State Action Antitrust Immunity For Airport Operators

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I. INTRODUCTION

Until recently, the operators of most major airports in the United States enjoyed nearly complete freedom from antitrust scrutiny in their decisions concerning access for air carriers and concessionaires operating at the airport. Private entities doing business with those airports were similarly confident in most instances that their contracts with the airport operators were immune from antitrust scrutiny.

Two developments are drastically altering this antitrust situation. First, government entities such as those which operate most major airports are being increasingly subjected to antitrust scrutiny, largely as a result of the decision in *City of Lafayette v. Louisiana Power & Light Co*.[1] Thus, airport operators must begin to consider competitive impacts in many of their operational decisions, and those who do business with the airport operators must similarly be more circumspect.[2]

Second, while the number of major airports with scheduled commercial service will not increase measurably in the foreseeable future because of environmental and other constraints, the number of air travelers seeking to use those airports is expected to increase steadily. As the capacity of an increasing number of major airports is being met or exceeded by the demand, the value of the ability to serve and do business at those airports will increase. As the "stakes" go higher, airport operators can expect ever more stringent scrutiny of their activities.

This article discusses the impact of the eroding antitrust immunity[3] upon the manner in which the operators of the major airports may conduct

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

2. If an airport operator is immune from antitrust scrutiny as to an agreement with a private entity, the private entity is, of course, also immune as to that agreement as well, *see* Caribe Trailer Systems v. Puerto Rico Maritime, 475 F. Supp. 711, 720-21 (D.D.C. 1979); Trans World Assoc., Inc. v. City & County of Denver, [1974-2] TRADE CASES (CCH) ¶ 75,293 at 97,899-900 (D. Colo. 1974). Conversely, if airport operators must become more concerned about the antitrust status of their agreements, the private entities entering into agreements with the airport operators must be similarly cautious.

3. As noted below, the terms "immunity" and "exemption," which are used interchangeably in this article, are used loosely here to describe what should more appropriately be considered a preemption issue rather than an exemption issue. *See* cases cited note 96 and accompanying text *infra*.

various activities. The problems presented are enumerated, the legal framework within which these problems must be analyzed is set forth, and this legal framework is applied to several activities of airport operators.

This article considers antitrust *immunity*, but not antitrust *liability*.[4]

II. Statement of the Problem

This article considers in general terms the antitrust problems which may be encountered by the major airports[5] with scheduled commercial service.[6] These problems may result from an exercise of monopoly power

4. Also not discussed at length here is *sovereign* immunity deriving from state law because, among other reasons, most airport operators are given the power to sue and be sued, which generally constitutes a waiver of that immunity, *e.g.*, in a federal context, Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381 (1939); Federal Land Bank v. Priddy, 295 U.S. 229, *rehearing denied*, 295 U.S. 769 (1935). It is true that the eleventh amendment of the United States Constitution provides that there is no federal jurisdiction over cases by citizens of one state against another state, and has been construed to preclude federal jurisdiction over cases by citizens against their own state, *e.g.*, Edelman v. Jordan, 415 U.S. 651 (1973), *rehearing denied*, 416 U.S. 1000 (1974); Parden v. Terminal Ry., 377 U.S. 184, *rehearing denied*, 377 U.S. 1010 (1964); Hans v. Louisiana, 134 U.S. 1 (1890). As a result, the eleventh amendment would, if applicable, bar *any* available forum because federal jurisdiction with respect to federal antitrust laws is generally considered to be exclusive, *see generally* Union Oil Co. v. Chandler, 84 Cal. Rptr. 756, 4 Cal. App. 3d 716 (1970); Big Top Stores, Inc. v. Ardsley Toy Shoppe, Ltd., 315 N.Y.S.2d 897, 64 Misc.2d 894 (1970), *aff'd*, 318 N.Y.S.2d 924, 36 A.2d 582 (1971). However, this eleventh amendment "immunity" is not usually relevant in this context because the administrative and fiscal ties between the states and most airport operators are not sufficiently strong to qualify the airport operators for eleventh amendment protection, *e.g.*, Doris Trading Corp. v. SS Union Enterprise, 406 F. Supp. 1093 (S.D. N.Y. 1976); George A. Fuller Co. v. Coastal Plains, Inc., 290 F. Supp. 911 (E.D. La. 1968); *but see* Howell v. Port of New York Auth., 34 F. Supp. 979 (E.D.N.J. 1940). Even for those airport operators which constitute the state for eleventh amendment purposes, the operation of a proprietary enterprise in interstate commerce with federal permission, and the power to sue and be sued, probably waive the protection, *see* Maryland Port Admin. v. SS American Legend, 453 F. Supp. 584 (D. Md. 1978).

5. This article is limited to the antitrust concerns of "municipalities," which, for the purposes of this article, include counties and their agencies, cities and their agencies, and other local government entities which are not directly appointed by or accountable to the state administrative hierarchy. As a practical matter, however, it is expected that airports operated by states and state agencies will be subject to antitrust scrutiny very much like that described in this article (assuming the eleventh amendment does not bar a federal antitrust action, as discussed in note 4 *supra*), attenuated only by the principle enumerated in Princeton Community Phone Book, Inc. v. Bate, 582 F.2d 706, 719 (3rd Cir.), *cert. denied*, 439 U.S. 966 (1978), that "the closer the relationship between the state and the defendant, the less clearly the state need command the precise action for the defendant to enjoy the exemption." Conversely, if a private entity contracts to operate an airport that is owned by a government entity, very close supervision would be required, especially where the private contractor may compete with entities which deal with the airport, *e.g.*, Alphin v. Henson, 392 F. Supp. 813 (D. Md. 1975), *aff'd*, 538 F.2d 85 (4th Cir.), *cert. denied*, 434 U.S. 960 (1976). Airports which are owned by private entities, and the two major airports which are owned and operated by the Federal Aviation Administration—Dulles International and Washington National Airports—are not included within the scope of this article.

6. Some of the antitrust problems which can result from airport operations may, of course, be shared by smaller airports with little or no scheduled commercial service, *e.g.*, Alphin v. Henson,

by the airport operator, or from unjust discrimination as between participants engaged in or seeking to engage in business at the airport, or both.

A. Monopoly Abuses

The fact that most major U.S. airports are natural monopolies, and the fact that the demand is increasing steadily while the capacity is relatively constant, contribute to the need for airport operators to become increasingly responsive to the competitive impacts of their operational decisions.

1. Natural Monopoly Attributes

In theory, a facility is a *natural* monopoly by virtue of being a "geographically fixed facilit[y] designed to serve customers in close proximity to such facilit[y] and almost entirely useless for any other purpose."[7] A facility is a natural *monopoly* because the economies of scale make it more efficient to obtain a given level of output at a given location from only one such facility.

As points of origin and destination, most major airports enjoy both of these attributes[8]—they serve passengers in close proximity to the airport[9] and are useless for any other function; and theoretically they can serve a given level of traffic more efficiently at one facility than at two or more facilities due to the very high fixed costs.[10] In most cities the airports are natural monopolies even if there is more than one major airport in the area because the location or other attributes of the airports generally prevent the airports from being considered by passengers or by airlines as interchangeable under normal circumstances.[11]

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392 F. Supp. 813 (D. Md. 1975), *aff'd*, 538 F.2d 85 (4th Cir.), *cert. denied*, 434 U.S. 960 (1976).

7. W. Jones, Cases and Materials on Regulated Industries 51 (2d ed. 1976).

8. As points of connection between flights, however, airports may not be natural monopolies. They are, as connecting points, largely interchangeable to the passenger; and to the airlines, there is generally nothing inherent in the nature of any given airport that makes it more or less desirable as a point of connection—that desirability is usually a function of the system-wide totality of airline route planning.

9. The extent of "close proximity" for an airport depends upon the nature of the service. Passengers will come from much farther away to use an airport for an international flight than for a short domestic flight.

10. As a practical matter, airports may not always enjoy such economies of scale. For example, unless an airport can accommodate simultaneous traffic on several runways, the total economic efficiency, including the direct and indirect costs of ground and air delays, may be better with several proximate facilities.

11. Other airports are not a realistic alternative for short trips because the impact of ground transportation time is more significant in connection with a short air trip. In the New York City area, for example, domestic traffic with a New Jersey origin or destination prefers Newark Airport; and domestic traffic with a New York or Connecticut origin or destination prefers LaGuardia Airport or, when feasible, Westchester County Airport. Other airports are not a realistic alternative for long trips because, although the relative impact of ground transportation time is less, there are usually

In addition, the development of a new major airport in or near any city in the foreseeable future is highly unlikely in view of the strenuous noise and other environmental opposition, as well as the social and economic costs of acquiring land and displacing residents. This opposition, in turn, increases the costs of acquisition for a new airport by increasing the amount of land which must be acquired around the airport to act as a buffer zone between the airport activities and the surrounding residents. Consequently, very few new airports will be constructed, and most increases in the number of airports with commercial service will result from the introduction of commercial service into existing airports. In this sense, airports may be considered as "practical" monopolies as well as natural monopolies.

2. Demand Exceeds Capacity

The airport's status as a natural monopoly does not, in itself, give the airport operator the "power to control market prices or exclude competition" which constitutes monopoly power.[12] In order to have monopoly power, the airport must also be enjoying demand which is substantial in relation to the most limiting—airside, groundside, or other—capacity constraint. Accordingly, at the many airports which are operating at less than capacity and are eagerly seeking more business, there is little potential for monopoly abuse. At several airports, however, the potential for abuse arising from the airport's natural monopoly is exacerbated by the substantial and increasing demand which results from the fact that the number of passengers is increasing but the number of major airports is essentially constant.

The number of passengers carried by the scheduled air carriers has increased more than five-fold in twenty years (from about 58 million in 1960, to about 170 million in 1970, to about 275 million in 1978, to more than 316 million in 1979),[13] and this number is expected to double again in the next ten to fifteen years.[14] The increase in the number of air travelers results from several factors, including population growth; greater public acceptance of air transportation as safe; relatively reduced air transportation costs because of technological improvements, wide-body aircraft, and air-

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fewer airports within a metropolitan area which can accommodate longer distance air traffic. Long distance domestic and international traffic in the New York City area, for example, cannot be accommodated at LaGuardia or Westchester.

12. United States v. Grinnell Corp., 384 U.S. 563, 571 (1966); United States v. E. I. DuPont DeNemours & Co., 351 U.S. 377, 391 (1956).

13. AIR TRANSPORT 1980 (published by the Air Transport Association of America); AEROSPACE FACT AND FIGURES 1979/80 (published by the Aerospace Industries Association of America, Inc.). Present indications are that, largely because of recessionary factors, this number may drop to about 300 million in 1980.

14. TERMINAL AREA FORECASTS, 1980-1991 (published by the Federal Aviation Administration).

line economic deregulation; and reduced highway speed limits.[15]

The number of major airports, on the other hand, will not be increasing measurably because of the costs and environmental opposition noted above. Moreover, the same few major airports will continue to be the backbone of the system and absorb the brunt of the increase.[16] Today the five busiest air carrier airports handle twenty-eight percent of the scheduled air carrier passengers and twenty percent of the scheduled air carrier operations; and the 100 busiest air carrier airports handle ninety-two percent of the scheduled air carrier passengers and eighty-two percent of the scheduled air carrier operations.[17]

3. *The Absence of Effective Constraints*

While there are theoretically both economic and legal external constraints (*i.e.*, constraints not within the monopolist's control)[18] on the ability of a monopolist to manipulate the market, the practical efficacy of either constraint is questionable as to airports. With respect to the external economic constraints, the limits beyond which additional monopoly abuses provide no additional benefits to a monopolist are normally established by the comparability, availability, and price of the substitute goods or services to which customers would convert as the monopolist approaches those limits. This economic limitation is not very effective in the airport context because the substitutes for the passengers—other airports, other forms of transportation, or not traveling at all—are not alternatives in any practical sense. As noted above, other airports are generally not viable alternatives as a practical matter even when there are other airports in the same metropolitan area. Other modes of transportation are not generally a comparable alternative except for very short (*e.g.*, less than two or three hundred miles) trips, particularly as longer distance air fares approach or go below the fares of other modes.[19] Not traveling at all may or may not be an alterna-

15. Also important for purposes of airport planning is the number of air *carriers*. The number of air carriers which may result from this substantial increase in the number of passengers is not presently known.

16. The present increase in traffic at the busiest airports will, however, probably be less than the percent increase in the total system because, among other reasons, these airports will be used less as connector airports as they become more congested.

17. TERMINAL AREA FORECASTS, 1980-1991 (published by the Federal Aviation Administration). These concentrations of service will probably be alleviated to some extent in the future as the use of the busiest airports as connector airports is proportionately reduced, and as commercial service to satellite "reliever" airports is encouraged pursuant to 49 U.S.C. § 1302(a)(6) (Supp. III 1976).

18. Not discussed in this article are the political constraints which can influence any entity (such as an operator of a major airport) which is ultimately responsive to elected officials, especially when dealing with an air carrier or concessionaire, for example, which is a large taxpayer or employer in the local area.

19. In 1978, 85.5% of intercity common carrier passenger miles were by air carrier, and 12.0% of all intercity passenger miles were by air carrier. These numbers were up from 74.7%

tive, depending upon the reason for the travel. Once within the airport confines, of course, the passenger is captive and the availability of alternatives varies from none—*e.g.*, as to parking—to very little—*e.g.*, as to restaurants, gift shops, and newsstands.

Consequently, there is little economic deterrent to monopoly abuses by airports with monopoly power[20] because the concessionaires and airlines can normally pass to the passengers most or all of the price impact of such abuses, and the passengers have little real choice. Moreover, the excess of demand over capacity at these airports undercuts the potential limiting effect of alternatives upon the monopolist's ability to impose abuses because the monopolist can afford to lose some of the demand before responding to the existence of alternatives by curbing monopoly abuses.

At airports with monopoly power, the efficacy of the legal constraints upon airport operator monopoly abuses is likewise limited. The air carriers and concessionaires who deal directly with the airport operator may be reluctant to complain because, as a natural monopoly, the airport is figuratively the "only game in town," and there is little reason to incur the wrath of the airport operator when the price impact of any monopoly abuses can simply be passed to the passengers. The passengers, on the other hand, rarely have sufficient incentive or resources to complain individually, and there is no practical vehicle for collective passenger complaints.[21]

With perfect competition, the economic feedback provided by the supply-demand relationship assures resource utilization which is optimally responsive to the society's wants and needs because the prices of goods and services are a reflection of their real value to society, and the quantity of goods or services is the quantity desired by society. At several major airports at which demand exceeds capacity, the airport operators are insulated from this economic feedback by the absence of effective competition, the capacity-demand relationship, and the absence of effective external constraints. Consequently, these airport operators are able to manipulate the market in a manner which is not necessarily optimal to society.

B. Other Antitrust Problems

Irrespective of whether an airport enjoys sufficient demand to give it monopoly power, the airport operator may encounter antitrust challenges whenever it limits the number of participants who may engage in any given

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and 8.7% in 1969, respectively. Statistical Handbook of Aviation, (Calendar Year 1978) (published by the Federal Aviation Administration).

20. *See* cases cited note 12 and accompanying text *supra*.

21. In addition to the numerous practical problems presented by such class actions, note the legal obstacles presented by the decisions in Illinois Brick Co. v. Illinois, 431 U.S. 720, *rehearing denied*, 434 U.S. 881 (1977); Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968). *But see* Reiter v. Sonotone Corp., 442 U.S. 330 (1979).

business at the airport. The legal issue created by such limitations is whether they are applied to present and potential participants in a manner that is not unjustly discriminatory. The factual details as to these limitations and the problems which may result are discussed in more detail below in relation to each type of activity.

III. State Action Antitrust Immunity

Recent Supreme Court cases have created considerable uncertainty for many government entities, such as the operators of most major airports, about the extent to which competitive impact must be considered in their operational decisions.[22] This section sets forth the legal framework for consideration of this issue.

A. General

The antitrust immunity for activity by airport operators must be viewed in the context of the state action immunity generally. With the general principles as a background, the aspects which apply to airport operators will be considered.

1. The Statutes

Private federal antitrust actions are brought under the Sherman Act[23] and the Clayton Act.[24] The Sherman Act provides at section 1, in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade among the several States, or with foreign nations, is declared to be illegal . . . . Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony.[25]

section 2 of the Sherman Act provides, in pertinent part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of the trade or com-

22. Indeed, despite the reduction of federal economic regulation of air transportation which results from the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified in scattered sections of 49 U.S.C.), these problems pose the real question, not discussed in this article, whether major airports should be federally regulated.

