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Municipal Antitrust Immunity after *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344 (1991)

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MUNICIPAL ANTITRUST IMMUNITY AFTER *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344 (1991).

Abstract: For most of this century, states and municipalities were immune from liability for anticompetitive action. However, in *City of Lafayette v. Louisiana Power & Light Co.*, the Supreme Court sharply limited antitrust immunity for municipalities. The *Lafayette* Court held that municipal immunity only applied to municipalities following a clearly articulated state policy. In *City of Columbia v. Omni Outdoor Advertising, Inc.*, the Supreme Court has expanded the immunity available to municipalities by requiring only that a municipality's actions be a foreseeable result of a specific grant of state authority. This Note examines the history of municipal immunity and the *Omni* ruling. The Note argues that the foreseeability test is inadequate because it violates federalism principles and treats home rule municipalities inequitably. The Note concludes that the *Omni* rule should be broadened to protect home rule municipalities.

The Supreme Court recently broadened the state action immunity that municipalities enjoy from the Sherman Antitrust Act. According to the previous rule, municipalities could be sued under the Sherman Act because of the anticompetitive results of zoning ordinances that they enacted. Under *City of Columbia v. Omni Outdoor Advertising, Inc.*,[1] the Supreme Court's most recent ruling on the matter, the Court has greatly expanded municipal antitrust immunity. Municipalities now have antitrust immunity for their zoning ordinances and for many other activities for which they were previously liable.

I. STATE ACTION IMMUNITY FROM THE SHERMAN ACT

The municipal antitrust immunity question dates to the passage of the Sherman Act in 1890. The language of the Act is sweeping: "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."[2] At that time, the Sherman Act could not have applied to the states because the Supreme Court had not yet interpreted the commerce clause as extending to state government actions.[3] State immunity from the Act

1. 111 S. Ct. 1344 (1991).

2. 15 U.S.C.A. § 1 (West 1973); *see also* 15 U.S.C.A. § 2 (West Supp. 1991) ("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 . . . .").

3. Thomas M. Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 CAL. L. REV. 227, 229 (1987); *cf.* John E. Lopatka, *State Action and Municipal Antitrust Immunity: An Economic Approach*, 53 FORDHAM L. REV. 23, 52–54 (1984).

did not become an issue until after the Supreme Court expanded the commerce clause.

A. Parker v. Brown: *The Beginning of State Action Immunity*

State immunity from the Sherman Act is largely based on the landmark decision *Parker v. Brown.*[4] California had developed a "marketing program" for the 1940 raisin crop that included a classification program and a controlled price for raisins.[5] The plaintiff, a raisin grower, brought suit against the State under the Sherman Act. California's action would have been illegal if undertaken by "individual agreement," but the Court held that state action was entirely different.[6] In fact, the Court found that the Sherman Act's language did not restrain state action.[7] The Court's policy basis for state immunity was based on federalism: "In a dual system of government . . . the states are sovereign . . . . [A]n unexpressed purpose to nullify a state's control over its offices and agents is not lightly to be attributed to Congress."[8] Thus, the *Parker* Court held that state action was immune from the Sherman Act.

B. The Limitation of Municipal Immunity: Vicarious Liability in City of Lafayette v. Louisiana Power & Light Co.

The Supreme Court first limited municipal immunity from the Sherman Act in *City of Lafayette v. Louisiana Power & Light Co.*[9] Despite some prior weakening in state action immunity,[10] courts since *Parker* had assumed that antitrust immunity extended to municipalities as well as to the states.[11] However, *Lafayette* sharply limited municipal immunity. Petitioners in *Lafayette* were Louisiana cities operating utilities inside and outside of their city limits. The cities sued a competing utility, alleging Sherman Act violations that harmed their elec-

4. 317 U.S. 341 (1943).
5. *Id.* at 346–48.
6. *Id.* at 350–51.
7. *Id.*
8. *Id.* at 351.
9. 435 U.S. 389 (1978).
10. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). In *Goldfarb,* the Court narrowed state action to situations where state agents are compelled by the state to regulate commercial activity. *Id.* at 791. The Court relied on language in *Parker* emphasizing that the raisin program was under "legislative command." *Id.* at 788 (quoting *Parker,* 317 U.S. at 350); *see also* Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (finding immunity due to direct action by the state); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) (finding no immunity despite state involvement).
11. Stuart L. Deutsch, *Antitrust Challenges to Local Zoning and Other Land Use Controls,* 60 CHI.-KENT L. REV. 63, 65 (1984).

tric service. The competing utility counterclaimed, also under the Sherman Act.[12] The cities claimed *Parker* immunity to the counterclaims. A plurality of the Supreme Court held, however, that *Parker* immunity applied to municipalities only under certain narrow conditions. Immunity applied where the state legislature had both given the municipality authority "to operate in a particular area" and "contemplated the kind of action complained of."[13]

The plurality's policy basis for granting municipal immunity only through the state stemmed from a mistrust of local decision making. Fearing that local decisions would be too parochial, the plurality opined that municipalities were "[no] more likely to comport with the broader interest of national economic well-being than are those of private corporations."[14] The four dissenting Justices would have found immunity based on *Parker* and upon their confidence in local decision making. The dissent argued that *Parker* created immunity for " 'the state or its municipality.' "[15] The dissent also pointed out differences between local government and private business that should justify municipal immunity, primarily that a local government is subject to popular control.[16] Finally, they predicted the decision would create problems for local government: unwarranted federal interference, a chilling effect on experimentation, and financial jeopardy.[17]

C. *Applying a Clearly Articulated State Policy Test to Municipalities:* Community Communications Co. v. City of Boulder

The Supreme Court outlined a state action test for municipal immunity in *Community Communications Co. v. City of Boulder.*[18] The city of Boulder, Colorado, operated under a home rule provision in the state constitution. Home rule gives a municipality the "full right of self-government in both local and municipal matters."[19] In accord with its powers, in 1966 the city had granted one cable television company a limited license to operate. In 1980, the assignee of the original

12. *Lafayette,* 435 U.S. at 391–92.

13. *Id.* at 415 (citing City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434 (5th Cir. 1976), *aff'd,* 435 U.S. 389 (1978)).

14. *Id.* at 403. Chief Justice Burger concurred due to the cities' proprietary activity. *Id.* at 418 (Burger, C.J., concurring).

15. *Id.* at 429 (Stewart, J., dissenting, joined by White, Blackmun & Rehnquist, JJ.) (quoting Parker v. Brown, 317 U.S. 341, 351 (1943)).

