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Community Communications Co. v. City of Boulder: The Emasculation of Municipal Immunity from Sherman Act Liability

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NOTE

COMMUNITY COMMUNICATIONS CO. V. CITY OF BOULDER: THE EMASCULATION OF MUNICIPAL IMMUNITY FROM SHERMAN ACT LIABILITY

The Sherman Antitrust Act[1] prohibits monopolization and unreasonable interference with competition in interstate and foreign commerce. The Act was not intended to replace existing state statutes regulating commerce within state borders.[2] The anticipated complementary relationship, however, foreshadowed conflict as the Supreme Court began to sanction congressional efforts to regulate intrastate activities deemed to affect interstate commerce.[3] This broadening of the federal commerce power increased the

1. Section 1 of the Sherman Antitrust Act of 1890 provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, 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, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (1976). Section 2 of the Sherman Act provides:

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

Id. at § 2.

2. The legislative history indicates, in pertinent part, that:

> No attempt is made to invade the legislative authority of the several States or even to occupy doubtful grounds . . . Congress has not authority to deal, generally, with the subject within the States, and the States have no authority to legislate in respect of commerce between the several states or with foreign nations . . . .
>
> Whatever legislation Congress may enact on this subject, within the limits of its authority, will prove of little value unless the States shall supplement it by such auxiliary and proper legislation as may be within their legislative authority.

H.R. REP. No. 1707, 51st Cong., 1st Sess. 1 (1890).

3. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 (1935).

likelihood that state regulation might be attacked under the Sherman Act.[4] The Court's consideration of this potential conflict gave rise to a judicially created immunity from Sherman Act liability:[5] the state action doctrine.[6] This doctrine, as originally stated in *Parker v. Brown*[7] in 1943, afforded immunity to the anticompetitive activities of a sovereign state when the activities were directed by the state's legislature.

Nonetheless, the broad statement of the state action doctrine left lower courts to grapple with its application without feasible guidelines.[8] By the mid-1970's, the doctrine required that Sherman Act immunity be predicated on a state acting as sovereign, articulating and supervising specific anticompetitive functions.[9] Subsequently, the doctrine was clarified when the Supreme Court refused to invoke the doctrine to recognize a municipality's claim of sovereignty.[10] In *Community Communications Co. v. City of Boulder*,[11] the Supreme Court held that a "home rule" municipality, granted broad powers of self-government under a state constitution, does not enjoy exemption from Sherman Act liability.

Community Communications Co. (CCC) held a nonexclusive permit to conduct a cable television business in Boulder, Colorado.[12] Planning to take advantage of advances in cable technology that became available in the late 1970's, CCC announced plans to enlarge its business from serving a portion of the city to serving the entire city.[13] Fearing the company's

4. *E.g.*, Hospital Bldg. Co. v. Rex Hosp. Trustees, 425 U.S. 738, 743 n.2 (1976). *See generally* McCall, *The State Action Exemption in Antitrust: From Parker v. Brown to Cantor v. Detroit Edison Co.*, 1977 DUKE L.J. 871; Areeda, *Antitrust Immunity For "State Action" After Lafayette*, 95 HARV. L. REV. 435 (1981).

5. Statutory exemptions are far more common. *See, e.g.*, 7 U.S.C. §§ 291-292 (1976) (agricultural cooperatives); 15 U.S.C. § 17 (1976) (labor, horticultural, and agricultural associations); 15 U.S.C. § 18 (1976) (SEC, CAB, ICC, FPC, and FCC approved transactions); 15 U.S.C. § 62 (1976) (export trade associations); 15 U.S.C. § 1012 (1976) (state regulation of insurance companies).

6. The state action exemption from Sherman Act liability was first clearly articulated in Parker v. Brown, 317 U.S. 341 (1943). For a detailed discussion of *Parker*, see *infra* notes 36-51 and accompanying text.

7. 317 U.S. at 344-350.

8. *See infra* notes 48-51 and accompanying text.

9. Bates v. State Bar of Ariz., 433 U.S. 350 (1977); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

10. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978).

11. 455 U.S. 40 (1982).

12. *Id.* at 44.

13. *Id.* The district court noted that:

> Up to late 1975, cable television throughout the country was concerned primarily with retransmission of television signals to areas which did not have normal reception, with some special local weather and news services originated by the cable operators. During the late 1970's, however, satellite technology impacted the

growth would discourage new entries in the Boulder cable market, the Boulder City Council enacted an ordinance to block CCC's expansion for three months.[14] The city council expressed plans to solicit competition during the moratorium by circulating a model cable television ordinance to potential competitors.[15]

CCC sought a preliminary injunction in the United States District Court for the District of Colorado, contending that the city had violated the Sherman Act by thwarting the firm's proposed expansion.[16] The city claimed immunity under the state action doctrine, maintaining that the moratorium constituted a valid exercise of its municipal power.[17] The district court found that the city was not immune to antitrust liability,[18] and therefore granted CCC's motion for a preliminary injunction.[19] The United States Court of Appeals for the Tenth Circuit reversed,[20] holding that antitrust immunity extends to a home rule municipality engaged in anticompetitive activity shown to be a governmental function supervised by the state in advancement of a specific state policy.[21]

The Supreme Court reversed. Justice Brennan, writing for the majority, articulated a two-prong test for determining if an ordinance is exempt from antitrust scrutiny. First, the ordinance must constitute the action of the state in its sovereign capacity. Second, the ordinance must represent municipal action in furtherance of "clearly articulated and affirmatively expressed state policy."[22] Justice Brennan asserted that the dual system of government in the United States precluded a finding of sovereign authority in a municipality.[23] Because the Colorado legislature did not clearly

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industry and prompted a rapid, almost geometric rise in its growth. As earth stations became less expensive, and 'Home Box office' companies developed, the public response to cable television greatly increased the market demand for such expanded services.

The 'state of the art' presently allows for more than 35 channels, including movies, sports, FM radio, and educational, children's and religious programming. The institutional uses for cable television are fast increasing, with technology for two-way service capability. Future potential for cable television is referred to as 'blue sky,' indicating that virtually unlimited technological improvements are still expected.

485 F. Supp. 1035, 1036-37 (D. Colo. 1980).

14. 455 U.S. at 45-46.
15. *Id.* at 46.
16. 485 F. Supp. at 1038.
17. *Id.*
18. *Id.* at 1039.
19. *Id.*
20. 630 F.2d 704 (10th Cir. 1980).
21. *Id.* at 707.
22. 455 U.S. at 52.
23. *Id.* at 53-54.

and affirmatively articulate that Colorado municipalities could regulate cable television, the ordinance was not immune to attack under the Sherman Act.[24] Justice Brennan maintained that, in the area of cable regulation, Colorado's grant of home rule power[25] to Boulder evidenced only a neutral legislative stance.[26]

Justice Rehnquist, joined by Chief Justice Burger and Justice O'Connor, dissented. He claimed that the majority had improperly treated a preemption question as if it were an exemption question.[27] Consequently, Justice Rehnquist asserted, the Court ignored federalist principles and equated a municipality with a private business for Sherman Act purposes.[28] The dissent predicted that under the decision, municipalities engaged in traditional local economic regulation unsupported by a clear and affirmative expression of state policy, may be found liable for treble damages under the Sherman Act.[29] In a concurring opinion, Justice Stevens accused the dissent of confusing the majority's refusal to grant an exemption with a finding that Boulder had violated the Sherman Act.[30]

This Note will examine past applications of the state action exemption to the Sherman Act. It will then discuss the ramifications of the stringent test for immunity announced in *Boulder* in light of the potentially increased threat of municipal liability it poses. The Note also will analyze the difficulties the Supreme Court would encounter in examining local regulations attacked under federal statutes if it applied the preemption analysis suggested by the dissent. Finally, because of the unworkability of the *Boulder* test and of the preemption analysis, the Note will conclude that the Sherman Act is best given meaning through a process of case-by-case adjudication until Congress legislates in the area of municipal immunity.

