ANTITRUST—MUNICIPALITIES ARE EXEMPT FROM ANTITRUST STATUTES ONLY WHEN THEIR RESPECTIVE STATE LEGISLATURES AUTHORIZE OR CONTEMPLATE THAT THEY ENGAGE IN THE ANTICOMPETITIVE CONDUCT PURSUANT TO A STATE POLICY TO DISPLACE COMPETITION.—*City of Lafayette v. Louisiana Power & Light Co.* (U.S. Sup. Ct. 1978).

Two cities which owned and operated electric utility systems brought a federal antitrust action against privately owned competitors[1] who in turn filed a counterclaim charging violation of antitrust laws.[2] In response to the counterclaim the cities moved to dismiss, arguing that because they were cities and subdivisions of the state of Louisiana, the "state action" doctrine of *Parker v. Brown*[3] rendered federal antitrust laws inapplicable to them.[4] The utilities countered the cities' argument by claiming that municipalities were not *ipso facto* exempt from the operation of the antitrust laws.[5]

The district court granted the cities' motion to dismiss, holding that their status as cities precluded the utilities from maintaining antitrust suits against them.[6] The Court of Appeals for the Fifth Circuit reversed and remanded.[7] In a plurality opinion[8] the United States Supreme Court *held,*

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1. Petitioners Plaquemine and Lafayette, two Louisiana cities, brought suit in district court against Middle-South Utilities, Inc., Louisiana Power & Light Company, Central Louisiana Electric Company, Inc. and Gulf State Utilities, charging them with conspiracy to restrain trade, monopolization of the generation, transmission and distribution of electric power by preventing the construction and operation of competing utility systems, improper refusal to wheel power, foreclosure of supplies from markets served by respondents engaging in boycotts against them and utilization of sham litigation to prevent the financing of construction of electric generation facilities. City of Lafayette v. Louisiana Power & Light Co., 98 S. Ct. 1123, 1126 n.5 (1978).

2. The amended counterclaim alleged that the petitioners, with a nonparty electric coop., had conspired to involve Louisiana Power & Light [hereinafter L.P. & L.] in sham litigation for the purpose of delaying or preventing the construction of a nuclear electric generating plant, to eliminate competition within the municipal boundaries by use of covenants in their respective debentures, to exclude competition in certain markets by using long-term supply agreements and to displace L.P. & L. in certain areas by requiring customers of L.P. & L. to purchase electricity from plaintiffs as a condition of continued water and gas service (tie-in arrangements). *Id.* at 1126 n.6.

3. 317 U.S. 341 (1943).

4. 98 S. Ct. at 1126.

5. City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434-35 (5th Cir. 1976), *aff'd* 98 S. Ct. 1123 (1978).

6. *Id.* Although the district court ruled in favor of petitioners, it was reluctant to do so since they were clearly engaged in a business activity for profit. *Id.*

7. City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431 (5th Cir. 1976), *aff'd* 98 S. Ct. 1123 (1978). The appellate court held that a city was not *ipso facto* exempt from the federal antitrust laws. Rather, a city must show that the state legislature intended to grant it the power to conduct the anticompetitive actions involved. *Id.* at 434-35, *reviewed in,* Note, *Antitrust Law and Municipal Corporations: Are Municipalities Exempt From Sherman's Act Coverage Under The Parker Doctrine?* 65 GEO. L. J. 1547, 1548 (1977) [hereinafter cited as *Are Municipalities Exempt?*].

8. Justice Brennan delivered the opinion of the Court, in which Justices Marshall, Powell,

affirmed. The "state action" doctrine of *Parker v. Brown* exempts a city's anticompetitive conduct only if the city is acting pursuant to a state policy to displace competition with regulation or with a monopoly.[9] *City of Lafayette v. Louisiana Power & Light Co.*, 98 S. Ct. 1123 (1978).

