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EXPLORING THE FAR REACHES OF THE STATE ACTION EXEMPTION: IMPLICATIONS FOR FEDERALISM

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The state action exemption is an attempt to balance the national interest in antitrust enforcement with the sovereign authority of the states.¹ This clash between the states and the national government was not envisioned by the authors of the antitrust laws. Passage of the Sherman Act (the Act)² in 1890 was accompanied by few strains on our federal system, for at the time it was believed that Congress did not have the power to regulate state economic activity.³ The Supreme Court, however, decided that

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¹ Since the passage of the Sherman Act (the Act) in 1890, various groups have sought to be exempt from its provisions. Comment, *State Action Antitrust Immunity: The Parker Doctrine's Application to Municipalities*, 8 OHIO N.U.L. REV. 513, 514 (1981) [hereinafter cited as *Parker Doctrine Comment*]. Both Congress and the federal judiciary have been sources of antitrust exemptions. *Id.* Perhaps the most troublesome of the judicially created exemptions is that accorded the activities of the states. Although creation of the state action exemption is attributed to the Supreme Court case of *Parker v. Brown*, 317 U.S. 341 (1943), see *infra* notes 21-31 and accompanying text, the underpinnings of the doctrine can be traced to two earlier cases, *Lowenstein v. Evans*, 69 F. 908 (C.C.D.S.C. 1895), and *Olsen v. Smith*, 195 U.S. 332 (1904).

Lowenstein addressed whether a South Carolina statute granting the state a monopoly in the liquor trade violated the Sherman Act. 69 F. at 910. The court found that the state's total control of the liquor industry fell outside the ambit of activities prohibited by the Act, since a state was neither a "corporation" nor a "person" for antitrust purposes. *Id.* at 911. In *Olsen*, the Supreme Court sustained a Texas law regulating pilotage, holding that a state's exercise of its power to regulate did not implicate the antitrust laws. 195 U.S. at 344-45; see Comment, *State Action and the Sherman Antitrust Act: Should the Antitrust Laws Be Given a Preemptive Effect?*, 14 CONN. L. REV. 135, 137-38 (1981) [hereinafter cited as *Sherman Antitrust Act Comment*]; Comment, *Antitrust Immunity: State Action Protection Under Parker v. Brown*, 7 U.S.F.L. REV. 453, 455-56 (1973) [hereinafter cited as *Antitrust Immunity Comment*].

² Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . ." 15 U.S.C. § 1 (1976). The Supreme Court has stated that the purpose of the Sherman Act is "to use [constitutional] power to make . . . , so far as Congress could under our dual system, a competitive business economy." *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 559 (1944) (footnote omitted).

³ *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 605-06 (1976) (Blackmun, J., concurring); see Page, *Antitrust Federalism and the Regulatory Process: A Reconstruction and Critique*

Congress intended to broaden the scope of the Act to parallel the expanding ambit of the commerce power.⁴ Thus, by virtue of the enlarged post-1890 jurisdictional reach of the Sherman Act, the state action exemption has become increasingly significant.⁵

Manifestations of the conflict between the national policy favoring competition and local regulatory power are particularly acute in light of the country's current states' rights mood.⁶ Moreover, there is no easy escape from this dilemma since the Court, obligated under the supremacy clause⁷ to uphold the Sherman Act,

of the State Action Exemption After Midcal Aluminum, 61 B.U.L. REV. 1099, 1104-07 (1981). Originally, it was believed that the commerce clause did not accord Congress the power to regulate the economic activity of the states, see Page, *supra*, at 1104-07. This narrow view of the commerce clause has been attributed to the fact that "Congress probably never actually considered whether state action was to be included within the coverage of the act." Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 Nw. U.L. REV. 71, 84 (1974).

⁴ See *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 743 n.2 (1976). Initially, the commerce clause was expanded through eliminating the distinction between intra-state and interstate activities. See *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 233-35 (1948). This inquiry eventually extended Congress' power under the commerce clause "beyond the flow of commerce to all activities having a substantial effect on interstate commerce." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 201-02 (1974). The scope of the Sherman Act paralleled the expanding scope of the commerce clause so that "however local its immediate object, a 'contract, combination . . . or conspiracy' nonetheless may constitute a restraint within the meaning of [the Act] if it substantially and adversely affects interstate commerce." *Id.* at 194-95.

⁵ See *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 637 (1976) (Stewart, J., dissenting); see Richards, *Reconciling the Tension Between Anticompetitive State Regulations and the Sherman Act: California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 19 AM. BUS. L.J. 539, 541-42 (1982).

⁶ The recent state of federalism has been described as a relationship where "the federal government . . . [has] all the money, the states [have] the police power, and the local governments [have] all the problems." Freilich, Cox & Hall, 1980-1981 *Annual Review of Local Government Law: The Changing Federal Direction and its Impact on Local Government*, 13 URB. LAW. 621, 623-24 (1981). The panacea for this apparent inequity is believed to be decreased federal influence in state decisionmaking. See Note, *Taking Federalism Seriously: Limiting State Acceptance of National Grants*, 90 YALE L.J. 1694, 1712-14 (1981). More specifically, "a requirement that states make decisions on matters within the realm of exclusive state power uninfluenced by . . . [federal political pressure] is necessary . . . to carry out the constitutional system of allocating power and to achieve the goals of Federalism." *Id.* at 1713. In addition, this movement of returning power to the states is justified by the notion that local governments more accurately reflect the sensibility and needs of the popular electorate. C. BARFIELD, *RETHINKING FEDERALISM* 49 (1981). It is argued that "the closer a unit of government is to the people it serves, the more likely it will be to implement policy goals they desire." Note, *supra*, at 1700. When decisionmaking is made in smaller units, more direct public participation is possible. Kaden, *Politics, Money and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 853 (1979).

⁷ The supremacy clause provides: "[T]he laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing

has also played a considerable role in nurturing a diverse and pluralistic network of state and local governments.⁸ As a result, the state action exemption, as a balancing device, clearly has broad implications for the eventual composition of the federal system.⁹ Further, judicial reconciliation of the tension between the Sherman Act and state sovereignty often has left the courts open to charges of unduly interfering with the legislative prerogative of the states.¹⁰

in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

⁸ Richards, *supra* note 5, at 539-42; see Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 623 & n.6 (1975). The Supreme Court's recent attempt "to return legislative power and prerogatives to the states in order to preserve the nation's dual system of state and federal sovereignty," Richards, *supra* note 5, at 539, is limited severely by its obligation to "uphold the congressional commitment to antitrust," *id.* at 542. For a recent attempt by the Supreme Court to resolve this dilemma, see *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1981); Comment, *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.: Federal Power Under the Twenty First Amendment?*, 38 WASH. & LEE L. REV. 302, 305 (1981). In *Midcal*, the Court concluded that the federal interest in interstate commerce will override a conflicting state interest in alcohol regulation only in "appropriate situations." 445 U.S. at 110; see *infra* notes 135-49 and accompanying text. The determination of an appropriate situation would be made after recognizing the burden a state regulation imposes upon interstate commerce and weighing the state's interest in imposing that regulation against the federal interest in interstate commerce. *Id.* at 110-11. It has been suggested that this balancing test should be done on a case-by-case basis. See Note, *The Effect of the Twenty-First Amendment on State Authority to Control Intoxicating Liquors*, 75 COLUM. L. REV. 1578, 1594 (1975).

⁹ The following has been proffered as a definition of the federal system:

A type of polity operating a Constitution which works on two levels of government: as a nation and as a collection of related but self-standing units. . . . It seeks on the one hand to create and maintain a nation, on the other to preserve the integrity of the units, their identity, culture and tradition. The objective of building and maintaining a nation implies that there needs to be unity of commercial and financial policy, and free movement of labour and capital from one part to another. But neither level of government can be allowed absolute sovereignty, because this would violate some of the rights of the other level, which are guaranteed in the Constitution.

U. HICKS, *FEDERALISM: FAILURE AND SUCCESS* 4 (1978).

¹⁰ See *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 630-31 (1976) (Stewart, J., dissenting); *infra* note 87 and accompanying text. Justice Stewart, dissenting in *Cantor*, criticized the majority's interpretation of the Sherman Act by claiming that such an interpretation would allow the federal judiciary to substitute its judgment for that of state legislators. *Id.* at 630 (Stewart, J., dissenting). The purported state legislative judgment was made by the State of Michigan's Public Service Commission when it permitted a Detroit supplier of electricity to distribute light bulbs to its customers at no separate charge. 428 U.S. at 582-83. Reasoning that "[t]he lamp supply program . . . [was] by no means imperative in the continued effective functioning of Michigan's regulation of the utilities industry," *id.* at 597 n.36, the Court concluded that the Sherman Act precluded granting "a host of state regulatory agencies broad power to grant exemption from an important federal law for reasons wholly unrelated to federal policy or even to any necessary significant state interest," *id.* at

Indeed, the Court has been warned against adopting a "freewheeling approach that contemplates the selective interdiction of those anticompetitive state regulatory measures that are deemed not 'central' to the limited range of regulatory goals considered 'imperative' by the federal judiciary."¹¹ Thus, the Court's interpretation of the state action exemption not only implicates the federalist system but also defines the proper relationship between the federal judiciary and state and local decisionmaking authority.

This Article will chart the development of the state action exemption from its inception in *Parker v. Brown*¹² to its present status after *Community Communications Co. v. City of Boulder*.¹³ The Article will identify the federalism concerns that formed the foundation for the Court's decisions in *Goldfarb v. Virginia State Bar*,¹⁴ *Cantor v. Detroit Edison Co.*¹⁵ and *Bates v. State Bar*.¹⁶ An analysis of *City of Lafayette v. Louisiana Power & Light Co.*¹⁷ will provide particular insight into *Boulder's* application of the state action exemption to municipalities, presaging the wide rift that marked the *Boulder* decision.¹⁸ *New Motor Vehicle Board v. Orrin W. Fox Co.*¹⁹ and *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*²⁰ will capture a rare moment of consensus as to the proper application of the *Parker* doctrine, a consensus ultimately shattered by the *Boulder* decision. The Article will conclude that the Court's present interpretation of the *Parker* doctrine enables responsible judicial application of the federal anti-trust laws while simultaneously permitting the states and localities to maintain an active role within our federal system.

Parker v. Brown: BIRTH OF THE STATE ACTION EXEMPTION

The advent of the state action exemption generally has been traced to the decision of *Parker v. Brown*.²¹ The dispute in *Parker*

603; see *infra* notes 45-62 and accompanying text.

¹¹ *Cantor v. Detroit Edison Co.*, 428 U.S. at 640 (Stewart, J., dissenting).

¹² 317 U.S. 341 (1943).

¹³ 102 S. Ct. 835 (1982).

¹⁴ 421 U.S. 773 (1975); see *infra* notes 34-44 and accompanying text.

¹⁵ 428 U.S. 579 (1976); see *infra* notes 45-70 and accompanying text.

¹⁶ 433 U.S. 350 (1977); see *infra* notes 71-87 and accompanying text.

¹⁷ 435 U.S. 389 (1978); see *infra* notes 88-122 and accompanying text.

¹⁸ See *infra* notes 150-216.

¹⁹ 439 U.S. 96 (1978); see *infra* notes 123-34 and accompanying text.

²⁰ 445 U.S. 97 (1980); see *infra* notes 135-49 and accompanying text.

²¹ 317 U.S. 341 (1943).

arose when a raisin producer sued California officials administering a state agricultural prorate program.²² The program, designed to stabilize prices, created a restraint on competition by limiting production of raisins.²³

Examining the antitrust laws, the Court recognized that the Sherman Act contained no express textual authority regarding its applicability to state action.²⁴ In addition, since the acts of governmental bodies could not normally be viewed as "contracts, combinations or conspiracies" within the meaning of the Sherman Act,²⁵ the Court regarded the prorate program as beyond the Act's purview.²⁶ Perhaps most importantly, the *Parker* Court was concerned with preserving the federal system, a consideration that militated against eroding the states' control over their officers and agents.²⁷

²² 317 U.S. at 344.

²³ *Id.* at 355.

²⁴ *Id.* at 351.

²⁵ *Id.* at 350; see Slater, *supra* note 3, at 82; Note, *Of Raisins and Mushrooms: Applying the Parker Antitrust Exemption*, 58 VA. L. REV. 1511, 1514 (1972) [hereinafter cited as *Parker Antitrust Exemption Note*]; *Sherman Antitrust Act Comment*, *supra* note 1, at 139-40; see also Note, *Emerging Limitations on the Immunities of State Action and Efforts to Influence Governmental Action Under the Sherman Act*, 1 MEM. ST. U.L. REV. 323, 325 (1971). In an early antitrust case, the Circuit Court for the District of South Carolina found no substantive violation of the Sherman Act by reasoning that state involvement in the purchasing, transportation, and sale of liquor, was neither a contract nor a business combination or conspiracy. See *Lowenstein v. Evans*, 67 F. 908, 911 (C.C.D.S.C. 1895); *supra* note 1. The *Parker* Court adopted an analysis quite similar to that of the *Lowenstein* court and held that the primary purpose of the Act was to prevent individual and corporate, as opposed to state, combinations that restrain competition. 317 U.S. at 351.

²⁶ 317 U.S. at 350; see Slater, *supra* note 3, at 82. The *Parker* Court recognized that the Sherman Act made no reference to the state as such, but only to "persons" and "corporations." 317 U.S. at 351. Indeed, the Court stated that the legislative history of the Act made no suggestion that the state should be subject to the federal antitrust prohibitions. *Id.*; see Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. REV. 693, 698-99 (1974). Despite this proffered justification for the *Parker* decision, it has been suggested that "the *Parker* Court did not base its construction of the Sherman Act on legislative history, but instead derived a presumption of congressional intent from the concept of federalism." Page, *supra* note 3, at 1105.

²⁷ 317 U.S. at 351; see *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 103 (1980) (*Parker* doctrine is grounded in our federal structure); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 400 (1978) (policies of federalism underlie *Parker*). Some commentators regard the *Parker* decision as based upon federalist principles, "the outcome hing[ing] on a judicial determination that Congress had left the states some power to regulate their own economic activities and that the judiciary should not undertake to plug the gap that the legislature had left open." *Parker Antitrust Exemption Note*, *supra* note 25, at 1514-15. Others have voiced doubt as to the validity of this federalism interpretation. See, e.g., Slater, *supra* note 3, at 86; Verkuil, *State Action, Due Process and Antitrust: Reflections on Parker v. Brown*, 75 COLUM. L. REV. 328, 332-33 (1975). One commentator has stated that the *Parker* Court did not need to concern itself with the idea

Indeed, the Court declared that “[i]n a dual system of government in which, under the Constitution, the states are sovereign . . . an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress.”²⁸ Rather than permitting federal encroachment upon the sovereignty of the states, the *Parker* Court elected to recognize a general antitrust exemption for the anticompetitive activities of the states. Such a course was necessary because, according to one commentator, without such an exception the vitality of state-created economic, health and safety regulations would be cast into doubt.²⁹ The Court, however, implicitly qualified the exemption, perhaps in anticipation of the lobbying pressures that would follow its failure to identify precisely what would qualify as state action,³⁰ suggesting that the exemption would not be applicable unless the state itself was responsible for the organization and implementation of the program.³¹ The Court further implied that an anticompetitive program’s participants might be subject to antitrust sanctions “if a governmental

of balancing conflicting federal and state interests because the state program questioned in *Parker* was consistent with the policy of the federal government. Slater, *supra*, note 3, at 86. It has also been suggested that the *Parker* decision can be attributed to the Supreme Court’s fear of the disruptive potential that is inherent in the nullification of a state statutory scheme. Verkuil, *supra*, at 332-33.

