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Balancing Federalism and Free Markets: Toward Renewed Antitrust Policing, Privatization, or a State Supervision Screen for Municipal Market Participant Conduct

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BALANCING FEDERALISM AND FREE MARKETS: TOWARD RENEWED ANTITRUST POLICING, PRIVATIZATION, OR A "STATE SUPERVISION" SCREEN FOR MUNICIPAL MARKET PARTICIPANT CONDUCT

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I. INTRODUCTION

THE past decade has witnessed an historic rejection of state control of markets in eastern Europe.[1] Expansion of domestic antitrust immunity policy toward municipal businesses based upon federal-

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1. As one commentator has stated,
> Recognition of the need to establish antitrust policy as the sine qua non . . . of a democratic society's economic policy is being reaffirmed by nations newly emerging from a Marxist tradition . . . . Poland, Hungary, Bulgaria and the former Czechoslovakia have all recently adopted antitrust laws in recognition of the necessary connection between establishing a private enterprise-based economy and the need to protect the economic liberty of the state, people and businesses in that economy. . . .

John J. Flynn, *Antitrust Policy and Health Care Reform*, 39 ANTITRUST BULL. 59, 65 n.12 (1994) (citations omitted). *See also* Irving Howe, *Introduction* to MICHAEL HARRINGTON, SOCIALISM: PAST AND FUTURE xiv (1990).

ism concerns,[2] however, which occurred during the same period, has fostered autonomous governmental control of markets. The judicial application of the *Parker* doctrine to local government has tended to contradict the premise underlying several generations of U.S. foreign policy designed to support emerging competitive market economies outside the country.[3] Academic analysis of the *Parker* doctrine during the 1980s was heated and creative. A number of commentators, with varying viewpoints, have addressed the bases for and appropriateness of municipal antitrust immunity.[4] This article, after summarizing the currently ambig-

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2. The Supreme Court created and applied the so-called "State-Action" immunity doctrine in Parker v. Brown, 317 U.S. 341 (1943). In *Parker*, the Court refused to affirm antitrust liability with respect to a state-imposed agreement to limit output and supply of raisins in California because "nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Id.* at 350-51. "The Supreme Court in *Parker* thus first articulated the state action immunity doctrine after consulting the text and history of the Sherman Act." Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co., 22 F.3d 1260, 1265 n.7 (3d Cir. 1994).

Thirty-three years after *Parker*, the Court clarified that state-action antitrust immunity did not apply to private persons whose conduct was merely authorized by a state agency. Cantor v. Detroit Edison Co., 428 U.S. 579, 598 (1976). Similarly, *Parker* immunity did not apply to proprietary business conduct by a municipal government participating in the marketplace merely because the state had authorized the municipality to become a market participant. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 412-13 (1978). The Court clarified that municipal immunity existed only when the municipality acted "pursuant to state policy to displace competition with regulation or monopoly public service." 435 U.S. at 413. The Court affirmed *Lafayette* in Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982), and found no antitrust immunity for home rule based regulation of cable television by the municipal dependant. The Court affirmed *Cantor* in California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), and required persons claiming *Parker* immunity to satisfy a two-pronged test: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." 445 U.S. at 105 (quoting *Lafayette*, 435 U.S. at 410).

Thereafter, as will be addressed below, the courts dramatically liberalized the *Parker* doctrine until the Supreme Court's most recent *Parker* analysis in FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992) reversed that trend. *See infra* notes 26-28 and accompanying text. In particular, and a focus of this article, the Court in Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985), held that a municipality is entitled to *Parker* immunity if it meets only the "clear articulation" prong of *Midcal*, even in the absence of active state supervision. *Id.* at 47.

3. *See, e.g.*, Ferdinand Protzman, *Privatization in the East is Wearing to Germans*, N.Y. TIMES, Aug. 12, 1994, at D1. In *Ticor*, the Supreme Court emphasized its earlier recognition in *Lafayette* of the contradiction between an antitrust-policed free market on one hand, and markets controlled by government-owned or regulated business on the other hand:

> The preservation of the free market and of a system of free enterprise without price fixing or cartels is essential to economic freedom. A national policy of such a pervasive and fundamental character is an essential part of the economic and legal system within which the separate States administer their own laws for the protection and advancement of their people. Continued enforcement of the national antitrust policy grants the States more freedom, not less, in deciding whether to subject discrete parts of the economy to additional regulations and controls.

Ticor, 504 U.S. at 632 (citation omitted).

4. *See infra* note 97 and accompanying text.

uous state of the caselaw[5] and reconsidering prior characterizations of Supreme Court doctrine, will attempt to synthesize those views. The article will argue that the balancing of federalism and free market concerns as first addressed in *Lafayette*, modified in *Midcal*, and confirmed in *Ticor*, constitutes the best policy toward municipal market participant conduct and the only practical alternative to the privatization of municipally-owned business. In light of legislated damages immunity, *Hallie* should be reversed to limit municipal market participant antitrust immunity to those situations in which the state not only authorizes proprietary municipal conduct which would displace competition, but also acts in its sovereign capacity, through the creation of public utility or similar control, to actively supervise non-competitive municipal business practices.[6]

5. The ambiguity has been created by *Ticor*'s apparent reiteration of the "clear articulation" requirement from *Midcal*, as contrasted with a mere "foreseeability" interpretation of *Midcal's* first prong in some lower courts. *See, e.g.*, FTC v. Hospital Bd. of Directors, 38 F.3d 1184, 1190-91 (11th Cir. 1994) (*Lee County*). The Court's implied distinction in City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991) between municipal regulation on one hand, and market participation on the other, has added to the confusion. For example, the refusal by the court in *Lee County* to respond to the FTC's effort to apply the language in *Ticor* and *City of Columbia* to the case before it is puzzling at best. The Court apparently requires a "clear articulation" of state policy to displace competition before affording immunity to municipal market participant conduct.

6. In other words, this article proposes that municipal market participant conduct be treated the same as private market participant conduct for purposes of applying the *Parker* doctrine, as recently interpreted in *Ticor*. As the Second Circuit held in Hertz Corp. v. City of New York, 1 F.3d 121, 128 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1054 (1994), "a municipality may benefit from the 'state action' exemption only if it has acted pursuant to a clearly articulated state policy," rejecting a mere state "foreseeability" test for municipal *Parker* immunity in light of *Ticor*. *See also* Genentech, Inc. v. Eli Lilly & Co., 998 F.2d 931, 948 (Fed. Cir. 1993), *cert. denied*, 114 S. Ct. 1126 (1994) (holding that for *Parker* state action immunity to apply as a limitation on antitrust liability, the alleged anticompetitive acts "must be taken in the state's 'sovereign capacity', and not as a market participant in competition with commercial enterprise."). *Hertz* and *Genentech* reflect the need, first, for a clear articulation of state policy to displace competition, and second, the need for stricter scrutiny for market participant conduct. Neither decision directly challenges the *Hallie* rule that municipalities participating in the market do not need to prove active state supervision of their conduct to obtain antitrust immunity. This article does. This article challenges, for example, the Eleventh Circuit position that, not only does state legislation that merely foresees that local governments will act anticompetitively suffice to confer *Parker* immunity, but also that "there is no meaningful distinction for purposes of immunity between 'governmental' and 'proprietary' activities." Askew v. DCH Regional Health Care Auth., 995 F.2d 1033, 1039 (11th Cir.), *cert. denied*, 114 S. Ct. 603 (1993) (citing McCallum v. City of Athens, 976 F.2d 649, 653 n.7 (11th Cir. 1992)). The distinction advocated in *McCallum* was not "governmental/proprietary" but rather "regulatory/market participant." *See infra* notes 132-37 and accompanying text.

The irony and irrationality of supporting free market capitalism as a national economic and foreign trade and foreign diplomatic policy, on one hand, yet protecting local state monopoly and command economies in the name of authoritarian federalism, on the other hand, is explored generally in Richard M. Steuer, *Getting it Backward on Antitrust*, N.Y. TIMES, Dec. 6, 1992, at F13, and Michael E. Porter, *Japan Isn't Playing by Different Rules*, N.Y. TIMES, July 22, 1990, at F13.

II. FEDERAL ANTITRUST POLICY AND MUNICIPAL BUSINESS: AN OVERVIEW

Municipal governments regularly choose between demands of employee organizations and the less affluent to increase or maintain the provision of services and goods by government and the conflicting demands of wealthier taxpayers and private business to privatize or otherwise defer to the private sector.[7] These choices occur within the broader context of federal and state unfunded mandates to local government to provide municipal services, combined with disappearing revenue sources. More fundamentally, these choices implicate the core competitive market/industrial policy/command economy debate.[8]

Reinforced in part by the so-called "market participant" exception to the dormant Commerce Clause,[9] which has eliminated potential Commerce Clause challenges to the proprietary business conduct of state and

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7. The issue of "privatization" of services now provided by government arises in both the national and local governmental context. The debate contains political as well as economic elements, and its resolution is far from obvious. *See, e.g.*, Ferdinand Protzman, *Privatization in the East Is Wearing to Germans*, N.Y. TIMES, Aug. 12, 1994, at D1:

> [T]he controversy over [the] economic transformation [in East Germany] . . . continue[s] to rage, with some Germans complaining of the financial cost of the privatization and others saying that the human toll — high unemployment and economic upheaval — has been too great to be acceptable . . . 'There were people . . . who knew all about market economics . . . . [B]ut no one knew how to transform an economy from socialist central planning to a free market. There was no road map.'

Id.

8. *See* HARRINGTON, *supra* note 1. When the privatization debate occurs at the municipal level, and the debate incorporates whether antitrust policing is necessary for non-privatized municipal business, the fundamental political consequences of authorizing a local command economy are frequently overlooked by the courts and commentators, who focus either on a cost-benefit analysis or federalist deference to local government decision-making. *See* Thomas McArdle, *New Broom in New York City? Giuliani Has Cut Spending, Is Mulling Privatizing*, INVESTOR'S BUS. DAILY, June 6, 1994, at 1:

> 'New York is actually one of America's laggards when it comes to privatization . . . countless other U.S. cities, large and small, have already committed themselves to extensive privatization, generally with good results in cost savings and service improvement' . . . The privatization of hospitals and other social services could be the biggest battle against the City Council.