I. THE DEVELOPMENT OF THE STATE ACTION DOCTRINE AND THE ELIMINATION OF MUNICIPAL IMMUNITY

A. Olsen v. Smith and Parker v. Brown: The Development of the State Action Doctrine

The first clear evidence[31] of a state action doctrine appeared in *Olsen v.*

24. *Id.* at 54-55.
25. COLO. CONST. art. XX, § 6.
26. 455 U.S. at 54-55.
27. *Id.* at 60 (Rehnquist, J., dissenting).
28. *Id.*
29. *Id.*
30. *Id.* at 58 (Stevens, J., concurring).
31. In Lowenstein v. Evans, 69 F. 908 (4th Cir. 1895), the court foreshadowed the state action exemption through a finding that South Carolina's monopolization of liquor traffic

Smith,[32] fourteen years after the passage of the Sherman Act. In *Olsen*, the Supreme Court held that a Texas law granting a steamboat-pilotage monopoly did not violate federal antitrust law. *Olsen*'s language implied that for the purposes of immunity, a distinction should be made between private action that violated the Sherman Act and otherwise similar state regulatory action.[33] Sustaining a competent pilot's right to render services in violation of the state regulation would "simply den[y] that pilotage is subject to governmental control . . . ."[34] Denying Sherman Act immunity to the monopoly granted by the state, the Court pointed out, would undercut the authority of the state to regulate.[35] Dicta indicating that a state regulatory scheme may displace competition without running afoul of the Sherman Act evolved into an explicitly stated exemption in *Parker v. Brown*.[36]

In *Parker*, the Court held that the California Agricultural Prorate Act[37] was insulated from scrutiny under the Sherman Act.[38] The California statute created a cartel for raisin production through which state officials controlled the handling, disposition, and prices of California's raisin crop.[39] The *Parker* Court examined the language and history of the Sherman Act,[40] but found nothing to suggest that a statutory anticompetitive marketing program enacted in California's capacity as a sovereign would violate the Act.[41]

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did not violate the Sherman Act, because a state is neither a "person" nor a "corporation" within the Act. Rather, the court found that a "state is a sovereign having no derivative powers, exercising its sovereignty by divine right." *Id.* at 911. *But see* Georgia v. Evans, 316 U.S. 159, 162-63 (1942).

32. 195 U.S. 332 (1904).

33. *Id.* at 344-45.

34. *Id.*

35. The Court noted:

> The contention that because the commissioned pilots have a monopoly of the business, and by combination among themselves exclude all others from rendering pilotage services, is also but a denial of the authority of the State to regulate, since if the State has the power to regulate, and in so doing to appoint and commission, those who are to perform pilotage services, it must follow that no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the State are alone allowed to perform the duties devolving upon them by law.

195 U.S. at 344, 345.

36. 317 U.S. 341 (1943).

37. Act of June 5, 1933, ch. 754, 1933 Cal. Stat. 1969, *as amended by* chs. 603, 1150 & 1186, 1941 Cal. Stat. 2050, 2858 & 2943; chs. 363, 548 & 894, 1939 Cal. Stat. 1702, 1947 & 2485; ch. 6, 1938 Cal. Stat. Extra Sess. 39; & chs. 471 & 743, 1935 Cal. Stat. 1526 & 2087. Current provisions of the Act are found in the Agricultural Producers Marketing Law, CAL. AGRIC. CODE §§ 59501-60015 (West 1968).

38. 317 U.S. at 344-50.

39. *Id.* at 346.

40. *Id.* at 350-51.

41. The Court, however, assumed "that the California prorate program would violate

In addition to finding support for its holding in the text of the Prorate Act[42] and its legislative history,[43] the Court maintained that absent a contrary expression of congressional intent, notions of federalism offered protection for state regulatory schemes.[44] Amid this pronouncement,[45] the *Parker* Court tendered two general exceptions. First, the Court determined that a state could not immunize those who violate the Sherman Act by authorizing them to do so. Nor could a state declare that the actions of such violators were lawful.[46] The second exception prohibited a state from participating in a private agreement or combination to restrain trade.[47] Thus, *Parker* indicated that at least *some* state action is exempt from Sherman Act liability.[48] Still, its lack of a specific test[49] for discerning *what*

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the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate." 317 U.S. at 350.

42. *Id.* at 351. The Court said:

> The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. The Act is applicable to 'persons' including corporations (§ 7), and it authorizes suits under it by persons and corporations (§ 15). A state may maintain a suit for damages under it, Georgia v. Evans, 316 U.S. 159 [1942] but the United States may not, United States v. Cooper Corp., 312 U.S. 600 [1941]—conclusions derived not from the literal meaning of the words 'person' and 'corporation' but from the purpose, the subject matter, the context and the legislative history of the statute.

Id. at 351.

43. *See* 21 CONG. REC. 2562, 2457 (1890). The Court said the "sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only 'business combinations.'" 317 U.S. at 351. In support of this proposition, the Court cited Apex Hosiery Co. v. Leader, 310 U.S. 469, 492-93 & n.15 (1940); Standard Oil Co. v. United States, 221 U.S. 1, 54-58 (1910); United States v. Addyston Pipe & Steel Co., 85 F. 271, *aff'd*, 175 U.S. 211 (1899). *But see* Slater, *Narrowing Parker v. Brown*, 69 NW. U.L. REV. 71 (1974) in which Slater suggests that the Court's reference to "business combinations" is taken out of context. Citing 21 CONG. REC. 2562 (1890), Slater notes that Senator Sherman's actual words were: "It [the Act] does not interfere in the slightest degree with voluntary associations made to affect public opinion to advance the interests of a particular trade or occupation . . . [t]hey are not business combinations. They do not deal with contracts, agreements, etc." Slater, *supra* at 83 (quoting 21 CONG. REC. 2562 (1890)).

44. *See* 317 U.S. at 351. The Court said: "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.*

45. Although *Parker*'s state action exemption has served as a focal point for a great deal of legal literature, the actual doctrine is enunciated in only two and a half pages. The reader might be justified in questioning whether the explication was merely an afterthought on the part of the Court.

46. 317 U.S. at 351 (citing Northern Securities Co. v. United States, 193 U.S. 197, 332, 344-47 (1904)).

47. 317 U.S. at 351-52. The language of the limitation here implies the genesis of the notion that a subdivision of a state can invoke the state action exemption.

48. *See* Slater, *supra* note 43, at 73.