²⁸ 317 U.S. at 351.

²⁹ Posner, *supra* note 26, at 697; see 2 M. HANDLER, TWENTY-FIVE YEARS OF ANTITRUST 914-15 (1973). Professor Handler posits that the system of state licensing statutes, state-regulated utility monopolies, and other state monopolies, such as New York’s off-track betting industry, would undergo a “revolutionary restructuring” if the limited state police power over interstate commerce were preempted by federal antitrust laws. 2 M. HANDLER, *supra*, at 914-15.

³⁰ See *Parker Doctrine Comment*, *supra* note 1, at 515-16; Antitrust Immunity Comment, *supra* note 1, at 457-58. The *Parker* decision has engendered confusion with respect to its applicability. See Note, *Parker v. Brown Revisited: The State Action Doctrine After Goldfarb, Cantor and Bates*, 77 COLUM. L. REV. 898, 898 (1977); Comment, *City of Lafayette, Louisiana v. Louisiana Power & Light Co.: Will Municipal Antitrust Liability Doom Effective State-Local Government Relations?*, 36 WASH. & LEE L. REV. 129, 129-30 (1979). The source of this confusion has been traced to the *Parker* Court’s failure to provide guidance as to what activity qualifies as state action. See Richards, *supra* note 5, at 547.

³¹ 317 U.S. at 351; see Note, *Antitrust Law and Municipal Corporations: Are Municipalities Exempt from Sherman Act Coverage under the Parker Doctrine?*, 65 GEO. L.J. 1547, 1551-52 (1977). A list of cases interpreting the *Parker* requirement of state organization and implementation of the program includes *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (“challenged restraint must be ‘one clearly articulated and affirmatively expressed as state policy’ [and] ‘actively supervised’ by the State itself”); *Euster v. Eagle Downs Racing Ass’n*, 677 F.2d 992, 994 (3d Cir. 1982); *Knudsen Corp. v. Nevada State Dairy Comm’n*, 676 F.2d 374, 379 (9th Cir. 1982); *Morgan v. Division of Liquor Control*, 664 F.2d 353, 356 (2d Cir. 1981); *Corey v. Look*, 641 F.2d 32, 36-37 (1st Cir. 1981).

entity acts as a co-conspirator" in a private restraint.³²

A close reading of the *Parker* decision, in light of the language qualifying the exemption, illustrates the Court's intention to defer to a state's regulatory authority only when the state has committed its governmental apparatus to a particular scheme. Such a restriction would limit private industry's ability to attenuate the national antitrust policy. Accordingly, the *Parker* doctrine seems to imply that permitting private interests to exercise undue influence over state agencies would neither further the aims of state sovereignty nor, ultimately, federalism itself.³³

Goldfarb: DEFINING *Parker*'s PROTECTION

For 32 years the lower courts, receiving little assistance from the Supreme Court,³⁴ struggled to define the parameters of the *Parker* exemption.³⁵ Finally, in 1975 the Supreme Court reexamined the *Parker* doctrine. In *Goldfarb v. Virginia State Bar*,³⁶ the Court held that a minimum fee schedule, published by a county bar association, constituted price fixing in violation of the Sherman Act.³⁷

The state bar had argued that in issuing the fee schedule re-

³² See Note, *supra* note 31, at 1551-52.

³³ See, e.g., *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1180 (8th Cir. 1982) (electric company's "manipulation" of state regulatory scheme violative of antitrust laws); *Rangen, Inc. v. Sterling Nelson & Sons, Inc.*, 351 F.2d 851, 862 (9th Cir. 1965) (bribes to state purchasing agent resulted in violation of Clayton Act).

³⁴ See Handler, *Anti-Trust—1978*, 78 COLUM. L. REV. 1363, 1374 (1978). For decades, the only guide provided lower courts in their struggle to identify which state-sanctioned activities were beyond the reach of the Sherman Act was Chief Justice Stone's brief treatment of the issue in *Parker*. See 317 U.S. at 350-52. The result was "a crazy quilt of disparate rationales and rubrics." Handler, *supra*, at 1374.

³⁵ See, e.g., *New Mexico v. American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974); *Padgett v. Louisville & Jefferson County Air Bd.*, 492 F.2d 1258 (6th Cir. 1974); *Saenz v. University Interscholastic League*, 487 F.2d 1026 (5th Cir. 1973); *Business Aides, Inc. v. Chesapeake & Potomac Tel. Co.*, 480 F.2d 754 (4th Cir. 1973); *Norman's on the Waterfront, Inc. v. Wheatley*, 444 F.2d 1011 (3d Cir. 1971); *Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

³⁶ 421 U.S. 773 (1975). Justice Powell took no part in the consideration of the *Goldfarb* case.

³⁷ *Id.* at 788, 791. The suit in *Goldfarb* arose when a Virginia family sought a title examination in order to receive financing for the purchase of a home, *id.* at 775, and discovered that no attorney would perform the title search for less than the minimum amount appearing in the fee schedule published by the Fairfax County Bar Association, *id.* at 776-78. The fee schedule contained an enforcement mechanism, although the bar association had never taken formal disciplinary action to compel adherence. *Id.* at 776-77.

ports and ethical opinions³⁸ it was merely implementing the fee provisions of the ethical codes.³⁹ The county bar, a voluntary association rather than a state agency,⁴⁰ asserted that its activities were state action since "the State Bar 'prompted' it to issue fee schedules."⁴¹ A unanimous Supreme Court, however, finding that mandate for the price floors emanated from either the Virginia Supreme Court or the state legislature,⁴² ruled that there was insufficient state action to trigger an antitrust exemption.⁴³ Thus, *Goldfarb* distilled a fundamental principle from the ambiguity of *Parker*: an exempt activity must be a response to the command of the state.⁴⁴

Cantor v. Detroit Edison Co.: SOVEREIGN COMPULSION AS A
Parker ISSUE

Although *Goldfarb* identified the threshold state action inquiry—whether the activity is a response to the command of the

³⁸ See Virginia State Bar Comm. on Legal Ethics, Op. 170 (1971); Virginia State Bar Comm. on Legal Ethics, Op. 98 (1960). Commenting on the schedule reports and ethical opinions, the Court noted: "[A]ny lawyer who contemplated ignoring the fee schedules must have been aware that professional sanctions were possible . . ." 421 U.S. at 778 n.6.

³⁹ 421 U.S. at 789-90. As authorized by the Virginia legislature, the ethical codes were adopted by the Virginia Supreme Court to regulate the practice of law. *Id.* at 789.

⁴⁰ *Id.* at 790. Because the county bar association was a purely voluntary association of attorneys, it possessed no formal authority to enforce the fee schedule. *Id.* at 776.

⁴¹ *Id.* at 790.

⁴² *Id.* The Court remarked that it could not be said that Virginia, through its state supreme court rules, mandated the anticompetitive prices since no Virginia statute referred to minimum fee schedules. *Id.* The regulation of fees, therefore, was found to be left to the Virginia Supreme Court, which only mentioned advisory fees but did not direct the bar association to supply them. *Id.*; see *infra* note 44.

⁴³ 421 U.S. at 791.

⁴⁴ *Id.* at 790. The Court stated that "[t]he threshold inquiry in determining if an anticompetitive activity is state action . . . [which] the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign." *Id.* Moreover, the Court implied a requirement that the state exhibit an active interest in an anticompetitive scheme before the protection of *Parker* is triggered, stating that "[a]lthough the State Bar apparently has been granted the power to issue ethical opinions, there is no indication in this record that the Virginia Supreme Court approves the opinions." *Id.* This requirement, that government machinery be committed to anticompetitive conduct before the activity can be exempt from the antitrust laws, foreshadowed the later standard that there be substantial supervision by the state acting as a sovereign. See *infra* note 143 and accompanying text; see also 7 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 46.02 (1982); Note, *The State Action Exemption and Antitrust Enforcement Under the Federal Trade Commission Act*, 89 HARV. L. REV. 715, 725 (1976). In *Goldfarb*, the absence of a state requirement for the fee schedule precluded a finding of "state action" for antitrust purposes. 421 U.S. at 791.

state—*Cantor v. Detroit Edison Co.*⁴⁵ is the only Supreme Court decision in the *Parker* line that significantly addresses the impact of the state action exemption on the lobbying activities of private entities.⁴⁶ In *Cantor*, a retail druggist who sold light bulbs sued Detroit Edison Company, a privately owned utility, for its role in allegedly tying the sale of light bulbs to its utility service pursuant to a program approved by the Michigan Public Service Commission.⁴⁷ A divided Supreme Court denied the appropriateness of an antitrust exemption to the distribution program, although five Justices reached accord on the type of inquiry to be made.⁴⁸

Justice Stevens, author of the Court's opinion,⁴⁹ asserted that when a private citizen is merely obeying his state sovereign, it would be unfair to punish him for violating conflicting federal law.⁵⁰ Expounding upon this "unfairness rationale," Justice Stevens noted that a rule which prohibited imposition of antitrust liability on a party who merely obeyed a state command would have limited relevance, since "typically cases of this kind involve a

⁴⁵ 428 U.S. 579 (1976).

⁴⁶ *Id.* at 609-10 (Blackmun, J., concurring). Justice Stevens, writing for a plurality of the Court, denied the *Cantor* defendants a *Parker* exemption because the state itself was not chargeable with anticompetitive practices. *Id.* at 591-92.

⁴⁷ *Id.* at 581. The retail store operator, *Cantor*, sought treble damages and an injunction to enjoin the utility from tying the sale of light bulbs to its distribution of electrical service. *Id.* at 581-82 n.3. See Note, *Will Detroit Edison Turn Off Parker's Power?*, 15 AM. BUS. L.J. 379, 381-82 (1978). Pursuant to such tying agreements, a seller conditions the sale of one product on the purchase of another. The traditional objection to such an arrangement is that "they enable a firm having a monopoly in one market to obtain a monopoly in a second market." R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 172 (1976).

In Detroit Edison's marketing area, the utility was the sole electricity supplier for roughly 5 million people. The utility also furnished its consumers with almost 50 percent of the standard sized bulbs most frequently used. 428 U.S. at 582. The bulbs were provided under an exchange program whereby bulbs were initially installed in all permanent fixtures and then replaced in proportion to the customers' estimated use of electricity; no direct charge was incurred. *Id.* at 583 n.5. The expense to Detroit Edison presumably was reflected in the cost of servicing customers though this cost was not reported to the Michigan Public Service Commission. *Id.* at 582-83. The Court recognized, therefore, that since 1916 "the Commission's approval of . . . [Detroit Edison's] tariffs has included implicit approval of the lamp-exchange program." *Id.* at 583. Detroit Edison argued that such approval constituted a shield from antitrust regulation; both the district court and the court of appeals agreed. See *Cantor v. Detroit Edison Co.*, 392 F. Supp. 1110, 1111 (E.D. Mich. 1974), *aff'd*, 513 F.2d 630 (6th Cir. 1975).

⁴⁸ Chief Justice Burger described the proper threshold inquiry as focusing on the challenged activity, not the identity of the party. 428 U.S. at 604 (Burger, C.J., concurring).

⁴⁹ The plurality did not find *Parker* to be appropriate precedent for state compulsion cases of the *Cantor* variety, *id.* at 591, since the result would be to punish a private person for obeying the mandate of a state sovereign, *id.* at 592.

⁵⁰ *Id.* at 592.

blend of private and public decisionmaking."⁵¹ The plurality further observed that neither state authorization,⁵² approval,⁵³ encouragement,⁵⁴ nor participation⁵⁵ in anticompetitive conduct would confer an antitrust exemption.⁵⁶

Concluding that it would not be unfair to hold Detroit Edison accountable under the antitrust laws,⁵⁷ Justice Stevens refocused his inquiry upon whether Congress intended to superimpose its antitrust standards on conduct already regulated by the states. The mere possibility of a conflict between a state's regulatory policy and the federal antitrust policy was not enough, in Justice Stevens' view, to support an implied exemption from antitrust.⁵⁸ The plurality believed that Congress had not intended to give state regulatory agencies more power than federal agencies to carve out exemptions from the antitrust laws.⁵⁹ Thus, it would appear that an

⁵¹ *Id.* at 582. The Court noted that even in *Parker*, significant private participation existed in the proration program's planning. *Id.* at 592 n.25. The program's effectuation was conditioned upon the approval of a prescribed number of private producers. *Id.*

⁵² *Id.* at 592 n.26 ("It cannot be said that any State may give a corporation . . . authority to restrain . . . commerce against the will of . . . Congress.") (quoting *Northern Sec. Co. v. United States*, 193 U.S. 197, 346 (1904)).

⁵³ 428 U.S. at 592 n.27. ("[A] State does not give immunity to those who violate the Sherman Act 'by declaring . . . [their] action . . . lawful.'") (quoting *Parker v. Brown*, 317 U.S. 341, 351 (1943)).

⁵⁴ 428 U.S. at 592-93 n.28 ("It is not enough that . . . anticompetitive conduct is 'prompted' by state action; . . . [the] activities must be compelled by . . . the State acting as a sovereign.") (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975)).

⁵⁵ 428 U.S. at 592-93; *cf.* *Continental Co. v. Union Carbide*, 370 U.S. 690, 706 (1962) (fact that conspiracy involved acts of agents of foreign government does not insulate corporation from antitrust laws).

⁵⁶ 428 U.S. at 592-93. The Court concluded that the State of Michigan was neutral toward Detroit Edison's exchange program. *Id.* Furthermore, the Court did not consider its holding to be in conflict with the *Parker* decision since the state never required any utility to implement a bulb exchange scheme. *Id.* at 594 n.32; *see also* 1 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 214, at 81 (1978) (where agency exceeds statutory authority in approving activity, individual will be subject to sanctions for antitrust violations).

⁵⁷ 428 U.S. at 594-95. The risk of unjustified punitive damages was held not to exist in *Cantor* since Detroit Edison never reasonably believed its program would be exempt from antitrust liability, but had exercised sufficient freedom of choice in enacting the exchange program to warrant the court holding it responsible for the resulting anticompetitive consequences. *Id.* at 593. Further, the Court emphasized that the decision was not unjust in light of the alternative holding, that federal antitrust laws do not apply to anticompetitive actions approved by the state. *Id.* at 595-96. In addition, the assumption that Congress did not intend laws to apply to state-regulated areas would not foreclose the enforcement of the antitrust statutes to unregulated areas such as the light bulb market. *Id.* Since the monopolistic utility already was regulated by antitrust standards, no hardship resulted by submitting its business activity in competitive areas to the same criteria. *Id.* at 596.

