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Antitrust Law - Sherman Act - Home Rule Municipalities - Municipal Ordinances

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Recent Decisions

ANTITRUST LAW—SHERMAN ACT—HOME RULE MUNICIPALITIES—MUNICIPAL ORDINANCES—The United States Supreme Court has held that a home rule municipality is not exempt from liability under the Sherman Antitrust Act unless the municipality's action constitutes an action of the state itself or is municipal action in furtherance or implementation of a clearly articulated and affirmatively expressed state policy to displace competition.

Community Communications Co. v. City of Boulder, 102 S. Ct. 835 (1982).

The City of Boulder was organized as a "home rule" municipality pursuant to the provisions of the constitution of the State of Colorado, as amended,[1] and was granted extensive powers to exercise the right of self-government in both local and municipal matters. The city charter provided that all municipal legislative powers would be exercised by an elected city council.[2] In October, 1964, the City Council, pursuant to this power, enacted an ordinance which granted Colorado Televents, Inc., a twenty-year, revocable, non-exclusive permit to use the public ways in the City of Boulder to string cables for cable television.[3] In 1966, Colorado Televents,

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1. Community Communications Co. v. City of Boulder, 102 S. Ct. 835, 836-37 n.1 (1982). COLO. CONST. art. XX, § 6, provides in pertinent part:

> The people of each city or town of this state, having a population of two thousand inhabitants . . . are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.
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> Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith . . . .
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> . . . .
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> It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters . . . .
>
> The statutes of the state of Colorado so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.

Id.

2. 102 S. Ct. at 837. Boulder, Colo., Charter § 11 (1965 rev. ed.).

3. 102 S. Ct. at 837.

Inc., assigned its rights under the permit to the petitioner, Community Communications Co., Inc. (CCC).[4]

Since that assignment, CCC provided cable television service to the University Hill area of Boulder, in which approximately twenty percent of the City's population resided, and where geographical limitations made traditional television broadcast signals difficult to receive.[5] CCC's service was limited because of the quality of cable television technology available to it at the time. Eventually, however, the availability of improved technology enabled CCC to extend better service to its customers and to expand to other areas of the City.[6]

In May 1979, CCC informed the City Council that it planned to expand service to other areas of the City.[7] A potential competitor, Boulder Communications Company (BCC), which also sought to enter the City's cable television market, sought a permit to provide competing cable television service througout the City.[8] At that time the City and its officers undertook an extensive study to reconsider the cable television business in light of the new developments in the industry since the enactment of the original ordinance.[9]

At the conclusion of its review, in December 1979, the City issued an emergency ordinance which restricted CCC from expanding its service into other areas for three months.[10] The City stated that the purpose of the moratorium prohibiting further construction by CCC was to afford other cable television companies the opportunity to make proposals to the City; the City Council believed that allowing CCC to continue its construction in other areas would give it a competitive advantage over other companies

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4. *Id.*

5. *Id. See* Community Communications Co. v. City of Boulder, 485 F. Supp. 1035, 1036 (D. Colo.), *rev'd*, 630 F.2d 704 (10th Cir. 1980), *rev'd*, 102 S. Ct. 835 (1982).

6. 102 S. Ct. at 837.

7. *Id.*

8. *Id.* BCC was a defendant below and a respondent in the instant case. *See id.* n.4.

9. *Id.* n.6. The district court in *Boulder* explained that the City Manager and City Council initiated a complete review of cable television service due to the many changes in the industry since the 1964 ordinance. Consultant Robert Sample warned that the City should be concerned about the tendency of a cable system to become a natural monopoly. The City Council feared that CCC had an unfair advantage because it already was operating in Boulder and even though it might not be the best cable operator for Boulder, it would nonetheless be the only operator because of its head start in the area. The Council wanted to lessen the advantage of CCC and make it easier for other cable television companies to make their offers. 485 F. Supp. at 1037.

10. *Id.* at 838.

seeking to start service in those areas.[11]

Petitioner CCC filed suit in the United States District Court for the District of Colorado,[12] seeking a preliminary injunction to prevent the City of Boulder from restricting its expansion and alleging that such a restriction would violate section one of the Sherman Antitrust Act.[13] The City asserted a two-fold defense against CCC's claim that it was violating the Sherman Act, arguing that the City's ordinance restricting construction was a valid exercise of the City's police powers, and alternatively, that the City had antitrust immunity pursuant to the state action exemption established in *Parker v. Brown*.[14]

The district court examined the rights attendant to a grant of authority to a home rule municipality and found that the Constitution of Colorado had given Boulder autonomy only as to matters of strictly local concern.[15] The district court concluded that the cable television business was not of a strictly local nature and was therefore beyond home rule authority because it encompassed a wide area of concerns including interstate commerce and the first amendment freedoms of communicators.[16] After considering *City of Lafayette v. Louisiana Power & Light Co.*,[17] the district court also held that the City was subject to antitrust liability because the state action exemption set forth in *Parker*[18] was wholly inapplica-

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11. *Id.* The city was concerned that CCC might become a natural monopoly. *Id.* at 837 n.6.

12. Community Communications Co. v. City of Boulder, 485 F. Supp. 1035 (D. Colo.), *rev'd*, 630 F.2d 704 (10th Cir. 1980), *rev'd*, 102 S. Ct. 835 (1982).

13. Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1-7 (1976). Section 1 makes unlawful "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . . *Id.* § 1. CCC also alleged that the City of Boulder and BCC had entered into a conspiracy to restrict competition by attempting to replace CCC with BCC. 102 S. Ct. at 837 n.9.

14. 317 U.S. 341 (1943). In *Parker*, a marketing program for the 1940 raisin crop, adopted pursuant to the California Agricultural Prorate Act, was determined to derive its authority from the legislative command of the state and thus was not in violation of the Sherman Act. *Parker* interpreted the Sherman Act to be inapplicable to actions by a state or to official action directed by a state. *Id.* at 350-51.

15. 102 S. Ct. at 838. *See* 485 F. Supp. at 1038-39.

16. 102 S. Ct. at 838. *See* 485 F. Supp. at 1038-39.

17. 435 U.S. 389 (1978). In *Lafayette*, petitioner cities which owned and operated electric utility systems brought an action against a privately owned facility for antitrust violations. When defendants counterclaimed that the petitioners had committed various antitrust violations, petitioner cities claimed immunity under the *Parker* "state action doctrine" because of their status as "cities." The Court held that no intent of Congress could be inferred from the Sherman Act to grant cities immunity from antitrust liability. *Id.* at 398-400.