16. *Id.* at 430.

17. *Id.* at 439–41.

18. 455 U.S. 40 (1982).

19. *Id.* at 43; *see* COLO. CONST. art. XX, § 6.

permit, along with a competing company, planned to expand cable service in the city.[20] The city council decided, however, to impose a three-month moratorium on cable expansion in order to draft an ordinance that would regulate the activity and promote competition before one company could dominate the market.[21] Petitioner, the permit-holding company, sued under section 1 of the Sherman Act, claiming the moratorium restrained trade.[22]

The Supreme Court found that unless a local ordinance restricting competition responded to a "clearly articulated and affirmatively expressed" state policy, local government was not immune from antitrust actions.[23] Applying the clear articulation test, the majority found that home rule merely allowed local control and did not articulate a specific state policy with respect to cable television.[24] Thus, Boulder's regulations were not immune from antitrust suits.

D. The 1984 Boulder *Bill*

Congress soon acted to limit *Boulder.* The holding in *Boulder,* with the treble damages for antitrust violations provided by the Clayton Act,[25] prompted commentators to argue that many cities were in financial jeopardy, and that there had been a chilling effect on local regulation.[26] When Congress acted in 1984, there were over 300 antitrust suits against cities pending in the federal courts.[27] The Local Government Antitrust Act of 1984[28] eliminated many of the bankruptcy fears by eliminating treble damages for local governments.[29] The Act, however, did not provide complete immunity. The Act still allowed for equitable relief and attorneys' fees for the winning party and did not fully answer the question of personal liability for local

20. *Boulder,* 455 U.S. at 45.

21. *Id.* at 46.

22. *Id.* at 46–47.

23. *Id.* at 54 (relying on California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) (to qualify for immunity, the action must follow a clearly articulated state policy actively supervised by the state)). The *Boulder* Court also said state supervision might be required. *Id.* at 51 n.14.

24. *Id.* at 55–56.

25. 15 U.S.C.A. § 15(a) (West 1973).

26. Lopatka, *supra* note 3, at 24.

27. Stuart Deutsch & JoAnn Butler, *Recent Limits on Municipal Antitrust Liability,* LAND USE L., Jan., 1987, at 3, 4. The plaintiffs in *Lafayette,* for example, were asking for $540 million from cities with a combined population of about 75,000. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 440 (1978) (Stewart, J., dissenting, joined by White, Blackmun & Rehnquist, JJ.).

28. 15 U.S.C.A. §§ 34–36 (West Supp. 1991) (the *Boulder* Bill).

29. *Id.*

officials.[30] Thus, some commentators predicted that municipal antitrust suits would continue as before.[31]

E. Limiting Boulder: Town of Hallie v. City of Eau Claire

In *Town of Hallie v. City of Eau Claire,*[32] a unanimous Supreme Court drew back from the *Boulder* rule.[33] In *Hallie,* the city of Eau Claire, Wisconsin refused to extend its sewer service to unincorporated townships unless the towns voted to incorporate. A state statute gave Eau Claire authority to fix the area of service and required that serviced areas incorporate.[34] The towns brought an antitrust suit. The towns relied on a broad reading of *Boulder,* contending that the Wisconsin statute did not demonstrate a clear "state policy to displace competition" or make "express mention of anticompetitive conduct."[35]

The *Hallie* Court held that the action qualified for immunity under the clear articulation test.[36] It was unclear, however, whether the Court had retained the clear articulation test as expressed in *Boulder,* or whether it had created a new "foreseeable result" test. The Court required only that the statute "clearly contemplate" that the anticompetitive effect in question would result from the legislative grant of authority.[37] Accordingly, the Court carefully considered the statute at issue and found it sufficient that "the statutes authorized the City to provide sewage services and also to determine the areas to be served. We think it is clear that anticompetitive effects logically would result from this broad authority to regulate."[38] Yet when describing its holding, the Court said that the city's actions were taken "pursuant to

30. The Act exempts officials "acting in an official capacity," but does not state whether it includes officials who conspire with private parties or who otherwise violate antitrust laws. *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW § 212.2c n.18 (1991).

31. Deutsch & Butler, *supra* note 27, at 5. *But see* AREEDA & HOVENKAMP, *supra* note 30, at § 212.2c (predicting that the number of suits would drop).

32. 471 U.S. 34 (1985); *see also* Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985) (state agency did not need express legislative authority to obtain state action immunity where the state policy is to displace competition).

33. *But see* William H. Page, *Interest Groups, Antitrust, and State Regulation:* Parker v. Brown *in the Economic Theory of Legislation,* 1987 DUKE L.J. 618, 642–44 (arguing that *Hallie* did little to change the clear articulation requirement).

34. *Hallie,* 471 U.S. at 41.

35. *Id.* at 41–42.

36. *Id.* at 47.

37. *Id.* at 42. *But see* City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344, 1360 n.5 (1991) (Stevens, J., dissenting, joined by White & Marshall, JJ., arguing that *Hallie* did not end clear articulation).

38. *Hallie,* 471 U.S. at 42.

a clearly articulated state policy to replace competition" and did not mention foreseeability.[39] Thus, the exact standard remained unclear.

II. POLICY REASONS FOR AND AGAINST MUNICIPAL IMMUNITY

Commentary on the limitation of municipal antitrust immunity abounds. Many argue for greater immunity because municipalities pose little danger of antitrust violations, enforcement is inefficient, and the principles of federalism allow for local autonomy. Others maintain that municipalities are in a position to abuse the power that antitrust immunity would give.

The first argument for municipal antitrust immunity is that local governments present little monopoly danger to the electorate. Further, what danger they do present can be most efficiently controlled on the local level. Commentators find the same differences between a municipality and a private actor that the Supreme Court found between the state and a private actor in *Parker*.[40] Being subject to popular control, a municipality will normally avoid anticompetitive activity that does not promote the greater good.[41] A municipality is also a branch of the state government.[42] Municipalities are thus subject to intensive state review, both on an administrative level and through the state courts.[43] Popular control and state review eliminate the need for further federal review under the Sherman Act.

A second argument is that municipal antitrust liability does not promote one of the primary goals of antitrust law, economic efficiency.[44] Commentators assert that municipal antitrust liability is inefficient.[45] Though municipalities are no longer liable for treble damages, commentators point out that the state action doctrine still imposes signifi-

39. *Id.* at 47. The Court also ended questions about the degree of state supervision required in municipality cases by stating that "the active state supervision requirement should not be imposed in cases in which the actor is a municipality." *Id.* at 46. For earlier treatment of state supervision, see *supra* note 23; *see also* Community Communications Co. v. City of Boulder, 455 U.S. 40, 71 n.6 (1982).