23. Act of July 2, 1980, ch. 647, 26 Stat. 209 (current version at 15 U.S.C. § 1 (1976)).

24. Act of Oct. 15, 1914, ch. 323, 38 Stat. 730 (current version at 15 U.S.C. § 15 (1976)).

25. 15 U.S.C. § 1 (1976). This article does not consider the impact upon interstate commerce that is required to constitute "trade among the several States" for this purpose. However, it is noted that no state action antitrust immunity case has been found in which the Sherman Act was found to be inapplicable because of insufficient impact upon interstate commerce. If such a case were to arise, it certainly would not relate to the operation of a major airport, *e.g.*, Pinehurst Airlines, Inc. v. Resort Air Serv., Inc., 476 F. Supp. 543 (M.D.N.C. 1979); Woolen v. Surtran Taxicabs, Inc., 461 F. Supp. 1025 (N.D. Tex. 1978).

merce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ."[26] section 8 of the Sherman Act further provides: "[T]he word 'person,' or 'persons,' wherever used in this Act shall be deemed to include corporations and associations. . . ."[27]

The private right of action for damages for violations of the Sherman Act is provided by section 4 of the Clayton Act,[28] and private injunctive relief may be sought under section 16 of the Clayton Act.[29]

2. The Cases

Because the Sherman Act and the Clayton Act contain no specific reference to the antitrust liability of government entities, the law on this issue derives entirely from judicial construction. In the wake of several recent Supreme Court cases, the vitality of many older lower court cases is questionable. The general judicial background presented here therefore consists primarily of cases decided by the Supreme Court.

The first federal case relating to an antitrust claim under the Sherman Act against a government entity was *Lowenstein v. Evans*,[30] in which the court held that the sale of liquor by the South Carolina State Board of Control, to the exclusion of private sellers, was not a violation of the Sherman Act because the system of liquor sales was required by state law; there was no contract, combination, or conspiracy; and the state was neither a "corporation" nor a "person" under the Sherman Act.

The first case decided by the Supreme Court relating to a Sherman Act claim against a government entity was *Olsen v. Smith*,[31] in which the Court saw no antitrust problem in the regulation by the State of Texas of vessel pilots in its ports, and the prohibition against unlicensed pilots.

The next case decided by the Supreme Court on this issue was *Parker*

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26. 15 U.S.C. § 2 (1976).

27. 15 U.S.C. § 7 (1976).

28. 15 U.S.C. § 15 (1976), which provides, in pertinent part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States . . . without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

The term "antitrust laws" in this section includes the Sherman Act by virtue of the definitions in the Clayton Act, § 1, 15 U.S.C. § 12 (1976). Also included in § 1 of the Clayton Act is the same definition of "person" that is cited above from the Sherman Act, § 8, 15 U.S.C. § 7 (1976). The statute of limitations for actions brought under this section is four years, 15 U.S.C. § 15b (1976).

29. 15 U.S.C. § 26 (1976), which provides, in pertinent part:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . .

30. 69 F. 908 (D.S.C. 1895).

31. 195 U.S. 332 (1904).

v. Brown,[32] which is generally considered to be the genesis of the state action antitrust immunity doctrine. *Parker* involved a challenge of the activities of the (California) Agricultural Prorate Advisory Commission, which was established as a state agency under the California Agricultural Prorate Act for the purpose of restricting competition among growers and stabilizing prices in their commodities. Upon petition from at least ten producers for the establishment of a prorate marketing program, the Commission would decide, after notice and hearing, whether the program would prevent agricultural waste and preserve agricultural wealth without permitting unreasonable profits to producers. If so, the Commission would select a prorate program committee. After notice and hearing, the plan developed by the committee was subject to approval, with modification if necessary, by the Commission. If enough producers consented, the plan would go into effect.

The specific plan under attack in *Parker* established categories for raisins and controlled their sale in order to stabilize raisin prices. The Supreme Court stated that the plan would have violated the Sherman Act if it had been organized and conducted entirely by private persons. However, because the state created the machinery for establishing the prorate program, adopted the specific plan, supervised it closely, and enforced it, the Supreme Court unanimously held that the raisin prorate program was not subject to Sherman Act scrutiny, stating:

> [There is] nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government . . . an unexpressed purpose to nullify a state's control over its officers is not lightly to be attributed to Congress . . . The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.[33]

Based upon *Parker*, the state action immunity was generously applied to a variety of government entities with little analysis beyond whether the activity was a bona-fide activity of the government entity.[34] This relatively

32. 317 U.S. 341 (1942).

33. 317 U.S. at 350, 352.

34. *Cf.* Metro Cable Co. v. CATV Inc., 516 F.2d 220 (7th Cir. 1975); New Mexico v. American Petrofina, Inc., 501 F.2d 363 (9th Cir. 1974); Padgett v. Louisville Jefferson County Air Bd., 492 F.2d 1258 (6th Cir. 1974); Saenz v. University Interscholastic League, 487 F.2d 1026 (5th Cir. 1973); LaDue Local Lines, Inc. v. Bi-State Dev. Agency, 433 F.2d 131 (8th Cir. 1970); E.W. Wiggins Airways, Inc. v. Massachusetts Port Auth., 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966); Harman v. Valley Nat'l Bank of Arizona, 339 F.2d 564 (9th Cir. 1964); Continental Bus Systems, Inc. v. City of Dallas, 386 F. Supp. 359 (N.D. Tex. 1974); Murdock v. City of Jacksonville, Fla., 361 F. Supp. 1083 (M.D. Fla. 1973); Trans World Assoc., Inc. v. City & County of Denver, [1974-2] TRADE CASES (CCH) ¶ 75,293 (D. Colo. 1974). But see George R. Whitten, Jr.,

automatic grant of state action immunity lasted for more than thirty years[35] until the Supreme Court's next major state action immunity decision, *Goldfarb v. Virginia State Bar*.[36] *Goldfarb* was an action to enjoin minimum attorney fee schedules which were established by the Fairfax County Bar Association (a private voluntary association of attorneys) and enforced by the Virginia State Bar (a state agency whose members were attorneys appointed by the Virginia Supreme Court). After deciding that the fee schedule constituted price fixing which affected interstate commerce, and that the fee schedule was not entitled to a "learned profession" exemption, the Court looked to whether the state action antitrust immunity applied. The Court held (8-0) that there was no such immunity:

> The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign. Here we need not inquire further into the state-action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent. [I]t is not enough that . . . anticompetitive conduct is "prompted" by state action; rather, anticompetitive activities must be compelled by direction of the State acting as sovereign.[37]

After this introduction by *Goldfarb* of "compulsion" as a requirement for immunity, the state action immunity was dramatically converted from being granted in most instances to being denied in most instances.[38]

Shortly after *Goldfarb* came *Cantor v. Detroit Edison Company*,[39] an antitrust action by light bulb retailers against an investor-owned utility com-

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Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 85 (1970), *remand*, 376 F. Supp. 125 (D. Mass.), *aff'd*, 508 F.2d 547 (1st Cir.), *cert. denied*, 421 U.S. 1004 (1974), in which the Court of Appeals for the First Circuit, in denying state action immunity in relation to a competitive procurement by the city from a dealer who lobbied the agency to change the bidding specifications in the dealer's favor, indicated that the state action immunity applied only where the government had decided to displace competition with regulation, 424 F.2d at 30-31; *see also* Allegheny Uniform v. Howard Uniform Co., 384 F. Supp. 460 (W.D. Pa. 1974) (no immunity to designate sole supplier of uniforms for state employees); Azzaro v. Town of Branford, [1974-2] TRADE CASES (CCH) ¶ 75,337 (D. Conn. 1974) (no immunity regarding city's purchase of insurance).

35. After *Parker* the Supreme Court held that a state resale price fixing scheme for liquor was preempted by the Sherman Act. Schwegmann Bros. v. Calvert Corp., 341 U.S. 384 (1951). The Court stated that "the fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, absent approval by Congress." 341 U.S. at 386. The view has been expressed that *Parker* and *Schwegmann* are factually so similar that the implicit federal statutory support for the scheme in *Parker*—the *Parker* plan could have been implemented by the U.S. Secretary of Agriculture under 7 U.S.C. § 601 (1976) (originally enacted as the federal Agricultural Marketing Agreement Act of 1937, ch. 296, 50 Stat. 246)—"may well have been crucial" to the *Parker* result because there was no such federal statutory support for the scheme in *Schwegmann*. *See* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 238, at 734 (1977).

36. 421 U.S. 773 (1975).

37. *Id*. at 790-91.

38. *See* Duke & Co. v. Foerster, 521 F.2d 1277 (3d Cir. 1975).

39. 428 U.S. 579 (1976).

pany that encouraged the use of electricity by distributing free light bulbs. The light bulb plan was conducted in accordance with a tariff which had been filed by the utility company and approved by the Michigan Public Service Commission. Unlike *Parker* and *Goldfarb*, *Cantor* produced a divided Court. Five Justices held that the program might be exempt from antitrust scrutiny if a private person did "nothing more than obey the command of his state sovereign;"[40] however, a private person cannot file a tariff and then, upon routine approval of the tariff by the appropriate state agency, claim that any action pursuant to the tariff is thereby "compelled" for antitrust purposes.[41] These five Justices also agreed that immunity might be appropriate if the Sherman Act conflicted with the state regulatory mechanism, stating: "The Court has consistently refused to find that regulation gave rise to an implied exemption without first determining that exemption was necessary in order to make the regulatory Act work, 'and even then only to the minimum extent necessary.' "[42] However, the Justices noted that the lack of state regulation of the electric light bulb market alleviated any possibility of conflict between the antitrust laws and a state regulatory scheme.[43]

In a concurring opinion, Mr. Justice Blackmun questioned the advisability of the "compulsion" test,[44] doubted the relevance of whether the state or the private party initiated the practice,[45] and found the "affirmative articulation" test to be "wanting."[46] He suggested a "rule of reason" balancing of the benefits and harms of the state-sanctioned activity.[47] The three dissenting Justices indicated generally that any pervasively regulated utility scheme should be exempt from Sherman Act scrutiny.[48]

The *Cantor* opinion created the need for the courts to examine in detail the role of the private person in the development of the regulatory scheme in order to determine who actually made the decision in the "blend of private and public decisionmaking."[49] By adding the "when and only to the extent necessary" test to the "compulsion" test, it also compounded the confusion as to whether state action immunity derives from an exemption

40. *Id*. at 592.

41. *Id*. at 594. Only four of those five Justices agreed that *Parker* was not applicable to the private activities in *Cantor*; the other five Justices stated that *Parker* applied both to state activities and to state-sanctioned private activities.

42. *Id*. at 597.

43. *Id*. at 596. Indeed, the Court "infer[red] that the State's policy is neutral on the question whether a utility should, or should not, have such a program." *Id*. at 585.

44. *Id*. at 609.

45. *Id*.

46. *Id*. at 610.

47. *Id*. at 610-11.

48. *Id*. at 615.

49. *Id*. at 592.

analysis or from a preemption analysis.[50]

The next state action immunity case in the Supreme Court, *Bates v. State Bar of Arizona*,[51] enumerated the state action immunity tests which now appear to be emerging as the tests generally to be applied. In *Bates*, a unanimous Court (on this issue) held that the Arizona Supreme Court's disciplinary rule prohibiting advertising by attorneys was immune from antitrust scrutiny.[52] The Court distinguished *Goldfarb* by noting that the Virginia Supreme Court in *Goldfarb* did not compel the subject anticompetitive activities, while the advertising ban in *Bates* resulted from an "affirmative command of the Arizona Supreme Court" and was therefore, in the words of *Goldfarb*, "compelled by the State acting as sovereign."[53] The Court distinguished *Cantor* by noting that (1) *Cantor* related to activities of a private person, as contrasted with the activities of the Arizona Supreme Court in *Bates*; (2) in *Cantor* there was no state regulatory interest in the light bulb market, and an antitrust exemption as to light bulbs was not essential to the state's regulation of electric utilities, while in *Bates* the "controls over solicitation and advertising have long been subject to the State's oversight;"[54] and (3) the light bulb program in *Cantor* was privately initiated, with mere acquiescence by the state regulatory agency, while in *Bates* the disciplinary rules "reflect a clear articulation of the state's policy," and "it [is] significant that the state policy is so clearly and affirmatively expressed and that the state's supervision is so active."[55]

Although the Court discussed the *Goldfarb* "compulsion" test in *Bates*,[56] it was not enlightening because the "compulsion" in *Goldfarb* relates to the command from the highest state level to the implementing state level (*i.e.*, the lowest level at which discretion concerning the manner of implementation could be exercised), while the implementing state level in *Bates*—the Arizona Supreme Court—*was* the highest state level.

Shortly after *Bates*, a new wrinkle appeared. The Supreme Court decided *City of Lafayette v. Louisiana Power & Light Co.*,[57] relating to whether a municipality can obtain state action immunity for its operation of an electric utility. *Lafayette* is discussed here in greater detail than the other Supreme Court cases because the operation of an electric utility is roughly analogous for this purpose to the operation of a major airport.

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50. The Court began this exemption line of reasoning as to state action immunity in *Goldfarb*, in which it noted that there is a "heavy presumption against implicit exceptions" from the Sherman Act, 421 U.S. at 787. *See* discussion note 96 and accompanying text *infra*.

51. 433 U.S. 350 (1977).

52. The prohibition was found, however, to run afoul of the first amendment.

53. 433 U.S. at 360.

54. *Id.* at 362.

55. *Id.* at 362.

56. *Id.* at 360.

57. 435 U.S. 389 (1978).

In *Lafayette*, two cities which owned and operated electric utility systems brought an antitrust action against Louisiana Power and Light Co. (LP&L), an investor-owned electric utility company which competed with the city-owned utility companies outside their city limits. LP&L counterclaimed that the cities committed antitrust violations in their operation of the utilities.

The District Court for the Eastern District of Louisiana dismissed the counterclaim on the ground that *Parker*, and a more recent case in the Fifth Circuit, *Saenz v. University Interscholastic League*,[58] rendered the antitrust laws inapplicable to the alleged activities. The Court of Appeals for the Fifth Circuit reversed the dismissal and remanded the counterclaim on the basis that, after the decision in *Goldfarb* (which came subsequent to the District Court's dismissal), the cities were not necessarily exempt from antitrust scrutiny. Rather, the exemption determination required a closer examination of whether the state legislature contemplated the type of activity alleged.[59]

In affirming the Court of Appeals, five Justices (Burger, Brennan, Marshall, Powell and Stevens) joined in opining that under Section 8 of the Sherman Act[60] and sections 1 and 4 of the Clayton Act,[61] states and municipalities as plaintiffs are "persons"[62] and that there is no reason under the Sherman or Clayton Acts not to consider a municipality which is a counterclaim defendant as a "person" as well.[63]

Those five Justices rejected the three policy reasons advanced for exempting municipalities as such from the antitrust laws. First, as to the problems of imposing civil and criminal antitrust liabilities upon municipalities, the Court simply noted, to the dismay of the dissenting Justices, that the issue of remedy was not presented in *Lafayette*. Second, as to the desirability of limiting the scope of the Sherman Act to abuses of private power and exempting government proprietary activities, the Court responded that the alleged abuses by the cities—selling gas and water only to those who purchased electricity from the city utilities rather than from LP&L, and instituting "sham" litigation to delay LP&L's nuclear plant—adversely impact competition as much as if they were committed by private parties, but have no greater countervailing benefit than if they were conducted by private parties.[64] Finally, to the claim that the citizens can use the legislative process to correct antitrust wrongdoings by a municipality,

58. 487 F.2d 1026 (5th Cir. 1973).

59. City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, *rehearing denied*, 540 F.2d 1084 (5th Cir. 1976).

60. 15 U.S.C. § 7 (1976).

61. 15 U.S.C. §§ 12, 15 (1976).

62. *See* Georgia v. Evans, 316 U.S. 159 (1942); Chattanooga Foundry v. City of Atlanta, 203 U.S. 390 (1906).

63. *Lafayette*, 435 U.S. at 394-95.

64. *Id*. at 403-05.

the Court responded that legislative redress would be no more effective or desirable as a remedy for municipal antitrust problems than for private antitrust violations, and that Congress did not leave the fundamental national policy of competition to be enforced by the "vagaries of the political process."[65] Thus, the Court concluded that these policy reasons were not "sufficiently weighty to overcome the presumption" against "repeal by implication" of the antitrust laws.[66]

As to whether the cities were entitled to *Parker* exemption as agents of the state, however, only four of those five Justices (Brennan, Marshall, Powell and Stevens) agreed. As a result of the decisions in *Goldfarb* and *Bates*, in conjunction with cases in other contexts which indicate that municipalities are not necessarily entitled to the deference afforded to states, the four-Justice plurality was "unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach" and would not automatically extend *Parker* immunity to municipalities.[67] Instead, they concluded that: "[T]he *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service."[68] Accordingly, those four Justices affirmed the Fifth Circuit, remanding the case for a determination of whether the state "authorized or directed a given municipality to act as it did."[69] More particularly, the plurality noted:

> This does not mean, however, that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit. While a subordinate governmental unit's claim to *Parker* immunity is not as readily established as the same claim by a state government sued as such, we agree with the Court of Appeals that an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of."[70]

Chief Justice Burger concurred in the result, saying that *Parker* does not exempt a proprietary enterprise from the Sherman Act merely because it is engaged in by a municipality.[71] He sought a remand for the purpose of determining whether there was a "state policy to displace competition with

65. *Id.* at 405-07.

66. *Id.* at 399, 400.