18. 317 U.S. at 350-51. *Parker* held that the state acting in its sovereign capacity could

ble. Accordingly, CCC's motion for a preliminary injunction was granted.[19]

On appeal, the United States Court of Appeals for the Tenth Circuit reversed.[20] After concluding that the grant of authority to Boulder as a home rule municipality under Colorado law gave the City supremacy over local matters, the court of appeals found that, pursuant to case law in the state, regulation of the cable television industry was a local matter.[21] The Tenth Circuit disagreed with the lower court's application of *Parker*, as refined by *Lafayette*, because the City of Boulder had a governmental interest at stake rather than a proprietary interest of the type denied exemption in *Lafayette*.[22] Because Boulder's regulation represented the only active governmental supervision and was the only expression of policy regarding the subject matter, the court of appeals held that the requirements for a *Parker* exemption had been met.[23]

The United States Supreme Court granted certiorari,[24] and reversed, holding that the City could be liable for antitrust violations because it did not qualify for the *Parker* state action exemption.[25] Justice Brennan, writing for the majority,[26] stated that the ques-

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act in restraint of trade without violating the federal antitrust laws. *Id. See supra* note 14.

19. 102 S. Ct. at 838-39. *See* 485 F. Supp. at 1040. The district court concluded the plaintiff should be protected:

> [I]n the exercise of the lawful rights which it had prior to the conduct which in reasonable probability will be declared to be unlawful under the antitrust laws. In considering the public interest and how it may be effected by this injunction, it is necessary to look beyond Boulder to the national policy of protecting free market competition.

Id. The district court enjoined the City and its agents, "from taking any unilateral action to restrict, limit, or revoke the authority of the plaintiff to conduct its cable television business in the City of Boulder." *Id.* at 1041.

20. Community Communications Co. v. City of Boulder, 630 F.2d 704 (10th Cir. 1980), *rev'd*, 102 S. Ct. 835 (1982).

21. 630 F.2d at 707.

22. 102 S. Ct. at 839. The court of appeals concluded that even if the criterion of *Lafayette* were applicable — that a city was exempt from antitrust liability under *Parker* only if the action in question was directed or authorized by a state in furtherance of a policy to displace competition — Boulder had met that standard by its status as a home rule municipality. 630 F.2d at 707-08.

23. 102 S. Ct. at 839. A dissenting opinion was filed by Chief Judge Markey who argued that the majority had overstated the sovereign absorption of the home rule municipality from the State of Colorado and maintained that the *Parker* state action exemption should not apply. 630 F.2d at 709. (Markey, C.J., dissenting).

24. 450 U.S. 1039 (1981).

25. Communty Communications Co. v. City of Boulder, 102 S. Ct. 835 (1982).

26. *Id.* at 836. Justices Marshall, Blackmun, Powell, and Stevens joined Justice Brennan's opinion. Justice Stevens also filed a separate concurring opinion, and Justice Rehnquist filed a dissenting opinion in which Chief Justice Burger and Justice O'Connor joined.

tion presented in *Parker* was whether a state exercising its sovereign power was prohibited from imposing anti-competitive restraints under the federal antitrust laws.[27] Because the marketing program in *Parker*[28] derived its authority from the legislative action of the state, it was held to be exempt from antitrust attack under the Sherman Act because the federal antitrust legislation was not intended to apply to state actions.[29] Justice Brennan noted that whether that exemption should be extended to municipalities was considered in *Lafayette,* where petitioner cities licensed to operate electric utility systems within and outside the municipality were charged with antitrust violations.[30]

The Court explained that in *Lafayette* it had rejected the argument that Congress had intended to exempt local governments from antitrust liability.[31] The *Lafayette* plurality, the Court noted, held that a blanket exemption did not exist for all government action merely because of the status of the empowering entity.[32] Relying on precedent, the *Lafayette* Court concluded that built into the *Parker* exemption is a principle of federalism — that this country is made up of sovereign states, not sovereign subdivisions of states.[33] States could, however, in the exercise of their sovereign

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Id. at 845. Justice White did not take part in the consideration or decision of this case. *Id.* at 844.

27. *Id.* at 839.

28. *See supra* note 14.

29. 102 S. Ct. at 839. The Court in *Parker* stated: "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Parker,* 317 U.S. at 351.

30. 102 S. Ct. at 839. *See supra* note 17.

31. 102 S. Ct. at 840.

32. *Id. See* Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 408 (1978). *See also* Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (ban on lawyer advertising set down in disciplinary code of the Arizona Supreme Court held exempt from Sherman Act treatment because the supreme court exercised the State's ultimate authority over lawyers and thus restraint was compelled by the State as sovereign); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (minimum fee schedule for lawyers approved by state bar association held not to be sufficiently compelled by the State so as to qualify for Sherman Act exemption).

33. 102 S. Ct. at 840. The Court observed:

> Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them. *Parker*'s limitation of the exemption to 'official action directed by a state,' is consistent with the fact that the States' subdivisions generally have not been treated as equivalents of the States themselves. In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach.

power, absolve municipal actions from antitrust liability by expressly authorizing a municipality to engage in activities in furtherance of a state policy to displace competition with regulation or monopoly public service.[34] However, such state policy must be clearly articulated and affirmatively expressed.[35]

Justice Brennan explained that Boulder's conduct would be eligible for the state action exemption only if it met one of two criteria: (1) that the ordinance was an act of the State of Colorado itself exercising its sovereign power, i.e., *Parker;* or (2) that the ordinance represented municipal conduct in furtherance or implementation of a clearly articulated and affirmatively expressed state policy pursuant to *Lafayette, New Motor Vehicle Board v. Orrin W. Fox Co.,*[36] and *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*[37]

Boulder claimed that Colorado has vested it with sovereign powers in local and municipal affairs by permitting its establishment as a home rule municipality, thus transforming Boulder's regulation of cable television — an otherwise local matter — into a sovereign act of the state.[38] Boulder asserted that its moratorium ordinance was a governmental act, performed by Boulder acting as the State in local matters.[39] Justice Brennan rejected the City's claims on the theory that the *Parker* state action exemption incorporates the intent of Congress under the Sherman Act to reflect a dual federalism principle which acknowledges a degree of sovereignty in

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Id. at 840 (quoting *Lafayette*, 435 U.S. at 412-13).