Id. at 2. The anticompetitive conduct of a private service provider, of course, is not entitled to *Parker* immunity in the absence of active state supervision, under *Midcal*.

9. *See generally* GSW, Inc. v Long County, 999 F.2d 1508, 1511-12 (11th Cir. 1993) (discussing application of the dormant Commerce Clause):

> At its most basic level, the dormant Commerce Clause stands for the principle "'that the right to engage in interstate commerce is not the gift of a state, and that a state cannot regulate or restrain it . . . .'" The Supreme Court, however, has developed an exception to the broad reach of the dormant Commerce Clause to address situations where a state is acting as a participant in the market, rather than as a regulator.

Id. at 1511 (citation omitted).

Thus, the Court has recognized the distinction (and its constitutional significance) between regulatory conduct and market participant conduct by government. While local government is free under the Commerce Clause to participate in the market like a private actor, its conduct should be subject to the same competitive rules as that of private actors, unless the local government is actively supervised by the state pursuant to sovereign state policy.

local government,[10] and by expanded legislative[11] and judicial[12] immunization of municipal conduct from federal antitrust challenge, municipalities frequently have adopted a compromise policy: they are increasing municipally-owned business activities but, where economically and politically feasible, are doing so on a profit-making basis, and commonly are exerting law-making power to exclude competitive challenges.[13] Not only does reliance upon monopoly market participant ventures by government reduce the specific fiscal and availability concerns regarding particular services, monopoly profits frequently provide a politically preferable alternative to taxes as a general revenue source.[14]

The massive lobbying response by local government to the *City of Boulder* decision, together with a change in political control following the 1980 election, resulted in a crucial policy reaction by the three branches of the federal government.[15] This reaction has begun to cause significant interference with the preeminent national economic goals of uniformity and free markets.[16] In particular, the twin holdings of *Hallie*, confirming that municipal antitrust immunity requires only state contemplation, not clear articulation or specific authorization, of the displacement of competition, and eliminating the requirement found in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*[17] that anticompetitive conduct by

10. *See, e.g.*, White v. Massachusetts Council of Constr. Employers, 460 U.S. 204 (1983) (upholding city-funded discrimination in construction employment under the market participant exception to the dormant Commerce Clause). *But see* C & A Carbone v. Town of Clarkstown, 114 S. Ct. 1677, 1684 (1994) (holding that the dormant Commerce Clause does not permit local government to "hoard a local resource"); Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality, 114 S. Ct. 1345, 1355 (1994) (striking down Oregon's imposition of an extra dumping fee for out-of-state waste). In these latter two Commerce Clause cases, as well as in *Ticor*, the Court has signalled its awareness of the importance of eliminating undue governmental interference in or control over the marketplace.

11. In response to Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982), Congress immunized municipalities from antitrust damages actions but not from antitrust actions seeking injunctive relief under 15 U.S.C. § 26 or attorneys fees under Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 (1988).

12. *See, e.g.*, City of Columbia v. Omni Outdoor Advertising, Inc. 499 U.S. 365 (1991); Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985); *Lee County*, 38 F.3d 1184 (11th Cir. 1994).

13. *See, e.g.*, McCallum v. City of Athens, 976 F.2d 649 (11th Cir. 1992), and discussion *infra* at notes 132-37 and accompanying text. The City of Athens, Georgia earned an average profit of $2,000,000 per year from the sale of water to non-residents for a price double that paid by residents.

14. For an interesting outgrowth of local governmental monopoly, see Martin Tolchin, *13 Cities Accused of Diverting Airport Money: Congressman Sees Revenue Being Illegally Diverted to Pay for Local Needs*, N.Y. TIMES, Feb. 3, 1994, at A17: "Some [municipally operated] airports are financially successful while the cities that own them may well experience critical financial problems . . . . This creates a condition where political leaders view their successful airports as cash cows." *Id.*

15. The Supreme Court responded with *Hallie* and *City of Columbia*. Congress responded with the Local Government Antitrust Act of 1984. The Executive Branch supported each of these changes. ,

16. *See* FTC v. Ticor Title Ins. Co., 504 U.S. 620, 621 (1992). *See also infra* note 34 (quoting City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 408 (1978)).

17. 445 U.S. 97 (1980).

municipalities be actively supervised by the state to receive immunity,[18] have provided inadequate guidance to municipal officials and may no longer be supported by a majority of the Supreme Court. The Court in *City of Columbia v. Omni Outdoor Advertising*,[19] left tantalizingly open its understanding that municipal market participant[20] conduct may be treated deferentially for antitrust immunity purposes.[21] Moreover, subsequent to *City of Columbia*, in its most recent treatment of state action immunity, the Court (including Justice Scalia, specially concurring) recognized the continuing vitality of the core concerns expressed in *Lafayette*,[22] and appeared to distance itself from lower court interpretations of *Hallie*.[23] Even more recently, the Court condemned anticompetitive conduct by local governments in the context of Commerce Clause challenges.[24]

As will be described in the next section, a re-examination of the Supreme Court's wavering path in applying *Parker* antitrust immunity to municipalities demonstrates an unfortunate judicial lapse in deferring to a one-dimensional concept of conservative economic policy.[25]

III. RECONSIDERING THE SUPREME COURT'S FREE MARKET/FEDERALISM PENDULUM

As introduced above, the question of whether and to what extent municipalities would be subject to federal antitrust laws was initially addressed by the Supreme Court in the late 1970s when a municipal electric utility company brought suit against a private electric utility.[26] Having initiated antitrust claims, the city became the subject of a counterclaim alleging, among other things, attempted monopolization, exclusion of competition through the use of long-term supply contracts, and tying electrical service to continued water and gas service.

Justice Brennan's opinion in *Lafayette* gained a majority only for its first section. However, this first section explicates certain fundamental

18. *See supra* note 2 (discussing the evolution of the "State-Action" immunity doctrine).

19. 499 U.S. 365 (1991).

20. As used in this article, the term "market participant" refers to those situations in which a local government both owns and operates a product or service-providing business and does so on a fee-for-service basis, participating in a seller-purchaser market.

21. *See City of Columbia*, 499 U.S. at 365.

22. *Lafayette*, 435 U.S. at 389.

23. *See Ticor*, 504 U.S. at 621.

24. *See Carbone*, 114 S. Ct. at 1677; Oregon Waste Sys., Inc. v. Department of Envtl. Quality, 114 S. Ct. 1345 (1994).

25. In a recent decision, the district court for the Southern District of Texas indicated, perhaps, the beginning of the return of the pendulum in the lower courts. In response to a challenge to a municipal ordinance limiting private jitney service, the court held that the city was not immune from antitrust liability under the state action doctrine because the municipality engaged in unreasonable and arbitrary regulations in a manner that was not consistent with state policy. The court also struck down the ordinance as a Commerce Clause violation, thereby expressly recognizing the relationship between such recent Supreme Court decisions and policy as *Carbone* and *Ticor*. *See* Santos v. City of Houston, 852 F. Supp. 601 (S.D. Tex. 1994).

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

constitutional values that have resurfaced recently in *Ticor*. The decision begins with the premise that the Sherman Act[27] is comprehensive in its scope and " 'shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states.' "[28] Two counterbalancing policies are identified by the majority as allowing an activity or an entity to escape from the scope of the Act: first, open communication between the people and their government[29] and second, federalism.[30]

It is the second policy, federalism, from which the state action doctrine has blossomed. The Constitution as a whole structurally provides that the federal government has certain enumerated powers while all other powers are left to the states.[31] In *Lafayette*, the majority is concerned that, should municipalities become economically autonomous, there would be over 60,000 local units each going in its own direction without regard to the aggregate effects on the national economy, thereby creating "a serious chink in the armor of antitrust protection" which Congress has carefully provided in the form of national legislation.[32] "In enacting the Sherman Act... Congress mandated competition as the polestar by which all must be guided in ordering their business affairs."[33] When municipalities, on their own and without continuing control and supervision by the state, decide to enter and control the marketplace, two general outcomes are likely. First, conflicting local rules and policies interfere with national attempts to produce a uniform regulatory system.[34] For instance, if each community within the United States enacted laws concerning, or

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27. Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7 (1988).

28. *Lafayette*, 435 U.S. at 398 (quoting United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553 (1944)). The Court noted that previous decisions had settled that municipalities are "persons" subject to the Sherman Act. *See, e.g.*, Georgia v. Evans, 316 U.S. 159 (1942); Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906).

29. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137-38 (1961). This concept includes the first amendment right to petition. *Id. See also* United Mine Workers v. Pennington, 381 U.S. 657, 669-72 (1965).

30. Parker v. Brown, 317 U.S. 341 (1943). The *Parker* Court recognized that the Sherman Act was meant to apply only to business combinations. The states, as sovereigns themselves, have the authority to enact anti-competitive legislation for their own ends. *Parker* noted the distinction, however, between a state's legislative action as sovereign and the state's authorization to private parties to violate antitrust laws, Northern Securities Co. v. United States, 193 U.S. 197, 332, 344-47 (1904), or by joining in a private agreement, *cf.* Union Pac. R.R. v. United States, 313 U.S. 450 (1941). Where the state enacts governmental policy, the activity is that of a sovereign and therefore beyond the scope of federal antitrust laws; it is where the state acts otherwise that it may run afoul of the federal regulations. *Parker*, 317 U.S. at 350-52.

31. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW ch. 5 (2d ed. 1988).

32. *Lafayette*, 435 U.S. at 407-08.

33. *Id.* at 406.

34. *Id.* at 408. As the Court notes:

> When these bodies [i.e., municipalities] act as owners and providers of services, they are fully capable of aggrandizing other economic units with which they interrelate, with the potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender.

Id.

participated in the sale of, bottled water, such that a continuum existed, from the complete ban of competitive private sales or strict regulation on labeling and prices to laissez faire, the end result would likely be a chaotic, inefficient allocation of supply across the nation. The result would be related to the motivating factors behind the municipal laws and not based upon the desires and demands of the consumers for bottled water.