67. *Id.* at 408-14.

68. *Id.* at 413.

69. *Id.* at 414. The Court noted that, unless there were such authorization, "The most that could be said is that state policy may be neutral." *Id.* The same lack of deference to neutral state policy was shown in Cantor v. Detroit Edison Co., 428 U.S. at 585.

70. *Id.* at 415 citing the Fifth Circuit, 532 F.2d at 434.

71. *Id.* at 418.

regulation or monopoly public service," consistent with the plurality,[72] but he wanted to add the *Cantor* test[73] to the remand—a determination of "whether the implied exemption from federal law was necessary in order to make the regulatory Act work, and even then only to the minimum extent necessary."[74] Mr. Justice Marshall added that Chief Justice Burger's additional test was already inherent in the plurality's holding.[75]

The dissenting Justices indicated that the Sherman Act was concerned with "attacking concentrations of private economic power unresponsive to public needs," which is not the situation for municipalities that are instrumentalities of the state and are subject to direct popular control through the political process.[76] The dissent further disagreed with the plurality's two reasons for holding that *Parker* is inapplicable to municipalities. In particular, the dissent viewed as irrelevant the plurality's assertion that cities are not afforded the same deference as states under the Eleventh Amendment,[77] and argued that the question, which was answered in the affirmative in *National League of Cities v. Usery*,[78] should more appropriately be whether cities are afforded the same deference as states under the Commerce Clause;[79] and the dissent argued that the plurality's reliance upon *Goldfarb* was misplaced because *Goldfarb* applies only to private actions.[80]

The four dissenting Justices also argued that the Court's decision will fundamentally interfere with the *method* by which states delegate functions to municipalities because (1) the requirement for a state legislative mandate will hamper municipal action, (2) the "authorize or direct" standard is vague, and (3) there is rarely any state legislative history from which to determine intent.[81] These dissenting Justices added further that the decision will interfere with the *substance* of municipal activity because the uncertainty of the "authorize or direct" standard will discourage innovation by state agencies and subdivisions and will invite wide-ranging federal judicial scrutiny into the reasonableness of state regulations.[82] Finally, the dissent was concerned that the costs to municipalities, in terms of the cost of litiga-

72. Chief Justice Burger also stated that the plurality advocated the *Goldfarb* "compulsion" test, *Id*. at 425. Although the plurality discussed this *Goldfarb* test, *Id*. at 410, it does not appear that the plurality applied the test in *Lafayette*.

73. 428 U.S. at 597.

74. 435 U.S. at 426.

75. *Id*. at 417-18.

76. *Id*. at 428. Note the very broad statement in *Parker* that the Sherman Act "must be taken to be a prohibition of individual and not state action." 317 U.S. at 352.

77. 435 U.S. at 430-31.

78. 426 U.S. 833 (1976). *See* discussion note 140 and accompanying text *infra*.

79. U.S. CONST. art. I, § 8, cl. 3.

80. 435 U.S. at 431-34.

81. *Id*. at 434-38.

82. *Id*. at 438-40.

tion and treble damages, could be staggering.[83]

Mr. Justice Blackman separately expressed concern that imposition of treble damages is mandatory under section 4 of the Clayton Act,[84] and that the decision will therefore leave no way to avoid the imposition of treble damages upon municipalities if liability is found.[85]

Lafayette added considerably to the confusion by introducing the "authorized or directed" and "contemplated by the legislature" tests, without indicating whether the *Goldfarb* "compulsion" test was being abandoned generally,[86] or whether these *Lafayette* tests were to be applied only to its facts (proprietary activities by municipalities). It is submitted here that the two Supreme Court cases decided on this issue since *Lafayette* suggest that the "compulsion" test is being abandoned, and provide a reasonable basis for concluding that the *Bates* tests may prevail and become the general tests in situations beyond the facts presented in *Bates*. As noted in Chief Justice Burger's concurring opinion, the analysis in *Lafayette* also indicates that, for all practical purposes, the antitrust immunity analysis for state proprietary activities will be essentially the same as the antitrust immunity analysis applied in *Cantor* for state-sanctioned private activities.[87]

In *New Motor Vehicle Board of California v. Orrin W. Fox Co.*,[88] the Supreme Court decision (8-0 on this issue) permitted antitrust immunity for the activities of the California New Motor Vehicle Board pursuant to a state statute which required an automobile manufacturer to obtain state approval for the placement of a dealership if any existing nearby dealer protested. The only private action was the protest; thereafter, the response to the protest, which determined whether and when the new dealer would obtain state permission, was wholly with the Board under its statutory mandate. The Court stated: "[The California statute's] regulatory scheme is a system

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83. *Id*. at 440-41. The damages claimed in *Lafayette*, multiplied by three, would have been $540 million. With a combined population of the two defendant cities in 1970 of about 75,000, this would have resulted in a per-capita assessment for damages alone of about $7,200. *Id*.

84. 15 U.S.C. § 15 (1976).

85. 435 U.S. at 441-43. *See Municipal Antitrust Liability: Applying City of Lafayette v. Louisiana Power & Light Co.*, 31 BAYLOR L. REV. 563 (1979); *Federal Antitrust Immunity: Exposure of Municipalities to Trebel Damages Sets Limit for New Federalism: City of Lafayette v. Lousiana Power & Light Co.*, 11 CONN. L. REV. 126 (1978); *Antitrust—Whither Antitrust Liability After Lafayette?*, 15 WAKE FOREST L. REV. 89 (1979). For arguments that treble damages might not be within the intent of section 4 as to municipalities, *see* Note, *The Application of Antitrust Laws to Municipal Activities*, 79 COLUM. L. REV. 518, 544-49 (1979). For a discussion of the inappropriateness of treble damages "when novel principles are established [or] the law is unclear," *see* 3 P. ARREDA & D. TURNER, ANTITRUST LAW, ¶ 630c, at 96-99 (1978) [hereinafter cited as ARREDA & TURNER].

86. As to the undesirability of "compulsion" as a requirement for state action antitrust immunity, *see* 1 AREEDA & TURNER ¶215b, *supra* at 92-97.

87. 435 U.S. at 424-26. *But see* United States v. Southern Motor Carriers Rate Confer., Inc., 467 F. Supp. 471, 484 (N.D. Ga. 1979).

88. 439 U.S. 96 (1978).

of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the manner of the establishment and relocation of automobile dealerships. The regulation is therefore outside the reach of the antitrust laws under the 'state action' exemption."[89] Thus, without any reference to the "compulsion" test, the Court used the much clearer and more easily applied *Bates* tests.

The most recent Supreme Court case to consider the state action immunity issue, *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*,[90] involved wine price-fixing under a California statute which required wine producers, wholesalers, and retailers to file their prices with the state, whereupon wine merchants were required to sell to retailers at that price. The prices were established by the private persons who filed them, but the state did not review the prices for reasonableness. After deciding that the price-fixing scheme violated the Sherman Act, the Court reviewed its previous state action immunity decisions and stated that those decisions "establish two standards for antitrust immunity under [*Parker*]. First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy;' second, the policy must be 'actively supervised' by the state itself."[91] The Court decided (8-0) that the price fixing satisfied the "clearly articulated and affirmatively expressed" requirement, but failed the "actively supervised" requirement:

> The State simply authorizes price-setting and enforces the prices established by private parties. The State neither established prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination of the program." The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price fixing arrangement.[92]

Thus, although the primary actors in *Midcal* were private parties, the Court applied the standards from *Bates*, in which the primary actor was the state. Moreover, the Court noted that a compulsion standard was used in *Goldfarb*, but again did not apply compulsion as a standard in *Midcal*. Taken together, these analytical developments refute the contention that a "compulsion" standard applies to state-sanctioned private activities and to government proprietary activities,[93] while a lesser standard applies to government sovereign activities.[94] Instead, the *Bates* standards are apparently

89. *Id*. at 109.

90. 445 U.S. 97 (1980).

91. *Id*. at 105.

92. *Id*. at 105-06.

93. Government proprietary activities and state-sanctioned private activities have been subject to a similar analysis since *Lafayette*. *See* cases cited note 87 and accompanying text *supra*.

94. It has been argued that the *Goldfarb* "compulsion" test reflected the Court's desire to apply a more stringent standard of analysis to state-sanctioned private action than to state action.

of general applicability, not limited to the fact situation in *Bates*.

3. The Standards From the Cases

There is little agreement as to the standards which can be distilled from these cases. It is submitted here that the later Supreme Court cases are beginning to create a path out of the confusion, and that the path is to be found in a two part test: (1) is the state statute preempted by the Sherman Act; and if not, then (2) are the actions pursuant to the state statute sufficiently the actions of the state to enjoy this protection from preemption.[95]

a. *Preemption rather than exemption*. One major area of uncertainty relates to whether the state action "immunity" reflects a *preemption* analysis or an *exemption* analysis. While the matter is certainly not free from doubt,[96] it is submitted here that the state action immunity cases fit partially into both categories and squarely into neither category, but that a preemption analysis is conceptually more appropriate.

Preemption, on one hand, derives from the Supremacy Clause[97] and relates in broad terms to the supremacy, by occupation[98] or conflict,[99] of federal statutes over state statutes. According to principles of federalism,

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However, because the scheme in *Goldfarb* failed the "compulsion" test, the Court saw no need to "inquire further into the state-action question" 421 U.S. at 790, and did not address the distinciton between state-sanctioned private activities and state activities. Moreover, the applicability of a "compulsion" standard to private activities is questionable after *Midcal*.

95. The order in which the tests are applied depends, of course, upon which is easier. Occasionally the second part of the test may be applied before preemption is examined because the courts are reluctant to engage in an unnecessary preemption analysis, *e.g.*, California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); Star Lines, Ltd. v. Puerto Rico Maritime Ship. Auth., 451 F. Supp. 157, 162 n.27 (S.D.N.Y. 1978). By the same token, if there is no basis for liability, the court may dispose of the case on that ground and thereby avoid the immunity issue, *e.g.*, Security Fire Door Co. v. County of Los Angeles, 484 F.2d 1028 (9th Cir. 1973).

96. *See generally* Handler, *Antitrust—1978*, 78 COLUM. L. REV., 1363, 1378-83 (1978); 1 AREEDA & TURNER, ¶ 211, *supra*, at 66. The Supreme Court has usually referred to the state action immunity as an exemption issue rather than a preemption issue, *e.g.*, New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. at 96; City of Lafayette v. Louisiana Power & Light Co., 435 U.S. at 414; Bates v. State Bar of Ariz., 433 U.S. at 362-63; Cantor v. Detroit Edison Co., 428 U.S. at 596-598; Goldfarb v. Virginia State Bar, 421 U.S. at 786-787.

97. U.S. CONST. art. VI, cl. 2.

98. Preemption by occupation may occur either because an activity is inherently appropriate for federal control and inherently inappropriate for state control (even if Congress has not in fact legislated as to that activity), or because preemption is expressly mandated by federal statute, or because federal coverage of the area by statute and regulation is so pervasive that no room is left for state control, *e.g.*, Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978); Florida Lime & Avacado Growers, Inc. v. Paul, 373 U.S. 132, 141 (1963); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

99. *See generally* Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978); Perez v. Campbell, 402 U.S. 637 (1971); Huron Cement Co. v. City of Detroit, 362 U.S. 440 (1960); Hines v. Davidowitz, 312 U.S. 52 (1941).

preemption is not to be lightly inferred, and the courts generally avoid finding preemption if possible[100]—thus, the assertion in *Parker* that: "In a dual system of government . . . an unexpressed purpose to nullify a state's control over its officers is not lightly to be attributed to Congress."[101] Some state statutes which may have anticompetitive effects are preempted by the Sherman Act and others are not.[102] The exemption from the Sherman Act by the *terms* of a state statute is preempted.[103] Thus, the *Parker* Court noted 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."[104] *Parker* has been interpreted to mean that a state statute may not, by its terms "determine the extent to which a particular government agency under its control should be exempt from the provisions of the Sherman Act."[105]

The application of principles of federalism in determining whether a state statute is preempted has varied over the years. Recently, this application has apparently been shifting in favor of the states.[106]

Exemption, on the other hand, relates to the relationship between the laws of *one* sovereign[107] and results, in the antitrust context, in frequent assertions that "repeals of the antitrust laws by implication . . . are strongly

100. *See e.g.*, Exxon Corp. v. Governor of Md., 437 U.S. 117, 132, *rehearing denied*, 439 U.S. 884 (1978).

101. 317 U.S. at 351.

102. The Court in New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. at 111, cited the following language from Exxon Corp. v. Governor of Md., 437 U.S. 117, 133, *rehearing denied*, 439 U.S. 884 (1978): "[I]f an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the State's power to engage in economic regulation would be effectively destroyed." On the other hand, note the assertion in *Cantor* that: "The mere possibility of conflict between state regulatory policy and federal regulatory policy is insufficient basis for implying an exemption from the federal antitrust laws." 428 U.S. at 596.

103. Schwegmann Bros. v. Calvert Corp., 341 U.S. 384 (1951). *See also* Note, *The Application of Antitrust Laws to Municipal Activities*, 79 COLUM. L. REV. 518, 529-30 (1978).

104. 317 U.S. at 351. *See also* California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. at 106; Goldfarb v. Virginia State Bar, 428 U.S. at 600; Northern Sec. Co. v. United States, 193 U.S. 197 (1904); Star Lines, Ltd. v. Puerto Rico Maritime Ship. Auth., 451 F. Supp. 157, 166 (S.D.N.Y. 1978).

105. Star Lines, Ltd. v. Puerto Rico Maritime Ship. Auth., 451 F. Supp. 157, 166 (S.D.N.Y. 1978).

106. *See generally* B. MEZINES, J. BASIL, ADMINISTRATIVE LAW §§ 2.01-2.03 (1980); *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 639-653 (1975).

107. A substantially increased federal role in the proprietary activities of the airport operators could transform the antitrust analysis for airport operations into an exemption analysis. For example, if the Federal Aviation Administration (FAA) allocated takeoff and landing slots among the carriers at the busier airports (*see* discussion note 211 and accompanying text *infra*), this allocation function, rather than being subjected to the state action preemption analysis, would undergo an exemption analysis which would weigh the FAA's actions against the national competition policy.

disfavored."[108] The exemption doctrine is the source of the statements in *Cantor* and *Lafayette* that exemptions from the antitrust laws are implied only after "first determining that exemption was necessary in order to make the regulatory Act work and even then only to the minimum extent necessary."[109]

For state action "immunity," a preemption analysis is more appropriate than an exemption analysis for several reasons. First, the basic presumptions in a preemption analysis support the principles of federalism described in *Parker*.[110] A preemption analysis presumes that state action will *not* be preempted by the Sherman Act, while an exemption analysis, as stated in *Cantor* and *Lafayette*, presumes that exemption is granted only *when* necessary, and then only to the *extent* necessary. Thus, once an action meets the demanding tests for being "state" action for this purpose, it obtains antitrust immunity under a preemption analysis; under an exemption analysis, on the other hand, there is no theoretical reason why the mere fact of being "state" action would or should excuse it from the *Cantor* "exempt when and only to the extent necessary" standard.

Second, the concept of federalism reflects a view of state sovereignty which suggests a presumption that the states will act responsibly. As to a state action for which a state has a valid interest in regulating or displacing competition with monopoly public service, such a presumption should theoretically preclude any federal analysis into the competitive aspects of the *basic* state scheme[111] and should render generally inappropriate a federal "when and only to the extent necessary" inquiry. This "when and only to the extent necessary" test is inherent to an exemption analysis, but would not arise in a preemption analysis. The cases from which this test was taken[112] all relate to conflicts between the antitrust laws and *federal* regulatory schemes. The casual extension of this concept to a conflict between the antitrust laws and *state* regulatory schemes was protested by the dissent in *Cantor*[113] and prompted the warning by Areeda and Turner against "applying standards developed for accomplishing accommodation within

108. *See, e.g.*, City of Lafayette v. Louisiana Power & Light Co., 435 U.S. at 398; Goldfarb v. Virginia State Bar, 421 U.S. at 787; United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350 (1963).

109. 428 U.S. at 597; 435 U.S. at 426.

110. *See* Handler, *Antitrust—1978*, 78 COLUM. L. REV. 1363, 1378-83 (1978).

111. As to the implementing details, on the other hand, *see* discussion note 130 and accompanying text *infra*.

112. The *Cantor* Court, 428 U.S. at 596-97, quoted the test from Otter Tail Power Co. v. United States, 410 U.S. 366, 389 (1972), which was in turn quoting from Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963). In support of this statement the Court also cited United States v. National Ass'n of Sec. Dealers, 422 U.S. 694, 719-720 (1975); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); United States v. Bordon Co., 308 U.S. 188, 197-206 (1939).