34. 102 S. Ct. at 840. The *Lafayette* Court concluded that the *Parker* doctrine would shield municipal conduct from antitrust liability here engaged in "pursuant to state policy to displace competition with regulation or monopoly public service." 435 U.S. at 413. Justice Brennan recognized that states frequently effectuate their policies through instrumentalities of their cities and towns. 102 S. Ct. at 840.

35. 102 S. Ct. at 840. Justice Brennan noted that this standard has since been adopted by a majority of the Court. *See* California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) (state wine-pricing scheme found not exempt under *Parker* even though part of a clearly articulated and affirmatively expressed state policy, because scheme was not actively supervised by state); New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978) (state act requiring motor vehicle manufacturer to get approval of state regulatory agency before it could open dealership within existing challenging franchisee's market determined to be outside the Sherman Act since the regulatory scheme was clearly articulated and affirmatively expressed).

36. 439 U.S. 96 (1978).

37. 445 U.S. 97 (1980). *See supra* note 35.

38. 102 S. Ct. at 841. Boulder contended that this delegation of home rule powers satisfied both the *Parker* and *Lafayette* requirements. *Id.*

39. *Id.*

the state but not in cities.[40] The Court observed that *United States v. Kagama*[41] held that cities are not sovereign and must derive their power from the states.[42] Justice Brennan asserted that this principle was adopted in *Parker* and reaffirmed in *Lafayette, Fox,* and *Midcal.*[43] *Lafayette* expressly recognized that municipalities are not themselves sovereign and that they could be eligible for the state action exemption only to the extent that they acted in furtherance of a clearly expressed and affirmatively articulated state policy.[44]

The Court next addressed Boulder's claim that Colorado's home rule amendment granting the City automony fulfilled the requirement of clear articulation and affirmative expression of a state policy.[45] Justice Brennan rejected this contention reasoning that Colorado, by allowing the City to regulate the cable industry, had not "contemplated" that the City would enact an anticompetitive program.[46] Rather, the State had not expressed any opinion at all regarding Boulder's anticompetitive ordinance. Justice Brennan found that a broad grant of authority by the state to regulate in an area could not properly be said to satisfy the "clear articulation" standard because one locality could regulate in a certain way while another could choose not to regulate at all.[47] Such divergent actions could not both be said to be "contemplated" by the state. Justice Brennan explained acceptance of such a position would almost certainly eviscerate the meaning of clear articulation and af-

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40. *Id.*

41. 118 U.S. 375 (1886).

42. 102 S. Ct. at 842. The *Boulder* Court maintained that sovereignty in the United States can rest either with the federal government or with the single states. As stated in *Kagama:* "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." 118 U.S. at 379. *See* 102 S. Ct. at 842.

43. 102 S. Ct. at 842.

44. *Lafayette,* 435 U.S. at 413. Alternatively, Boulder had claimed that in accordance with Chief Justice Burger's concurrence in *Lafayette,* its actions were clearly justified as a governmental rather than a proprietary interest. 102 S. Ct. at 842 n.18.

45. 102 S. Ct. at 842. The Court found that the requirement of "clear articulation and affirmative expression" could not be satisfied when the State's position was only neutral regarding the challenged municipal restraint. *Id.* at 843. If a State allows its municipalities free rein they can hardly be said to have "contemplated" any specific anticompetitive restraint. *Id.* Nor could these: "[A]ctions be truly described as 'comprehended within the powers *granted,*' since the term, 'granted,' necessarily implies an affirmative addressing of the subject by the State. The State did not do so here: The relationship of the State of Colorado to Boulder's moratorium ordinance is one of precise neutrality." *Id.*

46. *Id.* at 842.

47. *Id.* at 843.

firmative expression that prior case law demands must be attached to the phrase.[48]

The Court next considered Boulder's argument that a denial of a *Parker* exemption would have an adverse effect on cities and unduly burden the federal courts.[49] Justice Brennan rejected these contentions, stressing the policy of free markets and open competition underlying the antitrust laws.[50] The Court concluded that if a state, which is exempt from antitrust laws under *Parker,* does not directly authorize a district or municipality to act in a certain manner, then the district or municipality must follow the antitrust regulations.[51] Justice Brennan concluded that the decision of the court of appeals that the requirements of a *Parker* exemption had been met should be reversed and remanded.[52]

Justice Stevens, in a concurring opinion,[53] made it clear that simply because the Court had not found an exemption for Boulder under the *Parker* doctrine, it did not mean that Boulder had violated the antitrust laws, an assumption he believed to be implicit in the dissenting opinion.[54] According to Justice Stevens, the reasons for denying an exemption for municipalities in the *Lafayette* case were equally applicable to the instant case regardless of Boulder's home rule status. In neither case did the Court determine that the Sherman Act had been violated; exemption and violation were two separate and distinct issues.[55]

Justice Stevens explained the distinction between exemption from the antitrust laws and violation of them by reference to *Can-*

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48. *Id.*

49. *Id.*

50. *Id.* On this point, the Court emphasized:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important as the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete — to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.

Id. at 843 n.19 (quoting United States v. Topco Assoc., 405 U.S. 596, 610 (1972)).

51. 102 S. Ct. at 843-44. The federal antitrust laws which impose sanctions on persons for illegal acts apply as well to municipalities. *Id.* at 843. The Court specifically did not examine the question of liability for private persons performing similar acts since the instant case did not so demand. In addition, the problem of remedies against municipalities was not examined. *Id.* n.20.

52. *Id.* at 844.

53. *Id.* (Stevens, J., concurring).