40. *See* Jorde, *supra* note 3, at 229; *supra* notes 4–8 and accompanying text.

41. *See* Lopatka, *supra* note 3, at 66–68.

42. Louisiana *ex rel.* Folsom v. Mayor of New Orleans, 109 U.S. 285, 287 (1883) ("Municipal corporations are instrumentalities of the state for the convenient administration of government . . . .") (cited in City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 429 (1978)).

43. *See* Lopatka, *supra* note 3, at 69 (state legislature has "almost unlimited control" over cities); Herbert Hovenkamp & John A. Mackerron III, *Municipal Regulation and Federal Antitrust Policy,* 32 UCLA L. REV. 719, 753–55 (1985) (state courts exercise strict control over home rule cities).

44. Lopatka, *supra* note 3, at 54–55.

45. *Id.*

cant costs. First, defending an antitrust suit is notoriously expensive.[46] Many smaller cities cannot afford to defend such suits. Second, if the municipality loses the suit, it must both pay the plaintiff's legal fees and submit to an injunction.[47] Third, because the state action doctrine requires some form of state approval, municipalities and state legislatures must spend time and money lobbying for and drafting specific directives.[48] Consequently, some conclude that the above costs, or even the threat thereof, delay or "chill" beneficial local government action.

Commentators also suggest that municipal liability is inefficient where the local government is the best regulator.[49] In most instances of local concern such as zoning, cable television regulation, sewage disposal, and ambulance service, the local government is in the best position to regulate in accordance with the unique needs of the community.[50] Requiring the state to take regulatory action forces regulation at higher costs by officials who are not in the best position to regulate or to account for their decisions.

Underlying all of the above arguments is the view that the principles of federalism discourage municipal antitrust liability. Federal intrusion into municipal regulation is similar to, and as problematic as, the federal intrusions during the *Lochner* era.[51] Many also see the promo-

46. One Maryland town incurred $12,000 in expenses when the town's yearly budget was $18,151. *See* Susan M. Stevens, Note, *Antitrust Immunity for Local Governments: Maryland's Response in the Wake of* Boulder, 45 MD. L. REV. 1045, 1064 (1986).

47. AREEDA & HOVENKAMP, *supra* note 30, at § 212.2c; *see* 15 U.S.C.A. §§ 34–36 (West Supp. 1991).

48. Maryland invested significant time and expense to enact new municipal guidelines. *See* Stevens, *supra* note 46, at 1056–63; *see also* Lopatka, *supra* note 3, at 75 ("There are 82,290 units of local government . . . . Simple multiplication of the number of municipalities by the number of municipal acts that might appear anticompetitive suggests the staggering direct costs of requiring specific state authorization.").

49. *See* Jorde, *supra* note 3, at 232 n.28; Robert E. Bienstock, Comment, *Municipal Trust Liability: Beyond Immunity,* 73 CAL. L. REV. 1829, 1852–56 (1985) (proposing a test to determine when the local government is the appropriate regulator).

50. *See* Hovenkamp & Mackerron, *supra* note 43, at 758–77 (arguing that the position of "best regulator" ought to provide immunity for local government action); *see also* Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy,* 71 CAL. L. REV. 837, 882–87, 911 (1983) (arguing that the character of local politics is more suited to land use regulations).

51. During the era of Lochner v. New York, 198 U.S. 45 (1905), judges invalidated legislation with which they disagreed by relying on substantive due process. *See* Hovenkamp & Mackerron, *supra* note 43, at 758 ("The 'liberty of contract' espoused in *Lochner v. New York* has become 'the right to an unrestrained market,' but the basic principle is the same: Federal law creates a substantive limitation on the power of local government to impose economic regulation on private businesses.") (footnote omitted); Bienstock, *supra* note 49, at 1846; Community Communications Co. v. City of Boulder, 455 U.S. 40, 67 (1982).

tion of local experimentation as an important policy behind federalism.[52] In the context of economic regulation, municipalities engage in creative anticompetitive activities to correct market defects such as public goods, natural monopolies, or externalities.[53] For example, a city might interfere in local electricity distribution and enhance efficiency in what might otherwise be an unchecked monopoly.[54] Municipalities might further act to promote values other than efficiency such as public safety, redistribution of wealth, or exclusionary zoning.[55] Finally, the concerns of governmental efficiency and enforcement at the local level previously discussed are also interests of federalism.[56] Local responsibility promotes citizen participation, enhances diffusion of power, and most important for many commentators, creates the feeling and reality of local autonomy.[57]

On the other hand, commentators who favor antitrust liability also base much of their reasoning on the policies of federalism. These commentators focus on the dangers of excessive local government power.[58] Local governments often lack the mix of interests that exist on the state level, making them more susceptible to factions.[59] Thus, the argument is that municipalities are likely to act for their own parochial interests and should be treated more like private actors.[60]

III. *CITY OF COLUMBIA V. OMNI OUTDOOR ADVERTISING, INC.*

The latest Supreme Court decision in the municipal antitrust cases, *City of Columbia v. Omni Outdoor Advertising, Inc.*,[61] explores the limits of the state action exemption and retreats from *Boulder* even more than *Hallie* did. The majority further eased the standard that municipal action must meet in order to qualify for state action immunity. In addition, the Court refused to recognize a conspiracy excep-

52. Jorde, *supra* note 3, at 232.

53. Lopatka, *supra* note 3, at 56–61; *see* Bienstock, *supra* note 49, at 1852–54 (regulating market failures is justified). Some analysts give cities immunity for action in the public interest. *See* DANIEL R. MANDELKER ET AL., FEDERAL LAND USE LAW § 10.02 (1991).

54. *See* Lopatka, *supra* note 3, at 57.

55. *See id.* at 61–63.

56. *See supra* notes 40–50 and accompanying text.

57. *See* Jorde, *supra* note 3, at 230–34.

58. *See* Page, *supra* note 33, at 637–40 (*The Federalist No.* 10 merits application to municipalities).

59. *See id.;* Rose, *supra* note 50, at 853–57.

60. *See supra* note 14 and accompanying text.

61. 111 S. Ct. 1344 (1991) (Scalia, J., joined by Rehnquist, C.J., Blackmun, O'Connor, Kennedy & Souter, JJ. Stevens, J., filed a dissenting opinion in which White & Marshall, JJ., joined).

tion to state action immunity, either for the city or the alleged co-conspirator.