49. *Id. See also* Shaw, *The Application of Antitrust Laws to Municipal Activities*, 79

state action would be exempt generated a significant split of interpretation in the lower courts,[50] which the Supreme Court did not address for more than thirty years.[51]

B. Goldfarb, Cantor, and Bates: The Modern Application of the State Action Doctrine

Between 1975 and 1977 the Supreme Court addressed the state action doctrine in three cases central to its modern application: *Goldfarb v. Virginia State Bar*,[52] *Cantor v. Detroit Edison Co.*,[53] and *Bates v. State Bar of Arizona*.[54] In these cases, the Court examined the activities of three parties[55] who claimed exemption from Sherman Act liability. After this examination, the Court required that Sherman Act immunity be predicated

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COLUM. L. REV. 518-19 (1979); Note, *Antitrust State Action Defense Expanded to Include Home Rule Municipalities*, 58 WASH. U.L.Q. 1026, 1029 (1981); Note, *Parker v. Brown Revisited: The State Action Doctrine After Goldfarb, Cantor, and Bates*, 77 COLUM. L. REV. 898, 899-900 (1977); McCall, *supra* note 4, at 875-76.

50. Several commentators have amply considered lower courts' application of the *Parker* doctrine. *See, e.g.*, Note, *Antitrust State Action Defense Expanded to Include Home Rule Municipalities, supra* note 49, at 1029 n.28; Costilo, *Antitrust's Newest Quagmire; The Noerr-Pennington Defense*, 66 MICH. L. REV. 333 (1967); Note, *The Quagmire Thickens: A Post-California Motor View of the Antitrust and Constitutional Ramifications of Petitioning the Government*, 42 CIN. L. REV. 281 (1973); McCall, *supra* note 4, at 876 nn.36-37.

51. It is generally conceded that between Parker v. Brown, 317 U.S. 341 (1943), and Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), the Supreme Court touched on the state action exemption in only two cases (without notably clarifying it). *See* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) (despite state authorization, Sherman Act held to bar effort by interstate liquor distributors to enjoin a retailer from offering distributor's products at less than minimum resale price established in statutorily authorized contracts with other retailers in state.); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) (rejecting a defense that Union Carbide was insulated from liability because their anticompetitive activity was compelled by a foreign sovereign). The Supreme Court seemed almost reluctant to consider the doctrine. A large number of state action exemption question cases were denied certiorari between 1943 and 1974; *see, e.g.*, Gas Light Co. v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972); Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972). *See also* U.M.W. v. Pennington, 381 U.S. 657 (1965) and Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), two cases considering the legality of businesses combining to lobby for anticompetitive statutes, but often mistakenly cited as considering a *Parker*-type exemption.

52. 421 U.S. 773 (1975).

53. 428 U.S. 579 (1976).

54. 433 U.S. 350 (1977).

55. In *Goldfarb*, the state bar was held to be a state agency only for limited purposes. For a full discussion of *Goldfarb*, see *infra* notes 56-60 and accompanying text. *Cantor* concerned a state utility. For a full discussion of *Cantor*, see *infra* notes 61-65 and accompanying text. In *Bates*, the state supreme court, rather than the state bar, was deemed to be the real party in interest. For a full discussion of *Bates*, see *infra* notes 66-70 and accompanying text.

on a state acting as sovereign, articulating and supervising specific anticompetitive activities.

In *Goldfarb*, the Court considered whether the state action doctrine applied to a county bar association that enacted a minimum fee schedule.[56] A couple who unsuccessfully sought counsel at rates lower than those published in the schedule, attacked the bar association for attempting to monopolize lawyers fees. The Court stated that the bar association was not entitled to immunity, even though its fee schedule was "prompted"[57] by the state bar association, operating under the rules of the Virginia Supreme Court.[58] The Court reasoned that the state bar was a state agency for limited purposes only, and was not entitled to *Parker* immunity because it had joined in a private anticompetitive activity.[59] Consequently, the Court concluded, *Parker* dictated that only entities involved in anticompetitive activities *compelled* by the state acting as a sovereign qualified for the immunity.[60]

Cantor concerned a private utility that was an area's sole supplier of electricity.[61] For almost ninety years the utility had been furnishing free light bulbs to residential customers under a rate structure approved by a state regulatory commission. A light bulb retailer claimed the utility violated the Sherman Act through its light bulb distribution plan. The distribution plan was an obscure provision in the rate schedule that received little attention from the reviewing authority.[62] The Supreme Court concluded that the commission's implicit approval of the distribution plan in its certification of the utility's rate schedule did not constitute sufficient state action to exempt the distribution.[63] The Court said that even though the distribution plan could not be terminated until a new rate schedule was filed,[64] mere passive approval of the plan did not give rise to immunity.[65]

In *Bates*, the Court examined a bar association's ban on advertising.[66] Two attorneys charged by the bar association with violating the ban, countered that the association violated the Sherman Act because the advertising

56. 421 U.S. at 790.
57. *Id.* at 791.
58. *Id.* at 790.
59. *Id.* at 791.
60. *Id.*
61. 428 U.S. at 581.
62. *Id.* at 583.
63. *Id.* at 601-02.
64. *Id.*
65. *Id.* The Court said it "has never sustained a claim that otherwise unlawful private conduct is exempt from the antitrust laws because it was permitted or required by state law." *Id.* at 600.
66. 433 U.S. at 360.

ban limited competition. The Court held that the restraint on advertising was shielded from Sherman Act liability because the ban was the "affirmative command" of the state supreme court, the "ultimate body wielding the state's power over the practice of law."[67] The *Bates* Court distinguished *Goldfarb*, concluding that there the state *did not require* anticompetitive activities through its supreme court.[68] The *Bates* Court distinguished the state "acquiescence"[69] in *Cantor*, from the "clear articulation of [state] policy . . . subject to pointed reexamination by the policymaker" present in *Bates*.[70]

When considered together, *Goldfarb, Cantor*, and *Bates* marked a clearer enunciation of the standard for ascertaining when to grant the exemption.[71] In short, the test that evolved required that a state, acting as sovereign,[72] compel the specific anticompetitive activity.[73] This mandate of anticompetitive activity should arise through the clear and affirmative expression[74] and the active supervision of state policy.[75]

C. Lafayette and the Fall of Municipal Immunity From Sherman Act Liability

In 1978, the Supreme Court, in *City of Lafayette v. Louisiana Power & Light Co.*,[76] considered the application of the modified *Parker* exemption to nonprivate entities. In *Lafayette*, a privately owned utility brought an antitrust claim against power companies owned by two Louisiana cities.[77] A sharply divided Court further refined *Parker* by refusing to extend state action immunity to municipalities.[78] In a plurality opinion, Justice Brennan reasoned that although a municipality may be more cognizant of safeguarding the community than is a private business, it is no more likely to advance national economic policy.[79] The Court concluded that cities were not mere subdivisions of the state; therefore, they were not entitled to im-