54. *Id.*

55. *Id.*

tor v. Detroit Edison Co.,[56] in which the Supreme Court held that the *Parker* exemption was inapplicable to the tariff actions of Detroit Edison Company as approved by the Michigan Public Utility Commission. Although the suit was allowed to go forward, the Court did not determine that the members of the Michigan Public Utility Commission had become parties to an antitrust violation.[57] Justice Stevens stressed that on the contrary, the plurality in *Cantor* had emphasized the difference between a charge that public officials had violated the Sherman Act and a charge that private parties had done so.[58]

Justice Stevens maintained that any inquiry into whether an actual violation of the antitrust laws had occurred was a question of fact and law which must first be addressed by the district court.[59] He suggested that the violation issue had to be decided on a case-by-case basis and would prove more complex than the dissenting opinion implied.[60]

Justice Rehnquist, in a dissenting opinion,[61] disagreed with the Court's decision on two grounds. First, he challenged the Court's application of the "state action" exemption to the case, maintaining that a preemption analysis should be used instead for determining the impact of *Parker* on this case.[62] Justice Rehnquist claimed that the real issue in *Parker* and in the instant case was not whether the actions of state and municipal governments are *exempt* from the Sherman Act treatment but whether those actions are *preempted* by the Sherman Act under the supremacy clause of the United States Constitution and the very principle of federalism itself.[63] Secondly, he charged that the Court treated a local governmental entity identically to any private business.[64] He argued that as he read the Court's opinion, a municipality may *violate* the antitrust laws by enacting legislation in conflict with the Sherman Act, unless the ordinance is enacted pursuant to an af-

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56. 428 U.S. 579 (1976). In *Cantor*, the Michigan Public Utility Commission had approved a tariff which allowed Detroit Edison to distribute free light bulbs to its customers. Because the distribution was approved by an entity of the State, the lower court determined that the company qualified for the *Parker* exemption. *Id.* at 581.

57. 102 S. Ct. at 844 (Stevens, J., concurring).

58. *Id. See* 428 U.S. at 585-92.

59. 102 S. Ct. at 845 (Stevens, J., concurring).

60. *Id.*

61. *Id.* (Rehnquist, J., dissenting). Justice Rehnquist was joined by Chief Justice Burger and Justice O'Connor.

62. *Id.*

63. *Id.*

64. *Id.*

firmative state policy to suppress competitive market forces.[65]

Justice Rehnquist explained that preemption and exemption are distinct concepts. Preemption analysis is invoked when conflict occurs between legislative enactments of two sovereigns — one federal and one state.[66] Questions under the supremacy clause[67] arise when either the actions of both sovereigns conflict or where the federal government has exclusively occupied a particular legislative field precluding any state action.[68] When the Court finds preemption, the state enactment must be struck without consideration of the state's purposes.[69] Justice Rehnquist further explained that exemption, on the other hand, involves the interplay between the enactments of only one sovereign and whether one enactment was intended to relieve a party of the necessity of complying with a prior one.[70] Exemption analysis requires the reconciling of two schemes while preemption analysis requires that one legislative scheme be discarded. According to Justice Rehnquist, a preemption analysis was much more applicable to a state action question since the core of the case involves alleged conflict between state or local legislative action and the Sherman Act.[71]

According to Justice Rehnquist, the *Parker* Court had found that the challenged state regulation which attempted to maintain

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65. *Id.*

66. *Id.* Justice Rehnquist stated:

> We are confronted with questions under the Supremacy Clause when we are called upon to resolve a reported conflict between the enactments of the federal government and those of a State or local government, or where it is claimed that the federal government has occupied a particular field exclusively, so as to foreclose any state regulation.

Id. at 845-46.

67. U.S. CONST. art. VI, § 2. The supremacy clause provides that the Constitution and the laws made in pursuance thereof and the treaties made by the United States, "shall be the Supreme Law of the Land." *Id.*

68. 102 S. Ct. at 845-46 (Rehnquist, J., dissenting).

69. *Id.* at 846 (Rehnquist, J. dissenting). Justice Rehnquist stated that because of the sensitive area of federal-state relations, courts are "reluctant to infer preemption," the presumption being against preemption absent a clearly expressed intention by Congress to supersede the power of the states. *Id.* (quoting Exxon Corp. v. Governor of Md., 437 U.S. 117, 132 (1978)). *See* Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978).

70. 102 S. Ct. at 846 (Rehnquist, J., dissenting). Justice Rehnquist noted that no problems of federalism exist with only one sovereign. A court must merely ascertain congressional intent as to whether the exemption is express or implied. *Id. See* National Broiler Mktg. Ass'n. v. United States, 436 U.S. 816 (1978) (Sherman Act and the Capper-Volstead Act); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963) (Clayton Act and the federal Bank Merger Act of 1960); Silver v. New York Stock Exch., 373 U.S. 341 (1963) (Sherman Act and the Securities Exchange Act).

71. 102 S. Ct. at 846 (Rehnquist, J., dissenting).

prices for the California raisin crop at an artifically high level would have violated the Sherman Act if it had been instituted by an agreement between private persons.[72] The *Parker* Court assumed that Congress could prevent a state from establishing such a stabilization program because of its effects on interstate commerce by occupying the field itself.[73] Justice Rehnquist further noted, however, that the *Parker* Court found nothing in the Sherman Act which indicated that it applied to the states or its agents, and that any attempt to interfere with the control of a state over its officers or agents should not be lightly attributed to Congress.[74] To Justice Rehnquist, the reasoning employed by the Court in *Parker* was clearly one of preemption under the supremacy clause rather than exemption. The Court in *Parker* held that Congress did not intend by the Sherman Act to overrule state control of the economy, even though such action would violate the Sherman Act if engaged in by private persons.[75]

Citing the two state action cases ruled on by the Court prior to *Boulder* — *Fox* and *Midcal* — Justice Rehnquist maintained that both more accurately involved preemption rather than exemption analysis.[76] In the *Fox* case, the Court held that a practice authorized by an act of the California legislature which interfered with the establishment of car dealerships was not subject to the Sherman Act because it represented a clearly articulated and affirmatively expressed policy to displace competition.[77] In addition, the *Fox* Court determined that the possible anticompetitive effect of a state statute was not enough to invalidate it under the Sherman Act because the power of the states to regulate the economy would be nullified, thus allowing a state statute to survive in spite of possible conflict with the Sherman Act.[78]

In *Midcal,* the Court determined that California's wine-pricing system constituted resale price maintenance and was a per se vio-

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72. *Id. See supra* note 14.

73. 102 S. Ct. at 846 (Rehnquist, J., dissenting). *See Parker,* 317 U.S. at 350-51.

74. 102 S. Ct. at 846 (Rehnquist, J., dissenting). *See Parker,* 317 U.S. at 350-51.

75. 102 S. Ct. at 847 (Rehnquist, J., dissenting). Justice Rehnquist noted that some state regulations may be preempted by the Sherman Act since a state "does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Id.* (quoting Parker v. Brown, 317 U.S. 341, 351 (1943)).

76. 102 S. Ct. at 847 (Rehnquist, J., dissenting). *See supra* note 35.

77. 102 S. Ct. at 847 (Rehnquist, J., dissenting). *See* New Motor Vehicle Bd. v. Orrin W. Fox, Co., 439 U.S. 96, 109 (1978).

