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City Of Lafayette, Louisiana V. Louisiana Power & Light Co.: Will Municipal Antitrust Liability Doom Effective State-Local Government Relations?

CITY OF LAFAYETTE, LOUISIANA v. LOUISIANA POWER & LIGHT CO.: WILL MUNICIPAL ANTITRUST LIABILITY DOOM EFFECTIVE STATE-LOCAL GOVERNMENT RELATIONS?

The scope of the state action doctrine is one of the least clearly delineated areas of federal antitrust law. The Supreme Court first applied the doctrine in *Parker v. Brown*[1] which upheld the California Prorate Marketing Act[2] against a claim that the operation of the statute gave rise to violations of sections 1 and 2 of the Sherman Act.[3] Reviewing the language and legislative history of the Sherman Act, the Court held that the Act was not intended to constrain the regulatory acts of state government.[4] Subsequent application of the doctrine has been confusing because courts have been unable to agree on when antitrust defendants, other than states which are engaged in anticompetitive activity, may claim antitrust immunity under *Parker*. Some courts have required defendants to show that the conduct was undertaken pursuant to a state's legislative mandate. Other courts have extended *Parker* immunity to defendants other than states without requiring a legislative mandate, provided the defendant was a political subdivision or other agency of the state.[5] Where a mandate has

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[1] 317 U.S. 341 (1943). The *Parker* doctrine is often referred to as an exemption from federal antitrust laws. *See* Handler, *The Current Attack on the* Parker v. Brown *State Action Doctrine*, 76 COLUM. L. REV. 1, 9 n.44 (1976). The term "exemption", while convenient, does not properly describe the doctrine. Action taken by a state legislature is more precisely not within the scope of the antitrust laws.

The state action doctrine has its origins in Olsen v. Smith, 195 U.S. 332, 345 (1904) and Lowenstein v. Evans, 69 F. 908, 911 (C.C.D.S.C. 1895). In *Olsen*, the state had enacted a statute that allowed only persons who held state issued licenses to engage in the pilotage profession. *Lowenstein* upheld a South Carolina statute which prevented private parties from selling distilled spirits. Since the state in both cases rightfully exercised its power to regulate local trade, no monopoly or restraint of trade arose from the fact that only the state's authorized agents were engaged in the challenged activities. 195 U.S. at 345.

[2] The California Agricultural Prorate Act, ch. 754, 1933 Cal. Stats. 1969 (current version at CAL. AGRIC. CODE §§ 59501-60015 (West 1967)) authorized state officials to stabilize the prices of agricultural commodities produced in the state by establishing marketing programs which restricted competition among growers. In *Parker*, a raisin grower and packer had contracted to sell most of his 1940 crop before the program in question was adopted. 317 U.S. at 349. The program as adopted required raisin growers to pool a large part of their crop and allow a program committee, selected by the State Director of Agriculture, to control the classification and distribution of the raisins. *Id.* at 346-48. Brown alleged that if the program was enforced against him he would be prevented from marketing his 1940 crop and fulfilling contracts which he had already negotiated. *Id.* at 349.

[3] 317 U.S. at 350. 15 U.S.C. § 1 (1976) makes illegal all contracts, combinations and conspiracies in restraint of interstate trade or commerce. 15 U.S.C. § 2 (1976) makes it a felony to monopolize or endeavor to monopolize any aspect of interstate or foreign trade or commerce.

[4] 317 U.S. at 350-51.

[5] Subsequent to the *Parker* decision, some courts held that state agencies need not show a legislative mandate for their conduct in order to claim state action immunity. Saenz v. University Interscholastic League, 487 F.2d 1026 (5th Cir. 1973) involved allegedly anticompetitive activity undertaken by an agency of the state of Texas. *Id.* at 1028. The court held

been required, inconsistent standards for establishing its existence have been applied by different courts.[6] In *City of Lafayette, Louisiana v. Louis-*

that the League's status as a state agency automatically afforded it antitrust immunity under the *Parker* doctrine. *Id. See also* E. W. Wiggins Airways, Inc. v. Massachusetts Port Auth., 362 F.2d 52, 55 (1st Cir. 1966), *cert. denied,* 385 U.S. 947 (1967). Other courts applying the *Parker* doctrine to the conduct of state agents have required that the defendants show state involvement in the activity before extending antitrust immunity to the agency. In Ladue Local Lines, Inc. v. Bi-State Dev. Agency, 433 F.2d 131 (8th Cir. 1970), two states had monopolized bus transportation service through Bi-State, their common agency. *Id.* at 132. The fact that Bi-State's activities were engaged in pursuant to powers granted by the states made the Sherman Act inapplicable. *Id. See also* Hecht v. Pro Football, Inc., 444 F.2d 931 (D.C. Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972). In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), the Supreme Court applied the *Parker* doctrine in an antitrust suit against a state agency and adopted the state mandate requirement. *Id.* at 790; *see* text accompanying note 30 *infra.*

Two circuit court cases subsequent to *Goldfarb* have applied the *Parker* doctrine to state political subdivisions engaged in allegedly anticompetitive conduct. Duke & Co. v. Foerster, 521 F.2d 1277 (3d Cir. 1975) involved a suit by a manufacturer and seller of malt beverages alleging a conspiracy between three municipal corporations, a county commissioner and three private corporations to boycott the use of his goods in the municipal facilities they operated. *Id.* at 1278. The court held that the defendants had to demonstrate a mandate whereby the state intended to compel a restraint on competition in the area of the market they occupied. *Id.* at 1280-81. Nothing explicit or implied in the defendant's powers compelled the boycott, thus the defendants were not protected under *Parker.*

In Kurek v. Pleasure Driveway & Park Dist., 557 F.2d 580 (7th Cir. 1977), *cert. granted, vacated,* 435 U.S. 992 (1978), the defendant District was a unit of local government under the state constitution. ILL. CONST. art. VII, § 1. Pursuant to its statutory powers the District operated several golf courses and granted concessions to operate a pro shop at each course. 557 F.2d at 585. The concessions were terminated and granted to a private corporation precipitating the plaintiffs' allegations of antitrust violations. *Id.* at 585. Relying on *Goldfarb,* the court held that a legislative mandate showing state compulsion of the challenged activity was necessary in order for subordinate governmental units to be protected under *Parker. Id.* at 589-90. The absence of specific statutory language directing the defendants to engage in the challenged conduct and the District's limited revenue raising powers made state action immunity inappropriate. *Id.* at 590-91. Significantly, the plaintiffs also alleged that the District's conduct had resulted in a hidden sales tax illegal under Illinois law. *Id.* at 591. The court would not imply state direction of activity which was illegal under state law. *Id.*

Private defendants seeking state action immunity have generally been required to show a legislative mandate for their anticompetitive activity. *See, e.g.,* Cantor v. Detroit Edison Co., 428 U.S. 579, 600 (1976). *Cantor* raised the issue of whether state approval of the utility's tariff which included a plan to replace its customer's lightbulbs without additional cost made the plan state action and thus immune from the Sherman Act. The Court held that state approval was not a state mandate. *Id.* at 585; *see* text accompanying note 67 *infra.*

[6] Judicial confusion regarding the proper application of the mandate requirement prevailed in cases involving both private and governmental antitrust defendants. Prior to *Cantor* private antitrust defendants were sometimes required to meet a less strict test for a state mandate of their conduct than the *Cantor* Court enunciated in order to claim state action immunity. In Gas Light Co. v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971), *cert. denied,* 404 U.S. 1062 (1972), the defendant, an electric utility company, employed allegedly anticompetitive rate scales. *Id.* at 1137. The court held that the Georgia Public Service Commission's consideration and approval of the rate scales constituted a sufficient state mandate to immunize the defendant from the antitrust laws under the *Parker* doctrine. *Id.* at 1140. *See also* Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248, 252 (4th Cir. 1971) (holding that the State Corporation Commission's silence on the validity of certain rate

iana Power & Light Co.,[7] a divided Supreme Court[8] reaffirmed the legislative mandate requirement for municipalities[9] seeking *Parker* immunity but the Court left unclear the standard by which the mandate must be established.[10]

In *City of Lafayette*, the cities of Lafayette and Plaquemine, Louisiana sued the Louisiana Power & Light Co. (LP&L), LP&L's parent company, and two other power companies for alleged antitrust violations.[11] LP&L

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schedules implied approval by the state resulting in a valid state action defense). In Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962), the Supreme Court rejected the defendant's contention that they were exempt from the antitrust laws because one of Union Carbide's subsidiaries, a named defendant, had acted as the sole purchasing agent for the Canadian government. *Id.* at 703 & 706-07. The Court required the defendants to show that Canadian laws had compelled the subsidiary's actions before recognizing a valid defense to antitrust liability under *Parker*. *Id.* at 707. *Continental Ore* illustrates the Court's uncertainty regarding the proper test for a state action mandate. While Canadian laws were found not to compel the defendant's conduct, the Court also noted that Canadian authorities had neither approved nor directed the challenged act. *Id.* at 706. The implication is that governmental approval or direction would have sufficed to show a mandate absent a compelling statute. *See* text accompanying note 67 *infra*.

