ANTITRUST LAW—MUNICIPAL IMMUNITY— APPLICATION OF THE STATE ACTION DOCTRINE TO MUNICIPALITIES—City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978). In *City of Lafayette v. Louisiana Power & Light Co.*[1] the United States Supreme Court decided an issue which had divided lower courts:[2] whether the *Parker v. Brown*[3] doctrine which exempts state action from the antitrust laws applies to municipalities engaging in conduct violative of the antitrust laws. Two Louisiana cities, Lafayette and Placquemine, operated an electric system and contracted to provide customers with water and gas only on the condition that they purchase electricity from the cities, or at least not from any other supplier. The action arose when the cities filed an antitrust action against several competing privately owned electric utilities, one of which was the Louisiana Power & Light Co. The cities claimed that the utilities had violated sections 1 and 2 of the Sherman Act.[4] Power & Light counterclaimed,[5] charging the cities with violations of the Sherman Act and section 3 of the Clayton Act.[6]

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

2. Tchorni, *Antitrust Laws and Municipal Corporations: Are Municipalities Exempt from Sherman Act Under the Parker Doctrine*, 65 GEO. L.J. 1547, 1549 (1977). *See, e.g.*, Duke & Co. v. Foerster, 521 F.2d 1277, 1282 (3d Cir. 1975) (boycott of plaintiff's beverages in municipal facilities not protected under *Parker* since the activities not compelled by state as sovereign); Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1134 (5th Cir. 1975) (rate-setting activities by local government immune from antitrust attack when state expressly delegated to municipality authority to set rates).

3. 317 U.S. 341 (1943). In *Parker* the Court held that the antitrust laws did not apply to anticompetitive activity undertaken by a state acting in its sovereign capacity. The court found that "[t]he state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly, but as sovereign, imposed the restraint as an act of government . . . ." *Id.* at 352 (footnotes omitted).

4. Section 1 of the Sherman Act makes unlawful "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1 (1976). Section 2 of the Sherman Act makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States." 15 U.S.C. § 2 (1976).

5. City of LaFayette v. Louisiana Power & Light Co., 532 F.2d 431, 432-33 (5th Cir. 1976). Power & Light alleged that the cities were engaged in sham litigation to delay the construction of the power plant, that the cities' debentures contained anticompetitive convenants, and that the cities had conspired with other parties to provide power to certain areas beyond the time permitted by state law. Because public officials administered the program pursuant to legislative command, the court held that the antitrust laws did not apply to their conduct. The court found evidence of such a command in the fact that the state itself exercised its legislative authority in making the regulation and in prescribing the conditions of the application. *Id.* at 433-35.

6. Section 3 of the Clayton Act makes it unlawful "for any person engaged in commerce . . . to make a sale or contract for sale . . . on the condition that the purchaser thereof shall not use . . . the goods . . . of a competitor or competitors of the lessor or seller. . . ." 15 U.S.C. § 14 (1976).

The United States District Court for the Eastern District of Louisiana held that the cities' status as governmental entities entitled them to a per se exemption[7] which rendered the municipalities' anticompetitive conduct immune from the operation of the Sherman Act.[8] Consequently, the court granted the cities' motion to dismiss Power & Light's counterclaim.[9] Nevertheless, the court expressed its reluctance to find an exemption for what was clearly "business activity."[10]

On appeal the Court of Appeals for the Fifth Circuit disagreed with the trial court's conclusion that the cities' status as cities was sufficient to render all their conduct automatically immune from the Sherman Act under the state action exemption.[11] Adopting a form of state legislative intent test for the scope of the exemption for municipalities,[12] the court remanded the case for a determination of "whether the activities alleged fell within the scope of the powers granted the cities by the legislature."[13]

The Supreme Court granted certiorari[14] to determine whether the state action exemption should be extended to municipalities. Justice Brennan, speaking for a plurality of four,[15] nar-

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7. *Lafayette,* 532 F.2d at 433. In part, the *Lafayette* court based its holding that the municipalities were not automatically entitled to immunity on a recent case, Duke & Co., Inc. v. Foerester, 521 F.2d 1277 (3d Cir. 1975). In *Duke* the plaintiff, a manufacturer, brought an action against several private and municipal corporations for conspiracy in restraint of trade because of a boycott of plaintiff's beverages at various municipal facilities. The trial court held that the cities' status was sufficient to render them immune. On appeal, the court reversed, thereby implying that municipal corporations do not enjoy a per se exemption.

8. 532 F.2d at 433.

9. *Id.* In granting the motion to dismiss the counterclaim the court effectively rejected the claim under the Clayton Act.

10. *Id.*

11. *Id.* at 436.

12. *Id.* at 435-36. Although the court clearly held that in order for a municipality to claim immunity under the antitrust laws the legislature must have intended that the municipality engage in the disputed anticompetitive activity, it is unclear how specific the articulation of intent must be. The court confused the issue by employing a variety of phrases to describe articulation which would suffice. At one point, for example, the court indicated that the anticompetitive activity had to be "comprehended" by the legislature. *Id.* at 434, 436. At another point, the court predicated immunity on a finding that the challenged activity came "within the legislative intent." *Id.* at 434. The court also suggested that the activity would be exempt if "contemplated" by the legislature. *Id.* These tests are unsatisfactory since they do not enumerate explicit criteria to be used in determining how specific the articulation must be; they merely assert that articulation must exist. *See also* text accompanying notes 70-95 *infra* (legislative intent test discussed).

13. 532 F.2d at 436.

14. 430 U.S. 944 (1977).

15. Justice Marshall, Justice Powell and Justice Stevens joined in Justice Brennan's opinion. Chief Justice Burger also joined in Part I of Justice Brennan's opinion. Part I

rowly construed the scope of the exemption. The plurality was chiefly concerned with upholding the antitrust laws and did not think that an exemption for anticompetitive conduct of municipalities should be widely available. As part of its narrow reading of the state action doctrine the plurality indicated that it would not lightly imply exclusions from the antitrust laws.[16] Justice Brennan stated that there were only two policies which courts had held were sufficiently important to overcome the presumption against implied exclusions from the antitrust laws: first, the protection of "open communication between the policy and its lawmakers,"[17] and second, the protection of the sovereignty of the states.[18] He concluded that subjecting the municipality to liability would not undermine either of those policies and so refused to imply an exclusion.[19]

Like the court of appeals, the plurality adopted a test for determining the immunity issue which turned on an assessment

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dealt with the cities' secondary argument that Congress never intended to subject local governments to the antitrust laws. 435 U.S. at 394-408. The main issue of contention between the parties, which is the focus of this note, was the intended scope of the Sherman Act vis-à-vis local political subdivisions (municipalities) given its scope vis-à-vis states.

16. Thus, the Court considered all of the arguments advanced by the petitioner cities "in light of tbe presumption against implied exclusions from coverage under the antitrust laws." *Id.* at 398.

17. As an example the Court cited Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), in which it held that a concerted effort by persons to influence lawmakers to enact anticompetitive legislation beneficial to themselves or detrimental to competitors was protected from an antitrust challenge. *Id.* at 139. *See also* United Mine Workers of America v. Pennington, 381 U.S. 657 (1965).

18. The Court further said that " 'an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.' " 435 U.S. at 400 (quoting Parker v. Brown, 317 U.S. 341, 351 (1943)).

19. 435 U.S. at 408. The plurality limited the availability of a state action exemption to municipalities in another way. It held tbat the definition of "persons" in § 7 of the Sherman Act included cities not only when suing as plaintiffs but also when sued as defendants in antitrust cases. In doing so the Court extended the holdings of both Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906) and Georgia v. Evans, 316 U.S. 159 (1942), whicb defined "person" in the antitrust statutes to include cities suing as *plaintiffs*. The Court added that it would construe the antitrust laws to be inapplicable to cities only if there was some overriding policy wbich would preclude subjecting them to antitrust liability. 435 U.S. at 397.

Since the cities themselves did not argue that they were not "persons" within the meaning of the antitrust laws, *id.* at 395, the Court's decision to consider the issue underscores its disposition to limit the availability of an immunity to cities. Further evidence of this disposition can be seen in the Court's rejection of the cities' argument that it would be anomalous to subject them to the same kinds of civil and criminal liabilities imposed on private parties. Since the counterclaim against the cities would render them subject to $1.5 billion in treble damages, 532 F.2d at 431, the cities' argument seems a plausible one. The plurality's refusal to consider the merits of this argument reflects its reluctance to analyze fully differences between municipal corperations and private parties which might dictate a different test.

of legislative intent. The principal question was whether the legislature had intended to exempt the disputed activity from the operation of the antitrust laws.[20] The plurality required some affirmative articulation that the state intended to replace a scheme of enforced competition with an alternative regulatory scheme.[21] To be able to claim the exemption successfully, the plurality demanded that the legislature "contemplated the kind of action complained of."[22]

Chief Justice Burger concurred in the judgment of the Court.[23] He thought that the issue of a municipality's exemption be determined on a case-by-case assessment of the type of municipal regulation involved.[24] Specifically, he would have asked whether the municipality was engaged in commercial or governmental activities. Since he concluded that the cities were involved in commercial activities, he agreed with the plurality that the cities were not immune from the antitrust laws.[25]

Justice Stewart, joined by two other Justices in dissent,[26]

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20. *See* notes 4-5 *supra* and text accompanying notes 76-89 *infra*.

21. There are several reasons why a court may require such an affirmative articulation: first, that a state regulatory pricing is truly at stake; second, that it guarantees that anticompetitive behavior will be subjected to some regulation and will not be merely uncontrolled; and finally, that it helps to ensure account will be taken of federal interests in antitrust enforcement. For a more detailed discussion of these reasons, see text accompanying notes 77-83 *infra*.

22. 435 U.S. at 415 (quoting City of Layfayette v. Louisiana Power & Light Co., 532 F.2d 431, 434 (5th Cir. 1976)). It was not, however, entirely clear how specific the articulation had to be. *See generally* notes 12-13 *supra* (court of appeals formulation of specificity discussed).

Another unanswered issue was whether a city could claim the exemption where it was merely authorized to engage in anticompetitive activity or whether it had to actually be compelled or directed to do so as a precondition to the immunity. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), in which the court had held that only conduct compelled by the sovereign is exempt; conduct merely prompted by the state is not adequate. *Id.* at 791. It is possible that in adopting the test based on legislative intent, the plurality sought to modify the *Goldfarb* test. Chief Justice Burger, however, interpreted the plurality opinion as adhering to the *Goldfarb* test as a threshold inquiry in determining whether an anticompetitive activity is the kind proscribed by the Sherman Act. *Lafayette,* 435 U.S. at 425 (Burger, C.J., concurring). *See also* text accompanying notes 96-107 *infra*.

23. 435 U.S. at 418 (Burger, C.J., concurring).

24. Chief Justice Burger said: "This case turns, or ought to, on the District Court's explicit conclusion, unchallenged here, that 'these plaintiff cities are engaging in what is clearly a business activity; activity in which a profit is realized.'" *Id.* (Burger, C.J., concurring).

25. *Id.* (Burger, C.J., concurring).

