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# National League of Cities and the Parker Doctrine: The Status of State Sovereignty Under the Commerce Clause

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# COMMENTS

## *NATIONAL LEAGUE OF CITIES* AND THE *PARKER* DOCTRINE: THE STATUS OF STATE SOVEREIGNTY UNDER THE COMMERCE CLAUSE

### I. Introduction

States, as the primary providers of governmental services, existed well before the formation of our national government.[1] The Constitution recognizes this historical fact by creating a federal government "authorized to act directly on the people within the powers confided to it rather than solely on the states, and . . . endowed with an amplitude of powers which might or might not be used as the future . . . dictate[s]."[2] This concept of federalism under the Constitution does not dictate absolute deference to states' rights, nor does it demand centralization of control in our national government. The Framers sought a compromise between these two courses.[3] As Justice Black has reasoned, the concept represents "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."[4]

Judicial decisions since the enactment of the Constitution have struggled to understand the scope of those powers granted to the national government and of those reserved by the states.[5] At present, nowhere is this struggle more perplexing than in cases involving the exercise of Congress' power to regulate interstate commerce. Until recently, the only judicially enforceable limits on Congress'

1. *See* Lane County v. Oregon, 74 U.S. 71, 76 (1868).
2. *See* Friendly, *Federalism: A Forward*, 86 YALE L.J. 1019 (1977).
3. Younger v. Harris, 401 U.S. 37, 44 (1971).
4. *Id.*
5. *See generally* Friendly, *supra* note 2, at 1020-34.

exercise of this plenary power have been found in the Bill of Rights[6] or in the political process itself where states and individuals can influence congressional action through their representatives.[7] In 1976, however, for the first time in over forty years,[8] the Supreme Court declared a congressional regulation of interstate commerce to be an unconstitutional impairment of the sovereignty of state and local governments. In *National League of Cities v. Usery*,[9] the Court invalidated an amendment to the Fair Labor Standards Act[10] which prescribed minimum wages and maximum hours for state and municipal government employees. This exercise of Congress' commerce power was considered an obstacle to the states' "ability to function effectively in a federal system."[11] The Court relied upon the tenth amendment[12] as providing an affirmative protection of the states from an overbearing Congress. While the concept of state sovereignty imposing a restraint on the exercise of federal power is hardly novel,[13] *National League of Cities* represents the Supreme Court's most recent and emphatic expression of the federalist doctrine.[14] The case signals a growing sensitivity of the Court to the effect of federal regulation on the autonomy of state and local governments,

6. *See, e.g.*, Leary v. United States, 395 U.S. 6 (1969) (fifth amendment); United States v. Jackson, 390 U.S. 570 (1968) (sixth amendment); Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946) (first amendment).

7. *See* L. TRIBE, AMERICAN CONSTITUTIONAL HISTORY 239-42 (1978) [hereinafter cited as TRIBE].

8. The last Supreme Court case which invalidated a regulation of interstate commerce on state sovereignty grounds was Carter v. Carter Coal Co., 298 U.S. 238 (1936).

9. 426 U.S. 833 (1976). *National League of Cities* represents the first judicial check on commerce power since NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), where the Court announced an expansive view of federal commerce power.

10. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (amending 29 U.S.C. § 206 (1970)).

11. 426 U.S. at 852 (quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975)).

12. 426 U.S. at 842-43. The tenth amendment reads: "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." U.S. CONST. amend. X.

13. *See* Texas v. White, 74 U.S. 700, 725 (1868); Lane County v. Oregon, 74 U.S. 71, 76 (1868); THE FEDERALIST No. 46, at 330 (J. Madison) (B. Wright ed. 1961). *See also* Fry v. United States, 421 U.S. at 547 n.7.

14. The Court had also expressed concern for the rights of states in the federal system in Edelman v. Jordan, 415 U.S. 651 (1974) (eleventh amendment bars liability for damages payable out of state treasury) and Rizzo v. Goode, 423 U.S. 362 (1976) (federal court may not order structural changes in police department as remedy for police invasion of constitutional rights absent showing of high level official encouragement of police misconduct).

a valued but hitherto moribund concern of the Court.[15] Unfortunately, the decision of a sharply divided Court in *National League of Cities*[16] offers little to our understanding of the federal-state balance, except to remind us that state sovereignty is not a dormant doctrine.

Clarification of what constitutes state sovereignty in the face of federal commerce power may be found in the antitrust context. In 1943, the Supreme Court in *Parker v. Brown*[17] determined that the Sherman Act did not apply to state action. This decision was based on an express concern for the sovereignty of states.[18] Although the principals in *Parker* escaped Supreme Court consideration for over thirty years,[19] the Court has recently given them new importance. In *City of Lafayette v. Louisiana Power and Light Company*,[20] the Court analyzed the *Parker* doctrine for the fourth time in less than three years.[21] In doing so, it established a definition of state sovereignty based on what is the express policy of a state legislature.[22] While this emphasis on a legislative policy mandate helps to overcome some of the ambiguities inherent in *National League of Cities*, it creates novel problems for lower courts faced with questionable exertions of commerce power by the Congress over states. At the very least, however, the inquiry into what is a state legislature's policy provides a useful starting point in understanding our judiciary's steadfast concern for the sovereignty of states.

This Comment will consider *Parker* and *National League of Cities* separately as expressions of the state sovereignty doctrine. A comparison between these independent developments of state sovereignty under the commerce clause will then be presented, delineating those instances where the very concerns articulated in *National League of Cities* were either adopted or abandoned in the recent

15. *See* Tribe, *Unraveling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1068-69 (1977).

16. *See* note 28 *infra* and accompanying text.

17. 317 U.S. 341 (1943).

18. *See* note 92 *infra* and accompanying text.

19. The Supreme Court did not consider *Parker* again until 1975 in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

20. 435 U.S. 389 (1978).

21. In addition to *Goldfarb* and *City of Lafayette*, the Court analyzed *Parker* in Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) and in Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

22. *See* text accompanying notes 162-65 *infra*.

*Parker* cases. In examining the congressional exercise of commerce power over state activity in the antitrust area, the principal aim is to clarify the parameters of the Court's present conception of state sovereignty as a limit to federal power.[23]

## II. State Sovereignty as an Affirmative Limit to the Federal Commerce Power: *National League of Cities v. Usery*

In *National League of Cities v. Usery*, individual cities and states, the National League of Cities, and the National Governor's Conference, as plaintiffs, challenged the validity of the 1974 amendments to the Fair Labor Standards Act ("FLSA").[24] These amendments extended the coverage of federal minimum wage and maximum hour standards from private employees to all public employees of states and their subdivisions.[25] Application of the standards to private employees was previously upheld as a constitutionally valid exercise of congressional commerce clause power in *United States v. Darby*.[26] The cities and states asserted, however, that when the

23. The analysis here will emphasize the anticompetitive acts of states and their subdivisions and will not attempt to explore the possible immunity of private actions. *Cf.* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951); Union Pacific R.R. v. United States, 313 U.S. 450 (1941) (dealing with private enterprises asserting a *Parker* defense). This Comment will discuss Cantor v. Detroit Edison Co., a case against a private utility, only to the extent it reflects upon the *Parker* doctrine in general. *See* notes 111-33 *infra* and accompanying text. For a broader discussion of state action immunity under antitrust laws and the implications for private action, *see* Note, Parker v. Brown *Revisisted: The State Action Doctrine After* Goldfarb, Cantor, *and* Bates, 77 COLUM. L. REV. 898 (1977).

Numerous commentators have addressed the question: how far does the state sovereignty doctrine extend? *See, e.g.*, Schwartz, National League of Cities v. Usery—*The Commerce Power and State Sovereignty Redivivus*, 46 FORDHAM L. REV. 1115 (1978) (Professor Schwartz argues that state sovereignty is not a viable constitutional concept and was a misused term in *National League of Cities*); TRIBE, supra note 7; Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in* National League of Cities v. Usery, 86 YALE L. J. 1165 (1977). Michelman and Tribe argue that the state sovereignty doctrine is an effort to protect citizens' rights to essential governmental services provided by local governments. *See also* Note, *Federal Securities Fraud Liability and Municipal Issuers: Implications of* National League of Cities v. Usery, 77 COLUM. L. REV. 1064 (1977).

One commentator has explored the implications of exposing municipalities to treble antitrust damages on the doctrine of federalism. *See* Note, *Federal Antitrust Immunity: Exposure of Municipalities to Treble Antitrust Damages Sets Limit for New Federalism:* City of Lafayette v. Louisiana Power and Light Co., 11 CONN. L. REV. 126 (1978).

24. 426 U.S. at 836.

25. As originally enacted, the Act specifically excluded states and their political subdivisions from its coverage. 29 U.S.C. § 203(d) (1940); 426 U.S. at 836 n.7.

26. 312 U.S. 100 (1941).

Act was applied to state and municipal government employees, it unconstitutionally infringed the sovereignty of states in the federal system.[27] In a five to four decision,[28] the Supreme Court upheld the challenge, asserting that to the extent the amendments operated to "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by [the commerce clause]."[29] Writing for the majority of the Court, Justice Rehnquist acknowledged that these amendments were enacted pursuant to the commerce clause of art. I, which granted plenary authority to Congress to regulate interstate commerce.[30] Nonetheless, when Congress regulates "States as States," according to Rehnquist, it transgresses an affirmative limitation on the exercise of its plenary commerce powers.[31] The Court found the source of this limitation to be contained in the tenth amendment of the Constitution which reserves to the states, or the people, all powers not delegated to the federal government.[32] As the Court had reasoned one year earlier in *Fry v. United States*:[33]

> While the Tenth Amendment has been characterized as a "truism," stating merely that "all is retained which has not been surrendered," . . . it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.[34]

Thus, the Court in *National League of Cities* did not dispute the existence of congressional power to regulate wages and hours of employees, but instead asserted that this power is limited by the tenth amendment protection of state sovereignty.[35]

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27. 426 U.S. at 841.

28. J. Rehnquist delivered the opinion of the Court joined by JJ. Stewart, Blackmun, Powell and C.J. Burger. J. Blackmun wrote a concurring opinion. J. Brennan filed a dissenting opinion in which JJ. White and Marshall joined. J. Stevens wrote a separate dissenting opinion. *Id.* at 834.

29. *Id.* at 852.

30. *Id.* at 840.

31. *Id.* at 841.

32. *Id.* at 842-43.

33. 421 U.S. 542 (1975).

34. *Id.* at 547 n.7.

35. 426 U.S. at 841-45. The Court endorsed the appellant's assertion that "Congressional enactments which may be fully within the grant of legislative authority contained in the Commerce Clause may nonetheless be invalid because found to offend against the right to

The majority in *National League of Cities* analogized[36] its ruling to the Court's decision in *New York v. United States,*[37] where congressional power to tax was found not to include the right to impose a non-discriminatory tax on the states. Although the Court in *New York v. United States* upheld a federal tax on a state-operated mineral water business, it cautioned that the invalidity of a tax on certain state activities might be based wholly on the fact that the state is "being taxed so as unduly to infringe, in some manner, the performance of its functions as a government which the Constitution recognizes as sovereign."[38] Thus, in *New York v. United States,* a constitutional limitation on the power of Congress to tax was recognized based on the sovereignty of states. A similar limitation was applied in *National League of Cities* to the federal power to regulate commerce.[39] The majority in *National League of Cities,* however, expressed no view as to the limits created by state sovereignty on the exercise of congressional powers under other sections of the Constitution, such as the spending power, art. I §8 cl. 1, or section 5 of the fourteenth amendment.[40] In addition, apart from *New York v. United States,* the Court relied on pre-World War II cases to sound the federalist theme.[41] More recent Supreme Court cases had not found that the tenth amendment created such an affirmative limitation on the exercise of congressional commerce power. For example, in *Fry* the wages of all state and local government employees were held to be a validly limited by the federal government under the Economic Stabilization Act of 1970. The majority in *National League of Cities* distinguished the situation in *Fry* by finding that the federal regulation involved was an emergency measure intended to ameliorate severe inflation plaguing the national economy.[42] This "extremely serious problem . . . endangered

trial by jury contained in the sixth amendment, United States v. Jackson, 390 U.S. 570 (1968), or the Due Process Clause of the fifth amendment, Leary v. United States, 395 U.S. 6 (1969)." 426 U.S. at 841.

36. 426 U.S. at 843.

37. 326 U.S. 572 (1946).

38. *Id.* at 588.

