Antitrust and Zoning - How Much Respect for Local Government

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ANTITRUST AND ZONING—HOW MUCH RESPECT FOR LOCAL GOVERNMENT?

I. INTRODUCTION

There are 79,862 units of local government in the United States,¹ and many of these governments restrain trade through zoning. Restraints of trade and combinations² of persons to monopolize any part of trade or commerce are federal antitrust violations.³ States, however, are implicitly excluded from the coverage of the federal antitrust laws under Parker v. Brown.⁴ Municipalities had rested safely behind the holding of Parker until a majority of the Supreme Court in City of Lafayette v. Louisiana Power and Light Co.⁵ rejected the City's contention that Congress had intended to exempt municipalities from the antitrust laws. Though a majority of the Court in Lafayette agreed that municipalities should not receive the same deference as states under the state action doctrine, there was no majority agreement as to the standard to be applied for deciding when a municipality would be exempted.

¹ 1982 by Donald M. Hartford, Jr.
² See infra notes 72-76 and accompanying text.
³ Sherman Act, 15 U.S.C. §§ 1-7 (1976). Section 1 of the Sherman Act makes "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, . . . illegal." Id. at § 1. Section 2 of the Sherman Act states that:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by a fine not exceeding one million dollars if a corporation, or if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Id. at § 2.

⁴ 317 U.S. 341, 351 (1942). The exclusion is based on concerns of federalism and interpretation of the intended scope of the Act. The court in Parker stated: "In a dual system of government in which, under the constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." Id.
This comment explores two basic questions: First, when and what municipal zoning activities will be subject to antitrust attack; and, second, what amount of deference is due a local government, in our federal system, when it acts in its zoning capacity and is faced with a federal antitrust suit? The comment ultimately advocates a direct balancing of interests: the state and local interest in sovereignty should be balanced against the national interest in a competitive economy. This balancing approach provides a sound basis for addressing both the national interest in antitrust enforcement and federalism.

Part II of this comment illustrates how and where municipal zoning activities are vulnerable to potential antitrust attack and how different states have dealt with anticompetitive zoning under state law. This section concludes that the approach state courts use to deal with anticompetitive zoning often fails to consider the harm a particular zoning activity can have on the national economy.

Part III looks at substantive antitrust law as applied to zoning and draws two conclusions. First, because of the disruptive effect that local zoning regulation may have on the national economy local governments should not be automatically exempted from the antitrust laws. Second, the plurality's approach in Lafayette, exempting local governments from antitrust enforcement, fails to protect either of the two objectives it should protect under Parker and the antitrust laws: concerns of federalism and competition. Part III discusses several barriers to a plaintiff's successful antitrust challenge of a zoning activity. It highlights the Parker state action exemption as the line of skirmish in the Burger Court’s battle of competing interests in federalism and antitrust enforcement.

Part IV discusses two historical concerns of federalism, decentralization and community self-determination, and their relation to the deference due local governments in our federal system. This section also notes the trend in federal courts to abstain in cases involving local land use ordinances, and the deference due municipalities in light of the Supreme Court’s decision in National League of Cities v. Usery.\(^6\)

Part IV proposes and applies the balancing test mentioned earlier. The test weighs the concerns of federalism and

\(^6\) 426 U.S. 833 (1976).
the national interest in a competitive economy. Part IV then points out the comparative advantages inherent in a balancing test as opposed to the test suggested by the Supreme Court plurality in *Lafayette*.

The comment concludes that the balancing approach is preferable. It ensures that neither of the competing interests involved, federalism versus the national interest in a competitive economy, need be sacrificed at the expense of the other.

**II. State Law Control of Anticompetitive Zoning**

By definition, zoning puts restrictions on the use of land. Zoning restrains trade to the extent that restrictions affect commercial land use. Construction projects worth billions of dollars are affected by zoning and subdivision regulations each year. The restraints that zoning places on competition are generally seen as necessary by the attorneys, planners, and local governments that support them. Their arguments in favor of zoning are usually nothing more than admonishments that competition will not always facilitate the most efficient allocation of resources. In the antitrust courtroom, competition is presumed to be the most efficient allocator of resources. Social and economic justifications will not be entertained unless they have a procompetitive purpose or accept the presumption in favor of the free market economy.

In *Village of Euclid v. Ambler Realty Co.*, the Supreme Court examined the constitutionality of zoning and found that such restrictions do not violate the constitution if they have a substantial relation to the public health, safety, morals or general welfare. Local zoning regulations are usually challenged

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10. *Id.* The market cannot be relied upon to make the most economic use of available sites. Under conditions of comparative land scarcity, planning will have to see to it that the right choices are made. *Id.* at 41.

11. *See infra* notes 35-40 and accompanying text.


13. *Id.* at 395. The Court also said that:

[U]pon the broad ground that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values
in state courts on the basis that the regulations are not related to one of the broad purposes considered proper for zoning. In state courtrooms a showing may usually be made of a social justification that is related to one of zoning's proper purposes, even though the purpose is not procompetitive. Practically speaking, the state court approach appears rational. Examination of the approach of state courts to the control of anticompetitive zoning, however, reveals that state court review of anticompetitive zoning often results in state court protection and perpetuation of restraint on trade. On the other hand, the substantive antitrust law approach seems too rigid. Because most commercial zoning regulations would restrain competition and have no procompetitive purpose, such regulation would be violative of the federal antitrust law.

Several different zoning practices have been challenged as anticompetitive in state courts.

A. Zoning to Exclude Business Uses

In Wyatt v. City of Pensacola, the City of Pensacola, Florida, passed a zoning ordinance which listed permissible uses in a neighborhood commercial district. The city council agreed that the district would be suited for dry cleaning establishments but excluded new establishments for a period of

and curtailing the opportunities of the market, constitute a present and irreparable injury, the court will not scrutinize its provisions sentence by sentence, to ascertain by a process of piecemeal dissection whether there may be, here and there, provisions of a minor character which, if attacked separately, might not withstand the test of constitutionality.


15. See infra notes 19-29 and accompanying text.
three years. The council did not want to place "the established cleaning firms at a competitive disadvantage without sufficient warning." The District Court of Appeal found the ordinance was not based upon any purpose relating to the promotion of health, safety, morals, or the general welfare. The court held the sole basis for delaying the effective date of the ordinance was to restrict competition in the industry through the use of the state's police power. It concluded that this was not a proper zoning purpose.

B. Petition for Exception to a Zoning Ordinance

In Blair v. Board of Adjustment, the plaintiff sought an exception from a zoning ordinance in order to use her property as a site for service stations. There were already three filling stations in the immediate area. The Board of Adjustment concluded that introduction of new filling stations would have a disastrous impact upon existing service stations and denied the petition for exception. It appears that the sole motive for refusing the petition was to restrain trade. On appeal, the intermediate appellate court's holding affirming denial was upheld. The Pennsylvania Supreme Court said that the Board of Adjustment may well have been in error in taking into consideration the adverse impact that the granting of the petition would have on the existing businesses. The court disregarded this, however, because there were several other grounds for objection, including concerns for public safety caused by increased traffic.