26. Justice Rehnquist and Justice Blackmun joined Justice Stewart's opinion. Justice Blackmun, however, did not agree with Part B of Justice Stewart's opinion. Part B criticized the result reached in *Lafayette* on the ground that it would "cause excessive judicial interference not only with the procedures by which a State makes its governmental decisions, but with their substance as well." *Id.* at 438 (Stewart, J., dissenting). Justice Blackmun specifically noted that he did not interpret Justice Stewart's dissent as reaching

disagreed sharply with the narrow reading of the state action doctrine adopted by the plurality and implied that some exemption for municipalities should be available.[27] The plurality's legislative intent test, the dissent asserted, would defeat the availability of an exemption in most cases. It would be available only in those limited instances involving acts by the state legislature to validate specifically the anticompetitive actions of the municipality.[28] The dissent's broader reading of the state action doctrine led it to adopt a per se test based on the governmental status of the municipality.[29] Since the key distinction to be drawn under the dissent's view is between governmental and private conduct,[30] and a city's conduct is governmental,[31] cities persumably would always be able to claim an exemption.

This note will first examine the origin of the state action doctrine in *Parker v. Brown*.[32] Since neither the specific holding of *Parker* nor the *Parker* Court's analysis of the legislative history of the Sherman Act provide an answer to the appropriateness of an exemption for a municipality's conduct, the note will conclude that it is necessary to examine the policies implicit in the state action exemption. An analysis of the policy tensions implicit in *Parker*, coupled with a realization that municipalities and states

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the issue of whether the cities would be immune under the Sherman Act if "found to be acting in concert with private parties." He concluded that to grant an immunity in such a case would "go beyond the protections previously accorded officials of the States themselves." *Id.* at 441 (Blackmun, J., dissenting).

27. Justice Stewart criticized the plurality's narrow reading of *Parker*, stating that "instead of applying the *Parker* doctrine, the Court today imposed new and unjustifiable limits upon it." *Lafayette*, 435 U.S. at 426-27 (Stewart, J., dissenting).

28. "By this exclusive focus on a legislative mandate the plurality has effectively limited the governmental action immunity of the *Parker* case to the acts of a state legislature." 435 U.S. at 427 (Stewart, J., dissenting). Justice Stewart disagreed with what he regarded as an unjustifiably narrow reading of *Parker* on policy grounds. *See* text accompanying notes 55-61 *infra* (discussing the reasons a municipality might be entitled to an excemtion under *Parker*). Further, he thought this narrow reading conflicted with the court's opinions in prior cases. 435 U.S. at 427 (Stewart, J., dissenting).

29. For a discussion of the importance of status as a factor in the dissent's decision on the availability of an immunity from the antitrust laws, see text accompanying notes 108-17, 127-28 *infra*.

30. The importance which the dissent attached to this distintion is reflected in its criticism that "[t]he fundamental error in the opinions of the plurality and of the Chief Justice is their failure to recognize the difference between private activities authorized by the government on the one hand, and the actions of the government itself on the other." 435 U.S. at 428 (Stewart, J., dissenting).

31. "There can be no doubt on which side of this line the petitioners' actions fall. 'Municipal corporations are instrumentalities of the state for the convenient administration of government within their limits.'" *Id.* at 429 (citing Louisiana v. Mayor of New Orleans, 109 U.S. 285, 287 (1883)).

32. 317 U.S. 341 (1943).

share many relevant characteristics,[33] suggest that a per se approach to the applicability of the state action exemption to municipalities is unsatisfactory. This note will then examine the doctrinal tests available to the Court in *Lafayette* and conclude that none of these tests alone is sufficient to resolve the municipality issue. Instead a case-by-case balancing test, which looks to the underlying policies[34] behind the state action exemption and the nature of the municipality's conduct,[35] should be adopted to determine the scope of the exemption for municipalities.

I. Inapplicability of a Per Se Approach to the State Action Exemption in the Municipal Context

A. *Development of the State Action Exemption in the State Context*

The doctrine exempting state regulation from the scope of the antitrust laws was firmly established in *Parker v. Brown.*[36]

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33. For a comparison of cities and municipalities, see text accompanying notes 55-66 *infra.*

34. Courts have often looked to underlying policies in reaching a decision on the availability of an exemption from the antitrust laws. The *Parker* Court's consideration of values of federalism clearly influenced its decision to uphold the state regulation. *See* text accompanying notes 50-54 *infra.* For other instances in which the Court looked to policies, see notes 84-85 and text accompanying notes 112-20 *infra.*

35. This focus on the nature of the challenged activity is an approacb endorsed by Chief Justice Burger in his concurring opinion in *Lafayette.* 435 U.S. at 420 (Burger, C.J., concurring). He first espoused such a test in his concurrence in Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), stating that "in interpreting *Parker,* the Court has heretofore focused on the challenged *activity,* not upon the identity of the *parties* to the suit." *Id.* at 604 (Burger, C.J., concurring). For a discussion of the need for and the advantages of a substantive test, see text accompanying note 129 *infra.*

36. 317 U.S. 341 (1943). Courts had dealt with the question of the applicahility of the federal antitrust laws to state action before *Parker,* however. *See* Olsen v. Smith, 195 U.S. 332 (1904); Lowenstein v. Evans, 69 F. 908 (D.S.C. 1895). In *Olsen* several licensed pilots of the port of Galveston sued the defendant for damages for offering his services as a pilot without a license. They also sought an injunction against further violations. In his defense, the defendant challenged the state licensing laws on several grounds, including an alleged violation of the antitrust laws. He based his challenge on the ground that the plaintiffs had violated the Sherman Act by suppressing the trade of nonlicensed pilots. The Court refused to entertain that defense and held that there was no antitrust violation when the alleged conduct was undertaken pursuant to a state regulatory statute. The Court stated: "No monopoly or combination in a legal sense can arise from the fact that duly authorized agents of the State are alone allowed to perform the duties devolving upon them by law." *Id.* at 345.

In *Lowenstein,* a North Carolina liquor merchant tested the validity of a South Carolina statute establishing a state liquor monopoly under the newly enacted Sherman Act. When South Carolina seized a barrel of whiskey he had shipped across the border, he alleged that the statute violated the antitrust laws. The court dismissed the suit on the ground that, because the state was not a person within the meaning of the Sherman Act, the court lacked jurisdiction. *See* Handler, *Twenty-Fourth Annual Antitrust Review,* 72 Colum. L. Rev. 1, 4 (1972) [hereinafter cited as Handler, *Antitrust Review*].

The Court held in *Parker* that the antitrust laws did not apply to anticompetitive state regulation so long as the state exercises legislative authority in making the regulation and supervises its application.[37]

In *Parker* a private raisin producer sought to enjoin the California Director of Agriculture from enforcing the state's Agricultural Marketing Act.[38] The producer attacked the program provided for in the Act on the ground that it violated the antitrust laws.[39] The program was an anticompetitive scheme designed to cure the persistent problem of overproduction and the harmful effects of oversupply in the raisin industry[40] through the maintenance of prices and the restriction of competition.[41]

To effectuate its stated goals, the Act authorized a scheme involving both private producers and public officials.[42] The Court scrutinized the scheme to determine how substantial the state's involvement was and found it significant. The state was involved in creating the machinery for establishing the program; moreover, the programs could not become effective without the approval of

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37. 341 U.S. at 352. For a discussion of the substantiality of the state's involvement in the scheme, see note 42 *infra*.

38. Act of June 5, 1933, ch. 754, 1933 Cal. Stats. 1969, *as amended by* chs. 471, 743, 1935 Cal. Stats. 1530, 2088; ch. 6, 1938 Cal. Stats. 2485; ch. 1150, 1186, 1941 Cal. Stats. 1186, 2943, *now* CAL. AGRIC. CODE §§ 59501-59694 (1973), *cited in* Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 NW. U.L. REV. 71, 81 (1974).

39. *Parker*, 317 U.S. at 348-49.

40. The oversupply of raisins had been a persistent problem since 1920 and the carryover in record raisins was estimated at 30-50% of each year's annual crop. *Id.* at 364. On the basis of this fact, one student commentator has attempted to limit the scope of the state action doctrine of *Parker* to situations in which unfettered competition produces undesirable results. That view has not gained general acceptance. *See* Note, *Parker v. Brown: A Preemption Analysis*, 84 YALE L.J. 1164, 1173 (1975) [hereinafter cited as Note, *A Preemption Analysis*].

41. *Parker*, 317 U.S. at 346. Given the declared purposes of the Act, it is not surprising that at hearings before the advisory commission, *see* note 42 *infra*, private producers carried the burden of showing that the institution of the program is a designated zone would in fact "prevent economic waste in the marketing of agricultural products" and "conserve the agricultural wealth of the State." *Id.* at 346. *See* Slater, *supra* note 38, at 81 n.51.

42. The Act provided for the appointment of an advisory commission whose members were appointed by the governor and confirmed by the state senate. The state agriculture director served as an ex-officio member. At the same time private producers were involved in several stages of the scheme. They could petition the commission for the establishment of a marketing program in a designated area. If the commission then concluded the need existed for such a program based on prescribed economic findings, it would appoint program committees consisting of private producers to draw up proration programs. The commission could hold public hearings on and suggest modifications of proposed programs. If approved by the commission the program would be submitted to a referendum of private producers. If 65% of such producers, controlling acreage of at least 51% approved, the commissioner would declare the program effective. 317 U.S. at 346-47.

puhlic officials.[43] Finding that the involvement of the state was sufficient to render the action "state action," the *Parker* Court concluded that such action did not fall within the scope of the Sherman Act[44] and was, therefore, exempt.

1. PARKER'S RELIANCE ON LEGISLATIVE HISTORY

The Court hased its conclusion on the interpretation of congressional intent and legislative history of the Sherman Act.[45] The Court relied on two key factors in its analysis. The first was a statement by Senator Sherman, a sponsor, that the Act was intended to prevent "business combinations."[46] From that statement the Court drew the negative inference that the bill was designed to reach only monopolistic practices undertaken by such combinations and, by implication, not any other anticompetitive conduct. The other factor was the absence of any explicit mention of state activity in the Act.[47] From this the Court inferred an intent to exclude states from coverage.

This legislative history does not convincingly lead to a conclusion that Congress intended state activity to be exempt from the Sherman Act.[48] Neither the absence of explicit mention of state activity nor the statement of an interested sponsor are particularly reliable indicia of legislative intent. Because the evi-

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43. *Id.* at 350.

44. *Id.* at 350-51. *See* Note, *A Preemption Analysis, supra* note 40, at 1173: "The traditional interpretation of *Parker* is framed in jurisdictional terms. Under this approach *Parker* is read to hold, as a matter of statutory construction, that a state and its officials are not within the intended reach of the Sherman Act."

45. The Court stated: "We find nothing in the language of the Sherman Act or in its history which suggests its purpose was to restrain a state or its officers from activities directed by its legislature." 317 U.S. at 350-51.

46. "The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only 'business combinations.' 21 CONG. REC. 2562, 2457 . . . ." *Id.* at 351. Slater has criticized this interpretation. He asserts that the quotation relied on was taken out of context. Slater contends that when the remark is placed in context it appears that the sponsor "was distinguishing associations which carry on lobbying and public relations activities from those which actually make sales contracts and reach agreements as to the manner of carrying on commerce." He concludes that the prorate program at issue in *Parker* would clearly constitute a business activity prohibited by the Sherman Act. Slater, *supra* note 38, at 83. Slater's remarks are important primarily as an indication that the legislative history was not wholly conclusive on the exemption issue.