The second possible result, related to the lack of uniformity and efficient allocation, is the undermining effect some of these divergent policies would inevitably have upon operation of the free market system itself extending beyond the particular product and geographic markets at issue. In the course of regulating or entering a market, a municipality may decide it is the most efficient or fairest provider of goods to its people. To this end, the municipality may decide to become the sole supplier of bottled water, to follow through with the above example, and regulate its competitors out of business[35] or otherwise engage in exclusionary conduct derived from its *de jure* status.[36] The end result would be state or municipal ownership of what, as a matter of national policy, should be a private means of production.[37] These pockets of socialism could not easily restrain their anticompetitive effects to particular localities.[38]

Having recognized the inherent dangers involved in proprietary municipal companies, the *Lafayette* Court concluded that municipalities cannot automatically be immunized from antitrust liability. The Court held that, in the case of municipal market participant conduct, courts must perform a *Parker* analysis to determine the extent of antitrust immunity for these political subdivisions of the state.[39] As the majority recognizes, in perhaps the most controversial part of the decision,

> the economic choices made by public corporations in the conduct of their business affairs, designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders.[40]

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35. This has happened in Colorado with a shuttle service. *See infra* notes 138-42 and accompanying text.

36. *See, e.g.*, McCallum v. City of Athens, 976 F.2d 649 (11th Cir. 1992).

37. *See* JAMES A. CAPORASO AND DAVID P. LEVINE, THEORIES OF POLITICAL ECONOMY 55-57 (1992).

38. *See supra* notes 6-8.

39. *Lafayette*, 435 U.S. at 408.

40. *Id.* at 403. The Court drew an interesting parallel between a corporation and a municipality finding three common factors: (1) both entities are answerable to some third party (shareholders or residents); (2) both must keep the third party happy or else the people running the municipality/corporation will lose their job (losing at the next election, vote of no confidence, proxy fights, LBOs, etc.); and (3) both can and do enter the marketplace to buy and sell products and/or services. In Union Pac. R.R. v. United States, 313 U.S. 450 (1941) Kansas City officials entered into an agreement to provide certain concessions and free rents to dealers who would move from Missouri to Kansas, where the city was developing a new market. These incentives went beyond the costs the dealers would incur in such a move. A suit was brought under the Interstate Commerce Act and the Elkins Act, which prohibited certain actions from being taken with respect to the transpor-

Although Justice Brennan's opinion only gathered a plurality, the Court, using the *Parker* doctrine[41] as a basis, concluded that a municipality would be exempt under *Parker* only with respect to "anticompetitive conduct . . . pursuant to state policy to displace competition with regulation or monopoly public service."[42] In hindsight, perhaps the most practically significant aspect of the holding was the observation that the municipality need not point to an express state legislative mandate for each anticompetitive act in question to receive immunity; rather, it is sufficient to find, from the state's grant of authority to conduct such operations, " 'that the legislature contemplated the kind of action complained of.' "[43] Thus, federalism concerns caused an expansion of Tenth Amendment immunity from the states to their subdivision merely by virtue of legislated "contemplation" of the displacement of competition. The plurality thus reinforced a troublesome view that the Tenth Amendment might trump the Supremacy and Commerce Clauses with respect to local economic regulatory policy.

Five years later, the Court revisited the state action doctrine in *Community Communications v. City of Boulder.*[44] The city government, in response to the development of new technologies in the television signal delivery system market, placed a hold on the plaintiff's request to expand its cable television business in the city. The plaintiff had a revocable, non-exclusive license to conduct his cable business at the time, but the city was concerned that by allowing it to expand before the city was able to analyze its options the city would preclude competitors from entering the market later. Community Communications felt this moratorium constituted a section 1 Sherman Act violation and filed suit to enjoin the city's restriction.[45]

What distinguished this case from *Lafayette* is the existence of a home rule clause in the state constitution of Colorado. This clause empowers cities and towns with more than 2,000 inhabitants, including Boulder, to alter their municipal charter, which, like a private corporate charter, contains the requisite state authorization to engage in specified activities. Additionally, the principal charter trumps any law of the state with which it conflicted, provided the issue in conflict was solely one of local concern.

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tation of property by railroad in interstate commerce. The city was authorized by the state to make disbursements or concessions "in such amounts as its . . . governing body may determine" for those purposes which the governing body believed to be in the best interests of the city. 313 U.S. at 468. However, the concessions made by the city here were found not only to be in contravention of federal law, but also contrary to the best interests of the city. 313 U.S. at 467-74. In Genentech, Inc. v. Eli Lily & Co., 998 F.2d 931 (Fed. Cir. 1993), *cert. denied*, 114 S. Ct. 1126 (1994) the court using *Union Pacific* concluded *Parker* policies do not extend to a state acting as a commercial participant. *See id.* at 938-49.

41. The *Lafayette* plurality would like to strictly construe the exemption to ensure there is no problem of 60,000 local units going in different directions.

42. *Lafayette*, 435 U.S. at 413.

43. *Id.* at 415 (quoting City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434 (1976), *aff'd*, 435 U.S. 389 (1978)).

44. 455 U.S. 40 (1982).

45. *Id.* at 44-47.

In other words, the state of Colorado gives municipalities self-defining, self-government for all local matters.[46] The Court recognized that, under *Lafayette*, the city's action regulating cable television by restricting plaintiff's expansion could be immune only if it fell into one of two categories: if it were (1) an action of the state, under *Parker*, or (2) an action of a municipality pursuant to a "clearly articulated and affirmatively expressed state policy."[47]

As in *Lafayette*, the *Boulder* Court was concerned with balancing federalism and free market interests and explicitly stated that the American system of government "has no place for sovereign cities."[48] Relying also

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46. COLO. CONST. art. XX, § 6.

47. *Boulder*, 455 U.S. at 54 (citing 435 U.S. at 413).

48. *Id.* at 53. It has been noted that the decision not to treat cities as equivalent to states for federal antitrust purposes is debatable because cities are treated equal to states in other areas of the law. Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L.J. 486, 502 (1987) (citing National League of Cities v. Usery, 426 U.S. 833 (1976) (municipalities treated the same as states for 10th amendment purposes), *overruled on other grounds* by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); *see also* City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624 (1973) (municipalities and states treated the same under the supremacy clause); Avery v. Midland County, 390 U.S. 474 (1968) (municipalities and states treated the same under the Fourteenth Amendment). *But see* Edelman v. Jordan, 415 U.S. 651, *reh'g denied*, 416 U.S. 1000 (1974) (municipalities and states not treated the same under the Eleventh Amendment)). The mere fact that cities are treated as equal to states in one area of law is, however, not support for them being treated the same in other areas. One should look instead at the underlying policies of the laws in question and what they mean. *Lafayette* and *Boulder* both say the U.S. system of government has no place for sovereign cities. The *Parker* doctrine is primarily based on sovereignty. *See* cases cited *supra* note 2. The courts are attempting to determine if municipalities should be shielded for the same reason. If municipalities are sovereign, then they need not have separate authorization by the state in order to be protected by *Parker*. If municipalities are not sovereign, then the only way to be protected by *Parker* is to have their acts authorized by the states, thus gaining protection through the sovereignty of the state. At the surface level, municipalities are not sovereign because the Constitution contains no mention of them. All power is divided between the federal government and the states. This point is relied upon by *Lafayette* as a basis for its conclusion. *Lafayette*, 435 U.S. at 400, 412. At a more fundamental level, however, to recognize municipalities as sovereign would be to create a city-state system in America—in essence creating a multitude of small societies founded in some sense upon a democratic foundation. But, as Madison stated, it is the sovereign, small society that

> can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party, or an obnoxious individual. Hence it is, that such Democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property. . . .

THE FEDERALIST NO. 10, at 30 (James Madison) (John P. Kaminski & Richard Leffler eds., 1989).

Madison was of course writing about pure democracies, a form of government that can only survive on a small scale. Madison's answer was to form a republican government, but even a republican form of government "must be raised to [represent] a certain number, in order to guard against the cabals of the few . . . ." *Id.* Thus, our republican form of government, so far as sovereignty is concerned, rests at the federal and state level, as represented by the Constitution.

on *United States v. Kagama*,[49] the Court noted that cities may have limited legislative functions, but such functions are derived solely from the state.[50]

When addressing the question of whether the Colorado legislature had contemplated the anticompetitive acts involved here, the Court recognized that the state had taken a stance of pure neutrality on the subject, reportedly delegating state legislative policy-making authority to local governments. The Court adopted the Court of Appeals' characterization that "[w]e are here concerned with City action in the absence of any regulation whatever by the State of Colorado."[51] Each city in the state was able to make its own economic choices in local matters such as the regulation of cable television.[52] It would, therefore, be difficult to accept that the state legislature had contemplated the various actions a municipality might take in response to this freedom, including anticompetitive actions. Accordingly, a policy of state neutrality was not sufficient, and *Parker* could not be a bar to injunctive relief in the face of home rule legislation.[53] Left open was the question of whether local regulation would have received *Parker* immunity had the Colorado legislature expressed an expectation that municipalities would displace competition in cable television markets, but had not imposed state regulation.

The next major case for the Supreme Court, *Town of Hallie v. City of Eau Claire*,[54] moved away from *Lafayette*, as the political sands shifted. The city of Eau Claire was the sole provider of sewage treatment in two counties. The plaintiff township alleged that the city tied the collection and transportation of waste services, a market that might have been competitive, to their non-competitive sewage treatment services. The plaintiff further alleged that the town refused to supply service to surrounding towns while simultaneously providing service to individuals within those towns. Purportedly applying the *Lafayette* and *Boulder* standards, the Court examined whether there existed a clearly expressed state policy to replace competition with regulation.[55] However, the new nuance here, previously left unanswered by the Court, was how clearly the policy to displace competition must be expressed, and whether an alternative state

49. 118 U.S. 375 (1886). There, the Supreme Court upheld the constitutionality of a federal law which granted jurisdiction to state courts over the acts of certain crimes committed on reservations by American Indians. Without congressional action, the States are powerless to exercise political authority over Indians. The Indian Appropriation Act of 1885 addressed therein was a valid exercise of U.S. power in giving state courts jurisdiction over such matters.

50. *Boulder*, 455 U.S. at 53-54.

51. *Id.* at 55 (citing 630 F.2d 704, 707 (10th Cir. 1980), *rev'd*, 455 U.S. 40 (1982)).

52. The Court recognized that cable television has been characterized as a proper subject under the Interstate Commerce Clause, thus making the issue a federal concern. *Id.* at 53 n.16, *relying upon* United States v. Southwestern Cable Co., 392 U.S. 157, 168-69 (1968). However, the Court also acknowledged that Colorado believed the regulation of the cable television industry to be a local concern within the Colorado Home Rule Amendment and, therefore, not a state matter. *Id.* at 53 n.16.