The *Omni* case involved a battle of billboard companies. Columbia Outdoor Advertising (COA) was a billboard company in Columbia, South Carolina. COA had been in business since the 1940's. In 1981, it controlled 95 percent of the local billboard market.[62] When Omni Outdoor Advertising, an out-of-town company, tried to move in on the market, COA (along with various anti-billboard community groups) lobbied the city council to restrict new billboard construction. The council first passed an ordinance so restrictive of billboard construction that a state court struck it down on grounds that it gave the city council unconstitutional discretion.[63] After numerous public hearings the council passed another ordinance restricting the size, location, and spacing of billboards in Columbia.[64] COA was little affected by the ordinance, since it already had its billboards in place, while Omni's ability to compete was severely impaired. Omni sued Columbia and COA in federal district court, alleging violations under sections 1 and 2 of the Sherman Act. Aware that *Hallie* had broadened municipal immunity, Omni also alleged a conspiracy between COA and the Columbia city council.[65] Omni urged the Court to make a conspiracy exception even if the Court found that Columbia would otherwise have immunity.[66]

The Supreme Court first decided that the action taken by the city of Columbia qualified for *Parker* immunity as "authorized implementation of state policy."[67] In doing so, the Court used a two-prong test: authority and foreseeability. The Court noted that its declarations in *Hallie,* as well as earlier decisions concerning *Parker* immunity, were unclear.[68] The *Omni* Court found that *Hallie* established that if a state statute authorized a city's action with a view toward regulation,

62. *Id.* at 1347.

63. *Id.* at 1348.

64. *Id.* This ordinance was enacted pursuant to the South Carolina Zoning Enabling Act. S.C. CODE ANN. § 6-7-710 (Law Co-op. 1976) provides: "[I]n order to protect, promote and improve the public health, safety, morals, convenience, order, appearance, prosperity, and general welfare, the governing authorities of municipalities and counties may . . . regulate the location, height, bulk, number of stories and size of buildings and other structures . . . ."

65. *Omni,* 111 S. Ct. at 1348.

66. *Id.* The circuit court overturned the district court's judgment notwithstanding the verdict and held that though Columbia would normally have immunity for zoning decisions, there was a conspiracy exception. *Id.; see* Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc., 891 F.2d 1127 (4th Cir. 1989), *rev'd sub nom.* City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct 1344 (1991).

67. *Omni,* 111 S. Ct. at 1349.

68. *Id.*

the city would have immunity from any anticompetitive consequences of that action.[69] The ambiguity lies in the word "authorize." It was unclear whether the Court should review the city ordinance and determine if it complied with the state act under which it was ostensibly passed. In *Omni* for instance, the Court would have had to decide if Columbia's new zoning act was adopted for "the purpose of promoting health, safety, morals or the general welfare of the community" in accordance with the state zoning enabling act.[70] The *Omni* majority rejected any such intrusive role, saying that it would undermine "the very interests of federalism that [*Parker* was] designed to protect."[71] Instead, the Court held that the city needed to establish only that it had "unquestioned zoning power over the size, location, and spacing of billboards."[72]

The *Omni* Court also found that the ordinance passed the foreseeability prong of the test. The majority acknowledged the clear articulation standard from *Lafayette,* but grounded its decision on the foreseeability test outlined in *Hallie.*[73] According to the Court, suppression of competition was a foreseeable result of a zoning enabling act.[74]

The majority also refused to recognize a conspiracy exception to a city's immunity.[75] The *Omni* Court held that there should be no conspiracy exception to the *Parker* state immunity doctrine because the exception could easily swallow the rule.[76] The Court reasoned that almost any regulation is the result of an agreement between private parities and the government.[77] Nearly all municipal regulation, therefore, would be the result of conspiracy.[78] The *Omni* Court noted that the language in *Parker* that courts had used to find such a conspiracy exception refers to a possible exception to governmental immunity when the state enters the marketplace as a commercial participant.[79]

69. *Id.* at 1350.

70. *Id.* at 1349.

71. *Id.* at 1350; *see also* AREEDA & HOVENKAMP, *supra* note 30, § 212.3b, at 158–60.

72. *Omni,* 111 S. Ct at 1350.

73. *Id.*

74. "The very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition . . . ." *Id.*

75. *Id.* at 1351. Some circuits had ruled otherwise. *See, e.g.,* Bolt v. Halifax Hosp. Medical Ctr., 891 F.2d 810, 825 (11th Cir.), *cert. denied,* 110 S. Ct. 1960 (1990); Whitworth v. Perkins, 559 F.2d 378, 381–82 (5th Cir. 1977), *vacated sub nom.* City of Impact v. Whitworth, 435 U.S. 992, *aff'd on remand,* 576 F.2d 696 (5th Cir. 1978), *cert. denied,* 440 U.S. 911 (1979).

76. *Omni,* 111 S. Ct. at 1351.

77. *Id.*

78. *Id.*

79. *Id.*

Moreover, many federal and state laws are designed to address corruption in government.[80] Accordingly, resorting to antitrust law is unnecessary. In sum, the Court found that a conspiracy exception is supported neither by sound policy nor by *Parker*.[81]

Three Justices joined in a dissenting opinion that emphasized the danger presented by powerful local governments and challenged the majority's interpretation of the *Hallie* case. The dissent argued that the deference to the states required by federalism does not extend to municipalities.[82] The dissent justified their policy for disfavoring local autonomy by recalling the doubts voiced in *Lafayette* about municipal decision making.[83] The dissent further argued that the majority read *Hallie* incorrectly, pointing out that *Hallie* had not relied on a foreseeability test alone, but had examined the state's statutes and found a clearly articulated policy favoring regulation.[84] According to the dissent, *Hallie* still required that the decision to replace competition with regulation be made at the state level.[85] Thus, the *Omni* dissent would have required that the state zoning enabling act expressly speak to "economic regulation" of a specific industry.[86] Because the South Carolina Zoning Enabling Act was neutral as to economic regulation, the dissent would have held that it did not meet the clear articulation standard.[87]

IV. BENEFICIAL RESULTS AND UNRESOLVED PROBLEMS

The *Omni* holding significantly expands a city's ability to regulate local zoning without challenge under the Sherman Act. The *Omni* case affects municipal antitrust liability by expanding the state action

80. *Id.* at 1353; *see, e.g.*, 18 U.S.C.A. § 1951 (West 1984) (Hobbs Act).