C. Zoning to Monopoly Power

In Sunny Slope Water Co. v. City of Pasadena, the City of Pasadena was in the business of providing water to its residents and others. It annexed a tract of land where the water rights were owned by Sunny Slope Water Co., a private water company. Sunny Slope had already begun to construct a well on the property. After annexation, Pasadena restricted the use of the land by zoning it for residential purposes only. The city subsequently refused Sunny Slope a permit to continue operating its steam boiler and drilling its well. The city did

17. Id. at 778.
19. 1 Cal. 2d 87, 33 P.2d 672 (1934).
allow the continued existence of its own wells in residentially zoned areas. Sunny Slope sued to invalidate the zoning ordinance complaining that the city's motive was to restrain competition and was therefore illegal. The California Supreme Court held that the city's purpose or motive in passing the ordinance was irrelevant and immaterial where it fell short of being fraudulent.20

D. Zoning a Monopoly for Another

In In re White,21 Atherton, California, zoned 1-1/10 acres of its 2,500 acres for commercial use. This small area was occupied by existing businesses. When the plaintiff began running a commercial enterprise in a residential zone, he was convicted of violating the zoning ordinance. He sued to invalidate the restrictive zoning ordinance. The California Supreme Court held the zoning ordinance invalid because it was not related to the public health, safety, morals or general welfare, and granted a monopoly to the business establishments already existing in the commercial zone.22 Subsequent California cases did not follow In re White. Zoning ordinances have been held valid because the city had no intent to create a monopoly23 or because sufficient shopping was available in neighboring communities.24 In a case similar to White, Ensign Bickford Realty Corp. v. City Council,25 the court held that the primary purpose of the city council in allowing only one district for business and denying a petition to rezone another parcel to business was not to create a business monopoly but to reasonably regulate land use.26 Another case held that a system of exclusionary zoning which eliminates all or virtually all commercial uses of property within a city was invalid27 because no evidence was introduced showing a lack of available space in the county or region for

20. Id. at 99, 33 P.2d at 677.
22. Id. at 520, 234 P. at 397.
26. Id. at 477, 137 Cal. Rptr. at 310.
the prohibited use.\(^{28}\)

State courts, focusing on whether an anticompetitive zoning activity is in the general welfare, may in many cases completely disregard the anticompetitive effects zoning activity will have on the economy. The first two zoning activities discussed above (zoning excluding business uses and petitions for exception to a zoning regulation) are susceptible to antitrust attack as agreements or combinations in restraint of trade under section 1 of the Sherman Act.\(^{29}\) The second two zoning activities addressed involve monopolization of commerce by local government action; both would be proscribed by section 2 of the Sherman Act.\(^{30}\)

III. THE FEDERAL ANTITRUST LAW AND THE STATE ACTION EXEMPTION

Application of the federal antitrust law to local government zoning activity may often result in \textit{per se} violations of the antitrust laws.\(^{31}\)

The Sherman Act,\(^{32}\) the Clayton Act,\(^{33}\) and the Federal Trade Commission Act\(^{34}\) all contain sections which could be utilized by a plaintiff injured by the anticompetitive behavior of a municipality. Anticompetitive local zoning regulation and activity are potentially violative of sections 1 and 2 of the Sherman Act. Zoning regulations may provide the elements necessary to state a cause of action under the Act. There are, however, potential barriers to a successful antitrust action, such as showing an effect on interstate commerce, duality and the state action exemption.

A. \textit{Sherman I: Per Se Violations and The Rule of Reason}

Under section 1 of the Sherman Act, contracts, combina-

\begin{itemize}
  \item \textit{Id.} at 507-10, 108 Cal. Rptr. at 285-87.
  \item See \textit{supra} note 3.
  \item \textit{Id.}
  \item This rigidity is exacerbated by the fact that treble damage awards are mandated by section 4 of the Clayton Act, 15 U.S.C. \textsection 15c (1976). It has been argued by commentators that treble damages need not be mandatory in the case of municipal antitrust defendants. \textit{See generally}, 2 P. \textsc{Areeda} \& D. \textsc{Turner}, \textsc{Antitrust Law}, \textsection 33 (1978).
  \item \textit{Id.} \textsection\textsection 1-7 (1976).
  \item \textit{Id.} \textsection\textsection 12-27.
  \item \textit{Id.} \textsection\textsection 41-46 and 47-58.
\end{itemize}
tions and conspiracies in restraint of trade are judged illegal either under per se treatment or under the rule of reason. It has been held that certain agreements "because of their pernicious effect on competition and lack of any redeeming virtue are presumed to be illegal without elaborate inquiry as to precise harm they have caused or business excuse for their use." Justice Black, in *Northern Pacific Railway*, indicated that there are four types of agreements that should receive per se treatment: price fixing, market divisions, tying arrangements, and group boycotts.

In cases under section 1 of the Sherman Act, agreements in restraint of trade, other than those receiving per se analysis, receive a "rule of reason" analysis. The antitrust laws assume that competition is the best method of allocating resources in a free market. This "statutory policy precludes inquiry into whether competition is good or bad." The inquiry demanded by the rule of reason is whether "the restraint promotes or suppresses competition." Therefore, under a rule of reason analysis, if it is shown that a zoning regulation restrains trade, the only evidence admissible to refute the regulation's anticompetitive effect would be evidence of the regulation's procompetitive purpose. If, as is the case with most zoning ordinances, there is no procompetitive purpose, antitrust law precludes showing that a restraint on trade is required for reasons of social desirability, or any other justifications not related to stimulation of competition.

Zoning activities may provide the framework for three of the four per se violations: price fixing, market division and boycott. Commentators have suggested the use of price fixing in proposed inclusionary zoning regulations. The inclusion-
ary zoning regulations would regulate the resale price of low cost housing that has been created in the municipality. The desirability of such a control over the resale price of the housing is apparent. Once an individual bought such a house he might have a great incentive to resell it to realize a profit. He undoubtedly would be assured a high profit on resale as a result of inflation or of the low price paid for the home. A local government proposing to protect the availability of low cost housing in its community would be vulnerable to antitrust attack for maintaining such a program of resale price maintenance. If private individuals were to engage in such collusive behavior, there would be no doubt of its illegality. Price fixing is per se illegal.42

Horizontal market division43 is per se illegal while vertical market division44 is to be judged under a "rule of reason" standard. A zoning ordinance may have the effect of granting exclusive territory to commercial enterprises. An example of such an ordinance exists when a city zones an area residential but exempts existing nonconforming commercial activities. If the relevant markets are drawn narrowly enough, an exclusive territory, and perhaps a monopoly, has been granted to the existing nonconforming commercial activities. Market division imposed by the zoning ordinance does not fit into either the horizontal or vertical market division formula. Because it is not a market division by competitors, it is not horizontal, and because it is not imposed by a seller or manufacturer, it cannot be readily analogized to a vertical market division. Nevertheless, a market division by zoning would probably receive a


43. United States v. Topco Assocs., Inc., 405 U.S. 596 (1972). A horizontal market division is an agreement among competitors to compete only in agreed markets. In Topco, 25 retail grocers agreed to market Topco products only from their exclusive locations, and not to sell to other retailers. Their market division agreement was held per se illegal under section 1 of the Sherman Act despite the fact that the grocers held only an insignificant share of the retail grocery market and were, practically speaking, incapable of setting market price.

44. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977); White Motor Co. v. United States, 372 U.S. 253 (1963). Vertical market divisions or vertical territorial restraints are usually manufacturer or seller-imposed restrictions limiting the territory where a buyer/reseller may do business. In Continental T.V., the Court found vertically imposed restrictions, unlike per se violations, do not always lack redeeming virtues and deserve a rule of reason analysis to determine their legality. One redeeming virtue was the promotion of interbrand competition. 433 U.S. at 54.
rule of reason analysis analogous to vertical market division if a redeeming virtue in the form of a procompetitive purpose could be found for the ordinance.\textsuperscript{46}

Group boycotts, although designated by Justice Black in \textit{Northern Pacific Railway}\textsuperscript{46} to receive per se treatment, may receive rule of reason analysis.\textsuperscript{47} The traditional illegal per se group boycott involves an agreement to exclude a competitor from the market. The pernicious effect of boycotts is illustrated in \textit{Klor's v. Broadway Hale Stores}.\textsuperscript{48} Broadway Hale conspired with wholesale suppliers to exclude Klor's from the market. Though the loss of one store would have had only a slight effect on the competitiveness of the market, the Court found a \textit{per se} violation of section 1 of the Sherman Act.

A boycott was established in an Iowa zoning case\textsuperscript{49} in which a municipality entered into an agreement with a developer of a downtown shopping center providing the city would not allow competing shopping centers to be built. Subsequently, a land owner on the outskirts of the city unsuccessfully petitioned the city to have his property rezoned as commercial. He claimed that by excluding him from the market, the city had entered into an agreement with a competitor to restrain trade.\textsuperscript{50} The defendant city’s motion to dismiss for failure to state a claim, based on the state action exemption, was denied. Because the court determined that a more complete factual record should be developed, there was no discussion of rule of reason versus per se treatment for the alleged boycott. This is, however, the type of boycotting activity which is traditionally found illegal per se.\textsuperscript{51}

\textbf{B. \textit{Sherman 2}}

Under section 2 of the Sherman Act there are three sepa-

\begin{itemize}
\item \textsuperscript{45} \textit{See supra} note 44.
\item \textsuperscript{46} \textit{See supra} note 16; \textit{see e.g.}, Silver \textit{v. N.Y. Stock Exchange}, 373 U.S. 341 (1963) (rule of reason analysis applied where Securities and Exchange Act authorized N.Y. Stock Exchange to act in an anticompetitive manner).
\item \textsuperscript{47} \textit{See supra} notes 38-40 and accompanying text.
\item \textsuperscript{48} 359 U.S. 207 (1959).
\item \textsuperscript{49} Mason City Center Assoc. \textit{v. City of Mason City}, 468 F. Supp. 737 (N.D. Iowa 1979); \textit{see also} Nelson \textit{v. Utah}, 1978-1 Trade Case. ¶ 62, 128 (D. Utah 1978).
\item \textsuperscript{50} Mason City Center Assoc. \textit{v. City of Mason City}, 468 F. Supp. 737 (N.D. Iowa 1979).
\item \textsuperscript{51} \textit{See supra} notes 38-40 and 46-48 and accompanying text; \textit{but see supra} note 47 and accompanying text.
\end{itemize}
rate offenses: monopolizing, attempting to monopolize, and combining or conspiring to monopolize. To state a cause of action under a charge of monopolizing, the plaintiff must prove the defendant holds monopoly power within a specific product and geographic market. This is determined by showing that the defendant has a sufficient market share to qualify as having monopoly power. The plaintiff must also show the "wilfull acquisition or maintenance of the monopoly power." This is sometimes simply referred to as anticompetitive conduct. There need be no showing of specific intent in section 2 monopolization cases, unlike a cause of action based on attempted monopoly or conspiracy to monopolize. The plaintiff need only prove that the defendant had the general intent to do the act in question.

To establish a cause of action for attempt to monopolize, a plaintiff must show a specific intent to monopolize and a dangerous probability of success. The defendant’s substan-

52. See supra note 3.
54. See United States v. Aluminum Co. of Am., 148 F.2d 416 (2nd Cir. 1945). Justice Learned Hand stated that a defendant with a 90% market share clearly holds a monopoly; if, however, a defendant’s market share is 60%, monopoly status is doubtful, whereas a market share of 33% is clearly not a monopoly. Id. at 424. The Supreme Court later affirmed a lower court holding where a 75% market share was held to constitute a monopoly. United States v. United Shoe Mach. Co., 110 F. Supp. 295 (D. Mass. 1953), aff’d, 347 U.S. 521 (1954).

The conduct of United Shoe was not illegal in itself but was illegal when coupled with its monopoly power. See also United States v. Griffith, 334 U.S. 100 (1948) (use of monopoly power in one market to affect purchase terms in another market); United States v. American Tobacco Co., 221 U.S. 106 (1911) (selling below cost to drive competitors out of business).
tial market share is used to demonstrate dangerous probability of success.60

To prove a combination or conspiracy to monopolize under section 2, the plaintiff need only show a specific intent to monopolize.61 In line with the common law concept of conspiracy, cases have also shown an overt act in furtherance of that conspiracy.62

C. Interstate Commerce Requirement

There is a jurisdictional requirement that interstate commerce be affected when bringing an antitrust suit. The Sherman Act was passed by Congress pursuant to its commerce clause power. The Court has determined that Congress exercised all the power it possessed under the commerce clause when it approved the Sherman Act.63 In 1890, when the Sherman Act was passed, the jurisprudential and congressional interpretation of the extent of the commerce power was, of course, more restricted than today. Nevertheless, the courts have allowed the coverage of the Sherman Act to correspond

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60. Harold Friedman, Inc. v. Kroger Co., 581 F.2d 1068 (3rd Cir. 1978). But cf. Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848 (9th Cir. 1977) (alleged attempt to monopolize by predatory pricing; held dangerous probability of success needn't be shown by direct proof of the defendant's market power).