39. 426 U.S. at 843 n.14.

40. *Id.* at 852. For a discussion of states' rights under the fourteenth amendment see *Ex parte* Virginia, 100 U.S. 339, 346-48 (1879).

41. *E.g.,* Metcalf & Eddy v. Mitchell, 269 U.S. 514 (1926); Coyle v. Oklahoma, 221 U.S. 559 (1911); Texas v. White, 74 U.S. 700 (1869); Lane County v. Oregon, 74 U.S. 71 (1869).

42. 426 U.S. at 853.

the well-being of all the component parts of our federal system and . . . [required] collective action by the National Government."[43] Thus, *National League of Cities* did not impose state sovereignty as an absolute barrier to the exercise of federal commerce power. Rather, "[t]he limits imposed . . . when Congress seeks to apply [its Commerce power] to the States are not so inflexible as to preclude temporary enactments tailored to combat a national emergency."[44]

Another recent decision, *Maryland v. Wirtz*,[45] did not involve a national emergency; rather, it concerned an extension of the Fair Labor Standards Act to school and hospital employees of each state. The Court in *National League of Cities* expressly acknowledged that a factual distinction between school and hospital employees and police and fire personnel existed.[46] Nevertheless, the majority did not consider this distinction to have any constitutional merit and concluded that state sovereignty was impaired in the application of FLSA to both types of employees.[47] As a result, *Wirtz* was overruled.[48]

Furthermore, in reviving the state sovereignty doctrine, the Court was careful to note the distinction between the tenth amendment and the supremacy clause of the Constitution: "It is one thing to recognize the authority of Congress to enact laws regulating individual businesses . . . subject to the dual sovereignty of the government of the Nation and of the State in which they reside."[49] Such federal regulation of the private sector would necessarily preempt, under the supremacy clause of article VI, any state regulation in the same area. This is to be contrasted with "a similar exercise of congressional authority directed not to private citizens, but to the

43. *Id.*

44. *Id.* An analogous case noted by the majority is Case v. Bowles, 327 U.S. 92 (1946), where the scope of Congress' authority under its war power was found not to be limited by a state's sovereignty.

45. 392 U.S. 183 (1968).

46. 426 U.S. at 854-55.

47. *Id.*

48. *Id.* The majority observed that *Wirtz* had relied on dicta in United States v. California, 297 U.S. 175 (1936), which announced there to be "no . . . limitation upon the plenary power to regulate commerce. The State can no more deny the power if its exercise has been authorized by Congress than can an individual." *Id.* at 185.

49. 426 U.S. at 845.

States as States."[50] Such regulations of state action cannot withstand constitutional scrutiny. As the *National League of Cities* decision observes, there exists "attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."[51]

In explaining how the 1974 amendments invalidly impaired the state's attributes of sovereignty, the Court mentioned the potential impact of increased costs resulting from compliance with the regulations on local governmental bodies.[52] The costs would erode the financial ability of the states and cities to provide important governmental services.[53] The actual impact of the challenged legislation, however, was not the basis for the Court's decision.[54] More central was the fact that the Act displaced state policies.[55] In practical terms, the Act's application to state and municipal governments abrogated their choice of hiring employees not possessing minimum employment requirements and paying such employees less than the federally prescribed minimum wage.[56] The opinion stated, "the vice of the Act . . . is that it directly penalizes the States for choosing to hire governmental employees on terms different from those which Congress has sought to impose."[57] The Act would "significantly alter or displace the State's abilities to structure employer-employee relationships"[58] in areas involving "integral governmental functions."[59] In sum, after *National League of Cities,* to determine

50. *Id.*

51. *Id.*

52. *Id.* at 846.

53. *Id.* at 846-47. As an example, the Court refers to the State of California's report that the Act would force a reduction in its police academy training program from 2,080 hours to only 960 hours. *Id.* at 847.

54. Justice Rehnquist pointed out that "[w]e do not believe particularized assessments of actual impact are crucial to resolution of the issue presented. . . ." *Id.* at 851. *See also id.* at 874 n.12 (Brennan, J., dissenting).

55. *Id.* at 847-48.

56. As Justice Stevens observed, "the Federal Government may not interfere with a sovereign State's inherent right to pay a substandard wage to the janitor at the state capitol." *Id.* at 880 (Stevens, J., dissenting).

57. *Id.* at 849.

58. *Id.* at 851.

59. *Id.* at 855.

whether an otherwise valid exercise of congressional commerce power would impermissibly impair state sovereignty, a court must examine whether state policy choices regarding the delivery of integral governmental services are being supplanted.[60]

Major difficulties arise in attempting to define the scope of the state sovereignty doctrine announced in *National League of Cities.* Equally difficult is determining its relationship to other areas of federal commerce clause regulation. The Court offered meager assistance for those attempting to determine when a state acts as a state, that is, when a state activity constitutes an "integral governmental function"[61] thereby deserving immunity from federal law. The Court did announce the nebulous principle that "activities typical of those performed by state and local governments" were sovereign.[62] Although several examples of these activities were offered, such as fire and police protection,[63] the Court refrained from offering a specific test, and did not provide an exhaustive list of examples.[64]

A step towards understanding this nebulous standard may be taken by noting that *National League of Cities* did not concern itself

60. "Congress may not exercise [commerce clause] power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." *Id.*

In a recent case in the Sixth Circuit Court of Appeals, Amersbach v. City of Cleveland, 598 F.2d 1033 (6th Cir. 1979), state sovereignty, as a restraint on federal commerce power, was limited to situations where it is shown that "(1) a congressional enactment (in the exercise of commerce clause powers) operates to displace, regulate or significantly alter (2) the management, structure or operation of (3) a traditional or integral governmental function." *Id.* at 1035-36 (footnotes omitted).

Friends of the Earth v. Carey, 552 F.2d 25 (2d Cir.), *cert. denied,* 434 U.S. 902 (1977), refers to the scope of the state sovereignty doctrine as defined by "the extent of usurpation of state policymaking or invasion of integral state functions. . . ." *Id.* at 37. The use of the conjunctive "or" in this case appears inconsistent with the letter of *National League of Cities* which considered both factors in defining state sovereignty.

61. 426 U.S. at 855. The opinion uses similar phrases apparently to stand for the same type of activity but which do not serve to clarify exactly what type of activities are sovereign, for example, "important governmental activities," *id.* at 847, "those governmental services which their state's citizens require," *id.*, "integral operations in areas of traditional governmental functions," *id.* at 852, and "integral parts of [states'] governmental activities." *Id.* at 854 n.18.

62. *Id.* at 851.

63. *Id.* Other examples offered by the Court included sanitation, public health, and parks and recreation. *Id.* Such areas, explained the Court, "are typical of those performed by state and local governments in discharging their dual functions or administering the public law and furnishing public services." *Id.* (footnote omitted).

64. *Id.* n.16.

with whether each state is performing a function which is exclusively performed by government.[65] This follows from the majority's rejection of its eight year old decision in *Wirtz*. There, the Court observed:

> [V]alid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation.[66]

Despite "obvious differences"[67] between school and hospital employees and policemen and firemen, the Court in *National League of Cities* asserted that each type of service is an "integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens."[68] This conclusion overlooks the obvious fact that the services provided by state hospitals and schools have also been traditionally available from private sources.

The majority may be giving some deference to this distinction between governmental services utilized in *Wirtz*, however, by affirming *United States v. California*,[69] a case which found employees of state-operated railroads to be covered by federal railroad regulations.[70] The operation of a railroad was unequivocally excluded from the category of services which the states have regarded as an integral part of their governmental activities.[71] Unfortunately, the Court offered no explanation of why railroads are not integral.[72]

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65. *See* Schwartz, *supra* note 23, at 1128 (discussion of Maryland v. Wirtz, 392 U.S. 183 (1968) and United States v. California, 297 U.S. 175 (1936)).

66. 392 U.S. at 196-97.

67. 426 U.S. at 855.

68. *Id.*

69. 297 U.S. 175 (1936).

70. 426 U.S. at 854-55 n.18.

71. *Id.* at 854 n.18.

72. *See* 426 U.S. at 880 (Brennan, J., dissenting).

In *Amersbach*, the court attempted to isolate certain elements commonly attributed to "integral" governmental functions as found in previous cases.

> Among these elements are:
>
> (1) the government service or activity benefits the community as a whole and is available to the public at little or no direct expense;
>
> (2) the service or activity is undertaken for the purpose of public service rather than pecuniary gain;

In *Fry v. United States,*[73] a case reaffirmed by the Court in *National League of Cities,*[74] Justice Rehnquist recognized the difficulties posed by the characterization of governmental functions as integral. Explaining that the ambiguities inherent in determining the scope of state sovereignty would require a case-by-case resolution, Justice Rehnquist observed

> that a line will have to be drawn somewhere. It is conceivable that the traditional distinction between "governmental" and "proprietary" activities might in some form prove useful in such line drawing. The distinction suggested in *New York v. United States* . . . between activities traditionally undertaken by the States and other activities, might also be of service. . . .[75]

In an era of expanding state activity and growing urban problems, a decision requiring each state to assess which of its activities are "integral," no matter what the method of line drawing is used, may have perplexing implications. The ownership or operation of a railroad, mill or an irrigation system may be deemed, in certain regions, as essential as the operation of bridges, street lights, or a sewage system. Moreover, "[w]hat might have been viewed in an earlier day as an improvident or even dangerous extension of state activities may today be deemed indispensable."[76] As a result, state agencies accused of violating a federal regulation may argue that its activity comes within the broad rubric of integral governmental functions where such a defense may not be justified.[77] On the other hand, too narrow a view of what is "integral" may stifle a state's innovative solution to a local problem.

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(3) Government is the principal provider of the service or activity; and

(4) government is particularly suited to provide the service or perform the activity because of a community wide need for the service or activity.

598 F.2d at 1037.

Unfortunately, each of these characteristics of what is "integral" creates problematic distinctions for determining if a given activity is "integral."

73. 421 U.S. 542 (1975).

74. 426 U.S. at 852-53.

75. 421 U.S. at 558 n.2 (Rehnquist, J., dissenting).

76. New York v. United States, 326 U.S. at 591 (Douglas, J., dissenting).

The need for giving the words "traditional" or "integral" expansive meanings to meet changing times was also recognized by the Sixth Circuit recently in *Amersbach,* 598 F.2d at 1037.

77. This possibility is implied by Professor Schwartz. *See* Schwartz, *supra* note 23, at 1125.

## III. Limitations on the Application of Federal Antitrust Laws to State Action: *Parker v. Brown* and its Progeny

### A. *Parker v. Brown*

Thirty-three years before the decision in *National League of Cities*, the Supreme Court declared federal antitrust laws inapplicable to certain actions of states. In *Parker v. Brown*,[78] a raisin producer sued a California state agency to challenge the enforcement of an agricultural marketing program. The program, enacted by the state legislature to restrict competition among growers and maintain prices in the distribution of raisins, limited the amount and type of raisins that producers could sell to packers in specified regions.[79] The purpose of the program was to " 'conserve the agricultural wealth of the State' and to 'prevent economic waste in the marketing of agricultural products' of the state."[80] In addition, the agricultural program "derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command."[81] The Court concluded that this type of state action was not within the purview of the Sherman Act.[82] Chief Justice Stone, writing for the majority, reasoned that Congress intended the Sherman Act to restrain private anticompetitive conduct and not to regulate action taken by a state, its offices or agencies in furtherance of a legislative mandate.[83]

It is unclear whether the *Parker* decision is based on a notion of state sovereignty as an affirmative limitation on the exercise of federal commerce power or whether the decision rests on a preemption analysis.[84] It is certain that the Court relied heavily on a construction of the Sherman Act to find the Act inapplicable to states. Chief Justice Stone reasoned that although the California program

78. 317 U.S. 341 (1943).
79. *Id.* at 347-48.
80. *Id.* at 346.
81. *Id.* at 350.
82. *Id.* at 350-52.
83. *Id.* at 352.
84. For a discusson of *Parker* and the preemption doctrine, see Note, Parker v. Brown: *A Preemption Analysis*, 84 YALE L. J. 1164 (1975). For a further discussion of the constitutional implications of *Parker*, see Davidson & Butters, Parker *and* Usery: *Portended Constitutional Limits on the Federal Interdiction of Anticompetitive State Action*, 31 VAND. L. REV. 575 (1978).

would definitely violate the Sherman Act if it were "organized and made effective solely by virtue of a contract, combination or conspiracy of private persons individual or corporate,"[85] because the Sherman Act makes no mention of state action, the California program and the state agencies administering the program could not be subject to the Act.

