ANTITRUST—STATE ACTION—HOME RULE MUNICIPALITY'S ORDINANCES NOT EXEMPT FROM SHERMAN ACT—*Community Communications Co. v. City of Boulder*, 102 S. Ct. 835 (1982).

Community Communications Company (CCC) held a revocable, nonexclusive permit which was granted by the City of Boulder, Colorado (Boulder) to operate a cable television service within the city limits.[1] Although CCC was authorized to provide cable service to the entire city,[2] the company only serviced the University Hill area of Boulder, an area where only twenty percent of the city's population lived.[3]

In May 1979, CCC expressed a desire to expand cable television service to other areas of the city[4] as a result of markedly improved technology.[5] The new technology, however, afforded opportunities to potential competitors as well,[6] and in July, 1979 Boulder Communications Company (BCC) expressed an interest in obtaining a permit and in competing with CCC.[7] The City Council reviewed the cable

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[1] Community Communications Co. v. City of Boulder, 485 F. Supp. 1035, 1036 (D. Colo.), *rev'd and remanded*, 630 F.2d 704 (10th Cir. 1980), *rev'd and remanded*, 102 S. Ct. 835 (1982). The permit was issued to a predecessor corporation in 1964. This permit derived from an ordinance which was enacted by the Boulder City Council. *Id.* The ordinance permitted CCC to use public ways in Boulder for a period of twenty years to string cables for a community antenna system, or cable television. *Id.*

[2] *Id.*

[3] Community Communications Co. v. City of Boulder, 102 S. Ct.835, 837 (1982). It would have been impractical for CCC to service the entire city. Until February 1980, CCC provided retransmission of television signals from television stations in Denver and from one station in Cheyenne, Wyoming. *Id.* These television signals were available to all the residents of Boulder except those in the University Hill area. University Hill residents were unable to receive broadcast television signals because of geographic factors. *Id.* Accordingly, CCC conducted a very limited cable business.

[4] *Id.* at 837. CCC desired to establish an earth station for the reception of remote channels via satellite. Community Communications Co. v. City of Boulder, 485 F. Supp. 1035, 1037 (D. Colo.), *rev'd and remanded*, 630 F.2d 704 (10th Cir. 1980), *rev'd and remanded*, 102 S. Ct. 835 (1982).

[5] Satellite technology enabled CCC to offer Boulder's citizens an increased variety of programming, including movies, sports, and channels from distant major cities. Community Communications Co. v. City of Boulder, 485 F. Supp. 1035, 1036 (D. Colo.), *rev'd and remanded*, 630 F.2d 704 (10th Cir. 1980), *rev'd and remanded*, 102 S. Ct. 835 (1982). The district court stated: "Future potential for cable television is referred to as 'blue sky' indicating that virtualy unlimited technological improvements are still expected." *Id.* at 1037.

[6] Community Communications Co. v. City of Boulder, 102 S. Ct. 835, 837 (1982). The new technology prompted a rapid growth in the cable television industry. Cable television became much more attractive to the public, thereby increasing the market demand for expanded cable television services. Community Communications Co. v. City of Boulder, 485 F. Supp. 1035, 1036-37 (D. Colo.), *rev'd and remanded*, 630 F.2d 704 (10th Cir. 1980), *rev'd and remanded*, 102 S. Ct. 835 (1982).

[7] Community Communications Co. v. City of Boulder, 102 S. Ct. 835, 837 (1982). BCC sent a letter to the Boulder City Council outlining its proposals for a new cable system and stating

television industry[8] in view of the many changes which had occurred since the enactment of the original ordinance dealing with cable television, and enacted two emergency ordinances[9] which restricted CCC from expanding its cable television business into other areas of the City for a period of three months.[10] During this three month period the City Council drafted a model ordinance which provided for pervasive city control over the eventual cable television operator in Boulder.[11]

CCC, seeking a preliminary injunction, brought suit against the City,[12] alleging that enactment of the two ordinances violated section one of the Sherman Act.[13] Boulder contended that its conduct was not violative of the antitrust laws since it was immune under the state

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its intention "to begin building its system as soon as feasible after the City grants BCC its permit." Community Communications Co. v. City of Boulder, 485 F. Supp. 1035, 1037 (D. Colo.), *rev'd and remanded*, 630 F.2d 704 (10th Cir. 1980), *rev'd and remanded*, 102 S. Ct. 835 (1982).

[8] The City Council and the Boulder City Manager hired a consultant and held a number of meetings in an attempt to formulate a governmental response to the industry. Community Communications Co. v. City of Boulder, 485 F. Supp. 1035, 1037 (D. Colo.), *rev'd and remanded*, 630 F.2d 704 (10th Cir. 1980), *rev'd and remanded*, 102 S. Ct. 835 (1982). The consultant informed the city that a cable system could easily become a natural monopoly. *Id.* The City Council and City Manager feared that CCC might not be the best operator, but would nonetheless remain the only operator in Boulder because it was already established in the area. *Id.*

[9] *Id.* The first ordinance unilaterally amended the original ordinance and imposed a 90 day moratorium on CCC's cable expansion in Boulder. City of Boulder, Colo. Ordinance 4473 (Dec. 19, 1979). The second ordinance revoked and reenacted CCC's franchise to include the moratorium. City of Boulder, Colo. Ordinance 4472 (Dec. 19, 1979). The Boulder City Council sought to justify the ordinances by claiming that the moratorium on CCC's expansion was essential to serve the best interests of Boulder's citizens. The Council determined that an expansion of Boulder's operation "would result in hindering the ability of other companies to compete in the Boulder market," and would disrupt and impede the Council's attempt to draft a model cable television ordinance which would best serve the ends of service and competition. *Id.*

[10] Community Communications Co. v. City of Boulder, 102 S. Ct. 835, 838 (1982).

[11] Community Communications Co. v. City of Boulder, 630 F.2d 704, 710 (10th Cir. 1980) (Markey, J., dissenting), *rev'd and remanded*, 102 S. Ct. 835 (1982). This model ordinance was actually in the form of a contract to be entered into by the successful bidder.

[12] CCC also brought suit against Boulder Communications Company. CCC alleged that BCC and Boulder conspired to restrict competition by replacing CCC with BCC. Community Communications Co. v. City of Boulder, 485 F. Supp. 1035, 1038 (D. Colo.), *rev'd and remanded*, 630 F.2d 704 (10th Cir. 1980), *rev'd and remanded*, 102 S. Ct. 835 (1982). The district court maintained however, that although there was "some circumstantial evidence which might indicate such a conspiracy, that evidence [was] insufficient to establish a probability that the plaintiff will prevail on this claim." *Id.*

[13] 15 U.S.C. § 1 (1976). See *infra* note 45 for the text of the Sherman Act. CCC maintained that these ordinances prevented further expansion of the geographical area of its business, thus amounting to a restraint of trade. Community Communications Co. v. City of Boulder, 485 F. Supp. 1035, 1038 (D. Colo.), *rev'd and remanded*, 630 F.2d 704 (10th Cir. 1980), *rev'd and remanded*, 102 S. Ct. 835 (1982).

action doctrine[14] delineated in *Parker v. Brown*,[15] and that it was validly exercising its police powers.[16] The city asserted that its status as a home rule municipality gave it power tantamount to that of the state in matters of purely local concern.[17] The district court chose not to address this question, but did consider whether the *Parker* exemption applied.[18] In holding the *Parker* exemption to be "wholly inapplicable,"[19] the court assumed that Boulder had the power to regulate cable television[20] despite having grave doubts about whether cable television was purely a matter of local concern.[21] The district court focused on the nature of the regulation and determined that the city's formulation of governmental policy by requesting input from the parties to be regulated was not a proper subject for immunity.[22]

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[14] Community Communications Co. v. City of Boulder, 485 F. Supp. 1035, 1038 (D. Colo.), *rev'd and remanded*, 630 F.2d 704 (10th Cir. 1980), *rev'd and remanded*, 102 S. Ct. 835 (1982). For a discussion of the state action doctrine, see *infra* notes 47-56 and accompanying text.

[15] 317 U.S. 341 (1943).

[16] Community Communications Co. v. City of Boulder, 485 F. Supp. 1035, 1037 (D. Colo.), *rev'd and remanded*, 630 F.2d 704 (10th Cir. 1980), *rev'd and remanded*, 102 S. Ct. 835 (1982). See *infra* note 21 and accompanying text.

[17] Community Communications Co. v. City of Boulder, 485 F. Supp. 1035, 1037 (D. Colo.), *rev'd and remanded*, 630 F.2d 704 (10th Cir. 1980), *rev'd and remanded*, 102 S. Ct. 835 (1982). The Colorado home rule amendment, 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.
>
> 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.

Id.

The people of the City of Boulder elected home rule status on October 30, 1917. Brief for Respondent at 15, Community Communications Co. v. City of Boulder, 102 S. Ct. 1035 (1982) [hereinafter cited as Brief for Respondent].

[18] Community Communications Co. v. City of Boulder, 485 F. Supp. 1035, 1038-39 (D. Colo.), *rev'd and remanded*, 630 F.2d 704 (10th Cir. 1980), *rev'd and remanded*, 102 S. Ct. 835 (1982).

[19] *Id.* at 1039.

[20] *Id.*

[21] *Id.* at 1038-39. The district court observed:

> There is no Colorado case which characterizes the operations of cable television companies as a matter of local concern. Obviously there are wider concerns, including interstate commerce, giving rise to some uncertainty about the power of the state government in this regard, both in terms of an obstruction to interstate commerce, and with respect to the First Amendment rights of communicators.

Id.

[22] *Id.* In deciding that immunity was not proper, the district court did not focus on the moratorium imposed on CCC. *See id.* Rather, the court emphasized that the City in drafting the model ordinance had "submitted it to the cable television industry with the request that those who wished to make proposals to enter the Boulder market should give their comments on that draft." *Id.* at 1038.

Immunity was denied because of excessive involvement by private parties in the legislative process.[23] Accordingly, CCC's motion for a preliminary injunction was granted.[24]

The City of Boulder appealed the decision to the Court of Appeals for the Tenth Circuit which reconsidered whether the city was exempt from the antitrust laws.[25] Chief Judge Seth, writing for the majority, reversed the district court decision concluding that the regulation of cable television was within Boulder's authority,[26] and that the city was immune under the *Parker* doctrine.[27] The court reached this conclusion because the regulation of cable television was a local matter[28] and the city met the standards necessary to find a *Parker* exemption.[29] Since Boulder had complete authority over local matters,[30] the court of appeals concluded that the city's enactment of the challenged ordinances was equivalent to state action for *Parker* immunity purposes.[31] Boulder satisfied the state action immunity test[32]

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[23] *Id.* at 1039.

[24] *Id.* at 1040.

[25] Community Communications Co. v. City of Boulder, 630 F.2d 704, 705 (10th Cir. 1980), *rev'd and remanded*, 102 S. Ct. 835 (1982).

[26] *Id.* at 707. Following reversal by the court of appeals of the district court order granting a preliminary injunction, the Boulder City Council passed a new ordinance. City of Boulder, Colo. Ordinance 4515 (July 1, 1980). The ordinance placed a permanent geographic limitation on CCC's pre-existing contract right to establish and operate a cable television communications system throughout the City of Boulder. Community Communications Co. v. City of Boulder, 496 F. Supp. 823, 825-26 (D. Colo. 1980), *rev'd and remanded*, 660 F.2d 1370 (10th Cir. 1981). CCC again sought a preliminary injunction which was granted by the district court. The Court of Appeals for the Tenth Circuit, however, reversed and remanded the case to allow the district court to tailor more appropriate relief for both parties. Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1380 (10th Cir. 1981).