67. *Id.*
68. *Id.* at 359.
69. *Id.* at 362.
70. *Id.*
71. *See supra* note 49.
72. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 791 (1975).
73. *Id. See also* Cantor v. Detroit Edison Co., 428 U.S. 579, 597-98 (1976).
74. *See* Bates v. State Bar of Arizona, 433 U.S. 350, 362 (1977).
75. *Id. See also* Note, *Parker v. Brown Revisited: The State Action Doctrine After Goldfarb, Cantor, and Bates, supra* note 49, at 922 n.115.
76. 435 U.S. 389 (1978).
77. *Id.* at 391.
78. *Id.* at 394.
79. *Id.* at 403-04. The Court asserted that in extending the exemption to municipalities, "serious economic dislocation . . . could result if cities were free to place their own paro-

munity.[80] The conclusion was based on the assertion that *Parker* applies only to sovereign acts of a state itself.[81] It followed, therefore, that municipal state action claims merit the same approach as do private claims.[82]

The Court, recognizing that a state might not clearly authorize action in an area of legitimate municipal concern,[83] reexamined the standards for immunity enunciated in *Goldfarb, Cantor*, and *Bates*.[84] In order to invoke immunity successfully, the Court asserted, a municipality must show that the alleged anticompetitive activity was contemplated by the state legislature.[85] The Court implied that state authorization to displace competition may be inferred by courts in examining state legislative intent.[86] Given this qualification, the *Lafayette* plurality appeared to weaken the state compulsion and active supervision standard of *Goldfarb, Cantor*, and *Bates*. Nonetheless, *Lafayette* left intact the requirement that state enacted restraints must be "clearly articulated and affirmatively expressed as state policy"[87] before *Parker* immunity can be granted.

Chief Justice Burger, concurring in part, framed the issue around the

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chial interest above the Nation's economic goals reflected in the antitrust laws." *Id.* at 412-13.

80. *Id.* at 394.

81. *Id.* at 409-13.

82. *Id.* at 411 n.41. The Court rejected "automatic" immunity for municipalities. Instead, the Court stressed that the *Parker* exemption embodied the federalism principle that we are a nation of sovereign states, not sovereign municipalities. *Id.* at 412-13.

83. *Id.* at 414.

84. *Id.* at 413-15.

> 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 . . . 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.'

Id. at 415 (quoting City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434 (5th Cir. 1976)).

85. The Court offered some perspective on its use of "contemplation" saying that "in the absence of evidence that the State authorized or directed a given municipality to act as it did . . . . [t]he most that could be said is that state policy may be neutral." 435 U.S. at 414.

86. *Id.* at 415. The Court said that in order for a municipality to assert *Parker* immunity it does not have to "be able to point to a specific, detailed legislature authorization." For a brief consideration of what courts have used for such examination of legislative intent, see Shaw, *supra* note 49, at 523-24. *See also* Bangasser, *Exposure of Municipal Corporations to Liability for Violations of the Antitrust Laws: Antitrust Immunity after the City of Lafayette Decision*, 11 URB. LAW., vii, xxv (1979).

87. 435 U.S. at 410. After *Lafayette*, the Court found the *Parker* requirements satisfied without an actual express declaration of intent to displace antitrust laws. *See* New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978). In *Fox*, a statute requiring existing auto dealers to approve new dealerships in their area and requiring a state-held hearing if a franchise protested such establishment was granted *Parker* immunity. The "clearly articu-

nature of the challenged municipal action.[88] The Chief Justice distinguished between a municipality's governmental and proprietary functions,[89] stating that anticompetitive business activities not articulated by a state as sovereign cannot qualify for exemption.[90] For the purposes of federalism, the Court must recognize a dichotomy between a state's "entrepreneurial personality and a sovereign's decision—as in *Parker*—to replace competition with regulation."[91] Chief Justice Burger resolved that the cities should be required to demonstrate that immunity is critical to the state regulatory scheme.

D. Midcal and the Clarification of the Test for Immunity

Two years later, in *California Liquor Dealers v. Midcal Aluminum Inc.*,[92] the Court considered an attack on a California statute requiring resale price maintenance, and reaffirmed *Lafayette*'s conclusion that there are "two standards for antitrust immunity under *Parker v. Brown*."[93] The Court said the anticompetitive pricing statute satisfied *Parker*'s first requirement: it clearly articulated and affirmatively expressed state policy.[94] The Court found, nevertheless, that the state's mere authorization of the program and enforcement of privately set prices evinced only passive state involvement.[95] The Court voided the resale pricing control, holding that

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lated and affirmatively expressed" end of the state policy was to "displace unfettered business freedom." *Id.* at 109.

88. 435 U.S. at 418-20 (Burger, C.J., concurring in part).

89. *Id.*

90. *Id.*

91. *Id.* at 422.

92. 445 U.S. 97 (1980).

93. *Id.* at 105. Briefly, the statute required wine suppliers to specify dealer resale prices and wine dealers to sell at those prices or face fines, license suspension or revocation.

94. *Id.* at 105. *See* Norman's On the Waterfront, Inc. v. Wheatley, 444 F.2d 1011, 1018 (3rd Cir. 1971); Asheville Tobacco Bd. v. FTC, 263 F.2d 502, 509-10 (4th Cir. 1959); *see also* Note, *Parker v. Brown Revisited: The State Action Doctrine After Goldfarb, Cantor, and Bates, supra* note 49, at 916. *Accord* New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Bates v. State Bar of Arizona, 433 U.S. 350 (1977). *See supra* note 87 and accompanying text.

95. 445 U.S. at 100. The Court found Rice v. Alcoholic Beverage Control Appeals Bd., 21 Cal. 3d 431, 579 P.2d 476 (1978), to be "squarely controlling." 445 U.S. at 101. In that case, the court, striking down an almost identical liquor price control structure, said:

> In the price maintenance program before us, the state plays no role whatsoever in setting the retail prices. The prices are established by the producers according to their own economic interests, without regard to any actual or potential anticompetitive effect; the state's role is restricted to enforcing the prices specified by the producers. There is no control, or 'pointed reexamination,' by the state to insure that the policies of the Sherman Act are not 'unnecessarily subordinated' to state policy.

the activity failed to meet *Parker*'s second requirement of active state supervision.[96] Accordingly, *Lafayette*'s teaching was that "the national policy in favor of competition cannot be thwarted by casting . . . a gauzy cloak of state involvement over what is essentially a private arrangement."[97] A state home rule amendment was held to be such a cloak in *Boulder*.

II. *BOULDER* AND THE EMASCULATION OF MUNICIPAL ANTITRUST IMMUNITY

In *Community Communications Co. v. City of Boulder*,[98] CCC held a permit to conduct a cable television business in Boulder, Colorado.[99] To encourage new entries in Boulder's cable market, the city placed a moratorium on the firm's planned expansion within Boulder during which the city solicited competition.[100] CCC contended that the moratorium violated the Sherman Act,[101] and the city claimed immunity under the state action doctrine.[102]

The district court found that the city was not immune to antitrust liability.[103] The United States Court of Appeals for the Tenth Circuit reversed,[104] and extended immunity to Boulder, holding that the moratorium was a governmental function supervised by the state in advancement of a specific state policy.[105] The Supreme Court reversed.[106]

Justice Brennan, writing for the majority, first addressed the question of Boulder's sovereignty and noted that Colorado's Home Rule Amendment did not empower the city to act on behalf of the state in local matters.[107]

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21 Cal. 3d at 445, 579 P.2d at 486.

