

MUNICIPAL ANTITRUST LIABILITY: CITY OF LAFAYETTE V. LOUISIANA POWER & LIGHT CO.

The extent to which state laws or the action of state officials can immunize conduct which would otherwise violate the federal antitrust laws is unclear.¹ The constitutional primacy of federal over state law² commands that federal antitrust laws dominate whenever in conflict with state law or policy. The principles of federalism, on the other hand, dictate that states should be able to regulate their own economies.³ In *City of Lafayette v. Louisiana Power & Light Co.*⁴ the

1. See generally VON KALINOWSKI, BUSINESS ORGANIZATIONS ANTITRUST LAWS AND TRADE REGULATION vol. 16, § 46.03 (1978); Donnem, *Federal Antitrust Law Versus Anticompetitive State Regulation*, 39 A.B.A. ANTITRUST L.J. 950 (1970); Jacobs, *State Regulation and the Federal Antitrust Laws*, 25 CASE W. RES. L. REV. 221, 231-57 (1975); Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. REV. 693 (1974); Saveri, *The Applicability of the Antitrust Laws to Public Bodies*, 4 U.S.F. L. REV. 217 (1970); Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 NW. U. L. REV. 71 (1974); Teply, *Antitrust Immunity of State and Local Governmental Action*, 48 TUL. L. REV. 272 (1974).

2. U.S. CONST. art. VI, cl. 2.

3. Traditionally, states have enjoyed broad authority to legislate for the health, safety and general welfare of their citizens, limited only by constitutional and statutory restraints. The fundamental rationale for exempting state conduct from federal antitrust scrutiny is a concern for the impact of a contrary policy on federalism interests. States often enact regulatory programs, such as zoning, restrictive franchise licensing and blue laws, which interfere with free competition. Without such an exemption, much of this regulation would be exposed to federal antitrust liability, threatening the states' long-recognized power to regulate the commercial affairs of their citizens. See *Parker v. Brown*, 317 U.S. 341, 351 (1943) ("In a dual system of government . . . the states are sovereign, save only as Congress may constitutionally subtract from their authority . . ."). See generally Donnem, *Federal Antitrust Law Versus Anticompetitive State Regulation*, 39 A.B.A. ANTITRUST L.J. 950, 951 (1970); Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 NW. U. L. REV. 71, 75-77 (1974).

Different considerations arise in cases alleging that federal action, rather than state action, is anticompetitive. Congress may change or limit its own policies without raising the federalism issue. See *Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971), cert. denied, 404 U.S. 1047 (1972), rev'd on other grounds, 570 F.2d 982 (D.C. Cir. 1977). In federal regulatory cases, the issue is one of primary jurisdiction and

Supreme Court concluded that municipal regulatory activities are not always immune from the application of federal antitrust laws.⁵

Plaintiffs were two municipal corporations⁶ which owned and operated electric utility systems. They brought suit alleging that Louisiana Power & Light Company (LP&L)⁷ and three private electric utilities had violated federal antitrust laws.⁸ LP&L counterclaimed, seeking damages and injunctive relief for federal antitrust offenses which plaintiffs had allegedly committed. The counterclaim charged that the cities had entered into contracts in restraint of trade, conducted vexatious litigations, and imposed an illegal tying arrangement on their customers.⁹

Plaintiffs moved to dismiss the counterclaim. They contended that, as subdivisions of the state of Louisiana, the state action doctrine of

deference to agency findings. *See* *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) (FPC).

4. 435 U.S. 389 (1978).

5. Before *Lafayette*, several courts debated whether to grant municipalities immunity from the federal antitrust laws. Each undertook a different analysis to resolve the question. *See* *Duke & Co. v. Foerster*, 521 F.2d 1277, 1281 (3d Cir. 1975) (municipalities liable for boycott allegedly caused by cities' refusal to sell plaintiff's products in municipal stadium because state legislature did not intend to compel or even permit a boycott); *Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1133 (5th Cir. 1975) (antitrust challenge to city council's rate making practices dismissed because state legislature had expressly delegated rate making authority to municipalities); *Continental Bus System, Inc. v. City of Dallas*, 386 F. Supp. 359, 362-63 (N.D. Tex. 1974) (cities are immune from antitrust liability for granting themselves exclusive franchise to conduct airport bus service because they are public instrumentalities); *Murdock v. City of Jacksonville*, 361 F. Supp. 1083, 1091-92 (M.D. Fla. 1973) (city immune from antitrust liability for participating in exclusive contract to rent city auditorium because power had been specifically delegated to city by state legislature).

6. *City of Lafayette* and *City of Plaquemine* are both organized under the laws of the State of Louisiana. *See* LA. CONST. art. VI, §§ 2, 7(a) (effective Jan. 1, 1975); LA. CONST. art. XIV, § 40(a) (1921) (effective before Jan. 1, 1975); *See generally* LA. REV. STAT. ANN. §§ 33:361, :506, :621 (West 1950).

Louisiana law grants cities the power to own and operate electric utility systems both within and beyond their city limits. *See* LA. REV. STAT. ANN. §§ 33:1326, :4162, :4163 (West 1950).

7. Defendant, Louisiana Power & Light Company (LP&L), is an investor-owned electric service utility with which the cities compete in areas beyond their city limits.

8. Plaintiffs' complaint charged that defendants conspired to restrain trade and attempted to monopolize and have monopolized the generation, transmission and sale of electric power in Louisiana. This complaint was not involved on appeal. 435 U.S. at 392-95.