113. 428 U.S. at 629.

the federal system to the very different context of federal/state conflict."[114]

Finally, the results of the cases fit better into a preemption framework than into an exemption framework. For example, contrary to the "exempt when and only to the extent necessary" test, it is clear from *Bates* that minimal impact of the basic state scheme upon competition is not a requirement for state action antitrust immunity.[115] Moreover, the activities conducted by municipalities as such are not afforded as much deference for antitrust immunity purposes as action by states. Affording greater deference to the states than to municipalities is theoretically more justified under a preemption analysis than under an exemption analysis.[116]

Accordingly, the phrase state action "immunity" is used in this article, because of its widespread use, although it refers to what actually results from a preemption analysis.

b. *State action*. Because the protection from preemption which is provided by principles of federalism applies only to "state" action, an activity is entitled to antitrust "immunity"—protection from preemption—only if that activity is sufficiently clothed with the indicia of state participation and control to become "state" action for this purpose. In broad terms, the recent Supreme Court cases suggest that the standards for state-sanctioned activities by private parties, or for proprietary activities conducted by government entities other than the state itself,[117] to be "state" action for the purpose of the state action immunity, are:

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114. 1 AREEDA & TURNER, ¶214a *supra*, at 83 note 11; Handler, *Antitrust—1978*, 78 COLUM. L. REV. 1363, 1378 (1978). As to the *implementing details* of the scheme, on the other hand, principles of federalism would *not* preclude an application of the "when and only to the extent necessary" standard. *See* discussion note 130 and accompanying text *infra*.

115. In particular, the Court was not concerned that "the advertising ban is not tailored so as to intrude upon the federal interest to the minimum extent necessary." 433 U.S. at 361. Also, with respect to attorney advertising, *see* Foley v. Alabama State Bar, [1980-2] TRADE CASES (CCH) ¶ 63,396 (N.D. Ala. 1979). Prior to *Bates*, of course, this result was also apparent from the facts in *Parker*, and a fact situation analogous to *Parker* appeared subsequent to *Bates* in Hinshaw v. Beatrice Foods, Inc., [1980-81] TRADE CASES (CCH) ¶ 63,584 (D. Mont. 1980).

116. Even under a preemption analysis, however, the different levels of deference may remain only theoretical. The plurality in *Lafayette* discusses this issue in a non-preemption context, 435 U.S. at 411-13, and dictum in several preemption cases implies that state statutes and municipal ordinances are due the same degree of deference, *e.g.*, City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973); Huron Cement Co. v. City of Detroit, 362 U.S. 440 (1960); Chase v. McMasters, 573 F.2d 1011 (8th Cir.), *cert. denied*, 439 U.S. 965 (1978); Rogers v. Larson, 563 F.2d 617 (3d Cir. 1977); United States v. City of New Haven, 496 F.2d 452 (2nd Cir.), *appeal dismissed*, 419 U.S. 958 (1974); DeKalb County, Ga. v. Henry C. Beck Co., 382 F.2d 992 (5th Cir. 1967); United States v. City of Pittsburgh, 467 F. Supp. 1080 (N.D. Cal. 1979); 515 Assoc. v. City of Newark, 424 F. Supp. 984 (D.N.J. 1977); but no case was found which *holds* that municipal ordinances are or are not entitled to the same deference as state statutes for preemption purposes, and there is little likelihood that a comparative situation would be presented in one case to result in such a holding.

117. *See* discussion note 87 and accompanying text *supra*.

1. The state must have a valid interest in displacing competition with regulation or monopoly public service as to the activity;
2. The State's policy to displace competition with regulation or monpoly public service as to the activity must be clearly articulated and affirmatively expressed; and
3. The activity must be actively supervised by the state.[118]

The first standard, although discussed in some of the state action cases,[119] presents the most difficult federalism policy issues of the three standards and is generally not discussed in cases in which the other standards were not met, *e.g.*, *Midcal, Lafayette, Cantor, and Goldfarb*. As a result of principles of federalism, this test does not require a state to show that it *must* displace competition; only that it has a *valid interest* in displacing competition as to the activity.[120] Use of a "valid interest" test rather than a "must" test, *i.e.*, rather than the *Cantor* "exempt when and only to the extent necessary" test, on this standard avoids the use of an exemption standard in a preemption context, and substantially responds to the concern expressed in the dissenting opinion in *Lafayette* about the "wide-ranging [federal] inquiry into the reasonableness of state regulations."[121]

The second standard will often be difficult to apply because many state statutes do not specifically address the competitive aspects and few states have legislative histories. This standard reflects the fact that the state must clearly intend the general activity, and the intent may be shown if, for example, the activity is compelled, as required in *Goldfarb*,[122] or "authorized or directed," as required in *Lafayette*.[123] This should not, however, be taken

118. For sovereign activities conducted by the state, the standards are slightly different: (1) the state must have a valid interest in the activity; (2) the state's scheme must be clearly articulated and affirmatively expressed; and (3) the activity must be actively supervised by the State. *See* discussion note 184 and accompanying text *infra*.

119. *See*, Bates v. State Bar of Ariz., 433 U.S. 362; New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. at 100-103; Mobilefone of N.E. Pa., Inc. v. Commonwealth Tel. Co., 571 F.2d 141, 144 (3rd Cir. 1978); Guthrie v. Genesee County, N.Y., 494 F. Supp. 950, 956 (W.D.N.Y. 1980); Glenwillow Landfill, Inc. v. City of Akron, 485 F. Supp. 671, 676 (N.D. Ohio 1979); Beckenstein v. Hartford Elec. Light Co., 479 F. Supp. 417, 421 (D. Conn. 1979); Northeastern Tel. Co. v. AT&T, 477 F. Supp. 251, 263 (D. Conn. 1978).

120. *See*, Bates v. State Bar of Ariz., 433 U.S. at 361.

121. 435 U.S. at 439.

122. 421 U.S. at 791. Some of the more recent lower court cases have, however, treated "compulsion" as a requirement rather than as one basis from which intent may be inferred, *e.g.*, Sound, Inc. v. AT&T, 631 F.2d 1324 (8th Cir. 1980); City of Fairfax v. Fairfax Hosp. Ass'n, 562 F.2d 280, 284 (4th Cir. 1977); Northeastern Tel. Co. v. AT&T, 497 F. Supp. 230, 237-38 (D. Conn. 1980); Litton Sys., Inc. v. AT&T, 487 F. Supp. 942, 958-59 (S.D.N.Y. 1980); United States v. Southern Motor Carriers Rate Conf., Inc., 467 F. Supp. 471, 481-83 (N.D. Ga. 1979); City of Groton v. Connecticut Light & Power Co., 456 F. Supp. 360, 369 (D. Conn. 1978); Star Lines, Ltd. v. Puerto Rico Maritime Ship. Auth., 451 F. Supp. 157, 167 (S.D.N.Y. 1978).

123. 435 U.S. at 413; *see also* United States v. Texas State Bd. of Public Accountancy, 464 F. Supp. 400 (W.D. Tex. 1978), *aff'd as modified*, 592 F.2d 919 (5th Cir.), *cert. denied*, 444 U.S. 925 (1979).

by state legislatures as an invitation to legislatively authorize, direct, or compel anticompetitive activities. Such legislation, if not carefully drawn, may not only be unhelpful in attempting to provide immunity, it may in fact precipitate a preemption confrontation.[124]

The clear intent test should be applied only to the basic scheme, but not to the specific implementing acts.[125] As several courts have indicated, the legislature need only contemplate the *type* of activity in order for the immunity to be available.[126] This is a desirable result because state legislatures rarely address, and for sound reasons of public policy should not generally address, the day-to-day operating details of a government proprietary activity. Again, therefore, the *Cantor* "when and only to the extent necessary" standard is inappropriate in this context. For basic schemes that are essential to the state, there is disagreement as to whether the state should nonetheless have to "clearly articulate" its intent in order for the activity to be immune.[127]

Directing the intent test toward the general and away from the specifics does not, however, leave free reign as to the specifics.[128] Thus, for example, a state statute allowing the government proprietor to *have* a monopoly would not constitute authority to *abuse* the monopoly.[129] Rather, the specific activities, assuming they will not normally be legislatively mandated, should be subject to a loosely applied *Cantor* "exempt when and only to the extent necessary" test.[130] So applied, this *Cantor* test would be ap-

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124. *See, e.g.*, Star Lines, Ltd. v. Puerto Rico Maritime Ship. Auth., 451 F. Supp. 157 (S.D.N.Y. 1978). *But see* Hinshaw v. Beatrice Foods Inc., [1980-81] TRADE CASES (CCH) ¶ 63,584 (D. Mont. 1980).

125. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. at 415; Princeton Community Phone Book, Inc. v. Bate, 582 F.2d 706, 717 (3d Cir.), *cert. denied*, 439 U.S. 966 (1978); Northeastern Tel. Co. v. AT&T, 477 F. Supp. 251 (D. Conn. 1978); Mason City Crt. Assoc. v. City of Mason City, 468 F. Supp. 737 (N.D. Iowa 1979).

126. *See, e.g.*, City of Lafayette v. Louisiana Power & Light Co., 435 U.S. at 414; Princeton Community Phone Book, Inc. v. Bate, 582 F.2d 706, 717-19 (3d Cir.), *cert. denied*, 439 U.S. 966 (1978); Guthrie v. Genesee County, N.Y., 494 F. Supp. 950, 956-57 (W.D.N.Y. 1980); Caribe Trailer Sys. v. Puerto Rico Maritime, 475 F. Supp. 711, 721-22 (D.D.C. 1979); Star Lines, Ltd. v. Puerto Rico Maritime Ship. Auth., 451 F. Supp. 157, 166 (S.D.N.Y. 1978).

127. *See* Mr. Justice Blackmun's concurring opinion in Cantor v. Detroit Edison Co., 428 U.S. at 610. Compare 1 AREEDA & TURNER ¶ 213c, *supra* at 75, with Handler, *Antitrust—1978*, 78 COLUM. L. REV. 1363, 1378 (1978). *See also* United States v. Southern Motor Carriers Rate Conf., Inc., 467 F. Supp. 471, 484 (N.D. Ga. 1979).

128. In Pinehurst Airlines, Inc. v. Resort Air Serv., Inc., 476 F. Supp. 543, 552 (M.D.N.C. 1979), the court stated: "[A]lthough a particular area of activity may be directed or authorized by the state, the actual implementation of that authorization or direction can fall outside of that which the legislature intended and thus not be covered by the *Parker* doctrine."

129. *See* City of Lafayette v. Louisana Power Light Co., 435 U.S. 389 (1978); Duke & Co. v. Foerster, 521 F.2d 1277 (3d Cir. 1975); Star Lines, Ltd. v. Puerto Rico Maritime Ship. Auth., 451 F. Supp. 157 (S.D.N.Y. 1978); *but see* City of Mishawaka, Ind. v. American Elec. Power Co., 616 F.2d 976 (7th Cir. 1980).

130. It has been stated that the "when and only to the extent necessary" standard was appro-

proximately equivalent to a "least anticompetitive" test. As long as the basic schemes are selected by the state and are not subject to the "least anticompetitive" test, requiring the states to consider the competitive impacts and to select one of the less anticompetitive methods to implement their basic schemes would pose no problems of federal intrusion into state functions.[131]

Contrary to suggestions drawn from *Cantor* that private initiation of a scheme may be fatal to antitrust immunity, this standard does not depend upon who initiates a scheme, but upon the extent of state analysis in considering and approving it. Thus, for example, if the state agency would not have approved a contrary plan, the fact that the plan was privately conceived is irrelevant.[132]

As to the third standard, active state supervision of an activity indicates either that the state is continually aware of the details, and conditions have not justified the withdrawal of its approval (for approval functions); or that the state maintains active oversight as to those activities for which regulation or monopoly public service displaces competition (for oversight functions). This supervision is essential to assure that the displacement of competition is not proceeding without close state involvement and continuous approval.

B. Relationship to Usery

Two years before *Lafayette* the Supreme Court decided *National League of Cities v. Usery*,[133] in which the issue was whether state and local employees could be covered by the minimum wage provisions of the

priate in the *Cantor* fact situation, 1 Areeda & Turner, ¶ 214a, *supra*, at 83 note 11. *See also* Northeastern Tel. Co. v. AT&T, 477 F. Supp. 251, 264 (D. Conn. 1978); Caribe Trailer Sys. v. Puerto Rico Maritime, 475 F. Supp. 711, 722 (D.D.C. 1979); Interconnect Planning v. AT&T, 465 F. Supp. 811, 813 (S.D.N.Y. 1978). If the test is applied loosely, this statement is correct. However, a comprehensive and detailed analysis to determine the least anticompetitive method from among several methods of approximately equivalent competitive impact would be the type of federal intrusion feared by the dissent in *Lafayette*, 435 U.S. at 439.

131. To some extent, even a loose application of the "least anticompetitive" test would undercut a basic premise of federalism, which is that states will act responsibly. However, the strength of the federal policy favoring competition justifies "warning" in advance that responsible competitive behavior is expected as to the implementing details, rather than waiting to see whether responsible competitive behavior will occur. Moreover, although not directly relevant in a preemption context, a loosely applied "least anticompetitive" test is also useful as a threshold matter because there is no federal-state conflict, and therefore no problem with granting the state action immunity, if the state's valid regulatory interest is being implemented in one of the less anticompetitive ways, *e.g.*, Cantor v. Detroit Edison Co., 428 U.S. at 595.

132. *See*, *e.g.*, North v. New York Tel. Co., [1980-81] Trade Cases (CCH) ¶ 63,675 (S.D.N.Y. 1980); Hinshaw v. Beatrice Foods, Inc., [1980-81] Trade Cases (CCH) ¶ 63,584 (D. Mont. 1980); Northeastern Tel. Co. v. AT&T, 477 F. Supp. 251, 264 (D. Conn. 1978).

133. 426 U.S. 833 (1976).

(federal) Fair Labor Standards Act.[134] The divided (5-4) Supreme Court held that the ability of local governments to determine the wages of their employees is essential to the ability of those local governments to handle their affairs, and that:

> This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution. We hold that insofar as the challenged [Fair Labor Standards Act] amendments operate to directly displace the State's freedom to structure integral operations in areas of traditional government functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3.[135]

Concern has been expressed that *Lafayette* conflicts with *Usery*.[136] In his concurring opinion in *Lafayette*, Chief Justice Burger stated that *Lafayette* presented no conflict with *Usery* because *Usery* applied, by its terms, only to the "State's freedom to structure integral operations in areas of traditional government functions,"[137] while the operation of a business enterprise, or at least the operation of the electric utility in *Lafayette*, "is not an integral operation in the area of traditional government functions."[138] This response erroneously equates the traditional/non-traditional distinction with the sovereign/proprietary distinction and fails to recognize that many business enterprises, such as airports, have historically been operated by government entities[139] and are therefore traditional government functions for *Usery* purposes.[140]

It is submitted here that there is no conflict between *Lafayette* and *Usery*, irrespective of whether proprietary functions constitute traditional government functions. The state action immunity doctrine developed by

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134. 29 U.S.C. § 201 (1976 & Supp. II 1978) (original version at ch. 676, 52 Stat. 1060 (1938)). The inclusion of state and local employees resulted from the 1974 amendments to the Act, Pub. L. No. 93-259, 88 Stat. 62.

135. 426 U.S. at 852.

136. *See* Note, *The Application of Antitrust Laws to Municipal Activities*, 79 COLUM. L. REV. 518, 535-37 (1979); Davidson & Butters, *Parker and Usery, Constitutional Limits on the Federal Interdiction of Anticompetitive State Action*, 31 VAND. L. REV. 575 (1978) [hereinafter cited as Davidson & Butters].

137. 426 U.S. at 852.

138. 435 U.S. at 424.

139. *See* Amersbach v. City of Cleveland, 598 F.2d 1033, 1037 (6th Cir. 1979), which held that "operation of the [airport] is an integral governmental function within the meaning of [*Usery*]." Because the traditional/non-traditional distinction is not equivalent to the sovereign/proprietary distinction, this decision is not inconsistent with decisions which rely upon the proprietary nature of airport operations, *e.g.*, City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973), and other cases cited note 219 *infra* (sovereign/proprietary distinction in relation to state's police power); and *see* cases cited in note 153 *infra* (sovereign/proprietary distinction in relation to *Noerr-Pennington* immunity).

140. *Usery* was also discussed in *Lafayette* in relation to whether municipalities as such are sovereign—the dissent said they are, 435 U.S. at 430, citing *Usery* at 426 U.S. at 855 n.20; and the plurality said they are not, 435 U.S. at 412 n.42.