⁵⁸ *Id.* at 596.

⁵⁹ *Id.* Federal agencies possess the requisite authority to shield private conduct from

implied exemption would not be warranted unless it was absolutely essential to make the regulatory act function, and, even then, such an exemption should be no broader than necessary.⁶⁰

Underlying the Court's rejection of an exemption in *Cantor* was its determination that denial of *Parker's* protection would in no way threaten Michigan's execution of its sovereign functions. A majority of the Court agreed that the state's policy with respect to the program was one of mere neutrality.⁶¹ One commentator has described *Cantor's* fairness language, coupled with its emphasis on the state's neutrality, as "merely an alternative linguistic form" of the threshold inquiry called for in *Goldfarb*, with the only difference being that *Cantor* "shifts the focus of inquiry from the decisionmaking action of the state to the decisionmaking freedom of the private party."⁶²

This emphasis on the private entity's participation in initiating the anticompetitive compulsion appears to undercut the policies enunciated in *Eastern Railroad Presidents Conference v. Noerr Motor Freight*,⁶³ in which the Court accorded antitrust immunity to private entities' concerted efforts to influence legislative action.⁶⁴ The *Noerr* Court observed that such conduct should be protected notwithstanding its anticompetitive intent and consequences, since application of the antitrust laws to lobbying activi-

antitrust liability only if a "plain repugnancy between the antitrust and regulatory provisions" exists. *Gordon v. New York Stock Exch.*, 422 U.S. 659, 692-93 (1975) (Stewart, J., concurring) (quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 351 (1963)); see 428 U.S. at 596-97 n.36; see also *United States v. National Ass'n of Sec. Dealers*, 422 U.S. 694, 719-20 (1975); *United States v. Borden Co.*, 308 U.S. 188, 198-99 (1939); *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936).

⁶⁰ 428 U.S. at 596 n.34, 597; see *Otter Tail Power Co. v. United States*, 410 U.S. 366, 389-91 (1973) (Stewart, J., concurring in part, dissenting in part); *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963). Justice Stewart, dissenting in *Cantor*, argued that the plurality opinion was based upon the mistaken premise that implied repeal of federal antitrust laws by inconsistent state regulations may be possible. 428 U.S. at 629 (Stewart, J., dissenting). According to Justice Stewart, "implied repeal" is not only "'not favored, . . . it is impossible.'" *Id.* (Stewart, J., dissenting) (citing U.S. CONST. art. VI, cl. 2).

⁶¹ 428 U.S. at 584-85.

⁶² Case Note, *Immunity Denied to State Approved Utility Practice—Cantor v. Detroit Edison Co.*, 1976 B.Y.U. L. Rev. 912, 934. *Cantor* added a new dimension to the *Parker* line by holding that absent sovereign compulsion private entities do not qualify for an antitrust exemption. *Id.* At least one commentator has postulated that even if a program was not the product of state legislation, an exemption may still be denied. Note, *State Action Immunity and State "Neutrality" in Regulated and Compelled Activities*, 55 N.C.L. Rev. 207, 210 n.21 (1977).

⁶³ 365 U.S. 127 (1961).

⁶⁴ *Id.* at 135.

ties would impede the free flow of information vital to a representative democracy and would have a chilling effect on the right to petition.⁶⁵

Although the dissent in *Cantor* characterized the plurality opinion's failure to immunize lobbying efforts as an interference with the policies established in *Noerr*, recognition of such ostensible conflict may be simply a more realistic assessment of the regulatory process at the state and local levels.⁶⁶ The *Cantor* Court's comment, that *Goldfarb's* exacting verbal formula will not confer antitrust immunity for compliance with *any* requirement of the state, suggests that presence of a state mandate is merely the first element of the state action exemption formula, requiring, in addition, a clear articulation of regulatory intent.⁶⁷ Viewed in this light, *Cantor* provides a check on the ease with which special interests might capture or overwhelm state regulatory bodies by requiring, as a natural incident to the decisionmaking process, that the state articulate its preference for regulation over competition. Showing deference to the federalism rationale underlying *Parker*, Justice Stevens' plurality opinion emphasized that this approach was designed to prevent private entities from undermining the anti-trust laws "for reasons wholly unrelated either to federal policy or even to any necessary significant state interest."⁶⁸ Rather than lim-

⁶⁵ *Id.* at 137-38. The *Noerr* doctrine immunizes from antitrust liability the petitioning of the executive and judicial branches, as well as the legislative branch. See *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972) (lobbying before the judiciary is exempt from antitrust laws); *United Mine Workers v. Pennington*, 381 U.S. 657, 669 (1965) (lobbying activities before administrative officials is exempt); see also Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80, 80-81 (1977) (private exemptions from antitrust laws generally are limited to those activities protected by the right to petition).

⁶⁶ The dissent in *Cantor* maintained: "[The utility] proposes a tariff and, if the tariff is approved, it obeys its terms. The first action cannot give rise to antitrust liability under *Noerr* and the second—compliance . . . under command of state law—is immune from antitrust liability under *Parker* and *Goldfarb*." 428 U.S. at 624 (Stewart, J., dissenting). Surely, if antitrust liability were to arise from lobbying efforts of private parties, the power of state governments to impose restraints would be impaired. It follows that "a rule permitting Sherman Act liability to arise from private parties' compliance with [state] rules would impair the exercise of State power." *Id.* at 623 (Stewart, J., dissenting). See Note, *supra* note 30, at 904-05. Nevertheless, the plurality apparently believed that the Michigan Public Service Commission was merely "rubber-stamping" the utility's tariffs. See *infra* note 70 and accompanying text.

⁶⁷ See 428 U.S. at 584-85; see also 7 J. VON KALINOWSKI, *supra* note 44, § 46.03(2)(c), (3).

⁶⁸ 428 U.S. at 603.

iting the flow of information to decisionmaking bodies, a result the *Noerr* doctrine was designed to foreclose,⁶⁹ *Cantor's* approach might actually guarantee that the decisionmakers explore all sides of an issue as part of the process of articulating a regulatory mandate.⁷⁰

Bates v. State Bar: ESTABLISHING A THREE-STEP TEST FOR *Parker* PROTECTION

All of the disagreement that marred the *Cantor* Court's exploration of the "sovereign compulsion" aspects of the *Parker* doctrine dissipated the following year in *Bates v. State Bar*.⁷¹ The *Bates* dispute involved the suspension of two Arizona attorneys who placed an advertisement in a newspaper, listing their fees in violation of an Arizona disciplinary rule.⁷² In defending against their suspension, the attorneys argued that the ban on attorney

⁶⁹ See Fischel, *supra* note 65, at 82-83; *supra* note 65 and accompanying text.

⁷⁰ See *supra* text accompanying note 67. Justice Blackmun agreed that "some degree of affirmative articulation by the State of its conscientious intent to sanction the challenged scheme" was useful, but concluded that neither mere authorization nor articulation was enough. 428 U.S. at 610 (Blackmun, J., concurring). Therefore, "state-sanctioned anticompetitive activity must fall, like any other, if its potential harms outweigh its benefits." *Id.* (Blackmun, J., concurring). As between purely private activity and state-sanctioned conduct, however, state sanction figures powerfully in the calculus of harm and benefit. *Id.* at 610-11 (Blackmun, J., concurring); see Case Note, *supra* note 62, at 923.

The dissent in *Cantor* severely criticized Justice Blackmun's rationale, arguing that *Goldfarb* clearly refined *Parker* to hold that anticompetitive activity must be compelled by the state, not merely prompted, and that the exemption should be limited to those areas where, "by the State's own judgment," the state sovereign interest is strongest. 428 U.S. at 637 (Stewart, J., dissenting). The dissent, therefore, objected to the Court's adoption of an approach that permits the federal judiciary to substitute its judgment for that of the state in determining whether anticompetitive measures are "sufficiently central . . . to a judicial conception of the proper scope of state utility regulation." *Id.* at 630 (Stewart, J., dissenting). Notwithstanding these admonitions, the plurality was unconcerned with the discretion vested in the judiciary to refine and define the state action exemption, *id.* at 603, since under the commerce clause state activity is already subject to searching review, *id.* at 612 (Blackmun, J., concurring).

One commentator has summarized the debate concerning *Cantor* as follows:

Cantor should be narrowly interpreted to mean that a private party may not shield himself from antitrust liability by having a regulatory body rubber-stamp a tariff which includes a report or description of an anticompetitive activity. Thus, *Cantor* does not undercut *Noerr*, but rather, represents a realistic assessment of the regulatory process.

Fischel, *supra* note 65, at 92.

⁷¹ 433 U.S. 350 (1977).

⁷² *Id.* at 354-55; see 72A ARIZ. REV. STAT. ANN. R. 29(a) (Supp. 1982-1983) (original version at ARIZ. REV. STAT. ANN. R. 29(a) (Supp. 1976), incorporating MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1976)).

advertising violated the Sherman Act and unduly infringed upon their first amendment rights.⁷³ Justice Blackmun, speaking for the Court,⁷⁴ extended *Parker's* protection to the challenged disciplinary rule holding that it was "an activity of the State of Arizona acting as sovereign."⁷⁵ In a reexamination of *Cantor*, Justice Blackmun detailed several elements that distinguished it from *Bates*, and, in effect, articulated a three-step test for *Parker* protection.

The Court first noted that the claim in *Bates* was brought against the Arizona Supreme Court while the defendant in *Cantor* was a private party.⁷⁶ In Justice Blackmun's view, "*Cantor* would have been an entirely different case if the claim had been directed against a public official or public agency, rather than against a private party."⁷⁷ Second, the Court observed that there was no state regulatory interest in *Cantor's* light bulb exchange program while the state's interest in regulating the legal profession in *Bates* was clearly well-established.⁷⁸ Third, Justice Blackmun acknowledged

⁷³ 433 U.S. at 356.

⁷⁴ The entire Court agreed that the *Parker* rule protected appellee from antitrust liability. *See id.* at 363. Four members dissented, however, from the majority's invalidation of the statutory prohibition of legal advertising. *See id.* at 386 (Burger, C.J., concurring and dissenting, joined by Stewart, J.); *id.* at 389 (Powell, J., concurring and dissenting); *id.* at 404 (Rehnquist, J., dissenting in part).

⁷⁵ *Id.* at 356-57 (quoting *In re Bates*, 113 Ariz. 394, 397, 555 P.2d 640, 643 (1976) (en banc)). The *Bates* Court reaffirmed the reasoning of *Goldfarb* and *Cantor*, but distinguished the present case on its facts. 433 U.S. at 359-63. Noting that the minimum fee schedules in *Goldfarb* deserved no antitrust exemption because they were not mandated by the state, Justice Blackmun contended that the advertising restraint in *Bates* was "'compelled by direction of the State acting as a sovereign,'" the restraint being affirmatively promulgated by the state supreme court. *See id.* at 359-60 (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975)).

⁷⁶ 433 U.S. at 361.

⁷⁷ *Id.* at 361. Justice Blackmun observed that the *Cantor* plurality appeared to read *Parker* as applicable only to suits against public officials. *Id.* at 361 n.13. It should be noted, however, that since Justice Blackmun and the Chief Justice appeared to join *Cantor's* three dissenters in holding that *Parker* could apply regardless of the identity of the defendants, a majority of the *Cantor* Court apparently had rejected this view. *See Cantor v. Detroit Edison Co.*, 428 U.S. 579, 603-04 (1976) (Burger, C.J., concurring in part, dissenting in part); *id.* at 613 n.5 (Blackmun, J., concurring). Perhaps Justice Blackmun's comment in *Bates* refers to his *Cantor* concurrence, in which he acknowledged that a state might be more likely to receive *Parker* protection than would a private entity under his "rule of reason" analysis. *See id.* at 610-11 (Blackmun, J., concurring) (fact of state promulgation of anticompetitive regulation influential in striking balance between harm and benefit of such regulation).

⁷⁸ 433 U.S. at 361-62. Emphasizing the fact that "[f]ederal interference with a State's traditional regulation of a profession is entirely unlike the intrusion the Court sanctioned in *Cantor*," Justice Blackmun observed that *Bates* was presaged by *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748 (1976), in which the Court acknowledged that the

that while the light bulb program in *Cantor* was initiated by a private party qualified only by the passive acceptance of the state regulatory commission,⁷⁹ the disciplinary rules in *Bates* were viewed as "reflect[ing] a clear articulation of the State's policy with regard to professional behavior."⁸⁰ In a summary that touched the very heart of the *Parker* doctrine, the Court explained that where a state's role is readily apparent and its intent is lucidly and positively expressed, there is little justification for the sentiment that federal policy would be unjustly subordinated to the concerns of the state.⁸¹

The *Bates* opinion fully appreciates the state action exemption's precarious perch between federal antitrust policy and the sovereign functions of the states.⁸² The three steps identified by the Court as crucial in determining the applicability of *Parker* protection were clearly designed to maintain that delicate balance. The initial inquiry of whether the state was the real party-in-interest would seem, at first glance, to unduly restrict the autonomy of the states.⁸³ A closer reading, however, suggests that the Court viewed the state's active supervision of an anticompetitive activity as essential for application of the exemption doctrine. Such a reading strengthens the Court's claim that the sovereign function is crucial to the separate existence of the states.⁸⁴ Locating the pres-

State of Virginia was free to regulate the professional conduct of its pharmacists or shelter them from competition. *Id.* at 362 & n.16 (quoting *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 770 (1976)).

⁷⁹ See *supra* note 75.

⁸⁰ 433 U.S. at 362. In addition to reflecting state policy, the disciplinary rules in *Bates* were "subject to pointed re-examination by the policymaker—the Arizona Supreme Court—in enforcement proceedings." *Id.*

⁸¹ *Id.*

⁸² See *id.* The Court indicated that active participation by the state in revision of the rules of professional behavior lessened its concern that "federal policy [was] being unnecessarily and inappropriately subordinated to state policy." *Id.*; see also Rogers, *Municipal Antitrust Liability in a Federalist System*, 1980 ARIZ. ST. L.J. 305, 312.

⁸³ The *Cantor* dissenters believed that permitting municipalities to be punished under the antitrust laws for conduct in compliance with state law necessarily restricts state action. See *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 622-23 (1976) (Stewart, J., dissenting); accord *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 & n.17 (1961). Commentators have criticized the rule limiting the state action exemption to governmental entities, disapproving an overly restrictive interpretation of the exemption. See, e.g., Handler, *The Current Attack on the Parker v. Brown State Action Doctrine*, 76 COLUM. L. REV. 1, 8-9 (1976); Posner, *supra* note 26, at 720-21; Simmons & Fornaciari, *State Regulation as an Antitrust Defense: An Analysis of the Parker v. Brown Doctrine*, 43 U. CIN. L. REV. 61, 68-69 (1974).