It bears noting that the *Parker* Court assumes that Congress could in the exercise of its commerce power make the Sherman Act expressly applicable to state agricultural stabilization programs.[86] This assumption is based on the supremacy clause of the Constitution which permits Congress, in the exercise of a granted power, to suspend laws by occupying the same legislative field.[87] The preemption doctrine presumes that state regulation is operative until Congress acts.[88] If, however, the *Parker* decision is based on state sovereignty as protected by the tenth amendment, Congress may simply not have the power to apply the Sherman Act to certain "state action" due to the present Court's rationale in *National League of Cities.*[89] Though the tenth amendment, as an affirmative limitation on congressional commerce power, was never specifically referred to in *Parker*,[90] the Court in *Parker* voiced concern for the effect the Sherman Act had on state sovereignty.[91] Expressing the same federalist sentiments found in *National League of Cities,* the Court in *Parker* asserted, "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally substract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."[92]

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85. *Id.* at 350.

86. *Id.*

87. *See* cases cited by the Court, 317 U.S. at 350. Other bases for federal preemption exist including a federal decision not to act in the field. *See* TRIBE, *supra* note 7, at 376-77.

88. *See, e.g.,* Adams Express Co. v. Croniger, 226 U.S. 491, 506 (1913); Olsen v. Smith, 195 U.S. 332, 345 (1904).

89. *See* text accompanying notes 24-34 *supra.*

90. Just six years earlier in Carter v. Carter Coal Co., 298 U.S. 238 (1936), the Court found the federal government to lack inherent power under the commerce clause to regulate the internal affairs of the states.

91. "The state . . . as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." 317 U.S. at 352.

92. *Id.* at 351.

In addition, the Court in *Parker* cited *Lowenstein v. Evans*[93] for the proposition that a restraint imposed by the state as sovereign is not prohibited by the Sherman Act. This 1895 circuit court case held exempt from the Sherman Act a state liquor monopoly established by the South Carolina legislature. In finding that the state legislature's actions were not covered by the Sherman Act the court observed that

> the state is a sovereign having no derivative powers, exercising its sovereignty by divine right. The state gets none of its powers from the general government. It has bound itself by compact with the other sovereign states not to exercise certain of its sovereign rights, and has conceded these to the Union, but in every other respect it retains all its sovereignty which existed anterior to and independent of the Union.[94]

By utilizing these statements of a state's sovereign power, the Court in *Parker* may be grounding its decision as much in the tenth amendment's protection of states as in the preemption doctrine. While this distinction may not have bearing on the outcome of *Parker*, it may be significant in appreciating the developing scope of the state action doctrine.

Unfortunately, the precise meaning of state action which escapes antitrust scrutiny is not provided in *Parker*.[95] Nonetheless, the Court is careful to note that it was not establishing a blanket exemption from the antitrust laws for all state action; rather, two possible exceptions to *Parker* were suggested. First, a state may not authorize private action which violates the Sherman Act merely by authorizing a party to violate the Act.[96] Second, the Court observed

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93. 69 F. 908 (C.C.D.S.C. 1895).

94. *Id.* at 911.

95. *See* TRIBE, *supra* note 7, at 381-82.

96. *Id.* To support this proposition, the Court cited Northern Sec. Co. v. United States, 193 U.S. 197, 332, 344-47 (1904). In that case, the defendants argued that because their holding company had been organized in compliance with the New Jersey corporation law and was acting consistently with its charter, the company's business practices were immune from antitrust laws. Rejecting this defense, the Supreme Court declared:

> If the certificate of the incorporation of that company had expressly stated that the object of the company was to destroy competition between competing, parallel lines of interstate carriers, all would have seen, at the outset, that the scheme was in hostility to the national authority, and that there was a purpose to violate or evade the act of Congress.

193 U.S. at 345.

Thus, *Parker* clearly distinguished a state statute that is merely permissive of private

that *Parker* did not involve a question of a governmental entity becoming a participant in a private agreement or combination by others in restraint of trade,[97] thereby implying that a government entity might be liable under antitrust laws if it acts as a co-conspirator. Thus, despite the ruling that the Sherman Act prohibited "individual and not state action,"[98] the Court in *Parker* created the possibility that the Act would apply to certain acts of governmental entities.

### B. *Goldfarb v. Virginia State Bar*

The *Parker* doctrine and its concept of state action was addressed by the Court thirty years[99] later in *Goldfarb v. Virginia State Bar.*[100] There, the Court was faced with an antitrust challenge to a minimum fee schedule for lawyers published by a county bar association and recommended by the state bar. The plaintiffs brought the action against the county and state bar associations to contest the fee schedules. Although the state bar had never taken any formal disciplinary action to compel adherence to the schedules, they had condoned their use.[101] In addition, while the county bar was a private association, the state bar was an agency of the Virginia Supreme

anticompetitive conduct from one that actually substitutes a policy of governmental regulation for the free market policy of the federal antitrust laws. The former statute is preempted by the Sherman Act's prohibition of private anticompetitive behavior, while the latter enactment represents a governmental decision not prohibited by the Sherman Act.

97. 317 U.S. at 351-52.

98. *Id.* at 352.

99. Between 1943 and 1975, the Supreme Court analyzed the state action doctrine in three cases: Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) (rejecting a defense of compulsion 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); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) (a concerted effort by persons to influence lawmakers to enact legislation beneficial to themselves or detrimental to competitors was held not to be within the scope of the antitrust laws in the same way the state's power in *Parker* to impose competitive restraints was free from Sherman Act prohibitions); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) (upholding an antitrust defense to the enforcement of a state statute which permitted resale price maintenance agreements against nonsigners despite evidence of a clear state policy, because the statute abdicated all authority to private parties free of state supervision).

100. 421 U.S. 773 (1975).

101. *Id.* at 776-77.

Court authorized to administer ethical codes adopted by the court.[102]

Nevertheless, the Supreme Court unanimously rejected a *Parker* state action immunity defense.[103] Citing *Parker*, the Court stated "[t]he threshold inquiry in determining if an anti-competitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is *required by the State acting as sovereign*."[104] Neither bar association showed that they had authority from the legislature or the high court to impose competitive restraints on the legal profession. The state bar, though "a state agency for some limited purposes,"[105] exceeded its statutory authority by "[joining] in what is essentially a private anticompetitive activity. . . ."[106] It stood in the identical position as the private county bar and could claim no immunity as a state agency.

Thus, the *Goldfarb* decision stands for the proposition that actual anticompetitive conduct must be required by the state as sovereign.[107] This was an effort by the Court to clearly distinguish state action from merely private action, a problem which never arose in *Parker*. Significantly, the state must be "acting as sovereign"[108] in compelling the acts in issue. This requirement may be the reason the Court referred to its inquiry as a threshold one; that is, anticompetitive conduct can be required by the state not acting as sovereign. Therefore, *Parker's* suggestion that a state would be liable only if it had entered into a private agreement[109] was expanded under *Goldfarb* to include state instrumentalities performing certain acts not considered sovereign.[110]

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102. *Id.* at 789-90.
103. *Id.* at 788-92.
104. *Id.* at 790 (emphasis added).
105. *Id.* at 791.
106. *Id.* at 792.
107. *Id.* at 792-93.
108. *Id.* at 790.
109. *See* text accompanying notes 95-98 *supra*.
110. Several lower courts are in accord with the conclusion in *Goldfarb*. In Hecht v. Pro-Football, Inc., 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972), the District of Columbia Circuit reversed a district court decision to dismiss an antitrust claim against the District of Columbia Armory Board, a public body that operates Robert F. Kennedy Stadium, which had entered into a lease with a professional football team that excluded any other pro football team from using the stadium. The court rejected the Armory Board's argument that where direct governmental action, as distinct from private conduct, has caused

### C. *Cantor v. Detroit Edison Co.*

Further clarification of the scope of the state action exemption was provided one year later in *Cantor v. Detroit Edison Co.*[111] *Cantor* involved a suit for treble damages and injunctive relief directed against a private electric utility company. Detroit Edison, the sole supplier of electricity for an area of southeastern Michigan, provided its customers with limited amounts of light bulbs without charge. The cost of the bulbs was reflected in the basic rate for electricity service charged by the utility under a state-approved tariff. Once these tariffs were in effect the utility could not change them unilaterally. For this reason the utility claimed that the light bulb program, the purpose of which was to increase the consumption of electricity, was deserving of *Parker* protection.[112] Plaintiff, the owner of a drug store selling light bulbs, asserted that the utility was using its monopoly power in the distribution of electricity to restrain competition in the separate market for light bulbs.[113] Thus, the issue in *Cantor* addressed by the majority was "whether the *Parker* rationale immunizes private action which has been approved by a state and which must be continued while the state approval remains effective."[114]

The Court rejected the defendant's state action defense, finding the relevant legislation which authorized the Michigan Public Service Commission to regulate electricity distribution did not specifically deal with the sale of light bulbs. Because the state policy concerning light bulbs was, at best, neutral, there existed no state policy designed to supplant competition. As the Court explained, the light bulb program was initiated by the utility and was not an example of a "private citizen doing nothing more than [obeying]

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the alleged injury to a plaintiff, the provisions of the federal antitrust laws are inapplicable. Quoting Judge Goldberg in Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971), the court noted, "[t]he instant case involve[s] state participation. That proposition, however, only begins the analysis, for it is not every governmental act that points a path to an antitrust shelter. We reject the facile conclusion that action by any public official automatically confers exemption. George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 30 (1st Cir. 1970)." 444 F.2d at 934 (footnote omitted).

111. 428 U.S. 579 (1976).

112. *Id.* at 585.

113. *Id.* at 581 n.3.

114. *Id.* at 581.

the command of his state sovereign."[115] In fact, the utility implemented the program before the Michigan regulatory commission was even established.[116] Therefore, the light bulb exchange program was not "state" but merely "private" action fully subject to the Sherman Act.

One important facet of *Cantor* was that a balancing test that weighs the federal interest in competition and state interests in regulation may be introduced to decide if the *Parker* doctrine will be operative. This approach was suggested by Justice Blackmun in his concurring opinion in *Cantor*, where he endorsed a "rule of reason" analysis similar to the test used in traditional equal protection review.[117] This approach would further require that a state regulatory scheme be reasonably and rationally related to the policies it purports to promote. Not surprisingly, Justice Blackmun, that same year in *National League of Cities*, suggested that a balancing approach be used in order to determine whether federal power is applicable to state action.[118]

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115. *Id.* at 592.

116. *Id.* at 600.

117. *Id.* at 609 (Blackmun, J., concurring).

118. National League of Cities v. Usery, 426 U.S. at 856 (Blackmun, J., concurring).

Support for such a balancing test to determine the parameters of state sovereignty can also be found in the majority opinion in *National League of Cities* where the Court affirmed Fry v. United States, 421 U.S. 542 (1975), by stating, "[t]he limits imposed upon the commerce power when Congress seeks to apply it to the States are not so inflexible as to preclude temporary enactments tailored to combat a national emergency." 426 U.S. at 853. *See also*, Princeton Community Phone Book, Inc. v. Bate, 582 F.2d 706, 720 (3d Cir.), *cert. denied*, 99 S. Ct. 454 (1978); L. SULLIVAN, ANTITRUST 737 (1977).

Several commentators, however, have asserted that such a balancing test would be inimical to the tenets of federalism and the *Parker* rationale. *See* Davidson & Butters, Parker *and* Usery: *Portended Constitutional Limits on the Federal Interdiction of Anticompetitive State Action*, 31 VAND. L. REV. 575, 592 (1978). ("Such a balancing test has no place in the state action doctrine . . . because it does not address the only constitutionally significant issue - whether the activity under review is sovereign regulatory conduct not subject to antitrust proscription."). *But see* Slater, *Antitrust and Governmental Action: A Formula for Narrowing* Parker v. Brown, 69 NW. L. REV. 71 (1974). Professor Slater asserts that "a state program of dubious merit should not prevail over the federal interest of protecting competition merely because the state legislature has spoken." *Id.* at 103. Slater advocates a balancing test, *id.* at 104-08, despite recognizing that the Sherman Act does not apply "to state action taken in pursuit of public policy goals, no matter how weak the public goals or how serious the injury to competition." *Id.* at 91.