61. American Tobacco Co. v. United States, 328 U.S. 781 (1946); United States v. Consolidated Laundries Corp., 291 F.2d 563 (2nd Cir. 1961); Giant Paper & Film Corp. v. Albermarle Paper Co., 430 F. Supp. 981 (S.D.N.Y. 1977). In California, the state courts have found that zoning regulations have not created monopolies in certain businesses because the local governments lacked the specific intent to monopolize. See supra notes 24-29 and accompanying text. State causes of action challenging zoning regulations as conferrals of monopoly may reach the same result in federal court on antitrust claims where the charge is attempted monopoly or conspiracy to monopolize. Monopolizing activity by local governments as in Sunny Slope Water Co. v. City of Pasadena, 1 Cal. 2d 87, 33 P.2d 672 (1934) (see supra notes 19-20 and accompanying text), only require general intent to monopolize. A finding in state court that a local government lacked specific intent to monopolize would not mean in cases such as Sunny Slope that the local government would not be guilty of monopolizations in federal court.

62. In American Tobacco Co. v. United States, 328 U.S. 781 (1946), the defendant's predatory pricing may be seen as the overt act in furtherance of the conspiracy to restrain trade.

to the courts' expanded interpretation of the commerce power.

The Court has held that "wholly local business restraints can produce the effects condemned by the Sherman Act," and that "[i]f it is interstate commerce that feels the pinch, it doesn't matter how local the operation which applies the squeeze." A zoning activity or regulation must in the above context "substantially and adversely" affect interstate commerce. Zoning restrictions frequently affect the real estate market which is often tied to loans from out of state banks. In Goldfarb v. Virginia State Bar, the defendant Bar Association had fixed prices for title examinations in the purchase of real property. The plaintiffs successfully showed that a significant amount of interstate commerce was affected where loans from out of state sources and guarantees on loans from the Department of Housing and Urban Development and Veteran's Administration were involved. It is obvious that not all antitrust claims involving zoning will meet the jurisdictional requirement of substantially and adversely affecting the interstate commerce. It is clear, however, that a finding that interstate commerce has been affected by local zoning regulations is within the reach of a court.

D. Duality Requirement

To have a successful cause of action under section 1 of the Sherman Act, a plaintiff must show the existence of "a contract, combination . . . or conspiracy" to restrain trade. This requirement is generally referred to as duality. Zoning regulations can be viewed as the unilateral act of government; therefore, the duality requirement may present a barrier to a plaintiff in alleging a violation of section 1 of the Sherman

69. Id. at 783. But cf. Income Realty & Mortgage, Inc. v. Denver Bd. of Realtors, 578 F.2d 1326 (10th Cir. 1978) (rejection by local board of realtors of broker's membership application was a local activity which had no impact on interstate commerce).
70. See supra note 3.
Act. The barrier is not as great as might appear. The Supreme Court has evidenced a willingness to find duality in cases arising under section one. Wholly owned subsidiaries of a single corporation have been held to be conspirators.71 In *Perma Life Mufflers Inc. v. International Parts Corp.*, the Court found that a combination was formed to restrain trade between a franchisor and a franchisee "the day he [franchisee] unwillingly complied with the restrictive franchise agreements. . . ."72 A district court in *United States v. Texas Board of Public Accountancy*78 found that a combination does not require a showing of voluntary assent74 and the fifth circuit found that a combination existed on the basis of firm and resolute enforcement of restrictions and the inferrable acquiescence of those coerced.75

It is evident from the tests set forth in the above cases that the plaintiff should be able to find a combination to restrain trade where a local government has restrained trade by the use of its zoning power. The facts from *Wyatt v. City of Pensacola*76 are illustrative. A zoning regulation was passed which permitted commercial uses within a district, including existing laundries, but excluded the creation of new dry cleaning establishments for a period of two years. Using the reasoning from *Perma Life* and the above cases, it could be shown that the required combination existed as soon as an individual who wanted to establish a dry cleaning business acquiesced in the illegally restrictive zoning ordinance.77

E. State Action Doctrine

After the Supreme Court decisions in *Lafayette v. Louisiana Power and Light Co.*78 and *Community Communications* .

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72. 392 U.S. 134, 142 (1968).
74. Id. at 403, citing Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 142 (1968).
76. 196 So. 2d 777 (Fla. Dist. Ct. App. 1967); see supra notes 16-17 and accompanying text.
77. See supra notes 70-75 and accompanying text.
Co. v. Boulder, local governments may no longer find the state action exemption from the antitrust laws available to them. To understand the ramifications of this possibility it is necessary to consider not only the evolution of the Parker v. Brown doctrine, but also to look at two major concerns of the current Court—federalism and support for aggressive antitrust enforcement. The Court has emphasized the importance of both states' rights and enforcement of the antitrust laws. The inevitable conflict between these two interests is seen when the Parker state action doctrine is raised in an antitrust suit. The result of the conflict between federalism and the national interest in competition has been an erosion of the Parker state action doctrine.

The Supreme Court's decision in Lafayette lends strong support to the proposition that the Burger Court considers antitrust enforcement to be of paramount importance. Part I of the majority opinion states that "[a]ntitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." Justice Brennan, speaking for the majority of the Court, left no doubt as to the Court's view that Congress did not intend to exempt anticompetitive behavior of local governments from the antitrust laws.

If Municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established.

The Court has also stressed federalism principles in National League of Cities v. Usery. In 1974, the Fair Labor

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79. 102 S.Ct. 835 (1982).
80. 317 U.S. 341 (1942); see supra notes 4-5 and accompanying text.
82. 435 U.S. at 398 n.16 (quoting United States v. Topco Assoc., 405 U.S. 596, 610 (1972)).
83. Id. at 408 (1978).
84. 426 U.S. 833 (1976).
Standards Act was amended to extend the act’s minimum wage and maximum hour restrictions to most employees of states and their political subdivisions. Individual cities and states challenged the legislation on the grounds that the amendments exceeded congressional power under the commerce clause of the Constitution. Justice Rehnquist, writing for the majority, quoted Justice Douglas’ dissent in Maryland v. Wirtz\(^\text{85}\) which cautioned that increasing national assertions of power left unchecked could “allow ‘the national Government [to] devour the essentials of state sovereignty,’”\(^\text{86}\) “though that sovereignty is attested by the Tenth Amendment.”\(^\text{87}\) The Court held that the amendments were an infringement of state and local government’s sovereignty because they interfered with functions essential to the separate and independent existence of the states in our federal system.\(^\text{88}\) The Court read the amendments as displacing the states’ ability to perform as states in “their dual functions of administering the public law and furnishing public services. . . .”\(^\text{89}\) The Court stated that “there would be little left of the States’ ‘separate and independent existence’”\(^\text{90}\) if Congress could withdraw from the states the power to structure integral operations in the area of traditional governmental functions.\(^\text{91}\)

*Parker v. Brown*\(^\text{92}\) is recognized as creating the state action exemption from the antitrust laws. In *Parker*, the United States Supreme Court ruled that a California state raisin marketing program which stabilized the price of raisins by regulating the raisin producer’s output was not illegal as constituting a restraint on trade under the Sherman Act.\(^\text{93}\) The Court’s holding rested on an inability to find, in the history or language of the Sherman Act, congressional intent that the anti-