9. 435 U.S. at 392 n.6. *See* 15 U.S.C. §§ 1, 2, 14 (1976). *See also* note 6 and accompanying text *supra*.

*Parker v. Brown*¹⁰ rendered federal antitrust laws inapplicable to them. The district court reluctantly agreed.¹¹ The Fifth Circuit Court of Appeals reversed,¹² rejecting the contention that municipalities are always exempt from federal antitrust laws.¹³ On certiorari, the Supreme Court affirmed.¹⁴ A majority of the Court concluded that, in enacting the trade regulation statutes, Congress did not intend to exclude local governments from antitrust liability.¹⁵ Five

10. 317 U.S. 341 (1943). The state action doctrine applies when litigants challenge a state policy under federal antitrust laws. Anticompetitive state action appears in various forms. In particular, courts have examined the *Parker* doctrine's application to state regulatory programs. *Macom Prods. Corp. v. AT&T Co.*, 359 F. Supp. 973 (C.D. Cal. 1973); *Wainwright v. National Dairy Prods. Corp.*, 304 F. Supp. 567 (N.D. Ga. 1969) (state creation of statutory torts or unfair competition); *Murdock v. City of Jacksonville*, 361 F. Supp. 1083 (M.D. Fla. 1973) (nonregulatory anticompetitive action by state officials).

11. See *City of Lafayette v. Louisiana Power & Light Co.*, 532 F.2d 431, 433 (5th Cir. 1976). Unwilling to exempt an enterprise which was "clearly a business activity" from the antitrust laws, the district court held that plaintiffs' status as cities was sufficient to bring all their conduct within the state action exemption. *Accord*, *New Mexico v. American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974) (antitrust laws do not apply to a state and its political subdivisions that allegedly conspired as consumers of asphalt to fix prices and eliminate competition); *Saenz v. University Interscholastic League*, 487 F.2d 1026, 1028 (5th Cir. 1973) (state agency and state official acting within the scope of their authority are not subject to requirements of federal antitrust laws).

12. 532 F.2d 431 (5th Cir. 1976).

13. *Id.* at 434-35. The Fifth Circuit found that a "subordinate state governmental body was not *ipso facto* exempt from the operation of federal antitrust laws." *Id.* Rather, the district court must examine whether the anticompetitive restraint is the type of activity that the legislature intended the governmental body perform. *Accord*, *Duke & Co. v. Foerster*, 521 F.2d 1277 (3d Cir. 1975).

14. 435 U.S. 389 (1978).

15. *Id.* at 418. Part I, written by Justice Brennan, represents the opinion of the Court. (Burger, C.J., and Marshall, Powell and Stevens, J.J., joined in Part I). In Part I, the Court held that the term "person" or "persons" as defined in the federal antitrust laws included cities as municipal utility operators, whether suing as plaintiffs or being sued as defendants. Furthermore, the court asserted that based on public policy, there was no implied exclusion of cities as municipal utility operators from coverage as "persons" under the antitrust laws.

The antitrust statutes repeatedly use the word "person" or "persons." See 15 U.S.C. §§ 1, 2, 3, 7, 8, 15 (1976). Nowhere, however, do the antitrust laws mention the state as within the scope of "person." Several courts have reasoned that the terms "person" or "persons" included public bodies when suing as plaintiffs. See *Georgia v. Evans*, 316 U.S. 159 (1942) (the words "any person" in Section 7 of the Sherman Act included states, therefore, the State of Georgia was permitted to bring an action in its own name charging injury from a combination to fix prices and suppress competition in the market for asphalt); *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906) (a municipality is a "person" within the meaning of Section

members of the Court, although unable to concur on an opinion, agreed that the state action exemption did not automatically exempt cities from the operation of federal antitrust laws.¹⁶

By enacting federal prohibitions against unreasonable restraints of trade and monopolization,¹⁷ unlawful price discrimination,¹⁸ unfair trade practices¹⁹ and other anti-competitive conduct,²⁰ Congress cre-

8 of the Sherman Act. Therefore, the City of Atlanta could maintain a treble damage action). *Cf.* *United States v. Cooper Corp.*, 312 U.S. 600 (1941) (federal government not recognized as a person entitled to sue under the Sherman Act). *But cf.* *Lowenstein v. Evans*, 69 F. 908 (C.C.D. S.C. 1895) (a state is not "a person" subject to liability under the Sherman Act. Therefore, the Act did not preclude a state from declaring itself a monopoly in the purchase and sale of liquor).

A partial answer to this dilemma came in *Parker v. Brown*, 317 U.S. 341 (1943). In *Parker*, the Supreme Court held that the Sherman Act, in view of its language and legislative history, "must be taken to be a prohibition of individual and not state action." *Id.* at 352. This broad language provided the foundation for lower court development of a disparate state immunity doctrine. Some courts accorded full antitrust immunity for all anticompetitive activity in which a state participated. Other courts cautioned that state involvement only begins the inquiry. *See generally* cases cited note 39 and accompanying text *infra*.