In Ladue Local Lines, Inc. v. Bi-State Dev. Agency, 433 F.2d 131 (8th Cir. 1970), the court held that a state's authorization of its agent's activity was an adequate mandate to invoke *Parker* immunity. *Id.* at 133-135. After *Goldfarb*, however, courts have applied a strict standard which governmental subunits must meet to establish the existence of the state mandate. *See* Duke & Co. v. Foerster, 521 F.2d 1277 (3rd Cir. 1975), and Kurek v. Pleasure Driveway & Park Dist., 557 F.2d 580 (7th Cir. 1977), *cert. granted, vacated*, 435 U.S. 992 (1978).

[7] 435 U.S. 389 (1978).

[8] *Id.* at 390. The division of the Justices indicates the unsettled state of the *Parker* doctrine. A majority agreed on the necessity for a legislative mandate of municipal anticompetitive conduct before invoking the doctrine but split on the issue of what standard the mandate must meet. *Compare* 435 U.S. at 408-17 (plurality opinion) *with* 435 U.S. at 318-26 (Burger, C.J. concurring). Justice Stewart, joined by Justices White, Blackmun, and Rehnquist dissented. 435 U.S. at 426-41. *See* text accompanying notes 37-88 *infra*.

[9] Both the plurality and the dissent in *City of Lafayette* referred to the petitioner cities as political subdivisions of the state. 435 U.S. at 408, 428. Political subdivisions have been defined as entities that exist to discharge local governmental functions within a prescribed area through locally elected officials. McClanahan v. Cochise College, 25 Ariz. App. 13, 540 P.2d 744 (1975), Dugas v. Beauregard, 155 Conn. 573, 236 A.2d 87 (1967). In the past, the Court has classified cities as political subdivisions of the state. Reynolds v. Sims, 377 U.S. 533, 575, *rehearing denied*, 379 U.S. 870 (1964). An alternative analysis characterizes cities as political subdivisions based on the nature of the functions they perform. *See* 1 E. McQUILLAN, MUNICIPAL CORPORATIONS § 209 (3d ed., 1971 rev. volume). [hereinafter cited as E. McQUILLAN]. In its public or governmental capacity a city is a political subdivision of the state; in its private or proprietary capacity it is not. *Id.* Two factors help determine whether a function is public or private. Activities undertaken for the state's benefit are public and those performed for the locality's benefit are private. Functions of a business nature which are also performed by private persons or corporations are private. Under McQuillan's analysis municipal ownership of public utilities presents special problems because both the state and the locality are benefited thereby. 12 E. McQUILLAN, MUNICIPAL CORPORATIONS § 35.04 (3d ed., 1970 rev. volume).

[10] Before the district court could apply the Supreme Court's decision on remand, the parties in *City of Lafayette* settled out of court.

[11] 435 U.S. at 392. The cities alleged that the defendants conspired to restrain trade and attempted to monopolize the generation, transmission and distribution of electric power

counterclaimed and alleged that the cities had violated the Sherman Act[12] by the manner in which they operated their public utility systems.[13] The cities successfully moved in the district court to dismiss the counterclaim arguing that the *Parker* doctrine exempted cities from Sherman Act coverage.[14] On appeal, the Fifth Circuit reversed and remanded on the issue of whether a state legislative mandate existed for the cities' anticompetitive conduct.[15] The Supreme Court granted the cities' petition for certiorari[16] on the issue of whether municipalities, as political subdivisions of the states, may avail themselves of the *Parker* doctrine to avoid federal antitrust liability.[17]

Implicit in the cities' contention that the *Parker* doctrine affords municipalities antitrust immunity was the argument that the Sherman Act was not intended to operate against local governments. Only Justice Brennan's rejection of this argument commanded a majority of the Court.[18] Justice Brennan relied on *Chattanooga Foundry & Pipe Works v. Atlanta*,[19] which held that cities are persons within the general definitional section of the Sherman Act.[20] The Court also rejected two policy arguments advanced by the cities to justify an implied municipal exemption from the Act.[21] The petitioners argued that to subject cities to the severe civil and

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causing injury to the cities in the operation of their utility systems. *Id.* Specifically the cities charged that the defendants had improperly refused to wheel power, withheld supplies from their own markets, undertaken boycotts against the cities and commenced sham litigation to prevent the cities from financing the construction of municipal power generating facilities. *Id.* at n.5. The cities were empowered by state statute to own and operate public utilities within and beyond their city limits. LA. REV. STAT. ANN. §§ 33:1326, :4162, :4163 (West 1950).

[12] 435 U.S. at 392; *see* text accompanying note 3 *supra*.

[13] 435 U.S. at 392 n.6. The defendant's counterclaim alleged conspiracies between petitioners to engage in sham litigation against LP&L in order to prevent the construction of a nuclear power plant by the defendants, to eliminate competition within city limits through covenants in their debentures, to limit competition through long term supply contracts, and to displace LP&L in the market through tying arrangements. Under the tying arrangements LP&L's customers had to purchase their electricity from the cities in order to retain their water and gas service. *Id.*

[14] *Id.* at 392.

[15] 532 F.2d 431, 434-35 (5th Cir. 1976); *see* text accompanying notes 27-36 *infra*.

[16] 430 U.S. 944 (1977).

[17] 435 U.S. at 391.

[18] Joining Justice Brennan in the first part of his opinion were Chief Justice Burger and Justices Marshall, Powell and Stevens. The Chief Justice did not join in parts II and III of the plurality opinion and filed a separate concurring opinion. *See* notes 36 & 63 *infra*.

[19] 203 U.S. 390 (1906).

[20] 435 U.S. at 396. The Sherman Act defines persons in 15 U.S.C. § 7 (1976). It defines "person" to include corporations and associations existing under or authorized by state, federal, territorial or foreign laws. The question in *Chattanooga Foundry* was whether a municipality had standing as a "person" to bring suit under § 7 of the Sherman Act. Ch. 647, 26 Stat. 210 (1890) (repealed 1955). Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), presently permits suits only by "persons" injured by antitrust law violations. Antitrust laws, as defined by § 1 of the Clayton Act, include the Sherman Act. *Id.* at § 12. While the city of Atlanta was the plaintiff in *Chattanooga Foundry*, the cities in *City of Lafayette* were before the Supreme Court as defendants to LP&L's counterclaim. *See* text accompanying note 13 *supra*.

[21] 435 U.S. at 399-407. Aside from the *Parker* doctrine, the Court recognized that the

criminal sanctions of the Act would be improper.[22] Without holding that the Act's sanctions are applicable to municipal defendants,[23] the Court said such a holding would not be improper in light of other federal laws which subject cities to various statutory sanctions.[24] In response to the cities' second contention, that the Act was intended to apply only to private abuses of power, the Court emphasized that the goal of the cities' operation of public utilities was at least partly private profit.[25] The Court equated the cities with private enterprises since the efforts of both to maximize profits through anticompetitive conduct can result in the contravention of national antitrust policy.[26]

After refusing to imply a blanket exemption from Sherman Act coverage for local governments, Justice Brennan addressed the applicability of

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principles at issue in Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) justify an implied exclusion from antitrust laws. 435 U.S. at 399. *Noerr* involved a claim by Pennsylvania truck operators that 24 eastern railroads violated §§ 1 and 2 of the Sherman Act by hiring a public relations firm to campaign against Pennsylvania truckers. The campaign was designed to secure the retention and adoption of state laws and enforcement practices detrimental to the trucking business, to incite public distaste for the industry, and to damage the relations between the truckers and their customers. 365 U.S. at 129. The Supreme Court held that the alleged activities did not violate the Sherman Act because they were attempts to influence the passage of legislation. *Id.* at 135, 140-43. The Court stated that the defendant's first amendment right to petition the government would be infringed by extending antitrust liability to the challenged conduct. *Id.* at 137.

[22] 435 U.S. at 400.

[23] *Id.* at 402-03 n.22. The majority did not decide whether treble damage liability was the proper remedy in an antitrust suit against municipalities because the district court had not determined the petitioners in *City of Lafayette* had violated the antitrust laws. *See* text accompanying notes 73, 132-35 *infra*.