47. The Court said: "The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state." 317 U.S. at 351.

48. As Slater points out, "[T]he real problem with trying to use legislative history to resolve the issue posed in *Parker* is that Congress probably never actually considered whether state action was to be included within the coverage of the act." Slater, *supra* note 38, at 84.

dence of legislative intent regarding a state action exemption was almost non-existent, it seems reasonable to conclude that the real basis for the finding of a state action exemption lay not in the scant legislative intent, which at best showed that Congress had not explicitly excluded the states within the coverage of the Sherman Act, but instead in the policies inherent in such a finding.[49]

2. POLICIES INHERENT IN THE PARKER DECISION

A basic policy tension is involved in any state action exemption determination like the one made in *Parker*. A narrow reading of the exemption is supported by the desire to ensure adequate enforcement of the antitrust laws in order to protect the competitive system.[50] This policy conflicts with two policies which support the exemption. The first of these is a desire to protect federalism values by deferring to a local interest in regulation. Application of this policy requires a court to make a value judgment that striking down the regulation would unjustifiably intrude on local sovereignty.[51] The other policy concern weighed against the national interest in antitrust enforcement is a desire to protect the not-for-profit regulatory objectives of governmental entities. That policy concern was implicitly reflected in the Court's distinction between public and private action and in its characertization of the disputed conduct as an act of government.[52] From

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49. Some courts and commentators have reached the same conclusion. *See* Hecht v. Pro-Football, Inc., 444 F.2d 931, 946-47 (D.C. Cir. 1971); Gas Light Co. v. Georgia Power Co., 440 F.2d 1135, 1136 (5th Cir. 1971); Handler, *The Current Attack on the Parker v. Brown State Action Doctrine*, 76 COLUM. L. REV. 1, 17 (1976); Handler, *Antitrust Review*, *supra* note 36, at 18; Pogue, *The Rationale of Exemptions from Antitrust*, A.B.A. SECTION OF ANTITRUST LAW 313 (1961); Slater *supra* note 38, at 86, 90; Tchorni, *supra* note 2, at 1556.

50. Implicit in the policy is the value judgment that the best way to ensure adequate economic performance is through competition. A. KAHN, THE ECONOMICS OF REGULATION, 1, 3 (1970). This assumption, however, has been questioned. *See, e.g.*, J. GALBRAITH, THE NEW INDUSTRIAL STATE (1967); Markovits, *A Response to Professor Posner*, 28 STAN. L. REV. 919 (1976) (questioning the traditional view of justifying the antitrust laws by allocation theory).

51. *See* Tchorni, *supra* note 2, at 1555: "The Court's holding in *Parker*—that Congress did not intend the Sherman Act to reach state action—exemplifies a judicial reluctance to make inroads on state sovereignty."

52. *Parker*, 317 U.S. at 352. In addition, Slater has found some direct support for the importance of a proprietary/regulatory distinction in the opinion.

> In *Parker* itself there is some indication that when the state acts in a private or proprietary capacity it will be treated differently from when it acts in a governmental or regulatory capacity. Again, the point is not directly confronted, but Chief Justice Stone intimated that the case might be decided differently if there were a "question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade."

Slater, *supra* note 38, at 90 (citing *Parker*, 317 U.S. at 351-52). *See also* text accompanying note 130-44 *infra* (regulatory/proprietary distinction discussed).

that distinction one can infer that the Court would more readily imply an exemption from the antitrust laws when the action is governmental, and therefore presumably without a profit motive, than when the actor is a private party interested in maximizing profits.[53]

To resolve the immunity question in *Parker,* the Court weighed the state interests in regulation against the competing interest in antitrust concerns, and concluded that federalism values and the absence of a profit motive in governmental regulation were sufficiently important to warrant an exemption.[54] The *Parker* holding thus indicates that certain policies which state regulation embodies may outweigh the desire for a competitive system and justify the grant of an exemption from the antitrust laws.

B. Applicability of the State Action Exemption to a Municipality

Under the state action exemption laid down in *Parker,* a state's desire to suspend enforcement of the antitrust laws is sufficient to create an exemption.[55] Thus, under the fact situation in *Lafayette,* it seems clear that had the state, and not the municipality, undertaken to implement the program, the same scheme would have been found exempt from the antitrust laws. The question in *Lafayette* therefore becomes to what extent cities should be accorded the same treatment as states for purposes of making

53. Implicit in the *Parker* Court's assessment of the governmental or private status of the regulators may also be the underlying tension between federalism and antitrust values. A court may be unwilling to imply an exemption for a private party since it falls outside the scope of federalism concerns. However, if a state or local governmental entity is involved, federalism concerns are present and tbe court may wish to grant immunity to preserve the balance between local and national spheres of authority, even at the expense of antitrust enforcement. *See* note 2 *supra* and the cases cited therein. *See also* New Mexico v. American Petrofina, Inc., 501 F.2d 363 (9th Cir. 1974).

For a discussion of the importance of this difference between the government as a proprietor and the government as a regulator in the determination of an antitrust exemption, see text accompanying notes 130-44 *infra.*

54. It should be pointed out that althougb the state agricultural marketing scheme was inconsistent with the antitrust laws, it was nevertheless consistent with the Federal Agricultural Marketing Agreement Act, Act of June 3, 1937, ch. 296, §§ 1-2, 50 Stat. 246 (current version at 7 U.S.C. §§ 601-664 (1976)). Tbus, *Parker* could be interpreted as exempting state action from the antitrust laws only to the extent it is consistent with a similar scheme of federal policy. One court has held that this is an inherent limitation of *Parker. See* Hecht v. Pro-Football, Inc., 444 F.2d 931, 937 (D.C. Cir. 1971). *See also* Handler, *Antitrust Review, supra* note 36, at 15. Most courts, however, bave not attempted to limit the scope of the *Parker* doctrine in this way. *But see Lafayette,* 435 U.S. at 409. n.39 ("[t]he State regulatory program involved in *Parker* . . . was consistent with federal policy").

55. *See generally* L. SULLIVAN, THE LAW OF ANTITRUST 739 (1977).

the state action exemption determination. Since cities and states share many characteristics, it is arguable that courts should accord to the cities' interests in regulation the same deference accorded to the states' interests. Because cities differ from states, however, an exemption for cities equivalent to that afforded to state action may not be warranted. Cities combine characteristics of both the public regulator and private profit maker, and thus it is important to compare cities with states to determine how courts trying to resolve the policy tensions between federalism and antitrust law should treat them.

1. SIMILARITIES BETWEEN CITIES AND STATES

Cities and states share many of the same relevant characteristics. Like states, cities are an important element in a governmental system which allocates power between local and national government.[56] The basic policy tension between protecting federalism values and ensuring adequate antitrust enforcement is present in determining the applicability of a state action exemption to cities.[57] Concerns for efficiency and even necessity have dictated that the cities assume a wide range of responsibilities.[58] Because it is impossible for the state to anticipate fully all potential problems a city might face and because its own resources are

56. As the Court stated in Avery v. Midland County, 390 U.S. 474, 481 (1968): "[I]nstitutions of local government have always been a major aspect of our system, and their responsible and responsive operation is today of increasing importance to the quality of life of more and more of our citizens." In spite of the fact that *Avery* was decided under the 14th amendment, the Court's statements about the importance of local government are still relevant to the case at hand, even though it does not involve a 14th amendment claim. But as the Court pointed out in *Lafayette*, "Although . . . the actions of a local government are the actions of the State for purposes of the Fourteenth Amendment, state action required under *Parker* has different attributes." 435 U.S. at 414 n.43.

57. The dissent clearly thought that cities raised federalism concerns. First, the dissent criticized the opinion as "an extraordinary intrusion into the operation of state and local government." 435 U.S. at 434. The plurality apparently discounted the federalism aspects of the municipality question on the ground that since municipalities were not sovereign for the purposes of the 11th amendment, they "do not receive *all* the federal deference of the States that create them." *Id.* at 412 (emphasis added).

58. The dissent pointed out the primary advantages of delegation of powers to municipal governments. "Such local self-government serves important state interests. It allows a state legislature to devote more time to statewide problems without being burdened with purely local matters, and allows municipalities to deal quickly and flexibly with local problems." *Id.* at 435 (Stewart, J., dissenting). As the *Avery* Court explained: "Legislators enact many laws but do not attempt to reach those countless matters of local concern necessarily left wholly or partly to those who govern at the local level." 390 U.S. at 481. It appears that *Lafayette*, "by demanding extensive [state] legislative control over municipal action," 435 U.S. at 435 (Stewart, J., dissenting), will hinder a state's ability to delegate authority by broad grants and thus may hamper the most efficient functioning of government.

limited, a state must, and often does, delegate some powers to municipalities to legislate for the general welfare. Their importance as a local unit of government responsible for integral functions and essential services suggests that cities should be accorded the same deference as the Court accords states.[59]

Cities, like states, also act in purely regulatory capacity. Since the *Parker* Court granted an exemption to a state engaged in governmental activities—activities which lack a profit motive—it seems appropriate to grant an exemption for purely regulatory conduct. Cities, to the extent they are acting in a purely regulatory capacity, are acting to protect the public welfare and are not profit motivated. Thus, the desire to restrain trade and thereby to increase profits is less present than it is in a purely private context.

Moreover, cities, like states, are also subject to political controls.[60] Because they are accountable to the public, there is argua-

59. Zoning and licensing are two areas in particular where municipalities have been accorded autonomy to legislate for the general welfare. *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387-89 (1926) (zoning laws proper exercise of police power); Hadacheck v. City of Los Angeles, 239 U.S. 394, 413-14 (1915) (burden on party seeking to invalidate local ordinance prohibiting manufacture of bricks within specified city limits); Barnes v. Merritt, 428 F.2d 284, 287 (5th Cir. 1970) (dictum) (presumption exists that geographical limitation on liquor licensing was enacted with requisite formalities). *See* Tchorni, *supra* note 2, at 1559 n.72. The *Lafayette* decision could limit the municipalities' ability to provide this essential local regulation.

In City of New Orleans v. Dukes, 427 U.S. 297 (1976), the city passed a municipal ordinance the principal purpose of which was to preserve the character of an historic area. The Court detailed the authority for the city's passage of the regulation as follows: "pursuant to the Louisiana State Constitution, c. 8 of Art. V of the city's Home Rule Charter grants the New Orleans City Council power to enact ordinances designed to preserve [the Vieux Carre's] distinctive charm, character, and economic vitality." *Id.* at 299. The ordinance at issue prohibited sales by pushcart vendors unless they had been in Vieux Carre for at least 8 years.

The Court upheld the constitutional validity of the ordinance under an equal protection challenge by an excluded vendor. The Court asserted that the city could reasonably have concluded that street vendors tended to interfere with the charm of the historic area. Vieux Carre, the Court said, "is the heart of that city's considerable tourist industry and an integral component of the city's economy." *Id.* Further, the Court found that newer vendors were more likely to interfere with that charm than older vendors who had themselves become part of the charm of the area. *Id.* at 304-05.