81. The Court also held that the *Noerr-Pennington* doctrine has no conspiracy exception. *Omni*, 111 S. Ct. at 1354–56. Although outside the scope of this Note, the *Noerr-Pennington* doctrine covers businesses that petition the government to take actions favoring their interests at the expense of competition. The theory is that private parties have free speech rights to lobby the government for lawful state actions. *See* United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). The *Omni* majority held that an exception would limit the right to petition the government and that "*Parker* and *Noerr* are complementary expressions of the principle that the antitrust laws regulate business, not politics." *Omni*, 111 S. Ct. at 1355.

82. *Omni*, 111 S. Ct. at 1358–59 (Stevens, J., dissenting, joined by White & Marshall, JJ.).

83. *Id.* at 1359 (citing Madison's view that small societies oppress); *see supra* notes 58–60 and accompanying text.

84. *Omni*, 111 S. Ct. at 1360 n.5.

85. *Id.*

86. *Id.* at 1360–61.

87. *Id.*

defense. The effects of the *Omni* decision are positive because they expand municipal antitrust immunity. Problems still remain, however, because the foreseeability test violates federalism and treats home rule cities unfairly.

A. Omni *Creates Absolute Protection for Zoning Ordinances*

Omni ensures that zoning ordinances enacted pursuant to a zoning enabling act are absolutely protected by state action immunity from challenge under the Sherman Act. The importance of this newfound freedom to municipalities cannot be underestimated. Before *Omni,* some courts had found that zoning was not protected, largely because a zoning enabling act was not seen as an adequately clear articulation of a state policy to displace competition with regulation.[88] Once the clear articulation standard was weakened in *Hallie,* commentators suggested that zoning might enjoy state action immunity.[89] By using the foreseeable result test in place of clear articulation, *Omni* confirms that a municipality's zoning decisions are immune.[90]

The *Omni* Court's reasoning should be read to apply broadly to any zoning enabling act. Before *Omni,* many courts considered whether particular enabling statutes suggested a clearly articulated state policy to suppress competition.[91] The clear articulation standard required a searching inquiry of the specific statutory language in question. Under *Omni,* statutory inquiry is unnecessary. Although the Court referred to the South Carolina Zoning Enabling Act early in its decision, its reasoning is not dependent on the specific language in that statute. The Court quoted the statute when it declined to undertake a substantive review of Columbia's ordinance.[92] However, when the majority turned their attention to foreseeability, they conspicuously failed to mention any language of the South Carolina Zoning Enabling Act.[93] The Court spoke to the purpose of zoning in general, not to any pur-

88. *E.g.,* Mason City Ctr. Assoc. v. City of Mason City, 468 F. Supp. 737 (N.D. Iowa 1979). In *Mason City,* the court held that a zoning enabling act was not an expression of anticompetitive policy. Although zoning statutes "sometimes have anticompetitive effects," the court said it was "somewhat fatuous to contend that they inevitably reflect a state's clear and affirmative intent to displace competition." *Id.* at 742.

89. *See* MANDELKER et al., *supra* note 53, § 11.06, at 11-22 to 11-23.

90. *Omni,* 111 S. Ct. at 1350.

91. *See, e.g.,* Unity Ventures v. County of Lake, 631 F. Supp. 181 (N.D. Ill. 1986), *aff'd,* 841 F.2d 770 (7th Cir.), *cert. denied,* 488 U.S. 891 (1988).

92. *Omni,* 111 S. Ct. at 1349.

93. *Id.* at 1350.

pose specific to the South Carolina statute.[94] Thus, *Omni* can be applied to American zoning enabling acts in general.

The *Omni* Court's use of the foreseeability test means that municipalities will not have to analogize the zoning enabling language of their states to that of South Carolina. The specific grant of zoning authority foreseeably results in anticompetitive activity. Possible exceptions are local zoning ordinances based on home rule provisions and, to the extent they may exist, ordinances sanctioned under general grants of police power.[95] In general, however, the *Omni* decision gives municipalities immunity from antitrust suits for all zoning ordinances.

B. Omni *Broadens Municipal Antitrust Immunity*

The *Omni* decision will impact all local anticompetitive regulation. The *Omni* Court's approach should not be confined to zoning enabling acts. As discussed below, it should apply to any grant of specific authority from a state to its municipality.[96]

1. Omni *and the Expansion of The State Action Doctrine*

The most significant effect of *Omni* is its strengthening of state action immunity for municipalities. According to the state action doctrine, a municipality must show that it acted under state authorization. The Supreme Court has developed a two-prong test to determine whether state action immunity applies to a given action.[97] *Omni* has left its mark on each prong.

a. Omni *and the Authority Prong: The Affirmation of Federalism as an Important Antitrust Policy*

Arguing that a municipality has acted outside the scope of its authority[98] is no longer apt to be successful unless the state gave the municipality no power over the activity.[99] The *Omni* Court did not decide that Columbia had complied with the state zoning enabling act,

94. *See supra* note 74 and accompanying text.

95. *See infra* notes 129–41 and accompanying text; *see, e.g.*, Nelson v. City of Seattle, 64 Wash. 2d 862, 395 P.2d 82 (1964) (city allowed to zone under general grant of police power).

96. Note that municipalities have another defense based on the unilateral action theory. In Fisher v. City of Berkeley, 475 U.S. 260 (1986), the Supreme Court held that the municipality could not have violated section 1 of the Sherman Act because any action by a municipality, except in the case of a conspiracy, must be unilateral. *See supra* note 2 and accompanying text.

97. *See supra* notes 67–68 and accompanying text.

98. The authority prong is the first part of the state action immunity test.

99. At one point, alleging that a municipality had acted outside the scope of its authority was an effective alternate plea for plaintiffs. *See* Eric W. Hoaglund, Note, *Municipal Antitrust Liability After* Town of Hallie v. City of Eau Claire, 1986 WIS. L. REV. 1039, 1053–55.

but instead determined that it was improper for the court to even make the inquiry.[100] The Court refused to review the issue on the basis of federalist principles.[101] The Court's reasoning is broad enough to apply to any anticompetitive regulation undertaken by a municipality.

The *Omni* decision has so broadened the authority prong that the only real question left is whether a municipality could fail such a broad test. Before *Omni,* it was conceivable that a state statute may have foreseen anticompetitive activity, but a federal court could have found that a municipality, though acting within the area covered by statute, had acted outside the bounds of its specific authority. Under *Omni,* the municipality would have to have acted outside the bounds of its general authority, that is, have enacted a zoning ordinance when the state had not conferred zoning authority at all.[102] One could argue, however, that the *Omni* Court's treatment of the authority prong does not apply to the analysis of a grant of authority under a state's home rule or police power. The *Omni* decision hinged on the city's "unquestioned zoning power," originating in the state enabling act.[103] In contrast, activities based on a home rule grant of authority have no specific authorization. Thus, one might conclude that *Omni* does not preclude inquiry into whether a municipality had authority under home rule.