[24] 435 U.S. a 401-02 nn.19-21. The Court cited three federal statutes under which cities or states may be held liable for financial penalties as "persons" within the statutory definitions: 49 U.S.C. § 41(1) (1976) (persons giving or receiving rebates respecting interstate transportation of property are subject to maximum penalty of $20,000); *see* Union Pac. R. R. Co. v. United States, 313 U.S. 450, 463 (1941) (cities are included within the term "persons" in § 41); Shipping Act of 1916, §§ 16-17, 39 Stat. 734 (1916) (current version at 46 U.S.C. §§ 815-816 (1970) (amended 1972)) (making certain discriminatory acts unlawful and punishable by a $5,000 fine); *see* California v. United States, 320 U.S. 544, 585 (1944) (the Shipping Act applies to states and municipalities); Rev. Stat. §§ 3244, 3140 (1878) (imposing a $25 to $100 tax on "persons" selling alcoholic beverages); *see* Ohio v. Helvering, 292 U.S. 360, 370 (1934) (states qualified as "persons" under § 3140).

[25] 435 U.S. at 403-05.

[26] *Id.* at 406-08. Petitioners argued that their conduct would naturally enhance the public welfare because the electorate ultimately controlled their policy decisions. The Court rejected the argument noting that non-city residents would have to purchase power from the cities if LP&L was displaced by the cities' conduct. Those new customers would be unable to influence municipal conduct through the cities' political processes. *Id.* at 406. Also, the fact that LP&L's parent company is a Florida corporation greatly impaired its ability to influence the cities' policies through the state legislature. *Id.* The Court stated that the cities' argument was overly broad since it could also justify non-enforcement of the antitrust laws against private parties. Persons injured by anticompetitive activity would always have alternative recourse through the political process. *Id.* at 406-07. Moreover, even if local welfare was served by the cities' actions, an implied antitrust exemption was not warranted since local interests would not necessarily comport with the national policy of economic competition embodied in the Sherman Act. *Id.* at 408.

the *Parker* doctrine to the cities' activities.[27] A majority of the Court held that the cities were exempt from the antitrust laws under the *Parker* doctrine only if they could show a state legislative mandate for their activity.[28] Justice Brennan, writing for the plurality, read *Parker* as exempting only those activities directed by the state, as sovereign, through its legislature.[29] Relying on the Court's application of the *Parker* doctrine in previous decisions,[30] the plurality stated that the underlying premise of *Parker*'s holding was that the principle of federalism[31] prevents the Court from inferring a congressional intent to subject state governmental acts to the application of the antitrust laws.[32] According to the pluraility, the *Parker* doctrine should not automatically extend to municipal activities because cities are

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[27] *Id.* at 408-13.

[28] *See* note 8 *supra.* While agreeing that an implied antitrust exemption for the cities was not warranted and that *Parker* immunity was not automatic the five majority Justices did not agree under what circumstances cities would have state action immunity. *See* text accompanying notes 33-36 *infra.*

[29] 435 U.S. at 409.

[30] *Id.* at 411-12. The Court reviewed its earlier decisions in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) and Bates v. State Bar of Ariz., 433 U.S. 350 (1977). In *Goldfarb* the Court enunciated a legislative mandate test to be applied to state administrative agencies claiming antitrust immunity under *Parker.* The State Bar Association had issued ethical opinions supporting local fee schedules in its capacity as a state agency for the administration of the legal profession. 421 U.S. at 776, 777 nn.4 & 5; *see* text accompanying note 5 *supra.* The Court held that in order for the Association's conduct to be protected by the state action exemption the state must have "directed" the use of fee schedules or "required" the price floor the schedules produced. 421 U.S. at 790. Since the state, through the State Supreme Court, had promulgated ethical codes directing lawyers not to be controlled by fee schedules, the Bar Association's ethical opinions, which had promoted adherence to local schedules, were not state action. *Id.* at 789-90. The local Bar Association which had published the minimum fee schedules at issue in *Goldfarb* was also required to show a state mandate for its conduct. The fact that the fee schedules may have been "prompted" by the State Bar's ethical opinions was held not to justify invoking the *Parker* doctrine. Instead, the schedules had to be compelled by the state's direction to be exempt from the Sherman Act. *Id.* at 791.

The defendants in *Bates* unsuccessfully attacked, on antitrust grounds, the ban on attorney advertising imposed by the Arizona Supreme Court as the state body regulating the practice of law in Arizona. 433 U.S. at 359. The State Bar Association's enforcement of the ban was not an antitrust violation because the advertising was prohibited by State Supreme Court Rule 29(a) and was therefore an expression of state policy articulated by the state's authority. *Id.*

In *City of Lafayette* the majority used *Goldfarb* and *Bates* to illustrate the need for a legislative mandate before invoking the *Parker* doctrine when the state itself is not a defendant. *See* text accompanying note 32 *infra.* The dissent, however, contended that *Goldfarb* was factually distinguishable from *City of Lafayette. See* text accompanying notes 54-63 *infra.*

[31] A federal system contemplates a general government of delegated powers which coexists with other levels of government with regional jurisdiction. The tenth amendment to the United States Constitution embodies the principle of federalism, reserving to the states or the people those powers not delegated to the national government. The states' existence is guaranteed against infringement by protection of their ability to exercise their reserved powers. *See generally* G. DIETZE, THE FEDERALIST: A CLASSIC ON FEDERALISM AND FREE GOVERNMENT (1960); THE FEDERALIST No. 39 (J. Madison).

[32] 435 U.S. at 411-12.

not accorded the same level of federal deference as are states.[33]

While withholding automatic antitrust immunity from the cities, the plurality recognized that local governmental actions might reflect state policy and therefore be protected under the *Parker* doctrine. Justice Brennan said state authorization or direction[34] of the challenged activity is required in order to assure that it reflects state policy and is therefore state action.[35] The plurality, agreeing with the Fifth Circuit, explained that a state mandate of a local activity exists if it can be shown, from the authority granted to a municipality, that the state legislature contemplated the kind of activity engaged in by the locality.[36]

The dissent in *City of Lafayette,* authored by Justice Stewart, focused on three issues raised by the Court's interpretation and application of the *Parker* doctrine. First, the dissent criticized the majority for improperly limiting the scope of the state action doctrine.[37] Justice Stewart also discussed the adverse effects of the legislative mandate requirement in general, focusing particularly on the ambiguity of the tests proposed by the plurality and concurring Justices for establishing the existence of a proper mandate.[38] The dissenters finally addressed the possible deleterious financial effects of subjecting local governments to treble damage liability.[39]

Jutice Stewart began his criticism of the majority's interpretation of the state action doctrine by stating that the holding in *Parker* was based on the Court's understanding of the congressional purpose behind the Sherman Act. The dissenters contended, on the basis of the legislative

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[33] *Id.* at 412. The plurality placed particular emphasis on the fact that political subdivisions of the state are not accorded immunity from suit under the eleventh amendment. *See* text accompanying notes 45-47 *infra.*

[34] 435 U.S. at 414. By using the term "authorization", Justice Brennan appeared to be adopting a less stringent test for a legislative mandate than the Court adopted in *Cantor. See* text accompanying notes 5 *supra* & 67 *infra.*

[35] 435 U.S. at 414.

[36] *Id.* at 415. Unlike the plurality, Chief Justice Burger's concurring opinion stated that the dispositive factor in *City of Lafayette* should have been the proprietary nature of the cities' activities. The Chief Justice used the term proprietary to emphasize that both the parties challenging the cities' conduct and the cities were engaged in economic competition to which the federal antitrust laws should apply. *Id.* at 422 n.3. Burger supported the appropriateness of his distinction between proprietary and governmental activities with specific instances where the Court had distinguished between a state's private and sovereign capacities in upholding federal regulation of state conduct under the commerce and taxing powers. *Id.* at 422. Relying on the cities' allegations of inability to expand their businesses, lost profits, and diminished business value, the Chief Justice said the cities' operation of utilities was a proprietary function. *Id.* at 419. Like the plurality, he would therefore require the cities to show a legislative mandate for anticompetitive activity before invoking *Parker* but also proposed a two part test to measure the sufficiency of the mandate. First, the state, as sovereign, must have required the activity and second, the city would be protected only if an antitrust exemption was absolutely necessary in order to effectuate the state's regulatory policy. *Id.* at 425-26.

[37] 435 U.S. at 408-13, 428-34; *see* text accompanying notes 27-33 *supra.*

[38] 435 U.S. at 414, 434-40; *see* text accompanying notes 35-36 *supra.*

[39] 435 U.S. at 440. In a separate dissenting opinion Justice Blackmun also addressed the issue of damages. *Id.* at 442; *see* note 88 *infra.*

history of the Act, that the purpose of federal antitrust law is to eliminate private concentrations of economic power which tend to be unresponsive to public needs.[40] Since Congress was concerned with private and not governmental economic power, the dissenters concluded that the dispositive factor in *Parker* was that the administration of the Agricultural Prorate Act had been a governmental and not private activity.[41] According to Justice Stewart, the *Parker* exemption was not limited to the activities of a state, as opposed to local governmental activity.[42] The test the dissent in *City of Lafayette* advocated to determine whether a challenged activity was governmental or private focused on the nature of the party engaged in the activity. Justice Stewart reasoned that because cities are state instrumentalities administering local government, and are controlled by their residents through local elections and state legislatures, they are governmental bodies whose activities fall within the *Parker* doctrine.[43]

Since the plurality's reading of *Parker* differed substantially from the dissent's,[44] Justice Stewart addressed the two reasons advanced by the plurality as precluding the automatic extension of state action immunity to local governments.[45] The plurality reasoned that judicial reluctance to equate states and localities under the eleventh amendment supported a distinction between cities and states in applying the *Parker* doctrine.[46] In

[40] 435 U.S. at 428.