The Court's holding imposes a new limitation on the principle that state action is beyond the scope of the antitrust laws.[10] The "state action" doctrine had its origin in *Parker v. Brown*, which held that "nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."[11] In *Parker* the Supreme Court upheld the California Agricultural Prorate Act, in spite of its anticompetitive effects, because the program derived its authority from a legislative mandate of the state.[12] The Court found that neither the text nor the legislative history of the Sherman Act disclosed a congressional intent to restrain state action.[13] The Court qualified the exemption, however, by indicating that a state could not immunize private action violative of the antitrust laws by authorizing that conduct,[14] nor could the

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and Stevens joined. Chief Justice Burger concurred in Part I of the plurality opinion and in the judgment. Justice Stewart, with whom Justices White, Blackmun and Rehnquist joined, dissented. Justice Blackmun joined in all of Justice Stewart's dissent except for Part II-B and also authored his own dissent.

9. *Id.* at 1137. Before reaching this conclusion, however, the Court held that a municipality was a person within the meaning of the antitrust laws and that there was a presumption of nonexemption for municipalities. *Id.* at 1127. Petitioners sought to demonstrate countervailing policies which would overcome this presumption. The Court rejected both of the petitioner's arguments: that it would be anomalous to subject municipalities to the criminal and civil liabilities of the antitrust laws and that these laws were intended to protect the public only from abuses of private power and not from actions of municipalities. *Id.* at 1131.

10. The state action principle evolved shortly after passage of the Sherman Act. *Are Municipalities Exempt?*, *supra* note 7, at 1545 n.1. *See, e.g.*, Olson v. Smith, 195 U.S. 332, 344-45 (1904) (if a state has the power to regulate harbor pilotage and in so doing to appoint and commission those who are to perform pilotage services, it follows that no monopoly in a legal sense can arise from the fact that the duly authorized agents of the state are alone allowed to perform pilotage duties); Lawenstein v. Evans, 69 F. 908, 911 (C.C.D.S.C. 1895) (the antitrust laws do not apply to a state-created liquor monopoly since the laws only prohibit restraints of trade by persons or corporations, not by states).

11. 317 U.S. at 350-51.

12. *Id.* at 350-52. The act authorized creation of an advisory commission of nine members, eight of which were appointed by the Governor and confirmed by the state senate. Each Commissioner was required to take an oath of office and the State Director of Agriculture was an unofficial member of the commission. *Id.* at 346. The Court found that the program's adoption and enforcement by the Commission constituted state action even though the raisin producers proposed and ratified the program. *Id.* at 352.

13. *Id.* at 350-51. One commentator has suggested, however, that even the most careful reading of the Sherman Act's legislative history will not disclose any congressional intent either to grant or withhold state antitrust immunity since Congress probably never considered the issue. Slater, *Antitrust and Government Action: A Formula for Narrowing, Parker v. Brown*, 69 Nw. U. L. Rev. 71, 83-84 (1974); *see also* Cantor v. Detroit Edison Co., 428 U.S. 579, 614 (1976) (Stewart, J., dissenting).

14. 317 U.S. at 351; *see, e.g.*, Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 386-89 (1951) (Louisiana statute which enforced private price-fixing contracts against both signers and nonsigners was invalidated. The Court held the Miller-Tydings Act exempts from the

state become a participant in a private agreement to restrain trade.[15]

The Supreme Court did not refine the "state action" doctrine until the case of *Goldfarb v. Virginia State Bar.*[16] In *Goldfarb,* the Court unanimously held that the threshold question in determining whether activities were within the exemption of *Parker* was whether the state, acting as sovereign, had required the anticompetitive practices.[17]

A year after *Goldfarb,* the Supreme Court in *Cantor v. Detroit Edison Co.*[18] again declined to extend *Parker* protection to activity not compelled by the state.[19] The Court rejected the utility's defense that its free light bulb exchange program was exempt from federal antitrust laws since the state had approved the program as part of a tariff package which the utility could not abandon without state utility commission approval.[20]

The most recent application of the *Parker* exemption prior to *Lafayette* was in *Bates v. State Bar of Arizona,*[21] where the Court upheld, in the face of an antitrust attack, attorney advertising prohibitions promulgated by the Arizona Supreme Court.[22] In contrast to *Goldfarb,* the Court in *Bates* found that the state supreme court had affirmatively commanded the challenged conduct.[23]