96. 445 U.S. at 105-06. The Court offered as examples of nonpassive state involvement: state price establishment, state review of the reasonableness of price schedules, state regulation of the terms of fair trade conflicts, or state monitoring of market conditions. *Id.* In essence, then, active state supervision requires a "pointed reexamination" of any state program or at least a clear manifestation of intent to displace competition. *Id.* at 106. The "pointed reexamination" language was first used in the *Parker* context in *Bates*, 433 U.S. at 362. *See also* New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978). *See supra* note 87 and accompanying text.

97. 445 U.S. at 106.

98. 455 U.S. 40 (1982).

99. *Id.* at 44.

100. *Id.* at 45-46.

101. 485 F. Supp. at 1038.

102. *Id.*

103. *Id.* at 1039.

104. 630 F.2d 704 (1980).

105. *Id.* at 707.

106. 455 U.S. at 57.

107. *Id.* at 52-54.

Further, the Court refused to address conflicting Colorado decisions which interpreted home rule powers as including or excluding the power of a local municipality to regulate cable television.[108] Since *Parker* implicated congressional intention in federal antitrust law, Brennan asserted that determining qualification for a *Parker* exemption was strictly a matter of federal law.[109]

Stressing what it termed a principle of federalism,[110] the Court interpreted *Parker*'s emphasis on a "dual system of government" to preclude a finding of sovereign authority in a municipality.[111] The Court found that states, not "city-states," comprise the United States.[112] Justice Brennan noted that the *Lafayette* Court asserted that cities are not sovereign; therefore, they can invoke the *Parker* exemption only when acting under a clearly articulated and affirmatively expressed state policy actively supervised by the state.[113] After establishing that Boulder did not enjoy sovereign status, the Court considered whether the city's actions qualified it for exemption under the two-pronged test synthesized in *Lafayette* and more recently underscored in *Midcal*.[114]

According to the Court, Colorado's Home Rule Amendment did not show the legislature's contemplation of anticompetitive municipal action within the dictates of *Lafayette*. Instead, it indicated a neutral legislative stance.[115] A state, seeking to permit municipal flexibility under a home rule amendment, cannot be found to have contemplated a specific munici-

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108. *Id.* at 52-53 nn.15-16. *See* Denver Urban Renewal Auth. v. Byrne, 618 P.2d 1374, 1381 (Colo. 1980) (home rule grants every power possessed by legislature in local affairs). *Contra* City and County of Denver v. Sweet, 138 Colo. 41, 48, 329 P.2d 441, 445 (1958); City and County of Denver v. Tihen, 77 Colo. 212, 219-20, 235 P. 777, 780-81 (1925). Regarding municipalities' power to regulate cable television, see Manor Vail Condo. Ass'n v. Vail, 604 P.2d 1168, 1171-72 (Colo. 1980) (cable regulation local matter). *Contra* United States v. Southwestern Cable Co., 392 U.S. 157, 168-69 (1968).

109. 455 U.S. at 52 n.15.

110. *Id.* at 53. "The *Parker* state action exemption reflects Congress's intention to embody in the Sherman Act the federalism principle that the state possess a significant measure of sovereignty under our Constitution." *Id.*

111. *Id.* at 53-54. The Court quoted United States v. Kagama, 118 U.S. 375, 379 (1886), in which the Court stated that sovereign authority within the United States rests with

> the Government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these.

Id.

112. 455 U.S. at 54.

113. *Id.* at 54-56.

114. *Id.*

115. *Id.* at 55.

pal action.[116] Because the state did not comprehend the power to regulate cable television within the authority granted to Boulder, the Court held the Colorado amendment did not meet the mandate of *Lafayette*.[117] The Court interpreted the term "grant" as used in *Lafayette* to imply a specific conferral of power.[118] Therefore, under Colorado's neutral legislative stance, the city's moratorium ordinance could not meet *Lafayette*'s test for "clear articulation and affirmative expression."[119] The Court noted that a municipality's power under home rule to enact ordinances did not imply state authorization to enact specific anticompetitive ordinances.[120] Indeed, the Court proffered, a finding that the Home Rule Amendment contemplated varied municipal postures respecting cable television competition would allow municipalities too much latitude and would "eviscerate" the standards of *Midcal* and *Lafayette*.[121] Since Boulder failed to meet the first part of the test, the Court did not address whether the ordinance satisfied the "active state supervision" criteria emphasized in *Midcal*.[122] The Court conclusively asserted that denial of exemption would not burden municipalities and federal courts[123] because a state was free to grant specific anticompetitive regulatory powers to municipalities.[124]

In a brief concurrence, Justice Stevens reasoned that the Court's opinion adequately explained its refusal to grant Boulder immunity.[125] Focusing on assumptions made by the dissent, Justice Stevens argued that the dissent had confused the majority's refusal to grant immunity with a finding that Boulder's ordinance actually violated the Sherman Act.[126] On the

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116. *Id.*

117. *Id.*

118. *Id.* The Court noted:

> A State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as 'comprehended within the powers *granted*,' since the term 'granted,' necessarily implies an affirmative addressing of the subject of the State.

Id. at 55 (emphasis added by the Court, quoting *Lafayette*, 435 U.S. at 415).

119. 455 U.S. at 55.

120. Boulder maintained that the Colorado General Assembly was actually without power to act on local matters regulated by a home rule city. *Id.* at 55, 56. The Court said that the concepts of "clear articulation and affirmative expression" would be destroyed if it accepted Boulder's proposition that "the general grant of power to enact ordinances necessarily implies state authorization to enact specific and anticompetitive ordinances." *Id.* at 55.

121. *Id.* at 56.

122. *Id.* at 51 n.14.

123. *Id.* at 56-57.

124. *Id.* at 57.

125. *Id.* at 58-60 (Stevens, J., concurring).

126. *Id.*

contrary, Stevens perceived that the Sherman Act "proscribes the conduct of persons, not programs . . . ."[127] Government officials charged by state law with the responsibility of implementing a program attacked under the Sherman Act were not necessarily parties to a violation of the Act.[128] Justice Stevens maintained that a charge against public officials for violating the Act was distinct from a charge that private parties were in violation of the Act.[129] The dissent's assumption that the majority found Boulder guilty of a Sherman Act violation was, therefore, invalid.[130] In determining whether Boulder violated antitrust law, Justice Stevens contended "the Court should adhere to its settled policy of giving concrete meaning to the general language of the Sherman Act by a process of case-by-case adjudication of specific controversies."[131]

In a dissenting opinion, Justice Rehnquist, joined by Chief Justice Burger and Justice O'Connor, maintained that the Court erred in treating a preemption question as if it were an exemption question.[132] Justice Rehnquist said that a search for exemption was improper because it involved reconciling the relationship between the statutes of a single sovereign by gauging the sovereign's intent in enacting conflicting legislation.[133] He asserted that in resolving exemption questions where an expressly legislated exemption did not exist, courts have routinely employed the presumption that federal antitrust law reflects a national policy which is dominant over

127. *Id.* at 59 n.2 (quoting Cantor v. Detroit Edison Co., 428 U.S. 579, 601 (1976)).

128. *Id.*

129. *Id.*

130. *Id.* at 58.

131. *Id.* at 60 (quoting Cantor v. Detroit Edison Co., 429 U.S. at 603).

132. *Id.* (Rehnquist, J., dissenting).