⁸⁴ A function that is crucial to the separate existence of the states necessarily would be

ence of a clear articulation of state policy is thus closely connected with the question of who is the real party-in-interest.⁸⁵

Indeed, the first and third steps provide a means by which the Court can measure the importance to the state of a particular anticompetitive program. As such, they provide a marginally intrusive means by which the judiciary may reconcile the tension between antitrust policy and the sovereignty of the states. This standard is in contrast, however, to the Court's second inquiry into whether the state possessed an independent regulatory interest in the anticompetitive rationale.⁸⁶ This latter investigation invites the Court to scrutinize the substance of states' regulatory assumptions, thereby subjecting itself to charges of usurping legislative functions.⁸⁷

Lafayette: THE *Parker* DOCTRINE AND MUNICIPAL GOVERNMENT

Although *Bates* appeared to calm the unsettled waters left in the wake of *Cantor*, *City of Lafayette v. Louisiana Power & Light*

a governmental function, and its exercise, therefore, would not constitute an antitrust violation under the *Parker* rule. See *Parker v. Brown*, 317 U.S. 341, 352 (1943) (state adoption of prorate agricultural program constituted "the execution of a governmental policy" and thus not a Sherman Act violation). It is the determination of what kinds of functions are essential to the separate existence of state government that makes application of this test problematic. See *supra* note 30.

⁸⁵ The *Bates* Court apparently believed that even if an independent state interest in promulgating the disciplinary regulations were found to exist, unless the regulations clearly expressed a vital state policy they could still be found violative of the antitrust laws. See *Bates v. State Bar*, 433 U.S. 350, 362 (1977); Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 HARV. L. REV. 435, 438 (1981); Note, *supra* note 44, at 722-24.

⁸⁶ The existence or nonexistence of an "independent" state regulatory interest in the anticompetitive regulation under scrutiny generally has been evaluated in terms of Justice Blackmun's economic impact test. This test weighs the economic "harms" inflicted upon competition by the regulation against the benefits the regulation is meant to produce, upholding the regulation only if the benefits are greater. See *Bates v. State Bar*, 433 U.S. 350, 361-62 (1977) (Blackmun, J.); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 610-11 (1976) (Blackmun, J., concurring); Page, *supra* note 3, at 1124-25. Professor Page argues that such an economic balancing compels evaluation of the merits of state legislation in an inappropriate forum and thus infringes upon the rights of states to engage in economic regulation. See Page, *supra* note 3, at 1124-25; see also I P. AREEDA & D. TURNER, *supra* note 56, ¶ 215c, at 98. This standard has also been criticized as an undesirable reinstatement of substantive due process in the context of economic regulation. See Verkuil, *supra* note 27, at 334-35. But see Posner, *supra* note 26, at 707-12, 714-20 (approving the economic standard only if used in conjunction with other tests).

⁸⁷ See *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 630-31 (1976) (Stewart, J., dissenting). Inquiry into the justifications for a state regulation, it has been argued, undermines *Parker's* deference to the judgments of the state legislatures. See Page, *supra* note 3, at 1123.

Co.⁸⁸ brought a new wave of judicial turbulence. The dispute arose when the city of Lafayette, organized under the laws of Louisiana,⁸⁹ charged the Louisiana Power & Light Co. with various antitrust violations.⁹⁰ The utility counterclaimed, seeking damages and injunctive relief for certain antitrust offenses allegedly committed by Lafayette.⁹¹ Faced with the task of determining if the city of Lafayette was automatically exempt from the antitrust counterclaim, the Supreme Court was unable to recapture the solidarity characteristic of *Bates*. Instead, only five Justices agreed that municipal governments did not automatically qualify for an exemption, while no more than a plurality of four could agree on the proper standards for applying the state action exemption to cities.⁹²

In an acknowledgement of the grave importance of the federal policy favoring antitrust enforcement, Justice Brennan, in his majority opinion, was able to characterize only two policies as possessing sufficient weight to bring an activity within an implied exemption from antitrust liability.⁹³ The first was the *Noerr* exemption of

⁸⁸ 435 U.S. 389 (1978).

⁸⁹ The State of Louisiana "grant[ed] . . . [the City of Lafayette] power to own and operate electric utility systems both within and beyond their city limits," and the city exercised this power. *See id.* at 391 & nn.1-2, 392.

⁹⁰ *Id.* at 392 n.5. The city asserted that the defendants conspired to restrain trade and to monopolize "the generation, transmission, and distribution of electric power" by obstructing the building, financing and operation of competing power plants, by refusing to sell power at wholesale rates, and "by engaging in boycotts . . . sham litigation and other improper means . . ." *Id.*

⁹¹ *Id.* at 392. In its counterclaim, Louisiana Power & Light alleged that the city had conspired with a private electric cooperative to delay the construction of a nuclear power plant, and had also attempted to restrict competition by using debenture covenants, long-term power supply contracts, and agreements conditioning the continuance of water and gas supplies on purchase of electrical power from the city. *Id.* at 392 n.6.

⁹² The Chief Justice and Justices Marshall, Powell, and Stevens joined Justice Brennan in concluding that municipalities are not entitled to an automatic exemption from the antitrust laws. *See id.* at 403-08. Chief Justice Burger was unable to concur in the plurality's rationale, reasoning that any for-profit organization, even a municipality, remains subject to the Sherman Act. *See id.* at 418-20, 425-26 (Burger, C.J., concurring in part, dissenting in part). The plurality thought that the *Parker* rule should absolve a city from liability when the city's action was the fruit of a state policy of fostering such monopolies. *See id.* at 413-17. The dissenters adopted a middle ground asserting that municipalities, by virtue of electoral accountability, are "a far cry from the private accumulations of wealth that the Sherman Act was intended to regulate." *Id.* at 430 (Stewart, J., dissenting). Since municipal conduct falls outside the ambit of the antitrust laws' policy, *Parker* protects such conduct whether or not it is rooted in state policy. *Id.* at 432-34 (Stewart, J., dissenting).

⁹³ *Id.* at 399-400. Justice Brennan noted that the presumption against exclusions is so strong that "even when Congress by subsequent legislation establishes a regulatory regime

protecting the activities of individuals seeking to obtain the passage of legislation either favorable to themselves or unfavorable to competitors.⁹⁴ The *Parker* doctrine was identified as the only other policy worthy of overriding the fundamental considerations promoted by the antitrust laws.⁹⁵ The *Lafayette* majority emphasized that the *Parker* and *Noerr* doctrines shared a "potential conflict with policies of signal importance in our national tradition and governmental structure of federalism."⁹⁶ Yet the mere fact that antitrust enforcement implicated the policies promoted by either doctrine was not considered sufficient to overcome the presumption against implied exclusions. The Court would offer these exemptions only when the policies were severely impinged.⁹⁷

Unable to discover any reason independent of *Parker* for shielding the municipality, Justice Brennan turned his attention to

over an area of commercial activity, the antitrust laws will not be displaced unless it appears that the antitrust and regulatory provisions are plainly repugnant." *Id.* at 398; see *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 & n.28 (1963).

⁹⁴ 435 U.S. at 399; see *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961). The *Noerr* exemption was accorded lobbying railroads to avoid "imped[ing] the open communication between the polity and its lawmakers" and to avoid a "threat to the constitutionally protected right of petition." 435 U.S. at 399. This "open communication" was perceived as being "vital to the functioning of a representative democracy." *Id.* For a general discussion of lobbyists' exemptions, see 1 P. AREEDA & D. TURNER, *supra* note 56, ¶¶ 201-05; Comment, *Noerr-Pennington Antitrust Immunity and Proprietary Government Activity*, 1981 ARIZ. ST. L.J. 749, 755-61.

⁹⁵ 435 U.S. at 400.

⁹⁶ *Id.*

⁹⁷ *Id.* The majority believed that the city of Lafayette failed to demonstrate the possible existence of any countervailing policies that could justify an antitrust exemption. To the argument that "it would be anomalous to subject municipalities to criminal and civil penalties imposed upon violators of the antitrust laws," the Court responded that municipalities have been required to comply with other federal laws that impose criminal sanctions. *Id.*; see, e.g., *California v. United States*, 320 U.S. 577, 585-86 (1944) (Shipping Act of 1916 applied against a city and a state); *Union Pacific R.R. v. United States*, 313 U.S. 450, 463-64, 474 (1941) (city criminally liable under the Elkins Act for collaborating with a common carrier to grant "discriminatory advantages" to shippers). More importantly, in rejecting the claim that antitrust laws should not apply to municipal acts performed as public services and not for private profit, the majority observed, "[i]f municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established." 435 U.S. at 408. This view of the federal antitrust statutes is in accord with other Supreme Court decisions which held that these statutes should be broadly interpreted in order to meet the goals of federal antitrust policy. See, e.g., *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110-11 (1980); *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972); see also *Pfizer Inc. v. Government of India*, 434 U.S. 308, 315-18 (1978) (Sherman Act broad enough to include antitrust suits brought against American firms by foreign powers).

the central question of whether *Parker's* protection was available to political subdivisions of the state.⁹⁸ A plurality of the Court rejected outright any assertion that mere status as a governmental entity triggers the protection described in *Parker*. Since cities did not enjoy independent sovereign status, federal deference was proportionally limited.⁹⁹ The plurality refused to extend automatic protection under the *Parker* doctrine, noting that municipalities would be exempt from antitrust liability only to the extent that they operate "pursuant to state policy [designed] to displace competition with regulation or monopoly public service."¹⁰⁰

Chief Justice Burger's concurring opinion complained that too much judicial energy was spent determining the Sherman Act's reach over the anticompetitive activities of the states and localities and neglected the more significant issue of whether its reach extended to the "proprietary enterprises of municipalities."¹⁰¹ In developing a dichotomy in which the nature of the act—governmental or proprietary—is dispositive, the Chief Justice refused to exempt the municipal activity from antitrust liability, stating that the activity of Lafayette was "clearly a business activity; activity in which a profit was realized."¹⁰²

Dissenting, Justice Stewart, joined by Justices White, Blackmun, and Rehnquist, argued that both the plurality and the Chief Justice had misconstrued *Parker*.¹⁰³ Justice Stewart stressed that

⁹⁸ 435 U.S. at 408.

⁹⁹ *Id.* at 412; accord *Lake Country Estates, Inc., v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979) (counties and municipalities not protected under the eleventh amendment unless Congress and the state so agree); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890) (county is different than the state for eleventh amendment purposes). Justice Brennan reemphasized, however, that the plurality opinion neither proscribed municipal monopolies nor threatened "legitimate exercise[s] of governmental power." 435 U.S. at 416-17. In conceding that a subordinate government will not be able to claim *Parker* protection as easily as a state government, Justice Brennan argued that if it appeared from the municipal charter of authority that the state contemplated the anticompetitive activity, the *Parker* rule would apply. *Id.* at 414-15. Detailed legislative authorization would not be required. *Id.* at 415.

¹⁰⁰ 435 U.S. at 413.

¹⁰¹ *Id.* at 422 (Burger, C.J., concurring in part, dissenting in part).

¹⁰² *Id.* at 418 (Burger, C.J., concurring in part, dissenting in part). The Chief Justice believed that the facts showed this controversy to be a mere dispute between competing utilities. *Id.* at 419 (Burger, C.J., concurring in part, dissenting in part). Justice Marshall read Chief Justice Burger's requirement that the state action exemption be no broader than necessary to serve the states' "legitimate purposes" as implicitly incorporating a requirement that the state actively impose the anticompetitive restraint "as an act of government" before the exemption would apply. *Id.* at 417-18 (Marshall, J., concurring).

¹⁰³ *Id.* at 430-34 (Stewart, J., dissenting). Justice Blackmun did not share the dissent-

where an anticompetitive activity is governmental, rather than private in nature, no violation of the Sherman Act should be found.¹⁰⁴ The dissent identified the fundamental error of the plurality and the Chief Justice as the "failure to recognize the difference between private activities authorized or regulated by government on the one hand, and the actions of the government itself on the other."¹⁰⁵ The dissent was certain that municipalities, as public entities, were entitled to *Parker's* protection.¹⁰⁶ Justice Stewart accordingly criticized the *Lafayette* decision as an incursion into the province of state and local government,¹⁰⁷ that limits the inherent flexibility of a federal system¹⁰⁸ "by demanding extensive legislative control over municipal action."¹⁰⁹

ers' view that inquiry into the nature of municipal activity would result in judicial interference with state legislative decisionmaking. *Id.* at 441 (Blackmun, J., dissenting). He acknowledged, however, that to grant immunity to a municipality that engaged in anticompetitive action in combination with private parties would be to extend to municipalities greater protection from liability than that enjoyed by the states. *Id.* (Blackmun, J., dissenting).

¹⁰⁴ *Id.* at 428-30 (Stewart, J., dissenting).

¹⁰⁵ *Id.* at 428 (Stewart, J., dissenting). In arguing that municipalities should not be treated as private persons for Sherman Act purposes, the dissent emphasized that city governments are accountable to the public through the electoral process. *Id.* at 430 (Stewart, J., dissenting). This accountability, it was asserted, distinguishes municipalities from "the private accumulations of wealth" against which the Sherman Act was aimed. *Id.* (Stewart, J., dissenting). It appears that the dissenters would apply the *Parker* exemption whenever the defendant is a public entity. *See id.* at 431-32 (Stewart, J., dissenting).

The Chief Justice, on the other hand, insisted that prior decisions of the Court based the granting of the state action exemption upon whether the activity in question is governmental or proprietary in nature. *See id.* at 418 (Burger, C.J., concurring in part, dissenting in part). The dissenters criticized the governmental-proprietary standard on the ground that the distinction between governmental and proprietary functions cannot be made with certainty. *See id.* at 433 (Stewart, J., dissenting). Although Chief Justice Burger has suggested that this determination merely necessitates a showing of "functions essential to [a state's] separate and independent existence," *id.* at 423 (Burger, C.J., concurring in part, dissenting in part) (quoting *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976)), commentators have discounted this type of analysis as circular, since an "essential" function of state government must necessarily be governmental, *see Note, Municipal Bankruptcy, the Tenth Amendment and the New Federalism*, 89 HARV. L. REV. 1871, 1881 (1976).

¹⁰⁶ 435 U.S. at 429-30 (Stewart, J., dissenting).

¹⁰⁷ *Id.* at 434 (Stewart, J., dissenting).

¹⁰⁸ *Id.* at 438 (Stewart, J., dissenting).