Arguably, a state mandate, which was held necessary for the *Parker* exemption in all these cases, should not be applied to *Lafayette* because it is factually distinguishable from these cases. All the earlier cases concerned limited-purpose entities rather than the multi-purpose cities challenged in *Lafayette.*[24] However, with the exception of *Cantor,* the Supreme Court in every case applied the state mandate requirement to a defendant which was a subordinate governmental unit.[25] Because cities share this characteristic of

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Sherman Act contracts or agreements prescribing prices for resale of articles purchased, not contracts or agreements concerning the practices of noncontracting competitors of the contracting retailers).

15. 317 U.S. at 351-52.

16. 421 U.S. 773 (1975). In *Goldfarb,* the Court was presented with the question of whether a state bar association's enforcement of a minimum fee schedule published by a county bar association violated the Sherman Act. *Id.* at 775.

17. *Id.* at 790. Despite legislative authorization for the state supreme court to regulate the legal profession, the Court concluded that the state had not compelled publication of the minimum fee schedules. Although the State Bar was a state agency by law and had apparently been granted the power to issue ethics opinions, there was no indication that the Virginia Supreme Court approved those opinions. *Id.* at 791.

18. 428 U.S. 579 (1976).

19. *Id.* at 598.

20. *Id.* The Court inferred that the state policy was neutral on the issue of light bulb exchange programs since other state utilities did not have similar programs. *Id.* at 584-85.

21. 433 U.S. 350 (1977).

22. *Id.* at 360. The Court reiterated its *Goldfarb* holding that the *Parker* doctrine applies to anticompetitive activities compelled by the state. *Id.* at 359.

23. *Id.* at 359-60.

24. *See* 1 E. McQUILLIN, MUNICIPAL CORPORATIONS § 2.09, at 146-47 (3d ed. 1971) (municipal corporations have dual purpose: to assist in government of the state and to act for the good of local constituents).

25. *See* notes 11, 17, 20, 22 *supra* and accompanying text.

subordinate governmental function, it is not surprising that the Supreme Court has required cities to show similar mandates for *Parker* exemptions.[26]

The cities in *Lafayette* argued for a broad application of the "state action" doctrine. Their principal argument was based on the premise that a city is a subdivision of a state and that it only exercises power delegated to it.[27] The cities contended that because *Parker* held that Congress did not intend the Sherman Antitrust Act to apply to the states,[28] it should also not apply to the state's subdivisions.[29] The cities' delegation premise was supported by prior decisions which held that "[m]unicipal corporations are instrumentalities of the State for the convenient administration of government within their limits."[30] Therefore, the argument ran as follows: cities' powers are those delegated to them by their respective states and, when they act, they exercise the sovereign power of those states.[31]

In opposition to the cities' argument, the private utilities contended that the *Parker* doctrine provided immunity only to cities which had a specific state legislative mandate to conduct particular anticompetitive activities.[32] The utilities relied upon the *Parker* rationale which stressed "state command"[33] and upon the later cases which developed that theme.[34]

The Supreme Court agreed with the utility that mere municipality status does not automatically carry with it the "state action" exemption.[35] *Goldfarb* had made it clear that, for purposes of the *Parker* doctrine, not every act of a state instrumentality was that of the state as sovereign.[36] However, since the actions of municipalities may reflect state policy,[37] cities may lawfully engage in anticompetitive activities if they have a sufficient state mandate to do so.[38]

In reaching this conclusion, the Court sought to reconcile two conflicting national policies. On the one hand was freedom of competition, embodied in

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26. *See* City of Lafayette v. Louisiana Power & Light Co., 98 S. Ct. at 1137-38 (noting that a city or other subordinate governmental unit must show an adequate state mandate to fall within the *Parker* exemption).

27. *Id.* at 1134.

28. *See* note 10 *supra* and accompanying text.

29. 98 S. Ct. at 1126.