Parker and its progeny relates to preemption[141]—the supremacy of federal law over state law—and federalism—including the applicational principle that preemption is not to be lightly inferred—and is based upon the premise that Congress *could* occupy the field and preempt state law if it desired.[142] *Usery*, on the other hand, relates to *whether* Congress may preempt state law and concludes, also applying principles of federalism, that the Commerce Clause[143] does not give Congress the authority to enact statutes which "operate to directly displace the States' freedom to structure integral operations in areas of traditional government functions."[144]

The absence of conflict between the two therefore results from the fact that the *Usery* analysis and the state action immunity analysis can only be applied sequentially, *i.e.*, the latter is applied to a given situation only if the former leads to the conclusion that Congress *can*, if it desires, exercise its commerce clause authority and preempt state laws as to that situation. Moreover, in an antitrust context, a *Usery* analysis will almost always lead to the conclusion that Congress can preempt state law because the likelihood is slim, as a practical matter, that any reasonably foreseeable scenario of federal control over the competitive aspects of state activities would be so intrusive as to rise to the level of "directly displac[ing] the State's freedom to structure integral operations in areas of traditional government functions"[145] under the stringent tests established in *Usery*.[146]

C. Relationship to the Noerr-Pennington Doctrine

The Noerr-Pennington doctrine relates in general terms to the potential antitrust liability of private enterprises for influencing a legislature or government entity to take actions which may cause economic injury to other private enterprises. This general issue was decided by the Supreme Court in *Eastern Railway Conference v. Noerr Motor*,[147] and *Mine Workers v. Pen-*

141. The view that *Parker* is not a preemption case is expressed in Davidson & Butters, *supra* note 136, at 598.

142. In *Parker*, the Supreme Court "assume[d] . . . without deciding, that Congress could, in the exercise of its commerce power, prohibit a state from maintaining [the program sued upon]." 317 U.S. at 350. The premise that the federal statute is valid would clearly also be implicit even if state action immunity derived from an exemption analysis.

143. U.S. Const. art. I, § 8, cl. 3.

144. 426 U.S. at 852.

145. *Id.* at 853.

146. *But see* Jordan v. Mills, 473 F. Supp. 13, 19 (E.D. Mich. 1979), in which the operation of the state prison store was "immune [from antitrust scrutiny] under *Usery*." Although the *Usery* doctrine is not an appropriate conceptual basis for granting immunity from a federal statute, the *Jordan* result probably typifies the strength of many traditional state functions against antitrust attack, which in turn reduces the likelihood of attempts at overly intrusive federal control with respect to such activities.

147. 365 U.S. 127 (1961).

nington.[148] In *Noerr*, the Supreme Court held that the lobbying and publicity campaign by railroad representatives seeking to obtain the passage and enforcement of laws that were injurious to the trucking industry was not a Sherman Act violation. The Court held that their activity must be immune from antitrust scrutiny in order to preserve the lines of communication between the citizens and their elected representatives, and in order to avoid possible conflicts with the First Amendment right to petition. In *Pennington*, relating to an alleged conspiracy to force small coal companies out of business by lobbying the Secretary of Labor to obtain certain wage and purchasing policies for the Tennessee Valley Authority, the Supreme Court added that such lobbying efforts are not an antitrust violation even if they are conducted with the specific intent of eliminating competition.

Taken together, these cases established what is commonly referred to as the *Noerr-Pennington* doctrine.[149] As a result of *California Transport v. Trucking Unlimited*,[150] the immunity is generally considered also to apply to attempts to influence administrative processes.

The *Noerr-Pennington* doctrine is mentioned here only for the purpose of noting that, insofar as this analysis is concerned, the doctrine is not affected by the developments as to state action immunity.[151] Thus, the state action immunity developments do not alter the fact that less antitrust deference is shown for lobbying of a "local municipal body acting on a nonlegislative capacity" (such as the operators of most major airports) than for attempts to influence the state legislature,[152] or the fact that lobbying by a private enterprise of a government proprietary enterprise concerning a commercial relationship between them is not generally entitled to *Noerr-Pennington* immunity.[153]

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148. 381 U.S. 657 (1965).

149. Unlike the state action "immunity," the *Noerr-Pennington* doctrine is, strictly speaking, an immunity.

150. 404 U.S. 508.

151. In broader terms, however, the *Noerr-Pennington* doctrine may be affected by changes in the boundaries of the state action immunity. This development can be traced to careless application of the statement in California Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 515 (1972), that, "[i]f the end result is unlawful, it matters not that the means used in violation may be lawful." Based upon this broad language, some courts have suggested that lobbying for an activity that does not enjoy the state action antitrust immunity may not be entitled to the *Noerr-Pennington* immunity, *e.g.*, Duke & Co. v. Foerster, 521 F.2d 1277 (3d Cir. 1975); In re Airport Car Rental Antitrust Litigation, 474 F. Supp. 1072 (N.D. Cal. 1979). Because of the tremendous uncertainty concerning the boundaries of the state action antitrust immunity, and because this uncertainty is often resolved only by litigation after the fact, linking *Noerr-Pennington* to *Parker* in this fashion will have a very unfortunate and unnecessary chilling effect upon lobbying activities. Conditioning one immunity upon the other effectively shifts from the government agency to the prospective lobbyists the decision as to whether an activity would qualify for *Parker* immunity.

152. In re Airport Car Rental Antitrust Litigation, 474 F. Supp. 1072 (N.D. Cal. 1979).

153. George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 85 (1970), *remanded*, 376 F. Supp. 125 (D. Mass.), *aff'd*, 508 F.2d 547 (1st

IV. Application of State Action Immunity To Airport Operators

A. Legal Framework

The various legal constraints which apply to airport operators must be set forth as background for considering the availability of antitrust immunity for airport operators.

1. *Federal (Non-Antitrust) Constraints*

All of the major airports to which this article applies are recipients of federal airport development funds and are therefore subject to the legal constraints imposed by section 308(a) of the Federal Aviation Act of 1958, as amended, which provides, in pertinent part: "There shall be no exclusive right for the use of any landing . . . facility upon which Federal funds have been expended."[154] The phrase "any landing area or air navigation facility" in section 308(a) has been held to apply, for example, to airport ramp and hangar space[155] but not to ground transportation concessions.[156] In an interpretation of "exclusive right" in section 303 of the Civil Aeronautics Act of 1938,[157] which is the predecessor of the language in section 308(a) of the Federal Aviation Act, the U.S. Attorney General has stated that this exclusive use proscription not only prohibits the exclusion of any class of user, it also prohibits the exclusion of users within any class of airport user. The Attorney General stated that this interpretation "is confirmed by the legislative history which shows that the purpose of the provisions is to prohibit monopolies and combinations in restraint of trade or commerce and to promote and encourage competition in civil aeronautics in accordance with the policy of the [Civil Aeronautics Act of 1938]. . . ."[158] The Federal Aviation Administration (FAA) has interpreted section 308(a) to prohibit the exclusion of users except as necessitated by complete and immediate use of all available space by the existing users.[159] The FAA requires assurances of compliance with section 308(a) from recipients of federal airport development funds.[160]

Cir.), *cert. denied*, 421 U.S. 1004 (1974); In re Airport Car Rental Antitrust Litigation, 474 F. Supp. 1072 (N.D. Cal. 1979).

154. 49 U.S.C. § 1349(a) (1976).

155. *See* Niswonger v. American Aviation, Inc., 411 F. Supp. 769 (E.D. Tenn.), *aff'd mem.*, 529 F.2d 526 (6th Cir. 1975).

156. Continental Bus Systems, Inc. v. City of Dallas, 386 F. Supp. 359 (N.D. Tex. 1974).

157. Act of June 23, 1938, ch. 601, 52 Stat. 973.

158. 40 Op. Att'y Gen. 71 (1941).

159. *See* 27 Fed. Reg. 7055 (1962); 30 Fed. Reg. 13661 (1965); Exclusive Rights at Airports, FAA Advisory Circular AC 150/5190-2A.

160. The "Sponsor Assurances" in the grant agreement which must be executed by recipients of airport development funds under the Airport and Airway Development Act of 1970, 91 Pub. L. No. 258, 84 Stat. 219 (current version at 49 U.S.C. § 1711 (1976 & Supp. III 1979)), include the following provisions:

In addition, section 18(a)(1) of the Airport and Airway Development Act of 1970 requires an airport to assure the Secretary of Transportation, as a condition precedent to the Secretary's approval of an airport development project, that the airport "will be available for public use on fair and reasonable terms and without unjust discrimination."[161] Although this provision has been construed to apply only to the access by air carriers and fixed-based operators, it is broader than section 308(a) because air carrier access includes all access required by air carrier passengers, such as ticket counter, gate, and baggage space (even though federal funds are not generally expended on these facilities). As with section 308(a), however, this provision does not apply to ground transportation or to on-site concessions other than fixed-based operators.[162]

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19. The Sponsor—

a. Will not grant or permit any exclusive right forbidden by Section 308(a) of the Federal Aviation Act of 1958 (49 U.S.C. 1349(a)) at the Airport, or at any other airport now owned or controlled by it;

b. Agrees that, in furtherance of the policy of the FAA under this covenant, unless authorized by the Administrator, it will not, either directly or indirectly, grant or permit any person, firm or corporation the exclusive right at the Airport, or at any other airport now owned or controlled by it, to conduct any aeronautical activities, including, but not limited to charter flights, pilot training, aircraft rental and sightseeing, aerial photography, crop dusting, aerial advertising and surveying, air carrier operations, aircraft sales and services, sale of avaiation petroleum products whether or not conducted in conjuction with other aeronatuical activity, repair and maintenance of aircraft, sale of aircraft parts, and any other activities which because of their direct relationship to the operation of aircraft can be regarded as an aeronautical activity.

c. Agrees that it will terminate any existing exclusive right to engage in the sale of gasoline or oil, or both, granted before July 17, 1962, at such an airport, at the earliest renewal, cancellation, or expiration date applicable to the agreement that established the exclusive right; and

d. Agrees that it will terminate any other exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under the Airport and Airway Development Act. . . .

21. Nothing contained herein shall be construed to prohibit the granting or exercise of an exclusive right for the furnishing of nonaviation products and supplies for any service of a nonaeronautical nature or to obligate the Sponsor to furnish any particular nonaeronautical service at the Airport.

161. 49 U.S.C. § 1718(a)(1) (1976).

162. The "Sponsor Assurances" in the grant agreement which must be executed by recipients of airport development funds under the Airport and Airway Development Act of 1970 include the following provisions:

18. The Sponsor will operate the Airport as such for the use and benefit of the public. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically agrees that it will keep the Airport open to all types, kinds, and classes of aeronautical use on fair and reasonable terms without discrimination between such types, kinds, and classes. Provided; That the Sponsor may establish such fair, equal, and not unjustly discriminatory conditions to be met by all users of the Airport as may be necessary for the safe and efficient operation of the Airport; And Provided Further, That the Sponsor may prohibit or limit any given type, kind, or class of aeronautical use of the Airport if such action is necessary for the safe operation of the Airport or necessary to serve the civil aviation needs of the public. . . .

20. The Sponsor agrees that it will operate the Airport for the use and benefit of the public, on fair and reasonable terms, and without unjust discrimination. In furtherance of

No court has yet opined as to whether these statutory provisions may be construed so broadly as to provide the FAA with the authority to "prohibit monopolies and combinations in restraint of trade or commerce and to promote and encourage competition in civil aeronautics" as suggested in the Attorney General's Opinion.[163] Nonetheless, the federal mandates against exclusionary or discriminatory use, and the encouragement of more competition in air commerce in, among other places, section 3(a) of the Airline Deregulation Act of 1978,[164] clearly militate against activities by airport operators which adversely affect competition in the aeronautical and related activities at the airport.[165]

2. Non-Federal Constraints

On the state and local levels, the state usually provides the airport operator with a broad mandate, by legislation or otherwise, to conduct the airport affairs in a manner which best serves the public interest, with general powers to operate and maintain the airport, negotiate and enter into contracts, fix terms, conditions, and charges for services and rentals, and engage in other activities as necessary and appropriate. Most such mandates provide that the airport operator's activities must comply with all state and federal laws (including, presumably, the antitrust laws). Specific legislative approval of any type of anticompetitive activity, and specific legislative requirements for any consideration of competition, are rare.

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the covenant (but without limiting its general applicability and effect), the Sponsor specifically covenants and agrees: . . .

b. That in any agreement, contract, lease, or other arrangement under which a right or privilege at the Airport is granted to any person, firm, or corporation to conduct or engage in any aeronautical activity for furnishing services to the public at the Airport, the Sponsor will insert and enforce provisions requiring the contractor:

(1) to furnish said service on a fair, equal, and not unjustly discriminatory basis to all users thereof, and

(2) to charge fair, reasonable, and not unjustly discriminatory prices for each unit or service; Provided, That the contractor may be allowed to make reasonable and nondiscriminatory discounts, rebates, or other similar types of price reductions to volume purchasers.

c. That it will not exercise or grant any right or privilege which would operate to prevent any person, firm, or corporation operating aircraft on the Airport from performing any services on its own aircraft with its own employees (including, but not limited to maintenance and repair) that it may choose to perform.

d. In the event the Sponsor itself exercises any of the rights and privileges referred to in subsection b, the services involved will be provided on the same conditions as would apply to the furnishing of such services by contractors or concessionaires of the Sponsor under the provisions of such subsection b.

163. 40 OP. ATT'Y GEN. 71 (1941). *See* discussion note 158 and accompanying text *supra*.

164. 49 U.S.C. § 1302(a) (Supp. III 1979).

165. This is not necessarily to suggest, however, that these federal statutes provide a private right of action, *see* Guthrie v. Genesee County, N.Y., 494 F. Supp. 950 (W.D.N.Y. 1980).

3. Antitrust Immunity

Because the operators of most major airports are municipalities,[166] and because the operation of an airport is generally considered to be proprietary,[167] it is useful to review here the state action antitrust immunity cases relating to municipalities and to proprietary activities.

a. *Municipalities*. As *Lafayette* made clear, a municipality is not necessarily entitled to the same deference for antitrust purposes as a state.[168] The treatment of municipalities for antitrust purposes has been the subject of extensive comment, especially after *Lafayette*.[169]

Prior to *Goldfarb* there were very few antitrust challenges of municipal activity, and most of the challenges failed on the basis that government activities generally, including regulatory activities, operating a monopoly enterprise, and contracting with private parties, were exempted by *Parker*

166. For the purposes of this article, the term "municipality" is defined at note 5, *supra*.

167. Lockheed Air Terminal, Inc. v. City of Burbank, 411 U.S. 624, 635 n.14 (1973) (in holding that an aircraft curfew for noise purposes could not be imposed by a state in the exercise of its *police* power, the Supreme Court expressly noted that its decision did not apply to the authority of an airport owner as a *proprietor*); Padgett v. Louisville & Jefferson County Air Board, 492 F.2d 1258 (6th Cir. 1974); E.W. Wiggins Airways, Inc. v. Massachusetts Port. Auth., 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966); Pinehurst Airlines, Inc. v. Resort Air Serv., Inc., 476 F. Supp. 543 (M.D.N.C. 1979); In re Airport Car Rental Antitrust Litigation, 474 F. Supp. 1072 (N.D. Calif. 1979); Woolen v. Surtran Taxicabs, Inc., 461 F. Supp. 1025 (N.D. Tx. 1978). *See also* § 105(b)(1) of the Federal Aviation Act, 49 U.S.C. § 1305(b)(1) (1978 Supp. II & 1979 Supp. III) *as amended by* § 4(a) of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1708. *But see* Trans World Assoc., Inc. v. City & County of Denver [1974-2] TRADE CASES (CCH) ¶ 75,293 (D. Colo. 1974); Shrader v. Horton, 471 F. Supp. 1236 (W.D. Va. 1979), *aff'd*, 626 F.2d 1163 (4th Cir. 1980).