78. 102 S. Ct. at 847 (Rehnquist, J., dissenting). *See Fox,* 439 U.S. at 111.

lation of the Sherman Act.[79] The system could not qualify for *Parker* treatment, Justice Rehnquist explained, because even though it was directed by a clearly articulated and affirmatively expressed state policy, the system was not actively supervised by the state.[80]

Justice Rehnquist maintained that in *Parker, Midcal,* and *Fox,* the Court reached the conclusion that a state statute is unenforceable because it was *preempted* by the Sherman Act, thus avoiding any question of violation of the antitrust laws by an action of the state.[81] He noted that unlike *Boulder,* these cases had involved challenges to a state statute.[82] Justice Rehnquist accused the majority of determining that a municipality may actually violate the antitrust laws when it merely enacts an ordinace invalid under the Sherman Act, and when the ordinance cannot be saved by being an affirmative expression of state policy or that it is acting as the instrumentality of the state.[83]

According to Justice Rehnquist, applying *Parker* in such a way will cause many problems for the courts, including whether per se rules of illegality should be applied to local governments on the same basis as private defendants, whether municipalities may be liable for treble damages for antitrust violations,[84] and under what circumstances the rule of reason[85] should be applied to municipal restraints.[86]

As a vehicle for examining the implications of applying the rule of reason to municipal activity, Justice Rehnquist characterized the analysis in *National Society of Professional Engineers v. United States*[87] as determining two categories of possible defenses

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79. 102 S. Ct. at 847 (Rehnquist, J., dissenting). *See* California Retail Liquor Dealer's Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 102-03 (1980).

80. 102 S. Ct. at 847 (Rehnquist, J., dissenting). *See Midcal,* 445 U.S. at 105-06.

81. 102 S. Ct. at 847 (Rehnquist, J., dissenting).

82. *Id.*

83. *Id.* at 847-48 (Rehnquist, J., dissenting).

84. *Id.* at 848 (Rehnquist, J., dissenting). *See* 15 U.S.C. § 15 (1976), which requires "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." *Id.*

85. The rule of reason originated in antitrust law in the landmark case of Standard Oil Co. v. United States, 221 U.S. 1 (1911). The Court's decision, authored by Chief Justice White, condemned the holding company which monopolized the Nation's oil refining business and concluded that only those restrictions which were unreasonable would be considered violations of the Sherman Act. *Id.* at 59-61.

86. 102 S. Ct. at 848 (Rehnquist, J., dissenting).

87. 435 U.S. 679 (1978). The test for the rule of reason employed in *Professional Engineers* is whether the challenged policy or agreement promotes or suppresses competition.

of private parties to potential antitrust violations. Under the analysis, either a restraint is supportable because it is not an *unreasonable* restraint of trade or because its procompetitive effects outweigh its anticompetitive effects.[88]

Applying *Professional Engineers* to municipalities, Justice Rehnquist found that a challenged restraint could not be saved because its benefits to the community outweighed its anticompetitive effects.[89] Regardless of the best interests of the inhabitants, any anticompetitive effect of a municipal regulation under this analysis would invalidate it.[90] Justice Rehnquist stressed, however, that competition cannot and does not further the interests that lie behind most social welfare legislation.[91] He indicated that although state or local enactments are not invalidated by the Sherman Act simply because of anticompetitive effects, the Court has invalidated them on the basis that such a program would violate the antitrust laws if engaged in by private parties.[92] Absent an affirmatively expressed state policy to displace competition to support its regulation, the municipality would violate the Sherman Act if the regulation was not procompetitive. Justice Rehnquist charged that the ability of the municipality to regulate the economy would therefore be nullified.[93]

Justice Rehnquist found, however, that if the analysis of *Professional Engineers* was not applied strictly and an exemption was carved out allowing municipalities to justify a regulation if its social good outweighed its anticompetitive effect, the Court would be called upon to conduct a wholesale review of social legislation in the same manner as in the *Lochner* era.[94] Rehnquist charged that

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More succinctly, the test is "[w]hether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Id.* at 691 (quoting Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1917)).

88. 102 S. Ct. at 848 (Rehnquist, J., dissenting).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 849 (Rehnquist, J., dissenting). Justice Rehnquist emphasized two recent cases determined by the Supreme Court to involve resale price maintenance. *See* California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), and Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951).

93. 102 S. Ct. at 849 (Rehnquist, J., dissenting).

94. *Id.* He stated, "[i]nstead of liberty of contract and substantive due process, the pro-competitive principles of the Sherman Act will be the governing standard by which the reasonableness of all local regulation will be determined." *Id.* With its decision in Lochner v. New York, 198 U.S. 45 (1905), invalidating regulation of hours of labor, the Supreme Court inaugurated three decades of judicial control over legislative enactments of the Congress

the Sherman Act should not be used to authorize a federal court to impose its will on local legislators' regulation of the economy.[95]

Justice Rehnquist further maintained that all of these problems could have been avoided had the Court used a preemption rather than exemption analysis.[96] Under the preemption analysis, the same process could be used to invalidate a municipal ordinance that is used to invalidate a state statute. Thus, an ordinance would survive if it met an adjusted *Midcal* test: the regulatory scheme must have been enacted due to an affirmative policy of the municipality to displace competition and be actively supervised and implemented by the municipality.[97]

Justice Rehnquist also criticized the Court for its conclusion that federalism is not affected when a municipal ordinance is invalidated by the Sherman Act.[98] He stated that federalism is implicated in the same degree when a municipal ordinance is invalidated as when a state statute is struck down. According to Justice Rehnquist, the majority premised its opinion on the theory that because municipalities are not states, they are not sovereign, and federalism is not implicated when federal law is used to invalidate a constitutionally valid municipal ordinance.[99] By contrast, Justice Rehnquist maintained that notions of federalism are implicated when a municipal ordinance is preempted by a federal statute.[100] No such distinction has been made by the Court regarding states and their subdivisions concerning the preemption effect of federal law.[101] Rather, he argued, the standards applied by the Court are the same whether the action is taken by the state or by one of its subdivisions.[102] The Court, in Justice Rehnquist's estimation, could not have wanted to completely alter established supremacy clause

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and the states regulating the economy which interferred with contract and property rights. W. LOCKHART, Y. KAMISAR, & J. CHOPER, THE AMERICAN CONSTITUTION 263 (1981). Justice Rehnquist feared that were the application of the rule of reason set forth in *Professional Engineers* modified to allow municipalities to save anticompetitive legislation on the basis of benefit to the community, the Court would be forced to "engage in the same wide-ranging, essentially standardless inquiry into the reasonableness of local regulation that this Court has properly rejected." 102 S. Ct. at 849 (Rehnquist, J., dissenting).