30. Louisiana v. Mayor of New Orleans, 109 U.S. 285, 287 (1883); *cf.* Reynolds v. Sims, 377 U.S. 533, 575 (1964) (political subdivisions of states have been traditionally regarded as subordinate governmental instrumentalities created by the state to assist in the carrying out of governmental functions).

31. Avery v. Midland County, 390 U.S. 474, 480 (1968) (the actions of local government are the actions of the state). *See also* Breard v. Alexandria, 341 U.S. 622, 640 (1951) (city council actions to protect the city's population from practices subversive of peace and quiet are exercises of a state's sovereign power).

32. *See* 532 F.2d at 434.

33. *See* 317 U.S. at 352.

34. *See* note 25 *supra* and accompanying text.

35. 98 S. Ct. at 1136.

36. *Id.* at 1135 (analyzing Goldfarb v. Virginia State Bar, 421 U.S. at 790).

37. *Id.* at 1137.

38. *Id.* at 1138.

the Sherman Act,[39] and on the other was federalism.[40] The Court, recognizing that serious economic dislocation would result if cities were free to disregard the nation's economic goals in favor of their own parochial interests,[41] held that municipalities were not per se exempt from the antitrust laws.[42] The Court, however, made it clear that it was not depriving a state of its freedom to direct an anticompetitive practice.[43]

In so holding, the Court articulated standards for determining what conduct constitutes state direction of an anticompetitive policy. The Court began with the proposition that if there is an absence of evidence of state authorization or direction, then the most that can be said for any state policy is that it is neutral.[44] This does not mean, however, that the requisite authorization or direction need be specifically articulated; it is enough if the legislature "contemplates" the kind of action challenged.[45]

The goal which these standards seek to implement is a laudable one: preventing the serious economic dislocation which could result if cities were free to place their parochial interests above the nation's economic goals as reflected in the antitrust laws.[46] Nonetheless, the decision may be criticized for certain unfavorable consequences that may result from its broad application. Moreover, the consequences of *Lafayette* on municipalities will be far-reaching since municipal anticompetitive activity is legion[47] as are the governmental entities engaging in such activity.[48] It is this impact on municipal government that gave the dissenters their greatest ammunition against the plurality.

In particular, Justice Stewart's dissent argued that the plurality's "decision will impose staggering costs on the thousands of municipal governments in our country," causing increased taxes, decreased services and bankruptcies.[49] The plurality's response was that the question of damages can only

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39. *Id.* at 1129, 1138.

40. *Id.* at 1138.

41. *Id.* at 1134, 1137. Generally stated, the Sherman Act was designed to encompass every person who might restrain or monopolize commercial intercourse among the states. *Id.* at 1129 (quoting United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553 (1944)).

42. *See* note 35 *supra* and accompanying text.

43. "It [the decision] means only that when the State itself has not directed or authorized an anticompetitive practice, the State's subdivisions in exercising their delegated power must obey the antitrust laws." 98 S. Ct. at 1138.

44. *Id.* at 1137-38.

45. *Id.* (the Court quoted from the Fifth Circuit's analysis of the problem).

46. *Id.* at 1137.

47. Just a few examples of such activity are: passage of Sunday closing laws and other blue laws; passage of building and construction ordinances and regulation of size of advertising signs, occupational licensing, zoning, ambulance services, utilities and transportion. *See* Slater, *supra* note 13, at 75-77.

48. "In 1972, there were 62,437 different units of local government in this country. Of this number 23,885 are special districts which have a defined goal or goals for the provision of one or several services, while the remaining 38,552 represent the number of counties, municipalities, and townships, most of which have broad authority for general governance . . . ." 98 S. Ct. at 1134 (footnotes omitted).

49. *Id.* at 1151. Justice Stewart argued in his dissent that even if petitioners should prevail,

be addressed by the district court on remand,[50] thereby suggesting that treble damages may not be appropriate in some antitrust actions.[51] However, the Court did not give any indication upon what basis a district court could so hold.