The view more consistent with *Omni,* however, is that activities based on home rule powers should be treated like those based on a specific statutory authorization for purposes of the authority prong. After explaining that it would not decide whether a municipality had exceeded the bounds of its authority, the Court noted that it had adopted a concept of authority "broader than what is applied to determine the legality of the municipality's action under state law."[104] If a municipality is acting in a general area in which it has legally acted under the home rule grant of authority, there is no greater reason for a court to inquire into a grant of home rule authority than for a statu-

100. City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344, 1349–50 (1991).

101. *Id.*

102. For examples of municipalities acting outside their authority see Austin Mun. Sec., Inc. v. National Assn'n of Sec. Dealers, 757 F.2d 676, 696 (5th Cir. 1985); Bankers Life and Casualty Co. v. Larson, 257 F.2d 377 (5th Cir.), *cert. denied,* 358 U.S. 879 (1958); La Salle Nat. Bank v. County of Lake, 579 F. Supp. 8 (N.D. Ill. 1984); *see also* Hoaglund, *supra* note 99, at 1054–55.

103. *Omni,* 111 S. Ct. at 1350.

104. *Id.; see* Stump v. Sparkman, 435 U.S. 349 (1978) (refusal to review the conformity of a court order to state law beyond finding that the state authorized the court to make the type of order in question).

tory grant.[105] There may be some point where a home rule municipality's action is so far beyond its authority that a court would rule on the authority question. The *Omni* Court, however, offers no explanation of where that point might lie.

The *Omni* Court's treatment of the authority prong shows that federalism and not the public interest model is the basis of municipal immunity. Some commentators have argued that municipal immunity should be based on a judicial determination of whether a particular action was taken for the public good.[106] If the Court were to have adopted such a view, it would have been evident in the authority prong. In the case of zoning, for example, the Court could have tested whether the ordinance was enacted pursuant to the municipality's authority to further the public "health, safety, morals or the general welfare."[107] *Omni* expressly refused to administer such a test because it would be an intrusion on federalism,[108] and explicitly rejected the public interest model as a guiding policy.[109] The Court's rejection of the public interest model is not a rejection of the idea that governmental actions promoting the public good should be immune from antitrust liability. The argument that municipalities ought to be free to engage in certain anticompetitive actions such as zoning, water, sewer, and power regulation is one of the strongest reasons to favor municipal antitrust immunity.[110] However, as *Omni* explains, the federal courts could not engage in substantive review of municipal policy without violating the principles of federalism.[111] Thus, the *Omni* Court's discussion of the authority prong not only expands municipal antitrust immunity, it identifies federalism and not the public interest model as a key policy that courts must consider in antitrust cases.

105. A home rule municipality would have greater trouble proving foreseeability. *See infra* notes 129–41 and accompanying text.

106. *See supra* note 53 and accompanying text.

107. *Omni,* 111 S. Ct. at 1349.

108. *Id.*

109. *Id.* at 1352 ("Parker was not written in ignorance of the reality that determination of 'the public interest' . . . entails . . . value judgment, and it was not meant to shift that judgment from elected officials to judges and juries."). The Court's rejection of the public interest model occurred in its discussion of a conspiracy exception, but the rejection applies equally here. *See also* Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 56 (1985) (antitrust law does not compromise a State's ability to regulate domestic commerce).

110. *See* Town of Hallie v. City of Eau Claire, 471 U.S. 34, 45 (1985) (emphasizing that a municipality presumably acts in the public interest).

111. *Omni,* 111 S. Ct at 1349–50.

b. The Foreseeable Result Test

i. Abandoning Clear Articulation

Omni's reliance on the foreseeability standard in the second prong shows that the Court has implicitly abandoned the clear articulation test. In *Hallie,* the Court used an approach which had elements of both a clear articulation test and a foreseeability test without clearly expressing upon which approach it relied.[112] The *Hallie* Court concluded, however, that the actions "were taken pursuant to a clearly articulated state policy."[113] In contrast, the *Omni* Court followed a bare foreseeability test. As the dissenting opinion points out, South Carolina had no clearly articulated state policy that authorized municipalities to engage in anticompetitive zoning.[114] Rather than imputing a clear articulation in ambiguous statutory language, the *Omni* Court relied on the "foreseeable result" language of *Hallie.*[115] The *Omni* Court did not scrutinize statutory language and legislative history as did the *Hallie* Court. The *Omni* Court simply found that a legislature would have foreseen anticompetitive behavior due to the nature of zoning.[116] The method employed was to look at the type of legislation in question and the general policy reasons behind it, and then to determine whether the state legislature would have foreseen an anticompetitive result in enacting that type of legislation.

The Court should abandon the "clear articulation" standard altogether. Such language only confuses the inquiry. The *Omni* Court rejected the idea that the delegating state statute had to explicitly allow anticompetitive activity, instead finding "[i]t is enough . . . if suppression of competition is the 'foreseeable result' of what the statute authorizes."[117] The *Omni* decision stated, nonetheless, that the authority to regulate must be accompanied by "clear articulation of a state policy to authorize anticompetitive conduct."[118] "Clear articulation" is a misnomer, because actual clear articulation is not required.

112. *Hallie,* 471 U.S. at 40–42. The *Omni* dissent would later argue that Hallie did not initiate a foreseeability defense. *Omni,* 111 S. Ct. at 1360 n.5 (Stevens, J., dissenting, joined by White & Marshall, JJ.); *see supra* notes 84–85 and accompanying text.

113. *Hallie,* 471 U.S. at 47.

114. The dissent in *Omni* had a much narrower view of the second prong of the test. *See supra* notes 82–87 and accompanying text. Also, several courts had ruled that a zoning act is not evidence of a clearly articulated state policy. *See supra* note 88.

115. *Omni,* 111 S. Ct. at 1350.

116. *See supra* note 74 and accompanying text.

117. *Omni,* 111 S. Ct. at 1350. The Court also refused to label billboards "output" and fit their holding under a clear articulation test. *Id.* at 1350 n.4.

118. *Id.* (citing Town of Hallie v. City of Eau Claire, 471 U.S. 34, 40 (1985)).