The *Lafayette* court addressed the issue of whether Congress did or did not intend to subject local governments to the antitrust laws—even though it was not presented by the parties or facts of the case—to resolve the historical confusion over the exact scope of "person" or "persons" as used in the antitrust laws. *Compare* *Standard Oil Co. v. United States*, 221 U.S. 1 (1911) (Sherman Act forbids only those trade restraints and monopolizations which are created or attempted by individuals or corporations or combinations of individuals or corporations) *and* *New Mexico v. American Petrofina, Inc.*, 501 F.2d 363, 371-72 (9th Cir. 1974) (Sherman Act does not apply to states regardless of the proprietary nature of the government activity in question) *with* *Woods Exploration & Prod. Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1294 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (court cautioned that state involvement "only begins the analysis, for it is not every governmental act that points a path to an antitrust shelter.") *and* *Georgia v. Evans*, 316 U.S. 159, 163 (1942) (Roberts, J., dissenting) (Court's recognition that a state is a "person" entitled to sue as a plaintiff for injuries to its proprietary interests logically permits a state to be sued as a defendant). *See generally* Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 *Nw. U. L. Rev.* 71, 83-84 (1974); Tepley, *Antitrust Immunity of State and Local Governmental Action*, 48 *Tul. L. Rev.* 272, 277 (1974); White, *Participant Governmental Action Immunity from the Antitrust Laws: Fact or Fiction*, 50 *Tex. L. Rev.* 474, 482 (1972).

16. 435 U.S. 389, 400 (1978).

17. Sherman Act, 15 U.S.C. §§ 1-7 (1976).

18. Robinson-Patman Price Discrimination Act, 15 U.S.C. §§ 13, 13a-b, 21a (1976).

19. Federal Trade Commission Act, 15 U.S.C. §§ 4-58 (1976).

20. *See, e.g.*, Clayton Act, 15 U.S.C. §§ 12-27 (1976).

ated a federal policy of competition for interstate commerce.²¹ Congress did not, however, explicitly deal with the issue of conflict between federal antitrust policy and state regulatory action.²² The courts, vested with broad discretion in construing the antitrust statutes,²³ have given competition precedence and have repeatedly held that immunity from the antitrust laws cannot be lightly implied.²⁴ In

21. The basic judicial view as to the scope and purpose of the federal antitrust laws was succinctly stated by the Supreme Court in *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958):

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

Id. at 4-5. See also *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 406 (1978) ("In enacting the Sherman Act . . . Congress mandated competition as the polestar by which all must be guided in ordering their business affairs."); *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise.").

22. The constitutional implications of the antitrust law/state action conflict stem from the general concepts of federalism, pre-emption and two specific limits on federal power. Under the Tenth Amendment, states may regulate local markets and attend to local economic problems "save only as Congress may constitutionally subtract from their authority." *Parker v. Brown*, 317 U.S. 341, 351 (1943). See also *United States v. Darby*, 312 U.S. 100, 124 (1941) (Tenth Amendment was enacted "to allay fears . . . that the states might not be able to exercise their fully reserved powers."). The *Federalist* Nos. 45, 46 (J. Madison); Handler, *The Current Attack on the Parker v. Brown State Action Doctrine*, 76 COLUM. L. REV. 1, 17-20 (1976); Tepley, *Antitrust Immunity of State and Local Governmental Action*, 48 TUL. L. REV. 272, 272 n.3 (1974). The Eleventh Amendment prohibits suits brought in federal court against an unconsenting state. See *Lowenstein v. Evans*, 69 F. 908, 910 (C.C.D. S.C. 1895) (proceeding under Sherman Act against state as holder of monopoly on sale of liquor dismissed for lack of jurisdiction). See also note 57 and accompanying text *infra*.

23. The generality of the statutory language embodied in the antitrust laws vests courts with a wide range of discretion in construing their statutory provisions and in molding their remedies. *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 348 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954) ("In the antitrust field the courts have been accorded by common consent, an authority they have in no other branch of enacted law."). See generally J. VAN CISE, *THE FEDERAL ANTITRUST LAWS* (3d ed. 1975).

24. *California v. Federal Power Comm'n*, 369 U.S. 482, 485 (1962) *reprinted in* *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348 (1963). *Accord*, *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 397 (1978); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975); *United States v. Nat'l Assoc. of Securities Dealers*, 422 U.S. 694, 719-20 (1974).

Commentators examining Congressional deliberations prior to the Sherman Act's

Parker v. Brown,²⁵ however, the Supreme Court concluded that Congress did not intend to apply the federal antitrust laws to conduct sanctioned by state governments.²⁶

In *Parker*, plaintiff questioned the validity of California's collaborative raisin marketing program²⁷ under the Sherman Act.²⁸ Assuming that the program would violate the Act if implemented by private persons,²⁹ the Court nevertheless rejected the Sherman Act challenge.³⁰ Chief Justice Stone announced the general rule that restraints of trade resulting from valid governmental action cannot give rise to private antitrust liability.³¹ His opinion cautioned, however,

enactment have generally concluded that the Act's legislative history lends little assistance in resolving whether Congress intended the Act to apply to states and their political subdivisions. See Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 NW. U.L. REV. 71, 83-87 (1974); Tepley, *Antitrust Immunity of State and Local Governmental Action*, 48 TUL. L. REV. 272, 277 & n.39 (1974); White, *Participant Governmental Immunity from the Antitrust Laws: Fact or Fiction*, 50 TEX. L. REV. 474, 482 & n.6 (1972).

25. 317 U.S. 341 (1943).

26. *Id.* at 350-52.

27. The California Agricultural Prorate Act authorized the state director of agriculture and a publicly appointed commission to adopt marketing programs regulating the production and sale of agricultural products. 317 U.S. at 346-47. The overriding purpose of the raisin marketing program was to restrict competition among growers, maintain wholesale prices and guard against the harmful effects of excess supply. *Id.* at 346, 355.