An additional consequence of subjecting cities to antitrust liability is that it creates a chilling effect on local government operations. Public officials may be fearful of incurring economic sanctions in the performance of their official functions.[52]

Justice Stewart forcefully argued that these adverse consequences of subjecting municipalities to antitrust liability require the formulation of precise guidelines for the application of the "state action" doctrine to municipal transactions. A vague and uncertain test, argued Stewart, is bound to increase litigation and discourage state subdivisions from experimenting with innovative social and economic programs.[53] If officials are unsure of the legality of potential solutions to civic problems, those solutions may never be implemented.

In light of the necessity for clear standards, the Court's failure to be precise in formulating a test is particularly disconcerting. The Court's test is that state governmental subdivisions are immune from the Sherman Act only when "authorized" or "directed" by the state pursuant to a state policy to displace competition.[54] The problem with this test becomes apparent when determining what constitutes "authorization" or "direction" by a state. In *Parker*, the Court required a "state's command,"[55] and in *Bates* the Court required a "compulsion" for antitrust immunity.[56] Now under *Lafayette*, immunity exists where the legislature merely "contemplates" a particular anticompetitive activity.[57] The *Lafayette* Court held that a specific, detailed legislative authorization does not have to be available to attain *Parker* immunity.[58] Augmenting the confusion resulting from these various definitions of "authorization" is *Cantor's* holding that mere authorization is not enough.[59] *Cantor* stated that state authorization, approval, encouragement, or participation in restrictive private conduct conferred no antitrust immunity.[60] Distinguishing *Lafayette* from *Cantor* on the basis of the nature of the

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their citizens will still have to bear the brunt of rapidly growing costs of litigation through greater taxes and lesser services. *Id.*

50. *Id.* at 1131 n.22.

51. *Id.* at 1151 n.30 (this possibility was suggested by Justice Brennan in his opinion). The Supreme Court has previously indicated in dicta that the assessment of treble damages may be inappropriate when unfairness would result. *See* Cantor v. Detroit Edison Co., 428 U.S. at 595.

52. 98 S. Ct. at 1150 (Stewart, J., dissenting).

53. *See id.* at 1150.

54. *Id.* at 1137.

55. *See id.* at 1135; Parker v. Brown, 317 U.S. at 352.

56. *See* Bates v. State Bar of Arizona, 433 U.S. at 360 (quoting Goldfarb v. Virginia State Bar, 421 U.S. at 791).

57. 98 S. Ct. at 1138.

58. *Id.*

59. 428 U.S. at 592-93.

60. *Id.*

political subdivisions involved suggests that the courts will show greater deference to city anticompetitive activity than to private or even state agency activity which is essentially private in nature.[61] The "authorization" to engage in anticompetitive activity need not be as explicit for municipalities as it does for certain other state entities, such as the State Bar Association in *Goldfarb*.[62]

Although such deference may adequately distinguish *Cantor*, it does not solve the question of what constitutes sufficient "authorization." The *Lafayette* plurality stated that "authorization" is sufficient if the legislature "contemplates" the kind of action complained of.[63] But as Justice Stewart's dissent points out, state statutes are often enacted with little recorded legislative history so that ascertaining what the legislature "contemplates" is very difficult.[64] One way to clarify some of the ambiguity of the plurality's criteria is to establish parameters and then examine the Court's policy reasons for applying the antitrust laws to municipalities within that framework.

As for the parameters to the criteria, it is clear that an express directive from a state legislature authorizing a city to engage in a particular anticompetitive activity would grant *Parker* immunity to that city.[65] On the opposite end of the authorization spectrum are specific directives prohibiting a city from engaging in an anticompetitive activity.[66] A wide range of possible authorizations occupy the middle portion of the spectrum. The Court suggests that whatever the required authorization for cities is, it is less than is necessary for individuals or state agencies to attain *Parker* immunity.[67] This, however, only gives us a comparative model. Vagaries still exist in abundance. An examination of the plurality's policy reasons for applying antitrust laws to municipalities provides adequate criteria for the establishment of needed guidelines.