### D. *Bates v. State Bar of Arizona*

*Bates v. State Bar of Arizona*[119] provided the Court with an opportunity to carry the state action doctrine beyond the threshold question addressed in *Goldfarb*. In *Bates*, two Arizona lawyers who had violated a disciplinary rule prohibiting advertising by lawyers asserted that the advertising prohibition violated federal and state antitrust laws.[120] The disciplinary rule and the procedure for its enforcement were embodied in the rules of the Arizona courts.[121] The Supreme Court concluded that this rule was exempt from the federal antitrust laws under *Parker* because it was an activity of the State of Arizona acting as sovereign.[122]

In reaching the determination that Arizona was acting in its sovereign capacity, the Court first remarked that the appellant's claim was against a state entity rather than a private party.[123] Unlike the situation in *Cantor*, a state entity, the Arizona Supreme Court, was the real party in interest. Furthermore, the disciplinary rules prohibiting advertising were required of all attorneys.[124] This distinguished the circumstances in *Goldfarb* where the Virginia Supreme Court rules merely recommended the use of minimum fee schedules. Thus, the threshold inquiry established in *Goldfarb* was satisfied in *Bates*.

Finding that state action was clearly involved, the Court went on to address the question of whether there was a clear state policy involved to supplant competition.[125] Finding there was, the State Supreme Court's enforcement of the prohibition on advertising was declared exempt from the antitrust laws under *Parker*. To highlight its analysis of this second criterion for determining whether *Parker* applied, the Court compared the situation in *Cantor*.[126] In *Cantor*,

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119. 433 U.S. 350 (1977).

120. The petitioners also claimed that the disciplinary rule violated their first amendment rights. After rejecting the antitrust claim, the Supreme Court struck down the rule on those grounds. *Cf.* Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748 (1976) (state law which prohibited advertisement of retail drug prices was found to violate first amendment rights).

121. 433 U.S. at 355.

122. *Id.* at 357.

123. *Id.* at 361.

124. *Id.* at 359-60.

125. *Id.* at 361.

126. *Id.*

"the State had no independent regulatory interest in the market for light bulbs,"[127] and "an exemption for the program was not essential to the State's regulation of electric utilities."[128] In contrast, the state's interest in "regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice. . . ."[129] Moreover, the *Bates* Court viewed the prohibition of legal advertising as "a clear articulation of the State's policy with regard to professional behavior."[130] The rules had a credible regulatory justification and did not merely involve the acquiescence of the state.[131] Significantly, the majority found the circumstances in *Bates* to mitigate its "concern that federal policy is being unnecessarily and inappropriately subordinated to state policy. . . ."[132] This same concern had been voiced one year earlier by Justice Brennan in his scathing dissent in *National League of Cities.*[133]

After *Bates,* the test to be applied in determining whether sovereign activity is present is as follows: first, does the state require the activity or conduct, and second, does the activity fulfill a clear state policy of supplanting competition. In addition, the majority of the Court has introduced to the examination of state sovereignty an express concern over whether the state interest in the activity deservedly outweighs the federal interest in prohibiting anticompetitive action.

### E. *City of Lafayette v. Louisiana Power & Light Co.*

This two-tiered test for determining state sovereignty received further application by the Supreme Court in *City of Lafayette v. Louisiana Power & Light Co.,* the Court's most recent consideration

127. *Id.* (quoting *Cantor*, 428 U.S. at 584-85, 604-05, 612-14 (concurring opinions)).

128. 433 U.S. at 361.

129. *Id.* at 361-62 (quoting *Goldfarb*, 421 U.S. at 792).

130. 433 U.S. at 362.

131. This was the crux of the Court's distinction between *Cantor* and *Bates.* In *Cantor,* the state could be said to have, at best, only acquiesced to the light bulb program. *Bates,* however, involved an affirmative regulatory act by the state. *Id.*

132. *Id.*

133. National League of Cities v. Usery, 426 U.S. 833, 859-60 (1976) (Brennan, J., dissenting). "There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power." *Id.* (quoting *The Minnesota Rate Cases*, 230 U.S. 352, 399 (1913)).

of the *Parker* doctrine.[134] This case presented the Court with the novel issue of whether the *Parker* doctrine extended to the anticompetitive acts of cities.[135] By finding that *Parker* did not apply in all

134. 435 U.S. 389 (1978).

135. *Id.* at 391.

Several lower courts had previously faced the issue of antitrust liability for state subdivisions but with mixed results. *Compare* Duke & Co. v. Foerster, 521 F.2d 1277 (3d Cir. 1975) (boycott of plaintiff-supplier's beverages in municipal facilities not protected under *Parker*); Kurek v. Pleasure Driveway & Park Dist., 557 F.2d 580 (7th Cir. 1977), *vacated* 435 U.S. 992 (1978), *judgment reinstated* 582 F.2d 378 (7th Cir. 1978), *cert. denied*, 99 S.Ct. 873 (1979) [hereinafter cited as *Kurek*] (anticompetitive practices of local Park District in operating golf courses not protected under *Parker* because no state policy shown); Hecht v. Pro-Football, Inc., 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (no exemption for the District of Columbia Armory Board where it granted an exclusive lease of Robert F. Kennedy stadium to a professional football team); Surety Title Ins. Agency, Inc. v. Virginia State Bar, 431 F. Supp. 298 (E.D. Va. 1977), *vacated* 571 F.2d 205 (4th Cir.), *cert. denied*, 436 U.S. 941 (1978) (district court held there was no immunity for a state bar association attempting to restrict the working of title opinions; the Fourth Circuit vacated and remanded the decision so that the trial court could consider in its analysis of *Parker* the results of a state court suit which was determining the proper role of the state bar association under state law); *and* Brenner v. State Bd. of Motor Vehicle Mfrs., Dealers & Salesmen, 413 F. Supp. 639 (E.D. Pa. 1976) (state agency exempt if its action is compelled by the state); *with* Jeffrey v. Southwestern Bell Tel. Co., 518 F.2d 1129, 1134 (5th Cir. 1975) (allegation of anticompetitive practices resulting in unfair telephone rate structure; express state delegation of authority to municipalities to set telephone rates makes practice protected under *Parker*); Saenz v. University Interscholastic League, 487 F.2d 1026 (5th Cir. 1973) (organization within the university was granted immunity from an alleged conspiracy involving a sponsored event); George R. Whitten, Jr., Inc. v. Paddock Pool Builders Inc., 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970) (immunity granted only where the state's legislature affirmatively provides for comprehensive regulation); Ladue Local Lines, Inc. v. Bi-State Dev. Agency, 433 F.2d 131 (8th Cir. 1970) (public transportation body created by the legislature was immune); E.W. Wiggins Airways, Inc. v. Massachusetts Port Auth., 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966) (immunity granted airport officials entering into a price fixing agreement as conducting a valid governmental function); Alphin v. Henson, 392 F. Supp. 813 (D. Md. 1975), *aff'd*, 538 F.2d 85 (4th Cir.), *cert. denied*, 429 U.S. 960 (1976) (municipality not liable under antitrust laws for the anticompetitive acts of its airport manager under the *Parker* doctrine); *and* Murdock v. City of Jacksonville, 361 F. Supp. 1083 (M.D. Fla. 1973) (immunity granted where the city acted within its powers in exclusively leasing the city coliseum to a single wrestling promoter).

*See also,* Whitworth v. Perkins, 559 F.2d 378 (5th Cir. 1977), *vacated* 435 U.S. 992(1978), *judgment reinstated* 576 F.2d 696 (5th Cir. 1978), *cert. denied*, 99 S.Ct. 1224 (1979). There, the Fifth Circuit reversed a district court opinion that held that a municipality's enforcement of a zoning ordinance restricting the sale of liquor was protected under *Parker*. The circuit court remarked that there was no evidence showing that a state policy was involved and thus remanded the case. 559 F.2d at 381.

Similarly, in City of Fairfax v. Fairfax Hosp. Ass'n., 562 F.2d 280, 284-85 (4th Cir. 1977), the circuit court reversed a grant of summary judgment in favor of defendant-hospital association because of the lack of showing of state compulsion. The Supreme Court vacated this decision, 435 U.S. 992 (1978), for reconsideration in light of *City of Lafayette*.

instances to municipalities, the Court illuminated its conception of state sovereignty under the antitrust laws.

In *City of Lafayette,* two cities organized under the laws of the State of Louisiana were granted the power by the state to own and operate electric utility systems both within and beyond their city limits. They brought an antitrust action against the Louisiana Power & Light Company ("LP&L"), an investor-owned electric service utility, which was the municipalities' only competition in the areas beyond their city limits. When LP&L counterclaimed alleging antitrust violations on the part of the municipal utilities,[136] the cities moved to dismiss the counterclaim on the grounds that the *Parker* doctrine rendered federal antitrust laws inapplicable to them. The Court of Appeals for the Fifth Circuit reversed and remanded the district court ruling in favor of the cities.[137] Relying primarily on *Goldfarb,*[138] the Fifth Circuit declared that subordinate state governmental bodies are not *ipso facto* exempt from antitrust law.[139] Only when the state legislature contemplates the anticompetitive acts of a municipality will a city enjoy the sovereign status of the state.[140] The Supreme Court affirmed this decision five to four and remanded the case to decide whether the state had contemplated that the operation of the city utility would be anticompetitive.[141]

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136. The counterclaim alleged that the cities, with a nonparty electric cooperative, had conspired to engage in sham litigation against LP&L to delay or prevent the construction of a nuclear electric generating plant, to eliminate competition within city limits by use of covenants in their respective debentures, to exclude competition in certain markets by using long term supply agreements, and to displace LP&L in certain areas by requiring customers of LP&L to purchase electricity from petitioners as a condition of continued water and gas service. 435 U.S. at 392 n.6.

137. 532 F.2d 431 (5th Cir. 1976). The district court granted the cities' motion in an unpublished opinion. While noting its reluctance to exempt an enterprise which was "clearly a business activity" from the antitrust laws, the district court found that the plaintiffs' status as cities was sufficient to bring all their conduct within the "state action" exemption as announced in *Parker. Id.* at 433. The district court also relied on Saenz v. University Interscholastic League, 487 F.2d 1026 (5th Cir. 1973) which held that a state agency which ran interscholastic competitions was not answerable under the Sherman Act.

138. *Goldfarb* was decided after the trial court reached its conclusion in *City of Lafayette.* 532 F.2d at 433.

139. *Id.* at 434.

140. *Id.* at 434-35.

141. 435 U.S. at 389. J. Brennan, author of the plurality opinion, was joined by JJ. Marshall, Powell and Stevens. C.J. Burger wrote an opinion concurring with respect to Part

In deciding that municipally-operated utilities are not necessarily covered by the antitrust laws, the Supreme Court altered several of the premises upon which the decision in *Parker* was based.[142] Justice Brennan, writing for the plurality, initially reexamined the purpose of the antitrust laws and concluded that Congress intended the laws to apply to local governments. Noting that municipalities and States have been held to be "persons" within the meaning of the antitrust laws and may, therefore, maintain treble damage actions as plaintiffs,[143] the plurality concluded that this "plainly preclude[d] a reading of . . . 'persons' to include municipal utility operators that sue as plaintiffs but not . . . such municipal operators when sued as defendants."[144] According to Justice Brennan, if Congress wished to exclude cities from coverage of the Sherman Act they would have done so explicitly.[145] This conclusion, however, conflicts directly with the Supreme Court's finding in *Parker* that "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."[146] In fact, the *Parker* opinion, by explaining that Congress could restrain such state activity because of its affect on interstate commerce if it so desired, assumes such restraints do not presently exist in the Sherman Act.

The Court's analysis in *City of Lafayette* is further prefaced by a reading of the legislative history of the Sherman Act as establishing "a regime of competition as the fundamental principle governing commerce in this country."[147] This presumption against implied

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I of the opinion and concurring in the judgment. J. Stewart filed a dissenting opinion in which JJ. White and Rehnquist joined. J. Blackmun also wrote a dissenting opinion.

142. As mentioned earlier, for the *Parker* doctrine to apply the state legislature must "require" that the activity of the state subdivision occur and, second, that the activity be in fulfillment of a clear state policy to supplant competition. *See* text accompanying note 133 *supra*.

143. The Court cites Georgia v. Evans, 316 U.S. 159 (1942), which held that "any person" under § 7 of the Sherman Act includes States, and Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390 (1906) which held that a city is a "person" within the meaning of § 8 of the Sherman Act.

