361 F. Supp. 1083 (M.D. Fla. 1973).

Frequently, municipal government agreements with private parties are necessary to effectuate an authorized municipal project. For example, the construction of a state authorized municipal hospital necessarily entails that the municipality let a contract with a general contractor. The state delegation of authority would presumably not countenance municipal participation in a bid-rigging or other restraint of trade, however, absent specific empowerment.[208] Thus, a municipality could not claim antitrust immunity for any alleged irregularities in the bidding process but would have to confront directly antitrust claims brought by disgruntled contractors.

It should be apparent that the plurality approach, which focuses on the municipal conduct as well as the nature of the state delegation of authority, produces sensible results in many situations. Where the supposed state authorization lies in home rule provisions or broad enabling statutes, however, the difficulty of discerning legislative intent for a particular municipal activity becomes paramount.[209] As noted, resort to implied legislative intent, through the use of extrinsic evidence, will often be necessary to determine whether the municipal conduct falls within the state's contemplation.[210]

It is unsettling that such an uncertain standard would determine local government antitrust liability where the state delegation is broad. For a municipality to assure itself of immunity, it would be important to show state control or supervision over its conduct or, at least, that the state itself engaged in similar anticompetitive conduct or permitted other politi-

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208. *See* City of Mishawaka v. American Elec. Power Co., 465 F. Supp. 1320 (N.D. Ind. 1979) where an electric power company alleged that a municipality had improperly annexed territories adjacent to its boundaries, thereby expanding the area served by the municipality's competing electric utility at the company's expense. The municipality successfully asserted the state action defense because the relevant Indiana statutes authorized municipalities to monopolize electric, water, sewer, and other utilities as well as to annex territories and provide mandatory services to the annexed areas.

209. Ultimately, the antitrust liability of home rule municipalities will hinge upon the amount of control a state is found to exercise over its local government units. Here, the differing approaches of the plurality and the Chief Justice are critical. Following the Chief Justice's view, it is rare that the state could be said to compel the anticompetitive conduct of home rule municipalities. 435 U.S. at 425 n.6. Thus, Burger would presumably regard home rule units as the equivalent of private corporations for antitrust purposes. In contrast, the plurality would not require state compulsion or even specific delegation of authority to municipalities to engage in anticompetitive activity. *Id.* at 414-15. The four member dissent would exempt any government, as opposed to private, action. *Id.* at 426 (Stewart, J., dissenting). The broad delegation of authority by the state to home rule provinces would not provide state sanction for local regulatory or entrepreneural action. Hopefully, neither will it serve to subject every activity by home rule municipalities to possible antitrust liability under the rationale that home rule units are autonomous. The plurality approach, while vague and difficult to administer predicatably, at least assures a somewhat middle ground between these extremes.

210. *See* note 203 *supra* and accompanying text.

cal subdivisions to do so.[211]

Further, the plurality's focus on legislative intent to displace competition necessarily supplants the ability of a municipality to act in contravention of the antitrust laws to further a legitimate governmental objective or perhaps to make fundamental decisions about public health, safety, or protection.[212] The plurality, pointing to the lack of independent sovereign status of municipalities, was simply unwilling to permit the cities to advance their own interests at the expense of competition.[213] Thus, the state mandate must be ever present for municipal immunity no matter how compelling the local decision to disregard the antitrust laws may appear.[214]

In this context the plurality standard conflicts with the Court's recognition in *National League of Cities v. Usery* of state and local freedom from federal interference when performing integral governmental functions. As noted previously, the state sovereignty principles of *National League of Cities* should be significantly more restricted than the state action antitrust doctrine.[215] The plurality's emphasis on legislative intent, however, may create instances in which *National League of Cities* would require federal noninterference even though the conduct would not qualify for *Parker* immunity. An integral government function carried on without discernible legislative contemplation would seemingly necessitate resort to *National League of Cities* to forestall antitrust intervention.