¹⁰⁹ *Id.* at 435 (Stewart, J., dissenting). It was feared that adoption of an activity-based standard would impair the ability of states to delegate power to municipalities, burdening state governments with purely local concerns. *Id.* at 434-35 (Stewart, J., dissenting). Additionally, both Justices Stewart and Blackmun feared that the impact of antitrust awards on local governments could be financially ruinous. *See id.* at 439-41 (Stewart, J., dissenting); *id.* at 442-43 (Blackmun, J., dissenting). *But see Curtin, Antitrust Comes to the Cities—Analysis of City of Lafayette v. Louisiana Power & Light Co. and Its Effect on Municipal Anti-*

A central thrust of the dissent's concern was that the *Lafayette* result presented a serious setback to the decentralization movement fostered by *National League of Cities v. Usery*.¹¹⁰ In *Usery*, Justice Rehnquist recognized the sovereignty of the states as an outer limit to the reach of Congress' commerce power.¹¹¹ Basing his opinion partly upon the historic balance of power between the states and the national government, Justice Rehnquist ruled that, absent some compelling national interest that necessitated state compliance with national guidelines, those traditional state activities integral to a state's separate existence in the federal system would be beyond the reach of national regulation.¹¹²

The *Usery* opinion, by preserving the attributes of sovereignty and the functions essential to the "separate and independent existence" of the states,¹¹³ contemplated a decentralized government that would permit local problems to be dealt with in a local forum.¹¹⁴ It is not all that clear that the *Lafayette* decision actually sabotages these principles, despite the dissent's assertions to the contrary. Certainly Chief Justice Burger's concurring opinion in *Lafayette*, with its focus upon the nature of the entity's activities, made the governmental-proprietary distinction in order to diminish the impact of antitrust enforcement on the sovereign character

trust Liability, 5 U. DAYTON L. REV. 7, 36-37 (1980) (courts unlikely to impose treble damages on municipalities unless municipal officials knowingly become involved in private conspiracies in restraint of trade).

¹¹⁰ 426 U.S. 833 (1976).

¹¹¹ *Id.* at 852. The Court in *Usery* struck down amendments to the Fair Labor Standards Act that extended the Act's minimum wage and maximum hour provisions to virtually all employees of state and municipal governments. *Id.* at 836; see Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6, 88 Stat. 55.

¹¹² 426 U.S. at 852. One example of a case in which a "compelling national interest" could be said to justify encroachment upon state sovereignty is *Fry v. United States*, 421 U.S. 542 (1975). In *Fry*, the Court upheld the constitutionality of federally imposed limits on annual wage increases for state employees. *Id.* at 545. Citing *Maryland v. Wirtz*, 392 U.S. 183 (1968), the Court deemed the statute a justifiable intrusion upon state sovereignty because it was enacted to counter an economic emergency of national proportions and was not overly intrusive. 421 U.S. at 548. When it overruled *Maryland v. Wirtz* in *Usery*, the Court distinguished *Fry* on factual grounds. 426 U.S. at 852-53.

¹¹³ 426 U.S. at 851-52. State functions that the *Usery* Court deemed worthy of protection include sanitation, public health services, fire prevention, police protection, and the preservation of parks and recreational facilities. *Id.* at 851.

¹¹⁴ See *id.* at 851-52. Advocates of the majority approach in *Usery* have emphasized the role of the states as a testing ground for innovative social programs. See, e.g., *FERC v. Mississippi*, 102 S. Ct. 2126, 2152-53 (1982) (O'Connor, J., concurring in part, dissenting in part); Note, *supra* note 105, at 1886.

of the states.¹¹⁵ The *Lafayette* plurality itself indicated its concern with preserving the attributes of state sovereignty by emphasizing the availability of an exemption for an official action directed by the states.¹¹⁶

Justice Marshall, in his *Lafayette* concurrence, recognized that the common ground between the plurality opinion and that of Chief Justice Burger was a concern for balancing state sovereignty with national policy.¹¹⁷ If this recognition is accurate, the real threat may be more subtle than a direct assault upon the federalism principles underlying *Usery*.¹¹⁸ Justice Marshall's inquiry as to the extent a state activity should be permitted to restrict competition¹¹⁹ is highly reminiscent of the second step in the *Bates* inquiry.¹²⁰ Justice Stewart's dissent meanwhile, in response to this willingness to scrutinize state action, registered a strong criticism that the "decision will cause excessive judicial interference not only with the procedures by which a State makes its governmental decisions, but with their substance as well."¹²¹

Thus, after *Lafayette*, the state action exemption was characterized not only by a divided Court, but also by an interpretation of the *Parker* doctrine that posed serious problems for intergovern-

¹¹⁵ See 435 U.S. at 424-26 (Burger, C.J., concurring in part, dissenting in part).

¹¹⁶ *Id.* at 408-10. The *Lafayette* plurality denied that cities are sovereign, and felt that widespread economic disruption could occur if local governments were allowed to place their interests above those dictated by federal antitrust policy. *Id.* at 411-13.

¹¹⁷ See *id.* at 417-18 (Marshall, J., concurring).

¹¹⁸ The plurality opinion in *Lafayette* suggests that the state action exemption should not be granted unless the anticompetitive state policy in question is supported by federal policy. See 435 U.S. at 409 & n.39. Justice Brennan, author of the opinion, emphasized that in *Parker* the California Agricultural Prorate Act was consistent with existing federal agricultural policy. *Id.* The same argument has been proposed by several commentators. See, e.g., Jacobs, *State Regulation and the Federal Antitrust Laws*, 25 CASE W. RES. L. REV. 221, 249 (1975); cf. Verkuil, *supra* note 27, at 343 n.77 (test based on concurrence of state and federal policies fails to resolve conflict between federal interest in antitrust policy and preservation of federalism).

¹¹⁹ See 435 U.S. at 418 (Marshall, J., concurring).

¹²⁰ Compare *Lafayette*, 435 U.S. at 389 (Marshall, J., concurring) ("state policy" test implies that only action which meets state policy goals without being overly broad will merit exemption) with *Bates*, 433 U.S. at 361-62 ("independent" state regulatory interest was the important missing element in *Cantor*).

¹²¹ 435 U.S. at 438 (Stewart, J., dissenting). Justice Stewart believed that a standard which grounded antitrust immunity on the nature of state economic regulation would require specific delegations of state power in order to sustain local governmental action in the federal courts. *Id.*; accord Curtin, *supra* note 109, at 19-21. Additionally, Justice Stewart contended that the vagueness of the *Lafayette* standard would discourage state experimentation with economic regulation. 435 U.S. at 439 (Stewart, J., dissenting); see *supra* note 114.

mental relations. First, by noting that cities are not themselves sovereign, and, therefore, not entitled to the same deference accorded states, the Court threatened to stifle experimentation at the local level. Second, a plurality, and perhaps a majority, of the Court fashioned a *Parker* test that invited "the sort of wide-ranging inquiry into the reasonableness of state regulations" that the Supreme Court had abandoned when it rejected *Lochner*.¹²²

Fox AND *Midcal*: A CONSENSUS RETURNS TO THE COURT

Shortly after *Lafayette*, the state action exemption was extended in *New Motor Vehicle Board v. Orrin W. Fox Co.*,¹²³ by a relatively united Court.¹²⁴ In *Fox*, the California Automobile Franchise Act¹²⁵ required automobile manufacturers to secure the approval of the California New Motor Vehicle Board before opening or transferring a dealership if existing dealers protested.¹²⁶ *Fox*, recently assigned by General Motors to operate a new franchise, brought this action when the vehicle board, in response to the protests of threatened dealers, notified *Fox* that he could not open his outlet pending hearings on whether there existed good cause for not permitting the new dealership.¹²⁷ It was contended that the Act conflicted with antitrust principles "by delaying the establishment of automobile dealerships whenever competing dealers protest" thereby giving effect to restraints of trade.¹²⁸ Justice Brennan

¹²² 435 U.S. at 439 (Stewart, J., dissenting); see *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963); *infra* note 182. See generally Comment, *supra* note 30, at 140-41.

¹²³ 439 U.S. 96 (1978).

¹²⁴ Justice Brennan wrote for the majority, joined by Chief Justice Burger and Justices Stewart, White, Marshall, and Rehnquist. Justice Blackmun, joined by Justice Powell, concurred in the result. Justice Stevens filed a dissenting opinion.

¹²⁵ CAL. VEH. CODE §§ 3062-3063 (West Supp. 1978).

¹²⁶ *Id.* § 3062.

¹²⁷ 439 U.S. at 104. Under the California Vehicle Code, when a competing franchisee files a notice of protest with the vehicle board concerning the establishment or relocation of a dealership within a particular market area, the franchisor is not permitted to establish or relocate the proposed dealership until the board has held a hearing pursuant to section 3066 of the California Vehicle Code or thereafter if the board has good cause for concluding that the proposed dealership is impermissible. CAL. VEH. CODE § 3062(a) (West Supp. 1978). Where several franchisees notify the vehicle board of their protest, hearings may be consolidated to facilitate resolution. *Id.*

¹²⁸ 439 U.S. at 109. Initially, *Fox* and General Motors contended that the statutory scheme violated due process since it entitled "a protesting dealership to a summary administrative adjudication in the form of a notice having the effect of a temporary injunction restraining . . . General Motors' exercise of its right to franchise at will." *Id.* at 104. Disagreeing, the *Fox* majority held that "[t]he Board's notice has none of the attributes of an

accorded the regulation state action exemption since the regulatory scheme contained a "clearly articulated and affirmatively expressed" intention to restrict unbridled business freedom in establishing and relocating automobile dealerships.¹²⁹

Perhaps the greatest criticism of extending *Parker's* protection to the *Fox* context arises from the private character of the parties who may trigger the review procedure. Justice Stevens' dissent, although directed at the due process aspects of the case,¹³⁰ raised this very issue when he complained that the statute gave private individuals the ability to invoke states' power to limit the business freedom of their competitors.¹³¹ Of crucial importance in *Fox* was the fact that since the inception of the dealership location program, 117 protests had been filed before the reviewing agency.¹³² As in *Bates*, this reexamination indicated the state's awareness and active supervision of the scheme.¹³³ In such circumstances, where a program was so clearly favored and scrutinized by a state, application of antitrust principles could place unwarranted strains on state and local power. Accordingly, the Court held that "[p]rotesting dealers who invoke in good faith their statutory right to governmental action in the form of a Board determination that there is good cause for not permitting a proposed dealership do not violate the Sherman Act."¹³⁴

California Retail Liquor Dealers Ass'n v. Midcal Aluminum,

injunction," *id.*, and could "hardly be characterized as an administrative order [since] [i]ssuance of the notice did not involve the exercise of discretion," *id.* at 105. According to the majority, "[e]ven if the right to franchise . . . constituted a protected interest . . . , California's Legislature was still constitutionally empowered to enact a general scheme of business regulation that imposed reasonable restrictions upon the exercise of the right." *Id.* at 106. Finally, notwithstanding that the board only delayed franchise establishment or relocation when existing franchisees elected to protest, *id.* at 109, the Court rejected the assertion that the scheme was an impermissible delegation of state power to private persons, *id.* at 108-09. In the Court's opinion, "[a]n otherwise valid regulation is not rendered invalid simply because those whom the regulation is designed to safeguard may elect to forego its protection." *Id.* at 109.

¹²⁹ *Id.*

¹³⁰ *Id.* at 127 (Stevens, J., dissenting); see Richards, *supra* note 5, at 553 n.95.

¹³¹ 439 U.S. at 127 (Stewart, J., dissenting). Justice Stewart stated that the California statute "blatantly offends the principles of fair notice, attention to the merits, and neutral dispute resolution that inform the Due Process Clause of the Fourteenth Amendment." *Id.*

¹³² *Id.* at 110 n.14. In his dissent, Justice Stewart reasoned that since only one protest of 117 filed was sustained, over 99% were found to be inconsistent with the policy of the statute and that therefore there was no real evidence that California had a policy against new dealerships. *Id.* at 120 (Stewart, J., dissenting).

¹³³ See 7 J. VON KALINOWSKI, *supra* note 44, § 46.03[2], at 46-28.

¹³⁴ 439 U.S. at 110; see *Sherman Antitrust Act Comment*, *supra* note 1, at 155 & n.126.

*Inc.*¹³⁵ provided the Court with an opportunity to reinforce the *Parker* test employed in *Fox*. *Midcal* involved an antitrust challenge to a California regulation that required wine producers, wholesalers and rectifiers to file fair trade contracts or price schedules with the state.¹³⁶ Wholesalers were required to establish a resale price schedule and any licensee selling below the established prices was subject to fines, license suspension or license revocation.¹³⁷ *Midcal* Aluminum was charged with selling wine at prices below those established in its price schedules and for selling wine for which no fair trade contract or schedule had been filed.¹³⁸ After stipulating that the allegations were true, the company sought an injunction against the wine pricing system based upon its anticompetitive nature.¹³⁹

The Supreme Court scrutinized the scheme in order to determine whether the state's participation in the activity rose to the level required by *Parker*.¹⁴⁰ Justice Powell, speaking for a unanimous Court, examined the prior state action exemption cases, recalling that the *Fox* Court had extended the exemption to California's automobile dealer location program based upon: (1) the state's "clearly articulated and affirmatively expressed" intention to replace entrepreneurial liberty with regulation,¹⁴¹ and (2) the active supervisory role assumed by the state.¹⁴² The *Midcal* Court thus identified these two factors as prerequisites to receiving an exemption under the *Parker* doctrine. Although the wine pricing

¹³⁵ 445 U.S. 97 (1980).

¹³⁶ *Id.* at 99. The California statute provided:

Each wine grower, wholesaler licensed to sell wine, wine rectifier, and rectifier shall:

(a) Post a schedule of selling prices of wine to retailers or consumers for which his resale price is not governed by a fair trade contract made by the person who owns or controls the brand.

(b) Make and file a fair trade contract and file a schedule of resale prices, if he owns or controls a brand of wine resold to retailers or consumers.

CAL. BUS. & PROF. CODE § 24,866 (West 1964) (repealed 1980).

¹³⁷ CAL. BUS. & PROF. CODE § 24,880 (West 1964) (repealed 1980).

¹³⁸ 445 U.S. at 100.

¹³⁹ *Id.* *Midcal* Aluminum challenged California's fair trade posting laws, which regulated wholesale and retail sale of wine in the state. *Id.* The California Court of Appeals, relying upon the California Supreme Court decision in *Rice v. Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d 431, 579 P.2d 476, 146 Cal. Rptr. 585 (1978), had already held that California's wine pricing system violated the Sherman Act. 90 Cal. App. 3d 979, 981, 153 Cal. Rptr. 757, 758 (Ct. App. 1979).

¹⁴⁰ 445 U.S. at 103.

¹⁴¹ *Id.* at 105 (quoting *Fox*, 439 U.S. at 109); see *supra* text accompanying note 128.

¹⁴² 445 U.S. at 105.

scheme met the first standard, the Court denied the program an exemption based upon its failure to satisfy the second standard of active state participation.¹⁴³

By confining its *Parker* analysis to procedural questions, such as whether the state clearly articulated its regulatory policy and whether it actively supervised the program, the *Midcal* Court appears to have removed the substantive due process element from the state action inquiry.¹⁴⁴ This is not entirely certain, however, as a closer examination of the *Midcal* decision demonstrates. The Court additionally noted that the wine pricing scheme was not sheltered by the twenty-first amendment.¹⁴⁵ The language of the amendment and the federal interest in antitrust enforcement¹⁴⁶ compelled Justice Powell to impose antitrust liability on the Cali-

¹⁴³ *Id.* at 105-06. The Court determined that California had authorized the price-setting and enforced the prices established by private parties, *id.*, but had no further involvement in the program, *id.* at 106. The Court held that the California regulations could not stand because they permitted private parties to engage in price fixing in violation of the Sherman Act. *Id.* In reaching this conclusion, the Court stated "[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price fixing arrangement." *Id.*; see Note, Rice v. Alcoholic Beverage Control Appeals Board: *The Demise of Fair Trade in California*, 3 GLENDALE L. REV. 105, 115 (1978-1979).