144. 435 U.S. at 397.

145. *Id.* at 397 n.14.

146. 317 U.S. at 350-51.

147. 435 U.S. at 398.

exclusions from coverage of antitrust laws is not easily defeated.[148]

One policy which will override the presumption of inclusion is the doctrine of federalism, first isolated in the antitrust context in *Parker v. Brown.*[149] Consistent with the dissent in *National League of Cities,* however, the plurality in *City of Lafayette* warned that federalism should not be given absolute reverence: "the recognized exclusions have been unavailing to prevent antitrust enforcement which, though implicating those fundamental policies, was not thought *severely* to impinge upon them."[150] The Court obliquely discredits the municipalities' position in *City of Lafayette* by admonishing petitioners that their arguments "cannot prevail unless they demonstrate that there are countervailing policies which are *sufficiently weighty* to overcome the presumption"[151] in favor of the federal policy for competition. This qualified description of federalism seems to be contrary to *Parker's* assessment of federalism in the antitrust context, where the Court noted a presumption in favor of state sovereignty.[152] Thus, the required showing that a state policy intends to supplant competition has apparently been extended in *City of Lafayette* to overrule the presumption in *Parker* in favor of state sovereignty. As Professor Paul E. Slater has noted about

148. *Id.* at 399.

149. The plurality isolated two policies which were sufficiently weighty to overcome this presumption. Aside from the *Parker* doctrine, the Court observed the need for open communication between the polity and its lawmakers and the protection of citizens rights to petition. 435 U.S. at 399. This policy was expressed by the Court in Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), where it was held that a concerted effort by persons to influence legislators to enact laws beneficial to them but detrimental to others is not within the scope of the antitrust laws.

150. 435 U.S. at 400. It was Justice Brennan who two years earlier had dissented so vigorously to the Court's enunciation of federalism in *National League of Cities,* 426 U.S. 833, 856 (Brennan, J., dissenting). Justice Brennan regarded the Court's decision there "as reflecting nothing but displeasure with a congressional judgment." *Id.* at 872. "States," he opined, "are not immune from all federal regulation under the Commerce Clause *merely because of their sovereign status.*" *Id.* at 873 (emphasis in original) (quoting Fry v. United States, 421 U.S. 542, 548 (1975)). "[F]or by empowering Congress to regulate commerce . . . the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation." 426 U.S. at 873 (quoting Parden v. Terminal Ry. Co., 377 U.S. 184, 192 (1964)).

151. 435 U.S. at 400 (emphasis added).

152. The plurality in *City of Lafayette* quoted the observation made in *Parker* that "in a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.* (quoting *Parker,* 317 U.S. at 351).

*Parker*, "a fair reading of the case indicates that the Court believes that the Sherman Act, and its policy in favor of competition, do not apply to state action taken in pursuit of public policy goals, no matter how weak the public goals or how serious the injury to competition."[153] After *City of Lafayette*, that policy must be "sufficiently weighty" to overcome the presumption in favor of federal policies.

In addressing the specific application of *Parker* to the electric utility in *City of Lafayette*, the Court discussed the distinction between cities and states in the federal system.[154] Municipalities do not receive "all the federal deference of the States that create them,"[155] and as a result, municipal acts are not automatically acts of the state as sovereign. The plurality based this distinction on cases under the eleventh amendment which have held consistently that cities are not protected, as are states, from suits in federal courts.[156] The basic rationale for these decisions is that immunity attaches to the state only in its sovereign capacity.[157] Municipal corporations are essentially political and are considered distinct from the state as sovereign.[158] Justice Brennan's application of this rationale of eleventh amendment cases in *City of Lafayette* has justification. Though municipalities are "instrumentalities of the State for the convenient administration of government within their limits,"[159] cities are typically free to adopt many of their own policies.[160] At best, state policy may be neutral, which, according to

153. Slater, *supra* note 118, at 91.

154. Lower courts have made the distinction in the *Parker* context before. *See, e.g., Kurek, supra* note 135, at 589; Duke & Co. v. Foerster, 521 F.2d at 1279-80. *Contra*, New Mexico v. American Petrofina, Inc., 501 F.2d 363, 370 n.15 (9th Cir. 1974) (*Parker* immunity applies whenever a state or its subdivisions are implicated).

155. 435 U.S. at 412.

156. *Id.* (*citing* Edelman v. Jordon, 415 U.S. 651, 667 n.12 (1974)); Lincoln County v. Luning, 133 U.S. 529 (1890).

157. *See* S.J. Groves & Sons Co. v. New Jersey Turnpike Auth., 268 F. Supp. 568, 579 (D.N.J. 1967).

158. *See* Wright v. Houston Independent School Dist., 393 F. Supp. 1149, 1153 (S.D. Tex. 1975), *vacated on other grounds*, 569 F.2d 1383 (5th Cir. 1978) (municipalities traditionally not protected by eleventh amendment due to separate existence from the state).

159. *See* Louisiana v. Mayor of New Orleans, 109 U.S. 285, 287 (1883).

160. 435 U.S. at 414. Indeed, the respective policies may conflict. An example of a disparity in policies offered by the Court is a state public utility commission's adoption of a policy prohibiting the specific anticompetitive practices in which the municipality engages. The commission would be unable to enforce that policy with respect to municipalities because it

Justice Brennan, is an insufficient basis for allowing a city's parochial interests to impair the Congressional goal of eliminating anticompetitive conduct.[161]

On the other hand, the distinction created by the plurality presents difficulties when distinguishing municipalities from other subdivisions of the state such as the state bar association involved in *Bates* and *Goldfarb* or the agricultural commission in *Parker*. The same potential for pursuit of parochial interest exists with these organizations. Thus, while *City of Lafayette* established a test for deciding when the rift between cities and states may be bridged, the decision also addressed the test for sovereignty under *Parker*.

To gain sovereign status under the *Parker* doctrine a municipality's anticompetitive action must be within those actions contemplated by the state legislature.[162] It should be noted, however, that this is a weaker standard than that required as a threshold test in *Goldfarb* when the Court demanded a showing that the state bar association was *required* or *compelled* to act in an anticompetitive fashion.[163] Nevertheless, the test appears consistent with *Parker*, which referred to restraints on a "state or its officers or agents from activities directed by its legislature."[164] In addition, *City of Lafayette* requires that the municipality's actions be pursuant to a state policy of displacing competition with regulation or monopoly public service.[165]

## IV. Constitutional Implications of the *Parker* Doctrine: The Present Scope of State Sovereignty

From *Parker* to *City of Lafayette*, the development of standards that define the scope of the state action exclusion from antitrust

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lacks jurisdiction over them. In such a case, "it would be difficult to say that state policy fosters, much less compels, the anticompetitive practices." 435 U.S. at 414 n.44. *See generally* Michelman, *supra* note 23.

161. 435 U.S. at 412-14.

162. *Id.* at 413. This does not mean that anticompetitive municipal action which is lawful under state law, but is not state-directed, enjoys immunity from federal antitrust laws. *Id.* at 415 n.45.

163. *Goldfarb*, 421 U.S. at 791. In his concurring opinion in *City of Lafayette*, Chief Justice Burger, the author of *Goldfarb*, announced that he would require a showing of state compulsion. 435 U.S. at 425 n.6.

164. *Parker*, 317 U.S. at 350-51.

165. 435 U.S. at 413.

laws has been consistent with judicial concern for "our national traditions and governmental structure of federalism."[166] The scope of coverage of the Sherman Act over state entities was limited in *Parker* but then refocused in *Goldfarb, Carter, Bates* and *City of Lafayette* after a 32-year hiatus by the Court from consideration of the doctrine. As we have seen, these more recent applications of *Parker* have refined the definition of what constitutes sovereign state activity under the antitrust laws. Outside of the context of the Sherman Act, this interest in state sovereignty under congressional commerce power lay dormant until the Court's polemical decision in *National League of Cities.*

The relationship of the federalist principles announced in *National League of Cities* to the *Parker* doctrine was noted by Chief Justice Burger in *City of Lafayette.*[167] In his concurring opinion, the Chief Justice observed that "the *Parker* decision was . . . firmly grounded on principles of federalism,"[168] and employed the same emphasis on state sovereignty that the Court later used in *National League of Cities.* The importance described earlier[169] of state sovereignty as the jurisprudential basis for both *Parker* and *National League of Cities* is highlighted by the historical context in which the decisions had been made. Both cases were decided at a time when expansive federal regulation under the commerce clause presented the threat of compromising the autonomy of states. By the time it deliberated over *Parker,* the Supreme Court had decided that con-

166. *Id.* at 400.

167. *Id.* at 421-24. The plurality did not consider *National League of Cities* to be even "tangentially implicated." 435 U.S. at 412-13 n.42. There is a distinction that can be made between the *Parker* doctrine and *National League of Cities. Parker* involved a judicial construction of the Sherman Act where it was found that because Congress did not expressly include states within its coverage, inclusion would not "lightly" be inferred. 317 U.S. at 351. On the other hand, *National League of Cities* involved federal regulations clearly intended to apply to the states. It was not an example of the Court's reluctance to interpret legislation in such a way as to alter the federal-state balance of power. *See* 426 U.S. at 858 n.2. (Brennan, J., dissenting); *cf.* Employees v. Missouri Pub. Health Dept., 411 U.S. 279, 285-87 (1973) (majority of the Court refused to read the 1966 amendments to FLSA as granting state employees a federal cause of action against state governments in federal district courts because it would be inimical to the eleventh amendment). It could be said, therefore, that in *City of Lafayette* the issue of a constitutional impairment of state sovereignty is never reached because of the Court's inquiry into whether the utility is state action of the kind the Sherman Act was not meant to cover.

168. 435 U.S. at 421.

169. *See* pt. III (A) *supra.*

gressional power under the commerce clause was very broad and that "persons" under the Sherman Act included states and municipalities.[170] Similarly, *National League of Cities* was decided in the face of four decades of decisions to the contrary.[171] Chief Justice Burger acknowledged these trends by explaining:

> Our conception of the limits imposed by federalism are bound to evolve, just as our understanding of Congress' power under the Commerce Clause has evolved. Consequently, since we find it appropriate to allow the ambit of the Sherman Act to expand with evolving perceptions of congressional power under the Commerce Clause, a similar process should occur with respect to "state action" analysis under *Parker*. That is, . . . the scope of the Sherman Act's power should parallel the developing concepts of American federalism.[172]

Recent decisions by the Court, notably *City of Lafayette*, indicate that the analysis of the scope of state sovereignty under *Parker*, if it is indeed parallel to the doctrine of state sovereignty espoused in *National League of Cities*, may help to clarify the problems inherent in the *National League of Cities* decision.

Before comparing these cases, it is worth noting that according to *City of Lafayette* coverage of the Sherman Act over states will now be presumed in the first instance.[173] This analysis in *City of Lafayette* may indicate that the Court's view of the "newly announced state sovereignty doctrine in *National League of Cities*"[174] has been refocused to give greater assurance that federal regulation will not be easily neutralized. The plurality's discussion of the presumption against exclusions from antitrust laws serves as a caveat to the application of the test set out by *City of Lafayette;* that is, if the state-approved anticompetitive activity conflicts severely with the federal interest in fair competition, federal antitrust laws might prevail.[175]

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170. *Id.* at 420-21.

171. Schwartz, *supra* note 23, at 1115.

172. 435 U.S. at 421 n.2.

173. *See* text accompanying note 151 *supra.*

174. Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 822 n.4 (1976) (Brennan, J., dissenting).

175. At least one lower court has supported this dicta. *See* Missouri v. National Organization for Women, Inc., 467 F. Supp. 289, 303 (W.D. Mo. 1979) which held that antitrust laws did not apply to a boycott in furtherance of political, not marketplace, goals.