Lafayette, however, mandates a different result. As Justice Stewart pointed out in the dissent, the pushcart vendor might now bring an action challenging the statute not on equal protection grounds but on the ground that the statute unreasonably limited the number of competitors in the area—and he might prevail. 435 U.S. at 440 (Stewart, J., dissenting). Unless the city could successfully demonstrate that the state legislature had "contemplated" the exclusion of most pushcart vendors, their regulation would not qualify as valid state action. *Id.* (Stewart, J., dissenting). This contemplation is unlikely since zoning decisions are made by municipalities.

60. It is significant that the plurality and the dissent viewed the distinction differently. The dissent regarded the fact that city governments "are subject to direct popular control through their own electorates and through the state legislature," 435 U.S. at 430

bly no need for a court to scrutinize their anticompetitive conduct more than a state's anticompetitive conduct. Presumably, the public can protect its own interests in competition in the market by voting against municipal governments which do not protect public interests.[61]

2. DIFFERENCES BETWEEN CITIES AND STATES

Although these similarities between cities and states suggest that extension of the state action docrine is justified, their differences indicate that courts cannot treat cities as equivalents of states in all instances.[62] The first difference is that cities are far more numerous than states and therefore, perhaps, have a greater potential to undermine the effectiveness of the antitrust laws.[63] Conceivably, municipalities could enact numerous anticompetitive regulations, each at odds with the antitrust laws.[64] Because of their variety and quantity, the national government might have difficulty controlling such regulations. Second, because cities are not in themselves sovereign entities and have no power

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(Stewart, J., dissenting), as important in analyzing the immunity issue. The accountability of the municipality to political control underscored an important difference between municipalities and private combinations of wealth and provided a further reason to construe the state action doctrine broadly to include municipalities. The plurality, on the other hand, rejected the importance of the political accountability of cities. The plurality thought that the opportunity for consumers to take their complaints to the legislature was not a sufficient reason to imply an exemption. It reasoned that the protection afforded such consumers was fictitious since they did not really "have a meaningful chance of influencing the state legislature to outlaw on an ad hoc basis whatever anticompetitive practices petitioners may direct against them from time to time." *Id.* at 406.

61. Even if swindled consumers at the local level could compel the municipal government to act in their interests, those interests would not necessarily comport with national antitrust interests. Thus, as the plurality pointed out, it is possible to conceive of situations where constituents were being protected, but overall regional efficiency was being impaired. *Id.* at 406-08. The political redress argument does not take account of the problem of a possible divergence of local constituent interests and federal antitrust concerns.

62. *But see* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951), in which the Court delineated some limits on how far a state could go in interfering with the competitive process. *See* text accompanying note 72 *infra;* SULLIVAN, *supra* note 55, at 731-37.

63. The plurality noted that "[i]n 1972, there were 62,437 different units of local government . . . ." 435 U.S. at 407 (citing 1 U.S. BUREAU OF THE CENSUS, 1972 CENSUS OF GOVERNMENTS, GOVERNMENTAL ORGANIZATIONS 1 (1973)). The plurality's concern tbat an increasingly large sector of the economy is becoming exempt from the antitrust laws is shared by commentators. *See* Slater, *supra* note 38, at 74; Tchorni, *supra* note 2, at 1591 (both noting the increased role of government as a consumer of goods and services). *See also* Donnem, *Federal Antitrust Law Versus Anticompetitive State Regulation,* 39 A.B.A. ANTITRUST L.J. 950 (1970).

64. It is even possible that a municipality may enact an ordinance which contravenes state policy, but which would not be rendered unlawful under state law. 435 U.S. at 414 n.44.

other than that derived from the state, they are not entitled to the same deference in the federal scheme.[65] While cities may be entitled to some deference, the policy favoring the federalist system is less compelling in the municipality context.

This comparison between cities and states suggests that there is no easy answer which will resolve the question of an exemption for municipalities. Cities are hybrid units and require special attention. A case-by-case scrutiny may be necessary to determine the appropriateness of an exemption.[66] Though states are often accorded a per se exemption when they are charged with antitrust violations, the differences between states and cities indicate that cities should not automatically be denied or granted an exemption.

II. Doctrinal Tests for Assessing Antitrust Immunity

To assist in the resolution of the municipality question the Court had available to it several doctrinal tests which help define the scope of the state action exemption.[67] These doctrinal tests

65. The difficulty with the plurality's statement that cities are not sovereign and do not enjoy all the deference accorded states is that it never reached the issue of whether, since they are local units of government, albeit not sovereign ones, they should be accorded *any* deference in the federal system. *See* note 57 *supra*. *See generally* Edelman v. Jordan, 415 U.S. 651, 667 n.12 (1974); Lincoln County v. Luning, 133 U.S. 529 (1890) (11th amendment does not protect counties from suits in federal courts). *But see* National League of Cities v. Usery, 426 U.S. 833 (1976).

66. The case-by-case approach is one that many courts, concerned about an overextension of the state action doctrine, have begun to use. They have begun to screen claims of antitrust immunity carefully and to reject any facile conclusions of state action. *See, e.g.*, Hecht v. Pro-Football, Inc., 444 F.2d 931 (D.C. Cir. 1971) (court interpreting *Parker* as placing an inherent limitation on the state action doctrine to regulatory schemes which comply with a similar scheme of federal regulation).

For another instance in which the court scrutinized public action to determine whether an exemption should be available, see George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir. 1970), *discussed in* note 84 *infra*. The court said that the *Parker* Court's "emphasis on the extent of the state's involvement precludes the facile conclusion that action by any public official automatically confers exemption." *Id.* at 30. The need for a case-by-case scrutiny in the context of municipalities is particularly great because there is no clear answer to whether municipalities automatically warrant an exemption.

67. For interesting discussions of these doctrinal approaches, see Slater, *supra* note 38; Note, *Parker v. Brown Revisited: The State Action Doctrine After Goldfarb, Cantor, and Bates*, 77 Colum. L. Rev. 898, 909 (1977) [hereinafter cited as Note, *Parker Revisited*].

Professor Ronald Kennedy analyzes the state action exemption cases in a slightly different way from the analysis presented here. *See* Kennedy, *Of Lawyers, Lightbulbs, and Raisins: An Analysis of the State Action Doctrine Under the Antitrust Laws*, 74 Nw. U.L. Rev. 31 (1979). In his view, state action doctrine consists of "two closely related but analytically distinct elements, immunity and validity." *Id.* at 72. As to immunity, Kennedy states that the state insofar as it acts in its sovereign capacity is immune from the

provided a framework for addressing the issue raised in *Lafayette*. As will be seen, the tests basically reflect different ways of analyzing the same problem, ways that have been elevated to test status by courts without sufficient articulation of why the court applies the particular test in the particular circumstance. Moreover, the tests, standing alone, have limited usefulness for assessing the appropriateness of a municipality exemption. They were developed in differing factual contexts either of state action or a mixture of purely private action and state action and do not address the municipality question directly.[68] The greatest shortcoming of the tests is that they adopt a fairly narrow mechanical approach to the state action exemption which is based on a single criterion—either the particularity of the state's delegation, the independence of the decisionmaker, or the status of the antitrust defendant. For that reason, they appear to be too inflexible to adequately resolve the policies of *Parker* in the municipality context.[69]

A. Legislative Intent Test

A court employing a legislative intent test focuses on the acts of the state legislature to determine whether an exemption is available. Under this test the court seeks to determine whether a party charged with antitrust violations was authorized to engage

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antitrust laws. *Id.* A private party may be immune where it has acted "pursuant to an anticompetitive state regulatory program to which it was required by the state to conform [and the state has] an independent regulatory interest." *Id.* As to validity, the statute must satisfy a four-part test.

> Under the test, it must be shown that the private party's conduct is compelled by the state pursuant to a state scheme that conflicts with the antitrust laws, that the anticompetitive conduct is necessary to make the state scheme work (and even then the antitrust laws will be repealed only to the minimum extent necessary), and that the state's interest in its scheme outweighs the federal interest in competition.

Id.

68. A few lower court decisions have dealt with anticompetitive acts of cities. *See, e.g.*, Continental Bus Sys., Inc. v. City of Dallas, 386 F. Supp. 359, 362-63 (N.D. Tex. 1974) (city bus company with exclusive airport franchise held per se exempt under *Parker*). *But see* Duke & Co. v. Foerster, 521 F.2d 1277 (3d Cir. 1975) (holding that a municipal corporation conspiring to boycott a supplier's products as not per se exempt from the antitrust laws). *See also* New Mexico v. American Petrofina, Inc., 501 F.2d 363 (9th Cir. 1974) (state and several of its political subdivisions sued for conspiring to violate the antitrust laws).

69. The lack of a concern with the substance of the disputed conduct formed the principal basis of Slater's criticism of the available doctrinal tests. In particular, he criticized a final decision rule which looks to the independence of the decisionmaker in deciding the state action question. The difficulty with such a rule is that it "focuses not so much on the type of state action as on the interests of the parties who implemented the program." Slater, *supra* note 38, at 91-92.

in such conduct by the legislature.[70] Although the basic requirement is that the legislature take some action authorizing the conduct, courts differ on the degree of affirmative articulation required. For some courts a general enabling-act statute setting up a public instrumentality is sufficient to render all conduct immune from the operation of antitrust laws.[71] Even under this broad view, the limitation would apply which forbids any attempt to immunize private conduct clearly proscribed by the antitrust laws.[72] Other courts, however, require more specific articulation that the party have authority to engage in the particular anticompetitive activity at issue.[73]

Most courts begin their analysis by determining whether the legislative intent or statutory purpose is clear on the face of the statute. Ordinarily, however, they do not restrict their inquiry to

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70. In *Lafayette* the Court spoke in terms of both authorization and direction. The Court appears to have used these terms interchangeably. As the dissent pointed out, the distinction may be an important one since a city that is merely authorized to engage in anticompetitive conduct "cannot be certain it will not be subject to antitrust liability" if it provides monopoly service. 435 U.S. at 435 (Stewart, J., dissenting). The ambiguity regarding whether authorization or direction is required raises the issue of whether the plurality, in adopting authorization as a test, intended to modify the *Goldfarb* test which requires that the anticompetitive action was compelled by the state, not merely prompted. *See* text accompanying notes 96-106 *infra*.

71. *See* Tchorni, *supra* note 2, at 1561-64.

72. This limitation on the mere attempt to immunize action otherwise forbidden by the Sherman Act is reflected in the Court's holding in *Parker* that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or hy declaring that their action is lawful." 317 U.S. at 351 (citing Northern Sec. Co. v. United States, 193 U.S. 197, 332, 344-47 (1904)). A later case, Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951), indicated the continuing validity of the limitation suggested in *Parker*. The Court stated that "[t]he fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, absent approval hy Congress." 341 U.S. at 386.

The limitation of the mere attempt to immunize is not so significant in the context of municipalities since the legislature is presumably not authorizing a subdivision to engage in activity clearly forbidden under the Sherman Act. The question which arises is likely to be less clear-cut than an attempt to immunize. The limitation therefore is not helpful in defining the scope of the municipality exemption.