[27] Community Communications Co. v. City of Boulder, 630 F.2d 704, 708 (10th Cir. 1980), *rev'd and remanded*, 102 S. Ct. 835 (1982).

[28] *Id.* at 707. The court relied upon the holding in Manor Vail Condominium Ass'n v. Town of Vail, ___ Colo. ___, 604 P.2d 1168 (1980) (en banc). Community Communications Co. v. City of Boulder, 630 F.2d 704, 706-07 (10th Cir. 1980), *rev'd and remanded*, 102 S. Ct. 835 (1982). In *Manor Vail*, the Colorado Supreme Court assumed that in the home rule context rate regulation of cable television was a matter of local concern before considering whether the regulation was permissible. ___ Colo. at ___, 604 P.2d at 1171; *see* TV Pix, Inc. v. Taylor, 304 F. Supp. 459 (D. Nev. 1968), *aff'd per curiam*, 396 U.S. 556 (1970). *But see* United States v. Southwestern Cable Co., 392 U.S. 157 (1968); *cf.* People v. Mountain Tel. & Tel. Co., 125 Colo. 167, 243 P.2d 397 (1952) (en banc) (regulation of telephone and telegraph company operating within city is not local matter).

[29] Community Communications Co. v. City of Boulder, 630 F.2d 704, 708 (10th Cir. 1980), *rev'd and remanded*, 102 S. Ct. 835 (1982). Whereas the district court focused on the manner in which the model ordinance was drafted to determine immunity, *see supra* note 22, the court of appeals deemed this to be inapposite. 630 F.2d at 706.

[30] *See supra* note 17 and accompanying text.

[31] Community Communications Co. v. City of Boulder, 630 F.2d 704, 706-07 (10th Cir. 1980), *rev'd and remanded*, 102 S. Ct. 835 (1982).

[32] The state action immunity test was developed by a series of cases, *see infra* notes 47-104 and accompanying text, and expressly delineated in California Retail Liquor Dealers Ass'n v.

because the city had clearly articulated and affirmatively expressed a policy regarding cable television[33] and had actively supervised this policy.[34] Accordingly, Boulder was immune from antitrust violations.

Judge Markey authored a lengthy dissent in which he dealt with the antitrust issue at considerable length.[35] Judge Markey disagreed with the majority on two fundamental points. First, he stated that cable television was not a purely local matter.[36] Second, he maintained that Boulder's home rule status did not elevate it to the position of the state for antitrust immunity purposes.[37] Judge Markey stated: "The home rule status of Colorado cities, and the negative fact that state articulation, expression, and supervision are totally absent cannot" confirm immunity on Boulder under the state action test.[38] Therefore, Judge Markey would have affirmed the injunction order.[39]

The United States Supreme Court granted certiorari[40] and reversed over a strong dissent. The Court maintained that the ordinance

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Midcal, 445 U.S. 97 (1980). A unanimous court (Justice Brennan did not participate) stated that for state action immunity to apply "the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; [and] the policy must be 'actively supervised' by the State itself." *Id.* at 105 (quoting City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978)).

The *Midcal* court stressed that immunity depended upon *state* policy and *state* supervision. Because of the home rule provision, Boulder's actions were in reality actions by the state, thus immunity could be granted because there was a clearly articulated city policy and active city supervision.

[33] Community Communications Co. v. City of Boulder, 630 F.2d 704, 707-08 (10th Cir. 1980), *rev'd and remanded*, 102 S. Ct. 835 (1982). The policy of Boulder was clear: one of fostering competition. *Id.*

[34] *Id.* at 708. Boulder actively supervised the policy by: 1. imposing a moratorium on construction and expansion by CCC; 2. issuing civil and then criminal citations to cable workers when they ignored the moratorium; and 3. drafting a model ordinance. *Id.*

[35] Judge Markey did not view the antitrust issue as being dispositive, and would have affirmed the district court on first amendment grounds so as to avoid having to interpret the Colorado Constitution's home rule amendment. *Id.* at 711 n.2 (Markey, J., dissenting). Although he noted that the district court did not consider the first amendment issue to be ripe, *see id.* at 712 n.4 (Markey, J., dissenting), Judge Markey decided that the Boulder ordinances were prior restraints on speech. *Id.* at 712 (Markey, J., dissenting).

[36] *Id.* at 718 (Markey, J., dissenting); *see* United States v. Southwestern Cable Co., 392 U.S. 157 (1968) (community antenna television (CATV) systems covered by FCC regulations because FCC has broad authority over all interstate and foreign communication by wire or radio). See also *supra* note 28.

[37] Community Communications Co. v. City of Boulder, 630 F.2d 704, 717 (10th Cir. 1980), (Markey, J., dissenting), *rev'd and remanded*, 102 S. Ct. 835 (1982). By rejecting the majority approach, Judge Markey emphasized the federalism concerns inherent in his reasoning. He observed: "We are a nation not of 'city states' but of States." *Id.*

[38] *Id.* at 719 (Markey, J., dissenting).

[39] *Id.* at 720 (Markey, J., dissenting).

[40] Community Communications Co. v. City of Boulder, 450 U.S. 1039 (1981).

would be subject to the antitrust laws "unless it constituted action of the State of Colorado itself . . . or unless it constituted municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy."[41] The Court decided that the Boulder ordinance met neither test.[42] Justice Brennan, writing for the majority, emphasized that the state action exemption which is based upon the principle of limited state sovereignty immunizes states as states and does not reach sovereign cities.[43]

Sections one and two of the Sherman Act[44] speak in broad, all encompassing language.[45] Literally construed, the Sherman Act would hold every restraint of trade and every monopoly or attempt to monopolize illegal. Courts, however, have refused to interpret the Sherman Act in such a manner.[46]

In *Parker*, the Supreme Court considered whether the pervasive language of the Sherman Act applied to state action.[47] Brown, a producer and packer of raisins, brought suit under the Sherman Act[48] to enjoin California officials from enforcing a marketing program for the raisin industry.[49] The marketing program promoted a legitimate state interest,[50] but restricted competition and maintained prices in the distribution of the commodities.[51] The Court assumed that the

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[41] Community Communications Co. v. City of Boulder, 102 S. Ct. 835, 841 (1982) (citation omitted).

[42] *Id.* at 841-43.

[43] *Id.* at 842.

[44] 15 U.S.C. §§ 1-2 (1976).

[45] Section 1 provides: "*Every* contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several states . . . , is declared to be illegal." *Id.* § 1 (emphasis added). Section 2 provides: "*Every* person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several states . . . , shall be deemed guilty of a felony . . . ." *Id.* § 2 (emphasis added).

[46] The Supreme Court has most clearly rejected a literal reading of the Sherman Act in analyzing restraints of trade. The Court has interpreted the statute as invalidating only unreasonable restraints. *See, e.g.*, Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918); Standard Oil Co. v. United States, 221 U.S. 1 (1911). *See generally* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST §§ 63-66, at 165-82 (1977).

[47] *Id.* at 350-52.

[48] *Id.* at 344. Brown also maintained that the California program was preempted by the Agricultural Marketing Agreement Act, 7 U.S.C. §§ 601-674 (1976), and the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3. The Court rejected both arguments by finding that the state program was compatible with the Agricultural Marketing Agreement Act, and that the regulation did not discriminate against interstate commerce. 317 U.S. at 352-68.

[49] 317 U.S. at 344.

[50] The Supreme Court stated: "The declared purpose of the [California Agricultural Prorate Act, CAL. AGRIC. CODE §§ 59641-60015 (West 1968)] is to 'conserve the agricultural wealth of the State' and to 'prevent economic waste in the marketing of agricultural products' of the State." 317 U.S. at 344 (quoting *id.*).

[51] 317 U.S. at 346.

program would violate the Sherman Act if it were made effective solely by virtue of private conduct. The Court deemed it critical, however, that the program "derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command."[52]

Because of state sovereignty and principles of federalism, the Court was reluctant to restrain state action absent a clear congressional intent mandating such restraints.[53] Finding no such congressional intent, the Court found the California regulatory program to be outside the purview of the Sherman Act.[54] The Court made clear, however, that there are limitations on the state action exemption.

> [A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . ; and we have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade.[55]

Because the State of California engaged in no questionable practices, the Court found the alleged anticompetitive acts to be legitimate government action.[56]

After firmly establishing the state action immunity doctrine[57] in *Parker*,[58] the Supreme Court unfortunately provided no guidance to

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[52] *Id.* at 350.

[53] *Id.* at 351.

[54] *Id.* The *Parker* Court examined the legislative history of the Sherman Act and concluded that the Act was not intended to reach state action. Rather, "its purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations." *Id. See generally* Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. of L. & Econ. 7 (1966).

[55] 317 U.S. at 351-52 (citing Union Pac. R.R. v. United States, 313 U.S. 450 (1941); Northern Sec. Co. v. United States, 193 U.S. 197, 332, 344-47 (1904)). In *Union Pacific Railroad*, the Supreme Court decided that state participation alone in an agreement which violated federal law did not immunize the agreement from the purview of federal law. 313 U.S. at 464-68. Similarly in *Northern Securities*, the Supreme Court decided that by merely granting a corporate charter to Northern Securities Corporation, the State of New Jersey did not insulate the corporation from the Sherman Act. 193 U.S. at 344-47.

[56] 317 U.S. at 352.

[57] The terms exemption and immunity connote the existence of an exception from the scope of the antitrust laws. This connotation, however, does not apply. In Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 393 n.8 (1978), the Supreme Court stated: "The word 'exemption' is commonly used by courts as a shorthand expression for *Parker's* holding that the Sherman Act was not intended by Congress to prohibit the anticompetitive restraints imposed by [states]." *See* E.W. Wiggins Airways, Inc. v. Massachusetts Port Auth., 362 F.2d 52, 56 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966) ("we do not reach any question of immunity, since there was no attempt on the part of Congress to impose liability in the first place").

[58] Although *Parker* has been recognized as the case establishing the state action immunity doctrine, the doctrine actually had its genesis much earlier. *See* Olsen v. Smith, 195 U.S. 332,

the lower federal courts which considered the scope of the limitations placed on state action immunity.[59] Thus, the lower courts failed to establish a consistent standard in applying the doctrine.[60] For the most part, however, courts viewed the *Parker* exemption broadly.[61]

In *Goldfarb v. Virginia State Bar*,[62] the Supreme Court finally elaborated on the *Parker* state action exemption. In *Goldfarb*, the Virginia State Bar Association enforced a minimum fee schedule which had been published by the Fairfax County Bar Association.[63] The plaintiff alleged that the program constituted price fixing in violation of section one of the Sherman Act,[64] whereas the State and County Bar Associations claimed that their actions were immune from antitrust challenge.[65] The Supreme Court held that the anticompetitive activity of the Bar Associations was not the type of state action which the Sherman Act was intended to immunize.[66] Relying on *Parker*, the Court stressed that for the challenged activity to be exempt, the activity must be "compelled by direction of the State acting as sovereign."[67] Since the State of Virginia did not compel the

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344-45 (1904). For an in-depth discussion of the history of the state action doctrine prior to *Parker*, see Handler, *The Current Attack on the* Parker v. Brown *State Action Doctrine*, 76 COLUM. L. REV. 1 (1976).