133. *Id.* at 61-62. *See, e.g.*, National Broiler Mktg. Ass'n v. United States, 436 U.S. 816 (1978) (cooperative agricultural marketing association members did not qualify for the Capper-Volstead Act exemption, which protects agricultural cooperatives from Sherman Act liability, because the legislative history of the Capper-Volstead Act indicated that protection does not extend to processor and packer association members); Silver v. New York Stock Exch., 373 U.S. 341, 357-61 (1963) (New York Stock Exchange's removal of securities firm's direct wire connection not protected by the duty of self-regulation created by the Securities Exchange Act of 1934 because the intent of the Act was not to protect the Exchange from liability for per se violations of the Sherman Act). *See* Handler, *Antitrust-1978*, 78 COLUM. L. REV. 1363, 1378-79 (1978). Handler maintains that:

> [The exemption doctrine involves] the reconciliation of two ostensibly conflicting enactments of a *single* sovereign—typically the Sherman Act and a federal regulatory scheme which authorizes or at least contemplates anticompetitive conduct. The job . . . is to ascertain . . . the intent of the legislators. Usually such an intention can be gleaned in one of two ways—either from an express exemption or from a plain repugnancy between the regulatory enactment and the requirements of antitrust.

Id. at 1378.

any implied exemption.[134] Antitrust law was to be displaced, then, only when an examination of congressional intent revealed a severe conflict favoring another federal enactment restraining competition.[135]

Justice Rehnquist claimed that a preemption analysis was more appropriate, because it involved the interplay of sovereign states and the federal government.[136] He acknowledged that sovereign state action may be preempted under the supremacy clause if it is detrimental to the purposes and objectives of federal statutes, or if Congress has already occupied that particular regulatory field.[137] Courts should be reluctant, however, to infer preemption absent manifest congressional intent to supersede state regulations,[138] avoiding judicial intervention in "the very sensitive area of Federal-State relations."[139] In deference to state sovereignty, therefore, the presumption under a preemption analysis would favor the validity of state

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134. 455 U.S. at 66-67. *See* Handler, *supra* note 133, at 1379. Justice Rehnquist draws much of his analysis from Handler. Handler notes:

> Where the exemption is express, the role of the judiciary is to determine whether the arrangement or practice is fairly embraced by the exemptive language, and whether, in cases of ambiguity or doubt, construction should favor liability or immunity. When, however, the regulatory legislation contains no express exemption, an unexpressed legislative intent must be reconstructed to determine whether an exemption should be 'implied,' taking into account the divergent objectives of the two enactments. In discharging this responsibility, the courts routinely presume that antitrust is the dominant national policy and that, accordingly, it should be displaced only when there is plain repugnancy between the enactments—and even then 'only to the minimum extent necessary.'

Id. (footnotes omitted).

135. 455 U.S. at 61.

136. *Id.* at 61. *Accord* Handler, *supra* note 133, at 1379-80. *See* Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 624-26 (1975).

137. 455 U.S. at 61. *Accord* Handler, *supra* note 133, at 1379.

138. 455 U.S. at 61, *citing* Exxon Corp. v. Governor of Md., 437 U.S. 117, 132 (1978). In *Exxon*, the Court held that a Maryland statute prohibiting oil companies from operating retail service stations within the state was not preempted by the Clayton Act, as amended by the Robinson-Patman Act, or the Sherman Act. *Id.* at 133-34. Exxon maintained that the Maryland statute was preempted by § 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, which affords price reductions an exemption to the statute's "broad prohibition against discriminatory pricing." *Id.* at 132. The Court noted that "it is illogical to infer that by excluding certain competitive behavior from the general ban against discriminatory pricing, Congress intended to preempt the States' power to prohibit any conduct within that exclusion. This Court is generally reluctant to infer preemption . . . ." *Id.* (citing De Canas v. Bica, 424 U.S. 351, 357-58 n.5 (1976) and Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117, 127 (1973)). *See also* Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) (holding that certain state pilotage regulations were not preempted by federal statutes, the Court noted that "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.") (citation omitted). *See* Handler, *supra* note 133, at 1380.

139. 455 U.S. at 61. *See supra* note 138, and accompanying text.

regulatory schemes.[140]

Justice Rehnquist read *Parker* as a preemption decision, holding that Congress did not intend the Sherman Act to preempt state sanctioned anticompetitive activity.[141] Thus, *Parker*'s contention that "[o]ccupation of a legislative 'field' by Congress in the exercise of a granted power is a familiar example of its constitutional power to suspend state laws"[142] was "clearly the language of federal preemption"[143] under the supremacy clause. Furthermore, Justice Rehnquist observed that the Court had never distinquished between states and their subdivisions for the purpose of supremacy clause and preemption analyses.[144]

By requiring Boulder to show a clear articulation and affirmative expression of state policy as a threshold to exemption, the Court, in effect, ignored federalist principles. The Court also failed to distinguish between Boulder, as a political subdivision of a state, and Boulder, as a private business.[145] The general consequence of the decision in *Boulder* is that absent a grant of immunity through the clear articulation of state policy, even traditional municipal economic regulation would be found to be in violation of antitrust law and a municipality could be held liable for treble damages.[146]

On the other hand, Justice Rehnquist noted that municipal regulation preempted by the Sherman Act would be "simply invalid and unenforceable."[147] The underlying rationale of the preemption doctrine was that the supremacy clause of the Constitution invalidated state laws inconsistent with the laws of Congress.[148] Therefore, Justice Rehnquist ventured, "there [would] be no problems with the remedy" when a local law was preempted:[149] the threat of treble damages if a local law violated the Sher-

140. 455 U.S. at 61. *Accord* Handler, *supra* note 133, at 1379, 1380. Central to Justice Rehnquist's analysis is Handler's assertion that under a dual system of government, a preemption analysis does not embody an "effort to accomodate or subordinate the goals of the state law to those of the federal statute." *Id.* at 1380.

141. 455 U.S. at 62-63.

142. *Parker*, 317 U.S. at 350 (1943).

143. 455 U.S. at 63.

144. *Id.* at 69-70. *See, e.g.*, City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) (municipal curfew on jet flights preempted by Noise Control Act of 1972); Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960) (criminal provisions of municipal antipollution controls not preempted by federal regulation of ships which were polluting).

145. 455 U.S. at 60.

146. *Id.* at 60, 63-71.

147. *Id.* at 68 n.4.

148. *Id.* at 61. *See generally* Chicago & North Western Transp. Co. v. Kalo Brick & Tile, 450 U.S. 311 (1981) (federal railroad abandonment law preempts state law permitting shipper to sue railroad for failure to provide satisfactory service).

149. 455 U.S. at 68 n.4.

man Act would be lifted from the regulatory process if the municipal law was preempted.