[41] *Id.* at 428-29; *see* text accompanying note 2 *supra.*

[42] 435 U.S. at 429.

[43] *Id.* at 429-30.

[44] *See* text accompanying notes 27-33 *supra.*

[45] 435 U.S. at 430; *see* text accompanying notes 30-33 *supra.*

[46] 435 U.S. at 412. The proposal and ratification of the eleventh amendment was a reaction to the Supreme Court's decision in Chisolm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), and was designed to prevent future application of the case. *See generally* C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY (1975). In *Chisolm* the Court held that individual citizens of a state could sue another state in federal court without the defendant state's permission. 2 U.S. (2 Dall.) at 428. Article III of the Constitution extended the federal judicial power to controversies between a state and a citizen of another state. U.S. CONST. art. III, § 2, cl. 1. Section 13 of the Judiciary Act of 1789 had vested original jurisdiction in the Supreme Court over cases to which a state was a party. Act of Sept. 24, 1789, ch. XX, 513, 1 Stat. 73, 80 (1789). Since neither the Constitution nor the Judiciary Act had made a jurisdictional exception for cases where a state was the defendant instead of the plaintiff, the Court held that by ratifying the Constitution the states had agreed to subject themselves to involuntary suits in federal court. 2 U.S. (2 Dall.) at 420-21. Fear that states would be subjected to undue control by the federal judiciary prompted the eleventh amendment. The amendment states that federal jurisdiction will not exist in suits against the states by non-residents. U.S. CONST. amend. XI. *See generally* Baker, *Federalism and the Eleventh Amendment,* 48 U. COLO. L. REV. 139 (1977). In Lincoln County v. Luning, 133 U.S. 529 (1890), the Court refused to extend the eleventh amendment's protection to political subdivisions of the states since unlike states, they are not sovereign entities. *Id.* at 530. Whether the plurality's analogy in *City of Lafayette* between the state action doctrine and the eleventh amendment is valid, however, may be disputed since some question exists as to whether the eleventh amendment reflects principles of federalism, as the Court maintains the *Parker* decision does, or respect for the doctrine of sovereign immunity. *Compare* C. JACOBS, *supra* at 3-26 *with* Baker, *supra* at 172. If the eleventh amendment is purely an expression of sovereign immunity, then the conflicting interests it balances are governmental sovereignty and citizens' legal remedies, not federal

response, Justice Stewart stated that the Court's focus on constitutional principles in resolving issues of statutory interpretation was improper.[47] His contention stemmed from his belief that the *Parker* Court had interpreted the Sherman Act in light of the evils Congress intended to eliminate, and had held that governmental economic power was not among them.[48] The dissenters also argued that if constitutional analogies were to be made in *City of Lafayette,* the appropriate constitutional provision was the commerce clause.[49] In *National League of Cities v. Usery,*[50] the Court had equated states and their political subdivisions in holding that provisions of the Fair Labor Standards Act had been impermissably extended to both.[51] Since both the Sherman Act and the Fair Labor Standards Act were promulgated pursuant to the commerce clause,[52] Justice Stewart stated that *National League of Cities* supported the view that state and local governments should be treated as equals under the *Parker* doctrine.[53]

The dissent's rejection of the plurality's arguments for limiting *Parker's* applicability, based on principles of federalism, was followed by an attack on the plurality's reliance on *Goldfarb v. Virginia State Bar* as a second reason supporting a limited application of *Parker.* In *Goldfarb,* the Court required a local bar association and the Virginia State Bar to demonstrate a legislative mandate for certain anticompetitive activities in order to establish immunity under the *Parker* doctrine.[54] In *City of Lafayette,* the plurality emphasized that the Court in *Goldfarb* had characterized the State Bar as a state agency.[55] Since a legislative mandate was a prerequisite to a state action defense in *Goldfarb,*[56] the plurality[57] in *City of Lafayette* reasoned that a city, as an agent of the state,[58] had to meet the same requirement.[59]

Justice Stewart disagreed with the plurality's reading of the *Goldfarb* decision. Although the Virginia State Bar, like a city, was labeled the state's agent, the dissent distinguished the two bodies because the State

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power and state sovereignty. Consequently, *Lincoln County* did not address the issue of federal deference to the states' political subdivisions. The analogy used in *City of Lafayette* is nevertheless arguably valid because under both the federalism and sovereign immunity analyses the controlling issue is whether the party seeking to invoke the principles involved is a sovereign entity.

[47] 435 U.S. at 430.

[48] *Id.* at 429-30; *see* text accompanying notes 40-43 *supra.*

[49] *Id.* at 430; *see* U.S. CONST. art. I, § 8, cl. 3.

[50] 426 U.S. 833 (1976).

[51] *See* text accompanying notes 99-121 *infra.*

[52] Act of July 2, 1890, ch. 647, § 1, 26 Stat. 209; Act of June 25, 1938, ch. 676, §§ 2-3, 52 Stat. 1060.

[53] 435 U.S. at 430.

[54] *See* text accompanying note 30 *supra.*

[55] 435 U.S. at 409.

[56] 421 U.S. at 790.

[57] Although they proposed different standards for establishing a legislative mandate which would afford the cities *Parker* immunity, the plurality and concurring Justices agreed on the necessity of a state mandate. *See* text accompanying note 8 *supra.*

[58] *See* text accompanying note 9 *supra.*

[59] 435 U.S. at 415, 424-25.

Bar is not a political subdivision of the state,[60] but rather a private state agency.[61] The dissent read *Parker* as protecting governmental activities from the purview of the Sherman Act and defined governmental activities as those performed by governmental bodies.[62] Justice Stewart viewed the activities of a private state agency as non-governmental and subject to the Sherman Act absent a state mandate. The activities of a state's political subdivisions, however, would be governmental. Under the dissent's analysis it would not be inconsistent to require a legislative mandate for the State Bar's activities while automatically extending *Parker* immunity to a city's activities.[63]

The dissent's disagreement with the plurality over the proper application of *Parker* focused on the propriety of requiring a legislative mandate

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[60] *Id.* at 431. Under the definition advanced by the dissent, the State Bar Association in *Goldfarb* was not a political subdivision because it did not administer local government through locally elected officials. *See* text accompanying note 43 *supra.* The State Bar Association would not be classified as a political subdivision under the functional analysis adopted by McQuillan since his framework is limited to the classificaion of *cities* engaged in conduct for the state's benefit. *See* 1 E. MCQUILLAN, *supra* note 9, at § 209.

[61] 435 U.S. at 431.

[62] *Id.*; *see* text accompanying notes 40-43 *supra.*

[63] 435 U.S. at 431-32. Justice Stewart also addressed the Chief Justice's contentions as to the circumstances under which state action immunity should be extended to municipalities. The Chief Justice distinguished municipal proprietary and public functions, allowing automatic antitrust immunity under the *Parker* doctrine for cities acting in their public capacity and requiring a legislative mandate for proprietary anticompetitive conduct. *See* note 36 *supra.* The dissenters believed that Chief Justice Burger's analysis would result in inconsistent applications of the *Parker* doctrine in what they said were two identical situations. A state might choose to regulate private economic activity or engage in the activity itself through one of its political subdivisions. 435 U.S. at 432; *see* Donnem, *Federal Antitrust Laws Versus Anticompetitive State Regulation,* 39 A.B.A. ANTITRUST L. J. 950, 951-56 (1969-70); Slater, *Antitrust and Government Action: A Formula for Narrowing* Parker v. Brown, 69 NW. U. L. REV. 71, 75-77 (1974). State regulation would not be proprietary conduct because it would not put the state in a competitive relationship with private participants in the regulated activity. *See* note 36 *supra.* Presumably, the regulating governmental body would be afforded automatic *Parker* immunity. If the governmental body entered the marketplace itself, it would have to show that its conduct was mandated even though the motivation for and effect of the regulatory program would be the same as for state entrance into the market. 435 U.S. at 432. If a private party engaged in anticompetitive activity under the regulatory program was the defendant claiming *Parker* immunity, it would still have to show a state mandate to prevail. *See* Cantor v. Detroit Edison, Co., 428 U.S. 579 (1976).