53. *Boulder*, 455 U.S. at 55-56.

54. 471 U.S. 34 (1985).

55. *Id.* at 38-44.

regulatory apparatus must exist. The Court answered that foreseeability of the challenged conduct by the state is sufficient to displace antitrust policy, even where the practical result is "sovereign" city states unregulated by the state.[56] Surprisingly, the Court relied upon *Lafayette*,[57] holding that the defendant satisfied the clearly expressed state policy test although the *Lafayette* Court had remanded for a factual determination as to whether such a test was met.[58] Moreover, the *Lafayette* Court observed that mere authorization by a state for a municipality to provide a natural monopoly service was insufficient to allow a state policy to displace competition. The Court held that Wisconsin had clearly expressed a policy to displace competition, and that the granting of power to construct and run sewage systems, in addition to allowing the municipality to decide the area they are to serve, was enough to satisfy the foreseeability screen.[59]

The *Hallie* Court proceeded under a fundamental assumption that was quite different from that assumed in *Lafayette*. *Hallie* presumes municipalities necessarily act in the public interest and not to promote private monopoly.[60] As addressed above, *Lafayette* understood that municipalities, although acting consistent with certain conceptions of public interest, e.g. those premised upon command economy ideals, are not necessarily more likely to comport with national economic policy than are private enterprises.[61] The presumption in *Hallie* is used to reject any requirement for a showing that the state compelled the municipality to partake in anticompetitive acts.[62] Compulsion, according to *Hallie*, is a sufficient, but unnecessary, showing of state policy. An indirect result of *Hallie's* reliance upon federalism values to exclude the values of national uniformity in regulation and free markets for proprietary municipal conduct is the Court's acceptance of the premise that localized state economies—by definition, socialized economies—may be consistent with the "public" interest, even without state control.

Furthermore, *Hallie* extends this rationale to determine that municipalities are not subject to the second *Midcal* prong—active state supervi-

56. *Id.* at 42.

57. In *Lafayette* the state statutes had similarly authorized municipalities to provide electric power and to determine the areas to be served.

58. The question before the Court in *Lafayette* was if the court of appeals erred in holding further inquiry was necessary to determine if the city's actions were authorized by the state. The Court found no such error. 435 U.S. 389 at 413-17.

59. *Hallie*, 471 U.S. at 44. The Court in *Hallie* did not find that the mere authority to own and operate a business coupled with a municipality doing so created a regulatory regime. Although not made explicitly clear in *Hallie*, these subjects are different questions that the Court must address.

60. *Hallie*, 471 U.S. at 45. This presumption is rebuttable; it is still unclear, however, what showing would be necessary to rebut the presumption and whether such a showing would be sufficient to remove state immunity from municipalities.

61. *Lafayette*, 435 U.S. at 403.

62. *Hallie*, 471 U.S. at 45-46. Compulsion was a point raised in *Cantor* and *Goldfarb*; both cases covered actions against private parties claiming the state action exemption, on which point the Court in part distinguished them from actions against a municipality in *Hallie*. *Id.* at 45.

sion—a question previously left open by the Court. Directly contrary to the *Lafayette* Court's governing premise, the *Hallie* Court held that unlike private parties, a municipality carries "little or no danger that it is involved in a private price-fixing arrangement."[63] The Court believed the only real danger might be that municipalities act in a parochial nature to the detriment of state goals; however, where a contemplated state policy to allow municipalities to act anticompetitively exists, according to the Court, no such conflict between state and municipal goals is likely.[64]

The most recent Supreme Court decision to address the issue of municipal antitrust immunity is *City of Columbia v. Omni Outdoor Advertising*.[65] Omni had begun to provide billboard space in Columbia, a city where Columbia Outdoor Advertising (COA) held ninety-five percent of the billboard market. In response to Omni's market entrance, COA persuaded city officials to enact zoning ordinances to restrict billboard construction in the city. The government complied; the resulting zoning laws were highly favorable to COA, allowing it to maintain dominance of the billboard market.

The Court relied upon the fact that the city had express statutory authority from the state to regulate the use of land and the construction of buildings and other structures within its boundaries. Omni argued that the municipal action was beyond the city's authority, because the actions at issue did not promote the health, safety, moral, or general welfare if its citizens. The Court held, however, that narrowing the concept of state "authority" in such a way would involve federal courts in the construction of state law in an intrusive fashion, thereby undermining the concept of federalism.[66] Omni's claim would be more appropriately addressed in a state court forum challenging whether the municipality was acting appropriately under state law, but federal courts applying *Parker* to federal antitrust challenges against local governments should only consider whether the municipality is acting under a power facially granted to it by the state. When such a grant is evident on the face of a state statute, the federal antitrust courts should go no further in the application of federal antitrust policy. The Court implied that such a narrowly circumscribed review of state policy was appropriate even where the activities of the municipal defendant might, upon further analysis, actually conflict with state policy.

The "authority" the Court addressed in *Omni* was the authority to regulate. The Court also noted that the antitrust court must address as a separate matter, whether the municipality had the authority, to suppress

63. *Hallie*, 471 U.S. at 47 (emphasis omitted). This move away from *Lafayette* is questionable because it is based upon a presumption which is not necessarily true. Municipalities are just as capable as private actors of violating antitrust and free market policy. *See* Union Pac. R.R. v. United States, 313 U.S. 450 (1941).

64. *Hallie*, 471 U.S. at 46-47.

65. 499 U.S. 365 (1991).

66. *Id.* at 371-72.

competition.[67] Such authority, according to the Court, following *Hallie*, is dependent upon a " 'clear articulation of a state policy to authorize anticompetitive conduct' by the municipality *in connection with* its regulation."[68] Since the very purpose of zoning regulation is to displace business freedom, the Court concluded this test was easily met.[69] In dicta, however, the Court indicated that its holding was limited to municipal regulatory activity that necessarily displaced competition. Thus, there may be a "market participant" exception to municipal immunity under the state action doctrine, an issue which to date the Court has not yet decided.[70]

IV. THE INADEQUACY OF THE "CLEAR ARTICULATION" STANDARD

A so-called "market participant" exception to municipal immunity does appear to follow from the Court's earlier decisions, particularly *Lafayette*, as discussed above.[71] Since *Lafayette*, the Court has required that there be a clearly articulated "state policy to displace competition with

67. This analysis on its face seems odd because, by definition, the authority to regulate appears to encompass the authority to suppress competition. Although the Sherman Act is a form of regulation it is designed to spur competition, not suppress it. In essence, the Act protects the free market system from certain flaws that inherently exist. *See, e.g.,* John Cirace, *An Economic Analysis of the "State-Municipal Action" Antitrust Cases*, 61 TEX. L. REV. 481, 491-95 (1982) (stating that market failures include natural monopolies, externalities, and public good and free rider problems). *See generally* ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS (1988).

68. 499 U.S. at 372 (emphasis added).

69. *Id.* at 373.

70. In Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) the governmental/proprietary distinction was rejected as a form of analysis for Interstate Commerce Clause cases. Many commentators agree that the governmental/proprietary distinction should play no role in antitrust either. *See, e.g.,* Einer R. Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 668, 730 (1991) (the application of antitrust laws to municipalities should be based upon whether the body politic has a collective financial interest; since the financial profits gained from a business do not necessarily result in a *collective* financial interest for the local residents and government together, a proprietary/governmental dichotomy does not reach the proper result); John E. Lopatka, *State Action and Municipal Antitrust Immunity: An Economic Approach*, 53 FORDHAM L. REV. 23, 78 (1984) (courts should not use a governmental/proprietary distinction because it focuses on an irrelevant economic detail; it fails to see that both governmental and proprietary *conduct* can have the same effect on consumer welfare). *Cf.* Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CAL. L. REV. 263, 347 (1986) (*all* acts of the government, whether "governmental" or "proprietary," should be exempt from antitrust due to the original intent of the legislature). *But see* Kenneth J. King, Note, *The Preemption Alternative to Municipal Antitrust Liability*, 51 GEO. WASH. L. REV. 145, 146-47, 167 (1982) (the Eleventh Amendment protects state independence, but a municipality is only the state's alter ego when it is performing a state function; therefore, when a municipality, under a Commerce Clause analysis, is performing a proprietary act instead, it should be subject to federal antitrust laws). However, as discussed *infra* notes 112-18 and accompanying text, this distinction is very different from the market participant exception. As noted above, the Court has accepted a market participant analysis for interstate commerce cases. For an additional explanation of the role and scope of the market participant exception in the Commerce Clause context, see Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395 (1989).

71. *See supra* notes 9-24 and accompanying text.

regulation or monopoly public service."[72] Understandably, if the state has authorized a municipality to regulate an area of business, then an inference that the state contemplated the displacement of, or an alternate to, competitive markets, is more logical, as in *Omni*. On the other hand, if the state has authorized local government to participate in the respective market, then such a market participant could be deemed to be acting in a competitive capacity and therefore be subject to state and federal guidelines, including federal antitrust law. In other words, state authorization to regulate is more logically associated with the policy to displace competition than is state authorization to participate in and control the market or displace competitive forces.

However, lower courts have not taken a unified stance on how to treat municipal business when no public monopoly has been clearly authorized by the state. In fact, it appears the circuits have split into at least two interpretive camps. The first camp focuses primarily upon the *Lafayette* language inquiring whether the legislature contemplated the type of anticompetitive activity in dispute.[73] In general, such an analysis frequently leads courts to conclude that state action immunity exists, particularly when the municipal activity is the sale of natural monopoly services normally associated with regulated utilities and limited entry. In such cases federal courts read a state intention to authorize public monopoly from the mere authorization granted to local government to provide the service in question.[74] The second camp places more weight on the *Lafayette* language requiring evidence of the state policy literally to displace competition with regulation or public monopoly.[75] This analysis tends to preclude a finding of immunity for municipalities where the state has not acted further to regulate the non-competitive markets resulting from municipal conduct.