Justice Rehnquist found support in *Midcal* for the proposition that the state action doctrine was not an exemption, but a matter of federal preemption.[150] He read the *Midcal* decision as a preemption analysis because it involved the interplay of a state statute and the Sherman Act.[151] In *Midcal*, a state pricing system was held *invalid* under, rather than a violation of, the Sherman Act.[152] The pricing sytem was enacted pursuant to a clear articulation of state policy, but was not actively supervised and was therefore voided.[153] Justice Rehnquist saw no need to create a new preemption test for municipalities.[154] He suggested that municipal ordinances should be tested under the *Midcal* criteria.[155] By applying *Midcal*'s criteria to cities, the need for a clear articulation of state policy and state supervision would be replaced with a requirement of a clear articulation of municipal policy and municipal supervision as a step in determining whether municipal ordinances would be preempted by federal law.[156]

III. *Boulder*'s Ill-Defined Exemption Test—A Pall Over Local Control of Local Problems

In *Boulder*, the Supreme Court was presented with an opportunity to clarify the application of the state action doctrine to municipalities. Precluding municipal immunity except under rigidly defined circumstances, the *Boulder* Court stressed a strong policy against granting blanket immunity for anticompetitive municipal activities.[157] In effect, the Court gutted the remaining traces of municipal immunity from federal antitrust law. Given the obvious distinctions between municipalities and private litigants, certainly some municipal government activities should be held immune. *Parker v. Brown* prohibits state and, ultimately, municipal collusion with private individuals for restraining trade and prohibits authorizing private parties to violate the Sherman Act.[158] This aspect of *Parker* supports the concept that municipalities should not be allowed to ravage competition and national economic policy without concern for lia-

150. *Id.* at 64-65.
151. *Id.*
152. *Id.*
153. 445 U.S. at 105, 106. The Court noted that the state did not "monitor market conditions or engage in any 'pointed reexamination' of the program." *Id.* at 106.
154. 455 U.S. at 68-69.
155. *Id.*
156. *Id.*
157. *Id.* at 56.
158. 317 U.S. at 351-52.

bility.[159] Nevertheless, the *Boulder* requirement that the state direct each specific anticompetitive restraint to qualify for *Parker* immunity is extreme and the test articulated is unworkable.

A central defect in *Boulder*'s test for immunity is that it disturbs a state's ability to delegate authority. Typically, states delegate authority through the implied power doctrine, enabling acts, and, as in *Boulder*, home rule amendments to state constitutions.[160] Generally, these delegations are stated in broad terms.[161] It is unlikely, therefore, that *Lafayette*'s requirement that the state legislature contemplate the anticompetitive activities later embarked upon by municipalities will ever be met.[162] Colorado's Home Rule Amendment was found to indicate only a neutral state policy regarding cable television regulation.[163] Given the existence of home rule, however, it would seem redundant for Colorado to enact specific legislation from which an intent to encourage a municipality to displace competition in the cable television industry could be inferred. Furthermore, the decentralization of authority implicit in home rule underscores a state's intention to encourage municipal autonomy in local regulation.

The majority's ruling, therefore, threatens to render unworkable the proposition that, with proper delegation, municipalities may serve as the vehicle for state decisions. The practical result of the majority's suggestion, that states could specifically empower municipalities to enact individual economic regulation, would be a burden to state legislatures.[164] Cautious municipalities would seek the articulation of a concurrent state policy for every municipal activity involving some relationship with competition, however slight. Response to local needs would therefore be slowed. Local government would, in large part, be removed to the states.

The issues left unaddressed in *Lafayette* and unresolved in *Boulder*, are vital to a consistent application of the state action doctrine. The Court did not consider what level of clarity is required in a "clear and affirmative expression" of intent to displace competition. The Court did not specifically state which bodies within a state government qualify for the state

159. *See generally* Areeda, *Antitrust Immunity for State Action After Lafayette*, 95 HARV. L. REV. 435 (1981). *See also* Shaw, *supra* note 49.

160. *See* Shaw, *supra* note 49 at 528-29.

161. *Id.*

162. *Id.*

163. 455 U.S. at 55.

164. States—for better or worse—may be willing to accept this burden. For example, it should be noted that 23 states, including Colorado, supported Community Communications Co. as amicus curiae. Justice Rehnquist interpreted this as an effort to "recapture power . . . lost over local affairs." *Id.* at 71 n.7.

action doctrine. The Court also did not explain how strong a link between the legislature and a state agency is acceptable.

Absent answers to the questions left unresolved by *Boulder*, traditional municipal functions may be stifled by the threat of antitrust liability. Zoning, contract awards, and franchise grants, for example, all involve restraints of competition.[165] Following *Boulder*, municipalities enacting potentially beneficial regulations in these areas must consider not only the threat of litigation, but potential liability. The cost of engaging counsel to dispel even specious attacks may be deleterious to many municipalities. Without a clearly and affirmatively expressed state policy to displace competition, it is possible that municipalities merely regulating the local economy will find themselves in violation of the Sherman Act.[166]

Following *Boulder*, courts resolving Sherman Act attacks on local economic regulation may be required to interpret antitrust principles.[167] As Justice Rehnquist noted, it is well-established that private parties may defend their anticompetitive action only if that action does not unreasonably affect competition, or if the action's benefits to competition outweigh any burden to competition.[168] The majority's approach of equating municipalities with private defendants bars municipalities from balancing the health and safety value of a regulation that burdens competition against the regulation's anticompetitive effects.[169] Therefore, unless an affirmatively ex-

165. *Id.* at 66.

166. *Id.* at 60, 63-71.

167. *Id.* at 65. Justice Rehnquist's dissent notes that the Court leaves open the question whether per se rules of illegality will apply to municipal defendants in the same way they do to private defendants. Similarly, he claimed that the question of whether municipalities would be liable for treble damages was not addressed in the majority opinion. *Id.*

168. *Id.* (citing National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 695 (1978); Continental T.V., Inc. v. G.T.E. Sylvania, Inc., 433 U.S. 36 (1977)).

169. 455 U.S. at 66 (Rehnquist, J., dissenting). *See National Soc'y of Professional Eng'rs*, 435 U.S. at 686-96. The Court held that the society's canon of ethics prohibiting competitive bidding among members violated the Sherman Act. The Court reasoned that the canon was not justified because it was enacted to reduce the risk that competitive bidding would encourage engineering work endangering the public safety. *Id.* at 696. Writing for the Court, Justice Stevens noted:

> There are . . . two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are 'illegal *per se*.' In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.

pressed state policy to displace competition exists, municipalities may only be able to enact ordinances consistent with the Sherman Act. In effect, this would eliminate their power to regulate the local economy to further the public health, safety, and welfare.[170] Adapting existing antitrust principles in order to allow courts to balance competition against the public well-being would solve this dilemma.[171] Federal courts, however, would be placed in the untenable position of acting as "super-legislature[s]"[172] engaged in an essentially standardless review of legislation.[173] Alternatively, as Chief Justice Burger suggested in his *Lafayette* concurrence,[174] the resolution of immunity questions based on a distinction between a municipality's governmental and proprietary functions would be equally difficult. Courts would be left to work with little or no guidance, attempting to give meaning to an overly flexible distinction.

IV. Municipal Immunity Through Preemption Analysis: A Flawed Alternative

To some extent, the problems in the Court's exemption test are circumvented by determining the validity of local regulations potentially inconsistent with federal statutes under a preemption analysis.[175] As Justice Rehnquist noted, there was no need to develop a new test;[176] *Midcal* provides an appropriate preemption test for municipalities.[177] Under the *Midcal* criteria, an ordinance would be held valid if it embodied an affirmative

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Id. at 692 (footnotes omitted). Balancing the Sherman Act's policy of prohibiting unreasonable restraints on competition against the potential threat competition poses to the public safety "is nothing less than a frontal assault on the basic policy of the Sherman Act." *Id.* at 695.