[59] Subsequent to *Parker*, the Supreme Court continuously denied certiorari in cases involving state action immunity. *See, e.g.*, Lamb Enterprises, Inc. v. Toledo Blade Co., 461 F.2d 506 (6th Cir.), *cert. denied*, 409 U.S. 1001 (1972); Hecht v. Pro Football, Inc., 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970); E.W. Wiggins Airways, Inc. v. Massachusetts Port Auth., 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966).

[60] *Compare* New Mexico v. American Petrofina, Inc., 501 F.2d 363 (9th Cir. 1974) (state and its political subdivisions automatically immune from antitrust liability when state or subdivision is involved in antitrust violative conduct) *with* Hecht v. Pro Football, Inc., 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972) (antitrust violative action taken by public official not automatically shielded from antitrust liability).

[61] *See, e.g.*, New Mexico v. American Petrofina, Inc., 501 F.2d 363 (9th Cir. 1974); Business Aides, Inc. v. Chesapeake & Potomac Tel. Co., 480 F.2d 754 (4th Cir. 1972); Gas Light Co. v. Georgia Power Co., 440 F.2d 1155 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972); Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248 (4th Cir. 1971); Ladue Local Lines, Inc. v. Bi-State Dev. Agency, 433 F.2d 131 (8th Cir. 1970). *See generally* Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. REV. 693 (1974); Slater, *Antitrust and Government Action: a Formula for Narrowing* Parker v. Brown, 69 NW.U.L. REV. 71 (1974).

[62] 421 U.S. 773 (1975).

[63] *Id.* at 776.

[64] *Id.* at 775-78.

[65] *Id.* at 789-90. The State Bar Association contended that its actions represented state action because it was "a state agency by law," while the County Bar Association contended that although it was a voluntary association and not a state agency by law, "the activities of the State Bar 'prompted' it to issue fee schedules and thus its actions, too [were] state action for Sherman Act purposes." *Id.*

[66] *Id.* at 790.

[67] *Id.*

promulgation or enforcement of the minimum fee schedule, the respective Bar Associations' activities could not be exempt from antitrust challenge.[68]

In *Cantor v. Detroit Edison Co.*,[69] the Supreme Court indicated that it would not limit denial of the state action exemption to cases such as *Goldfarb* where there was no element of state compulsion. *Cantor* involved a suit against the Detroit Edison Company by a retail druggist who alleged that the company's marketing of lightbulbs violated the antitrust laws.[70] In addition to providing electricity to residents of the State of Michigan, the Detroit Edison Company gratuitously supplied residents with fifty percent of the lightbulbs which they used.[71] The company's rates, which were approved by the Public Service Commission,[72] did not reflect any charge for these lightbulbs.[73] The power company could not discontinue this marketing practice without filing a new tariff with the Commission and having it approved by the Commission.[74] The defendant claimed that because the tariff was approved by the state, acting through the Michigan Public Service Commission, the marketing practice was exempt from the scope of the Sherman Act.[75] The Supreme Court held that neither the Commission's approval nor the requirement that any change in the tariff be approved by the Commission constituted sufficient state compulsion to establish an exemption.[76] Furthermore, the state regulatory scheme did not evidence a strong state policy in favor of the distribution of lightbulbs.[77]

In *Bates v. State Bar*,[78] the Supreme Court dealt with a challenge to an Arizona Supreme Court disciplinary rule prohibiting advertising by attorneys.[79] The plaintiffs claimed that the rule, which was

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[68] *Id.* at 790-92. The necessary compulsion was absent because the Virginia Legislature had not enacted a statute requiring the publication and enforcement of the minimum fee schedules. *Id.* at 790. The legislature simply authorized the Virginia Supreme Court to regulate the legal profession. The Virginia Supreme Court neither approved nor disapproved of the publication and enforcement of the minimum fee schedules; their position was neutral.

[69] 428 U.S. 579 (1976).

[70] *Id.* at 581. Cantor's complaint asserted that the company's program violated sections one and two of the Sherman Act. *Id.* at 581 n.3.

[71] *Id.* at 582.

[72] The Michigan Public Service Commission has " 'complete power and jurisdiction to regulate all public utilities in the state.' " *Id.* at 584 (quoting MICH. COMP. LAWS § 460.6 (1970)).

[73] *Id.* at 582.

[74] *Id.* at 585.

[75] *Id.* at 581-82.

[76] *Id.* at 584-85, 593-95.

[77] *Id.* at 584-85.

[78] 433 U.S. 350 (1977).

[79] *Id.* at 355-56.

promulgated by the Arizona Supreme Court and enforced by the State Bar Association, violated sections one and two of the Sherman Act.[80] The Supreme Court held that the disciplinary rule was exempt from antitrust challenge.[81]

The *Bates* Court characterized the challenged restraint as being "the affirmative command of the Arizona Supreme Court."[82] Because the Arizona Constitution granted the state supreme court power over the practice of law,[83] the restraint was " 'compelled by direction of the State acting as a sovereign.' "[84] The Court, however, did not end its analysis there. Instead, the Court recognized the importance of other factors when determining the applicability of the state action doctrine. In distinguishing *Cantor*, the Court emphasized that *Cantor* involved a claim against a private party while *Bates* involved a claim against the state.[85] The *Bates* Court also noted that in *Cantor* the State of Michigan had no clear policy concerning the distribution of lightbulbs whereas in *Bates* "[t]he disciplinary rules reflect[ed] a clear articulation of the State's policy with regard to professional behavior."[86] Moreover, the *Bates* Court recognized that the State of Arizona, unlike Michigan, actively supervised the disciplinary rules.[87] The Court concluded that these factors effectively immunized the challenged restraints.[88]

After *Goldfarb*, *Cantor*, and *Bates*, it was apparent that the *Parker* exemption would not apply to all state government activities.[89] It was unclear to what extent the *Parker* immunity would

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[80] *Id.* at 356.

[81] *Id.* at 363.

[82] *Id.* at 359-60.

[83] *See In re* Bailey, 30 Ariz. 407, 248 P. 29 (1926); ARIZ. CONST. art. III.

[84] 433 U.S. at 359-60 (quoting *Goldfarb*, 421 U.S. at 791). Although *Parker*, *Goldfarb*, and *Cantor* recognized the need for state legislative action to establish antitrust immunity, *see supra* notes 50, 68 & 72 and accompanying text, *Bates* clearly established that state legislative action was not the *sine qua non* to granting antitrust immunity. The *Bates* Court held that through the promulgation of rules the Arizona Supreme Court could establish a state policy sufficient to grant antitrust immunity. 433 U.S. at 360.

[85] 433 U.S. at 361. The *Bates* Court offered no reasons why "*Cantor* would have been an entirely different case if the claim had been directed against a public official or public agency, rather than against a private party." *Id.* *But see* Rogers, *Municipal Antitrust Liability in a Federalist System*, 1980 ARIZ. ST. L.J. 305, 309-10.

[86] 433 U.S. at 362.

[87] *Id.* The Court deemed it important that "the rules [were] subject to pointed re-examination by the . . . Arizona Supreme Court in enforcement proceedings." *Id.*

[88] *Id.* at 362-63.

[89] The Court of Appeals for the Seventh Circuit in Kurek v. Pleasure Driveway & Park Dist., 557 F.2d 580, 589 (7th Cir. 1977), *vacated and remanded*, 435 U.S. 992, *reinstated*, 583 F.2d 378 (7th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979), stated: "*Cantor* and *Goldfarb* demonstrate beyond serious questioning that the Supreme Court is not inclined any longer, if it ever

apply to a municipality's anticompetitive activity.[90] The Supreme Court attempted to outline the scope of the *Parker* immunity with respect to municipalities in *City of Lafayette v. Louisiana Power & Light Co.*[91]

In *Lafayette*, two Louisiana cities filed suit alleging that the Louisiana Power & Light Co. (Louisiana Power) committed various antitrust offenses which injured the cities in the operation of their electric utility systems.[92] Louisiana Power counterclaimed, alleging that the cities also committed antitrust offenses.[93] The cities moved to dismiss the counterclaim, claiming that *Parker* immunized their actions.[94] The Supreme Court rejected this theory on two alternative grounds. First, a majority of the Court rejected the cities' contention that Congress intended to exclude municipalities from the scope of the Sherman Act.[95] The Court observed that there is a presumption against implied exclusions[96] and that courts will not find an exclusion unless there are weighty countervailing policies present to overcome

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was, to accept superficial and mechanical application of a *Parker*-based 'rule' that antitrust inquiry ends upon such a finding of governmental actions or laws being involved."

Subsequent to the Supreme Court's decision in *Goldfarb*, and continuing after *Cantor* and *Bates*, lower federal courts tended to view the exemption narrowly. *See, e.g.*, City of Fairfax v. Fairfax Hosp. Ass'n, 562 F.2d 280 (4th Cir. 1977), *vacated*, 435 U.S. 992 (1978); Kurek v. Pleasure Driveway & Park Dist., 557 F.2d 580 (7th Cir. 1977), *vacated and remanded*, 435 U.S. 992 (1978), *reinstated*, 583 F.2d 378 (7th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979); Duke & Co. v. Foerster, 521 F.2d 1277 (3rd Cir. 1975).

[90] Although the Court had not yet considered the scope of *Parker* immunity with regard to municipalities, the lower federal courts had done so. In Whitworth v. Perkins, 559 F.2d 378 (5th Cir. 1977), *vacated sub nom.* City of Impact v. Whitworth, 435 U.S. 992 (1978), the Court of Appeals for the Fifth Circuit stated: "[W]here the governmental unit concerned is other than a state itself, such as the municipality here, a more thorough analysis is required before *Parker* can be held to apply." *Id.* at 381. The court refused to equate the municipality's action with the state's action. The court stated: "A subordinate state governmental body is not *ipso facto* exempt from the operation of the antitrust laws." *Id.* (quoting City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431 (5th Cir. 1976), *aff'd*, 435 U.S. 389 (1978)). Thus, the court noted that immunity could only attach after the court applied the traditional state action immunity test. *Id.*; *accord* Duke & Co. v. Foerster, 521 F.2d 1277 (3d Cir. 1975). *See generally* Note, *The Antitrust Liability of Municipalities Under the* Parker *Doctrine*, 57 B.U.L. REV. 368 (1977); Note, *Antitrust Law and Municipal Corporations: Are Municipalities Exempt from Sherman Act Coverage Under the* Parker *Doctrine?*, 65 GEO. L.J. 1547 (1977).

[91] 435 U.S. 389 (1978).

[92] *Id.* at 391-92. The complaint alleged that Louisiana Power violated sections one and two of the Sherman Act in order to retain sole control over the electric bulk power in the area. *Id.* at 392 n.5.

[93] *Id.* at 392. The counterclaim alleged that the cities violated section one of the Sherman Act in order to displace Louisiana Power in certain areas. *Id.* at 392 n.6.

[94] *Id.* at 392.

[95] *Id.* at 398-408.