One of the earlier decisions in the first camp, coming on the heals of *Hallie*, was *Grason Electric Co. v. Sacramento Municipal Utility District*.[76] In *Grason* the Sacramento Municipal Utility District (SMUD) was, de facto, the sole provider of electricity in Sacramento. Grason Electric alleged that SMUD used its monopoly power to leverage into the electrical distribution systems market and the outdoor lighting systems market, the two markets in which Grason Electric competed with SMUD. The Ninth Circuit compared the state statutory grant of authority at issue with the grant of authority in *Hallie*. Because of their alleged similarities, and because the Court in *Hallie* had found a sufficiently clear articulation of state policy to grant immunity, SMUD was also given immunity.[77] In essence, the court reasoned that a state legislative grant to operate a "natu-

72. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 413 (1978). *Accord* Town of Hallie v. City of Eau Claire, 471 U.S. 34, 39 (1985).

73. *See infra* notes 76-84.

74. *See infra* notes 78-83.

75. *See infra* notes 85-93.

76. 770 F.2d 833 (9th Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986).

77. *Id.* at 838.

ral monopoly" service normally associated with public utility regulation was evidence that the state contemplated a non-competitive market.

The Ninth Circuit is not alone in its analytic approach. Other circuits adopting this logic, finding state contemplation of non-competitive markets from legislative authorization to provide public utility service, include the First,[78] Fourth,[79] Sixth,[80] Eighth,[81] Tenth,[82] and the Eleventh Circuits.[83] The Eighth Circuit has expressly announced it will continue to follow a functionally similar, so-called "necessary and reasonable" rule until such time as the Supreme Court decides formally whether to adopt the market participation exception.[84] Thus, anticompetitive conduct by municipalities that is necessary and reasonable to support a state-authorized natural monopoly business will be deemed antitrust immune.

Other circuits have taken another route, however, particularly when the municipal business is not a traditional natural monopoly. One Ninth Circuit case which focuses upon the issue is *Lancaster Community Hospital v. Antelope Valley Hospital District*.[85] Antelope Valley is a public hospital that is the sole provider of perinatal care in the Lancaster area. Lancaster Community Hospital (LCH) alleged that Antelope Valley was pressuring insurance companies to send a percentage of their in-patient work to it or else the hospital would make it difficult for the insurance company's customers to receive perinatal care—a version of a monopoly

78. Fisichelli v. City Known as Town of Methuen, 956 F.2d 12 (1st Cir. 1992) (denying issuance of municipal bonds, even though due in part to the self-interest of a council member, is a foreseeable result of the grant of authority to issue bonds). *See also* Tri-State Rubbish, Inc. v. Waste Management, Inc., 998 F.2d 1073 (1st Cir. 1993).

79. Cohn v. Bond, 953 F.2d 154 (4th Cir. 1991) (holding that statutes authorizing municipalities to construct, operate, and maintain hospitals generally contemplate the possible anticompetitive effect of denial of medical privileges to doctors), *cert. denied*, 112 S. Ct. 3057 (1992); Coastal Neuro-Psychiatric Assocs. v. Onslow Memorial Hosp., 795 F.2d 340 (4th Cir. 1986) (denying privileges to association for use of the only C.A.T. scan in the county is a foreseeable result of enabling legislation allowing municipality to determine what physicians may practice locally).

80. Consolidated Television Cable Serv., Inc. v. City of Frankfort, 857 F.2d 354 (6th Cir. 1988) (holding that a cable company who provides service to part of the city was not allowed to expand to areas that were now serviced by a new municipal cable company because the enabling legislation was similar to those granted in *Hallie*), *cert. denied*, 489 U.S. 1082 (1989).

81. Paragould Cablevision v. City of Paragould, 930 F.2d 1310 (8th Cir.), *cert. denied*, 502 U.S. 963 (1991). *But cf.* Laidlow Waste Sys. v. City of Fort Smith, 742 F. Supp. 540 (W.D. Ark. 1990).

82. Allright Colo. v. City & County of Denver, 937 F.2d 1502 (10th Cir.) (holding a municipality is shielded from antitrust laws where it enters the private shuttle business in direct competition with private companies and passes regulations severely limiting the ability of the private companies to compete since the enabling legislation is similar to that in *Hallie*), *cert. denied*, 502 U.S. 983 (1991). *See infra* notes 138-42 and accompanying text for a further discussion of this case and its impact.

83. Bolt v. Halifax Hosp. Medical Ctr., 980 F.2d 1381 (11th Cir. 1993) (denying staff privileges at a municipal hospital is foreseeable and therefore clearly authorized conduct). *See also* McCallum v. City of Athens, 976 F.2d 649 (11th Cir. 1992) (finding that a state grant allowing a municipality to own and operate waterworks is comparable to the facts in *Hallie* and therefore constitutes a clearly articulated state policy to displace competition).

84. *Paragould*, 930 F.2d at 1312-13.

85. 940 F.2d 397 (9th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992). The Ninth Circuit makes the distinction between natural monopolies and other businesses.

leveraging claim. The court employed a two-step process to analyze whether the state action doctrine applies to municipal entities. First, the court addressed whether the municipality has been authorized by the state to act as challenged.[86] Second, the court addressed whether it is state policy is to displace competition with regulation or public monopoly.[87]

Antelope Valley clearly had the authority to engage in the challenged business activities, as evidenced by statutes similar to those seen in other cases.[88] However, with respect to the second inquiry, the court noted that the state legislature did not grant municipalities the power to regulate or exclude competition in the relevant health care markets.[89] Antelope Valley was merely authorized to provide a service to the community. The court observed that the likely intent of the state was to spur competition and not to displace it, and that state authorization of municipal entry into the hospital market was not a clear articulation of a policy to monopolize that market.[90] A similar analysis has been applied by other circuits,[91] was recognized by a dissent in the Eleventh Circuit,[92] and was carried out by the Eighth Circuit prior to *Paragould*.[93] As a matter of *Parker/Town of Hallie* interpretation, therefore, the circuits are divided with respect to how clearly and specifically states must articulate a policy to displace competition.

V. COMMENTATORS AND THE POLITICAL ECONOMY DEBATE

The line of cases emanating from *Parker* have rested firmly on the Tenth Amendment principle that Congress did not intend for the Sherman Act to apply to the actions of a state as sovereign.[94] This body of law, of course, derives from broader-based federalism concerns. Some courts have recognized that the applicability of state immunity to local government-owned businesses is not free from doubt, either as a matter

86. *Id.* at 400 n.4. This step is the focus of the lower courts discussed *infra* note 113-18 and accompanying text.

87. This language reflects that of the *Lafayette* Court, which describes a clearly articulated "state policy to displace competition with regulation or monopoly." 435 U.S. at 413. These two aspects of the state grant of authority also parallel *Hallie*.

88. Similar statutes were found in *Hallie* and *McCallum*.

89. *Lancaster*, 940 F.2d at 402.

90. *Id.* at 403.

91. Hertz Corp. v. City of New York, 1 F.3d 121 (2d Cir.) (holding municipal law prohibiting rental companies from basing rental fees and decisions on customer residence is not based upon a specific state grant of regulatory powers over the rental industry and is therefore not immune from antitrust attack), *cert. denied*, 114 S. Ct. 1054 (1994); Genentech, Inc. v. Eli Lilly & Co., 998 F.2d 931 (Fed. Cir. 1993) (finding market participants are not immune from federal antitrust laws, but trademark subject matter is immune), *cert. denied*, 114 S. Ct. 1126 (1994).

92. *Bolt*, 980 F.2d at 1381 (holding that must a state policy must be found before displacing competition with regulation).

93. *Laidlow Waste*, 742 F. Supp. at 540.

94. *See, e.g., Yeager's Fuel, supra* note 2.

of statutory construction or constitutional policy.[95] Some commentators believe that the federalism foundation for the state action doctrine is inconsistent with federal Commerce Clause power and that more appropriate rationales exist for the doctrine.[96] A state or a municipality action that interferes with the operation of the free market impedes, at least facially, the congressional choice to commit our economy to the free market system.[97] Policy differences regarding the applicability of competitive

95. *Compare Hertz*, *supra* note 6, *with Bolt*, *supra* note 83.

96. *See, e.g.*, Ronald D. Friedmann, *Antitrust III: The State Action Doctrine*, 1985 ANN. SURV. AM. L. 491 (proposing a "rational advancement test" by which the courts make an unintrusive inquiry into the policies behind the state action and whether the alleged restraint on competition rationally advances those policies); Elhauge, *supra* note 70 (critizing state action doctrine because it denies preemptive law and because it precludes a principled coherent resolution; in other words, there is no affirmative theory that supports favoring state interests over federal interests); Cirace, *supra* note 67 at 487-88 (grounding the state action doctrine in sovereignty is useless because it does not adequately explain why municipalities obtain this shield when they are not sovereign but maintaining that municipalities should gain some immunity because there are certain market problems that are best met by attention from the municipalities rather than some higher level of government).

97. As has been mentioned earlier, the free market system has flaws, and the antitrust laws were designed to correct these flaws without undermining the essence of our economic system. Of course, certain aspects of the law on state immunity have been altered from that which would normally follow from *Parker*. An underlying shift in society's views about regulation may account for the change in approach from *Parker* to date. *Parker* grew out of a time when people were hit hard by the Depression, which was an example to many that laissez faire does not always work. Accordingly, the Depression was a major motivating factor behind many of today's programs including the FDIC, social security, and the nation's current impetus for universal health care. Additionally, World War II indoctrinated a generation to the idea and benefits, when needed, of price regulation and rationing. *See* John S. Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 714-15 (1986); WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 10-11 (1965). *But see*, Matthew L. Spitzer, *Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory*, 61 S. CAL. L. REV. 1293 (1988). As a result, the *Parker* Court may have been more open to the need to protect state regulation than the more recent Supreme Court cases such as *Boulder* have been in terms of municipal regulation. Historically, antitrust policy developed as an alternative to laissez faire. The extreme was socialism, which proscribed the concentration of the means of production as an inevitable consequence of capitalism and set as an alternative the state ownership of those means. However, the federal government was hoping to find a unique, American middle ground between laissez faire and socialism. *See* Andrew I. Gavil, *Reconstructing the Jurisdictional Foundation of Antitrust Federalism*, 61 GEO. WASH. L. REV. 657, 669-71 (1993). *See also* William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1128-39 (1989) (discussing the debate in the early 1900s about the proper relationship that government should have with business, particularly Woodrow Wilson's concern that Roosevelt's good trust/bad trust distinction, where bad trusts are dissembled and good trusts are overseen and regulated by government, would lead to a situation where the trusts would work the relationship to their advantage and corrupt the political process). Within that continuum, one possibility would be to selectively socialize natural monopolies. However, as one commentator has pointed out, America's experiences with such a system to date suggest better than any theoretical argument that such a system does not eliminate the problems of monopoly, bureaucracy, inadequate incentives, and political interference. Instead, it is better to accept and minimize the imperfections built into the capitalist/competitive system. 2 ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 328-29 (1988). With the Sherman Act, Congress decided that America would continue down the path of a free enterprise system, but recognized that certain imperfections existed and decided the bur-

rules create the widely recognized tension that exists between the tenets of federalism and economic uniformity.[98] As John Cirace has noted, neither federalism nor economic uniformity have been, nor can be, absolute policy guidelines when local practice would displace competition: "[The] *Parker* line [does] not encompass all economic regulation and restriction of competition by states and their subdivisions. Rather, the *Parker* line acknowledges exemption from Sherman Act restrictions only for certain activities by the state government, such as regulation designed to 'displace competition with regulation or monopoly public service.' "[99] With the premise that this tension exists, the question becomes whether the lower courts have properly applied the state action doctrine in cases where a municipal government has entered an industry, pursuant to the authority granted it by the state, and where that industry is neither regulated by the state nor any other body delegated by the state to regulate such industry.