28. *Parker* is better known for its interpretation of the commerce clause. U.S. CONST. art. I, § 8(3). The Court sustained the validity of the program under the commerce clause on grounds that the state program only applied to intrastate transactions. Furthermore, the Court found that regulation of the raisin industry was a local concern that, absent preemptive federal legislation, was subject to state supervision. 317 U.S. at 360-61, 368. See generally Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 NW. U. L. REV. 71, 72 n.5 (1974); 41 MICH. L. REV. 968 (1943); 27 MINN. L. REV. 468 (1943).

29. 317 U.S. at 350.

30. *Id.* at 350-52. The Supreme Court found no conflict between the California raisin marketing program and the Sherman Act, basing its conclusion on two grounds. First, the Court determined the Sherman Act was not intended to apply to the states or to official actions taken by states in their sovereign capacities. *Id.* at 350-51. See also *United Mine Workers v. Pennington*, 381 U.S. 657, 671 (1965) (coal mining company not entitled to damages under Sherman Act for injuries suffered from actions of public official); *Olsen v. Smith*, 195 U.S. 332 (1904) (state system of licensing harbor pilots not a Sherman Act violation); note 15 *supra*. Second, the Court found that the program did not operate through combinations, conspiracies or agreements among individuals, but by force of valid state law. 317 U.S. at 350.

31. 317 U.S. at 350-52.

that the government action exemption created³² was neither all-inclusive nor restricted to state conduct.³³

Thirty-two years after *Parker*, the Supreme Court reexamined the precise scope and meaning of the state action exemption.³⁴ In *Gold-*

32 The fundamental elements of the *Parker* holding antedated the decision by some 50 years. In *Olsen v. Smith*, 195 U.S. 332 (1904), for example, the Court upheld a state statute limiting pilotage services to licensed pilots. Defendants argued the licensed pilot association constituted a monopoly in violation of the Sherman Act. The Court was unpersuaded: "[I]f the State has the power to regulate [pilots] . . . it must follow that no monopoly or combination can arise from the fact that the duly authorized agents of the State are alone allowed to perform the duties devolving upon them by law." *Id.* at 345. See also *Lowenstein v. Evans*, 69 F. 908 (C.C.D. S.C. 1895) (validity of state liquor monopoly sustained against a Sherman Act challenge).

33. 317 U.S. at 351-52. The Chief Justice stated that the "case involved no question of the state or its municipality participating in a private agreement to restrain trade." *Id.* This language suggested first, that the *Parker* Court viewed municipalities as agents of the state entitled to the same antitrust protection as states. Second, the Court's statement indicated it did not intend the state action exemption to go so far as to shield a state or city acting as a co-conspirator in an agreement to restrain trade.

34. Following *Parker*, the Supreme Court consistently declined to review cases in which the state action issue was contested. *E.g.*, *Woods Exploration & Prod. Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970); *E. W. Wiggins Airways, Inc. v. Massachusetts Port. Auth.*, 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966). The Court did refer to *Parker* in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951) (statutory resale price maintenance scheme requiring non-signers of the price maintenance contracts to charge the same minimum price as that charged by signers of the contract held unenforceable under the Sherman Act notwithstanding the element of state compulsion); *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (Sherman Act cannot interfere with the individual's right to solicit government action or communicate with government officials, even if the requested action has an anticompetitive purpose); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) (rejected a defense of compliance by a foreign sovereign, supported by analogy to *Parker*, because there was no indication that the foreign government required, or even approved, the anticompetitive conduct in question) None of these cases, however, involved a direct examination of the *Parker* doctrine.

Lower federal courts, left without resolution of the precise scope of the state action exemption, rendered a series of inconsistent and often contradictory opinions. *Compare Asheville Tobacco Bd. of Trade, Inc. v. FTC*, 263 F.2d 502, 509 (4th Cir. 1959) (exemption inappropriate where state control was limited to a statute authorizing the local board of trade to make reasonable rules and regulations for sale and handling of leaf tobacco) *with Travelers Ins. Co. v. Blue Cross*, 361 F. Supp. 774 (W.D. Pa. 1972), *aff'd*, 481 F.2d 80 (3d Cir.), *cert. denied*, 414 U.S. 1093 (1973) (immunity claim by a private, non-profit insurance company rejected, even though its business activities were regulated by state, because (1) it was "the creature of individuals—not the state," and (2) it had "not been extended valid governmental authority to engage in

farb v. Virginia State Bar,³⁵ the Court faced a Sherman Act challenge to minimum fee schedules published and enforced by a state bar association. Traditionally, the bar has been a regulated profession and the state bar was a state agency by law for some purposes.³⁶ Yet the Court unanimously concluded that the federal antitrust laws applied because the state did not command the establishment of minimum fees.³⁷ The Court reasoned that the state bar's participation in price

monopolistic practices.") and *Alabama Power Co. v. Alabama Elec. Corp.*, 394 F.2d 672, 675 (5th Cir. 1968), *cert. denied*, 393 U.S. 1000 (1968) ("it is settled that neither the Sherman Act nor the Clayton Act was intended to authorize restraint of governmental action.").

Several courts accorded full antitrust immunity to all public instrumentalities regardless of their functions. *Miley v. John Hancock Mut. Life Ins. Co.*, 148 F. Supp. 299, 303 (D. Mass.), *aff'd*, 242 F.2d 758 (1st Cir. 1957) (Sherman Act does not apply to state activities or to activities of its officers directed by the state legislature); *Continental Bus Systems, Inc. v. City of Dallas*, 386 F. Supp. 359, 363 (N.D. Tex. 1974) (establishment of a municipal airport bus service by two cities and their refusal to allow a private bus line to enter into competition with that service was immune from Sherman Act).