73. Under this narrow view, a party charged with an antitrust violation would have to show not only that he acted pursuant to general powers delegated to him by the legislature, but also that the legislature actually considered and approved the specific disputed conduct. *See* Travelers Ins. Co. v. Blue Cross, 298 F. Supp. 1109 (W.D. Pa. 1969), in which the court disallowed a state action defense by an insurance company regulated by the Pennsylvania Insurance Department. Although the department had a wide range of powers to set premiums and establish rates of payment, the court held that the insurance company could not claim an exemption because the department had not contemplated that the company use anticompetitive means. *See also* George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir. 1970). *See* notes 12-13 *supra* (discussing the ambiguity as to degree of articulation required by the *Lafayette* court).

statutory language[74] but also examine such factors as legislative history[75] and state policy.[76]

1. RATIONALE FOR THE LEGISLATIVE INTENT TEST

There are several obvious reasons underlying this doctrinal test, all of which involve finding a strong indication that the state legislature meant to provide an alternative to the competitive market system. The first purpose of requiring legislative articulation is that it permits a court to determine if a state regulatory policy is actually involved.[77] The existence of some legislative articulation is good evidence that a state regulatory policy is involved and that the policy may be worth protecting.[78]

Another major purpose behind the test is that it helps to ensure that the exemption will only be available in instances where the legislature has consciously and affirmatively enacted a regulatory scheme to replace the ideal of enforced competition.[79] When no such considered scheme is present, but only "uncontrolled anticompetitive behavior,"[80] granting an exemption may be unwise.

Finally, requiring articulation provides some assurance that the state, in balancing policies, took adequate account of the

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74. The Fifth Circuit in *Lafayette* properly held that judicial inquiry must go beyond the statutes themselves. 532 F.2d at 431, 435 n.9.

75. *See Parker*, 317 U.S. 341 (1943). *See also* text accompanying notes 45-49 *supra* (discussing the use of the legislative history in *Parker*); Note, *Parker Revisited*, *supra* note 67, at 905 n.43.

76. *See* Bates v. State Bar of Arizona, 433 U.S. 350, 361-62 (1977) (policy of allowing state to regulate activities of state bar), *discussed in* text accompanying notes 115-19 *infra*; Parker v. Brown, 317 U.S. 341 (1943) (policy of federalism); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 31 (1st Cir. 1970) (state policy in favor of competitive bidding).

77. As one writer explained, if there is no state regulatory policy involved, no "rational purpose could be served by recognition of a state action defense." Note, *Parker Revisited*, *supra* note 67, at 921. The writer's reasoning is somewhat unsatisfactory, however, because he apparently assumes that merely because a state statute exists, a state policy deserving protection from antitrust challenge also exists.

78. It should be noted that the assumption that a grant of immunity is justified merely because that statute conclusively indicates that a state policy is at stake may be ill-founded. *See* Tchorni, *supra* note 2, at 1563.

79. The desire of courts to ensure that the regulatory schemes protected under the state action doctrine embody an affirmative alternative to enforced competition has been identified as the "surrogate for competition" test. Handler, *Antitrust Review*, *supra* note 36, at 9; Slater, *supra* note 38, at 91. For an example of the importance attached to this test, see Ladue Local Lines, Inc. v. Bi-State Dev. Agency, 433 F.2d 131, 137 (8th Cir. 1970) (sustaining the claim of state action in part because the state had announced a public policy "against free competiton in an industry essential to it" and regulated "that industry, even to the extent of eliminating competition").

80. Handler, *Antitrust Review*, *supra* note 36, at 9.

federal antitrust interests.[81] If the court were to extend a blanket exemption, without imposing the requirements of articulation, it is unlikely that the legislature would feel compelled to engage in an explicit and overt weighing process.[82] Without the weighing process, states will consider only their own interest in regulation without regard to the possible anticompetitive effects.[83]

2. PROBLEMS WITH THE LEGISLATIVE INTENT TEST

Although the legislative intent test may be useful as a device for limiting the availability of the state action exemption and ensuring that antitrust interests are adequately considered by state regulators, the focus of the test is incorrect because it diverts attention from the underlying policies. Courts applying the test have interpreted its requirements differently and consequently have demanded different degrees of articulation.[84] To the extent

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81. Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. REV. 693 (1974). Additionally, Posner states:

> Under federalism reasoning, part of the justification for the exemption must be that, from the vantage point of the state, other policies outweigh competition and may be implemented with minimal injury to the interests normally secured by the competitive process. Therefore, it makes sense to require that the choice be faced openly.

Id. at 715.

82. *Id.* at 715.

83. The plurality was particularly concerned with the problem of a municipality enacting regulatory schemes without having assessed the possible antitrust consequences. "If 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.

84. Two recent cases in which courts adopted some form a legislative intent test but differed in regard to the degree of articulation needed are E. W. Wiggins Airways, Inc. v. Massachusetts Port Auth., 362 F.2d 52 (1st Cir. 1966) and George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir. 1970). In *Wiggins*, the court adopted an expansive view of the state action exemption and held that a broad delegation of powers to a public instrumentality was sufficient to render its anticompetitive conduct immune. *Wiggins*, 362 F.2d at 55. Under *Wiggins*, if the statute made an agency a public instrumentality and the agency exercised powers generally conferred on it and thus performed essential government functions, the agency's conduct would be immune from the antitrust laws. *Id.*

In *Whitten*, however, the court demanded a more specific articulation that the legislature mandated anticompetive activity in a designated field. That court rejected a *Parker* defense because the legislature had failed to provide such articulation. *See* Note, *Government Action and Antitrust Immunity*, 119 U. PA. L. REV. 521, 526 (1971) [hereinafter cited as Note, *Governmental Action*]. The *Whitten* court narrowly read *Parker* and would uphold an exemption only when "government determines that competition is not the *summum bonum* in a particular field and deliberately attempts to provide an alternate form of public regulation." *Whitten*, 424 F.2d at 30.

Although both *Whitten* and *Wiggins* apparently focused on the degree of legislative articulation in determining whether an exemption should be available, it is clear that both courts, at least implicitly, took some account of underlying policy. Thus, the *Wiggins*

courts focus on the degree of articulation, they may neglect the policies which are the real basis for exemption.

Some courts scrutinizing legislative enactments have recognized this problem and seem to have supplemented their inquiry in order to vindicate the underlying policies.[85] The fact that courts employing a legislative intent test supplement their inquiry by reference to underlying policies suggests that the test cannot be the exclusive criterion for deciding the availability of an exemption. Moreover, the test has several other weaknesses which impair its usefulness as a tool in analyzing the municipality issue.

The first problem in requiring that the state legislature specifically authorized the disputed conduct in the municipality context is that the required articulation is unlikely to exist. State legislatures delegate broad authority to municipalities to exercise police and health powers,[86] typically through the enactment of a general authorizing statute.[87] This creates a problem, for where there is nothing more than a general grant of authority with no investigation of the desirability of anticompetitive activity,[88]

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decision upholding the exemption can be explained by the fact that the public instrumentality was not profit motivated. Since courts are more willing to imply an exception when the disputed conduct is without a profit motive, *Wiggins* may be understood in terms of underlying policy. The *Whitten* decision may also be explained in terms of underlying policy. Because the state legislature had specifically enacted a statute in favor of competitive bidding, the court concluded that the legislature could not have intended the agency to engage in anticompetitive conduct, since to so intend would have undermined the state policy in favor of such bidding.

85. *See* note 84 *supra*. Similarly, in Woods Exploration & Producing Co. v. Aluminum Co. of Am., 438 F.2d 1286 (5th Cir. 1971), policy probably shaped the outcome of the case. In *Woods*, the court refused to extend a state action exemption to a party who had submitted false reports to a state agency. The defendant's strategy was to persuade the state agency to adopt low production allowances for an oil field, thus driving out marginal competitors. The court's technical ground for rejecting the state action defense was that the submission of false data prevented defendant's conduct from merging with that of the state. Thus no state action was involved. *Id.* at 1295. The decision could be explained on the ground that the submission of false data to state agencies should be discouraged. One commentator has explained this case and other similar cases by saying that "[w]hat the courts have really demonstrated in these cases is that state action which is so ill-advised as to serve no state purpose will be insufficient to invoke a *Parker* exemption." Slater, *surpa* note 38, at 97.

86. Thus, municipalities "may enact ordinances prescribing rules and conduct relating to their corporate affairs, limited only by constitutional and statutory restraints." Tchorni, *supra* note 2, at 1559.

87. This lack of specific delegation is particularly troublesome where the municipality operates under a home rule charter. "Home rule charters represent the most significant limitation on state power over local subdivisions." Tchorni, *supra* note 2, at 1559. For a discussion of how widespread state provisions for home rule are, see Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269, 280 (1968), *cited in Lafayette*, 435 U.S. at 434 n.15 (Stewart, J., dissenting).

88. Louisiana's laws are typical. Investor-owned utilities are regulated by the Louis-

ambiguous inferences may be drawn. Since the delegation is broad, one could conclude the legislature intended the power to be broad enough to include the anticompetitive conduct of a municipality.[89] Alternatively, it could be inferred that since the legislature was silent about anticompetitive activity, the activity is not "required."[90]

The test also has other drawbacks which suggest that even if it could be implemented it should not be. The test impairs delegation of authority by states to municipalities. One of the advantages of our present system of government is that a state may share power with its subdivisions.[91] A state may decide to permit the subdivisions to exercise a variety of police powers without having to seek specific prior approval of such acts.[92] The system of delegation serves important state interests since it permits the state to devote the necessary time to statewide interests and permits municipalities to deal flexibly with problems the state could not have anticipated.[93] As the *Lafayette* dissent pointed out, the plurality "by demanding extensive legislative control over municipal action, will necessarily diminish the extent to which a State can share its power with autonomous local governmental bodies"[94] and still retain the advantages of the *Parker* antitrust immunity exemption.

Under the legislative intent test a municipality will have difficulty qualifying its conduct as state action if the test is strictly read. The adoption of such a test, therefore, signifies nothing more than a refusal to extend the state action exemption to municipalities. It is equivalent to a per se denial of immunity and precludes analysis of whether the particular circumstances warrant an exemption.[95] Although the legislative intent test does

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iana Public Service Commission, LA. REV. STAT. ANN. § 45:1163 (West 1978). Article IV, § 21(C) of the Louisiana State Constitution provides that: "The commission shall have no power to regulate any . . . public utility owned, operated, or regulated . . . by the governing authority of one or more political subdivisions . . . ."

89. *See* Brief for Appellee at 20-22, City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); C.D. SANDS, 3 SUTHERLAND STATUTORY CONSTRUCTION 108 (4th ed. 1974) ("a grant of express power carries with it all unexpressed incidental powers necessary to carry it into effect").

90. The use of legislative silence as a basis for denying an exemption is inadequate, however. It ignores the inability of a legislature to antitipate fully every activity which a subdivision must engage in to function efficiently. Therefore, since it is unlikely that this approach will render a definitive result, the court's inquiry cannot be limited to the factors which the legislature has actually examined.

91. 435 U.S. at 434 (Stewart, J., dissenting).

92. *Id.* (Stewart, J., dissenting).