¹⁴⁴ See *Sherman Antitrust Act Comment*, *supra* note 1, at 159-60. *Midcal's* two-step test for application of the state action exemption reflects the *Bates* test absent its second factor, see *supra* text accompanying notes 76-80, and appears to sanction a more responsible approach by reducing the potential threat that the Court will scrutinize the wisdom or desirability of state legislation. See text accompanying notes 86-87, 118-21. Every member of the Court appeared to accept this restatement of the state action standard originally articulated by the *Lafayette* plurality. See *Community Communications Co. v. City of Boulder*, 102 S. Ct. at 840, 841 n.14.

¹⁴⁵ 445 U.S. at 114. Section 2 of the twenty-first amendment states: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI, § 2. Section 1 of the amendment repealed the 18th amendment's prohibition on the manufacture, sale, or transportation of liquor. *Id.* § 1.

Section 2 of the twenty-first amendment generally is considered a reservation of power to the states. See 445 U.S. at 106; Note, *The Effect of the Twenty-First Amendment on State Authority to Control Intoxicating Liquors*, 75 COLUM. L. REV. 1578, 1579 (1975); Note, *Retail Price Maintenance for Liquor: Does the Twenty-First Amendment Preclude a Free Trade Market?* 5 HASTINGS CONST. L.Q. 507, 510 (1978). But see Norman's on the Waterfront, Inc. v. Wheatley, 444 F.2d 1011, 1019 (3d Cir. 1971) (section 2 of the twenty-first amendment was not an affirmative grant of power to the states to enact legislation, but merely "allows states to utilize their police powers with respect to liquor in ways which might otherwise offend the Commerce Clause").

¹⁴⁶ 445 U.S. at 110-11. The Court reasoned that the Sherman Act is as important to economic freedom as the Bill of Rights is to personal freedom, and stressed that Congress had exercised its commerce clause power to its full extent when the Sherman Act was approved. *Id.* at 111; see *Atlantic Cleaners & Dryers v. United States*, 286 U.S. 427, 435 (1932).

ifornia wine industry,¹⁴⁷ since the reasons proffered in support of the state program were considered inconsequential.¹⁴⁸ It would seem to follow that when a state statute purports to regulate the importation, sale or distribution of alcohol indirectly, as for example by price setting, the state will have to show a legitimate interest to overcome the federal commerce power.¹⁴⁹ Thus, it remains doubtful that the *Midcal* Court effectively has abandoned the second *Bates* inquiry—the state's interest in regulation—in all situations.

¹⁴⁷ See 445 U.S. at 110. The California courts adopted the view that the state's interest in regulating wine prices included the promotion of temperance and orderly market conditions, *Midcal Aluminum, Inc. v. Rice*, 90 Cal. App. 3d at 984, 153 Cal. Rptr. at 76, and the Supreme Court accepted that finding, 445 U.S. at 111-12.

¹⁴⁸ 445 U.S. at 114. The Court reasoned that the state interests of promoting temperance and creating orderly market conditions were simply unsubstantiated. *Id.* The Court based this conclusion on a California study that indicated a 42% increase in per capita liquor consumption in California during the years that resale price maintenance was in effect. *Id.* at 112.; see CALIFORNIA DEPT. OF FINANCE, ALCOHOL AND THE STATE: A REAPPRAISAL OF CALIFORNIA'S ALCOHOL POLICIES xi, 15 (1974). At the very least, the Court asserted, the study raised doubt as to whether the California laws would promote temperance. 445 U.S. at 112. Moreover, the Court rejected the claim that the laws promoted orderly market conditions, basing its conclusion on a congressional study that indicated that states with fair trade had a higher rate of firm failures than did free trade states. *Id.* at 113 (citing S. Rep. No. 466, 94th Cong., 1st Sess. 13 (1975), reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1569, 1571). Thus, in weighing the state's interest in promoting temperance and orderly market conditions against the federal interest in promoting a competitive economy, the Court concluded that "[t]he unsubstantiated state concerns . . . simply are not of the same stature as the goals of the Sherman Act." 445 U.S. at 114.

¹⁴⁹ The *Midcal* Court observed that a state has "virtually complete control over whether to permit importation or sale of liquor." 445 U.S. at 110 (emphasis added). Prior case law, however, has established that states are possessed of total control over the importation or sale of liquor. *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395, 398 (1939); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 403-04 (1938); *State Bd. of Equalization v. Young's Market Co.*, 299 U.S. 59, 62 (1936); see Note, *Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-First Amendment*, 72 HARV. L. REV. 1145, 1147 (1959). The Court's use of the word "virtually," however, instead of "complete" in referring to a state's control over alcohol may refer only to restrictions placed on a state's power by constitutional provisions other than the commerce clause. See, e.g., U.S. CONST. art. I, § 10, cl. 2 (prohibits any state from taxing imports or exports); see also *Department of Revenue v. James B. Bean Distilling Co.*, 377 U.S. 341, 346 (1964) (states have no power to tax alcohol imported from abroad under the 21st amendment). The Court's holding, then, may be restricted to employment of a balancing test between state regulation of alcohol and federal commerce power when a state statute purports to exercise power over a peripheral aspect of liquor regulation. See Comment, *supra* note 8, at 310-11. Under *Midcal*, courts will be required to scrutinize state statutes dealing with peripheral state regulation of alcohol in an effort to determine whether the asserted state policies are effected by the state regulatory statute. *Id.* at 311.

Boulder: RADICALLY ALTERING THE RELATIONSHIP BETWEEN THE STATES AND THEIR POLITICAL SUBDIVISIONS

*Community Communications Co. v. City of Boulder*¹⁵⁰ afforded the Supreme Court its most recent opportunity to explore the state action exemption. Refining the issues adjudicated in *Lafayette*, the *Boulder* case looked to whether the state action exemption would clothe a "home rule" municipality with antitrust immunity.¹⁵¹

The dispute arose when the city of Boulder, organized as a home rule municipality under the Colorado Constitution,¹⁵² passed a city ordinance that placed a 3-month moratorium on cable television expansion by the Community Communications Company (CCC).¹⁵³ During the moratorium period the city council was to

¹⁵⁰ 455 U.S. 40 (1982). Justice Brennan filed the opinion for the majority. A concurring opinion was filed by Justice Stevens. Justice Rehnquist authored a dissenting opinion in which the Chief Justice and Justice O'Connor joined. Justice White took no part in the decision of the case.

¹⁵¹ *Id.* at 43.

¹⁵² *Id.* The Colorado Constitution provides in part:

The people of each city or town of this state, having a population of two thousand inhabitants as determined by the last preceding census . . . are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.

Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.

. . . .

It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.

The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.

COLO. CONST. art. XX, § 6. This provision is similar to those adopted by many other states throughout the country. *See, e.g.*, ILL. CONST. art. VII, § 6; MICH. CONST. art. VII, §§ 22, 34. Colorado's home rule amendment is particularly broad, however, in that it allows the municipal law, in effect, to preempt state law when the two conflict. *Driker & Share, Community Communications v. Boulder—New Problems for Municipalities*, 61 MICH. B.J. 426, 429 (1982).

¹⁵³ 455 U.S. at 45-46. CCC was operating a cable franchise in Boulder under a nonexclusive permit granted by the city council in 1964 and extending for a 20-year period. *Id.* at 44. This permit granted CCC the right to conduct business within the Boulder city limits. *Id.* In May of 1979, CCC informed the council of its intentions to expand. *Id.* at 45. In July of 1979, Boulder Communications Company advised the council of its intention to enter into

draft a model cable television ordinance and solicit new businesses to enter the market in compliance with the ordinance.¹⁵⁴ CCC sought an injunction to prevent the city from imposing the moratorium, alleging that enforcement of the ordinance would violate the Sherman Act.¹⁵⁵ In response, the city claimed that the ordinance was shielded by the *Parker* doctrine.¹⁵⁶

The district court focused upon the city's status as a home rule municipality and concluded that the *Parker* exemption was "wholly inapplicable."¹⁵⁷ It grounded this denial of an antitrust shield partly upon the fact that home rule status gave the city autonomy solely over matters of local concern, while cable television embraced not only the more expansive concern of interstate commerce but also the first amendment rights of free speech.¹⁵⁸

Rejecting this conclusion, a divided court of appeals reversed, extending the *Parker* exemption to the city.¹⁵⁹ The court of appeals characterized the cable franchise as a distinctly local concern, and noted that home rule cities in Colorado had absolute authority to regulate local matters.¹⁶⁰ Thus the court of appeals granted the

direct competition with CCC in providing cable services. *Id.* The city responded with its "emergency" moratorium. *Id.* at 45-46.

¹⁵⁴ *Id.* at 46. The city council defended its moratorium period by contending that time was needed for solicitation and evaluation of applications from other interested companies. *Id.* at 46 n.7. The council believed that the 3-month advantage would discourage the potential competitors from locating in Boulder. *Id.* at 46. The Boulder Communications Company, however, had already expressed an interest in entering the market despite any action the city would take with respect to CCC. *Id.* at 45 & n.5, 46 & n.8.

¹⁵⁵ *Id.* at 46-47. The petitioner also complained of a conspiracy to replace services provided by their corporation with those provided by the Boulder Communications Company. The district court found insufficient evidence by which CCC could obtain a judgment on this claim. *Id.* at 47 n.9.

¹⁵⁶ *Id.* at 47. The municipality contended that the state action exemption enunciated in the *Parker* decision protected it against any antitrust claims arising from imposition of the moratorium against CCC. *Id.* It further contended that the 3-month prohibition on expansion was a valid exercise of the police powers reserved to the city. *Id.*

¹⁵⁷ *Community Communications Co. v. City of Boulder*, 485 F. Supp. 1035, 1039 (D. Colo. 1980).

¹⁵⁸ *See id.* at 1038-39. The district court recognized the city of Boulder's authority to regulate matters of local concern without interference by state government, but noted that "[t]here is no Colorado case which characterizes the operations of cable television companies as a matter of local concern." *Id.* at 1038.

¹⁵⁹ *Community Communications Co. v. City of Boulder*, 630 F.2d 704, 708 (10th Cir. 1980).

¹⁶⁰ *Id.* at 707. The court of appeals directed its attention to the franchise rather than the industry as a whole in determining the ambit of the local concern. *Id.* The majority viewed the cable services as necessarily restricted to the Boulder city limits by the terms of the franchise. *Id.* The court concluded, "[t]he matter or subject is a local one." *Id.*

state action exemption to the home rule city limiting the applicability of *Lafayette* to an exercise of governmental, as opposed to proprietary control.¹⁶¹

The Supreme Court, by a five-to-three margin, denied the city an exemption from the antitrust laws.¹⁶² Justice Brennan, author of the Court's opinion, declined to equate the activity of a municipality with that of a state, asserting that an exemption must pay homage only to the federalist principles of state sovereignty.¹⁶³ The majority accepted as controlling *Parker's* characterization of our governmental system as one of state and federal authority "which has no place for sovereign cities."¹⁶⁴ Striking a blow to the country's home rule movement,¹⁶⁵ Justice Brennan observed that "we are a nation not of 'city-states' but of States."¹⁶⁶ Accordingly, since municipalities did not share the sovereignty of states, the city of Boulder would not qualify for an exemption.¹⁶⁷

Boulder argued, however, that its ordinance was entitled to an exemption as an express implementation of state policy.¹⁶⁸ It claimed that the home rule statute's deference to local autonomy created an inference that Boulder's anticompetitive ordinance was squarely within the contemplation of the state.¹⁶⁹ In rejecting this argument, the majority stressed that "the requirement of 'clear ar-

¹⁶¹ *Id.*; see *Parker Doctrine Comment*, *supra* note 1, at 532.

¹⁶² 455 U.S. at 56.

¹⁶³ *Id.* at 53-54. Since cities are not the equivalent of states with respect to sovereignty, Justice Brennan reasoned, the exemption should not be extended. *Cf. Edelman v. Jordan*, 415 U.S. 651, 667 n.12 (1974) (county not equivalent of state for eleventh amendment purposes). This reasoning was encouraged by *Lafayette*, in which the Court determined that the antitrust laws should be extended to local governments to ensure against local government making "economic choices counseled solely by their own parochial interests and without regard to anticompetitive effects." *Lafayette*, 435 U.S. at 408.

¹⁶⁴ 455 U.S. at 53; see *supra* text accompanying note 28.

¹⁶⁵ See 455 U.S. at 71 (Rehnquist, J., dissenting). Justice Rehnquist complained that the *Boulder* decision "effectively destroys the 'home rule' movement in this country, through which local governments have obtained, not without persistent state opposition, a limited autonomy over matters of local concern." *Id.* (Rehnquist, J., dissenting).

¹⁶⁶ *Id.* at 54 (quoting *Community Communications Co. v. City of Boulder*, 630 F.2d at 717 (Markey, C.J., dissenting)).

¹⁶⁷ 455 U.S. at 52. The Court concluded that under *Lafayette's* standard, the City of Boulder was not exempt from liability without a "clearly articulated and affirmatively expressed state policy." *Id.*

¹⁶⁸ *Id.* at 52-53.

¹⁶⁹ *Id.* at 54-55. Boulder claimed that the Colorado Home Rule Amendment was intended by the state to grant the council the authority to enact the type of regulation represented by the ordinance. *Id.* Therefore, the requisite state articulation and expression were present in the amendment's delegation of state power. *Id.*

ticulation and affirmative expression' is not satisfied when the State's position is one of *neutrality* respecting the municipal actions challenged as anticompetitive."¹⁷⁰

The Court perceived no justification for extending an antitrust shield but was not wholly unmindful of the possible adverse consequences its decision would have upon cities.¹⁷¹ Clearly, however, the majority was not seriously troubled by this contingency. First, the Court minimized the issue of fashioning a remedy, asserting that it was not necessary, at the time, to confront such a problem.¹⁷² Second, the complaint against municipal liability was viewed as "simply an attack upon the wisdom of the long-standing congressional commitment to the policy of free markets and open competition embodied in the antitrust laws."¹⁷³ Finally, the majority stressed that its decision would not foreclose the allocation of power between the states and their political subdivisions.¹⁷⁴ The Court disbelieved that the *Boulder* decision would threaten the effectiveness of local government, and emphasized a municipality's freedom to engage in anticompetitive activity so long as it was authorized by the state.¹⁷⁵

Justice Rehnquist, joined by Chief Justice Burger and Justice O'Connor, authored a dissent that challenged the majority's basic perception of the *Parker* doctrine.¹⁷⁶ First, the dissent argued that the doctrine, rather than raising exemption questions, actually

¹⁷⁰ *Id.* at 55. The Court concluded that the state had not expressed the desire to grant Boulder the power to promulgate anticompetitive regulations, since the amendment did not identify the powers granted with sufficient precision to satisfy the elements of the *Lafayette* test. *Id.* The state in effect gave the municipalities a free hand in government, but its lack of direct comment on the issue rendered its stance one of neutrality. *Id.*

¹⁷¹ *Id.* In the Court's view, "[a]cceptance of . . . [the] proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anti-competitive ordinances—would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that [the] precedents require." *Id.*; see *infra* notes 172-75 and accompanying text.