The decision in *Jordan v. Mills*[216] is illustrative. A prison inmate at a

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211. *See* Avery v. Midland Co., 390 U.S. 474, 481 (1968). The plurality in *City of Lafayette* noted that state policy may be contrary to an anticompetitive policy adopted by a municipality even though the local policy might not violate state law. It was pointed out that if that occurred, state policy could hardly be said to foster, much less compel, the anticompetitive practices. 435 U.S. at 414 n.44. Certainly that would generally be the case with regard to anticompetitive decisions by home rule subdivisions. Adoption of the Chief Justice's approach would preordain antitrust exposure for those local government units.

The plurality refers to the significance in the grant of antitrust immunity in Bates v. State Bar, 433 U.S. 350, 360 (1977), to the fact that the state policy there "was one clearly articulated and affirmatively expressed . . . and actively supervised" by the state. 435 U.S. at 410. Some commentators have believed that the clear statement and/or the active supervision requirements are or should be implicit in the plurality's approach. *See The Supreme Court, 1977 Term, supra* note 54, at 282-84; Note, *supra* note 185, at 523-24.

212. *See, e.g.*, City of Fairfax v. Fairfax Hosp. Assoc., 562 F.2d 280 (4th Cir. 1977), *vacated and remanded*, 435 U.S. 992 (1978). *But see* Huron Valley Hosp. Inc. v. City of Pontiac, 466 F. Supp. 1301 (E.D. Mich. 1979).

213. 435 U.S. at 413-17.

214. The Chief Justice's test for immunity is even more exacting. He would require that the local activity be compelled by state and, further, that the conduct be essential to the state's plan to displace competition. 435 U.S. at 425 n.6.

215. *See* notes 170-72 *supra* and accompanying text.

216. 473 F. Supp. 13 (E.D. Mich. 1979).

Michigan state prison sought to maintain a class action against prison officials for alleged price fixing and monopolistic activity in the operation of the prison's inmate store. The court was unwilling to find that *City of Lafayette* was inapposite simply because state officials rather than officials of political subdivisions had been sued.[217] Further, if the *City of Lafayette* plurality rationale was applied, the court stated that it would be difficult to find that the Michigan legislature "contemplated the anticompetitive activity of its officials in running the inmate store" when it granted the Department of Corrections broad powers to manage the state prisons.[218] However, the court ultimately concluded that the state action doctrine did attach based upon language in *Goldfarb v. Virginia State Bar* and *Bates v. State Bar* which could be read as permitting immunity for "primary governmental functions" such as the regulation of prisons and prisoners.[219]

The court, assuming arguendo that its conclusion about the state action doctrine was wrong, proceeded to find the defendants immune from antitrust attack pursuant to the federalist principles of *National League of Cities*.[220] The court explicitly recognized that the plurality's legislative intent mandate rendered it possible for the state action immunity not to apply to conduct which would be protected under *National League of Cities* if the application of the antitrust laws would interfere "with the State's freedom to structure integral operations in areas of traditional governmental functions."[221] Thus, even if the plurality's contemplation test failed to immunize the anticompetitive operation of prison stores, *National League of Cities* would protect the conduct as essential to the traditional governmental function of administering prisons.[222] The court believed it imperative that the state have some discretion with respect to providing a prison store as part of the delivery of integral governmental services.[223]

The *Jordan* court's characterization of the operation of a prison store as an integral governmental service because it is part of the state's tradi-

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217. *Id.* at 15. The court believed that although the *City of Lafayette* plurality took pains to distinguish actions against state officials and actions against local government units, the plurality opinion was ambiguous about the application of different *Parker v. Brown* standards to separate governmental levels.

218. *Id.*

219. *Id.* at 15-16, *citing* Bates v. State Bar, 433 U.S. 350, 361-62 (1977).

220. 473 F. Supp. at 17-19.

221. *Id.* at 19.

222. *See* 426 U.S. at 847-48.