93. *Id.* at 435 (Stewart, J., dissenting).

94. *Id.* (Stewart, J., dissenting).

95. As one student writer noted, the test precludes an analysis of "the precise scope

not rule out a balancing approach if it is treated only as a threshold inquiry, such a balancing would be foreclosed when the test is the conclusive focus of the municipality decision. Nevertheless, the test may prove useful if considered in conjunction with a determination of the policies which would be served by granting or denying immunity.

B. Goldfarb and the Compulsion Test

A corollary to the legislative intent test is the requirement or compulsion test. Courts employing the test are chiefly concerned with limiting the availability of the state action exemption. To claim an immunity, a party must show not only that the state prompted his conduct, but also that it compelled it.

The test originated in *Goldfarb v. Virginia State Bar*,[96] in which the plaintiff challenged a minimum fee schedule of a county bar association on the ground that it violated section 1 of the Sherman Act.[97] The county bar association adhered to the schedule at the prompting of the state bar,[98] an administrative agency of the Virginia Supreme Court. Both the state and county bar associations claimed that their actions were exempt from the Sherman Act as state action.[99] The Court concluded that neither bar association could claim a state action exemption because the state had not required their activities. In order to be exempt from the antitrust laws, the conduct had to be compelled by the direction of the state as a sovereign. Thus, "[t]he threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign."[100]

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of the powers delegated to the government agency, and of the corollary question of legislative or executive consideration of the benefits of regulation as opposed to competition." Note, *Governmental Action, supra* note 84, at 522.

96. 421 U.S. 773 (1974).

97. *Id.* at 778.

98. Although the state bar never took any formal action to enforce the fee schedules, it prompted adherence through the publication of two fee-schedule reports and through the issuance of ethical opinions. *Id.* at 776-77.

99. *Id.* at 779.

100. *Id.* at 790. The Court based its conclusion that the requisite compulsion did not exist on two facts. First, there was no Virginia statute requiring the anticompetitive activity. Second, there was no indication that the state supreme court had approved the actions of the state bar encouraging adherence to such minimum fee schedules. One difficulty with the Court's reasoning is that the county bar might have been able to provide protection against an antitrust action merely by securing legislative authorization for the fee schedule. The problem with a test which focuses on the existence of an authorizing statute is that it emphasizes the extent of delegation, not the merits of a particular case. Thus, even if it were clear than an exemption were undesirable, if the bar association

The test has its origins in *Schwegmann Brothers v. Calvert Distillers Corp.*[101] *Schwegmann* involved a Louisiania statute which required retailers to maintain minimum resale prices.[102] Louisiana law, moreover, authorized enforcement of the price-fixing agreement against both signers and nonsigners of the agreement.[103] Nevertheless, the Court found the state's authorization of the price-fixing scheme was itself insufficient to give immunity to what was essentially private anticompetitive conduct.[104] It held that a state could not immunize private conduct merely by permitting it.[105]

The basic reason for the compulsion test is that it limits the availability of a state action exemption to cases where there is a strong showing that the state specifically approved the disputed conduct. The test prevents a broad extension of the exemption by denying it to parties who are actually acting on their own, but seeking to shield their conduct under the state action doctrine.

While this may be a worthy goal, the compulsion test is not particularly helpful in determining the appropriateness of a municipality exemption because the test does not translate well into the municipality context. The broad delegation of power to municipalities will often make it impossible to characterize the local activity as compelled by the state.[106] The test is more appropriate for private parties seeking to claim the exemption, since it enables a court to determine if there is any governmental interest at stake. When a governmental entity claims the exemption, however, the imposition of the compulsion test is superfluous.[107] By

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had successfully lobbied for a statute permitting anticompetitive conduct, the Court would bave been forced to give the exemption effect.

101. 341 U.S. 384 (1951).

102. *Id.* at 385.

103. *Id.* at 386-87.

104. *Id.* at 389.

105. *Id.* at 386.

106. A particular problem in applying the compulsion test to municipalities is that "it is unclear whether a state's grant of a municipal charter is, without more, the equivalent of compelling the municipality to act, or whether the compulsion standard should apply to all actions taken by municipalities." Tchorni, *supra* note 2, at 1556. "Yet another question left unanswered by the Supreme Court is whether the judiciary should accord municipal compulsion the same respect as state compulsion in treating the required activity as beyond the scope of the federal antitrust laws." *Id.* at 1556.

107. As Justice Stewart noted in the dissent:

> State compulsion is an appropriate requirement when private persons claim that their anticompetitive actions are not their own but the State's, since a State cannot immunize private anticompetitive conduct merely by permitting it. But it is senseless to require a showing of state compulsion when the state itself acts through one of its governmental subdivisions.

Lafayette, 435 U.S. at 431-32 (Stewart, J., dissenting).

equating municipalities and private parties, the test blurs the important distinction between governmental and private action, and thus is inappropriate in the municipality context.

C. *Status of the Antitrust Defendant*

Another test developed to define the scope of state action exemption is based on the status of the defendant.[108] This test differs from the other two doctrinal tests because, instead of emphasizing the intent of the state legislature or the particularity of delegation, it focuses on whether the decisionmaker is a state or private party.

1. THE FOCUS ON STATUS IN PARKER AND SUBSEQUENT CASES

Parker provided the impetus for an exemption based on official status. In that case the Court held that if a state or its officers were engaged in activities directed by the legislature, the conduct was exempt.[109] Since the Court in *Parker* expressly incorporated the official status of the defendants in its holding that state action is exempt from the antitrust laws, it was unclear whether private parties or municipalities could successfully raise a state action defense. Furthermore, the Court did not indicate the degree of state delegation or supervision needed in cases where the defendant was not a state or authorized officer. Nevertheless, subsequent decisions made it clear that the exemption would be available to private parties in certain limited circumstances.[110] A nonpublic party could claim an exemption if he acted under coercion of state law or if the degree of state supervision was sufficiently great to render the action state action.[111]

In *Gas Light Co. v. Georgia Power Co.*[112] the Fifth Circuit found that defendant's actions, approved by the Georgia Public Service Commission after extensive hearings, were exempt from

108. For an interesting discussion of this test, see Sherrill, *supra* note 67, at 908-13.

109. *Parker*, 317 U.S. at 352.

110. As Chief Justice Burger remarked in his concurring opinion in Cantor v. Detroit Edison, 428 U.S. 579 (1976): "If *Parker's* holding were limited simply to the nonliability of state officials, then the Court's inquiry in *Goldfarb* as to the County Bar Association's claimed exemptions could have ended upon our recognition that the organization was a 'voluntary association and not a state agency . . . .'" 428 U.S. at 790 (Burger, C.J., concurring). "Yet, before determining that there was no exemption from the antitrust laws, the Court proceeded to treat the Association's contention that its action, having been 'prompted' by the State Bar, was 'state action for Sherman Act purposes.'" *Id.* at 604 (Burger, C.J., concurring) (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773, 790 (1974)).

111. Posner, *supra* note 81, at 694-95.

112. 440 F.2d 1135 (5th Cir. 1971).

the antitrust laws because the conduct involved state action.[113] The *Gas Light* decision is significant because it illustrates that when a private party seeks immunity under the state action doctrine, a court will carefully scrutinize the claim to determine the degree of the state's involvement. If the state is substantially involved in regulating the disputed conduct, a private party may be able to successfully claim state action immunity, but if the state's involvement is only minor, the immunity may be unavailable. Holding that a private party may claim immunity if the state is substantially involved implies that a court would almost certainly find an exemption if the state itself were the defendant.[114]

The focus on the official status of parties was also present in *Bates v. State Bar.*[115] In determining that the ban on lawyer advertising was exempt from antitrust liability, the *Bates* Court emphasized the status of the antitrust defendant. Although the action had been brought against the state bar, the Court found that the real party in interest was the Arizona Supreme Court.[116] Further, although the state bar played a role in the enforcement of the rules promulgated by the court, it was an agent of the state supreme court, and was under its continuous supervision.[117]

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113. In *Gas Light* a distributor of natural gas brought an action against one of its competitors, an electric company, for alleged violations of the Sherman and Clayton Acts. *Id.* at 1136. The Georgia Public Service Commission regulated the rates and services of both plaintiff and defendant and had approved the alleged anticompetitive practices. The defendant claimed, and the trial court agreed, that since the disputed practices were approved by tbe state, they were necessarily the products of state action and so fell outside the prohibitions of the antitrust laws. *Id.* at 1138.

On appeal the Fifth Circuit upheld the finding of state action. Not only had the Public Service Commission approved the disputed rates and practices, but it had done so only after extensive consideration in full adversary hearings. *Id.* at 1139-40.

But see Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248 (4th Cir. 1971), in which the court held that because an independent state agency had the authority to approve the program, the state action exemption was applicable even though the state had never actively supervised the anticompetitive conduct. The court concluded that mere silence amounted to agency approval and thus brought the conduct within the ambit of the state action exemption. *Id.* at 252.

114. However, there is apparently a tendency in more recent cases to narrow the scope of tbe state action defense and a corresponding reluctance to reach facile conclusions of valid state action. *See* note 66 *supra.*

115. 433 U.S. 350 (1977). In *Bates* two lawyers who had set up a legal services clinic were charged with violating the state supreme court's ban on lawyer advertising. *Id.* at 353. The lawyers defended on the ground that the ban violated §§ 1 and 2 of the Sherman Act because of its tendency to restrict competition. *Id.* at 356.

116. "The Arizona Supreme Court is the real party in interest; it adopted the rules, and it is the ultimate trier of fact and law in the enforcement process." *Id.* at 361.

117. *Id.* The importance which the Court attached to official state status was reflected not only in the Court's conclusion that the supreme court was the real party in interest, but also in the manner in which the Court distinguished the earlier opinion of

2. PROBLEMS WITH THE STATUS TEST

However, even in *Bates,* the Court did not restrict its inquiry to that criterion alone. Rather the Court examined the underlying policy of the need to protect a local interest in regulation.[118] The Court apparently was aware of the problem inherent in the status test: its sole focus on the nature of the antitrust defendant is unsatisfactory since, by avoiding the underlying policy concerns, it begs the question of whether a municipality should be exempt.[119] An approach which focuses directly on these policies, especially with regard to the hybrid nature of municipalities, would be preferable.[120]

D. Doctrinal Tests Applied in Lafayette

In contrast to the willingness of the Court in prior cases to supplement the doctrinal tests with an examination of underlying policy,[121] the plurality and dissent were unwilling to engage in a substantive policy analysis to resolve the immunity issue in *Lafayette.*[122] The cities in *Lafayette* argned that under *Parker*

Cantor v. Detroit Edison Co., 428 U.S. 579 (1976). *See* Tchorni, *supra* note 2, at 1571. The *Bates* Court suggested that *Cantor* was distinguishable because the action had been brought against a private party, implying that if the state had been named as defendant, the Court might have decided the case differently and granted the exemption. According to one author, the narrow reading of *Parker* in *Bates* which would restrict the state action doctrine to instances in which the state or its authorized officers are parties in interest conflicts "with both logic and precedent." Sherrill, *supra* note 67, at 910. *See also Lafayette,* 435 U.S. at 427 (Stewart, J., dissenting).