¹⁷² 455 U.S. at 56-57 n.20.

¹⁷³ *Id.* at 56. Section 1 of the Sherman Act disallows unreasonable restraints of trade. See *supra* note 2. The Supreme Court has recognized that the only guideline which effectively may be used to interpret the reasonableness of a trade restraint is to weigh its anticompetitive effects against its beneficial effects. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 691-92 (1978).

¹⁷⁴ 455 U.S. at 57.

¹⁷⁵ *Id.* Quoting *Lafayette*, the Court stated: "[A]ssuming that the municipality is authorized to provide service on a monopoly basis, these limitations on municipal action will not hobble the execution of legitimate governmental programs." *Id.* (quoting *Lafayette*, 435 U.S. at 417).

¹⁷⁶ 455 U.S. at 60 (Rehnquist, J., dissenting).

presented a preemption problem.¹⁷⁷ Second, Justice Rehnquist disagreed with the majority's treatment of municipal entities as being indistinguishable from private business for antitrust purposes.¹⁷⁸ Justice Rehnquist calculated that the combined effect of these two serious flaws would have a substantial adverse effect on local governments' ability to marshal their police powers.¹⁷⁹

The dissent expressed an additional fear that municipalities would be precluded from experimenting with innovative social programs.¹⁸⁰ Moreover, Justice Rehnquist believed that if the rule of reason analysis¹⁸¹ were modified to permit cities to defend their

¹⁷⁷ *Id.* (Rehnquist, J., dissenting). The doctrine of preemption is rooted in the constitutional supremacy of the laws of the federal government. See U.S. CONST. art. VI, cl. 2. Federal law is said to preempt state law when there is a direct conflict between the two, or when the state legislates in an area that the federal government has displayed an intention to occupy wholly. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 376-79, 384 (1978). Under an exemption analysis, the task of the judiciary is initially to look for an express statutory exemption. In the absence of an express exemption, the Court then will decide whether an implied exemption is warranted. With respect to the antitrust laws, the Court has not been favorably disposed to finding implied exemptions. See, e.g., *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963). Express statutory exemptions from the antitrust laws include the Capper-Volstead Act's exemption of agricultural cooperatives, 7 U.S.C. § 291 (1976), and the Webb-Pomerene Act's statutory exemption of certain agreements made by trade associations, 15 U.S.C. § 62 (1976). An example of a judicially created exemption is that recognized in favor of professional baseball. See *Federal Baseball Club v. National League*, 259 U.S. 200, 208-09 (1922). Although the baseball exclusion originally was based upon the notion that professional baseball did not sufficiently implicate interstate commerce, *id.*, the Court reaffirmed the exclusion on the basis of legislative inaction, *Flood v. Kuhn*, 407 U.S. 258, 282 (1972).

While exemption analysis has long been utilized by the judiciary in the antitrust context, preemption analysis is usually employed with respect to the commerce clause. L. TRIBE, *supra*, at 390. As early as 1978, Professor Handler suggested that preemption analysis was well suited to the state action question. See Handler, *supra* note 34, at 1378. It has been argued that the application of a preemption analysis to the state action question would provide the analytical framework that was found lacking in earlier Supreme Court state action cases. *Id.*

When a preemption analysis is utilized, there is a greater possibility that the action of the state will be upheld since there is a presumption in favor of the state law from the outset. *Id.* at 1380. It currently appears that the Court is moving toward the preemption approach advocated by the dissenters in *Boulder*. See *Rice v. Norman Williams Co.*, 102 S. Ct. 3294, 3299 (1982). In *Rice*, the Court applied a preemption analysis to a state statute challenged as violative of the Sherman Act. *Id.* The Court stated that resolution of the preemption issue rendered consideration of the *Parker* question unnecessary. *Id.* at 3301 n.9.

¹⁷⁸ 455 U.S. at 60 (Rehnquist, J., dissenting).

¹⁷⁹ *Id.* at 70-71 (Rehnquist, J., dissenting).

¹⁸⁰ *Id.* at 67 (Rehnquist, J., dissenting).

¹⁸¹ The rule of reason analysis first set forth by Chief Justice Edward D. White in *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911), served to place a judicial gloss over the Sherman Act's blunt proscriptions against "every contract, combination . . . or conspiracy

anticompetitive regulations, judicial review would come to resemble that of the *Lochner* era.¹⁸² Opposing such a broadly conceived investigation of local regulation, Justice Rehnquist was wary of a *Parker* approach which would permit federal courts to impose their own sociological and economic ideology upon state legislative bodies.¹⁸³ Since the dissenters believed that a preemption analysis should guide the Court, they saw no reason to use a different test to examine municipal ordinances than the standards applied to state statutes.¹⁸⁴ Thus, in disagreeing with the majority's conclusion that federalism remains unaffected when the Sherman Act is

in restraint of trade." See 15 U.S.C. § 1 (1976) (emphasis added). In contrast to the rule of reason approach, the per se approach to illegality condemns certain practices that are so clearly pernicious as to be declared violative of the antitrust laws without an inquiry as to possible justifications. See, e.g., *United States v. Topco Assocs.*, 405 U.S. 596, 608 (1972) (territorial division of markets); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) (price fixing). While the application of a per se analysis is fairly mechanical, *Northern Pac. R.R. v. United States*, 356 U.S. 1, 5 (1958), a rule of reason analysis necessarily involves an uncertain case-by-case adjudication, see 1 J. VON KALINOWSKI, *supra* note 44, § 2.03[1]. The analysis requires the factfinder to consider the particular facts of the case as well as the intricacies of the business in which the case arose. See *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692 (1978).

¹⁸² 455 U.S. at 67 (Rehnquist, J., dissenting). In *Lochner v. New York*, 198 U.S. 45 (1905), the Court struck down a New York statute prohibiting more than 60 hours of work per week. *Id.* at 64. The *Lochner* Court determined that the statute interfered with the right of contract between employer and employee. *Id.* During the *Lochner* era, the Court continually reviewed and invalidated social and economic legislation based upon a failure to show a clear nexus between the challenged legislative scheme and its purported objectives. L. TRIBE, *supra* note 177, at 438. The Court's abandonment of the *Lochner* rationale was characterized by a sustaining of regulatory measures on the barest of facts supporting the legislative judgment. *Id.* at 450.

¹⁸³ 455 U.S. at 67-68 (Rehnquist, J., dissenting). It has been suggested that during the *Lochner* era, the Court was influenced by a laissez-faire economic outlook. L. TRIBE, *supra* note 177, at 435. Arguably, the danger of having politico-economic ideology influence judicial decisionmaking is inherent in the rule of reason approach which necessarily requires a case-by-case adjudication. See 1 J. VON KALINOWSKI, *supra* note 44, § 2.03[1]. Interestingly, an argument that liberty of contract and property rights would be impaired by the Court's application of the Sherman Act was rejected at an early date. See *Standard Oil Co. v. United States*, 221 U.S. 1, 69-70 (1911).

¹⁸⁴ 455 U.S. at 68 (Rehnquist, J., dissenting). Under preemption analysis the Court does not distinguish between state statutes and city ordinances. *Id.* Generally, any restriction in the federal Constitution will limit municipalities in the same way that states are limited given the fact that cities are merely creatures of the state legislature. 5 E. McQUILLIN, *MUNICIPAL CORPORATIONS* § 19.02 (3d rev. ed. 1979). Justice Rehnquist's bold assertion that the state action analysis always has been characterized by a preemption analysis, then, is difficult to square with *Lafayette's* focus on the inherent differences between cities and states, 435 U.S. at 412, and *Goldfarb's* unequivocal emphasis on an exemption approach, see 421 U.S. at 787. In denying *Parker* immunity in *Goldfarb*, the Court construed the state action question as falling within a long line of exemption cases, noting that these "cases have repeatedly established that there is a heavy presumption against implied exemptions." *Id.*

used to strike down a municipal ordinance,¹⁸⁵ the dissenters called for analysis whereby a uniform standard would be applied to both state and municipal regulation.¹⁸⁶ Accordingly, the dissenting Justices believed that the majority's distinction between municipalities and states became chimerical when the proper method of analysis was applied.¹⁸⁷

Lamenting the decision, Justice Rehnquist described it as one which "radically alter[s] the relationship between the States and their political subdivisions" and signaled the end of the home rule movement in the United States.¹⁸⁸ Greatly concerned about the ad-

¹⁸⁵ See 455 U.S. at 69 (Rehnquist, J., dissenting). The charge of the dissent that federalism is implicated when the Sherman Act is used to strike down a municipal ordinance may be somewhat overstated, since the majority characterized the exemption analysis as founded upon principles of federalism. See *id.* at 50. According to the majority, the federal system of government recognizes only two sovereigns, state and federal, and, therefore, there was no finding of *Parker* immunity for cities. *Id.* The majority's conception of federalism in the *Boulder* case has been criticized as allowing an inordinate amount of federal interference with state matters. Freilich & Carlisle, *The Community Communications Case: A Return to the Dark Ages before Home Rule*, 14 URB. LAW x (1982). It has been suggested that true concepts of federalism would require the Court to defer to the state's delegation of power to the home rule municipality. *Id.* at xi-xii.

¹⁸⁶ 455 U.S. at 70 (Rehnquist, J., dissenting).

¹⁸⁷ *Id.* (Rehnquist, J., dissenting).

¹⁸⁸ *Id.* (Rehnquist, J., dissenting). A home rule municipality is unique in that ordinary municipal corporations have no inherent right of self-government due to the fact that cities are creatures of the state legislature. The right to home rule must come from the state constitution (in which case it is conferred by the people) or the state legislature. 2 E. McQUILLIN, *supra* note 184, § 4.82. Traditionally, the construction of the powers of a home rule municipality were limited by the application of "Dillon's Rule." See *City of Evanston v. Create, Inc.*, 85 Ill. 2d 101, 104, 421 N.E.2d 196, 198 (1981). According to Dillon's Rule, any doubts as to whether power lies in the municipal corporation or the state were resolved in favor of the state. 1 J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237(89) (5th rev. ed. 1911). The modern home rule movement, on the other hand, has witnessed a gravitation away from the strict application of Dillon's Rule and toward expanding the powers of the municipality. J. HARRIGAN, POLITICAL CHANGE IN THE METROPOLIS 146 (1976); see *City of Evanston v. Create, Inc.*, 85 Ill. 2d 101, 104, 421 N.E.2d 196, 198 (1981).

In deciding whether the power in question lies with the city or state government, state courts have utilized a preemption analysis analogous to the approach taken when deciding whether a federal statute will preempt state legislation. See, e.g., *City of Evanston v. Create, Inc.*, 85 Ill. 2d 101, 107, 421 N.E.2d 196, 201 (1981); *City of Junction City v. Griffin*, 227 Kan. 332, 336, 607 P.2d 459, 464 (1980). In addition to declaring that the powers of home rule jurisdictions be liberally construed, the Illinois home rule statute expressly includes the preemption approach. See ILL. CONST. art. VI, § 6(i), (m). The broad powers granted municipalities under this approach are clear, since it has been argued that in order for a state statute to preempt a city ordinance, the statute specifically must mention the legislature's intent to wholly occupy the field. Comment, *A Balancing Analysis: The Construction of Illinois Home Rule Powers—County of Cook v. John Sexton Contractors Co.*, 11 LOY. U. CHI. L.J. 543, 552-53 (1980).

verse impact on the future of our system of federalism, Justice Rehnquist closed his dissent with a stinging rebuke: "It is nothing less than a novel and egregious error when this Court uses the Sherman Act to regulate the relationship between the States and their political subdivisions."¹⁸⁹

There was no dispute among the Justices over the great degree of autonomy with which the city of Boulder, as a home rule city, was vested. Instead, the *Boulder* split arose over the determination of whether *Parker* was intended to dilute federal antitrust policy for the benefit of all governmental units or whether it was narrowly designed to balance the interests of the national government and the state governments, thus preserving a federal system. The *Boulder* majority's choice of the narrower reading of *Parker* apparently is consistent with the weight of authority.¹⁹⁰ The *Lafayette* plurality unequivocally determined that cities were not entitled to the same deference accorded states since cities are not sovereign.¹⁹¹ Moreover, such an approach comports with the historical view that municipalities lack the constitutional foundation of the states.¹⁹² While the *Boulder* decision may interfere with the flexibility of

¹⁸⁹ 455 U.S. at 71 (Rehnquist, J., dissenting).

¹⁹⁰ See e.g., *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 408 (1978) (plurality opinion) (rejecting an implied exclusion for cities based on their status); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 590-91 (1976) (noting that the limiting language used by Justice Stone in *Parker* required an express legislative command to displace the antitrust laws); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 790 (1973) (requiring a specific state authorization of attorney's minimum fee schedules in order to receive *Parker* protection). In addition to state action cases, support for a narrow reading of *Parker* can be found in cases adjudicating claims of implied exemption from the antitrust laws. See, e.g., *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963). Additionally, the Court has given a narrow reading to express statutory exemptions. See, e.g., *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 217-18 (1966) (Shipping Act's exemption from antitrust laws limited to specific statutory language); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (agricultural cooperative exemption given a narrow construction). The broad construction these cases have afforded the Sherman Act is consistent with the broad statutory language of the antitrust laws. See *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944); L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 13-14 (1977); cf. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239-44 (1972) (noting the broad powers of the Federal Trade Commission in enforcing the antitrust laws).

¹⁹¹ See 435 U.S. at 408.

¹⁹² The powers of the state are defined as those that have not been delegated by the people to the federal government. See U.S. CONST. amend. X. The powers of a municipal corporation, on the other hand, are granted exclusively by the state. 1 E. McQUILLIN, *supra* note 184, § 3.02(b), at 208. The people do not possess the power to form a municipal corporation independent of the action of the state legislature. *Id.* While the powers of most municipalities then, are necessarily limited to those granted by the state legislature, the powers of a home rule municipality are fairly broad. See *supra* note 188.

city government,¹⁹³ it is certainly an overstatement to speak of the destruction of local governance as a necessary result of *Boulder*. Although the Court has not acknowledged the right of municipalities to a separate exemption,¹⁹⁴ the *Boulder* Court reaffirmed the notion first set forth in *Lafayette*, that the anticompetitive acts of cities are protected when imposed pursuant to a clearly articulated state policy to replace competition with regulation.¹⁹⁵

A look at some post-*Boulder* decisions reveals that the Court's failure to accord the home rule municipality any special significance has not had the crippling effect envisioned by Justice Rehnquist's dissent. A narrow reading of *Boulder* has allowed courts to hold that while a home rule provision standing alone will not afford a blanket immunity from the antitrust laws, a broad statutory mandate will suffice. Additionally, a willingness to distinguish between public and private defendants has allowed a broader range of *Parker* immunity for the public defendant.