[96] *Id.* at 399. *See generally* United States v. Topco Assocs., 405 U.S. 596 (1972) (antitrust laws are critical to functioning of free enterprise system).

the presumption.[97] The *Lafayette* Court rejected the policy arguments which the cities advanced in seeking to establish an implied exemption.[98]

Having rejected the cities' first argument, the *Lafayette* Court next considered whether the *Parker* exemption should apply with equal force to a state's political subdivisions. A plurality of the Court[99] held that a municipality's status as such did not automatically make available the *Parker* exemption.[100] Nevertheless, the *Lafayette* plurality noted that a municipality's anticompetitive activities could be

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[97] 435 U.S. at 400. The Supreme Court has only recognized two policy-based implied exclusions. In Eastern R.R. President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), the Court held that the Sherman Act was not intended to "prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint of a monopoly." *Id.* at 136. The Court stated, however, that efforts to influence government action which were a "mere sham" were subject to the antitrust laws. *Id.* at 144. The *Noerr* Court reasoned that one's right to "make [his] wishes known to [his] representatives," and one's right to petition the government would be infringed if no exemption were found. *Id.* at 137-38. *See also* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972) (destructive of rights of association and of petition to use antitrust laws to prevent groups from using state and federal agencies and courts to promote their causes *vis-a-vis* their competitors); United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965) ("[j]oint efforts to influence public officials do not violate . . . antitrust laws even though intended to eliminate competition").

A second policy-based exclusion was put forth in *Parker v. Brown*. In *Parker*, the Supreme Court held that state sovereignty and principles of federalism were sufficient countervailing policies to preclude application of the Sherman Act. *See Lafayette*, 435 U.S. at 400 (construing Parker v. Brown, 317 U.S. 341 (1943)).

[98] 435 U.S. at 400-08. Initially, the *Lafayette* Court rejected the cities' contention that "it would be anomalous to subject municipalities to the criminal and civil liabilities imposed upon violators of the antitrust laws," noting that cities have had to comply with other federal laws which impose sanctions on "persons." *Id.* at 400; *see, e.g.*, Monell v. Department of Social Servs., 436 U.S. 658 (1978) (Civil Rights Act); Union Pac. Ry. v. United States, 313 U.S. 450 (1941) (Elkins Act).

The Court next rejected the cities' contention "that the antitrust laws are intended to protect the public only from abuses of private power and not from actions of municipalities." 435 U.S. at 403. The Court maintained that many times municipalities act to benefit their citizens at the expense of non-citizens. Such acts can have just as disruptive an effect on the national economy as acts done by a private party in furtherance of his interests. *Id.* at 405. Therefore, in reality there was no "public service" policy sufficient to create an implied exemption from the antitrust laws.

[99] Chief Justice Burger joined in part I of the Court's opinion but failed to join in part II. The Chief Justice agreed with the plurality's position that a municipality's status as such did not automatically make available the *Parker* exemption; however, he focused on the proprietary nature of the cities' action in refusing to apply *Parker*. *See* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) (Burger, C.J., concurring).

[100] *Id.* at 408. The *Lafayette* plurality noted that municipalities are not afforded identical protections and considerations as the state itself. *Id.* at 412. The plurality stated: "Cities are not themselves sovereign; they do not receive all the federal deference of the states that create them." *Id.*; *cf.* Lincoln County v. Luning, 133 U.S. 529 (1890) (eleventh amendment does not operate to prevent counties from being sued in federal court). *But cf.* Avery v. Midland County, 390 U.S. 474 (1968) (actions of local government are actions of state for purposes of fourteenth amendment).

immune from antitrust challenges.[101] The plurality stated: "[T]he *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service."[102] Thus, to qualify for immunity a municipality must show that the state "authorized or directed a . . . municipality to act as it did . . . [and] that 'the legislature contemplated the kind of action complained of.' "[103] The *Lafayette* plurality made clear, however, that "[t]his does not mean . . . that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit."[104]

In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*,[105] the Supreme Court adopted a uniform state action immunity test.[106] Midcal Aluminum Company, a wholesale distributor of wine, sought to enjoin enforcement of California's wine pricing program[107] on the grounds that it violated the Sherman Act.[108] Although the Supreme Court recognized that the program violated the

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[101] 435 U.S. at 413.

[102] *Id.*

[103] *Id.* at 414-15 (quoting City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434 (5th Cir. 1976), *aff'd*, 435 U.S. 389 (1979)); *see* Community Builders, Inc. v. City of Phoenix, 652 F.2d 823 (9th Cir. 1981) (Arizona statute evidences specific declaration of anticompetitive policy); Cedar-Riverside Assocs. v. United States, 459 F. Supp. 1290 (D. Minn. 1978), *aff'd on other grounds sub nom.* Cedar-Riverside Assocs. v. City of Minneapolis, 606 F.2d 254 (8th Cir. 1979) (statutory scheme as whole evidences intent by legislature to permit municipalities to engage in anticompetitive activity).

[104] 435 U.S. at 415. In not requiring unequivocal authorization, the *Lafayette* plurality made *Parker* immunity for political subdivisions of the state dependent upon judicial interpretation of what constitutes a proper legislative mandate. To determine if a proper legislative mandate is present, a court must review "all evidence which might show the scope of legislative intent." Pinehurst Airlines, Inc. v. Resort Air Servs., Inc., 476 F. Supp. 543, 554 (M.D.N.C. 1979) (quoting City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 435 (5th Cir. 1976), *aff'd*, 435 U.S. 389 (1979)); *see* United States v. Texas State Bd. of Pub. Accountancy, 592 F.2d 919 (5th Cir.) (Gee, J., dissenting) (construing *Lafayette*, 532 F.2d at 434) (connection between grant and use of power cannot be too tenuous to permit conclusion that legislature intended anticompetitive regulation), *cert. denied*, 444 U.S. 925 (1979).

[105] 445 U.S. 97 (1980).

[106] Although the Supreme Court formulated a uniform test, courts stressed different factors when applying the test to private parties and subdivisions of the state. *See* United States v. Title Ins. Rating Bureau, Inc., 517 F. Supp. 1053, 1058-59 (D. Ariz. 1981); Highfield Water Co. v. Public Serv. Comm'n, 488 F. Supp. 1176, 1186-91 (D. Md. 1980). *See generally Lafayette*, 435 U.S. at 410 n.40.

[107] The wine pricing program required that all wine producers, wholesalers, and rectifiers file fair trade contracts or price schedules with the state. 445 U.S. at 99 (citing CAL. BUS. & PROF. CODE ANN. § 24866 (West 1964)). The program also required state licensed wine merchants to sell wine to retailers at the price set " 'either in an effective price schedule or in an effective fair trade contract.' " *Id.* (quoting CAL. BUS. & PROF. CODE ANN. § 24866 (West Supp. 1980)).

[108] *Id.* at 100.

Sherman Act, it maintained that the program could survive if it were shielded from the Sherman Act by *Parker*.[109] Incorporating the holdings and rationales of *Parker*, *Goldfarb*, *Cantor*, *Bates* and *Lafayette*, the Court put forth the proper test for *Parker* immunity. "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy';[110] second, the policy must be 'actively supervised'[111] by the State itself."[112] The *Midcal* Court observed that the California program was established pursuant to a clear legislative policy.[113] Because it was not actively supervised by the state,[114] however, it was not exempt from antitrust challenge.[115]

In *Community Communications Co. v. City of Boulder*,[116] the Supreme Court considered whether a home rule[117] municipality's actions were exempt from antitrust challenge.[118] City of Boulder, a home rule municipality, advanced two arguments in attempting to insulate its acts from antitrust scrutiny. Boulder maintained that

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[109] *Id.* at 103.

[110] *See* Community Builders, Inc. v. City of Phoenix, 652 F.2d 823, 828-29 (9th Cir. 1981); United States v. Title Ins. Rating Bureau, 517 F. Supp. 1053, 1059 (D. Ariz. 1981); Serlin Wine & Spirit Merchants, Inc. v. Healy, 512 F. Supp. 936, 942 (D. Conn. 1981); Health Care Equalization Comm. v. Iowa Medical Soc'y, 501 F. Supp. 970, 993 (S.D. Iowa 1980); Mason City Center Assocs. v. City of Mason City, 468 F. Supp. 737, 742 (N.D. Iowa 1979).

[111] *See* Serlin Wine & Spirit Merchants, Inc. v. Healy, 512 F. Supp. 936, 942 (D. Conn. 1981); Guthrie v. Genesee County, 494 F. Supp. 950, 955-56 (W.D.N.Y. 1980); Bechenstein v. Hartford Elec. Light Co., 479 F. Supp. 417, 421 (D. Conn. 1979).

[112] 445 U.S. at 105 (quoting *Lafayette*, 435 U.S. at 410).

[113] *Id.*

[114] *Id.* The Court stated:

> The State simply authorized price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed re-examination" of the program.

Id. at 105-06 (footnote omitted).

[115] *Id.*

[116] 102 S. Ct. 835 (1982).

[117] Municipal home rule refers to the "power of local self government." 1 E. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 141, at 51 (3d ed. 1971). This power is vested in cities and towns by a charter granted to the municipality pursuant to constitutional or statutory provisions. *Id.*; *see, e.g.*, COLO. CONST. art. XX, § 6 (people of cities with population of two thousand vested with power to choose home rule authority); N.J. STAT. ANN. §§ 40:69A.29-30 (West 1967) (municipalities have full power to organize and regulate external affairs). The purpose of a home rule charter is to grant a municipality freedom to manage its local affairs without state interference. 2 E. McQUILLIN, *supra*, § 9.08, at 634. *See generally* Klemme, *The Powers of Home Rule Cities in Colorado*, 36 U. COLO. L. REV. 321 (1964); Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643 (1964); Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269 (1968).

[118] 102 S. Ct. at 836-44.

when dealing with purely local matters,[119] its status as a home rule municipality made it the equivalent of the state itself for *Parker* immunity purposes.[120] Accordingly, Boulder emphasized that for the *Parker* exemption to apply, it need only show that the alleged anticompetitive practices were part of a clearly articulated, affirmatively expressed, and actively supervised city policy.[121]

Justice Brennan rejected this argument because "it both misstates the letter of the law and misunderstands its spirit."[122] The *Boulder* Court deemed it inapposite that Boulder was a home rule municipality with extensive powers in local affairs. Instead, the Court emphasized that the *Parker* exemption was premised on "the federalism principle that we are a nation of *States*, a principle that makes no accommodation for sovereign subdivisions of States."[123] The Court, relying on the plurality opinion in *Lafayette*, reiterated that municipalities " 'are not themselves sovereign,' "[124] rather, they derive their authority from the state and are subordinate to the state.[125]

After dismissing Boulder's state equivalency argument, the Court considered Boulder's second argument. Boulder maintained that the alleged anticompetitive actions were undertaken pursuant to a clearly articulated policy as affirmatively expressed by the Colorado home

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[119] The Supreme Court assumed, without deciding, that Boulder's regulation of cable television was a local matter, and thus "within the scope of the power delegated to the City of Boulder by virtue of the Colorado Home Rule Amendment." *Id.* at 841 n.16. See *supra* note 28.

[120] 102 S. Ct. at 841. Boulder relied on the expansive language of the home rule amendment of the Colorado Constitution. See *supra* note 17. Boulder maintained that a home rule municipality possessed "every power theretofore possessed by the legislature . . . in local and municipal affairs." 102 S. Ct. at 841 (quoting Denver Urban Renewal Auth. v. Byrne, ___ Colo. ___, ___, 618 P.2d 1374, 1381 (1980) (quoting Four-County Metropolitan Capital Improvement Dist. v. Board of County Comm'rs, 149 Colo. 284, 294, 269 P.2d 67, 72 (1962)). Therefore, the acts of Boulder were in reality the acts of the legislature. *See* 102 S. Ct. at 841 n.17; Brief for Respondent, *supra* note 17, at 20-22. *See generally* Klemme, *supra* note 117, at 359 (Colorado Constitution provides one of broadest grants of home rule power).