The plurality in *City of Lafayette* did state, however, that its decision does not "preclude

### A. When Is State Action Sovereign?

An important implication of *Parker*'s progeny for the federalist doctrine concerns the analysis of what is an integral governmental function. As discussed above, *National League of Cities,* in general, focused on the type of activity involved as much as it did on the identity of the parties to determine if a local governmental function enjoyed a sovereign status.[176] The question addressed by the Court was whether the determination of wages and hours of employment were "functions essential to separate and independent existence."[177] In *City of Lafayette,* though faced with the commercial activities of a municipal electric utility, the Court refused to analyze the *Parker* exemption in terms of the type of activity engaged in.[178] Thus, even after *City of Lafayette,* the problem of deciding what types of state activities will be considered immune from federal regulation persists. Justice Brennan apparently recognized this problem when he noted that the cities are competing with private utilities.[179] This observation is reminiscent of the inquiry established by the Court in *National League of Cities.* As Professor Bernard Schwartz has noted about the test for finding sovereign state action under that case:

> [T]he question no longer is whether the state is performing a function which only government performs, as opposed to engaging in activities which are also engaged in by others. The test now is whether the state is performing *a service which the states have traditionally afforded their citizens,* or whether the state activity to which the congressional command was directed was . . . *in an area that the States have regarded as integral parts of their governmental activities.*[180]

Rather than pursue this characterization of proscribed city activities in developing a case for accountability under antitrust laws, *City of Lafayette* focuses on a distinction between cities and states.

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municipal government from providing services on a monopoly basis" provided the State has directed or authorized the anticompetitive practice. 435 U.S. at 416-17.

176. *See* pts. I & II *supra.*

177. *National League of Cities,* 426 U.S. at 845 (quoting Coyle v. Oklahoma, 221 U.S. 559, 565 (1911), which quoted Lane County v. Oregon, 74 U.S. 71, 76 (1868)).

178. For a contrary interpretation of *City of Lafayette,* see Comment, *The Erosion of State Action Immunity from the Antitrust Laws:* City of Lafayette v. Louisiana Power & Light Co., 45 BROOKLYN L. REV. 165, 182 (1978).

179. 435 U.S. at 403-08.

180. Schwartz, *supra* note 23, at 1129 (emphasis added).

Municipal acts, according to the plurality, are not automatically acts of the state as sovereign. Thus, the federal antitrust laws may apply to a city-run utility. *City of Lafayette* is the first time the Court has drawn this distinction in a case involving limitations on congressional commerce power. The *Parker* opinion indicated that the Court viewed municipalities and states in the same light;[181] moreover, *National League of Cities* had treated the two entities equally.[182] As "the denomination 'political subdivision' implies," Justice Rehnquist noted in writing the majority opinion in *National League of Cities*[183] and Justice Stewart alluded to in his dissent in *City of Lafayette*,[184] "the local governmental units which Congress sought to bring within the Act derive their authority and power from their respective States."[185] Therefore, "[i]nterference with integral governmental services provided by such subordinate arms of a state government is therefore beyond the reach of congressional power under the Commerce Clause just as if such services were provided by the State itself."[186] Despite being presented with a non-traditional governmental function, the Court utilized the city-state distinction and avoided application of the *National League of Cities* standard of state action.

In his concurring opinion to *City of Lafayette* Chief Justice Burger strived to revitalize the integral governmental functions test of state sovereignty developed in *National League of Cities*. The Chief Justice observed that *National League of Cities* focused its examination of sovereignty on a determination of whether the state's interest

181. *See Parker*, 317 U.S. at 351-52 (case involved "no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade").

182. *National League of Cities*, 426 U.S. at 855 n.20. *See also* Tribe, *supra* note 15, at 1069 n.20, and Michelman, *supra* note 23, at 1169. In *Amersbach*, the Sixth Circuit treated cities the same as states for purposes of determining the extent of state sovereignty. 598 F.2d at 1037.

183. 426 U.S. at 855 n.20.

184. 435 U.S. at 430.

185. 426 U.S. at 855-56 n.20. *See also* 1 E. McQUILLIN, MUNICIPAL CORPORATIONS § 2.08(a) (1971) (municipalities are creations of the state legislature and derive authority from and exercise powers delegated by the state government).

186. 426 U.S. at 855-56 n.20. Justice Stewart noted in *City of Lafayette* that under many other provisions of the Constitution a municipality is equated with the state. 435 U.S. at 430 n.7 (Stewart, J., dissenting) (citing *e.g.*, Waller v. Florida, 397 U.S. 387 (double jeapordy clause); Avery v. Midland County, 390 U.S. 474, 480 (fourteenth amendment); Trenton v. New Jersey, 262 U.S. 182 (impairment of contract)).

involved "functions essential to separate and independent existence."[187] "The running of a business enterprise," he concluded, "is not an integral operation in the area of traditional government functions."[188] Alternatively, Chief Justice Burger said that "[e]ven if this were not generally true, the particular undertaking at issue here—the supplying of electric service—has not traditionally been the prerogative of the State."[189] *Parker* protection, therefore, should not apply to this type of activity. The Chief Justice suggested that there be a supplemental inquiry to the *Goldfarb* test of whether the state required the challenged activity. When proprietary activities of the state are involved, the court must inquire "whether the implied exemption from federal law 'was necessary in order to make the regulatory Act work, and even then only to the minimum extent necessary.' "[190] This additional test would insure that the goals of the Sherman Act are not unnecessarily thwarted.[191]

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187. 435 U.S. at 423.

188. *Id.* at 424.

In his dissent in *National League of Cities,* Justice Brennan stated that the only true limit on commerce powers was that it may not infringe individual liberties. 426 U.S. at 858. Several commentators have elaborated on this view and interpreted the majority's list of "traditional governmental functions," 426 U.S. at 851, to be activities which provide basic rights of a state's citizens and are therefore protected. *See* Michelman, *supra* note 23; Tribe, *supra* note 15. Two commentators have criticized this analysis as a failure to "recognize that the character of the service affected by the minimum wage law in *Usery* is irrelevant to the Court's decision." Davidson & Butters, Parker and Usery: *Portended Constitutional Limits on the Federal Interdiction of Anticompetitive State Action,* 31 VAND. L. REV. 575, 604 n.135 (1978). They see the proper issue in *National League of Cities* to be "whether states shall be free from federal commerce power interference to make certain economic decisions that fundamentally affect their role as coordinate sovereigns in the federal system." *Id.* However, it is precisely this role as sovereign which Michelman and Tribe sought to define. Michelman, *supra* note 23, at 3; Tribe, *supra* note 15, at 1076 n.42. *City of Lafayette* sets up criteria for determining whether a municipality's actions were those of the state.

189. 435 U.S. at 423.

190. *Id.* at 426 (Burger, C.J., concurring) (quoting *Cantor,* 428 U.S. at 597).

191. 435 U.S. at 424-26.

Some commentators have argued that *Parker* should not protect purely commercial activity by states. Donnem, *Federal Antitrust Law Versus Anticompetitive State Regulation,* 39 A.B.A. ANTITRUST L.J. 950, 965 (1970); Handler, *Twenty-Fourth Annual Antitrust Review,* 72 COLUM. L. REV. 1, 18 (1972); Saveri, *The Applicability of the Antitrust Laws to Public Bodies,* 4 U.S.F.L. REV. 217, 227 (1970); Slater, *supra* note 118, at 89-90. The argument is supported by language in *Parker* that emphasizes the governmental character of the regulation under attack. *See Parker,* 317 U.S. at 352 ("The state . . ., as sovereign, imposed the restraint as an act of government . . . ."). Only one district court, however, has accepted the argument. Reid v. University of Minn., 107 F. Supp. 439, 443 (N.D. Ohio 1952) (In dictum, the court seriously questioned whether the *Parker* exemption would cover a state

Because of the majority's use of the legislative mandate test in lieu of this analysis, however, the continued viability of the governmental-proprietary distinction as a tool for determining the scope of state sovereignty is doubtful.[192] To the local government official trying to determine whether the antitrust laws or other federal regulations will apply to a proposed program, the distinction's demise may spell welcome relief. The conclusion that electric utilities are proprietary and, therefore, not integral governmental functions[193] is based on tradition rather than on any rational criteria. As the problems faced by urban governments evolve, so will the citizenry's expectations of what are appropriate governmental services. Just as hospitals went from being accountable under federal regulations to a status of immunity,[194] electric utilities may someday, in certain regions, provide an integral governmental function.[195]

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agency acting as a commercial enterprise and competing with other businesses in the production, sale and distribution of books in interstate commerce.).

192. The commercial-governmental distinction was explicitly rejected in New Mexico v. American Petrofina, Inc., 501 F.2d 363, 371-72 (9th Cir. 1974), and in the Fifth Circuit decision in *City of Lafayette*, 532 F.2d 431, 434 n.8 (5th Cir. 1976). *See also* Ladue Local Lines, Inc. v. Bi-State Dev. Agency, 433 F.2d 131 (8th Cir. 1970) (upholding an agency's operation of a monopolistic school bus system pursuant to a legislative mandate; disregarded governmental-proprietary distinction); *accord*, Continental Bus Sys. Inc. v. City of Dallas, 386 F. Supp. 359, 361 (N.D. Tex. 1974).

*But see* Note, *Antitrust Law and Municipal Corporations: Are Municipalities Exempt From Sherman Act Coverge Under the* Parker *Doctrine?*, 65 GEO. L.J. 1547, 1584 (1977), where the author argues that because the distinction is applied to municipal action in eleventh amendment immunity cases, the Fifth Circuit in *City of Lafayette* may have erred.

193. Justice Douglas would conclude otherwise: "A State's project is as much a legitimate governmental activity whether it is traditional, or akin to private enterprise, or conducted for profit." New York v. United States, 326 U.S. 572, 591 (Douglas, J., dissenting).

At least one lower court has interpreted the terms "traditional" and "integral" found in *National League of Cities* expansively in order "to meet changing times." Amersbach v. City of Cleveland, 598 F.2d 1033, 1037 (6th Cir. 1979). There, the Sixth Circuit Court of Appeals concluded that the operation of the Cleveland Hopkins International Airport was an integral governmental function within the meaning of *National League of Cities*. Decided after *City of Lafayette*, the case did not discuss the existence of a state policy choice being made, but did observe that airports are indispensible and must be maintained on a municipal level. The case went on to rule that airport employees were not covered by the Fair Labor Standards Act.

194. Maryland v. Wirtz, 392 U.S. 183 (1968), *overruled in* National League of Cities v. Usery, 426 U.S. at 855.

195. *See* Indian Towing Co. v. United States, 350 U.S. 61 (1955). "[T]he 'non-governmental-governmental quagmire' . . . has long plagued the laws of municipal corporations. A comparative study of the cases in the forty-eight States will disclose an irreconcilable conflict. More than that, the decisions in each of the States are disharmonious and disclose

The abandonment of the integral governmental function test in the antitrust area, and ultimately in the entire realm of federal regulation, presents a problem, however, where the state has decided to set up an agency to act in a manner which may violate federal law and which is in an area not historically regarded as an integral part of governmental activities.[196] Should the district court on remand in *City of Lafayette* find that the legislature contemplated the type of action complained of through a policy to supplant competition, serious questions would result because of Chief Justice Burger's characterization of the municipal utility as "entrepreneurial,"[197] a characteristic of state activity which has previously not been considered protected by the federalist doctrine.[198] For instance, the utility in *City of Lafayette* could be analogized to the state run railroad found in *United States v. California*.[199] In that case, the Court required the railroad to adhere to federal safety standards:

> [W]e think it unimportant to say whether the state conducts its railroad in its "sovereign" or in its "private" capacity. That in operating its railroad it is acting within a power reserved to the states cannot be doubted. . . . The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. . . . The power of a state to fix intrastate railroad rates must yield to the power of the national government when their regulation is appropriate to the regulation of interstate commerce.[200]

One commentator has reconciled the tests for sovereignty introduced in *California, Parker* and *National League of Cities* by concluding that all three cases indicate that the "mere status of a state as a sovereign does not prevent preemption under the supremacy clause and that only a threat to the constitutionally recognized

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the inevitable chaos when courts try to apply a rule of law that is inherently unsound." *Id.* at 65.

It was recognized by the Fifth Circuit in *City of Lafayette* that the legislative mandate test, with its emphasis upon what state laws provide, "will necessarily lead to variations, dependent upon the differing wills of state legislatures." 532 F.2d at 434 n.8.

196. *See National League of Cities*, 426 U.S. at 854; United States v. California, 297 U.S., 175 (1936).

197. 435 U.S. at 422. (Burger, C.J., concurring).

198. *See* 425 U.S. at 695-96 and cases cited therein.

199. 297 U.S. 175 (1936).