Perhaps the most appropriate starting point for analyzing the answer, now that damages immunity is in place and the issue has been somewhat de-politicized, is the Court's focus in *Lafayette*; it may then be determined whether the *Lafayette* principles are still followed by the Court and are, in hindsight, sound. *Lafayette* recognized that municipal governments are not per se immune from federal antitrust law under the Tenth Amendment.[100] The Court observed that not only is such a reading in compliance with *Parker*,[101] but also deciding otherwise would create "a serious chink in the armor of antitrust protection."[102] Whether or not this con-

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den of correcting these imperfections rested with the government. Others have expanded on this theme and have gone so far as to say the burden rests with the lowest level of government that can approach the problem without a self-interest.

98. *See, e.g.*, Herbert Hovenkamp & John A. Mackerron III, *Municipal Regulation and Federal Antitrust Policy*, 32 UCLA L. REV. 719, 719-22 (1985) (arguing that at its extremes, antitrust could be used to forbid all state and local regulation, and that it has been the role of the state action doctrine to reach some middle ground between the federal preference for unrestrained markets and the state and local preference to manage their own economies); Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L.J. 486, 507 (1987) (arguing that the Supreme Court cases along the *Parker* line are all attempts to compromise between the interests that both the federal and state governments have in their respective economies); James R. Ratner, *Using Currie's Interest Analysis to Resolve Conflicts Between State Regulation and the Sherman Act*, 30 WM. & MARY L. REV. 705 (1989) (urging that an interest analysis should be used to best identify and address the issues as to the conflict between federal and state interests in economic regulation). Elhauge does not believe this paradigm is necessarily useful. Neither camp, federalism nor economic uniformity, offers grounds for distinguishing between the regulatory restraints of the state and the similar restraints of a local government nor for distinguishing the instances where the state does and does not supervise the restraints imposed. Elhauge, *supra* note 70, at 675.

99. Cirace, *supra* note 67, at 482 (quoting *Lafayette*, 435 U.S. at 413).

100. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 411 (1978). Several commentators, relying on congressional intent in the 1890s, have nevertheless expressed their view that the Sherman Act in no way should be applied to the acts of governments, state or local.

101. *Id.* at 411-12.

102. *Id.* at 408.

clusion rests in part on sovereignty,[103] the underlying economic principles are still sound. Congress made the choice in enacting the Sherman Act and related laws[104] that America's overriding economic regulatory system is free market capitalism, subject to necessary antitrust policing.[105] That Congress has done little during the past fifty years[106] to modify *Parker*'s conclusion that both municipal and state action[107] are subject to, or preempted by, federal antitrust law strongly suggests that the courts have correctly decided when government intervention in the market must give way to this fundamental economic choice.[108] The state's role as regulator, with such experimentation as state sovereign policy authorizes, is the court's only per se exception to this analysis.[109]

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103. *See supra* notes 100-02 and accompanying text.

104. Federal Trade Commisssion Act, 15 U.S.C. §§ 41-58 (1988 & Supp. V 1993); Clayton Act, 15 U.S.C. §§ 12-27 (1988 & Supp. V 1993).

105. "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." United States v. Topco Assocs. Inc., 405 U.S. 596, 610 (1972). This language has been relied upon by various other Supreme Court cases. *See, e.g., Lafayette*, 435 U.S. at 398 n.16; Community Communications v. City of Boulder, 455 U.S. 40, 56 n.19 (1982); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 485 U.S. 97, 110-11 (1980).

106. *See supra* notes 2-3.

107. Jefferson County Pharmaceutical Ass'n, Inc. v. Abbott Lab., 460 U.S. 150 (1983). Here, the state entered the marketplace to buy and sell pharmaceuticals. The Court held the state liable under the Robinson-Patman Act, 15 U.S.C. §§ 13(a)-(b), 21(a) (1988), because the state, in essence, chose to shed its sovereignty and enter the private retail market. *Jefferson County*, 460 U.S. at 170. The Court clearly distinguished between state purchases for use in traditional government functions and state purchases for the purpose of competing against private enterprise in the retail market. *Id.* at 153-54. The fact that the activity of a state, as opposed to "state action," can be actionable under federal antitrust laws can only be reconciled with *Parker* if one notes the distinction between action in a competitive market and action to regulate a market.

108. Although Congress recently removed antitrust damage liability from the shoulders of local governments, anticompetitive activity is still subject to other remedies such as injunctions and attorney fees. *See* 15 U.S.C. §§ 35-36 (1988).

109. *Parker* clearly stated that the states could regulate and be free from federal antitrust laws. Parker v. Brown, 317 U.S. 341, 352 (1943). Certain acts by the state that are not regulatory in nature, however, are not necessarily exempt. *See supra* note 91. In essence, the Court has created a per se immunity for states that act within their regulatory powers. *See* Thomas M. Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 CAL. L. REV. 227, 228 (1987) (arguing that the courts, in compliance with the idea of economic federalism, have struggled with the distinction between state activity and private activity to the point where, today, states are now relatively free to regulate their economies without fear of federal antitrust prosecution). This regulatory exemption only applies, however, if the "exemption [is] necessary in order to make the regulatory act work. . . ." Cantor v. Detroit Edison Co., 428 U.S. 579, 597 (1976) (holding that a free light bulb program initiated by a monopoly electric company is not protected from the federal antitrust laws merely because the state has approved the usage of such marketing techniques, since the light bulb market itself is not regulated and gives an unfair competitive edge to the defendant). Note, however, that the sovereignty-regulatory notion *Parker* seems to be founded upon is in part the problem that has hounded the courts when it comes to addressing municipal immunity because municipalities are not sovereign. *See supra* note 48. One suggestion has been to do away with the sovereignty analysis and address the question on preemption grounds. Cirace, *supra* note 67, at 486-88 (stating that there are certain market failures that require municipal attention and are best handled by municipalities; preemption would allow the courts to address whether municipalities are

With the advent of *Hallie*, many commentators and lower federal courts marked the extension of municipal immunity for the municipality's anticompetitive activities.[110] However, *Hallie* did not facially overrule *Lafayette*'s analytical starting point that municipalities are not protected by the Tenth Amendment. The Court affirmed that a municipality will not be immune from antitrust litigation if it is not acting pursuant to a grant of authority from the state.[111]

Preserving the power of the federal government to control the anticompetitive acts, particularly proprietary acts, of a municipal entity does make sense. The Constitution, of course, only provides political power to the federal government and the states.[112] Before a subdivision of the

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actually meeting these market failures or otherwise acting in a way in which federal antitrust laws should apply). Nevertheless, the ability of the state to regulate is highly valued in our economic system. *See* Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 133 (1978) (holding anticompetitive effects of a statute cannot be grounds for invalidation because that would destroy the state power to regulate). Natural monopolies, externalities, and the free rider problem plague the openly competitive market. Cirace, *supra* note 67, at 491. Concentration of economic power, the spark that ignited the antitrust movement to begin with, occasionally places people in a situation where competitive forces are no longer working. *See* Standard Oil Co. v. United States, 221 U.S. 1 (1911). Thus, the role of government is not one of complete laissez faire nor of complete control but of correcting the problems the free-market system inherently contains. *See* 1 KAHN, *supra* note 97, at 2 (stating that as opposed to public utilities, the role of government in the private economic sector is generally that "of enforcing, supplementing, and removing the imperfections of competition—not supplanting it"). The importance of regulatory powers and the ability to correct market failures is so strong that it applies to actions by municipalities even where such action is done under questionable circumstances. *See, e.g.*, City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 374 (1991) (holding that municipalities are not liable under antitrust laws for zoning, a form of regulation, even when the decision to zone may have been due to a conspiracy between the government and a private party with an economic interest in the subject matter).

110. Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L.J. 486 (1987). Some, like Garland, see this municipal immunity rightly founded in the judiciary's deference to those outcomes that result from the political process. In essence, if the result came from an elected body, then such results should be free from federal antitrust review. *Id.* at 487. This view of what the Court is doing derives from *Hallie*'s presumption that municipalities are not likely to act in a harmful manner vis-à-vis their constituents. *See supra* notes 54-64 and accompanying text. However, it should be clear that although municipalities may be acting in their own interests and the interests of their constituents, the effects of what they do can easily extend beyond their municipal borders. *See Lafayette*, 435 U.S. at 403-08 (stating that municipalities are very capable, like any private party, of acting in a manner contrary to antitrust laws, but if municipalities were immune from antitrust, they would be capable of impacting the economies beyond their borders and distorting allocative efficiencies, both at the regional and national levels); Elhauge, *supra* note 70, at 732 (arguing that the dormant commerce clause does not apply where the municipality affects those outside its borders but within the state, thus federal antitrust laws should apply and municipalities should have less immunity from antitrust then states). Another reason municipal immunity has been upheld is due to a welfare exemption to antitrust. This claim of immunity, however, seems limited to municipal action in a regulatory sense. *See, e.g.*, Matt Farmer & Kathy Gaertner, Comment, *Municipal Immunity from Antitrust Liability: Recognition of a Broad Welfare Exemption*, 1 U. FLA. J.L. & PUB. POL'Y 177, 191 (1987).