[121] 102 S. Ct. at 841.

[122] *Id.* at 842.

[123] *Id.* at 840. The *Boulder* Court wholeheartedly accepted the federalism rationale used by Judge Markey in Community Communications Co. v. City of Boulder, 630 F.2d 704 (10th Cir. 1980) (Markey, J., dissenting), *rev'd and remanded*, 102 S. Ct. 835 (1982). Judge Markey maintained that the *Parker* exemption was intended to apply to states as states, thus, the "state sovereignty approach . . . is inapplicable here." *Id.* at 717; *see* Woolen v. Surtran Taxicabs, Inc., 461 F. Supp. 1025, 1032 (N.D. Tex. 1978) ("However 'sovereign' home rule cities . . . may be, they nonetheless carry the status of municipalities so far as federalism is concerned"); *see also* City of Denver v. Sweet, 138 Colo. 41, 329 P.2d 441 (1958) (home rule cities can only be arm or branch of state). *But see* Pueblo Aircraft Serv., Inc. v. City of Pueblo, 498 F. Supp. 1205, 1210 (D. Colo), *appeal pending*, No. 80-2083 (10th Cir., Oct. 16, 1980) ("municipal policy exercised by a home rule city in Colorado is the equivalent of 'state action' when exercised in connection with municipal affairs").

[124] 102 S. Ct. at 842 (quoting *Lafayette*, 435 U.S. at 412).

[125] *Id.* (citing United States v. Kagama, 118 U.S. 375, 379 (1886)).

rule amendment's "guarantee of local autonomy."[126] Moreover, Boulder maintained that it could be inferred from the broad power granted to the city by the home rule amendment that the State of Colorado "contemplated the kind of action complained of."[127]

The *Boulder* Court, however, rejected this theory. Although the Court recognized that a state may sanction anticompetitive municipal activities and thereby immunize municipalities from antitrust liability,[128] it reasoned that Boulder's actions were not a proper subject for immunization. The Court held that Boulder's activities were not undertaken pursuant to a clearly articulated, affirmatively expressed state policy.[129] Rather, the actions were undertaken pursuant to a state policy of "precise neutrality."[130] Justice Brennan stated: "A State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought."[131] The *Boulder* Court refused to accept the proposition "that a general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances."[132] Such a theory "would wholly eviscerate the concepts of 'clear articulation and affirmative expression' " which are essential for the *Parker* exemption to apply.[133]

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[126] *Id.*

[127] *Id.* Boulder asserted that a locally autonomous government does not need "to point to a specific detailed legislative authorization" to establish a clearly articulated and affirmatively expressed state policy. Brief for Respondent, *supra* note 17, at 26. Rather, a guarantee of local authority and a broad grant of power to effectuate that guarantee imply that the state contemplated and approved the actions taken by home rule municipalities. *See id.*

[128] 102 S. Ct. at 842.

[129] *Id.* at 843. Because there was no clearly articulated, affirmatively expressed state policy, the *Boulder* Court advanced no opinion on whether a municipality "must or could satisfy the 'active state supervision' test" essential for *Parker* immunity to apply. *Id.* at 841 n.14.

[130] *Id.* at 843.

[131] *Id.*

[132] *Id.* The *Boulder* Court is not alone in this respect. *E.g.*, Affiliated Capital Corp. v. City of Houston, 519 F. Supp. 991 (S.D. Tex. 1981); *In re* Airport Car Rental Antitrust Litig., 474 F. Supp. 1072 (N.D. Cal. 1979); Woolen v. Surtran Taxicabs Inc., 461 F. Supp. 1025 (N.D. Tex. 1978).

[133] 102 S. Ct. at 843. The *Boulder* Court reasoned that any "clear articulation and affirmative expression" must be evidenced by a uniform statewide policy to replace competition with regulation. Justice Brennan determined that if each home rule municipality were able to establish a different antitrust policy, the "clearly articulated and affirmatively expressed" test would no longer be viable. In Glenwillow Landfill v. City of Akron, 485 F. Supp. 671, 678 (N.D. Ohio 1979), *aff'd sub nom.* Hybud Equip. Corp. v. City of Akron, 654 F.2d 1187 (6th Cir. 1981), *vacated*, 50 U.S.L.W. 3667 (U.S. Feb. 22, 1982) (No. 81-723), the district court of Ohio noted that "clear articulation and affirmative expression" need not necessarily reflect a uniform state policy. A court must examine whether there is a "clearly articulated and affirmatively expressed" intent on the part of the state to have diversity instead of homogeneity. *See id.* The Supreme Court, however, has clearly rejected this rationale by its decision in *Boulder*. *See* Hybud Equip. Corp. v. City of Akron, 50 U.S.L.W. 3667 (U.S. Feb. 22, 1982) (No. 81-723); *see also Boulder*, 102 S. Ct. at 843.

The majority opinion rejected the city's assertion that a denial of the *Parker* exemption "will have serious adverse consequences for cities, and will unduly burden the federal courts."[134] Instead, the Court decided that the "policy of free markets and open competition embodied in the antitrust laws" outweighed any adverse consequences or burdens resulting from enforcement of the antitrust laws against municipalities.[135] As a result, a municipality will still be able to provide services on a monopoly basis provided the anticompetitive activities are undertaken pursuant to a clear state policy.[136] Accordingly, Justice Brennan concluded: " '[A]ssuming that the municipality is authorized to provide service on a monopoly basis, these limitations on municipal action will not hobble the execution of legitimate governmental programs.' "[137]

Justice Rehnquist filed a dissenting opinion[138] maintaining that the majority's analysis was flawed in two respects.[139] First, he claimed that the *Boulder* majority erroneously concentrated on whether municipalities were "exempt" from the Sherman Act.[140] It was his contention that the true issue before the *Boulder* Court was whether statutes, ordinances, and regulations are preempted by the Act.[141]

Focusing on the differences inherent in preemption and exemption analysis,[142] the dissent observed that preemption analysis involves

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[134] 102 S. Ct. at 843.

[135] *See id.* Because of the preliminary posture of the case, the Court did not consider the adverse consequences and burdens resulting from enforcement of the antitrust laws against municipalities. *Id.* at 843 n.20. Nevertheless, the *Boulder* Court noted that substantive antitrust law may differ depending upon the identity of the defendant. *See id. See generally* 1 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 317a(1), at 102-03 (1978) (equitable antitrust remedy only for antitrust violations by state and state subdivisions); Klitzke, *Antitrust Liability of Municipal Corporations: The Per Se Rule vs. The Rule of Reason—A Reasonable Compromise*, 1980 ARIZ. ST. L.J. 253 (unique nature of municipal corporations precludes identical treatment for private parties and municipal corporations); Note, *Federal Antitrust Immunity: Exposure of Municipalities to Treble Antitrust Damages Sets Limit for New Federalism:* City of Lafayette v. Louisiana Power & Light Co., 11 CONN. L. REV. 126 (1978) (alternatives to exposing municipalities to federal antitrust laws).

[136] 102 S. Ct. at 843-44 (construing *Lafayette*, 435 U.S. at 416-17).

[137] *Id.* at 844 (quoting *Lafayette*, 435 U.S. at 417).

[138] Chief Justice Burger and Justice O'Connor joined in Justice Rehnquist's dissent.

[139] 102 S. Ct. at 845 (Rehnquist, J., dissenting).

[140] *Id.* Justice Rehnquist maintained that the *Parker* Court did not even consider the exemption issue. Rather, he claimed that the *Parker* Court held that the Sherman Act did not preempt all state and local anticompetitive regulations. *Id.* at 845 (Rehnquist, J., dissenting). See *supra* notes 47-56 and accompanying text & *infra* notes 142-46 and accompanying text.

[141] 102 S. Ct. at 845 (Rehnquist, J., dissenting). Preemption is the remedy used by courts to invalidate state statutes that irreconcilably conflict with federal statutes or that intrude upon a field exclusively occupied by the federal government. *See id.* at 845-56 (Rehnquist, J., dissenting); *infra* notes 180-87 and accompanying text.

[142] 102 S. Ct. at 845-46 (Rehnquist, J., dissenting). *See generally* Handler, *Antitrust—1978*, 78 COLUM. L. REV. 1363 (1978).

the reconciliation of state and federal statutes while exemption analysis involves the interplay between enactments of a single sovereign.[143] Justice Rehnquist stated that because the "state action" doctrine involves the interplay of state and local regulations with federal antitrust statutes, "questions concerning the 'state action' doctrine are more properly framed as being ones of preemption rather than exemption."[144] Relying expressly on *Parker*, Justice Rehnquist stated that the *Parker* Court held "that state regulation of the economy is not necessarily preempted by the antitrust laws."[145] Nevertheless, the dissent continued, the *Parker* Court held that "some state regulation is preempted by the Sherman Act."[146]

As further support for this proposition, the dissent noted that two recently decided Supreme Court cases treated the "state action" doctrine as a "matter of federal preemption."[147] Justice Rehnquist maintained that in *New Motor Vehicle Board v. Orrin W. Fox Co.*,[148] the Supreme Court held that a motor vehicle dealership franchising regulatory act "was outside the purview of the Sherman Act."[149] Similarly, Justice Rehnquist maintained that in *Midcal* the Supreme Court held that a state regulated wine pricing system was preempted by the Sherman Act.[150]

The dissent observed that the *Parker*, *New Motor Vehicle*, and *Midcal* Courts merely decided that state legislation not saved by the *Parker* doctrine was invalid and unenforceable because it was pre-

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[143] 102 S. Ct. at 845-46 (Rehnquist, J., dissenting). The dissent observed that preemption analysis invariably involves the "sensitive area of federal-state relations," thus preemption is not readily inferred. *Id.* at 846 (Rehnquist, J., dissenting). In contrast, however, exemption analysis involves "no problems of federalism." *Id.* Accordingly, exemptions from the purview of federal law are not readily found. *See id.* Implied exclusions have also been recognized if enforcement of the antitrust laws would be repugnant to a federal regulatory scheme applicable to the antitrust violative activity. *See* Gordon v. New York Stock Exch., 422 U.S. 659, 682 (1975); United States v. Philadelphia Nat'l Bank, 394 U.S. 321, 350-51 & nn. 28-29 (1963).

[144] 102 S. Ct. at 846 (Rehnquist, J., dissenting).

[145] *Id.* at 847 (Rehnquist, J., dissenting). Justice Rehnquist indicated that much of the language used in *Parker* was "clearly the language of federal preemption." *Id.* (construing *Parker*, 317 U.S. at 350-51). Justice Rehnquist noted that the *Parker* Court concentrated on the Sherman Act's "occupation of the legislative field" and its effect on state sovereignty. *Id.* at 846 (Rehnquist, J., dissenting). This signified to Justice Rehnquist that the *Parker* Court utilized a preemption analysis in holding some anticompetitive activities to be outside the purview of the antitrust laws. *See id.*

[146] *Id.* at 847 (Rehnquist, J., dissenting).

[147] *Id.*

[148] 439 U.S. 96 (1978).