168. Murdock v. City of Jacksonville, Fla., 361 F. Supp. 1083, 1091 (M.D. Fla. 1973).

169. *See Municipal Antitrust Liability: Applying City of Lafayette v. Louisiana Power and Light Co.*, 31 BAYLOR L. REV. 563 (1979); *Antitrust—Municipal Immunity—Application of the Sate Action Doctrine to Municipalities*, 1979 WIS. L. REV. 570; *Antitrust Liability of Local Governments*, 3 ALI-ABA COURSE MATERIALS 69 (1979); Note, *The Application of Antitrust Laws to Municipal Activities*, 1979 COLUM. L. REV. 518; Bangasser, *Exposure of Municipal Corporations to Liability for Violation of the Antitrust Laws: Antitrust Immunity After the City of Lafayette Decision*, 11 URB. LAW. vii (1979); *Lafayette v. Louisiana Power and Light Co.—The State Action Doctrine and Municipalities*, 1979 DET. C. L. REV. 299; *Antitrust—Municipalities are Exempt from Antitrust Statutes Only When Their Respective State Legislature Authorizes or Contemplates That They Engage in the Anticompetitive Conditions Pursuant to a State Policy to Displace Competition*, 28 DRAKE L. REV. 513 (1978-79); *Antitrust—Whither Antitrust Liability After Lafayette?*, 15 WAKE FOREST L. REV. 89 (1979); *The Erosion of State Action Immunity From the Antitrust Laws: City of Lafayette v. Louisiana Power & Light Co.*, L. REV. 165 (1978); *Antitrust Law—Municipal Corporations—Even When Acting as Agents of the State, Cities are Not Automatically Immune from Federal Antitrust Laws Under the State-Action Exemption Doctrine*. 47 U. CIN. L. REV. 469 (1978); *Federal Antitrust Immunity: Exposure of Municipalities to Treble Antitrust Damages Sets Limit for New Federalism: City of Lafayette v. Louisiana Power & Light Co.*, 11 CONN. L. REV. 126 (1978); Note, *Antitrust Law and Municipal Corporations: Are Municipalities Exempt From Sherman Act Coverage Under the Parker Doctrine?*, 65 GEO. L.J. 1547 (1977); *The Antitrust Liability of Municipalities Under the Parker Doctrine*, 57 B.U.L. REV. 368 (1977).

from antitrust scrutiny.[170] In some instances, the courts noted that antitrust immunity cannot casually be extended to all government bodies and activities,[171] and immunity was generally denied in more extreme cases, such as when the government entity was influenced by a private party to modify the bidding specifications to allow the private party to win the competitive bid.[172] Allegations of government conspiracy with private persons have always been detrimental to a claim of immunity.[173]

After *Lafayette*, the number of antitrust cases against municipalities increased substantially, and immunity was no longer automatic.[174] In some cases the immunity was granted on the basis that the state legislature contemplated that implementing the basic scheme might entail anticompetitive activities.[175] In other cases the immunity was not granted because the stat-

170. *See* LaDue Local Lines, Inc. v. Bi-State Dev. Agency, 433 F.2d 131 (8th Cir. 1970); E.W. Wiggins Airways, Inc. v. Massachusetts Port. Auth., 362 F.2d 52, 56 (1st Cir.) ("[W]e do not reach any question of immunity since there was no attempt on the part of Congress to impose the liability in the first place"), *cert. denied*, 385 U.S. 947 (1966); Continental Bus Sys., Inc. v. City of Dallas, 386 F. Supp. 359 (N.D. Tex. 1974); Metro Cable Co. v. CATV of Rockford, Inc., 375 F. Supp. 350 (N.D. Ill 1974), *aff'd*, 516 F.2d 220 (7th Cir. 1975); Murdock v. City of Jacksonville, Fla., 361 F. Supp. 1083 (M.D. Fla. 1973); Trans World Assoc. v. City & County of Denver, [1974-2] TRADE CASES (CCH) ¶ 75, 293 (D. Colo. 1974).

171. *See* Padgett v. Louisville & Jefferson County Air Board, 492 F.2d 1258 (6th Cir. 1974).

172. George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 30 (1st Cir.) (containing the forerunner of the *Lafayette* test), *cert. denied*, 400 U.S. 85 (1970), *remanded*, 376 F. Supp., 125 (D. Mass.), *aff'd*, 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1974). *See also* Allegheny Uniform v. Howard Uniform Co., 384 F. Supp. 460 (W.D. Pa. 1974).

173. *See* Parker v. Brown, 317 U.S. at 351-2; Whitworth v. Perkins, 559 F.2d 378 (5th Cir.), *reinstated per curiam*, 576 F.2d 696 (5th Cir.), *rehearing denied*, 580 F.2d 1052 (5th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); Kurek v. Pleasure Driveway & Park Dist., 557 F.2d 580 (7th Cir. 1977), *vacated and remanded*, 435 U.S. 992, *remanded*, 583 F.2d 378 (7th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979); Duke & Co. v. Foerster, 521 F.2d 1277 (3d Cir. 1975); Harman v. Valley National Bank of Ariz., 339 F.2d 564 (9th Cir. 1964); Cedar-Riverside Assoc., Inc. v. United States, 459 F. Supp. 1290 (D. Minn.), *aff'd* 660 F.2d 254 (8th Cir. 1979); Azzaro v. Town of Branford [1974-2] Trade Cases (CCH) ¶ 75,337 (D. Conn. 1974).

174. According to a Deputy Assistant Attorney General for the Antitrust Division of the U.S. Department of Justice, the *Lafayette* decision should cause municipalities to exercise more caution in the following areas, among others: (1) any regulatory activity, including occupational licensing and regulation; (2) the operation of sports arenas or convention centers; (3) the provision of water, electric, and other utility services; (4) garbage collection; (5) transit systems, including taxis, (6) public health services; (7) airports; (8) parking lots; (9) procurement practices generally; and (10) zoning. Remarks of Joe Simms, 72nd Annual Conference of Municipal Finance Officers Association (May 15, 1978).

175. Shrader v. Horton, 471 F. Supp. 1236 (W.D. Va.), *aff'd* 1980-2 [Trade Cases] (CCH) ¶ 63,446 (4th Cir. 1980) (operation of public water system); Huron Valley Hosp. v. City of Pontiac, 466 F. Supp. 1301 (E.D. Mich. 1979) (limitation of number of hospitals); City of Mishawaka, Ind. v. American Elec. Power Co., 616 F.2d 976 (7th Cir. 1980) (operation by city of monopoly electric utility); Huron Valley Hosp. v. City of Pontiac, 466 F. Supp. 1301 (E.D. Mich. 1979) (limitation of number of hospitals); Cedar-Riverside Assoc., Inc. v. United States, 459 F. Supp. 1290 (D. Minn. 1978), *aff'd*, 606 F.2d 254 (8th Cir. 1979) (applied *Lafayette* test to hold that statute contemplated monopoly as to urban development project, but then said that the holding in *Lafayette* did

ute did not contemplate anticompetitive activities to implement the basic scheme, and the activity was not essential to the proper operation of the scheme.[176]

In view of these cases, airport operators have been afforded less deference for antitrust purposes than states subsequent to *Lafayette*, consistent with *Princeton Community Phone Book, Inc. v. Bate*,[177] in which the court stated:

> The weaker the relationship between the state and the defendant, the more clearly the state must command the precise action taken by the defendant for the defendant to enjoy the state action exemption. Conversely, the closer the relationship between the state and the defendant, the less clearly the state need command the precise action for the defendant to enjoy the exemption.[178]

In the extreme, of course, a municipality which merely implements detailed instructions from the state would be considered as the state for this purpose,[179] but a municipality with only the broadest of guidelines from the state, such as the operators of most major airports, will not be able to claim the state contemplated the details fo the day-to-day operations unless those operations are inherently essential to the general activity.[180] Accordingly, even if the state contemplates government operation of a monopoly, the state does not necessarily contemplate that the monopoly be operated in a manner that unnecessarily restricts competition.[181]

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not apply because, among other reasons, the activity in *Lafayette* was a profit-making government activity but the activity here was not).

176. Guthrie v. Genesee County, N.Y., 494 F. Supp. 950 (W.D.N.Y. 1980) (exclusive fixed-based operator concession at airport); Pinehurst Airlines, Inc. v. Resort Air Serv., Inc., 476 F. Supp. 543 (M.D.N.C. 1979) (exclusive fixed-based operator concesson at airport); Mason City Center Assoc. v. City of Mason City, 468 F. Supp. 737 (N.D. Iowa 1979) (exclusive permit to construct downtown shopping center); Woolen v. Surtran Taxicabs, Inc., 461 F. Supp. 1025 (N.D. Tex. 1978)(exclusive taxicab franchise at airport).

177. 582 F.2d 706 (3d Cir. 1978).

178. *Id*. at 719.

179. *Lafayette*, 435 U.S. at 412 n.42.

180. Despite the absence of any detail in the "delegation," it has been held, even after *Lafayette*, that home rule charters in which a municipality's powers flow directly from the state constitution may confer the state's sovereignty upon the municipality for this purpose, *e.g.*, Community Communications Co. v. City of Boulder, 630 F.2d 704 (10th Cir. 1980); Glenwillow Landfill, Inc. v. City of Akron, 485 F. Supp. 671 (N.D. Ohio 1979); *but see* In re Airport Car Rental Antitrust Litigation, 474 F. Supp. 1072 (N.D. Cal. 1979); Woolen v. Surtran Taxicabs, Inc., 461 F. Supp. 1025 (N.D. Tex. 1978).

181. Guthrie v. Genesee County, N.Y., 494 F. Supp. 950 (W.D.N.Y. 1980); Pinehurst Airlines, Inc. v. Resort Air Serv., Inc., 476 F. Supp. 543 (M.D.N.C. 1979); Woolen v. Surtran Taxicabs, Inc., 461 F. Supp. 1025 (N.D. Tex. 1978); Kurek v. Pleasure Driveway & Park Dist., 557 F.2d 580 (7th Cir. 1977), *vacated and remanded*, 435 U.S. 992, *remanded, 583 F.2d 378 (7th Cir. 1978), cert denied*, 439 U.S. 1090 (1979); Northeastern Tel. Co. v. AT&T, 477 F. Supp. 251 (D. Conn. 1978); Mason City Center Assoc. v. City of Mason City, 468 F. Supp. 737 (N.D. Iowa 1979); U.S. v. Southern Motor Carriers Rate Conf., Inc., 467 F. Supp. 471 (N.D. Ga. 1979); City of Fairfax v. Fairfax Hosp. Ass'n, 562 F.2d 280 (4th Cir. 1977), *vacated and remanded*, 435 U.S. 992 (1978).

b. *Proprietary activities*. Prior to *Lafayette*, the distinction between sovereign and proprietary activities by a government entity was not generally considered to be relevant to the analysis and immunity was essentially automatic for government activities even if proprietary.[182] In *Lafayette*, Chief Justice Burger highlighted the issue in his concurring opinion: "There is nothing in [*Parker*], or its progeny, which suggests that a proprietary enterprise with the inherent capacity for economically disruptive anticompetitive effects should be exempt from the Sherman Act merely because it is organized under state law as a municipality."[183] Moreover, Chief Justice Burger noted that the principles of federalism apply differently to sovereign functions, when the state chooses to supplant competition with regulation, than to activities in which the state itself decides to compete.[184] The dissent in *Lafayette* argued, on the other hand, that neither the Sherman Act nor *Parker* justifies any difference in treatment as between sovereign and proprietary actions by a government entity. Furthermore, argued the dissent, the distinction between sovereign and proprietary activities by a government entity is not clear, and "has been aptly described as a 'quagmire' . . . [with] 'distinctions [which] are so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation.' "[185] Irrespective of whether a formal distinction between proprietary and sovereign activities is mantained for this purpose, it is clear that proprietary activities by a government entity will, as a practical matter, encounter close antitrust scrutiny and encounter more difficulty than sovereign activities in obtaining antitrust immunity.

Except as to procurement activities, most government proprietary activities are monopolies. The cases suggest that the antitrust immunity analysis of such a monopoly will depend upon whether the activity is traditionally engaged in by a government entity. For proprietary activities

182. New Mexico v. American Petrofina Co., 501 F.2d 363 (9th Cir. 1974) (purchase of asphalt); Padgett v. Louisville & Jefferson County Air Board, 492 F.2d 1258 (6th Cir. 1974) (operation of taxicabs at an airport); LaDue Local Lines, Inc. v. Bi-State Dev. Agency, 433 F.2d 131 (9th Cir. 1970) (operation of a bus system); E.W. Wiggins Airways, Inc. v. Massachusetts Port Auth., 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966) (operation of an airport); Continental Bus System, Inc. v. City of Dallas, 386 F. Supp. 359 (N.D. Tex. 1974) (operation of bus franchise at an airport); Trans World Assoc., Inc. v. City & County of Denver, [1974-2] TRADE CASES (CCH) ¶ 75,293 (D. Colo. 1974) (airport car rental); *but see* Azzaro v. Town of Branford, [1974-2] TRADE CASES (CCH) ¶ 75,337 (D. Conn. 1974) (purchase by city of insurance *not* immune); Allegheny Uniforms v. Howard Uniform Co. 384 F. Supp. 460 (W.D. Pa. 1974) (designation of sole source for state uniforms *not* immune).

183. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. at 418.

184. *Id*. at 422. *See also* Davidson & Butters, *supra*, at 591-92; Pinehurst Airlines, Inc. v. Resort Air Serv., 476 F. Supp. 543, 552 (M.D.N.C. 1979). It is not clear whether this would apply to all government proprietary activities or only to those which are also engaged in by private entities.

185. 435 U.S. at 433, citing Indian Towing Co. v. United States, 350 U.S. 61, 65-68 (1955).

which are *not* traditionally conducted by government entities, the immunity analysis will go to whether the statute contemplated that the government conduct and monopolize the activity, and if not, the immunity may not be available.[186] For more traditional government proprietary activities, which are often natural monopolies, the fact that the government is operating the monopoly will normally not be challenged,[187] but the *manner* of conducting the monopoly will be subject to immunity scrutiny. In *Lafayette*, for example, the allegations related to sham litigation and market abuses, including boycotts and product ties. The problem, of course, is that the state legislature normally will not, and for sound reasons of public policy should not, legislate as to the day-to-day business management decisions of the government proprietary activity. Therefore there will be little or no "clear articulation" as to how the monopoly should be operated.

Prior to *Lafayette* the operating details in the conduct of a proprietary activity by a government entity received little scrutiny. After *Lafayette*, the necessary absence of clear articulation as to the operating details has resulted in the application of the *Cantor* "when and only to the extent necessary" standard.[188] As Chief Justice Burger noted in his concurring opinion in *Lafayette*, the application of this test will have the practical effect of subjecting proprietary activities traditionally engaged in by government entities to essentially the same immunity analysis that is applied to state-sanctioned activities by private parties.[189]

c. *Airports*. Because the major airports have traditionally been operated by government entities, the cases discussed above suggest that an antitrust immunity analysis will not examine whether the natural monopoly airport should be operated by a government entity. Rather, the immunity analysis will look to *how* the airport is operated, and the operating details will probably be subject to the *Cantor* test—"exempt when and only to the extent necessary"—which translates loosely for this purpose into a "least anticompetitive" test, as discussed above.[190]

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186. *Compare* Caribe Trailer Sys. v. Puerto Rico Maritime, 475 F. Supp. 711 (D.D.C. 1979) (immunity available where statute contemplated state monopoly on Puerto Rico-Mainland shipping trade) *with* Star Lines, Ltd. v. Puerto Rico Maritime Ship. Auth., 451 F. Supp. 157 (S.D.N.Y. 1978) (no immunity because same statute did not contemplate state monopoly in Mainland—Near East shipping trade).

187. City of Mishawaka, Ind. v. American Elec. Power Co., 616 F.2d 976 (7th Cir. 1980) (electric utility); Jordan v. Mills, 473 F. Supp. 13 (E.D. Mich. 1979) (prison store).

188. *See* City of Fairfax v. Fairfax Hosp. Ass'n, 562 F.2d 280 (4th Cir. 1977), *vacated and remanded*, 435 U.S. 992 (1978) (purchase of hospital from one hospital operator and lease to only other hospital operator, thereby eliminating competition); Shrader v. Horton, 471 F. Supp. 1236 (W.D.W. Va. 1979), *aff'd*, 626 F.2d 1163 (4th Cir. 1980) (requirement to tie into city water system does not destroy immunity).

189. *See* note 87 *supra*.

190. *See* note 131 and accompanying text *supra*.

It is submitted here that, in order to satisfy this *Cantor* test, airport operators must treat air carriers and concessionaires in a manner that is not unjustly discriminatory. In effect, this would require the airport operator to apply to *all* of its activities the "available for public use . . . without unjust discrimination" standard which federally funded airports must use for air carrier and fixed-based operator access.[191] In addition, in order to meet the *Cantor* test, airport operators with monopoly power must carefully avoid monopoly abuses. This would require the airport operator to apply to all of its activities the "available for public use on fair and reasonable terms" standard which federally funded airports must use for air carrier and fixed-based operator access.[192]

With respect to the anti-discrimination guideline, the cases thus far have been clear—exclusionary practices, such as exclusive concessions, were generally permitted prior to *Lafayette*,[193] but exclusive concessions or exclusionary practices by airport operators have not usually received immunity subsequent to *Lafayette*.[194] It is noted, however, that this guideline does not ban *all* discrimination, it bans only *unjust* discrimination. Thus, differences in treatment by an airport operator of air carriers and concessionaires would not preclude immunity if the differences were justified by the circumstances.[195]

Although there is little antitrust law with respect to natural monopolies because most natural monopolies[196] have historically been free of antitrust scrutiny by being either regulated or operated by a government entity, it is apparent that this antidiscrimination guideline for *immunity* goes well beyond the standards for antitrust *liability*.[197] With respect to the guidelines

191. 49 U.S.C. § 1718(a)(1) (1976).

192. *Id*.

193. *See* Padgett v. Louisville & Jefferson County Air Board, 492 F.2d 1258 (6th Cir. 1974) (exclusive taxicab franchise); E.W. Wiggins Airways, Inc. v. Massachusetts Port. Auth., 362 F.2d 52 (1st Cir. 1966), *cert. denied*, 385 U.S. 947 (1966) (exclusive fixed-based operator franchise).

194. *See* Guthrie v. Genesee County, N.Y., 494 F. Supp. 950 (W.D.N.Y. 1980); Pinehurst Airlines, Inc. v. Resort Air Serv., Inc., 476 F. Supp. 543 (M.D.N.C. 1979) (exclusive fixed-based operator franchise); In re Airport Car Rental Antitrust Litigation, 474 F. Supp. 1072 (N.D. Cal. 1979); Woolen v. Surtran Taxicabs, Inc., 461 F. Supp. 1025 (N.D. Tex. 1978) (exclusive taxicab franchise).