95. 102 S. Ct. at 849 (Rehnquist, J., dissenting). *See* Ferguson v. Skrupa, 372 U.S. 726 (1963).

96. 102 S. Ct. at 849 (Rehnquist, J., dissenting).

97. *Id.* at 850 (Rehnquist, J., dissenting).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id. See* City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973); Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960).

analysis, even though in effect it had done so by allowing a municipality to invoke *Parker* immunity only to the same extent as a private litigant.[103] A better application of *Parker* would provide for similar treatment of municipal regulations and state regulations.[104] Using a preemption rather than an exemption analysis, Justice Rehnquist urged, no principled basis can be used to support different treatment for cities and states.[105]

Justice Rehnquist stated that the *Parker* doctrine should be applied to determine whether a municipal action is preempted by the Sherman Act; as with a state, a municipality should not be hauled into federal court to justify its decision to displace competition with regulation.[106] A correct application of *Parker*, according to Justice Rehnquist, would determine that the protection awarded by the federal government to promote free trade and competition is not compromised if the state or local regulation is clearly an act of government in furtherance of the interests of its citizens, not private parties, to displace competition with regulation.[107] By placing the municipality on the same footing as a private litigant, Justice Rehnquist charged that the Court would severely alter the relationship between states and their subdivisions.[108] Justice Rehnquist feared that absent a specific state authorization, a municipality will no longer be free to regulate the local economy.[109]

According to Justice Rehnquist, the decision of the Court rings the death knell for the home rule movement, effectively eviscerating the local autonomy municipalities have gained throughout past decades.[110] In areas where the state is prevented from enacting legislation on local matters, the municipality will now be defenseless to antitrust challenges to its regulation of the economy because the state will be prevented from authorizing such municipal activity.[111] In Justice Rehnquist's view, the only way to counteract such an effect and permit municipalities to legislate on local matters would be to dramatically alter the relationship between the state and its

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103. 102 S. Ct. at 850 (Rehnquist, J., dissenting).
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 850-51 (Rehnquist, J., dissenting).
109. *Id.* at 851 (Rehnquist, J., dissenting).
110. *Id.* Justice Rehnquist noted that the municipalities standing to lose the most by the Court's decision were those with the most autonomy. *Id.*
111. *Id.*

subdivisions.[112] To regain its power without antitrust liability, municipalities would be forced to cede back their authority to the state. By its decision, Justice Rehnquist argued, the Court had not only erroneously determined that federalism is not implicated when a municipal ordinance is invalidated by a federal statute, it had used the Sherman Act to regulate the very relationship between states and their political subdivisions.[113]

In 1890 Congress passed the Sherman Act,[114] pursuant to the power granted to it by the commerce clause, to prevent unreasonable restraints of trade among *persons* in interstate and foreign commerce. The Sherman Act itself does not specifically address whether the actions of a state or municipality in restraint of trade should be likewise prohibited.[115]

The applicability of the Sherman Act to state functions was first considered by the Court in 1943 in *Parker v. Brown*,[116] where suit was brought by a producer and packer of raisins in California to enjoin the state from enforcing its prorate marketing program. The controversy in *Parker* revolved around whether the California Agricultural Prorate Act, which allowed state officials to restrict the industry, violated the federal antitrust laws. The Supreme Court held that the program was specifically authorized and commanded by the State, and because the Court could find no prohibition against state action under the Sherman Act, the Court upheld the state statute.[117] The *Parker* Court could not be persuaded to find that Congress intended to include states in the class of persons prohibited from acting in restraint of trade. According to the Court, the purpose of the Sherman Act was to prevent business combinations and because there was no such danger in the instant case, the provisions of the Act did not apply to invalidate the state legislation.[118] The *Parker* decision specifically did not consider the

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112. *Id.*

113. *Id.*

114. Pub. L. No. 93-528, 88 Stat. 1708 (codified as amended at 15 U.S.C. §§ 1-7 (1976)). *See supra* note 13. Section 2 of the Sherman Act makes it unlawful to "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." 15 U.S.C. § 2.

115. *See* Parker v. Brown, 317 U.S. 341, 350-51 (1943).

116. *Id.*

117. *Id.* at 350-52. The Court reasoned that in our dual system of government, states are sovereign, and except as Congress may subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not likely to be attributed to Congress. The Sherman Act gives no indication that it intended to restrain state action or official action directed by a state. *Id.* at 350-51.

118. *Id.* at 351. The Court stated:

problem of a state or a municipality participating in a private agreement in restraint of trade, leaving open the matter of the liability of states and municipalities as co-conspirators.[119]

Not until *Goldfarb v. Virginia State Bar*[120] in 1975 did the Supreme Court again consider the state action exemption enunciated in *Parker*. In *Goldfarb*, a class action suit was brought by a Virginia couple against the state bar association when they could not find a lawyer to perform a title search and to issue title insurance, necessary for the purchase of a house, for less than the fee set by the state bar association.[121] The Supreme Court held that although the association's action constituted price fixing under the Sherman Act and although the state supreme court had ultimate control over the unethical practices of the legal profession, there still existed insufficient specific state direction for the state action exemption to apply. The test for immunity established under *Goldfarb* was whether the questioned action was compelled by the state acting in its sovereign capacity.[122]

The following year, the state action exemption was again confronted in *Cantor v. Detroit Edison Co.*[123] Detroit Edison's practice of distributing free light bulbs to its customers, which was approved by the Michigan Public Utility Commission, was held to involve insufficient state action to qualify for the *Parker* exemption.[124] Because the commission had merely approved the public utility's rate schedule and practice, no direct action by the State was involved and thus no immunity attached. The Court found that mere supervision by a state regulatory body of a private utility was insufficient to trigger the *Parker* exemption.[125] Detroit Edison was subsequently held accountable under the federal anti-

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> Here the state command to the Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for establishing the prorate program.

Id. at 352.

119. *Id.* at 351-52. For a thorough discussion of the development of state action exemption under *Parker* as it applies to municipalities, see Note, *Antitrust Law and Municipal Corporations: Are Municipalities Exempt From Sherman Act Coverage Under the Parker Doctrine?*, 65 GEO. L.J. 1547 (1977).