[149] 102 S. Ct. at 847 (Rehnquist, J., dissenting). In *New Motor Vehicle*, a state statute was allowed to stand even though it purportedly conflicted with the Sherman Act. *Id.* The dissent noted that this regulation was not preempted because it met the "state action" immunity test. *Id.*

[150] *See id.*

empted by the Sherman Act.[151] By contrast, however, the dissent indicated that the majority opinion suggests that a municipality may violate the Sherman Act for enacting anticompetitive legislation not pursuant to an affirmatively expressed state policy.[152]

Justice Rehnquist maintained that the majority's exemption analysis would lead to many problems.[153] Justice Rehnquist questioned whether "per se" rules of illegality would apply to municipalities and private parties alike and whether municipalities which violated the antitrust laws would be liable for treble damages.[154] Moreover, the dissent maintained that the most troubling problem would be the proper application of the rule of reason to municipal anticompetitive actions.[155]

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[151] *Id.*

[152] *Id.* at 847-48 (Rehnquist, J., dissenting). Justice Stevens, who joined the majority opinion, strongly disagreed with the dissent's assertion. *See id.* at 844 (Stevens, J., concurring). Justice Stevens stated that in antitrust exemption cases "the violation issue is separate and distinct from the exemption issue." *Id.* Stevens observed that in City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978), the plurality decided that the state action exemption was not available to the cities' actions. This decision, however, was not tantamount to a decision that the antitrust laws were violated. 102 S. Ct. at 844 (Stevens, J., concurring). *Compare* Air Freight Hualage Co. v. Ryd-Air, 408 F. Supp. 446 (S.D.N.Y. 1976) (defendant's motion for summary judgment on immunity from antitrust laws denied) *with* Air Freight Hualage Co. v. Ryd-Air, Inc., 1978-2 Trade Cas. (CCH) ¶ 62,321 (S.D.N.Y. 1978), *aff'd*, 603 F.2d 211 (2d Cir.), *cert. denied*, 444 U.S. 864 (1979) (no antitrust violations found during trial on merits).

Justice Stevens also emphasized "the obvious difference between a charge that public officials have violated the Sherman Act and a charge that private parties have done so." 102 S. Ct. at 844 (Stevens, J., concurring); *see id.* at 844 n.2 (Stevens, J., concurring). See *supra* note 85.

[153] 102 S. Ct. at 848 (Rehnquist, J., dissenting).

[154] *Id.* The dissent asserted that under the majority's current test, municipalities would inevitably be held liable for treble damages. *See id.* at 848 n.2 (Rehnquist, J., dissenting). *See generally* Note, *Antitrust Treble Damages as Applied to Local Government Entities: Does the Punishment Fit the Defendant?*, 1980 ARIZ. ST. L.J. 411 (inappropriateness of holding municipalities liable for treble damages); Note, *The Erosion of State Action Immunity From the Antitrust Laws:* City of Lafayette v. Louisiana Power & Light Co., 45 BROOKLYN L. REV. 165, 187-88 (1978) (problems inherent in imposition of treble damages to municipalities); Note, *supra* note 135, at 139-46 (effects of treble damages on municipalities; alternatives to treble damages).

[155] 102 S. Ct. at 848 (Rehnquist, J., dissenting). In Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918), Justice Brandeis formulated the classic statement of the rule of reason. He stated:

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether 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. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because

The dissent observed that in *National Society of Professional Engineers v. United States*,[156] the Court held that anticompetitive restraints can only be defended if they are reasonable in their effect on competition or if they ultimately promote competition.[157] Because municipal ordinances are enacted to further the best interests of the community in a non-economic way,[158] the dissent claimed that such ordinances would not survive antitrust scrutiny.[159] Thus, such an application of the rule of reason would destroy a municipality's power to regulate the economy.[160]

The dissent viewed as equally troublesome the application of a "modified" rule of reason standard to accommodate municipalities.[161] Such a "modified" rule of reason would permit "a municipality to defend its regulation on the basis that its benefits to the community outweigh its anticompetitive effects."[162] Justice Rehnquist indicated that such an approach would lead to an "essentially standardless inquiry into the reasonableness of local regulation."[163] This would allow courts to use the Sherman Act's ban on anticompetitive activity as an expedient to invalidate "unwise" legislation.[164]

According to Justice Rehnquist, these problems could be avoided by using a preemption rather than an exemption analysis.[165] Municipalities would not be liable for treble damages when enacting anticompetitive ordinances since these ordinances would be preempted by

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knowledge of intent may help the court to interpret facts and to predict consequences.

Id.

For a discussion of the rule of reason, see L. SULLIVAN, *supra* note 46, §§ 63-66, at 165-82; Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775 (1965).

[156] 435 U.S. 679 (1978).

[157] 102 S. Ct. at 848 (Rehnquist, J., dissenting) (construing National Soc'y of Professional Engineers v. United States, 435 U.S. 679 (1978)).

[158] *Id.*

[159] *See id.* at 848-49 (Rehnquist, J., dissenting).

[160] *Id.* at 848 (Rehnquist, J., dissenting). The dissent stated that the effect of *Boulder* is that "[t]his country's municipalities will be unable to experiment with innovative social programs." *Id.* at 849 (Rehnquist, J., dissenting). See generally Rose, *Municipal Activities and the Antitrust Laws After* City of Lafayette, 57 U. DET. J. URB. L. 483 (1980).

[161] 102 S. Ct. at 849 (Rehnquist, J., dissenting).

[162] *Id.*

[163] *Id.* The dissent compared this approach to that used by courts reviewing social legislation. *Id.* During the *Lochner* era, "liberty of contract" and "substantive due process" were the standards used to judge the reasonableness of local regulation. *See id.* The dissent maintained that if the "modified" rule of reason were adopted, "the procompetitive principles of the Sherman Act will be the governing standard by which the reasonableness of all local regulation will be determined." *Id.*

[164] *Id.*

[165] *Id.*

the Sherman Act, and preempted legislation is simply invalid and unenforceable.[166] Furthermore, courts would not have to engage in a "standardless review" of the reasonableness of local ordinances since courts would simply apply the *Midcal* criteria to determine if an ordinance is preempted.[167] Thus, an ordinance which is enacted pursuant to a clearly articulated and affirmatively expressed city policy to displace competition with regulation and is actively supervised by the city would survive the preemptive effect of the Sherman Act.[168]

The preemption analysis advocated by Justice Rehnquist illustrates the dissent's second major problem with the majority's opinion. The dissent maintained that the majority failed to recognize the federalism principles involved when municipal ordinances are invalidated.[169] Because such principles are involved, the dissent stated that municipal ordinances should not be "more susceptible to invalidation under the Sherman Act than are state statutes."[170] In his preemption analysis, Justice Rehnquist recognized this fact by noting that "[the preemption analysis] should apply in challenges to municipal regulation in similar fashion as it applies in a challenge to a state regulatory enactment."[171]

Justice Rehnquist warned that the majority's holding "will radically alter the relationship between States and their political subdivisions."[172] In addition to thwarting a municipality's ability to regulate the local economy, the dissent claimed that the majority's opinion will force home rule municipalities "to cede its authority back to the

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[166] *Id.* & n.4.

[167] *Id.* at 849.

[168] *Id.* The preemption test offered by the dissent permits a municipality to authorize anticompetitive activity without any state policy mandating the anticompetitive activity or any state supervision. See *infra* note 170.

[169] 102 S. Ct. at 850 (Rehnquist, J., dissenting). The dissent stated that courts treat state and municipal enactments identically "with regard to the preemptive effects of federal law." *Id.*; *see e.g.*, City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960).

[170] 102 S. Ct. at 850 (Rehnquist, J., dissenting). By permitting municipalities to determine when to replace competition with regulation, the dissent maintained that municipalities would receive the deference mandated by federalism which had previously been afforded states and municipalities alike when courts have examined whether state and local regulations had been preempted. *See id.* See also *supra* note 143.

[171] 102 S. Ct. at 850 (Rehnquist, J., dissenting).

[172] *Id.* at 850-51 (Rehnquist, J., dissenting). Justice Stevens, in a concurring opinion, noted that the majority merely held that the City of Boulder was not entitled to an antitrust exemption. *Id.* at 844 (Stevens, J., concurring). He stated that since the *Boulder* Court made no finding concerning whether the antitrust laws had been violated, "[t]he dissent's dire predictions about the consequences of the Court's holding should therefore be viewed with skepticism." *Id.* at 844 (Stevens, J., concurring).

States" in order to prevent antitrust challenges.[173] The dissent concluded that such a holding was unsound.[174]

The Supreme Court's holding in *Boulder* is simply the logical progression of the Court's state action doctrine holdings. By rejecting Boulder's arguments, the Court demonstrated the limited availability of the state action doctrine for municipal actions. The Court's paramount concern was ensuring that only "true state action" is immune from antitrust scrutiny.[175]

In *Midcal*, the Supreme Court outlined the elements of true state action. The *Midcal* Court held that true state action was present only when the state had clearly articulated and affirmatively expressed a policy to displace competition with regulation[176] and had actively

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[173] *Id.* at 851 (Rehnquist, J., dissenting). The dissent noted that home rule municipalities will be defenseless to antitrust challenges to its regulation of the local economy since the state is totally unable to authorize the challenged conduct. *Id.* Thus, the home rule municipality will be forced to alter its status so that it will not be precluded from regulating the local economy. *Id.*

[174] *Id.* The dissent stated:

> It is unfortunate enough that the Court today holds that our federalism is not implicated when municipal legislation is invalidated by a federal statute. It is nothing less than a novel and egregious error when this Court uses the Sherman Act to regulate the relationship between the states and their political subdivisions.

Id.

[175] In Whitworth v. Perkins, 559 F.2d 379 (5th Cir. 1977), *vacated sub nom.* City of Impact v. Whitworth, 435 U.S. 992 (1978), the Court of Appeals for the Fifth Circuit recognized the importance of the Court's concern. The circuit court observed that "[a] thoughtful analysis is called for to ensure that it is a *bona fide* governmental decision for which exemption is being sought." *Id.* at 381.

[176] *See e.g.*, California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc. 445 U.S. 97 (1980); *see also Cantor*, 428 U.S. at 590-91. Although the *Midcal* Court observed that clear articulation was a necessary element of true state action, it failed to specify the exact components of clear articulation. Nevertheless, these components are evident when cases interpreting the true state action doctrine are examined.

Initially, there must be a valid state regulatory interest present before a state can clearly articulate a policy displacing competition with regulation. Mobilfone v. Commonwealth Tel. Co., 571 F.2d 141, 144 (3d Cir. 1978); Guthrie v. Genesee County, 494 F. Supp. 950, 956 (W.D.N.Y. 1980); *see Lafayette*, 435 U.S. at 410; *Cantor*, 428 U.S. at 584-85. Were it not for the requirement of a valid regulatory interest, a state would always be able to circumvent the Sherman Act's policy in favor of competition by clearly articulating an anticompetitive activity and actively supervising the anticompetitive activity. *See Parker*, 317 U.S. at 351-52. A state statute enacted without a valid regulatory interest will be automatically invalidated. If a court finds that the state has a valid regulatory interest, the court will next examine the language which the defendant relied upon when engaging in the challenged activity to see if the state had in fact clearly articulated an anticompetitive policy.