Other decisions focused on the degree of state control over and participation in the defendants' activities before extending immunity. *Norman's on the Waterfront, Inc. v. Wheatley*, 444 F.2d 1011, 1017-18 (3d Cir. 1971) (mandatory filing program of Virgin Islands Alcoholic Beverages Fair Trade Law did not involve governmental action sufficient to warrant protection of *Parker*); *Washington Gas & Light Co. v. Virginia Elec. & Power Co.*, 438 F.2d 248, 251 (4th Cir. 1971) (promotional plans by state regulated electric utility exempt from application of antitrust laws because plans were always under active supervision of state commission); *Feminist Women's Health Center, Inc. v. Mohammad*, 415 F. Supp. 1258, 1268 (N.D. Fla. 1976) (state statute did not protect actions of doctors in boycotting abortion clinic because defendant's actions were not required by the state acting as sovereign). See generally Verkuil, *State Action Doctrine, Due Process and Antitrust: Reflections on Parker v. Brown*, 75 COLUM. L. REV. 328, 339-40, 340 n.66 (1975).

A number of cases examined the clarity of the state's legislative intent to undertake the disputed program. *Padgett v. Louisville & Jefferson County Air Bd.*, 492 F.2d 1258, 1260 (6th Cir. 1974) (county air board's award of an exclusive contract to a taxicab company to service the airport held immune from antitrust attack because regulation of ground transportation is necessarily incident to statutorily granted right to manage and operate airport facilities); *Ladue Local Lines, Inc. v. Bi-State Dev. Agency*, 433 F.2d 131, 132, 137 (8th Cir. 1970) (operation of bi-state public transportation held immune from federal antitrust laws because transit agency was a joint instrumentality of two states authorized to enter field of public transportation). *E.W. Wiggins Airways, Inc. v. Massachusetts Port Auth.*, 362 F.2d 52, 53, 55 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966) (Massachusetts Port Authority held to have acted as agency of state pursuant to mandate imposed on it, and to have exercised a valid governmental function in allowing only one fixed base operation at airport).

35. 421 U.S. 773 (1975).

36. *Id.* at 789-90.

37. *Id.* at 790. The Virginia State Legislature had empowered the State Supreme

fixing failed to satisfy "the threshold inquiry" under *Parker*—"whether the activity is required by the state acting as sovereign."³⁸

In *Cantor v. Detroit Edison Co.*,³⁹ a sharply divided Court denied antitrust immunity for the anticompetitive conduct of a private utility even though such immunity was "required" by the state sovereign.⁴⁰ The utility operated a free light bulb exchange service⁴¹ as part of tariffs filed with the state power commission.⁴² The Court looked beyond this government approval and concluded that there was no unfairness in holding the utility liable for an activity it initiated.⁴³

Court to regulate the practice of law and had assigned the State Bar a role in that regulation as an administrative agency of the Supreme Court. VA. CODE § 54-48, 54-59 (1978). The Supreme Court of Virginia, however, had taken no action requiring the use of and adherence to minimum fee schedules. 421 U.S. at 790. Furthermore, no Virginia statute referred to the establishment of lawyers' fees. *Id.* But see *Lathrop v. Donahue*, 367 U.S. 820, 825 (1961) (because attorneys are officers of the court, regulation of their conduct is a power inherent in the judiciary, regardless of legislative delegation).

38. 421 U.S. at 790. See also *Ballard v. Blue Shield of S. W. Va., Inc.*, 543 F.2d 1075, 1079 (5th Cir. 1976) (antitrust immunity denied where no state action compelled insurance company to exclude chiropractor from their insurance plans). Cf. *City of Fairfax v. Fairfax Hosp. Ass'n.*, 562 F.2d 280, 284 (4th Cir. 1977) (command from lesser state body than state legislature does not satisfy conditions for invocation of state action doctrine). See generally *Handler, The Current Attack on the Parker v. Brown State Action Doctrine*, 76 COLUM. L. REV. 1, 10-13 (1976); 7 LOY. U. OF CHI. L.J. 254, 272 (1976).

39. 428 U.S. 579 (1976).

40. *Id.* at 582-85. The plurality found *Parker* did not control because the case presented no question of the legality of any acts of the state, its officers or agents. *Id.* at 591-92 (Stevens, J., with Brennan, White and Marshall, J.J., concurring). Chief Justice Burger, author of the *Goldfarb* opinion, disagreed, stating that the court should focus on the nature of the challenged activity rather than the identity of the parties. *Id.* at 603-04 (Burger, C.J., concurring). The boldest approach was taken by Justice Blackmun. He advocated a preemption analysis, giving federal courts significant discretion to override state regulation whose justification was insufficient to warrant displacement of the antitrust laws. *Id.* at 610-11 (Blackmun, J., concurring in the result). See generally Note, *Parker v. Brown: A Preemption Analysis*, 84 YALE L.J. 1164 (1975).

41. 428 U.S. at 582, 584 n.9. See also MICH. COMP. LAWS ANN. § 460.6 (West Supp. 1977).

42. 428 U.S. at 593-94. The Court also noted that although the state regulated the distribution of light bulbs, it was not involved in the marketing of light bulbs. *Id.* at 584-85.