One of the primary reasons for the Court's holding was that a city's promotion of parochial interests may often have anticompetitive effects reaching beyond city boundaries.[68] The Court reasoned that the economic welfare of the nation should not be sacrificed for the benefit of the parochial interests of municipalities; otherwise, "a serious chink in the armor of antitrust protection would be introduced [and be] at odds with the comprehen-

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61. *See* Goldfarb v. Virginia State Bar, 421 U.S. at 792, where the State Bar, though acting within its broad powers, had "voluntarily joined in what was essentially a private anticompetitive activity . . . ."

62. *Id.* and accompanying text.

63. *See* note 45 *supra* and accompanying text.

64. 98 S. Ct. at 1149 (Stewart, J., dissenting).

65. *See id.* at 1138. This is true no matter how weak the public goals or how serious the injury to competition. Slater, *supra* note 13.

66. The approach of Justice Stewart, however, would continue to exempt a city from antitrust action, even if the city is disregarding a specific state directive not to engage in that activity. *See* 98 S. Ct. at 1138. Such a result is a perversion of federalism. *Id.*

67. *See* notes 59, 60, 61 and accompanying text.

68. 98 S. Ct. at 1134, 1137.

sive national policy established by Congress."[69] For example, the Court stressed the adverse effects that the alleged utility tie-in[70] would have on outsiders.[71] In the same light, the Court also discussed the detrimental effects of the municipal action on regional efficiency in providing utility service.[72] The Court's stress on extra-territorial effects indicates that they should be an important part of the criteria for finding sufficient state authorization in future cases.

In fact, an examination of extra-territorial effects in large measure can be used to determine whether a city's anticompetitive practice was "authorized" by the state legislature. This follows from a basic assumption of legislative representation; a representative will not passively allow passage of legislation which benefits other portions of the state at the expense of his or her own electorate. An attempt at passage of such a measure will elicit vigorous opposition from affected representatives and will force the legislature to weigh the law's costs and benefits to the citizenry before its enactment. If the law is one that authorizes a city to engage in anticompetitive activities, its passage by the legislature will depend upon the weight attributed to adverse extra-territorial effects.[73] If the costs are greater than the benefits, then no authorization will emerge.

This process should be considered by a court in determining whether a city's claimed anticompetitive authorization was indeed "contemplated" by the state legislature. If a city's anticompetitive activity creates numerous adverse extra-territorial effects and the city's claimed authorization is vague, ambiguous, or overbroad, it could be fairly said that the legislature never "contemplated" the city's activity. If such activity and its consequences had been anticipated, the legislature would not have passed the professed authorization.

Placing an extra-territorial effects analysis into the model for determining what constitutes "authorization" creates a bifurcated approach. A court must first look to the specificity of the alleged authorization.[74] If the claimed

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69. *Id.* at 1134.

70. L.P. & L. alleged that the City of Plaquemine provided gas and water to L.P. & L.'s electric customers outside the city limits only if those customers began purchasing electricity from the city. *Id.* at 1132.

71. The effect of the tying contract may be to increase the cost of electric service to former L.P. & L. customers. Moreover, a municipality might discriminatorily charge higher rates to the captive customers outside its jurisdiction without a cost justified basis. Thirdly, there would be an adverse impact on the utility whose service is displaced. Reduced revenues would likely occur and possible losses of equipment would reduce its rate base, possibly affecting its capital structure. In addition, it would be the surviving customers who would bear the brunt of these consequences. *Id.*

72. *Id.* at 1132.

73. The Court recognized that the absence of representation of outsiders in municipal government made municipal activities which affected outsider interests suspect since outsider interests would not be adequately defended. *Id.* at 1133, 1137.