Although the *Lafayette* plurality stated that one seeking to establish the existence of a clearly articulated policy need not "be able to point to a specific detailed legislative authorization," 435 U.S. at 415, Courts have been reluctant to infer such a policy in the absence of a clear declaration showing a legislative authorization of anticompetitive activity. *See, e.g.*, Community Builders, Inc. v. City of Phoenix, 652 F.2d 823, 329 (9th Cir. 1981); Mason City Center Assocs. v. City of Mason City, 468 F. Supp. 737, 742-43 (N.D. Iowa 1979); Woolen v. Surtran Taxicabs, Inc., 461 F. Supp. 1025, 1031-32 (N.D. Tex. 1978). *But see* Cedar-Riverside Assocs. v. United States, 459 F. Supp. 1290, 1298 (D. Minn. 1978), *aff'd on other grounds sub nom.* Cedar-Riverside Assocs. v. City of Minneapolis, 606 F.2d 254 (8th Cir. 1979) (although anticompetitive

supervised[177] that policy.[178] The unanimous decision of the *Midcal* Court signified the strength of the true state action doctrine. Nevertheless, due to a fundamental disagreement concerning the essence of the doctrine, the *Boulder* majority and dissent arrived at opposite conclusions while employing identical tests. The dissent maintained that the majority's failure to appreciate the preemption principles inherent in true state action analysis was unsound.[179] It is the dissent, however, which failed to appreciate the interaction between preemption principles and true state action.

The preemption doctrine is based on the principle of supremacy of federal law over state law.[180] Thus, state law that is incompatible with federal law will be invalidated.[181] Incompatibility arises in two

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activity is not specifically mentioned, statutory scheme as whole permits court to infer clearly articulated policy to replace competition with regulation). *See generally* 1 P. AREEDA & D. TURNER, *supra* note 135, ¶ 214, at 80-92.

[177] Mere approval or acquiescence of a regulatory program is insufficient to constitute active supervision. Rather, a certain degree of affirmative supervisory action by the state is required to constitute active supervision. *See Midcal*, 445 U.S. at 105-06. *Compare* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 386-87 (1951) (Louisiana statute leaving both initiation and enforcement of fair trade pricing contracts to discretion of private parties does not constitute active supervision) *and* Asheville Tobacco Bd. of Trade v. FTC, 263 F.2d 502, 509-10 (4th Cir. 1959) (state statute requiring Boards of Trade to promulgate "just and reasonable" regulations does not constitute adequate supervision) *with Bates*, 433 U.S. at 359-62 (Arizona Supreme Court's promulgation, enforcement, and reexamination of alleged anticompetitive disciplinary rules constitutes active supervision) *and Parker*, 317 U.S. at 352 (decisions by state regarding adoption, enforcement, and application of alleged anticompetitive program constitutes active supervision). *See generally* 1 P. AREEDA & D. TURNER, *supra* note 135, ¶ 213, at 71-79; Posner, *supra* note 61, at 721-24.

[178] 445 U.S. at 105. In antitrust analysis "true state action" is a concept separate and distinct from the traditional concept of state action. Traditional state action has most often been analyzed in the context of the fourteenth amendment. Courts have focused on the degree of state involvement in the practice challenged as violating the fourteenth amendment to determine if state action is present. *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Shelley v. Kraemer, 334 U.S. 1 (1948). Traditional antitrust state action merely refers to statutes and regulations affecting competition. *See, e.g.*, Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978); Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966). *See generally* Verkuil, *State Action, Due Process and Antitrust: Reflections on* Parker v. Brown, 75 COLUM. L. REV. 328, 330 & n.14 (1975).

[179] *See* 102 S. Ct. at 851 (Rehnquist, J., dissenting).

[180] This principle has its roots in the supremacy clause of the United States Constitution, U.S. CONST. art. VI, cl. 2, which provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

[181] *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 6-24 to 6-25, at 376-91 (1978); Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and The Burger Court*, 75 COLUM. L. REV. 623 (1975) [hereinafter cited as Note, *The Preemption Doctrine*]; Note, *A Framework for Preemption Analysis*, 88 YALE L.J. 363 (1978) [hereinafter cited as Note, *Preemption Analysis*].

instances. First, federal law may be such that any parallel state legislation is inherently in conflict with federal law.[182] Inherent conflict is present when Congress has expressed a clear and manifest purpose to occupy the field;[183] either the scheme of federal regulation is so pervasive that the inference of occupation is created;[184] or the nature of the subject matter mandates uniformity.[185] Second, incompatibility arises when federal and state statutes irreconcilably conflict.[186] Such conflict occurs when the "challenged state statute 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' "[187]

Because federal and state antitrust laws are not in inherent conflict, federal law has not been viewed as supplanting state power to enact antitrust legislation.[188] All state antitrust legislation, however, does not necessarily promote competition. Therefore, when a state enacts legislation having anticompetitive effects, courts must determine whether the state legislation irreconcilably conflicts with federal antitrust legislation. If so, the state legislation is preempted.[189] In applying the preemption test, a court must first determine the national objective behind the federal statute. Having done this, a court

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[182] *See* Note, *The Preemption Doctrine*, *supra* note 181, at 624-25.

[183] Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141-46 (1963); Campbell v. Hussey, 368 U.S. 297, 301 (1961); Welch Co. v. New Hampshire, 306 U.S. 79, 85 (1939).

[184] New York State Dep't of Social Servs. v. Dublino, 413 U.S. 405, 413-15 (1973); City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633 (1973); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[185] For example, the Supreme Court has recognized that labor policy demands uniformity; thus, federal labor laws are exclusive. *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244-45 (1959); Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Bd., 315 U.S. 740, 740-51 (1941). *See generally* Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972).

[186] *See* Note, *The Preemption Doctrine*, *supra* note 181, at 626.

[187] Perez v. Campbell, 402 U.S. 637, 649 (1971) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)); *e.g.*, Jones v. Rath Packing Co., 430 U.S. 519 (1977); Free v. Bland, 369 U.S. 663 (1962). For cases in which the Court found no irreconcilable conflict, *see, e.g.*, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960).

[188] *E.g.*, N.J. STAT. ANN. §§ 56:9-1 to :9-19 (West Cum. Supp. 1981); *see, e.g.*, Giboney v. Empire Storage & Ice. Co., 336 U.S. 490, 495 (1948); Watson v. Buck, 313 U.S. 387, 394 (1940); Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 97-98 (1908); *see* 1 P. Areeda & D. Turner, *supra* note 135, ¶ 208, at 58; *see also* sources cited *id.* at 58 n.1. *See generally A Collection and Survey of State Anti-Trust Laws*, 32 COLUM. L. REV. 347 (1932).

[189] Courts are generally reluctant to infer preemption. Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 132 (1978); *see* Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 101 S. Ct. 1124, 1130 (1981). Therefore, courts will not "[seek] out conflicts between state and federal regulation where none clearly exists." Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 446 (1960).

must then decide whether the challenged state law substantially burdens achievement of the objective.[190] The national objective behind federal antitrust laws is the enhancement of competition.[191]

In *Parker*, the Supreme Court decided that true state action which has anticompetitive effects will not be preempted.[192] The *Parker* decision represents a recognition that Congress intended to subordinate competition to true state action.[193] True state action is simply never in conflict with the federal antitrust laws since Congress recognized the paramount importance of permitting states to enact "anticompetitive" regulatory programs amounting to true state action.[194] Accordingly, once a court finds true state action present, the antitrust preemption inquiry must cease.[195]

The *Boulder* dissent therefore is correct in maintaining that preemption principles should be applied when analyzing true state action issues. The dissent, however, would treat state statutes amounting to

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[190] *See* Note, *Preemption Analysis*, *supra* note 181, at 382-85. If the challenged state statute requires conduct that the federal statute specifically forbids, it will always burden achievement of the national objective. *See* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 143-49 (1963).

[191] *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972) (freedom to compete is guaranteed by antitrust laws); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 372 (1963) ("competition is our fundamental national economic policy"); Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958) (free and unfettered competition best serves needs of our society). *See generally* Bork, *supra* note 54 (preservation of competition promotes consumer satisfaction).

[192] 317 U.S. at 350-52. In *Parker*, the Court did not even consider the anticompetitive effects of the state prorate program. In fact, the Court assumed that the program would violate the Sherman Act. *See id.* at 350.

[193] *See* L. TRIBE, *supra* note 181, § 6-24, at 381-82; Slater, *supra* note 61, at 91.

[194] Thus, true state action can "violate" federal antitrust law and still remain effective despite the doctrine of preemption. *Contra* Posner, *supra* note 61, at 703 ("absent persuasive reasons to the contrary, state regulation should be invalidated whenever it achieves results which, privately arranged, would violate the antitrust laws").

[195] *But see* New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978). The *New Motor Vehicle* Court decided that California's Automobile Franchise Act regulating the establishment of automobile dealerships was true state action. *Id.* at 109. Accordingly, the regulatory scheme was "outside the reach of the antitrust laws" and not preempted. *Id.* This determination should have ended the Court's antitrust preemption analysis, but the Court proceeded to hold that the regulatory scheme did not irreconcilably conflict with the Sherman Act. *Id.* at 110-11. This second holding is unclear. It may be mere dictum or it may be a retreat from the absolute position that federal antitrust laws have no preemptive effect on true state action.

Although true state action will not be preempted by federal antitrust law, it must still be scrutinized to determine whether it violates the Constitution or other federal law. *See* Bigelow v. Virginia, 421 U.S. 809 (1975) (Virginia statutory scheme regulating advertising impermissibly infringed on one's right to free speech, thus preempted); Gibson v. Berryhill, 411 U.S. 564 (1973) (Alabama statutory scheme regulating optometry conflicted with due process clause, thus preempted); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (Arizona statutory scheme regulating packing procedures for cantaloupes grown in Arizona impermissibly burdens interstate commerce, thus preempted).

true state action and municipal ordinances identically for preemption purposes since federalism principles are implicated whenever municipal ordinances or state statutes are invalidated.[196] This approach exemplifies the dissent's misunderstanding of the true state action doctrine and leads to an incorrect application of preemption.

The true state action doctrine reflects Congress' intent to allow states as states to regulate their affairs free from the restraints imposed by the Sherman Act.[197] Implicit in this intent is the congressional choice to subordinate competition to true state action. Congress has not chosen to extend to municipal ordinances the deference which has been granted to true state action.[198] By focusing on the majority's alleged error in treating state statutes amounting to true state action and municipal ordinances differently, the dissent misconstrues the true state action doctrine. The dissent failed to recognize that Congress only intended to grant deference to states as states. Therefore, although federalism principles are implicated when municipal ordinances are invalidated, the very essence of the true state action doctrine requires municipal ordinances to be more susceptible to invalidation than true state action.

Although municipal ordinances can amount to true state action, municipalities cannot unilaterally establish a regulatory program constituting true state action.[199] In *Boulder*, the municipality's ordinance was not enacted pursuant to a clearly articulated affirmatively expressed *state* policy to displace competition with regulation. Thus, it did not constitute true state action[200] and the ordinance was not automatically saved from preemption.

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[196] *See Boulder*, 102 S. Ct. at 850 (Rehnquist, J., dissenting).

[197] *See id.* at 842; *Lafayette*, 435 U.S. at 411-12.

[198] *See Lafayette*, 435 U.S. at 412 n.42.

[199] City of Fairfax v. Fairfax Hosp. Ass'n, 562 F.2d 280, 284 (4th Cir. 1977), *vacated*, 435 U.S. 992 (1978) (command from state body less than state legislature "does not automatically satisfy the conditions precedent for invocation of the 'state action' doctrine"). *Compare* New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96 (1978) (state legislature has power to form true state action) *and* Bates v. State Bar, 433 U.S. 350 (1977) (state supreme court as co-equal branch of government has power to form true state action) *with* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) (municipality can never establish true state action) *and* Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (state agency can never establish true state action). *Contra Boulder*, 102 S. Ct. at 847-51 (Rehnquist, J., dissenting) (all municipalities, regardless of home rule status, must be able to establish true state action). *See generally* Thomas, City of Lafayette's *State Action Test Reformulated: A Meaningful Standard of Antitrust Immunity for Cities*, 1980 ARIZ. ST. L.J. 345, 372-75.