111. Town of Hallie v. City of Eau Claire, 471 U.S. 34, 40 (1985).

112. U.S. CONST. art. I, § 8 (enumerating the powers of Congress); U.S. CONST. art. I, § 10 (listing the powers prohibited for the states to exercise); U.S. CONST. amend. X (stating "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

state, frequently constituted as a public corporation, can act, it must be granted authority by the state.[113] Therefore, the parameters of municipal action are defined by the state. Action taken by the municipality outside its grant of authority is not a proper exercise of municipal power under state law and, notwithstanding *Omni*, based upon Tenth Amendment limitations in the reach of federal antitrust law. As in *Omni*, municipal action may improperly extend beyond the power granted by the state with anticompetitive effects. If municipalities were not subject to federal antitrust law for such conduct, there would be anticompetitive activity throughout the United States that would not be subject to national legislation,[114] and inconsistent with sovereign state policy including state limitations upon municipal conduct. Furthermore, to allow municipalities complete immunity from federal antitrust laws merely because of their status as a government entity would provide municipalities with greater protection from federal antitrust law than states themselves are accorded. The Court in *Jefferson County Pharmaceutical Association, Inc. v. Abbott Laboratories*[115] held that state purchasers are subject to Robinson-Patman restrictions so long as the state has chosen to compete in the private retail market.[116] If one suggests, as do some commentators weighing the federalism/local experimentation side of the balance more heavily, that most municipal activity should be immune from antitrust law,[117] then all

113. *See* South Macomb Disposal Auth. v. Township of Washington, 790 F.2d 500, 504 (6th Cir. 1986).

114. See Elhauge, *supra* note 70 for an explanation of how this can occur. Elhauge begins with the premise that antitrust laws are, in part, premised upon the idea that those who stand to profit from restraints cannot be trusted to determine which restraints are in the public interest and which are not. There will be times when a restraint affects those to whom the acting governmental body is not accountable, giving the representatives a financial interest in the restraint. Where the benefits of the restraint gained from outsiders outweigh the burdens, if any, to insiders due to the same restraints, the community has a collective financial interest in the restraints being imposed. *See* McCallum v. City of Athens, 976 F.2d 649 (11th Cir. 1992) (illustrating one way these financial benefits can be extracted). States, which are immune from antitrust, can still be attacked under other provisions of the law, such as the Commerce Clause. However, if the action extends beyond the municipal borders but not beyond the state, the Commerce Clause cannot reach this breach. Therefore, this action which is contrary to the economic interests of the nation goes unpoliced if the antitrust laws cannot reach it. Elhauge, *supra* note 70, at 672, 729-32.

Following up on the deference to political action suggested by Garland, *supra* note 110, at 486, a municipal government would not take an action that would restrain its residents more than outsiders. Therefore, it only makes sense that restraints imposed on insiders would be instituted only if a great benefit from outsiders can be obtained. Elhauge, *supra* note 70, at 737. Therefore, the proposal that courts should uphold choices made by political bodies leads to the outcome of the courts upholding the use of market power by municipalities against others, even where not explicitly authorized by the state. *See, e.g.*, Allright Colo. v. City & County of Denver, 937 F.2d 1502 (10th Cir.), *cert. denied*, 502 U.S. 983 (1991), *infra* notes 138-42 notes and accompanying text. An ill-enlightened deference leads to an absurd result. It would be better for the courts to address the action being taken and not to focus so hard on who is acting.

115. 460 U.S. 150 (1983).

116. *Id.* at 154.

117. Several commentators say it should be so. *See, e.g.*, Arthur, *supra* note 70, at 347 (asserting that the meaning of the Sherman Act should be derived solely from its traditional sources, which show the Act was meant only to apply to business actors such as the trusts; since municipalities are not private actors, they should be completely immune);

state action, contrary to *Jefferson County*, must also be immune. Such a position elevates local economic power over the federal choice to promote allocative efficiency through a competitive process.[118]

Assume for the moment that state immunity from antitrust is derived from state sovereignty theory. It does not necessarily follow that such sovereignty inexorably leads to immunity from antitrust. Some commentators would allow such immunity because there are other laws that the federal government can use to police the activities of the states, such as the Commerce Clause.[119] This viewpoint, however, seems to disregard the fact that federal antitrust laws are themselves based on the congressional power over interstate commerce.[120] Since antitrust law is an application of the Commerce Clause, the fact that some other aspect of federal power derived from the Commerce Clause can also be used to deter an activity is no basis upon which to deny the application of antitrust laws. The focus should be on applying a law, essentially unchanged by Congress during the past 100 years, that has goals applicable to the actions at issue and not upon whether some other body of law also applies. It is not uncommon for different bodies of law to be applicable to the same situation but result in different outcomes.[121]

In addition, local governmental entities engaged as market participants should be open to antitrust attack on a more fundamental level. Whatever goal one wishes to ascribe to antitrust,[122] there will be times

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Lopatka, *supra* note 70, at 25 (arguing that only a fraction of municipal activity conflicts with federal goals; the costs of policing such activity is prohibitive, and therefore antitrust review should be abandoned, providing municipalities with absolute immunity from federal antitrust laws).

Arthur seems to ignore the fact that municipalities can and do enter into the business arena, thereby becoming business actors. If municipalities act and compete with private business, they should be subject to the same laws. *McCallum* and *Allright Colorado* are examples of cases in which municipalities entered the competitive marketplace but were not held to the conditions required by antitrust laws. In *Jefferson County* and *Union Pacific*, the state and municipality, respectively, were held accountable.

118. There are others who agree. For instance, Elhauge recognizes there are times when, if antitrust did not intervene, the action would go without review. Elhauge, *supra* note 70.

119. *See, e.g.*, Richard M. Steuer, *Coming Full Circle on State Action*, 7 CARDOZO L. REV. 439, 447-48 (1986) (municipalities will be largely free from antitrust laws, but the federal government can still challenge certain activities under the Civil Rights Act, the Due Process and Equal Protection Clauses, the First Amendment, and the Interstate Commerce Clause); Lopatka, *supra* note 70, at 70 (Interstate Commerce Clause can be used instead of antitrust laws if a municipality's actions affect those outside of the state). *Cf.* Stephanie Ames, Note, City of Columbia v. Omni Outdoor Advertising, Inc.: *The Expansion of State Action Immunity to Municipal Regulation*, 18 J. CONTEMP. L. 309 (1992) (Interstate Commerce Clause, first amendment rights, and due process violations can be used to preempt local regulations; however, this is not the proper subject for antitrust law).

120. Chatham Condominium Ass'ns v. Century Village, Inc., 597 F.2d 1002, 1006 (5th Cir. 1979).

121. *Compare, e.g.*, Commerce and Due Process Clause applications *with* state regulation of a corporate takeover, Edgar v. Mite Corp., 457 U.S. 624 (1982); CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1987).

122. Chicago theorists propose antitrust has but one goal: the maximization of consumer welfare. *See* Lopatka, *supra* note 70, at 54 (maximization of consumer welfare is synonymous with allocative efficiency). However, others believe the courts have upheld or

when the action of a state or municipality will conflict with and undermine antitrust law,[123] resulting in a move to preempt this state or local activity by antitrust law.[124]

The Court after *Lafayette* simply has not addressed the core choice involved in municipal immunity cases among alternative forms of regulation: free market, public utility, or command economy (municipal services). In *Lafayette* the Court held that for a municipality to be granted immunity, a state policy to replace competition with regulation must exist.[125] Other Supreme Court decisions have also contained this requirement as a necessary element of immunity.[126] Several commentators, however, conclude that *Hallie* gave municipalities practical immunity from federal antitrust laws,[127] by virtue of the inherent, underlying requirement that the state must authorize any municipal conduct. The black letter rule from *Hallie* provides that a municipality is to be afforded protection under the state action doctrine if the anticompetitive actions complained of were a foreseeable result of the state's grant of authority to act.[128] Beyond that holding, the Court mentioned in at least three

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should uphold other philosophies as well. *See, e.g.,* Wiley, *supra* note 97, at 724, 743 (capture theory in part demonstrates how the small in number can exploit the majority); Spitzer, *supra* note 97, at 1300 (efficiency criteria and other outcome orientated values are a better guide than producer capture theory); Garland, *supra* note 98, at 519 (it is not the role of antitrust to overturn the results of the state political process); Jorde, *supra* note 109, at 251-52 (federalism, and thus deference to the state, should be placed above allocative efficiency); Nolan E. Clark, *Antitrust Comes Full Circle: The Return to the Cartelization Standard*, 38 VAND. L. REV. 1125, 1134 (1985) (the Supreme Court has wisely chosen not to find any one goal or set of goals, nor has it uniformly adopted the Chicago School theory, for antitrust law since it has upheld social and political advantages as other benefits of competition). *See generally* ROBERT H. BORK, THE ANTITRUST PARADOX (rev. ed. 1993).

123. *Lafayette*, 435 U.S. at 417. "[E]ven a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization." *Id.* (citing Otter Tail Power Co. v. United States, 410 U.S. 366, 377-382 (1973)). This language in *Lafayette* has not yet been expressly affirmed by a majority of the Supreme Court, but the Court in *Hallie* did rely on similar language from *Parker*: "[T]he State may not validate a municipality's anticompetitive conduct simply by declaring it to be lawful." *Hallie*, 471 U.S. at 39 (citing *Parker*, 317 U.S. at 351).

124. Several excellent articles state that there are times when municipal and state activity would otherwise escape federal control when such regulation would be necessary. *See, e.g.,* Elhauge, *supra* note 70; Jorde, *supra* note 109; Hovenkamp & Mackerron, *supra* note 98; Cirace, *supra* note 67.

125. *Lafayette*, 435 U.S. at 417. At least one commentator has pointed out that the anticompetitive activities in *Lafayette* were not directed towards the correction of a market failure, imperfection, or instability and therefore properly subject to antitrust laws despite the fact that the businesses involved there were each a natural monopoly. Cirace, *supra* note 67, at 501.