120. 421 U.S. 773 (1975).

121. *Id.* at 775-76.

122. *Id.* at 790.

123. 428 U.S. 579 (1976).

124. *Id.* at 590-91.

125. *Id.* at 590-91, 598.

trust laws.

In *Bates v. State Bar of Arizona*,[126] the Supreme Court granted antitrust immunity to the state bar on the grounds that its activity was specifically mandated by the disciplinary code of the Arizona Supreme Court, which derived its authority from the state constitution.[127] Bates sought to invalidate the disciplinary rules of the legal profession, which prohibited attorneys from advertising in newspapers or other media, as inhibiting competition.[128] A different result had ensued in *Goldfarb*, according to the *Bates* Court, because the rigid fixed-price schedule was not specifically directed by the state supreme court.[129] The disciplinary action in the *Bates* case was an affirmative command of the Arizona Supreme Court and thus met the threshold test of being compelled by direction of the state as sovereign.[130]

The Supreme Court tooks its initial look at whether municipalities could be immune from liability under the Sherman Act in *City of Lafayette v. Louisiana Power & Light Co.*[131] In *Lafayette*, two Louisiana cities that owned and operated electric utility systems were found liable for alleged antitrust abuses. A plurality of the Court determined that antitrust immunity should be granted to a municipality only if the challenged conduct passed the threshold test: a state policy specifically authorizing a displacement of competition which was clearly articulated and affirmatively expressed.[132] The very narrow holding on which five Justices agreed was a negative one — that there was no automatic immunity for cities as the defendants had claimed.[133] Chief Justice Burger, in a concurring opinion, agreed with the other four Justices that the Lousiana cities should not be granted immunity because they were exercising a proprietary interest in the operation of the utilities,

126. 433 U.S. 350 (1977).

127. *Id.* at 360.

128. *Id.* at 356.

129. *Id.* at 359.

130. *Id.* at 360.

131. 435 U.S. 389 (1978).

132. *Id.* at 410. *See generally* 59 DEN. L.J. 399 (1982).

133. 435 U.S. at 408-13. Justice Brennan, writing in that part of the opinion in which all five justices agreed, said that municipalities acting as providers are in a position to affect the allocation of resources so as to alter our cherished system of free trade and open competition protected by the antitrust laws. Justice Brennan feared that should municipalities be allowed to regulate the local economy solely on the basis of their parochial interests without being subject to antitrust liability, the procompetitive policy established by the Congress would be undermined. *Id.* at 408, 413.

not a governmental one.[134]

Justice Stewart, in a dissenting opinion in *Lafayette,* argued that because a city only operates through the power that is delegated to it by the state, it acts as a subdivision of the state and should carry the same immunity.[135] According to Justice Stewart, in such a case no requirement of state compulsion need be satisfied because the state itself is acting. Justice Stewart feared that the Court's decision in *Lafayette* could have a disastrous effect on the governing of local matters by a municipality. A city might be forced to have a state statute passed specifically authorizing its anticompetitive conduct if it were to escape antitrust liability.[136] Justice Stewart urged that the requirements of the *Parker* exemption should be met when the state itself was acting through one of its political subdivisions, and that no further state compulsion was necessary.[137] Justice Stewart was particularly sensitive to the staggering costs the municipality would incur if it were forced to seek specific state authorization for any acts which might be considered anticompetitive.[138] Further, Justice Stewart found that exposing municipal governments to treble damages could cripple their effectiveness.[139]

In its next case involving the state action exemption, *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.,*[140] the Court applied a two-fold test, based on the *Lafayette* decision, for determining antitrust immunity. *Midcal* considered the ques-

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134. *Id.* at 418 (Burger, C.J., concurring in part and in the judgment).

135. *Id.* at 429 (Stewart, J., dissenting).

136. *Id.* at 438 (Stewart, J., dissenting). Justice Stewart emphasized that under our federal system, states are generally free to allocate their power amongst their political subdivisions as they wish, even to the extent of allowing a municipality to exercise its police power without obtaining approval for each new action. Such freedom of self-government by a municipality permits the state legislators to legislate on state-wide matters rather than strictly local concerns while it permits the local governments to deal promptly and directly with local matters. The decision of the majority, Justice Stewart lamented, would necessarily lessen the extent to which a state could realistically allocate its power to autonomous political subdivisions. *Id.* at 434-35 (Stewart, J., dissenting).

137. *Id.* at 433-34 (Stewart, J., dissenting).

138. *Id.* at 440 (Stewart, J., dissenting).

139. *Id.* If a challenged restraint were declared to be in violation of the antitrust laws and a treble damage award lodged against a municipality, the dissent charged, the citizens would bear the brunt of such an award in the form of increased taxes and decreased services. Justice Stewart charged: "The prospect of a city closing its schools, discharging its policemen, and curtailing its fire department in order to defend an antitrust suit would surely dismay the Congress that enacted the Sherman Act." *Id.* at 441 (Stewart, J., dissenting).

140. 445 U.S. 97 (1980).

tion of whether the wine pricing plan of the California Department of Alcoholic Beverage Control violated the Sherman Act. The two-fold test set forth by the Court was that the policy must be (1) clearly articulated and affirmatively expressed as state policy, and (2) actively supervised by the state itself.[141]

In *Boulder*, the Court applied the *Midcal* test to home rule municipalities and found no special exemption was warranted. According to the Court, the home rule municipality of Boulder, seeking to regulate the cable television industry within its immediate jurisdiction, failed to be eligible for the *Parker* exemption because it did not meet even the first requirement of the *Midcal* standard. The threshold test for immunity applied in *Boulder* was whether the challenged restraint constituted an action of the state in its sovereign capacity, or in furtherance or implementation of a clearly articulated and affirmatively expressed state policy to displace competition. This standard corresponded to the first prong of the *Midcal* test.[142] Since the Court found that Boulder had not satisfied the first part of this test, it did not consider the second prong which provides that the challenged restraint also must be actively supervised by the state.

In finding that the first *Midcal* requirement was not met, the *Boulder* Court erred by failing to recognize the special status that a home rule municipality requires in our present-day governmental structure. The State of Colorado, by virtue of the Home Rule Amendment to the Colorado Constitution,[143] had ceded its authority to act concerning local affairs to the City of Boulder. The purpose of the home rule movement in the United States was to free municipalities from the control of the state legislature — to allow municipalities to act on matters of strictly local concern without seeking specific authorization from the state governments.[144] Silence on the part of the state on matters of local concern was to be expected after the initial grant of home rule status.[145] Thus, municipal action in an antitrust context should be viewed as a state

141. *Id.* at 104-05 (quoting New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 109 (1978)).