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85. 392 U.S. 183, 201 (1968).
87. 392 U.S. at 205 (Douglas, J., dissenting).
89. Id. at 851.
90. Id. (quoting Coyle v. Oklahoma, 221 U.S. 559, 580 (1911)).
91. Id. Examples of traditional governmental functions given by the court were service oriented—fire prevention, police protection, sanitation, public health, parks and recreation.
93. Id.
trust laws were to be applied to "restrain a state or its officers or agents from activities directed by its legislature." Principles of federalism, however, were the evident underpinning of the Court's finding that Congress had not intended the Sherman Act to be applied to the state's action. Following Parker, a state action exemption was consistently applied in cases which involved municipal antitrust defendants. The Burger Court, however, began narrowing the application of the Parker doctrine. In judicial decisions prior to Lafayette v. Louisiana Power and Light Co., the standard used to determine whether agencies of a state could claim the state action exemption can best be described as a compulsion standard. This standard adhered to the language in Parker which stated there was no implied congressional intent in the Sherman Act "to restrain a state or its officers or agents from activities directed by its legislature." In Goldfarb v. Virginia State Bar, the state found that the State Bar, claiming a state action exemption as a legal agency of the state, was not protected by the Parker doctrine. The State Bar was not acting under compulsion of the state as sovereign and could not claim a Parker exemption from the antitrust laws. In Bates v. State Bar of Arizona, the Arizona Supreme Court had imposed a ban on attorney advertising. As an agent of the State of Arizona, the Supreme Court was viewed as the ultimate body wielding the state's power over the practice of law. Quoting Goldfarb, the Bates Court held that the restraint of trade was "compelled by direction of the State acting as a sovereign," and the state action exemption was granted. The Court emphasized that the anticompetitive restraint was part of a comprehensive regulatory system which was clearly

94. Id. at 350-51.
95. Id. The Court went on to say, however, that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . and we have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade." Id. at 351-52 (citations omitted).
97. 317 U.S. at 350-51 (1942).
99. Id. at 791.
101. Id. at 360.
articulated and affirmatively expressed and that the state’s supervision was active.\textsuperscript{102} Similar language has been emphasized in subsequent decisions to determine the applicability of the state action exemption.\textsuperscript{103}

In \textit{Cantor v. Detroit Edison Co.},\textsuperscript{104} the Court refused to grant a state action exemption to Detroit Edison. Although the standard applied in \textit{Cantor} was not strictly a compulsion standard,\textsuperscript{105} the case can be explained in this way.\textsuperscript{106} The \textit{Cantor} case did not involve a state agency but a private utility. Detroit Edison was engaged in providing electricity to customers and along with this service provided “free” light bulbs. When a light bulb retailer brought an antitrust suit claiming market foreclosure, Detroit Edison claimed the state action exemption on the grounds that its program of light bulb distribution had been approved by the Michigan Public Service Commission. It further contended that the Commission’s approval had \textit{compelled} its distribution of light bulbs along with electricity. The plurality decision concluded that the State of Michigan had no statewide policy relating to the monopolizing of light bulb distribution.\textsuperscript{107} It found that the state was neutral on the question of such distribution, so Detroit Edison could not claim a state action exemption.\textsuperscript{108}

In 1978 the Supreme Court was faced with the issue of whether a municipality should be automatically exempted from the antitrust laws in \textit{City of Lafayette v. Louisiana Power & Light Co.},\textsuperscript{109} 435 U.S. 389, 411 n.40 (1978). Justice Brennan interprets \textit{Cantor} this way in \textit{Lafayette}.\textsuperscript{110}

\begin{thebibliography}{99}

\bibitem{102} \textit{id.} at 362.
\bibitem{103} Community Communication Co. v. Boulder, 102 S.Ct. 835 (1982); see California Retail Liquor Dealers Ass’n v. Midcal Alum., Inc., 455 U.S. 97 (1980).
\bibitem{104} 428 U.S. 579 (1978).
\bibitem{105} \textit{See id.} at 629 (Stewart, J., dissenting). The Court in \textit{Cantor} actually relied on a test extending the implied immunity doctrine. The implied immunity or implied repealer doctrine is a court created doctrine which has been used to reconcile conflicting \textit{federal} statutes. Under this doctrine, the basic rule is that repeal of a first by a second federal statute will not be favored. As Justice Stewart points out in his dissent, “implied repealer of federal antitrust laws by inconsistent state regulatory statutes is not only ‘not favored’ . . . , it is impossible.” \textit{Id.} at 629-30 (citing U.S. Const. art. IV, cl. 2). Such a formulation for finding a state action exemption from the antitrust laws flies in the face of the Constitution’s supremacy clause. No majority has followed this analysis—presumably because of the weakness of the theory as pointed out by Justice Stewart.
\bibitem{107} 428 U.S. at 579.
\bibitem{108} \textit{id.}
\end{thebibliography}
Power and Light Co.\textsuperscript{109} The common standard in the state action cases decided before Lafayette has been one of compulsion. That standard was modified when the antitrust defendant was a municipality.

In Lafayette the city operated a municipally owned utility system under state authority. It brought suit against Louisiana Light and Power Co., a private utility, claiming antitrust violations. Louisiana Power counterclaimed, claiming that the city had conspired to bring sham litigation against the privately owned utility and had entered into illegal tying arrangements—tying purchases of city water and gas to purchase of electricity. A majority of the Court rejected the city's contention that Congress had intended to exempt municipalities from the antitrust law.\textsuperscript{110} A plurality of the Court found that Parker did not automatically exempt local governments from the antitrust laws.\textsuperscript{111} The plurality decided that the Parker doctrine exempted municipal anticompetitive conduct which was authorized,\textsuperscript{112} directed,\textsuperscript{113} or contemplated by the state in connection with a state policy to displace competition with regulation or monopoly public service.\textsuperscript{114} It emphasized that the state policy upon which a municipality relies must be clearly articulated and affirmatively expressed.\textsuperscript{115}

The plurality found that cities are not themselves sovereign and thus "do not receive all the . . . deference of the States that created them."\textsuperscript{116} The Court went on to state that

\begin{enumerate}
\item[(109)] 435 U.S. 389 (1978).
\item[(110)] Id.
\item[(111)] Id. at 408.
\item[(112)] Id. at 415.
\item[(113)] Id. at 416.
\item[(114)] Id. But cf. id. at 425-26 (Burger, C. J., concurring). Chief Justice Burger would have applied the standard announced for private entities in Cantor v. Detroit Edison, 428 U.S. 579 (1976) (see supra notes 104-07 and accompanying text). In addition, the Chief Justice made a distinction between local government's "proprietary" and "non-proprietary" functions. He found that cities engaged in proprietary functions would not automatically be exempt from antitrust enforcement under Parker v. Brown, 317 U.S. 341 (1942) (see supra note 4), but Chief Justice Burger did not speak of nonproprietary functions such as zoning. Despite the theoretical softness of the Cantor test, the Chief Justice's attempt to distinguish municipal liability under the antitrust laws on the basis of the activity in which the city is involved and his discussion of the federalism concerns of National League of Cities v. Usery, 426 U.S. 833 (1976), is an attempt to grapple directly with the issue that is raised in Lafayette: federalism and the degree of deference due the City of Lafayette, 435 U.S. at 423-25.
\item[(115)] 435 U.S. at 410 (1978).
\item[(116)] Id. at 412.
\end{enumerate}
the city could not be exempted from the antitrust law "[i]n light of the serious economic dislocation that could result if cities were free to place their own parochial interests above the nation's economic goals reflected in the antitrust laws. . . ." Because of this serious economic dislocation the Court found itself unwilling to presume that Congress intended to exclude anticompetitive municipal action from its reach.\footnote{Id. at 412-13.}