170. 455 U.S. at 66-67 (Rehnquist, J., dissenting). *See also supra* note 138 and accompanying text. Justice Rehnquist asserted that this limitation on municipal power will thwart municipal attempts to experiment with innovative social programs. 455 U.S. at 67. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

171. 455 U.S. at 67-68 (Rehnquist, J., dissenting). Justice Rehnquist said:

> If the Rule of Reason were 'modified' to permit a municipality to defend its regulation on the basis that its benefits to the community outweigh its anticompetitive effects, the courts will be called upon to review social legislation in a manner reminiscent of the *Lochner* era. Once again, the federal courts will be called upon to engage in the same wide-ranging, essentially standardless inquiry into the reasonableness of local regulation that this Court has properly rejected.

Id. at 67. *See* Ferguson v. Skupra, 372 U.S. 726, 730 (1963); Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 535 (1949).

172. 455 U.S. at 68 (Rehnquist, J., dissenting).

173. *Id.*

174. *See supra* notes 88-91 and accompanying text.

175. 455 U.S. at 60-69 (Rehnquist, J., dissenting).

176. *Id.*

177. *Id.*

municipal policy to restrain competition, and if the municipality actively supervised this policy.[178] Justice Rehnquist further observed that preempted municipal regulation would thereby be rendered merely unenforceable[179] and the pall of treble damages would be lifted from a muncipality's regulatory process. Applied with deference to *Parker*'s explicit limitations on governmental collusion with private individuals as a device to avoid Sherman Act liability,[180] the use of *Midcal* to test municipal immunity would serve to preserve the integrity of local control of local problems.

If Justice Rehnquist's suggestion is followed, however, the integrity of local control of local problems would be preserved at the expense of a basic principle of federalism. The *Boulder* majority correctly emphasized that *Parker* immunity is conferred to protect state, not municipal, sovereignty[181] within the United States' "dual system of government."[182] *Lafayette* expressly held that municipalities "are not themselves sovereign."[183] The *Parker* decision, used by Justice Rehnquist to assert that *Parker* immunity is granted through preemption, rather than exemption, never contemplated a grant of municipal immunity.[184] The *Parker* Court noted that the Sherman Act does not "restrain a state . . . from activities directed by its legislature."[185] In a dual system of government, the Court maintained, the authority of a sovereign state may be tempered only by Congress.[186]

Justice Rehnquist's assertion that the *Midcal* test be used to determine whether municipal statutes are preempted is made without regard for the efficacy of the test. The test remains unworkably ambiguous, whether applied to a state or to a municipality. Justice Rehnquist does not consider what level of clarity is required in a "clear and affirmative expression" of municipal intent to displace competition. He does not indicate which municipal bodies within a local government qualify for the state action doc-

178. *Id.*

179. *Id.* at 68 n.4.

180. 317 U.S. at 351-52.

181. 455 U.S. at 53-54. The Court noted that a dual system of government has its own limitations, with "no place for sovereign cities." *Id. See supra* notes 49 & 111.

182. 455 U.S. at 53.

183. 435 U.S. at 412. Cities do not "receive all the federal deference of the states that create them." *Id.* (citing Edelman v. Jordan, 415 U.S. 651, 667 n.12 (1974); Lincoln County v. Luning, 133 U.S. 529 (1890)).

184. 317 U.S. at 350-51.

185. *Id.*

186. *Id.* at 351. *See supra* note 44.

trine. Nor does he explain how strong a connection between a municipal governing body and a municipal agency is acceptable.

Finally, Justice Rehnquist ignores *Lafayette* when contending that the majority's equation of municipalities with private litigants is the same as finding municipalities in violation of the Sherman Act for the purpose of gauging immunity. As Justice Stevens' concurrence noted, in *Lafayette*, the Court did not hold that the city had violated antitrust law.[187] Rather, the *Lafayette* Court "held that municipalities' activities as providers of service are not exempt from the Sherman Act."[188] Municipalities are still governmental entities. Without a finding that a government entity colluded with a private entity to restrain trade, *Parker* and its progeny provide no precedent for holding a government in violation of the Sherman Act. Similarly, after the *Cantor* Court rejected a grant of *Parker* immunity to a state utility adhering to a state rate structure, it held that the plaintiff would then have to pursue a separate antitrust violation attack on the utility.[189] As Justice Stevens indicated, the officials who authorized the rate structure did not automatically "become parties to a violation of the Sherman Act."[190]

VI. Municipal Immunity: A Brighter Future Through a Process of Case-By-Case Adjudication?

Considering the unworkability of *Boulder*'s immunity test, and of Justice Rehnquist's suggested preemption test, the most sound approach to questions of municipal immunity is found in Justice Stevens' concurrence. The attempts by the *Boulder* majority and Justice Rehnquist to fashion a simple and predictable test for Sherman Act immunity cannot be reconciled with a complex economy.[191] Justice Stevens' concurrence suggests defining the application of the Sherman Act through a process of "case-by-case adjudication of specific controversies."[192] This analysis affords the Court an opportunity to distinguish municipalities from private litigants for the purpose of Sherman Act liability. Until Congress legislates in the area of municipal immunity from antitrust liability, the Court should employ a case-by-case analysis to fashion a more workable test for municipal immunity.

187. 455 U.S. at 58. *See* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978).
188. 455 U.S. at 58.
189. *Id.* at 844 & n.2. *See* Cantor v. Detroit Edison Co., 428 U.S. 579 (1976).
190. 455 U.S. at 58.
191. *Id. See Cantor*, 428 U.S. at 603.
192. 455 U.S. at 60.

VII. Conclusion: Municipal Immunity From Sherman Act Liability—The Need For A Workable Test Through A Process Of Case-By-Case Analysis

In *Community Communications Co. v. City of Boulder* the Supreme Court held that municipalities seeking immunity from Sherman Act liability must meet the same stringent test as is applied to private litigants. The test for immunity requires that the state must actively supervise, as well as clearly and affirmatively direct, each specific anticompetitive restraint enacted by a municipality. This test dangerously weakens the notion that municipalities may serve as the vehicle for state decisions through the delegation of power. As applied to municipalities, the test is unworkable. The majority offers no guidance regarding what constitutes a clear and affirmative expression of state policy, or what entities comprise the state for the purposes of the doctrine. Without the imprimatur of a clearly and affirmatively expressed state policy to displace competition, municipalities engaging in regulatory activities having a slight nexus with competition may be held in violation of the Sherman Act. Current antitrust law would not allow a municipality to defend such regulations as a valid exercise of its police power.

Considering municipal immunity under a preemption analysis is one solution to these problems, as the dissent indicates. Employing a preemption analysis to measure municipal immunity, however, runs counter to the duality of the federalist system. Further, the test remains ambiguous when applied to municipalities. Finally, the dissent's premise, that equating municipalities with private litigants for the purpose of questioning immunity is the same as finding municipalities in violation of the Sherman Act, is an erroneous assumption.

Because the existing test for municipal immunity is flawed, its application must be refined. Since the complexities of our economic system make the application of hard and fast rules difficult, the best way to refine the test is through a case-by-case analysis of municipal immunity questions. In this manner, the courts will be able to distinquish municipalities from private litigants until Congress legislates in the area of municipal immunity.

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