200. *Id.* at 183-84.

sovereign activity of a state can inhibit the application of the federal commerce power."[201] In other words, the railroad in *California* was not a constitutionally recognized sovereign activity. If the railroad had the proper legislative mandate, however, as was prescribed in *City of Lafayette,* it might be considered a constitutionally recognized sovereign activity. This contingency may have been the reason for Justice Brennan's caveat early in the *City of Lafayette* opinion to the effect that the *Parker* doctrine has been unavailing in instances where, though the fundamental policy of federalism was implicated, it was not severely impinged.[202] As a result, courts in the future may simply weigh the relative merits of the state policy versus the federal policy to decide the limits on federal commerce power over states.[203]

### B. Legislative Mandate Test: A Respect for the Policy Choices of States

The present scope of state sovereignty in the antitrust context remains predicated on a state legislature's mandate. In the antitrust context, this development is clearly manifested in the cases from *Parker* through *City of Lafayette.* In each of them, the Court has been concerned with isolating those areas of sovereign interest to the states as defined by the state's legislatures themselves.[204] This appears consistent with Congress' own perception of the limitations on its commerce clause power.[205] As the House Report to the Sherman Act of 1890 stated: "No attempt is made to invade the legislative authority of the several States or even to occupy doubtful grounds."[206]

This is not to say that a state can explicitly authorize conduct which the antitrust laws condemn. Such a view would violate the very concept of preemption and federal supremacy.[207] The *Parker*

201. Davidson & Butters, *supra* note 118, at 601.

202. *See* text accompanying note 150 *supra.*

203. This approach was suggested by Justice Blackmun in *National League of Cities,* 426 U.S. at 856 (Blackmun, J., concurring) and in *Cantor,* 428 U.S. at 610-11 (Blackmun, J., concurring). *See also,* Friends of the Earth v. Carey, 552 F.2d 25, 37 (2d Cir.), *cert. denied,* 434 U.S. 902 (1977).

204. *See* pt. III *supra.*

205. *See Cantor,* 428 U.S. at 632 (Stewart, J., dissenting).

206. H.R. REP. No. 1707, 51st Cong., 1st Sess. 1 (1890).

207. *See* Handler, *supra* note 178, at 15.

Court itself warned that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."[208] Rather, as recognized in *Parker,* principles of federalism dictate that courts not lightly attribute to Congress "an unexpressed purpose to nullify a state's control over its officers and agents."[209] States thus are protected from federal regulation insofar as they may provide services in a manner which consciously supplants federal policies formulated under the commerce clause. As the Third Circuit Court of Appeals summarized in a case subsequent to *City of Lafayette,* "the state need not have contemplated the precise action complained of as long as it contemplated the kind of action to which objection was made."[210]

This basis for state sovereignty is also consistent with the Court's analysis in *National League of Cities.* There, the majority was chiefly concerned with federal regulation displacing "state policies regarding the manner in which [states] will structure delivery of . . . governmental services which [a state's] citizens require."[211] Should the standards developed under the *Parker* doctrine be applied to all areas of federal regulation, as earlier noted, many of the ambiguities that resulted from *National League of Cities* will be circumvented.

Application of the legislative mandate test, however, may result in disruption of the federal-state relationship which, ironically, may violate the spirit of both *Parker* and *National League of Cities.* Many of these problems manifest themselves in the *City of Lafayette* decision. As was noted by plurality in *City of Lafayette,* state legislatures, in structuring delivery of governmental services, depend upon municipalities to deal quickly and flexibly with local problems.[212] This effectual delegation allows the legislature to devote more time to purely state-wide matters.[213] By requiring the legislature to mandate municipal action, however, the *Parker* analysis "will necessarily diminish the extent to which a State can share

208. 317 U.S. at 351.
209. *Id.*
210. Princeton Community Phone Book, Inc. v. Bate, 582 F.2d 706, 717 (3d Cir. 1978).
211. 426 U.S. at 847.
212. 435 U.S. at 434-35.
213. *Id.*

its power with autonomous local governmental bodies."[214] In addition, state statutes are often enacted with little recorded legislative history thus making the task of determining what the legislature contemplated nearly impossible.[215] As the Court in *City of Lafayette* concedes, state legislatures generally give their subordinate agencies broad operating authority in order for them to have the flexibility to meet both foreseen and unforeseen situations.[216] Thus, the difficulties of determining what the legislature contemplated are "bound to discourage state agencies and subdivisions in their experimentation with innovative social and economic programs."[217]

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214. *Id.* at 435.

215. *Id.* at 436-37.

216. *Id.* at 414 n.43 (quoting Avery v. Midland County, 390 U.S. 474 (1968)).

217. 435 U.S. at 439 (Stewart, J., dissenting). Justice Stewart's concern over the impracticality of applying this analysis has not prevented lower courts from distinguishing the type of activity that comes within a legislative mandate. For example, in *Kurek, supra* note 135, the Park District of Peoria, Illinois, which operated five municipal golf courses in that city, was sued by five golf professionals for alleged antitrust violations in offering pro-shop concessions. The defendant was a unit of local government deriving its powers from various Illinois statutes. *Id.* at 585. The Court of Appeals for the Seventh Circuit initially addressed the issue of the qualification of the Park District to utilize the *Parker* state action defense. Interpreting *Goldfarb* and *Cantor* in much the same way as did the Fifth Circuit, and later the Supreme Court, in *City of Lafayette,* the court held that the alleged misconduct by the Park District was not sovereign "state action." *Id.* at 589-90. Applying the legislative mandate test, the court found nothing in the Illinois statutory provisions governing park districts that would have authorized the type of activity alleged to have taken place. *Id.* at 590. The court was unable to discriminate between mandated and non-mandated activities despite broad language in the enabling statute empowering the park district to "construct, equip and maintain . . . golf . . . courses, . . . as well as necessary facilities pertinent thereto . . . and to contract in furtherance of any of their corporate purposes . . . ." *Id.* at 590 (citations omitted).

The Seventh Circuit found this language to "fully authorize the Park District to operate pro shops at its golf course or to make contracts or leases allowing outside parties to operate such shops." *Id.* At the same time, the court was able to posit a situation where the case for a *Parker* defense would be stronger: if the complaint in *Kurek* "alleged no more than that the Park District had substantially reduced relevant competition by operating the shops itself, foreclosing others, or by determining that the 'corporate purposes' of the District would be best served by contracting with a single concessionaire for the operation of the shops." *Id.* at 590-91 (footnotes omitted).

A similar type of interpretation of a broad enabling statute was made in Star Lines, Ltd. v. Puerto Rico Maritime Ship. Auth., 451 F. Supp. 157 (S.D.N.Y. 1978). *Star Lines* involved an antitrust claim against the Puerto Rico Maritime Shipping Authority ("PRMSA") that allegedly entered into a contract with a shipping company, Pacific Far East Lines ("PFEL"). The effect of this contract was to eliminate the plaintiff, PFEL's only competitor, from the service of vessels in the East Coast-Persian trade. Applying the legislative mandate test, the district court first examined what on its face appears to be an enabling statute sanctioning

Also, legislatures will be forced to foresee these interpretative difficulties and take measures to avoid them.

Justice Stewart, in his dissent, concluded that pressures resulting from the test established in *City of Lafayette* will infringe upon "the manner in which [States] will structure delivery of those governmental services which their citizens require."[218] The possibility of stifling a state's innovative public-service programs or burdening legislatures with the duty to spell out the intended scope and application of a law before its enactment is just as threatening to a state's sovereignty as is forcing the state to pay a minimum wage to the janitor at the state capitol.[219]

This disruption of state policy would result even if the questioned municipal activity was engaged in for purely parochial interests and not pursuant to a state policy. For example, enormous costs occasioned by antitrust compliance would financially burden municipalities and deplete funds intended for public programs which may or may not be sovereign activities. Considering present limitations on local government budgets, the substantial costs of antitrust compliance[220] could force abandonment of important governmental serv-

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all activity with antitrust significance. The act creating PRMSA provided that:

> The legislature of Puerto Rico intends that [PRMSA] acquire and operate shipping lines and terminal facilities as a public service, and that in doing so, it shall not be subject to the antitrust laws nor any other limitation that could hinder the effective discharge of the endeavor that this act has imposed on [PRMSA].

Puerto Rico Maritime Shipping Authority Act, Act No. 62 (June 10, 1974) (Statement of Motives).

In addition, the Act provided that "the Antitrust Laws shall not be applicable to any section of the Authority taken pursuant to the provisions hereof." *Id.*

The district court rejected the argument that this broad language granted *Parker* immunity. The court noted that the intended purpose of the legislation in setting up PRMSA was to assure the island of a "complete, reliable and economical maritime transportation system for cargo and passengers between Puerto Rico and abroad." *Id.* at 166-67. The alleged contract between PRMSA and PFEL did not directly involve trade with Puerto Rico. As a result the court found "the connection between the legislative grant of power to PRMSA and its use of that power under the facts of this case to be simply 'too tenuous to permit the conclusion that the entity's intended scope of activity included such conduct.' *City of Lafayette*, 532 F.2d 431, 434 (5th Cir. 1976)." 451 F. Supp. at 167. Citing *Kurek*, the court suggested specific circumstances where PRMSA's claim to antitrust immunity would rest on much firmer ground if "PRMSA had reduced competition in the Puerto Rican-East Coast trade by acquiring a majority of those vessels suitable for engaging in that trade or that PRMSA had contracted with a single private company to control Puerto Rico's port facilities. . . ." 451 F. Supp. at 167.

218. *See* note 217 *supra*.

219. *See* note 56 *supra* and accompanying text.

220. For a thorough discussion of the necessity of having an antitrust compliance program

ices. While these cost considerations were not central to the Court's decision in *National League of Cities,* they were noted by the Court and should take on special importance in the antitrust field.[221] Of course, liability for treble damages would have an even greater impact on the operation of a municipal government. Petitioners in *City of Lafayette* warned that the city's financial liability after trebling could exceed $1.5 billion, an enormous bill for a few thousand taxpayers to meet.[222] Justice Blackmun's dissent was premised on the majority's failure to address this problem.[223] Justice Blackmun considered both the Clayton Act's requirement of treble damages and congressional sentiment adverse to making this remedy discretionary to be central to the issue of liability.[224]

The possibility of treble damages may also directly infringe upon the "sovereignty" of a local governmental unit by inhibiting a municipality from addressing its rapidly changing problems with innovative programs which are not customarily considered "integral governmental functions."[225] Modern government is "increasingly undertaking social and economic functions that a century ago were

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and the form it should take, *see* J. GARRETT, ANTITRUST COMPLIANCE: A LEGAL AND BUSINESS GUIDE (1978). The cost of procuring insurance has been cited by one commentator as posing an ancillary problem to the imposition of antitrust liability. *See* Comment, *The Erosion of State Action Immunity From the Antitrust Laws:* City of Lafayette v. Louisiana Power and Light Co., 45 BROOKLYN L. REV. 165, 187 (1978).

221. In a recent decision in the Second Circuit Court of Appeals, Turpin v. Mailet, 579 F.2d 152 (2d Cir. 1978), *vacated* 99 S.Ct. 554 (1978) to be reconsidered in light of Monnell v. Department of Social Services, 436 U.S. 658 (1978) (local governments are not wholly immune from suit under Civil Rights Act of 1871), it was held that a municipality can be liable in damages for unconstitutional actions of its employees if the municipality is itself a wrongdoer. The court, sitting *en banc,* decided the case in a five to four decision. One of the arguments made by the dissent was that municipalities today are not in a position to afford a damage award against them. 579 F.2d at 180 (citing Blackmun's dissent in *City of Lafayette*). In the future, as municipalities are forced to pay these awards, the concerns expressed by a number of these judges will undoubtedly prevail to affect the substantive law. For a more complete discussion of the ramifications of antitrust treble damage liability on municipalities see Note, *Federal Antitrust Immunity: Exposure of Municipalities to Treble Antitrust Damages Sets Limit for New Federalism:* City of Lafayette v. Louisiana Power & Light Co., 11 CONN. L. REV. 126 (1978).

222. Brief for Petitioner at 14, City of Lafayette v. Louisiana Power and Light Co., 435 U.S. 389 (1978).

223. 435 U.S. at 441. The plurality asserted that the question of remedy can only arise if the district court on remand determines that the cities' activities are prohibited by the antitrust laws. *Id.* at 402 n.22.

224. *Id.* at 443.

225. *See* note 193 *supra* and accompanying text.

thought beyond the sphere of government."[226] After *City of Lafayette*, the risk of fiscal devestation through treble damages would stifle any municipal leader in implementing such programs.