223. 473 F. Supp. at 19. The *Jordan* court stated that to find *National League of Cities* inapplicable because operating a prison store is not essential to running the prison would render it a nullity. *Id.* at 18.

tional administration of prisons may be overbroad.[224] It illustrates, however, the peculiar possibility of a constitutionally ordained recognition of states rights being applied more broadly, at least in some instances, than a judicially created immunity grounded in policy.

The same difficulty may arise with respect to anticompetitive municipal activities that may be deemed part of an integral governmental function. For example, broad enabling act authority or home rule authority may not meet the contemplation standard if a municipality decides, for public health purposes, to replace a private ambulance service with a municipally funded one. Similarly, if a city opens a municipal waste disposal site for public sanitation purposes and requires all solid waste to be deposited there, to the detriment of privately owned waste processors, legislative contemplation may be lacking although characterization of the service as an integral part of a traditional governmental function would be permissible.[225]

National League of Cities grants immunity to local government units only because they "derive their authority and power from their respective States."[226] *Jordan* illustrates, however, that it is unlikely that the courts, when deciding whether a governmental activity is integral, will pay as much heed to legislative intent as the *City of Lafayette* plurality requires for state action purposes. Although integral municipal services can presumably point to some type of state authorization, it may often be questionable whether the specific act complained of can be said to have been within the contemplation of the legislature when the authority was granted.

The possibility of further conflict between the *Parker* doctrine and *National League of Cities* is raised by the Supreme Court's recent decision in *California Retail Liquor Dealers Association v. Midcal Aluminum,*

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224. Presumably state and local immunity from federal interference is more extensive when directed against a federal statute not specifically meant to usurp state laws than when Congress intended federal exclusivity. *See* notes 128-32 *supra* and accompanying text.

225. Another approach is illustrated by the decision in Cedar-Riverside Assocs., Inc. v. United States, 459 F. Supp. 1290 (D. Minn. 1978). In that case private developers sued, among others, a city and its housing authority alleging that they had conspired to prevent plaintiffs from participating in an urban renewal project in violation of the Sherman Act. The district court, in considering whether the defendants were immune from the antitrust claims, set forth a dual alternative test which incorporates both the standards of the *City of Lafayette* plurality and *National League of Cities* (although *National League of Cities* was not cited). According to the court, the conduct is immune if the state action involved is of "such 'signal importance in our national traditions and governmental structure' as to overcome the fundamental policies of the federal antitrust laws" or if the local government unit has acted under an "adequate state mandate" where "the legislature contemplated the kind of action complained of." *Id.* at 1297-98.

226. 426 U.S. at 856 n.20.

Inc.[227] The Court, citing the *City of Lafayette* plurality opinion, held that for *Parker* to apply to state conduct there must be a "clearly articulated and affirmatively expressed" state policy coupled with active state supervision.[228] The active supervision requirement, if applicable to municipalities, would limit the reach of the *Parker* doctrine to indisputably integral local government functions which were not subject to effective state review. Conceivably, municipal health care or public safety functions would face possible antitrust scrutiny. Thus, the state action antitrust doctine would, in many instances, not apply to local activities able to withstand federal interference pursuant to *National League of Cities.*

It is questionable whether a showing of active state supervision is necessary for political subdivisions to gain *Parker* immunity, however, in spite of the seemingly unequivocal language of *California Retail Liquor.* First it should be noted that *California Retail Liquor* involved an action to enjoin a state agency from enforcing a state statute.[229] No municipal conduct was implicated. Secondly the Court's reference to *City of Lafayette* is somewhat enigmatic since it is highly questionable that the *City of Lafayette* plurality required active state supervision in addition to legislative authorization and contemplation of the municipal anticompetitive conduct.[230] The plurality's one reference to active supervision came in its discussion of the *Bates* case and was used to reject the claim that municipalities automatically qualify for state action antitrust immunity.[231] It was not referred to when the plurality articulated the standards necessary for local government immunity.[232]

Although the absence of an active supervision requirement for municipal antitrust immunity would eliminate a good deal of the potential conflict between *National League of Cities* and the *Parker* doctrine on the local government level, discord between the two is still apparent on the

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227. 100 S. Ct. 937 (1980).