The Supreme Court decided two state action cases after Lafayette which did not involve municipal defendants. The Court in these two cases applied a standard which utilized language found in Bates and Lafayette. The first was New Motor Vehicle Board of California v. Orrin W. Fox Co.,\footnote{439 U.S. 96, 109 (1978).} a case involving a defendant-state agency. The Court held that actions of the Board were within the state action exemption because the challenged regulatory scheme was a "clearly articulated and affirmatively expressed" policy of the state.\footnote{Id.}

In the second case, California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,\footnote{445 U.S. 97 (1980).} the defendant was a private entity. Midcal required that the defendant show not only that the activity with which he was charged was one clearly articulated and affirmatively expressed as state policy, but also required that the activity be "actively supervised" by the state itself.\footnote{Id. at 105.} The Court relied on Lafayette as authority for the active supervision standard.\footnote{Id.}

In Community Communications Company, Inc. v. City of Boulder,\footnote{102 S.Ct. 835 (1982).} the first state action case involving a municipal defendant since Lafayette, a majority of the Supreme Court denied the City of Boulder a state action exemption. Boulder, a home rule municipality, granted Community Communications Company (CCC) a revocable non-exclusive permit to conduct a cable television business in Boulder. Because CCC had a head start on competition and because the city was concerned that the company might not be the best operator for the city,
Boulder passed an "emergency" ordinance which prohibited CCC from expanding its business for a period of three months. CCC brought suit in federal court alleging that the ordinance violated section 1 of the Sherman Act. The Court held that Boulder's ordinance was not exempt from antitrust scrutiny, pursuant to the state action exemption, unless the ordinance constituted the action of the State of Colorado itself in its sovereign capacity or "municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy." The opinion did not reach the question of whether a municipal defendant must satisfy the "active state supervision" standard articulated in Midcal because Boulder failed to meet the first standard enunciated in that case. The Court cited Lafayette as the genesis of the active state supervision requirement; therefore, it appears that the Court may, in a future case, require municipalities to meet this standard as well before the state action exemption will apply.

The Parker doctrine established an implied intent to exempt the state from antitrust enforcement. This comment accepts the Lafayette and Boulder position that the disruptive potential local governments can have on the national economy is so great that it is impossible to impute to Congress an intent to automatically exclude municipalities from the antitrust laws under the Parker doctrine. There is, however, the danger that the Boulder decision will lead to an increase in government centralization and a decrease in the individuals' immediate access to local public decision making. Because of this danger, this comment proposes that principles of federalism would be better served by a balancing analysis as opposed to the Boulder approach requiring an affirmative statement of state policy and perhaps active state supervision.

Justice Brennan purportedly based the holding in Boulder on the federalism principle which supports the Parker state action exemption: "Ours is a 'dual system of government' which has no place for sovereign cities." Part IV of this comment disagrees with the Boulder decision's refusal to

125. Id. at 841.
126. See id. at 841 n.14.
127. See Mason City Center Assoc. v. City of Mason City, 468 F. Supp. 737, 742-43 (N.D. Iowa 1979).
128. 102 S.Ct. at 842.
show any deference to local governments. Municipalities have not been considered sovereign by the federal courts, but they have been accorded deference in several contexts based on more general federalism concerns. The federalism concern that shaped these decisions might best be described as the Jeffersonian concept of federalism.

IV. ANTITRUST AND FEDERALISM—THE COMPETITIVE ECONOMY VERSUS COMMUNITY SELF-DETERMINATION

A popular understanding of what federalism meant to the drafters of the Constitution was articulated by Thomas Jefferson. Jefferson's emphasis "was on local government to prevent centralization and to provide citizens with the opportunity of self-government in their immediate affairs." A traditional and essential attendant to the functioning and existence of the states since the days of the New England townships and town meetings has been public access and control over local government. The reality of the way in which state governments have operated in the past and the way in


131. Id. at 109 (emphasis added). Thomas Jefferson referred to all levels of government, local, county, state and federal as being republics. In a letter to Joseph Cabell, February 2, 1816, he stressed the importance of individual public access to local government in his scheme of federalism. "Where every man is a sharer in the direction of his ward republic . . . he will let the heart be torn out of his body sooner than his power be wrested from him by a Caesar or a Bonaparte." Id. Though a popular understanding of federalism is not a legal one, Thomas Jefferson's interpretation of federalism may fit within the definition of federalism espoused by National League of Cities v. Usery, 426 U.S. 833 (1976). Throughout Part III of National League of Cities, id. at 852-856, the point is made that decentralization stands for increased access to public decision making and this is part and parcel of why the state exists. When the federal government infringes upon the basic structuring of a state's political processes, there is danger of the state ceasing to provide government access to its citizens.

132. See Stewart, Pyramids of Sacrifice? Problems of Federalism and Mandating State Implementation of National Environmental Policy, 86 Yale L.J. 1196, 1210-11 (1977). Professor Stewart illustrates how federalism and individual rights in our decentralized system are linked. He sees several elements of a decentralized federal structure which are valued by the individual which "include the greater sensitivity of local governments to the preferences of citizens and the costs of achieving environmental goals in a given locality; the diffusion of governmental power and the promotion of cultural and social diversity; and the enhancement of individual participation in and identification with governmental decisionmaking." Id. at 1231.
which they operate today is an acceptance of the Jeffersonian concept of federalism. Home rule charters and broad enabling acts are the methods that a majority of the states use to grant power to local governments. The federal courts have recognized the importance of allowing the states power and discretion to operate in accord with the Jeffersonian concept of federalism.

Boulder's holding, that local governments may never act in a sovereign capacity undirected by the state, will greatly undermine what federalism has stood for since the founding of our nation, i.e., decentralization and increased access to public decision making. It is important to the vitality of our democracy that citizens have public access to the public decision making process at the local level on questions as basic as the regulation of their property. If the state must authorize and supervise a local government's zoning activities, it is clear that the individual will feel less in touch with the democratic process of which he is, theoretically, the most important part.