Furthermore, the specter of treble damages may distort the legislative mandate test by forcing increased involvement of the states in the operation of their agencies and subdivisions. In many situations, a municipality assessed with treble damages would have no alternative but to turn to the state in order to satisfy the judgment.[227] This possibility alone might compel a state to exercise a greater degree of control and scrutiny over the cities' budgets than it otherwise might. Such a result would be inimical to the federalist doctrine espoused in *National League of Cities*.[228] Moreover, such control may compel a court to conclude that a state has "contemplated" actions with antitrust significance and thus make the application of the *Parker* exemption automatic.[229]

Another problem arising from the legislative mandate test is the difficulty in establishing the precise form a state policy should take in order to qualify as a limitation upon federal commerce power. This problem has been a source of confusion among lower courts since *City of Lafayette*. For example, in *Star Lines v. Puerto Rico Maritime Shipping Authority*,[230] the district court for the Southern District of New York found that the "blanket antitrust exemption provisions contained in the Act creating [the Puerto Rico Maritime Shipping Authority ("PRMSA") did] not in and of themselves confer antitrust 'immunity' from PRMSA."[231] Upon an analysis of *Parker* and its progeny, the district court decided that PRMSA's actions did not satisfy two criteria derived from *City of Lafayette*:

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226. *See* Schwartz, *supra* note 23, at 1129.

227. "A recent study revealed that the statutes of 15 states provide for a State receiver or state agency to act as a receiver when a local government unit defaults on its financial obligations." ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, CITY FINANCIAL EMERGENCIES: THE INTERGOVERNMENTAL DIMENSION 77 (1973).

228. *See* pt. II *supra*.

229. *Cf.* S.J. Groves & Sons Co. v. New Jersey Turnpike Auth., 268 F. Supp. 568, 578 (D.N.J. 1967) (no eleventh amendment immunity where turnpike authority has substantial fiscal and managerial autonomy and is insulated from state treasury); Jagnandam v. Giles, 538 F.2d 1166, 1174-75 (5th Cir. 1976), *cert. denied*, 429 U.S. 1110 (1977) (under state law, state involved in all aspects of financial management of university).

230. 451 F. Supp. 157 (S.D.N.Y. 1978). *See* note 217 *supra*.

231. *Id.* at 166. *See* note 217 *supra* for text of act creating PRMSA.

they "were neither compelled by the state acting as sovereign nor executed pursuant to any governmental policy to displace market forces in the area in which PRMSA's activities took place."[232]

In determining whether the state was "acting as sovereign," Judge Carter's opinion in *Star Lines* focused solely on the issue of legislative intent as prescribed by *City of Lafayette*. "We fail to see," explained the court, "how PRMSA's authority in this regard suggests an intention by the legislature that in the conduct of its business on these foreign trade routes PRMSA should seek to establish a foreign, private entity as a monopolist of a particular route and seek to eliminate all other competition from participating in that trade."[233]

*Star Lines* also concluded that the challenged anticompetitive activity was not pursuant to a state policy intending to displace competition with regulation or monopolistic public service. This second finding appears no different from the first. The court found that the "legislature focused on insuring adequate carrier and passenger services between Puerto Rico and the mainland,"[234] not on displacing "competition in the conduct of international commerce on a trade route completely removed and unrelated to Puerto Rico."[235] *Star Lines* determined, under both criteria, that the legislature did not compel anticompetitive activity involving trade outside Puerto Rico. This point is underscored by the court's observation that

> if the conduct being challenged here were that PRMSA had reduced competition in the Puerto Rican-East Coast trade by acquiring a majority of those vessels suitable for engaging in that trade, or that PRMSA had contracted with a single private company to control Puerto Rico's port facilities, PRMSA's claim to antitrust immunity would be on much stronger ground.[236]

The court thus viewed PRMSA's enacting legislation as not permitting anticompetitive conduct outside the Puerto Rico—East Coast trade routes.

One disturbing aspect of this case concerns the court's requirement that the legislature "compel" the anticompetitive conduct

232. 451 F. Supp. at 166.
233. *Id.* at 167.
234. *Id.* at 168.
235. *Id.*
236. *Id.* at 167.

rather than "contemplate" it as prescribed in *City of Lafayette.* While this distinction may not have affected the outcome in *Star Lines,* it may in the future change the application of the *Parker* doctrine.[237] The Supreme Court had explicitly stated that a political subdivision need not point to a "specific, detailed legislative authorization" before it properly may assert a defense of immunity.[238] An adequate state mandate exists when it is found " 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.' "[239]

An indication that the distinction between "compel" and "contemplate" is more than semantic appears in a recent case decided by the Fifth Circuit Court of Appeals. In *United States v. Texas Board of Public Accounting,*[240] a state instrumentality was held liable under antitrust laws because its enabling statute did not mandate anticompetitive activity. In that case, the court scrutinized section 5 of the Texas Accountancy Act which provided that the Texas Board of Accountancy "may promulgate, and may amend from time to time, rules of professional conduct appropriate to establish and maintain a high standard of integrity in the profession of public accountancy. . . ."[241] The District Court for the Western District of Texas considered this "permissive, not mandatory, language,"[242] and therefore, the Board could not sanction restraints against competitive bidding in the accounting industry.[243]

The District Court for the Northern District of Indiana, in *City of Mishawaka, Indiana v. American Electric Power Co.,*[244] took a more liberal view of the legislative mandate test to find that a municipality-run utility enjoyed immunity from the federal antitrust laws. Relying on the Supreme Court's explanation in *City of*

237. Justice Stewart, in his dissent in *City of Lafayette,* pointed out the problems that the vagueness inherent in the legislative mandate test presents. He analogizes the problem to the cases involving substantive due process where federal judges invalidated state and municipal economic regulations they thought were unfair. 435 U.S. at 438-40.

238. *Id.* at 415.

239. *Id.* (quoting 5th Circuit opinion below).

240. 464 F. Supp. 400 (W.D. Tex. 1978), *aff'd and modified,* 592 F.2d 919 (5th Cir. 1979).

241. 464 F. Supp. at 402.

242. *Id.* at 404.

243. Judge Gie of the Fifth Circuit vigorously dissented from the court's analysis stating that *City of Lafayette* did not require mandatory language. 592 F.2d at 919-20.

244. 465 F. Supp 1320 (N.D. Ind. 1979).

*Lafayette* that a "specific, detailed legislative authorization"[245] need not be found, the district court concluded that sufficient state authority to operate as a monopoly can be inferred from a general statutory mandate to operate a utility.[246] The relevant state statute merely empowered Indiana municipalities to own and operate utilities.[247]

This apparent discrepancy in interpretations of what will satisfy the legislative mandate test lends support to Justice Stewart's dissent in *City of Lafayette.* Justice Stewart stated that the *City of Lafayette* test was vague in prescribing the type of state legislative mandate required for the *Parker* doctrine to apply.[248] Justice Stewart observed that the counterclaim in *City of Lafayette* alleged, in essence, that the municipalities engaged in sham litigation, maintained their monopolies by debenture covenants, foreclosed competition by long-term supply contracts, and tied the sale of gas and water to the sale of electricity."[249] According to Justice Stewart, these actions could be considered the same as "bringing law suits, issuing bonds and providing electric and gas service, all of which were activities authorized by [Louisiana] statutes."[250]

It has yet to be decided by the district court to which *City of Lafayette* was remanded whether or not the utilities' enabling statutes meet the criteria established by the Supreme Court. Because the Supreme Court affirmed the court of appeals' decision, however, it appears that the Court does not consider these statutes alone a sufficient mandate to trigger the *Parker* doctrine.[251] To what de-

245. 435 U.S. at 415.

246. "The relevant Indiana statutes show that the State of Indiana has authorized its municipalities to operate as exclusive monopolies of electric, water, sewer, and other utilities." 465 F. Supp. at 1347. *See* note 247 *infra* for the text of the Indiana statute.

247. IND. CODE ANN. § 8-1-2-90 (Burns 1973) states, in pertinent part:

> Any municipality in the state of Indiana is hereby empowered . . . to own, lease, erect, establish, purchase, condemn, construct, acquire, hold and operate any utility within the boundaries of such municipality . . . without the consent or control of any department, bureau or commission other than the municipal council of the municipality in which such utility may be operated.

248. 435 U.S. at 435.

249. *Id.* at 435-36.

250. *Id.* at 436.

251. The strong language against exemption found in the Louisiana statutes presented to the Court, 435 U.S. at 414 n.44, suggests the plurality did not comtemplate the possibility of a finding by the district court on remand that the municipal utility would satisfy the criteria set up by the Court. However, in a footnote, Justice Brennan reiterates the *City of Lafayette*

gree the legislative mandate test will have to be refined will remain a source of confusion for lower courts. Until the Supreme Court clarifies this doctrine, state legislative intent runs the grave risk of being misinterpreted by the judiciary. Considering the importance of interpreting a state legislature's mandate on the determination of the scope of state sovereignty, this problem cannot be neglected by the Court. The only viable solution may be to turn the *Parker* inquiry, and ultimately the entire question of state sovereignty, into a balancing process where the court will overlook those state legislative mandates it deems inappropriate in the face of overriding federal policies.[252] Such a result, though inimical to the federalist doctrine,[253] would forthrightly address the single most difficult issue which underlies these cases: when should federal policies take precedence over those of the states.

## V. Conclusion

*National League of Cities* represents a revived sensitivity by the Supreme Court to the effect of federal regulation on the autonomy of local and state governments. Announcing this concern, the Court declared that Congress may not "force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made."[254] Unfortunately, *National League of Cities* fails to offer workable guidelines for determining the limits on federal commerce power created by a state's sovereignty.

Possible clarification of what these limits are may be found in the antitrust context where the Supreme Court's application of federalism resulted in an exclusion from antitrust laws for state action thirty years before *National League of Cities* in *Parker v. Brown.* The same court that decided *National League of Cities*[255] considered the *Parker* decision on four separate occasions, culminating in *City*

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standards announcing that "municipalities are 'exempt' from antitrust enforcement when acting as state agencies implementing state policy to the same extent as the State itself." 435 U.S. at 412 n.42.

252. *See* notes 132, 150-53 & 175 *supra* and accompanying text.

253. Such a result may also conflict with those decisions which condemned the regime of substantive due process. *See Cantor,* 428 U.S. at 627 (Stewart, J., dissenting).

254. 426 U.S. at 855.

255. The *Goldfarb* decision took place prior to Mr. Justice Douglas' retirement and Mr. Justice Stevens' appointment.

*of Lafayette.* There, the Sherman Act was held inapplicable to state subdivisions acting in a manner contemplated by the state legislature. The decisions which led to this test of sovereignty under the antitrust laws circumvented many of the ambiguities inherent in *National League of Cities.* While problems exist in attempting to decipher what are a state's policies, the test under *Parker* should assist in defining the scope of state sovereignty as a limit to congressional commerce power.

Whereas *National League of Cities* served as a check on an increasing amount of federal power over states,[256] the *Parker* doctrine rightly acknowledges that states and municipalities should not automatically be allowed to transcend the federal interest in free trade. Government is emerging as the economy's largest consumer and to exempt it totally from antitrust regulation would subvert the goals of our free enterprise system. Principles of federalism upon which this country was founded, however, demand that states be allowed to formulate their own methods of delivering the governmental services which they deem important free from interference of any federal regulation. Significantly, the *Parker* doctrine's legislative mandate test insures that a state remains free to formulate its own policies.

Of course, this view presents the risk that some states will abuse their unique status in the federal system to the detriment of competing private concerns, consumers and constituents of their states and neighboring states. Some type of balancing approach by the courts may thus be necessary to insure that states do not seriously disrupt the anticompetitive goals of the national government.[257] But as Judge Henry J. Friendly so aptly observed, "although some state governments may be ignorant or venal, many are far seeing and courageous; and not all wisdom reposes in Washington."[258] The judiciary should not lose sight of Chief Justice Chase's vision of "an indestructible Union, composed of indestructible States."[259]

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256. *See* Blumstein, *Some Intersections of the Negative Commerce Clause and the New Federalism: The Case of Discriminating State Income Tax Treatment of Out-of-State Tax-Exempt Bonds*, 31 VAND. L. REV. 473, 488 (1978).

257. The possibility that states will abuse their status to the detriment of national policies may be limited by the state's constitutional inability to regulate commerce. *See* TRIBE, *supra* note 7, at 326.

258. Friendly, *supra* note 2, at 1033-34.

259. Texas v. White, 74 U.S. 700, 725 (1868).