[200] 102 S. Ct. at 842-43. Since the *Boulder* majority held that the municipality's ordinance was not enacted pursuant to a clearly articulated policy, the Court did not "reach the question whether [Boulder's] ordinance must or could satisfy the 'active state supervision' test." *Id.* at 811 n.14.

When dealing with municipalities, it is doubtful whether the Court will stress the same elements of the active state supervision test that it has stressed when examining state statutes and

In his dissent, Justice Rehnquist, predicted that this holding would have serious consequences. Among the consequences predicted by the dissent were: difficulties in applying per se rules and the rule of reason test; and the availability of harsh penalities against municipal defendants.[201] This prediction, however, is unfounded because these problems can be avoided by using a preemption analysis.

The problem raised by Justice Rehnquist could only arise when no true state action is present. Merely because no true state action is involved, however, does not mean that a municipality will be found to have violated the antitrust laws. Courts must decide when "non-true state action" which has anticompetitive effects will be pre-empted.[202] Two Supreme Court cases provide appropriate guidelines for courts to follow when considering the preemptive effect of federal antitrust law on "non-true state action."[203]

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rules which apply to private parties. Our federalism will not allow states free reign through the guise of state supervision to pervasively interfere in municipal affairs. *See* Rogers, *supra* note 89, at 340-43; *cf.* National League of Cities v. Usery, 426 U.S. 833 (1976) (Congress cannot exercise commerce power in manner that interferes with state's ability to conduct integral governmental affairs).

[201] 102 S. Ct. at 848-49 (Rehnquist, J., dissenting). The dissent also maintained that the *Boulder* Court's holding "will radically alter the relationship between states and their political subdivisions." *Id.* at 851 (Rehnquist, J., dissenting). The dissent maintained that a state would be unable to clearly articulate and affirmatively express a policy displacing competition with regulation since the state had no power over local matters. *See id.* Accordingly, to protect themselves from antitrust challenges, home rule municipalities would have to renounce their home rule status, thus altering their relationship with the State. *Id.*

The dissent's argument, however, is flawed in two respects. First, all anticompetitive municipal ordinances are not necessarily antitrust violations. *See infra* note 219. Second, home rule municipalities can ensure that they will receive all powers that the state decides to grant to non-home rule cities. If a home rule municipality is legislatively created, it will automatically receive the power that the state subsequently grants to its political subdivision. *See* 2 E. McQUILLIN *supra* note 117, § 10.08, at 755. If a home rule municipality is created by charter, however, the charter must contain a provision granting the home rule municipality all powers that the state subsequently grants to non-home rule municipalities. *See id.* § 10.25, at 806. Thus through proper drafting, a home rule municipality can avail itself of true state action.

[202] The *Boulder* dissent was concerned with the disparate preemption treatment afforded state statutes and municipal ordinances. Justice Rehnquist observed: "This Court has made no . . . distinction between States and their subdivisions with regard to the preemptive effects of federal law. The standards applied by this Court are the same regardless of whether the challenged enactment is that of a State or one of its political subdivisions." *Boulder*, 102 S. Ct. at 850 (Rehnquist, J., dissenting).

This statement is undoubtedly correct. *See* City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960). Nevertheless, it fails to recognize the distinction between state action and true state action. Once a court determines that true state action is not present, the same preemption standards will be applied to state statutes and municipal ordinances.

[203] For a discussion of preemption and antitrust principles, see generally, Note, Parker v. Brown: *A Preemption Analysis*, 84 YALE L.J. 1164 (1975).

In *Schwegmann Brothers v. Calvert Distillers Corp.*,[204] distributors of liquor sought to enjoin a retailer from selling liquor at a price different from that fixed by a price schedule.[205] Although the price fixing schedule was authorized by federal and state law, the state statute was broader than the federal statute.[206] The federal statute permitted distributors and retailers to enter into a contract fixing the retail price of goods whereas the state statute in addition permitted enforcement of price fixing agreements against all retailers. The state statute was therefore an attempt to allow horizontal price fixing.[207] Although Louisiana had affirmatively expressed this price fixing plan as its state policy, it did not actively supervise the policy.[208] Therefore, the plan was not true state action and it was subject to further antitrust preemption analysis. Because horizontal price fixing is a per se violation of the antitrust laws, the statute was preempted.[209]

In *Exxon Corp. v. Governor of Maryland*,[210] the State of Maryland enacted a statute providing that a producer or refiner of petroleum products "may not operate any retail service station within the state."[211] Exxon and other oil companies maintained that because this statute had anticompetitive effects it violated federal antitrust law and should be preempted.[212] The Court held, however, that mere anticompetitive effects were not enough to find a statute preempted.

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[204] 341 U.S. 384 (1951).

[205] *Id.* at 835-86.

[206] *See id.* at 386-87.

[207] *Id.* at 389. Horizontal price fixing compels those in competition at the same functional level to follow a parallel price policy. *Id.* The Supreme Court has held that this practice is a per se violation of the Sherman Act. *See* Keifer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951). For a discussion of price fixing and per se violations, see generally, L. SULLIVAN, *supra* note 46, §§ 67-70, at 182-94.

[208] *See* 341 U.S. at 386-87. The Louisiana statute fulfilled the "affirmatively expressed" requirement because the statute declared that it was unfair competition for any retailer with notice of a price fixing agreement to sell liquor at a price different from the price fixed by any agreement. *Id.* at 386-87 & n.2. Therefore, the state had clearly articulated a policy favoring horizontal price fixing agreements. Nevertheless, since the Louisiana statute left both the initiation and enforcement of the price fixing contracts to the discretion of private parties, it did not meet the active supervision requirement. *See id.*

[209] *See id.* at 389.

[210] 437 U.S. 117 (1978).

[211] *Id.* at 119. The statute also required a producer or refiner of petroleum products to "extend all 'voluntary allowances' uniformly to all service stations it supplies." *Id.* at 119-20. Exxon and other oil companies argued that the statute should be preempted since compliance with this statute would force them to violate the Robinson-Patman Act, a specific federal antitrust law. *Id.* at 130. The *Exxon* Court disagreed and held that compliance with the state statute would not necessarily compel the oil companies to violate federal antitrust law. *See id.* at 130-31; *see also* Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 45-46 (1966).

[212] *See* 437 U.S. at 129. Maryland did not claim that the statute was true state action. Thus, the *Exxon* Court had no reason to apply the *Midcal* test.

The Court stated: "[A]n adverse effect on competition . . . [is not] in and of itself, enough to render a state statute invalid, [otherwise] the States' power to engage in economic regulation would be effectively destroyed."[213]

Schwegmann and *Exxon* signify that the Supreme Court will apply the same per se rule and rule of reason test when examining state action and action by private parties. The *Schwegmann* Court held that a Louisiana statute authorizing conduct amounting to a per se violation of the Sherman Act was preempted by the Act.[214] The Court concentrated on the nature of the anticompetitive effects, and not on the presence of state action.[215] Because the anticompetitive effects were so pernicious, the Court held the statute to be preempted despite the presence of state action. In *Exxon*, the Supreme Court was not confronted with a per se violation of the Sherman Act, thus the Court had the opportunity to outline the parameters of the rule of reason test as applied to state action. Traditional rule of reason analysis requires "the factfinder [to weigh] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[216] The *Exxon* Court simply decided that the Maryland statute did not place an unreasonable restraint on competition.[217] Thus, the *Exxon* Court employed the traditional rule of reason test to determine whether the state action had enough of an anticompetitive effect to warrant preemption.[218]

In addition to providing workable standards for per se and rule of reason analysis, an application of preemption principles will provide an appropriate remedy for antitrust violative state action. Although Justice Rehnquist's assertion that treble damage liability for municipalities would be forthcoming if the majority's analysis were accepted

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[213] *Id.* at 133.

[214] 341 U.S. at 389.

[215] *See id.* If the conduct has manifestly anticompetitive effects, per se rules of illegality are appropriate. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 (1977); *see also* Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1957) (due to its anticompetitive effects, certain conduct presumed to be per se violation of Sherman Act).

[216] Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 (1977).

[217] *See Exxon*, 437 U.S. at 113; Shell Oil Co. v. Younger, 587 F.2d 34 (9th Cir. 1978) (per curiam), *cert. denied*, 440 U.S. 947 (1979); Exxon Corp. v. Georgia Assoc. of Petroleum Retailers, 484 F. Supp. 1008 (N.D. Ga. 1979), *aff'd sub nom.* Exxon Corp. v. Busbee, 644 F.2d 1030 (5th Cir.), *cert. denied*, 102 S. Ct. 430 (1981).

[218] Although *Exxon* established that private conduct and state action will be subject to the same rule of reason test, results may vary depending on the defendant's identity. *Lafayette*, 435 U.S. at 417 n.48.

is premature,[219] the specter of treble damage liability looms on the horizon. Preemption analysis will prevent a court from subjecting municipalities to treble damage liability.[220] Once a court decides that state action unreasonably restricts competition, the statute, regulation, or ordinance will be preempted by the Sherman Act.[221]

Although the Supreme Court has employed exemption language when analyzing the true state action doctrine, the Court has in reality applied preemption principles. The Supreme Court has recognized that Congress' intent when enacting the Sherman Act was to allow states as states to formulate and apply anticompetitive policies free from the strictures imposed by the Sherman Act. Thus, as long as the state clearly articulates and affirmatively expresses a policy displacing competition with regulation and actively supervises this policy, the Sherman Act will not preempt this regulation. If the court holds that the true state action test is not met, the state action will be further examined. A court will determine whether the state action irreconcilably conflicts with the Sherman Act. If it does, it will be preempted. The antitrust preemption test as formulated in *Schwegmann* and *Exxon* provides a clear and workable test for determining when state action will be invalidated. *Schwegmann* and *Exxon* further demonstrate that the Sherman Act will not prevent state and local governments from enacting anticompetitive statutes, ordinances, and regulations provided these enactments do not unreasonably restrain competition. Finally, application of preemption principles will avoid the undesirable result of imposing treble damages on municipalities.

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[219] Once a court determines that true state action is not present, this determination does not demand that a court find an antitrust violation present. *See supra* note 152; *see also* Pinehurst Airlines, Inc. v. Resort Air. Servs. 476 F. Supp. 543, 555 & n.21 (M.D.N.C. 1979) (mere fact that antitrust exemption is not present does not mean that antitrust violation has occurred); Woolen v. Surtran Taxicabs, Inc., 461 F. Supp. 1025, 1040 (N.D. Tex. 1978) ("This opinion does not hold that the present arrangement is [violative of antitrust laws]; it only holds that it must stand for antitrust inspection").

[220] It is beyond the scope of this Note to speculate on the antitrust liability of private parties operating under a preempted statute, regulation or ordinance. For a discussion of liability of private parties operating under a preempted statute, see I P. AREEDA & D. TURNER, *supra* note 139, ¶ 217(b), at 108-14; Note, *supra* note 209, at 1176 n.73.

[221] *See* 1 P. AREEDA & D. TURNER, *supra* note 135, ¶ 209, at 60 & ¶ 217(a)(2), at 103.