In addition to asserting the anomalous results of applying the Chief Justice's analysis, the dissenters stated that the proprietary-public function distinction had not been made either in the Sherman Act or in the *Parker* decision. 435 U.S. at 433. Justice Stewart reasoned that the Court has failed to make this distinction because such a distinction is specious. He cited a case in which the Court had rejected the argument that the Federal Torts Claim Act, 28 U.S.C. § 2674 (1976), did not apply to uniquely governmental functions. 435 U.S. at 433, *citing* Indian Towing Co. v. United States, 350 U.S. 61 (1955). In refusing to distinguish between uniquely private and governmental functions the Court in *Indian Towing* referred to the distinction as a quagmire resulting in judicial chaos. 350 U.S. at 65. Instead, the *Indian Towing Court* characterized governmental activities as not being partly private and partly public. *Id.* at 67-68. According to the *City of LaFayette* dissent, the Chief Justice illustrated the futility of drawing the governmental-proprietary distinction by describing the distinction with several different terms. 435 U.S. at 433-34 n.12.

for the cities' anticompetitive activities. Justice Stewart next criticized the vague standard advanced by the Court for establishing the existence of a proper mandate and the adverse effects resulting from its application. First he argued that requiring a legislative mandate for a city's anticompetitive acts would diminish the state's ability to delegate effectively its governmental functions to its political subdivisions.[64] The dissenters believed that the states' ability to delegate power would be impaired because of the difficulty of determining whether a mandate exists under the plurality's analysis.[65] Justice Stewart stated that the plurality did not clearly indicate whether a state's authorization would constitute a sufficient mandate or whether direction from the legislature was required.[66] The different meanings of these terms has been recognized in *Cantor v. Detroit Edison Co.*[67] By using them interchangeably the plurality in *City of Lafayette* had injected an element of uncertainty into state procedures for delegating governmental powers.[68] As a result, the state interest in allowing its legislature to concentrate on state-wide matters, while local problems are addressed by local government bodies, would be sacrificed.

Applying either a state authorization or direction standard to establish a legislative mandate, Justice Stewart further contended that the plurality was unclear on how specific the mandate had to be.[69] The plurality stated that a city need show only that the state legislature had contemplated the *kind* of activity challenged.[70] Giving the term *kind* a broad meaning, the dissent noted that a Louisiana statute[71] authorizing cities to file suits, operate public utilities, and borrow money by issuing bonds was evidence

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[64] 435 U.S. at 434-38.

[65] *Id.* at 435; *see* text accompanying notes 35-36 *supra.*

[66] 435 U.S. at 435. At one point in the plurality opinion Justice Brennan stated that in order to gain antitrust immunity the cities had to show that the state had "commanded" their actions or "imposed" restraints which the cities effectuated by their conduct. The cities could prove the existence of this command with evidence that the state had "authorized" or "directed" their actions. *Id.* at 414. The dissent took issue with the logical inconsistency of proving that activities were "commanded" by showing that they had been "authorized." *Id.* at 435; *see* text accompanying note 67 *infra.*

[67] 428 U.S. 579, 592-93 (1976). In *Cantor* the Court stated that antitrust immunity was not created by a state authorizing, approving, encouraging, or participating in private anticompetitive activities. *Id.* The key issue for the Court in *Cantor* was that in each of these circumstances a private party engaged in the conduct had sufficient discretion not to undertake the activity. *Id.* at 593. The *Cantor* Court believed that the mandate was adequate grounds for invoking the *Parker* doctrine, only where the state's mandate "command[ed]" the private party's conduct. *Id.* at 592. By allowing the *City of Lafayette* petitioners *Parker* immunity for anticompetitive conduct "authorized" by the state, the plurality appeared to establish a less stringent legislative mandate test for political subdivisions of the state to meet than that which the *Cantor* Court had required private defendants to meet. *See* note 66 *supra.* The plurality further confused the issue by saying not that state authorization would result in antitrust immunity but that the state's authorization could be used to prove that the state had commanded the challenged municipal conduct. *Id.*

[68] 435 U.S. at 438; *see* text accompanying notes 126-29 *infra.*

[69] 435 U.S. at 435-37.

[70] *Id.* at 415 (emphasis added).

[71] LA. REV. STAT. ANN. § 33:621 (West 1950).

that the Louisiana legislature had contemplated the kind of activities with which the cities were charged.[72] Justice Stewart interpreted the Court's remand of *City of Lafayette* as indicating that the plurality did not believe the statutory authority in question was sufficient to afford the petitioners state action immunity.[73] The dissenters could not, therefore, discern the level of specificity the Court would require short of a separate statute compelling each activity undertaken by the cities, an alternative which the dissenters viewed as improperly dictating state policy-making procedures.[74]

The problem of deciding whether a state legislature contemplated a challenged activity was exacerbated for Justice Stewart by the absence, in most cases, of recorded legislative history for state statutes.[75] The plurality had stated that the wording of a state statute was not the only valuable evidence of the enacting legislature's intentions.[76] When the statutory language is ambiguous and no legislative history exists, however, the issue of legislative intent is resolved only by judicial guesswork.[77] The plurality, by formulating a nebulous test for establishing a legislative mandate in areas where means of discerning legislative intent are nonexistent, had enunciated what Justice Stewart saw as an impractical standard for antitrust defendants to meet.

Three of the four dissenting Justices[78] contended that the Court's decision would lead to improper judicial control over the powers states can delegate to their political subdivisions as well as the means by which those delegations can be made. Justice Stewart stated that the vagueness of the Court's legislative mandate test would result in less social and economic innovation by local governments. A city would be less willing to undertake

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[72] 435 U.S. at 435-36. Justice Stewart stated that the "kind" of activity complained of in *City of Lafayette* could be discerned by characterizing the conduct alleged in LP&L's counterclaim in more general terms. *Id.* at 436; *see* note 13 *supra.* Although LP&L alleged that the cities had engaged in sham litigation, maintained a monopoly through debenture covenants and long term supply contracts, and employed illegal tying arrangements, the dissenters considered that "kind" of activity as no more than bringing lawsuits, issuing bonds, and providing utility services, respectively. 435 U.S. at 435-36.

[73] 435 U.S. at 436. Contrary to Justice Stewart's understanding, the Court made no finding that the Louisiana statute was insufficient evidence that Louisiana contemplated the kind of activity challenged by LP&L. The Fifth Circuit had remanded *City of Lafayette* to the district court with instructions to determine whether a sufficient mandate existed to invoke the *Parker* doctrine. 532 F.2d at 434-35. The Supreme Court merely affirmed the Fifth Circuit's decision to remand. 435 U.S. at 394, 415, 425.

[74] 435 U.S. at 438.

[75] *Id.*; *see* G. FOLSOM, LEGISLATIVE HISTORY RESEARCH FOR THE INTERPRETATION OF LAWS, 5-6, 33-34 (1972).

[76] 435 U.S. at 394. The Court quoted and affirmed the Fifth Circuit's statement that a court's inquiry into the state legislature's intent should be broad, taking into consideration all possible evidence of legislative intent. 532 F.2d at 435. However, the Court did not indicate specifically what sources could be appropriate.

[77] 435 U.S. at 437.

[78] Justice Blackmun did not join in that part of Justice Stewart's dissent which asserts that the Court's holding will result in questioning and interfering with the substance of state laws. *Id.* at 438-40.

economic experimentation pursuant to its statutory powers because a federal court might subsequently decide that it was not mandated under the plurality's test.[79] Rather than risk antitrust liability, a city would be more likely to refrain from a questionable activity. The result would be to diminish the role of local government as a proving ground for new ideas.[80]

Justice Stewart also compared the Court's inquiry into whether state legislatures contemplate the anticompetitive results of their delegations of power to the substantive due process analysis rejected in prior decisions of the Court.[81] Deciding whether or not certain results were contemplated by the legislature was said to amount to challenging the reasonableness of the legislature's decision to delegate its powers in a particular manner.[82] Although the abandonment of substantive due process inquiries was intended to preclude judicial nullification of statutes which a court finds unreasonable, Justice Stewart believed application of the plurality's standards would have the opposite effect of promoting improper judicial legislating.[83]

While the effect of the decision on the relationship between state and local governments particularly concerned Justice Stewart, he also emphasized the negative impact of the financial burden the decision might place on municipal antitrust defendants and their residents. The dissent noted

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[79] 435 U.S. at 439; *see* text accompanying notes 65-68 *supra*. According to the dissent, less local governmental innovation would also result from applying the Chief Justice's test for a legislative mandate. While the plurality required a legislative mandate for all anticompetitive municipal conduct, Chief Justice Burger required a mandate only for proprietary conduct. Under the Chief Justice's test, a city could not be certain that its actions are not proprietary and therefore might refrain from the activity. Even if municipal uncertainty about the nature of the activity did not prevent the city's action, the fact that the Chief Justice's strict mandate standard (*see* text accompanying note 36 *supra*) might have to be met would likely preclude the city's action.