195. This may even apply to unjust discrimination as between a fixed-based operator or other concessionaire, on one hand, and, on the other hand, the airport operator engaged in a comparable activity. *See* Sponsor Assurances 20(d) note 162 *supra*.

196. This does not include the "brand"—as opposed to "market"—natural monopolies which result from the fact that, in theory, every manufacturer has a natural monopoly over its own product, *e.g.*, V.&L. Cicione, Inc., v. C. Schmidt & Sons, Inc., 403 F. Supp. 643 (E.D. Pa. 1975) *aff'd per curiam*, 565 F.2d 154 (3rd Cir. 1977); Bushie v. Stenocord Corp., 460 F.2d 116 (9th Cir. 1972); Neugebauer v. A.S. Abell Co., 474 F. Supp. 1053 (D. Md. 1979).

197. As between persons similarly situated, a monopolist acting alone may, without incurring antitrust liability under the Sherman Act, grant exclusive rights or concessions, *e.g.*, Golden Gate Acceptance Corp. v. General Motors, 597 F.2d 676 (9th Cir. 1979); Bushie v. Stenocord Corp.,

against monopoly abuses, the result is less clear, and no reported federal cases were found relating to monopoly abuses by an airport operator. However, unlike the antidiscrimination guidelines, the monopoly abuse standards for antitrust *immunity* are quite similar to the standards for antirust *liability* in relation to monopolization by an entity acting alone.[198] The prohibition against monopoly abuse applies both to unwarranted capacity constraints and to the imposition upon air carriers and concessionaires of unfair or unreasonable rates, terms, or conditions.

Concerning capacity constraints, it is submitted here that an unfounded lack of desire by an airport operator to expand in response to excess demand will probably jeopardize the antitrust immunity for capacity limitation constraints, particularly if the failure to expand results in undue profits or other benefits for the airport operator.[199] On the other hand, if expansion as to the most limiting capacity constraint is difficult or impossible under the circumstances, for sound financial, environmental, or other reasons beyond the airport operator's control, a failure to expand would not jeopardize the antitrust immunity.

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460 F.2d 116 (9th Cir. 1972); or deal or refuse to deal with anyone it wishes for any reason it wishes, *e.g.*, Lamb's Patio Theatre, Inc. v. Universal Film Exch., 582 F.2d 1068 (7th Cir. 1978); Oreck Corp. v. Whirlpool Corp., 579 F.2d 126 (2nd Cir.) *cert. denied*, 439 U.S. 946 (1978); Aviation Specialists v. United Technologies Corp., 568 F.2d 1186 (5th Cir. 1978); T'ai Corp. v. Kalso Systemet, Inc., 568 F.2d 145 (10th Cir. 1977); except for anticompetitive reasons, *e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366, *rehearing denied*, 411 U.S. 910 (1973); even if its behavior is unfair or discriminatory, Fulton v. Hecht, 580 F.2d 1243 (5th Cir.) *rehearing denied*, 585 F.2d 520 (5th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979), except that, pursuant to the Robinson-Patman Act, 15 U.S.C. § 13(a) (1976), it may not generally discriminate in price as to commodities of like grade and quality sold to similarly situated buyers. Similarly, unless the discrimination benefits the monopolist or injures its competitors, the prohibition against unfair competition in the Federal Trade Commission Act, § 5, 15 U.S.C. § 45, (1976), does not preclude discrimination, however arbitrary, by a monopolist acting alone, *e.g.*, Official Airline Guides, Inc., v. FTC, 630 F.2d 920 (2d Cir. 1980); LaPeyre v. FTC, 366 F.2d 117 (5th Cir. 1966).

198. As to liability for unregulated single-entity monopolies, the Sherman Act, § 2, 15 U.S.C. § 2 (1976), proscribes conduct not status. Thus, the mere *existence* of a monopoly is not unlawful, *e.g.*, United States v. E.I. DuPont DeNemours & Co., 118 F. Supp. 41 (E.D. Va. 1951), *aff'd*, 351 U.S. 377 (1956), but the monopoly must not be wrongfully obtained and it must not be abused, *e.g.*, United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). Monopoly abuse may result generally from any buying, selling, or licensing practice which has little business purpose other than to create or enhance a competitive advantage, *e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366, *rehearing denied*, 411 U.S. 910 (1973); United States v. Griffith, 334 U.S. 100 (1948); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 1061 (1980); Fulton v. Hecht, 580 F.2d 1243, *rehearing denied*, 585 F.2d 520 (5th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979); United States v. Aluminum Co., 148 F.2d 416 (2d Cir. 1945).

199. Most monopolists exercise caution in restraining capacity because the resulting higher prices increase the incentive for others to provide the goods or service or a substitute. With a *natural* monopoly, however, the goods or service cannot economically be provided by a second source, and the lack of substitutes for airport natural monopolies in particular is noted in the discussion note 11 and accompanying text *supra*.

If capacity could not be expanded to meet the demand, then the antidiscrimination guideline for antitrust immunity would require the airport operator to give all interested and able takers an opportunity to participate unless there were sound economic justification for precluding a larger number of participants. With respect to air carriers, this requirement for an opportunity to participate has already been effectively imposed by the Civil Aeronautics Board (CAB) at four airports with excess demand.[200] This requirement falls short of strict prorationing, in which each participant would be permitted the same percentage of its demand, and at least in situations in which air carriers or concessionaires have made substantial capital imputs or improvements at the airport or have otherwise helped the airport obtain financing which could not otherwise have been obtained, strict prorationing by an airport operator would not be required for antitrust immunity.[201]

d. *Similarity to common carrier standards*. The antitrust immunity standards enumerated above are quite similar to the standards which must be observed by a common carrier in relation to the service provided by the carrier to its passengers and shippers. In particular, a common carrier is required to charge rates for those services which are just, reasonable, and not unjustly discriminatory, and to give no undue, unreasonable, or unjustly discriminatory preference or advantage.[202] Moreover, common carriers are generally required to have sufficient capacity to meet the reasonably foreseeable demand[203] unless it is impractical or impossible under the circumstances to increase capacity.[204] When capacity exceeds demand and expansion is not possible, the prohibition against discrimination becomes, under some circumstances, a requirement to prorate the existing capac-

200. *See* discussion note 209 and accompanying text *infra*.

201. The capital input by the air carriers at an airport distinguishes the airport situation from situations in which proration has been required, such as petroleum pipelines, *see* note 205 and accompanying text *infra*, and would justify a sharing of capacity that is short of strict prorationing.

202. *See* the Revised Interstate Commerce Act, 49 U.S.C. 10701, 10741, 11101 (Supp. III 1979), the Federal Aviation Act, §§ 404(a)-(b), 49 U.S.C. §§ 1374(a)-(b) (1976 & Supp. III 1979).

203. Note, for example, the statutory requirements for rail, 49 U.S.C. § 11121(a) (Supp. III 1979), motor, 49 U.S.C. 11101(a) (Supp. III 1979), and air carriers, 49 U.S.C. 1374(a)(1) (1976 & Supp. III 1979). These provisions would not necessarily require the common carrier to have the equipment necessary to meet peak period demand; nor would slack period demand suffice to define the need, *e.g.*, Vulcan Coal & Mining Co. v. Illinois Cent. R.R., 33 I.C.C. 52, 70-71 (1915). The actual amount of equipment required under these provisions would have to be determined in each instance, based upon the circumstances such as the demand patterns.

204. Petroleum pipelines, for example, are not required to expand when demand exceeds capacity. This generic distinction from other common carriers is justified by the fact that, while an airline or a railroad, for example, can increase capacity simply by adding more airplanes or cars, the maximum safe capacity of a pipeline common carrier (*i.e.*, the capacity when no more pumping stations can be added or enlarged because of pressure or other structural limitations of the pipeline) can be increased only by adding a parallel pipeline.

ity.[205]

B. *Application of Various Situations*

This section presents a broad overview of the applicability of the legal principles enumerated above to the various situations encountered by the major airports.

1. Nondiscriminatory Treatment

1. *Air access*. Air access to and from airports is generally on a first-come, first-served basis—each airplane is handled in turn as it arrives or departs. From the standpoint of congestion in the air, only a few of the airports in the United States with scheduled commercial service have serious problems accommodating aircraft on a first-come, first-served basis. At four of these airports, the FAA has established limits on the number of hourly operations.[206] The primary impetus for these limits was the delays and associated costs encountered by aircraft at these airports under instrument flight rule conditions.[207] At several other airports with scheduled commercial service, aircraft may encournter considerable delays during rush hours, especially in bad weather, and it is expected that within ten years, a total of about thirty-five airports will have either severe congestion or capacity constraints.[208]

At the four airports which presently have FAA hourly operations limits in effect, the air carriers (other than air taxis) allocate the slots among them-

205. This proration requirement is most commonly seen in relation to petroleum pipelines because of their difficulty of expanding, even over the long run, as noted in n.206, *supra*. *See* G. Wolbert, Jr., U.S. Oil Pipe Lines 356 (1979) (American Petroleum Institute). The major exception to this lack of a requirement for petroleum pipelines to expand relates to deepwater ports, which are a natural monopoly petroleum common carrier by pipeline, licensed by the U.S. Department of Transportation (of which the FAA is a part) pursuant to the Deepwater Port Act of 1974, 33 U.S.C. § 1501, (1976 Supp. I 1977, Supp. II 1978 & Supp. III 1979). The one deepwater port which has thus far been licensed is required to expand if the demand exceeds the capacity by an amount that is sufficient to justify another pipeline. *See* The Secretary's Decision on the Deepwater Port License Application of LOOP, Inc. 50-51 (Dec. 17, 1976) (Dept. of Transportation). Other common carriers would be required to expand in the long run, but they may still be required to prorate in the short run to meet peak period demand or until expansion is completed, *e.g.*, Pennsylvania R.R. v. Puritan Coal Co., 237 U.S. 121 (1915).

206. 14 C.F.R. Part 93, Subpart K (—) establishes limits on instrument flight rules (IFR) operations per hour for air carriers (other than scheduled air taxis), scheduled air taxis, and "other," at John F. Kennedy International, La Guardia, O'Hare, Newark and Washington National Airports. Newark Airport is excepted from the limits by § 93.133(a). The severity of the air access problems at Kennedy International has been declining in recent years, in part because the addition of many new U.S. cities as international gateways from Europe has reduced New York's gateway role.

207. 33 Fed. Reg. 17896 (1968).

208. Terminal Area Forecasts, 1980-1991, (published by the Federal Aviation Administration).

selves pursuant to an antitrust exemption granted by the CAB.[209] Accordingly, airport operators have not played a role in allocating slots for air carriers other than air taxis, and few have shown any desire to become involved in the problem. However, it is conceivable that some airport operators may in the future become involved in allocating these slots to alleviate airside or other congestion.

Another allocation system now in effect is the seniority list slot allocation mechanism which is used by commuter carriers at Washington National Airport when the demand for slots exceeds the number available. The original seniority list was determined by the longevity of the carrier service at National (or by the date of the carrier's application for slots, if service has not yet begun). The carrier at the top of the list is entitled to take the next slot that becomes available for that hour. If the carrier accepts a slot which was also requested by one or more other carriers, it goes to the bottom of the list. This system of allocation has the tacit approval of the FAA as the operator of National Airport.[210]

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209. Each of the four airports has an Airline Scheduling Committee, consisting of all certificated air carriers with CAB authority to serve the respective airport. In 1968, the CAB granted antitrust immunity to these Committees, subject to the conditions, among others, that (1) all air carriers with CAB authority to serve the airport be permitted to participate in the Committee meetings; (2) all scheduling agreements of the Committees must be voluntary; (3) city pairs, rates, fares, and charges must not be discussed at the Committee meetings; and (4) notice of the meetings must be given, and representatives of the CAB, DOT/FAA, air carriers, and the affected airport authorities must be permitted to attend, CAB Order 68-12-11 (Docket 20051, Dec. 3, 1968). Until recently, this immunity has been renewed annually: CAB Order 77-10-49 (Docket 20051, Oct. 19, 1977); CAB Order 76-9-24 (Docket 20051, Sept. 10, 1976); CAB Order 75-10-78 (Docket 20051, Oct. 20, 1975); CAB Order 74-9-80 (Docket 20051, Sept. 23, 1974); CAB Order 73-12-94 (Docket 20051, Dec. 26, 1973); CAB Order 72-11-72 (Docket 20051, Nov. 16, 1972); CAB Order 71-10-23 (Docket 20051, Oct. 6, 1971); CAB Order 70-11-112 (Docket 20051, Nov. 23, 1970) (deleting Newark Airport and helicopter operations); CAB Order 70-3-140 (Docket 20051, March 27, 1970). In 1978, the CAB announced by CAB Order 78-7-110 (Dockets 31448, 31596, and 32014, July 21, 1978) that it was reconsidering whether to renew the immunity, and that any application for renewal would have to include a clear showing of a serious transportation need or other important public benefits, in accordance with the standards in its Local Cartage Agreement Case, 15 C.A.B. 850 (1952), as enunciated in the Capacity Reduction Agreements Case, CAB Order 75-7-98 (Docket 22908, July 21, 1975). The CAB later announced CAB Order 79-1-119 (Docket 20051, Jan. 19, 1979) that, pursuant to 5 U.S.C. § 558(c) and 14 C.F.R. § 377.10(a), it would extend the antitrust immunity for the Committees until reaching a final decision concerning how the slots should be allocated. The final decision process was underway at the time of this writing, CAB Order 80-9-148 (Dockets 20051, 20700, Sept. 30, 1980), 45 Fed. Reg. 64,999 (1980). Meanwhile, due to the inability of the carriers of National Airport to reach agreement after the addition of several new carriers, the FAA, as proprietor, has begun to reconsider the slot allocation process there, 45 Fed. Reg. 71,236 (1980).

210. *See* Sections 2 and 3 of Article IX of the By-laws of the Washington National Commuter Airline Association. FAA approval of this allocation mechanism probably does not confer antitrust immunity upon the participating carriers. However, the CAB apparently considers of the antitrust exemption originally conferred upon air taxi scheduling committees, CAB Order 69-2-52 (Docket 20700, Feb. 12, 1969) to still be effective CAB Order 90-9-148 (Dockets 20051, 20700, Sept. 30, 1980), 45 Fed. Reg. 64,999 (1980), although the issue is not free from doubt.

Environmental constraints have also led to capacity limitations at airports. For example, in order to control the impact of aircraft noise on the community, the Orange County (California) Board of Supervisors has imposed a limitation of approximately forty-one "average daily departures" for air carriers at its John Wayne Airport.[211] This limitation, which provided absolute grandfather rights to the two existing carriers, resulted in the denial of several applications by air carriers for entry into the airport. After the FAA warned that the absolute grandfathering violated the airport's non-exclusive use and non-discrimination obligations,[212] the Board of Supervisors began to formulate other methods of allocation. One plan under consideration at the time of this writing was a slot auction which, within those forty-one average daily departures, would permit substantial grandfather rights (provided that the two existing carriers agreed to pay the auction price for their grandfathered slots), and the remaining slots would go to the highest bidder.

Finally, the lack of desire by an airport operator to increase the airport's passenger capacity generally, for whatever reason, *e.g.*, because the road congestion to and from the airport is become unmanageable, may result in capacity limitations.

The antitrust analysis of these capacity limitations and allocation mechanisms is made in the context of the federal statutes which prohibit exclusive rights for the use of any landing areas upon which federal funds have been expended,[213] and which require federally funded airports to be made available for public use on fair and reasonable terms and without unjust discrimination,[214] in conjunction with the general federal mandate favoring freedom of competition in commercial air transportation.[215]

Within this statutory context,[216] the first question for antitrust immunity

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211. In its capacity as proprietor, the FAA has also recently imposed capacity limitations upon Washington National Airport for noise reasons which are more restrictive than the capacity constraints imposed by the FAA in its capacity as regulator of the nation's airspace, *see* note 206 and accompanying text *supra*; 45 Fed. Reg. 62,398 (1980). The method of allocating slots at National Airport, *see* note 209 and accompanying text *supra*, was not altered by this new constraint and is the subject of a separate rulemaking, 45 Fed. Reg. 71,236 (1980).

212. Letter from Clark H. Onstad, Chief Counsel of the FAA, to Philip L. Anthony, Chairman of the Orange County Board of Supervisors (dated Apr. 3, 1980). This, in turn, prompted an action by one of the incumbent carriers for an injunction to prevent the FAA from forcing the airport away from its initial absolute grandfathering plan, Air California v. Dep't of Transp., No. CV-80-1827-TJH(Kx) (C.D. Cal., filed May 6, 1980).

213. 49 U.S.C. § 1349(a) (1976).

214. 49 U.S.C. § 1718(a)(1) (1976).