142. *See City of Boulder*, 102 S. Ct. at 841.

143. COLO. CONST. art. XX, § 6. *See supra* note 1.

144. Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269, 270 (1968). *See* National Institute of Municipal Law Officers' Amicus Curiae Brief for Respondent at 6-7, Community Communications Co. v. City of Boulder, 102 S. Ct. 835 (1982).

145. National Institute of Municipal Law Officers' Amicus Curiae Brief for Respondent at 7-10, Community Communications Co. v. City of Boulder, 102 S. Ct. 835 (1982).

action and found to withstand the same requirements imposed upon states for antitrust immunity.[146]

Under the state home rule amendment, the City of Boulder was granted the full right of self-government in local matters; the laws of the State of Colorado were to remain in effect except to the extent superseded by the valid acts of the home rule municipality.[147] If an ordinance enacted by the City on a matter of strictly local concern, for example a zoning ordinance, came into conflict with a state statute, the controversy would be resolved in favor of the local ordinance.[148] Because the State had ceded its power to act in local matters to the City, Boulder claimed that both requirements set forth for immunity under the *Lafayette-Midcal* standard has been met. The *Boulder* Court found that neither criteria was satisfied,[149] and refused to consider such a broad grant of authority by the State to constitute an act of the State itself, therefore qualifying the actions of a home rule municipality as the actions of the State in its sovereign capacity.[150]

In addition to not recognizing the special status of home rule municipalities, the *Boulder* Court also failed to distinguish *Lafayette*. In *Lafayette*, the Court decided that the *Parker* state action exemption from the antitrust laws did not automatically apply to municipalities.[151] *Lafayette* is clearly distinguishable from *Boulder* because the cities in *Lafayette* were not home rule municipalities and the challenge against them was for operating an electric utility — a proprietary rather than a governmental function. The City of Boulder had no proprietary interest in regulating cable television service in the area; there was no expected monetary gain to Boulder. Rather, the City of Boulder was exercising a governmental function in attempting to provide the best possible service for its citizens.

The *Boulder* Court could have respected the desire of the State of Colorado to decentralize its functions, evidenced by the State's grant of home rule to Boulder by extending the *Parker* state action exemption to home rule municipalities. The spirit of that exemp-

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146. *Id.*

147. COLO. CONST. art. XX, § 6.

148. *Id. See* National Institute of Municipal Law Officers' Amicus Curiae Brief for Respondent at 18, Community Communications Co. v. City of Boulder, 102 S. Ct. 835 (1982).

149. 102 S. Ct. at 842-43.

150. *Id.* at 841-42.

151. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 408 (1978). *See supra* note 34.

tion could have been retained. Since the State through an amendment to its constitution had in effect made the municipality sovereign, the actions of the municipality could be considered to be the actions of the State. The *Boulder* Court chose instead to decide that a municipality is not using the state's power when it regulates the local economy, absent a precise mandate from the state.[152]

The effect this decision will have on the conduct of a home rule municipality's affairs is that virtually all of its franchising, licensing, and zoning actions may now be subjected to antitrust liability,[153] severely hampering the municipality's local obligations. Local home rule governments may now be subjected to numerous lawsuits in an area in which they previously believed they were immune. Taxpayers residing in these areas will be confronted with the possibility of being assessed for treble damages in an award against a disgruntled franchisee.

Boulder also leaves unsettled the extent to which a state may be required to have authorized or directed a course of action to satisfy the clearly articulated and affirmatively expressed standard of *Midcal*. An action taken by the elected representatives of a state in the people's best interest will be immune from antitrust liability. The same action taken by the elected representatives of a municipality will be subject to antitrust liability.[154] Actions of a municipality may benefit from the state's immunity only if its actions are specifically directed or supervised by the state.[155]

As Justice Rehnquist fears, *Boulder* may be the death knell for

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152. *See* Freilich & Carlisle, *The Community Communications Case: A Return to the Dark Ages before Home Rule*, 14 URB. LAW. v-xii (Spring 1982). Freilich and Carlisle challenge the very concept of federalism which Justice Brennan used to support his decision, fearing that such a restrictive view of only two sovereign entities, federal and state, would cause the demise of the home rule movement. Freilich and Carlisle stress that the federal government has delegated sovereign powers while the states have reserved sovereign powers. *Id.* at ix-x. According to Freilich and Carlisle:

> [T]rue federalism would recognize state rights and permit solutions to state problems by whatever delegation of power the state deemed appropriate, including home rule. Justice Brennan's federalism impinges on the manner in which states delegate authority and creates vacuums of power preventing the solution to many of the state's problems.

Id. at xi.

153. *See* T. Brunner, Municipal Antitrust Liability: Prospects After the *Boulder* Case, Memorandum to U.S. Conference of Mayors (Jan. 25, 1982) (unpublished memorandum).

154. *See* S. Chapple, Antitrust Liability of Cities, Memorandum to United States Conference of Mayors (Jan. 20, 1982) (unpublished memorandum).

155. T. Brunner, *supra* note 153, at 4. Brunner suggests that state legislatures may immunize actions by municipalities or by semi-governmental bodies like property owners' associations and professional organizations.

the home rule movement. Those cities with the highest degree of autonomy will be the ones with the most to lose.[156] Constitutional grants of sovereign authority apparently are insufficient to award sovereign immunity. The freedom of the home rule municipality is greatly lessened, to the point where the home rule movement itself may be extinguished.[157]

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156. 102 S. Ct. at 851 (Rehnquist, J., dissenting).

157. Freilich & Carlisle, *supra* note 152, at vi. According to Freilich and Carlisle:

> [I]f the spirit of this decision is extended Justice Rehnquist's predictions on the future of home-rule will be realized and the century old home rule experiment, unique to America, will be crippled or destroyed. Home rule municipalities will again have to crawl back to the state legislature begging for handouts, an evil which was abolished by state constitutional amendments prohibiting special legislation. The experimental era, the Renaissance of entrusting a portion of the state's power with smaller and responsive political entities, will be over and the dark ages before home rule was initiated by Joseph Pulitizer will return.

Id.