[80] 435 U.S. at 439.

[81] *Id.* at 439-40 & n.28. Fergusen v. Skrupa, 372 U.S. 726 (1963) was cited by Justice Stewart to support the statement that the Court has abandoned the substantive due process inquiries first undertaken in Lochner v. New York, 198 U.S. 45 (1905). In *Lochner* a state law prohibited the employment of persons in bakeries for more than sixty hours per week or ten hours per day. *Id.* at 46 n.1. The Court struck down the statute on the grounds that the right to contract for services was part of the liberty which could not be denied without due process of law under the fourteenth amendment. *Id.* at 53. The Court declared that the states could not go beyond the exercise of their police powers in infringing fourteenth amendment rights and defined state police powers as promoting the safety, health, morals and general welfare of the public. *Id.* The Court held that the New York statute had exceeded these limits. *Id.* at 58-59.

In *Fergusen,* the Court stated the reasons for the subsequent rejection of substantive due process analysis of state statutes. By applying the fourteenth amendment in this manner to strike down state statutes, the courts were in effect substituting their value judgments for those of the state legislatures. The Court has since recognized that states require broad legislative latitude in order to deal with novel economic and social problems. Consequently, judicial supervision of state legislative activity has been limited to ensuring that the legislatures are constrained by specific constitutional provisions prohibiting state legislation in certain areas. 372 U.S. at 730-31; *see* text accompanying notes 130-31 *infra*.

[82] 435 U.S. at 439-40.

[83] *Id.* at 438-39.

first that treble damages in a suit of *City of Lafayette*'s magnitude[84] would result in a decrease in essential public services in order for a defendant city to avoid bankruptcy.[85] The plurality justified the application of antitrust sanctions to municipalities by pointing out other federal laws which subject cities, as persons, to civil and criminal liability.[86] Justice Brennan, however, did not decide whether the petitioner cities could be subjected to treble damage because the district court had not made a finding of the cities' liability.[87] The majority's failure to address the damages issue was, according to Justice Stewart, improper since the Clayton Act mandates the assessment of treble damages against antitrust violators.[88]

Thus, the dissenting Justices' based their disagreement with the holding on a broad reading of *Parker*[89] and on the asserted adverse effects of

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[84] As a result of one of the cities' activities, engaging in sham litigation, LP&L claimed damages of $180 million which, when trebled, amounts to a $540 million claim. *Id.* at 405, 440, 442 n.1.

[85] *Id.* at 440-41.

[86] *Id.* at 401-02 nn.19-21; *see* text accompanying note 24 *supra.*

[87] *See* text accompanying notes 23 & 73 *supra.*

[88] 435 U.S. at 440 n.30. Justice Blackmun, in his separate dissenting opinion, also emphasized the issue of damages. *Id.* at 442-43. Focusing on the Court's reliance on other federal statutes which subject cities to liability as persons, Blackmun pointed out the lenient penalties under those statutes as compared with the treble damages available in antitrust suits. *Id.* at 442; *see* note 24 *supra.* Since the statutes cited by the Court posed less onerous financial burdens for defendants than the antitrust laws, Justice Blackmun said that application of the antitrust sanctions to cities was not automatically justified by municipal liability in other circumstances. 435 U.S. at 442-43. In view of the potential for municipal insolvency due to antitrust liability, Blackmun would limit the cities' liability for antitrust violations. *Id.* at 443. Moreover, he said the Court's refusal to address the issue of damages in *City of Lafayette* was improper. Like the other dissenting Justices, Blackmun noted the mandatory nature of treble antitrust damages. *Id.* The Court therefore should not have implied a possible exception for municipal defendants without a full review of the issue. *Id.*

Treble damages are considered mandatory in order to effectuate the congressional intent to discourage and punish antitrust violators. *See* Alaska v. Standard Oil Co. (In re Western Liquid Asphalt Cases), 487 F.2d 191, 201 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974). The severity of treble damage liability, however, has been cause for judicial refusal to certify a lawsuit as a class action under Federal Rule of Civil Procedure 23(b)(3). *See* Kline v. Coldwell, Banker & Co., 508 F.2d 226 (9th Cir. 1974), *cert. denied,* 421 U.S. 963 (1975). Under Rule 23(b)(3), in order for an action to be maintained as a class action the class action proceeding must be, among other things, the fairest and most efficient means of adjudication. *Fed. R. Civ. P.* 23(b)(3). In *Kline* one factor the court considered on the certification issue was that if the defendants were found in violation of the Sherman Act their individual shares of the $750 million claim would be significantly greater than if they were sued individually. 508 F.2d at 234-35. The fact that the Ninth Circuit refused to certify the case, however, does not support the dissent's contention in *City of Lafayette* that municipal defendants should not be subjected to treble damage liability. The court's action in *Kline* was strongly influenced by the fact that if the defendants were found liable, they could not avoid treble damages. *Id.* at 235. Nor does *Kline* support the proposition, implicitly advanced by Justice Stewart, that treble damage liability should preclude successful antitrust suits against municipalities. 435 U.S. at 440-41. *Kline* was limited to the question of the propriety of class actions under the antitrust laws pursuant to Federal Rule of Civil Procedure 23, and did not question the propriety of antitrust suits in general. 508 F.2d 226, 235.

[89] *See* text accompanying notes 40-43 *supra.*

applying the plurality's uncertain analysis to state enabling legislation to determine whether the activities of local governmental bodies are exempt from the antitrust laws. On its face, the *Parker* opinion does not make the application of the state action doctrine hinge on whether the challenged activity is governmental or private as the dissent in *City of Lafayette* suggests.[90] The defendants in *Parker* were persons whose official duties involved the administration of the California Agricultural Prorate Act.[91] The Court necessarily limited the opinion to the question of the Sherman Act's applicability to the acts of state government because private parties or local governmental bodies were not involved in the case.[92] Language in *Parker,* however, suggests that the Court intended the enunciated exemption to apply equally to state and local governments. In dictum the *Parker* Court stated that if the conduct in question had been undertaken by private parties they would have violated the Sherman Act.[93] Arguably, if the Court also had not intended to apply the doctrine to local government activity, it would have been equally explicit. Also, the Court equated states and municipalities by stating that if either became involved in a private agreement in restraint of trade an antitrust violation would exist.[94] A logical inference from this statement is that a municipality should also be treated like a state when engaged in activity in which no private agreement is involved, the Sherman Act applying to neither in those circumstances.[95]

The *Parker* Court also made clear, however, that a state agent's activities were state action only when directed by the state legislature.[96] The distinction made by dissenting Justice Stewart in *City of Lafayette* be-

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[90] *See* text accompanying notes 41-42 *supra.*

[91] *See* note 2 *supra.*

[92] 317 U.S. at 344. The suit involved in *Parker* was brought against the State Director of Agriculture, Raisin Proration Zone 1, the State Agricultural Prorate Commission, the Zone 1 Program Commission and others charged by the Agricultural Prorate Act to administer the Act to enjoin the Act's enforcement. *See* note 2 *supra.* The Act also provided that the organization of a prorate zone was first to be proposed by producers of a commodity. Once the Prorate Commission approved a program, it had to be submitted to a referendum of the producers. 317 U.S. at 346-47. The fact that private parties had a part in initiating the program was not dispositive in *Parker* because the state, through the Prorate Commission, had adopted and enforced the programs. *See* Eastern R. R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 135, 140-43 (1961). *See also* text accompanying note 21 *supra.*

[93] 317 U.S. at 350.

[94] *Id.* at 351-52.