For example, in *Gold Cross Ambulance v. City of Kansas City*,¹⁹⁶ the court upheld specific anticompetitive actions of a municipality on the basis of general statutory authority.¹⁹⁷ Although

¹⁹³ Freilich & Carlisle, *supra* note 185, at v, vi; Hoskins, *The "Boulder Revolution" in Municipal Antitrust Law*, 70 *ILL. B.J.* 684, 684 (1982). Commentators most often take issue with *Boulder*'s strict requirements that the state must have "specifically authorized the very action or conduct which is challenged as anticompetitive." *See, e.g., id.* at 684 (emphasis in original). It has been recognized that meeting this requirement will be difficult in the case of home rule municipalities due to the fact that state legislatures are often silent on the question of whether a particular area of the law is to be subject to state preemption. *See Areeda, supra* note 85, at 448-49; Driker & Share, *supra* note 152, at 430.

¹⁹⁴ *See supra* text accompanying note 191.

¹⁹⁵ 455 U.S. at 54-55. It was argued that a blanket immunity would greatly weaken *Parker*'s proscriptions against merely "authorizing" antitrust violations. While it is true that under the *Boulder* formulation, a municipality is not entirely deprived of *Parker*'s protection, it is equally true that *Boulder* may be construed as affording no greater deference to a municipality than that currently afforded any private party. Such a construction of *Parker* was not foreclosed prior to *Boulder* as is demonstrated by the Fifth Circuit's approach in *United States v. Texas State Bd. of Pub. Accountancy*, 592 F.2d 919 (5th Cir. 1979). In *Texas Board*, the court noted that "a political subdivision would not be required to point to a 'specific, detailed legislative authorization' before it may properly assert a defense of immunity." *Id.* at 920 (quoting *Lafayette*, 435 U.S. at 415).

¹⁹⁶ 538 F. Supp. 956 (W.D. Mo. 1982).

¹⁹⁷ *Id.* at 964. In *Gold Cross*, the City of Kansas City established an emergency ambulance service that allowed for only one ambulance company to operate within the city limits. *Id.* at 960. *Gold Cross* alleged that the actions of the city were violative of section 2 of the Sherman Act. *Id.* at 960-61. In allowing the municipality the claim of *Parker* immunity, the court pointed to a Missouri statute that authorized "any county, city, town or village to provide a general ambulance service." *Id.* at 964. It is important to note that the statute in question did not specifically authorize the city to set up *one and only one* ambulance ser-

the state statute in question did not specify the activity complained of, a reading of *Lafayette* in conjunction with a narrow reading of *Boulder* lead the court to sustain the city's activities.¹⁹⁸ In addition, the Fifth Circuit, in *United States v. Southern Motor Carriers Rate Conference, Inc.*,¹⁹⁹ indicated the importance of distinguishing between public and private defendants, noting that the burden of public defendants satisfying *Midcal's* requirements should be lighter.²⁰⁰ Further evidence of a willingness on the part of the judiciary to distinguish between public and private defendants is found in *Gold Cross's* emphasis on the motivations of the municipality²⁰¹ as well as the expression of doubt as to the propriety of the imposition of monetary damages on municipal defendants.²⁰² Finally, the Supreme Court itself recently has reaffirmed the principle that states have "extraordinarily wide latitude" in the management of their internal affairs and in the creation and management of political subdivisions.²⁰³

While these interpretations of *Boulder* may not solve entirely the home rule municipality's dilemma of satisfying the *Midcal* requirements,²⁰⁴ it is clear that *Boulder* has not foreclosed totally a city's ability to regulate in an anticompetitive manner. Unfettered municipal authority by way of a grant of blanket immunity, on the other hand, would have had the ultimate effect of undermining *Parker's* focus on preserving the integrity of the states in our federal system,²⁰⁵ and weakening the Court's proscription against

vice, but rather, contemplated that the city regulate ambulance service in a general sense. *Id.*

¹⁹⁸ *Id.* at 965.

¹⁹⁹ 672 F.2d 469 (5th Cir. 1982).

²⁰⁰ 672 F.2d at 473. The court emphasized that the "analysis differs substantially depending on whether the defendant is a public or private official or institution." *Id.*

²⁰¹ *Gold Cross Ambulance Co. v. City of Kansas City*, 538 F. Supp. 956, 965 (W.D. Mo. 1982).

²⁰² *Id.* at 969 n.10.

²⁰³ *Washington v. Seattle School Dist. No. 1*, 102 S. Ct. 3187, 3206 (1982). It is interesting that, in a footnote, the *Seattle School District* Court cited *Boulder* as support for the proposition that states have a great deal of leeway in the management of their internal affairs. *Id.* at 3207 n.7.

²⁰⁴ There remains the pressing problem of how to satisfy the *Midcal* test in the total absence of state legislation; the initial problem of home rule municipalities in state action questions. See *supra* note 193. This problem is at least partially ameliorated by utilizing the approach of the courts in *Gold Cross* and *Southern Motor Carriers Rate Conference*. See *supra* notes 196-202 and accompanying text.

²⁰⁵ See 317 U.S. at 351.

merely "authorizing" antitrust violations.²⁰⁶ Perhaps the major criticism of granting identical immunity to cities and states is that municipal government, in extending its services, is not always responsive to the users of its services.²⁰⁷ In *Lafayette*, Justice Brennan recognized that consumers utilizing the municipal services, but living outside of the city, were unable to exert any meaningful political influence.²⁰⁸ Assuming, "as *Lafayette* suggests, [that] the antitrust laws were intended to limit the activities of accumulations of power unresponsive to the people,"²⁰⁹ it is not unreasonable to demand that the cities obtain at least an articulation of regulatory policy from the states as a prerequisite to *Parker's* protection.²¹⁰

Justice Stevens' concurrence in *Boulder* placed in perspective the dissent's "dire predictions" of the calamitous consequences that would accompany the majority's failure to follow preemption analysis, reminding Justice Rehnquist that "the violation issue is separate and distinct from the exemption issue."²¹¹ Comparing

²⁰⁶ *Id.* at 352.

²⁰⁷ See *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 406-08 (1978). In *Lafayette*, the Court noted that in 1972, there were 62,437 different units of local government in the United States. *Id.* at 407. In addition to the fact that specialized concerns of municipalities may infringe on the rights of others, see *id.*, it is equally true that application of a blanket immunity to such a large number of governmental units would prove unworkable. This is especially so in light of the modern construction of home rule statutes which allow municipalities to legislate on matters whose impact will be felt beyond its borders. See *City of Junction City v. Griffin*, 227 Kan. 332, 336, 607 P.2d 459, 464 (1980) (stating that "limiting home rule power to 'purely' local matters . . . would totally emasculate home rule power") (quoting Clark, *State Control of Local Government in Kansas: Special Legislations and Home Rule*, 20 KAN. L. REV. 631, 666 (1972)).

²⁰⁸ 435 U.S. at 406.

²⁰⁹ Richards & Krider, *The State's Assault on Oil: Special Interests v. Consumer Welfare*, 18 AM. BUS. L. J. 477, 502 (1981); cf. R. BORK, *THE ANTITRUST PARADOX* 51 (1978) (the only "legitimate goal of American antitrust law is the maximization of consumer welfare").

²¹⁰ This accountability rationale behind the *Boulder* majority's interpretation of *Parker* is consistent with the underlying assumption that federalism "is a form of government for the people by the people. That is to say it is inherently democratic . . ." U. HICKS, *supra* note 9, at 4. Of course, one could also argue that many, if not most, of the anticompetitive programs implemented by the states also impact upon those without an effective voice in state government. This, however, merely supports the Court's narrow construction of the state action exemption recognizing that the *Parker* doctrine is an accommodation of state sovereignty and the expanding reach of the Sherman Act. See *supra* text accompanying note 1.

²¹¹ 455 U.S. at 58 (Stevens, J., concurring). Justice Stevens' comment distinguishing the exemption and preemption issues is important in that the Court has refrained from ruling on the question of the damage liability of municipalities. See 455 U.S. at 56-57 & n.20. Although cities traditionally have been subject to full liability for tortious acts, see Comment, *Strict Liability Under Section 1983 for Municipal Deprivations of Federal Rights?: Owen v. City of Independence*, 55 ST. JOHN'S L. REV. 153, 159 (1980), the cogency of the

Boulder with Lafayette, Justice Stevens found the *Lafayette* plurality opinion persuasive authority for denying an exemption to the City of Boulder.²¹² Moreover, drawing from his plurality opinion in *Cantor*, Justice Stevens stressed that members of the Michigan Public Utility Commission who had authorized the program under attack would not become parties to a violation of the Sherman Act.²¹³

The *Boulder* dissent's complaint that the decision would allow the courts to review the reasonableness of state legislation can be countered in two ways. First, under the commerce clause the states' justifications for their laws are already subject to judicial evaluation.²¹⁴ Second, in suggesting that cities receive the same *Parker* immunity as states, the dissent overlooked the fact that in a federal system an accommodation must be made between state and national interests.²¹⁵ Thus, *Boulder's* narrow application of the

imposition of treble damages, such as those pursuant to antitrust liability, has been questioned with respect to municipal defendants, see P. AREEDA, *ANTITRUST LAW* 48 (Supp. 1982). It has been argued that Congress never intended to impose liability on public officials. 1 P. AREEDA & D. TURNER, *supra* note 56, ¶ 217a(1), at 102. In the case of civil rights violations, however, the imposition of damage liability on public officials has been held to be entirely proper. See *Owen v. City of Independence*, 445 U.S. 622, 638 (1980).

Several factors distinguish the public antitrust defendant from the public civil rights defendant. For example, the Court has found that section 1983 had the specific purpose of curbing the acts of state officials. *Id.* at 651. The antitrust laws, on the other hand, did not intend to displace the acts of public officials. See *Parker v. Brown*, 317 U.S. 341, 350-51 (1943). Additionally, the damages paid to a plaintiff in a civil rights action may be the only source of recovery for the plaintiff. The availability of alternative remedial action and the fact that there are often other grounds upon which to invalidate alleged antitrust violations militates against an imposition of damage liability. 1 P. AREEDA & D. TURNER, *supra* note 56, at 103.

²¹² 455 U.S. at 58 (Stevens, J., concurring).

²¹³ *Id.* at 59 (Stevens, J., concurring); see *Cantor v. Detroit Edison Co.*, 428 U.S. at 585-92. It is not unlikely that in cases where a municipality is acting pursuant to a state's policy favoring regulation over competition, the Court will adjudge the city under *Cantor's* fairness test. See *supra* notes 50-51 and accompanying text.

²¹⁴ See, e.g., *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 447 (1978). In *Raymond Motor Transportation*, the Court held that the challenged state statute violated the commerce clause because of a substantial burden on interstate commerce that was not outweighed by legitimate state interests. *Id.* The Court has also invalidated city ordinances on commerce clause grounds. See, e.g., *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 356 (1951). Since a prerequisite to Sherman Act jurisdiction is that commerce "among the several states" be affected, it is likely that acts of states invalidated under the Sherman Act may be equally subject to commerce clause attack. It has been suggested that rather than resorting to invalidation of state laws under the antitrust statutes, a court can strike down state action under any one of several constitutional provisions including the first and fourteenth amendments. See *Areeda*, *supra* note 85, at 454-55.

²¹⁵ See *Lafayette*, 435 U.S. at 412.

Parker doctrine can be explained as a means of preventing "exemptions from an important federal law for reasons wholly unrelated either to federal policy or even to any necessary significant state interest."²¹⁶ The majority's adherence to *Midcal's* requirement that the state clearly articulate an anticompetitive policy and actively supervise the program appears to embody a procedural approach that will minimize the discretion of the judiciary in its review of state legislation, while ensuring a proper balance between the authority of the states and the national government in our federal system.

CONCLUSION

Throughout the 40 years since the creation of the *Parker* doctrine, the Supreme Court has been criticized for its treatment of the state action exemption. Professor Handler, writing in the wake of *Lafayette*, lamented the Court's "failure to provide an analytical framework by which the disposition of future state action cases can be predicted with at least a reasonable degree of certainty."²¹⁷ It appears, however, that in recent years, the Court has done much to eliminate the confusion surrounding the state action exemption, although, concededly, some uncertainty remains. Perhaps the clearest *Parker* situation is the instance where the anticompetitive activity stems from the actions of a state or one of its regulatory agencies. In these cases the Court unanimously has adopted a two-pronged test determining the appropriateness of *Parker's* protection:²¹⁸ a clear articulation of anticompetitive policy and active state supervision of the program. This two-step test safeguards against the dilution of the national interest in antitrust unless the challenged activity is, as a sovereign function of the state, vital to its separate existence. While thus preserving our federal system, such an approach is primarily procedural, thereby minimizing the possibility of unrestrained judicial forays into the substantive decisionmaking process of the states.

When the antitrust defendant is a private party the appropriate *Parker* inquiry is not quite as clear. *Cantor* indicated that at a minimum there must be some element of state compulsion in order to trigger an exemption. Therefore, the more freedom of choice ex-

²¹⁶ *Cantor*, 428 U.S. at 603.

²¹⁷ Handler, *supra* note 34, at 1378.

²¹⁸ See *supra* notes 141-43 and accompanying text.

exercised by the private defendant in implementing the anticompetitive scheme, the less likely it is to receive *Parker's* protection.²¹⁹ One might also expect that, at least where the private party lobbied for the anticompetitive mandate, the two-step test would also be applied. Thus, a private entity, despite receiving an anticompetitive mandate, would not qualify for an exemption unless the state itself could pass the two-pronged standard of *Midcal*. Notwithstanding objections that this would chill lobbying efforts,²²⁰ such an approach actually may increase the flow of information to regulatory bodies.²²¹ The private lobbyist, seeking to ensure that the state meets the "clear articulation" standard, would certainly solicit adequate review by the state of all aspects of the anticompetitive proposal. Perhaps this would eliminate numerous regulatory schemes wholly unrelated to the welfare of the state. If so, it would facilitate the accommodation between the national policy favoring competition and the legitimate regulatory interests of the states.

Finally, when the antitrust violation is committed by a municipality, the judicial standards for receiving *Parker's* exemption are still somewhat beclouded. After *Lafayette* and *Boulder* it is certain that a city, whether its activities are proprietary or governmental, will not be eligible automatically for an exemption. Both decisions require that there be a clear articulation of anticompetitive policy by the state. It is unclear, however, whether active supervision by some state entity other than the city is requisite or whether the state actually must compel rather than authorize the restraint. In any event, the post-*Boulder* cases clearly demonstrate that the *Midcal* test adopted by the *Boulder* Court does not present an absolute barrier to the expansion of municipal authority.

As the Court made clear in *Parker*, the federal system is composed of dual sovereigns—the national government and the states.²²² To speak of a return to unqualified local autonomy at a time when global complexities and interrelationships require greater harmony is to retreat to the past. It appears that with *Boulder*, the Supreme Court has arrived at an interpretation of the *Parker* doctrine that allows it to coordinate the functions of dual sovereigns while minimizing its input into the substance of legislative decisions.

²¹⁹ See *supra* notes 50-56 and accompanying text.

²²⁰ See *supra* text accompanying notes 63-65.

²²¹ See *supra* notes 66-70 and accompanying text.

²²² See *supra* text accompanying note 28.