118. The *Bates* Court concluded that the disputed regulation could not be invalidated without threatening the ability of the state supreme court to regulate the activities of the bar. Since there was an important state interest in such regulation, the Court concluded it would be appropriate to grant an exemption.

119. One author has criticized the narrow reading which limits *Parker* to state agents on the ground that the "distinction between agents and non-agents [may bear] no necessary relationship to the distinction between conduct worthy of the label 'state action' and purely private activity." Sherrill, *supra* note 67, at 909.

120. Although the Court in *Bates* regarded status as a relevant point of inquiry, it did not focus exclusively on that issue, but examined the underlying policies to be served by an exemption from the antitrust laws. This disposition to examine underlying policies even when apparently focusing on a mechanical test was also reflected in *Parker,* where the Court explicitly relied on legislative intent, but implicitly relied on a weighing of competing policies of federalism and antitrust concerns.

121. *See* text accompanying notes 46-54 and notes 84-85, 118 *supra.*

122. Although the *Lafayette* Court apparently adopted a per se approach based on the presence or absence of legislative articulation, the Court did indicate that policies might be important.

> [T]he conclusion that the antitrust laws are not to be construed as meant by Congress to subject cities to liability under the antitrust laws must rest on the impact of some overriding public policy which negates the construction of coverage, and not upon a reading of "porson" or "persons" as not including them.

435 U.S. at 397. The plurality also expressed its pragmatic concern that granting an

their status as governmental entities entitled them to an exemption from the antitrust laws.[123] By invoking the legislative intent test to resolve the more general question of state action exemption, the plurality rejected the argument that governmental status alone shall give rise to exemption entitlement. To support its rejection of that argument the plurality narrowly construed the state action doctrine. The Court was unwilling to allow municipalities to claim antitrust immunity under state action exemption unless specific legislative authorization was present.[124]

The plurality further demonstrated its preference for a narrow construction of the state action exemption in its discussion of *Goldfarb* and *Bates*. The plurality thought those cases were significant primarily for the limits they placed on parties seeking to claim an exemption. *Goldfarb* limited the exemption to activities compelled by the state[125] and *Bates* limited it to anticompetitive conduct which was part of a comprehensive regulatory scheme.[126] By adopting this approach, the plurality effectively ignored the key issue raised by the governmental nature of municipalities. If it had analyzed the issue, it might have concluded that competing policies rendered the governmental nature of the municipal activities insufficient to warrant an exemption. The plurality, however, avoided the question altogether.

The dissent adopted a similar per se approach, but reached the opposite conclusion. It postulated that the key distinction to be drawn is whether the regulation was governmental or private conduct.[127] Since the cities' conduct was clearly governmental, the dissent stated, they should be entitled to an exemption.[128]

The difficulty with the approach of both the dissent and the plurality, as well as with the traditional doctrinal tests, is that they are improperly focused. Important factors which should bear on an analysis of the immunity question are excluded from consideration.

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exemption to municipalities might lead to widespread noncompliance with the antitrust laws. *Id.* at 408. *See also* text accompanying notes 17-18 *supra*.

123. 435 U.S. at 408.

124. *Id.* at 409.

125. *Id.*

126. *Id.* at 410.

127. *Id.* at 428 (Stewart, J., dissenting). *See* text accompanying note 30 *supra*.

128. 435 U.S. at 429. "There can be no doubt on which side of this line the petitioners' actions fall. 'Municipal corporations are instrumentalities of the State for the convenient administration of government within their limits.'" *Id.* (Stewart, J., dissenting) (citations omitted).

III. SUBSTANTIVE TESTS

A. *Need for a Test that Looks to the Nature of the Conduct*

The traditional doctrinal tests are not by themselves sufficient to answer the municipality question. The tests are really fictions or labels that courts have developed to justify the grant or denial of an exemption in a particular case. While the specific criterion in each test may be a relevant factor, without a consideration of policies it cannot provide a satisfactory method for assessing claims of immunity from the antitrust laws.

An examination of policies which would justify granting the exemption is even more necessary in the context of municipal conduct than it is in the context of state conduct. Since municipalities cannot be accurately characterized as either state or private action, but are a hybrid consisting of aspects of both, courts must assess municipal conduct on a case-by-case basis. In order to determine how the conduct of the municipality fits into the tension between federalism and antitrust enforcement, a court must look to the nature of the challenged activity.[129]

An approach based on the nature of the challenged conduct has several advantages, all of which would prove useful in answering the municipality question. First, it would encourage a case-by-case adjudication. This would discourage courts from analyzing the issues in a narrow or mechanical way. Further, by turning the attention to the interests being served by the municipal regulations, it would discourage the kind of per se approach advocated by both the plurality and dissent in *Lafayette.*

B. *A Substantive Approach Based on the Regulatory/ Proprietary Distinction*

1. JUDICIAL AND CRITICAL SUPPORT

One judicial doctrine which may prove helpful in determining the availability of an exemption for municipalities is based on a distinction between regulatory and proprietary activity.[130]

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129. The failure of the doctrinal tests to consider the nature of the challenged conduct has formed the principal basis of Slater's criticism of these judicial approaches. Thus, the trouble with one such approach, the final decision rule, which bases the availability of a state action exemption on whether the decisionmaker is independent, is that it "focuses not so much on the type of state action involved as on the interests of the parties who implemented the program." Slater, *supra* note 38, at 91-92. For an example of an opinion which did focus on the nature of the activity, see Hecht v. Pro-Football, Inc., 444 F.2d at 947. In that case the court concluded that the nature of the interest—regulation of football activities in the District of Columbia—was not sufficiently important to justify overriding the existing antitrust laws.

130. The importance of drawing a regulatory/proprietary distinction has been recog-

Under such a distinction a court determines whether the disputed conduct is of an essentially governmental or profit-making nature. To the extent municipalities engage in purely commercial activities, they would be, under such a test, denied an exemption from the antitrust laws.

The distinction has been recognized by courts in defining the scope of the state action exemption, particularly in the context of municipalities.[131] In *Parker* itself, Chief Justice Stone intimated that a regulatory/proprietary distinction should be drawn. He suggested that the case might have been decided differently if there were a "question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade."[132]

More explicit judicial support for the use of the regulatory/proprietary distinction in determining the proper scope of the state action exemption can be found in *Union Pacific Railroad Co. v. United States.*[133] In *Union Pacific* the Court suggested that a governmental body does not enjoy absolute antitrust immunity if it engages in a profit-making venture. In that case Kansas City entered into a joint financing of a new market at a railroad terminal. Since another city operated a comparable nearby market, Kansas City concluded that the amount of business available was insufficient to permit a split market to survive.[134] In order to ensure the success of their venture, Kansas

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nized by courts and commentators alike. *See, e.g.*, Parker v. Brown, 317 U.S. 341, 351-52 (1943); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 29, 34 (1st Cir. 1970); E.W. Wiggins v. Massachusetts Port Auth., 362 F.2d 52, 55 (1st Cir. 1966); Azarro v. Town of Branford, [1974-2] Trade Cas. (CCH) ¶ 98,063, 98,064 (D. Conn. 1974); Reid v. University of Minn., 107 F. Supp. 439, 441 (D. Minn. 1952). *But see Lafayette*, 532 F.2d at 433; Ladue Local Lines, Inc. v. Bi-State Dev. Agency of Mo.-Ill. Met. Dis., 433 F.2d 131, 135 (8th Cir. 1970). *See also* Handler, *Antitrust Review*, *supra* note 36, at 18, Jacobs, *State Regulation and the Federal Antitrust Laws*, 25 CASE W. RES. L. REV. 221, 239 (1975); Kennedy, *supra* note 67, at 72-75, Posner, *supra* note 81, at 705-06; Slater, *supra* note 38, at 90; Tchorni, *supra* note 2, at 1556-61. This distinction is a particularly important one to draw in the context of municipalities because a municipal corporation may have a "dual character[.] [I]t may act in either a governmental or proprietary capacity." Tchorni, *supra* note 2, at 1557 (citing 1 MCQUILLIN, MUNICIPAL CORPORATIONS § 2.09, at 146-47 (3d ed. 1971)).

131. "Distinguishing between governmental and proprietary functions is important in the context of municipal activities because courts traditionally afford this dichotomy substantial respect in determining the extent of municipalities." Tchorni, *supra* note 2, at 1556.

132. *Parker*, 317 U.S. at 351-52, *cited in* Slater, *supra* note 38, at 90. One commentator has noted that "[a]lthough *Parker* and its progeny do suggest a recognition that a state's sovereign actions are more likely to be exempt from the antitrust laws than are its actions taken in other capacities, they leave unsettled the importance of this distinction in determining the exemption." Tchorni, *supra* note 2, at 1556.

133. 313 U.S. 450 (1941).

134. *Id.* at 452.

City authorized payments giving the dealers free rent and moving expenses. The rival city brought an action alleging violations of the Elkins Act anti-rebate provisions.[135] The Kansas court upheld the actions of Kansas City as valid governmental acts. On appeal the Supreme Court held that since any action by any person to bring about discrimination in interstate commerce was unlawful under the Elkins Act, an injunction restraining the anticompetitive practices of the city was valid.[136] Since Kansas City was acting in a proprietary capacity, it neither had antitrust immunity nor could it confer immunity on others.[137]

The distinction has value in defining the proper scope of the exemption of municipalities. First, it embodies a policy inherent in *Parker*—a governmental unit acting in a regulatory capacity is not motivated by a desire to maximize profits.[138] Regulatory conduct is motivated by a desire to enhance the social and economic welfare of citizens and is based, in theory, on an assessment by the governmental unit of the inadequacy of normal market forces to achieve this end. Where the local governmental unit has weighed the benefits and drawbacks of competition and decided that regulation is necessary and the activity is regulatory in nature, anticompetitive effects may be justified.[139]

A very different situation obtains if the governmental unit acts as a proprietor. In such situations a stricter standard of scrutiny should be imposed in deciding whether the activity should be immune from the antitrust laws. As a proprietor, a governmental entity is encouraged by profit maximization.[140] Any competitive effects are in conflict with the desire to maximize profits. Only self-restraint limits the harm from such interference with the market.[141]

Second, unlike the other tests, the distinction encourages a

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135. The Elkins Act makes it unlawful for "any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce . . . ." 32 Stat. 847, 34 Stat. 587 (current version at 49 U.S.C. § 41(1) (1976)). It should be noted that the *Lafayette* Court considered the definitional language to be similar to that used in § 8 of the Sherman Act. 435 U.S. at 401 n.19.

136. *Union Pacific*, 313 U.S. at 463, 474.

137. *See* Slater, *supra* note 38, at 90.

138. *See* Northern Natural Gas Co. v. FPC, 399 F.2d 953, 959 (D.C. Cir. 1968).

139. The prototype of this approach is Nebbia v. New York, 291 U.S. 502 (1934). In *Nebbia* the Court recognized that local governmental units may interfere with the free market so long as the scope of regulation is reasonable and not arbitrary or capricious. Thus, in *Nebbia* the Court, applying a due process analysis to local regulation, recognized that in certain circumstances divergence from the competitive system was justified.