[95] *See* 435 U.S. at 429 (Stewart, J., dissenting). In Azzaro v. Town of Branford, 1974-2 Trade Cases ¶ 75,337 (1974), a municipality was denied *Parker* immunity on the theory that the town had joined private parties in anticompetitive behavior. *Id.* The court implied, however, that if no agreements had been made between the town and private parties, but the town alone had engaged in similarly anticompetitive behavior, a legislative mandate for the activity would nevertheless have to be shown in order for the town to be afforded state action immunity. The court in *Azzaro,* therefore, rejected the implication drawn by Justice Stewart from *Parker* in *City of Lafayette.*

[96] 317 U.S. at 350-51. What the *Parker* Court meant by the term "directed" was not stated in the *Parker* opinion and was the point of contention between the plurality and concurring Justices in *City of Lafayette. Compare* 435 U.S. at 415 (Brennan, J., plurality opinion) *with* 435 U.S. at 425-26 (Burger, C. J., concurring).

tween nongovernmental and governmental state agents, requiring a legislative mandate only for the anticompetitive practices of nongovernmental agents,[97] does not logically follow from *Parker*. Where the *Parker* Court required state direction for a state's agent's anticompetitive practices no exception was made for political subdivisions of the state which are also state agents.[98]

Since the *Parker* decision did not fully address the applicability of the state action doctrine to cities, Justice Stewart relied on *National League of Cities v. Usery* to support his position that actions taken by a municipality, like those of a state, should be treated as state action. Examination of that case shows that the dissent's reliance is unfounded. The Supreme Court, in *National League of Cities*, held that Congress could not constitutionally extend certain Fair Labor Standards Act requirements to states or their municipalities.[99] The holding was based on the Court's belief that Congress, by expanding the Act's coverage, would effectively impair the states' capacity to function as sovereign governments[100] by unduly constraining their performance of "essential" state functions.[101] By extending minimum wage requirements and overtime standards to states,[102] the Act would increase the states' cost of providing public services.[103] A state would have to choose between imposing higher taxes on its citizens or eliminating

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[97] *See* text accompanying notes 11, 60-63 *supra*.

[98] 317 U.S. at 350-51. In his concurring opinion, the Chief Justice indicated one reason why the *Parker* Court failed to adddress specifically the issues raised in *City of Lafayette*. 435 U.S. at 420-21. When *Parker* was decided in 1943, the prevailing view narrowly construed interstate commerce and limited congressional exercise of the commerce power to the regulation of the purchase and sale of goods between the states and transportation incident to those transactions. Since production was not considered commerce, a state owning and operating the means of producing electrical power was not subject to federal control under the commerce power. *See* Slater, *supra* note 63, at 84-85. Consequently the Court in *Parker* did not address the question of the Sherman Act's applicability to states engaged in production. The defendants in *Parker* were engaged in regulating the sale and distribution of raisins, the vast majority of which were sold and shipped in interstate commerce. 317 U.S. at 345.

[99] 426 U.S. at 855-56 n.20.

[100] *Id.* at 852.

[101] *Id.* at 839-40.

[102] 29 U.S.C. §§ 206(a), 207(a)(3) (current version at 29 U.S.C. §§ 206(a), 207(a)(1) (1976)) was held to be a valid exercise of the commerce power in United States v. Darby, 312 U.S. 100 (1941). As originally enacted, the Fair Labor Standards Act excluded from its purview the United States, individual states, and their political subdivisions by stating that they were not "employers" within the statutory meaning. 29 U.S.C. § 203(d) (1940). In 1974 Congress amended the Act so that "employers" included public agencies. Act of April 8, 1974, Pub. L. No. 93-259, § 6(a)(1), 88 Stat. 58, 64 (1974). Public agencies were defined as including the United States government and the governments of the states and their political subdivisions. *Id.* at § 6(a)(6). Also, Congress added a provision which stated that employees of a public agency are deemed to be engaged in interstate commerce. *Id.* at § 6(a)(5). The result was extension of the Act's requirements to state and local governmental employees.

[103] 426 U.S. at 851. The Court held that the magnitude of the cost increases to states which resulted from the application of the Act to public agencies was not determinitive of whether the 1974 amendments were constitutional. *Id.* at 851-52.

services.[104] Since municipal power to provide services is derived from the states,[105] the Court reasoned that the cities providing public services should also be protected from federal encroachment.[106]

In *National League of Cities* the Court protected that aspect of state sovereignty defined as the ability of states and municipalities to perform essential or integral governmental functions.[107] State sovereignty was balanced against federal regulation of interstate commerce through the Fair Labor Standards Act.[108] Following the Court's reasoning in *National League of Cities,* city government should only be equated with state government[109] under the *Parker* doctrine if providing electric power is an essential state function and the federal statute undermining that function is an exercise of the commerce power.[110]

Providing electric power is not an essential state function which should override the federal commerce power. Whether activities of the state are necessary to the state's effective existence in a federal system[111] must be determined on a case by case basis.[112] In *National League of Cities* the Court stated that functions which are integral,[113] traditional,[114] essential,[115] and which government is created to provide[116] may not be thwarted by the commerce power. Significantly, the Court specifically affirmed *United States v. California,*[117] where a state's operation of a railroad was held to be subject to the commerce power,[118] because the activity was not generally regarded by the states as part of their governmental activities.[119] The

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[104] *Id.* at 848.

[105] *See* text accompanying note 9 *supra.*

[106] 426 U.S. at 855-56 & n.20.

[107] *Id.* at 839, 852; *see* text accompanying notes 105-106 *supra.*

[108] *See* text accompanying notes 99-106 *supra.*

[109] *See* text accompanying notes 105-106 *supra.*

[110] In *National League of Cities* the Court expressly reserved the issues of whether Congress could subvert important state interests through the exercise of its taxing powers or pursuant to enforcement of the fourteenth amendment. 426 U.S. at 852 n.17. By relying on *New York v. United States,* however, the Court did imply that the federal taxing power was limited to the same extent as the commerce power. *See* text accompanying note 120 *infra.*

[111] 426 U.S. at 852; *cf.* Fry v. United States, 421 U.S. 542, 537-38 n.7 (1975) (applying the Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 799 (1970) to states because the Act did not exceed the limits of the tenth amendment).

[112] Fry v. United States, 421 U.S. at 558 (Rehnquist, J., dissenting).

[113] 426 U.S. at 851, 852.

[114] *Id.* at 852.

[115] *Id.* at 839, 845.

[116] *Id.* at 851.

[117] 297 U.S. 175 (1936).

[118] *Id.* at 182-88. Railroads have been regarded as public utilities. *See* Pulitzer Pub. Co. v. Federal Commerce Comm'n, 94 F.2d 249, 251 (D.C. Cir. 1937); *cf.* National Ass'n of Theater Owners v. Federal Commerce Comm'n, 420 F.2d 194, 203 (D.C. Cir. 1969), *cert. denied,* 397 U.S. 922 (1970)(including railroads in a list of recognized public utilities).

[119] 426 U.S. at 854 n.18. Although the Court in *National League of Cities* said that *California* was based on a finding that the operation of a railroad was not a governmental activity, the Court did not specifically make such a finding in *California. See* 297 U.S. at 183-84. In *California* the Court based its decision on the broader theory that Congress' plenary power to regulate commerce extended to the states in all circumstances. *Id.* at 185. Neverthe-

National League of Cities Court also used an analysis employed in deciding which state instrumentalities are subject to the federal taxing power[120] to delineate the limits of the commerce power.[121] By the standard enunciated in *National League of Cities* the petitioners in *City of Lafayette* were not engaged in an essential state function.[122]

Moreover, although the federal interest at issue in *City of Lafayette* is more than just a vague economic policy,[123] the Sherman Act, like the Fair Labor Standards Act, was enacted pursuant to the commerce power.[124] The dispositive issue in *National League of Cities* was which federal powers could operate to displace state sovereignty.[125] Even if the operation of

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less, to avoid overruling *California* in *National League of Cities,* the Court dismissed the *California* Court's interpretation of the commerce clause as dictum, specifically rejected it, and applied its own narrow interpretation of the clause. 426 U.S. at 854-55.

[120] *Id.* at 843. The Court cited New York v. United States, 326 U.S. 572 (1946) where congressional power to tax the states was said to be limited only by principles of federalism. Only state activities and property which were unique from the standpoint of intergovernmental relations were said to be immune from federal taxation. *Id.* at 582 (opinion of Frankfurter, J.), 588 (Stone, C. J., concurring). The Court held that New York's entrance into the mineral water market was not a traditional state function deserving immunity from federal taxation. *Id.* at 573-74. *See also* Helvering v. Gerhardt, 304 U.S. 405, 419 (1938) (extending tax immunity only to functions performed by or for states which are essential to the states' preservation); Helvering v. Powers, 293 U.S. 214, 225 (1934)(upholding federal taxation of state corporation operating street railroad because the function was not indispensable to the maintenance of state government).

[121] 426 U.S. at 843.

[122] *See* text accompanying notes 113-119 *supra. But see* 1 E. McQUILLAN, *supra* note 9, at 95 (municipal provision of utility service is part of a list of essential services which is expanding as citizens demand that government perform functions formerly undertaken by individuals for profit or by volunteer groups); Michelman, *States' Rights and States' Roles: Permutations of Sovereignty in* National League of Cities v. Usery, 86 YALE L. J. 1165, 1177 (1976)(state functions are essential when the electorate, through the state legislature, has deemed them important enough to be provided by the state. *See* note 71 *supra*).