74. Claimed authorizations could range from specific directives authorizing a particular activity to broad-scoped "home rule" authorizations. Justice Stewart voiced the dissenters'

authorization is ambiguous and there remains doubt as to whether the legislature had contemplated the challenged activity, the court will have to examine and weigh the extra-territorial effects against the benefits to the municipality.[75] The greater the extra-territorial effects, the clearer the city's authorization must be. Consequently, negligible extra-territorial effects compared to numerous municipal benefits would indicate a legislative intent to authorize that activity and thus a lesser degree of clarity for the professed authorization would be required. Inherent in this type of analysis is a judicial balancing[76] of extra-territorial effects against local benefits. This is very similar to the type of balancing used in commerce clause litigation.[77]

In *Lafayette* the Court was guided by weighing the tenets of federalism against national free enterprise policy. In essence, these are the same factors which warranted balancing in commerce clause litigation. Parochial interests must give way to the interests of the whole. In antitrust litigation, however, there is a penalty of treble damages awaiting losing litigants. This explains *Lafayette's* holding that a city has antitrust immunity if its state legislature has directed it to engage in anticompetitive activities. Balancing should not be used in such circumstances.

Balancing anticompetitive effects, in particular, against local interests is neither novel nor without precedent.[78] The Supreme Court has previously sustained the use of the commerce clause to prevent an anticompetitive burden on interstate commerce. In *Dean Milk Co. v. City of Madison,*[79] the Court struck down a municipal ordinance because it erected barriers to interstate competition for the protection of the local milk industry.[80] The Court held

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concern over the survival of the "home rule" concept in his dissenting opinion. *Id.* at 1148 n.15 and accompanying text.

75. This analysis is not meant to exclude other indices of gauging legislative intent such as legislative histories, legislative debates, committee reports or comments by key legislators, no matter how scarce they are. For an exhaustive examination of legislative history, *see generally,* Chandler v. Roudebush, 425 U.S. 840, 848-60 (1976).

76. *See* Cantor v. Detroit Edison Co., 428 U.S. at 610 (Blackmun, J., concurring) (Justice Blackmun argued for a "rule of reason balancing test" in determining *Parker* application to state action. He suggested that state-sanctioned anticompetitive activity should fall if its potential harms outweighed its potential benefits.); *Are Municipalities Exempt?, supra* note 7, at 1586 (favorably discussing Justice Blackmun's rule of reason balancing test); Slater, *supra* note 13, at 104 (advocating a balancing test in determining what types of state activity should fall within the *Parker* exemption).

77. Slater, *supra* note 13, at 104.

78. *Id.* at 106.

79. 340 U.S. 349 (1951).

80. "The City of Madison inspected the facilities of all milk producers who were located within a twenty-five mile radius of the city and the facilities of all bottles within a five mile radius. The city ordinance in question required that a license to sell milk in Madison not be issued to anyone whose product was not produced or bottled at facilities not inspected by the city. As a practical matter this excluded out-of-state milk companies from selling in Madison."

Slater, *supra* note 13, at 107 n.168; *see also* Southern Pac. Co. v. Arizona, 325 U.S. 761, 770-84 (1945) (state restriction of train lengths held invalid under the commerce clause because "the state interest is outweighed by the interest of the nation in an adequate, economical and efficient railway transportation service").

that the burden on interstate commerce was not justified by the character of the local interests.[81]

It would be anomalous if the Court balanced anticompetitive effects against local interests under the broad prohibitions of the commerce clause, but refused to do so when dealing with the more specific Sherman Act. Fears of a flood of litigation and hindrance of state governmental bodies by uncertainty have proved unfounded in commerce clause contexts.[82] Furthermore, courts should have little difficulty in applying balancing principles to antitrust cases since such principles are now familiar from commerce clause litigation.

In summary, the proposed model inspired by *Lafayette* calls for weighing the extra-territorial effects of a particular municipal activity against the local benefits. The greater the outside effect, the greater and more explicitly the state authorization must be in order for that city to enjoy *Parker* immunity. Outside effects are simply a gauge by which legislative intent may be read. This approach should preserve to cities their ability to engage in activities long considered proper municipal functions. The dissenters disparage the plurality's guidelines as vague, but vagueness should not be confused with flexibility. When federalism and free competition conflict, it is flexibility which gives the courts the opportunity to save them both.

Barry Wilkie

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81. Dean Milk Co. v. Madison, 340 U.S. 349, 353-54 (1950).

82. Slater, *supra* note 13, at 106. These are among the many fears of the Justices joining in Justice Stewart's dissent. *See* 98 S. Ct. at 1150 (Stewart, J., dissenting).