43. *Id.* at 596-97. In *Litton Systems, Inc. v. Southwestern Bell Tel. Co.*, 539 F.2d 418 (5th Cir. 1976), under facts extraordinarily similar to the situation in *Cantor*, the Fifth Circuit denied antitrust immunity for Bell's tying of private branch exchanges to general telephone service as part of a tariff structure. *Id.* at 423-24. The Court noted that the state and municipal regulatory agencies had merely acquiesced in Bell's tar-

Furthermore, the state had no "independent regulatory interest" in the light bulb program which application of the antitrust laws might frustrate.⁴⁴

Two years later, *Bates v. State Bar of Arizona*⁴⁵ clarified an idea implicit in *Parker*, *Goldfarb* and *Cantor*: The extent to which the federal antitrust laws apply to governmental action depends on the nature of the government decision involved.⁴⁶ The Court held that the *Parker* doctrine barred claims against the Arizona State Bar which regulated advertising for lawyers pursuant to a disciplinary rule adopted by the Arizona Supreme Court.⁴⁷ The Court emphasized that the state policy compelling the challenged activity was clearly articulated as part of a comprehensive regulatory system and actively supervised by the State Supreme Court.⁴⁸

In *Lafayette*, the Court addressed the cognate problem of whether the antitrust laws apply to municipalities which are parties in a conspiracy to restrain trade. The plurality stated that municipal actions are immune from antitrust liability only when it can be shown "from the authority given a governmental entity in a particular area, that

iffs. The tying arrangement, like the light bulb program in *Cantor*, was neither necessary for effective state regulation of telephone service nor the result of a cohesive state policy. *Id.*

44. 428 U.S. at 596-97. See *Ellwood City v. Pennsylvania Power Co.*, 496 F. Supp. 1343 (W.D. Pa. 1979).

45. 433 U.S. 350 (1978).

46. See 428 U.S. at 605; 421 U.S. at 788-89; 317 U.S. at 351-52.

47. *Id.* at 359-63. Although divided on other issues, the Justices completely agreed on the applicability of the *Parker* doctrine to the case. The court distinguished *Cantor* as involving claims against a private party in which the state acquiesced. The claims in *Bates*, on the other hand, were directed against the Arizona Supreme Court as the real party in interest. Furthermore, the State of Michigan had no regulatory interest in the market for light bulbs whereas the State of Arizona had a well established interest in lawyer advertising. *Id.* at 360-62. *Goldfarb* was distinguished because the Virginia Supreme Court rules did not require the use of minimum fee schedules, whereas the Arizona Supreme Court rules clearly prohibited legal advertising. *Id.* at 359-60.

48. *Id.* at 359-63. In *Mobilfone of N.E. Pa., Inc. v. Commonwealth Tel. Co.*, 571 F.2d 141 (3d Cir. 1978), the court stated:

[W]e perceive *Cantor*, *Goldfarb* and *Bates* to teach that in order for the *Parker* rule to apply, the defendant must show that the state has an independent regulatory interest in the subject matter of the antitrust controversy; that there exists a clear and affirmative articulation of the state's policy with regard to that interest; and that the state supervision is active.

Id. at 144. See generally Note, *Parker v. Brown Revisited: The State Action Doctrine After Goldfarb, Cantor and Bates*, 77 COLUM. L. REV. 898 (1978).

the legislature contemplated the kind of action complained of."⁴⁹ Justice Marshall, concurring, explained that state action involving more anticompetitive restraint than necessary to effectuate governmental purposes was inconsistent with the plurality's approach.⁵⁰ The Chief Justice, also concurring in the result, believed that the appropriate issue was whether the Sherman Act reached the proprietary enterprises of municipalities.⁵¹ He concluded that the cities should

49. 435 U.S. at 415, quoting 532 F.2d 431, 434. The plurality, Justices Brennan, Marshall, Powell and Stevens, believed that the policy of preserving to the states the traditional authority they exercised to regulate their economies did not require granting antitrust immunity to all actions of municipalities. A state's regulatory prerogatives can be protected by holding that antitrust laws do not apply to conduct "contemplated" by the state legislature in its delegation of regulatory authority to a political subdivision. Any other rule would require federal policy to yield to a variety of local decisions that may have little to do with an articulable state policy and that may be severely detrimental to the interests protected by federal law. In essence, the Court determined that every act of a city is not necessary to the regulatory power of the state. Cities may act in defiance of the state policy. When that happens no state interest can be served by withholding application of the federal antitrust statutes. *Id.* at 408-416. See *Whitworth v. Perkins*, 559 F.2d 378, 381 (5th Cir. 1977) (application of *Parker* doctrine requires thoughtful analysis to ensure it is a *bona fide* state government decision for which the antitrust exemption is sought). See generally Note, *The Antitrust Liability of Municipalities Under the Parker Doctrine*, 57 B.U.L. REV. 368 (1977); Note, *Antitrust Law and Municipal Corporations: Are Municipalities Exempt from Sherman Act Coverage Under the Parker Doctrine?*, 65 GEO. L.J. 1547 (1977).

50. 435 U.S. at 417-18.

51. *Id.* at 418-19. The utility of distinguishing between governmental and proprietary activities has a long and colorful history. It has been discredited, *National League of Cities v. Usery*, 426 U.S. 833, 865-66 (1976) (Brennan, J., dissenting); *New York v. United States*, 326 U.S. 572, 580-84 (1946); *United States v. California*, 297 U.S. 175, 183 (1936); resuscitated, *National League of Cities v. Usery*, 426 U.S. 833, 854-55 (1976); *Fry v. United States*, 421 U.S. 542, 558 n.2 (1975) (Rehnquist, J., dissenting); and ignored, *City of Lafayette v. Louisiana Power & Light Co.*, 532 F.2d 431, 434 n.8 (1976); *New Mexico v. American Petrofina, Inc.*, 501 F.2d 363, 371-72 (9th Cir. 1974); *Ladue Local Lines, Inc. v. Bi-State Dev. Agency*, 433 F.2d 131, 137 (8th Cir. 1970).