[123] In *National League of Cities* the Court stated that the Fair Labor Standards Act's minimum wage requirements were a matter of economic policy and its overtime requirements an effort by Congress to spread employment. 426 U.S. at 848-49. In contrast, the maintenance of a competitive market system to which federal antitrust laws are directed has long been considered by the Court one of the more important national interests protected by federal legislation. *See e.g.,* United States v. Topco Assoc., 405 U.S. 596, 610 (1972), Apex Hosiery v. Leader, 310 U.S. 469, 490-501 (1940). The federal interest embodied in the Sherman Act was duly recognized by both the majority and dissent in *City of Lafayette. See* 435 U.S. at 398, 428 n.2.

[124] *See* text accompanying note 52 *supra.*

[125] 426 U.S. at 852. *But see id.* at 856 (Blackmun, J., concurring). In *National League of Cities* Justice Blackmun understood the Court to adopt a test which determines whether Congress can undermine state sovereignty by regulating essential state functions through the commerce power by balancing the importance of the federal *policy* pursued by the commerce power against state sovereignty. According to Blackmun, *National League of Cities* would not prevent Congress from regulating essential state functions when the impetus for exercising the commerce power is a more compelling federal interest than the vague economic policies pursued by the Fair Labor Standards Act. *Id.* Under Blackmun's analysis, *National League of Cities* does not prevent the Sherman Act from applying to state or municipal power companies even if providing electrical power is an essential state function. The federal interest in maintaining a free market economy is more important than the policies underlying the

public utilities was an essential state function, which it is not,[126] there would be no reason to allow the Sherman Act to constrain municipal operation of a power company when the Fair Labor Standards Act cannot. The *City of Lafayette* dissent's analogy to *National League of Cities* breaks down only because of the dissimilar state functions involved in each case.[127]

Although neither the *Parker* decision nor *National League of Cities* supports the position that state action immunity should automatically extend to cities, Justice Stewart believed that the adverse effects of requiring cities to show a legislative mandate for their activities were great enough to justify the broader application of the *Parker* doctrine. The requirement of a legislative mandate for municipal activities may lead to disruption of the relationships between state and city governments. The need for broad delegations of authority to municipalities has increased with the degree of congestion in urban communities and the range of problems peculiar to particular localities.[128] To deal effectively with unique problems,[129] local governments have assumed a more active role in areas previously reserved to state government or private enterprise. Municipal ownership of utilities has been recognized as being especially responsive to the need for local authority to address purely local matters.[130] Justice Stewart correctly points out that the plurality's nebulous standard for a legislative mandate of municipal activities[131] makes more specific delegations of power to local governments the only safe way to assure municipal antitrust immunity. State legislatures are thus put in the position of anticipating

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Fair Labor Standards Act. *See* text accompanying note 123 *supra.*

Justice Blackmun's analysis in *National League of Cities* finds credence in Justice Rehnquist's opinion. The Court specifically affirmed its decision in Fry v. United States, 421 U.S. 542 (1975). In *Fry,* the Court upheld the extension of the Economic Stabilization Act of 1970 requirements to states. *See* note 111 *supra.* Significantly, the Court noted that the Act was an emergency measure and that any resultant infringement of state sovereignty was therefore justified. 421 U.S. at 538. To distinguish *Fry* in *National League of Cities* Justice Rehnquist also emphasized the overriding importance of the Economic Stabilization Act to the economic well being of the nation. 426 U.S. at 853.

[126] *See* text accompanying notes 111-122 *supra.*

[127] *See* text accompanying notes 109-10 *supra; but see* text accompanying note 125 *supra.*

[128] 1 E. McQUILLAN, *supra* note 9, at 140.

[129] *Id.* at 95. The potential for municipal autonomy is greatest in states which have adopted home rule constitutional or statutory provisions. *See* Vanlandingham, *Municipal Home Rule in the United States,* 10 WM. & MARY L. REV. 269 (1968). Under these provisions, cities are free to adopt charters or statutes through which purely local matters are dealt with by local government. *Id.* at 279-80. Home rule provisions are thus responsive to the same concerns which have resulted in broader delegations of government authority to municipalities. *Id.* at 270; *see* note 121 *supra.*

[130] *See* 2 E. McQUILLAN, *supra* note 9, at 243-45. Municipal operation of public utilities should not be subject to state legislative controls beyond the service and rate scales for the utilities. *Id.* at 243. The operation of the utility is primarily, although not exclusively, a proprietary function, that is, for the benefit of local, as opposed to state interests. *Id.* at 243-45. That is not to say, however, that municipal operation is a private activity, as Chief Justice Burger suggests in *City of Lafayette. See* note 36 *supra.* McQuillan distinguishes between a city in its proprietary capacity and private ownership as mutually exclusive categories. 2 E. McQUILLAN, *supra* note 9, at 243-44.

[131] *See* text accompanying notes 29-36 *supra.*

the needs of each locality while the difficulty of anticipating local needs has been the impetus for increasingly broad delegations of governmental authority.

While the court's decision in *City of Lafayette* will have some effect on the manner in which states delegate power to localities, no support exists for Justice Stewart's contention that the substance of state legislation also will be subject to federal interference.[132] Requiring a state mandate for municipal anticompetitive activity will not prevent social and economic innovation by cities. By exposing municipalities to potential antitrust liability the Court seeks to influence states to consider the economic effects of their decisions to mandate anticompetitive conduct. Innovation will be curtailed only when the anticompetitive results of an activity outweigh its benefits. Where a state determines otherwise, nothing in the Court's opinions prevents a state from delegating to a city the power to act. Nor does the plurality opinion, contary to Justice Stewart's contentions, envision substantive due process inquiries into the reasonableness of state legislative enactments. Rather than questioning the wisdom of a state's decision to delegate anticompetive authority, the plurality's test is aimed only at ascertaining whether the authority was in fact delegated to a city claiming *Parker* immunity.[133]

The dissenters contended that, in addition to the disruption of state and local governmental relations, the subjection of cities to treble damage liability justifies extending antitrust immunity to municipalities.[134] Justice Stewart offered no basis for his statement beyond the financial hardships such liability would bring to local taxpayers.[135] Antitrust immunity, however, is not necessarily the proper way to avoid municipal treble damage liability. A persuasive argument can be made that Congress should reassess its prior reluctance to amend the Clayton Act by removing treble damage liability in certain cases.[136] Since the Congresses which enacted the Sherman Act and later provided for treble damages under the Clayton Act probably did not consider the effect of the Acts on local governments,[137] the

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[132] *See* text accompanying notes 78-82 *supra.*

[133] *See* text accompanying notes 29-36 *supra.* Although the plurality in *City of Lafayette* does not adopt an analysis similar to due process inquiries, the Chief Justice's concurring opinion does. Chief Justice Burger first required state compulsion of municipal anticompetitive proprietary activity. 435 U.S. at 425 n.6. Before extending state action immunity to a state's political subdivisions, however, the Chief Justice thought that a court should find that the compelled activity was no more anticompetitive than was necessary to effectuate the state's objectives in delegating its authority. *Id.* at 426. In other words, the Chief Justice would have the Court substitute its judgment for the state's on the question of how a state policy, which does not violate a specific constitutional provision, is to be implemented. This manner of judicial review is precisely that which the Court has abandoned. *See* text accompanying note 81 *supra.* Nevertheless, Justice Marshall, in a brief concurrence, agreed with the Chief Justice's analysis. 435 U.S. at 417.

[134] *See* text accompanying notes 84-88 *supra.*

[135] 435 U.S. at 440.

[136] Justice Blackmun, in his dissenting opinion, noted several occasions when Congress has refused to make treble damages in antitrust suits discretionary. 435 U.S. at 443 n.2.

[137] *See* note 98 *supra.*

unusually high cost of treble liability should not be imposed on taxpayers unless Congress specifically addresses the issue of damages in cases of governmental liability. Until the Clayton Act is amended, however, the severity of antitrust penalties alone should not serve to create antitrust immunity.

City of Lafayette, despite its narrow holding,[138] reaffirms the requirement of a legislative mandate as a prerequisite for application of the *Parker* doctrine to antitrust defendants other than a state. The Court did not agree on what standard a mandate must meet in cases challenging the conduct of a state's political subdivision. The vague standards advanced by the plurality and concurring Justices are the decision's weakest points. Whether the legislative mandate requirement is justified is a question for which neither the *Parker* decision nor *National League of Cities* provides a definite answer. The significant point made by the dissent, however, is that without a clear statement of what standard the mandate must meet, state legislatures will be forced to delegate governmental power in more specific terms in order to avoid potential judicial findings of insufficient state direction. The potential result is to make procedurally more difficult a state's delegation of power to local government for the solution of purely local problems. However, the states' capacity to decide which problems are to be addressed locally, and which powers the states will delegate to localities for that purpose will not be adversely affected.

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[138] *See* text accompanying note 18 *supra. See generally* Carrell, *Annual Survey of Antitrust Developments, 1977-1978,* 36 WASH. & LEE L. REV. 1, 9-17 (1979).