126. *See, e.g., Boulder*, 455 U.S. at 55 (concerned about city action absent any regulation whatsoever); *Omni*, 499 U.S. at 393 ("*Parker* defense also requires authority to suppress competition"); *Jefferson County*, 460 U.S. at 154 (state purchasers acting in the competitive market are subject to Robinson-Patman claims). *Cf.* Fisher v. Berkeley, 475 U.S. 260 (1986); Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985); New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 109 (1978) (no express intent to displace the antitrust laws, but the state statute provides a regulatory structure that inherently displaces "unfettered business freedom").

127. *See, e.g.,* Hovenkamp & Mackerron, *supra* note 98; Cirace, *supra* note 67.

128. *Hallie*, 471 U.S. at 42.

places the need for a state policy to displace competition with regulation.[129] This language created the continuing ambiguity that is the focus of this article.

Assuming, arguendo, that *Hallie* did make it necessary for the courts to address whether the state intended to displace competition, it appears the Court is prepared to tone down the results of *Hallie*. For example, in *Omni*, the Court stated: "Besides authority to regulate, however, the *Parker* defense also requires authority to suppress competition—more specifically, 'clear articulation of a state policy to authorize anticompetitive conduct' by the municipality in connection with its regulation."[130] This reading, followed by *Ticor*, should be recognized as a swing of the pendulum from increased municipal immunity to a return to addressing the existence of a regulatory regime; or it may simply be a clarification of what the Court in *Hallie* stated in the first place. Either way, the fundamental underpinnings of *Lafayette* remain strong.[131]

VI. THE PARADIGMS OF *MCCALLUM* AND *ALLRIGHT COLORADO*

Lower court applications of Supreme Court antitrust decisions can lead to outcomes quite contrary to such fundamental policy and have become quite common during the past decade in failing to incorporate the entirety of Supreme Court rationales. In *McCallum v. City of Athens*[132] the Eleventh Circuit was faced with a situation where the state did not and could not, pursuant to state constitutional law, regulate certain practices by water companies.[133] Consumers were serviced by either private or municipal water companies. State legislation authorized the existence of privately owned water businesses and thus plainly did not authorize public monopoly. Athens operated a for-profit waterworks that supplied water to between ninety and ninety-five percent of the consumers within the city limits and a bulk of the surrounding area. Non-residents were charged roughly two-and-a-quarter times more for water than residents,[134] several high-volume users within the city limits were billed below marginal cost,[135] and the city entered into several anticompetitive combinations effectively precluding the growth of competition.

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129. *Id.* at 38-39 ("[T]o obtain exemption, municipalities must demonstrate that their anticompetitive activities were authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service.' ") (citing *Lafayette*, 435 U.S. at 413); *Id.* at 40 ("[I]n *Boulder* . . . we declined to accept *Lafayette*'s suggestion that a municipality must show *more* than that a state policy to displace competition exists.") (emphasis added); *Id.* at 44 ("In sum, we conclude that the Wisconsin statutes evidence a 'clearly articulated and affirmatively expressed' state policy to displace competition with regulation in the area of municipal provision of sewage services.") (citing *Lafayette*, 435 U.S. at 415).

130. *Omni*, 499 U.S. at 372 (citing *Hallie*, 471 U.S. at 40).

131. *See, e.g., supra* notes 30-34 and accompanying text.

132. 976 F.2d 649 (11th Cir. 1992).

133. *See id.* 653-55.

134. *McCallum*, 976 F.2d at 651.

135. This point was not mentioned in the Eleventh Circuit opinion. It is alluded to in the district court's original decision in Wall v. City of Athens, 663 F. Supp. 747, 750 (M.D.

The court compared Georgia's statutes authorizing the municipality to act with Wisconsin's statutes in *Hallie* and held that the similarities pointed to reaching the same conclusion as in *Hallie*, finding immunity from antitrust.[136] A critical mistake was the court's failure to recognize that in Wisconsin the municipal sewage companies were operating under a regulatory regime, whereas in Georgia the municipal water companies were not regulated and were in direct competition with other for-profit enterprises, suggesting a basic difference in state economic regulatory policies. The effects of *McCallum* are to provide municipal businesses in the competitive marketplace with a strategic advantage over private companies, which do not have access to the protection of the state action doctrine,[137] and to legitimize totally unregulated monopolies which abuse non-resident consumers.

The effect of such legitimized monopoly status given to municipalities can be very destructive. One additional example of this danger occurred in Colorado.[138] In 1984, Allright Colorado, Inc. was in the business of shuttling people to and from outlying parking lots at the Denver airport. Allright held 62.1% of the market share, and a competitor, which also became a plaintiff in this case, held 37.4% of the market. When the City of Denver entered the shuttle service business, it passed laws exempting the city's business from fees charged to the other businesses; it forced the private companies to use other, less desirable access routes to the airport and pick-up locations at the airport; and it gave the city's shuttle service the exclusive right to advertise at the airport, to use the public right-of-ways, and to place signs leading travelers to its lots. All of this was done with no direct authority granted by the state to the cities to operate an airport shuttle service.[139] Five years later, Allright Colorado, Inc. had a

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Ga. 1987), and was more specifically stated in the appellant's brief, at 5-6. Other anticompetitive actions were also alleged and more fully addressed in *Wall*, 663 F. Supp. at 749 (market and customer division, monopoly and attempt to monopolize, and others). This situation appears to be one in which Elhauge would agree federal antitrust laws should apply. *See* Elhauge, *supra* note 70, at 729-32.

136. *McCallum*, 976 F.2d at 653-55.

137. Since Georgia does not regulate water companies, there can be no active state supervision of private activities as required for this protection to take effect. *See, e.g.*, California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992). Thus, the immunity found for defendant would not exist for its private competitors if engaging in identical conduct. Since several circuits refuse to focus on the subject of a regulatory/market participant distinction, this result is likely to repeat itself until the Supreme Court definitively answers the question. *See supra* notes 6-10.

138. Allright Colo. v. City & County of Denver, 937 F.2d 1502 (10th Cir.), *cert. denied*, 502 U.S. 983 (1991).

139. The enabling legislation did allow municipalities to own and operate airports and "to regulate the receipt, deposit, and removal and the embarkation of passengers . . . to or from such airports." *Id.* at 1508. There is a *large* difference between the power to regulate and the power to engage in business. The court ignores a canon of construction for state enabling legislation. Dillon's Rule says the scope of local power under state enabling legislation should be determined from either (1) the express words of the legislation; (2) those powers that necessarily or fairly are implied in or incident to those words; or (3) those powers that are essential to the declared objects and purpose of the legislation. Richard Briffault, *Our Localism: The Structure of Local Government Law* (pt. 1), 90 COLUM. L.

24.1% market share; the other private competitor had 18.3% of the market; and the municipal shuttle service enjoyed a 45% market share, which was still growing.

On its face, this seems to be the kind of activity which the antitrust laws under *Lafayette* were designed to outlaw. The court of appeals recognized that a municipality must pass a two-step test, according to *Hallie*, in order to claim protection under the state action doctrine: (1) The state legislature must have authorized the action in question; and (2) the state legislature must have *intended* to displace competition with regulation.[140] While Colorado intended the cities to regulate shuttle services and authorized such regulation, there was no authorization to enter the shuttle business.[141] Nevertheless, the court of appeals compared the grants of authority in *Hallie* and *Allright Colorado* and decreed that since the language in the two schemes was similar, the outcome must also be similar. As a result, the city was immune from antitrust attack under federal law.[142]

In isolation, monopolized water service in Athens and displaced competition in the airport shuttle market in Denver did not markedly interfere with the national competitive economy. In each case, however, segments of the public are faced with government control of a market that reverberates outside the local area to effect suppliers, potential competitors, and consumers in a presumptively inefficient fashion at odds with national policy. If the lower courts continue to divine state "authority" to monopolize from the scant and arguably non-existent language in *Allright Colorado*, then local governments will feel free to enter into other businesses under the guise of acting for the public good, and control increasing aspects of our economic lives. For example, if it is important that our people get the food they need at fair prices, municipal government could zone competitors out of business and operate the sole grocery store in an area; or if municipalities are unhappy with the moral content being provided through the written medium, municipal governments could own their own bookstores and effectively declare illegal all others. Why regulate when majoritarian local government can be the sole provider, unsupervised by the state?

VII. CONCLUSION

The lower federal courts increasingly in the wake of *Hallie* and *Omni Outdoor Advertising* have concluded that anticompetitive municipal conduct is immune from federal antitrust challenge because the respective state legislatures necessarily contemplated that the municipal defendant

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REV. 1, 8 (1990). It is clear that the express words of the Colorado legislation, unlike the statutes in *Hallie*, did not authorize the municipalities to operate a shuttle service. One would be hard pressed to argue it is necessary, incident to, or essential to operate a business if one has be authorized merely to regulate that business.

140. *Id.* at 1506.

141. *See supra* note 139 (discussing legislative authorization).

142. *Allright Colo.*, 937 F.2d at 1509.

would engage in the challenged conduct. Such a finding of state contemplation or foreseeability often is based upon the state's general grant of authority to the municipality required, under state law, to empower the municipality to act. When the challenged municipal conduct is regulatory, such as the zoning regulation challenged in *Omni*, the resulting immunity may be legitimate and defensible because of the natural repugnancy between some forms of regulation, on one hand, and an unregulated free market on the other. Moreover, Tenth Amendment federalism concerns appropriately support state delegation of its regulatory authority to local government to promote the kinds of economic experimentation and self-government that commentators cite in support of an extension of the *Parker* doctrine to municipalities.

When local government enters the marketplace as a market participant, however, and competes in the context of provider-consumer transactions, as opposed to providing tax-supported community services without a provider-consumer market, the municipal business, acting with antitrust immunity, poses a significant threat to free markets warned about in *Lafayette*, which is inconsistent with national economic policy and goals. The promotion of pockets of unregulated city-states, operating as command economies, can only be seen as ironic in the last decade of the twentieth century when socialism has failed elsewhere in the world.

In such municipal market participant situations, the respective states should be required to involve themselves more directly in the displacement of competition for their local governments to properly invoke *Parker* immunity. The "active state supervision" prong of the *Midcal* test for immunity now required only for private defendants, as in the recent *Ticor* decision, should be extended to challenged municipal market participant conduct. Only in such a setting, in which sovereign state policy is expressed unambiguously, including but not necessarily limited to state public utility regulation, should federalism concerns be allowed to displace federal antitrust policies of the markets and an on-going competitive process.