Unfortunately, several lower courts continue to adhere to the clear articulation requirement.[119]

ii. Clear Articulation Should be Abandoned as Impermissible Substantive Review

Abandoning the clear articulation requirement is consistent with federalism and local autonomy. A general foreseeability inquiry is more consistent with the Court's federalist policy of not engaging in state administrative review.[120] Detailed review of state legislative history and an attempt to reconcile the statute in question with the imputed expectations of the legislature is exactly the type of activity the Court wants federal courts to avoid. To do a detailed review on the second prong of the test would cause the very harm the Court sought to avoid under the authority prong. Moreover, the states are much better equipped than federal courts to judge whether municipalities are following state policies. If a municipality is not following the state policy, the state is fully capable of intervening. Forcing municipalities to predict whether a federal court will characterize a given piece of legislation as a clear articulation of a state anticompetitive policy creates an unreasonable financial burden on the municipality.[121] The costs of legislative research and lobbying and the potentiality of large legal fees produce a chilling effect on local government activity. Finally, allowing municipalities to operate where state law foreseeably permits anticompetitive activity allows municipalities more latitude to regulate local activities. A municipality should be able to regulate matters of purely local concern without the intrusion of the federal government through the antitrust laws. Sewer contracts and billboard regulation do not belong in federal court. In sum, the interests of federalism and local autonomy favor a loose "foreseeable result" test rather than the more strict "clear articulation" standard.

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119. *See, e.g.*, Allright Colorado, Inc. v. City of Denver, 937 F.2d 1502 (10th Cir.) (action must be pursuant to a "clearly expressed" anticompetitive state policy), *cert. denied,* 112 S. Ct. 587 (1991); Paragould Cablevision, Inc. v. City of Paragould, 930 F.2d 1310, 1312 (8th Cir.) ("A municipality is therefore subject to searching antitrust scrutiny and can defeat antitrust challenges only if the anticompetitive consequence necessarily and reasonably results from engaging in the authorized activity."), *cert. denied,* 112 S. Ct. 430 (1991). The "necessary and reasonable result" test is more restrictive than the Court's "foreseeable result" test.

120. *See supra* notes 98–101 and accompanying text.

121. *See Omni,* 111 S. Ct. at 1350 n.4. Even the dissent admitted the difficulty of differentiating between economic regulation and health and safety regulation. *See id.* at 1361 (Stevens J., dissenting, joined by White & Marshall, JJ.) (" 'Social and safety regulation have economic impacts, and economic regulation has social and safety effects.' ") (quoting D. HJELMFELT, ANTITRUST AND REGULATED INDUSTRIES 3 (1985)).

The *Omni* dissent, in its argument that federalism does not apply to municipalities,[122] failed to recognize the countervailing advantages of local governments. Concern for the influence of factions is not the only force behind the division of power between local, state, and federal governments. If such had been the case, local government would be given no power whatsoever. The framers recognized that the most effective democracy occurs at the local level, where the electorate has personal knowledge of the issues.[123] Even within *The Federalist No. 10,* Madison recognized that interests groups, though potentially dangerous, are an inevitable and vital part of the driving force behind all levels of government.[124] Although state governments generally use the bicameral process and diverse representation to combat factions, local governments have the advantage of decision makers with more direct knowledge and accountability, and an electorate with greater voice in the process.[125] Moreover, the local government is not bestowed with much independent power, it is merely an arm of the state, and must answer to it. Under *Omni,* municipalities must still adhere to the foreseeable result test when enacting anticompetitive ordinances. Thus, giving local governments broader power to regulate matters of local concern presents little real danger.

iii. Mixed Blessings: The Difficulty of Interpreting the Foreseeable Result Test

Although the foreseeable result test broadens municipal immunity, the test still requires the municipality to predict the foreseeability of a given action. Some of the potential benefit will be lost because of uncertainty. A municipality must determine from the language of a statute whether the legislature foresaw that the municipality would act in an anticompetitive way.[126] The task of statutory interpretation has proven difficult for courts,[127] and municipalities face these same difficulties. In fact, municipalities may have an even more difficult time,

122. *See supra* notes 82–87 and accompanying text.

123. *See* THE FEDERALIST No. 46, at 107 (Madison) (J. Cooke ed., 1961); THE FEDERALIST No. 17, at 316 (Hamilton) (J. Cooke ed., 1961), *cited in* Jorde, *supra* note 3, at 232; *see also* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 575 n.13 (1985).

124. Page, *supra* note 33, at 629–31.

125. *See* Rose, *supra* note 50, at 886–87.

126. Justice Stewart anticipated this obstacle when pointing out the problem of finding legislative intent at the state level where such history is often not recorded and the statutory language is unclear. *See* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 438 (1978).

127. *See* Town of Hallie v. City of Eau Claire, 471 U.S. 34, 44 (1985) (adopting Justice Stewart's argument that state legislative history is a poor basis for a clear articulation standard).

since municipalities may lack the legal expertise to make subtle, quasi-judicial, distinctions. Furthermore, a foreseeability test is still not totally consistent with the *Omni* Court's concern for federalism.

The foreseeability test will still require courts to make intrusive inquiries into state administration. The *Omni* Court's conclusion that the power to zone foreseeably includes the power to regulate flows logically from zoning's inherent economic effects, but other types of legislation will not afford so ready an answer. Federal courts will inevitably find themselves considering legislative history and other sources in contradiction to the Court's policy of federalism.[128]

The largest problem with the foreseeability test, however, is its equitable application to home rule cities. The *Omni* decision will affect delegations of power through specific grants of authority. As pointed out earlier, the Supreme Court has never required "specific detailed authorization"[129] from a statute to justify state action immunity. Before *Omni,* however, *Boulder* required that the state legislature had to make an affirmative statement that it intended to displace competition with regulation. Moreover, a statute of "mere neutrality respecting the municipal actions" was not an adequate manifestation of intent that would trigger the state action doctrine.[130] *Omni* has altered the Court's position with respect to grants of a specific kind of authority that are neutral as to competition.[131] The decision did not do so by overtly changing the test, but by finding that anticompetitive conduct was a foreseeable result of a zoning statute that many courts have declared to be neutral.[132] In fact, the neutrality standard seems to have been reversed. Now, any neutral grant of a specific power may be enough to show that the state could have foreseen that the power would be used in an anticompetitive fashion. Unfortunately, home rule cities will not benefit from the change.

iv. Overruling Boulder

The *Omni* decision results in a substantial benefit for cities that operate under enabling acts. It is little help, however, for cities that

128. Hovenkamp & Mackerron, *supra* note 43, at 743.

129. *Lafayette,* 435 U.S. at 415.