The federal courts have accorded local governments such

135. See Mason City Center Assoc. v. City of Mason City, 468 F. Supp. 737, 742-43 (N.D. Iowa 1979) (suggests state must set up a distinct agency actively supervising city zoning before such zoning would be within the state action exemption).
136. See L. Tribe, AMERICAN CONSTITUTIONAL LAW, 308-18 (1978). Tribe links federalism as it has been defined by National League of Cities with the affirmative rights of individuals:

Once one recognizes individual rights against the government for certain basic services, the problems become those of framing a system in which these rights can and will be meaningfully enforced. National League of Cities v. Usery may provide an important prototype—at least in areas where the federal government has left to the states and localities the responsibility for fulfilling individual claims to service provision. If the decision is justifiable, it is not simply because of any inherent rights of states; no such rights were truly threatened in this case. As a result, the state's central claim must be that, while the individual right is against the government, when the federal government leaves to states and localities the fulfillment of the government duty, it cannot act so as to undermine the ability of states and their subdivisions to perform that duty.

Id. at 315 (emphasis added).
deference in preemption cases, in land use abstention cases, and in *National League of Cities v. Usery.*

In preemption cases, the courts have given local government regulations deference equal to that of state regulations without inquiry into whether the local regulations were in furtherance or implementation of actively supervised state policy. In *Huron Portland Cement Co. v. City of Detroit,* the Supreme Court held that a municipal smoke abatement ordinance was enforceable though federal regulations also established emissions guidelines. The Court found the municipal ordinance and federal regulations had different purposes; they were not in conflict so there was no federal preemption.

The abstention doctrine has been used in land use cases in federal courts as a means of protecting principles of federalism. While fewer than ten land use cases decided prior to 1970 discussed abstention, at least fifty since 1970 have discussed it.

*Burford v. Sun Oil* is important in discussing zoning, land use, and the evolving tendency of federal courts to abstain in land use cases. On the basis of diversity jurisdiction, Sun Oil appealed to the federal court from a decision of the Texas Railroad Commission. The decision of the Railroad Commission involved land use and the regulation of the state's oil resources. The Court abstained, holding that an exercise of its jurisdiction would disrupt a state regulatory and

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139. The abstention doctrine has been judicially created. Generally, federal courts have a duty to hear any matters entrusted to their jurisdiction, however, in particular cases they may use their discretion to abstain. See, e.g., *Railroad Comm'n v. Pullman,* 312 U.S. 496 (1941) (abstention appropriate where prior disposition of state law questions obviates a federal constitutional issue); see also *Trainor v. Hernandez,* 431 U.S. 434 (1977) (state civil proceeding where important state interests involved); *Younger v. Harris,* 401 U.S. 37 (1971) (abstention held appropriate where federal jurisdiction invoked to restrain state criminal proceedings); *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943) (abstaining where a complicated regulatory system of local law involved important public policies).
141. *Land Use Regulation, the Federal Courts, and the Abstention Doctrine,* 89 Yale L.J. 1134, 1135 n.8. Federal courts in California have abstained in nearly all cases challenging the state's progressive land use regulations.
142. 319 U.S. 315 (1943).
administrative process. Courts have stressed that abstention is an extraordinary disruption of federal jurisdiction to be used only in exceptional circumstances where the order to the parties would clearly serve an important countervailing interest.

In *Louisiana Power and Light Co. v. Thibodaux City,* where the land use issue was eminent domain, the Supreme Court found such a countervailing interest. The Court emphasized that land use represented an aspect of the state’s sovereign prerogative. In cases where zoning is involved, there normally will be two elements which play a part in the court’s decision to abstain: a land use issue and a state or local regulatory scheme. Courts have utilized *Burford* as precedent to abstain in zoning cases without questioning whether the policy against interfering with state administrative programs should apply to local governments. In *Kent Island Joint Venture v. Smith,* the court found it particularly appropriate to abstain “because of principles of federalism which become particularly significant when a federal court is asked to review land use policies or zoning decisions of a local government.”

The tendency of the federal courts to abstain in land use and zoning cases illustrates the importance of these decisions in relation to principles of federalism, and demonstrates that local regulations have received deference in federal court without inquiry into state authorization or compulsion. A number of lower court decisions have tied federal interference

143. *Id.* at 334.
144. *Id.* at 25.
146. 360 U.S. 185 (1959).
147. *Id.* at 56.
149. 493 F.2d 820, 824-28 (9th Cir. 1963); *See Mach-Tronics Inc. v. Zirpoli,* 316 F.2d 820, 824-28 (9th Cir. 1963); *Schenley Indus. Inc. v. New Jersey Wine and Spirits Wholesalers Ass’n,* 272 F. Supp. 872, 882-83 (D.N.J. 1967).
with land use decisions and its impact on principles of federalism to the National League of Cities rationale.181

The Court in National League of Cities made no differentiation between local and state government in regard to validity of the Fair Labor Standards Act. National League of Cities stands for the proposition that a traditionally provided service or essential function of state government may not be subject to federal interference whether the state or local government is the provider of the service or essential function. There was no search for state authorization or compulsion in National League of Cities.182

The Boulder decision is an intrusion into the operation of state and local governments. This comment proposes a standard for local government exemption which takes into account the principles of federalism upon which Parker rests and gives equal consideration to the national interest in a competitive economy. First, it must not be assumed that local government activities should not receive federal deference. As seen above, a degree of deference has been accorded local government.183 Second, the Court should not require that a local zoning activity be in furtherance or implementation of clearly articulated and affirmatively expressed state policy and that it be actively supervised by the state. These requirements may lead to increased centralization of government and decreased public access to local decision making.184 For that reason, it should be replaced with a standard that balances the competing interests.185 The balancing should resemble that used by the courts in cases where state laws regulating commerce come into conflict with federal legislation regulating commerce under the commerce clause.186 The court should balance the adverse im-

151. Kent Island Joint Venture v. Smith, 452 F. Supp. 455, 463-64 (D.Md. 1978). In Kent Island, the court held that "[c]on siderations of federalism requiring deference to the state in the area of state government employment . . . apply with even more force in the area of state land use policy, an area traditionally considered 'distinctly a feature of local government.'" Id. at 463-64, quoting Hill v. El Paso, 437 F.2d 352, 357 (5th Cir. 1971).


153. See supra notes 137-51 and accompanying text.

154. See supra notes 128-29 and accompanying text.

155. This approach has been advocated by a number of commentators. See, e.g., Kennedy, Of Lawyers, Lightbulbs and Raisins: An Analysis of the State Action Doctrine Under the Antitrust Laws, 74 Nw. U.L. Rev. 31 (1979); Note, Application of the State Action Doctrine to Municipalities, Nw. U.L. Rev. 570 (1979).

impact that a local anticompetitive zoning action would have on the competitive economy against the degree to which state sovereignty and public access and control over local government are infringed. In balancing these concerns, the courts should ultimately exempt from the antitrust law only those zoning activities that minimally restrain competition in the areas the local government controls or in the region within which the local government interacts commercially.