140. R. HAVERMAN & K. KNOPF, THE MARKET SYSTEM 200 (2d ed. 1970).

141. 1 A. KAHN, THE ECONOMICS OF REGULATION 3 (1970).

case-by-case adjudication based on the nature of the municipality's anticompetitive activity. In applying the other tests, a court does not have to engage in any substantive analysis of the municipality's conduct. It must only examine whether the legislature passed an authorizing statute or the state compelled the disputed conduct. Consequently, under such a test, if the municipality acts under an umbrella of state action, the particular nature of the subdivision's conduct is unimportant. The regulatory/proprietary test encourages a substantive analysis. This approach is preferable because the hybrid nature of municipalities indicates that there is no easy answer to the immunity issue. To arrive at a satisfactory solution case-by-case adjudication is required.

Further, the test would permit courts to consider pragmatic concerns about the potential for widespread noncompliance with the antitrust laws.[142] It would do so by allowing the courts to permit municipalities to regulate in key areas that traditionally have been the subject to local regulation, while disallowing nonregulatory municipal activity. If the *Lafayette* Court had drawn this distinction, municipal zoning and licensing decisions, for example, might remain beyond the scope of the antitrust laws,[143] while the purely proprietary activity at issue in *Lafayette* would not be immune.[144] Moreover, the nature of the conduct was so egregious that self-restraint could not have been expected to provide an adequate safeguard. In spite of the availability of this simple guideline under which the state action exemption could have been denied, however, the Court avoided such an analysis.

2. DRAWBACKS OF THE REGULATORY/PROPRIETARY DISTINCTION AS A CONCLUSIVE TEST

The regulatory/proprietary test is preferable to the blanket legislative intent rule adopted in *Lafayette* or the traditional tests involving the status of the defendant or compulsion by the state. Nevertheless, it should not be wholly dispositive of the availabil-

142. *See, e.g., Lafayette,* 435 U.S. at 408. *See also* notes 63-64 *supra* and accompanying text.

143. *But see* note 59 *supra,* in which the potential for an antitrust challenge to municipal zoning is discussed.

144. Chief Justice Burger asserted that it was an unchallenged presumption that the cities were engaged in proprietary activity. *Lafayette,* 435 U.S. at 418 (Burger, C.J., concurring). The dissent, however, disagreed with this characterization of the cities' actions. "[T]he District Court's 'conclusion' . . . that the petitioners' electric utility service was a business activity engaged in for profit was not supported by any evidence (since the case was decided on a petition to dismiss) . . . ." *Id.* at 432 n.10 (Stewart, J., dissenting).

ity of the claimed immunity.[145] As the dissent points out in *Lafayette,* the distinction is not always a clear one.[146] The Court has termed the distinction between governmental and nongovermental activities "a quagmire"[147] and "untenable."[148] The difficulty of the test is illustrated by an example which the dissent posed: "[I]f a city or State decides to provide water services to its citizens at cost . . . , is its action to be characterized as 'proprietary'?"[149] Since it will not always be clear when an action is proprietary and when it is governmental, the Court should not adopt this test as the sole criterion.

Moreover, because the distinction necessarily focuses on the nature of the challenged state or local activity and does not concern itself with relative importance of this activity, it is not designed to account for the fundamental national interest in fostering free competition. Thus, the regulatory/proprietary test by itself is insufficient because its focus is too limited. Its advantages suggest that it should be the first part of a two-part test used to resolve the municipality question.

C. Second-level Scrutiny: Regulatory/Proprietary Supplemented by a Balancing Text

The federal antitrust laws play an important rule in a free market. American society has decided that the best way to ensure adequate economic performance is through a considerable degree of free competition.[150] The antitrust laws are designed to achieve that goal and are useful in preventing distortions in the allocation of resources, protecting consumers by insuring the availability of quality goods at a fair price,[151] and preserving small competitors.[152]

In spite of the fundamental importance of the antitrust laws in achieving the ideal of free competition in American society, courts have sometimes interpreted these laws narrowly. They

145. Not all courts have agreed with the suggestion in *Parker* and *Union Pacific* that the regulatory/proprietary distinction is an important one in defining the scope of state action. In *Lafayette,* the Court ignored the district court's finding that the activity was proprietary, 435 U.S. at 392-94, and in Ladue Local Lines, Inc. v. Bi-State Dev. Agency, 433 F.2d 131 (8th Cir. 1970), the court expressly disavowed the importance of the distinction in determining an exemption. The court called the distinction a "fallacy." *Id.* at 135.

146. 435 U.S. at 432-33 (Stewart, J., dissenting).

147. Indian Towing v. United States, 350 U.S. 61, 67-68 (1955).

148. New York v. United States, 326 U.S. 572, 586 (Stone, C.J., concurring).

149. 435 U.S. at 434 (Stewart, J., dissenting).

150. *See* note 50 *supra.*

151. *See* Note, *A Preemption Analysis, supra* note 40, at 1170.

152. *Id.*

have accorded deference to state regulatory schemes, even when those schemes conflict with national antitrust policy or laws.[153]

State regulation arises in part as a response to market imperfections.[154] Thus, although the antitrust laws provide that the optimum economic solution lies in competition, in some contexts competition may be an unattainable, or even undesirable goal.[155] At times a regulated monopoly is needed to avoid the dangers of cut-throat competition.[156]

State regulatory schemes often bring about results inconsistent with the free market economy embodied in the antitrust laws.[157] Because of the importance of preserving comity for local units of government through federalism, allowing local units to regulate economically when necessary, and ensuring competition through the antitrust laws, this conflict needs to be resolved. The major shortcoming of the regulatory/proprietary approach is that because it is concerned with only the regulatory side of the conflict, it cannot achieve a balance.

Several approaches have been suggested to achieve that balance. To defend antitrust policies against conflicting state laws, Professor Posner has suggested that certain technical or mechanical tests be used to enable a federal court to limit the application of state law.[158] Although he conceded that *Parker* appeared to foreclose that alternative,[159] he has argued that the antitrust laws are sufficiently important to justify a narrowing of the *Parker* doctrine. Posner would require the state to consider antitrust interests in deciding to regulate. In doing so the state would be forced to face its choice to enact an anticompetitive monopoly openly.[160] Compelling the state to engage in a conscious weighing process would have the beneficial effect not only of protecting national interests, but also of subjecting the states' choice to political review, thereby ensuring a foundation for later judicial review.[161]

Posner's suggestion is encouraging since it attempts to find

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153. *See* Posner, *supra* note 81, at 699: "The *Parker* court opted for a narrow interpretation of the scope of the antitrust laws and broad deference to state regulation."

154. *See* Northwestern Natural Gas Co. v. FPC, 399 F.2d 953, 959 (D.C. Cir. 1968).

155. Furst, *Private Interest and Public Control: Government Action, The First Amendment and the Sherman Act*, 1975 UTAH L. REV. 9, 27.

156. For a discussion of the pressure for and bases of such regulation, see J. MORGAN, ECONOMIC REGULATION OF BUSINESS 18-22 (1976).

157. Posner, *supra* note 81, at 695-96.

158. *Id.* at 695.

159. *Id.* at 696.

160. *Id.* at 715.

161. *Id.*

an approach which will take adequate account of the paramount federal antitrust policies. However, like many of the traditional tests developed by the courts, it is defective in its failure to examine the nature of the disputed local activity. Underlying Posner's approach is the assumption that if a state meets all the technical criteria—if the decisionmaker is independent and the state, consciously weighing the alternatives, explicitly authorizes the challenged activity—then a state policy warranting an exemption is at stake and an exemption should be granted.

Two drawbacks to this approach are readily apparent. First, it is just not clear that a legislature, pressured by powerful lobby groups, will do a better job of balancing the competing interests at stake than a court. Federal antitrust policy may be given short shrift by state legislatures confronted with self-serving business interests. Second, and perhaps more important, it is not clear that a legislature, often pressed for time, will be able to consider adequately each situtation in which a municipality seeks an exemption. Thus exemptions may be denied in many situations in which they would be desirable simply because the municipality cannot get the legislature to meet Posner's technical criteria.

Instead of trying to resolve the concerns inherent in *Parker* by resorting to technical tests, a preferable approach would focus on the nature and extent of the state and national interests at stake.[162] Such an approach would shift the court's focus to a substantive analysis, and go beyond a consideration of only the state's interests in determining if the state scheme should stand. As one commentator has indicated, this balancing of anticompetitive effects against state interests "is not an altogether novel ideal or one without some precedent."[163]

Another approach which incorporates the type of balancing required in the present situation is preemption analysis. Preemption is a judicially created doctrine[164] which is based on the supremacy clause of the United States Constitution.[165] The first

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162. *See* Slater, *supra* note 38, at 104; Note, *A Preemption Analysis*, *supra* note 40, at 1164-65.

163. Slater, *supra* note 38, at 106. For cases involving the commerce clause in which the Court has applied such a balancing test, *see, e.g.*, Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951); Southern Pac. Co. v. Arizona, 325 U.S. 761, 783 (1945). *See also* Kennedy, *supra* note 67, at 73 (suggesting that the balancing approach should be applied not to the question of whether the antitrust laws have been violated but to whether the antitrust laws apply at all).

164. *See* Note, *A Preemption Analysis*, *supra* note 40, at 1167 (application of preemption analysis to the state action exemption discussed).

165. "This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every

step of a preemption analysis is to determine in what field a state law operates and whether a federal law also operates in the same field. The next step is to determine whether the federal law was intended to exclusively occupy that field.[166] If the federal policy is intended to be exclusive, the state statute falls.[167] If the federal law or policy was not intended to be exclusive, the court must look at the policy objectives of the national scheme and see whether the state scheme stands as an obstacle.[168]

The main thrust of the preemption analysis is to compel an inquiry which goes beyond the statute toward an examination of the underlying policies and the market characteristics of the disputed activity.[169] Under such an approach, the activities of a public utility would be upheld although they fostered admittedly anticompetitive activity, because they nevertheless met other goals of the antitrust laws—goals such as allocational efficiency, the protection of consumers, or the preservation of small competitors. Although the facts of *Lafayette* do not present as clear a case for exemption from the antitrust laws as the public utility situation, nevertheless the approach suggested is helpful in focusing attention not only on the local interest in regulation but also on the fundamental national policy of fostering free competition.

IV. Conclusion

The *Lafayette* case presented the Court with a novel question: the application of the state action doctrine to municipalities. In trying to resolve that issue the Court's plurality relied exclusively on the legislative intent test. That test, like many of the technical tests developed by courts in determining the scope of the state action doctrine, does not provide a satisfactory answer to the immunity claim. A better and more logical approach lies in a test which focuses on the nature of the challenged activity as defined in terms of a regulatory/proprietary distinction. There is considerable support for drawing such a distinction in the municipality context.[170] This test has two additional advantages. First, it provides justification for stricter scrutiny of exemptions claimed by a local government acting in a proprietary capacity. Since government proprietors seek not only to advance public

State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI.

166. Note, *A Preemption Analysis*, *supra* note 40, at 1170.

167. *Id.* at 1166. *See, e.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947).

168. Note, *A Preemption Analysis*, *supra* note 40, at 1168.

169. *Id.* at 1172.

170. *See* text accompanying notes 131-32 *surpa.*