Most decisions examining municipal liability under the antitrust laws equate local entities with the state and ignore the anticompetitive nature of the disputed activity. See cases cited note 5 and accompanying text *supra*. A city, however, has two types of power. It can exercise powers expressly delegated to it by state government. See *City of Trenton v. New Jersey*, 262 U.S. 182, 185-87 (1923); *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907); *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1253-54 (5th Cir. 1976). A city also can act in a proprietary, quasi-private manner for its own benefit or the benefit of its citizens. See *George R. Whitten, Jr., Inc. v. Padlock Pool Builders, Inc.*, 424 F.2d 25, 31 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970); *City of Henderson v. Young*, 119 Ky. 224, 227-28, 83 S.W. 583, 584 (1904); *Hicks v. City of Monroe Util. Comm'n*, 237 La. 847, 866, 112 So. 2d 635, 641 (1959).

Where a municipality acts in an essentially commercial capacity, immunizing the

be treated in essentially the same manner as any private utility.⁵² Four justices dissented,⁵³ arguing that *Parker* should control.⁵⁴ They contended that cities are instrumentalities of the state, not private persons, and that their actions are acts of government immune from antitrust liability.⁵⁵

Lafayette demonstrates, perhaps more strikingly than any other

conduct from antitrust liability serves no rational policy objective. See Note, *The Antitrust Liability of Municipalities Under the Parker Doctrine*, 57 B.U.L. REV. 368, 386 (1977). Cf. Note, *Antitrust Law and Municipal Corporations: Are Municipalities Exempt from Sherman Act Coverage Under the Parker Doctrine?*, 65 GEO. L.J. 1547, 1583-85 (criticizes governmental/proprietary distinction and suggests its abolishment). The problem, however, is that in many situations the commercial activities of a city also serve regulatory or governmental purposes. See, e.g., *Ladue Local Lines, Inc. v. Bi-State Dev. Agency*, 433 F.2d 131, 137 (8th Cir. 1970) (transit system monopoly).

52. 435 U.S. at 418-20. Chief Justice Burger concluded that the focus of the Court's inquiry should be on the challenged activity rather than the identity of the parties to the suit. The Chief Justice found that the cities were engaging in a business activity in which a profit is realized and that the dispute involved was one among competitors in the same market. Therefore, the test that must be satisfied, as enunciated in *Goldfarb*, *Cantor* and *Bates*, is whether the anticompetitive conduct is "required by the state acting as sovereign." Chief Justice Burger also suggested a supplemental inquiry—determining whether the implied exemption was necessary to make the regulatory act work, "and even then only to the minimum extent necessary." *Id.* at 418-26.

53. Justices Stewart, White, Rehnquist and Blackmun dissented. *Id.* at 426. Justice Stewart's dissent asserted that both the plurality and the Chief Justice erred in failing to recognize the distinction between "private activities authorized or regulated by government on the one hand, and the actions of government itself on the other." *Id.* at 428. Although *Cantor* and *Goldfarb* may be applied in determining whether the state action exemption is to be extended to private activity, only *Parker* applies when municipalities are involved. *Id.* at 431-32. "Municipal corporations are instrumentalities of the State for the convenient administration of government within their limits." *Id.* at 429, quoting *Louisiana ex rel. Folsom v. Mayor of New Orleans*, 109 U.S. 285, 287 (1883). And the Cities should have enjoyed the antitrust exemption.

54. Justice Blackmun, agreeing with most of the Stewart dissent, wrote a short dissenting opinion in which he criticized the "nonchalance" with which the Court considered the question of the appropriate remedy. *Id.* at 441-43. See note 64 and accompanying text *infra*.

55. *Goldfarb*, *Cantor* and *Bates* involved entities associated with the state for only limited purposes. Municipalities, on the other hand, are subordinate government bodies selected by the state to carry out governmental functions. The states must act through agents, and states have delegated a significant portion of their regulatory authority to municipal governments. See, e.g., *City of Trenton v. New Jersey*, 262 U.S. 182, 185-87 (1923) (city could only acquire right to divert river by grant from state); *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1254 n.5 (5th Cir. 1976) (city is creature of and subject to state will).

case, the continuing tension between federalism and the national policy of fostering free competition. The Court's opinions convey the unmistakable message that subordinate government units are not entitled to all of the deference that federalism demands for the state itself.⁵⁶ *Goldfarb* and *Cantor* suggest that exemptions from antitrust coverage should extend only to activities in which the state has played a significant role as sovereign. *Parker* and *Bates* exemplify judicial reluctance to impose federal regulations on sovereign states. The *Lafayette* Court combines these impulses in reasoning that the connection between a legislative grant of power and a city's use of that power may be too tenuous to always warrant antitrust immunity.⁵⁷

The plurality approach in *Lafayette* is useful but not dispositive. State legislatures do not contemplate performance of a significant portion of local government action. The lines between a state's com-

56. Both the plurality and the Chief Justice rely on the notion of federalism—the distinction between the two opinions being the degree of deference to state activity that federalism requires. The plurality concluded that *Parker*, as interpreted by *Goldfarb*, *Cantor* and *Bates*, “exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or by its subdivisions, pursuant to a state policy to displace competition with regulation or monopoly public service.” 435 U.S. at 413. Such a state policy exists so long as the state legislature contemplated the alleged anticompetitive action. Such a finding is only the “threshold inquiry for the Chief Justice. He would take the “additional step . . . of determining whether the implied exemption from federal law ‘was necessary to make the regulatory Act work, ‘and even then only to the minimum extent necessary.’”” *Id.* at 425-26. Justice Marshall's concurring opinion suggests that the Chief Justice's emphasis on scrutiny of state regulatory policy may be little more than a detailed explanation of the plurality opinion. He concluded that the plurality's “test . . . relating to whether it is ‘state policy to displace competition,’ . . . incorporates within it the core of the Chief Justice's concern.” *Id.* at 417.