Several factors may be considered in the balancing of interests. When considering the adverse impact on the competitive economy, the court should examine the type of restraint imposed. If it is a restraint under section 1 of the Sherman Act, is it a per se violation or a restraint which would receive a rule of reason analysis? If a monopoly is created, how large is the market which is constricted—a neighborhood, a block, a region? If a zoning ordinance restricts competition within an area of a city but allows for competition at another locale, the burden on the competitive economy is not as great, but if competition is restricted significantly, there should be no exemption for the local government unless it is acting as an arm of the state. As to the infringement on the state and on individuals’ rights of access to local government, the degree of infringement may be gauged by looking first at the activity in question. Under National League of Cities, if it is determined that the antitrust laws unduly interfere with a traditional and essential function of state or local government such as fire prevention, police protection, public health, sanitation, and parks and recreation, then the infringement is a great burden to be overcome. Local land use control has also been viewed as a fundamental and traditional function and a prerogative of local government, and in the majority of cases involving zoning, a great deal of weight has been placed on this side. Chief Justice Burger pointed out in his concurrence in Lafayette that the Court has differentiated between a state’s deci-

Justice Powell stated that “[o]ur recent decisions make it clear that the inquiry necessarily involves a sensitive consideration of the weight and nature of the states regulatory concern in light of the extent of the burden imposed on the course of commerce”. In California Retail Liquor Dealers Ass’n. v. Midcal Alum. Inc., 445 U.S. 97 (1980), Justice Powell seems to play with the antitrust issues as if he never were balancing it: “We need not consider whether the legitimate state interests in temperance and small retailers ever could prevail against the undoubted federal interest in a competitive economy.” 445 U.S. 97, 113-14 (1980).

157. See supra note 151.
sions furthering a proprietary interest and a state’s sovereign decisions for the purposes of federalism. State and municipal zoning activity designed solely to further a proprietary interest of a local government would not, under this view, be accorded the weight of a zoning activity which went toward a non-proprietary interest of the local government.

In order to better understand how this balancing test would work, it will be applied to the antitrust zoning case, Mason City Center Assoc. v. City of Mason City. In Mason City, the city council entered into an agreement with a contractor to construct a shopping center in downtown Mason City. Part of the agreement was that the city would not allow another regional shopping center to compete with the contractor. A landowner on the outskirts of Mason City petitioned to have his property rezoned from agricultural to commercial in order to build a competing shopping center. When the petition was denied, the land owner brought an antitrust suit. The Iowa zoning statute is a general enabling statute. There were no facts relating to the city council’s purpose in entering into the agreement or in denying the rezoning.

This case, decided before Boulder, is illustrative of the way in which lower courts have interpreted Lafayette. The federal court read Lafayette in conjunction with California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc. as requiring that the municipal defendant show that its zoning activity was required by the state as sovereign and that it is part of a comprehensive regulatory system that is clearly articulated, affirmatively expressed, and actively supervised by the state. The decision, by suggesting that a distinct agency be established to protect local zoning ordinances from antitrust suit, stretches Parker to the extent that the state action exemption is no longer recognizable as a doctrine protecting

160. In an antitrust suit, social justifications unrelated to a procompetitive purpose are not heard. See supra note 40. But see supra note 12. Inquiry into the purpose of a zoning activity is the standard test in state courts for testing the validity of the action.
162. The court, in speaking of the Iowa enabling statute, stated: “Finally, the state statute does not set up any distinct agency or mechanism for active supervision of the cities’ zoning procedures by the state as sovereign policy maker.” Mason City Center Assoc. v. City of Mason City, 468 F. Supp. 737, 743 (N.D. Iowa 1979).
principles of federalism.

In a balancing approach, the first beneficial result is the jettisoning of encouragement for further coerced centralization of state government. In balancing the interests, the adverse impact of the local government's agreement to exclude competitors and its refusal to rezone must be weighed. This action amounts to a boycott under antitrust laws and boycotts may amount to per se violations. Other facts not discussed in *Mason City* should be considered. For example, were there other commercial sites for creating such a regional shopping center available in nearby towns?\(^\text{163}\) This would ameliorate the impact of the anticompetitive zoning activity because it would allow a base from which other shopping centers could compete for the Mason City market.

On the opposite side must be weighed the degree to which state sovereignty and individuals' rights to local government are infringed. To the extent that these are zoning and land use decisions of local government, they must be given great weight. However, if it could be shown that the agreement between the city council and the contractor was outside the scope of city zoning activity and was not related to land use, there would be much less weight on this side of the scale. Likewise, arguments can be made that zoning and land use control are the types of traditional and essential governmental services and functions which local governments are expected to provide and so are protected from federal infringement by *National League of Cities*\(^\text{164}\).

If it were stipulated that there was not a total exclusion from the region by the actions of the council, and that there were sites available for competitors in nearby towns, this commentator would grant a state action exemption to Mason City. On balance, the relative harm to the competitive economy would be slight in comparison to the intrusion into the sovereign affairs of the state.\(^\text{165}\)

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163. *See supra* notes 23-28 and accompanying text (discussing the treatment of monopoly zoning by the California state appellate courts).

164. On the other hand, zoning in the United States did not begin on a full scale until after Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), so it may be argued that zoning is not traditional. Since Houston does not zone, it is also arguable that it is not essential. *See Siegan, Non-Zoning in Houston*, 13 J.L. & Econ. 71 (1970).

165. There are still state causes of action that could invalidate both the city council's agreement and the refusal to rezone. As to the council's agreement, courts
If, on the other hand, evidence were introduced to show that the decision of the council was unrelated to land use considerations or that the city council's agreement with the contractor had in fact substantially excluded competition in the regional shopping center market, the conclusion would be that no exemption should apply to the local government action unless the local government was acting as an arm of the state. Concerns of federalism would be outweighed by the national interest in a competitive economy.

V. Conclusion

Federalism, including in its definition the concept of community self-determination and decentralization, is as essential to our political process as the protection of competition is to our national economy. Part I of this comment illustrated how state law attempts to deal with anticompetitive zoning can result in a complete disregard of the anticompetitive effect that a zoning restriction may have on the economy. Part II showed that if federal antitrust law is applied to local government zoning it may result most often in per se violations of the antitrust law. Due to the importance of both the national interest in a competitive economy and state and local federalism concerns, it is necessary that the competing interests be balanced in zoning antitrust cases. A balancing approach is preferable to the Boulder approach which promotes centralization and will lead to diminishment of citizens' rights of access to the local decision making process. Also under this approach, deference may be shown local governments on the basis of federalism without sacrificing the national interest in a competitive economy.

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have held that zoning boards cannot barter away their police power. Harnett v. Austin, 93 So. 2d 86 (Fla. 1956). As to the refusal to rezone, if the sole purpose of the agreement and denial of petition were to prevent competition, the refusal to rezone would be invalid under state law. See supra note 14.