130. Community Communications Co. v. City of Boulder, 455 U.S. 40, 55 (1982).

131. The dissent argued that South Carolina's Zoning Enabling Act was "simply neutral" as to its possible anticompetitive consequences. City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344, 1360 (1991) (Stevens, J., dissenting, joined by White & Marshall JJ.).

132. For a more restrictive treatment of municipal immunity under neutral statutes see *supra* note 88.

derive much of their power from home rule provisions. The problem for home rule cities is that *Boulder* is distinguishable from *Omni.*

At first, it is difficult to reconcile the *Boulder* holding with *Omni.* At one point, there was a distinction between statutes like those in *Hallie,* which were clearly articulated grants of authority, and in *Boulder* where there was a neutral grant of authority.[133] *Omni* has narrowed that gap. Courts in the past have held that a zoning enabling act is neutral as to anticompetitive activity.[134] In fact, the home rule constitutional provision in *Boulder* is arguably as neutral concerning economic impact as the zoning enabling act in *Omni.*

Comparison of the facts in *Boulder* and *Omni* reveals, however, that there is a distinguishing factor. In *Boulder,* the home rule provision of the state constitution contained no specific grant of authority. The constitution granted municipalities the general authority to legislate, but made no mention of cable television regulation. The *Boulder* decision refused to accept "that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances."[135] In contrast, the state statute in *Omni* granted specific authority to zone in the zoning enabling act.[136] The authority to zone is more specific than the bare authority to legislate. Thus, the *Omni* Court could more easily determine the legislature's intent in granting Columbia zoning authority.

The distinction between *Omni* and *Boulder* is too narrow a difference on which to base antitrust liability. The authority to legislate provided by home rule should provide sufficient foreseeability to satisfy the *Omni* test. In examining the statute in question in *Hallie,* the Court said that "anticompetitive effects logically would result from this broad authority to regulate."[137] Furthermore, *Omni* repudiated the idea that the relevant grant of authority need specify the type of industry regulated or that the authority granted be labelled economic regulation at all.[138] Thus, *Omni* has already moved toward the proposition that anticompetitive effects logically result from the broad authority to legislate such as those given by a home rule provision.

Overruling *Boulder* also tends to maximize the general goals of federalism. Although the Colorado home rule provision is not a specific

133. *See* Hoaglund, *supra* note 99, at 1049.

134. *See* Mason City Ctr. Assoc. v. City of Mason City, 468 F. Supp 737, 742–43 (N.D. Iowa 1979).

135. Community Communications Co. v. City of Boulder, 455 U.S. 40, 56 (1982).

136. City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344, 1350 (1991).

137. Town of Hallie v. City of Eau Claire, 471 U.S. 34, 42 (1985).

138. *Omni,* 111 S. Ct. at 1350 n.4.

grant of authority, it stands to reason that what Colorado envisioned in granting such authority was a very broad power.[139] Almost any government action involves some amount of interference in the market that could be labeled a restraint of trade. From paving roads and levying taxes to outright regulation of businesses, government action inherently interferes with the market place. Thus, some anticompetitive activity is a foreseeable result of granting the authority to govern. To insist on greater specificity for particular anticompetitive activities would return to the clear articulation standard from which the *Omni* Court departed.[140] Further, for the federal courts to insist that the states be more specific is an unwarranted intrusion on state administrative procedure. It is not logical that states that give their large cities the most autonomy should find those cities more restricted by the antitrust laws than are the smaller towns. Moreover, larger cities are less likely to experience the factional problem particular to smaller cities because the governments of large cities are likely to represent a wide variety of interests. The federal courts should not interfere with the basic state policy decision to let home rule cities govern themselves.

The *Boulder* rule also produces inconsistent and unjust results in the lower courts. If the rule is followed, zoning ordinances based on zoning enabling acts will be treated differently than zoning ordinances based on home rule provisions of state constitutions. Two cities with the same zoning ordinance should be treated the same way unless the state legislatures had different motives in allowing their cities to zone. Under a foreseeability standard, however, any difference between the intent of the legislature in either case would be but a figment of judicial imagination. There is no real difference in foreseeability of anticompetitive effects in ordinances based on an enabling act versus those based on a home rule grant. The *Boulder* distinction relies only on a technical basis of authority. The unfairness of this anomaly suggests that *Boulder* should be overruled.

Treating home rule municipalities equally would not entail a major change in the state action doctrine as it has been developed in *Omni.* A court could simply decide whether the home rule provision gives authority for the general type of activity in question. Although state

139. *See* Hovenkamp & Mackerron, *supra* note 43, at 747–58 (home rule provisions are not neutral grants of authority and should have passed the clear articulation test).

140. When the *Boulder* court argued that a grant of legislative power was not an authorization for a specific anticompetitive ordinance, the authority upon which it relied was the now outdated "clear articulation and affirmative expression" test. *See* Community Communications Co. v. City of Boulder, 455 U.S. 40, 56 (1982).

home rule provisions are usually very general grants of power, most states have a fairly well-developed common law circumscribing home rule powers.[141] After the question of authority is settled, a federal court can employ the *Omni* method to determine foreseeability. There is no need to have specific language in an enabling act to interpret. A court can make the foreseeability ruling based on the general authority to act in the area as it did in *Omni.* Consequently, the Supreme Court should overrule *Boulder* and treat non-home rule municipalities and home rule municipalities equally.

V. CONCLUSION

The Supreme Court in *Omni* has considerably broadened municipal antitrust immunity for certain municipalities by expanding the state action doctrine. First, the authority prong is easily met as *Omni* precludes substantive inquiry into the municipality's basis of authority. Second, the Court requires a municipality's action to be a foreseeable result of regulatory authority and not a result of a clearly articulated state policy.

Although *Omni* involved a zoning ordinance, its foreseeability test will apply to many other kinds of local ordinances. Unfortunately, the test is bound to produce uncertainty. The test is also inconsistent with the very principles of federalism that *Omni* purportedly reaffirmed. Further, the foreseeability test will not provide greater immunity for home rule municipalities. Sound policy reasons such as more efficient state review, local autonomy, and confidence in the local political process all support greater municipal immunity for home rule cities. Consequently, the Court should overrule *Boulder* so as not to impose the greatest federal restrictions on the very municipalities the states entrust with the greatest freedom.

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141. Hovenkamp & Mackerron, *supra* note 43, at 753–58.