57 The Court's assumption of possible municipal liability finds support in several differences between a state and its municipal subdivisions. See notes 49 and 51 and accompanying text *supra*. See also *Cowles v. Mercer County*, 74 U.S. (7 Wall.) 118, 121-22 (1868).

The Eleventh Amendment has been interpreted to prohibit suits brought in federal court against an unconsenting state by its own citizens and by citizens of other states. *Edelman v. Jordan*, 415 U.S. 651, 662-663 (1974). Courts have not extended the amendment's protections to municipalities. *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890); *Markham v. City of Newport News*, 292 F.2d 711, 716 (4th Cir. 1961); *N. M. Patterson & Sons, Ltd. v. City of Chicago*, 176 F. Supp. 323 (N.D. Ill. 1959). The rationale for this view is that immunity only attaches to the state in its sovereign capacity. *S.J. Groves & Sons Co. v. New Jersey Turnpike Auth.*, 268 F. Supp. 568, 579 (D.N.J. 1967) and municipalities are political corporations considered distinct from the state as sovereign. *Id.* at 578-79.

pulsion,⁵⁸ approval,⁵⁹ authorization⁶⁰ and contemplation⁶¹ of a particular municipal activity are often unclear. Furthermore, there are strong statutory,⁶² constitutional⁶³ and public policy⁶⁴ arrangements militating against municipal antitrust liability. The Court's decision

58. See, e.g., *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 790 (1975) (the "threshold inquiry" under *Parker* is "whether the activity is required by the State acting as sovereign") (emphasis added).

59. See, e.g., *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 596-97 (1976) (state commission's approval of utility tariff does not give rise to antitrust immunity where no independent state regulatory interest in program existed).

60. See, e.g., *Bates v. State Bar of Arizona*, 433 U.S. 350, 360 (1977) (rule prohibiting legal advertising exempt from federal antitrust laws when authorized by State Supreme Court).

61. See, e.g., *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978) (adequate state mandate for anticompetitive municipal activity exists when "legislature contemplated the kind of action complained of").

62. The Court's decision fails to consider the possibility of substantial local independence in states having constitutional or statutory provisions for home rule. See, e.g., CAL. CONST. art. XI, § 5(a) (home rule city may legislate on matters other than municipal affairs, subject to general law). Home rule charters permit municipalities to administer local matters without first seeking specific state authority. In home rule jurisdictions, a requirement of state contemplation of local government action before granting antitrust immunity may prove unworkable. See generally Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269, 280 (1968); Note, *Antitrust Law and Municipal Corporations: Are Municipalities Exempt from Sherman Act Coverage Under the Parker Doctrine?*, 65 GEO. L.J. 1547, 1559 & n.7 (1977).

63. There is a constitutional underpinning to municipal claims of immunity from antitrust liability. In *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Court determined the minimum wage provisions of the Fair Labor Standards Act, 29 U.S.C. § 206 (1978), unconstitutionally interfered with the administration of essential state and local government functions. 426 U.S. at 855. The Court held that Congress may not interfere, through legislation enacted pursuant to the commerce clause, with the operation of integral state and local government functions absent a national emergency. *Id.* at 852-53. Interference with the delivery of integral local government services by application of the antitrust laws, therefore, may be unconstitutional. See generally Comment, *At Federalism's Crossroads: National League of Cities v. Usery*, 57 B.U.L. REV. 178 (1977). See also *Usery v. Dallas Independent School Dist.*, 421 F. Supp. 111, 116 (N.D. Tex. 1976) (*National League of Cities* is a "narrow excision from the whole cloth" of Tenth Amendment).

64. Both dissenting opinions in *Lafayette* criticized the nonchalance with which the Court treated the consequences of municipal exposure to potential treble damages. 435 U.S. at 440-43. The consequence to a municipality of a treble damage award is potentially ruinous. In *Lafayette*, for example, the utilities alleged damages against the cities in the amount of \$180 million or \$540 million after trebling. Petitioner's Brief at 21.

Some courts have awarded damages against municipalities for violation of their citizens' constitutional rights by city agents. See, e.g., *Morales v. Haines*, 486 F.2d

in *Lafayette* circumscribes the *Parker* doctrine once again, but the difficult issue of federal-state-municipal relations remains unresolved.

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880, 881-82 (7th Cir. 1973) (actual and punitive damages and attorneys' fees are recoverable under 42 U.S.C. §§ 1982-83).

The existence of tort damage awards against municipalities demonstrates that imposition of antitrust liability would not be unprecedented. *Jones v. State Highway Comm'n.*, 557 S.W.2d 225 (Mo. 1977) (State Supreme Court rejected rule of sovereign tort immunity). *Oroz v. Board of County Comm'rs* 575 P.2d 1155 (Wyo. 1978) (State Supreme Court abrogated tort immunity of counties and other political subdivisions). See generally Levin, *The Section 1983 Municipal Immunity Doctrine*, 65 GEO. L.J. 1483 (1977); Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 919; Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922 (1976).