228. *Id.* at 943, citing City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978) (opinion of Brennan, J.).

229. Midcal Aluminum originally sought a writ of mandate enjoining the California Department of Alcoholic Beverage Control from enforcing the state's wine pricing system. Midcal had been charged by the department with selling wine below an effective price schedule and selling wine for which no fair trade contract or pricing schedule had been filed. 100 S. Ct. at 940.

230. *See* Note, *supra* note 185, at 523-24 & n.52.

231. 435 U.S. at 410-11.

232. *Id.* at 414-15. Further, the Court's holding in *California Retail Liquor* rested squarely on the *Parker v. Brown* principle that a state cannot grant antitrust immunity to violators by authorizing the violation or by declaring their action lawful. 100 S. Ct. at 944, *citing* Parker v. Brown, 317 U.S. 341, 351 (1943). Thus, the lack of state control over the price fixing and fair trade allowances mandated a finding of no immunity absent any reference to *City of Lafayette. See* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951).

state level. *California Retail Liquor* makes it clear that active supervision is necessary for immunity for state officials or agencies. *Jordan v. Mills*[233] is again illustrative. There the court found that the operation of a prison store was protected by *National League of Cities* from federal interference because the running of the store was encompassed in the "integral" governmental function of administering prisons.[234] Following the analysis of the Supreme Court in *California Retail Liquor*, however, the *Parker* doctrine could easily be found inapplicable to the operation of the prison stores since it is questionable whether the state actively supervised the alleged price fixing activities of the store.[235]

If active supervision is required for *Parker* immunity to attach to state activities but not to municipal conduct, municipalities may have, in some instances, a broader grant of antitrust immunity than state activites. It is questionable whether the plurality intended or foresaw such a result. The plurality's contemplation test assures state control over any local conduct immune from antitrust, however. Legislative contemplation focuses the state authority necessary to immunize municipal conduct and may, to a great extent, equate with the active supervision standard required by state regulatory immunity.

The distinction would thus seem to be workable in practice. Further conflict with the federalist principles of *National League of Cities* would be avoided. *National League of Cities* necessarily reflects a rationale disposed to identifying and protecting important government functions rather than concentrating on state legislative action. Thus *National League of Cities* should present a standard for state sovereignty which remains untouched by the antitrust laws, which were not specifically designed to constrain state conduct.[236]

VI. CONCLUSION

The antitrust state action decisions together with the Supreme Court opinion in *National League of Cities v. Usery* provide the needed framework for analysis of rights of states to make governmental decisions free from federal intrusion. The amount of deference due the states depends upon the nature of the state activity involved as well as the general or express applicability of the federal law. Further, it is clear that the ability of political subdivisions to resist federal intrusion depends on the relationship of municipal conduct in question to the governing state. Although the

233. 473 F. Supp. 13 (E.D. Mich. 1979). *See* notes 216-25 *supra* and accompanying text.
234. 473 F. Supp. at 18-19.
235. *But see* note 219 and accompanying text.
236. Parker v. Brown, 317 U.S. 341, 352 (1943).

nature of the relationship required for immunity is uncertain, the Court has made it clear that the ability of states to delegate authority to political subdivisions falls under the sovereignty rubric.

If the concept of dual sovereignty is to have any significance, the states must be given room to make governmental and economic decisions independently of the federal government. Thankfully, *National League of Cities* recognizes the basic necessity of this notion. There are constitutional and policy reasons for not extending the autonomy to municipalities, however. Moreover, subjecting municipal conduct to federal scrutiny does not interfere with state sovereignty since the states can usurp federal regulation by acting to exercise governmental authority over the local government.