215. Section 3(a) of the Airline Deregulation Act of 1978, 49 U.S.C. § 1302(a) (Supp. III 1979).

216. These statutory constraints are mentioned here primarily because the Statutory context is useful for the antitrust immunity analysis. In addition, it may be simpler in some situations to pursue the available administrative avenues provided by these statutes before commencing with antitrust litigation. This is not, however, intended to suggest that an administrative ruling by the FAA would be dispositive of the antitrust immunity issue or that prior recourse to the FAA would be required

purposes is the source of the limitation. If the limitation is derived from state sources, then the existence of a limitation, in addition to the method of allocation, would be scrutinized for state action immunity purposes. Because a state law limiting airport noise, for example,[217] clearly contemplates the possibility of operating limitations, the existence of a limitation to comply with such a law would probably survive immunity scrutiny.[218]

If the limitation resulted from federal constraints, the state action antitrust immunity analysis would be directed only at the *method* of allocation. Each particular method of allocation would, of course, have to be examined for a determination under the circumstances of whether immunity would be available. Applying this analysis to a system of allocating slots to the carrier at the top of the list, such as the system for commuter carriers at National Airport, and assuming that the state legislation is silent as to the method of allocation, this method of allocation, if implemented by a non-federal airport operator, would not satisfy the generalized common carrier standard discussed above and therefore would probably not obtain antitrust immunity except in the unlikely event that absoute grandfather rights were essential to the airport financing and no other allocation technique would suffice.[219] The auction system proposed for John Wayne Airport, on the other hand, has the benefit, from an antitrust standpoint, of providing little opportunity for unjust discrimination or for competitors to use the municipality to help

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before antitrust litigation could be commenced, *e.g.*, Litton Sys., Inc. v. AT&T Co., 487 F. Supp. 942 (S.D.N.Y. 1980); Pinehurst Airlines, Inc. v. Resort Air Serv., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

217. There is little question that the state's police power includes the power generally to regulate noise, but the extent to which federal regulation of aircraft and air navigation has left any room for state police power to regulate community noise impact from *aircraft* was cast into considerable doubt by City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973); *but see* Santa Monica Airport Ass'n v. City of Santa Monica, 481 F. Supp. 927 (C.D. Cal. 1979); Air Transport Ass'n of America v. Crotti, 389 F. Supp. 58 (N.D. Cal. 1975). Thus, a noise limit will be more likely to pass constitutional muster if it is imposed by the airport operator as the proprietor, rather than by the state pursuant to its police power, *e.g.*, British Airways Bd. v. Port Auth. of N.Y., 558 F.2d 75 (2d Cir. 1977); San Diego Unified Port Dist. v. Gianturco, 457 F. Supp. 283 (S.D. Cal. 1978); National Aviation v. City of Hayward, Cal., 418 F. Supp. 417 (N.D. Cal. 1976). The method of allocation within that limit would be subject to scrutiny for state action immunity purposes, but the extent to which a federal court would, for antitrust purposes, scrutinize the airport operator's choice of a limit is not clear. Detailed federal scrutiny of the activities of local governments was feared by the dissent in City of Lafayette v. Louisianna Power & Light Co., 435 U.S. at 439-40.

218. This would not, however, justify a permanent limit of the number of operations. Because newer airplane designs are quieter than older designs, a number limit based upon aircraft noise should be reviewed periodically by the airport operator.

219. The extent to which a federal court would scrutinize the airport operator's judgment concerning the importance of grandfather rights for airport financing is not clear. Detailed federal scrutiny of the activities of local governments was feared by the dissent in City of Lafayette v. Louisiana Power & Light Co., 435 U.S. at 439-40.

them accomplish their economic goals.[220] At the same time, unlike the commuter allocation system at National Airport, it would not freeze out newcomers unless grandfather rights applied to an unreasonable number of slots. Accordingly, the availability of antitrust immunity for an auction with partial grandfather rights would depend, among other things, upon the degree of grandfather rights permitted and upon the extent to which that degree of grandfather rights was necessary to the proper operation of the airport.

b. *Airline access to terminal and ground space*. Groundside airline access—ticket counter, baggage handling area, waiting area, and hangar and ramp space—is a potential capacity constraint in many more airports than the airside access. Unlike expansion of the airport's air capacity, however (such as by building more runways), expansion of ground facilities rarely encounters serious environmental or other opposition, and is normally limited only by the amount of space and financing available.[221] Accordingly, experience has generally shown that, one way or another, there is always a way to provide ground space for more carriers, ranging from new construction to rotation of facilities among carriers (even though the arrangements for newcomers may initially be less desirable than those for the incumbent carriers).

One of the major problems with respect to groundside access is that in many airports, either the air carriers themselves have built some or all of their facilities at their own expense (more typically as to cargo facilities and hangars, for example), or long-term terminal and hangar space agreements between the airport operator and the air carriers directly or indirectly underlie the airport financing. Where the air carrier owns the facility, it generally has the right to exclude other carriers from the facility. Where the air carrier has executed long-term agreements to help buttress the financing, the agreements often give the carriers the right to veto airport expansion plans in order to provide the carriers the ability to assure that their landing and other fees will not be used for lavish or unnecessary growth, but may also give the airport operators the right to modify the agreement or require subleasing of unused space (and, in some instances, even when the space is already fully utilized) when needed to accommodate air carriers.

As with air access, the antitrust analysis of ground access is made in the context of the federal prohibitions against exclusive rights (as to the

220. From a national air transportation system standpoint, however, the desirability of an auction to allocate slots at one airport in a complex interdependent system is questionable.

221. There may, however, be environmental opposition to groundside expansion if such expansion is viewed as a thinly veiled attempt to facilitate total airport expansion for which there is opposition.

ramp and hangar space) and unjust discrimination,[222] and the general federal mandate in favor of freedom of competition in commercial air transportation.[223] The relevant state statutes from which most airport operators derive their authority are generally silent concerning air carrier access to terminal and gate space, and most require compliance with all state and federal laws in the operation of the airport.

Viewed in the context of these state and federal statutes,[224] the antitrust cases, and the practical realities, any plan which does not utilize all conceivable reasonable measures to provide ground access to all carriers on an equitable basis in the existing facilities will probably encounter difficulty obtaining antitrust immunity, and any limitation in facility capacity which is not well founded may encounter such difficulty as well.

To the argument that the carrier must either construct terminal and ground space facilities or help support the airport financing in order for such facilities to be built, the response is that (1) the existence or absence of air carrier agreements is not itself determinative of the airport's ability to obtain financing, but is merely indicative of the determinative factor, which is the economic desirability of the airport in the national air transportation system; (2) even if a concern about the adequacy of business made the carrier agreements critical to financing, an express reservation in the agreements of a right for the airport operator to require modification or subleasing as appropriate for new entrants would not undermine the effectiveness of the agreement as a support to financing because new entrants would not generally seek entry unless business was more than adequate; and (3) air carrier restrictions, such as rights to veto an expansion, may actually have a negative effect upon the financing because such restrictions may *hamper* the airport operator's flexibility to respond to growth. Accordingly, in order to retain the flexibility it needs to respond to changing conditions, and in order to increase the likelihood of obtaining antitrust immunity, the airport operator should seek the maximum degree of financial self-sufficiency which the importance of the airport in the national air transportation system will support.

c. *Concessions*. Except as to fixed-based operators, the federal non-exclusive use and non-discrimination statutes[225] and the federal mandate favoring competition in commercial air transportation[226] do not apply to on-site concessions. State laws are generally silent on the issue.

For many types of concessions, the economic feasibility of multiple on-

222. 49 U.S.C. §§ 1349(a) (1976), 1718(a)(1) (1976), respectively.
223. 49 U.S.C. § 1303(a) (1976 & Supp. III 1979).
224. *See* note 216 *supra*.
225. 49 U.S.C. §§ 1349(a) (1976), 1718(a)(1) (1976), respectively.
226. 49 U.S.C. § 1302(a) (Supp. III 1979).

site concessions or concession operators or concessions depends largely upon the passenger volume of the airport. A very small airport, for example, might support only one restaurant with a small newsstand at the cash register, while a large airport might support at least one high-priced restaurant, banks, a barber shop, several lower-priced restaurants at diverse locations, and cocktail lounges, vending machines, newsstands, and gift shops in every terminal finger. In these cases it can reasonably be argued, in response to an antitrust challenge, that operating an airport inherently entails decisions as to the feasibility of multiple concessions, and nondiscriminatory limitations as to the number of concession operators or concessions, if economically justified, will probably be entitled to antitrust immunity.

The economic feasibility of ground transportation systems is also generally determined largely by passenger volume at the airport.[227] The ability of an airport to accommodate multiple ground transportation systems must be determined on a case-by-case basis using a number of factors, including the demand patterns at the airport (both daily and seasonal), the utility to the airport of the city's mass transit system, the disparity between the price and utility of dedicated (only to the airport) systems[228] and general taxicab systems, and other factors. If nondiscriminatory limitations on competition are, under the circumstances, essential for a profitable ground transportation system to function, and if the airport operator actively supervises the situaton to assure the continued necessity of such limitations, then antitrust immunity may be available as to the limitations. In the extreme, if there is not enough business even to support one ground transportation service and there is no inexpensive and convenient taxicab or mass transit service, the existence of a monopoly ground transportation service provided by the airport operator would probably be immune from antitrust scrutiny.[229]

For some types of concessions, even minimal passenger flow may not justify exclusions of competitors. With car rental agencies, for example, the airport may only represent a small part of the company's total operation and the on-site capital expenditure and space requirements are minimal. Ac-

227. Beyond broad limits, ground transportation may create demand for the airport if there is more than one airport in a metropolitan area. Thus, *vast* improvements in ground transportation, *e.g.*, a direct high speed rail link from downtown, would generally increase demand for an airport relative to other airports in the area. Conversely, the total absence of inexpensive transportation to an airport would generally decrease demand for an airport relative to other airports in the area.

228. If the presence of a dedicated system decreases the airport's ability to permit non-dedicated service, then the dedicated service must itself be amply justified by the circumstances.

229. Immunity as to the existence of a monopoly would not extend to the manner of operating the monopoly. Accordingly, although the airport operator may enjoy immunity in having a monopoly ground transportation system, it should carefully avoid monopoly abuses in operating the system.

cordingly, there is usually little economic reason to limit competition.[230]

For other types of on-site concessions, bona fide physical limitations are more likely to justify exclusive concessions. For example, each fixed-based operator may require a separate building and dedicated ramp space.[231] By the same token, few airports could accommodate multiple parking lot concessions.

2. Monopoly Abuses

The need for airport operators with monopoly power[232] to avoid capacity limitations that are not well-founded applies separately to each aspect of the airport operation. Thus, if there is airside congestion, the analysis as to whether the capacity could reasonably be expanded would look to the general feasibility of adding more runways. If there is groundside congestion, the analysis would look to the type of facility affected. Moreover, if expansion is possible, the airport operator should consider the desirability and feasibility of interim measures to expand capacity until more permanent measures are implemented.

Consistent with this obligation to meet the demand where possible, at any airport where demand in the foreseeable future will approach the capacity of any aspect of the airport operation, the airport operator should assure that any agreement with an air carrier or concessionaire for the use of airport space or facilities provides the airport operator the right, one way or another, to make unused space or facilities available to another prospective user. Moreover, the agreements should provide the airport operator the ability to prorate space and facilities when demand equals or exceeds capacity as to any activities for which prorationing might be appropriate and might be required in the foreseeable future.

Little can be said in the abstract about the need for the airport operator with monopoly power to avoid taking undue advantage of that power in setting the rates, terms, and conditions of agreements with air carriers and

230. *See* Note *The Airport Car Rental Concessions: The Role of City of Lafayette v. Louisiana Power and Light Co. in Restricting Threats to Free Competition*, 14 CAL. W.L. REV. 325 (1978).

231. In recognition of this problem as to fixed-based operators, the FAA has stated that a bona fide and immediate need by one fixed-based operator for all available space may justify an exclusive concession under 49 U.S.C. § 1349(a) (1976). *E.g.*, 27 Fed. Reg. 7055 (1962); 30 Fed. Reg. 13661 (1965); Exclusive Rights as Airports, FAA Advisory Circular AC 150/5190-2A. In addition, H.R. REP. No. 6721, 96th Cong., 2d. Sess. (1980) discussing the House version of the Airport and Airway Improvement Act of 1980, provides that the federal prohibition against exclusive use of any landing area would not apply to an exclusive fixed-based operator franchise if it would be "unreasonably costly, burdensome, or impractical for more than one fixed-based operator to provide such services, and if allowing more than one fixed-based operator to provide such services would require the modification of an existing agreement between such single fixed-based operator and such airport." *Id.* § 10(a)(2) at 39.

232. *See* cases cited note 12 and accompanying text *supra*.

concessionaires. The potential for monopoly abuse as to *cost* conditions may be substantially reduced for agreements which are let by competitive bidding and for agreements relating to any aspects of the airport operation which are conducted on a not-for-profits basis. However, as to the other terms and conditions of such agreements, as well as *all* of the terms and conditions of all other agreements, there is generally no clear line beyond which "undue" advantage has been taken, and there is little adequately comparable experience upon which to base such a determination. The terms and conditions of a car rental or restaurant concession agreement, for example, cannot necessarily be compared with similar agreements for car rental or restaurant operations downtown because of the vastly different situations, including the fact that the passengers are relatively captive at the airport. Moreover, the comparability of the terms and conditions of similar agreements at other airports is questionable for the purpose of determining whether those terms and conditions are unfair or unreasonable.

Monopoly abuses by an airport operator, if proven,[233] would almost certainly undermine the state action antitrust immunity because such abuses are not necessary to the proper operation of the airport and would not generally be authorized (let alone directed or compelled) by state statute, and there is probably no state supervision relating to the existence or extent of such abuses.

C. REMEDY

One of the major unanswered questions which would be of considerable interest to airport operators, although not directly relevant to the antitrust immunity analysis, is the remedy that could be awarded against a municipality. No court has yet assessed federal antitrust damages against a municipality. One objection to the *Lafayette* decision was its failure to address the remedy issue because it is generally agreed that treble damages are mandatory under section 4 of the Clayton Act in its present form,[234] and many cities could easily be bankrupted by a massive treble damage award.[235]

As a practical matter it is reasonable to expect that until the remedy issue is resolved, the undesirability of imposing massive antitrust damages upon a municipality may cause the courts to lean toward finding either that

233. The extent of monopoly abuse that would be necessary to destroy immunity or create liability is not clear in this context. Moreover, there is little predictability as to what any given court might consider to be monopoly abuse, either in the form of an unwarranted failure to expand or in the form of unfair or unreasonable terms conditions, largely because of the absence of sufficiently comparable experience upon which to base a determination of abuse. In view of these uncertainties, airport operators should be particularly circumspect about monopoly abuses.

234. 15 U.S.C. § 15 (1976).

235. *See* discussion note 83 and accompanying text *supra*.

antitrust immunity is available or that the municipality has incurred no antitrust liability.

V. Conclusion

Because an airport is a natural monopoly for which, in several instances, the demand is equal to or greater than the capacity, and because an airport is a facility which is necessarily limited in its ability to accommodate all who wish to operate a business on the premises, an airport operator may be a target for antitrust challenges from present and prospective air carriers and concessionaries who are doing or seeking to do business at the airport. The airport operator's first line of protection against such challenges lies in the state action immunity doctrine.

The state action "immunity" is not, strictly speaking, an immunity; it results from a preemption analysis. Principles of federalism cast an umbrella over most types of state action (short of express attempts by state legislation to exempt activities from the Sherman Act, and short of state participation in conspiracies in restraint of trade) that protects such action from preemption by the federal antitrust laws, but this protection of federalism is available only for activities which meet the demanding tests as to what constitutes state action for this purpose.

Prior to *Lafayette*, most non-private airport operators were immune from antitrust scrutiny for almost any activity, except conspiracies with a private entity to exclude another private entity, because their activities were generally considered to be state action. The recent line of Supreme Court cases which made the "state action" tests much more demanding generally, and the *Lafayette* decision which resulted in the application of these more demanding tests to entities such as those which operate most major airports, suggest that antitrust immunity will be available to the operators of the major airports only if they treat present and prospective air carriers and concessionaires in a manner that is not unjustly discriminatory. Moreover, for airport operators which enjoy monopoly power, antitrust immunity will be "available" only if that power is not abused—in particular, the airport operator must avoid unwarranted capacity constraints and unfair or unreasonable terms and conditions in agreements with air carriers and concessionaires.

The monopoly abuse prohibition for antitrust immunity is similar to the monopoly abuse standard for antitrust liability, but the antidiscrimination requirement goes well beyond the standards for liability because discrimination by a monopolist is generally not, in itself, an antitrust violation. Taken together, these standards for antitrust immunity are quite similar to the standards of service which must be observed by common carriers as to their passengers and shippers.

The existing state statutory mandates are generally adequate for airport operators to avoid antitrust scrutiny if they operate the airport without monpoly abuses or unjust discrimination. However, a state legislative mandate requiring, for example, exclusive car rental concessions at the airports would probably not increase the likelihood for antitrust immunity for the airport operator because the state normally has no valid interest in limiting car rental competition at airports.

The operation of an airport without monopoly abuses or unjust discrimination may in some instances require more careful planning and more detailed consideration or competitive factors in the airport operator's decisions as to users and concessionaires, but these standards are not likely to create any serious operational problems in the long run.